The PIL consequences of Brexit

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Abstract

The UK's triggering of Article 50 TEU poses problems for the future of private international law in the UK and in the EU27. The UK's departure from the EU will end the mutual application of European private international law within the UK's legal systems and will affect the application of that EU law by the EU27 in matters concerning the UK as a new third State. After setting the problem in context, this article provides a political background to the events that led to the Brexit referendum of 2016 and to the UK's June 2017 general election; thereafter it illustrates certain problems posed by the threat of 'cliff-edges' arising as a consequence of a 'disorderly' UK exit from the European Union, finally it offers various possibilities concerning the future of private international law in the UK and in the EU. It is argued that if the beneficial aspects of the progress achieved for all European citizens by European private international law are to be salvaged from the Brexit process, both the UK and the EU must each consider most urgently the need for a realistic and undogmatic policy on the future of each other's private international law that reflects the political reality that, though the UK will soon be a third State relative to the EU27, many natural and legal persons will remain connected with the EU27 despite Brexit. It is argued that each side might usefully consider the unifying goals underlying private international law.

1. Introduction

On 29 March 2017 Mrs May's Conservative government notified the European Union (EU) that the United Kingdom (UK) wished to invoke Article 50 Treaty on European Union (TEU) with departure scheduled for 00:00 on 30 March 2019. The UK plans to synchronise this withdrawal with the repeal of its domestic legislation implementing EU law, principally the European Communities Act 1972, and the massive reapplication of domesticated versions of EU laws. This affects private international law (PIL) because the UK's departure simultaneously ends the domestic application of the different EU Regulations that from 1985 have redefined the PIL landscape across the UK's three legal systems.[1] As many EU PIL Regulations are based

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1 The most important PIL Regulations are: Regulation (EC) No. 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) ([2012] OJ L351/1) (Brussels I recast Regulation); Council Regulation (EC) No. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000 ([2003] OJ L338/1) (Brussels IIa Regulation); Council Regulation (EC) No. 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations ([2009] OJ L7/1), UK application via Commission Decision 2009/451/EC ([2009] OJ L149/73); Council Regulation (EC) No. 1346/2000 on insolvency proceedings ([2000] OJ L160/1, replaced for proceedings

on a reciprocity that the UK's domestic replication plan cannot recreate independently it seems that much EU PIL, now normal and familiar to UK lawyers used to its concepts, procedures and reciprocities, will be lost. PIL lawyers are thus confronted with the astonishing prospect of the dislocation of the UK's three legal systems[2] from EU PIL across the remaining EU and Lugano States (as of 30 March 2019) with no clear governmental plan to replace the reciprocities sacrificed to Brexit.

The PIL uncertainties are complicated by more fundamental uncertainties concerning the Brexit process caused by the UK general election of 8 June 2017.[3] Mrs May's domestic position was weakened by a result that left her in a minority government eight seats short of a majority. The UK government and its Brexit plan now depend on the maintenance of a difficult voting 'agreement' (not a formal coalition)[4] which just about delivers the parliamentary majority necessary to pass the 'Brexit legislation' if the entire 'coalition' vote with the government. Securing such obedience is now more difficult for a weakened government that must accommodate a wider range of opinions on Brexit, the Single Market and the Customs Union (e.g. accommodating its pro-Brexit Northern Irish 'agreement' partners who wish to avoid a hard border with Ireland). Brexit itself remains a divisive issue in parliament and even with the voting agreement in place, the logistics of passing the massive suite of Brexit legislation look difficult. Thanks to the election result, this legislation is also more vulnerable to amendment by the House of Lords. So great are the post-election uncertainties that it has already begun to be doubted whether the present government, even with a different leader, can technically deliver the legislation required to effect its Brexit plans in time for the March 2019 deadline.[5] The obvious 'remedy' of another general election is attended by the risk of repeating Mrs May's catastrophic result and exposing her replacement to similar political damage.

As it is uncertain that the UK can negotiate a Brexit agreement before Article 50 TEU causes it to leave the EU, the risk of the UK leaving without an agreement remains pervasive; if this occurs it will cause the UK's three legal systems to default to whatever PIL they would apply if there were no EU PIL and to treat the EU27 as third States. Unless transitional provisions prevent it, this eventuality also raises the bizarre prospect of litigation planned or commenced in the UK under EU PIL immediately defaulting to the 'common law' PIL of the relevant UK legal system on withdrawal: equally, the cross-border recognition and enforcement possibilities currently provided to the UK *by EU PIL* (and *vice versa*) would all suddenly end and compel other arrangements.

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instituted from 26 June 2017 by Regulation (EU) No. 2015/848 of 20 May 2015 on insolvency proceedings (recast) [2015] OJ L141/19); Regulation (EC) No. 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I) ([2008] OJ L177/6), UK application via Commission Decision 2009/26/EC ([2009] OJ L10/22); Regulation (EC) No. 864/2007 of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II) ([2007] OJ L199/40).

2 The UK legal systems are England & Wales, Scotland and Northern Ireland.

3 See https://en.wikipedia.org/wiki/United_Kingdom_general_election,_2017 (accessed 9 June 2017).

4 See http://www.bbc.co.uk/news/uk-northern-ireland-40239664 and http://www.bbc.co.uk/news/election-2017-40217141 (both accessed 11 June 2017).

5 See http://www.bbc.co.uk/news/election-2017-40233327 (accessed 11 June 2017) and http://www.bbc.co.uk/news/uk-politics-40243782 (accessed 12 June 2017).

These are some of the uncertainties for PIL threatened by the Brexit cliff edge; they are all unwelcome. To resolve and mitigate such uncertainties, while establishing a basis for future mutual progress, the UK and EU must each take a pragmatic and proactive approach to agreeing transitional mitigation *before* withdrawal. This article is directed to the identification and reduction of such 'transitional' issues: section 2 concerns the UK political background which led to Brexit and informs the UK negotiating position; section 3 evaluates the disclosed negotiating methodologies from the perspective of PIL; section 4 illustrates aspects of the PIL cliff edge using the Brussels I recast Regulation; section 5 suggests ways to mitigate cliff edges. The article concludes that many threatened Brexit cliff edges can be mitigated or removed if both sides adopt a pragmatic approach to the implications and realities of post-Brexit PIL in the UK and EU.

2. Political background in the UK and the Brexit decision

Though explanations of political events are usually avoided by legal articles, if the UK's conflicted position on withdrawal from the EU and its likely effect on the possible futures for EU derived PIL in UK legal systems are to be understood, one is required here.[6] The crucial political point in the UK is that despite the narrowness of the 2016 referendum result (the majority for leave was 51.89%) this advisory result does not *yet* face any effective political opposition in the UK; respect for the 2016 referendum result is central for mainstream UK political parties. The former centrist position on Europe which, despite noting imperfections, considered that there was a strong UK economic benefit for continued membership of the EU, has seemingly been displaced by the referendum and subsequent events.

On 17 January 2017 Prime Minister May indicated in a speech that she interpreted the wishes of those who voted to leave the EU to also mean that the UK must additionally leave the Single Market (to regain control over immigration and UK borders), parts of the Customs Union, and, at all costs, must leave the jurisdiction of the Court of Justice of the European Union (CJEU) to regain UK sovereignty over UK laws.[7] Mrs May's conclusions on the 2016 referendum and her 'harder' vision of Brexit dominated UK politics and set the UK Brexit agenda until the June 2017 general election that, contrary to expectations, saw the Conservatives reduced to a minority government. The present condition of the UK's Brexit agenda is unclear. It is probable that the May conclusions and the May approach to the Brexit processes and negotiations will limp-on, refined by domestic compromises needed to sustain the legislation; astonishingly this may finally include a more 'business friendly' approach. The June 2017 election result does not reject Brexit, but may be regarded as indicating a questioning of the harder forms of Brexit indicated by the May conclusions. The election liberated those who wish to argue for softer and

6 See also P. Craig, 'Brexit: A Drama in Six Acts', *European Law Review* 2016, p. 447.

7 Lancaster House speech of 17 January 2017 'The government's negotiating objectives for exiting the EU', https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech; the UK White Paper of 2 February 'The United Kingdom's exit from and new partnership with the European Union', https://www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper and letter to Donald Tusk of 29 March triggering Article 50, https://www.gov.uk/government/publications/prime-ministers-letter-to-donald-tusk-triggering-article-50 (all accessed on 10 May 2017).

less inflexible forms of Brexit. It would be premature to suggest that the May conclusions on Brexit can be dismissed, but they may now be discussed rather than accepted without demur. Prior to the election, it was impossible to even consider the so-called Norway option; now, though implausible, it can be considered.[8]

Though it may be good that domestic political factors compel the UK to reflect on what Brexit should mean for the UK, and possibly for PIL, the timing is unfortunate; negotiations began on 19 June 2017 and Article 50 TEU continues to countdown to withdrawal while the UK remains riven with political and legal uncertainty.

