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Brexit and Private International Law: Looking Forward from the UK but Actually Going Backward

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Abstract: International judicial cooperation for civil matters between Member States of the EU and the United Kingdom can be severely curtailed as a consequence of Brexit if upon the end of the transitory period, 31 December 2020, no new partnership between the UK and the UE has been approved including agreements on civil judicial cooperation. Other multilateral solutions are possible within the framework of The Hague Conference on Private International Law, such as the accession by the UK in its own right to The Hague Convention 2005 on choice of court agreements or the ratification of The Hague Convention 2007 on child support, or via the UK's accession to the Lugano II Convention 2007. A unilateral approach (modified unilateral transposition) is also possible with regard to EU legislation retained by the *European Union (Withdrawal) Act 2018* determining in each case what piece of the EU legislation is effectively retained, modified or dismissed (pick and choose). In any case, the future outlook of civil judicial cooperation with the UK seems more like a leap back into the past than a step forward into the future. The situation for Gibraltar could be different if a new partnership agreement between the EU and UK includes a separate agreement in relation to Gibraltar where a sufficient repertory of EU cooperation instruments is bilaterally kept in force in order to safeguard the application of EU Private International Law applicable in Gibraltar to date.

Keywords: Brexit – International Judicial Cooperation for Civil Matters – International Civil Procedure Law – Conflict of Laws – Hague Conference On Private International Law – Lugano Convention – European Union – United Kingdom – Gibraltar

(A) THE WITHDRAWAL AGREEMENT BETWEEN THE UNITED KINGDOM AND THE EUROPEAN UNION: TRANSITORY PROVISIONS FOR MATTERS OF CIVIL JUDICIAL COOPERATION

The Withdrawal Agreement between the United Kingdom and the European Union entered into force on 1 February 2020,[1] with hardly any changes on matters of civil judicial cooperation with regard to the previous version of the Withdrawal Agreement negotiated by Theresa May's government. Actually, the new Withdrawal Agreement negotiated by Boris Johnson included only minor changes, with the notable exception of a new solution to the backstop clause with regard to Northern Ireland.

The general transition period will end on 31 December 2020 (Article 126 Withdrawal Agreement). A possible extension of the transition period for one or two additional years was

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[1] *OJEU* L 29, 31.1.2020. From the perspective of the UK's dualistic legal order this piece of legislation is the *European Union (Withdrawal Agreement) Act* 2020 (P. R. Polack, "The Road to Brexit: Ten UK Procedures towards Leaving the EU", 3 *Cuadernos de Gibraltar–Gibraltar Reports* (2018-2019) 1-23 [doi: 10.25267/Cuad_Gibraltar. 2019.i3.1303].

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always seemed as highly unlikely. The deadline for a time extension request (1 July 2020) is now well passed and only extraordinary circumstances might lead both the United Kingdom and the European Union to agree on a further extension. During the transition period the law of the European Union will be applicable and will be interpreted by the United Kingdom in conformity with the same methods and general principles applicable within the European Union (Article 127.3 Withdrawal Agreement). In particular, the European Court of Justice will retain its jurisdiction in conformity with the Treaties (Article 131 Withdrawal Agreement).

In addition to the general transition period, the Withdrawal Agreement contains a Title (Sixth) exclusively dealing with transitory issues of civil judicial cooperation (Articles 66 to 69), since the existing EU Regulations will cease to be applied from 1 January 2021, but specific transitory provisions are necessary to be applied to situations already in progress before the end of the transitory period and that will be completed when these EU Regulations are no longer applicable in the UK.

Of course, the UK has a particular position in EU law with regard to civil judicial cooperation and is bound only by some EU instruments of private international law: this only happens where it has expressed to the EU its intention to be bound (opting in mechanism), according to the conditions set out in Article 3 of its Protocol of accession to the TEU and the TFEU.[2] The UK has not opted-in and remains outside the binding effect of Regulation (EU) 650/2012 on international successions and Regulation (EU) 655/2014 on the European order for retention of bank accounts. Needless to say that the UK is not bound by EU Regulations for enhanced cooperation: Regulation (EU) 1259/2010 on the law applicable to divorce and judicial separation (Rome III), Regulation (EU) 2016/1103 on matrimonial property regimes, and Regulation (EU) 2016/1104 on the property consequences of registered partnerships.

For matters of jurisdiction, recognition and enforcement of judicial decisions and related cooperation issues between central authorities, Article 67 Withdrawal Agreement sets out that in the United Kingdom, and in the Member States, for situations concerning the United Kingdom, with respect of judicial procedures initiated before the end of the transitory period, and with respect of procedures and actions connected with such judicial procedures under Articles 29, 30 and 31 Regulation (EU) 1215/2012, Art. 19 Regulation (EC) 2201/2003, or Articles 12 and 13 Regulation (EC) 4/2009, the rules on international jurisdiction, *lis pendens*

[2] Therefore, the situation of the UK is not equal to that of the rest of Member States, with the exception of Ireland which has a similar protocol and has made analogous usage thereof, opting to remain outside the scope of the same instruments. On the contrary, Denmark is completely outside the scope of application of EU instruments on civil judicial cooperation and only through a bilateral agreement between the EU and Denmark it has been possible to extend the application of Regulation Brussels I *bis*, Brussels III and the Regulation on service of documents abroad. In this sense, the UK has not been the only country responsible for lack of uniformity in the Private International Law of the EU, but certainly it is the most notable exception (P. J. Cardwell, "The end of exceptionalism and a strengthening of coherence. Law and legal integration in the EU Post-Brexit", 57 *Journal of Common Market Studies* (2019) 1407-1418 [doi: 10.1111/jcms.12959]; N. Walker, "Sovereignty and Differentiated Integration in the European Union", 4 *European L. J.* (1998) 355-388 [doi: 10.1111/1468-0386.00058]).

and related actions contained in each of those EU Regulations will remain being applicable. The transitory application of existing *lis pendens* rules also includes the primacy rule under Art. 32.1 Regulation 1215/2012 that should be given to choice of court agreements in situations of parallel proceedings.

Nevertheless, and without prejudice to the foregoing exception for *lis pendens* cases, the transitory rules do not include a general validity clause for choice of court agreements concluded before the end of the transition period in cases where the judicial procedure might be opened after the end of such transition period, as was advocated by the United Kingdom at earlier stages of the negotiations. The consequence is that, in the absence of a new agreement on judicial cooperation for civil matters, ascertaining the exclusive effect of a choice of English courts where the case has been brought before the Courts of a Member State will depend on the international jurisdiction domestic rules of that particular Member State.

For matters of recognition and enforcement of judicial decisions, in the United Kingdom and in the Member States for situations involving the United Kingdom, Article 67.2 Withdrawal Agreement sets out that the main temporal factor of application of recognition rules under EU Regulations is the initiation of the original judicial procedure, usually by the filing of the initial claim, of course always prior to the end of the transition period, and not the date of the judicial decision to be recognized or enforced, which may well be subsequent to the end of the transition period; however, in relation to public acts, agreements and judicial transactions the relevant date will be that of execution, registration or approval, as the case may be. In this sense, Regulations (EU) 1215/2012, (EC) 2201/2003, and (EC) 4/2009 will be applicable to the recognition and enforcement of judicial decisions rendered as a consequence of a judicial procedure initiated before the end of the transition period, and also to public documents officially executed or registered and to judicial transactions approved or executed before the end of the transition period; however, in the case of Regulation (EC) 805/2004, this Regulation will only be applicable if the certification as European Enforcement Order for uncontested claims has been requested before the end of the transition period.

Additionally, Article 67.3 Withdrawal Agreement sets out that: a) Chapter IV Regulation (EC) 2201/2003 will be applicable to requests received by the central authority or any other competent authority in the requested State before the end of the transition period; b) Chapter VII Regulation (EC) 4/2009 will be applicable to requests received by the central authority of the requested State before the end of the transition period; c) Regulation (EU) 2015/848 will be applicable to insolvency proceedings, and actions referred to in Article 6(1) of that Regulation, provided that the main proceedings were opened before the end of the transition period; d) Regulation (EC) 1896/2006 will be applicable to European payment orders applied for before the end of the transition period; where, following such an application, the proceedings are transferred according to Article 17(1) of that Regulation, the proceedings shall be deemed to have been instituted before the end of the transition period; e) Regulation (EC) 861/2007 will be applicable to small claims procedures for which the application was

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lodged before the end of the transition period; f) Regulation (EU) 606/2013 on mutual recognition of protection measures in civil matters will be applicable to certificates issued before the end of the transition period.

