

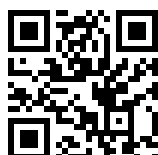
STUDY

Requested by the JURI committee



Ensuring Efficient Cooperation with the UK in civil law matters

Situation after Brexit and Options for
Future Cooperation



Policy Department for Citizens' Rights and Constitutional Affairs
Directorate-General for Internal Policies
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Abstract

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the JURI Committee, analyses the implications of Brexit in relation to the profile of judicial cooperation in civil matters. It examines the existing legal framework in order to identify the areas of law in respect of which there is a gap in the relationship between the EU and the UK. It assesses the consequences of the UK's failure to accede to the 2007 Lugano Convention. Concludes that the conclusion of new treaties between the EU and the UK should be pursued in relation to those areas where there is a regulatory gap, with particular reference to the area of human rights.

This document was requested by the European Parliament's Committee on Legal Affairs.

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LIST OF ABBREVIATIONS

ADGM	Abu Dhabi Global Market Courts
AIFC	Astana International Financial Centre
ART	Article
CICC	China International Commercial Court
CJEU	Court of Justice of the European Union
DG JUST	Directorate-General for Justice and Consumers
DIFC	Dubai International Finance Centre Courts
EC	European Community
EFTA	European Free Trade Association
EU	European Union
EURATOM	European Atomic Energy Community
FF	Following
HCCH	Hague Convention
ICC	International Commercial Court
IMI	Internal Market Information
No	Number
OJ	Official Journal
PARA	Paragraph
QICDRC	Qatar International Court and Dispute Resolution Centre
REG	Regulation
SICC	Singapore International Commercial Court
TEU	Treaty on European Union

TFEU	Treaty on the Functioning of the European Union
UNIDROIT	International Institute for the Unification of Private Law
UK	United Kingdom

EXECUTIVE SUMMARY

Background

On 23 June 2016, the British people went to the polls to vote in the referendum on whether the United Kingdom should remain in the European Union. By a narrow majority (51.9% to 48.1%), the British people decided for the UK to leave the European Union and the European Atomic Energy Community. This triggered the Article 50(2) of the Treaty on European Union (TFEU) procedure, which led to the British government notifying the European Council of its intention. A long phase of negotiations led to the conclusion of the Withdrawal Agreement, which entered into force on 1 February 2020. As of that day, the United Kingdom ceased to be a member state of the European Union.

The Withdrawal Agreement provided for a transition period expiring on 31 December 2020, in order to cushion the consequences of leaving the Community, with the possibility of negotiating arrangements for future relations. Thus, for the duration of this period, the United Kingdom saw European law apply, normally with the same legal effects as Member States. As of 1 January 2021, the UK became a third state for all intents and purposes.

As from 1 January 2021, therefore, the numerous European regulations adopted with regard to individual areas of the broader field of civil law (including civil and commercial matters in the strict sense, insolvency proceedings, divorce and legal separation, and maintenance obligations), as well as with regard to instruments of cooperation between courts, no longer apply in relations between the European Union and the United Kingdom.

A first part of the paper is therefore devoted to the analysis of matters originally governed by European regulations and in which today, due to Brexit, there is a regulatory vacuum.

Aim

This study aims to analyze the consequences of Brexit from the perspective of judicial cooperation in civil matters, identifying in particular the areas most affected by the UK's withdrawal. To this end, it will proceed with the analysis and comparison of the legislation applicable to the United Kingdom, as a member state, and that in force after its withdrawal from the European Union.

The paper is divided into seven chapters.

In the first chapter, the effects of the Withdrawal Agreement in the field of civil judicial cooperation are outlined, with particular reference to the residual applicability of the individual European Regulations in relations with the UK in the so-called transitional period, that is, from the entry into force of the Withdrawal Agreement until December 31, 2020. The reasons why the revival of the 1968 Brussels Convention is not conceivable are also explained.

It then goes on to examine the "body of law" consisting of the Hague Conventions (1961 Apostille Convention; 1965 Service Convention; 1970 Evidence Convention; 1970 Divorce Convention; 1980 Child Abduction Convention; 1996 Child Protection Convention; 2005 Choice of Court Convention; 2007 Child Support Convention) to see which of them and to what extent still apply to the relationship between the EU and the UK.

The third chapter discusses the content of the so-called EU Reintegrated Laws, i.e., the set of UK rules transposing sectors of EU legislation into that country's legal system. The continued applicability of the Rome I and Rome II Regulations and their effects in relations with the EU will be the subject of analysis, as well as, conversely, the superseded inapplicability of European simplified procedures and exclusion from the European Judicial Network.

The fourth chapter is specifically devoted to an analysis of the most relevant gaps left by Brexit in the area of, in particular, the following matters: legal separation and divorce, maintenance obligations, successions, notifications, taking of evidence, public documents, access to justice, mediation, and insolvency.

Particular attention is paid in Chapter Five to the effects resulting from the United Kingdom's non-accession to the 2007 Lugano Convention.

Indeed, as is well known, on June 28, 2021, the European Commission submitted a Note Verbale to the Swiss Federal Council as the Depositary of the Lugano Convention, in which it denied its consent to the UK's application for accession.

The effect of the UK's accession to the aforementioned Lugano Convention would have been that Regulation No. 44/2001, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (so-called Brussels I), would also apply to it. This accession would have entailed renewed UK participation in the European judicial area, albeit without the automatic recognition of court decisions introduced only by the subsequent Regulation No. 1215/2012 (so-called Brussels I bis).

The effects on the legal services market of the UK's exclusion from the European legal system are also analysed. Indeed, there is the emergence of specialized commercial courts, located in several EU countries, which are bidding to be alternative judicial hubs to the London courts.

Such competition would be fostered by the easier circulation of judicial orders rendered by EU courts in the European legal space than judicial orders rendered by UK courts.

The study dwells on the actual likelihood of success of such initiatives, raising the possibility in the future of the establishment at the EU level of a single court specializing in commercial matters, which could more effectively undermine the continued attractiveness of London courts.

The study then turns to viable remedies to prospectively reduce the impact of Brexit in the area of rights protection, with particular reference to individuals, families and Small Medium Enterprises (SMEs).

In particular, a possible path is outlined, as a result of which covenanted regulations can be introduced in the following matters: divorce and legal separation, alimentary obligations, Small Claims, and cross-border insolvencies.

Finally, special attention is given to the phenomenon of Strategic Lawsuits Against Public Participation (SLAPPs), the subject of a European Commission proposal for a directive, concluding as to the desirability of agreements involving the UK as well, in order to ensure broader protection for freedom of the press and opinion, limiting phenomena of forum shopping and possible circumvention of decisions on the subject.

In summary, the study pragmatically suggests that the parties establish negotiations on specific and limited matters of particular social relevance as a first step in rebuilding a system of international cooperation between the EU and the UK.

At the same time, the study points to the existence of areas in which economic competition is currently taking place in the area of legal services.

1. INTRODUCTION

1.1. Outline of Brexit: Signing of the Withdrawal Agreement

In 1972 the United Kingdom ("UK") acceded to the European Communities (ECSC, EURATOM and the EEC; later to become the European Union: "EU")¹ by signing the Accession Treaty² and the subsequent European Communities Act³.

As early as 1975, a referendum was held in the UK on whether the UK should remain in the Community, with the outcome in favour of remaining in the Community.

On 23 June 2016, a new referendum was held in the UK on the permanence of the UK in the European Union, in which the majority of UK voters voted for the UK to leave the European Union ("EU").

On 29 March 2017, the UK Parliament passed the European Union (Notification of Withdrawal) Act⁴ which gave the Prime Minister the power to notify, pursuant to Article 50(2) of the Treaty on European Union ("TEU"), the UK's intention to withdraw from the EU and the European Atomic Energy Community ("Euratom"). On the same date, the UK Government therefore notified the European Council of its intention to leave the EU and Euratom and the withdrawal procedure was initiated.

The lengthy negotiation phase of the Withdrawal Agreement ended with the conclusion of the EU Withdrawal Agreement⁵, which entered into force on **1 February 2020**, the date from which **the United Kingdom officially ceased to be a Member State of the European Union**.

The Withdrawal Agreement (the "**Agreement**") set out the modalities for the withdrawal of the United Kingdom from the European Union and the European Atomic Energy Community. The purpose of the Agreement, made explicit in the **Preamble**, was to ensure an orderly withdrawal to protect citizens and businesses, in view of the fact that:

- pursuant to Article 50 TEU, in conjunction with Article 106a of the Euratom Treaty, and subject to the arrangements laid down in this Agreement, the law of the Union and of Euratom in its entirety ceases to apply to the United Kingdom from the date of entry into force of this Agreement;
- it is necessary to provide reciprocal protection for Union citizens and for United Kingdom nationals, as well as their respective family members, where they have exercised free movement rights before a date set in this Agreement, and to ensure that their rights under this Agreement are enforceable and based on the principle of non-discrimination;
- it is necessary to provide legal certainty to citizens and economic operators as well as to judicial and administrative authorities in the Union and in the United Kingdom.

¹ The United Kingdom had explicitly opted out of the European Union by joining the EFTA group on 14 January 1960, along with six other countries (Austria, Denmark, Norway, Portugal, Sweden and Switzerland), by signing the Stockholm Convention. Thus, it was part of an alternative bloc, the aim of which was to promote an area of free trade and economic integration between the Contracting States.

² Treaty concerning the accession of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland to the European Economic Community and to the European Atomic Energy Community, OJ EC 1972, L 73/5.

³ European Communities Act 1972 (Repealed), c. 68, available at: <https://www.legislation.gov.uk/ukpga/1972/68/contents>.

⁴ European Union (Notification of Withdrawal) Act 2017, c. 9, available at <https://www.legislation.gov.uk/ukpga/2017/9/contents>.

⁵ Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, OJ EU 2019, CI 384/1.

The Withdrawal Agreement established, in the interest of both the Union and the United Kingdom, a transitional or implementation period from the date of entry into force of the Agreement until **31 December 2020** (Article 126). During this transitional period, the law of the Union, including international agreements, was applied to and in the United Kingdom, normally with the same legal effects as in the Member States, and was interpreted and applied in accordance with the same general methods and principles applicable within the Union, in order to avoid disruption during the period of negotiation of the agreement or agreements on future relations.

The date of 31 December 2020, on which the transitional period ended, also constitutes the time threshold for the applicability of European rules on jurisdiction and the circulation (recognition and enforcement) of judgments, in the United Kingdom as well as in Member States in situations involving the United Kingdom.

In addition, the Withdrawal Agreement provided that the United Kingdom and the Union were to take all necessary steps to commence formal negotiations as soon as possible for the conclusion of one or more agreements on the discipline of their future relations.

1.2. The Starting Point: the Regulations on International Civil Judicial Cooperation within the EU

Efficient international civil judicial cooperation guarantees easy and effective access to justice and legal certainty. Within the EU area, such cooperation is achieved through coordination between the judicial authorities of the countries for the conduct of procedural activities.

Coordination between EU judicial authorities concerns jurisdiction and the free movement of judicial decisions, but also the gathering of evidence and the service of documents.

In this respect, there are numerous European regulations on a variety of subjects that in addition to laying down uniform jurisdiction criteria for cross-border disputes, establish, as a general rule, the automatic recognition and enforcement of judgments issued by the courts of a Member State (through the abolition of *exequatur*) in each Member State, thus ensuring an immediate and effective protection of rights through the free movement of measures within the territory of the European Union.

In particular, the following Regulations are relevant:

- **Regulation (EU) No 1215/2012** (Brussels I bis Regulation), which replaced for actions brought as of 10 January 2015 the **Regulation (EC) No 44/2001** (Brussels I), sets out the criteria for jurisdiction and the rules for the circulation of judgments that apply to proceedings **in civil and commercial matters**⁶, including protective proceedings (art. 35) and proceedings for the enforcement of judgments (Art. 24(5)); the matters indicated therein are excluded⁷; there are special rules on jurisdiction in matters of: **insurance**, (arts. 10-16); **consumer contracts** (arts. 17-19); **individual employment contracts** (arts. 20-23);

⁶ The notion of civil and commercial matters is defined by the Regulation itself (Art. 1); disputes concerning the status and capacity of persons, matrimonial property regime, wills and succession, insolvency proceedings, social security and arbitration are excluded. Moreover, the Regulation does not extend to tax, customs and administrative matters, nor to the liability of the State for acts or omissions in the exercise of official authority.

⁷ Excluded from the scope of the Regulation are, in detail, the following matters (Art. 1) (a) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship or out of a relationship deemed by the law applicable to such relationship to have comparable effects to marriage; (b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings; (c) social security; (d) arbitration; (e) maintenance obligations arising from a family relationship, parentage, marriage or affinity; (f) wills and succession, including maintenance obligations arising by reason of death.

- **Regulation (EC) No 2201/2003 (Brussels IIa Regulation)**⁸, which repealed **Regulation (EC) No 1347/2000**, dictates the grounds of jurisdiction and rules for the circulation of judgments that apply to disputes in **matrimonial matters** (separations, divorces, dissolution of marriage) and in matters of **parental responsibility**; as of 1 August 2022, the Regulation was replaced in all EU Member States, with the exception of Denmark, by **Regulation (EU) 2019/1111** of 2 July 2019 “concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, and the international abduction of children”;
- **Regulation (EC) No 4/2009** sets out the criteria for jurisdiction and rules of circulation of decisions in matters of **maintenance obligations** arising from family, parentage, marriage or affinity relationships;
- **Regulation (EU) No 650/2012** sets out the rules on jurisdiction and the rules of circulation of decisions in matters of **succession**;
- **Regulation (EU) No 2015/848**, which repealed **Regulation (EC) 1346/2000**, sets out the criteria for jurisdiction and the rules for the circulation of judgments in relation to cross-border **insolvency proceedings** involving companies, traders and natural persons.

Within the EU (with the exception of Denmark, to which they do not apply) there are, then, in particular in civil and commercial matters, further Regulations that have introduced and regulated particular procedures, which aim to facilitate cooperation between Member States in order to guarantee, in a timely manner, an effective enforcement of the rights of individuals and businesses, also through the abolition of exequatur:

- **Regulation (EC) No 861/2007** established a **European Small Claims Procedure**;
- **Regulation (EC) No 1896/2006** created a **European order for payment procedure**;
- **Regulation (EC) No 805/2004** created a **European Enforcement Order for uncontested claims**.

Finally, in the EU context, the following regulations are relevant, which also ensure effective cooperation between the courts of the Member States:

- **Regulation (EC) No 1393/2007** on the **service** in the Member States **of judicial and extrajudicial documents** in civil or commercial matters, which has been repealed and partially replaced by **Regulation (EU) No 1784/2020** as of 1 July 2022⁹;

⁸ Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ EC 2003, L 338/1. It was repealed by the Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), OJ EU 2019, L 178/1.

⁹ Regulation (EU) 2020/1784 of the European Parliament and of the Council of 25 November 2020 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) (recast), OJ EU 2020, L 405/40. The repeal of Regulation No 1393/2007 is for the time being partial, according to Article 36 in conjunction with Article 37 of Regulation No 2020/1784. Indeed, the latter provides that Articles 4 and 6 of Regulation No 1393/2007 shall be deemed to be repealed upon the entry into force of Articles 5, 8 and 10, i.e. “from the first day of the month following the period of three years after the date of entry into force of the implementing acts referred to in Article 25”, concerning the establishment of a decentralised information system, to be done no later than 23 March 2022. Therefore, as of today, Articles 4 and 6 of Regulation No 1393/2007 continue to remain in force.

- **Regulation (EC) No 1206/2001** is on cooperation between the courts of the Member States in the **taking of evidence** in civil or commercial matters, which was repealed and partially replaced by **Regulation (EU) No 1783/2020** as of 1 July 2022¹⁰.

1.3. Provisions of the Withdrawal Agreement on "Ongoing Judicial Cooperation in Civil and Commercial Matters"

The Brexit has profoundly affected the regulatory framework just described, with reference of course to relations with the UK. Title VI of Part Three of the Agreement contains specific provisions on "Ongoing Judicial Cooperation in Civil and Commercial Matters".

As regards the law applicable to contractual and non-contractual obligations, the Agreement provides that in the UK (see Art. 66):

- Regulation (EU) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) applies to contracts concluded before the end of the transitional period;
- Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law **applicable to non-contractual obligations (Rome II)** applies to facts giving rise to damage if they occur before the end of the transitional period.

Regarding jurisdiction, recognition and enforcement of judgments and cooperation between central authorities, the Agreement provides that (see Art. 67), in the United Kingdom, as well as in Member States in situations involving the United Kingdom, the following shall apply to proceedings commenced before the end of the transitional period and to related proceedings or cases:

- the provisions of Regulation (EU) No 1215/2012 (Brussels Ia)¹¹ of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters;
- Council Regulation (EC) No 2201/2003 (Brussels IIa) of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility;
- Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.
- the provisions of Regulations (EU) 2017/1001 (European Union trade mark), (EC) No 6/2002 (Community designs), (EC) No 2100/94 (Community plant variety rights) and (EU) 2016/679 of the Parliament (protection of natural persons with regard to the processing of personal data and on the free movement of such data), Directive 96/71/EC of the European Parliament and of the Council (concerning the posting of workers in the framework of the provision of services), concerning jurisdiction.

¹⁰ Regulation (EU) 2020/1783 of the European Parliament and of the Council of 25 November 2020 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (taking of evidence) (recast), OJ EU 2020, L 405/1. The repeal of Regulation No 1206/2001 is currently partial, pursuant to Articles 34 and 35 of Regulation No 2020/1783. Article 6 of Regulation No 1206/2001 will be repealed by Article 7 of Regulation No 2020/1783, the entry into force of which will take place on the first day of the month following the period of three years after the adoption of the measures by the Commission to set up the decentralised IT system. Currently, Article 6 of Regulation 1206/2001 remains in force.

¹¹ The 1968 Brussels Convention on Jurisdiction has been replaced by Regulation (EC) No 44/2001 (Brussels I) and the latter has been replaced by Regulation (EU) No 1215/2012 (Brussels I bis). Regulation (EC) No 44/2001 (Brussels I) continues to apply to actions brought before 10 January 2015.

Insofar as it is of interest for the purpose of the present study, it should be noted that Article 67 specifies that in the United Kingdom, as well as in Member States in situations involving the United Kingdom:

- Regulation (EU) No 1215/2012 (civil and commercial matters) applies to the recognition and enforcement of judgments given in actions brought before the end of the transitional period, as well as to authentic instruments formally drawn up or registered and court settlements approved or concluded before the end of the transitional period;
- the provisions of Regulation (EU) No 2201/2003 (matrimonial matters and parental responsibility) concerning the recognition and enforcement of judgments shall apply to judgments given in proceedings instituted before the end of the transitional period, as well as to authentic instruments formally drawn up or registered and to judicial settlements approved or concluded before the end of the transitional period;
- the provisions of Regulation (EC) No 4/2009 (Maintenance Obligations) concerning the recognition and enforcement of decisions shall apply to decisions given in court proceedings commenced before the end of the transitional period, as well as court settlements approved or concluded, and authentic instruments drawn up before the end of the transitional period;
- Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims shall apply to judgments given in court proceedings instituted before the end of the transitional period, as well as court settlements approved or concluded and authentic instruments established before the end of the transitional period, provided that certification as a European Enforcement Order has been applied for before the end of the transitional period;
- Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings applies to insolvency proceedings provided that the main proceedings were opened before the end of the transitional period;
- Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure applies to European orders for payment requested before the end of the transitional period;
- Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure applies to small claims for which an application is made before the end of the transitional period.
- In relation to access to justice, a key issue in the context of this study, Article 69(1)(a) stipulated that Council Directive 2003/8/EC on the establishment of common minimum standards relating to legal aid will continue to apply only in respect of requests received by the receiving authority before the end of the transitional period, with the receiving authority being able to request an acknowledgement of receipt within seven days of the end of the transitional period if it doubts whether the request was received before that date.

1.4. The Impossible Revival of the Brussels Convention in Relations between the European and UK Judicial Authorities

Notwithstanding the inapplicability of the Brussels Ia Regulation as of 1 January 2021, doubts arose, however, as to the applicability between the EU and the UK of the 1968 Brussels Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.

Someone held that the 1968 Brussels Convention could be reapplied before the courts of the European Union for situations related to the United Kingdom (this would not happen in relation to disputes before English courts). Two opposing strands have arisen in this regard. On the one hand, there are

those who, as mentioned above, believe that the 1968 Brussels Convention can be revived¹², and on the other hand, there are those who exclude the application of the 1968 Brussels Convention altogether, due to its replacement by Regulation (EC) No 44/2001, subsequently replaced by Regulation (EU) No 1215/2012¹³.

This is the reasoning. The mentioned contrast arose in the aftermath of the 2016 Brexit referendum result. The positions supporting the thesis in favour of the revival of the 1968 Brussels Convention arose in a period before the conclusion of the Withdrawal Agreement signed by the European Union and the United Kingdom and the subsequent Regulations¹⁴, when there was still no prospect of this happening. But, subsequently, following the adoption of The Civil Jurisdiction and Judgment (Amendment) (EU Exit) Regulations 2019, in which Part 4 stated that "any rights, powers, liabilities, obligations, restrictions, remedies and procedures which [...] are derived from [...] the Brussels Conventions [...] cease to be recognised and available in domestic law (and to be enforced, permitted and followed accordingly) on [IP completion day]", on 29 January 2021, the British government confirmed, by communication to the European Council, that the aforementioned Convention ceased to apply to the United Kingdom as of 1 January 2021.

However, there are those who argue that the Withdrawal should only prevent individuals from invoking and applying the Convention before the UK courts; but it should not affect the UK's international law obligations and the possibility for other States Parties to apply it, with the

¹² The doctrine supporting this position held that the 1968 Convention should still be considered binding in the relations between the UK and the EU, both in relation to jurisdiction and in relation to the recognition and enforcement of judgments rendered in respect of judgments introduced after Brexit. The idea behind this position is the circumstance that the 1968 Convention has not been entirely and definitively replaced by Regulation No 44/2001, but the latter has merely succeeded it. For this position, see Dickinson A., *Back to the future: the UK's EU exit and the conflict of laws*, JPIL 2 (2016), pp. 201 ff; Aikens R., Dinsmore A., *Jurisdiction, Enforcement and the Conflict of Laws in Cross-Border Commercial Disputes: What Are the Legal Consequences of Brexit?*, in Eur. Bus. L. Rev., (2016), pp. 906 ff., which considers that by becoming a non-member State, the United Kingdom, by virtue of Article 68 of Regulation 44/2001, which provides that it shall supersede the Convention except in respect of States excluded from its scope, would see the 1968 Convention reapply, also in view of the reference made by the Civil Jurisdiction and Judgments Act of 1982; Ungerer J., *Consequences of Brexit for European Private International Law*, in European Paper, 4 (2019), pp. 396 ff.

