CROSS-BORDER LITIGATION

NEW DATA, INITIAL BREXIT IMPLICATIONS IN ENGLAND AND WALES AND LONG-TERM POLICY CHOICES

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The UK decision to leave the European Union could directly (or indirectly) impact on the legal landscape in relation to private international law ("PIL") in the UK. Any fresh legal uncertainty driven by such a change in the PIL framework could have significant impact on private parties' access to remedies which might adversely affect the attractiveness of the English courts. This article offers, on the basis of recent data which was gathered as part of a pilot study in the period from May to September 2018, an initial evaluation of the Brexit impact on litigants' access to legal remedies in cross-border case before the English courts. It shows that a decision on the long-term policy options for judicial cooperation in cross-border cases is a complex one which requires some wider economic interests to be factored in and appropriate policy choices to be made. The pilot study identifies

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some important issues which might potentially be impacting on the parties' strategies, inflating the litigation costs and requiring attention by the UK policy-makers.

I. Introduction and Preliminary Remarks

The increasingly high level of globalisation[1] of economic activities means that there is a significant number of multinational companies which are often active through their own subsidiaries in a number of different jurisdictions. It has been submitted that "[i]t is a commonplace that multinational companies now move their headquarters (and sometimes their plants and offices) to exploit lighter tax regimes and avoid larger ones."[2] The companies (and the multinational groups of companies in particular) appear to be very selective when deciding (in the light of the relevant regulatory landscape) where to have their primary and/or secondary establishments. Such multinational companies may be equally strategic when deciding where to issue legal proceedings in cross-border civil and commercial disputes. The latter set of strategic decisions would, in turn, impact on the cross-border litigation pattern, with some jurisdictions naturally attracting more disputes with an international element than others.

In order to "facilitate the free circulation of judgments and to [...] enhance access to justice"[3] in cross-border cases, the EU Member States have agreed upon applying harmonised EU PIL rules across the European Union.[4] Article 81 of the

[1] A.-M. SLAUGHTER, *A New World Order*, Princeton University Press 2004; S. SASSEN, *A Sociology of Globalization*, New York 2007; W. MATTLI/ N. WOODS, *The Politics of Global Regulation*, Princeton University Press 2009; P.S. BERMAN, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders*, Cambridge University Press 2012); N. WALKER, *Intimations of Global Law*, Cambridge University Press 2014.

[2] J. AGNEW, *Globalisation and Sovereignty*, Plymouth 2009, p. 3.

[3] Recital 1 of the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels Ia"). See also M. DANOV/ P. BEAUMONT, Measuring the Effectiveness of the EU Civil Justice Framework: Theoretical and Methodological Challenges, this *Yearbook* 2015/16, p. 151 *et seq*.

[4] *E.g.* Brussels Ia (note 3); Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility ("Brussels IIa"); Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations ("Maintenance Regulation"); Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations ("Rome I"); and Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations ("Rome II"). See also R. GARNETT, *Substance and Procedure in Private International Law*, Oxford 2012, p. 67-68; P. BEAUMONT/ M. DANOV, The EU Civil Justice Framework and Private

Treaty on the Functioning of the European Union (TFEU) enabled the EU and its Member States to adopt a number of EU PIL legislative instruments with a view to advancing a level of "judicial cooperation in civil matters having cross-border implications."[5] For example, certain EU regulations (*e.g.* Brussels Ia, Brussels IIa, Maintenance Regulation) were set to allocate jurisdiction among EU Member States' courts and facilitate the enforcement of EU Member States' court judgments within the EU. Other EU legislative instruments (*e.g.* Rome I, Rome II) were put in place to ascertain the applicable law in cross-border civil and commercial cases. Furthermore, Regulation (EC) No 1393/2007 (Service Regulation) was introduced "to improve and expedite the transmission of judicial and extrajudicial documents in civil or commercial matters for service between the Member States."[6] This resulted in the creation of an EU judicial area where legal practitioners – benefitting from mutual recognition of professional qualifications – are freely providing legal services.

The wide bases for jurisdiction under the EU PIL rules[7] suggest that alternative *fora* are available for sophisticated and strategic parties (with access to finance). The EU model for administration of justice provided the possibility for claimants to choose where to bring their cross-border (family; civil and commercial) claims. This is an important aspect because different legal entities may be exercising economic activities in several jurisdictions which are located within the EU internal market. Parties to such transactions need to take strategic decisions where/whether to issue private proceedings arising out of their cross-border economic activities within the EU.

