

# AND HERE REMAIN WITH YOUR UNCERTAINTY: THE CONSEQUENCES OF BREXIT FOR BUSINESS LAW\*

Working Paper IE Law School

AJ8-239

27-07-2017

Cátedra José María Cervelló

Alberto Escobar Ribas

Abogado

[alberto.escobar.rivas@gmail.com](mailto:alberto.escobar.rivas@gmail.com)

## **Abstract**

*Brexit will most certainly have fundamental legal consequences for businesses and commercial transactions. This article aims to ascertain the effects of the UK's withdrawal from the EU for Business Law. It will focus on the legal framework of withdrawal and the new legal framework, as well as emphasizing the problems of transitory law in respect of contracts, corporate operations and litigation. Many particular issues that need to be addressed during the negotiations under Article 50 TEU, such as freedom of establishment and the future of the EU Brussels regime, will be pointed out.*

## **Resumen**

Con toda seguridad, el Brexit tendrá consecuencias jurídicas fundamentales para las empresas y las transacciones comerciales. Este artículo tiene como fin discernir los efectos de la salida del Reino Unido de la UE para el Derecho de los Negocios. Se centrará en el marco jurídico de la retirada y el nuevo marco jurídico, así como hará énfasis en los problemas de Derecho transitorio respecto de los contratos, las operaciones corporativas y la litigación. Muchas de las cuestiones que deben ser tratadas en las negociaciones regidas por el artículo 50 TUE, como la libertad de establecimiento y el futuro del régimen de Bruselas de la UE, serán señaladas.

## **Keywords/ Palabras Clave**

*Brexit, Business law, withdrawal agreement, corporate citizenship, contract law, recognition and enforcement of foreign judgments*

Brexit, Derecho de los negocios, acuerdo de retirada, ciudadanía corporativa, derecho de contratos, reconocimiento y ejecución de resoluciones extranjeras

\*Este trabajo fue ganador del XI Premio Cervelló de Derecho de los Negocios (Julio 2017).

La publicación de la Serie Working Papers IE-Law School está patrocinada por la Cátedra José María Cervelló.  
Copyright © 2017. María de los Ángeles Villegas García y Miguel Ángel Encinar del Pozo.  
Este working paper se distribuye con fines divulgativos y de discusión.  
Prohibida su reproducción sin permiso del autor, a quien debe contactar en caso de solicitar copias.  
Editado por el IE Law School, Madrid, España

*The publishing of Serie Working Papers IE-Law School is sponsored by the José María Cervelló IE Chair.  
Copyright © 2017. María de los Ángeles Villegas García y Miguel Ángel Encinar del Pozo.  
This working paper is distributed for purposes of comment and discussion only.  
It may not be reproduced without permission of the copyright holder.  
Edited by IE Law School and printed at IE Publishing, Madrid, Spain*

## Introduction

On 23 June 2016, British citizens voted by a slim majority in favour of the UK leaving the EU. After David Cameron's resignation and the ensuing Shakespearian political backstabbing, the brand-new PM Theresa May showed her intention to honour the result of the referendum assuring that 'Brexit means Brexit'. However, little guidance was provided as to what 'Brexit means Brexit' meant. The government's strategy for withdrawal from the EU remained undefined in any but the vaguest terms, thus fuelling the debate over the merits of a 'hard Brexit' versus a 'soft Brexit'. It was not until 17<sup>th</sup> January 2017 that the PM explicitly ruled out continued membership of the EU's single market and customs union. The government's refusal to remain in the European Economic Area (EEA) as an alternative to EU membership has further increased insecurity for businesses in the UK and abroad. Brexit is set to unwind economic relations of incomparable complexity but a clear legal framework for withdrawal is not in place. As Coriolanus said, we only remain with our uncertainty<sup>1</sup>.

This article argues that Brexit raises complex legal questions that go beyond the two-year negotiation period and will need to be addressed by governments and companies. However, the reader should bear in mind that when analysing the consequences of Brexit for Business Law, one enters the realm of speculation. Without the benefit of a DeLorean-type time machine, the terms of the withdrawal agreement(s) on which the future legal framework hinges cannot be known, and so much of our inquiry is necessarily an exercise in guesswork. In our attempt to shed some light on the uncharted territory of Brexit, the discussion will be structured in four main parts. Part 1 provides a brief background on the withdrawal process under Article 50 TEU. Part 2 analyses the consequences of Brexit on cross-border corporate activity, particularly M&A, competition law and freedom of establishment. Part 3 deals with the impact of Brexit on contracts, both from the applicable law and substantive perspectives. Part 4 covers the future of litigation and arbitration and the possible alternatives to the EU Brussels regime. Finally, Part 5 will provide a short conclusion.

### 1. Legal framework of withdrawal from the EU

'I will withdraw: but this intrusion now seeming sweet shall convert to bitter gall'

Tybalt in *Romeo and Juliet* (Act I, Scene 5)

#### 1.1. Article 50 TEU and the negotiation process

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
2. A Member State which decides to withdraw shall notify the European Council of its intention.

---

<sup>1</sup> Act III, Scene 3. This is not the first article on Brexit to use Shakespeare quotes. See Paul Craig, 'Brexit: A Drama in Six Acts' [2016] *European Law Review* 447

In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it. A qualified majority shall be defined in accordance with Article 238(3)(b)[TFEU].

The process of withdrawal from the EU is solely governed by Article 50 TEU. Partly because it was drafted never to be used, this provision appears to create more problems than it solves<sup>2</sup>. Even before the notification under sub-section two on 29<sup>th</sup> March 2017, the interpretation of subsection one had already resulted in the UK constitutional case of the century. Space precludes a discussion on the Supreme Court judgment in *Miller*<sup>3</sup>, which ruled that an Act of Parliament was needed to trigger Article 50, and on the ongoing academic debate on the revocability of the notification to withdraw — even though the issue of revocation has gained relevance after Mrs May has called for a snap general election next June 8<sup>th</sup><sup>4</sup>. In turn, this article will focus on three key issues: the negotiations, the resulting agreement(s) and the possible lack thereof.

Under Article 50, the parties to the negotiation are the EU and the UK. As Araceli Mangas Martín has pointed out, this provision lays out the procedure for negotiations but does not determine any substantive outcome. We know who establishes the guidelines (the European Council), who forms the negotiation delegation (the Commission) who gives instructions and has appointed Michel Barnier as the EU chief negotiator (the Council) and the majority required to approve the withdrawal agreement (twenty votes over twenty-seven) or to extend the negotiation period (unanimity)<sup>5</sup>. We also know that the agreement must be ratified by the European Parliament and the withdrawing State.

---

<sup>2</sup> Daniel Sarmiento has described it as an instruction manual that self-destructs in five seconds. Daniel Sarmiento, 'Un manual de instrucciones que se autodestruye en cinco segundos' *El País* (Madrid, 24 June 2016)

<sup>3</sup> *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5

<sup>4</sup> See Craig (n 1) 464 and European Union Committee, *The process of withdrawing from the EU* (HL 2015-16, 138) paras 10-13

<sup>5</sup> Araceli Mangas Martín, 'Postbretxit: Una Europa confusa, entre el desánimo y la incertidumbre' [2016] *Revista de Derecho Comunitario Europeo*, 433

What we do not know is what the withdrawal regime will look like, but both parties have already outlined their negotiation goals and priorities. The UK Government has asserted in the PM's speech in Lancaster House<sup>6</sup> and in the Brexit White Paper<sup>7</sup> that it seeks to obtain certainty and clarity, bring an end to the jurisdiction of the CJEU, control immigration, secure rights for EU nationals in the UK and UK nationals in the EU and ensure free trade with European markets, *inter alia*. As for the EU, the European Council has welcomed 'the recognition by the British Government that the four freedoms of the Single Market are indivisible and that there can be no "cherry picking"'<sup>8</sup>.

In recent articles, Horst Eidenmüller<sup>9</sup> and Kalypso Nicolaïdis<sup>10</sup> have analysed the UK's and EU's likely negotiation strategy and the unfolding of the negotiation process. Despite the warning of the European Council, the UK is likely to try cherry-picking first (yes to the internal market but no to the free movement of persons) and jump for a truly 'hard Brexit' attenuated by the transitional agreement later if the desired outcome proves unattainable<sup>11</sup>. In turn, the EU will make sure that the general value of the deal with the UK cannot be greater than the value of EU membership. It would be absurd for the Commission to offer a deal more advantageous than membership itself, since like any club, the EU must protect itself against freeriding<sup>12</sup>. Additionally, the resulting deal will probably allow the UK to opt-in to aspects of EU membership which are 'earmarked for flexible integration' but the remaining Member States will resist British attempts to keep its favourite aspects of the internal market, like free provision of financial services, while excluding the free movement of persons<sup>13</sup>.

## 1.2. The withdrawal agreement, the transitional arrangement, the future trade deal

After the end of the negotiations, the European Parliament gives its consent to the draft withdrawal agreement, which is then signed and concluded by the Council. Article 50 leaves considerable room for interpretation as to the extent to which the 'future framework' for relations between a withdrawing state and the EU should be included in the final agreement<sup>14</sup>. At one end of the scale there could be an agreement that deals only with the core essentials of withdrawal, while leaving details concerning the future to be decided by a later treaty; at the other end, there might be a more comprehensive withdrawal agreement that includes the outline

---

<sup>6</sup> Number 10, *Speech: The Government's negotiating objectives for exiting the EU* (17 January 2017) <<https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech>> accessed 19 April 2017

<sup>7</sup> HM Government, *The United Kingdom's exit from and new partnership with the European Union* (White Paper, Cm 9417, 2017)

<sup>8</sup> 'In full: the EU's draft guidelines for Brexit negotiations' *The Telegraph* (London, 31 March 2017)

<sup>9</sup> Horst Eidenmüller, 'Negotiating and Mediating Brexit' [2016] <https://ssrn.com/abstract=2854829>

<sup>10</sup> Kalypso Nicolaïdis, 'Brexit arithmetics' (*Oxford University*, January 18 2017) <<http://www.ox.ac.uk/news-and-events/oxford-and-brexit/brexit-analysis/brexit-arithmetics>> accessed 27 March 2017

<sup>11</sup> Eidenmüller (n 9) 9

<sup>12</sup> Nicolaïdis (n 10). Also, see the EU's draft guidelines (n 8) paras 18-19

<sup>13</sup> *ibid*

<sup>14</sup> Foreign Affairs Committee, *Article 50 negotiations: Implications of 'no deal'* (HC 1077, 2017) 6

of the future relationship between the EU and the UK<sup>15</sup>. Theresa May has acknowledged that a trade deal with the EU cannot enter into force before Brexit, so some sort of transitional agreement, during which Brexit could accept the rules of the single market, is necessary<sup>16</sup>.

Thus, negotiations are likely to involve three separate but inter-related deals: a 'divorce' settlement, a transitional agreement and the outline of a future trade deal<sup>17</sup>. Deal one or the 'divorce' settlement will cover the institutional and financial consequences of leaving the EU, including pension and budget liabilities and the status of EU agencies currently based in the UK<sup>18</sup>. It will also include the status of UK migrants in the EU and the status of EU citizens living in the UK, as well as border arrangements between Northern Ireland and the Republic of Ireland and between Gibraltar and Spain<sup>19</sup>. Deal two will cover what the government calls a 'phased process of implementation' that gives businesses enough time to plan and prepare for the new legal framework<sup>20</sup>. This transitional deal will most certainly include a period of continued trade on internal market terms, while the UK and the EU work out the details of a future trade agreement<sup>21</sup>. It will cover immigration controls, custom systems, cooperation on criminal and civil justice matters and the interim legal and regulatory framework for businesses<sup>22</sup>.

Deal three will be the outline of a future trade agreement between the UK and the EU. Both the Lancaster House speech and the Brexit White Paper confirm that the government will seek 'a new comprehensive, bold and ambitious trade agreement [which] may take in elements of current Single Market arrangements in certain areas'<sup>23</sup>, such as 'the export of cars and lorries' or 'the freedom to provide financial services across national services'<sup>24</sup>. However, considering AG Sharpston's Opinion on the Singapore free trade agreement, such a trade deal would in all likelihood fall under the doctrine of 'mixity'<sup>25</sup>. If Member States as well as EU competences are engaged, the trade deal between the EU and the UK would have to be ratified by the Member States as well, opening the door to an impasse such as the one suffered by CETA in Wallonia.

As Derryck Wyatt points out, the difference between a best-case scenario and a worst-case scenario will probably depend on the degree of UK access to the EU financial services market<sup>26</sup>.

