UK-EU Civil Judicial Cooperation after Brexit: Five Models

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Abstract

The European Union has established a comprehensive and successful judicial cooperation framework that applies between EU Member States to facilitate cross-border relationships. This framework harmonizes and simplifies the rules in ascertaining the applicable law and competent court in cross-border disputes, and enables judgments rendered by the courts of one Member States to be recognized and enforced in other EU Member States.

The 2016 EU referendum resulted in the UK triggering Article 50 TEU to exit the EU by the end of March 2019 (Brexit). Upon Brexit and without special arrangements, relevant EU judicial cooperation instruments, in principle, would stop being effective in the UK. This article examines the potential consequence of Brexit and explores the possibilities for post-Brexit judicial cooperation between the UK and EU. After analysing the five potential models, this article proposes that the optimal model is for the UK and EU to enter into a special arrangement based on the existing EU judicial cooperation law and the UK should follow the CJEU judgments as closely as possible with diversion in exceptional circumstances. If this model is not achievable, the UK could transpose the unilateral applicable EU private international law into its domestic law and at the same time ratify relevant international conventions to re-shape the post-Brexit judicial cooperation with the EU.

I. INTRODUCTION

On 23 June 2016, the EU referendum took place in the UK, with majority of those who voted voting in favour of leaving the EU.[1] Following the UK Supreme Court's ruling in *R (Miller) v*

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Secretary of State for Exiting the European Union,[2] the UK parliament approved the European Union (Notification of Withdrawal) Act 2017,[3] which empowered the Prime Minister to trigger the Brexit process. The UK government invoked the formal withdrawing process, i.e. Article 50 of the Lisbon Treaty, on 29 March 2017, which results in the UK leaving the EU by the end of March 2019.

Brexit will undoubtedly affect EU and UK citizens and companies, especially those engaging in cross-border activities. European integration increases cross-border relationships between individuals and companies from different EU Member States. The increasing cross-border relationship leads to cross-border disputes. In the absence of the unified substantive law and court system, companies and citizens would face uncertainty and obstacles to predict the legal consequence of their cross-border activities, to access to justice or seek redress and to enforce their rights overseas. In order to facilitate cross-border relations in the internal market, the EU has established a comprehensive judicial cooperation system, which harmonises and simplifies the rules in ascertaining the applicable law and competent court, and enables judgments rendered by the courts of one Member States to be recognised and enforced in other EU Member States. Being in force for the past few decades, the EU civil judicial cooperation system is considered by most commentators as effective and successful,[4] which provides certainty, predictability and efficiency to EU (including UK) citizens and companies engaged in cross-border civil and commercial matters in the internal market.[5]

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[1] The full title is 'the United Kingdom European Union membership referendum', which is also known as the EU referendum and the Brexit referendum. The result is 17,410,742 (51.89%) in favour of leave and 16,141,241 (48.11%) remain.

[2] *R (Miller) v Secretary of State for Existing the European Union* [2017] UKSC 5.

[3] European Union (Notification of Withdrawal) Act 2017 (c. 9).

[4] Ministry of Justice, 'Review of the Balance of Competences between the United Kingdom and the European Union: Civil Judicial Cooperation', Feb. 2014, https://consult.justice.gov.uk/digital-communications/balance-of-competences/results/civil-judicial-cooperation-report-review-of-balance-of-competences.pdf (accessed on 12 Oct 2017); House of Lords, 'Brexit: Justice for Families, Individuals and Businesses?', 17th HL paper 134, 20 March 2017, https://www.publications.parliament.uk/pa/ld201617/ldselect/ldeucom/134/134.pdf (accessed on 4 July 2017), paras 26-38.

[5] M Pfeiffer, 'Legal Certainty and Predictability in International Succession Law', (2016) 12 Journal of Private International Law 566; M Danov and P Beaumont, 'Measuring the Effectiveness of the EU Civil Justice Framework', (2015-16) XVII Yearbook of Private International Law 151; S.C. Symeonides, 'Codification and Flexibility in Private International Law', in K.B. Brown and D.V. Snyder (eds), *General Reports of the XVIIIth Congress of the International Academy of Comparative Law* (Springer, 2012) 167; A. Fiorini, 'The Codification of Private International Law in Europe', (2008) 12 Electronic Journal of Comparative Law 1.

The EU civil judicial cooperation system has largely influenced the UK. The past 35 years or so have witnessed the gradual Europeanisation of UK private international law.[6] The EU has harmonised and codified private international law in cross-border civil and commercial jurisdiction and recognition and enforcement of judgments,[7] applicable law in contractual and non-contractual obligations,[8] jurisdiction and recognition and enforcement of judgments in cross-border matrimonial matters,[9] jurisdiction, applicable law and recognition and enforcement of judgments in maintenance obligations,[10]cross-border insolvency proceedings,[11]taking evidence abroad,[12] and service of proceedings abroad.[13] Traditional English private international law only applies in limited circumstances falling out of the scope of the EU harmonization.[14] EU rules have been applied in the English courts over the past four decades and have guided companies and practitioners to shape their contract and business strategy. Brexit will undoubtedly lead to uncertainty. Upon Brexit and without special arrangements, relevant EU judicial cooperation instruments, in principle, would stop being effective in the UK.[15] What would be the future civil judicial cooperation framework between the UK and the EU? Would the UK be treated as an

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[6] A Dickinson, 'Back to the future', (2016) 12 Journal of Private International Law 195, 196; P.S. Morris, 'The modern transplantation of continental law in England', (2016) 12 Journal of Private International Law 587, 587ff; J Harris, 'Understanding the English Response to the Europeanization of Private International Law', (2008) 4 Journal of Private International Law 347.

[7] Regulation (EC) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matter (recast), [2012] OJ L351/1.

[8] Regulation (EC) No. 593/2008 on the law applicable to contractual obligations (Rome I), [2008] OJ L177/6; Regulation (EC) No. 864/2007 on the law applicable to non-contractual obligations (Rome II), [2007] OJ L199/40.

[9] Regulation (EC) No. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, [2003] OJ L338/1.

[10] Regulation (EC) No. 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, [2009] OJ L7/1.

[11] Regulation (EU) 2015/848 on insolvency proceedings (Recast), [2015] OJ L 141/19.

[12] Regulation (EC) No 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, [2001] OJ L174/1.

[13] Regulation (EC) No 1393/2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, [2007] OJ L324/79.

[14]For example, traditional English law is applied to determine jurisdiction where the defendant is domiciled out of the EU, domicile of a natural person, applicable law in bills of exchange or other negotiable instruments, applicable law to agency relationship, applicable law to defamation and violation of privacy, applicable law on divorce (UK does not opt in the Regulation 1259/2010) and cross-border succession (UK did not opt in to Regulation No 650/2012).

[15] For more discussion on this point, see Sara Masters, Belinda McRae, 'What does Brexit Mean for the Brussels Regime?', (2016) 33 Journal of International Arbitration 483, 492; Dickinson, n 8, 200-205; R. Aikens and A. Dinsmore, 'Jurisdiction, Enforcement and the Conflict of Laws in Cross-Border Commercial Disputes: What are the Legal Consequences of Brexit', (2016) 27 European Business Law Review 903; J Fitchen, 'The PIL consequences of Brexit', (2017) 3 NIPR 411, 423.

ordinary third country by the other EU Member States post-Brexit? Would it be possible to maintain the existing judicial cooperation scheme between the UK and EU?

This article provides analysis of five potential models, i.e. the transposition model, multilateral model, bilateral model, unilateral model and international model, which may be relied on to shape the future judicial cooperation between the UK and EU. This analysis reveals that the optimal choice is for the UK and the EU to enter into a special agreement on civil judicial cooperation that incorporates the current EU private international law rules. This agreement will provide the most pragmatic benefits at least for the short term post-Brexit. If such an agreement cannot be reached because of disagreement on the CJEU jurisdiction, the UK could transpose existing EU law into UK domestic law and, at the same time, ratify international judicial cooperation conventions, which could provide a reliable alternative and may be a more politically sensible and realistic solution for the long-term.

II. TRANSPOSITION MODEL

The transposition model suggests the UK transposes EU law into UK domestic law.[16] On 2 October 2016, the Prime Minister of the UK, Theresa May, announced the intention to repeal the European Communities Act 1972 with a 'Great Repeal Bill'.[17] The UK Government later published a White Paper, conforming the general position to adopt the transposition model.[18] This will end the EU legislative competence in the UK, as well as the authority of the CJEU in interpreting the law applying in the UK. The UK Parliament then published the European Union (Withdrawal) Bill, which passed its Second Reading on 11 September 2017.[19] The Great Repeal Bill will convert the 'body of existing EU law' into UK law on the exit date to keep existing certainty for UK citizens and businesses, and the future amendment, repeal and improvement of

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[16] There are three systems of private international law in the UK – England and Wales, Northern Ireland and Scotland. It is for the Scottish Parliament to legislate on issues within the sphere of private international law rather than the UK Parliament. From the perspective of competency, if the transposition model is adopted by the UK Parliament, a legislative consent motion is needed in the Scottish Parliament.