The place of litigation would often depend on the parties' perceptions about such attributes of their claims as: the value of the legal remedy (that could often depend on the applicable substantive law) to which they believe are entitled; litigation costs, including parties' access to finance; procedural rules; reputation of the relevant legal system; experience of legal practitioners (broadly defined to cover judges and lawyers) in dealing with a particular set of disputes; speed in achieving the desired result (which would be pre-determined by the place of litigation as ascertained by the relevant jurisdictional rules).[8] In other words,

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Law: Integration through [Private International] Law, 22 *Maastricht J. of European and Comp. L.* 2015, p. 706.

[5] Art. 81(1) TFEU.

[6] Recital 2 of Regulation (EC) No 1393/2007 of the European Parliament and of the Council on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters.

[7] See the long-lasting jurisdictional battles: *Vedanta Resources PLC and another (Appellants) v Lungowe and others* (Respondents) [2019] UKSC 20; *Okpabi & Ors v Royal Dutch Shell Plc & Anor (Rev 1)* [2018] EWCA Civ 191; *The LCD Appeals* [2018] EWCA Civ 220.

[8] P. BEAUMONT *et al.*, Great Britain, in P. BEAUMONT/ M. DANOV/ K. TRIMMINGS/ B. YUKSEL (eds), *Cross-Border Litigation in Europe*, Oxford 2017, p. 79-124. See also E. LEIN *et al.*, Factors Influencing International Litigants Decisions to Bring Commercial Claims to the London Based Courts, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/396343/factors-influencing-international-litigants-with

offering a choice for private parties to decide where to bring their cross-border claims (whilst ensuring that the rendered judgments will be enforced within the EU) is an important governance feature of the EU PIL framework. It is well established the EU PIL regime promoted a level of adjudicatory competition which was driven by the law firms. Lawyers from different international law firms offering cross-border litigation services within the EU internal market may compete by promoting their own jurisdictions as venues of choice for high value private law claims.[9]

The fact that London is a global business/financial centre taken together with the high quality of the UK judiciary (and legal profession),[10] which have traditions in resolving cross-border civil and commercial disputes, enabled England and Wales to establish itself as one of the leading jurisdictions in the EU (facilitating parties' access to effective legal remedies in high value complex cross-border cases within the EU internal market and beyond it).[11] Indeed, it is now well established that "London is a global centre for commercial disputes. Over eighty per cent of commercial cases handled by London law firms now involve an international party."[12] In other words, the courts in London are widely perceived as a major venue for the resolution of complex civil and commercial disputes with an international element. This has increased the influence of the English and Welsh courts as well as of the English law firms which have acquired enormous experience of dealing with cross-border disputes that might often involve multiple parties (as claimants and/or defendants).

The UK decision to leave the European Union poses the following questions: "What would happen if"[13] the regulatory framework for cross-border trade/services as well as the legal framework for judicial cooperation between the UK and EU were to change in the post-Brexit era? What would be the Brexit implications for private parties' access to effective legal remedies in cross-border cases? PIL scholars have considered the Brexit options, proposing different policy options

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-commercial-claims.pdf; The Lord Chief Justice's Report 2017, available at: https://www.judiciary.gov.uk/wp-content/uploads/2017/09/lcj-report-2017-final.pdf.

[9] See more M. DANOV/ P. BEAUMONT (note 3).

[10] E. LEIN *et al.* (note 8).

[11] TheCityUK, The Impact of Brexit on the UK-Based Legal Sector – December 2016 – Appendix 3, available at: https://www.thecityuk.com/assets/2016/Reports-PDF/The-impact-of-Brexit-on-the-UK-based-legal-services-sector.pdf; TheCityUK, Legal Excellence, internationally renowned: UK legal services 2017 23 Nov 2017, available at: https://www.thecityuk.com/assets/2017/Reports-PDF/Legal-excellence-internationally-renowned-Legal-services-2017.pdf. See also P. BEAUMONT *et al.* (note 8); E. LEIN *et al.* (note 8).

[12] Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals, *Transforming Our Justice* System, September 2016, available at: https://www.judiciary.gov.uk/wp-content/uploads/2016/09/narrative.pdf 11.

[13] Mr George Peretz's response to Q4226 – Oral evidence: submitted to the Exiting the European Union Committee – 15 May 2019, *The progress of the UK's negotiations on EU withdrawal*, HC 372, available at http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/exiting-the-european-union-committee/the-progress-of-the-uks-negotiations-on-eu-withdrawal/oral/102216.html.