---

<sup>15</sup> Craig (n 1) 465

<sup>16</sup> Charlemagne, 'Descending Mount Brexit' *The Economist* (London, 8 April 2017)

<sup>17</sup> Foreign Affairs Committee (n 14) 6

<sup>18</sup> See Alex Barker, 'The €60 Billion Brexit bill: How to disentangle Britain from the EU Budget' (*Centre for Economic Reform*, 2017)

<sup>19</sup> Foreign Affairs Committee (n 14) 7. Also, see the EU's draft guidelines (n 8) para 22

<sup>20</sup> Brexit White Paper (n 7) para 5.10

<sup>21</sup> Derrick Wyatt, 'Brexit Negotiations: What Happens if there is no Deal and a Hard Brexit?' (Brick Court Brexit Court, 13 February 2017) <<https://brexit.law/2017/02/13/brexit-negotiations-what-happens-if-there-is-no-deal-and-a-hard-brexit/>> accessed 27 March 2017

<sup>22</sup> Brexit White Paper (n 7) para 1.9

<sup>23</sup> Brexit White Paper (n 7) para 8.2

<sup>24</sup> Lancaster House Speech (n 6)

<sup>25</sup> See Opinion of Advocate General Sharpston in Opinion procedure 2/15, delivered on 21 December 2016, and Aarti Shankar, 'What might legal case over EU-Singapore trade deal mean for Brexit?' (*OpenEurope*, 20 December 2016) <<http://openeurope.org.uk/today/blog/what-might-legal-case-on-eu-singapore-deal-mean-for-uk/>> accessed 27 March 2017

<sup>26</sup> Derrick Wyatt (n 21)

The best-case scenario would reflect the aims of the White Paper, with ‘passporting’ rights under MiFID II<sup>27</sup> being retained. UK based banks and other financial services providers could continue to operate in the EU directly or through branches, and without the need for capitalised and regulated subsidiaries within the EU. The worst-case scenario would be no such ‘passporting’. In a recent and interesting paper, Wolf-Georg Ringe is optimistic as to the prospects of the best-case scenario, arguing that, given the economic interests at stake in both sides, the impact of Brexit for financial services will be minuscule, if not irrelevant<sup>28</sup>.

In light of the nature of the aforementioned deals, the Court of Justice is destined to play a major role in the determination of the EU and the UK’s future relationship. Koen Laenerts, the President of the CJEU, has said that there are ‘many different ways’ in which the Court might be asked to confront Brexit<sup>29</sup>. The CJEU may be requested to deliver an opinion on the draft withdrawal agreement’s compatibility with EU law or on whether the future trade deal is a ‘mixed’ agreement<sup>30</sup>. This involvement is likely to cause friction given the government’s resolution to bring to an end the jurisdiction of the CJEU<sup>31</sup>.

Moreover, while the Brexit White Paper recognises that implementation of the future relationship with the EU requires provision for dispute resolution, it seems to suggest that the task to interpret and apply the agreements should be entrusted to a joint committee or to an ad hoc arbitration panel rather than the CJEU<sup>32</sup>. However, whether the CJEU will tolerate to be bypassed remains to be seen. In Opinion 2/13, the Court rejected the EU’s draft agreement on accession to the European Charter of Human Rights on the basis that it undermined the ‘autonomy of EU law’<sup>33</sup>. A similar argument could be displayed after Brexit for the CJEU to remain the final arbiter between the EU and the UK.

### 1.3. Implications of a ‘no deal’ scenario

A scenario where the UK withdraws from the EU without any deal in place is a real possibility. The government has asserted repeatedly that it will walk away from the Article 50 negotiations if it does not approve of the terms of the final deal. In both the Lancaster House speech and the Brexit White Paper, the government is clear that although they are confident that a positive deal can be reached, ‘no deal for the UK is better than a bad deal’<sup>34</sup>. Additionally, the tight timetable

---

<sup>27</sup> Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU

<sup>28</sup> Wolf-Georg Ringe, ‘The Irrelevance of Brexit for the European Financial Market’ [2017] *Oxford Legal Studies Research Paper* No 10/2017. Available at SSRN: <https://ssrn.com/abstract=2902715>

<sup>29</sup> Charlemagne, ‘Contempt of Court’ *The Economist* (London, 4 March 2017)

<sup>30</sup> Eva-Maria Poptcheva, ‘Article 50 TEU: Withdrawal of a Member State from the EU’ (*European Parliament Research Service*, 2016) 5 and Arts. 263 and 265 TFEU

<sup>31</sup> The House of Lords has shown their concern that if the Government adheres rigidly to this policy it will severely constrain its choice of adequate alternative arrangements. European Union Committee, *Brexit: justice for families, individuals and businesses?* (HL Paper 134, 2017), para 142

<sup>32</sup> Brexit White Paper (n 7) paras 2.4 – 2.10

<sup>33</sup> Opinion 2/13, of the Court, delivered on 18 December 2014. Also, EU’s guidelines (n 8) para 16

<sup>34</sup> Brexit White Paper (n 7) para 12.3

of two years set out by Article 50 leaves almost no room for error, magnifying the potential damage that might be done by any delay<sup>35</sup>. Michel Barnier has already said that the Commission will only discuss the future relationship between the EU and the UK after the ‘divorce’ settlement concerning ‘money and acquired rights’ has been reached<sup>36</sup>. Even though Article 50 permits the extension of the negotiation period, as we have seen unanimity in the Council is required, so any Member State could block the extension of talks.

If at the end of the two year-period there is not any deal in place, the Treaties would cease to apply and the UK would vividly fall over the cliff edge. Some of the potential implications of a ‘no deal’ scenario are uncertainty and confusion for residents, tourists and businesses, trading on World Trade Organization (WTO) terms<sup>37</sup> and the sudden return of a customs border between Northern Ireland and the Republic of Ireland<sup>38</sup>. As the Bar Council has pointed out, ending the Article 50 process without a deal could lead to ‘a lengthy period of economic dislocation and political acrimony’<sup>39</sup>. In the words of Tybalt, out of all the Brexit scenarios, no-deal is the most likely to convert a seemingly sweet withdrawal to bitter gall.

## 2. Brexit and contracts

‘There is no power in the tongue of man to alter me: I stay here on my bond’

Shylock in *The Merchant of Venice* (Act IV, Scene 1)

Brexit will most certainly not affect contract law as much as other areas of the law. Whereas the fields of intellectual property, competition and state aid law and environmental law, to cite but a few, are largely based on EU legislation, substantive contract law in England and Wales has evolved through the common law method<sup>40</sup>. The core features of English contract law, such as the objective interpretation of contracts and monetary remedies for breach, will presumably remain unchanged post-Brexit<sup>41</sup>.

However, the ramifications Brexit may have significant implications for particular aspects of business contracts. The economic turmoil and uncertainty caused by the UK’s withdrawal from the single market will most certainly raise certain crucial questions. This section will focus on issues of interpretation, applicable law and on Brexit as grounds for termination. The influence

---

<sup>35</sup> Foreign Affairs Committee (n 14) para 27

<sup>36</sup> Alex Barket, ‘Brussels focuses on UK’s €60bn exit bill before trade talks’, *FT* (19 February 2017)

<sup>37</sup> For a full account of the implications of trading on WTO terms, see Lorand Bartels, ‘The UK’s Status in the WTO after Brexit’ [2016] available at SSRN: <https://ssrn.com/abstract=2841747>

<sup>38</sup> Foreign Affairs Committee (n 14) para 32

<sup>39</sup> Foreign Affairs Committee (n 14) para 59

<sup>40</sup> See House of Commons Library, *Brexit: impact across policy areas* (Briefing Paper No. 07213, 2016)

<sup>41</sup> Even in those fields harmonized at EU level, such as consumer contract protection, it is extremely unlikely that the government will introduce major changes to UK consumer law. See Taylor Wessing, ‘UK Consumer Law in the Wake of the EU Referendum’ (Oxford Business Law Blog, 17 July 2016) <<https://www.law.ox.ac.uk/business-law-blog/blog/2016/07/uk-consumer-law-wake-eu-referendum>> accessed 21 March 2017

of Brexit on jurisdiction clauses in contracts, currently governed by the Brussels I *recast* Regulation, will be dealt with in section 4.3.

## 2.1. Interpretation

*What will be the likely interpretation of any term incorporating reference to the ‘EU’ or to ‘EU legislation’?*

It is not possible to list every contract term that could conceivably give rise to issues of interpretation in light of Brexit-related events<sup>42</sup>. However, references to the EU or to EU legislation are common in commercial contracts, and the construction of such clauses post-Brexit must be addressed. We should keep in mind that under English law, the court’s role in interpreting a contract term is to ascertain the meaning that it would convey to ‘a reasonable person with all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract’<sup>43</sup>. Crucially, business common sense is also taken into consideration<sup>44</sup>.

Where a contract refers to EU legislation which no longer has force in the UK, i.e. Treaties or Regulations, the issue may arise of whether that meant the relevant legislation as it existed at the time of contracting, or any legislation enacted to replace it. In the absence of an express interpretation clause, English courts may apply by analogy section 17(2) of the Interpretation Act 1978, which provides that a reference to legislation that has been repealed and re-enacted is construed as a reference to the re-enacted version. If that solution were to be adopted, any reference to ‘EU legislation’ should be construed as to mean the relevant provisions of UK law after the Great Repeal Bill.

Additionally, a contract may refer to the ‘EU’ to define its territorial application, so that questions may arise as to whether it should be construed to mean the territory of the EU at the time of contracting, or the territory of the EU from time to time, with the subsequent exclusion of the UK<sup>45</sup>. Since interpretation under English law depends on the objective meaning of the provision, the answer may be different in different contracts. However, British courts are likely to favour a commercial approach to the bargain. As Herbert Smith Freehills exemplifies, ‘in the context of an ongoing distribution agreement, if the UK forms an important part of the distributor’s operation, a court might readily conclude that the territory was not intended to change’<sup>46</sup>.

---

<sup>42</sup> Herbert Smith Freehills, ‘English Law Contracts post-Brexit: What changes should commercial parties expect?’ (Contract Disputes Practical Guides Issue 7, 2016) 3

<sup>43</sup> *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912 (Lord Hoffmann)

<sup>44</sup> *Antaios Compania Naviera S.A. v Salen Rederierna A.B.* [1985] AC 191, 201

<sup>45</sup> Herbert Smith Freehills (n 42) 4

<sup>46</sup> *ibid*

## 2.2 Applicable law

*Will Brexit affect contractual clauses which choose English law as the governing law of the contract?*

English law has long been a popular choice for commercial parties engaging in cross-border transactions. Under the Rome I Regulation, on the law applicable to contractual obligations, Member State courts will uphold the parties' choice of governing law to the extent that it does not infringe upon overriding mandatory provisions<sup>47</sup>. Since the Rome I Regulation enjoys universal application or *erga omnes* effect, it would continue to apply regardless of the UK's losing its Member State status<sup>48</sup>. Therefore, the remaining Member State courts would continue to enforce choice of English law clauses.

As for choice of law clauses before UK courts, the government could easily transpose the Rome I Regulation into domestic legislation using the Great Repeal Bill, again due to its character as a unilateral private international law instrument<sup>49</sup>. Another alternative, less than optimal, would be the revival of the Contracts (Applicable Law) Act 1990 and of the 1980 Rome Convention<sup>50</sup>. Given the importance of the English financial market, some of the disadvantages of the Rome Convention are that it does not contain any of the Rome I rules about insurance contracts or that it lacks an equivalent rule to its Art. 4(1)(h), which provides for the determination of the governing law for certain financial contracts.

*When will Regulations Rome I and Rome II cease to apply in the UK?*

Art. 50(2) TEU provides that 'the Treaties shall cease to apply to the State in question', after its withdrawal from the EU. Therefore, it may seem self-evident that Regulations lose their binding force<sup>51</sup> and stop to apply immediately in the UK after Brexit Day (presumably, 29<sup>th</sup> March 2019). However, the approach to the supranational instruments on applicable law, including the Rome I Regulation, is less straightforward. The reason, highlighted by Dickinson<sup>52</sup>, is that these Regulations distinguish between their 'entry into force' and their 'application', and subsequently link their application to facts extraneous to the institution of legal proceedings (namely, the conclusion of a contract after 17 December 2009)<sup>53</sup>.