With regard to conflict of laws issues, Art. 66 Withdrawal Agreement sets out that the temporal factor that will determine the applicability in the United Kingdom of Regulation 593/2008 (Rome I) on the law applicable to contractual obligations will be the date of conclusion of the contract which must be prior to the end of the transition period. In similar terms, Regulation 864/2007 (Rome II) on the law applicable to extra contractual obligations will be applicable in relation to events giving rise to damage, where such events occurred before the end of the transition period. The prospective application in the United Kingdom of Regulation 593/2008 to contracts concluded after the end of the transition period and the application of Regulation 864/2007 to events occurring after the end of the transition period will depend on their status as UK retained EU legislation in the *European Union (Withdrawal) Act 2018* and subsequent secondary legislation. On the contrary, for EU Member States, the universal scope of application of Rome I and Rome II Regulations means that these Regulations will remain applicable as EU legislation also in cases in which the applicable is English law or in cases connected with the UK (although the United Kingdom will be considered a third country after the end of the transition period, with relevant effects under Articles 3.4, and 7 Rome I Regulation, or Art. 14.3 Rome II Regulation).[3]

Judicial cooperation procedures will keep being governed by EU Regulations in the UK, and in EU Member States in cases concerning the UK, depending on the moment of reception of cooperation requests: a) Regulation (EC) 1393/2007 on judicial and extrajudicial notifications will be applied to all documents received for their notification before the end of the transition period, by a receiving agency, a central body of the State where the service is to be effected, or diplomatic or consular agents, postal services or judicial officers, officials or other competent persons of the State addressed, as referred to in Articles 13, 14 and 15 of that Regulation; b) Regulation (EC) 1206/2001 on obtaining evidence will be applicable to requests received before the end of the transition period by a requested court, a central body of the State where the taking of evidence is requested, or a central body or competent authority referred to in Article 17(1) of that Regulation.

[3] P. de Miguel Asensio, "El borrador de Acuerdo de Retirada del Reino Unido y los litigios en materia mercantil", 58 *La Ley Unión Europea*, 30 April 2018, 1-6.

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(B) A NEW MODEL OF CIVIL JUDICIAL COOPERATION BETWEEN THE UNITED KINGDOM AND THE EUROPEAN UNION

(1) A New Agreement on a Future Relationship between the United Kingdom and the European Union

Uncertainty has characterized the evolution of Brexit from the beginning and the same is still happening in the months leading up to Brexit effective day on 1 January 2021. The Withdrawal Agreement has managed to avoid a chaotic or disorderly Brexit (wild Brexit) but it is still to be seen whether Brexit will be soft (in case an agreement on a new relationship is reached) or hard (in the absence of a new agreement developing a new bilateral relationship between the UK and the EU). Everything until now shows that a new comprehensive framework or new relationship cannot be taken for granted by the end of 2020, although some agreements on specific areas are possible and negotiations will be stretched until the last minute. The goals expressed by both negotiating parties from the beginning of negotiations cannot be more contradictory. The UK Government insisted (Boris Johnson speech entitled "Unleashing Britain's Potential" of 3 February 2020) that its goal was to reach a free trade agreement modelled on the existing one between the EU and Canada. On the contrary, the EU is proposing, or some also would rather say requiring, a more ambitious free trade agreement (without tariffs or quotas) but where the regulations on both sides of the Channel should be aligned (level-playing field) on a wide variety of sectors (tax, social, State aids, environmental, etc.).

The hypothesis of political failure in the negotiations cannot be excluded. The United Kingdom has explicitly expressed its opposition to a regulatory alignment with EU law after Brexit, and also has threatened to leave negotiations prematurely if no preliminary agreements or improvements are reached. The UK also insists in declaring that a new extension is not possible. This means that there is high risk that by the end of the transitory period there will not be a new model or relationship between the UK and the EU or, even if there is a short-range new partnership agreement, it is rather possible that no agreements for matters of civil judicial cooperation are reached, meaning that some UK regulations (secondary legislation) designed for the no-deal horizon will have to be activated.

The United Kingdom made clear from the start of Brexit negotiations, and in more than one occasion, its interest in reaching an agreement for a new model of relationship with the EU that would include a new framework for judicial cooperation for civil matters, dealing with issues of international jurisdiction, applicable law, and recognition and enforcement of foreign judgments, in conformity with the principles and instruments of the EU for these matters which are currently applicable.[4] This was an expression of willingness to safeguard

[4] HM GOVERNMENT: *Providing a cross-border civil judicial cooperation framework: A future partnership paper*, August 2017; ID., *Framework for the UK-EU partnership: Civil Judicial Cooperation*, June 2018; ID., *The future relationship between the United Kingdom and the European Union*, July 2018.

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the application of the EU instruments on this matter but through a bilateral agreement within the new model of relationship with the EU.[5] The British proposal was not only limited to Family Law, a subject-matter for which the EU also expressed its willingness to maintain a close cooperation after Brexit, but also in relation to consumer protection and employment contracts, and in general civil and commercial matters, including the current EU rules for matters of cross-border insolvency. On the contrary, the initial negotiation position of the European Commission for matters of civil judicial cooperation was less ambitious and was focused mainly around the transitory rules applicable in relation to the different instruments of EU law.[6]

The Political Declaration that accompanies the Withdrawal Agreement, in which the European Union and the United Kingdom give an overview of their intentions as to their future relationship,[7] is quite clear in the sense that the priority for the European Union is ~~the~~ judicial cooperation for criminal matters (recitals 80 to 89, in particular recital 88). On the contrary, judicial cooperation for civil matters is only referred to partially and only as a side topic connected with the free movement of persons. Thus, recital 55 states: "To support mobility, the Parties confirm their commitment to the effective application of the existing international family law instruments to which they are parties. The Union notes the United Kingdom's intention to accede to the 2007 Hague Maintenance Convention to which it is currently bound through its Union membership" and recital 56 adds that the parties "will explore options for judicial cooperation in matrimonial, parental responsibility and other related matters". This means that the Political Declaration foresees the preservation of EU instruments of Private international law although limited to family law matters and to EU instruments which are now applicable in the UK; these instruments are only a few, but are of great importance: Regulation Brussels II *bis* on matrimonial matters and parental responsibility, Regulation Brussels III on maintenance obligations, and the Hague 2007 Convention on the International Recovery of Child Support and Other Forms of Family Maintenance.[8]

Of course, the agreement for matters of judicial cooperation for civil matters can be wider in scope as set out in recital 3 of the Introduction to the Political Declaration where it is

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5 Z.S. Tang, "Future Partnership in EU-UK Cross-Border Civil Judicial Cooperation European", 23 *European Foreign Affairs Review* (2018) 565–583; *Id.*, "UK-EU Civil Judicial Cooperation after Brexit: Five Models", 5 *European Law Review* (2018) 648-668.

6 *Position paper on Judicial Cooperation in Civil and Commercial matters*, 17 July 2017.

7 OJ C 34, 31.1.2020.

8 S. Alvarez Gonzalez, "Persona y familia en el Espacio de Libertad, Seguridad y Justicia tras el Brexit", 63 *La Ley Unión Europea*, 31 October 2018, 1-6; G. Smith, D, Hodson, V. Le Grice, "Brexit and international family law: a pragmatic approach to divorce and maintenance", *Family Law* (2018) 1554-1563; N. Lowe, "Some reflections on the options for dealing with international family law following Brexit", *Family Law* (2017) 399-406; ID, "What are the implications of the Brexit vote for the law on international child abduction", 29 *CFLQ* (2017) 253-266; A. Dutta, "Brexit and international family law from a continental perspective", 29 *CFLQ* (2017) 199-212; P. Beaumont, "Private international law concerning children in the UK after Brexit: comparing Hague Treaty law with EU Regulations", 29 *CFLQ* (2017) 213-232; R. Lamont, "Not a European Family: Implications of Brexit for International Family Law", 29 *CFLQ* (2017) 267-280.

explicitly expressed that if during the negotiations the Parties consider it to be in their mutual interest, the future relationship may encompass areas of cooperation beyond those described in the political declaration. But nothing seems to suggest the possibility that a wider scope of judicial cooperation for civil matters is being sought. Actually, the risk is that even the limited scope of family law matters may bring no results and that in the end no single instrument of EU civil judicial cooperation may survive Brexit.

