

**Cross-Border Litigation in England and Wales:
Pre-Brexit Data and *Post-Brexit* Implications**

Mihail Danov

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Exeter Centre for International Law
Exeter Law School, Amory Building
Rennes Drive, Exeter, EX4 4RJ, United Kingdom

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Cross-Border Litigation in England and Wales: *Pre-Brexit* Data and *Post-Brexit* Implications

Mihail Danov*

1 Introduction

Traditionally, private international law ('PIL')¹ forms an important part within each national legal system - England and Wales would normally have its own PIL rules, and so too would Scotland and France. The existence of multiple sets of national PIL rules which apply in different jurisdictions could generate a level of legal uncertainty which in turn would increase the parties' exposure to litigation risks in disputes with an international element. This would inflate the cross-border litigation costs, reflecting the level of variation with regard to the connecting factors chosen by national policy-makers to ascertain the applicable law and/or allocate jurisdiction. Addressing these issues, in terms of providing private parties with access to remedies, at EU level was important in view of the fact that the EU has promoted cross-border trade and services within the single market which *inter alia* contributed to the higher mobility of people across different jurisdictions.

In order to facilitate private parties' access to justice in disputes with an international element, the EU has "develop[ed] judicial cooperation in civil matters having cross-border implications"² by harmonising PIL rules.³ A number of EU PIL Regulations⁴ adopted at EU level created the foundation of the EU Civil Justice framework which was set to facilitate private parties' effective access to legal remedies in disputes with an international element.⁵ The objective has been to minimise the cross-border litigation risks, removing (or, at least, minimising) the barriers to justice (i.e. higher legal uncertainty and higher litigation costs) in

* Associate Professor, School of Law, University of Exeter, England, M.Danov@exeter.ac.uk. The author is very thankful to Professor Beaumont from the University of Aberdeen for his helpful remarks and edits on a previous version of this article. The gratitude is extended to two anonymous reviewers for their valuable comments and suggestions. The errors that remain are mine and mine alone.

¹ Private International Law ('PIL') for the purposes of this article is broadly defined to cover any set of national PIL rules. Respectively, EU PIL (referring to the EU harmonised PIL instruments) and/or English PIL (referring to the English common law rules) and/or Global PIL (referring to the Hague conventions).

² See Article 81 TFEU.

³ P. Beaumont and M. Danov, 'The EU Civil Justice Framework and Private Law: "Integration through [Private International] Law"' (2015) 22 *Maastricht Journal of European and Comparative Law* 706.

⁴ Eg Council Regulation 1215/2012 ('Brussels I recast'); Council Regulation 593/2008 ('Rome I'); Council Regulation 864/2007 ('Rome II'); Council Regulation 2201/2003 ('Brussels IIa'); and Council Regulation 4/2009 ('Maintenance Regulation').

⁵ M. Danov and P. Beaumont, 'Measuring the Effectiveness of the EU Civil Justice Framework: Theoretical and Methodological Challenges' (2015/2016) 17 *Yearbook of Private International Law* 151-180.

disputes with an international element. As a result, the current UK legal landscape in relation to PIL in civil and commercial matters has been largely designed at EU level.

The EU PIL legislative developments have significantly affected the English common law and the legal practice in cross-border disputes before the English courts.⁶ It is now well established that, in civil and commercial disputes, “the decision in *Owusu v Jackson* prevents any consideration of the *forum non conveniens* principle when the defendant, or one of the defendants, is domiciled in the UK.”⁷ The impact of the EU PIL family law on English law had been acknowledged by Lady Justice Black, stating that the “recourse to the inherent jurisdiction [is] through the Brussels IIa jurisdiction provisions not in spite of them.”⁸ In other words, EU PIL forms an integral and important part of the English legal landscape within which the companies and individuals would have to navigate in order to properly administer their cross-border private law relationships.

The UK decision to leave the EU strongly suggests that the legal landscape in relation to PIL in England and Wales would require a major redesign. A change in the legal landscape in relation to PIL would bring new challenges for UK policy-makers as well as for judges and litigants in cross-border cases before the English and Welsh courts. The UK policy-makers will have to consider how to re-shape the UK PIL regime, whilst EU policy-makers need to assess the impact of the UK decision to leave the European Union on the EU civil justice system, in order to identify how it should be reformed. In the post-*Brexit* era, there is a need for appropriate arrangements to be made between the UK and EU with a view to creating an effectively functioning regime which serves the interests of businesses and individuals by facilitating private parties’ access to remedies in cross-border cases. This appears to be

⁶ A. Dickinson, ‘Back to the future: the UK’s EU exit and the conflict of laws’ (2016) 12 *Journal of Private International Law*, 195, 196. A. Briggs, ‘Secession from the European Union and private international law: the cloud with a silver lining’ - Lecture to the COMBAR Association on 24 January 2017 < https://www.blackstonechambers.com/documents/311/Secession_from_the_European_Union_and_private_international_law.pdf > p 4.

⁷ *Dominic Liswaniso Lungowe & Others v Vedanta Resources Plc and Konkola Copper Mines Plc* [2016] EWHC 975 (TCC) [56] aff’d [2017] EWCA Civ 1528. See also: Case C-281/02, *Andrew Owusu v N. B. Jackson, trading as "Villa Holidays Bal-Inn Villas" and Others* ECLI:EU:C:2005:120; *Global Multimedia International Ltd v Ara Media Services* [2006] EWHC 3612 (Ch) [34]; *Attorney General of Zambia v Meer Care & Desai (A Firm)* [2006] EWCA Civ 390 [24]; *UBS AG v HSH Nordbank AG* [2009] EWCA Civ 585 [103]; *In the matter of A (Children)* [2013] UKSC 60 [31].

⁸ *Re J (A Child) (1996 Hague Convention) (Morocco)* [2015] EWCA Civ 329 [74]. See also: *In the matter of A (Children)* [2013] UKSC 60 [59].

acknowledged by the European Commission's Position Paper on Judicial cooperation in civil and commercial matters⁹ as well as by the UK Government's Future Partnership Paper.¹⁰

Devising an effectively functioning regime in relation to PIL in England and Wales, *post-Brexit*, presupposes a careful analysis of the relationship between the relevant PIL rules (ie be they EU PIL or English PIL rules), parties' strategies and access to remedies. Any fresh legal uncertainty in relation to PIL could impact on the settlement dynamics and parties' strategies, creating incentives for litigants to exploit any *post-Brexit* driven ambiguity and gain negotiating advantages which could adversely affect their opponent's access to remedies in disputes with an international element.¹¹

There is a need for a theoretical framework which allows for systematic analysis of existing *pre-Brexit* data and future data (capturing potential and actual *Brexit* impact) because any change in the UK legal framework might have significant implications for the parties' access to justice in cross-border cases before the English courts. The assessment of the *Brexit* impact pre-supposes such a theoretical framework for data analysis which captures the litigation pattern (considering the relationship between the relevant set/s of PIL rules and private parties' strategies) in cross-border family law disputes as well as in civil and commercial law disputes with an international element. This should allow for some comparisons not only between the *pre-Brexit* and *post-Brexit* data, but also between data concerning different types of family, civil and commercial disputes.

The aim of this article is to propose a theoretical framework for the relevant data analysis by the EU and UK policy-makers when deciding on any future regime for judicial cooperation. The proposed framework could be used when comparing existing (ie *pre-Brexit* data) with newly gathered data with a view to assessing the *Brexit* impact on the EU/UK policy facilitating access to justice in cross-border cases as well as on the recognition and enforcement of the UK courts' judgments across the EU and the recognition and enforcement of the EU Member States

⁹ European Commission - Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 TEU, 'Position paper transmitted to EU27 on Judicial Cooperation in Civil and Commercial Matters' – 28 June 2017 < https://ec.europa.eu/commission/sites/beta-political/files/essential_principles_judicial_cooperation_in_civil_and_commercial_matters.pdf >.

¹⁰ HM Government 'Providing a cross-border civil judicial cooperation framework: A future partnership paper' < https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/639271/Providing_a_cross-border_civil_judicial_cooperation_framework.pdf >.

¹¹ M. Danov and S. Bariatti, 'The Relationship between Litigation and ADR: Evaluating the Effect of the EU PIL Framework on ADR/Settlements in Cross-Border Cases' in P. Beaumont, M. Danov, K. Trimmings and B. Yuksel (eds), *Cross-Border Litigation in Europe* (Hart Publishing, Oxford 2017) 689-707. See also: M. Danov and P. Beaumont, 'Effective Remedies in Cross-Border Civil and Commercial Law Disputes: A Case for an Institutional Reform at EU Level' in P. Beaumont, M. Danov, K. Trimmings and B. Yuksel (eds), *Cross-Border Litigation in Europe* (Hart Publishing, Oxford 2017) 603-622.

courts' judgments in the UK. The author will make a case that there must be a constructive alignment of the policy objectives to be pursued in cross-border cases and the needs of the businesses and individuals in disputes with an international element. In other words, achieving a level of constructive alignment between the parties' legitimate goals in cross-border cases and the policy-makers' objectives in devising a legal landscape in relation to PIL is a necessary pre-condition for designing an appropriately functioning institutional framework *post-Brexit*.

2 Research Methodology and Theoretical Framework: A Purposive and Pragmatic Approach

It should be noted that a newly gathered empirical data will be necessary to identify how a change in the *post-Brexit* legal landscape in relation to PIL would impact on private parties' access to remedies in cross-border cases before the English courts. It is not possible to do this, without considering how the current regime is functioning.¹² Any such assessment of the impact of *Brexit* must draw on an analysis which identifies the factors that facilitate/impair access to justice in disputes with an international element under the current EU PIL regime.

Some recent academic papers have considered various aspects/challenges for litigants and UK/EU policy-makers in disputes with an international element arising in a *post-Brexit* context.¹³ Briggs¹⁴ has captured well the impact which Brexit may have on some of the relevant legal literature by noting that “[i]t could mean that about half the pages in the current edition of Dicey – the better half, as some would say – could be torn out and thrown away.”¹⁵ The UK Government's future partnership agenda aims to continue to promote a level of judicial cooperation with the EU Member States, stating that:

“The UK is clear that international civil judicial cooperation is in the mutual interest of consumers, citizens, families and businesses in the EU and in the UK. With this in mind, we are seeking a close and comprehensive framework of civil judicial cooperation with the EU. That framework would be on a reciprocal basis, which would mirror closely the current EU system and would provide a clear legal basis to support cross-border activities, after the UK's withdrawal.”¹⁶

¹² Beaumont et al, *supra* n 11.