Accordingly, the reasoning outlined above resulting in that the Rome I and Rome II Regulations would not temporally apply to any decision made after Brexit might have undesired

---

<sup>47</sup> Arts. 3 and 9 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)

<sup>48</sup> Art. 2 Rome I Regulation

<sup>49</sup> Sarah Garney and Karen Birch consider it 'almost inconceivable' that the UK will change its general approach to respecting a choice of law. Allen and Overy, 'Brexit – legal consequences for commercial parties: English governing law clauses – should commercial parties change their approach?' (Specialist paper No 1, 2016) 3

<sup>50</sup> See the discussion in section 4.2 on the 'revival' of the Brussels Convention

<sup>51</sup> Art. 288 TFEU

<sup>52</sup> Andrew Dickinson, 'Back to the future: the UK's EU exit and the conflict of laws (2016) 12 Journal of Private International Law 208

<sup>53</sup> Art. 28 Rome I Regulation

consequences. If that were the case, ‘a single set of events may produce two different outcomes depending whether the case was listed for hearing before or after the withdrawal date’<sup>54</sup>. Let us think of two contracts concluded on the same day, which are breached on the same day, but one of the claims for damages is brought up before Brexit Day and the other one afterwards. It would be absurd if the Rome I Regulation were applied to the decision as to the law applicable in the first case, but not the second.

The aforementioned considerations led the CJEU in *Homawoo*<sup>55</sup> to fix the entry into force of the Rome II Regulation by reference to the date of the event giving rise to damage. The same reasoning could be followed to identify the event by reference to which the Regulations would cease to apply in the UK after its withdrawal<sup>56</sup>. If this solution were to be adopted, English courts would apply the Rome II Regulation to events giving rise to damage before the withdrawal date, but not thereafter, and the Rome I Regulation would apply to all contracts concluded before Brexit Day. However, to avoid undue uncertainty, this point should be addressed in the transitional agreement.

*Will parties be less likely to agree on English law as the governing law in a cross-border commercial contract?*

English law is one of the most popular choices of applicable law in commercial disputes<sup>57</sup>. Whether parties will be less likely to stipulate English law as the governing law for their contract will probably depend on how much of a factor the UK’s membership of the EU was to contracting parties<sup>58</sup>. The general consensus among common lawyers is that English law’s attractiveness has little to do with EU membership<sup>59</sup>. Common lawyers like to take pride in the certainty, stability, predictability, flexibility and business orientation of English law, ‘one of the oldest and universally respected legal systems in the world [...] its principles having been developed alongside centuries of commercial activity and reflecting commercial common sense’<sup>60</sup>.

However, recent research by Stefan Vogenauer has challenged the commonplace assumption that the popularity of English law is due to its quality or substantive merits<sup>61</sup>. Rather, empirical evidence shows that choice of law is usually determined by familiarity and the dominant position of English law firms<sup>62</sup>. In major cross-border transactions, parties do not engage in significant ‘contract law shopping’, but leave such nuisances to Clifford Chance, Linklaters and other ‘Magic Circle’ firms. Moreover, choice of English law is often part of a ‘package’,

---

<sup>54</sup> Dickinson (n 52) 208

<sup>55</sup> *Deo Antoine Homawoo v GMF Assurances SA*, Case C-412/10

<sup>56</sup> Dickinson (n 52) 208

<sup>57</sup> Stefan Vogenauer, Stephen Weatherill, *Civil Justice Systems in Europe: Implications for Choice of Forum and Choice of Contract Law. A Business Survey* (IECL, Hart 2006) 16

<sup>58</sup> David Kilduff and Gwendoline Davies, ‘Brexit: Will Brexit affect choice of English law and jurisdiction clauses?’ (Walker Morris, 24 June 2016) <<https://www.walkermorris.co.uk/publications/brexit/brexitwill-brexit-affect-choice-english-law-jurisdiction-clauses/>> accessed 21 March 2017

<sup>59</sup> Allen and Overy (n 49) 2

<sup>60</sup> Kilduff and Davies (n 58)

<sup>61</sup> Stefan Vogenauer, ‘Regulatory Competition through Choice of Contract Law and Choice of Forum in Europe: Theory and Evidence’ [2013] 1 *European Review of Private Law* 13

<sup>62</sup> *ibid* 24

alongside with insurance and arbitration in London<sup>63</sup>. As long as English remains the *lingua franca* of international business and London-based firms retain their share of the legal market, the hopes expressed by French jurists that commercial parties might choose their new law of contract are unsubstantiated<sup>64</sup>. In conclusion, familiarity, and not the substantive merits of English law, seems to be the safeguard for its continued use in cross international commercial transactions.

## 2.2. Termination. Can Brexit allow the early termination of commercial contracts?

Parties looking to get out from a contract might, for example, argue that Brexit:

- (i) Gives rise to a termination right contained in a *force majeure* clause,
- (ii) Activates the ‘Material Adverse Effect’ provisions routinely included in commercial contracts, or
- (iii) Makes the contract ‘radically different’, thus triggering the common law doctrine of frustration

### *Force majeure*

The success in court of a claim that Brexit-related events constitute *force majeure* will largely depend on how the particular clause is drafted. In the run-up to the referendum, parties may have expressly included (or excluded) Brexit as grounds for termination<sup>65</sup>. It is common for negotiated and standard commercial contracts to contain a clause listing the events that will trigger a remedy<sup>66</sup>, together with a ‘catch-all’ term to include other events beyond a party’s control. If the wording of the particular clauses allows for termination in the event of a significant regulatory or legislative change, for example, then the clause could apply<sup>67</sup>. The restriction, suspension or withdrawal of any licences in connection with Brexit might also be covered by a *force majeure* clause<sup>68</sup>.

However, it is not enough that Brexit falls within the definition of *force majeure*. In the context of the Great Recession, the High Court has ruled that an ‘unanticipated, unforeseeable and cataclysmic downward spiral of the world’s financial market’ is not sufficient to trigger a *force majeure* clause<sup>69</sup>. The clause will generally be activated only if the UK’s withdrawal makes performance of the obligations under the contract by one party either impossible or

---

<sup>63</sup> I am grateful to Hugh Beale for this point

<sup>64</sup> ‘Le deuxième objectif poursuivi par l’ordonnance est de renforcer l’attractivité du droit français, au plan politique, culturel, et économique’. *Rapport au Président de la République relatif à l’ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations* <<https://www.legifrance.gouv.fr/eli/rapport/2016/2/11/JUSC1522466P/jo/texte>> accessed 21 March 2017

<sup>65</sup> Herbert Smith Freehills (n 42) 6

<sup>66</sup> John Cartwright, *Contract Law. An Introduction to the English Law of Contract for the Civil Lawyer* (3<sup>rd</sup> ed, Hart 2016) 270

<sup>67</sup> Jane Woods, ‘Impact of Brexit on Contract Law’ [2016] 79 *Student Law Review* 15

<sup>68</sup> Herbert Smith Freehills (n 42) 6

<sup>69</sup> *Tandrin Aviation Holdings v Aero Toy Store* [2010] EWHC 40 (Comm)

exceptionally difficult. Moreover, '[a] change in economic or market circumstances which makes the contract less profitable or performance more onerous is not generally regarded as sufficient to trigger a force majeure clause'<sup>70</sup>.

### *Material Adverse Change (MAC)*

Material Adverse Change or 'MAC' clauses are terms found in some agreements which allow a part to refuse to proceed with the contract if certain events occur. The drafting of these clauses varies greatly<sup>71</sup>, so whether Brexit-related events may amount to a MAC will also depend on the wording and the commercial circumstances surrounding the particular clause. In general, an English judge will not be easily persuaded that a MAC clause is activated unless 'events have taken an unexpected turn after the contract is entered into which has a dramatic impact in the particular circumstances of the transaction'<sup>72</sup>. Moreover, Brexit is unlikely to affect the enforcement of English-law governed financing contracts, since the Loan Market Association's standard forms do not generally contain MAC clauses referring to the conditions in the financial markets, operating instead primarily by reference to the financial condition of the group<sup>73</sup>. It is similarly unlikely that Brexit would activate *force majeure* provisions in bonds<sup>74</sup>.

### *Frustration*

Due to the ramifications of Brexit, contractual parties might claim that further performance has been rendered impossible or illegal, or has become something 'radically different from that which was undertaken by the contract'<sup>75</sup>. This claim is known as the doctrine of frustration, developed in the famous 'Coronation cases'<sup>76</sup>. However, English courts have tended to apply frustration narrowly, emphasizing that it 'is exceptional, and cannot be invoked lightly'<sup>77</sup>. In the light of cases such as *Tsakiroglou*<sup>78</sup>, in which the House of Lords rejected that the Suez Crisis of 1956 constituted a frustrating event, it seems that contracts will be terminated because of Brexit-related events only in rare occasions. For instance, the likely relocation of the European Medicine Agency and the European Banking Authority might constitute grounds for frustration of their current lease for office space in Canary Wharf. Another hypothetical example of frustration, provided by Lehmann and Zetsche, involves 'an English law firm that advises a client regarding EU subsidies for an investment in the UK. As these subsidies will no longer be available, the service promised will become pointless'<sup>79</sup>.

---

<sup>70</sup> Herbert Smith Freehills (n 42) 6

<sup>71</sup> *ibid* 7

<sup>72</sup> *ibid*

<sup>73</sup> See Loan Market Association, *LMA note on documentary implications of Brexit for LMA facility documentation* (Issues and Guidance, 2006)

<sup>74</sup> Slaughter and May, *Brexit Essentials: The legal and business implications of the UK leaving the EU* (Brexit Briefings, 2016) 6

<sup>75</sup> *Davis Contractors Ltd v Fareham UDC* [1956] AC 696 (HL) 728-29

<sup>76</sup> *Krell v Henry* [1903] 2 KB 740 (CA)

<sup>77</sup> Cartwright (n 66) 266

<sup>78</sup> *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* [1962] AC 93

<sup>79</sup> Matthis Lehmann and Dirk Zetsche, 'Brexit and the Consequences for Commercial and Financial relations between the EU and the UK' [2016] *European Business Law Review* 1007

Moreover, the doctrine of frustration does not apply where the performance of a contract has merely become more difficult or expensive. As it currently stands, English law does not admit economic frustration or hardship<sup>80</sup>. A contract would not be frustrated by the fact that a UK company has lost its access to the EU internal market or its ‘passporting’ rights under MiFID II and can only perform its obligations via a EU subsidiary or branch<sup>81</sup>. As Shylock would say, contractual parties should in principle stay on their bond.

Nonetheless, we should bear in mind the economic havoc that Brexit could wreak. The value of pound sterling fell to a 31-year low following the June referendum<sup>82</sup> and it dropped below \$1.20 ahead of Theresa May’s January Brexit speech<sup>83</sup>. The 12-month inflation rate was 2.3% in February 2017, up from 1.9% in January, breaking the Bank of England’s forecast<sup>84</sup>. Should the more pessimistic predictions come true, the UK’s GDP could fall between £26 and £55 billion, while household income could decrease by 2.6% due to increasing trade costs<sup>85</sup>.

In such a scenario, and given the flexibility of the common law method, English court might reformulate the test for frustration to cover economic hardship as well<sup>86</sup>. Lord Denning’s views in *Staffordshire Area Health Authority*<sup>87</sup> well support this hypothesis. As Markesinis et al argue<sup>88</sup>, if England were to experience significant inflation, its attachment to nominalism would fall by the wayside as it did in Germany during the Weimar Republic<sup>89</sup>. No one can seriously suggest (or hope) that Brexit will cause the pound to have a trillionth of its current value, but one may be permitted to speculate that if it ever did, the doctrine of frustration would undergo significant developments.

Continental civil laws are usually more receptive to the idea than a supervening change of circumstances may change the obligations of the parties under the contract<sup>90</sup>. For example, under the German doctrine of ‘interference with the basis of the transaction’ (*Störung der Geschäftsgrundlage*), parties may renegotiate or terminate the contract in the event of a fundamental change of circumstances<sup>91</sup>. Albeit without legislative basis, the Spanish Civil Supreme Court has reached a similar conclusion by implying a *clausula rebus sic stantibus* into

---

<sup>80</sup> Cartwright (n 66) 266

<sup>81</sup> Lehmann and Zetzsche (n 79) 1007

<sup>82</sup> Katie Allen, Jill Treanor, Simon Goodley, ‘Pound slumps to 31-year low following Brexit vote’ *The Guardian* (London, 24 June 2016)

<sup>83</sup> Jennifer Hughes, Robin Wigglesworth, ‘Pound falls below \$1.20 ahead of Theresa May’s Brexit speech’ *Financial Times* (Hong Kong, 16 January 2017)

<sup>84</sup> Fergal O’Brien, ‘U.K. Inflation Gains More Than Forecast, Breaching BOE Goal’ *Bloomberg Markets* (21 March 2017)

<sup>85</sup> Centre for Economic Performance of the London School of Economics and Political Science, ‘The Consequences of Brexit for UK Trade and Living Standards’ (Brexit Paper, No. 2, 2016) 6, 10

<sup>86</sup> I am grateful to John Cartwright for this point

<sup>87</sup> *Staffordshire Area Health Authority v South Staffordshire Waterworks Co* [1978] 1 WLR 1387

<sup>88</sup> Basil Markesinis, Hannes Unberath, Angus Johnston, *The German Law of Contract* (2<sup>nd</sup> ed 2006) 329

<sup>89</sup> See the *Reichsgericht* decision of 1923, RGZ 107, 78, case no 99

<sup>90</sup> Lehmann and Zetzsche (n 79) 1007

<sup>91</sup> Paragraph 313 BGB. Also, Article 1467 of the Italian *Codice civile*

long-term contracts<sup>92</sup>. The recent reform of the French law of obligations<sup>93</sup> has introduced a right to renegotiate or even terminate contracts in the event of economic hardship or *imprévision*, but this doctrine applies only to contracts concluded on or after 1 October 2016<sup>94</sup>. At this point in time Brexit would no longer be 'unforeseeable'<sup>95</sup>.