At the beginning of the negotiations in March 2020 for a new model of relationship ("a new partnership"), there were no reasons to be very optimistic. In fact, international judicial cooperation for civil matters did not appear in the Guidelines for the negotiations which were made public by the European Commission on 3 February 2020 for the approval of the Council in the form of a Recommendation.[9] Judicial cooperation for criminal matters was included among the goals to be accomplished in the negotiations, but civil judicial cooperation was not even mentioned, not even as accessory to negotiations for matters of mobility of physical persons. Maybe this was the result of a negotiation technic on the part of the EU, bearing in mind that in the past it has been the UK who has been actively seeking the introduction in the negotiations of a wider scope of agreements on matters of civil judicial cooperation, but nothing allows the confirmation of such speculation. Later, the negotiations mandate from the British government, made public in February, proposed an agreement in matters of judicial cooperation, but without making reference to any new bilateral agreement, and on the contrary it proposed the ratification of Hague Conference Conventions on the part of UK, and also the ratification in its own name of the Lugano Convention 2007.[10] It seems therefore that the UK negotiation team abandoned all attempts to reach a bilateral agreement directed towards the continuity of application of EU instruments and that solutions will have to come from non-EU multilateral instruments such as Hague Conventions and the Lugano Convention.

(2) Non-EU Multileral Instruments of civil judicial cooperation

As already explained above, if the view in the past was optimistic about bilateral solutions that could safeguard the continuity of application of EU instruments within the framework of a new model of relations or partnership between the UK and the EU, these hopes seem now to have been abandoned under a much gloomier negotiations outlook. Currently, it seems that the only venue by which the UK may keep a certain degree of civil judicial cooperation with the EU Member States is through the ratification in its own right of Non-EU multilateral instruments: a) The Lugano II Convention 2007; b) Hague Conference Conventions 2005 and 2009; in both cases the multilateral instruments are already applicable in the UK as a consequence of EU's ratification for the Member States, meaning that after Brexit day on 1

9 COM (2020) 35 final.

10 The guidelines for the British negotiators can be found in the document entitled "*The Future Relationship with the EU: the UK's approach to negotiations*", 27 February 2020.

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January 2021 these instruments would no longer be in force in the UK.

The ratification by the UK of the Lugano II Convention is only possible after the UK has left the UE (and the transition period has ended) and by unanimous acceptance from all the other parties (the EU, Denmark and three EFTA Member States: Switzerland, Norway and Iceland). This process may take considerable time, especially the acceptance of the EU which has exclusive competence in this area over the EU Member States. Whenever this ratification produces full effect the results would be highly relevant: the Lugano Convention 2007 would be the new instrument applicable to relations between the UK and the EU Member States, and it will also continue to be applied to relations between the UK and Switzerland, Norway and Iceland as it happened in the past. On 8 April 2020 the UK deposited an application for accession before the Swiss Federal Department of Foreign Affairs, as Depositary of the Lugano Convention 2007, and on 14 April 2020 the Swiss Depositary notified the parties (Denmark, EU, Switzerland, Norway and Iceland) that within one year at the latest they must expressly reply in the affirmative or negative as to the UK accession application to the Lugano Convention. The content and timing of the EU reply will be essential, but bearing in mind how this issue can be seen as entangled with other negotiation areas, it is hard to believe the EU will make a formal reply before the bilateral negotiation with the UK as to a new bilateral model of relations or partnership is completely over.

Nevertheless, the accession by the UK to the Lugano Convention 2007 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters is not the same as the continued application of EU Regulation Brussels I *bis* (1215/2012). Not only for obvious formal reasons, but also because, from a material point of view, the Lugano Convention 2007 is moulded after the text of the earlier Regulation Brussels I (44/2001) and this is a backwards step because it implies the acceptance of future technical inefficiencies and the lack of sufficient uniform interpretation mechanisms between Common law and Civil Law when compared with Regulation Brussels I *bis* (1215/2012).[11] Of course, this can be solved in a number of years by the initiation of a negotiation process towards a new Lugano III Convention, but for the time being the UK has only taken a step back to the material content of Brussels I (44/2001) in its relations with EU Member States through its accession to the Lugano II Convention.

The second multilateral approach is the ratification by the UK in its own right of The Hague Conference Conventions which are applicable in the UK as a result of the ratifications made by the UE for the Member States.[12] These are the following two instruments: a) *Hague*

[11] B. Hess, "The unsuitability of the Lugano Convention (2007) to Serve as a Bridge between the UK and the EU after Brexit" (January 17, 2018), *MPILux Research Paper* (2018), No. 2; Id., "Das Lugano-Übereinkommen und der Brexit", in *Europa als Rechts- und Lebensraum, Liber amicorum für Christian Kohler* (Gieseking, Bielefeld, 2018), at 179; F. Pocar, "The Lugano Convention of 30 October 2007 at the test with Brexit", *ibid.*, at 419-423.

[12] The Hague Conventions have taken a new gap-filling function for UK's private international law as a means to at least partially overcome some of the many shortcomings brought about by Brexit (H. Van Loon, "Le Brexit et les conventions de La Haye", *RCDIP* (2019) 353-366).

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Convention 2005 on Choice of Court Agreements: the UK already deposited an instrument of accession on 28 December 2018 on contemplation of a hard Brexit but suspended its application as a result of the ongoing Brexit negotiations and eventually withdrew the accession instrument on 31 January 2020 after the approval of the Withdrawal Agreement; finally, on 28 September 2020 the UK deposited a new instrument of accession that will take effect on 1 January 2021); b) *Hague Convention 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance*: the UK deposited an instrument of ratification on 28 December 2018 whose application was suspended and the instrument of ratification was withdrawn on 31 January 2020; on 28 September the UK deposited the instrument of ratification that will take effect on 1 January 2021, although the UK considers itself a contracting State without interruption from 1 August 2014 when the Convention entered into force in the UK as a consequence of the ratification by the EU).[13]

Accession by the United Kingdom to The Hague Convention 2005 on choice of court agreements is of interest for the continued application of this instrument to the relations between the UK and Mexico, Singapore and Montenegro, although the material scope of application of The Hague Convention 2005 is somewhat limited and it is only temporarily applicable to choice of court agreements made after the entry into force of the Convention for the State of the chosen court.[14] In this regard, UK's implementation of the accession to The Hague Convention 2005 says that the effective date is 1 October 2015 (when the EU ratification took effect), but this is not accepted by the EU Commission that has indicated that the Convention can only be applicable between the EU and the UK with regard to exclusive choice of court agreements made from 1 January 2021.

The accession to The Hague Convention 2005 also poses the problem of its relationship with other international instruments such as the Lugano II Convention 2007 once UK's accession to Lugano II is effective. With regard to relations between the UK and the EU Member States and Denmark, exclusive choice of court agreements and recognition and

[13] On the contrary, the UK has ratified or acceded as a contracting party to: Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions, Convention of 5 October 1961 on Abolishing the Requirement of Legalization for Foreign Public Documents, Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations, Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations, Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition; Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, and Convention of 13 January 2000 on the International Protection of Adults.

[14] B. Campuzano Díaz, *Los acuerdos de elección de foro. Un análisis comparado de su regulación en el Convenio de La Haya de 2005 y en el Reglamento 1215/2012* (Comares, Granada, 2018), at 52-80 and commentary by M. Checa Martínez in 37 *REEI* (2019); M. Ahmed, P. Beaumont, "Exclusive choice of court agreements: some issues on The Hague Convention on choice of court agreements and its relationship with the Brussels I recast especially anti-suit injunctions, concurrent proceedings and the implications of Brexit", 13 *JPIL* (2017) 386-410 [doi:10.2139/ssrn.2824703].

enforcement of decisions derived from them will be under the scope of application of Lugano II.

The exclusiveness of choice of court agreements designating English courts concluded in the past under the umbrella of Brussels I Regulation (1215/2012) poses a significant problem for the future, although UK's accession to the Lugano II Convention may be a great relief. In any case, Article 23 Lugano Convention 2007 still requires, following Regulation 44/2001, for the validity of an exclusive prorogation of jurisdiction that at least one of the parties is domiciled in a State bound by the Convention. It must also be mentioned, with regard to the relation between *lis pendens* and exclusive jurisdiction agreements under Lugano 2007, the possibility of new torpedo actions (CJEU Judgment of 9 December 2003, *Erich Gasser GmbH (C-116/02)*, instead of the solution now embodied in Article 31.2 Regulation 1215/2012 (stay of proceedings) in cases where there is an exclusive jurisdiction agreement between the parties but the courts first seized are those of a different Member State.

The introduction in the House of Lords on 27 February 2020 of the *Private International Law (Implementation of Agreements) Bill* is an important development as to how the British government intends to build counter measures against undesired effects of Brexit safeguarding the continued application of Hague Conventions after the end of the transition period. The *Bill* contains basically one main clause which implements and gives the force of law in the UK to the following three Hague Conference Conventions: a) the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children; b) the 2005 Hague Convention on Choice of Court Agreements;[15] c) the 2007 Hague Convention on the International Recovery of Child Support and other Forms of Family Maintenance. The implementation into domestic law of The Hague Convention 2005 on choice of court agreements and The Hague 2007 Convention on child support finds its explanation of course in the fact that the UK was only indirectly bound by these instruments as a consequence of its past EU membership status. The explanation is more difficult in the case of The Hague 1996 Convention for protection of children. This Convention was ratified by the UK on 27 July 2012 and entered into force on 1 November 2012 and therefore the UK is directly bound and the Convention is clearly applicable in the UK even after Brexit effective day at the end of the transition period. The explanation for the proposed implementation into domestic law may lie in two factors: a) the fact that the EU authorized its Member States at that time including the UK to sign and ratify the 1996 Hague Convention because the EU had competence in relation to some of its provisions, but was unable itself to become a contracting party; b) there is some overlapping between this Convention and Regulation Brussels II *bis* (2201/2003) concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and parental responsibility; in this sense, the end of the application of

[15] *Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005) (EU Exit) Regulations* 2018.

