

Secession from the European Union and Private International Law

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1. In the six or seven months since the referendum, the future of commercial litigation in England has been pondered and discussed, in many fora, as well as before the Committee. It seems fair to say that the general view is (1) that secession from the European Union represents, for commercial law and commercial lawyers, a serious loss; (2) that the only way to repair the damage, at least in part, will be to persuade the European Union to replicate the substance of the existing rules as found, in particular, in the Brussels I Regulation, Regulation 1215/2012; and (3) that on the issue of why the European Union might agree to this, the general tenor of advice appears to be that it is what reasonable people would agree to do, it being clear but unsaid that the European Union may not see a need to do what the British commentators see as reasonable.

2. The approach taken here is that points (1) and (2) are true, if only on balance; but that (3) seriously under-estimates the rational bargaining position of the United Kingdom.

3. That said, it is disconcerting to hear how often it is said that our legal system, commercial courts, judiciary, law, lawyers, et cetera, are the best in the world, with the implicit message that this is the reason why no-one need worry: the objections to such complacency are not diminished by the assertion that there is no complacency. What should surely be done is to work out what we want, and how, realistically, we may get there. We have a once-in-a generation opportunity to compare the rules of private international law which we currently have with what we might instead have, and to take stock. When that is done, the path ahead will be seen to be rather clearer and brighter than some others have suggested. One certainly hears people suggesting that secession from the European Union is going to have a damaging effect, but for our private international law, if we think carefully about it, the truth may well be otherwise.

(A) The issues in summary form

4. Here is what we have so far. The government says that it intends to repeal the European Communities Act 1972. This will cut the strings which tie Regulations of the European Union into the legal order of the United Kingdom: that means the end of the major Regulations which are, rather oddly, named after towns and cities: Brussels I (jurisdiction and judgments),¹ Brussels II (matrimonial decrees and parental

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responsibility),² Rome I (law applicable to contractual obligations),³ Rome II (law applicable to non-contractual obligations).⁴ It will also apply to the Lugano II Convention⁵ on jurisdiction and judgments between the EU (not the Member States as such) and Iceland, Norway and Switzerland, for the United Kingdom is not a state party to this Convention which was concluded by the EU, and not by its Member States.

5. Withdrawal and repeal of the 1972 Act will also cut the cord for those other⁶ hybrid European Regulations which deal with jurisdiction, applicable law and recognition, most notably in the fields of Insolvency⁷ and Maintenance.⁸ It will also disable the Evidence Regulation,⁹ the Service Regulation,¹⁰ as well as several other instruments of lesser daily importance but which assist small claims or proceedings in which the claim is unanswerable and unanswered.

6. Repeal of the 1972 Act will not, technically at least, affect the Brussels and Rome Conventions, which were made as international treaties and enacted in the United Kingdom by primary legislation.¹¹ It is therefore possible to argue, as some have argued, that these could rise from the dead and that all interested parties in the United Kingdom, in Europe, and in Luxembourg in particular, would instantly agree that this had taken place, even as the United Kingdom had declared its independence from the authority of the European Court: possible to argue, yes, but in the highest degree unlikely. Although some very serious colleagues have looked at the technicalities,¹² if one is being realistic about it, the idea is not credible.¹³ It would require the Member States, and the European

¹ The current version, Regulation (EU) 1215/2012 superseded, as between the Member States, (Art 68) Regulation (EC) 44/2001. Quite why the word 'recast' appears in parenthesis in the title of Regulation 1215/2012 is not clear, but the terminology has proved durable.

² Regulation (EC) 2201/2003, which repealed (Art 71) Regulation (EC) 1347/2000.

³ Regulation (EC) 593/2008.

⁴ Regulation (EC) 864/2007.

⁵ Printed in [2007] OJ L339/1.

⁶ Other, because to some extent, Brussels II is one of these.

⁷ Regulation (EC) 1346/2000, which is 'recast' by Regulation (EU) 848/2015. In this case, the recast Regulation repeals (Art 91) the earlier Regulation, though preserving it in legal effect (Art 84(2)) for proceedings opened prior to the commencement date of the recast Regulation.

⁸ Regulation (EU) 4/2009.

⁹ Regulation (EC) 1206/2001.

¹⁰ Regulation (EC) 1393/2007, which (Art 25) repealed Regulation (EC) 1348/2000.

¹¹ Civil Jurisdiction and Judgments Act 1982 and Contracts (Applicable Law) Act 1990, respectively.

¹² In particular Professor Dickinson (2016) 12 JPIL 195; Masters & McRae (2016) 33 J Int Arb, Special Issue, 483; Sir Richard Aikens and A Dinsmore (2016) 27 EBLR 903.

¹³ The Brussels Convention was a treaty between the Contracting States of the EEC, which they were directed to conclude, in general terms at least, by Art 220 of the Treaty of Rome. It was, as between the Member States, superseded by Regulation 44/2001 (see Art 68) except as it continued to apply to territories (such as Aruba, Tahiti, St Pierre & Miquelon) to which the Regulation did not extend, and to Denmark (defined as not being a Member State by Art 1(3)). As between the Member States, it was *not* said to be superseded for only so long as they remained Member States. The Regulation could not and did not declare the Brussels Convention to be repealed, for it is hard to see how a Regulation could repeal a Treaty. It was plainly intended that the Convention cease to operate as between the Member States, and that, therefore, the Regulation brought it to a final legal end as between the United Kingdom and the other states to which the Regulation then applied. There is no indication to be had from the Brussels Convention that it was ever

Union, which means the European Court, to agree on the analysis, and that is not on the cards. Neither is it desirable, for our law would not be in better shape if the Brussels Convention were restored to the register.¹⁴ It should be put aside.

7. This is the loss for private international law and lawyers. The government has, however, said that it will, where it is practicable to proceed this way, re-enact the laws whose strings it has just cut, adopting the orphaned texts and making them as laws of the United Kingdom on the direct authority of Parliament at Westminster. In practical terms, this makes a lot of sense: it is, after all, similar to what was done by various states which became independent of the United Kingdom as colonial power. It seems in our case to mean several things.