Whether Brexit-related events are significant enough to amount to a fundamental change of circumstances very much depends on the specifics on the contract. In the aforementioned example of a bank losing its financial 'passporting' rights, 'the performance of the contract will become excessively onerous where the bank has only one client in the respective Member State, but arguably not so where the bank has contracted with a large number of clients who it could serve by means of establishing a new subsidiary or branch under the EU's third country rules'<sup>96</sup>.

### 3. Brexit and cross-border corporate activity

'Do as adversaries do in law, strive mightily, but eat and drink as friends.'

Tranio in *Taming of the Shrew* (Act I, Scene 2)

#### 3.1. Brexit and M&A

The Merger and Acquisitions (M&A) market in the UK is the most dynamic one in the EU, with significant domestic and cross-border corporate operations. In 2016, UK deals accounted for 55% of all European deals<sup>97</sup>. However, research from Baker McKenzie predicts that M&A activity in the UK will drop sharply in the next few years as a result of the trading and financial uncertainty arising from Brexit<sup>98</sup>. Said study forecasts UK M&A values to fall to \$125 billion in 2017, down more than 60% from \$340 billion the previous year<sup>99</sup>.

Leaving economic considerations aside, when assessing the legal impact of Brexit on M&A regulation, we may distinguish between the private law and public law aspects of mergers and analyse them separately. Whereas the influence of EU law is not very significant as to takeover bids and cross-border mergers (the private law sphere), EU competition law plays a fundamental role in the control of concentrations between undertakings (the public law sphere).

---

<sup>92</sup> Judgments of the Spanish Supreme Court of 17 January 2013 (ROJ STS 1013/2013) and of 30 June 2014 (ROJ STS 2823/2014)

<sup>93</sup> Art. 1195 *Code Civil*: '[i]f a change of circumstances that was unforeseeable at the time of the conclusion of the contract renders performance excessively onerous for a party who had not accepted the risk of such a change, the party may ask the other contracting party to renegotiate the contract.'

<sup>94</sup> Lehmann and Zetzsche (n 79) 2007

<sup>95</sup> *ibid*

<sup>96</sup> *ibid*

<sup>97</sup> Europe Economics, *Implications of Brexit for the UK M&A Market* (Chancery House, 2016) 1

<sup>98</sup> Baker McKenzie, Oxford Economics, *2017 Global Transactions Forecast: From apprehension to appetite* (2017) 17

<sup>99</sup> *ibid*

*The private law sphere*

It has been longstanding EU policy to create a truly internal market for corporate operations, and legislation on control by way of takeover or merger has been introduced to facilitate such transactions. However, M&A regulation in the UK is unlikely to be substantially changed after Brexit, since the presence of EU regulation in the area is limited and the current legal framework (broadly) works<sup>100</sup>. The UK Takeover Code<sup>101</sup> was heavily influential in the drafting of the relevant EU legislation, namely the Takeover Directive<sup>102</sup>, and as Slaughter and May point out, ‘there is little appetite for change’<sup>103</sup>.

As for transnational mergers, Brexit could affect the application of the Directive on cross-border mergers of limited liability companies<sup>104</sup>. This Directive facilitates that two or more companies merge into a new corporate body (merger by formation of a new company), or that one company acquire one or more companies (merger by absorption), provided that at least two of the companies are governed by the laws of different Member States<sup>105</sup>. A 2013 study by the Commission concluded that the Directive had ‘ushered in a new age for cross-border mergers’<sup>106</sup>, a phenomenon UK companies would miss after Brexit. Although the reach and scope of the Cross-border Mergers Directive is limited, the Directive has had some use in the UK as evidenced by the case law<sup>107</sup>. After Brexit, companies could lose a potentially useful legal mechanism with regard to cross-border amalgamations, so there is benefit in their retention in the future trade deal with the EU.

*The public law sphere*

Since the pillars of UK competition law – the Competition Act 1998 and Enterprise Act 2002 – are independent domestic UK statutes, not directly dependent on EU regulation, they will automatically disappear after Brexit. However, there will be immediate consequences and pitfalls for UK businesses in the field of competition law.

The current EU Merger Regulation provides a mechanism for the control of mergers and acquisitions at the EU-level. Concentrations with a ‘Union dimension’, as defined by turnover thresholds, are generally scrutinized by the European Commission in Brussels and not by the national authorities (‘one-stop shopping’)<sup>108</sup>. After Brexit, however, the Commission will no longer have jurisdiction over mergers expected to result in a substantial lessening of competition

---

<sup>100</sup> Slaughter and May (n 74) 3

<sup>101</sup> The Panel on Takeovers and Mergers, *The Takeover Code* (12<sup>th</sup> ed, RR Donnelley 2016)

<sup>102</sup> Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids

<sup>103</sup> Slaughter and May (n 74) 3

<sup>104</sup> Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies

<sup>105</sup> Andreas Kokkinis, ‘The Impact of Brexit on the Legal Framework for Cross-Border Corporate Activity’ [2016] *European Business Law Review* 975

<sup>106</sup> Bech-Bruun/Lexidale, *Study on the Application of the Cross-border Mergers Directive*, 2013, 5

<sup>107</sup> See *In re Olympus UK Ltd and others* [2014] EWHC 1350 (Ch) where the court ruled that a merger involving companies belonging to the same corporate group fell within the scope of the Directive despite the fact that consideration for the shares of the transferor companies was waived

<sup>108</sup> After Regulation 1/2003, the European Commission shared with the national authorities its previously sole power to apply Articles 101 and 102

in the UK. This could have large implications for UK merger transactions and for the Competition and Markets Authority in London<sup>109</sup>.

The ‘one-stop shop’ of the EU Merger Regulation will thus no longer be available. Transnational mergers that the Commission alone would have examined before Brexit will also potentially receive UK scrutiny post-Brexit. Meanwhile, the same merger may well also undergo scrutiny over 300 km away in Brussels. Given the size and complexity of international mergers, this duplication of procedures will have substantial costs both for businesses and the supervisory authorities<sup>110</sup>. Moreover, the difficulties will not stop at duplication, since the issues addressed by the CMA and the Commission will not be identical. The two authorities will be looking at two different geographic markets, and the appropriate remedies in the UK might differ from those in the EU<sup>111</sup>.

In conclusion, even though UK competition law will remain unchanged immediately after Brexit, businesses and authorities will need to tackle several issues in relation to dual scrutiny of international mergers, and possibly dual remedies. The need to avoid unnecessary duplication and to safeguard competition both in the UK and the EU demands that these points be addressed in the transitional agreement.

### 3.2. Brexit and Corporate Citizenship

#### *The making of a ‘European Delaware’*

The CJEU’s judgments in *Centros*<sup>112</sup>, *Überseering*<sup>113</sup> and *Inspire Art*<sup>114</sup> declared that the TFEU provisions on freedom of establishment<sup>115</sup> protect the right of companies incorporated in one Member State to carry on their business in another Member State. This judicial development of corporate freedom of establishment led many entrepreneurs in the continent to incorporate new businesses under English law, triggering a small-scale and short-lived ‘European Delaware’<sup>116</sup>. The rush to incorporate companies in the UK appears largely to have been motivated by a desire to avoid minimum capital requirements in entrepreneurs’ home states<sup>117</sup>. The Companies Act

---

<sup>109</sup> John Vickers, ‘Consequences of Brexit for competition law and policy’ [2017] *Oxford Review of Economic Policy* 33 (suppl 1) 1

<sup>110</sup> *ibid* 5

<sup>111</sup> *ibid* 5

<sup>112</sup> Case C-212/97 *Centros Ltd v Erhvervs- og Selskabsstyrelsen* [1999] ECR I-1469

<sup>113</sup> Case C-208/00 *Überseering v NCC* [2002] ECR I-9919

<sup>114</sup> Case C-167/01 *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd* [2003] ECR I-10155

<sup>115</sup> Arts 49 and 54 TFEU

<sup>116</sup> Fernando Gómez Pomar, ‘Regulatory Competition in Company Law’ [2012] 15 available at <[https://www.upf.edu/dretcivil/\\_pdf/mat\\_fernando/LH11.pdf](https://www.upf.edu/dretcivil/_pdf/mat_fernando/LH11.pdf)> accessed 19 April 2017

<sup>117</sup> Marco Becht, Luca Enriques and Veronika Korom, ‘*Centros* and the Cost of Branching’ (2009) 9 *Journal of Corporate Law Studies* 171

2006 requires no minimum capital to create a limited company, and the start-up costs associated with forming a private company in the UK are also lower than in most other Member States<sup>118</sup>.

Incorporation under English law appears, however, to have peaked in 2006-7<sup>119</sup>, as many Member States responded to the exodus by reducing domestic minimum capital requirements<sup>120</sup>. However, there are currently as many as 333,000 English companies formed by entrepreneurs in other Member States,<sup>121</sup>. The UK limited company appears to have had the greatest popularity in Germany, presumably to avoid worker co-determination in German *GmbH*<sup>122</sup> or to circumvent German law restrictions regarding previous criminal convictions<sup>123</sup>.

The fate of these ‘pseudo-foreign’ firms, incorporated under English law but effectively operating in other Member States, would be in jeopardy after Brexit. If the UK were to withdraw from the EU without any transitional deal in place, all these companies would automatically lose their freedom of establishment under the Treaties. Even if the UK and the EU were to conclude a bilateral agreement, it is worth noting that neither the bundle of trade agreements between Switzerland and the EU, nor the recently concluded CETA with Canada include provisions protecting freedom of establishment for companies<sup>124</sup>.

If freedom of establishment ceases to apply, the legal consequences of ‘pseudo-foreign’ incorporations will be determined under national principles of private international law. Despite recent efforts, the conflict of laws rules on the law applicable to companies are not harmonized at EU level<sup>125</sup>. This article will focus on the legal regime after Brexit of UK companies in Germany and Austria, where incorporation in the UK has proved a particularly attractive option for domestic entrepreneurs<sup>126</sup>.

### *The ‘real seat’ theory*

Traditionally, continental rules for determining the applicable law to companies have been based on the ‘real seat’ theory (*Sitztheorie, théorie du siège réel*). Germany and Austria are not

---

<sup>118</sup> S Djankov et al, ‘The Regulation of Entry’ (2002) 67 Quarterly Journal of Economics 18

<sup>119</sup> WG Ringe, ‘Corporate Mobility in the European Union—A Flash in the Pan? An Empirical Study on the Success of Lawmaking and Regulatory Competition’ (2013) 10 *European Company and Financial Law Review* 230

<sup>120</sup> Since 2003 in France and since 2008 in Germany it is possible to incorporate a special type of private limited liability company with a legal capital of €1. In Hungary and Spain low-cost electronic formation of companies has also been introduced. Kokkinis (n 105) 971

<sup>121</sup> John Armour, Holger Fleischer, Vanessa Knapp, Martin Winner, ‘Brexit and Corporate Citizenship’ [2017] European Corporate Governance Institute (ECGI) 1. Available at SSRN: <<https://ssrn.com/abstract=2897419>>

<sup>122</sup> Hans Böckler Foundation, *Rechtsform verhindert Mitbestimmung* (Böckler Impuls, 3/2015) 4-5

<sup>123</sup> Carsten Kruchen, ‘Brexit: Need for Action for UK Limited Companies in Germany?’ (Oxford Business Law Blog, 5 July 2016) < <https://www.law.ox.ac.uk/business-law-blog/blog/2016/07/brexit-need-action-uk-limited-companies-germany>> accessed 22 March 2017

<sup>124</sup> Armour et al (n 121) 17

<sup>125</sup> See European Commission, *Study on the law applicable to companies with the aim of a possible harmonisation of conflict of laws rules on the matter* (2015/S 095-171730) and Francisco Garcimartín, ‘The Law Applicable to Companies in the European Union. A Proposal by the European Group for Private International Law’ [2016] Available at SSRN: <<https://ssrn.com/abstract=2857077>>

<sup>126</sup> Armour et al (n 121) 18

an exception<sup>127</sup>. Paragraph 10 of the Austrian Private International Law Act and extensive German case law provide that the *lex societatis* is determined by the location of the company's actual centre of administration<sup>128</sup>. The CJEU's case law resulted in a partial abolition of this 'real seat' theory, so that Member States can no longer require EU companies which move their centre of administration to, say, Frankfurt or Vienna, to re-register under their own laws<sup>129</sup>. This protection is of paramount importance given that the *lex societatis* determines the requirements for valid corporate formation and the issue of shareholder liability<sup>130</sup>.