¹³ This position is supported, among others, by Cortese B., *Brexit and Private International law, between Rome, Brussels and Lugano: "How can I just let you walk away?*, CTD, vol. 13, 1 (2021), p. 163, according to whom the condition of the Convention's continuing applicability no longer exists, both from a temporal point of view, whereby it would apply only to proceedings instituted or judgments given before the entry into force of Regulation (EC) No 44/2001, and from a territorial point of view, as regards relations between Member States and non-European territories, where the Lugano Convention of 2007 has replaced the 1968 Brussels Convention in its rules. Moreover, in the light of the entry into force of Regulation No 44/2001, the provision in Article 68, which exempted the 1968 Convention from application, expressly limited its scope of application, reducing it to Denmark, then a non-contracting party to the Regulation, and certain overseas territories referred to in Article 299 TEU. A further objection raised against the revival of the Convention in the relationship between the Member States and the United Kingdom concerns the question whether the 1968 Convention is understood to apply only to the Member States. It is also held, contrary to the opposing doctrine, that the Brussels I Regulation has replaced the Convention in relations between the Member States, "with the consequence that in respect of such States the convention should be deemed terminated under public international law", in addition to the fact that the 1968 Convention is found not to be in force for 13 of the 27 Member States of the Union (see Tuo C. E., *The Consequences of Brexit for Recognition and Enforcement of Judgments in Civil and Commercial Matters: Some Remarks*, RDIPP 2 (2019), pp. 306-308).

For this doctrinal position see also Rühl G., *Judicial cooperation in civil and commercial matters after brexit: which way forward?*, ICLQ, 67, (2018), pp. 99 ff, available at <https://ssrn.com/abstract=3287823>, who points out that even if the inapplicability of the Brussels Convention cannot result from the exercise of the right of withdrawal under Article 50 TEU, it can be regarded as a consequence of the change of circumstances provided for in Article 62 of the Vienna Convention as the basis for the termination of a treaty; Alberti J., *The (questionable) revival of the Brussels and Rome Conventions in relations with the United Kingdom following Brexit*, in rivista.eurojus.it, 4 (2019), pp. 42 ff.

¹⁴ The Regulations are statutory instruments, which are the most common form of secondary (or delegated) legislation. With the regulations, the UK took a position with regard to the European regulations previously binding on the UK and their applicability or receipt, after Brexit.

consequence that European claimants should be able to sue defendants domiciled in the UK under the provisions of the said Convention, albeit limited to the cases of exclusive jurisdiction provided for in Article 16¹⁵.

This is not the place to go into this in depth; here, it is sufficient to point out that the majority doctrine in any case tends to rule out the application of the 1968 Brussels Convention in relations between the UK and EU states, following Brexit¹⁶.

It is also barely worth noting that such a solution would also be politically difficult to implement.

1.5. Provisions of the Withdrawal Agreement on “Union Judicial and Administrative Procedures”

Title X of Part Three of the Agreement contains provisions on “Union judicial and administrative procedures”.

Article 86 provides that the Court of Justice of the European Union shall retain jurisdiction over all actions brought by or against the United Kingdom before the end of the transitional period. This jurisdiction applies to all stages of the proceedings, including the appeal before the Court of Justice and the proceedings before the General Court in the event of a reference.

The Court of Justice of the European Union retains jurisdiction to give preliminary rulings on references made by the courts of the United Kingdom before the end of the transitional period (the Court of Justice of the European Union is deemed to be seised and the reference for a preliminary ruling is deemed to have been made when the reference is registered at the Registry of the Court of Justice or, as the case may be, the General Court).

¹⁵ According to Article 4 of the Convention, “if the defendant is not domiciled in a Contracting State, the jurisdiction of the courts of each Contracting State shall, subject to the provisions of Article 16, be determined by the law of that State”. Therefore, the jurisdiction of the European courts exists with reference to the cases of exclusive jurisdiction provided for in Article 16 of the 1968 Convention with regard to a defendant who is not domiciled in a Member State (e.g. in matters of rights in rem in immovable property and tenancies of immovable property, the courts of the Contracting State where the property is situated have jurisdiction). In this sense, the advocates of the revival of the 1968 Convention affirm the application of the latter in respect of situations connected with the United Kingdom, at least with reference to cases of exclusive jurisdiction.

With regard to the aforementioned operation of Article 62 of the Vienna Convention, through which a fundamental change of circumstances is invoked as a ground for the termination of a treaty, it has been held that while it is true that the entry of the UK into the European Communities was an essential prerequisite for British accession to the Brussels Convention (through the Accession Convention of 1978), it is also true that it is difficult to consider that there has been a radical transformation of the obligations to be performed that would suggest that a “fundamental change of circumstances” has occurred: in fact, the recognition and enforcement of judgments from non-Member States already takes place under the Lugano Convention and, moreover, the Brussels Convention continues to apply to the non-European territories of the Member States (Overseas Countries and Territories).

¹⁶ For doctrinal positions excluding the revival of the 1968 Brussels Convention, see footnote 13, further supported by the UK’s adoption of The Civil Jurisdiction and Judgment (Amendment) (EU Exit) Regulations 2019.

2. NON-EU RULES ON SOURCES OF JURISDICTION IN THE INTERNATIONAL CONTEXT OUTSIDE THE EU (CONVENTIONS AND DOMESTIC LAW): LIST OF THE MAIN MULTILATERAL CONVENTIONS

In order to reconstruct the current structure of relations between the EU and the UK, it is also necessary to take note of the main conventional sources that still regulate the jurisdictional relations between the EU states and the UK, which are therefore not EU Regulations.

Outside the EU level, the rules on jurisdiction have two source levels: conventional and domestic.

In the international sphere, outside the Community level, the following multilateral conventions are of particular relevance:

- **1968 Brussels Convention** on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters;
- **Hague Convention of 5 October 1961** Abolishing the Requirement of Legalisation for Foreign Public Documents (Apostille Convention);
- **Hague Convention of 15 November 1965** on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Service Convention);
- **Hague Convention of 18 March 1970** on the Taking Abroad of Evidence in Civil or Commercial Matters (Evidence Convention);
- **Hague Convention of 1 June 1970** on the Recognition of Divorces and Separations (Divorce Convention);
- **Hague Convention of 25 October 1980** on the Civil Aspects of International Child Abduction (Child Abduction Convention);
- **Hague Convention of 19 October 1996** on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (Child Protection Convention);
- **Hague Convention of 30 June 2005** on the Choice of Court Agreements (Choice of Court Convention);
- **Hague Convention of 23 November 2007** on the International Recovery of Child Support and Other Forms of Family Maintenance (Child Support Convention).

Therefore, regarding non-EU countries and relations between these countries and the Member States, cooperation, including in the field of judicial cooperation in civil matters, is carried out within the framework of the multilateral Hague Conventions.

As we shall see in the following paragraphs, the analysis of the consequences of Brexit on the cooperation between EU Member States and the UK, in civil and commercial matters and in the other matters mentioned above, including those concerning family matters, must be based on the verification of the applicability, in relations with the UK, of the aforementioned Conventions.

Moreover, as we shall see (and as anticipated), a part of the European legislation has been “nationalised” in the UK: the UK has adopted legislative instruments, the so-called Regulations, by which it has explicitly declared its willingness to revoke the regulations previously applicable under its being a Member State or, on the contrary, to make the rules contained therein its own (EU retained law).

In the absence of Conventions (plurilateral or even bilateral), it becomes necessary to resort to the rules of private international law of each individual State (domestic level).

3. OVERVIEW OF THE POST-BREXIT SITUATION

3.1. The Current State of EU-UK Relations in the Field of Judicial Cooperation in Civil and Commercial Matters

3.1.1. EU Retained Law: Overview of Matters Regulated by Regulation (EU) No 1215/2012 (Brussels Ia Regulation)

It is worth briefly outlining the main features of Regulation (EU) No 1215/2012 (Brussels I bis Regulation).

The prerequisite for the application of the Regulation is that the defendant, regardless of nationality, is domiciled in a Member State, except in cases of exclusive jurisdiction. The general jurisdiction under the Regulation is that of the place where the defendant is domiciled¹⁷. Persons domiciled in a Member State may be sued before the courts of another Member State only in accordance with the rules laid down in Sections 2 to 7 of the Regulation.

These sections provide for special grounds of jurisdiction, which are either alternative¹⁸ or mandatory or exclusive. In particular, mandatory grounds of jurisdiction are provided for in the following areas: insurance contracts, specifically regulated in Section 3; consumer contracts, specifically regulated in Section 4; individual employment contracts, specifically regulated in Section 5. These will be discussed below.

Section 6 establishes exclusive jurisdiction, which excludes the applicability of the general rule of the forum of the defendant and applies also in respect of defendants not domiciled in a Member State, provided that the application of the rule leads to the jurisdiction of a Member State¹⁹.

Section 7 governs prorogation of jurisdiction, i.e. it regulates choice-of-court agreements in favour of the courts of the Member States: the parties may bring proceedings before the court of a Member State in respect of disputes over which, in the absence of agreement, the court of another State has jurisdiction.

According to Article 36, a judgment given in one Member State shall be recognised in another Member State without any special procedure being required; moreover, a judgment given in a Member State that is enforceable in that Member State shall also be enforceable in the other Member States without any declaration of enforceability being required²⁰. These rules also apply to judgments delivered by courts designated by choice of court agreements.

¹⁷ The Regulation indicates as the general forum the Member State in which the defendant is domiciled: Article 4.1 states that “persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State”.

¹⁸ In some matters the special grounds of jurisdiction are additional to the general forum of the defendant (see Section 2, Arts. 7-8-9). By way of example, as an alternative to the forum of the defendant's domicile, in contractual matters the person may be sued before the court of the place, situated in a Member State, of performance of the obligation in question (see Art. 7); in matters relating to tort, delict or quasi-delict, the person may be sued before the court of the place where the harmful event occurred or may occur (see Art. 7). Art. 8 identifies optional forums in hypothesis of subjective or objective connection (several defendants, call of a third party as surety, etc.).

¹⁹ Article 24 contains a list of grounds of jurisdiction designating exclusive courts. By way of example, in matters of rights in rem in immovable property, the authority of the member state where the property is situated has jurisdiction.

²⁰ The abolition of the *exequatur* had already been anticipated by Regulation No 805/2004 concerning the European Enforcement Order for uncontested claims and Regulations No 1896/2006 and No 861/2007 for European order for payment and small claims procedures; as we shall say, those regulations have also been expunged from English law through the adoption of the European Enforcement Order, European Order for Payment and European Small Claims Procedure (Amendment etc.) (EU Exit) Regulations 2018, respectively.

That said, Regulation (EU) No 1215/2012 has been revoked by The Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 No 479 and therefore it no longer applies in the UK, except for proceedings instituted and judgments rendered before 31 December 2020 as set out in the Withdrawal Agreement²¹.

However, the provisions contained in the Brussels Ia Regulation concerning jurisdiction in matters of consumer contracts (Arts. 17-19) and in matters of employment contracts (Arts. 20-23) have been transposed into UK domestic law.

These provisions were incorporated into the Civil Jurisdiction and Judgments Act 1982, in Articles 15A to 15E, through The Civil Jurisdiction and Judgments Regulations 2019 No 479. The “nationalisation” of this European legislation, concerning the jurisdictional rules on consumer contracts and on employment contracts, was done by the UK to avert the risk that judicial decisions issued in these matters might not be recognised in the EU Member States, as these are matters where it is essential to comply with stringent provisions protecting the weak figures of consumer and employee²².

a. Consumer Contracts

The Brussels Ia Regulation, as regards jurisdiction in matters of consumer contracts, provides that (see Art. 18):

- “A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or, regardless of the domicile of the other party, in the courts for the place where the consumer is domiciled” (Article 18, para. 1);
- “Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled” (article 18, para. 2).

Section 15B of the Civil Jurisdiction and Judgments Act 1982 provides, with respect to jurisdiction in relation to consumer contracts, that where the consumer is domiciled in the United Kingdom,

- “The consumer may bring proceedings against the other party to the consumer contract—(a) where the other party to the consumer contract is domiciled in the United Kingdom, in the courts of the part of the United Kingdom in which the other party to the consumer contract is domiciled, or (b) in the courts for the place where the consumer is domiciled (regardless of the domicile of the other party to the consumer contract)”.
- “Proceedings may be brought against the consumer by the other party to the consumer contract only in the courts of the part of the United Kingdom in which the consumer is domiciled”.

This provision is consistent with the Regulation, according to which an action by the other party to the contract against the consumer may only be brought before the courts of the Member State on whose territory the consumer is domiciled.

The contract is also governed by the law of the State where the consumer is domiciled.

²¹ Pursuant to Article 67 of the Withdrawal Agreement, in respect of judgments rendered in the context of judicial proceedings commenced in the United Kingdom and the Member States before the end of the transitional period, i.e. before 1 January 2021, the Brussels I bis Regulation will continue to apply in situations involving the United Kingdom; for judgments from Switzerland, Norway and Iceland, the 2007 Lugano Convention (an instrument that largely replicates the rules of Brussels Regulation No 44/2001) will apply.

²² See Davì A. & Zanobetti A., *Brexit: lo spazio giudiziario europeo in materia civile e commerciale all'alba dell'exit day*, federalismi.it, 4 (2020), p. x.

Therefore, in contracts with a consumer domiciled in the EU, UK-based businesses will not be able to provide for the applicability of a law other than EU law and courts will continue to apply EU consumer protection law, and the consumer will be able to sue the business or professional before an EU court.

b. Employment Contracts

As regards jurisdiction in matters of individual contracts of employment, the Regulation provides that (see Arts. 21-22):

- An employer domiciled in a Member State may be sued: (a) in the courts of the Member State in which he is domiciled; or (b) in another Member State: (i) in the courts for the place where or from where the employee habitually carries out his work or in the courts for the last place where he did so; or (ii) if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated (article 21, para. 1);
- An employer not domiciled in a Member State may be sued in a court of a Member State in accordance with point (b) of paragraph 1 (article 21, para. 2);
- An employer may bring proceedings only in the courts of the Member State in which the employee is domiciled (article 22).

Section 15C of the Civil Jurisdiction and Judgments Act 1982 provides, with regard to jurisdiction in relation to individual contracts of employment that:

- “the employer may be sued by the employee— (a) where the employer is domiciled in the United Kingdom, in the courts for the part of the United Kingdom in which the employer is domiciled, (b) in the courts for the place in the United Kingdom where or from where the employee habitually carries out the employee's work or last did so (regardless of the domicile of the employer), or (c) if the employee does not or did not habitually carry out the employee's work in any one part of the United Kingdom [or any one overseas country], in the courts for the place in the United Kingdom where the business which engaged the employee is [or was] situated (regardless of the domicile of the employer)” (Section 15 C, para. 2).
- “If the employee is domiciled in the United Kingdom, the employer may only sue the employee in the part of the United Kingdom in which the employee is domiciled (regardless of the domicile of the employer)” (Section 15 C, para. 3).

Also in this area, European law has been “nationalised” in order to transpose the protection guaranteed at European level for subjects considered weak, such as employees in this case. In these terms, by virtue of the application of the criterion of the defendant's domicile, for actions brought by the employer against the latter, where the employee is domiciled in a Member State, he can only be sued before the courts of the place of his domicile, with the consequent application of European legislation.

3.2. Inapplicability of European Simplified Procedures

3.2.1. European Enforcement Order for Uncontested Claims

In civil and commercial matters, it must finally be recalled that several special procedures have been regulated between the EU Member States, aimed, in the same way as the previous instruments, at facilitating productive cooperation between them. These do not apply to Denmark.

Regulation (EC) No 805/2004 established the European Enforcement Order for uncontested claims: all checks necessary for the enforcement, in one Member State, of judgments pronounced in another Member State concerning pecuniary claims that are liquid, due and uncontested are abolished.

As to its scope, it covers acts in civil and commercial matters and thus coincides with the scope of the Brussels I and Brussels Ia Regulations; it provides an alternative remedy to the procedure for the enforcement of judgments as well as authentic instruments and court settlements.

In matters of maintenance obligations, the Regulation on the enforcement order was replaced by Regulation (EC) No 4/2009.

If the requirements for an uncontested claim are fulfilled, the court of origin certifies the decision as a European Enforcement Order without the need for exequatur; one can apply directly to the bailiff to initiate the enforcement procedure.

3.2.2. European Payment Order Procedure

Regulation (EC) No 1896/2006 introduced the European Payment Order Procedure, which enables the circulation of payment orders aimed at the recovery of debts in a Member State other than the country of origin by means of simplified and less costly procedures, using standard forms, with respect to which the need to go through the procedures for the declaration of recognition and enforceability is eliminated.

The scope of application concerns disputes arising from the non-payment of pecuniary claims that are liquid and payable. The creditor applies for the issue using a special form that can be submitted electronically.

The jurisdiction of the court is determined in accordance with the applicable rules, i.e. Brussels Ia Regulation, but against consumers the court of their domicile has jurisdiction. In the absence of opposition, the enforceable order for payment is recognised and enforced in the other states of the European Union under the same conditions as an enforceable decision issued in the state of enforcement.

3.2.3. European Procedure for Small Claims

Finally, among the simplified procedures, mention should be made of the European Procedure for Small Claims (Reg. No 861/2007), as a procedure for the quicker and less costly resolution of small claims, as an alternative to the internal procedures of individual Member States. It is in addition to the procedures mentioned above, with the aim of reducing time and costs for simpler dispute resolution. The subject matter of the regulation is cross-border disputes in civil and commercial matters with a value not exceeding EUR 2,000. Here too, a standard form is to be filled in and sent to the competent court according to the Brussels Ia Regulation. Upon completion, the judgment is recognised and enforced in another Member State without the need for a declaration of enforceability.

The regulations now examined have been revoked by the UK with the European Enforcement Order, European Order for Payment and European Small Claims Procedure (Amendment etc.) (EU Exit) Regulations 2018, thus leading to a gap in those areas, creating greater difficulties for coordination between states in relation to the procedures covered by the respective regulations.

3.2.4. Exclusion of the United Kingdom from the European Judicial Network

Aimed at the same purpose as the simplified procedures is the **Decision of the Council of the European Union No 2001/470/EC**, which established the **European Judicial Network**, aimed at guaranteeing and promoting greater judicial cooperation between the Member States in civil and commercial matters, in particular by setting up an information system that can be accessed by members of the network as well as by the public.

The Decision established the creation of a network of so-called "contact points", designated by each Member State, which are assigned the task of facilitating judicial cooperation in civil and commercial matters and establishing an information system that is accessible to the public. These contact points may be used by central bodies and judicial or administrative authorities.

Following withdrawal from the European Union, The Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 revoked the decision in question, excluding the United Kingdom from the aforementioned Network and leaving a significant gap in light of the essentiality of such an instrument, the purpose of which is to strengthen the relationship between States and to facilitate greater and more consolidated cooperation between them, through a system composed of contact points and reference authorities. There is no similar framework between the UK and the EU.

4. STATE OF PLAY OF EU-UK RELATIONS IN THE FIELD OF JUDICIAL COOPERATION

4.1. On Exclusive Choice of Court: The 2005 Hague Choice of Court Convention

In matters other than those mentioned in the preceding paragraphs, the grounds of jurisdiction will in principle have to be found in international treaties and national law.

Given, as already mentioned, that neither the Brussels Ia Regulation nor the Brussels Convention are applicable any longer, in cases where recognition and enforcement of an English judgment is sought in an EU Member State or vice versa, the national rules of private international law of the State concerned will therefore apply.

Furthermore, it will be up to the domestic laws of each EU Member State to determine whether or not a clause conferring jurisdiction on a UK court will be effective, and in parallel, it will be up to the domestic law of the UK to determine whether or not a clause conferring jurisdiction on an EU court will be effective, unless the clause falls under the 2005 Hague Convention, as will be seen below.

Among the applicable international treaties, the 2005 Hague Convention on Choice of Court Agreements, which sets out uniform rules on jurisdiction, recognition and enforcement of judgments between state parties, is therefore of particular relevance.

The 2005 Hague Convention on Choice of Court Agreements was signed by the EU, making it binding on its member states. The UK also acceded individually to the Convention on 1 January 2021. Thus, the 2005 Hague Convention applies to the relationship between the EU and the UK.

However, the subject matter of the Hague Convention is much more limited than the Brussels Ibis Regulation. The Brussels Regulation and the Lugano Convention indicate uniform criteria for the identification of the competent court even in the absence of choice of the parties. The HCCH 2005, on the contrary, applies only where two parties belonging to contracting States have concluded an exclusive choice of court agreement (see Art. 1, according to which the Convention applies in international cases to exclusive choice of court agreements concluded in civil or commercial matters). The court chosen by the parties may not decline jurisdiction in favour of another court and must decide the dispute assigned to it (Art. 5); any other court must decline jurisdiction (Art. 6); the judgment rendered by the chosen court will be recognised and enforced in the other contracting States in accordance with Arts. 9 and 13.

Secondly, the 2005 Convention applies only to judgments rendered on the substance of the matter by the chosen court under a qualified exclusive jurisdiction agreement drafted or documented in writing,

and does not apply to provisional or procedural judgments, known as interim measures of protection (such as freezing injunctions).

Third, the matters excluded from the scope of application of the Convention are numerous. For example, the Convention does not apply when the party to the relationship is a natural person acting for personal, family or household purposes or to employment contracts, succession matters, intellectual property, antitrust matters, bankruptcy, maintenance obligations, rights in rem in immovable property, compensation for personal injury and compensation for non-contractual damages.

Fourth, the 2005 Hague Convention applies to agreements containing exclusive jurisdiction clauses concluded after the Convention's entry into force in the State in question, pursuant to Article 16. Well, there is a difference of opinion as to whether it applies to jurisdiction clauses concluded after 15 October 2015 - this is the position of the United Kingdom - or only to those concluded after 31 December 2020 - as the European Commission argues. The United Kingdom, as mentioned, acceded to the Convention by virtue of its accession to the Union in October 2015, whereas its independent accession did not occur until 1 January 2021.