8. First, the United Kingdom could and should re-enact the text of the Rome I and Rome II Regulations on the law applicable to contractual and non-contractual obligations. These are private international law rules for determination of the applicable law; they do not limit their scope to person or contracts connected with the Member States. The question which arises, and which will be answered shortly, is whether it would be better to do this or to go back to what was there before. We should therefore ask which set of rules – Regulation or pre-Regulation – offers the better way for an English court to approach the identification of the applicable law for contractual and non-contractual obligations. It is an easy question to answer.

9. Second, where the hybrid Regulations on matrimonial and parental matters, insolvency, and maintenance, are concerned, local re-enactment is impracticable. However, where matrimonial and parental, and maintenance, issues are concerned, it is not hard to imagine that a parallel copy instrument should be agreed on all sides. There is no commercial interest at stake, just the personal lives of adults and children. It raises issues entirely separate and distinct from the rather more controversial commercial issues which arise in relation to Brussels I, Lugano II, Rome I and Rome II, and is therefore not pursued here in any detail.

intended to operate in relation to a state which was not a contracting (now member) state; no indication to be had from the Regulation which superseded it that the supersession was intended to be provisional or temporary. As far as the other Member States are concerned, the United Kingdom will be, by its own choice, a non-Member State. Article 68(1) provides that Regulation 44/2001 'shall, as between the Member States, supersede the Brussels Convention, except as regards the territories of the Member States which fall within the territorial scope of that Convention and which are excluded from this Regulation pursuant to Article 299 of the Treaty'. The United Kingdom is not such an Art 299 territory; and the only plausible view is that the Brussels Convention is a dead letter, or will be so regarded by any Member State whose courts consider their relationship with the United Kingdom.

¹⁴ Reasons abound, but they include the fact that none of the states which became Member States in or after 2004 were party to it; and the textual improvements made by the Regulation were not applied to the Convention in the form in which it was last amended, and which was given legal effect by the 1982 Act and SI 2000 No 1824.

10. Third, the government could *not* enact or re-enact the whole of the Brussels I Regulation or Lugano II Convention. These are bi-lateral, or multi-lateral in their operation: they require reciprocal action on the part of the other states party or bound. There is no law which the United Kingdom can enact to render English judgments entitled to recognition and enforcement in the rest of Europe,¹⁵ or to impose a rule to prevent parallel litigation of claims as between English and foreign courts. Here, then, the material question here is whether the United Kingdom should simply allow the common law to expand to fill the space from which it had been displaced decades ago, or should instead invite expressions of interest in the negotiation of a new treaty, very closely aligned in content with the existing Brussels and Lugano regimes. It is a question which has two possible answers, each of them right.

11. It is convenient to take the easy case first: the law applicable to contractual and non-contractual obligations, the Rome I and Rome II Regulations.

(B) Rome I and Rome II, and the law applicable to obligations in civil and commercial matters

12. When it comes to the rules which determine the applicable law for obligations, which is to say the Rome I and Rome II Regulations, the United Kingdom can if it wants to copy the text of the Regulations into its own private international law. Any state, from China to Peru, could do the same. All that would be needed would be to snip out the small and unimportant references to the reserved application of European law on particular issues,¹⁶ and what is left would form perfectly serviceable rules of private international law.

13. This is the way one now needs to look at it. Leaving the European Union terminates our membership of it. Secession or termination in accordance with a clause of the Treaty does not rescind our membership it as though it had been created by a contract voidable *ab initio*. No-one is proposing that the Great Repeal Act will declare that the European Communities Act, or the instruments given effect under it, had never been made. Until midnight on the Last Day, the Rome I and Rome II Regulations are, by choice of the United Kingdom, which helped draft them and voted for them during the legislative processes of the EU, our private international law rules for the law of obligations. Given that we can retain or adopt these rules at the stroke of a pen, the material question is not whether we should do that, but whether we should instead legislate to take upon ourselves instead the common law rules of private international law.

¹⁵ Technically there is: in *Williams & Humbert Ltd v W&H Trade Marks (Jersey) Ltd* [1986] AC 368, Lord Templeman, at 428C, gave the example of a British law purporting to acquire the railway lines from Dieppe to Paris. The law might have to be regarded as good in England, but it would be without effect in France, whatever Parliament might have said.

¹⁶ Rome I Regulation, Art 23; Rome II Regulation, Art 27.

14. The answer is that no sane lawyer would propose taking us back to these chapters of the common law as it stood before the Rome instruments overrode it. The main reason is the perfectly pragmatic one that the rules of private international law of the common law, to which one might otherwise return, are in significant parts so dreadful that they are wholly unfit for purpose,¹⁷ at least without significant statutory repair. As mentioned above, all that is needed is to cut out the few references in the Rome I and Rome II Regulations which provide for the primacy of rules of European law, which will be the work of minutes rather than hours. Retention by local textual re-enactment, or replication, is easy and right, and practically inevitable. That is the executive summary of what should and will be done. If any further detail is required, it follows here.

15. One may start with Rome II. Re-enacting the common law rules of private international law would be at its very worst in tort. Any case other than the simplest started by asking where the alleged tort occurred: where the facts and matters making up the tort were strewn across the legal landscape this was an artificial question.¹⁸ Having answered it, the common law used a rule of double actionability except where, in the interests of flexibility, it turned out that it didn't, after all.¹⁹ The law got into a terrible pickle with cases in which the facts of the claim did not disclose a cause of action in tort according to English domestic law,²⁰ and we were required to draw distinctions between substance and procedure in the assessment of damages which did damage, but absolutely no credit, to the law.²¹ Amazing though it is, we never did decide whether it was possible for parties to choose by contract the law which would govern a claim framed in tort (unless they 'chose' English law by failing to plead foreign law). It is true that the Private International Law Miscellaneous Provisions Act 1995 removed the double actionability rule (not, though, the exceptions), but the Act came with so many incurable design flaws that did as much harm as it did good. No-one can look back on any of this with nostalgia.

16. By contrast, the Rome II Regulation tells us to start with the place where the immediate damage occurred, and to work out from there if exceptions are required.²² It tells us what the general exception is, rather than leaving us to guess what an exception would look like. It accepts that there are certain types or contexts of tort for which a modified, and more complex, rule is required because the basic architecture of certain torts is distinct from the ordinary run.²³ It allows parties considerable freedom to choose

¹⁷ This is not to say that they were not fun to teach, for that they certainly were. But their inability to give a straight answer to a simple question was shocking.