2.1 A background to Brexit; conflicted UK attitudes to 'Europe'

Before the UK joined the EEC in 1972, a range of UK politicians were opposed to UK membership. Subsequently they opposed the deepening of the UK's involvement with 'Europe' and the development of the EEC into the EC and then into the EU. In late 1974, during a general election called (and lost) by the Conservatives, UK membership of the EEC was still controversial enough for the opposition Labour Party to include a promise in its election manifesto to let the people tell the government whether they still wished to be part of 'the Common Market' via an advisory referendum. This referendum was held by the Labour government in 1975 and returned a 67% result that the UK should remain as a member of the Common Market. This referendum helped to cement a politically centrist position on the UK's membership of 'Europe' that, despite determined opposition from euro-sceptics, was until the 2016 referendum the centre ground common to mainstream UK political parties.

The 1975 referendum marginalised, but did not silence, those who continued to disagree with the case for UK membership of the EEC and with its political development. During the 1980s and early 1990s this opposition deepened, most notably in the ruling Conservative Party, at a rate proportional to the progress of the European programme to reform the 'dysfunctional' EEC into the more functional EU. Conservative opposition often advocated withdrawal, ostensibly to protect UK sovereignty from European 'reforms'; reform for many Conservative euro-sceptics being synonymous with further concessions of national sovereignty to what they regarded as an unaccountable and unelected Europe seeking to usurp the legitimate roles and functions of national governments. These issues gradually intensified into a general opposition inside the right-wing of the Conservative Party which grew in relevance as its parliamentary majority diminished[9] after Mrs Thatcher was ousted by members of her own party. Matters became particularly problematic for the Conservative government in the period associated with the domestic 'ratification' of the Maastricht Treaty in the UK Parliament in 1993.[10]

When in 1997 the long period in which the Conservative Party had governed ended with a landslide election for the Labour Party, the immediate political influence of the Conservative

8 See http://www.bbc.co.uk/news/election-2017-40215511 (accessed 10 June 2017).

9 Data concerning all UK election results and relative Parliamentary majorities may be found at https://en.wikipedia.org/wiki/List_of_United_Kingdom_general_elections (accessed 9 May 2017).

10 Conservative Prime Minister John Major, in an incautious moment between interviews, described three of his cabinet ministers, who had opposed the Maastricht Treaty in parliament as, 'Bastards'. See account and partial transcript https://www.theguardian.com/politics/1993/jul/25/politicalnews.uk (accessed 22 May 2017).

euro-sceptics waned and was not replaced with any significant Labour Party equivalent. The commanding majorities of the first and second Labour governments allowed it to take a policy line on Europe without facing de-stabilisation by any euro-sceptic MPs; its new policy was to increase UK influence by diluting what the UK had long seen as a Franco-German stranglehold on European policy. The UK Labour government thus supported the further expansion of the membership of the EU in 2004 to include 10 new Member States, and to admit Bulgaria and Romania in 2007.

The UK was one of only three existing EU Member States that did not seek to temporarily restrict the possibility of persons from the new 2004 Member States coming to its territory seeking work.[11] This UK decision led to the UK experiencing unexpectedly high net annual migration figures from the new Member States.[12] What some then presented as entirely unrestricted immigration from eastern Europe, unfortunately produced a significant and enduring anti-immigration (and hence anti-EU) political effect in the UK and in sections of its media.

Aspects of the strong political influence associated with this immigration effect were discernible in the 2010 election that swept the Labour Party from power[13] and in the emergence of the UK Independence Party (UKIP) as a seeming national force in the period 2012-2015.[14] Although the 2015 general election resulted in a slender majority of 16 MPs for the Conservative Party and only one UKIP MP, the *seeming* popularity of UKIP in the period prior to that election appeared to pose an existential challenge to *all* mainstream UK political parties as well as to the traditional centrist policy concerning the UK's membership of the EU.[15] Very awkwardly, UKIP appeared[16] to threaten irresistible changes in traditional political heartlands

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11 The other two Member States were Ireland and Sweden. The UK required *employers*, rather than would-be employees, to seek official permission for migrants to work for them. When Romania and Bulgaria joined in 2007 the UK *did* impose labour restrictions on migrants from these States until 2014. See http://www.bbc.co.uk/news/world-europe-25565302 and http://www.independent.co.uk/news/uk/politics/immigration-brexit-uk-eu-up-down-stats-bulgaria-romania-record-high-referendum-a7594851.html (both accessed 12 May 2017).

12 Assuming *all* Member State borders would open, the UK estimated circa 13,000 migrants per year. A conservative 2011 estimate of the actual figure (not including Bulgaria and Romania until 2014) by the UK's Office of National Statistics (ONS) was 60,000 per year. The latest version of this data shows a rise since 2012 to a peak of 80,000 per year from the eight new Member States in 2014. See https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/internationalmigration/bulletins/migrationstatisticsquarterlyreport/feb2017#immigration-to-the-uk-estimated-to-be-596000 and https://www.theguardian.com/news/2015/mar/24/how-immigration-came-to-haunt-labour-inside-story and http://www.migrationobservatory.ox.ac.uk/ (all accessed 9 May 2017).

13 For comment on the furore over EU migration caused by incautious words by Prime Minister Brown in the 2010 election campaign: see https://www.theguardian.com/politics/2010/apr/29/gordon-brown-gillian-duffy-bigot (accessed 9 May 2017).

14 See 'The Rise and Fall of UKIP' by Henry Mance, *Financial Times Weekend Magazine*, pp. 12-19, https://www.ft.com/content/c6d3528a-400f-11e7-82b6-896b95f30f58 (accessed 28 May 2017).

15 Much popularity was manifested by UKIP success in European Parliament elections. They came second in 2009 and first in 2014 (beating Labour and the Conservatives into second and third places).

16 UKIP lost catastrophically in local council elections in 2017, see http://www.independent.co.uk/news/uk/politics/local-election-results-2017-ukip-seats-brexit-latest-live-updates-tories-theresa-may-a7718826.html (accessed 10 May 2017).

at a time when no party had a significant parliamentary majority and when all faced the challenge of operating in an environment complicated by the global financial crisis. The fateful decision of Conservative dominated UK governments since 2010 to attempt to cure economic problems due to the global crisis by austerity policies, unintentionally assisted the creation of circumstances conducive to social division and to reaction against those such as EU migrants portrayed as unreasonably exploiting opportunities offered by European laws incapable of being gainsayed by the democratic intervention of UK voters.[17]

In 2013 Prime Minister Cameron sought to out-flank his Euro-sceptic critics, and UKIP, by adapting a plan to hold a referendum on the aborted European Constitution to instead promise that, if he were re-elected in 2015, there would be a referendum on continued UK membership of the EU. He was re-elected and attempted to re-negotiate aspects of the UK's obligations concerning migration, i.e. the free movement of persons, with the EU and the EU27. A draft deal was produced but it did not unify the Conservatives, did not out-flank UKIP, and did not convince enough of the population of the UK that it was better to remain inside the EU.[18]

The campaigns leading to the 2016 referendum were notoriously characterised by division, misrepresentation[19] and misunderstanding concerning the EU, and its interactions with UK political freedoms and the national identity of English and Welsh people.[20] The relatively narrow 'English' result in favour of leaving the EU did not resolve differences or heal divisions within a UK convulsed by post-referendum confusion. Theresa May was elected by the Conservative Party as its new leader and became UK Prime Minister but, after a period of stasis sustained by a refusal to entertain debate, her attempt to secure a personal mandate failed in the June 2017 election.