Fifth, there is further uncertainty as to jurisdiction when there is no party domiciled in the United Kingdom and all parties are domiciled in the European Union. In such a case, when the proceedings in the UK are not commenced first, it is unclear whether the EU courts can stay the proceedings or decline jurisdiction in favour of non-EU courts (chosen through an agreement under the Hague Convention), e.g. the English courts.

In other words, when an EU court has jurisdiction under Brussels Ia Regulation, and the UK court is seised second, there is uncertainty as to the circumstances under which the EU court, seised first, may stay proceedings or decline jurisdiction in favour of non-EU courts having jurisdiction through an exclusive choice of court agreement, such as the English court. It must in fact be borne in mind that such a choice of court agreement cannot fall under Article 25 Brussels I bis Regulation, since the latter refers to the choice of courts in the Member States only.

When, on the other hand, the UK court is seised first, the EU court has the power to suspend or decline jurisdiction under Articles 33 and 34 of the Brussels I bis Regulation, respectively in cases where the case is between the same parties, has the same subject-matter and the same cause of action as the case brought before the court in the third State and where the case is related to the case brought before the court in the third State.

Finally, it should be noted that on 29 August 2022 the European Union acceded to the 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters. The Convention will enter into force for the EU (and will bind the Member States under Article 216 TFEU, with the exception of Denmark) on 1 September 2023. As things stand, the UK has not acceded to this Convention.

In any case, if for some reason the 2005 Hague Convention does not apply, questions of jurisdiction and enforcement must be decided by the courts applying their own national laws.

In addition, bilateral conventions concerning the recognition and enforcement of judgments in civil and commercial matters concluded between the UK and certain Member States²³ could be applicable;

²³ Reference is made to the following conventions: (i) the Convention between the United Kingdom and the French Republic providing for the reciprocal enforcement of judgments in civil and commercial matters, with Protocol, signed at Paris on 18 January 1934, (ii) the Convention between the United Kingdom and the Kingdom of Belgium providing for the reciprocal enforcement of judgments in civil and commercial matters, with Protocol, signed at Brussels on 2 May 1934, (iii)

for instance, as regards the relationship between the UK and Italy, the 1964 bilateral convention applicable in cases of recognition and enforcement of judgments rendered by courts designated by non-exclusive choice of court agreements is relevant. However, the possibility of a revival of such bilateral conventions has been largely ruled out, at least in the absence of a renewed consent to their validity²⁴. Indeed, Article 55 of the 1968 Brussels Convention expressly stipulated that it would supersede the bilateral conventions then in force between the various States, which then became contracting States to the Convention²⁵. In these terms, the individual conventions were replaced by the Brussels Convention, which was in turn replaced by Regulation No 44/2001 and subsequently by Regulation No 1215/2012, as regards the matters covered by it. Moreover, it should be noted that the possibility for individual Member States to renew the covenanted will clashes with the exclusive external competence of the European Union in relation to judicial cooperation in civil and commercial matters²⁶.

In contrast, on the conflict-of-law side, Brexit should not lead to significant consequences in terms of applicable law in commercial and civil matters.

Contractual clauses that lead to the choice of English law under the Rome I Regulation (Regulation No 593/2008, on the law applicable to contractual obligations) and the Rome II Regulation (Regulation No 864/2007, on the law applicable to non-contractual obligations) will continue to be applied by the EU member states, as the law designated by the regulations applies even if it is not that of a member state (Art. 2 Rome I and Art. 3 Rome II).

the Convention between the United Kingdom and the Federal Republic of Germany for the reciprocal recognition and enforcement of judgments in civil and commercial matters, signed at Bonn on 14 July 1960; (iv) the Convention between the United Kingdom and Austria providing for the reciprocal recognition and enforcement of judgments in civil and commercial matters, signed at Vienna on 14 July 1961, with amending Protocol signed at London on 6 March 1970; (v) the Convention between the United Kingdom and the Republic of Italy for the reciprocal recognition and enforcement of judgments in civil and commercial matters, signed at Rome on 7 February 1964, with amending Protocol signed at Rome on 14 July 1970; (vi) the Convention between the United Kingdom and the Kingdom of the Netherlands providing for the reciprocal recognition and enforcement of judgments in civil matters, signed at The Hague on 17 November 1967 (Article 55 1968 Brussels Convention).

²⁴ There was a distinct position of those who argued that the effectiveness of those bilateral conventions had simply been suspended during the time the Brussels regime was in operation, and therefore that, in the face of the United Kingdom's withdrawal from the European Union and the consequent end of the applicability of the relevant regulations, those conventions would regain force. Further, it was argued that where these conventions could not operate, domestic private international law would take over. See Davì A. & Zanobetti A., *supra* note 22, p. xi; Briggs A., *Brexit and Private International Law: An English Perspective*, Riv. Dir. Int. Priv. Proc., 2 (2019), p. 272; Bertoli P., *La «Brexit» e il diritto internazionale privato e processuale*, Riv. Dir. Int. Priv. Proc., 3 (2017), p. 616.

However, Cortese B., *supra* note 13, points out that, even if the revival of the bilateral agreements were to be affirmed, it would lead to a "double 'failure'" in that positive conflicts of jurisdiction would resurface and be an obstacle to the circulation of UK judicial decisions in the EU and vice versa.

²⁵ Article 55 provides: "this Convention shall, for the States which are parties to it, supersede the following conventions concluded between two or more of them", going on to list the individual conventions. However, Article 56 provided that the treaties or conventions referred to in Article 55 would continue to apply in relation to those matters not covered by the Convention, as well as to judgments rendered and documents drawn up or registered before its entry into force.

²⁶ Article 81(2)(a) TFEU establishes the competence of the European Parliament and the Council to adopt measures to ensure "the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases". It was on the basis of this provision that Regulation (EC) No 44/2001 was adopted, by which common rules on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters were enacted. Thus, with the adoption of the aforementioned regulation, the European Union acquired exclusive external competence to regulate matters relating to the recognition and enforcement of third-country judgments in civil and commercial matters, based on Article 3(2) TFEU. The latter provides, in fact, that "the Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope". See Tuo C., *supra* note 13, p. 309.

In addition, the UK has incorporated the above-mentioned regulations into its domestic law by means of the Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019: the rules that apply in circumstances involving a conflict of laws in contractual and non-contractual obligations in civil and commercial matters will therefore remain the same²⁷.

Moreover, the UK is not obliged to implement any future regulatory changes in the European context and will not be bound by the decisions of the Court of Justice.

4.2. Matrimonial Matters: from the Brussels Ila Regulation (Reg. No 2201/2003) to the Applicability of the Hague Convention of 1 June 1970, the Hague Convention Of 19 October 1996, the Hague Convention of 25 October 1980, the Hague Convention of 1 June 1970

At the date of withdrawal from the EU, the Brussels II Bis Regulation (Reg. No 2201/2003) on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility applied to the United Kingdom²⁸.

The United Kingdom, on the other hand, still an EU Member State, did not see the Regulations implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (Reg. No 1259/2010), of jurisdiction, applicable law, recognition and enforcement of decisions in matters of matrimonial property regimes (Reg. No 1103/2016) and in matters of the property consequences of registered partnerships (Reg. No 1104/2016) apply. Indeed, the United Kingdom has never wanted to be part of regulations governing applicable law, so much so that the English Courts have always applied only national law²⁹.

Regulation (EC) No 2201/2003 (Brussels Ila Regulation), as of 1 August 2022, has been replaced in all EU Member States, with the exception of Denmark, by EU Regulation No 2019/1111 "on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction".

The objective scope of application of Regulation No 2019/1111 has remained the same as that of the Brussels Ila Regulation: it is limited to proceedings and measures affecting the marriage bond, while it

²⁷ The Withdrawal Agreement was the first instrument with which the application of the European regulations was given, as far as the transitional period after the United Kingdom's exit from the European Union was concerned. At the end of that period, the regulations were to be deemed automatically revoked, subject to the adoption of appropriate instruments to preserve the provisions of those regulations. In these terms, the United Kingdom, in view of the unilateral application of the regulations, opted to retain the rules contained in Rome I (Reg. No 593/2008) on contractual obligations, and Rome II (Reg. No 864/2007) on non-contractual obligations, by making them part of its own legislation. This was done in the Applicable Law to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) Regulations 2019, which, in adopting the aforementioned regulations, adapted the text thereof to the extent necessary to the remaining legislation applicable in the State after Brexit and in view of the situation created by the latter. In this area, therefore, no regulatory gap has been created, with the exception of the discipline concerning the procedures for the negotiation and conclusion of agreements between Member States and third countries in connection with the law applicable to contractual and non-contractual obligations, the relevant regulation (Reg. No 662/2009) of which has been removed.

²⁸ Regulation (EC) No 2201/2003 of the Council of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, in OJ EC 2003, L 338/1. This regulation has been repealed by the now current Regulation (EU) No 2019/1111 of the Council of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), in OJ EU 2019, L 178/1, which, however, came into force on 1 August 2022 and therefore never applied to the United Kingdom, already a non-EU state.

²⁹ See Bruno P., *La legge applicabile alle cause di famiglia dopo Brexit*, ilfamillarista.it (2021).

does not extend to property effects (right to maintenance, property regime, house assignment, etc.) and personal effects (right to a name).

However, several innovations have been introduced, concerning in particular parental responsibility and the hearing of the child, international abduction and the recognition and enforcement of judgments, with the aim of giving greater organicity to the matter and of ensuring a discipline that best serves the child's interests. We give an account of them in the footnote, as they are rules that have never been applied in EU-UK relations³⁰.

First of all, it must be pointed out that the Brussels II bis Regulation has been revoked by the Jurisdiction and Judgments (Family) (Amendment etc.) (EU Exit) Regulations 2019.

That being said, to understand what the current situation is as a result of Brexit, a distinction must be made between the different areas: a) jurisdiction over divorce and circulation of judgments; b) jurisdiction over parental responsibility and circulation of judgments. Regulation No 2201/2003 must be taken as a point of comparison, as the rules applicable to the United Kingdom prior to its withdrawal from the European Union.

³⁰ Uniform rules on jurisdiction in divorce, legal separation and marriage annulment, as well as in disputes concerning parental responsibility that have an international element, are laid down in EU Regulation No 2019/1111.

In relation to separation, divorce and annulment proceedings, the new regulation keeps the jurisdictional criteria of the Brussels IIa Regulation unchanged. The same applies to the rules on jurisdiction in parental responsibility proceedings, where the general jurisdiction remains that of the Member State where the child is habitually resident (Article 7 ff.). A novelty in this area is the provision for the possibility of choice-of-court agreements by "the parties and any other holder of parental responsibility", subject to "a substantial connection" of the child with a particular Member State and the aim of exercising jurisdiction in accordance with "the best interests of the child" (Article 10). Further, the right of the "child who is capable of discernment" to express his or her views in proceedings concerning parental responsibility "in accordance with national law and procedures" has been explicitly provided for (Recital 39 and Article 21).

Article 6 on separation, divorce and annulment and Article 14 on parental responsibility provide that where no court of a Member State has jurisdiction, jurisdiction in each Member State shall be determined by the law of that State. In comparison with the previous Brussels IIa Regulation, the reference to the internal rules of the Member States for cases where no Member State has jurisdiction on the basis of the uniform criteria has thus remained unaffected: for instance, when the spouses have neither habitual residence in one of the Member States nor common nationality of a Member State, and were, for instance, residents and nationals of the United Kingdom.

About the recognition and enforcement of judgments, the Regulation establishes, as the Brussels II bis Regulation already did, that judgments delivered in one Member State are automatically recognised in the other Member States without any special procedure being required. The grounds that may justify a refusal of recognition (conflict with public policy, failure to enter an adversarial plea in the event of default of the defendant, conflict with another judgment given or recognisable in the State) have also remained unchanged, with the only new element being the effects of failure to hear the child (Article 39(2)). Authentic instruments and agreements on divorce and separation are automatically recognised in all Member States if they have binding legal effects in the State of origin (Art. 65); grounds for refusal of recognition are the same as for recognition of judgments.

On the other hand, a significant novelty concerns the enforceability and enforcement of judgments (Art. 34 ff.). The Brussels II bis Regulation provided that judgments on the exercise of parental responsibility over a child that had been issued and enforceable in one Member State could be enforced in another Member State after having been declared enforceable there, on application by the party concerned, "provided it has been served". The new Regulation has abolished exequatur altogether: Article 34 provides that judgments on parental responsibility given and enforceable in one Member State are enforceable in the other Member States without the need for a declaration of enforceability.

The aim is set out in recital 58 and is "making cross-border litigation concerning children less time consuming and costly", so that "a decision given by the court of any other Member State" may "be treated as if it had been given in the Member State of enforcement". Thus, there is no longer any need, within the EU, to initiate any procedure to obtain enforceability. The previous regulation provided for this mechanism only for judgments on rights of access and the return of the child. The latter are considered "privileged" judgments and the new Regulation provides for even more simplified rules for their recognition and enforcement: the party against whom enforcement is sought may oppose it only if it is irreconcilable with a later judgment given in the Member State in which recognition is sought or with a later judgment given in another Member State or in the third State of the child's habitual residence that is recognisable in the State addressed (Articles 42-50).

4.2.1. The rules of the Regulation governing jurisdiction and recognition of judgments in matrimonial matters

Pursuant to Article 4 of Regulation No 2201/2003, the pivotal criterion in identifying general jurisdiction is the connection of the spouses to the territory of a Member State, through habitual residence, domicile or nationality. However, residual jurisdiction is provided for where no court of a Member State has jurisdiction in relation to Articles 3, 4 and 5. In this hypothesis, jurisdiction in each Member State will be determined by the law of that State.

In addition, Article 7 expressly provides for the case where a person habitually resident in a third State and a national of a third State³¹ is sued by a national of a Member State who is habitually resident in another Member State, stating that in that case the applicable rules of jurisdiction shall be those of the Member State where the plaintiff is resident.

This may lead to three different situations. Where the defendant spouse is a British citizen and resides in a Member State, European law will apply. Where the defendant spouse is habitually resident in the UK, but is a national of a Member State³², jurisdiction will also be determined in accordance with the Regulation. In the different case where the spouse is a British national and resides in the United Kingdom, as a third State, Article 7(2) of the Regulation provides that he or she may be sued in a Member State under the internal rules of jurisdiction³³.

As regards the recognition of judgments thus rendered by the courts of a Member State, Article 21 of the Brussels II bis Regulation provides for their automatic recognition in the other Member States, without the need for the exequatur procedure. Therefore, even in the hypothesis that the judgment is rendered by a court of a Member State, whose jurisdiction has been determined in the light of the domestic law of a Member State of which the plaintiff is a habitual resident, the judgment will automatically be recognised in the territory of the other Member States. It must be emphasised, however, that in the latter hypothesis, the judgment will not be recognised in the non-Member State of which the defendant is a national and in which he or she resides, on the basis of Regulation No 2201/2003.

In this matter, the Hague Convention of 1 June 1970 on the Recognition of Divorces and Separations, to which the United Kingdom is a party, is supplementary, but limited in its relations with some of the Member States. In fact, there are only twelve Member States of the European Union that are party to that Convention: Cyprus, Czech Republic, Denmark, Estonia, Finland, Italy, Luxembourg, the Netherlands, Poland, Portugal, Slovakia and Sweden.

The Convention states in general that divorces and separations are recognised in any other Contracting State if, at the time of the application in the State of divorce or separation, one of the parties was

³¹ In the case of a person who is a national of a Member State or habitually resident in a Member State, the uniform rules of the European Regulation, pursuant to Article 3, would be deemed applicable.

³² By way of clarification, it should be noted that the plaintiff must also be a national of a Member State within the meaning of Article 3(b) Reg. No 2201/2003.

³³ The national law to be applied is that of the Member State of habitual residence of the claimant, who is a national of a different Member State. Taking Italy as an example, Article 32 of Law No 218 of 31 May 1995 (Reform of the Italian system of private international law) provides that in matters of nullity and annulment of marriage, legal separation and dissolution of marriage, Italian jurisdiction subsists, in addition to the cases provided for in Article 3, when one of the spouses is an Italian national or when the marriage was celebrated in Italy. Therefore, a person having nationality and habitual residency in a third-party State may be sued by a citizen of a Member State, habitually residing in Italy, before the courts of the Italian State.

habitually resident there³⁴ or both spouses were nationals of that State or if the sole applicant was a national of that State³⁵.

Article 2 of this Convention thus lays down more restrictive conditions than the Regulation on the Recognition of Judgments in Matrimonial Matters (Reg. No 2201/2003). In fact, whereas in the latter case recognition is based on the mere requirement that the judgment has been delivered by a court of a Member State, the Hague Convention outlines more stringent conditions that had to be in place when the judgment was delivered. However, these criteria are likely to be similar to those laid down in the European Regulation for the purpose of identifying the jurisdiction of the member States.

The Convention differs from the Brussels II bis Regulation in the absence of a regulation on *lis pendens* and related actions, which is relevant for the purpose of eliminating the risk of parallel proceedings on the same subject-matter.

It should be emphasised that the Contracting States may make reservations and declarations with regard to the subject-matter of the Convention³⁶, in respect of which the final deadline is the time of ratification or accession.

It should also be noted that this Convention does not apply to marriage annulment judgments, for which recourse must therefore be had to the internal law of the individual State addressed.

A problem arises with regard to States that are not Contracting Parties to the 1970 Hague Convention and in particular Austria, Belgium, Bulgaria, Croatia, France, Germany, Greece, Hungary, Ireland, Latvia, Lithuania, Malta, Romania, Slovenia, Spain. A divorce or separation pronouncement made by the courts of any of these states will not be recognised in the United Kingdom under the provisions of the 1970 Hague Convention. Conversely, a divorce or separation pronouncement made by the courts of the United Kingdom in the territory of these States shall not be recognised under this Convention either. In these cases, the private international law rules of the requested State shall apply exclusively.

4.2.2. The rules of the Regulation governing jurisdiction, recognition and enforcement of judgments in matters of parental responsibility, including child abduction

Article 8 of the Brussels II bis Regulation provides that in matters of parental responsibility over a child, the court of the Member State, in which the child is habitually resident at the time the application is lodged, shall have jurisdiction. The person in relation to whom jurisdiction is established is the child,

³⁴ Article 3 specifies that 'habitual residence also means domicile where in the State of origin jurisdiction in divorce or separation matters may be based on domicile. Article 2 of the 1970 Hague Convention stipulates that with regard to the petitioner, in addition to the habitual residence in the State addressed, two further conditions must be fulfilled: a) such habitual residence had continued for not less than one year immediately prior to the institution of proceedings; b) the spouses last habitually resided there together.

³⁵ If only the plaintiff had the nationality of the Contracting State, it is expected that the plaintiff also had his habitual residence there or had been habitually resident there for an uninterrupted period of one year, including during the two years preceding the application. In the case of an application for divorce, the applicant, who was a national of a Contracting State, had to be present there at the time of the application and the spouses had to be habitually resident in a State that did not provide for divorce at that time.

³⁶ Article 19 provides for the right of any Contracting State not to recognise a divorce or separation concerning two of its nationals where a law other than that specified by its private international law has been applied and has led to a result that differs from that which would have been obtained by the application of that law, and not to recognise a divorce between two spouses who were both habitually resident in a State that did not provide for divorce at the time of acquisition. Articles 20 and 21, on the other hand, concern the possibility for States that do not provide for divorce or separation to reserve the right not to recognise the relevant pronouncement if, at the time of acquisition, one spouse was a national of a State that did not provide for divorce or separation respectively. A further reservation may be made with regard to the time of acquisition of the divorce or separation, i.e. they may reserve the right not to recognise the pronouncement if it was obtained prior to the entry into force of the Convention for that State. Of the Contracting States, more than half have made reservations and declarations to the Convention.

whose habitual residence is relevant, regardless of the nationality and residence of the parents. In this case, the reference is purely to situations related to the European Union and its Member States. In the light of the lack of jurisdiction of any of the courts of the Member States, for instance because of the child's habitual residence in a third State, Article 14 provides for recourse, in each Member State, to its domestic law for the purposes of circumscription of jurisdiction.

However, the United Kingdom is bound by the **Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children**, which also binds all EU states.

As far as jurisdiction is concerned, the Hague Convention of 19 October 1996 has similar and overlapping content to the Regulation. The Convention differs from the Regulation in that it does not regulate cases of *lis pendens* and related action. Like the Regulation, on the other hand, the Convention provides for mechanisms of connection between the courts, aimed at efficient cooperation between them in order to realise the best interests of the child. Article 8 provides, for example, that the authority of the Contracting State having jurisdiction, if it considers that the authority of another Contracting State would be better placed to assess the best interests of the child in a particular case, shall request that authority to accept jurisdiction or suspend the decision and invite the parties to refer the request to the authority of the other State; Article 9 provides for the opposite case, where it is the authority of the State which, believing that it is better able to assess the best interests of the child in a particular case, asks the competent authority to allow it to exercise jurisdiction; Art. 10 provides that the authorities of a Contracting State having jurisdiction to hear an application for divorce or separation may take, where the law of the State of the child's nationality so permits, "measures directed to the protection of the person or property of such child³⁷ if a) at the time of commencement of the proceedings, one of his or her parents habitually resides in that State and one of them has parental responsibility in relation to the child, and b) the jurisdiction of these authorities to take such measures has been accepted by the parents, as well as by any other person who has parental responsibility in relation to the child, and is in the best interests of the child". Article 7 also deals with jurisdiction in cases of child abduction, consistent with Article 10 of Regulation No 2201/2003.

As regards cooperation between judicial authorities in matters of parental responsibility, the rules laid down in the two sources of law under comparison are essentially the same. It provides for the designation of central authorities for each State, which are entrusted with a range of tasks, with the aim of cooperation between them and the State courts in order to achieve the objectives set out in their respective legislative texts, in the best interests of the child.

The Convention, unlike the Regulation, also contains provisions on applicable law. As far as the exercise of jurisdiction is concerned, it essentially refers to the domestic law of the State to which the competent court belongs, but also provides for the possibility that, where the protection of the person or property of the child so requires, the law of another State, with which the situation has a close connection, may be applied. In the different hypothesis where the attribution or termination of parental responsibility takes place without the intervention of a judicial or administrative authority, this will be governed by the law of the State of the child's habitual residence³⁸. Article 20 clarifies the applicability of the law thus identified, even if it belongs to a non-Contracting State, since it may be disapplied only where its application is "manifestly contrary to public policy, taking into account the best interests of the child"³⁹.