(largely similar to the current EU PIL regime).[14] A major omission in the relevant analysis of the proposed models for judicial cooperation is that the parties' access to effective legal remedies in cross-border cases has only a secondary role to the regulatory framework for cross-border trade and services that facilitates transnational economic activities (broadly defined to cover the free movement of workers) within the EU internal market.

For example, in analysing the various post-Brexit models, Professor Tang considered "five potential models, *i.e.* the transposition model, multilateral model, bilateral model, unilateral model and international model"[15] for judicial cooperation in the post-Brexit era. However, Professor Tang's article falls short of analysing how the proposed model/s for judicial cooperation would interrelate with the chosen model for the UK/EU trade relationship (because the UK and EU policy-makers are yet to finalise the regulatory framework for cross-border trade and services in post-Brexit era). It is difficult to see how the long-term policy options for private international law could be thoroughly analysed and ascertained, without knowing what the post-Brexit trade relations are going to be. This is a significant gap in the analysis in so far as the political risk/s (which could impact on the UK/EU trade arrangements) may be regarded as the main source of uncertainty for businesses. The point was made by George Peretz QC in front of the UK House of Commons' Exiting the European Union Committee where he stated:

> "it is important, when thinking about the EEA, to understand that it will be a comparative exercise in the end, rather than an absolute one. You have to measure that model against other models that may or may not be available. In any regime where we are in level playing field territory and dynamic alignment, the UK will be the smaller party vis-à-vis the EU. The EU is bigger and has legal difficulties of its own in agreeing ever to be influenced by a third country because of the principle of autonomy of EU law. In any model of dynamic alignment aligning to the single market, whatever that means, whatever one is thinking of, there will be a relationship where the UK is reacting to EU developments and under some form of obligation to follow, which may be qualified and limited in various ways. The question one has to ask is whether that model that one comes up with is better or worse than the EEA model. In the end, that is a political question, but that is the right question to ask, rather than whether the EEA will turn the UK into a rule-taker."[16]

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[14] A. DICKINSON, Back to the future: the UK's EU exit and the conflict of laws, 12 *Journal of Private International Law* 2016, p. 195-210; G RÜHL, Judicial cooperation in civil and commercial matters after Brexit: which way forward?, *ICLQ* 2018, p. 99; S. TANG, UK-EU civil judicial cooperation after Brexit: five models, *EL Rev.* 2018, p. 648. A more detailed review of relevant literature is made in M. DANOV, Cross-Border Litigation: Evaluating the Brexit impact – A Socio-Legal Model for Data Analysis, *Maastricht J. of European and Comp. L.* 2020 p. 199 at 206 *et seq*.

[15] S. TANG (note 14), p. 651.

[16] Mr George Peretz's response to Q4226 (note 13).

Therefore, deciding on the appropriate regime for judicial cooperation in the post-Brexit era is a very complex task. The policy options for the UK/EU PIL framework could only be meaningfully analysed after the EU and UK have agreed upon their preferred regulatory regime for cross-border business activities – reflecting *inter alia* far-reaching and broader policy objectives concerning the regulatory framework for cross-border trade and services (including competition law) as well as the free movement of workers.[17] Although the prevailing view is that the "UK will not become a tax haven after Brexit,"[18] there is a level of political uncertainty which appears to impact on the decision-making processes that are central to various cross-border economic activities.

The various and wider economic and political interests – which may impact on any country's decision in relation to judicial cooperation – strongly indicate that Brexit could affect the legal landscape in relation to PIL. This could potentially have a significant impact on litigants' strategies and – in turn – on parties' access to effective remedies in cross-border civil and commercial disputes. There could be real issues in disputes arising out of the existing supply chains. The matter is important and the New Political Declaration concerning the future UK/EU relationship appears to signify that:

> "The Parties recognise that they have a particularly important trading and investment relationship, reflecting more than 45 years of economic integration during the United Kingdom's membership of the Union, the sizes of the two economies and their geographic proximity, which have led to complex and integrated supply chains."[19]

The fact that the UK and EU appear to acknowledge that they both have a common interest[20] in maintaining the existing supply chains is a strong indication that the relevant regulatory framework concerning trade will be thoroughly negotiated[21] as part of an appropriate Free Trade Agreement.[22] The point was clearly reflected in the UK[23] and EU[24] negotiating positions. But, what would be the appropriate level

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[17] A. MORAVCSIK, Preferences, Power and Institutions in 21st-century Europe, *Journal of Common Market Studies* 2018, at 1648.