¹³ Dickinson, *supra* n 6; Briggs, *supra* n 6; 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) *European Business Law Review* 903; M Ahmed, 'BREXIT and English Jurisdiction Agreements: The Post-Referendum Legal Landscape' (2016) *European Business Law Review* pp. 989; J. Fitchen, 'The Private International Law consequences of Brexit' (2017) *Nederlands Internationaal Privaatrecht (NIPR)* 411; M. Pillich, 'Brexit and EU private international law: May the UK stay in?' (2017) *24 Maastricht Journal of European and Comparative Law* 382.

¹⁴ Briggs, *supra* n 6.

¹⁵ *Ibid* p 4.

¹⁶ A future partnership paper, *supra* n 10, [25].

A Sub-Committee forming part of the UK Parliament's Select Committee on the European Union gathered evidence from prominent legal practitioners and academics, considering *inter alia* the various policy options (e.g. common law, Brussels I, Brussels Ia and IIa, Lugano, The Hague Choice-of-Court Agreements) concerning the re-design of the UK legal landscape post-*Brexit*.¹⁷ The difficulties in determining the *Brexit* impact were exposed by the fact that a number of “academic and legal witnesses differed on the post-Brexit enforceability of UK judgments”.¹⁸ Such a difference in the opinions¹⁹ indicates how difficult is to evaluate the *Brexit* impact and identify the appropriate policy-options.

The recent developments (more compellingly than ever before) call for a new approach for doing research in PIL. This deduction could be sustained from the evidence provided, to the Justice Sub-committee, by Fentiman who submits that “in the realm of commercial law [...] disputes never go to judgment. [...] In other words, you simply will not reach the point at which you have a judgment which needs to be enforced.”²⁰ This is one of the important arguments, supporting his view that the non-application of Brussels Ia should not be seen as a significant disadvantage which is further sustained by the findings of the BIICL Report.²¹

But, surely all the previous studies (ie pre-*Brexit* data) were seeking to identify the factors which impacted on the *forum*-selection process at the time when the data was collected (ie February – June 2014 – BIICL Report), with all the respondents naturally making the assumption that the legal landscape will not significantly change (ie Brussels I regime will

¹⁷ House of Lords – European Union Committee, ‘Brexit: justice for families, individuals and businesses?’ HL Paper 134 < <https://publications.parliament.uk/pa/ld201617/ldselect/ldcom/134/134.pdf> >.

¹⁸ Ibid [52].

¹⁹ L Merrett and R Fentiman, ‘Oral Evidence presented to the House of Lords’ Select Committee on the European Union – Justice Sub-Committee - Tuesday 6 December 2016 at 10.45 am < <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/brexit-civil-justice-cooperation/oral/44259.html> > Responses to Questions 1 and 2; A Briggs — Written evidence (CJC0002), ‘Secession from the European Union and Private International Law’ < <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/brexit-civil-justice-cooperation/written/46823.html> >. Compare: D Greene, H Raulus, T Scott and H Mercer, ‘Oral Evidence presented to the House of Lords’ Select Committee on the European Union – Justice Sub-Committee - Tuesday 10 January 2017 at 10.45 am < <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/brexit-civil-justice-cooperation/oral/45378.html> >; J Harris, R Lord and O Jones ‘Oral Evidence presented to the House of Lords’ Select Committee on the European Union – Justice Sub-Committee - Tuesday 13 December 2016 at 10.45 am < <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/brexit-civil-justice-cooperation/oral/44510.html> >.

²⁰ Fentiman, ‘Oral Evidence’, *supra* n 19, Response to Question 2.

²¹ Ibid. See also: E. Lein et al, ‘Factors Influencing International Litigants’ Decisions to Bring Commercial Claims to the London Based Courts (‘BIICL Report’)’ < https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/396343/factors-influencing-international-litigants-with-commercial-claims.pdf >. Compare: H. Mercer QC, ‘Oral Evidence’, *supra* n 19, Response to Question 28.

continue to apply within the UK). A new data is necessary to find out whether and/or how (if at all) the non-application of Brussels Ia will impact on the attractiveness of the English courts. More importantly, a new data is needed to find out whether (and how) a change in the legal landscape would impact on the settlement dynamics. Even if there is no change in the rate of settlements post-*Brexit*, it is important to see whether a modification in the legal landscape would impact on the parties' decisions whether/where to issue proceedings as well as on litigants' strategies which could in turn impact on the settlement dynamics (eg the level of settlement discount could become higher/lower).

It is well established that “[o]ne way to find out what is going on as lawyers do such things as planning transactions or crafting litigation strategy is to find an insider willing to be interviewed”,²² so that a new set of qualitative interviews with legal practitioners (who should be randomly selected out of an appropriately designed sampling framework) would be much needed. Indeed, a systematic analysis of the *Brexit* impact on the cross-border litigation pattern in England and Wales presupposes the construction of a theoretical model (and then the adoption of an appropriate research methodology) that should take account of the relationship between PIL rules (shaping the litigants' strategies) and parties' access to remedies in cross-border cases. A “theory of legal strategy”²³ appears to suggest that:

“‘Law’ has direct effect through the rendition and enforcement of judgments in actual cases and indirect effect through the anticipation of such rendition and enforcement in hypothetical cases. Each such case is a complex undertaking that may require hundreds of strategic decisions by the parties and generate an indefinite number of actual or potential legal issues and extra-legal problems”²⁴

Whilst it is persuasive to say that “a central thrust of legal strategy is to control legal outcomes”²⁵, one should not forget that claimants and defendants will have entirely different objectives. If a claimant's goal was to swiftly obtain a legal remedy in a cross-border case, then the potential defendant could decide to make it difficult for the claimant, raising various “barriers to conflict resolution”.²⁶ The relevant PIL rules would have an important role in shaping the claimants/defendants' legal strategies because the PIL rules ascertain the applicable substantive laws (determining parties' entitlement to remedies in cross-border cases) and specify the competent national court (impacting on access to remedies by defining the relevant

²² S Macaulay, ‘New Legal Realism: Unpacking a Proposed Definition’ (2016) 6 *UC Irvine Law Review* 149, 164.

²³ L. M. LoPucki and W. O. Weyrauch, ‘A Theory of Legal Strategy’ (2000) 49 *Duke Law Journal* 1405.

²⁴ *Ibid* 1412.

²⁵ *Ibid* 1411.

²⁶ R H Mnookin and L Ross, ‘Introduction’ in K Arrow et al (eds), *Barriers to Conflict Resolution* (W W Norton & Company, 1995) 1, 6-24.

procedural rules as well as revealing whether a rendered judgment will benefit from any bilateral and/or multilateral regime for the recognition and enforcement). Hence, the litigants' strategies, which are devised under the relevant set of applicable PIL rules, do have a major impact on the triangular relationship (jurisdiction – choice of law – access to legal remedies).²⁷

The proposed theoretical model for data analysis draws on the EUPILLAR project²⁸ which assessed the effectiveness of the EU PIL framework and identified the weaknesses of the current EU institutional framework by analysing the relationship between the relevant EU PIL rules and private parties' access to remedies in cross-border cases. A strong and original feature of the theoretical model which has been applied in EUPILLAR is that our analysis considers the relationship between the EU PIL rules and the litigants' strategies which in turn will have a bearing on the parties' decision to sue and/or settle as well as on the settlement negotiations and parties' access to remedies in cross-border cases. Central to this analysis is the triangular relationship between the rules allocating jurisdiction and ascertaining the applicable law, on the one hand, and the private parties' ability to obtain a desirable legal remedy (which might require the recognition and enforcement of an English judgement abroad), on the other hand.²⁹ This theoretical framework allowed us to consider the context in which the PIL rules are set to be applied.

The EUPILLAR data analysis shows that a level of tactical manoeuvring by private parties in disputes with an international element is the most dynamic factor to be considered when identifying the aspects which may impair litigants' effective access to remedies under the current EU PIL rules. The litigants' strategies, which are often devised to exploit the weaknesses of EU PIL regime and/or the deficiencies of national legal system, are the central factor which would affect the expectations of the parties about the outcome (ie raising psychological barriers affecting the suing decision and settlement dynamics) and access to justice under the EU civil justice system (ie raising institutional barriers) exposing the ineffectiveness of the adopted PIL instruments.³⁰ Due to the specific nature of cross-border disputes, it was particularly important to consider whether/how the weaknesses of the EU institutional framework could be exploited by strategic litigants.³¹ For these purposes, datasets for the civil and commercial and family PIL cases before the English and Welsh courts were

²⁷ Danov and Beaumont, *supra* n 5.

²⁸ Danov and Beaumont, *supra* n 5.

²⁹ Danov and Beaumont, *supra* n 5.

³⁰ P. Beaumont, M. Danov, K. Trimmings and B. Yüksel, 'Cross-border Litigation in Europe: Some Theoretical Issues and Some Practical Challenges' in Beaumont et al, *supra* n 11, 817-830.

³¹ See more Danov and Bariatti, *supra* n 11.

compiled for the period from 1 March 2002 up to 2015.³² This included 354 cases, involving on some occasions more than one judgment; 427 judgments rendered in these cases have now been summarised on the project web site.³³

The gathered quantitative/qualitative data from the case law datasets was cross-checked with the qualitative data from the research interviews. It should be noted that the sampling framework,³⁴ which was used when randomly selecting interview participants in England and Wales, included over 1700 names of legal practitioners (including judges), with 20 interviews, being conducted in England and Wales.³⁵ In the latter context, qualitative interviews with legal practitioners were conducted, in order to determine how the EU PIL framework was shaping litigants' strategies³⁶ which may in turn indirectly impact on ADR/settlements negotiation.³⁷ Therefore, in order to set the agenda for the PIL community to consider in the *post-Brexit* era, the author relies on empirical (qualitative) data which was gathered in 2015 and early 2016 in the context of the EUPILLAR project.³⁸ This might turn out to be the last set of interview data which captures how the legal regime was functioning before the *Brexit* vote from June 2016. An analysis of the existing data, considering the relationship between litigants' strategies and parties' access to remedies in the *pre-Brexit* era, should indicate what type of data is needed to inform the design of a governance model in a *post-Brexit* context.

The *pre-Brexit* data appears to shed light on the way in which the EU PIL framework shaped the litigants' strategies, identifying the weaknesses of the EU PIL rules in place.³⁹ A careful consideration of the relationship between parties' strategies and access to legal remedies in cross-border cases under the *pre-Brexit* EU PIL framework should make it possible to identify the challenges for the UK policy-makers as well as the opportunities/incentives for the UK to maintain a good working relationship with its current EU partners, whilst contributing to the creation a global framework for judicial co-operation in civil and

³² See more about the research methodology in Chapters 1 and 5 in Beaumont et al, *supra* n 11. See also Danov and Beaumont, *supra* n 5.

³³ The EUPILLAR Database < <http://www.abdn.ac.uk/law/research/eupillar-database-559.php> >. It should be noted that the last search was done in the summer of 2015, so that the datasets include only a small proportion of the cases in 2015.