¹⁸ The Law Commission said so (Report 193 (1990)): it is just a means to get to the applicable law, and it would be better to cut it out and go straight to an applicable law.

¹⁹ *Boys v Chaplin* [1971] AC 356; *Bouygues SA v Red Sea Insurance Co Ltd* [1995] 1 AC 190.

²⁰ On the face of things, these would simply fail unless an exception were made to the rule which failed them.

²¹ *Cox v Ergo Versicherung AG* [2014] UKSC 22, [2014] 1 AC 1379, esp at [23]. The damage was done by *Boys v Chaplin* itself, and rendered incurable by Private International Law (Miscellaneous Proceedings) Act 1995, s 14, as interpreted or misinterpreted by *Harding v Wealands* [2006] UKHL 32, [2007] 2 AC 1.

²² Article 4.

²³ Articles 5-9.

the law to govern a non-contractual obligation.²⁴ It liberates the law from the substance-procedure distinction in the assessment of damages.²⁵ All of this is good; some of it is excellent; and we would need to be out of our minds to let it slip through our fingers.

17. It is fair to say that working out where ‘the damage’ occurred can at times be puzzling. There have been several recent cases focusing on the place where damage, when taking the particular form of pure financial or accounting loss, can be said to occur.²⁶ These cases worry about the fact that although financial loss can certainly be said to have happened, and it may be easy to say *when* it happened, it is may be less easy to say precisely *where* it happened.²⁷ But even if these answers are not always easy, one needs to remember that working out where a tort occurred was more frequently more puzzling. So much for Rome II; it is impossible to imagine that we will not keep it.

18. So far as concerns contractual obligations, if we were rid of the Rome I Regulation we could either go back to the 1980 Rome Convention; but if that were considered to be tainted by its European origins,²⁸ then to the common law rules. As to that, one may make five points to stand for all the rest. First, after two centuries of intellectual effort the common law could not make up its mind whether there were two versions (express choice, closest and most real connection) or three versions (express choice, implied or inferred choice, closest and most real connection) of the basic choice of law rule;²⁹ and even then it never committed itself to whether the looked-for closest and most real connection rule was to a law or a country.³⁰ Second, the common law never worked out how to deal with the problems caused by institutional inequality in the choice of law process where the contract was a consumer contract, or was an employment contract, or similar, save for an imprecise rule about the superimposition of English (and it was only ever English; there was no mechanism for extending this to foreign) rules of overriding effect.³¹ Third, its approach to the question, not infrequently arising, of which system of law supplied the rules by which to determine whether the parties formed a contract never really progressed beyond suggesting that it was a matter for the putative proper law.³² This was never

²⁴ Article 14.

²⁵ Article 15.

²⁶ In particular C-375/13 *Kolassa v Barclays Bank plc* EU:C:2015:37, [2016] 1 All ER (Comm) 733; C-12/15 *Universal Music International Holding BV v Schilling* EU:C:2016:449, [2016] QB 967. The cases are concerned with Article 5(3) of Regulation 44/2001 (which corresponds to Art 7(2) of Regulation 1215/2012), but the principle is of general application.

²⁷ This is not inherently surprising: we know when the Second World War broke out, but it is not so easy to say where it broke out.

²⁸ And if that is not a problem, then one would do better in any event to keep Rome I, which improves it in several respects.

²⁹ See the divergent approaches in *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1984] AC 50. In the end, Dicey & Morris (11th ed, 1987, pp 1162-63) was reduced to saying that it did not really matter.

³⁰ *Whitworth Street Estates (Manchester) Ltd v James Miller & Partners Ltd* [1970] AC 583; *Compagnie Tunisienne de Navigation SA v Compagnie d’Armement Maritime SA* [1971] AC 572; *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1984] AC 50.

³¹ And as for how such laws were to be identified, the law was just as obscure.

³² *The Parouth* [1982] 2 Lloyd’s Rep 351.

thoroughly defined (what account did it take, for example, of a disputed choice of law, court, or arbitration?), but whatever it meant it resulted in a fabulous exercise in bootstrapping and denial, which went roughly like this: pretend there was a contract; ask what its proper law was or would have been, and use that to decide whether there was a contract. When the party whose contention that there was no contract objected to the bias inherent in this approach, answer came there none. It was not good law. Fourth, the question whether the impact of supervening illegality in the place of performance took effect as a rule of domestic (English contracts only) or private international law, remained unresolved.³³ And finally, of course, the unnecessary distinction between substance and procedure in the assessment of damages cast its baleful shadow over contract cases, just as it did in tort.

19. By contrast, Rome I gives solutions to these problems. As to the first, there is either an express choice³⁴ or there is a mechanised form of a ‘country of closest connection’ to a country rule.³⁵ As to the second, it is recognised that in certain contexts, the ordinary rules which identify the governing law need to be supplemented to give added protection to the weaker party, if necessary by allowing laws from a particular system, which may be foreign, to be projected onto the law otherwise chosen (which always means ‘chosen by the stronger party’).³⁶ As to the third, it deals with the issue in two questions, the combination of which allows each side to see that its view about whether there is enough of an agreement to bring the matter under Rome I or Rome II will have had a proper hearing.³⁷ As to the fourth, it contains a pretty clear rule about the superimposition of rules of a foreign law which make performance illegal;³⁸ and as to the fifth, the substance-procedure distinction is erased to the extent possible.³⁹ The United Kingdom played a major part in making this law: it is a superior product, and we should re-enact it as well.

20. There are two more things to say about the fact that the Rome Regulations work in harness. First, consider the case in which it is alleged that both a tort and a breach of contract has been committed, or that a tort has been committed in answer to which the defendant contends that the claimant contracted not to sue in respect of it. The common law used to choose a law (or two, if the tort was committed overseas) for the claim in tort, and a third law as the proper law of the contract (albeit that certain contractual issues were

³³ Though Dicey & Morris (11th ed, 1987, p 1221) considered that if the rule was understood as confined to domestic law, it would have ‘much to commend itself’.

³⁴ Article 3(1).