³⁷ See also articles 11, 12, 13 and 14 HCCH 1996.

³⁸ In the event of a transfer of the child's habitual residence, with jurisdiction shifting to the courts of the new State of residence, Article 17 provides that the law to be applied by them shall be that of that State.

³⁹ See Article 22 HCCH 1996.

In relation, on the other hand, to the recognition and enforcement of judgments given in matters of parental responsibility, the Convention takes a step backwards compared to the new Regulation, in which exequatur was abolished altogether. In the 1996 Convention, on the contrary, while admitting the recognition “as of right” in other Contracting States of measures taken by the courts of a different Contracting State, it requires for their enforcement the declaration of enforceability or the registration of such measures by the requested State. Once the exequatur procedure has been carried out or registered, on the basis of domestic law, these measures must be enforced in the requested State as if they had been taken by its own authorities.

The Hague Convention of 19 October 1996, pursuant to Article 61 of Regulation No 2201/2003 (now Art. 97 Reg. No 2019/1111), which governs its relations, does not affect the possibility, also made safe by Article 52 of the Convention, for the Member States of the European Union to apply the rules of the Regulation in the case of children habitually resident in a Member State and in the matter of recognition and enforcement of a judgment given by an authority of a Member State, in a different Member State, even if the child is resident in a Contracting State to the Convention but to which the European rules do not apply.

Thus: authorities of a Member State hearing a case concerning a child habitually resident in a Member State will continue to verify their jurisdiction on the basis of the Regulation, regardless of whether the child has British nationality or whether his or her case is otherwise connected with the United Kingdom.

On the other hand, when seised of proceedings concerning a child established in the United Kingdom, the authorities of a Member State will establish their jurisdiction on the basis of the 1996 Hague Convention, even when the child is a national of a Member State or his or her case is otherwise connected with that State (they may also avail themselves of the opportunities for coordination between jurisdictions provided for in the Convention, subject to the conditions laid down therein).

Finally, as regards the **civil aspects of international child abduction**, the regulation of which has been included in the context of the Brussels II bis Recast Regulation (Reg. No 2019/1111), as the latter does not apply to relations between EU States and the United Kingdom, the framework is completed by the **1980 Hague Convention**. Both the Member States of the Union and the United Kingdom are in fact bound by the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, of which, moreover, the European rules currently in force constitute a development⁴⁰.

With the end of the transitional period, the provisions of Regulation No 2201/2003 concerning cooperation between central authorities became inapplicable. Instead, they are replaced by the rules governing cooperation between authorities contained in the 1980 and 1996 Hague Conventions referred to above, regarding the cases governed respectively by one and the other instrument. Moreover, no convention instrument is to be found that envisages similar forms of cooperation in matrimonial matters.

In the light of the foregoing, it may be noted, contrary to the unity of discipline already guaranteed by the Brussels IIa Regulation, and further increased by the IIa (Recast) Regulation, that the Hague Conventions provide a regulation, even if essentially corresponding to the European one, fragmented among different regulatory instruments to which States may adhere separately.

⁴⁰ Regulation (EU) No 2019/1111 complements the 1980 Hague Convention by providing a number of provisions, from Article 23 to Article 29, by which it promotes speedy proceedings, alternative dispute resolution, and regulates the procedure for the return of the child, the enforcement of judgments disposing of it, and the procedure following a refusal of return under Article 13(1)(b) and (2) of the Convention.

However, as far as the present case is concerned, it should be noted that all the member countries of the European Union have acceded to the aforementioned conventions, allowing the legislation dictated by them to fill the gap caused by the Withdrawal.

It is considered, therefore, that with regard to the matter of parental responsibility and child abduction, to which the protection of the best interests of the child is linked, the existence of the aforementioned conventions is useful to regulate the relations between the EU Member States and the United Kingdom in those matters.

4.3. EU-UK Relations in the Field of Judicial Cooperation in Matters of Maintenance Obligations arising from Family, Parentage, Marriage or Affinity Relations

At the date of the Withdrawal, Regulation (EC) No 4/2009⁴¹ on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations⁴² applied to the UK. However, the Hague Protocol of 23 November 2007 on applicable law, which the Regulation recalls for the states bound by it, did not apply to the UK.

The Regulation links the jurisdiction of the courts to decide maintenance obligations to the habitual residence of the defendant or creditor and recognises the jurisdiction of the courts that have jurisdiction to decide on the status of persons or parental responsibility where maintenance obligations are ancillary to the aforementioned. This is without prejudice to the parties' choice of court. Furthermore, Article 6 provides for subsidiary jurisdiction, stating that where no authority has jurisdiction even on the basis of the Lugano Convention, the courts of the Member State of common nationality of the parties shall have jurisdiction. Further, the so-called forum necessitatis is provided for, whereby the authorities of a Member State, with which the case is sufficiently connected, may hear a dispute both if proceedings cannot reasonably be brought or conducted or prove impossible in a third State with which the dispute is closely connected. This provision enshrines the possibility for Member States to rule on maintenance obligations in relation to situations connected to third States, such as the United Kingdom, with respect to which it is not possible to bring proceedings in the courts having jurisdiction there.

Regulation 4/2009 contains provisions on identification of the moment of adjudication, *lis pendens* and related actions, which ensure a certain coordination between States and avoid the risk of parallel judgments leading to conflicting outcomes.

The regulation governs the effectiveness in the Member States of judgments given in another Member State in matters of maintenance obligations⁴³. The Maintenance Regulation provides for two distinct regimes: on the one hand, the recognition of judgments given in a Member State bound by the 2007 Hague Protocol and, on the other, the recognition of judgments given in a Member State not bound by the Hague Protocol. Like the latter, the United Kingdom, as a country not bound by the Protocol on applicable law, had different rules on the recognition and enforcement of judgments rendered by its

⁴¹ Although it had initially declared its non-participation in Reg. 4/2009, in accordance with Articles 1 and 2 of Protocol No 21 to the Treaty on the Functioning of the European Union on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, the United Kingdom subsequently expressed its willingness to accede to this European regulation. The access of the United Kingdom to Regulation No 4/2009 was ordered by Commission Decision 2009/451/EC.

⁴² Maintenance obligations include benefits of a pecuniary nature due under a family relationship.

⁴³ The considerations made with regard to the effectiveness of judgments apply to authentic instruments and court settlements within the meaning of Article 48.

courts on maintenance obligations, even before its withdrawal from the Union⁴⁴. Indeed, judgments rendered there could be recognised without any necessary procedure, but with the possibility of opposition to recognition. Whereas, the enforcement of the judgment required a declaration of enforcement on application, with the possibility of an appeal against the judgment.

With the end of the transitional period, the Regulation ceased to apply to relations between the other Member States and the United Kingdom. It should be noted, however, that pursuant to Article 67(2)(d) of the Withdrawal Agreement, this discipline applies to all judgments made as a result of proceedings instituted before the end of the transitional period, irrespective of when the judgment is subsequently rendered.

Article 69 of the regulation states that the regulation does not affect the application of bilateral or multilateral conventions and agreements to which one or more Member States are party.

However, the effectiveness in the Member States of decisions taken in the United Kingdom at the outcome of proceedings instituted after 1 January 2021 is governed by the **Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance**, to which the United Kingdom is a party following its accession on 28 September 2020, without prejudice to the applicability - as recalled in Article 52 of that Convention - of any more favourable rules.

On the question of recognition and enforcement, the Convention refers to the domestic law of each Contracting State, but lays down a number of conditions for identifying judgments worthy of recognition and enforcement.

In addition, the rules on jurisdiction (Articles 3 - 14), with the related rules on *lis pendens*, related actions and provisional and protective measures, the rules cease to apply, creating a serious regression in the level of effectiveness of the protection provided, with the increased risk of parallel procedures and consequent denial of *exequatur*.

With the end of the transitional period, the applicability of the Regulation's rules concerning cooperation between central authorities also ceased in relations between the other Member States and the United Kingdom. Pursuant to Article 67(3)(b) of the Withdrawal Agreement, these provisions remain applicable to applications for recognition or enforcement of judgments received before the end of the transitional period. From 1 January 2021, the system of cooperation under the 2007 Hague Convention will operate, which are substantially similar, providing for a fundamental intermediary role of the central authorities in particular in applications for recognition and enforcement of judgments.

4.4. EU-UK Relations in the Area of Judicial Cooperation in Matters of Succession

In this matter, at European level, Regulation (EU) No 650/2012 (the so-called Rome IV Regulation), which governs jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession, applies.

The said Regulation has never applied to the United Kingdom; see Recital 82, on the basis of Articles 1 and 2 of Protocol 21 to the TFEU. Thus, the Brexit, on this point, has not created any particular consequences.

Article 4 of the Regulation provides as a general criterion of jurisdiction the place of habitual residence of the testator at the time of death. The court of the Member State of the deceased's last residence will

⁴⁴ The rules on the regime applicable to states not bound by the 2007 Hague Protocol are laid down in Articles 23-38.

therefore have jurisdiction. It is specified that the jurisdiction of the court thus identified will cover the entire succession⁴⁵. This implies that where the deceased had his habitual residence in a Member State, but the succession also involves assets located in a third State, such as the United Kingdom, then these will be subject to proceedings before the courts identified on the basis of the Regulation. Further, Article 10 provides that if the deceased did not have his habitual residence in a Member State at the time of death, the courts of the Member State in which the property is located shall be deemed competent to rule on the succession if the deceased was a national of that Member State or had his habitual residence there during the five years prior to death. Also in the latter case, the courts will be competent to rule on the entire succession. On the other hand, if these conditions are not met, the courts where the assets of the estate are located will have limited jurisdiction over those assets. The Regulation insists on the jurisdiction of the courts of the Member States.

Finally, Article 11 (*forum necessitatis*) provides that where there is no jurisdiction of the Member States in relation to the succession, but it is found that "proceedings cannot reasonably be brought or conducted or would be impossible in a third State with which the case is closely connected", the courts of a particular Member State, with which the case is sufficiently connected, may assert jurisdiction. Article 21 provides that the applicable law will be that of the State of the deceased's habitual residence, unless there is a manifestly closer connection with a different State, since the law of a third State may also be applied (Article 20).

The regulation, moreover, prevails over conventions to which only two or more Member States are parties in matters governed by the regulation, while it does not affect conventions to which Member States are also parties but not exclusively (Art. 75). In fact, the **Hague Convention of 5 October 1961 on the Form of Testamentary Dispositions**⁴⁶, which applies to the UK and some of the Member States of the European Union, is relevant in relation to the UK. If a State has not acceded to it, the connecting factors under the domestic law of each state must be checked.

4.5. EU-UK Relations in the Field of Judicial Cooperation in the Service and Taking of Evidence

In relation to instruments concerning procedures aimed at facilitating judicial cooperation between Member States are Regulation (EC) No 1393/2007 on service of documents and Regulation (EC) No 1206/2001 on evidence, both of which were revoked by the Service of Documents and Taking of Evidence in Civil and Commercial Matters (Revocation and Saving Provisions) (EU Exit) Regulations 2018.

With regard to the service of documents, the **Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters**, which in substance reproduces the content of the Regulation, applies to the UK.

As regards evidence, the **Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil and Commercial Matters** is applicable⁴⁷.

⁴⁵ However, it should be noted that there is a possibility for the court to refrain, upon application, from ruling on one or more hereditary assets located in the territory of a third State "if it may be expected that its decision in respect of those assets will not be recognised and, where applicable, declared enforceable in that third State" (Article 12).

⁴⁶ Eighteen European Union countries are parties to the 1961 Hague Convention. In particular, Bulgaria, Cyprus, the Czech Republic, Hungary, Latvia, Lithuania, Malta, Romania and Slovakia have not acceded to the Convention.

⁴⁷ Parties to the 1970 Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters are the United Kingdom and the Member States of the European Union, except Austria, Belgium and Ireland.

The text of the two above-mentioned conventions incorporates the substantive content of the above-mentioned regulations, ensuring in their entirety the same guarantees as those provided by European law for cooperation in service, communication and taking of evidence.

4.6. EU-UK Relations in the Field of Judicial Cooperation on Public Documents

The circulation of public documents was governed by Regulation No 1191/2016, on which the Withdrawal Agreement said nothing.

It is the European Commission in this context that made it clear in the notice to stakeholders⁴⁸ in the area of civil justice that the application of this regulation would continue for the transitional period until it would be replaced by the implementation of the **Hague Convention of 5 October 1961 on the Apostille**, as an international instrument on judicial cooperation, with similar content to the previous regulation.

The rules of the Convention are also aimed at the implementation of a system whose purpose is to remove the need for legalisation of public documents required to circulate in the territories of the Contracting Parties.

What principally distinguishes the two disciplines is the possibility, provided for by the European Regulation, to make use of IMI (Internal Market Information), established by Regulation (EU) No 1024/2012, as a multilingual IT tool facilitating administrative cooperation, mutual assistance and the exchange of information relating to the internal market between competent authorities, for the purpose of faster and less costly application of European Union law.

4.7. EU-UK Relations in the Field of Access to Justice through Legal Aid

The purpose of Directive 2002/8/EC is to improve access to justice in cross-border disputes by setting common minimum standards for legal aid.

Under Article 69(1)(a) of the Withdrawal Agreement, the European rules no longer apply in the United Kingdom as of the end of the transitional period. That article, however, provides that, for requests received before that day, the aforementioned directive continues to apply.

For the same purpose, the **Hague Convention of 25 October 1980 on International Access to Justice**⁴⁹, which provides, as part of a broader set of rules, for the regulation of legal aid. However, the Convention, although implemented in most European Union states, does not apply to the United Kingdom, which has not acceded to it.

4.8. EU-UK Relations in the Area of Judicial Cooperation in the Mediation of Civil Disputes

Directive 2008/52/EC aims to promote the amicable settlement of disputes by facilitating access to mediation, dictating principles that member states are called upon to respect.

The Directive, as a European act, is no longer addressed to the UK. According to Article 69(1)(b) of the Withdrawal Agreement, the subject matter of mediation, previously regulated by the Directive,

⁴⁸ European Commission DG JUST, *Notice to Stakeholders. Withdrawal of the United Kingdom and Eu Rules in the Field of Civil Justice and Private International Law*, REV2 (2020), p. 11.

⁴⁹ The EU Member States that have acceded to the 1980 Hague Convention on International Access to Justice are twenty-one, excluding Austria, Belgium, Denmark, Hungary, Ireland and Portugal.

continued to be governed by the Directive only if, before the end of the transitional period, the parties agreed to use mediation after the dispute arose, mediation was ordered by the court or the court invited the parties to use mediation.

At present, there are therefore no common principles on mediation in UK-EU relations.

At the international level, the Singapore Convention⁵⁰ was, however, adopted on 20 December 2018, to which 55 states (including states from the Middle East, Africa and Latin America)⁵¹ are currently signatories. At present, however, neither the United Kingdom nor the European Union has yet acceded to it.

4.9. EU-UK Relations in the Field of Judicial Cooperation in Insolvency Proceedings

Regulation (EU) No 2015/848 of 20 May 2015, which repealed Regulation (EC) No 1346/2000, regulates cross-border insolvency proceedings by laying down provisions on applicable law, jurisdiction and recognition of foreign judgments.

The Regulation applies to all Member States except Denmark and extends to proceedings promoting the reorganisation of debtors. It enables the efficient handling of insolvency proceedings against an individual or a company, which are characterised by cross-border elements within the European Union.

The Regulation establishes the opening of proceedings in the country in which the centre of the debtor's main interests is located (so-called COMI); secondary proceedings may be opened in respect of assets held in a country other than the first country.

In this way, the risk of parallel proceedings relating to the same debtor being initiated and conducted in two or more EU states is prevented in the EU, including by the maintenance of a publicly accessible electronic register, the updating of which is made possible by the European e-Justice Portal.

Pursuant to Article 67 of the Withdrawal Agreement, the Regulation only applies to the UK with respect to proceedings commenced before the end of the transitional period. Therefore, proceedings commencing thereafter will not see the Regulation apply in respect of the UK (which will thus be regarded as a third State).

With The Insolvency (Amendment) (EU Exit) Regulations 2019, the legislation has been incorporated into UK domestic law in some of its principles⁵². However, most of the provisions have been removed.

The non-application of the regulations in respect of the UK will lead to the possibility of parallel proceedings taking place, with the risk of conflicting decisions regarding the interests of creditors.

In addition, there will be obstacles inherent in the circulation of judgments, which the Regulation excludes by providing that only judgments pertaining to the court of the State where the centre of special interests is located by which the opening of proceedings is ordered will be recognised automatically: the judgment will produce, without any other formality, the effects provided for by the law of the State of the opening of proceedings in all Member States (Article 20). To be more precise,

⁵⁰ Singapore Convention website, available at: <https://www.singaporeconvention.org/>.

⁵¹ Of the 55 signatory states, only 10 have ratified the Convention. As far as the scope of application of the Singapore Convention is concerned, this is limited to commercial matters, as it does not apply to family law, succession or labour law matters.

⁵² The 2019 Regulations merely incorporated Articles 1 to 5, albeit with substantial amendments. In any case, these are general provisions that delimit the scope and circumscribe certain concepts that are essential for the enforcement of insolvency proceedings, but do not incorporate the fundamental regulations on secondary proceedings.

the Regulation, as regards judgments other than those opening the proceedings (e.g. approval of the composition), establishes that recognition is automatic, referring as regards enforcement to the rules laid down in Regulation No 1215/2012, and in particular to Articles 39 to 44 and 47 to 57 (Art. 32 Reg. No 2015/848).

5. REJECTION OF THE APPLICATION OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND TO ACCEDE TO THE 2007 LUGANO CONVENTION. ANALYSIS OF THE CONSEQUENT PROBLEMS

The 2007 Lugano Convention (Lugano II), which replaced the 1988 Lugano Convention⁵³, concerns jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and was concluded between the European Union, Denmark in its individual capacity and three of the four members of the European Free Trade Association (Switzerland, Norway and Iceland: EFTA States).

Until 31 January 2020 (as of 1 February the UK is no longer a member state of the EU, by virtue of the Withdrawal Agreement), the Lugano Convention applied to the UK by virtue of its membership of the EU. During the transitional period, i.e. until 31 December 2020, the Lugano Convention nonetheless continued to apply to the UK, as the UK was considered, during the transitional period, to be a Member State for the purposes of the international agreements to which the EU is a party (Article 129(1)(a) of the Withdrawal Agreement).

At the end of the transitional period on 31 December 2020, EU law ceased to apply in the UK (except as set out in the Agreement itself in relation to proceedings instituted before the end of the transitional period, as noted above).

Therefore, at the end of the transitional period, the UK ceased to be considered an EU Member State also for the purpose of the application of international agreements to which the EU is a party, including the Lugano Convention.

Ultimately, as of 1 January 2021, UK therefore became, for all intents and purposes, a third state in relation to the European communities. This has obviously had consequences, in the relations between the UK and the EU Member States, with regard to the European regulatory legislation - mentioned above: Brussels Ia Regulation, Brussels IIa Regulation - governing cross-border judicial cooperation matters, including uniform rules on jurisdiction and the free movement of judgments.

As regards, in particular, civil and commercial matters, Regulation (EU) No 1215/2012 (Brussels Ia) has therefore ceased to apply to the UK (we anticipate, however, that the rules on jurisdiction concerning consumer contracts and employment contracts have been transposed into UK law in order to ensure cross-border judicial cooperation in matters considered particularly sensitive involving the interests of a weaker party, such as a consumer or employee: EU retained law; we will come back to this point below).

In this context, on 8 April 2020, the United Kingdom therefore requested to accede to the 2007 Lugano Convention in an individual capacity⁵⁴, which, in civil and commercial matters, substantially replicates the content of the EU rules set forth in Regulation No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters with regard to EFTA States.

⁵³ At the international level, the Brussels Convention of 1968 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters was first concluded. The content of the Brussels Convention was then transposed into the Lugano Convention of 16 September 1988, concluded between the EC states and the EFTA states except Liechtenstein. On 30 October 2007, a new Convention, Lugano II, was approved between the EC, Denmark, Norway, Iceland and Switzerland, to align the content of the Convention with that of Regulation (EC) No 44/2001.

⁵⁴ The United Kingdom's application for accession to the 2007 Lugano Convention is available at: https://www.eda.admin.ch/dam/eda/fr/documents/aussenpolitik/voelkerrecht/autres-conventions/Lugano2/20210701-LUG_en.pdf.

The European Union refused its consent to the United Kingdom's accession to the 2007 Lugano Convention⁵⁵.

5.1. Problems Arising from the Non-Accession of the UK to the Lugano Convention Affecting the Generality of Operators

The above analysis allows the identification of the main areas in which the non-participation of the UK to the Lugano Convention leads to obstacles to access to justice for EU citizens and entities. The analysis is carried out with reference to the subjective situations of EU citizens and entities.

It is an obvious observation that, as a whole, the UK's withdrawal has resulted in a severe impairment of inter-country cooperation in judicial matters, diminishing the effectiveness of judicial protection both for EU citizens and entities and (to a greater extent) for UK citizens and entities.

The first area that remains totally unregulated is civil and commercial matters in the broad sense. This is, on the other hand, the main field of application of Regulation (EU) No 1215/2012 (so-called Brussels I bis, Art. 1).

It should also be recalled that the provisions of the Brussels I bis Regulation concerning jurisdiction in matters of consumer contracts (Arts. 17-19) and in matters of employment contracts (Arts. 20-23) have been transposed into UK domestic law, which we will therefore discuss below.

In civil and commercial matters, on the other hand, the criterion of the domicile of the defendant is no longer generally applicable, nor, perhaps even more significantly, is the special jurisdiction provided for in Article 7, nor the shifting of jurisdiction on grounds of subjective or objective connection provided for in Article 8.

Moreover, judgments rendered by EU courts will no longer have immediate effect in the UK, just as judgments rendered by UK courts will be subject to recognition according to the national rules⁵⁶ of the

⁵⁵ On 28 June 2021, the European Commission submitted a Note Verbale to the Swiss Federal Council as Depositary of the Lugano Convention, in which it declared that "The European Commission, representing the European Union, would like to notify to you that the European Union is not in a position to give its consent to invite the United Kingdom to accede to the Lugano Convention". See European Commission, *Communication from the European Commission representing the European Union to the Swiss Federal Council as the Depositary of the 2007 Lugano Convention (concerning the application of the United Kingdom of Great Britain and Northern Ireland to accede the 2007 Lugano Convention)*.