³⁴ A Wilmot, 'Designing sampling strategies for qualitative social research: with particular reference to the Office for National Statistics' qualitative respondent register' (2005), Paper on qualitative sampling strategies presented to QUEST 2005, Office of National Statistics < <http://www.ons.gov.uk/ons/guide-method/method-quality/general-methodology/data-collection-methodology/reports-and-publications/index.html?format=print> >

³⁵ P. Beaumont, M. Danov, K. Trimmings and B. Yüksel, 'Great Britain' in Beaumont et al, *supra* n 11, 79-124.

³⁶ *Ibid.* See also: Danov and Beaumont, *supra* n 11.

³⁷ The Right Honourable the Lord Woolf, *Access to Justice – Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO, 1996) 107. See more: Danov and Bariatti, *supra* n 11.

³⁸ Beaumont, Danov, Trimmings and Yüksel, *supra* n 35.

³⁹ *Ibid.* See also: Beaumont and Danov, *supra* n 11. Danov and Bariatti, *supra* n 11

commercial matters. Indeed, some systematic comparisons between the existing *pre-Brexit* data and the future *post-Brexit* data (capturing the impact of any potential and actual changes in the legal landscape on the litigants' strategies) should indicate the optimal policy option/s which should be pursued by policy-makers.

In order to construct a theoretical model for data analysis, the author will highlight the relationship between the elements of private parties' access to legal remedies and litigants' strategies in cross-border cases under the current EU PIL framework. The EUPILLAR project⁴⁰ shows that the policy objectives (ie certainty and predictability as prerequisites to facilitating parties' access to justice) which are reflected in the EU PIL rules are only achievable if the institutional framework is effectively functioning. There are several important factors which should be considered with a view to identifying the aspects that could impair private parties' access to remedies, shaping the triangular relationship (See Figure 1, jurisdiction – choice of law – remedy). In particular, there are two major elements of “the right to an effective remedy”⁴¹ which should be considered in cross-border cases.

First, it is important to outline that the private parties' *entitlement to legal remedies* would be dependent on laws which should be applied by the judges to determine the rights and obligations of the parties in cross-border cases. In this context, the author relies on the EUPILLAR empirical data which is used to determine how effectively the parties' *entitlement to remedies* could be ascertained under Rome I and II. Hence, the aspects which impact on the parties' decisions whether to embark on a dispute about the applicable law under the current EU PIL should be considered. On this basis, the author will consider what type of new empirical data will be required with a view to assessing the impact of *Brexit* on private parties' access to justice in cross-border cases.

Secondly, the litigants' *access to legal remedies* may be subject to various sets of procedural provisions which may be applicable depending on the place where the parties litigate. This means that the applicable procedural rules may be dependent on establishing jurisdiction before an appropriate Member State court.⁴² In order to factor these developments in, the proposed theoretical model considers the relationship between the disputes about the jurisdiction of the court seised and the parties' access to remedies in cross-border cases. A review of the reported cases under the current EU PIL framework appears to demonstrate that

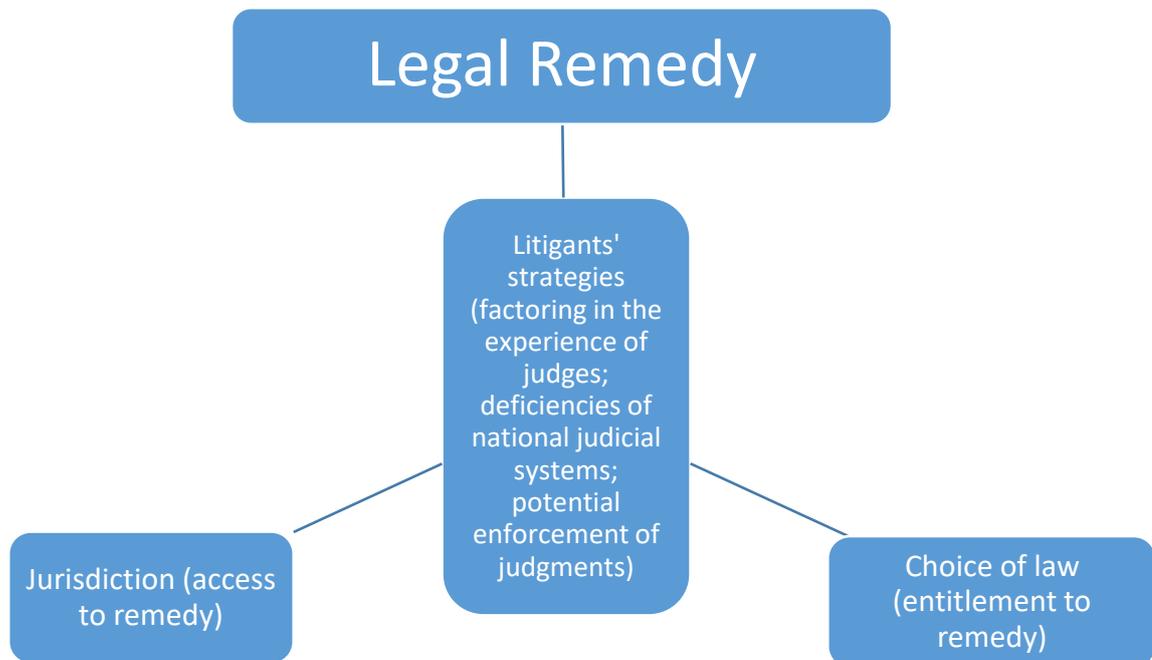
⁴⁰ Beaumont et al, *supra* n 11.

⁴¹ Art 47(1) and (2) of the Charter of Fundamental Human Rights. See also Recital 38 to Brussels Ia. See more: M. Danov, 'Data Analysis: Important Issues to be Considered in a Cross-Border Context' in Beaumont et al, *supra* n 11, 475-495.

⁴² Danov, *supra* n 41.

the jurisdictional challenges are quite common in cross-border disputes before the English courts.⁴³ An analysis of the behaviour of the claimant helpfully identifies the factors which impact on his decision to issue proceedings in this country and seek his desired remedy from the English courts. Equally important for the author is to identify the factors which impact on the defendant's decision to challenge jurisdiction of the English courts.

Figure 1



The EUPILLAR empirical data helpfully indicates how effectively jurisdiction may be established under Brussels Ia and IIa as well as whether the rendered judgment will be recognised and enforced abroad. Both aspects are cumulatively important pre-conditions for private parties' *access to legal remedies* in cross-border cases which might impact on the forum selection process. This framework for data analysis should allow for the collection of some new and relevant data which should indicate how the legal landscape in relation to PIL should be designed *post-Brexit*. In theory, any change in the legal landscape in relation to PIL – in so far as it shapes the litigants' strategies - may have significant implications for the parties' access to legal remedies in cross-border cases. Therefore, this theoretical framework, whilst modelled on the EUPILLAR paradigm for data analysis, could be used for the relevant data analyses which are necessary to assess the impact of *Brexit* on the resolution of cross-border disputes in

⁴³ Beaumont, Danov, Trimmings and Yüksel, *supra* n 35.

England and Wales. Indeed, as already noted above, a new and relevant empirical data will be needed to measure the impact of *Brexit* on parties' strategies in this context.

More importantly, devising an effectively functioning PIL framework also presupposes that the policy-makers set out clear objectives which could reasonably be pursued through the adoption of relevant PIL provisions. To this end, it is important to identify the policy options which would be relevant, and could be effectively and efficiently⁴⁴ pursued through PIL instruments. It is also important to agree upon the objectives which are to be pursued by the PIL regime. Mills has recently noted that "the primary motivation for the EU in pursuing multilateral harmonization of private international law is likely to be the potential for economic benefits to the EU itself from increased efficiency in global cross-border activity."⁴⁵ Although this could hardly be a directly and fully achievable objective through any PIL instrument, one could see an indirect link between an appropriately designed global legal landscape (which allows the parties to obtain effective legal remedies) and the need to reduce the cross-border litigation risks (which may have an impact on the costs for doing business across borders). But, significant economic benefits could hardly be a realistic objective which could be pursued by using PIL instruments (even global PIL instruments).

Nonetheless, facilitating litigants' access to justice by providing private parties with legal certainty about how their rights and obligations would be ascertained in cross-border disputes could well be a direct objective which could reasonably be pursued through PIL. A support for the proposed theory could be derived from the EUPILLAR project which demonstrates that the parties' decisions where/whether to bring their cross-border claims is preceded by a careful cost-remedy analysis,⁴⁶ factoring in the cross-border litigation risks. That said, the EUPILLAR project also shows that specifying a relevant policy objective (eg allowing parties to obtain an effective remedy in cross-border cases) does not necessarily mean that this objective would be fully achieved (or even be fully achievable), if the adopted PIL framework is not effectively functioning. In other words, the means through which the agreed objectives are to be pursued need to be carefully considered by the EU/UK policy-makers. The author proposes a purposive and pragmatic approach which allows for designing a legal landscape in relation to PIL that

⁴⁴ F. Varone, B. Rihoux, and A Marx, 'A New Method for Policy Evaluation? Longstanding Challenges and the Possibilities of Qualitative Comparative Analysis (QCA)' in B. Rihoux and H. Grimm (eds), *Innovative Comparative Methods for Policy Analysis* (Springer, 2006) 213, 215

⁴⁵ A Mills, 'Private International Law and EU External Relations: Think Local Act Global or Think Global Act Local' (2016) 65 *ICLQ* 541, 551.

⁴⁶ See more Section III below.

aligns the policy-makers' objective to facilitate effective access to justice with the litigants' objective to achieve a result in cross-border cases.

The proposed approach is in line with the different initiatives for harmonisation of PIL through regulations and/or conventions which appear to be aiming to facilitate private parties' effective access to remedies in cross-border cases.⁴⁷ This is clearly reflected in the relevant EU legislative instruments,⁴⁸ but more importantly in the objectives of the newly proposed text of the Global Judgments Convention.⁴⁹ The Report of the Working Group on the Hague Conference Global Judgments Project specifies that the proposed conventions aims to "enhance access to justice through the recognition and enforcement of judgments given by courts which the parties could reasonably have expected to determine their rights and obligations in the circumstances of the particular case."⁵⁰

3 Entitlement to a Legal Remedy: Applicable Law and Cost-Benefit

Analysis

It is well established that, in domestic cases, the parties' decision to issue legal proceedings is preceded by a careful analysis which compares the value of the remedies (ie desired result) that a claimant would be entitled to pursue (and the probability to achieve the result⁵¹), on the one hand, and the litigation expenses he would have to meet, on the other hand.⁵² In cross-border cases, there would be an added layer of complexity because there would potentially be, at least, two legal regimes (ie sets of substantive laws) which may be relevant when determining the rights and obligations of the parties. This means that the parties' entitlement to legal remedies would have to be ascertained under the applicable law identified through the application of the relevant PIL rules which, along with the relevant institutional framework in place, would shape the parties' strategies.

