The Framework of Judicial Cooperation after Brexit

Civil and Commercial Matters

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List of Abbreviations

CCA	*Choice of court agreement(s)*
Unilateral CCA	*Requires one party to a CCA to bring a claim before one specified jurisdiction, while the other party is allowed to bring proceedings before any court having jurisdiction.*
Brexit Date	*30 March 2019, i.e. the first day after the UK will have left the EU*
Brussels I Regulation	*Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters between the Member States of the European Union (OJ L 12, 16.1.2001, p. 1–23) available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001R0044&from=EN>.*
1968 Brussels Convention	*1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ C 27, 26.1.1998, p. 1–33) available at <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:41968A0927(01)&from=EN>.*
Brussels Ibis Regulation	*Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters between the Member States of the European Union (OJ L 351, 20.12.2012, p. 1–32) available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R1215&from=EN>.*
EU-Denmark Agreement	*Council Decision 2005/790/EC of 20 September 2005 on the signing, on behalf of the Community, of the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (extension to Denmark of the provisions of the Brussels I Regulation) (OJ L 299, 16.11.2005, p. 61–70), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32005D0790&from=en>.*
EU (Withdrawal) Act 2018	*European Union (Withdrawal) Act 2018, available at < http://www.legislation.gov.uk/ukpga/2018/16/contents>.*
2005 Hague Convention	*Hague Convention of 30 June 2005 on Choice of Court Agreements between the Member States of the European Union, Mexico, Montenegro and Singapore, available at <https://www.hcch.net/en/instruments/conventions/full-text/?cid=98>.*
Hague Judgments Project	*Draft Convention on the Recognition and Enforcement of Foreign Judgments by the Hague Conference on Private International Law Special Commission (24-29 May 2018) available at <https://assets.hcch.net/docs/23b6dac3-7900-49f3-9a94-aa0ffbe0d0dd.pdf>.*
Lugano Convention	*Convention of 30 October 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters between the European Union, Iceland, Norway and Switzerland (OJ L 339, 21.12.2007, p. 3–41) available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22007A1221(03)&from=EN>.*
Protocol on the position of Denmark	*Protocol No 22 on the position of Denmark annexed to the Treaty on the Functioning of the European Union (OJ C 326, 26.10.2012, p. 299–303) available at <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012E/PRO/22&from=EN>.*
1980 Rome Convention	*Convention 80/934/EEC on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 (Consolidated version CF 498Y0126(03)) (OJ L 266, 9.10.1980, p. 1–19) available at link <https://eur-*

	lex.europa.eu/resource.html?uri=cellar:22cc5c49-2b36-4962-aa60-e928a52efa66.0008.02/DOC_1&format=PDF>.
Rome I Regulation	*Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations between the Member States of the European Union except Denmark (OJ L 177, 4.7.2008, p. 6–16) available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008R0593&from=EN>.*
Withdrawal Agreement	*Agreement between the European Commission and the United Kingdom establishing the terms of the UK's withdrawal from the EU, available at <https://ec.europa.eu/commission/sites/beta-political/files/draft_withdrawal_agreement_0.pdf>.*
Withdrawal Date	*29 March 2019, i.e. the last day in which the UK will be a member of the EU.*

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Introduction

1. Until Brexit Date, judicial cooperation in civil and commercial matters between the UK and the EU is covered by the following EU Regulations:

EU-UK judicial cooperation	
Act	**Scope of Application**
Brussels Ibis Regulation	• Jurisdiction to adjudicate • Lis pendens • Validity and enforcement of exclusive and non-exclusive CCA • Recognition and enforcement of judgments, authentic instruments and court settlements • Pre and post-judgment provisional measures
Rome I and II Regulations	• Law applicable to contracts and torts • Validity and enforcement of choice-of-law clauses

As a member of the EU, the UK is also a party to two international conventions that regulate part of these same matters in cases involving certain third-States :

UK-Third States Cooperation (trough EU-membership)		
Convention	**Scope of Application**	**Third-States**
2005 Hague Convention on CCA	• Validity and enforcement of bilateral and exclusive CCA	Mexico Singapore Montenegro
2007 Lugano Convention	• Jurisdiction to adjudicate • Lis Pendens • Validity and enforcement of exclusive and non-exclusive CCA • Recognition and enforcement of judgments, authentic instruments and court settlements	Switzerland Iceland Norway

	• Pre and post-judgment provisional measures	

As a matter of principle, these instruments will cease to apply after the UK is no longer a member State of the EU, i.e. on 29 March 2019 from 23.00 GMT. Nonetheless, in practical terms, such instruments will not become irrelevant on Brexit Date for all EU-UK related litigation and contracts.

2. In order to tackle the consequences of Brexit for EU-UK judicial cooperation in civil and commercial matters, this Report will address the following questions:

    - How will the framework of EU-UK judicial cooperation be affected by Brexit?
    - What will happen to procedures pending on Brexit Date in the UK or in the EU Member States?
    - Will judgments rendered in the UK be recognized and enforced in the EU Member States after Brexit?
    - Will settlements concluded in EU or UK courts be recognized and enforced?
    - Will the courts of the EU Member States respect CCA in favour of the UK courts after Brexit?
    - Will the courts of the EU Member States respect Unilateral CCA in favour of the UK courts after Brexit?
    - Will choice-of-law clauses be upheld by UK Courts after Brexit?
    - Will choice-of-law clauses in favour of UK law be upheld by the courts of the EU Member States?
    - What are the main issues to consider for an effective litigation management?

3. This Report will look at the above-mentioned questions against the backdrop **of two possible political scenarios**:

    - The approval of the **Draft Withdrawal Agreement** between the EU and the UK, and
    - A '**No Deal Brexit**'

    At this stage of the Brexit process, it is necessary to consider both scenarios.

    Under Art. 50 TEU, the UK will no longer be a member of the EU on Brexit Date, even if no agreement between the EU and the UK has been reached. In preparation of Brexit, the UK Parliament passed the EU (Withdrawal) Act 2018,[1] which repeals the European Communities Act 1972 as of Brexit Date and makes other provisions in connection with the withdrawal regarding both (i) the case in which the EU and the UK Government reach an agreement regarding the withdrawal and (ii) the so called 'no-deal scenario', in which either such agreement is not reached or is not approved according to either party's constitutional requirements.

[1] On the EU (Withdrawal) Act and its evolution see: Mark Elliott & Stephen Tierney, Political Pragmatism and Constitutional Principle: The European Union (Withdrawal) Act 2018 (September 21, 2018). Forthcoming in Public Law; University of Cambridge Faculty of Law Research Paper No. 58/2018. Available at SSRN: https://ssrn.com/abstract=3252985 ; Paul Craig: European Union (Withdrawal) Bill: Legal Status and Effect of Retained Law (Parts I and II), U.K. Const. L. Blog (19th Feb. and 8th March 2018) (available at https://ukconstitutionallaw.org/); Catherine Barnard, 'Law and Brexit', Oxford Review of Economic Policy, Volume 33, Issue suppl_1, 1 March 2017, pp. S4–S11.

At the time of writing, the UK Government and the EU Commission have agreed and published a Draft Withdrawal Agreement.[2] Entry into force of such agreement is nonetheless subject to all domestic procedures for completion being finalized by each party and notified to the other party (Art. 185 of the Draft Withdrawal Agreement).

The process of ratification of the Draft Withdrawal Agreement will be carried out by the UK. Should the UK approve the Draft Withdrawal Agreement, the EU will proceed to approval and ratification. [3]

Under Section13 of the EU (Withdrawal) Act 2018, the UK Government can only ratify the Draft Withdrawal Agreement after it has been approved by a resolution of the House of Commons (the so called, 'meaningful vote'), following which a debate has taken place in the House of Lords and most importantly, Parliament has passed legislation to implement it.[4] Should the Draft Withdrawal Agreement be rejected, a no deal Brexit will be probable. The outcome of the meaningful vote will be crucial for understanding whether the Draft Withdrawal Agreement will be ratified by the UK or, in the negative, whether the 'no Deal' scenario will materialize.[5]

The House of Commons was initially scheduled to hold the 'meaningful vote' on Tuesday 11 December 2018. After debate, the Government chose to defer it. On 15 January 2019[6] the Withdrawal Agreement was voted down by the House of Commons. A second vote took place on 29 January 2019. It was decided that further clarifications on the backstop are needed.[7] A further 'meaningful vote' will take place on March12. At the moment there is uncertainty over the after-Brexit legal environment as the Withdrawal Agreement does not seem to find support and a substantial revision is not in sight.[8]

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[2] Published by the UK Government: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759019/25_November_Agreement_on_the_withdrawal_of_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_from_the_European_Union_and_the_European_Atomic_Energy_Community.pdf

[3] This has been agreed upon by the EU Commission and the UK Government and was also provided for by Section13(2) of the EU Withdrawal Act 2018.

[4] S13(1) to(9) of the EU (Withdrawal) Act 2018. For more details on this process and the possible outcomes, see : The 'meaningful vote': A user's guide, Commons Library Insight, available at: https://commonslibrary.parliament.uk/parliament-and-elections/parliament/the-meaningful-vote-a-users-guide/; Graeme Cowie, A User's Guide to the Meaningful Vote, Commons Briefing papers CBP-8424, 25 October 2018, available at: https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8424; The Institute for Government, Parliament's 'meaningful vote' on Brexit, 3 January 2019, available at https://www.instituteforgovernment.org.uk/explainers/parliament-meaningful-vote-brexit; Jack Simson Caird, Sean Butler, Justine Stefanelli, The Withdrawal Agreement and the Political Declaration: A Preliminary Rule of Law Analysis, BIICL- Bigham Centre on the Rule of Law, September 2018.

[5] On the consequences of a positive or negative vote, see: The Institute For Government, 'Losing the meaningful vote on Brexit – what next?', 21 December 2018, https://www.instituteforgovernment.org.uk/explainers/losing-meaningful-vote-brexit-what-next

[6] On the business of the House: https://www.parliament.uk/business/news/2018/december/the-meaningful-vote/

[7] Under Section 13 (10) to (12) of the EU (Withdrawal) Act 2018, if no political agreement can be reached between the Government and the EU The Government and the House of Commons have confirmed that the Government, by publishing the Draft Withdrawal Agreement on 16 November 2018, has fulfilled the requirements of Sections 13 and 12 of the the EU (Withdrawal) Act 2018: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759052/26_November_-_Statement_that_Political_Agreement_has_been_reached_.PDF

[8] For more details, see Louise Thompson, Brexit: what does the latest parliamentary upset mean for Theresa May?, The Conversation, 10 January 2019, available at: https://theconversation.com/brexit-what-does-the-latest-parliamentary-upset-mean-for-theresa-may-10959.