After Brexit, companies formed in the UK will not enjoy freedom of establishment as interpreted by the CJEU, so nothing will prevent Austrian and German courts from applying their rules of private international law<sup>131</sup>. This would have devastating consequences for UK companies. As rightly pointed out by Francisco Garcimartin, the 'real seat' theory is effectively a doctrine of non-recognition of foreign legal persons<sup>132</sup>. Accordingly, German and Austrian courts will arrive at the conclusion that the UK-incorporated companies with their administration centre in those countries is not a company at all, but merely some type of partnership<sup>133</sup>. Therefore, shareholders would become co-owners or partners under German and Austrian law, with the consequence that they would be personally liable for the debts of their 'company'<sup>134</sup>. Shareholders would then lose the protection against liability provided for by the UK Companies Act 2006, on which they relied when incorporating. Additionally, decisions taken by management could be invalidated as German and English rules on representation are different<sup>135</sup>.

#### *Possible solutions to the full-blown application of the 'real seat' theory*

Lehmann and Zetsche<sup>136</sup> have highlighted that the harsh consequence of UK-incorporated companies being transformed into German partnerships is by no means inevitable<sup>137</sup>. After all, before Brexit incorporation in the UK was protected by the freedom of establishment at that time 'even if the company's central administration was in Germany or Austria; only due to a later change of the legal regime applicable to the UK and, therefore, due to events the members could not control, the protection is lost'<sup>138</sup>.

---

<sup>127</sup> Other examples of Member States applying the 'real seat' theory are Spain, France, Portugal and Italy. See Art. 9.3 of the Spanish Ley de Sociedades de Capital (RD Legislativo 1/2010, de 10 de julio)

<sup>128</sup> *Bundesgerichtshof*, Judgment of 21 March 1986, V ZR 10/85; BGH, Judgment of 13 March 2003, VII ZR 370/98

<sup>129</sup> *Kokkinis* (n 105) 969

<sup>130</sup> *Armour et al* (n 121) 19

<sup>131</sup> *Kronos International Inc. v Finanzamt Leverkusen* (C-47/12): 'a company or firm which is not formed in accordance with the law of a Member State cannot enjoy freedom of establishment.'

<sup>132</sup> Francisco Garcimartin, 'De nuevo sobre la ley aplicable a las sociedades en Europa: ¿hacia un futuro Reglamento?' (Almacén de Derecho, 14 December 2015) <<http://almacendederecho.org/de-nuevo-sobre-la-ley-aplicable-a-las-sociedades-en-europa-hacia-un-futuro-reglamento/>> accessed 22 March 2017

<sup>133</sup> *Gesellschaft bürgerlichen Rechts (GbR)*

<sup>134</sup> Christian Kersting, 'Brexit und Gesellschaftsrecht' (RechtsBoard, 24 June 2016) <<http://blog.handelsblatt.com/rechtsboard/2016/06/24/brexit-und-gesellschaftsrecht/>> accessed 22 March 2017

<sup>135</sup> *Lehmann and Zetsche* (n 79) 1012

<sup>136</sup> *ibid* 1013

<sup>137</sup> *Armour et al* (n 121) 22

<sup>138</sup> *ibid*

These circumstances have sparked a lively academic debate within German legal literature, seeking to avoid personal liability for shareholders of companies incorporated in the UK before Brexit<sup>139</sup>. One of the proposed solutions is to protect these companies and their shareholders through a doctrine of vested or acquired rights under German international private law<sup>140</sup>. ‘Applying general principles of intertemporal law, German law would then continue to recognise such entities as UK companies, even after Brexit’<sup>141</sup>. A similar result might be reached by invoking the principles of German administrative law that protect legitimate expectations.

To avoid unwanted results, companies could also restructure into a more appropriate corporate form available under German or Austrian law. UK-incorporated companies could undertake a cross-border change of legal form into a company governed by the law of another Member State than the UK<sup>142</sup>. Another possible solution would be a cross-border merger with a company governed by the law of another Member State than the UK. As in *Taming of the Shrew*, UK companies would have to look for adversaries with whom to eat and drink as friends. Businesses would be well advised to carry on with these restructuring operations before Brexit in order to take advantage of their soon-to-cease freedom of establishment<sup>143</sup>. However, according to Article 16 of the Cross-border Merger Directive, UK-incorporated companies would then have to comply with the German rules on co-determination and worker participation. The foundation of a *Societas Europaea* (SE), may also be an option<sup>144</sup>. In any event, we should be mindful that reorganization costs may constitute major obstacles for corporations that have often been formed with a capital of as little as one pound<sup>145</sup>.

## 4. Brexit and litigation

‘The law hath not been dead, though it hath slept’

*Measure for Measure* (Act II, Scene 2)

### 4.1. The future of London as an international forum of dispute resolution

London currently enjoys a privileged position as the major place of dispute resolution in Europe. According to recent research, 66% of litigants before the Commercial Court between 2008 and

---

<sup>139</sup> *ibid*

<sup>140</sup> MP Weller, C Thomale and N Benz, ‘Englische Gesellschaften und Unternehmensinsolvenzen in der Post-Brexit-EU’ [2016] *Neue Juristische Wochenschrift* 2378, 2381

<sup>141</sup> Armour et al (n 121) 2

<sup>142</sup> Based on the CJEU judgments *Cartesio* (C-210/06) and *Vale* (C-378/10). Kruchen (n 123)

<sup>143</sup> Rafael Arenas García, ‘Consecuencias del Brexit para el Derecho Internacional Privado Europeo’ 12 <[https://www.academia.edu/29809824/CONSECUENCIAS\\_DEL\\_BREXIT\\_PARA\\_EL\\_DERECHO\\_INTERNACIONAL\\_PRIVADO\\_EUROPEO](https://www.academia.edu/29809824/CONSECUENCIAS_DEL_BREXIT_PARA_EL_DERECHO_INTERNACIONAL_PRIVADO_EUROPEO)> accessed 18 April 2017

<sup>144</sup> *ibid*. As for the future of UK’s SEs, see Lehman and Zetzsche (n 79) 1014

<sup>145</sup> *ibid* 1013

2016 were from outside the UK<sup>146</sup>. Despite the lack of available data, we may compare that figure to the meagre 0.9% of foreign litigants before German courts in 2013<sup>147</sup>. When surveyed, commercial parties cited the following factors as influencing their decision to bring commercial claims to London based courts: the reputation and experience of judges, the combination of choice of court clauses with choice of English law clauses, market practice, English language and effective UK-based counsel<sup>148</sup>.

Crucially, parties also see the enforceability of English judgments in foreign jurisdictions as a key reason to choose London courts<sup>149</sup>. This advantage will most certainly be in jeopardy post Brexit, since the UK will no longer participate of the free circulation of judgments within the EU. Following the referendum, authoritative voices from other Member States have suggested that London's influence as a leading centre for international commercial dispute resolution will be significantly weakened<sup>150</sup>. In a recent Report of the House of Lords, the Law Society of England and Wales has pointed to 'anecdotal evidence' of foreign businesses already being discouraged from choosing England as the jurisdiction in commercial contracts<sup>151</sup>. If this trend continued, the Law Society has anticipated a detrimental impact on the legal services sector<sup>152</sup>.

Other views are far more optimistic as to the future of London as a seat of international dispute resolution<sup>153</sup> and characterise the ability to enforce English judgments in EU Member States as a 'side issue'<sup>154</sup>. For example, in Briggs' view, 'the inability to enforce an English judgment in other Member states may not be so much of a problem if it can be enforced in England', because, for example, 'banks in which [defendants'] assets are found may have branches in London'<sup>155</sup>. Louise Merrett, going even further, has argued that that the disadvantage would be felt on the continent rather than in the UK, and therefore the EU has a strong incentive to negotiate a scheme of reciprocal recognition and enforcement of judgments<sup>156</sup>.

Academic commentary on the impact of Brexit on the London legal market as a seat of international dispute resolution has so far focused on whether the legal framework will change. However, as Michael McIlwrath has pointed out, potential legal change is but one factor in

---

<sup>146</sup> Portland Legal Disputes, 'Who Uses the Commercial Court? – 2016' (2016) <<https://portland-communications.com/publications/who-uses-the-commercial-court-2016/>> Accessed 20 March 2017

<sup>147</sup> Burkhard Hess, 'The legal framework of the transitional period' (2016). Talk presented at *Post Brexit: The Fate of Commercial Dispute Resolution in London and on the Continent*: [joint conference of the Max Planck Institute for Procedural Law and the British Institute for International and Comparative Law]. London, 26 May 2016

<sup>148</sup> Ministry of Justice, *Factors Influencing International Litigants' Decisions to Bring Commercial Claims to the London Based Courts* (Analytical Series, 2015) 15

<sup>149</sup> *ibid*

<sup>150</sup> Burkhard Hess and Marta Requejo Isidro, 'Brexit – Immediate Consequences on the London Judicial Market' (Kluwer Arbitration Blog, 29 June 2016) <<http://kluwerarbitrationblog.com/2016/06/29/brexit-immediate-consequences-on-the-london-judicial-market/>> accessed 26 March 2017

<sup>151</sup> EU Committee (n 31) para 40

<sup>152</sup> *ibid*

<sup>153</sup> *Passim*, see the delightful piece by Adrian Briggs, 'Secession From the European Union and Private International Law: the Cloud With a Silver Lining' (*Blackstone Chambers*, 24 January 2017)

<sup>154</sup> EU Committee (n 31) para 46. Richard Fentiman believes that the potential loss of the Brussels Regulation would not be 'as significant as some people ... imagine' and does not pose 'an existential threat'.

<sup>155</sup> *ibid* para 47

<sup>156</sup> *ibid* para 48

determining whether parties are less or more likely to choose a forum<sup>157</sup>. The uncertainty surrounding Brexit itself is likely to undermine London's reputation as a seat, diminishing its appeal to Europeans in both the short and medium term. Additionally, Brexit presents a perfect marketing opportunity for competing fora in other Member States, that will attempt to attract the lucrative business of dispute resolution<sup>158</sup>. In these circumstances, global litigation could move to Paris, Rotterdam, Frankfurt<sup>159</sup> or Singapore, 'which is putting in a big pitch'<sup>160</sup>.

## 4.2 The future of the Brussels regime in the UK

The jurisdiction of British courts and the courts of other EU Member States in civil and commercial matters is currently governed by Regulation 1215/2012 (the Brussels I *recast* Regulation)<sup>161</sup>. This instrument provides, inter alia, that a choice of court by the parties should be upheld<sup>162</sup> and that judgments delivered by the courts of one Member State should be recognised throughout the EU<sup>163</sup>. The Recast Regulation is the latest in a line of European legislative instruments on this subject, following its predecessors, the Brussels I Regulation<sup>164</sup> and the 1968 Brussels Convention.