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Brussels II *bis* for matters of parental responsibility after Brexit effective day is thus mitigated by the implementation into domestic law of The Hague 1996 Convention.

A second clause in the *Private International Law (Implementation of Agreements) Bill* delegated powers to the government (the UK Government and the Devolved Administrations in Scotland and Northern Ireland) to implement secondary legislation (statutory instruments) in relation to other private international law instruments which the government might accede to or ratify in the future, such as the Lugano II Convention, but has been eliminated during the Parliamentary sessions in the House of Lords.

Within the framework of The Hague Conference there is also another international convention of some future interest for the UK: Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (*Judgments Convention* 2019). Nevertheless, this Convention is not yet in force (for the time being there are only two signatory countries –Uruguay and Ukraine– and there is no ratification or accession). The Judgments convention was drafted in a lengthy process (after the approval of The Hague Convention on choice of forum agreements 2005 of which the Judgments convention is considered a further continuation) with transatlantic relations in mind, but Brexit adds a new future dimension to this Convention. A ratification by the UK and eventually by the EU would certainly have great implications, although the Lugano II Convention 2007 once ratified by the UK would take precedence over other multilateral agreements such as the Judgments Convention.

(3) Unilateral solutions with regard to EU retained legislation

The difficulties experienced by the Withdrawal Agreement in the British Parliament and the uncertainty as to the future existence of a hypothetical new model of relations between the UK and the UE soon gave way to unilateral proposals with regard to EU retained legislation for matters of civil judicial cooperation. Consequently, the UK Government using the delegated powers conferred by the *European Union (Withdrawal Act) 2018* has approved as secondary legislation (statutory instruments) a series of Regulations (EU Exit Regulations) which deal with matters of civil judicial cooperation. This comes in part as a result of UK's unilateral arrangements made for the possible scenario of a no-deal Brexit, but now that Brexit has happened with an Agreement the application of these Regulations has been suspended or postponed until Brexit effective day at the end of the transition period, of course only if nothing in a hypothetical new partnership agreement between the UK and the EU requires acting differently.[16]

In these EU exit Regulations, the British government has proceeded to explicitly confirm the transposition into UK law, or has reformed or has derogated, rules contained in EU

[16] M. Gernert, "Harter Brexit und IPR – Vorbereitende Papiere für einen ungeregelten Austritt des Vereinigten Königreich", *IPRax* (2019) 365-369.

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instruments on civil judicial cooperation. These EU instruments are in principle EU retained legislation by the UK and would otherwise remain in force without changes as the result of the inertial effect of the *European Union (Withdrawal) Act* 2018, –also known as the *Great Repeal Bill* because it was initially proposed for obvious political reasons with that technically misleading title–.

Thus, the derogation of Regulation 1215/2012 (Brussels I *bis*) for England and Northern Ireland at the end of the transition period has been set forth at *The Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations* 2019[17], although some parts of Regulation 1215/2012 will remain applicable via the *Civil Jurisdiction and Judgments Act 1982* such as the jurisdictional rules in relation to consumer protection and employments contracts, and the legal definition of domicile of legal persons for jurisdictional purposes.[18] These rules will remain applicable for international situations but will also be applicable in cases concerning defendants domiciled in other parts of the United Kingdom –*intra UK cases*–.

The loss of Regulation Brussels I *bis* is a heavy blow to international judicial cooperation for civil and commercial matters in the UK.[19]. Regulation Brussels I *bis* has served in the past decades under its different forms (Brussels Convention 1968, Regulation 44/2001 and Regulation 1215/2012) to consolidate London as judicial capital of Europe for commercial matters. The exclusiveness of choice of court agreements in favour of English courts (in particular the Commercial Court as sub-division of the Queen's Bench in the High Court) and the recognition and enforcement of UK's judicial decisions in other EU Member States is guaranteed by Regulation Brussels I bis. A non-exclusive characterization of London choice of courts agreements by the courts of EU Member States, the ensuing risk of parallel proceedings in different jurisdictions, and greater uncertainty as to the recognition and enforcement of London courts judicial decisions in each EU Member State following domestic private international rules may result to the benefit of other European judicial capitals –Paris, Amsterdam, Brussels, Frankfurt and other European cities have created international commercial courts with the intention to attract some of the litigation that until now has regularly gone to London[20]–. In the absence of choice of court agreements, the return in

[17] Statutory Instruments 2019 No. 479 and No. 1338.

[18] For contracts of employment *vid.* U. Grusic, "L'effet du Brexit sur le droit international privé du travail", 108 *RCDIP* (2019) 367-384.

[19] On the general backward process implied by the derogation of Regulation Brussels I *bis vid.* A. Dickinson, "Back to the Future: The UK's EU Exit and the Conflict of Laws", 12 *JPIL* (2016) 195-210 [doi:10.1080/17441048.2016.1209847]; Id., "Close the Door on Your Way Out. Free Movement of Judgements in Civil Matters. A "Brexit" Case Study", 25 *ZEuP* (2017) 539-568; E. Lein, "Unchartered Territory? A Few Thoughts on Private International Law post Brexit", 17 *Yearbook PIL* (2015/2016) 33-47; B. Hess, "Back to the Past: Brexit und das europäische internationale Privat- und Verfahrensrecht", 36 *IPRax* (2016) 409-418; M. Sonnentag, *Die Konsequenzen des Brexits für das Internationale Privat- und Zivilverfahrensrecht* (Mohr Siebeck, Tübingen, 2017), at 80-84; G. Rühl, "Judicial Cooperation in Civil and Commercial matters after Brexit: Which way forward", 67 *ICLQ* (2018) 99-128 [doi: 10.1017/S0020589317000574].

[20] In France, the creation of the *Chambre international* del *Tribunal de commerce* de París as first instance court and the *Chambre international* de la *Cour d'appel* de Paris as second instance (X. Kramer, "A Common Discourse in European Private International Law. A view from the Court System", in J. von Hein, E.-M. Kieninger, G. Rühl,

England to the particularism of their legal rules on international civil jurisdiction (transient jurisdiction rules, service of process rules on defendants out of the jurisdiction, etc.) and, in general, the return to the common law rules on recognition and enforcement of foreign decisions will also be a significant step back for UK's legal system.[21] On the contrary, the position of London as arbitration capital in Europe is not jeopardized by the loss of Regulation 1215/2012 since arbitration remains largely outside the scope of EU instruments and, on the contrary, arbitration in London may benefit from the uncertainties surrounding the judicial alternatives to arbitration. Also, English courts will now be set free from the *West Tankers* judgment by the ECJ and therefore able to protect the exclusiveness of arbitral proceedings in England through anti-suit injunctions against the courts of EU Member States.[22]

Regulations Brussels II *bis* for matrimonial matters and parental responsibility and Brussels III on maintenance obligations will be derogated for England and Northern Ireland for matters of recognition and enforcement of foreign judgments and cooperation between national authorities, but the international jurisdiction criteria will remain applicable although amended by the *Jurisdiction and Judgments (Family) (Amendment etc.) (EU Exit) Regulations* 2019[23].

With respect of divorce, the jurisdictional criteria contained in the list of Article 3 Regulation Brussels II *bis* will continue to be applied, but a new ground of jurisdiction has been expressly added in the case in which "*either to the parties of the marriage is domiciled in England and Wales*"). This ground until now was only applied in cases of residual competence under Article 7 Regulation Brussels II *bis* (i.e., the sole domicile of either party was only applicable where no EU member state had jurisdiction under the list in Article 3 Regulation Brussels II *bis*). The new legislation does not include rules on *lis pendens*, and those contained in Regulation Brussels II *bis* are derogated. This will result in parallel proceedings situations where the English courts will decide their own jurisdiction over that of the courts of EU Member States according to general notions of closest relationship and *forum non conveniens*.

The recognition in the UK of divorces obtained abroad will be governed by The Hague Convention 1970 on recognition of divorces and legal separations, implemented in the UK by the Family Law Act 1986. The 1970 Hague Convention is also in force in other twelve States

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How European is European Private International Law (Intersentia, Cambridge, 2019), at 230-233.