3. Emerging negotiating methodologies and post-Brexit PIL

The information released prior to the June election does not allow precision on the negotiating priorities and positions of the UK or the EU for matters as specialised as post-Brexit PIL. A little more clarity as to PIL intentions emerged from the EU in July and from the UK in late

17 In 2014 two serving Conservative MPs (Douglas Carswell and Mark Reckless) defected to UKIP, it was reported that there was a concern that more would follow, see https://www.theguardian.com/politics/2014/nov/19/mps-tory-party-fear-defect-to-ukip (accessed 28 May 2017). Mark Reckless lost his seat in the 2015 election and has since left UKIP. Douglas Carswell also left UKIP and declined to contest the 2017 election. UKIP presently have no UK MPs.

18 See http://www.telegraph.co.uk/news/2016/05/19/eu-deal-what-david-cameron-asked-for-and-what-he-actually-got/ and http://www.aol.co.uk/news/2016/01/17/lord-lawson-dismisses-eu-renegotiation-as-inconsequential/ (both accessed 9 May 2017).

19 Particularly concerning the £350M per week that leaving would allegedly save the UK and that could instead be spent on the National Health Service see https://infacts.org/uk-doesnt-send-eu-350m-a-week-or-55m-a-day/ and http://www.independent.co.uk/news/uk/home-news/brexit-nhs-350m-a-week-eu-change-britain-gisela-stuart-referendum-bus-a7236706.html (both accessed 17 May 2017).

20 It is notable that outside England & Wales the other parts of the UK and Gibraltar all voted to remain inside the EU e.g. Scotland (62% remain), Northern Ireland (55.8% remain) and Gibraltar (95.5% remain); see http://www.bbc.co.uk/news/politics/eu_referendum/results (accessed 9 May 2017). For age demographics etc. see http://blogs.ft.com/ftdata/2016/06/24/brexit-demographic-divide-eu-referendum-results/ (accessed 08 June 2017).

August when each published a position paper setting out aspects of their respective wishes for continued PIL cooperation.[21] It may be hoped that before this matter arises in earnest, each side will see the wisdom of reducing the issues to be resolved by encouraging the UK to accede to (or revive its involvement in) Hague conventions when this is possible.[22]

3.1 The UK negotiating position

The UK's original methodology, established by Mrs May prior to the 2017 election, was to negotiate withdrawal in parallel with a new comprehensive trade agreement. This oft repeated UK suggestion met with no approval from EU officials or the 27 Member States.[23] As the negotiations began, the UK repeated its suggestion for parallel negotiations but within 7 hours had accepted that the negotiations would follow a phased methodology.

Assuming, as seems plausible, the UK's general negotiating position continues to follow a modified version of Mrs May's conclusions, this will prevent any continued application of existing EU PIL Regulations, while allowing a spectrum of possibilities ranging from no further PIL arrangements at all, to a bespoke bilateral PIL convention. The UK's August position paper, read together with UK withdrawal plans, gives some indication of its unilateral, bilateral and multilateral PIL intentions.

The UK's Repeal Act is not just intended to repeal, but also to copy the *acquis* of EU law as it stood just before that moment in time. This is to allow the Westminster and other relevant UK parliaments to decide what of that *acquis* each wishes to adopt and adapt via secondary legislation. On the assumption that matters proceed as planned, this should allow UK legal systems to adopt and adapt those aspects of EU PIL that are essentially unilateral in their operation e.g. adapted versions of the Rome I Regulation or the Rome II Regulation. If there is no general reciprocity requirement for the basic operation of an EU PIL Regulation, it may be independently introduced in adapted form by any UK legal system and presumably will not (from the UK perspective) need to be included in the eventual PIL negotiations.

The UK cannot however produce either primary or secondary domestic legislation to replace those parts of EU PIL that require active or passive reciprocity/mutuality from other EU States. Once the UK withdraws from the EU it is a third State and must be treated as such by the EU 27 Member States. A UK legal system that tried to domestically enact a post-Brexit imitation of the Brussels I recast Regulation could not emulate the external effect of its provisions that

21 Position Paper on Judicial Cooperation in Civil and Commercial matters of 12 July 2017 TF50 (2017) 9/2 – Commission to UK https://ec.europa.eu/commission/publications/position-paper-judicial-cooperation-civil-and-commercial-matters_en (accessed 14 July 2017); Providing a cross-border civil judicial cooperation framework A FUTURE PARTNERSHIP PAPER 22 August 2017, https://www.gov.uk/government/publications/providing-a-cross-border-civil-judicial-cooperation-framework-a-future-partnership-paper (accessed 24 August 2017).

22 The options via the HCCH are discussed below.

23 See the account of a dinner meeting between Prime Minister May and Jean-Claude Junker published by the *Frankfurter Allgemeine Sonntagszeitung*, http://www.faz.net/aktuell/politik/theresa-may-jean-claude-juncker-and-the-disastrous-brexit-dinner-14998803.html?printPagedArticle=true#pageIndex_2 (accessed on 10 May 2017).

require mutuality or reciprocity from EU Member States: it seems unlikely that a UK legal system would wish to copy across EU PIL to unilaterally offer, *inter alia*, jurisdictional access, *lis pendens* privileges, and automatic recognition and enforcement procedures to EU Member States that could not reciprocate these concessions.

The uncertainties of the UK's Repeal Act methodology for PIL with reciprocal provisions were explored by the House of Lords European Union Select Committee in March 2017: it took evidence from various stakeholders and academics and questioned the Minister. The Minister's responses, as well as indicating that limitations on the possibilities of unilaterally converting EU PIL into domestic legislation may not have then been fully appreciated,[24] reveal aspects of a possible UK negotiating position and priorities concerning specific EU PIL Regulations. The Minster indicated that the Brussels I recast Regulation was regarded by those stakeholders with whom the government had already consulted as, '…essential to embed certainty and predictability for businesses particularly for those with a commercial aspect'.[25] The Minister also recognised that *aspects* of this Regulation were 'important' and confirmed that it would feature in UK EU negotiations.[26] He did not however indicate any settled government view that the Brussels I recast Regulation should wholly or even partially necessarily feature in any concluded UK EU agreement.[27] Similarly, the Minister indicated that the Brussels IIa Regulation was regarded as 'very important' and that *aspects* of its content would have to be part of the negotiations; again he indicated that the Regulation itself would not necessarily be argued for by the UK.[28] It seems that in March 2017 the UK's preferred approach to EU PIL was to negotiate new agreements and a new relationship with the EU concerning those PIL *issues* that it deems to be important.[29] The Minister's comments also left no doubt that the UK government was implacably opposed to any suggestion that the CJEU should have *any* jurisdiction over UK courts.[30]

The August position paper saw the UK refine aspects of its PIL position, contemplating unilateral introduction of legislation mirroring Rome I and Rome II, while signifying a wish to preserve as much of the status quo in civil cooperation as possible; it seems likely that its PIL priorities will probably be to explore the possibilities concerning important matters involving reciprocity that cannot be satisfactorily resolved by the UK independently. Though the potential for the UK to object to CJEU involvement in any PIL matter under discussion must be recognised, it may be that the unarguable necessity of 'finessing' the crude and unsuitable position of the Repeal Bill on the jurisprudence of the CJEU[31] will encourage the UK to sug-

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24 See e.g. pp. 20-21 paras. 59-61 and p. 31 paras. 94-98 of 'Brexit: justice for families, individuals and businesses?', House of Lords European Union Select Committee, 20 March 2017, HL Paper 134, https://www.publications.parliament.uk/pa/ld201617/ldselect/ldeucom/134/13402.htm (accessed 24 March 2017).