Brexit will have the effect of depriving Brussels I *recast* of legal force in the UK, alongside with the rest of all the key EU private international law instruments<sup>165</sup>. The same would be true of international treaties concluded by the EU such as the 2007 Lugano Convention and the Hague Choice of Court Convention, which (as matters stand) bind the UK only indirectly through its status as a Member State<sup>166</sup>. The uncertainty surrounding the jurisdiction and recognition landscape post-Brexit has already spurred enthusiastic debate among lawyers<sup>167</sup>. Following a recent article by Sara Masters and Belinda McRae<sup>168</sup>, we may identify five possible

---

<sup>157</sup> Michael McIlwrath, 'An Unamicable Separation: Brexit Consequences for London as a Premier Seat of International Dispute Resolution in Europe' (2016) 33 *Journal of International Arbitration* 451

<sup>158</sup> *ibid* 454

<sup>159</sup> Marta Requejo, 'Brexit: An Opportunity for Frankfurt to Become a New Hub of Litigation in Europe?' (Conflict of Laws.net, 13 March 2017) <<http://conflictolaws.net/2017/brexit-an-opportunity-for-frankfurt-to-become-a-new-hub-of-litigation-in-europe/>> accessed 22 March 2017

<sup>160</sup> EU Committee (n 31) paras 63-64

<sup>161</sup> 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 (recast)

<sup>162</sup> Art. 25 Regulation Brussels I recast

<sup>163</sup> Chapter III Regulation Brussels I recast

<sup>164</sup> Council Regulation (EC) No 44/2001, of 22 December 2000, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

<sup>165</sup> Notably, the Brussels II Regulation, the Rome I and Rome II Regulations, the Maintenance Regulation, the Insolvency Regulation and the Evidence and Service Regulations

<sup>166</sup> See Opinion 1/03 of the Court, delivered on 7 February 2006

<sup>167</sup> See Mukarrum Ahmed, 'BREXIT and English Jurisdiction Agreements: The Post-Referendum Legal Landscape' (2016) 27 *European Business Law Review* 989. As for the Spanish scholarship, see Rafael Arenas García 'Brexit y Derecho Internacional Privado' (2016) 8798 *Diario La Ley*

<sup>168</sup> Sara Masters and Belinda McRae, 'What Does Brexit mean for the Brussels Regime?' (2016) 33 *Journal of International Arbitration* 483

negotiation options for the future relation between the EU and the UK concerning the recognition and enforceability of judgments and the difficulties that they raise.

*Solution 1: The Danish model - Continued application of the Brussels regime*

The first option (and presumably, the option preferred by businesses) is that the UK negotiates the continued application of the Brussels regime. Given the reciprocal and multilateral nature of the Brussels I recast Regulation, an agreement with the EU would be needed. Conveniently, Denmark's 2005 agreement with the European Community<sup>169</sup>, which takes effect as a public international law treaty, provides a ready-made precedent from which to draw inspiration<sup>170</sup>.

This solution would have significant advantages. First, it would mean that each of the remaining twenty-seven EU Member States and the UK would continue to apply the same rules as to the allocation of jurisdiction as between the courts of those states and as to the recognition and enforcement of their judgments, thus avoiding uncertainty<sup>171</sup>. It would also allow the UK to continue to participate in a system that has been 'proven to work'<sup>172</sup>, in which jurisdiction is allocated on a clear and codified basis, parallel proceedings are largely prevented and judgments may be recognized and enforced with relative ease<sup>173</sup>.

There are, however, some potential disadvantages. If the Brussels I recast Regulation were to be modified, the UK would have no formal right to participate in the amendment process<sup>174</sup>. Additionally, under the Denmark-EC Agreement, Denmark is bound by the jurisdiction of the CJEU, and Danish courts (which, importantly for the purposes of the Treaty's preliminary reference procedure, remain courts 'of a Member State') are obliged to refer questions on the legislation's interpretation to the CJEU<sup>175</sup>. This continued supervision by the CJEU under the Danish model could prove politically unlikely, since the government seems determined to bring to an end the jurisdiction of the CJEU.

*Solution 2: The EFTA model - Lugano II Convention*

The second solution is to join the Lugano II Convention, conceived to extend the Brussels regime to the remaining EFTA states. The UK is presently bound by the Lugano II Convention only by virtue of its status as a Member State of the EU and not as a sovereign state<sup>176</sup>. This means that once the UK ceased to be a Member State, it would no longer be a party to the convention<sup>177</sup>. Conveniently, the Lugano II Convention is open for accession for third states, so

---

<sup>169</sup> In the light of Denmark's opt-out from the home affairs and justice pillar through the Maastricht Treaty, that agreement was necessary to bring the Brussels I Regulation into force. Agreement between the European Community and the Kingdom of Denmark on the service of judicial and extra-judicial documents in civil and commercial matters, [2005] OJ L/ 300/55, 17 November 2005

<sup>170</sup> Commercial Bar Association, *Brexit Report* (COMBAR Brexit Papers, 2017) para 58

<sup>171</sup> Masters and McRae (n 168) 483

<sup>172</sup> Oliver Jones quoted in EU Committee (n 31) para 28

<sup>173</sup> Masters and McRae (n 168) 483

<sup>174</sup> Looking beyond Brexit, Steve Peers has warned that 'one risk of not being part of the EU system is that it might be changed to take account of the UK not being part of it any more'. Quoted in EU Committee (n 31) para 50

<sup>175</sup> Article 6(2) of the EC-Denmark Agreement

<sup>176</sup> n 166 above

<sup>177</sup> Other imaginative solutions, such as the application by analogy of the Vienna Convention on Succession of States in respect of Treaties, seem outlandish and unconvincing.

the UK would not be required to join EFTA in order to become a contracting state<sup>178</sup>. Even though accession is only possible with the unanimous agreement of the parties, it is hard to imagine that the EU and EFTA Member States would deny such consent, given their interest in civil judicial cooperation with the UK<sup>179</sup>.

The principal difficulty, however, is that the Lugano II Convention has not been revised to reflect the case law of the CJEU and the amendments to the Brussels I *recast* Regulation. Unless British accession to the Lugano II Convention provided an incentive for reform, the UK would be opting for an outdated model. Specifically, the following key improvements would be sorely missed: (1) ‘the clarification of the arbitration exception in Article 1(2)(d); (2) the conferral of jurisdiction on the Member State court selected by the parties to a jurisdiction agreement, regardless of the domicile of the parties; (3) the reversal of the CJEU’s decision in *Gasser* to give priority to the court first seized where proceedings are brought under an exclusive jurisdiction clause, with the aim of destroying the now infamous ‘Italian torpedo’; and (4) the abolition of *exequatur*, with the goal of simplifying the process of enforcement’<sup>180</sup>

Additionally, as with the Danish model, the CJEU would still exert jurisdiction over the UK as provided by Protocol No. 2 of the Lugano II Convention. As its Preamble explains, the Protocol seeks to reduce divergent interpretations as between the Brussels I Regulation and the Lugano II Convention<sup>181</sup>. It provides that any court applying its provisions should ‘pay due account’ to similar judgments under the 1988 Lugano Convention, the Brussels Convention or the Brussels I Regulation, and sets up a system of information exchange in respect of such judgments<sup>182</sup>. This, again, is likely to result in some sort of political backlash.

### *Solution 3: The ‘old’ model - Brussels Convention*

The 1968 Brussels Convention, signed by the UK in 1978, became largely redundant following the 2001 Regulation. There is a question, however, about whether the Brussels Convention could ‘revive’ following the UK’s withdrawal from the EU. The question is posed by Dickinson as follows: ‘does the UK remain bound by, and entitled to benefit from, the Brussels Convention, which it entered into in connection with its membership of the (then) EEC despite the facts that (i) it is no longer a member of the EU, and (ii) those conventions had been “superseded” or “replaced” by EU legislation?’<sup>183</sup>

The status of the conventions involves questions of public international (treaty) law, as well as of EU law. A sound case can be made that the UK remains a contracting state to the 1968 Brussels Convention and its Protocols, which would revive after Brexit. Like in *Measure by Measure*, the law would not have been dead, but only asleep.

It could be argued the UK’s accession to, and participation in, the Convention was not in terms conditional upon its continued membership of the EEC, but that membership merely provided

---

<sup>178</sup> Art. 72 Lugano II Convention

<sup>179</sup> Lehmann and Zetzsche (n 79) 1025

<sup>180</sup> Masters and McRae (n 168) 489-490

<sup>181</sup> Recital no. 8 of the Preamble

<sup>182</sup> Articles 1-3 of the Protocol No. 2 to the Lugano II Convention

<sup>183</sup> Dickinson (n 52) 203

the reason for its accession<sup>184</sup>. As Art. 68(1) of the 2001 Brussels Regulation makes clear, the 1968 Brussels Convention remains in force and residually applicable in relation to territories to which the Convention applies but the EU Treaties do not (Aruba and certain French overseas territories). The wording of Article 68 of the Brussels I Regulation ('supersede *as between Member States*') and recital 23 of the same instrument, which states that the Convention 'continues to apply', also indicate that the Brussels Convention remains alive and well.

That said, the debate is far from clear<sup>185</sup>. As Dickinson points out, it is entirely possible that the CJEU (whose view on this matter may well be determinative) would reach a different conclusion, having regard to the strong link between the Convention and the former EEC Treaty. The Court might decide '(i) that a State's participation in the 1968 Brussels Convention is conditional upon its continued membership of the EU, (ii) that the UK's withdrawal from the EU is a fundamental change of circumstances which may be invoked by the other Contracting States as a ground for termination of the 1968 Brussels Convention, (iii) that Art 68 of the 2001 Regulation had the effect of permanently displacing the 1968 Brussels Convention as between the Member States at that time save as regards the non-EU territories, or (iv) that, in any event, the remaining Member States could not as a matter of EU law rely on Art. 71 of the 2012 Brussels I Regulation in order to justify giving overriding effect to the 1968 Convention'<sup>186</sup>.

In any event, bringing the Brussels Convention back from the dead is likely to raise significant difficulties<sup>187</sup>. If the 'revival' of the Brussels Convention were adopted as a last resort after failed negotiations to apply the Recast Regulation or the Lugano II Convention, there might be considerable political opposition. Additionally, the practical utility of such a treaty would be limited, since none of the states which became Member States in or after 2004 are party to it. After forty years of case law, legislation and private international law scholarship, the Brussels Convention is also substantially out-of-date.<sup>188</sup>

A similar argument about revival could be raised in respect of the 1988 Lugano Convention, although with less prospect of success<sup>189</sup>. Art. 59 of the Vienna Convention on the Law of Treaties seems to indicate that the Lugano II Convention impliedly terminated its predecessor.

#### *Solution 4: The 'new' model - Another treaty?*

A possible fourth option is for the UK to agree a brand-new treaty on civil jurisdiction with the EU (which has exclusive competence in this matter)<sup>190</sup>. However, given the time-consuming nature of any treaty-drafting exercise, the more likely solution would be for the UK to adopt an already existing treaty. The ideal candidate is the Hague Convention on Choice of Court

---

<sup>184</sup> *ibid.* Also, see the Preamble of the Brussels Convention

<sup>185</sup> Rafael Arenas has argued that Art. 68(1) of the Brussels I Regulation implicitly terminated the Brussels Convention (n 143) 21

<sup>186</sup> Dickinson (n 52) 205-206

<sup>187</sup> Briggs (n 153) 3

<sup>188</sup> Masters and McRae (n 168) 491. The Brussels Convention does not contain a head of jurisdiction for contractual disputes regarding contracts for the sale of goods and services, and still requires *exequatur*

<sup>189</sup> *ibid* 493

<sup>190</sup> See Article 81 TFEU and Opinion 1/03 of the Court of 7 February 2006 and Opinion 1/13 of the Court of 14 October 2014

Agreements, which was signed on 1 June 2005 and came into force in the UK on 1 October 2015, after its approval by the EU.

This Hague Convention does have certain practical benefits<sup>191</sup>. First, the EU has already acceded to it, so it applies in all Member States but Denmark. Secondly, it is open for signature by all states, without any special requirements, and the ratification process is relatively straightforward. Accordingly, ‘the risk of an exclusive jurisdiction clause falling outside the protection of either the Recast Regulation or the Hague Convention during a transitional period could be largely averted’<sup>192</sup>.

There would be, however, significant potential pitfalls if the UK were to adopt the Hague Convention instead of an EU or EFTA-based solution. First, the Convention does not provide a comprehensive regime for the establishment of jurisdiction; rather, it is limited to the enforcement of exclusive jurisdiction agreements<sup>193</sup>. Secondly, important areas of commercial litigation, such as carriage of goods, insolvency and interim relief fall outside its scope<sup>194</sup>. Thirdly, it is largely untested owing to the small number of signatory states<sup>195</sup>. Fourthly, its recognition and enforcement procedure is not as ambitious as that of the Brussels regime, since it allows for *exequatur*<sup>196</sup>. However, the Hague Convention may serve as a useful transitional scheme, particularly to safeguard the enforceability of jurisdictional clauses while a more comprehensive regime is being negotiated<sup>197</sup>.