[21] A return to the Common Law rules which are not always well known and whose flexibility may mean advantages as well as disadvantages (A. Briggs, "Brexit and Private International Law: An English Perspective", 55 *RDIPP* (2019) 261-283; C. Tuo, "The Consequences of Brexit for Recognition and Enforcement of Judgments in Civil and Commercial Matters: Some Remarks", 55 *RDIPP* (2019) 302-318; L. Merrett, "La reconnaissance et l'exécution en Angleterre des jugements venant des États de l'Union européenne, post-Brexit", *RCDIP* (2019) 385-409.

[22] F. Emanuele, M. Molfa, R. Monico, "The Impact of Brexit on International Arbitration", 55 *RDIPP* (2019) 856-874.

[23] The *Civil Partnership and Marriage (Same Sex Couples) (Jurisdiction and Judgments) (Amendment etc.) (EU Exit) Regulations* 2019 sets out the same rules in relation to the divorce of same sex marriages and the dissolution of civil unions.

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of the EU: Cyprus, Czech Republic, Denmark, Estonia, Finland, Italy, Luxembourg, Netherlands, Poland, Portugal, Slovakia and Sweden; in the rest of EU Member States recognition and enforcement should be done according to national rules of Private International Law.[24]

For matters of parental responsibility, the applicable international legal instrument will be The Hague Convention 1996 on parental responsibility and child protection, and also The Hague Convention 1980 on international legal kidnapping. These conventions in the future will be applied in the UK isolated from the complementary rules now existing in Brussels II *bis*.

With regard to maintenance obligations the derogation of Brussels III Regulation will be compensated by the ratification of The Hague Convention 2007 on child support recovery, although this is of no avail to guarantee the continued effectiveness of choice of court agreements concluded before the end of application of Regulation Brussels III.

Regulation (EU) 2015/848 of 20 May 2015 on insolvency proceedings has also been partially derogated and partially modified for England and Northern Ireland in the transposition effected by the *Insolvency (Amendment) (EU Exit) Regulations* 2019 and the *Insolvency (Amendment) (EU Exit) (Nº 2) Regulations* 2019.[25] In particular, the provisions regarding the recognition of the opening of insolvency proceedings in other Member States of the EU are eliminated, but also the jurisdictional criteria in Regulation 2015/848 are modified. The *Insolvency (Amendment) (EU Exit) Regulations* 2019 retains the jurisdictional test based on COMI only as an additional test of jurisdiction and the restrictions for opening insolvency proceedings in the UK where the COMI is in a member State are removed. Thus, UK Courts will have international jurisdiction where: a) the jurisdictional criteria under UK's private international law rules are satisfied; b) the COMI (centre of main interests) of the debtor is in the UK, c) the debtor has an establishment in the UK, even if the centre of the debtor's main interests is in a Member State. With regard to the recognition of foreign insolvency proceedings, the condition and powers of the bankruptcy administrators, trustees or receivers, and other foreign judicial decisions for insolvency matters, the EU Member States will apply in the future their domestic private international law rules in relation with the UK.[26]

The future situation regarding recognition of cross-border insolvency proceedings between UK and the EU is uncertain. Among the EU Member States only Greece (2010), Poland (2003), Romania (2002), and Slovenia (2007) have similar national private international law rules with regard to cross-border insolvency proceedings as a result of their transposition of

[24] In Spain Arts. 41-61 Law 29/2015, 30 July, on international judicial cooperation for civil matters.

[25] Statutory Instruments 2019, No. 146 and No. 1459.

[26] In Spain the private international law rules in the Book III (Arts. 721-752) of the Legislative Decree 1/2020 of 5 May 2020 containing the recast text of the Insolvency Law. With regard to future cross-border situations between Spain and the UK *vid.* A. Espiniella Menéndez, "Brexit e insolvencia transfronteriza", 17 *AEDIPr* (2017) 91-123 [doi: 10.19194/aedipr.17.3].

the UNCITRAL Model Law on Cross-Border Insolvency (1997), as also did the UK (*Cross-Border Insolvency Regulations* 2006), –and also Gibraltar (*Cross Border Insolvencies Regulations* 2014)–. However, the rules on cross-border recognition of foreign insolvency proceedings and cooperation between foreign courts and foreign representatives is not accompanied in the Model Law by rules governing international jurisdiction or applicable law issues.[27]

An obvious lack of future reciprocity means that the EU instruments for civil cooperation between national courts and authorities will cease to be applied from January 2021: Regulation 805/2004 on European Enforcement Order, Regulation 1896/2006 on European Payment Order and Regulation 861/2007 on Small Claims Procedure;[28] and of course also Regulation 1393/2007 on service of judicial and extrajudicial process and Regulation 1206/2001 on obtaining evidence abroad[29]. The gap-filling function of The Hague Conventions comes again to the rescue with the substitution of Regulation 1397/2007 by The Hague Convention 1965 and of Regulation 1206/2001 by The Hague Convention 1970, this time without the need for further accessions or ratifications by the UK but, in both cases, it is another step backwards hardly compatible with the position of London as great European judicial capital.

On the contrary, reciprocity is not necessary for the continued application of conflict of laws rules in EU instruments and the British government has already established the transposition and the resulting continuity of application of Regulation 593/2008 (Rome I) on the law applicable to contractual obligations and Regulation 864/2007 (Rome II) on the law applicable to non-contractual obligations.[30] This is the only part of EU civil judicial cooperation where continuity seemed to be the most natural solution –the loss of these conflict of laws rules would have hardly been defensible and the uncertainty this would have caused immense–. The unilateral solution (transposition) is also simple without the need for further explanations. The loss of Regulation Rome I would have also been hard to explain if we bear in mind that *Common Law* has had a great influence in the drafting and further evolution of Regulation Rome I, although the main influencing factor has not been English law (*proper law of the contract*) but American law (*Restatement Second on the Conflict of Laws*). This is evident both for the law applicable to contractual obligations (US *most significant relationship* test) and the law applicable to extra contractual obligations (US *proper law of the tort* theory). Nevertheless, continuity will be more apparent than real because of the inherent risk of

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[27] E. Adelus, "Global law-making in insolvency law: the role for the United Nations Commission for International Trade Law", 24 *Uniform L. R.* (2019) 175-213 [doi:10.1093/ulr/unz005]; R. Bork, "The European Insolvency Regulation and the Uncitral Model Law on Cross-Border Insolvency", 26 *Int. Insolvency Rev.* (2017) 246-269 [doi: 10.1002/iir.1282]; G. McCormack, H. Anderson, "Brexit and its implication for restructuring and corporate insolvency in the UK", 7 *JBL* (2017) 533-556.

[28] *The European Enforcement Order, European Order for Payment and European Small Claims Procedure (Amendment Etc.) (EU Exit) Regulations* 2018, *Statutory Instrument* No. 1311.

[29] *Service of Documents and Taking of Evidence in Civil and Commercial Matters (Revocation and saving provision) (EU Exit) Regulations* 2018, *Statutory Instrument*. No. 1257.

[30] *The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations* 2019.

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inconsistencies in the interpretation once the rules in Rome I Regulation will be interpreted in the UK by the Supreme Court of the United Kingdom as court of last resort and preliminary questions addressed to the Luxembourg Court become a thing of the past for UK courts (although case law from the CJEU in existence prior to Brexit effective day will cast a long shadow over English courts).

The final approval of the Withdrawal Agreement –*European Union (Withdrawal Agreement) Act* 2020– has established the date of effect of this secondary legislation (statutory instruments) known as *EU Exit Regulations* for the end of the transition period on 31 December 2020, without prejudice to the possibility that a new model of relations between the UK and the EU might foresee differently, although this possibility seems now quite remote. In the end, and for matters of civil judicial cooperation, the much-dreaded *no-deal* scenario will not be very different from the *hard brexit* that will result from the lack of new civil judicial cooperation rules in an eventual new partnership agreement (except for the existence of the agreed transitory rules in the Withdrawal Agreement).

(c) What civil judicial cooperation between Gibraltar and EU Member States?

(1) Civil judicial cooperation between Gibraltar and the EU Member States

Article 355.3 FTEU provides that Treaty provisions "shall apply to the European territories for whose external relations a Member State is responsible", extending the application of EU law to Gibraltar, the only British overseas territory that is part of the European Union, with some particular exceptions (customs union, common commercial policy, fisheries policy, value added tax, etc.) that were included in the 1972 Treaty of Accession. On the contrary, this extension is not applicable to the Isle of Man, or the Channel Islands (Jersey and Guernsey) which are not part of the EU (Article 355.5 FTEU), although for practical reasons became part of the customs union.