This Report will also highlight that, with respect to the legal framework of judicial cooperation between the UK and the EU, the two scenarios are much more interlinked than it appears. Ratification of the Draft Withdrawal Agreement does not make the preparation for a No Deal Brexit irrelevant. Some of the risks connected to a No Deal Brexit and the effects of the retention of EU law under the EU (Withdrawal) Act 2018 may simply be postponed to the end of the Transition Period instituted by the Draft Withdrawal Agreement.[9]

4. This Report will also briefly address two other scenarios, which would have a lesser impact on judicial cooperation. On the one hand, under Art 50 TEU, the Council of the EU may agree to **postpone the date of exit**. Such postponement requires the unanimous agreement of the EU Member States. For the purposes of judicial cooperation, this scenario will only extent the actual exit phase, and does not exclude any other possible scenario.

   On the other hand, the UK may decide to stop the Brexit process and remain a member of the EU. The framework of judicial cooperation will then remain unchanged. The possibility to **revoke the intention to withdraw from the EU** has been opened by the very recent decision of the CJEU in the *Wightman* case[10]. On 10 December 2018 after an expedited procedure, the ECJ ruled positively on the possibility for a withdrawing Member State to unilaterally revoke its notification of intention to withdraw from the EU under Art. 50 TEU before any agreement on withdrawal comes into force or, if no such agreement has been concluded, within the two-year period laid down in Art. 50(3) TEU.

   At the hearing, both the EU Council and Commission argued in favour of the possibility to revoke, but against the prospect for such revocation being unilateral. They pointed out, inter alia, that a unilateral revocation would alter the nature of the negotiation period provided for by Art. 50 TEU, allowing Member States to use their rights to notify and revoke as leverage in the negotiations, and ultimately "open the way for abuse by the Member State concerned to the detriment of the European Union and its institutions".[11] Discarding these arguments, the CJEU favoured, an interpretation of the term "intention" to withdraw as, "by its nature, neither definitive nor irrevocable" given that Art. 50 TEU makes no express provision on revocation.[12] The CJEU also put forward the sovereignty of the UK and pointed out that forcing the withdrawal of the UK would be inconsistent with

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[9] See below, n. 6-8.

[10] Case C-621/18, *Wightman v Secretary of State for Exiting the European Union*, 10 December 2018, ECLI:EU:C:2018:999, available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=208636&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=1372006.

[11] Ibid., para. 38-42. Academics have also criticized the judgement putting forward the risk of tactical use of Art. 50 TUE by other member States, for example: Stephen Weatherill, 'Why the withdrawal notification under Art. 50 TEU is not unilaterally revocable,(see also the contrary opinion of Steve Peers, 'The case for unilateral revocability of the Article 50 notice'), Eur. L. Blog,, 25 March 2018, available at: http://eulawanalysis.blogspot.com/2018/01/can-article-50-notice-of-withdrawal.html; Mac Amhlaigh, 'Can Brexit Be Stopped under EU Law?', U.K. Const. L. Blog (10 Oct. 2017) (available at https://ukconstitutionallaw.org/; A. Georgopoulos, 'Revoking Article 50 TEU (C-621/18 Wightman and others): "Iphigenia Must Reach the Altar"', U.K. Const. L. Blog (17 Dec. 2018) (available at https://ukconstitutionallaw.org/. In favor of the possibility to unilaterally revoke: Sir David Edward, Sir Francis Jacobs, Sir Jeremy Lever, Helen Mountfield QC, Gerry Facenna QC, 'In the matter of article 50 of the Treaty on European Union – Opinion', (the so called, 'Three Knights Opinion'), 10 February 2017, available at https://www.bindmans.com/uploads/files/documents/Final_Article_50_Opinion_10.2.17.pdf. Summarizing different views, see Kenneth Armstrong, 'Can An Article 50 Withdrawal Notice be Revoked? The CJEU is Asked to Decide', VerfassungBlog, 10 August 2018,available at: https://verfassungsblog.de/can-an-article-50-withdrawal-notice-be-revoked-the-cjeu-is-asked-to-decide/.

[12] *Wightman*, para. 49.

the Treaties' purpose of "creating an ever closer union among the peoples of Europe".[13]

The UK thus has the possibility, by a notice addressed to the European Council and in accordance with its constitutional requirements,[14] to revoke its notification before Brexit Date, or before the Draft Withdrawal Agreement enters into force, whichever date is earlier. Such revocation must be "unequivocal and unconditional" and will have for effect for the UK to remain an EU Member State under terms that are unchanged.[15]

[13] Ibid., para. 67.
[14] On such requirements, see Gavin Phillipson and Alison L. Young, Wightman: What Would Be the UK's Constitutional Requirements to Revoke Article 50?, U.K. Const. L. Blog (10th Dec. 2018), available at: https://ukconstitutionallaw.org/2018/12/10/gavin-phillipson-and-alison-l-young-wightman-what-would-be-the-uks-constitutional-requirements-to-revoke-article-50/.
[15] *Wightman*, para. 76.

The Framework of Judicial Cooperation under the Draft Withdrawal Agreement

Key-questions

What is the effect of the Withdrawal Agreement in the field of judicial cooperation?
Should the Withdrawal Agreement enter into force, there will be a clear cut between cases to which the current framework of judicial cooperation will continue to apply and cases left to domestic or international law, both in the UK and the EU Member States. The Withdrawal Agreement also establishes a Transition Period, ending on 31 December 2020, during which EU rules will generally continue to apply.

What will happen to procedures pending in the UK or in the EU Member States on Brexit Date?
Procedures pending in the UK or in the EU Member States on the Brexit Date will not be affected. The same rules that apply today will apply to them, notably regarding the validity and application of CCA, jurisdiction, recognition and enforcement of the subsequent judgment.

Will judgments rendered in the UK be recognized and enforced in the EU Member States after Brexit?
Yes, but under different regimes. Judgments rendered at any date, but arising from a procedure initiated before 31 December 2020, will be recognized and enforced under the current facilitated regime (Brussels I bis). Conversely, judgments arising out of procedures initiated after 31 December 2020 will be recognized under the domestic rules of each Member State. These rules will probably be costlier and more burdensome than the current facilitated regime.

What if I settle a dispute in a UK or EU court? Will the settlement be recognized and enforced?
Court settlements registered or approved before 31 December 2020 will be recognized and enforced in the UK and the EU Member States according to the current facilitated EU framework (i.e. Brussels I bis). Conversely, absent any further development in the negotiations, court settlements registered or approved by a court after 31 December 2020 will not be covered by this extension of the current regime. They will be subject to domestic rules on recognition and enforcement, which will probably be costlier and more burdensome than the current regime.

Will the courts of the EU Member States respect CCA in favour of the UK courts after Brexit?
It depends. In all procedures started before 31 December 2020, the courts of the EU Member States will be bound to uphold such clauses. Notably, in case of parallel proceedings, the court of the EU Member State will have to stay the proceedings and let the UK court decide on the validity of CCA and its own jurisdiction.
In all procedures started after 31 December 2020, the question will be governed by the domestic law of the UK and the EU Member States.

The UK will have to accede to the 2005 Hague Convention as an individual signatory State after the 31 December 2020 (note: the UK deposited its instrument of ratification to accede to the Convention, but only for the event of a No Deal, see p. 25 point 47). CCA will therefore be upheld in litigation involving the EU Member States. Nonetheless, the 2005 Hague Convention's scope does not cover non-exclusive CCA, Unilateral CCA, CCA where a consumer is a party, as well as tort and maritime matters.

Will the courts of the EU Member States respect Unilateral CCA in favour of the UK courts after Brexit?
In all procedures started before 31 December 2020, the courts of the EU Member States will be bound to uphold such clauses under the current framework. In procedures started after 31 December 2020, the question will be governed by the domestic law of the UK and the EU Member States. The 2005 Hague Convention will not be relevant as its scope does not cover Unilateral CCA.

Will choice-of-law clauses be upheld by UK courts after Brexit?
Yes. All choice-of-law clauses concluded before 31 December 2020 will be governed by the current EU framework. Conversely, clauses concluded after 31 December 2020 will be subject to domestic law in the UK. It is nonetheless understood that the UK will adopt domestic rules replicating the current EU rules, thus continuing to uphold choice-of-law clauses in the same way as is currently the case.

Will choice-of-law clauses in favour of UK law be upheld by the courts of the EU Member States?
Yes. In the EU, valid choice-of-law clauses are upheld by courts, even if the chosen law is the law of a non-Member Sate, such as the UK after Brexit.

What are the main issues to consider for an effective litigation management?
- All proceedings instituted after 31 December 2020, both in the UK and the EU Member States, will present a higher risk of uncertainty and will arguably be costlier than today, because of the following reasons:
    a. Exclusive CCA in favour of UK courts will no longer be as strongly protected from parallel proceedings started in EU Member States as under Art. 31(2) Brussels I
    b. Judgments and court settlements arising out of such proceedings will not avail of the facilitated system of recognition and enforcement under Brussels I bis.
    c. In cases involving the Lugano States (Switzerland, Iceland and Norway), there is no certainty regarding whether the UK will join the Lugano Convention, or if such cases will be governed by the respective domestic rules
- In pending litigation, parties interested in settling a dispute and availing of the current facilitated system of recognition and enforcement should consider concluding a court settlement before 31 December 2020.
- Although the Draft Withdrawal Agreement extends the application of the current framework beyond Brexit, uncertainty remains regarding whether the UK will follow all future amendments, or will remain stuck with the version in force at the time of entry into force of the Withdrawal Agreement. To contain the risks, parties may consider inserting stabilizing/freezing clauses in their contracts.

1. Background and Timeline of the Draft Withdrawal Agreement

5. At the time of writing, negotiations on a comprehensive agreement regulating the future relationship between the UK and the EU after Brexit seem politically difficult. The present section is based on the latest available version of the Draft Withdrawal Agreement, a treaty meant to arrange the orderly withdrawal of the UK from the EU and to make provisional arrangements for the first years after Brexit. It was published by the UK Government on 16 November 2018.[16]

6. Should the UK and the EU approve the Draft Withdrawal Agreement, the latter will enter into force on Brexit Date. Entry into force is subject to all domestic procedures for completion being finalized by each party and notified to the other party (Art. 185 of the Draft Withdrawal Agreement). Arguably, if the conditions for entry into force are not met by at least one party, the entry into force will be postponed until such date on which completion is achieved by all parties and notified accordingly. The time elapsing between the Brexit Date and the entry into force of the Draft Withdrawal Agreement will be equivalent to a No Deal Scenario. A subsequent agreement could retroactively cover the gap. Nonetheless, the Draft Withdrawal Agreement in its current version does not consider this situation.

7. If the Draft Withdrawal Agreement enters into force there will be a transition period, starting on the date of entry into force and finishing on 31 December 2020 (hereinafter, the 'Transition Period') (Art. 126). If entry into force of the Withdrawal Agreement happens on Brexit Date, as provided by its Art. 68, the Transition Period will start on Brexit Date.
As a rule, during the Transition Period EU law will continue to apply to the UK with no exceptions or modifications but those provided for in the Withdrawal Agreement itself (Art. 127).