Any legal uncertainty/ambiguity about the applicable law and/or the way the PIL rules should be interpreted could generate a level of delay which would impact on the parties'

⁴⁷ Danov and Beaumont, *supra* n 5.

⁴⁸ Eg Recital 38 of Council Regulation 1215/2012 ('Brussels I recast').

⁴⁹ Special Commission on the Recognition and Enforcement of Foreign Judgments (16-24 Feb 2017), 'February 2017 Draft Convention' < <https://assets.hcch.net/docs/d6f58225-0427-4a65-8f8b-180e79cafd9b.pdf> >.

⁵⁰ Report of the Fifth Meeting of the Working Group on the Judgments Project (26-31 October 2015) and Proposed Draft Text Resulting from the Meeting < <https://assets.hcch.net/docs/06811e9c-dddf-4619-81af-71e8836c8d3e.pdf> > p 3.

⁵¹ H Genn, 'Understanding Civil Justice' (1997) 50 *Current Legal Problems* 155.

⁵² R A Posner, *Economic Analysis of Law* (8th edn, WoltersKluwer, 2001) 761 – 767. See also R A Posner, 'An economic approach to legal procedure and judicial administration' (1973) *Journal of Legal Studies* 399; W A Landes and R A Posner, 'Adjudication as a private good' (1979) *Journal of Legal Studies* 235.

remedy-cost balancing exercise. In particular, a level of legal uncertainty about the applicable law could result in a dispute between the parties on this issue. Any prolonged dispute, on such a preliminary issue as the applicable law is, would raise the litigation costs and adversely affect the parties' expectations about the outcome of the dispute. In other words, the litigation costs might be higher in a cross-border case because, assuming that everything else is equal as in a domestic case (and assuming the jurisdiction of the national court is not challenged⁵³), the parties may disagree about the law which should apply to the merits of their dispute. Therefore, ascertaining the rights and obligations of the parties (being a difficult enough undertaking in domestic disputes) could be a very complex task in cross-border cases where the litigants disagree about the applicable law and/or its content.

Although the EUPILLAR project⁵⁴ shows that the disputes about the applicable law are far less common than the jurisdictional battles before the English courts in cross-border cases,⁵⁵ a careful analysis of the collected data shows that the higher the value of the legal remedy to which a party is entitled to recover under the applicable set of laws, the more likely the party is to issue proceedings.⁵⁶ There is a strong case that, due to the fact that the parties' entitlement to legal remedies depends on the law which is applicable to the merits of the cross-border disputes, any ambiguity/uncertainty with regard to the relevant PIL rules would impact on parties' behaviour in such cases. One way for the parties to minimise the level of legal uncertainty with regard to the applicable law which is to be used to ascertain the parties' rights and obligations is to include a choice-of-law clause as part of their contract. This appears to explain why choice-of-law clauses (and indeed choice-of-court agreements⁵⁷) form part of the terms of many cross-border transactions nowadays.

An ineffectively functioning PIL regime may impair private parties' access to remedies in cross-border cases.⁵⁸ A review of the case law and the EUPILLAR data⁵⁹ shows that there is a complex inter-relationship between the cross-border litigation tactics (devised under the relevant PIL framework) and the parties' expectations about the outcome of the relevant

⁵³ Even more complex issues may arise in cross-border cases where there is a dispute about the court's jurisdiction which could inflate litigation costs that might impact on private parties' access to remedies. See more Section 4 below.

⁵⁴ Beaumont, Danov, Trimmings and Yüksel, *supra* n 35. See also: Beaumont and Danov, *supra* n 11.

⁵⁵ See also: T. C. Hartley, *International Commercial Litigation* (2nd ed, CUP, Cambridge 2015) pp 5-6.

⁵⁶ Beaumont, Danov, Trimmings and Yüksel, *supra* n 35.

⁵⁷ See more Section 4 below.

⁵⁸ Beaumont, Danov, Trimmings and Yüksel, *supra* n 35.

⁵⁹ Danov, *supra* n 14; Danov and Beaumont, *supra* n 5.

disputes.⁶⁰ This would in turn be reflected in the ADR/settlement negotiations⁶¹ which could be further impacted by the cost-shifting rules, ordering ‘the unsuccessful party [...] to pay the costs of the successful party’.⁶² For example, since any dispute about the applicable law could increase the defendants’ exposure to costs, a level of legal uncertainty about the applicable substantive law may force a defendant to settle quickly with a view to minimising the costs.⁶³ However, the EUPILLAR data suggest that the litigation costs of several millions will be less of a factor in high value claims (ie over 100 million).⁶⁴ In such cases, the defendant might well gain a negotiating advantage by exploiting any ambiguity of PIL, in order to adversely affect the claimant’s expectations about the outcome of the case.

Therefore, it can be suggested that, once the parties have considered the value of the legal remedies and the impact which the applicable law would make to the outcome of their case, they will decide on their respective strategies with regard to the choice-of-law issues. A significant difference between the outcomes under the applicable substantive laws which would be relevant for the parties’ case would increase the likelihood for them to argue about the various aspects of governing law. Considering the strategic behaviour of the parties in cross-border disputes, there is a strong case that a new data is needed to consider the *Brexit* impact on the parties’ strategies and settlement/ADR negotiations. This deduction may be strengthened after considering the relevant case law under the current EU PIL framework.

There appear to be some governance aspects which due to the strategic nature of the parties’ behaviour⁶⁵ may need to be addressed on both side of the English Channel in the post-Brexit era. The *Homawoo*⁶⁶ case signified the relationship between PIL framework and parties’ behaviour showing the impact any legal uncertainty may have on settlements in cross-border cases. The point was captured by Mrs Justice Slade. In this case, the English court considered the question whether Rome II applies with regard to the assessment of damages which were caused by a traffic accident that occurred in France. The High Court judge felt that the law applicable to the assessment of damages in cross-border traffic accidents was a significant issue

⁶⁰ Danov and Barriati, *supra* n 11.

⁶¹ Danov and Barriati, *supra* n 11.

⁶² See English Civil Procedure Rule (‘CPR’) 44.2(2). See also N Andrews, *Andrews on Civil Processes: Court Proceedings* Vol I (Mortsel, Intersentia, 2013) 526–29; Danov and Beaumont, *supra* n 6; Danov and Barriati, *supra* n 11.

⁶³ M. Danov and S. Dnes, ‘Cross-Border EU Competition Litigation: New Evidence from England and Wales’ in M. Danov, F. Becker and P. Beaumont (eds), *Cross-Border EU Competition Law Actions* (Hart Publishing, Oxford 2013) 33-59.

⁶⁴ Beaumont, Danov, Trimmings and Yüksel, *supra* n 35.

⁶⁵ Danov and Beaumont, *supra* n 11; Danov and Barriati, *supra* n 11.

⁶⁶ *Homawoo v GMF Assurance SA* [2010] EWHC 1941 (QB).

because it was “relevant to a large number of actions which ha[d] been commenced in England. They [we]re also of relevance in resolving claims without resort to litigation.”⁶⁷ This further shows that any uncertainty with regard to the applicable law would also impact on the parties’ willingness to settle and/or continue with the litigation.⁶⁸ This would be particularly so in cases where the amount - at which the parties settle - does depend on the substantive law that applies to the merits of the dispute. A settlement is less likely to be reached if the claimant’s entitlement (and respectively defendant’s exposure) to damages would vary significantly under the competing sets of applicable laws. The relationship between the PIL framework and settlements/ADR in cross-border cases was clearly noted by Mrs Justice Slade:

“Where a tort is alleged, the parties will frequently seek to reach a settlement before commencing proceedings. The pre-action protocol for Personal Injury encourages this. Parties may engage in mediation. They need to know [which law] applies to the calculation of damages at issue.”⁶⁹

Although the value of the claim did not appear to be very high in *Homawoo*, the defendant – being an insurance company would have been exposed to a number of similar claims. This could explain the time and money which the defendant spent to argue this issue before the English court and CJEU. Indeed, there is a strong support for the argument that the parties’ decisions whether to embark on a dispute about the applicable law are strategically driven. As one interview respondent noted “the parties would only invest time and resources to argue the applicable law, if it would make a material difference to the resolution of the dispute.”⁷⁰ This deduction could be strengthened by an analysis of the relevant case law which indicates that the parties and their lawyers will often consider the available remedies under the different substantive laws which are potentially relevant as being applicable to the merits of the litigants’ cross-border dispute.

The disputes between the parties on PIL issues would be particularly common in cases where the PIL rules and/or the relevant institutional framework are not effectively functioning. The effectiveness of the PIL regime may be adversely affected by the inconsistent application of harmonised PIL instruments by national courts who represent different legal traditions. The problems will be amplified, if there is no institutional support for the national judges. Both set of problems could be illustrated by examining some of the English cases concerning the dichotomy between substance and procedure for PIL purposes.⁷¹ It should be noted that, traditionally, the questions in respect to assessment of damages were classified as procedural

⁶⁷ *ibid* [52].

⁶⁸ *Danov*, *supra* n 41.

⁶⁹ *Homawoo*, *supra* n 51 [46]. See also Case C-412/10, *Homawoo v GMF Assurances SA* [2011] E.C.R. I-11603

⁷⁰ *Beaumont, Danov, Trimmings and Yüksel*, *supra* n 35, 90.

⁷¹ R. Garnett, *Substance and Procedure in Private International Law* (OUP, 2012).

issues under English law.⁷² The EUPILLAR interview data appears to suggest that Article 15 of Rome II had a positive effect on English PIL⁷³ in providing more legal certainty by specifying the scope of the applicable law. On this basis, it may be concluded that the application of Rome II in England might have reduced, to an extent, the complexity of disputes on what constitutes substance and procedure when determining the parties' entitlement to damages under English PIL.⁷⁴

However, a review of the case law suggests that a level of ambiguity (largely influenced by the legal traditions in England and Wales) remains. The difficulties concerning the interpretation of Articles 1(3) and 15 of Rome II could be illustrated by making reference to the judgment of the English and Welsh High Court in *Actavis*.⁷⁵ In this case, the claimants sought declarations for non-infringement of a patent. The dispute was about the claimant's entitlement to the desired declarations. The difficulties were due to the fact that the designations of the relevant patent were France, Germany, Italy, Spain and the UK. The claimants argued that the question whether they were entitled to the desired declaratory relief was to be decided under English law because the court had to determine a procedural issue which was outside the scope of Rome II. The defendant's contra-argument was that the issue was a substantive one, and Article 15(c) had to apply. It should be noted that, after the jurisdiction had been assumed by the English courts,⁷⁶ the High Court awarded the desired legal remedies to the claimants. Although the Court of Appeal⁷⁷ set the awarded declarations aside, Lord Justice Floyd addressed the PIL issue *obiter*, holding that:

"142 [...] the negative declaration, whilst no doubt a remedy, is not a remedy which falls within (c).