25 Ibid., p. 15 para. 35.

26 Ibid., p. 15 para. 36.

27 Ibid., p. 15 para. 36.

28 Ibid., pp. 26-27 para. 80.

29 Ibid., p. 39 para. 139.

30 Ibid., p. 40 para. 141.

31 See UK White Paper, *supra* note 7, paras. 2.14 and 2.16-2.17 which would freeze CJEU jurisprudence at the point of departure and (bafflingly) require every UK court – except the UK Supreme Court – to follow it blindly while ignoring all post-Brexit decisions by the CJEU.

gest the inclusion of provisions based upon Protocol 2 of the 2007 Lugano Convention in any negotiated PIL agreement.

3.2 The EU's negotiating position

The EU set out a very different negotiating methodology. The European Council issued Guidelines[32] and the European Commission issued a Recommendation plus a now Council approved Annex 1.[33] The EU wishes to negotiate in phases it has unilaterally defined and to control how and when negotiations will proceed from one phase to another. Such transitions require the EU to have determined either that the current phase is satisfactorily concluded or appears to have proceeded sufficiently towards such a conclusion.

In Annex 1, so far as is relevant, the EU envisages that the first strand of the first phase of negotiations will aim to, 'Provide as much clarity and legal certainty as possible to citizens, businesses, stakeholders and international partners on the immediate effects of the United Kingdom's withdrawal from the Union'.[34] This strand of the phase 1 plan aims to deal with the first priority of the negotiations i.e. the safeguarding of the post-Brexit status and rights of EU27 citizens and their families in the UK (and *vice versa*). After the EU decides that sufficient phase 1 progress has been made (including UK financial obligations and commitments) to reach what the EU regards as a satisfactory agreement on an orderly UK withdrawal, the EU will allow phase two of the negotiations to begin. The second phase is intended by the EU to represent a preliminary and preparatory process of identifying an overall understanding of the nature of the future trading relationship between the EU and the UK. This second phase is described by the EU as preliminary and preparatory because the EU has stated that it will only finalise and conclude second phase outcomes in a third phase held once the UK has left the EU and deals as a third State.

From the perspective of PIL it is regrettable that the EU appears to wish to leave PIL arrangements of a non-transitional nature to the second or even third phases of their negotiations. It is usually considered advantageous to minimise the issues that must be negotiated concerning matters that (e.g. the UK's departure and eventual third State status) can be assumed; certainty and negotiating progress could each be assisted by applying this principle early in the negotiations to encourage the UK to re-engage with The Hague Conference on Private International Law (HCCH).

The EU's phased arrangements are also open to the objection that aspects of PIL could unintentionally arise in each of the EU's proposed phases. The phase one focus on the polymorphic rights of EU28 citizens post-Brexit is mainly framed in terms of 'substantive' EU legal rights

32 See Guidelines adopted by the European Council at the special Meeting of the European Council (Art. 50), Brussels, 29 April 2017 EUCO XT 20004/17.

33 See Recommendation for a COUNCIL DECISION authorising the Commission to open negotiations on an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union Brussels, plus draft Annex 1, both 3 May 2017 COM(2017) 218 final. Aspects of the Annex 1 document were revised before it was accepted in Brussels, 22 May 2017 XT 21016/17 ADD 1 REV 2 BXT 24; subsequent references to Annex 1 refer to the 22 May revised version.

34 See Annex 1, ibid., p. 4. The second strand of phase 1 concerns disentangling the UK from its rights and obligations incurred when it was a Member State – it is not discussed in the Annex or by this article.

derived from a minimum number of EU laws;[35] it could however, depending upon what is ultimately included in the non-exhaustively defined concept of '*status and rights derived from Union law*'[36] also involve or affect various aspects of EU PIL in UK or EU27 legal systems. The EU has previously been expert in expanding its competence over areas of PIL that relate tangentially to the citizen's interaction with the internal market; it may find that it is not only difficult but also inadvisable to exclude the PIL it has created for EU citizens from phase 1 negotiations.[37]

The EU's position on post-Brexit PIL concerning subsequent EU and UK arrangements appears to be that the EU only wishes to negotiate on this matter when the UK is a third State; hence, the EU position set out in the Council Guidelines and in Annex 1 does not proceed on the basis that the EU explicitly wishes the UK to retain *any* non-transitional EU PIL after its withdrawal. The tenor of the EU's opening position from the pre-negotiation material appears to be as follows; as the UK has opted to leave the EU it has also opted to leave the EU's PIL, it follows that there is no reason for the UK to participate further in any EU PIL post-withdrawal other than in relation to the sort of protective transitional arrangements proposed by the EU[38] as follows:

a) 'The Withdrawal Agreement should ensure that the relevant provisions of Union law on jurisdiction, recognition and enforcement applicable on the withdrawal date continue to govern judicial proceedings and procedures in civil and commercial matters *pending* on the withdrawal date.'[39]
b) 'The relevant provisions of Union law applicable on the withdrawal date establishing the Member State whose *courts are competent* should continue to govern all legal proceedings instituted before the withdrawal date.'[40]
c) Continue the application of EU law (as at the date of withdrawal) for choices of forum and law agreed *before* the withdrawal date *after* the withdrawal date.
d) Protect the recognition and enforcement possibilities of judgments between the UK and the EU27 (and *vice versa*) in 'civil and commercial matters' that were 'handed down' *before* the withdrawal date by continuing the operation and application of EU PIL (in this respect) *after* the withdrawal date in the EU and UK.

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35 For example, Annex 1, p. 9 para. 21(b)(ii) attempts to preserve the single applicable law approach used in Regulation (EC) No. 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems ([2004] OJ L166).

36 See Annex 1, p. 5 and p. 8 para. 20 envisages that these rights – which include nascent and later vesting rights such as residence requirements (even if acquired after withdrawal) and pension entitlements – will be directly enforceable vested rights that should endure for the duration of the life time of 'those concerned'. The definitions provided in para. 21 however only specify the *minimum* classes of natural persons and *minimum* specific rights and obligations.

37 Consider the PIL provisions protecting weaker parties dealing with insurance companies (that may well also provide pensions) or consumers or employees.

38 See Annex 1, p. 14 and EU Commission's Position Paper on Judicial Cooperation in Civil and Commercial Matters (Position Paper) of 28th June 2017, https://ec.europa.eu/commission/sites/beta-political/files/essential_principles_judicial_cooperation_in_civil_and_commercial_matters.pdf (accessed 29 June 2017).

39 Position Paper, ibid., p. 2 (emphasis added).

40 Ibid., original emphasis.

e) Ensure the continued application of EU PIL, as at the withdrawal date, in judicial cooperation proceedings pending at the withdrawal date until they are completed, assuming they have reached a yet to be agreed procedural stage by the withdrawal date.[41]

At present the EU is proposing a limited transitional continuity for matters deemed to be ongoing in relation to its existing PIL Regulations that involve the post-Brexit UK. There is no indication of any EU desire to consider PIL during phase 1 to establish a post-Brexit PIL arrangement with the UK while it remains a Member State. This apparent indifference may however alter if phase 2 and phase 3 of the negotiations are reached and a comprehensive trade deal between a third State UK and the EU becomes plausible.[42]

Though the EU's transitional PIL proposals seem, subject to necessary clarification, to identify the most problematic transitional areas it must be wondered whether they can be seriously intended to apply as specified in what will then be third State UK legal systems. With respect, aspects of the EU's phased methodology appear inconsistent: the EU gives the impression of treating the UK as a third State before it has departed the EU but of not doing so once the UK has left (and must somehow remain subject to aspects of EU law). This is unfortunate, transitional provisions are very important for those who may otherwise find that the Brexit process has removed vital aspects of the PIL that should allow them to depend on private law throughout the EU27 and the UK; it is however pointless to propose transitional provisions so discordant with political reality that they cannot be agreed.

Equally, the EU's explicit desire to preserve the CJEU's competence over transitional PIL issues in and affecting the UK post-Brexit may prove difficult for the UK.[43] This is symptomatic of a broader mutual problem between the EU and the UK on CJEU competence post-Brexit: the EU struggles with the implications of a return of sovereignty consequent on an Article 50 TEU departure,[44] while the UK struggles with the consistent drawing of its red-line on the jurisdiction of the CJEU over UK laws and courts. It remains to be seen whether the negotiating parties can address and 'finesse' these issues, which extend far beyond PIL matters, to accommodate each other's perspectives and legal requirements to allow progress towards an orderly and enforceable agreement.[45]

41 Ibid., the judicial cooperation procedures are listed on p. 3 of the Position Paper and include Regulations 1206/2001, 804/2004, 1896/2006, 861/2007, 1393/2007.