2. Relevant general provisions of the Draft Withdrawal Agreement

8. The following provisions of the Draft Withdrawal Agreement need to be taken into account when analysing the future framework of judicial cooperation in civil and commercial matters:

   - Art. 6(1) and (2) of the Draft Withdrawal Agreement render EU law applicable to the UK during the Transition Period, subject only to the limitations and conditions set forth in the Draft Withdrawal Agreement itself. The provisions of EU law applicable produce "in respect of and in the UK the same legal effects as those which they produce within the Union and its Member States", including the necessity for the national court to disapply inconsistent and incompatible domestic provisions (Arts. 6(3) and (4) of the Draft Withdrawal Agreement).

   - During the Transition Period, the CJEU maintains the same jurisdiction as provided for in the Treaties and acquires it with respect to the Draft Withdrawal Agreement itself (Art. 131 of the Draft Withdrawal Agreement).

[16] Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759019/25_November_Agreement_on_the_withdrawal_of_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_from_the_European_Union_and_the_European_Atomic_Energy_Community.pdf.

All decisions of the CJEU handed down before the end of the Transition Period have full binding force in the UK (Art. 89 of the Draft Withdrawal Agreement).

- The Draft Withdrawal Agreement provides that some acts of EU law, such as the Brussels Ibis and Rome Regulations, will be applied to certain cases after the end of the Transition Period, by both UK and EU courts.[17] There is no clear indication as to whether EU acts whose applicability is extended after the end of the Transition Period will be applicable as in force at the time of application, or in some previous version. The latter seems more likely. This interpretation is confirmed by some general provisions of the Draft Withdrawal Agreement. The Withdrawal Agreement generally provides that EU law, including secondary law, is referred to in the Withdrawal Agreement "as amended or replaced, as applicable on the last day of the transition period" (Art. 6(1) of the Draft Withdrawal Agreement). In addition, it is provided that the UK courts and authorities only have an obligation to "have due regard" to relevant case law of the CJEU handed down after the end of the transition period (Art. 4(5) of the Draft Withdrawal Agreement). Therefore, it should be considered that EU acts will "freeze" with respect to the UK on the last day of the Transition Period. In order to clarify the issue, during the Transition Period, parties may raise the question before a UK or EU court, asking for deferral of an interpretative question for preliminary ruling to the ECJ. After the end of the Transition Period, this interpretative question may be addressed by the Joint Committee set up by the Withdrawal Agreement, at the initiative of the UK or the EU (Art. 164 of the Draft Withdrawal Agreement).

- All international agreements, including those in the field of judicial cooperation (i.e., the Lugano Convention and the 2005 Hague Convention) will bind the UK during the Transition Period (Art. 129 of the Draft Withdrawal Agreement). The UK may use the Transition Period to negotiate its own membership in these instruments, subject only to the principle of sincere cooperation.[18]

Sensitive Point:

- The Lugano States (i.er., Switzerland, Iceland and Norway) may object that, after the Brexit Date, the UK will no longer be an EU Member State and may theoretically object to the mechanism provided for in Art. 129 (4) of the Draft Withdrawal Agreement. Nonetheless, it is probably not in the interest of the Lugano States to raise such issue.

[17] Details below, n. 10-26.
[18] The UK has already negotiated its individual membership in the 2005 Hague Convention on CCA, but only in preparation of a No Deal Scenario (see below, n. 47-48).

3. Jurisdiction to adjudicate, recognition and enforcement under the Draft Withdrawal Agreement

9. As we will explain in more details below, the effect of the Draft Withdrawal Agreement in this area is double:

   - **During the Transition Period**, the Brussels Ibis Regulation will continue to apply without change and the CJEU will retain its full jurisdiction, which entails that all future legislative amendments to the text of the Regulation and future rulings of the CJEU will be binding on the UK, and UK courts will retain the possibility to submit questions for preliminary ruling to the CJEU. These may include the interpretation of the provisions of the Draft Withdrawal Agreement concerning the Brussels Ibis Regulation;

   - **After the end of the Transition Period**, the Brussels Ibis Regulation will remain applicable, in the version in force on the last day of it, to certain pending cases, with respect to jurisdiction, recognition and enforcement in the UK and in the EU Member States in situations regarding the UK. For the purposes of the continued application of this 'freezed' version of the Brussels Ibis Regulation, the UK will not be bound by any amendment or interpretative ruling and the UK courts will not be authorised to refer questions for preliminary ruling to the CJEU.[19]

10. The Draft Withdrawal Agreement is predicated on the expectation that the UK and the EU will conclude a comprehensive agreement on their future relationship before the end of the Transition Period. It is therefore one effect of the Draft Withdrawal Agreement to postpone to the end of the Transition Period some of the risks of legal vacuum that are currently attached to a No Deal Brexit scenario.

    This paragraph will cover in more details the extension of the Brussels Ibis Regulation into the Transition Period and beyond. For all cases not covered by such extension, absent any further agreement between the EU and the UK before the end of the Transition Period, at this stage we can offer this very general advice:

    - Draft legislation adopted in preparation of a No-Deal Brexit may be adopted at the end of the Transition Period, considering the extension of the Brussels Ibis Regulation under the Draft Withdrawal Agreement and the possible revival of the 1968 Brussels Convention and other bilateral Treaties;[20]

    - The UK should consider adhering to the 2005 Hague Convention as an individual signatory state, similarly to what has been done in preparation of a No Deal Brexit;[21]

    - Strategic litigation planning will be crucial before the end of the Transition Period to ensure the application of the Brussels Ibis Regulation and foster legal certainty.

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[19] See above, n. 9.
[20] On these issues, see below, n. 42-43.
[21] See below, n. 47-48.

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3.1. Jurisdiction

11. Art. 67(1)(a) of the Draft Withdrawal Agreement reads as follows:

'In the United Kingdom, as well as in the Member States in situations involving the United Kingdom, in respect of legal proceedings instituted before the end of the transition period and in respect of proceedings or actions that are related to such legal proceedings pursuant to Arts. 29, 30 and 31 of Regulation (EU) No 1215/2012 [...] [the provisions on jurisdiction of the Brussels Ibis Regulation] shall apply'.

12. The effect of Art. 67 (1)(a) of the Draft Withdrawal Agreement is to prolong the application of Brussels Ibis after Brexit Date into the Transitional Period. During this time, the UK will be bound by any amendment and new ruling of the CJEU and UK courts will be authorised to refer questions for preliminary ruling regarding its interpretation.

13. The extension of Brussels Ibis covers proceedings instituted before 31 December 2020, whether pending or not at the date of entry into force of the Draft Withdrawal Agreement. Thus, as mentioned, Brussels Ibis will apply after the end of the Transition Period to those proceedings that were initiated during the Transition Period and were not terminated before its end. Procedures covered by the extension include those parallel proceedings for which a lis pendens or connexion mechanism exists under Arts. 29, 30 and 31 of the Brussels Ibis Regulation.

14. It will apply as in force on the last day of it, including any legislative amendment or CJEU ruling.[22] The UK and the EU27 will be bound to this 'freezed' version of Brussels Ibis after the end of the Transition Period.

15. A doubt may arise as to whether UK courts may use anti-suit injunctions and *forum non-conveniens* when adjudicating on a dispute to which Brussels Ibis applies, after the Transition Period. [23] Such mechanisms are currently forbidden under the Brussels Ibis Regulation by the case-law of the CJEU.[24] Absent any reversal of this case-law before the end of the Transition Period, the 'freezed'

[22] See above, n. 9.

[23] See Giesela Rühl, "Judicial Cooperation in Civil and Commercial Matters After Brexit: Which Way Forward?" (2018) International and Comparative Law Quarterly, 67(1), 122; on the issue of anti-suit injunctions under the Lugano Convention and the 2005 Hague Conventions, see Burkhard Hess "The Unsuitability of the Lugano Convention (2007) to Serve as a Bridge between the UK and the EU after Brexit" (2018) MPILux Research Paper Series 2018 (2) and Mukarrum Ahmed & 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" (2017) Journal of Private International Law, 13:2, 386-410.

[24] On forum non conveniens see C-281/02, Andrew Owusu v N. B. Jackson, 1 March 2005, ECLI:EU:C:2005:120, available at: http://curia.europa.eu/juris/showPdf.jsf?text=&docid=55027&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=6505367; on anti-suit injunctions see C-185/07, Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc., 10 February 2009, ECLI:EU:C:2009:69, available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=72841&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=6505736; see also Barry J. Rodger "Forum Non Conveniens Post-Owusu" (2006) Journal of Private International Law, 2:1, 71-97; Richard Fentiman, 'Civil jurisdiction and third States: Owusu and after' (2006) 43 Common Market Law Review, Issue 3, pp. 705–734; Haris Meidanis, Apostolos Giannakoulias, 'Case C-185/07, Allianz SpA, Generali Assicurazioni Generali SpA v. West Tankers Inc., Judgment of the Court (Grand Chamber) of 10 February 2009' (2009) 46 Common Market Law Review, Issue 5, pp. 1709–1724.

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Brussels Ibis Regulation is applicable in the UK and with respect of the UK. Within the scope of the Draft Withdrawal Agreement, such procedural devices should therefore continue to be considered precluded to UK courts.

3.2. Recognition and enforcement

16. Art. 67(2)(a) of the Draft Withdrawal Agreement reads as follows:

    '*In the United Kingdom, as well as in the Member States in situations involving the United Kingdom, the [Brussels Ibis Regulation] shall apply to the recognition and enforcement of judgments given in legal proceedings instituted before the end of the transition period, and to authentic instruments formally drawn up or registered and court settlements approved or concluded before the end of the transition period*'.

17. Art. 67(2)(a) of the Draft Withdrawal Agreement submits recognition and enforcement of judgments arising out of proceedings *instituted* before 31 December 2020 in the UK or in an EU Member State to the Brussels Ibis Regulation, irrespective of the date on which the judgment is rendered. Therefore, judgments rendered long after the end of the Transition Period, in the UK or in the EU Member States, will be subject to the facilitated recognition and enforcement regime of Brussels Ibis, provided that the proceedings have been instituted before the end of the Transition Period.

18. Differently from judgments, only courts settlements *approved or concluded* before 31 December 2020 will be subject to Brussels Ibis as to recognition and enforcement. Parties to pending litigation should consider whether settling the dispute before the end of the Transition Period may be a sound strategy to ensure the settlement's future enforceability in the UK or in the EU Member States.

19. As stated with respect to jurisdiction, while during the Transition Period the UK will be bound to any amendment and ruling of the CJEU, the Brussels Ibis Regulation will 'freeze' for EU-UK relations, for both the EU Member States and the UK, on the last day of the Transition Period.

3.3. CCA and Unilateral CCA under the Draft Withdrawal Agreement

20. Under Art. 67(1)(a) of the Draft Withdrawal Agreement, in proceedings initiated before 31 December 2020, both in the UK and the EU Member States, CCA and Unilateral CCA will continue to be regulated by the Brussels Ibis Regulation.[25] This system is particularly protective of exclusive CCA against parallel proceedings. This entails that for the entire Transition Period and in all proceedings initiated before its end, CCA and Unilateral CCA will receive the same protection as they receive today, i.e. under Section 7 of the Brussels Ibis Regulation, in the UK and in the courts of the EU27. As under the current system, such protection will extend to the stage of recognition, under art. 45(1)(e)(ii) of the Brussels Ibis Regulation.