[17] 'Theresa May's Conservative conference speech on Brexit', Politics Home, 2 Oct 2016.

[18] HM Government, Department for Exiting the EU, 'Legislating for the United Kingdom's Withdrawal From the European Union' (*White Paper*), March 2017.

[19] For more information on the EU (Withdrawal Bill) or the 'Great Repeal Bill', see https://services.parliament.uk/bills/2017-19/europeanunionwithdrawal.html (accessed on 25 Oct 2017).

these laws would be subject to full legislative process and Parliamentary debate.[20] The body of existing EU law, or the *Acquis Communautaire*, constitutes existing EU treaties, Regulations, Directives, and CJEU case law.[21] In the area of civil judicial cooperation, all the EU judicial cooperation instruments that are currently effective in the UK will be transposed into the UK law to avoid the 'black hole' caused by Brexit.

The transposition model may work for unilaterally applicable rules, such as choice of law rules in Rome I and Rome II but it would encounter an inevitable challenge in the area of judicial cooperation, which is largely based on mutual trust and reciprocity. In other words, the proper functioning and operation of the judicial cooperation system requires the continuous interaction between the UK and other EU Member States.

The importance of reciprocity is demonstrated by three examples. The first and most typical example is recognition and enforcement of judgments.[22] The greatest achievement of the current EU judicial cooperation is to enable civil and commercial judgments made by the court of one Member State to be freely circulated in other Member States, with very efficient, speedy and simplified procedure,[23] limited refusal grounds[24] and minimal review.[25] The judgment regime largely resolved the traditional difficulty in international commercial litigation caused by the great uncertainty, cost or even impossibility to enforce judgments abroad.[26] The transposition

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[20] *Ibid*.

[21] The UK Parliament, European Union (Withdrawal Bill) Explanatory Notes, 8, https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/en/18005en.pdf (accessed on 24 Oct 2017).

[22] For discussion on EU enforcement of judgments rules, see M Kilinsky, 'Mutual trust and cross-border enforcement of judgments in civil matters in the EU', (2017) 64(1) Netherlands International Law Review 115; Ugljesa Grusic, 'Recognition and enforcement of judgments in employment matters in EU private international law', (2016) 12 Journal of Private International Law 521; Samuel P. Baumgartner, 'Recent Reforms in EU Law' (2014) 97(4) Judicature 188.

[23] The Brussels I Recast accelerates recognition and enforcement of foreign judgments between Member States by abolishing *exequatur*. Foreign judgments can be recognised without any special procedure under Art 36.

[24] Refusal may only be granted under four grounds under Article 45 and these grounds are interpreted restrictively by the CJEU. See, e.g., restrictive interpretation of public policy defence, Case C-414/92 *Solo Kleinmotoren v Boch* [1994] ECR I-2237; Case C-145/86 *Hoffmann v Krieg* [1988] ECR 645; Case C-7/98 *Kromback v Bamberski* [2000] ECR I-1935.

[25] The requested court cannot review the merits of the judgment (Art 52) and can only review the jurisdiction of the original court in cases involving an exclusive jurisdiction under Article 24 or in some consumer, insurance and employment cases (Art 45(2) and (3)).

[26] A Feldman, 'Rethinking Review of Foreign Court Jurisdiction in Light of the Hague Judgments Negotiations', (2014) 89 New York University Law Review 2190, 2192; R.W. Hulbert, 'Some Thoughts on Judgments, Reciprocity, and the Seeming Paradox of International Commercial Arbitration', (2008) 29 U. Pa. J. Int'l L. 641, 641.

model, however, could not preserve the advantage provided by the free movement of judgments, which completely depends on the mutual trust and reciprocity. The UK could maintain the obligation to enforce judgments made by other Member States after transposing the current EU law into its domestic law. It, however, could not demand other Member States to exercise the equal respect towards the UK judgments post-Brexit, which would then be classified as judgments rendered in a third country.

The second example is the doctrine of *lis pendens,* which prevents concurrent proceedings on the same or related actions from being brought in the courts of more than one Member State.[27] Concurrent proceedings will increase public and private costs and lead to irreconcilable judgments which may cause enforcement difficulties. Therefore, Article 29(1) of the Brussels I Recast requests the second seised court to stay jurisdiction in favour of the first seised court in the same cause of action between the same parties, and Article 30(1) of the Regulation provides the second seised court 'may' stay jurisdiction in favour of the first seised court in the 'related action' under its discretion, considering how closely the two actions are linked, how far the first action is in progress, and how likely it is that the two actions may result in irreconcilable judgments.[28] Similar *lis pendens* rules are also provided in the Maintenance Regulation.[29] Besides, Brussels II bis also demands the second seised court to stay jurisdiction in proceedings relating to divorce, legal separation or marriage annulment between the same parties,[30] and parental responsibility relating to the same child and involving the same cause of action.[31] The operation of the *lis pendens* rule depends on the second seised court voluntarily respecting the jurisdiction of the first seised court of a Member State. Since it requires the court to restrain its own jurisdiction based on the first-come-first-served standard, it usually can only work

[27]Art 29-35 of the Brussels I Recast; Art 12 and 13 of the Maintenance Regulation; Art 19 of the Brussels II bis. For more discussion on *lis pendens*, see J Vlek, '*Lis pendens*, choice of court agreements and abuse of law under Brussels I bis', (2016) 63(3) Netherlands International Law Review 297; C Bradley, 'The *lis pendens* rules under Brussels II a', (2016) 46 Family Law 471; Vesna Lazic, 'The Revised *Lis Pendens* Rule in the Brussels Jurisdiction Regulation' (2013) 15 Review of European Law 5.
[28]AG Opinion in Case C-129/92 *Owens Bank v Bracco* (No 2) [1994] ECR I-117.
[29] Art 12 and 13 of the Maintenance Regulation.
[30] Article 19(1) of the Brussels II bis.
[31] Article 19(2) of the Brussels II bis.

effectively between countries with established obligations and reciprocity.[32] After the UK withdraws from the EU, the UK is no longer a 'Member State'. It means that the EU Member States no longer have the Regulation obligation to respect the judicial proceedings of the UK, even if the UK is the first seised court. The only provisions that are relevant in this scenario are Articles 33 and 34 of the Brussels I Recast, which provide discretionary *lis pendens* rules in relation to the concurrent proceedings pending in the EU court and the court of a third country.[33] It suggests that the court of an EU Member State has the discretion to stay jurisdiction in favour of a third country.[34] Articles 33 and 34 aim to improve the functioning of the Regulation in the international legal order by avoiding parallel proceedings in and out of the EU.[35] They were designed to reduce the risk of conflicting judgments between the courts of the EU and third countries, and they also show respect for proceeding of non-EU countries, especially when it is well advanced. This level of discretion, however, cannot provide the equal protection and respect to the UK proceedings after Brexit. Firstly, compulsory *lis pendens* applied to the concurrent proceedings between Member States would not apply to the proceedings between a Member State and a third country, even if the two proceedings concern the same cause of action between the same parties.[36] Secondly, discretion will only be made to stay jurisdiction if a third country judgment is capable of being recognised and enforced in the Member State, and a stay is necessary for the proper administration of justice.[37] It is unclear when it would be considered 'necessary for the proper administration of justice' to stay jurisdiction in favour of a third country.[38] A very general guidance is provided which suggests assessing 'all the circumstances of the case'.[39] Consideration should also be given to the comparative appropriateness of the forum, such as the nexus and proximity between the dispute and the parties and the forum and the stage of progress of the proceedings in the third country, and the efficiency of trial, such as

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[32]It is necessary to note that usually no one country would unilaterally adopt the *lis pendens* rule in favour of other countries in the world, given the fact that it cannot guarantee other countries would adopt the same rule in favour of it.

[33] For comments on these new provisions, see Ivan Ovchinnikov, 'Owusu, Lis Pendens and the Recent Recast of the Brussels I Regulation' (2016) 19 Trinity College Law Review 40; Koji Takahashi, 'Review of the Brussels I Regulation' (2012) 8(1) Journal of Private International Law 1.

[34] Art 33(1) and 34(1).

[35] European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters', COM(2010) 0748 final.

[36] Art 33(1).

[37]Art 33(1)(a) and (b); Art 34(1)(b) and (c).

[38] Art 33(1)(b) and Art 34(1)(c).

[39] Recital 24 of the Brussels I Recast.

the reasonable timeframe for the third country to deliver the judgment.[40] Furthermore, the court of a Member State could resume jurisdiction at any time, even after jurisdiction is stayed under *lis pendens* initially.[41] The decision to continue may be made if the court of the Member State considers the proceedings in the court of the UK are unlikely to be concluded in a reasonable time, or it is required for the proper administration of justice to do so.[42] Arguably, the new EU provisions allow EU courts to engage in a *forum non conveniens* style of analysis to decline jurisdiction in favour of a more appropriate non-EU forum, [43] which may assist better administration of justice and efficient trial. However, Articles 33 and 34 are likely to cause uncertainty as to how these factors are ascertained and whether EU Member States would apply them consistently. Particular difficulties also exist because the courts of many EU Member States do not have the tradition of exercising discretion at this level and some courts do not provide detailed justification for judgments. One would question the quality of implementation of these provisions and therefore the granting of sufficient protection to UK proceedings after Brexit.