⁵⁶ Consider, by way of example, the Spanish legislation. In this regard, there is a specific discipline, Titulo V of Ley 29/2015, de 30 de julio, de cooperación jurídica internacional en materia civil, headed "del reconocimiento y ejecución de resoluciones judiciales y documentos públicos extranjeros, del procedimiento de exequátur y de la inscripción en Registros públicos". The rules require, for the enforcement of the judgment, the execution of the exequatur procedure, governed by Articles 52 et seq. Only after obtaining the declaration of enforceability can the foreign judgment produce the same effects that it would have in the State of origin.

Article 64 of Italian Law No 218 of 31 May 1995, on the other hand, provides for hypotheses in which the foreign judgment may be recognised in Italy without the need for any kind of procedure (e.g. the judge who pronounced it could hear the case according to the principles of jurisdiction proper to the Italian legal system; the judgment is *res judicata* according to the law of the place where it was pronounced). If the conditions are not met, however, a procedure for recognition of the judgment must be carried out.

In German domestic law, the hypothesis in which a foreign judgment may be recognised are circumscribed by the delineation of negative prerequisites, pursuant to § 328 ZPO (*Zivilprozessordnung*).

On the other hand, as regards the recognition and enforcement of judgments delivered by courts of a Member State in the territory of England, subject to the applicability of the European Regulations in respect of judgments adopted during their period of validity and the Hague Convention of 2005 in respect of judgments delivered by authorities designated by choice of court agreements, three sources of law may be relied upon. The Administration of Justice Act 1920, which applies to judgments obtained in the superior courts of certain Commonwealth countries and English overseas territories, as well as those of the superior courts of Malta and Cyprus, and the Foreign Judgments (Reciprocal Enforcement) Act 1933, which applies to judgments obtained in the States of Australia, Canada, Guernsey, Jersey, Isle of Man, India, Israel, Pakistan, Suriname, and Tonga, and whose application extended, prior to accession to the European Community, to judgments

countries where recognition is sought, which are not only generally more restrictive than the rules provided for in Regulation No 1215/2012, but above all generally require the pursuit of an independent judicial initiative to obtain recognition and enforceability in the individual EU countries, in the same way as for other non-EU countries for which there is no specific convention.

This will entail not only a procedural burden, but also an increased risk of non-recognition of UK judgments in EU countries, and vice versa. In this regard, it must be remembered that the Lugano Convention reproduces, in brief, the content of Regulation No 44/2001, later replaced by Regulation No 1215/2012. One of the main differences between the two Regulations consists precisely in the regime of recognition and enforceability of judgments of the participating States. Whereas the former establishes the need to obtain a declaration of enforceability of the judgment, the latter provides that enforcement takes place without the need for an *exequatur* procedure.

It follows that if the UK were to become a party to the Lugano Convention, the different and less favourable regime provided by the former Regulation No 44/2001 would be applied to it; the same would happen for judgments rendered by EU judges that were to be enforced in the UK.

International experience shows that in most cases the grounds of opposition to the recognition of a foreign judgment are based on the pendency of another proceeding on the same subject before the national court, or on the existence of a judgment already rendered in the target jurisdiction.

It is precisely in order to avoid this kind of inconvenience that the Community legislation contains a series of rules intended to regulate *lis pendens* and related actions (Articles 29, 30, 31, 32, 33, 34 Reg. No 1215/2012), which are intended for an *ex ante* coordination of legal proceedings before the Member States, in order to avoid, where possible at the outset, the simultaneous litigation of related or - worse - identical disputes, often introduced, in international practice, precisely for the purpose of pre-establishing a possible element preventing recognition of the foreign judgment.

This entails a high indirect cost, which consists not only in the greater difficulty of obtaining recognition of the UK judgement in EU countries, but also in the risk of non-coordination of the simultaneous pendency of several cases in EU countries and in the UK, sometimes artfully provoked for the purpose, as mentioned above, of pre-establishing a possible ground of opposition to the recognition of the foreign judgement. It is not possible here to give even a brief description of the *lis pendens* and related actions regime in the EU regime dictated by the Brussels I bis Regulation, which is the result of a long and complex evolution.

It is important to note, however, that the UK's accession to the Lugano Convention would only partially solve the problems described above. As is well known, one of the most important changes made by Regulation (EU) No 1215/2012 was the introduction of Article 31(2). It stipulates that where there has been an agreement between the parties as to the choice of court to resolve a given dispute, if a court other than the latter is seised, it will be obliged to stay the proceedings until such time as the chosen court, even if subsequently seised, declines jurisdiction with regard to the subject matter of the case. This is an important innovation, which makes it possible to nip in the bud the so-called torpedo actions, abusive and circumventing practices of choice of court agreements, consisting in bringing an action before a court other than the prorogued court with the aim to preclude the commencement and

rendered by states with which the United Kingdom has bilateral treaties (Austria, Belgium, France, Germany, Italy, Netherlands). However, it is now considered that these disciplines cannot be applied, considering the impossibility of revival of the bilateral conventions, as mentioned above. This implies that common law rules will be applied (these rules have a residual scope of application compared to the previous sources). Under these rules, the aggrieved party will have to start a new lawsuit to obtain an English judgment on the debt arising from the foreign judgment. In the light of the successful outcome of this, the creditor will be able to enforce the judgment as if it were an English judgment.

conduct of proceedings before the latter, undermining the effectiveness of the prorogation agreement. However, this provision is not contained in Regulation No 44/2001, of which the 2007 Lugano Convention is a mirror, in the light of which these actions may continue to be brought, without any particular preclusion⁵⁷.

A further profile to be underlined concerns the interaction between the 2005 Hague Convention and the Lugano Convention (and more generally Regulation No 1215/2012).

The UK signed, as mentioned above, the 2005 Hague Convention on Choice of Court.

As is well known, the EU Court of Justice held that the so-called "anti-suit injunction" was not applicable in the EU context, with the consequence that, in the EU/Lugano Convention context, it had to be considered that the judge of no adhering country, and therefore in particular the UK, could grant an anti-suit injunction to protect the exclusivity agreement.

The non-adherence of the UK to the Lugano Convention will instead make it possible to adopt the anti-suit injunction to protect the parties' chosen exclusive forum⁵⁸.

A further effect should be noted. As has rightly been noted, "It appears that the non-chosen court's decision on the validity of the choice of court agreement is entitled to recognition and enforcement under the Brussels Ia Regulation. (See C-456/11 *Gothaer Allgemeine Versicherung AG v Samskip GmbH* EU:C:2012:719, [2013] QB 548) The Hague Convention does not similarly protect the ruling of a non-chosen court. In fact, only a judgment given by a court of a Contracting State designated in an exclusive choice of court agreement shall be recognised and enforced in other Contracting States. (See Article 8(1) of the Hague Convention)"⁵⁹.

This entails a further limitation on the circulation of judgments rendered within the EU, which cannot be recognised in the UK if they were rendered in violation of the exclusivity clause.

5.2. Problems Arising from the Non-Accession of the UK to the Lugano Convention: Specific Profiles for SME

As we have seen, the Brexit, and the consequent inapplicability of the Brussels Ia Regulation and the UK's non-participation in the Lugano Convention, has fragmented the legislative landscape, causing international judicial cooperation to regress.

Large corporations, especially multinationals, which can rely on the assistance of specialised law firms, will be less affected by this fragmentation. It is also foreseeable (which we will discuss below) that such

⁵⁷ See Ragno F., *London fog: fuga del contenzioso commerciale internazionale verso porti più sicuri?*, federalismi.it, 29 (2020), pp. 164-165.

⁵⁸ As has been correctly pointed out, "intra-EU Hague Convention cases may arguably not permit remedies for breach of exclusive choice of court agreements as they may be deemed to be an infringement of the principle of mutual trust and the principle of effectiveness of EU law (*effet utile*) which animate the multilateral jurisdiction and judgments order of the Brussels Ia Regulation (see pages 403-405 of the article; C-159/02 *Turner v Grovit* [2004] ECR I-3565)", with the consequence that "the ruling of a non-chosen court is not entitled to recognition and enforcement under the Hague Convention's system of 'qualified' or 'partial' mutual trust. This provides a ready explanation for the compatibility of anti-suit injunctions with the Hague Convention but does not proceed any further to transpose the same conclusion into the very different context of the Brussels Ia Regulation which prioritizes the principle of mutual trust". Mukarrum Ahmed, I thought we were exclusive? Some issues with the Hague Convention on Choice of Court, Brussels Ia and Brexit, in <https://www.abdn.ac.uk/law/blog/i-thought-we-were-exclusive-some-issues-with-the-hague-convention-on-choice-of-court-brussels-ia-and-brexite/>. See also Mukarrum Ahmed and Paul Beaumont, *Exclusive choice of court agreements: some issues on the Hague Convention on Choice of Court Agreements and its relationship with the Brussels I Recast especially anti-suit injunctions, concurrent proceedings and the implications of BREXIT*, *Journal of Private International Law*, 2017, pp. 386 ff.

⁵⁹ Mukarrum Ahmed, *I thought we were exclusive? Some issues with the Hague Convention on Choice of Court, Brussels Ia and Brexit*, supra note 58.

companies will continue to approach the UK Courts on the basis of exclusive agreements under the Hague Convention and that they will be able to cope with the increased costs that will inevitably arise both in terms of conflicts of jurisdiction and opposition to the effectiveness of domestic judgments in the EU and vice versa.

On the other hand, it is fair to assume that the biggest problems, and related costs, will be related to the risk of simultaneous litigation on the same subject matter in the absence of supranational coordination at EU level, such as that guaranteed by the Brussels Ia Regulation.

SME does not necessarily also mean small litigation. Large companies may have a multitude of low-value disputes, whereas a small medium-sized company may have very few disputes, but of not small value and such that the very life of the company is at risk.

Moreover, SMEs have a resistance to accessing the alternative tool of arbitration, which is often expensive and requires professionals competent in the relevant branch, as well as a corporate culture inclined towards ADR tools.

Having said that, I believe that joining the Lugano Convention in the UK would have only partially simplified the situation, for the reasons stated above.

More serious appears to me to be the loss of the possibility of using other instruments that, due to Brexit, can no longer be applied to the UK. These are in particular Regulation (EC) No 805/2004, which instituted the European Enforcement Order for uncontested claims; Regulation (EC) No 1896/2006 introduced the European Payment Order Procedure; and the European Procedure for Small Claims (Regulation No 861/2007) (cf. supra para. 3.2).

I believe, therefore, that a course of action that could usefully be taken by the EU would be to negotiate with the UK to accede to these Regulations on a conventional basis. We will return to this subject below.

5.3. Problems Arising from UK's Non-Accession to the Lugano Convention: Specific Profiles for Families

As we have specified above, after the date of withdrawal the Maintenance Regulation, concerning jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters of maintenance obligations, ceased to apply in relations between the EU and the UK.

The effectiveness in the Member States of decisions taken in the United Kingdom at the outcome of proceedings instituted after 1 January 2021 is governed by **the Hague Convention of 23 November 2007**⁶⁰ on the International Recovery of Child Support and Other Forms of Family Maintenance, to which the United Kingdom is a party following its accession on 28 September 2020, without prejudice to the applicability - as recalled in Article 52 of the same Convention - of any more favourable rules.

There are, however, important differences with regard to the substantive content of the Convention and the Regulation.

The subject-matter may be said to coincide, since both concern maintenance obligations arising from family relationships, parentage, marriage or affinity, and essentially the same aspects are regulated, including the powers and cooperation between central authorities, the possibility of bringing an action

⁶⁰ The 2007 Hague Convention superseded the previous 1973 Hague Convention in relations between the Contracting States, except where the provisions of the newer Convention preclude the recognition or enforcement of a judgment, which would have been recognised and enforced without problems on the basis of the Convention in force at the time of its delivery (in this case the 1973 Convention will apply; see Article 56(2) HCCH 2007).

before a court to obtain a ruling on the subject-matter mentioned, and the recognition and enforcement of such decisions.

On the other hand, there is no overlap in the respective regulations on these issues, the approach being different. In contrast to the common provisions concerning cooperation between central authorities, the Convention lays down a more meagre discipline than the Regulation, which deals in detail with jurisdiction in the matter, as well as abolishing any procedure for the recognition and enforcement of judgments, making them automatic in those Member States that are bound by the 2007 Hague Protocol. In the case of the United Kingdom, however, the discipline was different even before withdrawal from the European Union, as a country not bound by the 2007 Hague Protocol. With respect to the latter, in fact, it was possible to object to automatic recognition, while the exequatur procedure, with reference to domestic law, was required for enforcement.

In contrast, the 2007 Convention proposes a system that the European Union has long intended to overcome. In fact, it provides, against the delineation of the relevant criteria, a mechanism for both the recognition of judgments and their enforcement, which consists of its declaration of enforceability or its entry in a special register, referring for the procedure to the domestic discipline of the contracting states. It must be emphasised, however, that the situation in the United Kingdom, as far as recognition and enforcement are concerned, has not changed much compared to the regime to which it was subject before its withdrawal from the European Union.

However, there is a difference in the structure and construction of the discipline. Although both are marked by a spirit of cooperation, whereas Regulation No 4/2009 aims to provide as homogeneous a discipline as possible among the Member States, in terms of jurisdiction, applicable law, and recognition and enforcement, the 2007 Hague Convention limits itself to setting a few guidelines, often referring to the domestic legislation of the contracting States.

Also on the subject of coordination between States, the Convention has a particular deficiency, dictated by the absence of provisions to regulate institutions such as *lis pendens* or related actions, which allow for greater communication and efficiency between them, as well as the possibility for States that do not have jurisdiction to hear the case on the merits to adopt provisional or precautionary measures, as is the case under Regulation No 4/2009. It therefore refrains from laying down uniform rules to ensure, in the context of cross-border litigation, legal certainty and an effective circulation of decisions in the matter.

Finally, it should be noted that in the European context, there is Regulation (EC) No 664/2009, which, unlike the conventions, provides for a procedure for the negotiation and conclusion of agreements between Member States and third countries concerning jurisdiction, recognition and enforcement of judgments in matrimonial matters, parental responsibility and maintenance obligations, and applicable law in matters relating to maintenance obligations.

It has rightly been pointed out that the system envisaged by the Hague Convention is, moreover, much less efficient than both, obviously, Regulation No 4/2009 and the rules dictated by the Lugano Convention, which - let us recall - are those of Regulation No 44/2001⁶¹.

In particular, without being able to go into detail, it can certainly be stated that the non-participation of the UK in the Lugano Convention and the consequent exclusive application in matters of maintenance obligations of the Hague Convention entails the following drawbacks:

⁶¹ International Academy of Family Lawyers, European and UK family lawyers call on the EU to allow UK accession to Lugano Convention by highlighting implications for families and children, Practical law, (2021).

- uncertainty as to which court has jurisdiction, as opposed to the predetermined rules laid down in the Lugano Convention;
- absence of rules in the Hague Convention on *lis pendens*, with the consequent risk of parallel proceedings in different jurisdictions, with the related risk of conflicting decisions;
- given the greater breadth of grounds for refusal of recognition of the foreign judgment provided for in the Hague Convention compared with the Lugano Convention, there is an increased risk for the parties of being refused recognition of the foreign judgment.

It should also be noted that the UK's access to the Lugano Convention would limit the consequences of the termination of the application of Regulation No 4/2009, which, moreover, constitutes a specific corpus devoted to the matter. Rather, as we shall observe later in our conclusions, an autonomous convention on the subject would be desirable, providing the parties with overall protection that better conforms to the specificity of the matter in question.

As regards the matters of divorce and legal separation, the Brussels II bis Regulation no longer applies to the United Kingdom. The **1970 Hague Convention** takes over in this area, which, however, we have seen apply to only twelve of the twenty-seven Member States of the European Union. This results in a legal vacuum in the context of a significant number of relationships between the United Kingdom and individual member states.

It should also be noted, however, that the matters of divorce and legal separation are not even covered by the Lugano Convention, which indeed expressly excludes them in Article 1(2)(a). Note, however, Article 5(2)(b), which states that where the question of maintenance (covered by the Convention) turns out to be ancillary to the main proceedings on divorce, the latter will also be covered by the Lugano Convention, and thus jurisdiction can circulate on the basis of it, unless the jurisdiction of the authority is based solely on the nationality of one of the parties.

Therefore, the advantage in relation to divorce and legal separation matters attributable to the UK's access to the Lugano Convention would be minimal and reduced to limited cases.

5.4. Problems Arising from the Non-Accession of the UK to the Lugano Convention: Specific Profiles on the Rights of Persons

In the area of the rights of persons, with specific reference to actions of individuals against companies, the non-participation of the UK in the Lugano Convention entails a specific problem with regard to the protection of human rights.

A premise is indispensable.

Owusu v. Jackson is a 2005 ECJ judgment on a reference for a preliminary ruling from the English Court of Appeal on the interpretation of the 1968 Brussels Convention. It contains two important principles:

- Firstly, it considered judicial discretion inherent in the English doctrine of *forum non conveniens*⁶² to be inconsistent with the Convention⁶³;

⁶² The doctrine, as applied in common law jurisdictions, provides that a national court may decline jurisdiction on the ground that the court of another State is an objectively more appropriate forum for the resolution of a given dispute. That requires an evaluation by the court on a case-by-case basis as to, firstly, which is the most appropriate forum for the litigation and, secondly, whether the claimants can access justice in the country where the harm was committed. This results in the court declining jurisdiction suspending the trial before it to allow the case to be resumed before the most appropriate forum. The doctrine finds its affirmation in the decision of the House of Lords, *Spiliada Maritime Corporation v Cansulex Ltd* [1987], AC 460.

⁶³ The doctrine of *forum non conveniens*, despite the fact that its compatibility was discussed in the context of the approval of the Convention of 9 October 1978 on Access by Denmark, Ireland and the United Kingdom, was not provided for in the

- Secondly, it ruled that the Convention was applicable whenever the defendant is domiciled within a Contracting State, wherever the facts may have taken place or the claimant domiciled. Thus, "the Brussels Convention precluded the courts of Contracting States from declining the jurisdiction conferred on it by Article 2 of that Convention on the ground that a court of a non-Contracting State would be a more appropriate forum for the trial of the action even if the jurisdiction of no other Contracting State was in issue and the proceeding had no connecting factors to any other Contracting State"⁶⁴.

This interpretation of the Brussels Convention (and, of course, the following Regulations) has made it possible to bring actions before the UK Courts against companies based there in respect of damages (e.g. arising from environmental pollution) occurring in non-EU countries, often located in parts of the world where the judicial system is far less reliable than in England.

This has allowed cases to be brought against companies (often multinationals) that would have been more likely to be exempt from liability if brought before courts other than European ones.

With the Brussels Ia Regulation no longer applying and the UK not participating in the Lugano Convention, the English courts are free to apply not only their internal rules of jurisdiction, but especially the doctrine of "forum non conveniens"⁶⁵.

The concern of operators in the sector is therefore that multinational companies based in the UK may avoid going to trial before the English courts, thus diminishing the possibilities of the injured parties to bring the case before a jurisdiction (the English one) in thesis more suitable for the protection of the rights of individuals compared to the courts often located in countries that do not provide the same jurisdictional guarantees.

This could theoretically induce the companies most exposed to this type of litigation to relocate to the UK, precisely in order to benefit from the protection that would be assured to them by the application of the forum non conveniens doctrine.

Convention as an exception to the principles laid down in the Convention. In *Owusu v. Jackson*, the Court of Justice of the European Union ruled that the aforementioned doctrine was incompatible with the principle of legal certainty as an objective of the Convention itself. This certainty must also and above all concern the allocation of jurisdiction between the various national courts in relation to certain cases. The defendant must be able to foresee before which court he will be sued, and this cannot happen by application of the doctrine of forum non conveniens, which allows the court seised to deny its jurisdiction by recognising a different forum as being more appropriate to hear the case. It would also undermine the legal protection of persons established in the Member States. The judgment had affirmed the inapplicability of the principle of forum non conveniens even where it is determined that the most appropriate forum is that of a third State. However, the United Kingdom deliberately chose not to follow the decision where the appropriate forum was deemed to be on the territory of a third State.

⁶⁴ Case C-281/02 *Owusu v Jackson*, ECLI:EU:C:2005:120 ("**Owusu**"), p. I-1462.

⁶⁵ However, even if the United Kingdom were to accede to the Lugano Convention, the problem mentioned would not be solved. Article 1(1) of Protocol No 2 (on the uniform interpretation of the Convention and on the Standing Committee) of the Convention in fact provides that the courts of the Contracting States are not bound by the judgments of the Court of Justice of the European Union, but must simply "pay due account to the principles laid down by any relevant decision concerning the provision(s) concerned or any similar provision(s) of the 1988 Lugano Convention and the instruments referred to in Article 64(1) of the Convention rendered by the courts of the States bound by this Convention and by the Court of Justice of the European Communities". This would result in the *Owusu* decision not being binding on the United Kingdom, which could find a way to circumvent the prohibition of the application of the doctrine of forum non conveniens. Evidence of this possibility can be found in the conduct of Switzerland, which in multiple cases has deviated from the jurisprudence of the Court of Justice (see Hess B., *The Unsuitability of the Lugano Convention (2007) to Serve as a Bridge between the UK and the EU after Brexit*, MPILux Research Paper, 2 (2018), pp. 6-7). Further, this discretion for the UK is even more palatable due to the lack of any sanction for courts that deviate from the interpretation provided by the Court of Justice in relation to the provisions of the Lugano Convention.

This is certainly a problematic profile that deserves consideration. Moreover, the singularity of the case is that adhesion to the Lugano Convention is invoked here not so much to improve judicial cooperation between the countries adhering to the Convention itself, as to 'correct' the distortions that the application of the principle proper to English law of the so-called forum non conveniens may bring about in the rights of non-EU states.

5.5. The Non-Accession of the UK to the Lugano Convention. The Consequences in the Field of Consumer Contracts (Arts. 17-19) and in the field of Employment Contracts

As we have seen above, the provisions contained in the Brussels I bis Regulation concerning jurisdiction in matters of consumer contracts (Arts. 17-19) and in matters of employment contracts (Arts. 20-23) have been transposed into **UK domestic law**.

This means, in practice, that the relevant rules of Regulation Ia will continue to apply in UK-EU relations.

On these matters, therefore, accession to the Lugano Convention would not lead to increased protection for these subjects.