    As stated with respect to jurisdiction, after the end of the Transition Period, the Brussels Ibis Regulation will still be applied, by both EU and UK courts, to proceedings commenced before the end of the Transition Period. It will apply as in force on the last day of it.

[25] Section 7 and 45(1)(e)(ii)of the Brussels Ibis Regulation

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21. In addition, Art. 129 of the Draft Withdrawal Agreement prolongs the membership of the UK in the 2005 Hague Convention[26] until the end of the Transition Period. During this time, the Convention will continue to apply in the in litigation involving the UK and other non-EU signatories (i.e. Singapore, Mexico and Montenegro).

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[26] On the scope of the 2005 Hague Convention, see below, n. 47.

4. The law applicable to civil and commercial contracts under the draft Withdrawal Agreement

4.1. In the UK

22. Art. 66 of the Draft Withdrawal Agreement reads as follows:

'a) In the United Kingdom, the [Rome I Regulation] shall apply in respect of contracts concluded before the end of the transition period;

b) In the United Kingdom, the [Rome II Regulation] shall apply in respect of events giving rise to damage, where such events occurred before the end of the transition period'.

23. Art. 66 of the Draft Withdrawal Agreement has the effect of extending the temporal application of the Rome Regulations beyond the Brexit Date. As pointed out with respect to the Brussels Ibis Regulation,[27] such extension has a double effect. On the one hand, during the Transition Period the Rome Regulations will be fully binding on the UK, including any legislative amendments or ruling of the CJEU. On the other hand, the Rome Regulations will also be applied by UK courts long after Brexit and long after the end of the Transition Period, irrespective of the date on which proceedings were instituted. The Rome I Regulation will apply in the UK to determine the law governing contracts concluded before the end of the Transition Period. The Rome II Regulation will apply in the UK to determine the law governing torts when the event at the origin of the damage occurred before Brexit Date. As pointed out, in these cases, the Rome Regulations will apply as in force on the last day of the Transition Period and subsequent legislative amendments will not be taken into account by the UK courts. In addition, interpretative decisions handed down by the CJEU after the end of the Transition Period will not be binding on the UK.[28]
24. Note that the UK intends to maintain Rome I and II beyond Art. 66 in any event as a version incorporated into national law. However, outside the scope of Art. 66, CJEU decisions will no longer be binding.

4.2. In the EU Member States

25. The Withdrawal Agreement is silent regarding the application of the Rome Regulations by the EU Member States. Nonetheless, EU Member States' courts will systematically apply Rome I to determine the law applicable in cases falling within their scope, irrespective of whether the litigation involves a third State. If UK law is the applicable law under the Rome Regulations, all EU Member States will apply it. In addition, choice-of-law clauses in favour of UK law will be enforced by EU courts, subject to the fulfilment of the conditions of their validity set forth by the Rome I Regulation.

Establishing the date on which a contract is concluded

The Rome I Regulation and Art. 66(a) of the Draft Withdrawal Agreement's application depends on the date a contract has been concluded.

The CJEU clarified that the date on which a contract is concluded is to be determined under EU law, and not under the law applicable to the contract. The CJEU affirmed that Rome I applies

[27] See above, n. 10-22.
[28] Under the Draft Withdrawal Agreement, UK courts will only 'have due regard' to such case-law, see above, n. 9.

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"only to contractual relationships arising from mutual agreement of the contracting parties which has manifested itself on or after" 17 December 2009.[29] By analogy, it can be argued that Art. 66 of the Draft Withdrawal Agreement, which extends the application of Rome I to all contracts concluded before the end of the Transition Period, is intended to cover contractual relationships arising from mutual agreement of the contracting parties which has manifested itself on or before the end of the Transition Period.

When a contract has been concluded before Rome I's temporal scope of application – including as extended by the Withdrawal Agreement – a major modification of it happening within the delimitated period can bring the contract within the scope of the Rome I Regulation. The CJEU explained that such major modification should be 'a variation agreed between the contracting parties of such magnitude that it gives rise not to the mere updating or amendment of the contract but to the creation of a new legal relationship between the contracting parties, so that the initial contract should be regarded as having been replaced by a new contract'.[30]

Interconnected contracts, such as a master contract and future related transactions or agreements concluded at different times, may be subject to different conflict-of-laws rules. For example, a master contract concluded during the Transition Period will be covered by the Rome I Regulation, but future transactions concluded after the end of the Transition Period will not.

5. Litigation involving the Lugano States

26. The 2007 Lugano Convention covers issues of jurisdiction, recognition and enforcement. It applies to all disputes where one party is established in the UK and the other in one of the Lugano States (Switzerland, Iceland and Norway) (Art. 1(3) of the Lugano Convention). It is modelled on the Brussels Ibis Regulation, but presents very important differences, such as a less favourable system of mutual recognition and enforcement and a lower protection of exclusive CCA.[31]

27. Currently, the UK is a member to the Lugano Convention through its EU membership. Under Art. 129 of the Draft Withdrawal Agreement, the UK will continue to be treated as a member State for the purposes of the Lugano Convention until the end of the Transition Period.[32]

28. In order to maintain the current facilitated system of jurisdiction and recognition with the Lugano States, the best option for the UK would be to negotiate its own membership in the Lugano Convention during the Transition Period, reducing to a minimum any temporal gap between the end of the Transition Period and the entry into force of the Lugano Convention.[33] At this stage, it is unclear whether the UK wishes to accede to the 2007 Lugano Convention as an independent State. To accede again on its own the UK would have two options: either join EFTA, which appears unlikely, or rely on the unanimous agreement of the contracting parties (Art. 72). A significant temporal gap may elapse between the request to adhere and the effective application of the Convention, as the other

[29] Judgment of the Court (Grand Chamber) of 18 October 2016, Republik Griechenland v Grigorios Nikiforidis, Case C-135/15 ECLI:EU:C:2016:774.
[30] *Ibid*.
[31] See Rühl (n. 23) 126-127; Arguing against the use of the Lugano Convention after Brexit, see Hess (n. 23).
[32] See also above, n. 9.
[33] Similarly, to what the UK has done for accession to the 2005 Hauge Convention on CCA in case of No Deal. See below, n. 47-48.

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parties can delay their consent up to a year. In addition, the entry into force will happen three months after the deposit of the instrument of accession. [34]

29. The conflict-of-laws in these disputes is currently left to domestic law. For the UK, the Rome Regulations will apply until 31 December 2020. Afterwards, domestic law will apply (which will copy Rome I).

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[34] Rühl (n. 23).

The Framework of Judicial Cooperation in case of No Deal

Key questions

How will judicial cooperation be affected by a No-Deal Brexit?
On Brexit Date, the current framework of judicial cooperation will cease to apply in the UK and for the Member States in most all situations involving the UK. The EU (Withdrawal) Act 2018 and other draft secondary legislation prepared by the Government will make it applicable to some pending litigation.

What will happen to procedures pending on the Brexit Date in the UK or in the EU Member States?
Under the EU (Withdrawal) Act 2018 and draft secondary legislation prepared by the Government, the current rules on jurisdiction, enforcement and applicable law (i.e. the Brussels Ibis Regulation and the Rome I Regulations) will govern cases pending in the UK courts on Brexit Date. EU courts will instead revert to their own domestic rules.

Will judgments rendered in the UK be recognized and enforced in the EU Member States after a No-Deal Brexit?
It depends. As a matter of principle, this issue will be decided in each member State under their respective law, which will probably be less favourable than the current framework. There is uncertainty as to whether judgments rendered pre-Brexit could be recognized in the Member States under the current facilitated framework in the event of a no deal Brexit.

What if I settle a dispute in a UK court? Will the settlement be recognized and enforced?
Similarly to judgements, courts settlement will be recognized in each Member State of the EU under domestic law. It is uncertain whether court settlements concluded pre-Brexit could be recognized in the Member States under the current facilitated framework.

Will the courts of the EU Member States respect CCA in favour of the UK courts after a No-Deal Brexit?
The UK will accede to the 2005 Hague Convention as an individual signatory State on 1 April 2019. Therefore, CCA in favour of UK courts will be upheld in litigation involving the EU Member States under such Convention. Nonetheless, the 2005 Hague Convention's scope does not cover non-exclusive CCA, Unilateral CCA, CCA where a consumer is a party, tort and maritime matters. For such matters, Member States will revert to their own domestic law.

Will the courts of the EU Member States respect Unilateral CCA in favour of the UK courts after a No-Deal Brexit?

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It depends. As a matter of principle, the courts of each Member State will address the issue under either their own domestic law, which might be less open than the current system.

Will choice-of-law clauses be upheld by UK Courts after a No Deal Brexit?
Probably yes. Draft delegated legislation currently laid before the UK Parliament will incorporate the current rules into UK domestic law. Thus, choice-of-law in contracts concluded after 17 December 2009 will be governed by the current EU framework that upholds them.

Will choice-of-law clauses in favour of UK law be upheld by the courts of the EU Member States?
Yes. In the EU, valid choice-of-law clauses are upheld by courts, even if the chosen law is the law of a non-Member Sate, such as the UK after Brexit.

What are the main issues to consider for an effective litigation management?

All proceedings instituted after a No Deal Brexit, both in the UK and the EU Member States, will present a higher risk of uncertainty and will arguably be costlier than today, because of the following reasons:

- Judgments and court settlements arising out of such proceedings will not avail of the facilitated system of recognition and enforcement (Brussels Ibis)
- Unilateral CCA in favour of UK courts will no longer be protected from parallel proceedings started in the EU Member States
- In cases involving the Lugano States (Switzerland, Iceland and Norway), there is no certainty regarding whether the UK will join the Lugano Convention, or if such cases will be governed by the respective domestic rules

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1. Background: the status of EU law in the UK in case of No Deal Brexit

30. In case of No Deal,[35] the EU (Withdrawal) Act 2018 pursues the aim of maintaining legal certainty in the aftermath of Brexit, while at the same time providing a framework to change EU-derived law. In order to achieve this objective, the EU (Withdrawal) Act 2018 makes the following arrangements:

- EU law applicable in the UK immediately before Brexit will be integrated into domestic law, hereby creating a new category of legislation, i.e. retained EU law. More specifically, under Section 3 of the EU (Withdrawal) Act 2018, direct EU legislation, which includes the Brussels Ibis and Rome Regulations, will form part of domestic law on and after Brexit Date, in the version "so far as operative immediately before" such date. Under Section 6 of the EU (Withdrawal) Act 2018, pre-Brexit case-law of the CJEU and domestic UK case law relating to retained EU law also forms part of retained EU law. Questions about the "validity, meaning or effect" of retained EU law must be decided "in accordance with any retained case law and any retained general principles of EU law". On the other hand, under Section 6, UK courts will not be bound by post-exit CJEU jurisprudence, although the court may have regard to it.