143 The negative declaration is also not within (d), because it is not a measure which the court takes to prevent or terminate injury or damage, or provide compensation. Unlike an injunction to prevent infringement, it cannot be said that a characteristic of a [declaration for non-infringement] is that it prevents injury or damage. Moreover paragraph (d) is again concerned with the availability of such remedies, not the conditions which must be satisfied for their admissibility.

144 Finally, the mention of limitation periods in paragraph (h) is not a basis for suggesting that the conditions of applying for a [declaration for non-infringement] should be brought within the *lex causae*."⁷⁸

⁷² See *Harding v. Wealands* [2006] UKHL 32 (HL), para. 66–67. See more, P.R. Beaumont and Z. Tang, 'Classification of Delictual Damages—Harding v Wealands and the Rome II Regulation', 12 *Edinburgh Law Review* (2008), p. 131, 135.

⁷³ EUPILLAR – England and Wales - Transcript 19.

⁷⁴ *Harding*, *supra* n 57.

⁷⁵ *Actavis UK Ltd and others v Eli Lilly and Co* [2015] EWCA Civ 555.

⁷⁶ *Actavis Group v Eli Lilly & Co* [2012] EWHC 3316 aff'd [2013] EWCA Civ 517.

⁷⁷ *Actavis*, *supra* n 75.

⁷⁸ *Ibid* [142-4].

This case demonstrates how some ambiguous PIL rules may be interpreted by national judges who may often be influenced by their legal traditions. These issues need to be thought through when devising the UK legal landscape in relation to PIL, whilst considering whether England and Wales should remain part of Rome II.

It should be noted that the UK government intends “to incorporate into domestic law the Rome I and II instruments on choice of law and applicable law in contractual and non-contractual matters.”⁷⁹ With this in mind, another important issue, which may raise difficult interpretation issues and needs to be addressed in the course of this process, concerns the presumption that English law is the same as the foreign law. The aspect was put forward in *OPO v MLA*,⁸⁰ with Lady Justice Arden holding that:

“The first question is the effect of Article 4(1) in this case. I do not accept the submission that, even though there is no evidence as to Ruritanian law, the presumption that foreign law is the same as English law does not apply. That is a rule of evidence applied by the English courts. As such it is not affected by the Regulation. The choice of law rules laid down by Article 4 apply for the purposes set out in Article 15 of the Regulation, which does not extend to rules of evidence. Article 22 of the Regulation deals with the burden of proof but only in relation to the constituents of the tort in question. [...]”⁸¹

Although this interpretation appears to be consistent with the EU principle of national procedural autonomy,⁸² one could see some problems with it. More specifically, it could undermine the effectiveness of the EU PIL framework which is set for the national judges “to designate the same national law irrespective of the country of the court in which an action is brought.”⁸³ The limitations of the principle of national procedural autonomy in this respect should have been considered, at the very least, by the English courts when determining the parties’ entitlement to remedies in cross-border cases. The failure of the Court of Appeal judges to do so on this occasion might serve as an example of how inconsistent application of any harmonised PIL instrument may undermine the effectiveness of EU PIL. The issues re-appeared in *Lady Chritine Brownlie v Four Seasons Holdings Incorporated*.⁸⁴ In this case, Lady Justice Arden – once again without considering the limitations of the principle of national procedural autonomy - re-iterated that the presumption of English law being the same as the

⁷⁹ A future partnership paper, *supra* 10, [19].

⁸⁰ *OPO v MLA* [2014] EWCA Civ 1277.

⁸¹ *Ibid* [108].

⁸² Case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 1989 [5]. See also: Case C-261/95 *Palmisani* [1997] ECR I-4025 [27]; Joined Cases C-295/04-298/04 *Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] 5 CMLR 17. See also Case C-126/97 *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECR I-3055 [43]–[48]. See more: F Becker, ‘Application of Community law by Member States’ public authorities: between autonomy and effectiveness’ (2007) 44 *CML Rev* 1035.

⁸³ Recital 6 of Rome II.

⁸⁴ *Lady Chritine Brownlie v Four Seasons Holdings Incorporated* [2015] EWCA Civ 665.

foreign law must be regarded as a rule of evidence and, as a result, outside of the scope of Rome II.

Moreover, the *Lady Brownlie* case exposed another major weakness of the current EU PIL framework which is to be used, in order to determine parties' entitlement to remedies in cross-border cases before the English courts. In order to assume jurisdiction, the courts *inter alia* had to ascertain where the direct damage was sustained by Lady Brownlie who had been involved in a traffic accident that occurred in Egypt on 3rd January 2010. As a result of the accident, Professor Sir Ian Brownlie and his daughter, Rebecca, died. One preliminary issue for the courts to consider was whether Lady Brownlie was entitled to damages under the English Fatal Accidents Act 1976 (FAA76). This posed *inter alia* the question about its applicability with regard to an accident which occurred abroad. Lady Justice Arden held that:

“[...]To obtain an award of damages under the FAA76, [...] Lady Brownlie has to show not merely that the appellant was liable to Sir Ian Brownlie, but also that she was dependent on the deceased.

[...] Her claim for damages is not a derivative claim in the way that in *Dumez* the shareholder's claim for reflective loss was derived from the subsidiary's loss. A reflective loss claim simply mirrors the loss of the original victim: dependency does not have to be shown.

[...] Lady Brownlie's FAA76 claim is not properly described as for consequential loss. It is for an independent loss.

87 *If I am correct in my conclusion regarding Lady Brownlie's FAA76 claim*, she has established a good arguable case that English law applies to it. It is unnecessary to consider Article 4(3) of Rome II in relation to this claim.”⁸⁵

It is difficult to see why the FAA76 was considered applicable in the first place, if the accident occurred in Egypt. Although, the language of the judgments (as outlined above) clearly shows that Lady Justice Arden was not entirely sure what the correct interpretation is, her Ladyship refused to exercise a discretion and make a reference to the CJEU by submitting that this procedure would “involve a considerable delay”⁸⁶ There is no doubt that suing in England was important for the claimant to obtain an effective legal remedy. The outcome appears to be fair and just in protecting the weaker party who was dependant on the deceased, That said, the interpretation of PIL rules seems to fly in the face of Rome II which strongly suggests that the direct damage occurred in Egypt, and – as a result - Egyptian law should have been applied to determine the remedies which the claimant would be entitled to recover.⁸⁷

A case for an institutional reform may be strengthened by noting that, despite the EU policy-makers' objective to enhance the legal certainty with regard to the applicable law –

⁸⁵ Ibid [86-87] – the emphasis added by the author.

⁸⁶ Ibid [92].

⁸⁷ Case C-350/14 *Florin Lazar v Allianz SpA* ECLI:EU:C:2015:802, discussed further by P. Beaumont and B. Yüksel, ‘Cross-border Civil and Commercial Disputes Before the Court of Justice of the European Union’ in Beaumont et al, *supra* n 11, 499, 582.

through harmonisation of PIL rules,⁸⁸ there may often be gaps in the legal framework which could be exploited by the parties in disputes with an international element. This means that the national judges' interpretation of any harmonised EU PIL instrument could make a difference to the law which would be ascertained as applicable. This would in turn directly impact on the substantive outcome of the dispute. The point could be illustrated by the decision of the English court in the *Print Concept*⁸⁹ case which was decided under the Rome Convention. In this case, the real issue was whether the claimant was entitled to a legal remedy, but formal dispute between the parties was about the interpretation of the Rome Convention to a distribution agreement (which contained no choice of law agreement). The problem - which was seemingly driving parties' litigation strategies - was summarised in the first paragraph of the judgment rendered by Lord Justice Longmore who stated that:

“The answer to the [question which law governs the merits of the dispute] is said to be of importance because the contract has now terminated and, if German law governs the contract, GEW will have to pay an indemnity assessed as a proportion of the average contractual turnover while the contract lasted, whereas no such indemnity is said to be payable if the contract is governed by English law.”⁹⁰

In other words, the claimant in *Print Concept* would have only been entitled to a remedy, if German law had been applicable. On the contrary, if English law had to be applied, the claimant not only would be entitled to no remedy, but also would have to pay the defendant's litigation costs in line with the cost-shifting rules in England and Wales. This meant that the difference between the substantive outcomes under German law and, respectively, English law was so stark that the parties would be prepared to exploit any ambiguity in the PIL framework with a view to winning the dispute about the applicable law because a decision on the PIL issue would have pre-determined the outcome of the whole cross-border case.

The deduction that the parties' entitlement to a remedy, which is to be ascertained by the governing law, is a central issue that shapes the parties' strategies could be further sustained by an analysis of the claimants' tactics in cross-border matrimonial disputes before the English courts. In the *S v S*⁹¹ case, the wife - being the financially weaker party - was determined to issue proceeding in London where the English judges normally apply English law. This would have ensured a higher level of compensation for her, on this occasion. On the contrary, the husband was strongly-minded to contest the jurisdiction of the English courts and sue in France.

⁸⁸ See Rome I and Rome II.

⁸⁹ *Print Concept GmbH v GEW (EC) Ltd* [2001] EWCA Civ 352.

⁹⁰ *Ibid* [1].

⁹¹ *S v S* [2014] EWHC 3613 (Fam). See also: Case C-489/14 *A v B* EU:C:2015:654.

What seemingly looked like a heavy jurisdictional battle was largely a dispute about the amount of the wife's financial remedy/compensation.

Mr Justice Mostyn was no doubt right to criticise Brussels IIa's "iron inflexibility"⁹² which is being exploited by "the parties in divorce cases [who often] engage in [...] extensive, expensive and futile manoeuvres".⁹³ Whilst undoubtedly the court-first-seised rule needs to be reconsidered by the EU legislators,⁹⁴ one could equally criticise the inflexibility of the English PIL which does not allow English courts to apply foreign law in cross-border matrimonial proceedings. Due to this, it is a fairly safe prediction that, in the post-Brexit context, the jurisdictional battles may well continue, with the parties having long-lasting *forum non-conveniens* disputes in cross-border disputes before the English courts.

Could *Brexit* be an opportunity for the UK policy-makers to adopt "special substantive rules for multistate problems,"⁹⁵ which would allow English judges to take into account foreign laws when determining the financially weaker parties' entitlement to remedies in cross-border disputes? In a similar vein, a reform could allow national judges to take account of foreign mandatory rules (even if they were in conflict with the UK PIL rules), provided that the foreign legal order has a legitimate interest to regulate the relevant cross-border activities.⁹⁶ Such a reform could reduce the situations where the English and Welsh judges apply their own law (ie *lex fori*) when determining the rights and obligations of the parties. This may promote justice in cross-border cases by ensuring that an appropriate set of laws applies irrespective of the place where the parties litigate, whilst defeating parties' attempts to engage in *forum shopping*.