[18] Sky News, UK will not become a tax haven after Brexit, Philip Hammond say, available at http://news.sky.com/story/uk-will-not-be-tax-haven-after-brexit-hammond-says-10968530.

[19] HM Government, Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom, published 19 October 2020 [20].

[20] A. MORAVCSIK (note 17).

[21] *Ibid*., at 1649.

[22] *Ibid*.

[23] HM Government, "The Future Relationship with the EU: The UK's Approach to Negotiations" CP211 – February 2020. See also The UK Draft of the UK-EU Comprehensive Free Trade Agreement (CFTA) https://www.gov.uk/government/publications/our-approach-to-the-future-relationship-with-the-eu.

[24] Council of the European Union, Annex to Council Decision authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for

of judicial cooperation in civil and commercial matters? The UK suggestion is for the UK policy-makers to:

> "continu[e] to work together with the EU in the area of civil judicial cooperation through multilateral precedents set by the Hague Conference on Private International Law and through the UK's accession as an independent contracting party to the Lugano Convention 2007."[25]

Whilst a level of judicial cooperation within the Hague Conference's framework is an appropriate policy choice for the UK to pursue post-Brexit, the UK's accession to the Lugano Convention – without being a party to the European Free Trade Association ("EFTA") – would require "the unanimous agreement of the Contracting Parties".[26] Would the EU give the necessary consent?

The response to this question would be central to the UK's accession to the Lugano Convention. However, there could – in theory – be a major obstacle for such a consent to be granted by the EU. The issue is that the Lugano regime is set to strengthen the "links between [the Contracting Parties], which have been sanctioned in the economic field by the free trade agreements concluded between the European Community and certain States members of the European Free Trade Association."[27] But – by definition – Brexit may weaken the current economic and legal ties between the UK and EU.[28] Thus, there may be real difficulties to ascertain the appropriate solutions which are necessary with a view to facilitating private parties' access to effective legal remedies in disputes arising out of the existing cross-border supply chains in the post-Brexit era.

The relevant political processes should be thoroughly factored in, not least because the European project appears to be facing a mass wave of national populism.[29] Some political scientists submit that Brexit *inter alia* represents people's revolt against "neoliberal globalized economics".[30] There is a view that policy-makers should consider:

> "the way in which neoliberal globalized has stoked strong feelings of what psychologists call relative *deprivation* as a result of rising inequalities of income and wealth in the West and a loss of faith in a better future. […] This profound sense of loss is intimately entwined

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a new partnership agreement ("Negotiating Directives") Brussels, 25 February 2020. See also The EU Draft Text of the Agreement on the New Partnership with the United Kingdom UKTF (2020) 14 – 18 March 2020.

[25] *Ibid.* [64]. See also Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter Lugano Convention) *O.J.E.V.* 21.12.2007, L393/3.

[26] Article 72(3) of the Lugano Convention.

[27] See the Preamble of the Lugano Convention.

[28] The UK's Approach to Negotiations (note 23), [6-8].

[29] R. EATWELL/ M. GOODWIN, *National Populism: The Revolt Against Liberal Democracy,* Penguin UK, 2018.

[30] *Ibid,* at xxii.

> with the way in which people think through issues like immigration and identity."[31]

Such political processes might explain the impetus of the former UK Prime Minister to conduct the Brexit negotiations by setting out specified red lines.[32] Any compromise on the advanced red lines appeared to raise the risks about the approval of the Withdrawal Agreement by the members of the UK Parliament. More importantly, the UK election results from the EU Parliament Elections as well as from UK General Elections in 2019 appear to reflect wider public interests which may, in turn, impact on the regulatory framework for cross-border trade and services in the post-Brexit era. Indeed, the fact that the Brexit Party won most of the votes in May 2019[33] and the categorical win for the Conservative Party in December 2019 strongly indicate that the UK "will not agree to any obligations for [UK] laws to be aligned with the EU's, or for the EU's institutions, including the Court of Justice, to have any jurisdiction in the UK."[34]

In view of the foregoing, the EU might be reluctant to give its consent for the UK to join the Lugano Convention. This might be deduced from the fact that the Council of the European Union has recently approved the EU negotiating directives, without conferring any mandate on the European Commission to negotiate in such an important area as the judicial cooperation in civil and commercial matters. An analysis of the relevant the EU negotiating directives strongly indicates that the EU position was carefully thought through. The European Commission has a mandate to "explore options for enhanced judicial cooperation in matrimonial, parental responsibility and other related matters"[35] as well as to "provide for close law enforcement and judicial cooperation in criminal matters".[36] But, the EU policy-makers appear to have deliberately decided not to confer a negotiating mandate for a continuous judicial cooperation in civil and commercial matters post-Brexit.