- Under Section 6 of the EU (Withdrawal) Act 2018, retained EU law may, as a matter of principle, only be modified by an act of Parliament. Nonetheless, the EU (Withdrawal) Act 2018 also vests significant delegated powers in the executive, the so-called Henry VIII Powers, which enable ministers to amend primary legislation via statutory instruments (SIs).[36] Under Section 8 of the EU (Withdrawal) Act 2018, 'a Minister of the Crown may by regulation make such provision as the Minister considers appropriate to prevent, remedy or mitigate any failure of retained EU law to operate effectively, or any other deficiency in retained EU law, arising from the withdrawal of the United Kingdom from the EU'.[37] SI adopted under Section 8 of the EU (Withdrawal) Act 2018 are laid before Parliament for approval. The Ministry of Justice laid two draft statuary instruments before Parliament that would bring amendments to the Brussels Ibis and Rome I Regulations.[38]

- Like all secondary legislation, SI adopted under Section 8 are subject to judicial review under the ultra vires doctrine, i.e. an assessment of whether

[35] And, if no further agreement is reached before the end of the transitional period, also in case of approval of the Draft Withdrawal Agreement: Mark Elliott & Stephen Tierney (n. 1), p. 2.
[36] Daniel Greenberg, *Craies on Legislation*, 10th edition (Sweet & Maxwell, 2015), para. 1.3.9. On the use of Henry VIII powers regarding the management of Brexit, see Jack Simson Caird, Arabella Lang, 'House of Commons Library Briefing Note: Legislating for Brexit: the Great Repeal Bill' (Number 7793, 23 February 2017), available at: https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7793#fullreport.
[37] On the legislative evolution of Section 8, see Mark Elliott & Stephen Tierney (n. 1), pp. 13-18. Although partly limited by Parliament in its first version, this provision has been criticised by commentators for its broad scope, its effect of depriving Parliament of review and for increasing legal uncertainty and litigation, see Mark Elliott & Stephen Tierney (n. 1), pp. 13-18; more generally on the tension between the executive and the legislative powers as revealed all along the Brexit process, see for example Graham Gee and Alison L. Young, 'Regaining sovereignty, Brexit, the UK Parliament and the common law, European Public Law, vol. 22, no. 1, 2016, pp. 131–147; Jake Rylatt & Joe Tomlinson, 'Delegated Legislation, Brexit, and the Courts', Judicial Review, Vol. 22, 2017, pp. 320-325; Gianfranco Baldini Edoardo Bressanelli Emanuele Massetti, 'Who is in Control? Brexit and the Westminster Model', The Political Quarterly, Vol. 89, 2018, pp. 537-544
[38] See below, n. 31-48.

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the executive has acted outside the scope of the powers which Parliament delegated to it.[39] Section 8 of the EU (Withdrawal) Act 2018 requires the issuance of explanatory memoranda, stating why the Minister considers there to be 'good reasons' for the SI and why it is a 'reasonable course of action'. The obligation to issue explanatory memoranda has been introduced by Parliament to facilitate the judicial review of SIs adopted under Section 8. Litigation regarding the proper use of Section 8 of the EU (Withdrawal) Act 2018 is highly probable,[40] and it is likely to target its broad scope. In a recent case, the Supreme Court has adopted a restrictive reading of broad delegated powers conferred upon the executive.[41] The justification put forward by the executive in the explanatory memoranda to the SIs amending Brussels Ibis and Rome I will be the ones against which their legality may be tested once approved by Parliament.[42]

- As for international Conventions to which the UK is a party through its EU Membership, they do not form part of retained EU law under Sections 2 or 3 of the EU (Withdrawal) Act 2018. Instead, they are saved by Section 4(1).[43] They may be amended by Act of Parliament or SI under Section 6 and 8 of the EU (Withdrawal)Act 2018.

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[39] See Jake Rylatt & Joe Tomlinson, (n. 37), par. 7 and references to the classic ultra vires doctrine for judicial review in note 15.

[40] For a discussion, see Jake Rylatt & Joe Tomlinson, (n. 37); Angus McCullough QC, 'The EU Withdrawal Bill and Judicial Review: Are we ready?', UK Human Rights Blog, 15 January 2018, available at: https://ukhumanrightsblog.com/2018/01/15/the-eu-withdrawal-bill-and-judicial-review-are-we-ready/.

[41] See Jake Rylatt & Joe Tomlinson, (n. 37).

[42] On these rationales, see below, n. 33 and 49.

[43] Which reads: "(1)Any rights, powers, liabilities, obligations, restrictions, remedies and procedures which, immediately before exit day—(a)are recognised and available in domestic law by virtue of section 2(1) of the European Communities Act 1972, and (b)are enforced, allowed and followed accordingly, continue on and after exit day to be recognised and available in domestic law (and to be enforced, allowed and followed accordingly).

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2. Jurisdiction to adjudicate, recognition and enforcement in case of No Deal Brexit

2.1. Post-Brexit arrangements in the UK

31. As all EU Regulations applicable in the UK immediately before Brexit, the Brussels Ibis Regulation will form part of retained EU law as of Brexit Date under Sections 2 and 3 of the EU (Withdrawal) Act 2018.[44] As such, it will apply in the version in force on the day before Brexit, including any interpretative ruling of the CJEU.

32. As a matter of principle, the Brussels Ibis Regulation will keep the status of retained EU law as long as an Act of Parliament, or a statutory instruments (SI) within the meaning of Section 8 of the EU (Withdrawal) Act will not amend or revoke it. A draft SI addressing the status of the retained Brussels Ibis Regulation[45] has been produced by the Ministry of Justice according Sections 8 and Paragraphs 1 and 21 of Schedule 7 of the EU (Withdrawal) Act and laid before Parliament on 12 December 2018 (the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019, hereinafter, the 'CJJ Regulations 2019').[46] The Draft CJJ Regulations 2019 is subject to the affirmative procedure, which entails approval by both Houses before it can be made and brought into effect as law. At the time of writing, the Parliament website indicates that the Draft CJJ is currently being debated in both Houses.[47]

33. The rationale behind the amendments proposed by the Draft CJJ Regulations 2019 is that the Brussels Ibis regime of jurisdiction, recognition and enforcement is predicated on reciprocity. The executive has therefore argued that when the UK will cease to be a Member State of the EU, such reciprocity will be lost and the system will become unworkable on a unilateral basis.[48] Based on this premise, the CJJ Regulations 2019 put forward the following arrangements.

34. Regulation **89** of the Draft CJJ Regulations 2019 **revokes the Brussels Ibis Regulation**.[49] Litigation currently falling within the scope of the Brussels Ibis Regulation will be subject instead to the existing rules of jurisdiction provided for

[44] See above, par. 1. See also Explanatory Memorandum to The Civil Jurisdiction and Judgments (Amendment) (Eu Exit) Regulations 2019 (hereinafter, the Explanatory Memorandum to the CJJ Regulations 2019"), par. 6.6.

[45] And the 'galaxy of Brussels-related acts, including The Brussels I Regulation, the 1968 Brussels Convention the Protocol on Denmark and, surprisingly, the 2007 Lugano Convention. See below this par. and par. 4 for details.

[46] Published on http://www.legislation.gov.uk/ukdsi/2019/9780111176726/introduction.

[47] See https://beta.parliament.uk/work-packages/I2grPbXZ.

[48] Draft Explanatory Memorandum to the CJJ Regulations 2019, par. 6.6. As a SI, the CJJ Regulations 2019 is subject to judicial review under the ultra vires doctrine (see above, references in note 39).

[49] The Draft CJJ Regulations 2019 also revoke: (i) the Brussels I Regulation (Regulation 44/2001) (Section 84), to the extent that it was not repealed by the Brussels Ibis Regulation (Art. 80 of the Brussels Ibis Regulation. See also Draft Explanatory Memorandum to the CJJ Regulations 2019, par. 6.2) The Brussels I Regulation still applies to (i) legal proceedings instituted, authentic instruments formally drawn up or registered and to court settlements approved or concluded and to before 10 January 2015 and to (ii) judgments given in legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded before 10 January 2015 (Art. 66 of the Brussels Ibis Regulation); (ii) the 1968 Brussels Convention (see below, this paragraph) and (iii) the Protocol on Denmark. The savings to these instruments are equivalent to the one described in the text for the Brussels Ibis Regulation (under regulation 92 and 93 of the Draft CJJ Regulations 2019).

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in the common law and statutes[50] and, for exclusive CCA and for the States concerned, the 2005 Hague Convention, to which the UK is acceding as an independent Contracting State.[51] Nonetheless, **exceptions** to this general rule are provided.

35. A first exception concerns jurisdiction. Under regulation **92** of the Draft CJJ Regulations 2019, **the rules on jurisdiction of the Brussels Ibis Regulation will apply, with some limitations, to pending litigation**.[52] In particular, the Brussels Ibis Regulation will apply to determine the **jurisdiction** of a UK court **seized before Brexit Date**, if proceedings are still pending on Brexit Date.

This saving is subject to two limitations under regulation 93 of the Draft CJJ Regulations 2019. Firstly, regulation 93(2) of the Draft CJJ Regulations 2019 provides that, when a UK court is seized of a case covered by the retained[53] Brussels Ibis Regulation, in case **parallel proceedings** are started in a court of an EU member State, **UK courts may, after Brexit Date, 'decline jurisdiction if, and only if, it considers that it would be unjust not to do so'**.
This arrangement operates on the mechanisms of *lis pendens* provided for by Arts. 29 and 31(1) and 31(2) to 31(4) of the Brussels Ibis Regulation. Under such mechanisms, any court of a Member State that is not the court first seized shall either directly decline jurisdiction,[54] or stay the proceedings of its own motion, waiting for the court first seized to establish its own jurisdiction,[55] and if the latter concludes that it has jurisdiction, all other courts shall decline jurisdiction.[56]

In practical terms, in case of parallel proceedings, a UK court that is not the court first seized will still be obliged to stay the proceedings of its own motion to let the court first seized establish whether it has jurisdiction under Brussels Ibis Regulation, when the *lis pendens* mechanism so provides.[57] Should the court first seized conclude that it has jurisdiction, or in any case when declining jurisdiction is mandatory without staying the proceedings,[58] the UK court will not be obliged to decline jurisdiction, but it should do so "if and only if" it would be unjust to hear the case. Thus, regulation 93(2) of the Draft CJJ Regulations 2019 confers upon the UK courts a narrow margin of discretion to decline jurisdiction, where the Brussels Ibis Regulation would have given them no choice and compelled them to decline jurisdiction.