The third example is enforcement of choice of court agreements. The Brussels I Recast, Brussels II bis and Maintenance Regulation permit parties to enter into agreements to choose the competent court to resolve their disputes.[44] An exclusive jurisdiction clause usually has both prorogation and derogation effects in that firstly, the chosen court should take jurisdiction; and secondly, the non-chosen courts of other Member States should decline jurisdiction. In order to protect jurisdiction of the chosen court, Article 31(2) of the Brussels I Recast provides that 'where a court of a Member State on which an agreement … confers exclusive jurisdiction is seised, any courts of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement.'[45] It further provides that '(w)here the court designated in the agreement has established jurisdiction in accordance with the agreement, any court of another Member State shall decline jurisdiction

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[40] ibid.
[41] Art 33(2) and 34(2).
[42] Art 33(2)(b) and (c); Art 34(2)(c) and (d).
[43] The difference is that the common law forum non conveniens in the UK permits the court to decline jurisdiction even if it is the first seised court while the EU Regulation only allows the second seised EU court to decline jurisdiction.
[44] Brussels I Recast, Art 25; Brussels II bis, Art 12; Maintenance Regulation, Art 4.
[45] Art 31(2).

in favour of that court.'[46] It is true that these provisions are not perfect. For example, the Brussels I Recast does not provide the chosen court exclusive jurisdiction to assess the validity of the jurisdiction clause and the obligation to stay jurisdiction only arises if the chosen court in a Member State is also seised.[47] However, in practice, the other party wishing to rely on the exclusive jurisdiction clause usually would bring the proceedings in the chosen forum without delay. The Brussels I Recast at least establishes the hierarchy between the courts of Member States and grants the chosen court priority. Where the commercial parties conclude an exclusive jurisdiction clause in their contracts, they acquire certainty that such an agreement will be enforced and no other courts usually will take jurisdiction.[48]

It is true that the UK court may, under the transposition model, continue to enforce agreements choosing the courts of the UK by taking jurisdiction. However, the transposition model cannot impose the obligation for the courts of the EU Member States to stay jurisdiction in favour of the chosen court of a third country. Unless there are other treaty obligations in place, the opposing party may bring the action subject to the UK jurisdiction clause to the court of an EU Member State, which may nevertheless take jurisdiction.[49] An exclusive jurisdiction clause choosing UK courts no longer provides the same level of certainty that the commercial parties could acquire under the Brussels I Recast. It could result in concurrent proceedings and conflicting judgments that seriously undermine the purpose of jurisdiction clauses. Furthermore, the concurrent proceedings may result in irreconcilable judgments. The enforcement of a UK judgment is potentially made more difficult by the fact that the UK would no longer be a member of the EU judgment scheme. On the other hand, the judgment of the EU Member State may acquire the free circulation in the EU even if the court is not chosen by the parties and jurisdiction is wrongly

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[46]Art 31(3).

[47] ZS Tang, 'Cross-border Contract Litigation in the EU', in P Beaumont, M Danov, et al., (eds), *Cross-Border Litigation in Europe (*Hart, 2017) 623, 626-7; T Hartley, 'Choice-of-court Agreements and the New Brussels I Regulation', (2013) 129 Law Quarterly Review 309, 309-11.

[48] This rule is welcomed by most commentators. See Lukasz Gorywoda, 'The New Design of the Brussels I Regulation' (2013) 19 Columbia Journal of European Law Online Supplement 1; Delia Ferri, 'An End to Abusive Litigation Tactics within the EU' (2013) 1 Irish Business Law Review 21; David Kenny, Rosemary Hennigan, 'Choice-of-Court Agreements, the Italian Torpedo, and the Recast of the Brussels I Regulation' (2015) 64 ICLQ 197; Ian Bergson, 'The Death of the Torpedo Action' (2015) 11 J. PrivIntL 1.

[49] In reality, it is estimated that the UK will ratify the Hague Choice of Court Convention anyway upon Brexit and this Convention creates treaty obligations for the EU Member States and the UK with limited exceptions. This will be discussed in the paragraph that follows.

taken.[50] This would result in weakening the effect of a UK jurisdiction clause, in contrast to jurisdiction clauses choosing the courts of other EU Member States,[51] and could affect the popularity of London as an international centre for commercial dispute resolution.[52] According to a study conducted by the BIICL, factors making English courts the popular choice for commercial litigants including the use of choice of court clauses and enforceability of judgments in foreign jurisdictions.[53]

The negative impact to the UK jurisdiction agreement may be minimised by the international framework of the Hague Choice of Court Convention 2005, which provides obligations for its Contracting States to respect agreements choosing the court of other Contracting States,[54] and it binds all EU Member States apart from Denmark. However, since the UK does not ratify the Convention as an independent country, this Convention would not immediately bind the UK on the exiting date. It is very likely that the UK will sign and ratify the Convention anyway after Brexit, but uncertainty may continue to exist after Brexit and before the Convention finally enters into effect in the UK. Pursuant to Article 31 of the Hague Convention, it shall enter into force on the first day of the month following the expiration of three months after the deposit of the second instrument of ratification, acceptance, approval or accession.[55] From the perspective of the EU law, the UK cannot ratify the Hague Convention before it withdraws from the EU. Even if the UK immediately deposits the document for ratification on the day of withdrawal, there will be a three-month gap before the Convention eventually enters into effect in the UK.

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[50]The court of an EU Member State generally is not allowed to review jurisdiction in recognition and enforcement of judgments rendered by the court of other EU Member States. See Art 45(3) of the Brussels I Recast. Limited exceptions are granted to protection jurisdiction in employment, insurance and consumer contracts (Art 45(1)(e)). But even in these types of contracts, the finding of the fact on which jurisdiction is grounded cannot be examined (Art 45(2)).

[51] For the effect on the English jurisdiction agreements, see Mukarrum Ahmed, 'Brexit and English Jurisdiction Agreements', (2016) 27 European Business Law Review 989; Mukarrum Ahmed, Paul Beaumont, 'Exclusive Choice of Court Agreements', (2017) 13 J. Priv. IntL. 386.

[52] Bar Council (England and Wales), 'The Brexit Papers: Civil Jurisdiction and Judgments (Paper 4)', para 9, https://www.barcouncil.org.uk/media/557742/paper_4_civil_jurisdiction_and_judgments.pdf (last accessed 13 Dec 2017).

[53] E Lein, R McCorquodale, et al., 'Factors Influencing International Litigants' Decision to Bring Commercial Claims to the London Based Courts', para 4.3, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/396343/factors-influencing-international-litigants-with-commercial-claims.pdf (last access 13 Dec 2017).

[54] Hague Choice of Court Convention, Arts 5 and 6. For more discussion of the international convention, see sec.VI below.

[55] Art 31.

Given the future uncertainty, skillful lawyers may advise their clients to avoid inserting the exclusive choice of the UK jurisdiction clauses into their contracts from now on, which may result in long-term consequences, especially where companies do not frequently review and revise their standard terms and conditions including jurisdiction clauses. This problem may be addressed in two ways. Ideally, the UK-EU deal on the transitional period might enable the continued application of the Hague Choice of Court Convention between the UK and other Contracting States after Brexit and before the Convention enters into effect in the UK as an independent signatory, as far as this arrangement is accepted by the Hague Conference. In case such a transitional deal cannot be reached, the UK is arguably not prevented from acceding to the Hague Convention in its own right before Brexit under international law. It is debatable whether it is in the best interest of the UK, in a hard Brexit scenario, to breach the EU law by ratifying the Hague Convention a few months before the exit date when it is still a Member State. This strategy could provide a seamless coverage to protect the UK choice of court agreement and the UK litigation market.

The UK Government is aware of the reciprocity challenge. In its *White Paper*, the UK Government states that

> 'In some cases EU law is based on reciprocal arrangements, with all member states treating certain situations in the same way. If such reciprocal arrangements are not secured as a part of our new relationship with the EU, it may not be in the national interest, or workable, to continue to operate those arrangements alone.'[56]

However, the *White Paper* proposes the delegated powers to correct the relevant EU rules to prevent the reciprocal rules become one-sided.[57] In other words, it will only delete the relevant EU rules based on reciprocity to remove the unilateral obligations from the UK but it does not suggest how to maintain the current, or establish new, reciprocal obligations between the UK and EU Member States.

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[56] *White Paper*, n.18, para 3.3.
[57] *White Paper, ibid.*, para 3.7-3.15.

III. MULTILATERAL MODEL

Since the transposition model could not reserve the important reciprocal feature of the EU private international law, the multilateral model is deemed a promising alternative by commentators.[58] It requires the UK and EU negotiate an international treaty for the post-Brexit UK-EU civil justice cooperation. Such an agreement can be formed in a number of different ways. It could mirror the EU-Denmark arrangement in relation to the EU judgment scheme, or could rely on the existing Lugano II Convention. Or it could be a fresh new treaty designed specifically for the EU-UK judicial cooperation post Brexit.