The United Kingdom is vis-à-vis the other Member States of the EU the representative State of Gibraltar, particularly with regard to the application and transposition of EU law, as if they were a single State. The CJEU in Judgment 13 June 2017 (C-591/15) *The Gibraltar Betting and Gaming Association Limited C. Commissioners for Her Majesty's Revenue and Customs*, applying Article 355.3 FTEU concluded that provision of services from Gibraltar to persons established in the UK is, according to EU law, a situation in which all the elements are within just one Member State, and therefore the alleged violation of Article 56 FTEU on freedom to provide services cannot be possible.

If the situation is seen from Calais (EU) the UK and Gibraltar are the same State with regard to the provision of services, on the contrary, seen from Dover (England), the UK and Gibraltar are quite different territories (Gibraltar not being part of the United Kingdom and the only British overseas territory in the EU), and this gives sometimes the impression that Gibraltar is another jurisdiction in the EU, distinct from the UK, with a status somehow

closer to that of a micro-State within the EU. This is perceptible, for example, from the fact that Gibraltar is able to provide financial services to the rest of the EU with home country control only under Gibraltarian authorities (passporting rights), or where it corresponds to Gibraltar courts and authorities the application of the reciprocal EU instruments on civil judicial cooperation.[31]

Civil judicial cooperation in Gibraltar is governed by the same EU instruments that bind the UK by virtue of Art. 81 FTEU and this allows the development of a far-reaching legal activity and a thriving legal sector in the Rock of Gibraltar as an offshore jurisdiction where international commercial transactions are highly relevant for a local economy oriented towards the activities of multinational groups and for an estate planning industry aiming at high-net-worth individuals.[32]

Additionally, the United Kingdom with the occasion of each accession or ratification of a Hague Conference Convention is required to express the territorial scope of application of the Convention with regard to territories which are not the United Kingdom, but Crown dependencies (Isle of Man, Jersey, Guernsey) or British Overseas Territories (Gibraltar –as the only European territory under that characterization–, Bermuda, British Virgin Islands, Cayman Islands, etc.).

The UK has made a declaration of territorial extension to Gibraltar in relation to most of The Hague Conference Conventions ratified or acceded by the UK, with the exception of the following: a) Convention of 25 October 1980 on the Civil Aspects of International Child Abduction –in force for the UK from 1 August 1986–; b) Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption –in force for the UK from 1 June 2003; c) Convention of 13 January 2000 on the International Protection of Adults –although only force for Scotland from 1 January 2009, and not for the rest of the UK–.

Not least important, Gibraltar is included in the territorial scope of application in other Hague Conventions as a result of the ratification or accession deposited by the EU with effects for all Member States: a) Convention of 30 June 2005 on Choice of Court Agreements;[33] b) Convention of 23 November 2007 on the International Recovery of Child Support and Other

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[31] Gibraltar as British overseas territory enjoys wide-ranging self-government powers, with the exception of defence, foreign relations and internal order for which the British Governor is responsible (*Gibraltar Constitution Order* 2016), Within the EU, Gibraltar's stance as a self-governing sub-State entity is quite close to that of a micro-State within the EU (K. Azopardi, *Sovereignty and the Stateless Nation: Gibraltar in the modern legal context* (Hart Publishing, Oxford, 2009), at 61-126; and book review by J. Trinidad, 70 *Cambridge L. J.* (2011) 272-274); J. Trinidad, *Self-determination in disputed colonial territories* (Cambridge University, Cambridge, 2018), at 120-133.

[32] I. Kawaley, "Why judicial cooperation in civil and commercial litigation in the British Offshore world matters: An Overview", in I. Kawaley, A. Bolton, R. Mayor, *Cross-Border Judicial Cooperation in Offshore Litigation* (Wildy, Simmonds and Hill, London, 2016), at 3-16.

[33] The implementation into Gibraltar Law was made affective by the *Civil Jurisdiction and Judgments Act 1993 (Amendment No.2) Regulations* 2015.

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Forms of Family Maintenance.[34] Of course, the UK's strategy in relation to the gap-filling function of the Hague Conventions as a means to mitigate the consequences of Brexit for civil judicial cooperation means that the intention of the UK has always been that of acceding or ratifying these conventions with extension of territorial effects to Gibraltar; only the extension of the transition period until 31 December 2020 has suspended temporarily the attempts made for that purpose. On 28 September 2020 the UK has deposited instruments of accession to The Hague Convention on Choice of Courts Agreements 2005 and the Hague Convention on Child Support 2009 that will take effect on 1 January 2021, with extension to Gibraltar from the outset.

In the case of the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, the EC allowed the State Members to accede or ratify the Convention. The UK ratified on 27 July 2012 and the application was extended to Gibraltar on the same date. Gibraltar has implemented the Convention into domestic law through the *Children Act 2009*, *Children (Amendment) Act 2010* and the *Family Proceedings (Children) (1996 Hague Convention) Rules* 2011.

With regard to the territorial scope of application of the 2007 Lugano Convention, this Convention is in force in Gibraltar in relation Switzerland, Norway and Iceland as a result of accession by the EU with effects for all EU Member States. Of course, now that the accession by the UK to the 2007 Lugano Convention seems to be UK's main approach to reduce the uncertainties and loss of EU judicial civil cooperation instruments, the UK government made clear the expression of interest in the accession in its own right to the Convention with declaration of territorial extension to the territory of Gibraltar.

(2) A New Separate Agreement for Gibraltar?

The Withdrawal Agreement contains a Protocol on Gibraltar which is applicable, in particular, during the transition period (Article 185), except for citizens' rights under Article 1, which will also be applied after the end of the transition period.[35] The other provisions in the Protocol regard "air transport law" (Article 2), "fiscal matters and protection of financial interests (Article 3), "environment protection and fishing" (Article 4) and "cooperation in police and customs matters" (Article 5). The Protocol has created a specialised committee for the implementation of the Protocol and different coordinating commissions between the United Kingdom and Spain for the application of the Protocol on citizens' rights, environment protection and fishing, and cooperation in police and customs matters. Essentially, the Protocol confirms from the point of view of EU law the Memoranda of

[34] *Civil Jurisdiction and Judgments Act (2007 Hague Convention) Regulations 2018*, *International Recovery of Maintenance (2007 Hague Convention) Regulations* 2018, *Maintenance Proceedings (2007 Hague Convention) Rules* 2018, *Maintenance Act (2007 Hague Convention) Regulations* 2018, and *Magistrates Court Act (2007 Hague Convention) Regulations* 2018.

[35] *European Union (Withdrawal Agreement) Act 2020* (Gibraltar).

Understanding concluded between the Kingdom of Spain and the United Kingdom on 29 November 2018 in relation to citizens' rights, tobacco and other products, cooperation on environmental matters and cooperation in police and customs matters, as well as the agreement to conclude a treaty on taxation and the protection of financial interests.[36] The Tax Treaty was eventually signed by both parties on March 2019 (International Agreement on Taxation and the Protection of Financial Interests between the United Kingdom and Spain regarding Gibraltar).[37]

The Tax Treaty is still following the procedure for authorisation in the Spanish Parliament but apparently it will be approved before the end of autumn 2020 and will be applied only with prospective effects.[38] The entry into force requires also ratification by the United Kingdom and implementation into Gibraltar Law. A curious institutional aspect of the Tax Treaty –the first Treaty between the UK and Spain with regard to Gibraltar– is that it creates obligations and direct communications for administrative cooperation between Spanish tax authorities and Gibraltarian authorities, not only tax authorities but also the Registrar of Companies Registrar, the Land Registry, etc. The Explanatory memorandum that accompanies the Treaty in the version presented to the British Parliament on March 2019 explicitly recognizes the fact that "*The Government of Gibraltar have led the negotiations for the UK*", therefore it is a bilateral agreement between the UK and Spain but negotiated by Gibraltar for the UK. No wonder that the Treaty has received in Spain some criticisms as to how far has the Spanish government has gone recognizing Gibraltarian governmental or State structures in this Treaty. It is worth mentioning here that in multilateral contexts (Hague Conventions, EU instruments) direct communications between Gibraltarian authorities and other States, including Spain, are formally avoided through an indirect procedure of notifications known as *post-boxing* via the UK Government/Gibraltar Liaison Unit of the Foreign Office in London as channel for all formal communication between Gibraltar's competent authorities and their EU counterparts.[39]

Now that negotiations for a new partnership or model of relations are in progress between the UK and the UE, the application to Gibraltar of any new agreement will depend on the so-called "veto rights" of the Spanish government which actually consists in the acceptance

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[36] C. Martinez Capdevila, "Thoughts on the legal value of the instruments concerning Gibraltar adopted in relation to the EU-UK Withdrawal Agreement", 22 *SYIL* (2018), 1-6 [doi: 10.17103/sybil.22.0].