³⁵ Article 4.

³⁶ Articles 5-8 (and arguably, Article 9).

³⁷ Article 10: (1) The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Regulation if the contract or term were valid. (2) Nevertheless, a party, in order to establish that he did not consent, may rely upon the law of the country in which he has his habitual residence if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in paragraph 1.

³⁸ Article 9.

³⁹ Article 12(c).

governed by a yet different law); and with all three of these, or more, before it, pretended to know how to slot them together to get the answer. One might applaud the effort, but still be unconvinced by the result. By contrast, the Regulations produce the practical result that whether the issue between the parties is framed as one of contractual obligation or non-contractual obligation will make no difference so far as governing law is concerned: the same law will be found to govern it, whichever way it is looked at and whether one looks in Rome I or Rome II, meaning that there is no conflict of laws.⁴⁰ Some have observed that although the process of transition from one system of law to another was arduous, the European Union was making certain parts of the conflict of laws so easy that the experts were being written out of a job. The second point about the co-operation of the Regulations⁴¹ can be taken shortly. They deal comprehensively with unjust enrichment. There is no need to spend time debating the proposition that we should take ourselves back to the common law rules on choice of law for restitution and unjust enrichment, whatever they were, which no judge could say⁴² and no-one else could ever explain.

21. These are the reasons why the rules for determining the applicable law for the purpose of obligations in civil and commercial matters should not be changed and should not change when we leave the EU.

(C) The hybrid Regulations which regulate jurisdiction, applicable law, and recognition and enforcement in particular areas

22. The solution which lends itself to the status of the Rome I and II Regulations will not work; and what will shortly be said about Brussels I and Lugano II will not really work either. In these areas, if there is no new agreement between the United Kingdom and the EU, there will undeniably be a loss. It should, however, be easier to fill by common agreement. Where not, other laws will have to expand to fill the gap, which they will do, but not so well.

23. For example, in Insolvency it will not be possible to re-enact the Insolvency Regulation, for it is built on the basis on reciprocity and mutual trust (even though, as the cases and commentaries show, there is a considerable degree of European mistrust of English insolvency laws and the perception that that are too indulgent of the debtor). The natural extension of the UNCITRAL Model Law would be a reasonable way to fill the

⁴⁰ See in particular, Rome II Regulation, Arts 4(3) and 12.

⁴¹ See in particular Rome II Regulation, Chapter III (which is to say, Articles 10-12).

⁴² See *Barros Mattos (Jr) v MacDaniels Ltd* [2005] EWHC 1323 (Ch), esp at [119]: ‘an uncertain and developing area of the law’; also *Dexia Crediop SpA v Comune di Prato* [2016] EWHC 2824 (Comm), at [161]: ‘I do not accept that Rule 230(2), as it appears in the 14th edition, gives a clear statement applicable to the restitution counterclaim. The sub-paragraphs of paragraph (2) of Rule 230 are introduced by the term “(semble)”.’

gap if there were to be no separate agreement with the Member States to replicate the existing EU Regulation: this will not be perfect,⁴³ but it will not be so bad.

24. In matters of parental responsibility and maintenance, the removal of these Regulations will mean that various Hague Conventions will be left to do the same for issues between the United Kingdom and European states as they currently do for issues between the United Kingdom and the rest of the world. If there is a plus, it is only this: that with one fewer legal instrument to fit into the analysis, the law might be easier to understand.⁴⁴ The law on jurisdiction of, and recognition of matrimonial decrees from, European states would be lost, but on this, our default rules on recognition for foreign divorces and annulments were constructed on the basis of a Hague Convention.⁴⁵ They would expand to fill the gap – they already apply to the rest of the world, after all – reasonably well. Having said that, it is apparent that English courts have got to grips with the Brussels II Regulation (and will do with the Maintenance Regulation), and appear to like it. It is not for me to second guess Thorpe LJ when he says that loss of Brussels II would count as a serious loss for family law in the United Kingdom. One hopes that negotiations to replicate it may be self-contained and isolated from more predictably-contentious matters.

25. We would also lose the Taking of Evidence Regulation and the Service Regulation, but these have more often been impediments than efficiency gains; and once again, Conventions made at The Hague and enacted in domestic law will fill the gaps reasonably well.

(D) Jurisdiction and judgments: Brussels I (and Lugano II)

26. At first sight, jurisdiction and judgments seems harder. The reason why this perception prevails, and why it is misleading, requires a slightly greater introduction.

27. The starting point is that in the immediate aftermath of the referendum result, some influential continental writers could, it appeared, scarcely contain their excitement. An item was published on the conflictoflaws.net website,⁴⁶ the morning after the vote:

⁴³ The Model Law does not provide a basis for the recognition and enforcement of foreign insolvency judgments (see the discussion in *Rubin v Eurofinance SA* [2012] UKSC 46, [2013] 1 AC 236), but its co-ordination and co-operation provisions are reasonably robust.

⁴⁴ Articles 60 and 61 of the Regulation, concerning the relationship between the Regulation and (i) the Hague Convention of 5 October 1961, (ii) the Luxembourg Convention of 8 September 1967, (iii) the Hague Convention of 1 June 1970, (iv) the European Convention of 20 May 1980, (v) the Hague Convention of 25 October 1980, and (vi) the Hague Convention of 19 October 1996 do not fully convey the complications which arise. There is a proposal to recast Regulation 2201/2003 (COM(2016) 411 Final).

⁴⁵ The text of the 1968 Convention is most conveniently printed in Law Commission Report No 34 (1970); the Recognition of Divorces and Legal Separations Act 1971 is the first enactment; see now Family Law Act 1986, ss 44-54.

⁴⁶ 24 June 2016, reported as the views of Professors Burkhard Hess and Marta Requejo-Isidro of the Max Planck Institute.

One of the major misunderstandings of the Brexit is that it won't influence London's importance as a major place of dispute resolution in Europe. Up until now, the adverse consequences of leaving the European Judicial Area have been insufficiently discussed. A first seminar organized by the British Institute for International and Comparative Law and the Max Planck Institute Luxembourg for Procedural Law in May illustrated that the adverse legal consequences will start immediately, even within the transitional period of two years foreseen by Article 50 of the EU Treaty.