Hence, agreeing/acceding to a multilateral regime for judicial cooperation is, to a large extent, a political decision to be reached by the Contracting Parties. The EU position, as it stands at present, may be seen as an indication that it is possible for the UK to no longer have access to the EU institutional framework for judicial cooperation in cross-border civil and commercial cases arising in the EU

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[31] *Ibid*.

[32] A. BARKER/ G. PARKER, Theresa May straddles her red lines in search of Brexit deal, *Financial Times* – 14 October 2018, available at: https://www.ft.com/content/52e20306-cfa3-11e8-a9f2-7574db66bcd5.

[33] R. SHRIMSLEY, The forces of Brexit compromise lose in the European elections: Both Labour and the Conservatives will now find themselves at the mercy of hardliners, *Financial Times* – 27 May 2019, available at: https://www.ft.com/content/575bf094-8052-11e9-9935-ad75bb96c849; BBC News, European elections 2019: Brexit Party dominates as Tories and Labour suffer – 27 May 2019, available at: https://www.bbc.co.uk/news/uk-politics-48417228.

[34] The UK's Approach to Negotiations (note 23), at [5].

[35] Negotiating Directives (note 24), at [59].

[36] *Ibid*., at [117-8].

context.[37] A governance perspective in analysing the relevant policy choices in relation to PIL would be much needed, not least because – historically – PIL forms part of each country's legal order, with every jurisdiction having its own (potentially different) set of PIL rules (which are used to allocate jurisdiction and ascertain applicable law, and facilitate the recognition and enforcement of foreign judgments). In other words, Brexit means that an alternative framework for international cooperation[38] in cross-border civil and commercial cases must be considered by the UK to replace the existing arrangements which may set the scene for a new framework for global judicial cooperation in the post-Brexit era.

In this business and political context, this article is set to demonstrate that a decision concerning the long-term policy choices for judicial cooperation in civil and commercial matters is a complex one which pre-supposes a major empirical study, measuring the Brexit impact on parties' access to effective legal remedies. As part of such a study, long-term policy options need to be thoroughly considered. The article draws on a pilot study which was conducted from May to September 2018.

The purpose of the pilot study was to measure the *expected initial impact* of Brexit on parties' strategies which will in turn have a bearing on the litigants' access to legal remedies (as well as on settlement dynamics) in cross-border disputes. The project was designed to consider the aspects of the current PIL framework which – if changed post-Brexit – could have an impact on parties' access to legal remedies. The advanced paradigm is set to reflect the fact that the *outcome*[39] of the cross-border dispute would depend on the *procedure* (*i.e.* provisions allocating jurisdiction indicating *inter alia* whether the rendered judgments will be recognised and enforced abroad) and *substantive laws* (*i.e.* choice-of-law rules) which will be shaping litigants strategies. Therefore, since the issues concerning the methodology for an appropriate Brexit impact assessment are indeed numerous, a relevant socio-legal model is needed.[40]

II. Research Methodology[41]

The important role that PIL plays for the effective resolution of disputes with an international element is reflected in the advanced theoretical model which is set to be used to determine the Brexit impact on access to legal remedies in cross-border

[37] Art. 81 TFEU.

[38] Compare: MORAVCSIK (note 17), at 1649.

[39] H. GENN, Understanding Civil Justice, *Current Legal Problems* 1997, p. 155.

[40] See Figure 1 – Triangular relationship (jurisdiction – choice of law – legal remedy) and litigants' strategies in M. DANOV, Cross-Border Litigation in England and Wales: Pre-Brexit Data and Post-Brexit Implications, *Maastricht J. of European and Comp. L.* 2018, p. 139-167, at 147, as well as M. DANOV/ P. BEAUMONT (note 3) and M. DANOV (note 14).