The Draft Explanatory Memorandum to the CJJ Regulations 2019[59] argues that this arrangement is grounded in the need to prevent distortions in the handling of cross-border cases. Distortions may arise since, even if the UK applies the Brussels Ibis Regulation as part of retained EU law, the courts of the EU27 will

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[50] Parts 2 and 3 of the Draft CJJ Regulations 2019 amends the Civil Jurisdiction Act 1982 and other relevant legislation in order to accommodate the revocation of EU Regulations and international conventions in the field.
[51] On these arrangements, see also Draft Explanatory Memorandum to the CJJ Regulations 2019 (par. 7.3 to 7.9). See also Ministry of Justice, 'Handling civil legal cases that involve EU countries if there's no Brexit deal', 13 September 2018, available at (https://www.gov.uk/government/publications/handling-civil-legal-cases-that-involve-eu-countries-if-theres-no-brexit-deal. On the 2005 Hague Convention see also below par. 4.
[52] It shall be noted that regulation 92 also saves the Brussels I Regulation
[53] More precisely, it is the retained, revoked, and then reinstated Brussels Ibis Regulation.
[54] Art. 31(1) of the Brussels Ibis Regulation.
[55] Article 29(1) and 31(2) of the Brussels Ibis Regulation.
[56] Arts. 29(3) and 31(3) of the Brussels Ibis Regulation.
[57] Arts. 29(1) and 31(2) of the Brussels Ibis Regulation.
[58] Art. 31(1) of the Brussels Ibis Regulation.
[59] Par. 7.13.

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treat the UK as a third State, to which the Brussels Ibis Regulation[60] does not apply. They will revert instead to their own national rules, [61] which differ from State to State and which, in case of parallel proceedings, may lead the court of an EU Member State to hear a case, irrespective of whether they are the court first seized and the UK court asserts jurisdiction.

Secondly, regulation 93(3)(b) of the Draft CJJ Regulations 2019[62] makes another arrangement regarding situations in which proceedings before a UK court are pending before Brexit Date, but **the document instituting the proceedings could not be notified to the defendant in accordance with Regulation 1393/2007**,[63] i.e. when it is effectuated after Brexit Date.[64]
In such situations, **if the defendant does not appear before the court**, regulation 93(3)(b) of the Draft CJJ Regulations 2019 allows the UK court seized to choose the more 'just' course of action. On the one hand, the court may behave as it would under the current regime and notification was indeed effectuated according to Regulation 1393/2007.[65] In such cases, the UK court would have a more demanding obligation to stay the proceedings 'until the defendant has been able to receive the document instituting the proceedings or an equivalent document in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end'. On the other hand, the UK courts may apply the less stringent regime of Art. 15 of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters,[66] which in the current system would apply to notification to a defendant domiciled in a third State party to such Convention.[67]

36. A second exception to regulation 89 of the CJJ Draft Regulations 2019 concerns recognition and enforcement. Under regulation **92** of the Draft CJJ Regulations 2019, **the Brussels Ibis Regulation will apply to recognition and enforcement of certain judgments, authentic instruments and court settlements.** UK courts will apply the rules of the Brussels Ibis Regulation in relation to recognition and enforcement of judgments or decisions given in proceedings commenced in a court of an EU Member State before Brexit Date. UK courts will also apply the rules of the Brussels Ibis Regulation with respect to the recognition and enforcement of court settlements concluded, or authentic instruments registered in an EU Member State before Brexit Date.[68] These savings only apply where the question of recognition or enforcement has not arisen for consideration before the UK courts, or its consideration was not concluded before Brexit Date.

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[60] The language used in the Explanatory Memorandum is, perhaps comprehensibly, imprecise. Indeed, the relevant factor here is that Arts. 29 and 31 will not apply when the UK courts are the court first seized, because they expressly refer to the" courts of a member State". But more generally, it is inaccurate to state that the Brussels Ibis Regulation will never be applied by the courts of the EU27 in cross-border cases involving the UK (see below n. 39-40).
[61] Part of this issue, i.e. lis pendens rules in case of a non-exclusive CCA, will be covered by the 2005 Hague Convention, to which the UK is acceding as an independent signatory.
[62] An equivalent arrangement is made for cases covered by the Brussels I Regulation and the Lugano Convention (regulation 93(3)(a) and 93(3)(c) Draft CJJ Regulations 2019 respectively).
[63] Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000 OJ L 324, 10.12.2007, p. 79–12.
[64] Regulation 1393/2007 applies where a judicial or extrajudicial document has to be transmitted from one Member State to another for service there' (Art. 1(1) of Regulation 1393/2007).
[65] Art. 28(2) of the Brussels Ibis Regulation.
[66] Available at : https://www.hcch.net/en/instruments/conventions/full-text/?cid=17.
[67] Art. 28(4) of the Brussels Ibis Regulation.
[68] Regulation 92(1)(b) of the Draft CJJ Regulations 2019.

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In practical terms, similarly to the solution adopted by the Draft Withdrawal Agreement,[69] this arrangement has the effect of extending the relevance and applicability of the Brussels Ibis Regulation, as in force well beyond the Brexit Date.

We shall note here that regulation **93(4) contains also an incoherent cross-reference, which may nonetheless relate to recognition and enforcement**. Regulation 93(4) reads '*Where regulation 85(1)(b) applies, any obligation to provide or serve a certificate under Articles 53 and 60 of the Brussels Ibis Regulation*'.[70] Regulation 85 regards the revocation of the decision extending the applicability of the Brussels I Regulation to the Kingdom of Denmark, and in addition it does not include a (1)(b) paragraph. As a consequence, as it is, regulation 93(4) does not make sense. It could be that the reference to regulation 85, should be read as a reference to Regulation 92(1)(b), which reinstate the Brussels Ibis Regulation as to some matters of recognition and enforcement. If this is the case, the effect of regulation 93(4) would be to exclude the application of Arts. 53 and 60 of the Brussels Ibis Regulation in such cases.

37. Alongside reinstatement of the retained Brussels Ibis Regulation, the UK Government also proposed to create new rules of domestic law modelled on the Brussels Ibis Regulation. Regulation **26** of the Draft CJJ Regulations 2019 **modifies the Civil Jurisdiction and Judgments Act 1982** by inserting Section 15A to 15E which substantially **reproduce the rules on jurisdiction of the Brussels Ibis Regulation in matters of employment contracts and consumer contracts, when the consumer is domiciled in the UK**.
With this amendment, the UK Government adopts the EU's lawmaker policy of affording increased protection to weaker contractual parties in cross-border situations. The Explanatory Memorandum argues that such rules are unknown to UK private international law (including Scotland) and that they should be included in domestic UK law.[71]
Under regulation **42** of the Draft CJJ Regulations 2019, Section 42 of the Civil Jurisdiction and Judgment Acts 1982 is amended as to include the Brussels Ibis Regulation's definition of domicile of corporations and associations for the purposes of Sections 15B to 15E of the Civil Jurisdiction and Judgment Act 1982 as amended by the Draft CJJ Regulations 2019. The rationale for this replication of the policy of the EU lawmakers in UK domestic legislation seems to be continuity with the previous regime.[72]

The main difference between these new domestic rules and the reinstated retained Brussels Ibis Regulation will be the inapplicability of any pre-Brexit interpretative ruling of the CJEU with respects to consumer and employment contracts. More generally, interpretation of Sections 15B to 15E and 42 of the Civil Jurisdiction and Judgments Act 1982 will be based on domestic rules of interpretation, and not the special rules applying to retained EU law.[73]
We shall also point out that regulation 26 of the Draft CJJ Regulations 2019 only reproduces the rules of jurisdiction regarding consumers and employees but not policy holders. In addition, the rule barring recognition of judgments rendered

[69] See above, n. 11.
[70] The same applies to the 'sister' provisions: Arts. 54, 57 and 58 of the Brussels I Regulation and Art. 54, 57 and 58 of the Lugano Convention.
[71] Draft Explanatory Memorandum to the Draft CJJ Regulations 2019.
[72] Explanatory Memorandum to the Draft CJJ Regulation 2019, par. 7.13.
[73] Which may include, inter alia, the possibility for the UK courts to have due regard to post-Brexit CJEU decisions. See above, n. 39.

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abroad in violation of these rules, which exists in the Brussels Ibis Regulation,[74] is not reproduced by regulation 26 of the of the Draft CJJ Regulations 2019.

2.2. The point of view of the Member States of the EU

38. In case of No Deal and lacking any alternative arrangement, the questions of jurisdiction, recognition and enforcement will be mainly left to national law of each Member State.[75]

39. Nonetheless the Brussels Ibis Regulation will still come into play under certain circumstances. The provisions of the Brussels Ibis Regulation have a certain scope of application and cover certain cross-border situations, even if the situation at hand has some degree of connection with the UK. It is only outside such scope, the rules of jurisdiction, recognition and enforcement of each Member State are applicable.

40. The following are among the provisions of the Brussels Ibis Regulation that will still be relevant for UK-related litigation even after Brexit:

- The courts of the EU Member States will assert jurisdiction over claims falling within the scope of exclusive competences (Art. 22 of the Brussels Ibis Regulation);

- The courts of the EU Member States will retain jurisdiction over claims regarding consumer, employment and insurance contracts under Sections 3, 4 and 5 of the Brussels Ibis Regulation;

- The courts of the EU Member States will retain jurisdiction to issue provisional including protective measures in cases that have connections with the UK, whenever allowed under Arts. 35 and 40 of the Brussels Ibis Regulation.

- In general, claimants domiciled in the UK need to be aware that, the courts of the EU27 will still apply the rules of the Brussels Ibis Regulation in cross-border litigation after Brexit, not only with respect to UK-related litigation, but also in the relationships between them. For example, in deciding where to sue a defendant, claimants domiciled in the UK need to consider that defendants domiciled in the EU cannot be sued in the courts of another Member State, unless the Brussels Ibis Regulation so provides (Arts. 2 and 3 of the Brussels Ibis Regulation). Also, Unilateral CCA[76] in favour of a court of an EU Member State will be governed by Section 7 of the Brussels Ibis Regulation, even if competing proceedings are started in the UK or the case has any other connection with the UK;

41. An open issue remains whether a judgment rendered, or a court settlement registered in the UK before Brexit could be recognized and enforced in an EU Member State under the Brussels Ibis Regulation post-Brexit. On the one hand, a literal reading of the Brussels Ibis Regulation would lead to answer negatively. Since the Brussels Ibis Regulation expressly refers to recognition of acts that

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[74] Art. 45(1)(e)(i) of the Brussels Ibis Regulation.
[75] On the possible residual relevance of the 1968 Brussels Convention and the Bilateral Convention in force between the UK and some member States before it, see below
[76] Non-unilateral CCA will be governed by the 2005 Hague Convention, to which the UK is acceding as an independent contracting State.