28. The departure of the United Kingdom from the Brussels I Regulation would mean, so it was said, that English judgments would not be recognised in other Member States. This would make London a bad choice of venue for dispute resolution. It would make English jurisdiction agreements unattractive or even unwise: indeed, lawyers should not put them in contracts any more, for they would be given little or no effect under the Regulation.⁴⁷ The result would be that London would become a legal backwater. And there would be no incentive, according to the same writers, to create a new treaty relationship with the United Kingdom, for Europe had had quite enough of the free movement of litigants to London. As the same writers chose to express it:

The main interest of the Union won't be to maintain or to strengthen London's dominant position in the European judicial market: EU Member States might equally provide for modern and highly-qualified legal services ready to attract commercial litigants and high-value litigation and arbitration. Examples in this respect are The Netherlands and Sweden. Of course, there might be negotiations on a specific regime between the Union and the United Kingdom, but the EU Commission might be well advised to tackle the more pressing problems of the Union (ie the refugee crisis where no solidarity is to be expected from the UK) instead of losing time and strength in bilateral negotiations.

29. It is, no doubt, irksome to some that commercial litigants are more drawn to the English courts than they are to those in Amsterdam or Stockholm; but there are, no doubt, good and objective reasons for a fact which appears not currently to be in dispute. (One may also suggest that if some jurisdictions are setting up and trying to establish courts which will operate in the English language and apply English law, this is a tribute to the quality of English law, and not a source of anxiety. In a free market, one can hardly complain if others try to copy one's strengths.)

30. One learns rather more by asking how the landscape would look if London were in a non-Member State. If one does that, five points come rapidly to the fore; and the malevolent view disclosed by these comments can be seen to have got the issues very wrong indeed.

⁴⁷ Save for the limited staying of proceedings in accordance with Article 31.

31. First, it is correct that English judgments would not be entitled to automatic enforcement in the other Member States: they would lose their European passports. That is undeniably a loss, and it can be represented (or exaggerated) as a big loss. But there are still bilateral treaties with Austria, Belgium, France, Germany, Italy and the Netherlands;⁴⁸ and the prospect that an English judgment may not be automatically recognised in the remoter regions of Europe is, of some, but perhaps not overwhelming, importance.⁴⁹

32. Second, one of the provisions of the Brussels Regulation is that the enforcement of an English (say) judgment in another Member State falls within the exclusive jurisdiction of that other Member State.⁵⁰ The exact scope of that rule is not clear, but it has undoubtedly meant that there are some orders which an English court may have, or may be given, procedural power to make, the better to make its judgments effective, but which it is restrained or prevented from making because of this Regulation impediment. In particular, orders for obtaining information which will assist a judgment creditor in locating and unlocking assets which ought to be available to satisfy the judgment run into doubt or deeper trouble if either the person with information or the assets whose whereabouts may be disclosed, or both, may be in another Member State. It is currently far from clear just how far the Brussels I Regulation really does impede an English court in the making of orders which would make its judgments more effective: if these are seen as part and parcel of what a court with jurisdiction to adjudicate may do after it has adjudicated but because (or is it despite the fact that it *has*?), there is little problem, as the Court of Appeal has rather boldly claimed.⁵¹ But if, as is surely more plausible, they are part and parcel of the enforcement or execution procedure, jurisdiction to order them does not appear to belong to the court which has given final judgment. However this may be, once the Regulation is out of the way, any such limitation on the power of the court to

⁴⁸ These are still in force. Their making had nothing to do with the European Union, and though the laws of the European Union might displace them insofar as the Regulation also provided a mechanism for enforcement of judgments, Article 59 of the Vienna Convention on the Law of Treaties would suggest that they remain in force and no longer displaced. In any case, supersession was only partial: the bilateral treaties may extend to judgments giving effect to an arbitral award (Foreign Judgments (Reciprocal Proceedings) Act 1933, s 1(2A)), and to judgments ordering repayment of an unfair preference (*New Cap Reinsurance Corp Ltd v Grant* [2012] UKSC 46, [2013] 1 AC 236, to each of which the Regulation did not or would not extend. More to the point the question whether they are still in force will be determined by the two Supreme Courts concerned; any views of the European Court will not be relevant.

⁴⁹ It is also correct to say that certain rules of European financial market law (MiFID is the most obvious) may yet require certain issues to be adjudicated by the courts of (or arbitrated before a tribunal seated in) a Member State, and may refuse to recognise other judgments or awards. The arguments are obscure, but the idea that certain disputes must be determined by a local court, and may not be determined outside, is well known to some systems of private international law, such as China.

⁵⁰ Article 24(5).

⁵¹ *Masri v Consolidated Contractors International Co SAL: (No 2)* [2008] EWCA Civ 303, [2009] QB 450; *(No 3)* [2008] EWCA Civ 625, [2009] QB 503; *(No 4)* [2008] EWCA Civ 876, [2009] 2 WLR 699 (also reported at [2010] 1 AC 90, 102 *et s*): the reversal of this last judgment by the House of Lords ([2009] UKHL 43, [2010] 1 AC 90, 130 *et s*) did not engage with the issues of European law (see Lord Mance at para 39) which would have arisen if the relevant rules of English law had been interpreted differently.

invent and extend orders by way of investigation, disclosure and enforcement will also be out of the way: to put the point sharply, the enforcement gloves will be off.

33. Third – and this is the most important – to look on the Brussels Regulation as an instrument made to secure the free movement of judgments is to be deceived by appearances. It is certainly true that the original Brussels Convention was made to secure the enforcement of each other's judgments, and that the means adopted to that end was to enact harmonised rules of jurisdiction.⁵² But those means have actually become the end, as the harmonisation of jurisdiction has emerged as the principal impact of the Regulation, and the consequence for the comparatively small number of judgments which need to be enforced overseas is ancillary to it. The Brussels Regulation is the reason why English domiciled defendants cannot be sued in other Member States, or can only be sued in other Member States in limited circumstances: United Kingdom defendants would lose that. But it is also the reason why defendants domiciled in other Member States cannot be brought before the English courts, save in certain limited circumstances. They would lose their jurisdictional defensive shields. Simple arithmetic means that the jurisdictional loss to those established in the Member States will add up to much more than will be lost by those domiciled in the United Kingdom.