[41] See more M. DANOV (note 14), at 211-5.

cases. More specifically, the proposed socio-legal model[42] is developed around the litigants' strategies which are defined as directing the litigation (settlement) result that is desired by the party devising it.[43] In other words, parties will be devising their strategies, considering the relevant legal landscape and attributes of the claim with a view to attaining an appropriate and desirable legal remedy[44] in cross-border cases.[45] Since the opposing parties will seek to attain dissimilar legal remedies (whilst holding clashing views as to what their entitlement/liability is), the model is set to consider the interplay between different strategies which claimants and defendants devise in individual cases.[46]

As part of this process, it is important to analyse the dynamics of a triangular relationship[47] that will be formed by three key variables which would shape the litigants' strategies in cross-border cases: jurisdictional rules (which predetermine the applicable procedures, including evidential rules); applicable laws (ascertaining the parties' entitlement to legal remedies); private parties' access to remedies (final judgment/settlement, materialising the outcome). In order to analyse the triangular relationship systematically, two major correlations need to be considered. First, it is necessary to consider how the *relevant PIL framework shapes* the litigants' strategies (factoring in various broader attributes – *e.g.* types of parties (individuals, SMEs, multinational companies), desired remedy, including the value of the claim; facts of the cases; relevant substantive laws; costs, including access to finance and exposure to costs). Second, it is equally important to consider *whether the (so devised) parties' strategies are facilitating or impeding their opponents' access to legal remedies*. In this context, the specific aspects of the legal landscape in relation to PIL (*e.g.* Brussels Ia or IIa) and the broader attributes of a particular claim (*e.g.* value, types of parties, costs, access to finance) would need to be considered.

In theory, any change in the legal landscape in relation to private international law – in so far as it shapes the litigants' strategies in cross-border cases – may have significant implications for the parties' access to appropriate legal remedies. Hence, a reasonable working *hypothesis* is that any fresh legal uncertainty/ambiguity attributed to Brexit would be exploited by strategic parties (in order to adversely affect their opponents' expectations about the outcome of litigation). The nil hypothesis is that there will be no change in the litigation strategies (and private parties' access to legal remedies). To test this hypothesis as well as to test the advanced socio-legal model, empirical data was gathered through: 1) *self-comple-*

[42] M. DANOV (note 40).

[43] Compare: M. SHUBIK, Game theory and the study of social behaviour: an introductory exposition, in M. SHUBIK (ed), *Game Theory and Related Approaches to Social Behaviour*, Wiley, New York 1964, p. 1, 13; L.M. LOPUCKI/ W.O. WEYRAUCH, A Theory of Legal Strategy, *Duke L. J.* 2000, at 1411.

[44] H. GENN (note 39), at 173.

[45] P. BEAUMONT/ M. DANOV/ K. TRIMMINGS/ B. YUKSEL, Cross-border Litigation in Europe: Some Theoretical Issues and Some Practical Challenges (note 8), p. 824-831.

[46] M. DANOV (note 14), at 212-3; M. DANOV (note 40).

[47] The various cost implications need to be duly considered in this context. See Lord Chancellor *et al*. (note 12), at 11.

tion survey questionnaires (which were sent to the heads of litigation departments and family law within sampled law firms; 2) *semi-structured interviews* (which were conducted with legal practitioners in England and Wales). The primary quantitative data (from the *self-completion survey*) provides information about the *statics of the cross-border litigation pattern* (*e.g.* volume change; type of cases).

The quantitative data was gathered from the litigation departments and/or the family law units within the sampled law firms. The list of the relevant law firms for the quantitative survey was drawn, in April 2018, from the Legal 500 and Chambers & Partners. In family law, the list included eighty two (82) family law firms. They were all approached. Fourteen (14) responses were received back, with the response rate being approximately 17%. In commercial law, a list of one hundred forty four (144) was drawn. Twenty eight (28) responses were received which amounted to a response rate of 19.44%. It should be noted that the quantitative data was very difficult to obtain because many law firms do not record the information which was needed. Indeed, the response rate was disappointing, but – since nearly all respondents appear to indicate that the litigation pattern is broadly similar to the one before the Brexit vote – the collected data should suggest that, statistically, there is hardly much of a change at this stage.

Methodologically, the difficulties in obtaining quantitative data may be regarded as an indication that the qualitative data should be more revealing about any Brexit implications in the first instance. Indeed, any Brexit impact would not necessarily be statistically verifiable for a few years after Brexit had actually materialised. The qualitative element of the pilot study was particularly important because, given the high number of settlements[48] (*inter alia* suggesting that there is a high level of privatisation[49] of justice) in cross-border cases, any theoretical model which does not factor in the relationship between PIL and ADR/settlement negotiations[50] in England and Wales is bound to be incomplete.

The primary qualitative data (from the *semi-structured interviews*) provided information about the parties' strategies (*i.e.* the *dynamics of the cross-border litigation pattern*). The views of the legal practitioners were much needed. The sampling framework, which was drawn for the EUPILLAR project,[51] was adjusted to reflect the pilot nature of the study. It should be noted that, given the pilot nature of the study and the fact that the legislative framework has not changed yet – the judges were excluded from the sampling framework. The names of the actively practicing barristers was drawn from the judgments rendered in the EU PIL cases,

[48] The Right Honorable the Lord Woolf, *Access to Justice – Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO, 1996).