*Solution 5: No solution – Domestic statute and the common law*

The final possibility is the residual application of UK statute and the common law after a three-decade European holiday. The UK would revert to the rules of civil jurisdiction and enforcement of judgments contained in the Civil Procedure Rules<sup>198</sup> and the Civil Jurisdiction and Judgments Act 1982<sup>199</sup>, as well as in the case law<sup>200</sup>. In Master and McRae’s view, this option would be ‘fraught with uncertainty’, not least due to the abyss between the European and common law approaches to jurisdiction<sup>201</sup>. According to Briggs, the Brussels regime’s importance for the UK lay precisely in the protection it conferred on defendants in other Member States from the normal rule of the common law: ‘that any person who is present within the territorial jurisdiction of the English court, or any company [...] will be liable to be sued in

---

<sup>191</sup> Masters and McRae (n 168) 494

<sup>192</sup> *ibid*

<sup>193</sup> Commercial Bar Association (n 170) para 37. The Convention does not apply when there is a one-way or asymmetric jurisdiction clause.

<sup>194</sup> Arts. 2 and 7 of the Hague Convention on Choice of Court Agreements

<sup>195</sup> Even though it is expected that the Convention will grow in popularity after ratification by Singapore

<sup>196</sup> See Chapter III of the Hague Convention

<sup>197</sup> Masters and McRae (n 168) 495

<sup>198</sup> See Civil Procedure Rules Direction 6B, para 3

<sup>199</sup> Sections 32-34

<sup>200</sup> The leading authorities are *Spiliada Maritime Corporation v Cansulex LTD* [1987] AC 460, *Connelly v RTZ Corporation plc* [1998] AC 854 and *Lubbe v Cape plc* [2000] 1 WLR 1545 (HL). For a comprehensive account of the English common law of jurisdiction, see Adrian Briggs, *The Conflict of Laws* (3<sup>rd</sup> ed OUP 2013) 111-137

<sup>201</sup> Masters and McRae (n 168) 497

England'<sup>202</sup>. The return to the common law is neither desirable nor practicable for that reason alone.

The danger of exorbitant fora would not affect only defendants domiciled in the continent. If no deal regarding private international law is in place after withdrawal from the EU, the jurisdiction of the courts of the remaining Member States over defendants domiciled in the UK will be determined by their domestic law<sup>203</sup>. Therefore, and just by way of illustration, a Frenchman domiciled in France could sue a defendant domiciled in the UK solely on the basis of the French nationality of the claimant<sup>204</sup>.

As a finishing note, we may add that the residual application of the common law in a 'no deal' scenario would not be absolute. The UK still has functioning bilateral treaties with Austria, Belgium, France, Germany, Italy and the Netherlands concerning the recognition and enforcement of judgments<sup>205</sup>. However, these treaties are severely more limited than the Brussels and Lugano regimes, both in their territorial and material scope, since they only apply to final money judgments<sup>206</sup>.

### 4.3. The transitional regime

It is also unclear if (and how) the Brussels regime would apply beyond Brexit Day, although one might expect the transitional regime to be included in the withdrawal agreement<sup>207</sup>. However, to the extent that the future agreement remains silent, there are potential problems relating to (i) the applicable rules of jurisdiction (and whether UK-domiciled defendants are to be treated as domiciled in a Member State for the purposes of establishing jurisdiction), (ii) the relevance of pending proceedings before a Member State court to proceedings in an English court (and vice versa) and (iii) the applicable rules as to the recognition and enforcement of a judgment in or originating from the UK<sup>208</sup>.

About the applicable jurisdictional regime, Dickinson rightly argues that the date of institution of legal proceedings seems a reasonable justifiable and sensible guide, even if the hearing on jurisdiction takes place after a UK withdrawal<sup>209</sup>. Indeed, Article 9(1) of the EC-Denmark Agreement provided for the same solution, i.e., that the Agreement applies only to proceedings instituted after its entry into force. As to the *lis pendens* rules, and given their function of avoiding irreconcilable judgments, it seems doubtful that these provisions would apply once there is no danger of an outgoing UK judgment or incoming Member State judgment being automatically recognised. To prevent uncertainty over jurisdiction clauses the UK should

---

<sup>202</sup> Quoted in EU Committee (n 31) para 30

<sup>203</sup> Art. 6(2) Regulation Brussels I *recast*

<sup>204</sup> Arts. 14 and 15 of the French *Code Civil*. Rafael Arenas (n 143) 16

<sup>205</sup> See Foreign Judgments (Reciprocal Enforcement) Act 1933, s 1(2A)

<sup>206</sup> *ibid* s (2)(b)

<sup>207</sup> Commercial Bar Association (n 170) para 39

<sup>208</sup> Dickinson (n 52) 208

<sup>209</sup> *ibid*

become a signatory to the Hague Convention 2005<sup>210</sup>. In the event that no agreement with EU was reached and the UK did not accede the Choice of Court Convention, the question of whether a EU Member State court would uphold an English jurisdiction clause would largely depend on its own national law<sup>211</sup>.

Finally, as to the recognition and enforcement of judgments, after Brexit Day it is unlikely that a UK judgment would be capable of recognition and enforcement in another Member/Contracting State, and vice versa, even if the proceedings were on foot beforehand<sup>212</sup>. The enforcement of a British judgment would then be dependent on the domestic law of the state of destination. If, however, the judgment was delivered before the date of withdrawal, it could reasonably be argued that its automatic recognition under the Brussels or Lugano regime confers on the litigants an ‘acquired right’<sup>213</sup> which may be relied on to claim *res judicata* effects and enforcement even after Brexit<sup>214</sup>. In any case, and in order to avoid speculation and unnecessary uncertainty, it would be highly desirable for these issues to be addressed in detail in the withdrawal agreement.

We may add as a finishing note that Brexit could also affect the fate of a multi-million suit: the enforcement of the Spanish Supreme Court’s judgment on the damages caused by the shipwreck of the *Prestige* oil tanker in 2002<sup>215</sup>. The Spanish State Legal Service (*Abogacía del Estado*) is already preparing the proceedings against the insurance firm London P&I Club to obtain the reimbursement of 1 billion USD<sup>216</sup>. The success of the enforcement of the judgment in the UK largely depends on the terms of the transitional agreement on jurisdiction and enforcement of foreign judgments.

#### 4.4. Good news for arbitration?

As we have seen, Brexit is likely to cause much confusion and legal uncertainty over the rules governing the jurisdiction of British courts and the recognition and enforcement of British judgments. As a way of contrast, the consequences of Brexit on international commercial arbitration should be ‘limited and foreseeable, since this field has been harmonised at an international rather than at EU level’<sup>217</sup> and arbitration is expressly excluded from scope of the

---

<sup>210</sup> See supra.

<sup>211</sup> José Carlos Fernández Rozas, Sixto Sánchez Lorenzo, *Derecho internacional privado* (9th ed, Thomson Reuters/Civitas 2016) 46. See *Coreck Maritime GmbH v Handelsveem BV and Others* (C-387/98) and, by way of illustration, Art. 22 ter of the Spanish Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial.

<sup>212</sup> Dickinson (n 52) 208

<sup>213</sup> See Art. 70 of the Vienna Convention on the Law of Treaties and European Union Committee, *Brexit: Acquired Rights* (HL 2016-17, 82, 2016)

<sup>214</sup> Dickinson (n 52) 208

<sup>215</sup> Judgment of the Spanish Supreme Court (Second Chamber) of 14 January 2016 (ROJ: STS 11/2016)

<sup>216</sup> Pablo González, ‘¿Afectará el “Brexit” a las indemnizaciones del “Prestige”?’ *La Voz de Galicia* (A Coruña, 30 June 2016)

<sup>217</sup> Guillaume Croisant, ‘Towards the Uncertainties of a Hard Brexit: An Opportunity for International Arbitration’ (Oxford Business Law Blog, 1 March 2017) <<https://www.law.ox.ac.uk/business-law-blog/blog/2017/03/towards-uncertainties-hard-brexit-opportunity-international>> accessed 20 March 2017

Brussels I recast regulation and the Lugano II Convention<sup>218</sup>. Brexit itself does not affect the Arbitration Act 1996, which is the key arbitration statute, nor the 1958 New York Convention, which ensures the recognition and enforcement of arbitration clauses and awards in more than 150 signatory countries, including the UK and the remaining EU Member States.<sup>219</sup>

However, one notable change that will occur post-Brexit will be the re-introduction of anti-suit injunctions<sup>220</sup>. English courts will unequivocally regain the ability to freeze proceedings brought in breach of an arbitration clause in other Member State courts. The UK Supreme Court in *Ust-Kamenogorsk*<sup>221</sup> has upheld the English court's power to issue anti-suit injunctions except for the 'European inroad'<sup>222</sup> of the CJEU judgment in *West Tankers*<sup>223</sup>, i.e. the prohibition of anti-suit injunctions within the Brussels regime.

The post-Brexit broad availability of anti-suit injunctions in the UK may be seen, in some cases, as an advantage towards choosing London as a seat of arbitration<sup>224</sup>. Salahudine and Wahab<sup>225</sup> argue that the pre-eminence of London as a seat of arbitration will not be substantially changed in the short term, since the factors that have made London a reputed seat will remain unchanged post-Brexit: the city's position as international trading centre, its well-developed legal infrastructure, its openness to foreign litigants, commercial friendly attitude, etc.<sup>226</sup>. However, would more stringent visa requirements or immigration restrictions be introduced after Brexit, that would adversely impact the access to the international dispute resolution market in the UK<sup>227</sup>.

---

<sup>218</sup> See Art. 1(2)(d) and Recital 12 to the Preamble of the Brussels I recast Regulation and Art. 1(2)(d) of the Lugano II Convention

<sup>219</sup> Croisant (n 217)

<sup>220</sup> Mohamad Salahudine and Abdel Wahab, 'Brexit's Chilling Effect on Choice of Law and Arbitration in the United Kingdom: Practical Reflections Between Aggravation and Alleviation' (2016) 33 *Journal of International Arbitration* 472

<sup>221</sup> *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35

<sup>222</sup> Croisant (n 217)

<sup>223</sup> C-185/07. For a detailed account of the case and its aftermath, see Geert Van Calster, 'Kerpow! The United Kingdom Courts, West Tankers, and the Arbitration "Exception" in the Brussels I Regulation' (2001) *European Review of Private Law* 205

<sup>224</sup> Oliver Jones agrees: 'My personal view of who will win out is... the arbitration centres, in particular given the New York Convention on the universal enforceability of arbitration decisions'. Quoted in EU Committee (n 31) para 67

<sup>225</sup> Salahudine and Wahab (n 220) 473

<sup>226</sup> Ministry of Justice (n 148) 11

<sup>227</sup> Salahudine and Wahab (n 220) 473

## 5. Conclusion

‘The first thing we do, let's kill all the lawyers’

*Henry IV* (Act IV, Scene 2)

There will be no attempt to summarise the findings above. Suffice it to say the following by way of conclusion. There are difficult and crucial legal issues arising from Brexit, particularly because this is uncharted territory. Whatever the outcome of the negotiations, businesses both in the UK and the continent must prepare themselves for more than two years of legal uncertainty. We all should therefore resist the temptation to follow the advice in *Henry IV*, since we are going to need some lawyers for a while<sup>228</sup>. Commercial parties should be aware of the potential risks that Brexit poses for contractual relations and would be well advised to seek counsel to address issues such as interpretation, applicable law and termination. The UK government and the EU should provide some sort of scheme, either in the withdrawal or the transitional agreement, to protect companies that will lose their freedom of establishment and to facilitate the restructuring process. There is also much needed certainty concerning the future regime of jurisdiction and enforcement of civil judgments.

Paradoxically, and paraphrasing *Coriolanus*, even though the Leave option won the referendum, as of now we only Remain with our uncertainty.