34. For example, suppose litigation were to arise from the acquisition and implanting of surgical devices, such as artificial hips or knees, manufactured by a European company which has published false scientific data about their performance. If a claimant in England attempts to bring proceedings against the foreign *manufacturer*, he or she will have to rely on one of the exceptions to the general domiciliary jurisdictional rule in Article 4 of the Regulation which are, as is well understood, approached on a restrictive basis. Under the Regulation, if the claim is against the manufacturer alone – say the intermediary who supplied and fitted it is not worth powder and shot – it will have to be shown that the damage to the immediate victim occurred in England; and the claim will be confined to that damage. One may see problems with that, not only because the immediate damage is done to the immediate acquirer of the product, the claimant who subsequently acquires it being an indirect or secondary victim of an earlier wrong done to somebody else, but also because those who had their operation outside England⁵³ will not be able to sue. If instead it is sought to join a European defendant into proceedings against an English party, it must be shown that it is necessary to bring the defendant into the proceedings to avoid the risk of irreconcilable judgments resulting from separate proceedings;⁵⁴ and the fact that recovery against one defendant may have a direct effect on the measure of recovery

⁵² Treaty of Rome, Art 220: Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals... the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards. It may also be why the Convention and Regulation were referred to, in England, as the 'Judgments Convention', and 'Judgments Regulation'. This was never wise, and now would be seriously misleading.

⁵³ Special jurisdiction under Article 7(2) is given to the courts of a place within a Member State, not to the courts of the Member State in general.

⁵⁴ Article 8(1).

against another is not enough to justify joinder under a rule which is intended to be strict, as the European Court has explained.⁵⁵

35. By contrast, if the issue were left to the common law and civil procedure rules,⁵⁶ so long as there is a good arguable case that some significant damage, direct or indirect, was sustained in England, the manufacturer may be sued in England in respect of the whole of the damage; so far as joinder is concerned, the foreign manufacturer would easily be seen as a proper party to a claim against an English retailer, which seems likely to be the case as they should be joined to secure efficient disposal of a claim. On any view of the facts, the common law's characteristically loose-limbed⁵⁷ approach to jurisdiction will make it easier to bring these non-English defendants before an English court.

36. For another example, it will be possible to sue a French, German, Italian or Portuguese⁵⁸ financial institution in England, even though it may have come nowhere near England, if it made a contract governed by English law, as it appears from recent law reports that so many of them did, or if it failed to pay in England sums which the contract required to be paid in England. And, of course, jurisdiction agreements for the English courts will still work. Again, it will be possible to sue the Spanish hotel at or by which an English holidaymaker was injured or poisoned if he or she comes back to England for medical treatment, or sustains a loss of English earnings. The victim of a tort claiming against a non-English defendant will not be restricted to suing only in respect of direct and immediate damage which occurred in England: so long as some damage was sustained in England, even indirectly, the court will have jurisdiction over all of the rest of the claim.⁵⁹ The newest provision for service out of the jurisdiction, sub-paragraph 4A,⁶⁰ widens the jurisdictional reach of the English courts still further; and it illustrates the very obvious point that if we should think our jurisdictional rules are too narrow, or too imprecise (a view which has been heard, but which is supremely unconvincing), they can be put right by the Rules Committee in about 15 minutes.

⁵⁵ On this point in particular, *C-311/13 Profit Investment Sim SpA (in liq) v Ossi* EU:C:2016:282, [2016] 1 WLR 3832.

⁵⁶ Sir Richard Aikens is entirely correct to point out that the significant jurisdictional rules are not rules of common law properly so called, but Civil Procedure Rules (previously Rules of Court). Even so, it is convenient to refer to both together as 'common law rules'.

⁵⁷ This seems a far more telling image than 'long-arm' jurisdiction.

⁵⁸ Singled out for mention only because of the significant number of 'Portuguese' cases before the Commercial Court in recent months.

⁵⁹ This may involve accepting that the decision in *Brownlie v Four Seasons Holdings Inc* [2015] EWCA Civ 665, [2016] 1 WLR 1814, is wrong, but that submission was made in the 2015 Combar Lecture (published also at [2016] LMCLQ 236), and it is still sound (the appeal in *Brownlie's* case is to be heard by the Supreme Court in May 2017). The widening of paragraph 3.1(9) of the Practice Direction, to include damage which may be sustained, probably does not make much difference, for damage which may be sustained may be direct or indirect.

⁶⁰ (4A) A claim is made against the defendant in reliance on one or more of paragraphs (2), (6) to (16), (19) or (21) and a further claim is made against the same defendant which arises out of the same or closely connected facts.

37. Fourth: an English court will be able to adjudicate even though the courts of another Member State have jurisdiction under the Regulation, and even though proceedings were begun before that court before they were started in London. There will be no duty to wait for the foreign court to rule on its jurisdiction, and no duty to pay any attention to, still less yield to, its ruling on jurisdiction once it has made it. The Italian torpedo,⁶¹ and the other unhappy results of the first seised rule, will be banished from England. This is how things used to be, and this is what they would look like again. Some may think that this is not a pretty sight; others may regard it as a long-overdue rectification of the law which our courts apply.

38. And there is a fifth: the relationship between judicial jurisdiction and arbitration will be freed from the hamstringing complications of the Regulation and from the taint – to put it no higher – that the Regulation is less respectful of the rights *and duties* of those who promised to arbitrate than English law would naturally be. This is, no doubt, a topic on which much could be said, but it will be better said by someone from the world of arbitration. However, the Brussels I Regulation did nothing at all to support or encourage London as a venue for arbitration.

39. And these, surely, are the real points. So far as concerns the impact on defendants from other Member States, it is the Regulation which protects them. It shields defendants established in other Member States from the extraordinary reach of the common law's expansive rules for service out of the jurisdiction. It protects them from the normal jurisdictional rule of the common law: that any person who is present within the territorial jurisdiction of the English court, or any company which carries on business at a place within the jurisdiction of the court, will be liable to be sued in England, without restriction in the subject matter of the claim, in a way which has not been true within Europe for nearly 40 years. The Regulation regulates jurisdiction far more often and far more significantly than it does the enforcement of judgments: whatever its origins may have been, it has become a Jurisdiction Regulation, not a Judgments Regulation. These inescapable facts, especially when focused on by commercial interests in some of the more significant Member States, should affect the way the issues appear on the EU side of the negotiating table.