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emanate from a court of a Member State,[77] and the UK will not be a Member State post-Brexit, the Brussels Ibis Regulation would not apply to recognition and enforcement of UK-made judgments. On the other hand, the contrary could be argued based on what the CJEU decided with respect to the Brussels I Regulation[78] in the *Wolf* case.[79] The CJEU affirmed that 'for that regulation to be applicable for the purpose of the recognition and enforcement of a judgment, it is necessary that at the time of delivery of that judgment the regulation was in force both in the Member State of origin and in the Member State addressed'.[80] Since that would be the case for a judgment rendered in the UK pre-Brexit, it could be concluded that such judgment could access the simplified recognition and enforcement regime of the Brussels Ibis Regulation. Nonetheless, it has been convincingly argued that, the CJEU's conclusion in *Wolf*, despite its broad wording, did not concern the question of whether the enforcement regime of the Brussels I Regulation may apply if it is no longer in force and applicable in one of the States involved.[81] To the contrary, in *Wolf*, the CJEU was asked whether a judgment rendered in the Czech Republic at a time when the Brussels Ibis Regulation was not yet in force there, could nonetheless be recognized in Austria under the simplified regime of recognition and enforcement of the Brussels Ibis Regulation, at a time when the Brussels I Regulation was in force in both States. This point of view seems convincing, and we shall add that it would be possible for a court of a Member State to defer a question for preliminary ruling to the CJEU on this issue.[82]

42. Another open question is whether some international conventions that were superseded by the Brussels I and Ibis Regulations could revive after Brexit, becoming applicable instead of domestic rules.

    One instrument that could theoretically revive is the 1968 Brussels Convention, ancestor of the Brussels I and Ibis Regulations. Some authors[83] argued that such

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[77] Under Art. 2(a) and (b) of the Brussels Ibis Regulation a 'judgment' is 'any judgment given by a court or tribunal of a Member State […]', and a 'court settlement' is a 'a settlement which has been approved by a court of a Member State or concluded before a court of a Member State in the course of proceedings'.

[78] Which applied to the Brussels Ibis Regulation as well.

[79] C-514/10, Wolf Naturprodukte GmbH v SEWAR spol. s.r.o., 21 June 2012, ECLI: EU:C:2012:367, available at: http://curia.europa.eu/juris/document/document.jsf;jsessionid=B5640A88B0A2B7161C4262C4494649E6?text=&docid=124192&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=6498118

[80] *Wolf*, par. 34.

[81] Ruhl, (n. 23).

[82] Although, as it has been pointed out, it seems that the UK Government and the EU have suggested that the applicability of Brussels Ibis to pre-Brexit judgements and court settlements could be preferred after Brexit, or after the end of the transitional period (Ruhl, (n. 23), in note 99).

[83] Richard Aikens, Andrew Dinsmore, "Jurisdiction, Enforcement and the Conflict of Laws in Cross-Border Commercial Disputes: What Are the Legal Consequences of Brexit?" (2016) 27 European Business Law Review, 908ff; Andrew Dickinson, "Back to the Future: The UK's EU Exit and the Conflict of Laws" (2016) 12 Journal of Private International Law, 202; Matthias Lehmann and Nihal D'Souza, "What Brexit Means for the Interpretation and Drafting of Financial Contracts" (2017) 32 Journal of International Banking and Financial Law, 101 and 103; Matthias Lehmann and Dirk Andreas Zetzsche, "Brexit and the Consequences for Commercial and Financial Relations between the EU and the UK" (2016) 27 European Business Law Review 999, 1004ff and 1023ff; Eva Lein, "Unchartered Territory? A Few Thoughts on Private International Law post Brexit" (2015) Yearbook of Private International Law Vol. XVII, 38; Matthias Lehmann and Dirk Andreas Zetzsche, "Die Auswirkungen des Brexit auf das Zivil- und Wirtschaftsrechts" (2017) JuristenZeitung 52, 65, 70; Sara Masters and Belinda McRae, "What Does Brexit Mean for the Brussels Regime?" (2016) Journal of International Arbitration, 491ff (as regards the Brussels Convention); Johannes Ungerer, " Brexit von Brüssel und den anderen EU-Verordnungen zum

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convention was not terminated by the entry into force of the Brussels I Regulation, and that after Brexit it could revive and apply to litigations involving the UK and the Member States[84] which were Convention States. Arguments against this view, based both on EU and public international law, have been made, too.[85] There seems to be a relatively wide consensus among both sets of authors regarding the fact that the revival would not be desirable, because the 1968 Brussels Convention is an outdated instrument.[86]
Within the current context of Brexit negotiations, the question seems to lose its interest. The Draft CJJ Regulations 2019 will revoke the 1968 Brussels Convention,[87] and the savings have arguably little practical impact.[88] Thus, though the Convention may not have been terminated by the entry into force of the Brussels I Regulation, the UK will cease any application of it when the Draft CJJ Regulations will be made into law, i.e. very probably in case of No Deal Brexit and probably also if the Draft Withdrawal Agreement enters into force and no other arrangement is made after the end of the Transition Period.

43. In addition, a doubt may arise as to whether a handful of bilateral treaties covering certain issues of recognition and enforcement between the UK and six Member States of the EU[89] that were superseded by the entry into force of the Brussels Regime,[90] may revive after Brexit. Due to the post-Brexit inapplicability of the Brussels Ibis Regulation, it has been argued that such treaties, which were left untouched for all issues not covered by the Regulations and so never terminated, may come into play again.[91] Differently from the 1968 Brussels Convention, the Draft CJJ Regulations 2019 are not concerned with these treaties. Nonetheless, for all matters covered by the retained Brussels Ibis Regulation[92], these Treaties will still be superseded by its Art. 69. For all other matters, arguably these treaties could revive, which would be more of a problem than a solution, given the outdated nature of these instruments.[93] A formal termination of the treaties or a unilateral repeal of their ratification by the UK or the other Member States would restore legal certainty.

3. CCA and Unilateral CCA in case of No Deal Brexit

44. As mentioned, the CJJ Draft Regulations 2019 will reinstate the rules on jurisdiction of the retained Brussels Ibis Regulation with respect to cases pending

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Internationalen Zivilverfahrens- und Privatrecht" in Malte Kramme, Christian Baldus and Martin Schmidt-Kessel (eds), "Brexit und die Juristischen Folgen" (Nomos 2017); 298ff.
[84] The member States that joined the EU after 2002 never became contracting parties to the Brussels Convention, because they joined when the Brussels I or Ibis Regulation were in force.
[85] Ruhl, (n. 23).
[86] See Ruhl (n. 23), and references cited note 34.
[87] Regulation 82 of the Draft CJJ Regulation 2019.
[88] Regulations 92 and 93 of the Draft CJJ Regulation 2019 save all instruments revoked for pending litigation and judgements rendered before (see above, n XX). Since the Brussels I and Ibis Regulations are saved as well as the 1968 Brussels Convention, its scope of application remains limited to the territories to which it currently applies under Art. 68 of the Brussels Ibis Regulation and in any event only for pending cases and pre-Brexit judgements.
[89] Austria, Belgium, France, Germany, Italy and the Netherlands Available at https://treaties.fco.gov.uk/responsive/app/consolidatedSearch/#home.
[90] That is the effect of Arts. 69 and 70 of the Brussels Ibis Regulation.
[91] Guillaume Croisant, "Fog in Channel – Continent Cut Off. Les conséquences juridiques du Brexit pour le droit international privé et l'arbitrage international"(2017) Journal des tribunaux, 29; Hess (n 23); Lein (n 83); Masters and McRae (n 83).
[92] Retained, revoked and reinstated by regulations 89, 92 and 93 of the Draft CJJ Regulations 2019.
[93] Against this revival based on considerations of practicality and parties' expectations, see Ruhl (n 23).

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in the UK on the Date of Brexit. Nonetheless, the obligation to decline jurisdiction, which would particularly arise in the presence of a CCA in favour of an EU court will be heavily restricted under the Draft CJJ Regulations 2019.[94] The Draft CJJ Regulations 2019 will also retain the rules on recognition and enforcement of the Brussels Ibis Regulation with respect to judgments rendered in proceedings commenced before Brexit Date in the courts of a member State of the EU.[95] Thus, the violation of a CCA will entail the refusal of recognition of a judgment under Art. 45(1)(e)(ii)of the Brussels Ibis Regulation, including when such CCA was in favour of another Member State court, and not just a court of the UK.

45. In addition to this arrangement, the UK also prepared for the case of No Deal by adhering to the 2005 Hague Convention on CCA.

46. The 2005 Hague Convention applies to "exclusive"[96] CCA and does not cover Unilateral CCA. [97] It applies in international cases[98] in civil and commercial matters, to the exclusion of consumer and employment contracts, tort or delict claims for damage to tangible property, carriage of passenger and goods and certain maritime claims (Art. 2 of the 2005 Hague Convention). Under the 2005 Hague Convention, the jurisdiction of the chosen court is protected against parallel proceedings, unless public policy or other exceptional ground applies (Arts 5 and 6 of the 2005 Hague Convention). In addition, any judgment rendered by the chosen court must be recognised and enforced in other Contracting States, except where a grounds for refusal applies (Arts 8 and 9 of the 2005 Hague Convention).

47. The EU is currently a member of the 2005 Hague Convention on behalf of the Member States, including the UK.[99] On 28 December 2018, the UK signed and ratified the 2005 Hague Convention on CCA as an independent signatory State and the required notification of the instrument of accession (hereinafter, the 'Instrument of Accession')[100] has been effectuated.

    The Convention has nonetheless been ratified only for the event of a No Deal Brexit scenario, as expressly mentioned in a Verbal Note to the Instrument of Accession. In case of No Deal, the 2005 Hague Convention will enter into force on 1 April 2019. If the Withdrawal Agreement enters into force timely on Brexit Date, the UK will withdraw the Instrument of Accession and for the duration of the Transition Period, be treated as a Member of the EU.[101] The UK prepared this arrangement due to the procedure for adhesion and the risk connected to it. Entry into force for each adhering State is effective on the first day of the month following the expiration of three months after the deposit of such ratification or equivalent act (Art. 31(2) of the 2005 Hague Convention). This implies that,

[94] See above, n. 35.
[95] See above, n. 36.
[96] Defined as an agreement concluded by two or more parties in writing or other durable form of communication, and designating, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts (Art.3). CCA are presumed exclusive unless parties have agreed otherwise.
[97] See Ahmed & Beaumont (n. 23) 386-410; Rühl (n. 23).
[98] A case is international "unless the parties are resident in the same Contracting State and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State" (Art. 1(2)).
[99] But excluding Denmark, which adhered on its own as off 1 October 2018.
[100] According to art. 34 of the 2005 Hague Convention, available at https://verdragenbank.overheid.nl/nl/Verdrag/Details//011343/011343_Notificaties_13.pdf.
[101] See below, n. 48-49.

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there could have been a period of non-application of the Convention in case of No Deal.[102] Such risk is now minimized in terms of days, but a gap still remains.

48. Under the CJJ Draft Regulations 2019, the 2005 Hague Convention will apply outside the scope of the retained provisions of the Brussels Ibis Regulation, including in the relationships with the Member States of the EU and the other three third-States that are parties to it (Singapore, Mexico and Montenegro). As pointed out, the scope of the 2005 Hague Convention is more limited than the one of the Brussels Ibis Regulation. For all matters not covered by the 2005 Hague Convention, such as Unilateral CCA, the EU Member States and the UK will apply their own domestic rules. Such domestic rules will probably be less respectful of CCA, including exclusive CCA, than the current system, leaving room for delaying tactics such as torpedo actions. In addition, unilateral CCA in favour of the UK courts may not be enforced easily under the domestic law of some EU Member States.[103]

4. The law applicable to civil and commercial contracts in case of No Deal Brexit

49. Similarly to the Brussels Ibis Regulation,[104] the Rome Regulations will form part of retained EU law as off Brexit Date under Sections 2 and 3 of the EU (Withdrawal) Act.[105] On 10 December 2018, the Ministry of Justice laid a SI before Parliament dealing with the retained Rome I Regulation, The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2018,[106] (hereinafter, the 'Draft LACO Regulations 2018').