---

<sup>228</sup> Jamie Smyth, ‘Brexit triggers ‘mini-boom’ for lawyers, says Baker McKenzie chair’ *Financial Times* (London, 8 April 2017). Also, Paul Craig (n 1) 28

## References

Ahmed, M. (2016). 'BREXIT and English Jurisdiction Agreements: The Post-Referendum Legal Landscape'. *European Business Law Review*, 27, 989

Allen and Overy, (2016) 'Brexit – legal consequences for commercial parties: English governing law clauses – should commercial parties change their approach?'. Specialist paper No 1, 3

Allen, K., Treanor, J. & Goodley, S. 'Pound slumps to 31-year low following Brexit vote' *The Guardian* (Londres, 24 June 2016)

Arenas García, R. (2016) 'Brexit y Derecho Internacional Privado'. *Diario La Ley*, 8798

Arenas García, R. (2017) 'Consecuencias del Brexit para el Derecho Internacional Privado Europeo' 12  
<[https://www.academia.edu/29809824/CONSECUENCIAS\\_DEL\\_BREXIT\\_PARA\\_EL\\_DERECHO\\_INTERNACIONAL\\_PRIVADO\\_EUROPEO](https://www.academia.edu/29809824/CONSECUENCIAS_DEL_BREXIT_PARA_EL_DERECHO_INTERNACIONAL_PRIVADO_EUROPEO)> Consultado (18 Abril 2017)

Armour, J., Fleischer, H., Knapp, V. & Winner, M. (2017). 'Brexit and Corporate Citizenship'. *European Corporate Governance Institute (ECGI)* 1. Disponible en SSRN: <<https://ssrn.com/abstract=2897419>>

Baker McKenzie, Oxford Economics, (2017). 2017 Global Transactions Forecast: From apprehension to appetite, 17

Barker, A., 'Brussels focuses on UK's €60bn exit bill before trade talks', *FT* (19 February 2017)

Barker, A., 'The €60 Billion Brexit bill: How to disentangle Britain from the EU Budget' (Centre for Economic Reform, 2017)

Bartels, L. (2016). 'The UK's Status in the WTO after Brexit' Disponible en SSRN: <https://ssrn.com/abstract=2841747>

Bech-Bruun/Lexidale. (2013). *Study on the Application of the Cross-border Mergers Directive*, 5

Becht, M., Enriques, L. & Korom, V. (2009). 'Centros and the Cost of Branching' *Journal of Corporate Law Studies*, 9, 171

Briggs, A. 'Secession From the European Union and Private International Law: the Cloud With a Silver Lining' (Blackstone Chambers, 24 January 2017)

Briggs, A. (2013). *The Conflict of Laws*. Oxford: OUP.

Cartwright, J. (2016). *Contract Law. An Introduction to the English Law of Contract for the Civil Lawyer* (3<sup>a</sup> ed.). Oxford: Hart.

Centre for Economic Performance of the London School of Economics and Political Science, (2016). 'The Consequences of Brexit for UK Trade and Living Standards' (Brexit Paper, No. 2).

Charlemagne, 'Contempt of Court' *The Economist* (Londres, 4 Marzo 2017)

Charlemagne, 'Descending Mount Brexit' *The Economist* (Londres, 8 Abril 2017)

Commercial Bar Association, (2017). *Brexit Report* (COMBAR Brexit Papers)

Craig, P. (2016). 'Brexit: A Drama in Six Acts'. *European Law Review*, 447

Croissant, G. (2017). 'Towards the Uncertainties of a Hard Brexit: An Opportunity for International Arbitration' (*Oxford Business Law Blog*) <<https://www.law.ox.ac.uk/business-law-blog/blog/2017/03/towards-uncertainties-hard-brexit-opportunity-international>> Consultado (20 Marzo 2017)

Dickinson, A. (2016). 'Back to the future: the UK's EU exit and the conflict of laws' *Journal of Private International Law*, 12, 208

Djankov, S. et al, 'The Regulation of Entry' (2002). *Quarterly Journal of Economics* 67, 18

Eidenmüller, H. (2016) 'Negotiating and Mediating Brexit' Disponible en <https://ssrn.com/abstract=2854829>

Europe Economics, *Implications of Brexit for the UK M&A Market* (Chancery House, 2016)

European Commission, *Study on the law applicable to companies with the aim of a possible harmonisation of conflict of laws rules on the matter* (2015/S 095-171730)

European Union Committee, *Brexit: justice for families, individuals and businesses?* (HL Paper 134, 2017)

European Union Committee, *The process of withdrawing from the EU* (HL 2015-16, 138)

Fernández Rozas, J.C., Sánchez Lorenzo, S. (2016). *Derecho internacional privado*. Cizur Menor: Thomson Reuters.

Foreign Affairs Committee, *Article 50 negotiations: Implications of 'no deal'* (HC 1077, 2017)

Garciamartin, F. (2015). 'De nuevo sobre la ley aplicable a las sociedades en Europa: ¿hacia un futuro Reglamento?' (*Almacén de Derecho*) <<http://almacenederecho.org/de-nuevo-sobre-la-ley-aplicable-a-las-sociedades-en-europa-hacia-un-futuro-reglamento/>> Consultado (22 Marzo 2017)

Garcimartín, F. (2016). 'The Law Applicable to Companies in the European Union. A Proposal by the European Group for Private International Law'. Disponible en SSRN: <<https://ssrn.com/abstract=2857077>>

Gómez Pomar, F. (2012) 'Regulatory Competition in Company Law'. Disponible en <[https://www.upf.edu/dretcivil/\\_pdf/mat\\_fernando/LH11.pdf](https://www.upf.edu/dretcivil/_pdf/mat_fernando/LH11.pdf)> Consultado (19 Abril 2017)

González, P. '¿Afectará el "Brexit" a las indemnizaciones del "Prestige"?' La Voz de Galicia (A Coruña, 30 June 2016)

Hans Böckler Foundation, Rechtsform verhindert Mitbestimmung (Böckler Impuls, 3/2015)

Herbert Smith Freehills, 'English Law Contracts post-Brexit: What changes should commercial parties expect?' (Contract Disputes Practical Guides Issue 7, 2016)

Hess, B. & and Requejo Isidro, M. (2016). 'Brexit – Immediate Consequences on the London Judicial Market' (Kluwer Arbitration Blog) <<http://kluwerarbitrationblog.com/2016/06/29/brexit-immediate-consequences-on-the-londres-judicial-market/>> Consultado (26 Marzo 2017)

Hess, B. 'The legal framework of the transitional period' (2016). Trabajo presentado en Post Brexit: The Fate of Commercial Dispute Resolution in Londres and on the Continent: [Conferencia conjunta del Max Planck Institute for Procedural Law y el British Institute for International and Comparative Law]. Londres, 26 Mayo 2016

HM Government, (2017). The United Kingdom's exit from and new partnership with the European Union (White Paper, Cm 9417)

House of Commons Library, (2016). Brexit: impact across policy areas (Briefing Paper No. 07213)

Hughes, J. & Wigglesworth, R., 'Pound falls below \$1.20 ahead of Theresa May's Brexit speech' Financial Times (Hong Kong, 16 January 2017)

'In full: the EU's draft guidelines for Brexit negotiations' The Telegraph (Londres, 31 Marzo 2017)

Kersting, C. (2016). 'Brexit und Gesellschaftsrecht' (RechtsBoard) <<http://blog.handelsblatt.com/rechtsboard/2016/06/24/brexit-und-gesellschaftsrecht/>> Consultado (22 Marzo 2017)

Kilduff, D. & Davies, G. (2016). 'Brexit: Will Brexit affect choice of English law and jurisdiction clauses?' (Walker Morris) <<https://www.walkermorris.co.uk/publications/brexit/brexitwill-brexit-affect-choice-english-law-jurisdiction-clauses/>> Consultado (21 Marzo 2017)

Kokkinis, A. (2016). 'The Impact of Brexit on the Legal Framework for Cross-Border Corporate Activity'. European Business Law Review, 975

Kruchen, C. (2016). 'Brexit: Need for Action for UK Limited Companies in Germany?' (Oxford Business Law Blog) <<https://www.law.ox.ac.uk/business-law-blog/blog/2016/07/brexit-need-action-uk-limited-companies-germany>> Consultado (22 Marzo 2017)

Lehmann, M. & Zetsche, D., (2016). 'Brexit and the Consequences for Commercial and Financial relations between the EU and the UK'. *European Business Law Review*, 1007

Loan Market Association, LMA note on documentary implications of Brexit for LMA facility documentation (Issues and Guidance, 2006)

Mangas Martín, A. (2016). 'Postbrexit: Una Europa confusa, entre el desánimo y la incertidumbre'. *Revista de Derecho Comunitario Europeo*, 433

Markesinis, B., Unberath, H. & Johnston, A. (2006) *The German Law of Contract* (2<sup>a</sup> ed.). Oxford: Hart.

Masters, S. & McRae, B., (2016). 'What Does Brexit mean for the Brussels Regime?'. *Journal of International Arbitration*, 33, 483

McIlwrath, M. (2016). 'An Unamicable Separation: Brexit Consequences for Londres as a Premier Seat of International Dispute Resolution in Europe'. *Journal of International Arbitration*, 33, 451

Ministry of Justice, *Factors Influencing International Litigants' Decisions to Bring Commercial Claims to the Londres Based Courts* (Analytical Series, 2015)

Nicolaïdis, K. (2017). 'Brexit arithmetics' (Oxford University) <<http://www.ox.ac.uk/news-and-events/oxford-and-brexit/brexit-analysis/brexit-arithmetics>> Consultado (27 Marzo 2017)

Number 10, Speech: The Government's negotiating objectives for exiting the EU (17 January 2017) <<https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech>> Consultado (19 Abril 2017)

O'Brien, F. 'U.K. Inflation Gains More Than Forecast, Breaching BOE Goal' *Bloomberg Markets* (21 Marzo 2017)

Poptcheva, E-M. (2016). 'Article 50 TEU: Withdrawal of a Member State from the EU' (European Parliament Research Service)

Portland Legal Disputes, 'Who Uses the Commercial Court? – 2016' (2016) <<https://portland-communications.com/publications/who-uses-the-commercial-court-2016/>> Consultado (20 Marzo 2017)

Rapport au Président de la République relatif à l'ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations <<https://www.legifrance.gouv.fr/eli/rapport/2016/2/11/JUSC1522466P/jo/texte>> Consultado (21 Marzo 2017)

Requejo Isidro, M., (2017). 'Brexit: An Opportunity for Frankfurt to Become a New Hub of Litigation in Europe?' (Conflict of Laws.net) <<http://conflictoflaws.net/2017/brexit-an-opportunity-for-frankfurt-to-become-a-new-hub-of-litigation-in-europe/>> Consultado (22 Marzo 2017)

Ringe, W.-G. (2013). 'Corporate Mobility in the European Union—A Flash in the Pan? An Empirical Study on the Success of Lawmaking and Regulatory Competition'. *European Company and Financial Law Review* 10, 230

Ringe, W.-G. (2017). 'The Irrelevance of Brexit for the European Financial Market'. *Oxford Legal Studies Research Paper No 10/2017*. Disponible en SSRN: <https://ssrn.com/abstract=2902715>

Salahudine, M. & Wahab, A., (2016). 'Brexit's Chilling Effect on Choice of Law and Arbitration in the United Kingdom: Practical Reflections Between Aggravation and Alleviation'. *Journal of International Arbitration*, 33, 472

Sarmiento, D. 'Un manual de instrucciones que se autodestruye en cinco segundos' *El País* (Madrid, 24 June 2016)

Shankar, A. (2016). 'What might legal case over EU-Singapore trade deal mean for Brexit?' (OpenEurope) <<http://openeurope.org.uk/today/blog/what-might-legal-case-on-eu-singapore-deal-mean-for-uk/>> Consultado (27 Marzo 2017)

Slaughter and May, *Brexit Essentials: The legal and business implications of the UK leaving the EU* (Brexit Briefings, 2016)

Smyth, J. 'Brexit triggers 'mini-boom' for lawyers, says Baker McKenzie chair' *Financial Times* (Londres, 8 Abril 2017)

Van Calster, G. (2001). 'Kerpow! The United Kingdom Courts, West Tankers, and the Arbitration "Exception" in the Brussels I Regulation'. *European Review of Private Law* 205

Vickers, J. (2017). 'Consequences of Brexit for competition law and policy' *Oxford Review of Economic Policy* (suppl 1)

Vogenauer, S. & Weatherill, S. (2016). *Civil Justice Systems in Europe: Implications for Choice of Forum and Choice of Contract Law. A Business Survey*. Oxford: Institute of European and Comparative Law (Hart).

Vogenauer, S. (2013). 'Regulatory Competition through Choice of Contract Law and Choice of Forum in Europe: Theory and Evidence' *European Review of Private Law*, 1, 13

Weller, M.P., Thomale, C. & N Benz, N. (2016). 'Englische Gesellschaften und Unternehmensinsolvenzen in der Post-Brexit-EU'. *Neue Juristische Wochenschrift* 2378

Wessing, T. (2016). 'UK Consumer Law in the Wake of the EU Referendum' (Oxford Business Law Blog) <<https://www.law.ox.ac.uk/business-law-blog/blog/2016/07/uk-consumer-law-wake-eu-referendum>> Consultado (21 Marzo 2017)

Woods, J. (2016). 'Impact of Brexit on Contract Law'. *Student Law Review*, 79, 15

Wyatt, D. (2017). 'Brexit Negotiations: What Happens if there is no Deal and a Hard Brexit?' (Brick Court Brexit Court) <<https://brexit.law/2017/02/13/brexit-negotiations-what-happ>>