40. So what will happen ? Any answer involves making a prediction, of course. But that prediction is liable to be more useful if it takes account of reality. That reality, as it is seen here, comes in several strands, for of which can be mentioned before a conclusion is arrived at.

41. The first is that because the Brussels I Regulation is primarily concerned with limiting the jurisdiction of courts, and is only secondarily concerned with the recognition and enforcement of judgments, the key question for those on the EU side of the private

⁶¹ C-116/02 *Erich Gasser GmbH v MISAT srl* [2003] ECR I-14693.

international table will be whether they wish to perpetuate the existing limitations on the jurisdictional reach and powers of the English court which will spring back into action if nothing is agreed to. The useful answer to that will be given by commercial parties. It is not hard to imagine that those who carry on business in trade and finance and industry will wish to preserve their shields against English jurisdiction, and that when they speak, they will be heard.

42. The second is that the inability to enforce an English judgment in other Member States may not be so much of a problem if it can be enforced in England, or by means of orders and other measures made or taken in England. Banks in which assets are found may have branches in London; other debtors may find themselves (or the debts they owe to the judgment debtor) garnished for the benefit of the judgment creditor. Indirect control of assets may be gained by appointing receivers, or by taking a rather more robust approach to the corporate veil than the Supreme Court has recently supposed.⁶² The powers of the court to obtain or extract useful information by forced disclosure may not be back up to Star Chamber levels, but they are believed to be far more effective, or intrusive, than is found in the modern law of any other Member State. Indeed, in some European states the enforcement of judgments appears barely to be a judicial process at all: an administrative office deals with it,⁶³ and at a pretty perfunctory level at that. The common law has never been so restrained; and if there is reason to do so, it can be made more powerful still.

43. The third is that few European commercial entities, especially corporate ones, will feel altogether comfortable with having an unsatisfied judgment debt in England. A European entity may feel able to ignore a judgment from a court on the far side of the world, but England is closer to home and office for the defendants with which we are particularly concerned and, like it or not, an English judgment debt it is hard to ignore, whatever the law may say.

44. The fourth is that lawyers in Europe – including the United Kingdom – have grown accustomed to the idea that the states which make it up all read their laws on jurisdiction from the same page and, by and large, do their best to apply them properly. The idea that English courts might be told to pick up where they left off before the Brussels Convention first tied their hands (and subsequent amendment tied their hands tighter), is not one which one would expect to be very popular with those who might find themselves exposed to such unreconstructed jurisdictional power. The free movement of judgments would simply be replaced by the free movement of claim forms.⁶⁴ None of this involves any (slightly demeaning) menace or threat to change our laws or legal culture.

⁶² *Prest v Petrodel Resources Ltd* [2013] UKSC 34, [2013] 2 AC 108.

⁶³ This is true, at any rate, for Switzerland, which is rather surprising: see generally Berti, *Swiss Debt Enforcement and Bankruptcy Law* (Schulthess/Kluwer, 1997).

⁶⁴ It is tempting to describe this as ‘writzkrieg’; and although it may not be in the best possible taste, it makes the point directly and memorably.

These are the rules which, as must be well known, will come into force on Brexit day unless the United Kingdom decides for itself or agrees with others to prevent it.

45. Taking all that into consideration, it is evident that to focus attention on the fact that English judgments would lose their European passport is to take a rather myopic view of what will follow if nothing is done once the Brussels I Regulation has gone. One would have thought that the other Member States would be doing their level best to encourage the European Union to lock or tie the United Kingdom into a regime for the control of judicial jurisdiction as a matter of priority. Perhaps they are, though there is little sign of it yet: few of the few suggestions that the United Kingdom might become bound by the Lugano Convention or a new bilateral treaty have come from, still less been echoed from within, the European Union. Yet the issue of judgments and their portability or exportability is a side issue. The immature observation, which I mentioned earlier, that the EU would be ‘losing time and strength’ by negotiating a Lugano-ish regime with the United Kingdom does not appear to be based on coherent reflections. The perception of those early commentators was, and may still be, that the United Kingdom will need to beg for the free movement of its judgments along with the free movement of its goods and services, and that the European Union should act in its own self-interest. Quite so; but however may be the position with trade in goods and services, the United Kingdom does not need to beg for the freedom to exercise its rules of civil jurisdiction over defendants from the Member States: it has it already. The self-interest of the European Union may be seen to be rather different from what was first claimed on its behalf. And all this is without any mention of anti-suit injunctions.

46. In my opinion, the Lugano-ish option of a new agreement with the European Union, this mirroring what we currently have, seems a perfectly reasonable aim, though I also suspect that wanting it is as much a reaction to traumatic shock as anything else; and it is certainly not worth seeming to get stressed about it. One may perhaps go further: to suggest there is a need for such a negotiated agreement because its rules will be naturally superior to those of the common law is, to my mind, irrational. If it appears that neither the opening of Lugano nor terms for a new bilateral treaty is on the table, the United Kingdom would do just fine.

47. The United Kingdom could sign up to the Hague Convention on Choice of Court Agreements⁶⁵ easily enough. On balance it is probably worth doing so, not least because it already is part of English law, albeit a part which, so far, has had no perceptible effect. It would have the positive consequence that the courts of other Member States will have a clear duty to give effect to certain kinds of jurisdiction agreement for, and judgments from, the English courts: that is a plus. It means that the United Kingdom will have to give effect to jurisdiction agreements for the courts of other Member States, and give

⁶⁵ 30 June, 2005, in effect in the European Union since 1 Oct 2015; for the necessary amendments to English law, SI 2015 No 1644.

effect to judgments based on such agreements: but we always have always done that, and more extensively than the Hague Convention actually calls for.⁶⁶ There may be little to gain, but there is nothing to lose; and if it is politically wise to sign up to it, so as to convey the impression that judgments from the English courts will have an overseas power which they might not otherwise have, then it will do no harm. But it will do the kind of good which results from a letter of comfort, rather than anything more solid.