42 The EU is seemingly interested in promoting the revival of UK external competence, but apparently only when the UK is a third State; see Annex 1, *supra* note 33, p. 7 para. 18.

43 Position Paper, *supra* note 38, p. 2 under General Principles.

44 See strong criticism of the EU negotiating position on attempting to continue EU law and CJEU influence in the UK post-Brexit by F. Dehousse (former CJEU judge for Belgium) at http://www.egmontinstitute.be/publication_article/eu-exaggerating-in-its-demands-for-brexit/ (accessed 2 June 2017).

45 Particularly given the EU's contemplated enforceable final agreement that contains an internal dispute settlement mechanism designed to be administered by the CJEU (or by an alternative body that offers equivalent guarantees of independence and impartiality to those of the CJEU and will apply/take due account of CJEU case law). See Annex 1, *supra* note 33, p. 17 paras. 42-43 and p. 15 para. 35(c).

4. An assessment of the nature and extent of the possible cliff edges following Brexit

The UK's withdrawal from the EU will occur on 29 March 2019 and, at 00:00 on 30 March 2019, the UK becomes a third State as far as the EU is concerned. Negotiations between the EU and the UK's new government (elected 11 days earlier) began on 19 June 2017. The profound and continuing differences between the preferred negotiating processes and apparent negotiating goals of the UK and the EU scarcely seem auspicious. The probability of difficult and protracted negotiations related to, but separate from, the automatic departure promised by Article 50 TEU has given rise to speculation concerning the nature of the cliff edge potentially faced by those involved in or contemplating litigation involving the UK.[46]

A cliff edge arises because Brexit causes the PIL contained in an EU Regulation to cease to apply to proceedings conducted in the UK (or causes the UK to be treated as a third State in proceedings conducted in the EU27) before a satisfactory PIL alternative can be provided: the cliff edge variously refers to threatened *uncertainties* in such litigation. Such cliff edges are man-made phenomena that therefore can also be mitigated by human endeavour if those with the opportunities to avoid or minimise the problems will do so during the Brexit process.

What then in the Brexit process is likely to cause such cliff edges to arise in a fashion that is truly, rather than theoretically, problematic? At present the most dramatic cliff edge threat is posed by the prospect of negotiations between the UK and the EU breaking down in circumstances that lead to a Brexit with no agreement and relations soured on each side. Unfortunately, the prospects of such an eventuality are quite real: incompatibility between the proposed negotiating procedures, certain 'optimistic' proposals from the EU,[47] and political uncertainties in the UK may each delay or obstruct a negotiation that is conducted at the same time as the Article 50 countdown but is separate from it.

4.1 The PIL implications of a Brexit cliff edge

The prospect of the sudden disapplication of all EU PIL Regulations, with no PIL agreement, at the withdrawal date has led to speculation concerning the possibility that earlier examples of European PIL concluded by Conventions between the then EEC Member States could potentially revive (despite the UK's third State status following its withdrawal) to allow the UK the limited option of using the Brussels Convention, as it stood prior to its replacement by

46 A. Dickinson, 'Back to the Future: The UK's EU Exit and the Conflict of Laws', *Journal of Private International Law* (12) 2016, p. 195; B. Hess, 'Back to the Past: Brexit und das europäische internationale Privat- und Verfahrensrecht', *IPRax* 2016, p. 409; R. Aikens and A. Dinsmore, 'Jurisdiction, Enforcement and the Conflict of Laws in Cross-Border Commercial Disputes: What Are the Legal Consequences of Brexit', *European Business Law Review* (27) 2016, p. 903; A. Briggs, 'Secession from the European Union and Private International Law: The Cloud with a Silver Lining', Speech to the Commercial Bar Association 24 January 2017, available from https://www.blackstonechambers.com/barristers/adrian-briggs-qc-hon/ (accessed 10 May 2017).

47 See Annex 1, *supra* note 33, paras. 20-22 on directly enforceable lifetime vested legal rights and qualifications for EU citizens; paras. 23-30 generally on a financial settlement which has varied (according to different non-UK parties) from circa €35Bn to €100Bn then back to €40Bn during the writing of this article; and paras. 39-43 concerning the jurisdiction of the CJEU over the hoped-for agreement.

the Brussels I Regulation.[48] Similarly, the revival potential of the Rome Convention of 1980 has been considered. Lack of space prevents detailed discussion of the public international law difficulties surrounding these possibilities, but there are additional strong reasons to doubt the future utility of the Brussels Convention to the UK's legal systems once the UK has left the EU.

If, which must be doubted, the UK or a party within the UK (which may be doubted even further) were to wish to respond to a cliff edge Brexit by seeking to make use of the Brussels Convention, it would be necessary for it to establish that the convention was still operative (in the senses required for its multilateral operation) and then to establish that, post-Brexit, the UK remains a participating party in that convention. Arguments can be made for and against either proposition using the convention itself and the general principles of public international law enshrined in the 1969 Vienna Convention on the Interpretation of Treaties. All such arguments (and any suggested conclusions) are however necessarily tentative because the EU is a *sui generis* body that does not 'fit' into the State defined scope of the 1969 Vienna Convention.[49] Equally, the precise scenario contemplated in relation to Brexit, involving a convention entered into by Member States of such a *sui generis* body as the EU (which has itself since significantly morphed from the EEC into the EU), has never arisen in either public or private international law. Accordingly, even to resolve these issues in the UK it would be necessary to legislate or litigate. Assuming resolution in the UK, it would then be necessary to resolve the matter *again* in whichever other State was involved; in many such States a reference to the CJEU would then transpire.[50] Even subject to the matters omitted to allow this implausible argument to proceed, not the least of which are the twin assumptions that: a) the jurisdictional provisions of such an old convention might somehow apply instead of the common law or any post-Brexit replacement jurisdictional rules adopted in the relevant UK legal system and, b) that the procedure to operate the old convention rules survives in the other convention State. It is difficult to imagine any client willing to contemplate a legal process that is more complicated than just proceeding in another venue (or enforcing there on third State terms).

All in all, the revival arguments concerning EEC arrangements appear to be of little practical use to Member States who leave the EU.[51] Equally, the UK's proposed Repeal Act method-

48 See authors cited in footnote 46.

49 The Vienna Convention on the Law of Treaties of 23 May 1969 (in force 27 January 1980), https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en; if an international organisation is involved see the Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations of 21 March 1968 (not yet in force and unsigned by the EU), https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXIII-3&chapter=23&lang=en (both accessed 7 June 2017).

50 If the CJEU differed with the UK court on the revival of the old convention the other Member State could not proceed. A further point is that if revival occurred it would also present the UK with obligations concerning the interpretative role of the CJEU in relation to the relevant convention protocol. This is another reason to doubt the practical relevance of the revival argument.

51 There may be marginally more utility in the earlier bilateral conventions that applied to mutual recognition and enforcement between the UK and other countries who are now EU Member States: Austria (14 July 1961); Belgium (2 May 1934); France (18 January 1934); Germany (14 July 1960); Italy (7 February 1964); the Netherlands (17 November 1967); and Norway (12 June 1961) for texts search date and State at https://www.gov.uk/guidance/uk-treaties (accessed 4 April 2017).

ology concerns the re-application of *current* EU law into domestic legislation; the revival of the Brussels Convention would be inconsonant with this policy.

Having dismissed the revival eventualities, it is possible to illustrate certain aspects of the cliff edge posed in the UK and in the EU concerning Brexit and the operation of the Brussels I recast Regulation.

4.2 The PIL cliff edge illustrated in hypothetical Brussels I recast proceedings

Assume that a commercial contract was drafted in 2016; the contract, which may not otherwise be particularly connected with the UK, contains an exclusive choice of court agreement nominating the English court. In early March 2019, a dispute between the parties leads to the commencement of legal proceedings before the High Court in London based on Article 25 of the Brussels I recast Regulation. On 30 March 2019, the UK has left the EU. Assuming there is no EU/UK arrangement on this matter,[52] what effect will Brexit have on this legal procedure?