[37] *BOCG, Sección Cortes Generales, serie A, No. 7*, 14 February 2020.

[38] R. Falcón y Tella, "El nuevo acuerdo fiscal con Gibraltar, pendiente de ratificación", 20 *Quincena fiscal* (2019), 9-14; A. Checa Rodríguez, "The Bilateral Tax Treaty between the United Kingdom and Spain Regarding Gibraltar: another Step in Gibraltar's Quest for De-listing as a Tax Haven", 3 *Cuadernos de Gibraltar-Gibraltar Reports* (2018-2019), 1-14 [doi: 10.25267/Cuad_Gibraltar. 2019.i3.1309].

[39] *Agreed Arrangements relating to Gibraltar Authorities in the Context of EU and EC Instruments and Treaties* of 19 April 2000 (A. Rodríguez Benot, "Acuerdos de cooperación entre España y el Reino Unido de 19 de abril de 2000 a propósito de Gibraltar", 52 *REDI* (2000), 273-275; M. Checa Martínez, "La cooperación civil judicial entre España y Gibraltar" in A. del Valle Gálvez, *Gibraltar 300 años* (Universidad de Cadiz, Cadiz, 2004), 353-360) and *Agreed arrangements relating to Gibraltar authorities in the context of mixed Agreements* (2007) and *Agreed arrangements relating to Gibraltar authorities in the context of certain international Treaties* (2007).

by the EU negotiator that any agreement with the UK in relation to Gibraltar will only be possible if there is a separate agreement that has previously been accepted by the Spanish government. The Guidelines for negotiation of 3 February 2020 ("authorising the opening of negotiations for a new partnership with the United Kingdom") published by the EU Commission have been very clear about the need for a separate agreement in the case of Gibraltar and "prior agreement" from Spain. Of course, this also means that the Agreement in relation to Gibraltar can be very different from the one reached with regard to the UK. Gibraltarian authorities have always expressed their rejection to any separate negotiations as they prefer to be seen in the light of the main negotiation thrust of the UK, but they have also expressed their views as to how disinterested Gibraltar is about a Free Trade Agreement as the one pursued by the UK (Gibraltar lacks any manufacturing industry and is already outside the EU customs area); on the contrary, Gibraltar's main interest is the fluidity at their border with Spain where 40% of their labour force crosses back and forth every day. Keeping fluidity in the border can be guaranteed if Gibraltar becomes part of the Schengen area, notwithstanding the fact that the UK is not part thereof. It is interesting here to note that micro-States such as Monaco or Liechtenstein are not part of the EU but nonetheless are part of the Schengen area. Another area of Gibraltar's concern is keeping access to the EU market for services, even though only 10% of their cross-border services market goes to EU Member States (the UK is the market responsible for Gibraltar's 90% of trade in services, but this market has already been secured with unfettered access rights through direct contact and agreement between Gibraltar and London).

The guidelines for the British negotiators in the Brexit process can be found in the document entitled "The Future Relationship with the EU: the UK's approach to negotiations", 27 February 2020, and, without explicitly mentioning Gibraltar, the document states a guideline to the effect that the UK is negotiating "on behalf of all the territories for whose international relations the UK is responsible". This guideline does not oppose those of the EU Commission, which is not requiring separate negotiations, but only separate agreements with regard to Gibraltar. The British guidelines therefore are not against a separate agreement in relation to Gibraltar with the prior agreement from Spain. Once Gibraltar has left the EU its situation is somewhat similar to microstates like Andorra, Liechtenstein, San Marino or Monaco –micro states which do not belong to the EU but require bilateral agreements with the EU.[40] Although the prior agreement from Spain and British sovereignty over the territory add extra difficulty to the process of adoption of bilateral agreements.

The Political Declaration that accompanies the Withdrawal Agreement leading the way into the negotiations for a new partnership does not mention Gibraltar, but the Protocol on Gibraltar in the Withdrawal Agreement provides that the agreement of citizens' rights in

[40] D. Dozsa, "EU Relations with European Microstates. Happily, ever after?", 14 *European Law Journal (2008)* 93-104 [doi: 10.1111/j.1468-0386.2007.00403.x].

Article 1 of the Protocol will be in force beyond the end of the transition period and it is precisely the citizens' freedom of movement the logical basis for a negotiation leading to the continued application of EU instruments on civil judicial cooperation for family matters. To this effect, the agreed continuity of application of Regulations Brussels II *bis* and Brussels III would allow civil judicial cooperation between Gibraltarian and Spanish authorities in similar terms to what until now has been happening.[41] As we have pointed out earlier, nothing precludes the possibility that the parties may reach an agreement on civil judicial cooperation for Gibraltar different from the agreement reached in relation to the UK because agreements in relation to Gibraltar need to be separate, although with prior approval from Spain.

The risk of absence of new bilateral agreements on civil judicial cooperation in the new partnership agreement between the UK and the UE, and in the Protocol in relation to Gibraltar, will force all parties involved to shift the focus towards the gap-filling function of The Hague Conference Conventions. Of course, accession in its own name by the UK to the 2005 Hague Convention on choice of court agreements and ratification of the 2007 Hague Convention on international recovery of child support with temporal effects from Brexit day and territorial extension to Gibraltar has been the first measure to be contemplated. On 31 July 2019 the United Kingdom extended the application of both Hague Conventions to Gibraltar but in contemplation of a no-deal Brexit, and this the reason why the instruments of accession or ratification were withdrawn on 31 January 2020, without prejudice to a new presentation of instruments before the end of the transition period, which were in fact deposited on 28 September 2020 with extension of effects to Gibraltar. Other possible territorial extensions to Gibraltar could be declared by the UK in relation to the 1980 Hague Convention on the Civil Aspects of International Child Abduction and the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption.

Another major gap-filling technique will be the accession of the UK in its own right to the Lugano Convention 2007 as the only way to enjoy a system of civil judicial cooperation comparable to Brussels I bis Regulation. With all its technical deficiencies and shortcomings, the 2007 Lugano Convention already in force in Gibraltar but only in relation to Switzerland, Norway and Iceland, once acceded by the UK with declaration of extension to the territory of Gibraltar would allow the substantial continuity with regard to EU Member States, not of Regulation Brussels I *bis* (1215/2012) for civil and commercial matters, but of the text of Regulation Brussels I (44/2001) on which the 2007 Lugano Convention is modelled after; of course this can be only understood as a step back, but no so huge when compared to the leap in the dark that implies the lack of any similar agreement.

The *European Union (Withdrawal) Act 2019* (Gibraltar) and the *European Union (Withdrawal Agreement) Act 2020* (Gibraltar) do not provide further provisions on civil

[41] A. Borras Rodríguez, "El Brexit y Gibraltar: la perspectiva de las personas físicas y jurídicas", in M. Martín Martínez, J. Martín y Pérez de Nanclares, *El Brexit y Gibraltar: un reto con oportunidades conjuntas* (Ministerio de Asuntos Exteriores y de Cooperación de España, Madrid, 2017), 201-218.

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judicial cooperation, different from those enclosed within the Withdrawal Agreement as transitory provisions with regard to the different EU instruments. It is true then that EU instruments will remain in force in Gibraltar as *retained legislation* by virtue of the *European Union (Withdrawal) Act 2019* (Gibraltar) until modified or derogated by secondary legislation after the end of the transition period –*European Union Laws (Voluntary Implementation) Act 2019*–.[42] As has already been discussed the continuation of the EU instruments is not possible without the element of reciprocity required for their adequate effectiveness in three cases: a) EU instruments governing issues of international civil procedure (implemented in Gibraltar via the *Civil Jurisdiction and Judgments Act* 1993 and further amendments); b) EU instruments for cooperation with foreign courts or authorities (service of process, obtaining of proof, etc.); c) EU instruments governing special civil procedures (European Enforcement Order, European Payment Order and European Small Claims Procedure). On the contrary, the application of the EU instruments on conflict of laws may subsist as retained legislation after Brexit day (Regulation Rome I on the law applicable to contractual obligations and Regulation Rome II on the law applicable to extracontractual obligations). For the time being we have no knowledge of Gibraltar's attitude towards the cherry-picking methodology unilaterally followed by the UK in relation to the transposition of EU instruments after Brexit day. The UK seems to have decided already what parts of each EU instrument will be transposed into English law with modifications, without modifications or will be entirely derogated –in what seems to be an attempt at making a new "tailored suit" Private international law system, but actually resembles a "patchwork quilt" made out of the pieces of EU instruments sewn together with elements of UK domestic Private International Law–.