(E) Technical points

48. If the answers lie along some of the lines which I have described there will, of course, be technical details to be attended to. Three points should be made, two of which have been mentioned before.

49. First, it will be necessary to go through existing legislation with a blue pen, removing those parts which are not going to be compatible with secession. Of course this will be bothersome and time-consuming, but it can be left to technicians, for in this field, at least, it raises no matter of principle.

50. Second, it will be wise to deal decisively with whether European conventions which have been superseded will come back to life: the Brussels Convention, the Rome Convention, the first Lugano Convention, for example. I said at the beginning that arguments proposing revival are unlikely to be fruitful: the arguments are complex and unattractive and will only ever cause difficulty. There is no excuse for leaving such clutter lying around for our successors when we made the mess and should clear it up ourselves. The best solution would be to enact, that to the extent that they were superseded or suppressed (this was not completely done to the Brussels Convention, which continued to apply to Aruba, and to Tahiti and a few other francophone fishing villages in the middle of the sea) when the United Kingdom became a Member State, these instruments are repealed. That would save a lot of time and effort, and we should just do it.

51. Third, it will be necessary to state clearly the effect to be given to the jurisprudence of the European Court, past and future. Here there are precedents, and not just in Europe: states which took their independence from the British Empire faced and answered similar questions when wondering what to do with decisions of the English courts, prior to and given after independence. These are soluble problems. There is also the Human Rights Act 1998, which so far as material says that ‘a court or tribunal determining a question which has arisen in connection with a Convention right must take into account any judgment, decision, declaration or advisory opinion of the European Court of Human Rights... whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen’.⁶⁷ There is

⁶⁶ Because it applies to exclusive, but not at the moment to non-exclusive, jurisdiction agreements.

⁶⁷ No doubt there are other possible formulations of an essentially sensible proposition, but it is hard to see how one may improve on this one.

absolutely nothing wrong with giving or confirming the power of an English court to ‘take into account’ ? What would the alternative be: to enact that judgments of the European Court must not only be ignored but must be seen to be ignored ? One does occasionally hear someone trying to defend such idiocy, but it stops being entertaining, and becomes toe-curling, very quickly. This is a non-problem.

(F) Conclusion

52. If all this is broadly right, the great Repeal Act, if done sensibly, will do no great damage to our private international law. Rome I and Rome II will copy across as replicant legislation with barely a ripple to be seen on the surface of the sea. While the demise without replacement of the Brussels I and Lugano II would be a measurable loss, it will not be the United Kingdom which suffers it: its impact will be felt by enterprises established in the other Member States, much more than it will be felt in England.

53. It ought to follow that a replacement regime, practically copying the existing rules, should not be hard to agree to if the United Kingdom decides to be generous to its former European partners and not to summon up its inner Richard III, who was famously ‘not in the giving vein today’.⁶⁸ But – and this is important – it is necessary to take a balanced look at the position from which the United Kingdom should approach that negotiation. It has no need to beg; and although an appeal to reason is never wrong, it is well to remember that the ‘what if?’ question exposes significant vulnerabilities on the EU side.

54. And if reason does not prevail, we will be able to live very well, and provide litigants with powerful and effective adjudication, if we are left, jurisdictionally-speaking, to go it alone. It is hard to think of a commercial litigant who is able to sue in England under the Regulation but who will lose that right if there were no negotiated replacement; and if there is such a person, and this is seen as a problem, it can be cured by the stroke of an English legislator’s pen. Much the same is liable to be said for the English consumer. No English litigant will lose his right to sue in another Member State, for the jurisdictional rules of the Regulation apply just as much to non-Member State nationals as to everybody else.⁶⁹

55. Parties to commercial contracts, who would like English jurisdiction but who cannot be reassured about the position on enforcement of English judgments, can be given perfectly good dispute-resolution clauses, to be used in contracts, which deal with any uncertainty. Lawyers in the Temple and in the city are drafting, and have drafted, perfectly serviceable contract terms. It is well understood that to assert that this-or-that aspect of English law and litigation is ‘the best in the world’, while sitting back and doing nothing,

⁶⁸ Richard III, Act IV, Scene 2.

⁶⁹ C-412/98 *Universal General Insurance Co v Groupe Josi Reinsurance Co SA* [2000] ECR I-5925.

is quite useless; but we know how to draft, and we are drafting. These, to my mind, are the new realities of jurisdictional life. The end is not nigh.

56. There are some people, more than a few of whom with axes to grind, whispering that an English judgment is about to become about as useful to the winning party as a judgment from China or Peru. They are talking nonsense and should be ignored. There also appear to be some people in the United Kingdom saying that unless we can obtain a treaty with the EU, we will be left with jurisdiction rules which are as archaic as they are uncertain, and that ‘the little guy’ will never be able to obtain civil redress, presumably (though at this point the thread of the argument eludes me altogether) because there will be nothing anyone can do to correct shortcomings in English jurisdictional law. One cannot stop people talking tosh – service for any period as a Fellow of an Oxford college removes any doubt about that – but tosh is what it is.

57. One may therefore ask how commercial dispute resolution in London will look in 2019. If I am right, the answer will be much the same as, or perhaps more effective than, it is at the moment.

58. If there is to be a marginal loss in terms of the European passporting rules for English judgments, the corresponding gains may be seen – in enforcement of judgments – in terms of more effective measures for *English*⁷⁰ enforcement.

59. In terms of jurisdiction, there will be pure gain: in wider and better rules of English jurisdiction, to say nothing of anti-suit injunctions in those cases in which it is necessary to put the stick about. Dispute-resolution agreements are being drafted and refined to meet the challenge of what may lie ahead; and the rules which apply to the merits will be practically the same as before.

60. If that is correct, it will be seen that though secession from the European Union may, and probably will, have unpredictable consequences for the broad economy, and for public law, a radical reform of the effective rules of private international law is not on the cards. If one takes a realistic view of what may be achieved in negotiation, and how it may be approached, negotiation with the European Union need not be fraught.

ADRIAN BRIGGS
February 5th, 2017

⁷⁰ On this issue I am not qualified to say anything about enforcement in Scotland or Northern Ireland.