A. Denmark model

This model mirrors the EU-Denmark Agreement to apply the Brussels I Regulation to civil and commercial judicial cooperation between Denmark and EU Member States.[59] Denmark is an EU Member State, but it has opted out from the EU law of justice, including judicial cooperation.[60] In 2005, Denmark and the EU entered into the EU-Denmark Agreement, which implements the Brussels I Regulation to the relationship between Denmark and EU Member States. This Agreement is international law in nature, instead of EU law. Therefore, in principle, the UK and EU could follow this model after Brexit. Furthermore, it also provides flexibility to Denmark concerning the future amendment and changes to the Brussels I Regulation. Although Denmark cannot participate in amending the Regulation, any amendments will not apply in Denmark,[61] unless Denmark decides to adopt such amendments by notifying the Commission of its

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[58]S Masters, n 15 above, 484. See also the oral evidence by Prof Jonathan Harris QC to the House of Lords, 'Brexit: Civil Justice Cooperation', 13 Dec 2016, http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/brexit-civil-justice-cooperation/oral/44510.pdf (accessed 30 Sept 2017).

[59] Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2005] OJ L 299/62.

[60]See Arts 1 and 2 of 1997 Protocol No 22 and Annex. The four opt-outs from the Maastricht Treaty were received by Denmark in the Edinburgh Agreement 1992, which grants Denmark exemption from the economic and monetary union (EMU), the Common Security and Defence Policy (CSDP), Justice and Home Affairs (JHA) and the citizenship of the EU. Under the change made to JHA in the Amsterdam Treaty, Denmark opts-out from the Area of freedom, security and justice. Under the Treaty of Lisbon, Denmark could change the complete opt-out from JHA to the case-by-case opt-in, which was however rejected in a referendum in Denmark and the Amsterdam complete opt out Protocol continues to apply.

[61]Art 3(1).

decision.[62] The Danish notification creates mutual obligations under international law between Denmark and the Community and amends and updates the Agreement accordingly.[63] After the EU adopted the Brussels I Recast that updates the Brussels I Regulation, Denmark notified the European Commission of its decision to implement the Recast Regulation on 20 December 2012.[64]

This level of cooperation and flexibility may be favoured by the UK. However, it is crucial to understand the difficulty in adopting this model. Firstly, the situation of the UK and Denmark is different. Denmark is an EU Member State but acquires the exemption from the EU constitution. The EU has the interest for the coherent and consistent application of law within the EU member states to improve integration and shared common values within the Union.[65] After the UK withdraws from the EU, the UK is no longer a Member State and its situation is not comparable to Denmark. Furthermore, the European Commission also emphasised that direct extension of the effect of the Brussels I Regulation to Denmark is 'of an exceptional nature' and would be applied 'for a transitional period only'.[66] It suggests that the EU has the intention to encourage Denmark to fully take part in the EU justice scheme in the future and limit the use of this model. It would be contrary to the general EU policy to utilize this model easily for a third country.

Secondly, the alleged 'flexibility' to opt in to the amended EU law is not realistic. The amendment of EU law usually would repeal the old law, which no longer exists in operation after the new law being effective.[67] According to the EU-Denmark Agreement, if the EU has adopted the amendments, the Agreement that extends the effect of the old EU law to Denmark would terminate after 30 days of adoption.[68] In other words, the EU could unilaterally decide to amend the EU law without Denmark's contribution and Denmark has to opt in to the amended scheme to keep the cooperative relationship ongoing.

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[62] Art 3(2).
[63] Art 3(6).
[64] The EU-Denmark Agreement on the Brussels I Recast, [2013] OJ L 79/4.
[65] European Commission, 'Proposal for a Council Decision concerning the signing of the Agreement between the European Community and the Kingdom of Denmark extending to Denmark the provisions of Council Regulation (EC) No 44/2001 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters', COM(2005) 145 final, 2005/0055 (CNS), 2.
[66] 'EU-Denmark Proposal', *ibid.,* 2.
[67] Art 80 of the Brussels I Recast.
[68] Art 3(2) and Art 3(7)(a) and (b) of the EU-Denmark Agreement.

Thirdly, conflicts may also arise as to the enforcement of the special arrangement treaty. If disputes arise between EU and Denmark on the non-compliance under the EU-Denmark Agreement, the EU could bring this dispute before the CJEU against Denmark,[69] while Denmark may complain about the non-compliance of a Member State before the EU.[70] This dispute resolution mechanism follows the one set up in the TFEU,[71] because it adjudicates disputes between the EU and a Member State. After the UK becomes a third country, it is hard to justify adopting the same dispute resolution scheme to enforce the special arrangement agreement.

Furthermore, the EU-Denmark Agreement requires the Danish court to refer cases to the CJEU in questions on validity or interpretation of this Agreement.[72] Reserving the interpretation power of the CJEU may not be easily acceptable by the UK because the judicial cooperation agreement is not EU law, but an international treaty, which establishes treaty obligations for the UK and EU as parties of equal status.[73] The UK government has emphasised that it is the international custom that 'the courts of one party are not given direct jurisdiction over the other in order to resolve disputes between them'.[74]

Fourthly, this model may also affect the UK's power to enter into other international judicial cooperation agreements. For example, the EU-Denmark Agreement provides that although international agreements entered into by the EU based on Brussels I will not bind Denmark,[75] Denmark is also prevented from entering into international agreements that may affect or alter the scope of Brussels I unless satisfactory arrangements have been made regarding the relationship between this special agreement and the international agreement in question.[76] If the UK concludes the similar Agreement with the EU and wants to enter into other global private international law frameworks or conclude international judicial cooperation arrangements with

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[69] Art 7(1).
[70] Art 7(2).
[71] Art 258-260, TFEU. A. Gil Ibáñez, *The Administrative Supervision and Enforcement of EC Law, Powers, Procedures and Limits* (Oxford: Hart, 1999); H.A.H. Audretsch, *Supervision in European Community Law* (2nd ed., Amsterdam: North-Holland, 1987); M. Mendez, *The Legal Effects of EU Agreements* (OUP, 2013).
[72] Art 6(1).
[73] HM Government, *Enforcement and Dispute Resolution: A Future Partnership Paper*, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/639609/Enforcement_and_dispute_resolution.pdf, para 19 (accessed on 24 Oct 2017), para 15-16.
[74] Ibid., para 29.
[75] EU-Denmark Agreement, Art 5(1).
[76] EU-Denmark Agreement, Art 5(2).

any non-EU countries in the future, the UK can only enter into these Conventions after making arrangements with the EU first. Furthermore, Denmark is obliged to coordinate with the EU in negotiating any international agreements that may affect Brussels I, and cannot conduct any actions that would jeopardize the objectives of the EU in its sphere of competence in such negotiations.[77] This type of obligation may be more easily acceptable by the Member States of the EU than a third country that is not bound by the EU legislative competence and only wishes to participate in the judicial cooperation in the single market.

B. Lugano II model

The EU has made special judicial cooperation arrangement with non-EU Member States. A typical example is the Lugano Convention 2007 (Lugano II), which applies between the EU and Norway, Switzerland and Iceland. Article 70 of the Lugano II clearly states that this Convention is open for accession by Members of the EFTA, EU Member States acting on behalf of certain non-EU territories, and third states.[78] It means the UK could accede to Lugano II even without becoming an EU or EFTA Member. All Contracting Parties shall 'pay due account to the principles laid down by any relevant decision concerning the provision(s) concerned or any similar provision(s) of the 1988 Lugano Convention and the instruments referred to in Article 64(1) of the Convention rendered by the courts of the States bound by this Convention and by the Court of Justice of the European Communities.'[79] It is important to note that this article requires not only that CJEU decisions, but also the judgments of the courts of other Contracting States on relevant provisions in the Brussels and Lugano family, should be respected. This requirement would not impose any problem from the perspective of the UK. This indirect jurisdiction of CJEU will be more easily accepted by the UK. More importantly, the enforcement role of this Convention is dedicated to a 'Standing Committee'.[80] This Standing Committee will take the general management and monitoring role, including a consultation on the relationship between this Convention and other international instruments, accession of new states, revision

[77]EU-Denmark Agreement, Art 5(3).
[78] Art 70 of the Lugano Convention 2007.
[79] Protocol 2, Art 1.
[80] Lugano II, Protocol II, Art 4.

and amendment of this Convention and withdrawal of any reservations and declarations.[81] These arrangements would achieve a proper balance between the UK government's position to take over the legal supremacy and the practical necessity to maintain consistency in applying the EU private international law rules.