[49] H. GENN, Why the privatisation of justice is a rule of law issue, *36th F.A. Mann Lecture* – Lincoln's Inn, 19 November 2012, available at: www.laws.ucl.ac.uk/wp-content/uploads/2014/08/36th-F-A-Mann-Lecture-19.11.12-Professor-Hazel-Genn.pdf.

[50] M. DANOV/ S. BARIATTI, The Relationship between Litigation and ADR: Evaluating the Effect of the EU PIL Framework on ADR/Settlements in Cross-Border Cases, (note 8), p. 689-707.

[51] P. BEAUMONT *et al*. (note 7).

as identified for the EUPILLAR databases.[52] The list with names of solicitors was drawn to include the names of the leading individuals listed on the Legal 500 and Chambers and Partners. The solicitors' lists intended to represent both London lawyers and those working elsewhere in England and Wales by adding names of solicitors from regional law firms and branches of large law firms. After any duplicates were eliminated and the lists were updated to reflect any changes in the status of legal practitioners, the sampling framework included: 393 barristers (civil and commercial law); 217 barristers (family law); 457 solicitors (specialising in commercial law) and 396 solicitors (specialising in family law).

The potential interview respondents were randomly selected from each category, and invited to take part in the pilot study. (If one of the selected potential participants nominated their colleague as being better placed and willing to be interviewed, then the interview was conducted with the relevant nominee.) There were 15 interview respondents – 7 family law practitioners (4 barristers from London, including 1 QC; and 3 solicitors – 1 from London and 2 from regional law firms); 8 civil and commercial law practitioners (3 barristers from London, including 1 QC; 5 solicitors – 3 from London, 2 from regional law firms). The collected data was organised to capture the correlation PIL rules (and potential changes in this respect) – litigants' strategies – access to remedies, trying to identify the relevant Brexit implications (considering the level of speculation/ uncertainty).

There are three distinct stages of the litigation process which need to be analysed with a view to considering the Brexit implications for the correlation between any (actual and/or potential) changes in the UK legal landscape and parties' strategies in disputes with an international element in England and Wales. More specifically, quantitative and qualitative data was gathered about three distinct, but closely interrelated stages: 1) pre-action conduct of the parties broadly defined to cover forum-selection process;[53] 2) strategies of the parties after the claim has been issued; 3) strategies of the parties related to the recognition and enforcement of an English and Welsh judgment in the EU Member States and beyond.

There are two caveats which should be made. First, many of the litigators in England and Wales would have a broad client base acting on cases which would involve parties from across the globe. Although the business activities of the respondents' clients (which may be groups of companies) would be international, the respondents were not expected "to ascertain whether particular corporations, for whom [they] act, are necessarily domiciled in the UK."[54] Hence, any Brexit implications should not be overstated.

Secondly, given the fact that Brexit had not materialised at the time when the pilot study was conducted (*i.e.* the summer of 2018), the collected data was largely related to actual/potential pre-action strategies of the parties to minimise the Brexit related uncertainties and potential litigants' strategies which might be devised to exploit any fresh uncertainty. In other words, it should be acknowledged

[52] The EUPILLAR Database, established and maintained by the University of Aberdeen, available at: https://w3.abdn.ac.uk/clsm/eupillar/#/home.

[53] Compare: Civil Procedure Rules: Practice Direction – Pre-Action Conduct and Protocols.

[54] *Interview Transcript No 14*, at 1.

that the Brexit's potential impact is difficult to be ascertained at this stage, and the collected data has its limitations. Also, by definition, Brexit might not have much of a direct impact for litigants' strategies in cases which involve UK and non-EU parties with regard to non-EU relationships between the litigants.

III. Brexit and Forum Selection

As already noted above, English and Welsh courts have traditionally been attracting a significant volume of complex disputes with an international element. In order to identify any post-Brexit changes which may impede/facilitate private parties' access to legal remedies, the correlation between the legal landscape in relation to PIL and the litigants' strategies in cross-border cases needs to be considered. The prevailing assumption among interview respondents appeared to be that the legal landscape will, in the short term, remain broadly similar to the one we have. As one interview respondent put it, "the old cliché that people tend to overestimate the immediate effect and underestimate the long-term effect entirely applies here."[55]