The need for more flexibility for the judges to dispense justice when determining the rights and obligations of the parties in cross-border cases is yet another point which must be considered in the course of the post-*Brexit* review of the PIL framework. Giving national judges more flexibility when ascertaining the applicable law in appropriate cross-border disputes might be worth considering in this context. Gathering some relevant empirical data could help the UK policy-makers decide how to shape the post-*Brexit* legal landscape in relation to PIL.

⁹² *S v S*, *supra* n 91 [17]

⁹³ *Ibid* [17]

⁹⁴ Beaumont, Danov, Trimmings and Yüksel, *supra* n 30.

⁹⁵ A T von Mehren, 'Special Substantive Rules for Multistate Problems: Their role and significance in contemporary choice of law methodology' (1974-1975) *Harvard Law Review* 347.

⁹⁶ *Ibid*. See also: M. Danov, 'Global Competition Law Framework: A Private International Law Solution Needed' (2016) 12 *Journal of Private International Law* 77-105

4 Access to a Legal Remedy: Where to Sue and When/Whether to Settle

There would be two elements of access to remedies in cross-border cases. First, it would be particularly important for the parties to have their disputes heard and determined swiftly. Secondly, once a final judgment is rendered, the parties would be strongminded to have their rights recognised and enforced effectively in other jurisdictions. The impact of *Brexit* on both elements must be carefully considered.

The *S v S* case⁹⁷ (which was already discussed) indicates the substantive law advantages for the claimant may reflexively bring out disadvantages for the defendant. Lord Justice Thorpe has identified the issues in matrimonial disputes by stating:

“Of course some European jurisdictions will be regarded as a happy land for an applicant or, put the other way, a bad land for a respondent. No doubt this wife would have preferred her financial provision to have been determined by a London judge.”⁹⁸

In other words, if the English courts are a venue of choice for the financially weaker parties, then they would not be the preferred adjudicators for their opponents which means that some other courts would be more preferable for the financially stronger parties. This may well explain the rationale behind the heavily contested jurisdictional battles in cross-border matrimonial disputes in England and Wales. One might go a step further and submit that proceedings before an effective and efficient national court will increase the defendant’s exposure to damages.

The pre-*Brexit* data indicates that, once a party to a cross-border relationship has decided that he would be entitled to a legal remedy, the probability to access the desired remedy would be the most important consideration impacting on the claimant’s decision where to sue in cross-border cases. In the latter context, the applicable set/s of procedural and evidential rules, which may vary - reflecting the different legal traditions across the EU, could be the most important variable to be considered as part of the forum selection process. More importantly, the 2017 EU Justice Scoreboard⁹⁹ indicates that some jurisdictions may be more efficient than others. Furthermore, it is well established that the national judges’ qualifications and experience may well differ across the EU¹⁰⁰ which reflects the existing level of diversity in the process of administration of justice¹⁰¹ and the recruitment process for national adjudicators in different EU Member States. This means that issuing proceedings at one place rather than another may

⁹⁷ *S v S*, *supra* n 91.

⁹⁸ *Prazic v Prazic* [2006] EWCA Civ 497 [26].

⁹⁹ COM(2017) 167 final.

¹⁰⁰ See more: Danov, *supra* n 41.

¹⁰¹ See the 2017 EU Justice Scoreboard Score Board COM(2017) 167 final.

impact on the outcome of the case¹⁰² which may explain why well advised claimants might be highly selective when deciding where to bring their cross-border claims.

There is a strong case that a higher value of the remedies - which a party is entitled to recover - will increase the likelihood for such a party to issue proceedings before an effective and efficient national court, in order to access his desired legal remedy within a reasonable time.¹⁰³ Given the cross-border nature of the business activities, claimants with high value claims and deep pockets (or ready access to finance which may be provided by one of the various litigation funders) may often have a choice where to issue the proceedings, considering the relevant applicable procedural laws and the overall effectiveness and efficiency of the particular judicial system.¹⁰⁴ As a result, some EU jurisdictions appear to be continuously attracting more complex cross-border cases than others. This has had an impact on the ability of the lawyers in these jurisdictions to appropriately handle cross-border cases.

The English judges, barristers and solicitors have a renowned reputation for dealing with difficult cross-border disputes, applying the different EU PIL instruments. England and Wales has gradually established itself as a venue of choice for claimants with high value cross-border disputes.¹⁰⁵ The link between the place of litigation and private parties' access to remedies might be even more of a factor in cases involving non-EU parties. The point was put forward in a recent jurisdictional battle, which involved multiple claimants from Zambia, whose access to legal remedies was dependant on establishing jurisdiction in England. In this case, Mr Justice Coulson¹⁰⁶ had no doubt that having the dispute heard and determined in England was central to claimants' access to remedies. The High Court judge's view was reiterated by the Court of Appeal, with Lord Justice Simon holding: "There must come a time when access to justice in this type of case will not be achieved by exporting cases, but by the availability of local lawyers, experts, and sufficient funding to enable the cases to be tried locally."

The fact that parties with strong (or relatively strong) claims may be willing to issue proceedings in jurisdictions where judges could effectively and efficiently hear and determine their cross-border dispute would impact on the tactics/behaviour of their opponents. In particular, the parties against whom a strong (or relatively strong) claim is to be issued might have incentives to seise a national court which is less than effective and efficient in handling cross-border disputes, challenging the jurisdiction of the court seised by the other party and

¹⁰² *Wall v Mutuelle de Poitiers Assurances* [2013] EWHC 53 (QB).

¹⁰³ *Beaumont, Danov, Trimmings and Yuksel*, *supra* n 35.

¹⁰⁴ *Danov and Beaumont*, *supra* n 5. See also: *Beaumont et al*, *supra* n 11.

¹⁰⁵ *Lein*, *supra* n 20.

¹⁰⁶ *Vedanta* EWHC, *supra* n 7, [198].

hoping to adversely affect his expectations about the outcome of the case. Therefore, a level of tactical manoeuvring may be displayed by the opponents of the parties with strong (and relatively strong) claims.

Whilst the issues concerning the parties' strategic behaviour in cross-border matrimonial disputes were already highlighted above, it should be noted that the picture is not very different in civil and commercial disputes before the English courts. It appears that the parties have disputed the competence of the English court to hear and determine their disputes in over 80% of the cases in EUPILLAR datasets.¹⁰⁷ Particularly difficult issues may arise in high-value disputes, involving sophisticated parties because a defendant faced with a high value claim would typically be less prone to economise on litigation costs, exploiting any uncertainty in the interpretation of the PIL with a view to gaining a negotiating advantage.¹⁰⁸ Due to the increasingly complex nature of the cross-border business activities (or relationships between individuals), there could be a level of ambiguity as to how the jurisdictional rules of Brussels Ia (or Brussels IIa) would be interpreted.¹⁰⁹ The knowledge of legal advisers combined with the higher level of complexity which characterises the disputes with an international element may allow the parties to devise litigation strategies which exploit the ambiguities and/or the weaknesses of the PIL rules.¹¹⁰ Indeed, the stronger the claim and greater its value for the claimant, the higher the incentives for the defendant to challenge the jurisdiction with a view to deflating the claimants' expectations about the outcome of the dispute which could have an impact on his access to legal remedies.¹¹¹

EUPILLAR did not merely detect the fact that many of the cross-border cases (as well as the domestic cases) settle in England and Wales, but went further in trying to identify certain aspects of the PIL framework which could be exploited by the parties to impact on their opponents' expectations about the outcome of the dispute. It seems that the various jurisdictional challenges, which may or may not involve parallel proceedings elsewhere, appear to be playing an important role in this context. There is a case that, even if a jurisdictional challenge was wholly or partially unsuccessful, this may cause a level of delay which might make the claimant more willing to make a compromise and settle, in order to put the dispute behind him.¹¹² More importantly, a successful jurisdictional challenge might significantly

¹⁰⁷ Beaumont, Danov, Trimmings and Yüksel, *supra* n 35.

¹⁰⁸ *Ibid.* See also: Danov, *supra* n 41; Danov and Beaumont, *supra* n 5.

¹⁰⁹ Beaumont, Danov, Trimmings and Yüksel, *supra* n 35.

¹¹⁰ E.g. Case C-352/13, *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Akzo Nobel NV, Solvay SA/NV, Kemira Oyj, FMC Foret SA* – Judgment of the Court (Fourth Chamber), delivered on 21st May 2015.

¹¹¹ Danov and Bariatti, *supra* n 11.

¹¹² Danov and Bariatti, *supra* n 11; Danov and Beaumont, *supra* n 11.

impact on the willingness of the claimant to continue litigating elsewhere. This means that they could give up on a claim or settle by agreeing on a significant discount. This is an important aspect which needs to be considered when assessing the *Brexit* impact on the parties' access to justice because the EUPILLAR civil and commercial dataset indicates that the defendants' jurisdictional challenges were wholly or partly successful in over 30% of the relevant cases under the EU PIL framework.¹¹³

Therefore, the EUPILLAR data appears to demonstrate how strategic litigants could exploit the ambiguity of the current EU PIL framework and the deficiencies of some of the EU Member States' judicial systems in order to adversely affect their opponents' access to legal remedies in cross-border cases.¹¹⁴ On this basis, one hypothesis may be that any fresh legal uncertainty arising out of the UK decision to leave the EU could be exploited by private parties in cross-border cases. Although the EU PIL framework is not without its weaknesses,¹¹⁵ it is now well established that one of the main successes of the EU PIL framework is that it has facilitated the recognition and enforcement of foreign judgments¹¹⁶ by relying "on the principle of mutual trust".¹¹⁷

One potential consequence of *Brexit* would be non-application of Brussels Ia and IIa in the UK which might mean that there would be a higher level of legal uncertainty about the enforceability of an English judgment in the EU Member States. This might depreciate the value of the English and Welsh courts' judgments which may not be circulating freely across the EU post-Brexit. This could in turn impact on the litigants' decisions whether to sue in England. New empirical data is much needed to test all these hypotheses, considering how a change in the legal landscape in relation to PIL (and potential/actual non-application of Brussels I and/or II) would impact on the attractiveness of the English courts and the relevant settlement dynamics.

¹¹³ Beaumont, Danov, Trimmings and Yüksel, *supra* n 35.

¹¹⁴ Danov and Bariatti, *supra* n 11; Danov and Beaumont, *supra* n 11.

¹¹⁵ Beaumont et al, *supra* n 11.