There are, of course, a few conditions attached to this option. Basically, the UK should provide the Depositary with information on its judicial system, internal law on civil procedure and enforcement of judgments and its private international law relating to civil procedure.[82] This requirement may not generate too many problems. The real problem is that a third country will only be invited to accede if it has received the unanimous consent of the Contracting Parties.[83] This requirement generates two potential difficulties. Firstly, it may cause delay. It may take up to one year after the notification by the Depositary for the Contracting Parties to respond.[84] Furthermore, even if such unanimous consent is given by all Contracting Parties at the end of a year, the Convention will enter into force on the first day of the third month following the deposit of the instrument of accession.[85] It means even if the UK applied to accede to Lugano II on the first day of leaving the EU, there will be a 14 months gap before the Convention enters into force, causing uncertainty in the transition period, unless the transitional deal includes the continued operation of the Lugano Convention between the UK and the non-EU Contracting States by treating the UK as still an EU member for this purpose during the transitional period until the UK is accepted as an independent party to Lugano II, as long as Iceland, Norway and Switzerland accept this transitional arrangement. Secondly, the EU may not give consent for the UK's accession. The diversity of civil and common procedural law and legal culture, plus the lack of CJEU interpretive power, could lead to diverse interpretations and implementation of this Convention between the UK and other EU Member States.[86] The EU has shown the tendency of

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[81] Protocol II, Art 4(2).
[82] Lugano II, Article 72(1)(c).
[83] Art 72(3).
[84] Art 72(3).
[85] Art 72(4).
[86] Burkhard Hess, 'The Unsuitability of the Lugano Convention (2007) to Serve as a Bridge between the UK and the EU after Brexit', (2018) 2 MPILux Research Paper Series, 7, https://www.mpi.lu/fileadmin/mpi/medien/research/MPEiPro/WPS2_2018_Hess_The_Unsuitability_of_the_Lugano_Convention__2007__to_Serve_as_a_Bridge_between_the_UK_and_the_EU_after_Brexit.pdf, accessed on 24/01/2018.

being increasingly tough in preserving the CJEU jurisdiction in interpreting international conventions involving EU law elements.[87]

Besides, the quality of the Convention rules could constitute another challenge. Lugano II has been largely updated in contrast to the Lugano Convention 1988; it is based on the Brussels I Regulation (44/2001). It is necessary to note that the Brussels I Regulation was updated by the Brussels I Recast and the latest version has addressed a number of problems that are considered important by UK practitioners. For example, under the Brussels I Regulation, the CJEU strictly enforces the *lis pendens* rule by requiring the second seized court to stay jurisdiction in favour of the first seized court, even if the court second seized is chosen by the parties in an exclusive jurisdiction clause.[88] This approach has been criticized by most commentators and practitioners as it undermines the importance of party autonomy and it would generate incentives of abuse and the 'torpedo' action.[89] This decision may also show the different legal philosophy between civil law tradition that focuses more on certainty and regulation and common law tradition that focuses on liberalism and party autonomy.[90] Therefore, the revision made in the Brussels I Recast that eventually prioritizes the choice of court agreement over the *lis pendens* rule is strongly supported by UK stakeholders,[91] but this benefit will be lost by adopting the Lugano II model.

The Brussels I Recast has made other reforms, such as the abolition of *exequatur*,[92] the rules to prevent concurrent proceedings between EU and non-EU states,[93] allowing EU consumers to take advantage of the protective jurisdiction to sue a third country defendant in the consumer's domicile,[94] and clarification of the relationship between arbitration and the Brussels I Recast.[95]

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[87] This tendency has been observed and confirmed by many commentators, see the oral evidence given by Prof Dr Christa Tobler, Raphael Hogarth in Parliament inquiry 'Brexit: enforcement and dispute resolution inquiry' on 27 Feb 2018.

[88] Case C-116/02 *Gasser GmbH v MISAT Srl* [2003] ECR I-14693.

[89] J Hill, M.N. Shuilleabhain, *Clarkson and Hill's Conflict of Laws* (5th ed., 2016, OUP) 122; European Commission, 'Brussels I Recast Green Paper', COM (2009) 175 final, 5-6; T Hartley, 'The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws', (2005) 54 ICLQ 813, 813-828; Y. Baatz, 'Who Decides on Jurisdiction Clauses?', (2004) L.M.C.L.Q. 25, 28.

[90] ZS Tang, 'Conflict of Jurisdiction and Party Autonomy in Europe', (2012) 59 N.I.L.R. 321.

[91] House of Lords, European Union Committee, 'Twenty-First Report: Green Paper on the Brussels I Regulation', paras 66-68. Kenny and Hennigan, *supra* n.49, 19.

[92] Art 39.

[93] Arts 33 and 34.

[94] Art 18.

[95] Recital 12.

They are, however, less important in the interest of the UK. Although the UK government and stakeholders generally support those changes they were not a high priority for the UK apart from the clarifications in relation to arbitration and delaing with concurrent proceedings with courts outside the EU. For example, the UK government stated that the existence of *exequatur* did not create significant practical problems for litigants and safeguards should remain even if *exequatur* was indeed abolished.[96] The reform in relation to arbitral matters may appear too conservative and incomplete in contrast to the approach preferred by the UK but it is certainly better than the Brussels I Regulation position reflected in Lugano II.[97] The other reforms were rarely discussed or generated too much debate in the UK. It is likely that accession to the Lugano II may only raise serious problems on the priority status to the choice of court agreement versus *lis pendens*.

C. Unprecedented new arrangement—the UK model

The third potential multilateral solution is a special new arrangement between the UK and EU. This model has been favoured by some academic commentators and government alike.[98] The UK Government has published 'A Future Partnership Paper' in 2017, which outlines the support for the 'UK Model'. The UK Government will seek 'a deep and special partnership' with the EU which reflects the close existing relationship between the two sides and 'reflects closely the substantive principles of cooperation under the current EU framework'.[99] However, it does not provide more details as to how the partnership can be formed. Based on the above analysis, it is suggested that the EU-UK arrangement could follow the Lugano II model, being the international convention version of the existing EU law.[100]

However, the success of the 'UK model' depends on the cooperation and support of all EU Member States. Negotiating the judicial cooperation deal with the UK is not considered one of

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[96] House of Lords, 'Twenty-First Report', *supra* n.92, para 29.
[97] N Dowers, ZS Tang, 'Arbitration in EU Jurisdiction Regulation', (2015) 3 Groningen Journal of International Law 125.
[98] Hess, n 86 above; HM Government, 'Providing a cross-border civil judicial cooperation framework: A future partnership paper' ('Judicial Cooperation Position Paper'), para 10, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/639271/Providing_a_cross-border_civil_judicial_cooperation_framework.pdf (last accessed 13 Dec 2017).
[99] Judicial Cooperation Position Paper, n.99, para 18 and 10.
[100] See discussion of Lugano II in sec. III.B above.

the priorities either in the EU policy in general, or in the EU agenda in respect of the UK. The EU has more important and urgent matters to deal with first. Although the EU negotiation directive published on 22 May 2017 suggests that judicial cooperation should be clarified in the Article 50 Agreement, it is limited to ongoing proceedings excluding proceedings commenced after the withdrawal date.[101] However, it does not mean the EU definitely has no intention to enter into a long-term partnership agreement with the post-Brexit UK. The EU has confirmed its wish to have the UK as a close partner in the future, but this matter is not prioritized in the current stage of negotiation.[102] Furthermore, if the UK is out of the EU judicial cooperation system, the traditional common law instrument anti-suit injunction, which could restrain parties from suing in the courts of other EU Member States, would revive.[103] Anti-suit injunctions would indirectly affect jurisdiction of EU Member States and affect the coherent application of the EU jurisdiction rules.[104] It is likely that the UK would trade anti-suit injunction for a judicial cooperation agreement.

The real difficulty of the UK model is the status of the CJEU. Since the UK model proposes converting the EU law into an international convention, the EU would not allow the same EU law provisions enforced in a way different from the CJEU interpretation applied between EU Member States.[105] The 'soft' role of CJEU as adopted in the Lugano II may not be accepted by the EU for two reasons. Firstly, although Protocol No 2 of the Lugano II clearly states the principle of the uniform interpretation 'to prevent, in full deference to the independence of the courts, divergent interpretations and to arrive at an interpretation as uniform as possible' between

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[101] European Council, 'Guidelines following the United Kingdom's Notification under Article 50 TEU' ('EU Guidelines'), adopted by the European Council at the special Meeting of the European Council (Art. 50), Brussels, 29 April 2017, EUCO XT 20004/17, paras 13, 32 and 33.

[102] EU Guidelines, n.102, sec. I.1 and IV. The EU adopted a 'phased' negotiation strategy under which the EU will firstly items that deserve immediate attention. Upon satisfactory conclusion, the EU will move to the next phase that may target long-term issues. EU Guidelines, para 8; Fitchen, n.15, 420.

[103] Anti-suit injunctions are currently ruled by the CJEU as incompatible with the EU judicial cooperation scheme and banned in the EU. Case C-159/02 *Turner v Grovit* [2004] ECR I-3565; C-185/07 *Allianz SpA v West Tankers* [2009] ECR I-00663.

[104] EU Member States take different attitudes towards anti-suit injunction issued by a third country. Anti-suit injunction is enforceable in France but not Germany. See *Cass. Civ. 1re, 14 Oct 2009, No. 08-16.369 et 09-16.549*.