6. THE EVOLUTION OF CORPORATE LITIGATION; THE EU INTERNATIONAL COMMERCIAL COURTS AND THE PROSPECTS OF EVOLUTION

With the vote in favour of “Brexit”, the UK has made the choice to place itself, also in the judicial field, outside the system of judicial cooperation that had its founding moment with the Brussels Convention and therefore with the subsequent Regulations.

It is therefore clear that, from a “political” point of view, whereas the aim of EU cooperation was to improve judicial cooperation between all EU citizens, the current policies must take into account the existing competition between the UK and other European jurisdictions in order to attract, in particular, higher value litigation, which entails important economic spin-offs.

It is well known that for some time the UK courts, and in particular the High Court and its Commercial Court division in London, have become an important judicial hub, being chosen as judges by the international business community both by virtue of exclusivity agreements and - until now - by virtue of the application of the Brussels Ia Regulation.

It must be recognised that this undoubtedly pre-eminent position with respect to other European courts rests on a series of objective elements: the high quality and independence of the judges; the presence of a community of specialised lawyers (barristers and solicitors) with a good, if not excellent, average preparation; the use of the English language; rules of procedure functional to the speedy decision of cases; fast average decision times. Many international contracts also provide for the choice of English law as the applicable law, which obviously makes it preferable for an English law judge to decide the dispute.

The pre-eminent position of the UK courts may be affected by the legal effects of Brexit, as well as of course by the changed economic environment, and in particular by the non-application of Regulation No 1215/2012 and the non-accession to the Lugano Convention.

The negative effects resulting from the non-application of the Brussels Ia Regulation may concern three main areas:

- since the jurisdiction rules of Regulation No 1215/2012 do not apply, it is possible that a number of cases, which could have been lodged before the English court, may no longer be so, where of course there is no agreement for exclusive jurisdiction binding under the Hague Convention;
- the absence of the coordination mechanisms regulating lis pendens, relatedness and suspension, as well as the identification of the moment of pendency of a case, entails a greater risk of procedural problems that may lead both to the pendency of parallel proceedings to those instituted in the UK, and to difficulties in the recognition of judgments rendered there that conflict with judgments that may have been rendered in other EU jurisdictions;
- the effectiveness of judgments rendered by the UK courts will not benefit from the automatic effectiveness of EU judgments within the EU, but will be subject to the various exequatur procedures provided for by individual national laws.

It is too early to assess whether Brexit has had a real and, above all, lasting impact on the activity of London's judicial hub; the most recent statistical data and some studies⁶⁶ do not allow definitive conclusions to be drawn.

Actually, there is no shortage of indications of a gradual shift in outlook on the part of the business community. An important example comes from the change in the standard clauses contained in the International Swaps and Derivatives Association (ISDA) Master Agreements⁶⁷, which in terms of size and importance is particularly indicative of the trend.

Until recently, ISDA Master Agreements only provided for the choice of English, New York State or Japanese law and jurisdiction. In July 2018, ISDA introduced Irish and French law and courts as additional options to complement existing framework agreements. Katherine Tew Darras, General Counsel of ISDA, explains the recent change: "There will be good reasons for EU/EEA counterparties to continue using the English law framework agreement, and there will be good reasons to start using the French and Irish law versions. This is about offering a choice to the market and allowing counterparties to choose the option that best suits their needs".

These are the reasons that led ISDA to change the choice of jurisdiction clause⁶⁸:

- without some type of deal that replicates the effects of EU/EEA membership, English law would become a third-country law after Brexit. One of the consequences is that English court judgments would not be automatically recognised in EU/EEA countries;
- counterparties may also want to retain specific benefits of EU legislation – for example, protections under certain EU national insolvency laws that require use of an EU Member-State-law agreement in order to receive those protections;
- some EU/EEA counterparties may want to retain that automatic recognition and enforcement when trading with each other. There are other reasons why entities may want to carry on trading under EU/EEA law agreements. For instance, EU/EEA credit institutions are required to insert contractual recognition of bail-in into third-country law governed contracts under Article 55 of the EU Bank Recovery and Resolution Directive – and without some type of deal, this would include English law governed ISDA master agreements after Brexit. This wouldn't be an issue for agreements governed by the law of an EU/EEA Member State.

It is also worth noting that the main alternative to the choice of UK jurisdiction is, to date, not the choice of a different commercial court, but arbitration, whose circulation regime, regulated by the 1958 New York Convention, remains insensitive to Brexit-related events.

⁶⁶ Reuters T., *The Impact of Brexit on Dispute Resolution Clauses*, (2018), available at [https://uk.practicallaw.thomsonreuters.com/w-017-7792?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/w-017-7792?transitionType=Default&contextData=(sc.Default)&firstPage=true); Id, *35% of businesses choosing EU courts over UK due to Brexit uncertainty*, (2018), available at <https://www.thomsonreuters.com/en/press-releases/2018/july/35-percent-of-businesses-choosing-eu-courts-over-uk-due-to-brex-it-uncertainty.html#mainContent>; Hyde J., *Businesses shun UK courts in droves as Brexit looms*, *The Law Society Gazette*, (2018) available at <https://www.lawgazette.co.uk/businesses-shun-uk-courts-in-droves-as-brex-it-loom/s/5066997.article>.

⁶⁷ ISDA has over 1000 member institutions from 79 countries. These members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers. ISDA's work in three key areas – reducing counterparty credit risk, increasing transparency, and improving the industry's operational infrastructure – show the strong commitment of the Association toward its primary goals; to build robust, stable financial markets and a strong financial regulatory framework (news from <https://www.isda.org/about-isda>).

⁶⁸ ISDA, *Brexit and the ISDA Master Agreement*, 2018.

This situation has led to several national initiatives aimed at creating specialised commercial courts in the EU, which, in the hopes of the organisers, should divert some of the litigation now electively allocated in the UK to the EU.

Germany has been particularly active in this regard, having to date, by virtue of its nature as a federal state, established a plurality of “international commercial courts”⁶⁹. These are in particular:

- Specialised Chamber at the **Frankfurt District Court**⁷⁰;
- English-Speaking Civil Division and the Commercial Division at the **Hamburg Regional Court**;
- in 2020, a fully independent international commercial court in the **Land of Baden-Württemberg** with two locations: one in **Stuttgart** and the other in **Mannheim**⁷¹;

⁶⁹ In Germany, the first steps in this direction were taken well before Brexit, although not with exactly satisfactory results. First of all, one has to take into consideration the fact that German courts had already been consistently dealing with transnational cases for a long time, specifically, those in Hamburg with transport and commercial disputes, those in Mannheim, Dusseldorf and Munich with patents and intellectual property.

However, a central role regarding higher-value international disputes was played by the London Courts, in which disputes involving a considerable number of German litigants converged.

Awareness of this situation led the Federal Government of Germany and the Federal Bar Association in 2007 to promote an initiative called '**Law - Made in Germany**', in which the intention was to take advantage of the German law and legal system for the resolution of international commercial disputes. However, the project had no clear positive developments.

In 2010, another attempt was made to set up international commercial courts in connection with the cities of Aachen, Cologne and Bonn, however, without a satisfactory result. The main problem that arose concerned the provision of Section 184 GVG (Gerichtsverfassungsgesetz), which stipulates German as the official language of proceedings. In fact, despite the provision of exceptions to the general rule, for which the use of English is possible, this possibility is limited to oral hearings, with the remaining part of the trial having to be held in German.

⁷⁰ The prospect of the United Kingdom's exit from the European Union in 2016 led to another project to establish an international commercial court: this time in Frankfurt, in view of its status as Europe's leading commercial and financial centre. The initiative took the name '**Justizinitiative Frankfurt**' and was promoted by the Minister of Justice of the Federal State of Hesse, with the aim of making the Frankfurt forum more attractive for international litigation. Therefore, a special chamber was established at the Frankfurt District Court, which officially started operating on 1 January 2018. It does not constitute an independent judicial body, but fits into the already existing German legal system, using in particular the rules dictated by the Code of Civil Procedure (ZPO) on adjudication.

In order for this chamber to be seized, there must be a commercial dispute, as outlined in Section 95 GVG, which must not fall under the special jurisdiction of a different chamber of the Frankfurt District Court, and must have international character. In addition, the parties must agree on the recognition of its jurisdiction and promptly declare their intention to proceed in English. In these terms, the panel will consist of three judges, one president and two lay judges, usually businessmen appointed on the recommendation of the Chamber of Commerce and Industry for a period of five years, who are required, in addition to experience in commercial litigation, to have a good knowledge of English.

However, the obstacle posed by Section 184 GVG, according to which the official language of the proceedings is German, comes up again. Section 185 provides for the opportunity for persons who do not speak the language to be assisted by an interpreter, which the parties may waive if they all know the language. This therefore allows for oral hearings to be held in English, and some argue that this possibility can also be extended to written hearings. However, in order for the entire trial to be conducted in English, also with regard to the exchange of documents and the gathering of evidence, a reform of Section 184 GVG will be necessary, as was envisaged in 2018. In addition, if in the context of the trial, which is conducted in English, the third party is summoned, it is argued that the third party should have the right to contest the conduct of the trial in English, being able to request that it be continued in German.

Other criticisms also arise in connection with this special Chamber. On the one hand, the scope of competence of the special chamber is not entirely clear, as the notion of an international trade matter is not delineated. On the other hand, a question arises as to how this Court operates in relation to the hypothesis that a foreign law applies. In this case, there can only be two levels of jurisdiction, the International Chambers for Commercial Disputes having jurisdiction for the first level and the Higher Regional Courts for the second level. On the other hand, the Federal Civil Court will not have jurisdiction to review the appellate decision on the violation of foreign law. Only a double instance will therefore be possible, the review of the legitimacy of the second instance decision being precluded.

⁷¹ At the same time as the outbreak of the pandemic in 2020, an entirely independent international commercial court was then established in the Land of Baden-Württemberg, with two locations: one in Stuttgart and the other in Mannheim. These courts have jurisdiction over the acquisition of companies or shares in companies, corporate disputes, and cases arising out of commercial transactions. In addition, the Mannheim commercial court deals with disputes arising from banking and financial transactions having a value exceeding 2 million euros. The use of advanced technology is envisaged

- Finally, in 2021, two international chambers were established at the **Berlin Regional Court**⁷².

In **France**, the *Chambre de droit international* was created in 1995 and the *Chambre de droit de l'Union Européenne* in 1997, later merged into one chamber within the Paris Commercial Court in 2015⁷³.

for both, as hearings can be held electronically, and witnesses can be examined by video. Decisions made by the courts, each composed of a panel of three judges, can be appealed to the Higher Courts in Stuttgart and Karlsruhe.

⁷² Finally, in 2021, two international chambers were established at the Berlin Regional Court, which deal with distinct disputes: one chamber deals with unfair business practices and trademark issues, while the other looks at construction law disputes and general civil law disputes. These chambers offer the possibility of conducting proceedings having an international character not only in English, but also in French. The panel consists of three judges, as in the previous cases. The trial is conducted in the same manner as in the ZPO.

⁷³ These chambers originate within the Commercial Court of Paris, which has the distinction of being one of the largest commercial courts in France. This consists of twelve chambers, each having different subject-matter jurisdiction, which are united by the fact that the adjudicating figures are not actual judges, but people who come from the commercial world, holding in the latter, for example, the role of entrepreneurs or consultants to large corporations. Therefore, they are well acquainted with the discipline and critical issues peculiar to the commercial branch.

The legislation contained in the French Code of Civil Procedure was not suitable to regulate aspects concerning the operation of this Court, having to adapt it to the international nature of the disputes being tried, which involve the presence of foreign parties or the application of a foreign law. In 2018, with the establishment of the International Chamber at the Paris Court of Appeals, as a guarantee of double degree of judgment, two protocols were approved to govern the procedure to be followed before the two international chambers, the first instance and the appellate chamber. See the following protocols: Protocol on Procedural Rules Applicable to the International Chamber of the Paris Commercial Court, 2018 (available at <https://www.cours-appel.justice.fr/sites/default/files/2021-04/Protocol%20relating%20to%20procedural%20rules%20applicable%20to%20the%20International%20Chamber%20of%20the%20Paris%20of%20Appeal%20of%20Paris%20.pdf>); Protocol relating to procedural rules applicable to the International Chamber of the Court of Appeal of Paris, 2018 (available at <https://www.cours-appel.justice.fr/sites/default/files/2020-06/Protocol%20relating%20to%20procedural%20rules%20applicable%20to%20the%20International%20Chamber%20of%20the%20Court%20of%20Appeal%20of%20Paris%20.pdf>).

The judgments are conducted according to rules that largely recall the provisions contained in the French Code of Civil Procedure, however, with adaptations that have been made taking inspiration from common law rules, including, for example, those on evidence.

The protocols provide very similar rules for both levels of judgment, against a common premise whereby the rules provide for the extensive use of the English language and the applicability, in addition to French law, of other foreign laws, including that of the European Union, with the aim of meeting the expectations of economic operators and making the French forum more attractive to them.

The jurisdiction of the chambers falls on transnational commercial disputes, examples of which are proposed in the protocol, and may result from contractual clauses entered into by the same parties in favour of either the Chamber at the Paris Commercial Court or the Chamber at the Paris Court of Appeal. However, there is a lack of definition of the concept of "international" that can be considered for the purpose of circumscribing the jurisdiction of these chambers.

In relation to the advocacy of the case, before the International Commercial Chambers, lawyers belonging to the bar association of a member state of the European Union may assist their clients. For lawyers who are members of a bar association of a non-member state, acts on their part must be performed with the assistance of lawyers from the Paris bar association.

In view of the circumstance that, according to Article 2 of the French Constitution, the official language of the Republic is French, Article 2 of the Protocols stipulates that procedural acts must be done in French, subject, however, to the possibility for the parties to produce documents in English, without the need for any translation. At the same time, statements before the court must also be made in French, subject to the foreign origin of the party and the party's authorization to express itself in English where it so requests. As for, on the other hand, concerning foreign languages other than English, based on the Protocol on the International Chamber at the Court of Appeals, the possibility that documents may be produced in that language is provided. Although translation is required for them, even free translation, unless disputes arise regarding the same, for which a translator must be appointed to operate a sworn translation. In any case, hearings will be held in French, with the possibility for foreign parties to be assisted, at their own expense, by interpreters, even if it is the party itself that wishes to express itself in the context of the judgment. The final decision will have to be drafted in French, having to be accompanied by a sworn English translation.

Another key aspect of this procedure is the mandatory drafting of a trial calendar, intended to scan the timetable and encourage a more accelerated progress of the judgment. It is the protocols themselves that determine what tasks are to be set by the judge by his own order.

Ireland established the Commercial Division in Dublin⁷⁴, which came into being in the context of the High Court in 2004⁷⁵.

The Netherlands established the Netherlands Commercial Court (NCC)⁷⁶ which was incorporated into the already existing Dutch legal system, within which special Rules of Procedure of the NCC were provided⁷⁷.

Regarding the means of evidence, the possibility for the judge to issue an order to produce documents, specifically identified, that are located with the party or third party who does not intend to produce it, is provided. The judge may, in addition, order the personal appearance of the parties to hear them on the facts that he considers to be relevant to the case. The testimony of third parties must, on the other hand, be in writing, although the judge may hear them orally, who may, in the manner of the common law institution of cross-examination, also receive questions from the parties. Finally, provision is made for the judge to order, ex officio or at the request of the parties, technical advice, with the parties being able to appoint their own technical consultant.

⁷⁴ Official page of Dublin Commercial Court: <https://www.courts.ie/commercial-court>.

⁷⁵ It was created in response to the need for greater speed and effectiveness in adjudication required by the economic growth that Ireland had been facing since the 1990s. The need to be met therefore was not so much related to the international nature of disputes, and thus to making the Irish forum more attractive, but to make the court system more efficient in resolving high value and complex commercial cases. Indeed, there is not a legal definition of "international," but rather it can be fine the notion of "Commercial list," as the list into which commercial disputes listed in Order 63rd of the Superior Court Rules are made to fall discretionally. It is the parties who have to petition for the case to be brought before the Commercial Division, and it is the judges of the Commercial Division who will decide whether the transposition of the case can actually take place in the case at hand.

In the light of its objectives, the Dublin Commercial Division bases its actions on the need to reduce the time and cost of conducting adjudication. In this sense, the judge is granted broad powers to direct the process, which is characterized by strict time limits for the purpose of performing procedural acts, a strict system of managing the proceedings and the provision of sanctions, the application of which is conditional on non-compliance with the judge's orders. In the interests of greater efficiency of the process, there is also provision for the use of technologies that allow for the service and filing of documents by telematic means and for hearing witnesses even by videoconference, provided that the President of the Court allows it.

One obstacle encountered, however, concerns the possibility of advocacy of the case before the Commercial Division, as this is not automatic. There are different rules depending on the jurisdiction to which the advocate belongs.

Since 2014, there has been provision for the possibility of appealing the Division's judgments before the Court of Appeals, which is proposed to decide within six months after the appeal is lodged. However, it is deemed to be done only with the permission of the High Court or if there is a question of law of public importance. A limitation is also provided for the appeal to the Supreme Court, before which the appeal may be brought only with the authorization of the High Court, if it concerns an important matter of public importance or a question whose resolution is in the interest of justice.

As of 2019, the results achieved by the Commercial Division have been very satisfactory, given the speed of settlement of court matters and the high number of disputes resolved by agreement between the parties, although the percentage of cases of an international nature falling under them is unclear.

⁷⁶ Official page of NCC: <https://www.rechtspraak.nl/English/NCC/Pages/default.aspx>.

⁷⁷ Rules of Procedure of the International Commercial Chambers of the Amsterdam District Court (NCC District Court) and the Amsterdam Court of Appeal (NCC Court of Appeal), <https://www.rechtspraak.nl/SiteCollectionDocuments/NCC-Rules-second-edition.pdf>, applicable since 2021. For proceedings commenced before 2021, there are different rules, available at <https://www.rechtspraak.nl/SiteCollectionDocuments/ncc-procesreglement-en.pdf>.

Two degrees of trial are guaranteed, a Chamber within the Amsterdam District Court and a Chamber within the Court of Appeal being provided. A special Chamber for summary proceedings has also been established, as far as the first degree is concerned, to ensure speed in the trial and decision, for proceedings that require it (e.g., precautionary measures). These, like NCC decisions in the District Court, can be appealed to the NCC Court of Appeals. The decisions of the Court of Appeals may in turn be appealed to the Supreme Court.

Rule 1.3.1. sets out the conditions that must be incorporated in order to promote a trial before the NCC District Court, the NCC Court in Summary Proceedings or the NCC Court of Appeal. There are four conditions: (a) the action is a civil or commercial matter in connection with a particular legal relationship within the autonomy of the parties and is not subject to the jurisdiction of the Subdistrict Court or the exclusive jurisdiction of any other chamber or court; (b) the matter concerns an international dispute; (c) the parties to the proceedings have designated the Amsterdam District Court as the forum to hear their case or the Amsterdam District Court has jurisdiction to hear the action on other grounds; and (d) the parties to the proceedings have expressly agreed in writing for proceedings to be before the NCC District Court in English. The Rules are accompanied by the attached Explanatory Notes (available at <https://www.rechtspraak.nl/SiteCollectionDocuments/NCC-Rules2-Annex1.pdf>), which serve to clarify the meaning of the

In **Belgium**, on 10 December 2018, the House of Representatives published the text establishing the Brussels International Business Court (BIBC)⁷⁸, which is different from the other courts mentioned above, with the clear aim of creating a potentially attractive jurisdiction for international litigation⁷⁹.

provisions contained in the former. In particular, with regard to the conditions that must exist in order for the NCC to decide the dispute, the Explanatory Notes better define the concepts of "civil and commercial matter" and "international dispute," providing in this regard for the former a list by way of example and for the latter the alternative criteria whose possible existence delineates the international character of the case.

Regarding procedural aspects, Rule 2 provides that the language of the trial shall be English, subject to the possibility of service, following the filing of the summons, of a motion by the parties by which they request that a part or all of the trial be conducted in Dutch. In connection with the production of documents written in a language other than the language of the trial, the court may require that the party file a certified translation, except when the document is written in Dutch, English, French, and German. In addition, it is possible for a party who does not master the language of the proceedings to be assisted, at his or her own expense, by an interpreter. The party that eventually enters the trial as an intervener or third caller will tend to be bound by the parties' choice of idiom.

The case may be defended only and exclusively by lawyers registered with the Dutch bar, who are the only ones entitled to perform the acts of the trial. Lawyers registered with bars in member states of the European Union or EFTA states will be able to perform limited acts, in cooperation with Dutch lawyers. Lawyers from other states will not be able to perform any acts except to be heard at the hearing.

Specific discipline regarding service is dictated by the Rules, which are supplemented by additional regulatory sources, such as the eNCC Rules and the Digital Process Decree (Besluit elektronisch procederen). A special portal (eNCC) has been created. At this portal all documents and related papers are to be filed telematically, with the possibility of filing at the Registry only for those requested in original and for objects. Also with regard to hearings, it is provided that these must take place by videoconference, with the court having the power to establish other modalities that meet the requirement of due process.

Extensive and detailed regulations are provided for in relation to evidence, and in particular for the order for the production of documents, seeking to protect the right to confidentiality, for testimony, which is expected to be oral, subject to the judge's power to require written testimony prior to the hearing for the better management of the case, and for technical advice, which may be ordered *ex officio* or at the request of a party.

Some discretion is left to the parties in relation to the management of the trial, particularly with reference to the means of proof, being able to conclude an agreement, for example, in order to deviate from the regulations dictated on the subject, or to the costs of the trial, which turn out to be very high.

⁷⁸ Act of establishment of the Court: <https://www.dekamer.be/FLWB/PDF/54/3072/54K3072011.pdf>.

⁷⁹ This is a court that differs from the others scrutinized so far for several reasons. First, it is not governed by the general rules provided for Belgian civil proceedings, but by entirely new rules that take their inspiration from the UNCITRAL model law and therefore from the world of arbitration. Moreover, jurisdiction is not limited by the concept of "commercial matter," of which there is no definition in the normative text, but by the quality of the parties involved in the dispute. In particular, the text refers to the concept of "entreprise," which the same clarifies immediately refers to: (a) natural persons engaged in self-employed professional activity; (b) legal persons, with the exception of legal persons governed by public law who do not offer goods or services on a market; (c) other organizations without legal personality, unless they pursue a distribution purpose and do not actually make a distribution to their members or to persons who exercise a decisive influence on the organization's policy.