¹¹⁶ Ibid. See also: B Hess, T Pfeiffer and P Schlosser, *Study JLS/C4/2005/03 - Report on the Application of Regulation Brussels I in the Member States* (Heidelberg, 2007)

http://ec.europa.eu/civiljustice/news/docs/study_application_brussels_1_en.pdf [52–53].

¹¹⁷ Recital 21 to Brussels IIa. See also: Recital 26 to Brussels Ia.

5 Governance Aspects: The legal landscape in relation to PIL and *Brexit* Implications

The EU experience shows that effective and efficient adjudication service providers are highly likely to benefit from a process of adjudicatory competition which may be promoted by a level of enhanced judicial cooperation. London has clearly specialised in providing cross-border legal services.¹¹⁸ That said, the UK decision to leave the EU might be seen as an example demonstrating that any system for judicial cooperation could be susceptible to political risks. This signifies that the questions about various governance aspects of cross-border litigation and optimal policy-options must be addressed head-on by the policy-makers.¹¹⁹ The issues which need to be considered, as part of this process, could be identified by examining the pre-*Brexit* data which should be used as a foundation for any analysis of the future post-*Brexit* data.

The EUPILLAR project¹²⁰ shows that any deficiencies in the functioning of certain national judicial systems could have negative spill-over effects through the agreed mechanism for judicial co-operation among different legal systems in cross-border cases. For example, the EU PIL framework may be less than effective if the judges in some EU Member States have insufficient experience in applying EU PIL in so far as any judgment misapplying EU PIL rules may be circulating freely across the EU. Similarly, private parties' access to remedies may be impaired by the various deficiencies in the way the national judicial systems are functioning in the EU Member States,¹²¹ where the problems are being caused by the excessive delay of the courts to decide on jurisdiction.¹²²

In other words, a major finding of the EUPILLAR project is that a level of judicial co-operation without an effectively functioning institutional framework in place means that any deficiencies in the functioning of a particular national judicial system may be exported (through a PIL instrument based on the principle of mutual trust), impairing (rather than facilitating) private parties' access to remedies in cross-border cases. The court-first-seised rule may create incentives for parties to issue first before courts which are less than efficient in progressing the dispute to a final judgment.¹²³ This would directly impact on their opponents expectations

¹¹⁸ BIICL Report, *supra* n 105.

¹¹⁹ TheCityUK, 'The Impact of Brexit on the UK-Based Legal Sector' – December 2016 – Appendix 3 < <https://www.thecityuk.com/assets/2016/Reports-PDF/The-impact-of-Brexit-on-the-UK-based-legal-services-sector.pdf> >.

¹²⁰ Beaumont et al, *supra* n 11.

¹²¹ E.g. Chapters 8 (Italy) and 18 (Greece) in Beaumont et al, *supra* n 11.

¹²² Case C-116/02, *Erich Gasser v MISAT* [2003] ECR I-14693.

¹²³ Beaumont, Danov, Trimmings and Yüksel, *supra* n 35; Danov and Beaumont, *supra* n 5.

about the outcome of the case.¹²⁴ Since the Brussels Ia and IIa are heavily reliant on the court-first-seised rule¹²⁵ with a view to avoiding concurrent proceedings, the strategic litigants may well become selective when deciding where to bring their cross-border claims.¹²⁶

Problems may arise in cases where there is no exclusive choice-of-court agreement between parties. The inflexibility of the EU PIL instruments to allow, in such cases, for the relevant cross-border civil and commercial proceedings (or cross-border matrimonial proceedings) to be transferred to an effectively functioning and appropriate jurisdiction may be a real issue which may occasionally encourage abusive litigation tactics,¹²⁷ impeding litigants' access to effective remedies in cross-border cases. The rigidity of the court-first-seised rule, under the current EU PIL framework, means that the judges may have no effective tools to defeat abusive litigation tactics under the current EU PIL regime. If the more appropriate court to hear and determine a cross-border dispute was second seised within the meaning of Brussels Ia and IIa, then this court must stay its proceeding irrespective of the fact that it might take more than 5 years for the court-first-seised to render a judgment.¹²⁸

A real issue is that, even if it is clear that one of the parties is engaging in abusive litigation tactics, the domestic procedural tools (eg anti-suit injunctions) set to defeat such strategies would not be available. This would be so despite the silence of the EU PIL Regulations on this issue (ie the unavailability of any EU PIL measure specifically designated to defeat abusive litigation tactics) and the principle of national procedural autonomy which could have been interpreted as allowing national judges to rely upon their domestic procedural devices, avoiding abusive litigation tactics and facilitating access to justice. In other words, an unintended consequence of the current EU PIL framework is that (whilst promoting a level of adjudication competition through the court-first-seised rule) it reduces the regulatory competition for domestic procedural devices which are set to defeat abusive litigation tactics. In so far as the principle of mutual trust may be used to neutralise various domestic mechanisms (addressing abusive litigation tactics), one could regard this type of "harmonisation [...] as anti-competitive".¹²⁹

¹²⁴ Danov and Barriati, *supra* n 11.

¹²⁵ One major exception is Article 31(2) of Brussels Ia, which only applies in case where there is an exclusive choice-of-court agreement between the parties and states that: "any court 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."

¹²⁶ Beaumont, Danov, Trimmings and Yüksel, *supra* n 35.

¹²⁷ See Recital 22 of Brussels Ia.

¹²⁸ See Danov and Beaumont, *supra* n 5.

¹²⁹ S. Weatherill, 'Why harmonise?' in T. Tridimas and P. Nebbia (Eds), *European Union Law for the Twenty-First Century: Rethinking the New Legal Order*, Vol. 2, (Hart Publishing, 2004) 11, 14.

The unavailability of any EU PIL measure/s specifically designated to defeat abusive litigation tactics in cases where there is no exclusive choice-of-court agreement,¹³⁰ could be exploited by strategic parties to generate a delay with a view to impacting on their opponents' expectations about the outcome of the case which would have a bearing on any ADR/settlement negotiations. Therefore, continuous harmonisation without setting up an appropriate institutional framework could become counter-productive in making the EU civil justice system less than effective, encouraging abusive litigation tactics. This could adversely affect private parties' effective access to legal remedies in cross-border cases. These issues would consistently undermine the role of litigation in the EU, increasing the perception of arbitration as a more appropriate mode for transnational dispute resolution.¹³¹

Therefore, it is as important as ever for the UK to consider whether it should remain an important part of the EU PIL framework, if it has no say (or less of a say) on how the EU PIL institutional framework should be reformed with a view to facilitating private parties' access to remedies in cross-border cases. On the one hand, the EU experience demonstrates that the harmonisation of EU PIL brings some advantages in terms of a higher level of co-ordination of judicial proceedings and a greater degree of certainty for enforcement of foreign judgments. On the other hand, there are real issues concerning the administration of justice in cross-border disputes with an international element within the EU which must be addressed head-on by EU/UK policy-makers. There is a strong case that the effectiveness of the EU PIL framework could be adversely affected by the inability of the EU Member States to agree upon a well-functioning institutional architecture which addresses the deficiencies of some national judicial systems.

It is a significant issue that the adopted PIL instruments may often be a result of a compromise achieved at EU level.¹³² The stakes for some of the EU Member States, when it comes to negotiations of PIL instruments, could be high – because, due to the level of diversity in the EU, any change in the EU PIL regime could result in higher implementation costs in some jurisdictions. The 'societal costs'¹³³ would be particularly high if the adopted PIL instruments contain rules that are significantly different from the relevant PIL rules (which are reflecting their legal traditions) in some EU Member States PIL. Long-lasting negotiations between the EU Member States when PIL instruments are being adopted show that PIL is not

¹³⁰ See Recital 22 of Brussels Ia.

¹³¹ W. Matli and T. Dietz, *International Arbitration and Global Governance* (OUP, Oxford 2014).

¹³² P. Beaumont and P. McEleavy, *Anton's Private International Law* (3rd edn, SULI 2011) p 71.

¹³³ J Bronsteen, 'Some Thoughts About the Economics of Settlement' (2009) 78 *Fordham Law Review* 1129, 1133.

immune from the political risks which may result from the inability of the EU Member States to agree upon the approval of certain mechanisms and/or rules. All these issues might re-appear in the course of the *Brexit* negotiations.

The difficulties may be exacerbated, if the problems are not clearly identified by UK/EU policy-makers. The UK decision to leave the EU will have important implications in the area of PIL, adversely affecting private parties' access to remedies in cross-border cases in the UK and EU. In particular, the UK could potentially lose its access to the most developed system for judicial cooperation which has been developed under the auspices of the European Union since the adoption of the Brussels Convention 1968 (i.e. over a period of nearly 50 years). But, some of the academics in England appear to be underestimating the scale of the problems for litigants and legal practitioners. Fentiman submitting that "a key aspect [...] is what law governs the substance of the dispute. It is still the case—and I cannot see rationally that this would be affected by Brexit—that people want and will want English substantive law [...]"¹³⁴ to apply to the merits of their cross-border disputes. Briggs has taken a similar view, noting:

“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[...] 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. [...]"¹³⁵

The problem is that such submissions/assumptions may not be quite precise because, even if Rome I and II were incorporated into English law post-*Brexit*, the choice-of-law rules will only indicate which law would apply to the merits. If English law were to apply, then the Draft European Union (Withdrawal) Bill¹³⁶ indicates that this might not be the same as it is now (after all, EU law forms part of English law at present, but it appears this will gradually change¹³⁷). The point was put forward by Lord Thomas when giving evidence to the UK

¹³⁴ Fentiman, Oral Evidence', *supra* n 19, Response to Question 3. See also: J Harris, 'Brexit - choice of law, jurisdiction and enforcement' < <http://www.nortonrosefulbright.com/knowledge/videos/143504/brexit-choice-of-law-jurisdiction-and-enforcement> >.

¹³⁵ Briggs, *supra* n 19, emphasis added by the author. See also: Briggs, *supra* n 6, p 29.

¹³⁶ European Union (Withdrawal) Bill < <https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/18005.pdf> >

¹³⁷ HM Government, 'The United Kingdom's exit from and new partnership with the European Union' < https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/589191/The_United_Kingdoms_exit_from_and_partnership_with_the_EU_Web.pdf > [1.3].