[105] HM Government, Enforcement and Dispute Resolution: A Future Partnership Paper (Enforcement Paper), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/639609/Enforcement_and_dispute_resolution.pdf (accessed on 24 Oct 2017), para 19.

the Lugano II and the CJEU interpretation of the Brussels I, [106] the provision only requires the Contracting Parties to 'pay due account' to the CJEU rulings without imposing more restrictive obligations. It has been criticised by one commentator that such wording is too soft and insufficient to achieve the objective in Protocol 2;[107] that the case law of the non-EU Contracting Parties, such as Switzerland, shows that their courts might have deviated from the CJEU judgments too readily[108] and that the risk of divergent interpretations may be higher in the post-Brexit UK due to the different legal culture and tradition between civil and common law countries.[109] Whether this analysis is fair or not the EU has shown a desire to preserve the competence of the CJEU in the Brexit negotiation.[110]

From the perspective of the UK, however, the judicial cooperation agreement is not EU law, but an international treaty, which establishes treaty obligations for the UK and EU as parties of equal status.[111] There is no supremacy between the UK and the EU. The interpretation of the treaty is subject to international law and principles on treaty interpretation.[112] Furthermore, it is the international custom that 'the courts of one party are not given direct jurisdiction over the other in order to resolve disputes between them'.[113] Granting direct jurisdiction to the CJEU would be a red-line for the UK.

It is suggested that an innovative intermediate approach may help in resolving the dilemma. Since the proposed EU-UK arrangement applies the same EU law to the UK, it is practically necessary to maintain consistency in the application of the EU law to all countries to maintain certainty.[114] Although the EU-UK agreement is international law, instead of EU law, it is

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[106] Preamble, Protocol No 2, Lugano II.

[107] Hess, n. 86, 5.

[108] Hess, ibid., 5.

[109] Hess, ibid., 6.

[110] The EU emphasizes the importance to respect the role of CJEU in the future relationship with the UK in its most recent negotiation Guidelines. See European Council, 'European Council (Art. 50)(23 March 2018) Guidelines', EUCO XT 20001/18, Guidelines 7 and 18. The current attempt to empower CJEU against third countries is also observed by other commentators. See the evidence provided by Prof Carl Baudenbacher to 'Brexit: enforcement and dispute resolution' inquiry to the Justice Sub-Committee on 16 Jan 2018.

[111] HM Government, *Enforcement Paper, supra* n.105, para 15-16.

[112] *Ibid*., para 15.

[113] Ibid., para 29.

[114] HM Government, ibid., para 46.

originated from relevant EU private international law Regulations and its interpretation requires taking into account of the legislative purpose and backgrounds of those Regulations, and the CJEU is the most competent international entity to consistently interpret EU private international law. In other words, if the UK intends to apply the same EU private international law rules to maintain certainty for the UK-EU relationship, it will accept these rules to be interpreted consistently within and out of the EU. From the perspective of the EU, the main purpose of preserving jurisdiction of CJEU is to protect autonomy and consistent implementation of the EU law internally and externally.[115] Thus, the functioning is more important than the status. An arrangement that could both maintain the independence of the UK courts and effectively protect consistent interpretation of EU law might be accepted by both sides. The proposed EU-UK Agreement might include a provision that imposes on the Contracting Parties the treaty obligation to closely follow the CJEU judgments and only deviate in exceptional circumstances where the case law concerned relies on a concept of general EU law which is not expected to affect a third country. The Contracting Party is also required to highlight and justify any deviation. Although this approach requires the UK to closely follow the CJEU decisions, it does not submit the UK to the supremacy of CJEU. Furthermore, exemption from the general duty is still allowed in exceptional circumstances. Hopefully, this intermediate approach may help both sides to reach a compromise.

A relevant but different matter is the dispute resolution and enforcement of the proposed agreement. Since the UK is given the autonomy to deviate from the CJEU judgments, disputes may arise between the EU and the UK as to whether a particular deviation is permitted or amounts to a breach. However, the CJEU, as the internal judiciary of the EU, is not appropriate in resolving the enforcement dispute between the contracting states. A neutral, third entity, such as a joint committee, arbitral tribunal or a specially designed supranational court, should take on the dispute resolution role.[116] Since the EU has already shown dissatisfaction of a joint

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[115]R.A. Wessel and S. Blockmans, 'Between Autonomy and Dependence: The EU Legal Order under the Influence of International Organisations', in R.A. Wessel and S. Blockmans (eds), *Between Autonomy and Dependence* (The Hague: TMC Asser Press/Springer, 2013, 1-9; C. Eckes, 'International Rulings and the EU legal Order: Autonomy as Legitimacy?', CLEER PAPERS 2016/2, 10-13.

[116] See, in general, R. Hogarth, 'Dispute Resolution after Brexit', https://www.instituteforgovernment.org.uk/sites/default/files/publications/IfG_Brexit_dispute_resolution_WEB.pdf (accessed on 21.03.2018).

committee,[117] and the designation of a supranational court simply to resolve EU-UK judicial cooperation disputes may prove inefficient, [118] the most pragmatic approach probably is arbitration. Anyway, whichever entity has been chosen, it is necessary to ascertain that it will not open a legal back door to CJEU jurisdiction. For example, it should not include a term requiring the third entity to refer to the CJEU for a binding decision as is provided in the EU agreements with Ukraine, Georgia and Moldova.[119]

IV. BILATERAL MODEL

The bilateral model suggests that the UK enters into multiple bilateral judicial cooperation treaties with individual EU Member States.[120] The UK may not acquire the same reciprocal treatment and cooperation with all 27 Member States, but some of them. However, it allows the UK to choose the appropriate partners to conclude the justice cooperation treaties. The term of the agreement can also be altered according to the interaction between the UK and different partners and the different needs and situation of every relevant country. The parties are free to decide whether the current version of the EU private international law should be adopted, whether they should enter into a single agreement on recognition and enforcement rules, or whether they should conclude completely different rules on judicial cooperation.

The greatest challenge to the bilateral model, apart from being a piecemeal solution, is the competence of the Member States in entering into such an agreement. According to Article 81 of the TFEU, the EU has the competence to develop judicial cooperation in civil and commercial matters with cross-border implications, particularly when it is necessary for the proper

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[117] See the oral evidence by Raphael Hogarth, n 87 above.

[118] Unless such an entity is established in the Brexit agreement to resolve all future disputes between the UK and EU. The proper dispute resolution mechanism depends on the content of the arrangement. It is likely to have different dispute resolution mechanisms for different arrangements.

[119] Article 322 of the Ukraine Association Agreement, Article 267 of the EU-Georgia Association Agreement and Article 403 of the EU-Moldova Association Agreement. See discussion in Hogarth, n.116, 61-62. However, the EU does follow the international custom in most circumstances not to insist CJEU jurisdiction against third countries in dispute resolution.

[120] The UK entered into bilateral judicial cooperation treaties with Austria, Belgium, France, Germany, Italy and the Netherlands before it joined the European Community.

functioning of the internal market.[121] Since the EU legislation on civil and commercial judicial cooperation exists, the EU has the external competence to conclude international treaties as a single unit in areas covered by EU legislation to make sure that the international treaties would not affect or alter the operation of the EU law.[122] In Opinion 1/03, the CJEU ruled that such exclusive external competence exists as far as the conclusion of an international agreement is 'capable' of affecting the EU law,[123] and it is not necessary for the scope of the international treaty and the EU law to fully coincide.[124] In particular, the EU law on judicial cooperation aims to establish a uniform system preventing concurrent proceedings and enabling free circulation of judgments, the purpose of which is deemed by the CJEU as being easily undermined if there is an international treaty with the same purpose entering into between a third country and the EU or any Member State.[125] The exclusive external competence in relation to civil judicial cooperation was re-confirmed in Opinion 1/13, where the EU held exclusive competence to accept the accession of new non-EU contracting states to the Hague Child Abduction Convention.[126]

The exclusive competence of the EU prevents individual Member States from entering into bilateral jurisdiction and enforcement agreements with the UK. However, arguably a bilateral agreement that does not concern court jurisdiction but only deals with mutual recognition and enforcement of judgments between an EU Member State and a third country may not fall within the exclusive competence of the EU. The Brussels scheme only addresses recognition and enforcement of judgments between EU Member States and leaves every Member State to decide whether to recognise and enforce judgments rendered by a non-EU country. Since this matter is excluded from EU law, a Member State is free to legislate or amend its domestic law on non-EU

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[121]Art 81(1) and (2) of the TFEU.
[122] Article 3(2) and 216 TFEU. Opinion 1/13, ECLI EU C [2014] 2303, para 67. For more discussion and comments on the EU external competence on civil judicial cooperation, see Pietro Franzina (ed), The External Dimension of EU Private International Law after Opinion 1/13 (Intersentia, 2017); Inge Govaere, 'Setting the International Scene', (2015) 52 Common Market Law Review 1277; Koji Takahashi, n.33 above; Alex Mills, 'Private International Law and EU External Relations', (2016) 65(3) ICLQ 541. Ministry of Justice, 'Balance of Competences', n 4, para 18.
[123] Opinion 1/03, [2006] EU C 81, para 124-125.
[124] Para 126-128.
[125] Para 141-144. In Opinion 1/13, the CJEU also ruled that the EU has exclusive external competence to accept the accession of third states into the Hague Convention on International Child Abduction 1980.
[126] Opinion 1/13, n.122.

judgment enforcement.[127] A Member State could unilaterally enact its domestic law to enforce a particular non-Member State's judgment, which arguably has the same effect as if this Member State concludes a convention with a non-EU country to reciprocally recognise and enforce each other's judgments. Such a convention would not affect the 'scope' of this Member State or other Member States' power under the Brussels scheme.