The internal aspects of the potential cliff edge depend on whether, and if so how, the English procedural law was amended in the run-up to Brexit. As the current plan to domestically replicate EU laws appears unsatisfactory if the EU law requires reciprocity, it is presently uncertain what form any such replication might take in relation to provisions (such as Article 25 Brussels I recast) that do involve reciprocity. How will the internal UK disapplication of the Brussels I recast Regulation (caused by Brexit) affect the continuation of the case in London?

If the English legal system has no new legislative provisions to seamlessly provide a statutory basis for the continuation of litigation in England & Wales commenced while the EU PIL Regulations were operative, it seems that the litigation must probably default to governance by the English common law and its procedural rules at 30 March 2019.[53] In one sense this is unproblematic, UK courts are familiar with the proper treatment of exclusive choice of court clauses. If, however, the litigation is now governed by the common law and its procedures, does this not mean that formerly forbidden common law procedural possibilities (such as *forum non conveniens* and anti-suit injunctions) are now again available to each side in the proceedings?

The UK presently treats EU PIL as a special category of law and procedure that, when its temporal and subject matter scope are engaged, prevails over domestic PIL laws and procedures. The domestic law and procedure are thereafter only of residual relevance in matters where the Regulation does not apply at all. The logical consequence of Brexit is not merely that the EU PIL law will cease to apply in the UK, it is also that the special category employed by UK legal systems to keep 'common law' PIL and procedures apart from EU PIL will collapse. Lawyers and courts will therefore be immediately presented with procedural possibilities and arguments that previously would have been impossible in the UK because of the pre-Brexit distinction between EU and common law PIL and procedures. Though it is not suggested that this matter is intractable, it is truly novel and must be carefully addressed if it not to throw-up unexpected issues during litigation which concern litigation and *events* that straddle 30 March 2019.

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52 The EU's PIL Position Paper, *supra* note 38, proposes that EU PIL should remain in force on this issue as at the date of withdrawal, see p. 2.

53 See O. Jones, *Bennion on Statutory Interpretation*, 6th edn., London: LexisNexis, section 89 concerning s. 16(1)(a) of the Interpretation Act 1978 at p. 284.

To return to the hypothetical example, how will the English court react to applications lodged over the weekend of 30 March 2019 in which the claimant requests the issuance of an anti-suit injunction (to prevent the defendant from proceeding against it before an EU27 court), while the defendant requests instead that the re-awakened common law discretion to decline jurisdiction over the dispute be exercised in its favour because, post-Brexit, London is no longer an appropriate forum for a matter that (it asserts) was intended by both parties to be litigated *and enforced* within the EU and that has relevant connections to at least one *current* EU Member State?[54]

Though the English courts might instinctively wish to prevent the parties to cases commenced prior to the withdrawal date from 'exploiting' the transitional possibilities contingent on Brexit reawakening the common law, this instinct is one that should be examined carefully prior to being subsumed within the flexible common law discretions which will then be available. Even if it should prove to be regrettably bereft of transitional provisions, the Brexit process and the reawakening of the English common law threaten no retrospective or discriminatory application of laws and procedures to potential litigants.[55] In the absence of transitional arrangements a post-Brexit English court cannot continue to hear the case using pre-Brexit EU PIL or domestic procedures relating thereunto; an English court will have to accept the implicit revival of the common law because of the deliberate legislative cessation of EU law and EU PIL as from the withdrawal date. Such a court can thereafter presumably identify and consider all relevant factors concerning either the award of an anti-suit injunction or the grant of stay (or associated relief) concerning a *forum non conveniens* application which is wholly or partially motivated by compelling Brexit considerations.[56]

The reactions of the courts in the EU27 must also be considered. If it is to be effective, the exclusivity of an Article 25 choice of court clause must be respected throughout the EU Member States. Article 25 makes this mutual respect conditional on the parties having agreed that a court of *a Member State* is to have jurisdiction over the dispute. In 2016 the parties in the example above did agree this. In 2019 however the UK ceased to be a Member State.[57] What will the EU27 understand to be the effect on EU PIL of the UK's status change from Member State to third State? The obvious answer is that as, post-Brexit, EU law and PIL will cease to apply in the UK, therefore the UK must be treated as a third State and no longer included as a Member State in EU PIL provisions including, but not limited to, Article 25 Brussels I recast Regulation. The fact that the EU has proposed to attempt to protect ongoing litigation, choices

54 Concerning anti-suit injunctions and *forum non conveniens* applications in England & Wales see *Dicey, Morris & Collins on the Conflict of Laws*, 15th edn, London: Sweet & Maxwell, chapter 12; for Scotland see P. Beaumont and P. McEleavy, *Private International Law*, 3rd edn., Edinburgh: W. Green 2011, chapter 8.

55 Brexit will cause EU PIL Regulations to stop applying in the UK; neither the 'dematerialisation of EU law' nor the domestic replacement of law from a given date involve the retroactive application of law. Though we are 'returning' to the common law it can only (assuming there to be no domestic legislative replacement) be a return to the common law as at 30 March 2019.

56 For further discussion on the general topic see M. Ahmed, 'BREXIT and English Jurisdiction Agreements', *European Business Law Review* (27) 2016, p. 989.

57 Equally, by Art. 25(1) if the substantive validity of the agreement is questioned it is the law of '*that Member State*' (emphasis added) which determines this validity.

of forum and law (*inter alia*) post-Brexit by its Annex 1 transitional PIL proposals[58] supports and reinforce this conclusion: there is no need to propose transitional provisions if there is no danger.

The need for joint transitional provisions can be illustrated by exploring aspects of the probable post-Brexit consequences in the EU27 for litigation commenced, but not concluded, in the UK under the Brussels I recast Regulation. Because the EU's PIL Regulations were not drafted to accommodate the departure of a Member State, they contain no transitional provisions for situations when events and matters awkwardly straddle a departure date. This absence poses a range of problems which may, but hopefully will not, lead to multiple and uncoordinated legal proceedings during the transitional period. One aspect of this problem is due to the 'imperative' conception of jurisdiction associated with EU PIL Regulations. If a Member State court finds that it has jurisdiction under the Brussels I recast Regulation, it *must* take that jurisdiction unless another part of the Regulation allows or compels an alternative response. If the defendant in the hypothetical English litigation discussed above attempts to litigate in one of the EU27 Member States, post-Brexit, using Article 7(1) of Brussels I recast and argues successfully that the Article 25 choice of court clause is now ineffective because the UK has left the EU, the Member State court must accept the case if that jurisdictional basis is available.[59] Without contrary transitional provisions[60] there can be no use of the established *lis pendens* rules in Articles 29 or 30 as each requires *two* Member States and, post-Brexit, there will only be *one* on these assumed facts.

The UK's transformation into a third State, post-Brexit, may however activate a partial solution for the EU27 court faced with the abovementioned transitional scenario. The recasting of the Brussels I Regulation – which took account of the existence of the 2005 Hague Convention on choice of court agreements[61] – led to the introduction of two modified *lis pendens* provisions which sometimes allow a Member State court a discretion to stay its proceedings in favour of proceedings already pending in a third State.[62] The requirement that third State proceedings be pending means that if the party wishing to sue in the third State loses the race to initiate proceedings to the party who wishes to sue in the EU, the first seised Member State court cannot *then* grant a stay in favour of any third State court. Additionally, only certain forms of Regulation jurisdiction will allow the discretion to arise. To establish its discretion under either Article 33 or Article 34, the court must be confronted with jurisdiction based on Articles 4, 7,

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58 Annex 1, *supra* note 32, paras. 33 and 33 and PIL Position Paper, *supra* note 38.

59 Case C-281/02 *Owusu v. Jackson* [2005] ECR I-1383, *NIPR* 2005, 152 (if considered strictly) forbids a Member State court exercising any implied discretion over a jurisdiction allowed without express discretion by an EU PIL provision.