However, the international character of the dispute remains in place, which the legislation considers to be integrated where (a) the parties have their places of business or habitual residence in different states; or (b) the place where a substantial part of the obligations arising from the business relationship is to be performed or the place with which the subject matter of the dispute is most closely connected is located outside the state where the parties have their place of business or habitual residence; or (c) the elements for the resolution of the dispute are found in a foreign law.

The panel consists of three judges, including a president and two lay judges, who are appointed by the former for a period of five years, from among Belgian or foreign judges who are competent in international commercial law and have a good knowledge of English (the required level is C1 of the Common European Framework of Reference for Languages). The language of the judgment is English, but the option is given to place a preliminary question of constitutionality before the Constitutional Court or to file a third-party objection in French or Dutch, in the latter case with an attached translation of the document into English. The use of French or Dutch will also be possible at the hearing, with simultaneous translation into English and vice versa.

Another aspect that distinguishes this Court from the Chambers previously analysed is that of the impossibility of appealing decisions. It will, however, be possible to appeal such rulings to the Supreme Court of Cassation on grounds concerning questions of law only. This power has been criticized for two reasons: on the one hand, it notes the need to streamline and speed up the judgment that led to the creation of the BIBC, which would be frustrated where the decision pronounced by the court could be appealed, and on the other hand, the circumstance that the BIBC's rulings are issued in English, while the Supreme Court is pronounced in French or Dutch, comes into relief.

It is clear, therefore, that several EU countries have applied as potential alternatives to the London forum in order to attract, in particular, higher-value cases with international parties and that count on being able to obtain a competitive advantage from the withdrawal of the UK and thus, inter alia, from Regulation No 1215/2012; in this perspective, the UK's non-accession to the Convention is an element that strengthens the competitive position of these courts, which can instead count on the full applicability of the Brussels Ia Regulation.

At present, therefore, it seems clear - based on factual data and without wishing to enter into political evaluations - that there is a strong interest among legal practitioners in the UK remaining outside the Lugano system.

Two observations must be made, however.

First, the non-accession of the UK to the Lugano Convention strengthens, at least in theory, the competitive position of the EU specialised courts; this means that a specific economic sector, namely that of legal services, is benefited. However, this does not automatically translate into an advantage for the corporate sector as a whole. In other words, it cannot be ruled out that EU economic operators would benefit more from the continued application of the 'Brussels system' rules to the UK as well. Wanting to use the analogy, it is not necessarily the case that higher remuneration of doctors translates into better medical treatment, especially if this is achieved at the expense of competition with other doctors.

A second observation must be made. As we have seen, many countries have taken steps to set up internationally oriented commercial courts with the aim of intercepting disputes that would no longer find their way into the London courts.

The European Parliament is obviously strongly oriented towards allowing EU countries to take advantage of the competitive gap that has been created in this way. The reference is in particular to the adopted proposal of the Committee on Legal Affairs that proposed a draft for the "Expedited settlement of commercial disputes in the European Union (2018/2079(INL))"⁸⁰, where it proposed the adoption of European Expedited Civil Procedure at EU level.

At present, the Commission has not followed up on this proposal, although it noted that "the Commission will take the resolution as further inspiration to analyse simplifications to cross-border litigation, but not necessarily by a specific European Expedited Civil Procedure"⁸¹.

That said, the political direction is clear and is in the direction of developing the competitiveness of the EU civil procedural system.

However, the offer is at present very fragmented and with different entities that are in essence competing with each other within the EU; not only that, since they are still courts within national legal systems, they suffer from specific limitations that may make them unattractive for economic operators.

As a self-funded court, the BIBC also places very high costs on those who introduce the judgment, so much so that it has been called a "caviar court" or "court for the super rich." In addition to the standard registration fee, a higher fee is provided, by way of remuneration, which amounts to about €20,000 (the amount varies considerably depending on the specific case, as not all costs can be known in advance).

⁸⁰ European Parliament, Expedited settlement of commercial disputes European Parliament resolution of 13 December 2018 with recommendations to the Commission on expedited settlement of commercial disputes (2018/2079(INL)), P8_TA(2018)0519, 13 December 2018. His resolution was accompanied by the assessment about European added value (see Evas T., European Added Value Unit, *European Parliamentary Research Service, European Added Value Assessment accompanying the European Parliament's legislative initiative report*, (2018).

⁸¹ European Commission, *Follow-up to the European Parliament non-legislative resolution with recommendations to the Commission on the expedited settlement of commercial disputes*, 2018/2079 (INL), 11 March 2019.

It should also be noted that the competition for the attraction of higher value litigation is now global, and not only between the UK and the EU; among the International Commercial Courts we can mention the following:

- Singapore - Singapore International Commercial Court (SICC), since 2015⁸²;
- China - China International Commercial Court (CICC), since 2018⁸³;
- Qatar - Qatar International Court and Dispute Resolution Centre (QICDRC), since 2009⁸⁴;
- Dubai – Dubai International Finance Centre Courts (DIFC Courts), since 2004⁸⁵;
- Abu Dhabi – Abu Dhabi Global Market Courts (ADGM), since 2013⁸⁶;
- Kazakhstan - Astana International Financial Centre (AIFC), since 2018⁸⁷.

For these reasons, the opportunity to create a European international commercial court, a prominence of the EU institutions, in which jurists of different nationalities, but highly specialised, would take part, is beginning to be envisaged from several quarters.

It is important to point out that the Committee on Legal Affairs proposed the Expedited settlement of commercial disputes in the European Union (2018/2079(INL)), where, in addition to the approval of a European Expedited Civil Procedure at EU level, with consequent amendments also to the Rome I, Rome II and Brussels Ia Regulations, it also added: "the Commission is invited to further study the possibility to establish a European Commercial Court to supplement the courts of the Member States and offer litigants an additional, international forum specialised in settlement of commercial disputes".

The Commission considered that "at this stage, it does not seem appropriate to engage in preparatory action concerning the establishment of a European Commercial Court. However, the Commission will consider the question of the desirability of further studies in this field".

The establishment of a European Commercial Court is perhaps a premature prospect, but one that needs to be further explored in order to ensure effective global competitiveness of the "European judicial system" in commercial matters.

It is too early to verify whether this path can actually be taken. At this stage, it seems appropriate to verify whether indeed the market for legal services in the area of commercial litigation will start to be diverted to non-UK countries.

In this competitive situation, there is, in my view, no room today for the conclusion of conventional agreements reproducing the content of the 'Brussels - Lugano' system.

⁸² Singapore International Commercial Court (SICC), <https://www.sicc.gov.sg/>.

⁸³ China International Commercial Court (CICC), <https://cicc.court.gov.cn/html/1/219/208/209/1316.html>.

⁸⁴ [Welcome to QICDRC | QICDRC](#).

⁸⁵ [DIFC Courts](#).

⁸⁶ [ADGM, Abu Dhabi's International Financial Centre](#).

⁸⁷ [AIFC](#).

7. POSSIBLE AREAS OF JUDICIAL COOPERATION DEVELOPMENT

It is now necessary to ascertain in which areas UK-EU relations should be developed instead.

Obviously, the direction of investigation starts from the pre-existing situation, that is, when the UK was part of the EU: it is therefore necessary to ascertain which are the areas of cooperation already previously regulated with respect to which a revival, obviously in a conventional form, of the former regime is conceivable.

It is obvious that these are also political assessments. The Brexit has opened a profound caesura in the relationship between the EU and the UK; the Brexit itself was animated - obviously - by a competitive and revanchist spirit toward the European institutions.

That said, however, it is also certain that the EU and UK are part of a closely connected economic system and that, in general, collaboration between states is an enriching factor for citizens.

We take it for granted here that, at least in the short to medium term, it is not politically feasible for the UK to accede to the Lugano Convention, let alone a convention-based reissue of Regulation No 1215/2012.

The impracticality of such an option is probably not final, especially if the EU is able to offer a credible and attractive jurisdiction in the area of international trade. Indeed, should international commercial courts capable of channelling a significant part of "corporate" litigation be established in the EU (either at the national level or, as in the abstract would be preferable, by virtue of a single and coordinated initiative), there would be a renewed interest also for the EU to regulate adequately and if possible unitarily the relationship between domestic and UK jurisdictions, but on a level playing field of commercial parity.

Paradoxically, the opposite prospect, i.e., that of the substantial failure of a "European" alternative to the London legal hub, may also have the same effect, since the "competitive" reasons that make UK access to the Lugano Convention impracticable today would be lacking.

Moreover, it should be reiterated that the Lugano Convention, tracing Regulation No 44/2001 and not the more up-to-date Regulation No 1215/2012, does not in any case allow for automatic recognition of judgments in the other adhering countries and provides for a less than perfect system of coordination of cases pending in several jurisdictions.

Therefore, I believe that it is necessary to cultivate a conventional path that initially covers matters that have a subject matter that does not affect the attractiveness of the EU legal market as opposed to the UK legal market and that, at the same time, are of particular relevance to citizens' rights.

With this in mind, a first step would be to build on Council Decision No 568/2009, which established a European Judicial Network in civil matters.

Work would need to be done on an agreement, this time of a conventional nature, that would ensure coordination between the different EU jurisdictions and the UK jurisdiction. This is essentially organizational legislation, but it would not only improve cooperation between the states concerned, but could be a starting point for a dialogue with the UK.

More ambitious goals cannot be separated from forms of coordinating judicial actions and facilitating the recognition/enforcement of measures in specific areas. In the European legal space, the circulation

of judicial decisions is based on the principle of mutual trust in the administration of justice within the European Union (see as a general principle Recital No 26 to Reg. No 1215/2012⁸⁸).

It cannot be denied that the UK justice system is such that it has the "trust" of EU countries; so much so, that until Brexit the principle of automatic recognition of measures rendered there in EU countries applied to the UK.

Thus, there are no specific reasons that prevent the adoption of conventional instruments in specific matters, about which we will immediately say, that restore the principle of automatic recognition of UK measures in the EU, and vice versa⁸⁹.

The principle of automatic effect of judgments between EU countries also inevitably entails prior coordination rules for the relevant judicial proceedings: and thus rules on jurisdiction and *lis pendens* and connection.

Therefore, there is a need to identify specific areas of legal experience, other than generic civil and commercial matters, in which the reintroduction of mechanisms for the allocation of jurisdiction, the regulation of *lis pendens* and connection as well as the effectiveness of judgments can have a positive effect on the interests and subjective positions of EU citizens and which do not, on the other hand, negatively affect the "competitive" prospects of EU justice vis-à-vis the UK.

7.1. Possible Areas of Cooperation: Divorce and Legal Separation

A first area to consider is that concerning divorce and legal separation. In the same vein as stated *supra*, in the post-Brexit period the Brussels II bis Regulation ceased to apply in relations between the United Kingdom and member States.

That regulatory gap was immediately filled by the Hague Convention on the Recognition of Divorce and Legal Separation of June 1, 1970. However, this occurred only in the relations between the United Kingdom and only twelve member States of the European Union⁹⁰. This leaves out Austria, Belgium, Bulgaria, Croatia, France, Germany, Greece, Hungary, Ireland, Latvia, Lithuania, Malta, Romania, Slovenia, and Spain.

It is in relation to these States that it appears to be necessary to find an instrument of cooperation that can guarantee that persons having their habitual residence, or domicile (and in some cases citizenship) in them enjoy a regime about the recognition of divorces and legal separations as favorable as that which was provided by the Brussels II bis Regulation. There is a need to ensure the speedy circulation of judgments in order to provide proper protection for citizens or residents of both member States and the United Kingdom.

There are essentially two possibilities. The first sees the conclusion of a special convention between the United Kingdom and member States that are not parties to the 2007 Hague Convention. This, however, would result in the emergence of arguably different rules than those dictated by the 2007 Convention, leading to an uneven situation for EU member States. Alternatively, it would therefore be preferable to

⁸⁸ Recital No 26 states that: "Mutual trust in the administration of justice in the Union justifies the principle that judgments given in a Member State should be recognised in all Member States without the need for any special procedure. In addition, the aim of making cross-border litigation less time-consuming and costly justifies the abolition of the declaration of enforceability prior to enforcement in the Member State addressed. As a result, a judgment given by the courts of a Member State should be treated as if it had been given in the Member State addressed".

⁸⁹ The conclusion of a new treaty between the UK and the EU is also suggested by the Professor Giesela Rühl, as a means of "soft Brexit", and by Burkhard Hess (see Rühl G., *supra* note 13, p. 23; Hess B., *supra* note 65, p. 8).

⁹⁰ Those States are: Cyprus, Czech Republic, Denmark, Estonia, Finland, Italy, Luxembourg, the Netherlands, Poland, Portugal, Slovakia and Sweden.

enter into a new convention with all member States and the United Kingdom as contracting parties, with a content replicating, in essence, that of the Brussels II bis Recast Regulation (Reg. No 2019/1111). Indeed, the latter, reproducing the discipline of Regulation No 2201/2003, supplements it with more detailed, clear and homogeneous regulations⁹¹.

7.2. Maintenance Obligations

A further area in which the development of greater forms of cooperation appears necessary is in the areas of jurisdiction, applicable law, and recognition and enforcement of decisions and cooperation in matters of maintenance obligations.

It has been seen above that in this sensitive and important area the 2007 Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance applies today in relations with the UK.

Compared to the rules previously applicable under Regulation No 4/2009, the rules dictated by the 2007 Hague Convention do not provide a different regime for judgments on maintenance obligations rendered in the territory of the UK. Indeed, in both cases, the need to obtain a declaration of enforceability of English judgments is provided for their enforcement⁹².

Different, to date, is the discipline that applies to decisions of member States in relations between them and the United Kingdom. Whereas previously, by virtue of the bindingness on them of the 2007 Hague Protocol, member States saw automatic recognition and enforcement of judgments rendered by their own courts, *vis-à-vis* the United Kingdom (which was a member state at the time) recognized by Regulation No 4/2009, as of today in application of the 2007 Hague Convention, judgments rendered in a member State require the *exequatur* procedure for their enforcement in the United Kingdom.

Not only that. As noted *supra*, by ceasing the application of Regulation 4/2009, the rules laid down in the Regulation itself in Chapter II, which governs the rules of jurisdiction, specifying, in the manner of the Brussels Regulations, the rules on pendency of litigation, *lis pendens*, connection, provisional and protective measures, have also ceased to apply in EU-UK relations.

This severely increases the risk of conflicts of competence between different jurisdictions, with effects that are bound to be reflected downstream as well, in the context of *exequatur* guides.

Therefore, in light of what has just been observed, the convention is pejorative for families and persons habitually resident or domiciled in the European Union, compared to the previous legislation. The right to alimony concerns not only primary rights, but involves a large number of individuals, often in financial distress and with little access to qualified legal resources.

This is a widespread litigation, often of no particular economic value, but of extreme importance for the protection of the rights of the people involved and in particular the weak, primarily minors. Moreover, without wishing in any way to make gender assessments, it is a fact that often the creditor party seeking protection is women with responsibility for minors.

I believe that a path should be resumed that aims to re-regulate the relationship between the EU and the UK, possibly building on the experience gained in the implementation of Regulation No 4/2009.

⁹¹ Take as an example the matter of international child abduction, with respect to the Regulation No 2201/2003 devotes two articles (Art. 10 and 11). Instead, Regulation No 2019/1111 introduces an entire chapter in order to give more detailed regulation on the subject.

⁹² Although the United Kingdom had been a member, prior to Brexit, it had a different regime applied under the Regulation No 4/2009, by virtue of the circumstance that it was not bound by the 2007 Hague Protocol.

A conventional path in this direction would then be facilitated by the existence of the 2007 Hague Convention, which constitutes a common platform between UK and (also) EU countries, from which one could start to improve the profiles related to the coordination of national procedures and the recognition of related measures.

7.3. Small Claims

Secondly, I think it would be appropriate to check the space for the implementation of agreements regarding Small Claims, which are the subject of Regulation No 861/2007.

Such cases constitute an aggravation for national legal systems; moreover, given the modest amount of these disputes, it is important to decrease, as far as possible, the related costs and difficulties that may arise from their recovery.

Let us add, from a technical point of view, that Article 19 of Regulation No 861/2007 provides that, subject to the provisions contained in the Regulation, it shall be governed by the procedural law of the Member State in which it takes place. Even in cases where the party has decided to apply Regulation No 861/2007, the national rules thus assume a fundamental role in the economy of the entire Community process, since each member State will continue to apply its own rules with reference to the evidentiary inquiry and admissibility of evidence (Article 9), the regime for appealing the judgment (Article 17) and the enforcement of the judgment (Article 21), since these are areas not governed by the regulation.

This particularity should make it easier, also from a "political" point of view, to conclude an agreement with the UK that would allow, with the necessary adaptations, the reintroduction of a supranational system for Small Claims, in the interest in fact of all parties.

7.4. Cross-border Insolvencies

One very sensitive area of legal experience that has remained uncovered in EU-UK relations is that of cross-border insolvencies, the subject of Regulation (EU) No 848, of May 20, 2015 (Insolvency Regulation).

The world economy is increasingly made up of companies that are supranational in size, with the result that there may be insolvency proceedings involving groups of companies based in different countries.

It was precisely in order to coordinate the different proceedings that Regulation No 848/2015 was adopted, which, in summary, aims to create coordination between "main" proceedings opened in one member state with "secondary" proceedings opened in another member state.

Importantly, "the law of the Member State in whose territory the proceedings are opened" (the "State of opening") applies to the insolvency proceedings and their effects (Article 7); a similar principle applies to any secondary proceedings opened in other EU states (Article 35).

Some form of coordination between different national insolvency proceedings is clearly appropriate, given also the degree of integration that the UK economy has with EU countries.

The insolvency of industrial groups, particularly multinationals, entails very significant capital effects on a potentially very wide range of economic operators, which in fact in the field benefit from the effects of Insolvency Regulation.

In particular, the principle that the effects of bankruptcy pronounced in one member state also take place in the other states, and will therefore automatically have an effect on the debtor's entire assets, without national borders within the European Union being relevant, deserves to be renewed, also with respect to the UK.

It would then be important to reintroduce forms of coordination between the different proceedings opened in different states, in order to facilitate the satisfaction of creditors and, ultimately, the same interest of the person declared insolvent in a speedy closure of bankruptcy proceedings and an efficient liquidation of assets, not to mention the possibility of easier access to debt restructuring measures or composition.

7.5. Possible areas of future cooperation: in particular, Strategic Lawsuits Against Public Participation (SLAPPs)

Moving out of matters that were already the subject of EU Regulations that also applied to the UK, and thus moving into new frontiers of cooperation, "Strategic Lawsuits Against Public Participation (SLAPPs)"⁹³ deserve a mention.

A proper definition of this type of action is found in the European Commission's legislative proposal 2022/0117(COD)⁹⁴ of April 27, 2022, which defines the phenomenon as follows: "They are unfounded or exaggerated legal proceedings usually initiated by powerful individuals, pressure groups, companies and state bodies against parties who express criticism or communicate messages that are disturbing to the plaintiffs on a matter of public interest. Unlike regular proceedings, SLAPP suits are not brought with the aim of exercising the right of access to justice and obtaining a successful outcome or redress. Rather, the aim is to intimidate defendants and drain their resources. The aim is to achieve a chilling effect, silencing defendants and deterring them from continuing their work."

On the other side of the Channel, the problem has also arisen. The Ministry of Justice has issued a "Call for Evidence" on the subject, the results of which are summarized in the Report titled "Government Response to the Call for Evidence", where possible remedies that can be adopted to prevent and suppress SLAPPs are indicated⁹⁵.

It is clearly not possible to address here in detail the remedies proposed both at European level and in the UK or in other countries. It will suffice here to note that, in very general terms, the proposals focus on the adoption of procedural measures that allow for an "early dismissal" of actions that qualify as SLAPPs, a particularly punitive regime for the plaintiff of court costs, and the introduction of specific economic sanctions against the party that has initiated such an action.

However, these remedies, although tending to converge, strictly pertain to the national law of each individual country; while it is conceivable that the EU would adopt a directive on the subject, it seems highly unlikely that there would be any basis for coordinated action at the procedural level with the UK.

⁹³ See Borg-Barthet J., *The Brussels Ia Regulation as an Instrument for the Undermining of Press Freedoms and the Rule of Law: an Urgent Call for Reform*, Centre of Private International Law Working Paper Series, 7 (2020), pp. 4 ff., in relation to concrete cases concerning SLAPPs, symptoms of the need for appropriate and adequate legislation to protect freedom of the press.

⁹⁴ European Commission, *Proposal of Directive of the European Parliament and of the Council on Protecting Persons who engage in Public Participation from Manifestly Unfounded or Abusive Court Proceedings* ("Strategic Lawsuits Against Public Participation"), 2022/0117(COD), 27 April 2022. The European Commission's proposal was anticipated by a resolution of the European Parliament, in which the latter called on the Commission to take measures to combat SLAPPs, including the submission of a bill. [European Parliament, Strengthening democracy, media freedom and pluralism in the EU, European Parliament resolution of 11 November 2021 on strengthening democracy and media freedom and pluralism in the EU: the undue use of actions under civil and criminal law to silence journalists, NGOs and civil society (2021/2036(INI)), P9_TA(2021)0451].

⁹⁵ Ministry of Justice, *Strategic Lawsuits Against Public Participation (SLAPP) Government Response to the Call for Evidence*, 20 July 2022, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1093987/SLAPPs-call-for-evidence-response.pdf.

A joint initiative seems possible and appropriate to avoid forum shopping phenomena and to prevent the recognition of decisions that would incorporate the extremes of a SLAPP.

The aforementioned proposal 2022/0117(COD) of the European Commission takes up this problem, suggesting that: "Member States should refuse to recognise a third-country judgement against a person domiciled in a Member State if the proceedings are found to be manifestly unfounded or abusive under the law of that Member State. - Furthermore, where abusive court proceedings against public participation have been brought against a natural or legal person domiciled in a Member State in a court or tribunal of a third country, that person can seek compensation of the damages and the costs incurred in connection with the proceedings before the court or tribunal of the third country, irrespective of the domicile of the claimant in the proceedings in the third country."

As part of efforts to crack down on SLAPPS, the possibility of ensuring a reciprocal regime of non-recognition of judgments rendered on such actions deserves to be explored. This would become particularly relevant if the EU or the UK were to adopt domestic regulations designed to limit the phenomenon by inducing potential claimants to engage in forms of forum shopping.

Given the relevance that the UK will in any case retain in the field of civil judgments in the future, such a form of coordination seems highly appropriate.