The only argument that may prevent Member States from entering into a judgment-only bilateral treaty with a third country is that the Brussels I Recast includes discretionary *lis pendens* rules dealing with concurrent proceedings in a Member State and a third country.[128] The conditions to exercise the discretion include that the judgment of the third country is expected to be 'capable of recognition and…enforcement' in the Member State and the stay is necessary for the proper administration of justice.[129] A bilateral judgment-only convention that allows the Member State to enforce a third country judgment would affect the implementation of Articles 33 and 34 of the Brussels I Recast to a certain extent.[130] If this argument is accepted, individual Member States are prohibited from entering into any bilateral judicial cooperation treaties, including judgment-only treaties, with the UK.

V. INTERNATIONAL MODEL

One promising option is to urge the UK to cast its focus on the whole world and to explore opportunities at the international level. The Hague Conference on Private International Law, UNCITRAL, UNIDROIT, and International Civil Aviation Organization (ICAO), for example, have established international frameworks facilitating civil and commercial judicial cooperation at different levels. The international judicial cooperation might bring the UK more benefits because it involves more contracting parties worldwide, including other major markets and trade

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[127] Unfortunately, the CJEU in Opinion 1/03, without any satisfactory analysis of why, took the view that the recognition and enforcement provisions of the Lugano Convention clearly fell within the exclusive competence of the EU.
[128] Arts 33 and 34 of the Brussels I Recast.
[129] Art 33 and 34 of the Brussels I Recast.
[130] See comments in Mills, n.122, 547.

partners outside of EU, such as the US and China, and countries with historic links with the UK, such as commonwealth countries.

Existing international conventions may reduce the negative impact and uncertainty brought by Brexit. The UK has been active in the Hague Conference on Private International Law and UNCITRAL in the past, and is a Contracting Party to five Hague judicial cooperation conventions.[131] Continuous enforcement of these conventions will reduce the uncertainty caused by the termination of relevant EU instruments in the UK.[132]For example, the Protection of Children and Child Abduction Conventions may largely fill the gap left by the Brussels II bis.[133] It is even argued by some commentators that the original Hague Conventions have some advantages over the EU versions.[134] For example, the EU override return order issued by the abducted child's previous habitual residence is an ineffective and redundant procedure according to empirical data; the effective provisional measures in the Protection of Children Convention are not available in the Brussels II bis; and the rules on transfer of cases in relation to parental responsibilities are more flexible in the Hague Protection of Children Convention than the Brussels II bis.[135]

There are also international conventions which apply in the UK by virtue of its EU membership, including the Hague Maintenance Convention,[136] and Hague Choice of Court Convention. It has already been discussed above that one feasible approach for the UK is to enter into the Hague Choice of Court Convention as an independent state.[137] This could ease the uncertainty caused by Brexit at least where an exclusive choice of English court agreement is concluded. The Hague

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[131] Hague Convention on Service Abroad of Judicial and Non-Judicial Documents 1965; Hague Convention on the Taking of Evidence Abroad 1970; Hague Convention on the Recognition of Divorces and Legal Separation 1970; Hague Convention on the Civil Aspects of International Child Abduction 1980; Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children 1996.

[132] Bar Council, 'The Brexit Papers: Family Law', June 2017, http://live.barcouncil.netxtra.net/media/574626/brexit_paper_6_-_family_law.pdf (last access 13 Dec 2017).

[133] Bar Council, *ibid.*, para. 6.

[134] P Beaumont, 'Private International Law concerning Children in the UK after Brexit', (2017) Child and Family Law Quarterly 213-232; T Kruger, L Samyn, 'Brussels II bis', (2016) 12 Journal of Private International law 132, 159; P Beaumont, L Walker and J Holliday, 'Conflicts of EU Courts on Child Abudction', (2016) 12 Journal of Private International Law 211, 258.

[135] In general, see Beaumont, n.134.

[136]Hague Convention on the International Recovery of Child Support and other Forums of Family Maintenance 2007.

[137]See section II.B above.

Choice of Court Convention is ratified by the EU, Mexico and Singapore, and signed by China, Montenegro, Ukraine and USA,[138] which provides even a broader territorial coverage than the EU law. It is likely that more countries may ratify this Convention in the future.[139]

However, there are also a few limitations of the international approach. Firstly, the Hague Choice of Court Convention only applies to cases with exclusive jurisdiction clauses and it excludes some important civil and commercial matters out of its scope.[140] Ratifying the Hague Convention will only partially resolve the judicial cooperation difficulty that the UK may face after Brexit. The Hague Conference has continued the judgment project with the purpose to adopt a more comprehensive framework for civil and commercial judicial cooperation in the future.[141] However, this will take time before the convention is finally adopted and it takes longer for countries to ratify.[142] Furthermore, judicial cooperation at the international level is not as advanced as at the EU level, which is reflected in the quality of the provisions; the scope of the harmonization; the extent of the cooperation; the gaps left for domestic law; and broad reservations that are made available. For example, the Hague Choice of Court Convention has provided more grounds for the court of a Contracting State to refuse recognising and enforcing foreign judgments;[143] there is more leeway for a non-chosen court to take jurisdiction irrespective of a choice of court agreement;[144] and more reservations are available for a Contracting State to further limit the effect of the Hague Convention in its courts.[145] It is

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[138] For the current status of the Hague Choice of Court Convention, see https://www.hcch.net/en/instruments/conventions/status-table/?cid=98 (accessed on 13 Dec 2017).

[139] Therefore, it is inappropriate to claim that the Hague Choice of Court Convention has a narrow geographic scope. Cf Masters and McRae, n.15, 495; Annet van Hooft, 'Brexit and the Future of Intellectual Property Litigation and Arbitration', (2016) 33 Journal of International Arbitration 541, 555.

[140]Art 2 of the Hague Choice of Court Convention excludes a series of matters from its scope, such as consumer contracts, employment contracts, carriage contracts, maritime claims, anti-trust and competition, personal injury, damage to tangible property, right in rem in immovable property, validity and infringement of IP, etc.

[141] See information on https://www.hcch.net/en/projects/legislative-projects/judgments (accessed on 25 Aug 2017).

[142] J Regan, 'Recognition and Enforcement of Foreign Judgments', (2015) 14 Richmond Journal of Global Law and Business 63; A Feldman, n.26 above; A Bonomi, 'Courage or Caution?', (2015) 17 Yearbook of Private International Law 1; J. de Araujo, and F.B.P. Polido, 'Recognition and Enforcement of Foreign Judgments', (2014) 11 Brazilian Journal of International Law 20; P Beaumont, 'The Revised Judgments Project in the Hague', (2014) 4 Nederlands Internationaal Privaatrecht 532.

[143]P Beaumont, L Walker, 'Recognition and enforcement of judgments in civil and commercial matters in the Brussels I Recast and some lessons from it and the recent Hague Conventions for the Hague Judgments Project', (2015) 11 Journal of Private International Law 31, 44.

[144] Art 6, Hague Choice of Court Convention.

[145] For example, a state may declare that its court chosen by the jurisdiction clause may not hear the dispute if there is no connection between that state and the parties or the dispute (Art 19); its courts may not enforce a judgment

reasonable to predict that even if the final Hague judgment project is successful and a more full-range judgments convention is adopted, limitations and reservations to a similar extent may also exist. Thirdly, the Hague Choice of Court Convention does not directly address jurisdiction on preliminary matters of a choice of court clause and it is possible that sometimes concurrent proceedings would exist in deciding on the validity of a choice of court clause, resulting in conflicting rulings, followed by concurrent proceedings on the substantive matters, and potential conflicting judgments on the substance. Fourthly, the Hague Choice of Court Convention does not improve the efficiency of the procedure for recognition and enforcement of judgments. It only states that the court should act 'expeditiously', which is rather a vague requirement.[146] There is no minimum standard or harmonization of the refusal procedure. In contrast, the Brussels I Recast has abolished *exequatur* and partially streamlined the recognition and enforcement procedure,[147] which brings speed and efficiency in cross-border enforcement. These weaknesses cannot be improved by the UK alone and the UK can only benefit and fully utilise the international model if the overall international framework is improved.

VI. UNILATERAL MODEL

The unilateral model is the default position where traditional domestic laws of the UK and EU Member States are applied by their respective courts to determine EU-UK judicial cooperation. Some commentators suggest that returning to the traditional English law could be enough to deal with the uncertainty immediately post-Brexit, at least for a short term.[148] The main argument is that while concluding the new partnership agreement with the EU is likely to cause delay, it is necessary to have something to fill this gap. And since the transposition approach could not work

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rendered by a chosen court if all factors other than the choice of court clause locate in the requested country (Art 20); this Convention does not apply to certain matters (Art 21).

[146] Art 16. Beaumont and Walker, n.143, 60.

[147] Brussels I Recast, Recital 2, and Article 36.