    Contrary to Draft CJJ Regulations 2019, the Draft LACO Regulations 2018 does not revoke the Rome Regulations and then reinstate it for certain situations. As explained by the Ministry of Justice, since the Rome Regulations are not predicated on reciprocity, their unilateral application by the UK is workable.[107] Thus, as per the combined effect of Sections 2 and 3 of the EU (Withdrawal) Agreement and the Draft LACO Regulations 2019, on and after Brexit Date the retained Rome Regulations will apply in the whole UK. Their temporal scope of application will be the same as the current framework: the Rome I Regulation will govern all contracts concluded after 17 December 2009,[108] and Rome II Regulation will be applicable to events giving rise to damage which occurred on or after 11 January 2009.[109]

50. In addition, the Draft LACO Regulations have the effect of prolonging the residual effect of the 1980 Rome Convention, which is applicable to contracts

[102] See Jürgen Basedow, "BREXIT and Business Law" (2017) China-EU Law Journal (CELJ), Vol. 5, No. 3, p. 116, Max Planck Private Law Research Paper No. 17/1.
[103] E.g. France. See, Mme X v Societe Banque Prive Edmond de Rothschild, Cass. 1ère Civ., 26 September 2012, No 11-26022 and Crédit Suisse, Cass. 1ère Civ., 25 March 2015, No 13-27.264 and Apple Sales International v eBizcuss, Cass. 1ère Civ, 7 October 2015, No 14-16.898.
[104] See above, n. 34.
[105] On interpretation and relevance of pre-Brexit and post-Brexit EU law for retained legislation, see above n. 30.
[106] Available at : https://assets.publishing.service.gov.uk/media/5c0eb0daed915d0c221e4717/The_Law_Applicable_to_Contractual_Obligations_and_Non-_Contractual_Obligations__Amendment_etc.___EU_Exit__Regulations_2018_-_SI.pdf.
[107] Draft Explanatory Memorandum to the Draft LACO Regulations 2018, par. 7.1.
[108] Art. 28 of the Rome I Regulation.
[109] Arts. 31 and 32 of the Rome II Regulation.

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concluded between 1 April 1991 and 16 December 2009.[110] Such effect is nonetheless limited, because the amendments to the Contracts (Applicable Law) Act 1990 brought about by Part 2 of the Draft LACO Regulations 2018, cease the participation of the UK in the Convention. Thus, the 1980 Rome Convention will no longer apply to the UK as a matter of international law, but only as retained EU Law under the EU (Withdrawal) Act 2018.[111] As a consequence, the question of whether the Rome Convention could revive[112] is superseded by the Draft LACO Regulations 2018.

51. The Draft LACO Regulations 2018 are a much simpler instrument comparing to the Draft CJJ Regulations 2019. Their scope is simply to adapt the text of the retained Rome I Regulation and relevant UK domestic legislation to the post-Brexit situation through minor changes in terminology and updating.[113] Due to the lower stakes, approval of the Draft LACO Regulations 2018 by Parliament is subject to the negative procedure[114], which makes the approval swifter[115] than for the Draft CJJ Regulations 2019.[116] As all SIs, once made into law, the Draft LACO Regulations 2018 will be subject to judicial review.[117]

5. Litigation involving the Lugano States in case of No Deal Brexit

52. After Brexit, the UK will cease to be a part to the Lugano Convention. For the time being, we do not have any information available regarding any project to adhere individually. To accede again on its own the UK would have two options: either join EFTA, which appears unlikely, or follow Art. 72 Lugano Convention, which can lead to a significant temporal gap.[118]

53. For the time being, in case of No Deal, the EU (Withdrawal) Act retains the Lugano Convention and the Draft CJJ Regulations 2019 revoke and reinstate the Lugano Convention only for pending litigation and recognition and enforcement of judgments rendered in proceedings commenced before Brexit.[119]
It is unclear whether the Lugano States will reciprocate this treatment, or revert to their respective domestic rules. Arguably the text of the Lugano Convention is silent on the issue and the default solution would be the application of national law.[120] An agreement between the UK and the Lugano States would be the only option that would guarantee legal certainty.

54. For cases not covered by the retained Lugano Convention under the Draft CJJ Regulations 2019, the UK will also apply its own national rules.

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[110] Art. 24 of the Rome I Regulation.
[111] See Draft Explanatory Memorandum to the Draft LACO Regulations 2018, par. 2.1.
[112] See the discussion above regarding the Brussels Convention (n. 42) and the references in note 83.
[113] See Draft Explanatory Memorandum to the Draft LACO Regulations 2018, par. 7.
[114] Under Paragraph 7(2) of Schedule 1 to the European Union (Withdrawal) Act 2018.
[115] Unless the Sifting Committee disagrees with the Ministry of Justice, which seems unlikely (see Draft Explanatory Memorandum to the Draft LACO Regulations 2018, Part 2).
[116] Which are subject to the affirmative procedure. At the time of writing, the Draft LACO Regulations 2018 are under consideration in the Siting Committee.
[117] See above, n. 30.
[118] See above, n. 28. Rühl (n. 23).
[119] Regulations 82, 92 and 93 of the CJJ Draft Regulations 2019. By analogy, see the discussion on the Brussels Ibis Regulation, that is subject to the same regime, above n. 31-37.
[120] As it has been argued with respect to matters covered by the Brussels Ibis Regulation, see Rühl (n 23) and references notes 27 and 33.

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Ongoing work on the Hague Judgments Project

55. The Hague Conference on Private International Law is currently preparing an international convention that is designed to regulate recognition and enforcement of foreign judgments outside the situations where there is an exclusive jurisdiction agreement (which is the scope of the 2005 Hague Convention). The project is still in a preliminary phase, its success among major international players is still uncertain and it will in any event have a limited scope as compared to the current EU-UK framework of judicial cooperation. In particular, it does not deal with questions of jurisdiction or applicable law.
Nonetheless, at this stage, the project is certainly of interest for UK-based practitioners and, once finalized, it may come into play especially in case of No Deal or in the case in which, after the end of the Transition Period, no further agreement on judicial cooperation is reached with the EU.

56. The working group of the project prepared a number of draft texts that will be discussed at the diplomatic session to be convened mid-2019,[121] the most recent of which is the May 2018 Draft Convention (hereinafter, the "2018 Draft Convention").[122]

    The 2018 Draft Convention would apply to judgments in civil and commercial matters.[123] It is wider in material scope than the 2005 Hague Convention and would cover employment and consumer contracts, personal injuries, damage to tangible property, rights in rem and competition. The 2018 Draft Convention applies to contracts dealing with intellectual property rights such as licensing agreements, or agreements for the development of an intellectual property right. The 2018 Draft Convention would be "a floor, not a ceiling" and not prevent the use of more favourable rules of national law on recognition and enforcement of foreign judgments.

57. Though the 2018 Draft Convention does not deal with jurisdiction, the system of recognition and enforcement will depend on the jurisdictional criteria adopted by the issuing court. The authorised criteria are listed in Arts. 5 and 6 of the 2018 Draft Convention. In many cases, such criteria will be equivalent to the rules of jurisdiction found in the Brussels Ibis Regulation and the Lugano Convention. However, certain matters may give rise to different jurisdictional connections. For example, the 2018 Draft Convention requires that in contractual disputes, the courts of the place of performance have jurisdiction.[124] The place of performance is determined by reference to the parties' agreement or, failing that, the law applicable to the contract at hand. Thus, the place of performance will depend on the obligation relied upon. So, in a contract for sale of goods, if the obligation breached is the obligation to pay, the place of performance will be the place of payment. If, by contrast, the obligation breached is the obligation to deliver, then accordingly the place of performance will be the place of delivery.

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[121] See overview and chronology of the Judgments Project available at: https://www.hcch.net/en/projects/legislative-projects/judgments.
[122] Available at : https://assets.hcch.net/docs/23b6dac3-7900-49f3-9a94-aa0ffbe0d0dd.pdf.
[123] Art. 1 and 2 of the 2018 Draft Convention.
[124] See Art. 5(1)(g) of the 2018 Draft Convention.

Both the Lugano Convention and the Brussels Ibis Regulation provide for a more unitary regime for contracts for the sale of goods and provision of services whereby there is one single place of performance, irrespective of the obligation breached. For the contract of sale of goods, that is the place of delivery of goods (and never the place of payment).[125] For the contracts for provision of services, that is the place of provision of services (and never the place of payment).[126] For example, in a loan contract, the place of performance under the Brussels Ibis Regulation and the Lugano Convention will always be the agreed place of payment (rather than repayment) of the monies, and, failing that, the place of registered office of the lender.[127] Under the 2018 Draft Convention, the place of performance will depend on the obligation breached: either the obligation to pay or to repay. The place of payment of each of these obligations will be determined by reference to the governing law of the contract.

The 2018 Draft Convention does not provide any grounds of jurisdiction in respect of third states, but it does contain rules in the area of enforcement of foreign judgments. Thus, under Art 7(1)(d) of the 2018 Draft Convention, the court may refuse to recognise and enforce a judgment if it is in breach of a choice of court agreement, even if that choice of court agreement was in favour of a third state. Similarly, under Art 7(1)(f) of the 2018 Draft Convention, a judgment may be refused recognition and enforcement if that judgment is inconsistent with an earlier judgment, even if that earlier judgment emanates from a third state.

58. As anticipated, the 2018 Draft Convention presents some drawbacks:

- There are no rules on direct jurisdiction. The Draft Convention only provides eligibility requirements for the recognition and enforcement of judgments that are broadly comparable to grounds of jurisdiction under Brussels Ibis. There is no similar protection for insurance contracts as found in the Brussels Ibis Regulation(but there are protections for consumers and employees, albeit with a slightly different framework);

- The grounds for refusing recognition and enforcement of judgments under the 2018 Draft Convention are in general comparable to those under the Brussels Ibis Regulation, however in some respects they are wider than in the Brussels Ibis (e.g. judgment rendered in breach of a jurisdiction agreement);

- Interim measures of protection and decisions on procedural matters are not regulated by the Convention (Art. 3(1)(b) of the 2018 Draft Convention).

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[125] Art. 7(1)(b) first indent of the Brussels Ibis Regulation and Art. 5(1)(b), first indent, of the Lugano Convention.
[126] Art 7(1)(b) second indent of Brussels Ibis Regulation and Art. 5(1)(b) second indent of the Lugano Convention.
[127] Arts 4 and 63 of the Brussels Ibis Regulation and Arts 2 and 60 of the Lugano Convention.