At that time, an attempt could also be made to introduce homogeneous (though obviously not common) rules, based on identical principles, to extend protection against SLAPPS in the EU and the UK.

CONCLUSIONS

- The rationale that should animate the EU's activity in its relations with the UK in the area of judicial cooperation must, in my opinion, at present follow **two directions** that are not convergent for the time being.
- The UK, or more properly London, has for years been a very important jurisdictional hub, attracting, as a rule by virtue of exclusive jurisdiction clauses, litigation of other economic profile and high specialization. The Commercial Court also carries out an important activity related to arbitral judgments, which also have a privileged seat in London. As we have seen, the UK's exit from the EU entails a potential vulnus to the attractiveness of the English judicial pole, and, in parallel, may facilitate a competition on the legal services level with other EU specialized courts.
- At present, therefore, it seems premature, at least in the medium term, to assume a UK accession to the Lugano Convention, with the consequent applicability to it of the regime provided by Regulation No. 44/2001.
- Moreover, it is inevitable that judicial cooperation between the EU and the UK should continue, reknitting where possible the threads of the discourse interrupted by Brexit. In particular, certain matters, other than those directly involving international trade, should be identified where ensuring an **appropriate level of cooperation with the UK** is in the primary interest of EU citizens (and UK citizens, by the way).
- We have indicated as possible **areas for immediate cooperation** the following:
 - **Divorce and Legal Separation;**
 - **Maintenance Obligations;**
 - **Small Claims;**
 - **Cross-Border Insolvencies;**
 - **SLAPPs.**
- These are (apart from SLAPPS, which have a special connotation) widespread disputes that potentially involve the rights of vulnerable sections of the population and should be regulated.
- In this way, a **climate of mutual trust could be rebuilt**, which in any case seems indispensable in EU-UK relations, for reasons that it is even unnecessary to recall.

REFERENCES

- Abdel Wahab M.S., Brexit's Chilling Effect on Choice of Law and Arbitration in the United Kingdom: Practical Reflections Between Aggravation and Alleviation, *Journal of International Arbitration (J. Int. Arbitr.)* (2016), 463.
- Ahmed M., Brexit and English Jurisdiction Agreements: The Post-Referendum Legal Landscape, *European Business Law Review (Eur. Bus. L. Rev.)* (2016), 989.
- Ahmed M., The Enforcement of Settlement and Jurisdiction Agreements and Parallel Proceedings in the European Union, Centre for Private International Law Aberdeen Working Paper Series, Working Paper 5 (2015) available at <https://ssrn.com/abstract=2748292>.
- Aikens R., Dinsmore A., Jurisdiction, Enforcement and the Conflict of Laws in Cross-Border Commercial Disputes: What Are the Legal Consequences of Brexit?, *European Business Law Review (Eur. Bus. L. Rev.)* (2016), 903.
- Akyurek O., Philibert C., Brexit et exequatur, *Petites affiches (PA)* 406, 1 (2017), 7.
- Alberti J., La (discutibile) reviviscenza delle Convenzioni di Bruxelles e Roma nei rapporti con il Regno Unito in seguito alla Brexit, *rivista.eurojus.it*, 4 (2019), 39.
- Al-Nuemat A., Nawafleh A., Brexit, Arbitration and Private International Law, *Journal of Politics and Law (J.L. & Pol.)* 5 (2017), 116.
- Alwahaibi S., The Fate of rules of jurisdiction and recognition and enforcement of judgments in civil and commercial matters between the UK and the EU Post Brexit: Walking through a Foggy Path?, in Sacco M., *Brexit: a way forward*, Wilmington, Vernon Press (2019), 347.
- Antonopoulou G. & Kramer X., The International Business Courts saga continued: NCC First Judgment – BIBC Proposal unplugged, *ConflictofLaws.net*, (2019).
- Beaumont P., Ahmed M., Exclusive choice of court agreements: some issues on the Hague Convention on Choice of Court Agreements and its relationship with the Brussels I Recast especially anti-suit injunctions, concurrent proceedings and the implications of Brexit, *Journal of Private International Law (JPIL)* 12 (2017), 386.
- Beaumont P., Forum non conveniens and the EU rules on Conflicts of Jurisdiction: A Possible Global Solution, *Revue critique de droit international privé (Rev. crit. DIP)* 3 (2018), 447.
- Beaumont P., Private international law concerning children in the UK after Brexit: comparing Hague Treaty law with EU Regulations, *Child and Family Law Quarterly (CFLQ)* (2017) 213.
- Beaumont P., Walker L., Holliday J., Parental Responsibility and International Child Abduction in the proposed recast of Brussels IIa Regulation and the effect of Brexit on future child abduction proceedings., *International Family Law* (2016), 307.
- Bertoli P., La «Brexit» e il diritto internazionale privato e processuale, *Rivista di diritto internazionale privato e processuale (Riv. Dir. Int. Priv. Proc.)* 3 (2017), 599.
- Biard A., International Commercial Courts in France: Innovation without Revolution?, *Erasmus Law Review* 1 (2019), 24.
- Borg-Barthet J., The Brussels Ia Regulation as an Instrument for the Undermining of Press Freedoms and the Rule of Law: an Urgent Call for Reform, Centre of Private International Law Working Paper Series, 7 (2020).

- Bradley K., Agreeing to Disagree: The European Union and the United Kingdom after Brexit, *European Constitutional Law Review* (Eur. Const. Law Rev.) (2020), 379.
- Briggs A., Brexit and Private International Law: An English Perspective, *Rivista di diritto internazionale privato e processuale* (Riv. Dir. Int. Priv. Proc.) 2 (2019), 261.
- Briggs A., The Impact of Recent Judgments of the European Court on English Procedural Law and Practice, *Zeitschrift fur Schweizerisches Recht*, 124 (2005), 231.
- Bruno P., La legge applicabile alle cause di famiglia dopo Brexit, *ilfamiliarista.it* (2021).
- Büsser H., Brexit and dispute resolution - the exacerbated role of international arbitration in the post-Brexit legal landscape, *diplomarbeit, Johannes Kepler Universitat Linz* (2021).
- Cellamare G., Brexit e accordi di riammissione dell'Unione Europea, *Freedom Security & Justice: European Legal Studies* (FSJ) 3 (2021), 32 .
- Checa Martinez M., Brexit and Private International Law: Looking Forward from the UK but Actually Going Backward, *The Spanish Yearbook of International Law* (Span. Yearb. Int. Law) (2020), 73.
- Checa Martinez M., Brexit y cooperación judicial civil internacional: opciones para Gibraltar, *Cuadernos de Gibraltar – Gibraltar Reports*, 3 (2018-2019).
- Cortese B., Brexit and Private International law, between Rome, Brussels and Lugano: "How can I just let you walk away?", *Cuadernos de Derecho Transnacional* (CDT) vol. 13, 1 (2021), 153.
- Crawford E.B., Carruthers J.M., Brexit: The Impact on Judicial Cooperation in Civil Matters Having Cross-border Implications – A British Perspective, *European Papers*, 3 (2018), 183.
- Cuniberti G., Paris, the Jurisdiction of Choice?, *ConflictofLaws.net* (2011).
- Cuniberti G., The International Market for Contracts: The Most Attractive Contract Laws, *Northwestern Journal of International Law & Business* (Northwest. J. Int. Law Bus), (2014), 455.
- Curti Gialdino C., Verso la fase due della Brexit: promesse, insidie e risultati parziali del negoziato, *federalismi.it*, 24 (2017), 2.
- Dalhusein J.H., Recognition and Enforcement of Civil and Commercial Judgments in Europe after Brexit., (2017), available at: <https://ssrn.com/abstract=3042180>.
- Danov M., Cross-border litigation in England and Wales: Pre-Brexit data and post-Brexit implications, *Maastricht Journal of European and Comparative Law* (Maastricht J. Eur. Comp.) vol. 25, 2 (2018), 139.
- Davì A. & Zanobetti A., Brexit: lo spazio giudiziario europeo in materia civile e commerciale all'alba dell'exit day, *federalismi.it*, 4 (2020), iv.
- De Miguel Asensio A., Cuniberti G., Franzina P., Heinze C. & Requejo Isidro M, *The Hague Conference on Private International Law "Judgments Convention"*, 2018.
- Dechamps M., L'actualité de la prorogation volontaire de compétence en matière civile et commerciale: jurisprudence et Brexit, *Revue de droit commercial belge* (RDC belge) 1 (2018), 7.
- Dickinson A., A View from the Edge, *Oxford Legal Studies Research Paper* (Oxf. J. Leg. Stud.) 25 (2019).
- Dickinson A., Back to the future: the UK's EU exit and the conflict of laws, *Journal of Private International Law* (JPIL) 2 (2016), 195.

- Dickinson A., Close the Door on Your Way Out Free Movement of Judgments in Civil Matters - A 'Brexit' Case Study.
- Zeitschrift fur Europaisches Privatrecht (ZEuP) 3 (2017), 539.
- Dickinson A., Reading the Tea Leaves? Private International Law in England after EU Exit, Oxford Business Law Blog (OBLB) (2016), available at <https://blogs.law.ox.ac.uk/business-law-blog/blog/2016/10/reading-tea-leaves-private-international-law-england-after-eu-exit>.
- Dickinson A., Realignment of the Planets – Brexit and European Private International Law, Praxis des Internationalen Privat- und Verfahrensrechts (IPRax), vol. 41, 3 (2021), 213.
- Emanuele F., Molfa M., Monico R., The Impact Of Brexit On International Arbitration, Rivista di diritto internazionale privato e processuale (Riv. dir. int. priv. proc.) 4 (2019), 856.
- European Commission (Directorate-General for Justice and Consumers – DG JUST), Notice to Stakeholders, Withdrawal of the United Kingdom and EU Rules in the field of Civil Justice and Private International Law, 27 August 2020.
- European Commission, Communication from the Commission to the European Parliament and the Council, Assessment on the application of the United Kingdom of Great Britain and Northern Ireland to accede to the 2007 Lugano Convention, COM(2021)222, 4 May 2021.
- European Commission, Follow-up to the European Parliament non-legislative resolution with recommendations to the Commission on the expedited settlement of commercial disputes, 2018/2079 (INL), 11 March 2019.
- European Commission, Proposal of Directive of the European Parliament and of the Council on Protecting Persons who engage in Public Participation from Manifestly Unfounded or Abusive Court Proceedings (“Strategic Lawsuits Against Public Participation”), 2022/0117(COD), 27 April 2022.
- European Parliament, Expedited settlement of commercial disputes European Parliament resolution of 13 December 2018 with recommendations to the Commission on expedited settlement of commercial disputes (2018/2079(INL)), P8_TA(2018)0519, 13 December 2018.
- European Parliament, Strengthening democracy, media freedom and pluralism in the EU, European Parliament resolution of 11 November 2021 on strengthening democracy and media freedom and pluralism in the EU: the undue use of actions under civil and criminal law to silence journalists, NGOs and civil society (2021/2036(INI)), P9_TA(2021)0451, 11 November 2021.
- Evas T., European Added Value Unit, European Parliamentary Research Service, European Added Value Assessment accompanying the European Parliament's legislative initiative report, (2018).
- Fitchen J., The PIL consequences of Brexit, Nederlands internationaal privaatrecht : repertorium op verdragenrecht, wetgeving, rechtspraak en literatuur (NIPR) 35, 3 (2017), 411.
- Forina A., Le anti-suit injunctions dopo la Brexit: alcune considerazioni alla luce dell'Accordo di recesso, Studi sull'integrazione europea, (2020), 753.
- Franzina P., Leandro A., La Convenzione dell'Aja del 2 Luglio 2019 sul Riconoscimento delle Sentenze Straniere: una prima lettura, Quaderni di SIDIBlog, 6 (2019), 215.
- Frassinetti A., Le regole procedurali del regolamento (CE) sulle controversie di modesta entità, Rivista di diritto processuale (RDP) 3 (2021), 967.

- Gillies L., Appropriate adjustments post Brexit: residual jurisdiction and forum non conveniens in UK courts, *Journal of Business Law (J. Bus Law)* 3 (2020), 161.
- Grodl L., Forum Non Conveniens Doctrine – post Brexit Applicability in Transnational Litigation, *Časopis pro právní vědu a praxi*, 2 (2022), 285.
- Hartley T., Arbitration and the Brussels I Regulation – Before and After Brexit, *Journal of Private International Law (JPIL)* 1 (2021), 53.
- Hess B. & Boerner T., Chambers for International Commercial Disputes in Germany: The State of Affairs, *Erasmus Law Review* 1 (2019), 33.
- Hess B., The Justice Initiative Frankfurt am Main 2017, *ConflictOfLaws.net* (2017).
- Hess B., The Unsuitability of the Lugano Convention (2007) to Serve as a Bridge between the UK and the EU after Brexit, *Max Planck Institute Luxembourg for Procedural Law Research Paper Series (MPILux Research Paper)*, 2 (2018), 3.
- Hyde J., Businesses shun UK courts in droves as Brexit looms, *The Law Society Gazette*, (2018) available at <https://www.lawgazette.co.uk/businesses-shun-uk-courts-in-droves-as-brexit-looms/5066997.article>.
- International Academy of Family Lawyers, European and UK family lawyers call on the EU to allow UK accession to Lugano Convention by highlighting implications for families and children, *Practical law*, (2021).
- Larik J., Brexit, the EU-UK Withdrawal Agreement, and Global Treaty, *American Journal of International Law (AJIL)* (2020), 443.
- Leandro A., Brexit and Cross-Border Insolvency Looking Beyond the Withdrawal Agreement, *Diritto del commercio internazionale (Dir. comm. internaz.)* (2020), 153.
- Legal High Committee for Financial Markets of Paris, Report on the Implications of Brexit on Judicial Cooperation in Civil and Commercial Matters (2017), available at https://publications.banque-france.fr/sites/default/files/rapport_05_a.pdf.
- Lein E., Uncharted territory? A few thoughts on private international law post Brexit, *Yearbook of Private International Law (YPIL)* 17 (2015-2016), 33.
- Marx A., Bright C., Wouters J., Pineau N., Lein B., Schiebe T., Wagner J., Wauter E., Access to legal remedies for victims of corporate human rights abuses in third countries, *ethinktank.eu* (2019).
- Maters QC S., Mcrae B., What Does Brexit Mean for the Brussels Regime?, *Journal of International Arbitration (J. Int. Arbitr.)* (2016), 483.
- Missanelli P., Basilisco M., L'accordo commerciale tra Ue e Regno Unito nel sistema WTO. Gli eventuali conflitti in tema di enforcement, *Diritto del Commercio Internazionale (Dir. comm. internaz.)* 3 (2021), 737.
- Mortensen R., Brexit and private international law in the Commonwealth, *Journal of Private International Law (JPIL)* (2021), 18.
- Nell P.G., Brexit: What can the United Kingdom learn from Swiss-European Union Relations?, *Global Europe Basel Papers On Europe In A Global Perspective*, (2017).
- Nielsen P.A., The Hague 2019 Judgments Convention – from failure to success?, *Journal of Private International Law (JPIL)*(2020), 205.

- Ostendorf P., The choice of foreign law in (predominantly) domestic contracts and the controversial quest for a genuine international element: potential for future judicial conflicts between the UK and the EU?, *Journal of Private International Law (JPIL)* (2021), 421.
- Peetermans E. & Lambrecht P., The Brussels International Business Court: Initial Overview and Analysis, *Erasmus Law Review*, 1 (2019), 42.
- Pilich M., Brexit and EU private international law: May the UK stay in?, *Maastricht Journal of European and Comparative Law (Maastricht J. Eur. Comp.)* (2017), 1.
- Poesen M., Civil and commercial private international law in times of Brexit: Managing the impact, and fostering prospects for a future EU-UK cooperation (November 9, 2021), in Sacco M., *Brexit: A Way Forward*, Vernon Press, (2019), 255.
- Poesen M., EU-UK civil judicial cooperation after Brexit: Challenges and prospects for private international law, (2017), available at: <https://lirias.kuleuven.be/retrieve/507296>.
- Ragno F., London fog: fuga del contenzioso commerciale internazionale verso porti più sicuri?, *federalismi.it*, 29 (2020), 155.
- Requejo-Isidro M., Brexit and the Future Partnership: a View from the Continent, 2018, in Ruiz Abou-Nigm & Noodt Taquela (ed.), *Diversity and Integration: Exploring Ways Forward* (Edinburgh University Press, 2019), available at: <https://ssrn.com/abstract=3194381>.
- Requejo-Isidro M., International Commercial Courts in the Litigation Market, in Max Planck Institute Luxembourg for Procedural Law Research Paper Series (MPILux Research Paper) 2 (2019).
- Reuters T., 35% of business choosing EU courts over UK due to Brexit uncertainty (2018), available at <https://www.thomsonreuters.com/en/press-releases/2018/july/35-percent-of-businesses-choosing-eu-courts-over-uk-due-to-brexit-uncertainty.html#mainContent>.
- Reuters T., The Impact of Brexit on Dispute Resolution Clauses (2018), available at [https://uk.practicallaw.thomsonreuters.com/w-017-7792?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/w-017-7792?transitionType=Default&contextData=(sc.Default)&firstPage=true).
- Rühl G., "Private International Law post-Brexit: Between Plague and Cholera", *Revue de Droit Commercial Belge/Tijdschrift voor Belgisch Handelsrecht (RDC-TBH)* (2020) available at SSRN: <https://ssrn.com/abstract=3553768>.
- Rühl G., Judicial cooperation in civil and commercial matters after brexit: which way forward?, in *International and Comparative Law Quarterly (ICLQ)* 67 (2018), 99, available at <https://ssrn.com/abstract=3287823>.
- Rühl G., Judicial cooperation in civil and commercial matters, *British-European Relations Post-Brexit: A Legal Kaleidoscope* (2020).
- Rühl G., Settlement of international commercial disputes post-Brexit, or: United we stand taller, in Jörn Axel Kämmerer & Hans-Bernd Schäfer (eds), *Brexit and the Law. An Interdisciplinary Study*, Edward Elgar, Cheltenham/Camberley/Northampton, (2020), available at SSRN: <https://ssrn.com/abstract=3552011>.
- Rühl G., The effect of Brexit on the resolution of international disputes: choice of law and jurisdiction in civil and commercial matters, in Armour J., Eidenmüller H. (edited by), *Negotiating Brexit*, C. H. Beck-Hart-Nomos (2017), 61.

- Salerno L. & Buswell A., *Brexit And Jurisdiction: The Return Of Anti-suit Injunctions*, (2021), available at: <https://www.mondaq.com/uk/trials-appeals-compensation/1050052/brexit-and-jurisdiction-the-return-of-anti-suit-injunctions>.
- Silvestri C., *Il forum non conveniens e il giudice italiano, giudice dell'Unione europea*, diritto.it (2020), available at <https://www.diritto.it/il-forum-non-conveniens-e-il-giudice-italiano-giudice-dellunione-europea/>.
- Snelling T., *Negotiating Brexit: Recognition and Enforcement of Judgments*, in Armour J., Eidenmuller H. (edited by), *Negotiating Brexit*, C. H. Beck-Hart-Nomos (2017), 67.
- Tedioli F., *Sull'incompatibilità tra la dottrina del forum non conveniens e la convenzione di bruxelles del 27 settembre 1968*, *Rivista giuridica sarda*, 2 (2021), 547.
- Torsello M., *The Impact of Brexit on the Resolution of Transnational Commercial Disputes in Europe*, in Baruffi M.C., Ortino M., *Dai Trattati di Roma a Brexit e oltre*, Cacucci, Bari, (2019), 90.
- Torsello M., *The impact of Brexit on the Resolution of Transnational Commercial Disputes: the impact of Brexit on International Commercial Arbitration*, in Armour J., Eidenmuller H. (edited by), *Negotiating Brexit*, C. H. Beck-Hart-Nomos (2017), 73.
- Tretthahn-Wolski E., Förstel A., *Der Brexit von Rom und Brüssel: zu den Auswirkungen des Austritts des Vereinigten Königreichs aus der EU auf das internationale Zivil- und Zivilprozessrecht*, *Österreichische Juristen-Zeitung*, vol. 74, 11 (2019), 485.
- Tuo C. E., *The Consequences of Brexit for Recognition and Enforcement of Judgments in Civil and Commercial Matters: Some Remarks*, *Rivista di Diritto Internazionale Privato e Processuale (RDIPP)* 2 (2019), 302.
- Ungerer J., *Consequences of Brexit for European Private International Law*, in *European Papers*, 4 (2019), 395.
- Valkova L., *Brexit e diritto internazionale privato e processuale in caso di «no deal»*, *Rivista di diritto internazionale privato e processuale (Riv. dir. int. priv. proc.)* vol. LV, 1 (2019), 230.
- Vallar G., *La Commissione fornisce ulteriori indicazioni relative all'impatto della Brexit sull'applicazione del diritto internazionale privato e processuale europeo nel Regno Unito e negli Stati membri in relazione a situazioni che coinvolgono il Regno Unito*, rivista.eurojus.it (2020).
- Van Calster G., *European Private International Law, Commercial Litigation in the UE*, HART, (2021).
- Van Zelst B., Van Besouw D.L., *Private International Law Aspects of Arbitrator Liability: A European Perspective Post-Brexit*, in *Journal of International Arbitration (J. Int. Arbitr.)* (2021), 723.
- Wagner J., *Brexit – Die Künftigen Rechtlichen Beziehungen Zwischen Uk Und Den Mitgliedstaaten Der Eu*, diplomarbeit, Johannes Kepler Universität Linz (2019).
- Zanobetti A., *Eu cooperation in civil matters and multilevel unification of private international law: some remarks*, in Franzina P., *The External Dimension of EU Private International Law after Opinion 1/13*, 117, available at <https://doi.org/10.1017/9781780684840.009>.
- Zarra G., *Il ricorso alle anti-suit injunction per risolvere i conflitti internazionali di giurisdizione e il ruolo dell'international comity*, *Rivista di diritto internazionale privato e processuale (Riv. Dir. Int. Priv. Proc.)* 3 (2014), 561.

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the JURI Committee, analyses the implications of Brexit in relation to the profile of judicial cooperation in civil matters. It examines the existing legal framework in order to identify the areas of law in respect of which there is a gap in the relationship between the EU and the UK. It assesses the consequences of the UK's failure to accede to the 2007 Lugano Convention. Concludes that the conclusion of new treaties between the EU and the UK should be pursued in relation to those areas where there is a regulatory gap, with particular reference to the area of human rights.)

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