Parliament's EU Justice Sub-Committee.¹³⁸ In particular, his Lordship appeared to suggest that, bearing in mind the evolving nature of EU law, it is to be carefully assessed how any potential variation between the UK Supreme Court jurisprudence and the CJEU jurisprudence would impact on the parties' willingness to choose English law.¹³⁹ The problems could be exacerbated by the fact that Section 6(2) of the Draft European Union (Withdrawal) Bill states that "A court or tribunal need not have regard to anything done on or after exit day by the European Court, another EU entity or the EU but *may do so if it considers it appropriate to do so*."¹⁴⁰

Indeed, *Brexit* might have an impact on the attractiveness of London as a venue of choice in some EU law related disputes.¹⁴¹ The most obvious example is the follow-on cross-border EU competition law claims for damages which are normally preceded by a decision of the European Commission establishing an EU competition law infringement.¹⁴² Equally, difficult issues, *post-Brexit*, may need to be considered in the context of the recognition and enforcement of an English judgment applying EU competition law. Could the losing party in the English proceedings delay (or even ask a German court to deny) the recognition and enforcement of an English judgment because it, allegedly, misapplied EU competition law (which were to apply under the relevant PIL rules), *post-Brexit*? A carefully designed model for data analysis and further empirical data are much needed to assess the *potential* and *actual* impact of *Brexit* in the area of cross-border litigation.

A new data is needed to find out what the impact of these changes will be on the pattern of cross-border litigation in England. The need for further research can be strengthened by the views expressed by the English Bar Council Brexit Working Group¹⁴³ which suggest that "some market participants might consider moving away from English law as the governing law of asset purchase and sale arrangements in securitisation".¹⁴⁴ This might impact on the parties' *forum*-selection process, with the Bar Council noting that:

¹³⁸ The Rt Hon. Lord Hope of Craighead (Convener of the Crossbench Peers and Former Deputy President of the UK Supreme Court), The Rt Hon Lord Neuberger of Abbotsbury (Former President of the UK Supreme Court), The Rt Hon The Lord Thomas of Cwmgiedd (Former Lord Chief Justice of England and Wales) and The Rt Hon Sir Konrad Schiemann (Former judge at the Court of Justice of the European Union), 'Oral Evidence' - Brexit: the jurisdiction of the CJEU, EU Justice Sub-Committee on Tuesday 21 November 2017 – 11:08 am - 12.44pm, < <http://parliamentlive.tv/Event/Index/f805e3e9-ffe9-475c-b3fb-f880fafc8212> >.

¹³⁹ Lord Thomas, *supra* n 138.

¹⁴⁰ Emphasis added by the author. See more: Lord Neuberger, *supra* n 138.

¹⁴¹ It is well established that England and Wales is one of the dominant jurisdictions in the area of competition litigation at present. M. Danov, F. Becker and P. Beaumont (eds), *Cross-Border EU Competition Law Actions* (Hart Publishing, Oxford 2013).

¹⁴² Bar Council Brexit Working Group, 'Paper 9: Brexit and competition law' 'in *The Brexit Papers* < https://www.barcouncil.org.uk/media/508513/the_brexit_papers.pdf >.

¹⁴³ Bar Council Brexit Working Group, Paper 1: Jurisdiction and enforcement of judgments' in *The Brexit Papers*, *supra* n 142.

¹⁴⁴ *Ibid* [17].

“There is an increased risk that commercial parties’ negotiated and contractually agreed English jurisdiction clauses will not be respected by the courts in Member States and that the parties are more likely to become embroiled in proceedings in a court other than the court that they have chosen. This is demonstrated by the survey conducted by members of Simmons & Simmons’ offices in Germany, France, Italy, Spain and the Netherlands as to their courts’ approach to English jurisdiction clauses post-Brexit which revealed that over 50% of clients were considering moving away from English choice of law or jurisdiction clauses.”¹⁴⁵

This indicates that some of the remaining EU Member States’ courts may benefit from the process of adjudicatory competition by attracting some claims which would have otherwise been litigated in London.

That said, there are some important issues which must be addressed in the EU. *Brexit* may reduce the overall effectiveness of the EU Civil Justice system because, without appropriate arrangements being put in place, the EU might no longer be able to rely on the English courts and some of the world leading judges¹⁴⁶ to dispense justice in cross-border cases within the Union. The high level of complexity which characterises the contemporary disputes with an international element leaves no doubt that the English legal practitioners play an important role in facilitating private parties’ access to justice in the EU. Nonetheless, Hess and Requejo-Isidro have submitted that:

“From the European perspective, there is now a need to carefully evaluate the benefits of a bilateral agreement with the United Kingdom on issues of private international law. 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 & arbitration. Examples in this respect are The Netherlands and Sweden. [...] there might be much more interest on the English side in negotiating with the Union than the other way around.”¹⁴⁷

It is alarming that some of the leading PIL academics are more concerned with the impact of *Brexit* on the market for cross-border legal/litigation services (and process of competition between various service providers) rather than with the impact on access to justice in cross-border cases. In line with the approach taken by Hess and Requejo-Isidro, Merrett submits:

“It is a competitive market [for litigation services]. Singapore is actively competing for business, for example, and within Europe the Dutch courts are developing a specialty in collective action and redress. However, we are such a long way ahead at the moment that it is not much of a threat. The other thing to remember is that there is a disadvantage in Europe because their judgments will not be automatically enforceable in England. That will be a disadvantage for the other European jurisdictions trying to compete with us.”¹⁴⁸

¹⁴⁵ Ibid [14].

¹⁴⁶ Lein, *supra* n 20.

¹⁴⁷ B Hess and M Requejo-Isidro, ‘Brexit – Immediate Consequences on the London Judicial Market’ < <http://conflictoflaws.net/2016/brexit-immediate-consequences-on-the-london-judicial-market/> > emphasis added by the author.

¹⁴⁸ Merrett, ‘Oral Evidence’, *supra* n 19, Response to Question 3.

But, with respect, all these views appear to be underestimating the scale of the problem for a significant number of businesses and individuals who seem to be making a recourse to the English courts when seeking legal remedies in cross-border cases.¹⁴⁹ In particular, *Brexit* may bring some fresh legal uncertainty because any change in the legal landscape may generate a level of ambiguity with regard to issues of jurisdiction, choice-of-law, recognition and enforcement of foreign judgments and, more importantly, rights and obligation of the parties in cross-border cases.

Post-*Brexit* some litigants may adjust their strategies to reflect any such fresh legal uncertainty which would inflate cross-border litigation risks and costs. Both issues of jurisdiction and applicable substantive law/s may be subject to heated debates (ie higher level of uncertainty and costs) in the post-*Brexit* era which could impair private parties' access to justice in cross-border cases. In particular, the individuals and businesses that were reliant on cross-border adjudication services offered by English courts and law firms may have to cope with higher litigation risks which may adversely affect the cross-border economic activities within the EU, increasing the costs for businesses that are active in different Member States. It is a relatively safe assumption that the higher costs will be passed onto the end consumers (adversely affecting consumers' welfare across the EU).

Therefore, without an appropriate level of cooperation between the UK and EU policy-makers, there would inevitably be major implications of *Brexit* for the administration of justice in cross-border cases in the UK and EU. Indeed, if the existing data¹⁵⁰ overwhelmingly suggests that London is one of the leading litigation centres in the EU, then the UK withdrawal from the EU PIL framework will have a significant impact on the private parties' access to legal remedies in cross-border cases within the EU. In particular, a level of delay and higher litigation costs may have an adverse effect on one of the parties' (or even on both parties') willingness to initiate legal proceedings or continue with the process of litigation.

6 Setting the Post-Brexit Research Agenda in PIL

The access to justice in cross-border cases is becoming a real issue, which policy-makers across the Globe would need to address head-on. The need for an enhanced co-operation between UK/EU policy-makers, who should work together to set up the institutional framework in relation to PIL, could be strengthened by pointing out the increasing complexity of the disputes

¹⁴⁹ See Pilich, *supra* n 12. N Hatzimihail, 'Brexit – the view from Cyprus' (2017) *GPR Zeitschrift für das Privatrecht der Europäischen Union* 209.

¹⁵⁰ Lein, *supra* n 20. TheCityUK, *supra* n 119.

arising out of business relationships with an international element. An example illustrating this is a recent jurisdictional dispute in a case involving environmental pollution in Africa. In this case, the corporate structure of the Shell Group of companies had to be considered with a view to determining whether the English courts should assume jurisdiction. As a part of the fact-finding process, it was noted that “[w]ithin the corporate family of Shell companies, there are 1367 different companies which are located in 101 different countries.”¹⁵¹ Indeed, there appear to be some very complex issues concerning the administration of justice in relation to cross-border business activities, which raise issues about the liability of multinational groups of companies in cases where a mass harm has been caused across the EU (or across the Globe).

PIL rules which provide for an appropriate level of judicial cooperation between diverse national legal systems would be central to the creation of an effectively functioning PIL regime that facilitates access to justice in cross-border cases. The territorial competence of national policy-makers’ regulatory powers makes it increasingly difficult for them to create a legal landscape for cross-border cases which would have pan-European and/or global implications. There is a case for the policy-makers to act and agree upon a new model of judicial cooperation to apply between the EU and UK in a post-*Brexit* era.¹⁵² This poses the question: What is an appropriate (and/or) optimal level of judicial cooperation which the EU/UK policy-makers should aim to achieve *post-Brexit*?

The real issue for the UK policy-makers is how to facilitate private parties’ effective access to remedies in cross-border cases in the post-*Brexit* era, whilst leaving the most advanced system for a regional judicial co-operation and deciding on any alternative arrangements which should be made with the EU in relation to PIL. There could be an adverse impact on access to justice in cross-border cases before the English courts. The relevant issues should be clearly identified by analysing newly gathered empirical data. As part of this process, the PIL scholars should carefully consider how a change in the legal landscape will impact on the triangular relationship between the rules of jurisdiction and choice-of-law (ie PIL rules shaping litigants’ strategies) and the parties’ access to their desired legal remedies in cross-border cases (including the possibility to have the rendered judgment recognised and enforced abroad which might potentially impact on the forum selection process). In this context, the policy-makers should consider what lessons could be learnt from their experience with the EU PIL framework (i.e. the most advanced regional framework for judicial co-operation).

¹⁵¹ *His Royal Highness Emere Godwin Bebe Okpabi and Others v Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd* [2017] EWHC 89 (TCC) [82].

¹⁵² A future partnership paper, *supra* 10, [25].

Once the issues (impeding private parties' effective access to legal remedies in the post-*Brexit* era) have been identified, it will be possible to take an informed view about the optimal policy option/s which should be pursued in developing the legal landscape in relation to PIL. The EU experience has shown that setting up an effectively functioning PIL framework presupposes an appropriate institutional architecture which allows national judges, whilst dealing with any abusive litigation tactics, to swiftly establish jurisdiction and ascertain applicable law in cross-border cases. In order for the policy-makers to take an informed view on how the post-*Brexit* legal landscape in relation to PIL should be designed, they must consider how a change in the legal landscape would shape the litigants' strategies, assessing the effect it has on ADR/settlement negotiations (and private parties' access to remedies). This should allow the EU/UK policy-makers to appropriately shape the EU/UK legal landscape in relation to PIL post-*Brexit*, whilst taking a lead in developing the global landscape.