60 Such as those proposed by the text associated with footnote 40, *supra*.

61 The EU adopted the Hague Convention on choice of court agreements of 30th June 2005 for its Member States in June 2015, since 1 October 2015 this convention is in force. Once the UK leaves the EU it ceases to be included in the EU's 'membership' and so must independently ratify the convention if, as expected, it wishes to benefit from it.

62 Arts. 33 and 34 of Regulation 1215/2012 (supported by Recitals 23 and 24). See Magnus/Mankowski/Fentiman, *Brussels Ibis Regulation*, Cologne: Otto Schmidt 2016, Arts. 33 and 34; A. Briggs, *Private International Law In English Courts*, 1st edn., Oxford: OUP 2014, 4.351-4.373; P. Rogerson, 11.66–11.93, in: A. Dickinson and E. Lein, *The Brussels I Regulation Recast*, 1st edn., Oxford: OUP.

8 or 9 of Brussels I recast, and must be satisfied that proceedings are already pending in a third State. The exercise of this discretion is not however without restriction. Under Article 33,[63] the court must expect that the eventual third State judgment will be capable of recognition and (usually) enforcement[64] within its own Member State, and, must be satisfied that the stay 'is necessary for the proper administration of justice'.[65] Any stay may be withdrawn if the third State proceedings are: stayed or discontinued; or unlikely (in the estimation of the Member State court) to be concluded in a reasonable time; or if the continuation of Member State proceedings is required (again in the estimation of the Member State court) for the proper administration of justice.[66]

Although Article 33 can offer a potential solution to the jurisdiction problem sketched above, it does so without providing anything like the level of certainty that the parties would be entitled to expect from litigation involving only EU Member States e.g. in relation to enforcement. Uncertainty is inherent in the novelty of Articles 33 and 34 and in their operation by different Member State courts, all of which (including those in the UK) are unused to employing these new but circumscribed EU PIL discretions; references to the CJEU to clarify when to stay or recommence *in accordance with the Regulation* must be expected.

Brexit may add to the uncertainties connected with Articles 33 and 34 of Brussels I recast. Consider a claimant who would (as per the example above) proceed in the UK via an Article 25 choice of court agreement but who is beaten to court by one day by a party who commences in another Member State via Article 7(1). While the UK is an EU Member State, the Article 25 agreement and London venue will be protected by an automatic stay granted in the other non-UK Member State by Article 31(2).[67] After Brexit, as the UK is no longer a Member State for either Article 25 or Article 31(2), what becomes of the automatic stay? Presumably it lapses, though local procedural rules may complicate this conclusion, and presumably the remaining Member State court is then regarded as *again* seised with jurisdiction under Article 7(1). Is that court therefore precluded, because it was first seised (despite the Article 31(2) stay) while the UK was a Member State, from then employing Articles 33 or 34 to re-impose (or to continue) a stay in favour of the forum selected by the exclusive choice of court agreement in the nominated State which (because of Brexit) is no longer a Member State but is now a third State? If this question arises, a reference to the CJEU (or judgments with a potential to conflict) is likely.

These theoretical examples do not come close to exhausting the possibilities concerning the issues which could arise once the UK becomes a third State for the purposes of EU PIL. Rather than wearying the reader by leporine multiplication of examples, it is suggested that

63 Art. 34(1)(a) (in the context of related actions) adds the requirement that before the Member State court exercises its discretion to stay, it must first determine that it is expedient to hear the related actions together to avoid the risk of irreconcilable judgments; if so the recognition and enforcement point and whether a stay is necessary for the proper administration of justice then follow.

64 It is presently unclear how this requirement is to be interpreted.

65 Recital 24 indicates that the proper administration of justice is a wide-ranging concept that includes within all the circumstances of the case the evaluation of the progress of the proceedings in the third State.

66 Art. 34 adds the possibility of the Member State court concluding that there is no longer a risk of irreconcilable judgments.

67 Art. 31(2) of Brussels I recast reverses aspects of Case C-116/02 *Erich Gasser GmbH v. MISAT Srl* [2003] ECR I-14693, *NIPR* 2004, 36 to discourage opportunistic torpedo actions.

the scenarios outlined above indicate that realistic transitional provisions by the EU and by the UK must be singly and jointly employed to reduce the potential for anticipated uncertainties associated with Brexit.

It is worth repeating that such transitional provisions must be realistic. Post-Brexit, EU PIL will regard the UK's three legal systems as third States and this view will be reciprocated. Thus, the EU's stated desire to 'indefinitely' preserve the existing possibilities for recognition and enforcement of judgments delivered under EU PIL provisions after Brexit has occurred is unrealistic.[68] Post-Brexit the EU must deal with the UK legal systems as third States. Without a continuing mutual PIL arrangement between the EU and the UK, the EU cannot after Brexit expect the UK to indefinitely continue to recognise or enforce pre-Brexit judgments;[69] nor can it expect that such recognition or enforcement as may be agreed will necessarily proceed via EU PIL after 30 March 2019. Similar difficulties arise in relation to the EU's stated desire to ensure that civil proceedings currently subject to EU PIL will be, '…governed until their completion by the relevant provisions of Union law applicable before the withdrawal date'.[70]

Though the UK could agree to these proposals, why should it do so? Is the theoretical mutuality during the transitional period enough of an incentive to override the political consequences? Why should the UK agree to tolerate the difficulties of re-accommodating a wide category of EU 'judgments' alongside the narrower confines of a differently operating post-Brexit common law or accept the difficulties of defining when litigation has reached 'completion'; while also agreeing to tolerate the preservation of a supervisory and interpretative role for the CJEU in post-Brexit legal proceedings conducted in the UK? The EU's transitional proposals need only to be reversed to demonstrate their incompatibility with the political reality that the UK will be a third State as of 30 March 2019. Regardless of how much this matter is regretted, this is the political reality. After the withdrawal date, the UK must be treated by the EU as a third State. From the perspective of PIL this means that any transitional solutions that require continued *joint* participation must adequately reflect the probable third State status of each negotiating party to the other.

5. Suggestions to mitigate the PIL cliff edges

Though it is unclear what form the post-Brexit PIL relations between the UK and EU will assume, this PIL relationship must reflect the probability that the legal systems of each will relate to those of the other as third States. It is therefore for this eventuality that each side of the negotiations should prepare. Such preparations should not be confined to the negotiations but should also be explored by the EU and the UK on an independent basis to ensure that if the unwanted disorderly Brexit should arise, whether by negotiations breaking down or overrunning, there is a 'plan B' for the legal systems on each side to dictate how PIL will work as of 30 March 2019.

68 Annex 1, *supra* note 33, para. 33.

69 At present, only 'judgments' are contemplated; authentic instruments (particularly those associated with securing loans on second houses) and court settlements may however also be relevant.

70 Annex 1, *supra* note 33, para. 32.

5.1 Mitigation of the cliff edges via public international law and the HCCH

The first point is that when the UK leaves the EU it apparently does so free of public international law obligations consequent solely upon its former membership of the EU.[71] There is no compelling reason for the UK remaining subject to treaties the EU negotiated (using its exclusive competence) once the UK ceases to be a Member State.[72] Such continuation would require the drawing of an unusual analogy with the public international law concerning State succession to treaties; this analogy lacks any precedent inside (or outside) the EU and is vulnerable to various objections including the EU's status as an 'international organisation' (not *'a State'*)[73] with an inherently fluid membership. Such fluidity is routinely reflected in the terms of the international treaties exclusively negotiated by the EU that apply to its 'Member States'. Though it may be wondered if a member of an international organisation can abandon treaty obligations by exiting the organisation, it is suggested that, in this context, this is correct.[74] If treaties are negotiated by an organisation to bind *members* of that organisation; the natural effect of departure from that organisation is the termination of the departing member's consequential treaty obligations. It would be strange indeed to allow the post-Brexit UK to benefit from treaties concluded exclusively between the EU and third States as if it were still an EU Member State.