[148] See the oral evidence given by Prof Richard Fentiman and Dr Louis Merrett to the House of Lord, Select Committee on the European Union, Justice Sub-Committee, 'Corrected oral evidence: Brexit: civil justice cooperation and the CJEU', http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/brexit-civil-justice-cooperation/oral/44259.html (accessed on 10 Oct 2017); See also HL paper 134, n.4, para 106. Professor Fentiman and Dr Merrett believed the a special arrangement with the EU is an optimal choice for a long run, but for the short term, without such an arrangement in place, it is not necessary in transpose the EU law into the UK law, but could simply rely on the common law rules.

on a reciprocal basis, it is better to rely on traditional common law for the time being until a partnership arrangement enters into force.[149]

However, returning to the common law is likely to cause uncertainty.[150] The EU private international law provides consistency in that the same rules are adopted to decide jurisdiction and governing law of cross-border disputes that fall within the EU scheme. The cross-border players within the EU do not need to study the domestic conflict of laws of different Member States to assess their rights, obligations and commercial risks arising out of cross-border activities. Retrieving the common law will increase the cost of learning, especially for the parties who have already engaged in activities between the EU and the UK, who will have to reassess the risk and cost upon the change of law. Secondly, the quality of some common law rules, especially choice of law rules, are subject to criticism.[151] The common law choice of law rules in contract are unclear as to how the putative proper law is decided and it does not include any particular mechanisms to protect the weaker party in a contract. The tort conflicts rules in the Private International Law (Miscellaneous Provisions) Act 1995 are also cricitised for being uncertain in how the *lex loci delicti* is determined in complicated cases where tort occurs in multiple countries,[152] when the general rule should be displaced, whether party autonomy is accepted, and the complicated distinction between substance and procedure in damages.[153] Traditional jurisdiction rules are better in terms of quality, as they have been applied for a long time and still in use after the UK acceded to the Brussels regime for non-EU related cases,[154] except the EU stakeholders may argue the discretion based system uncertain. Thirdly, the unilateral model cannot resolve the problem of judgment recognition and respect of jurisdiction

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[149] See Fentiman and Merrett, *ibid*.
[150] See comments from Rt Hon Sir Richard Aikens, Richard Lord QC, Oliver Jones, David Greene, and Hugh Mercer, HL paper 134, n.4, para 107-112.
[151] A Briggs, 'Secession from the European Union and Private International Law', (written evidence to the HOL, CJC0002), para 14-21.
[152] B Rodger, 'Ascertaining the Statutory Lex Loci Delicti', (1998) 47 ICLQ 205.
[153] *Harding v Wealands* [2006] UKHL 32.
[154] P Rogerson, 'After Brexit: Is International Commercial Litigation in London Doomed?', https://www.repository.cam.ac.uk/bitstream/handle/1810/266692/Rogerson-on-BREXIT-for-NLJ.pdf?sequence=1 (accessed on 21.03.18).

clauses. The pure unilateral model is thus doubted by most commentators[155] and not likely to be the UK government's position.[156] The unilateral model, if adopted, would certainly be combined with international conventions. However, this approach could not provide the UK the same level of cooperation with other EU member states as the Lugano II model or the UK model. The limits of international conventions as analysed above will also remain. Finally, not all EU private international law rules are reciprocity based. Some rules, such as most choice of law rules and some jurisdiction rules, are unilaterally applicable. They could be transposed into the UK domestic law without causing a lot of problems. As to these rules, the transposition model would be superior because it could provide continuity, which largely maintains the current practice, and reduces uncertainty.

VII. CONCLUSION

The above analysis suggests that three models are promising: the UK model, the Lugano II model and the combination of transposition model with international model. From the pragmatic perspective, the UK model, which supports the conclusion of a new EU-UK convention on judicial cooperation, would be the best choice. Stakeholders want certainty and they wish their previous negotiated agreements or existing legal relationship to be governed by the similar framework. Certainty requires continuity of the current judicial cooperation scheme after the withdrawal date, or at least to keep the reciprocal cooperation at the similar extent. The UK model could achieve the wanted certainty for business practitioners. In terms of quality, the UK model implements the same EU law in the new EU-UK convention, which provides more comprehensive rules and more effective cooperation than current international conventions.

The UK model, of course, has some weaknesses. The first is the uncertainty as to whether such an agreement could ever be made, especially the EU has not shown clear sign of the same level

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[155]Masters and McRae, n 15, 495-497. See also the oral evidence of Richard Lord QC, Professor Jonathan Harris QC, Rt Hon Sir Richard Aikens, Oliver Jones, David Greene, Hugh Mercer QC, in HL paper 134, n.4, 20 March 2017, para 39, 107-112.

[156]HL paper 134, n.4, paras 107-116.[157] See more discussions in sec.III.C. The most recent EU Guidelines for future relationship published on 23 March 2018 does not include guidelines for judicial cooperation in civil and commercial matters.

of desire as the UK government.[157] However, given the close civil and commercial link between the UK and other EU Member States in the past few decades maintaining the current cooperation would provide certainty to and meet the common interest of both sides.[158] The second difficulty is the position of the CJEU, which is likely to generate disagreements if the EU wants to preserve its direct jurisdiction which is deemed a red line by the UK. However, this article suggests that an intermediate approach may work, which requires the UK to closely follow the CJEU interpretation and only allows deviation in exceptional circumstances with sufficient justification.[159] Although this suggestion subjects the UK to the CJEU indirect jurisdiction, this compromise is a necessary price for the exchange of commercial certainty. The third shortfall is the time frame. The special arrangements may take time to negotiate and conclude. It is thus necessary to take other approaches to fill this gap. Finally, the current EU private international law is not perfect, for example, some EU family law provisions may not work as effectively as their international counterparts,[160] and the EU rules dealing with third countries are generally weak.[161]

The Lugano II model may be a relatively straightforward and simple way. However, it is inferior to the UK model in that, firstly, the Lugano II sacrifices some improvements that the UK would like to keep, and secondly, the Lugano II is limited in its scope.[162] More importantly, there is an uncertainty as to whether the EU would be happy to accept the accession of the UK, given the 'soft' role that the CJEU has played and the fear of diverse interpretation.[163]

The transposition model cannot work alone and its adoption must be combined with the international model to compensate the cooperation gap that a unilateral approach lacks. The advantage of this approach is the flexibility and freedom to the UK and there is no compromise

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[157] See more discussions in sec.III.C. The most recent EU Guidelines for future relationship published on 23 March 2018 does not include guidelines for judicial cooperation in civil and commercial matters.

[158] Ibid.

[159] See justification in sec III.C.

[160] See footnotes 134 and 135 and accompanied text.

[161] See the discussion of Arts. 33 and 34 in sec II above. There are no even equivalent provisions on family proceedings in the Brussels II bis and Maintenance Regulation. See criticism in P. Beaumont, 'Interaction of the Brussels IIa and Maintenance Regulations with [Possible] Litigation in Non-EU States: Including Brexit Implications', University of Aberdeen Centre for Private International Law Working Paper No. 2018/1.

[162] See discussion in sce III.B.

[163] See more discussion in sec III.B.

to the CJEU jurisdiction. However, the current international framework does not provide the same level of intensive cooperation or the comprehensive coverage as the EU law. There will also be greater risk of inconsistent implementation of the convention rules by the courts of different contracting states, causing uncertainty to stakeholders. It is thus argued that the transposition plus international model would be a backup approach if no special arrangement can be reached due to the disagreement on CJEU jurisdiction. Furthermore, it could also play the gap-filling role if the EU-UK arrangement cannot be finalised in a short time. As to international conventions that apply to the UK by virtue of its EU membership, the UK has to follow a formal ratification process and it will take a few months for these conventions to take effect in the UK. The transitional period should enable a way to be found to have seamless application of those conventions to avoid any gap. In case a hard Brexit is inevitable, the UK perhaps needs to consider submitting the ratification while the UK is still governed by these conventions as a Member State of the EU to avoid any break in coverage.[164]

Based on the above discussion, the optimal model is the UK model. If an EU-UK arrangement is possible, the UK should still ratify relevant international conventions to cover the gap before such an arrangement enters into effects and to assist judicial cooperation with non-EU countries. If such an arrangement is not achievable and a hard Brexit is inevitable, the UK could transpose the unilateral applicable EU law into its domestic law and to ratify relevant international conventions as a reliable alternative. It is thus suggested that the UK should establish a strategy to combine multiple models applicable in different circumstances: (1) during the Article 50 negotiation, passing the Great Repeal Bill, which will become the Great Repeal Act and be effective on the exit date, to transpose choice of law rules and jurisdiction rules (removing the reciprocal part) into UK domestic law; (2) immediately after Brexit, negotiating with the EU for an international arrangement, or a few international treaties, that contain the reciprocal judicial cooperation rules mirroring the relevant provisions of the current EU instruments; (3) deposit the instruments of ratification or accession of the Hague 2005 and 2007 Conventions a few months before the date of withdrawal; (4) be more active in shaping and participating in future international judicial cooperation treaties post Brexit and ensure ratification of the new Hague Judgments Convention shortly after it is concluded in 2019.

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[164] See sec II above.