Brexit also gives the chance to evaluate the status of Gibraltar's domestic rules of Private international law and for the development of new rules. The application of these domestic rules may cause uncertainty for the following reasons: a) Gibraltarian domestic rules are rare and date back prior to the entry into the EC;[43] b) English statutory law is applicable in Gibraltar in some cases (e.g., the international jurisdictional rules in the *Civil Procedure Rules* 1998); c) application of *Common Law* rules brings flexibility but at the price of uncertainty (transient jurisdiction, *forum non conveniens*, anti-suit injunctions, etc.; d) the court of last resort is the *Privy Council* in London in relation to the challenge of judicial decisions from overseas territories (i.e., against judgments from the *Court of Appeal* in Gibraltar)[44]. With

[42] *European Union (Withdrawal) Act 2019*, *Challenges to Validity of EU Instruments (EU Exit) Regulations* 2019, *European Union Withdrawal (Application of International Agreements) Act 2019*, *European Union Laws (Voluntary Implementation) Act 2019*, *European Union (Withdrawal) Act 2019 (Consequential modifications) (EU Exit) Regulations 2020*, *European Union (Withdrawal Agreement) Act 2020*.

[43] *Judgments (Reciprocal Enforcement) Act* 1935, *Maintenance Orders (Reciprocal Enforcement) Act* 1973.

[44] Judgment of the *Privy Council* in the case *Vizcaya Partners Ltd, v. Picard* (2016) on the recognition of a judgment from New York in Gibraltar in relation to the *Madoff* case shows the complexities of Common Law rules versus the legal certainty provided by Regulation Brussels I *bis* (H. Kupelyants, "Implication of Jurisdiction Agreements", 75 *Cambridge L. J.* (2016) 216-219 [doi: 10.1017/S0008197316000477].

regard to the development of new rules, the first hypothesis is the alignment of Gibraltar private international law rules with those in force in the UK (let us not forget that the UK is the main services market for Gibraltar-based companies in the financial, insurance and gaming industries.[45]. On the other hand, and for some matters, Gibraltar has different regulatory needs and interests which are closer to other *offshore* jurisdictions such as Jersey o Guernsey, which have never participated in the EU instruments of civil judicial cooperation. An offshore approach in Gibraltar towards private international law rules can be found in the *Gibraltar Trusts –Private International Law- Act* 2015[46] or in the *Gibraltar Private Foundations Act* 2017[47].

(D) CONCLUSIONS

The UK has left the EU and the transition period in the Withdrawal Agreement will expire on 1 January 2021. The current negotiations between the UK and the EU for a future partnership agreement include criminal judicial cooperation as an ancillary agreement (UK's draft proposal) or an additional chapter (EU's draft proposal) to the main object of negotiation which is a free trade agreement. However, civil judicial cooperation has not been included in the negotiations and seems to have been totally left aside. The only issue on civil judicial cooperation that floats around the negotiations of the new partnership agreement is the application for accession that the UK has already made with regard to the Lugano Convention 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The other State parties to the Lugano Convention 2007 (Denmark, Norway, Switzerland, and the EU) will have to reply to UK's application for accession and it is in this way that the issue of the Lugano Convention 2007 accession is chronologically connected with the negotiations for a new partnership agreement between the UK and the EU. Although the UK's position is that this is a rather technical issue which should be kept separate and should not interfere with the future partnership agreement negotiations, the EU's position is not the same and probably the issue of UK's accession to Lugano somehow will keep being a card on the negotiation table for some time.

UK's accession to the Lugano Convention 2007 cannot be understood as progress in any sense of the term, quite on the contrary, it is only a damage control initiative. The loss of

[45] Gibraltar has implemented the UNCITRAL Model Law on Cross Border Insolvencies in the *Insolvency (Cross Border Insolvencies) Regulations* 2014, *Insolvencies (Cross Border Insolvencies) (Amendment) Regulations 2015*, following the example of the UK that implemented the UNCITRAL Model Law in the *Cross Border Insolvencies Regulations* 2006.

[46] This piece of Gibraltar legislation clearly responds to the needs of an offshore jurisdiction (protection of Gibraltar trusts against foreign laws and judicial decisions which do not recognize the trust or may confer forced heirship rights to any person) and should not be confused with the implementation of The Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition which was object of *Trusts (Recognition) Act 1989 (Gibraltar)*.

[47] J. Harris, M. Morrison, "Brexit and the offshore world", 23 *Trusts and Trustees* (2017) 259-262 [doi: 10.1093/tandt/ttx018].

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Regulation 1215/2012 (Brussels I bis), already prospectively revoked with effect on 1 January 2021 by the Civil Jurisdiction (EU Exit) Amendment 2019, is so colossal that something had to be done in the context of multilateral instruments (accepting that a bilateral solution for the continuity of application of Regulation Brussels I bis is not on the negotiation agenda between the UK and the EU). The Lugano Convention 2007 is not a whole substitutive product for Brussels I bis for technical reasons already expressed earlier in this article, but at least it will reduce much of the uncertainty brought about by the UK's unilateral revocation of Brussels I bis, both for matters of international jurisdiction (including the validity of choice of forum clauses) and for recognition and enforcement of foreign judgments.

The other multilateral methodological path followed by the UK with regard to civil judicial cooperation is the improvement of its status in relation to The Hague Conference Conventions. Firstly, by accession or ratification in its own right to The Hague Conventions that are already in force in the UK but only as a result of the ratification by the EU with effects for all EU Member States. For this purpose, the UK has deposited on 28 September 2020 instruments of accession or ratification, so that on 1 January 2021 the following Hague Conventions will be in force: a) 2005 Hague Convention on Choice of Court Agreements, and b) 2007 Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (2007). This future accession or ratifications scenario of Hague Conventions is the object of the Private International Law (Implementation of Agreements) Bill 2009 still pending in the British Parliament and expecting approval in autumn; the Bill foresees the implementation of the 2005 Hague Convention and the 2007 Hague Convention, but more unpredictably it also provides for the implementation of the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, which was already ratified by the UK in its own name on 27 July 2012 and entered into force for the UK on 1 November 2012. The underlying explanation for this implementation seems to be the loss of Regulation Brussels II bis Regulation on 1 January 2021 and how, at least for matters of parental responsibility, the void can be partly filled through a new implementation of The Hague 1996 Convention. A rather more speculative projected measure with regard to its practical effects in the short or medium term would be the UK's signature and further ratification of the 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters; the Convention, although envisaged from its inception for transatlantic relations between the EU and the USA, has not yet been ratified by any country and it remains doubtful whether the EU will try to play ball with this Convention now that the UK is in a post-Brexit context and seems to be the most likely interested country in its entry into force; of course, the projected UK's accession to the 2007 Lugano Convention also diminishes the drive for UK's signature and ratification of the 2019 Hague Convention.

The third movement of this symphony is the most bizarre and based on different heavy tuned scherzos: the collection of civil judicial cooperation UK's EU Exit Regulations adopted

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following the European Union (Withdrawal Act) 2018, with projected entry into force on 1 January 2021. The reason for these measures in the field of civil judicial cooperation is the issue of how to cope with EU's legislation retained in the UK's legal order as the main effect of the European Union (Withdrawal Act) now that mutual application or reciprocity will no longer exist after Brexit effective day. For issues of international jurisdiction, the UK has preferred to revoke most of the retained EU's legislation, although some elements have been retained (international jurisdiction for consumer contracts and employment contracts) and some have been modified (domicile of legal persons, international jurisdiction for divorce, insolvency, etc.) with the creation of new international jurisdictional rules that are a mixture or blend between rules of very different nature (some with origin in the EU's instruments and some with origin in the UK's legal tradition) in the hope that the amalgamation may keep the different materials together. For matters of recognition and enforcement of foreign decisions the movement is logical although more sombre: the UK falls back to its domestic private international law rules and the content of EU instruments is lost in the Brexit process. The same happens to the EU instruments creating special civil procedures (European Enforcement Order, European Payment Order and European Small Claims Procedure) or establishing means of cooperation between courts of different Member States (service of documents and taking of evidence in civil and commercial matters). The only positive, although merely inertial, step is the retaining of the content of EU's instruments on choice of law in the Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment) (EU Exit) Regulations 2019.

To sum up, it does not seem likely that the future partnership agreement or new free trade agreement will get into civil judicial cooperation, and that all the cards are now on the table: a) UK's accession to 2007 Lugano Convention seems quite likely in the short term, although this process is entangled with the current negotiations with the EU; b) the UK will enhance its status in as many Hague Conventions as it may sound practical; c) the UK will pursue its own goals and objectives revoking in most cases, amending in some, and retaining in a few instances the EU legislation retained by the European Union (Withdrawal) Act 2018; d) it remains to be seen whether the UK will also make arrangements in the medium term for the modernization of its own domestic private international law rules which, although highly regarded and nurtured by a long-standing tradition, also show clear signs of obsolescence that should be properly managed, of course not from Brussels anymore.

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