The most immediately relevant international law body for the UK's efforts to mitigate the EU PIL abandoned by Brexit will be the HCCH. The EU is also active in the HCCH and has based significant parts of its PIL Regulations on earlier HCCH conventions to which it is now a party. Since the EU acquired the exclusive competence to adopt Hague conventions its Member States have been technically incapable of independently participating in older Hague conventions to which they were already parties and from independently ratifying new Hague conventions. The return of the UK's external competence after Brexit will allow it to revive its independent involvement in earlier Hague conventions and also to exploit newly available Hague conventions to fill post-Brexit PIL gaps with laws that are close to EU PIL: e.g. it has been persuasively argued that, with the important exception of jurisdiction concerning divorce, most of the issues covered by the EU PIL Regulations concerning aspects of family law currently applicable in the UK may be relatively simply replaced by the UK ratifying (or again independently following) Hague conventions of at least equivalent utility and effect to the abandoned EU 'family' PIL.[75] If the EU is persuaded that UK ratification of such HCCH

71 If the UK participated in a convention together with the EU and third States this will require the UK to decide if it will continue or withdraw on a case by case basis. See blog discussion by J. Odermatt, 'Brexit and International Law', https://www.ejiltalk.org/brexit-and-international-law/ (accessed 17 June 2017).

72 Odermatt, *supra* note 71.

73 Art. 1 on the scope of the Vienna Convention on Succession of States in respect of Treaties 1978 only concerns 'States' and not arrangements between States and international organisations.

74 The question is noted by Odermatt, *supra* note 71.

75 The UK could address many 'family law' issues by ratifying (or re-activating) Hague conventions to which involve the EU and that have been used as models for its Regulations. See P. Beaumont, 'Private international law concerning children in the UK after Brexit: comparing Hague Treaty law with EU Regulations', Working Paper No. 2017/2, https://www.abdn.ac.uk/law/documents/CPIL%20Working%20Paper%20No%202017_2.pdf (accessed 20 May 2017).

conventions is sufficient to protect EU citizens this should mean that the cliff edge for EU family PIL will only pose significant problems for divorce jurisdiction. The loss of a common UK EU PIL provision on divorce jurisdiction is not trivial, but this cliff edge is less daunting than attempting to replace *all* EU PIL concerning family law.

Similar points concerning the partial mitigation of cliff edges associated with the Brussels I recast Regulation can be made concerning the UK ratifying the 2005 Hague Choice of Court Convention. As the EU is a party to this convention, a synchronised UK ratification could offset some post-Brexit uncertainties for EU PIL associated with choices of jurisdiction and the subsequent recognition and enforcement of the 'commercial contracts' covered by this convention. As the coverage of the 2005 Convention is narrower than the Brussels I recast Regulation there would still be significant cliff edges to mitigate, some of which could be addressed if the UK applied to join the 2007 Lugano Convention (see below) or, in the longer term, by a UK ratification of the expected Hague Judgments Convention.

Clearly it is not an option for the UK to replace all EU PIL Regulations[76] by ratifying an equivalent Hague convention, but when this possibility is available, a UK ratification synchronised with the Brexit withdrawal date would not only assist UK and EU citizens by mitigating aspects of given cliff edges but would also allow a considerable number of transitional PIL issues to potentially be resolved outside of the negotiations. Hopefully the UK and EU will each recognise the advantages of synchronised UK ratification of HCCH conventions and act to facilitate this.

5.2 Individual mitigation by the UK and by the EU

It would be prudent for the UK to swiftly enable the parties responsible for drafting the civil procedure law in each UK legal system to turn their attention to the procedural mitigation of unwanted Brexit scenarios. The directly effective nature of EU PIL Regulations and the unusual domestic nature of their anticipated 'dematerialisation' post-Brexit each require thought if post-Brexit legal procedure is to be effective as and *when* intended.[77]

As well as refining its phase 1 PIL transitional provisions by its PIL Position Paper, the EU could also usefully attempt to offer unilateral clarifications (e.g. via the European Judicial Network) concerning the advised effect of Brexit on EU PIL Regulations which specify the involvement of a 'Member State' that Article 50 TEU has awkwardly converted to a third State before any withdrawal agreement between the UK and EU can be reached.

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76 For example in the context of insolvency it is arguably the EU that lags behind the UK because it has not adopted the 1997 UNCITRAL Model Law on Cross-Border Insolvency; see L. Carballo Piñeiro, 'Brexit and International Insolvency beyond the Realm of Mutual Trust', https://www.abdn.ac.uk/law/documents/CPIL_Working_Paper_No_2017_1.pdf (accessed 01 June 2017).

77 Brexit raises unusual time-factor issues; on withdrawal, UK legislation will prevent reference to EU PIL and procedures that were formerly directly effective and referred to (e.g. by the Civil Jurisdiction and Judgments Act 1982 (etc.)) but were not otherwise part of UK law.

5.3 Joint mitigation by the UK and EU

The best joint mitigation would be a well drafted Brexit agreement, operating as of the withdrawal date to obviate the need for even short-term transitional provisions. Assuming however that transitional provisions are required, and that those already put forward by the EU are not rejected out of hand by the UK, the question becomes how to revise the EU's transitional PIL proposals to encourage their early adoption. As suggested above, it is advisable for both parties to appreciate the areas of PIL that require negotiated transitional provisions: with respect it is unnecessary to propose such provisions for *all* EU PIL. The transitional provisions should better reflect the 'extraordinary' nature of the continuation of EU law within the UK post-Brexit; the need for EU sensitivity on this point is as obvious as the need for the UK to propose compromises leading to transitional provisions limited in time and scope and potentially allowing but not *requiring* the oversight of the CJEU *in the UK*.

A further, politics dependent, option for joint mitigation would be for the UK and EU to swiftly consider the possibility of the UK applying to join the 2007 Lugano Convention via the 'open-door' offered by Article 70(1)(c) and Article 72.[78] If synchronised with withdrawal, this would allow the UK to replace aspects of the Brussels I recast Regulation with a version of the Brussels I Regulation that features what in practice (if not in theory) is a less dominant role for the CJEU. A UK application no longer requires invitation or sponsorship but does require unanimous consent from the contracting parties (EU, Denmark, Iceland, Norway, Switzerland). Hopefully consent would not be withheld merely because the UK was to leave the internal market, if however the manner of the UK's departure was acrimonious, EU consent might become problematic.

6. Conclusion

This article has attempted to explain the events that led to the Brexit referendum in 2016 and that since that date have led the UK and the EU ever closer to the unhappy prospect of a Brexit cliff edge without the partial consolation of a negotiated exit agreement and subsequent trade agreement. Respective negotiating strategies and proposals have been evaluated, certain 'transitional' problems illustrated, and suggestions have been offered to mitigate the cliff edges that could materialise across EU PIL from 30 March 2019 for the UK and for the EU27.

Apart from its propensity to create cliff edges, the impact of Brexit on PIL in the UK and EU is not yet clear; should it concern us? In one sense, such cliff edges are a normal consequence of the interaction of different bodies of private law (and PIL) during the assertion of private law rights with a foreign element. Considered from this lofty perspective, all that Brexit means for PIL is that the legal systems of the UK and those of the EU27 Member States must again treat each other as 'foreign' and lose further access to the common rules and principles of EU PIL that formerly removed many tiresome PIL formalities and incompatibilities *inter se*. This

78 See Pocar Report on 2007 Lugano Convention paras. 187-189 [2009] OJ C 319/1 and T. Domej, Arts. 70-73, in: F. Dasser, P. Oberhammer, *Lugano -Übereinkommen (LugÜ)*, 2nd edn., Bern: Stämpfli Verlag AG 2011. For the Art. 70(1)(a) option of the UK re-joining EFTA see Hess, *supra* note 46, the second option Hess discusses appears to be based on the 1988 Convention and does not apply to the 2007 Convention. Hess does not discuss Art. 70(1)(c) of the 2007 Convention.

perspective is however vulnerable to the objection that it ignores the injury Brexit threatens (but does not compel) to the fundamental unifying and harmonising goals of private international law. Though the last sentence may seem as abstruse as the reputation of the legal subject to which it refers, the issue could not be simpler: will the UK and EU each allow Brexit to so affect the cross-border operation of their private international laws as to routinely deny or multiply legal rights that they would formerly have routinely recognised and enforced, or, will each undogmatically strive to find means to avoid such undesirable eventualities?