The quantitative data from the self-completion surveys reinforces the impression that the short-term Brexit impact on the attractiveness of London as a litigation venue is likely to be insignificant. In family law cases, 100% of our respondents appear to state that they have observed a broadly similar pattern when comparing the volume and type of their cases with the ones in the period before the Brexit vote. Similarly, in civil and commercial law cases, approximately 92% of the survey respondents do suggest that they are dealing with a broadly similar volume and type of case as they used to deal with before the Brexit vote. Only on one occasion, it was recorded that the respondent law firm was dealing with slightly less cases (1-2 cases) in comparison to the pre-Brexit vote period, with the data missing on another occasion. There is a strong case that Brexit could hardly have any statistically significant and immediate impact on the number of cross-border cases before the English and Welsh courts. This is bound to be so, not least because many of the relevant disputes relate to cross-border relations and/or transactions which had occurred a while ago.

That said, Brexit might potentially trigger processes concerning the development of the dispute resolution mechanisms in a global context. Governing these process is central to facilitating private parties' access to appropriate legal remedies with a view to enhancing the appropriateness/attractiveness of the English and Welsh courts. To this end, the long term policy options must be carefully considered in the light of the relevant data which is properly organised and analysed. The point concerning the potential long-term impact was put forward by one interview respondent who submitted: "It will be very interesting, I would say, to have this conversation in three years' time and in 13 years' time. And I am fascinated the extent to which the conversation will be different."[56] A number of

[55] CH. BURDETT, *Interview Transcript No 11*, at 3.

[56] *Ibid,* at 24.

appropriately planned qualitative studies should enable researchers to systematically identify and address the risks concerning access to legal remedies which might adversely affect the parties' desire to litigate in England and the appropriateness of the English and Welsh courts to deal with various categories of cross-border cases.

The pilot study shows that an analysis of the litigation strategies which aims to consider the Brexit impact on parties' strategic decisions to issue proceedings in England and Wales needs to take account of the following questions: Is it the procedural or substantive law which is the major attraction for some parties (*e.g.* those having bargaining power)? Or is it rather the fairness and robustness of the outcome (which is a function of the application of both procedure rules and substantive law in individual cases) that is the major attraction for some sophisticate parties who might prefer to litigate in England and Wales? Would Brexit have (any positive or negative) impact on the parties' willingness/desire to litigate in England and Wales?

In the pre-Brexit era, the BIICL study[57] and EUPILLAR project[58] appeared to suggest that the relevant aspects, which could impact on the parties' decisions to sue in England and Wales rather than elsewhere, include: experience of judges; procedural and evidential rules; value of the desired remedy; cost and cost-recovery rules; length of proceedings.[59] However, in order to inform policy choices in a post-Brexit context, a detailed analysis of the interrelations between the identified factors is necessary. It is important to consider how the identified factors interrelate with each other in individual cases in different jurisdictions (considering the relevant claims' attributes which would *inter alia* include: value of desired remedy; parties' access to finance; applicable regulatory regimes). In other words, relevant data needs to be gathered from other EU Member States (*i.e.* some competing jurisdictions). The collected data should indicate whether any Brexit-driven changes in the English and Welsh legal landscape in relation to PIL would diminish/enhance the attractiveness of the courts in London, whilst increasing/lowering the level of the attractiveness of the other EU Member States.

The pilot study appears to demonstrate that Brexit has intensified a level of adjudicatory competition between the various *fora* (broadly defined to include arbitration) within the EU. This appears to be an issue in civil and commercial cases which was recurrently re-appearing in interviews with legal practitioners from London and regional law firms. This is so despite the fact that it is beyond any doubt that the ability of judges to deal with cross-border cases is an important factor in the forum selection process. Indeed, as an interview respondent noted, it is widely accepted that: "it is the independence and quality of the judiciary[;] that is the most important factor – you cannot buy a judge in England and Wales."[60] It is a safe assumption that this will remain to be the case in the years to come, so that Brexit is highly unlikely to make any impact in this respect.

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[57] E. LEIN *et al.* (note 8), at 15.

[58] P. BEAUMONT *et al.* (note 8).

[59] E. LEIN *et al.* (note 8), at 15. See also P. BEAUMONT *et al.* (note 8).

[60] D. HONEY, *Interview Transcript No 6*, at 9.

Nonetheless, Brexit appears to be having another initial impact on the pre-action conduct of the potential litigants. The qualitative data from the pilot study strongly suggests that the post-Brexit risks – concerning the recognition and enforcement of English and Welsh judgments – may be regarded as a major reason, which prompts more parties to include arbitration clauses (rather than jurisdiction clauses) into their contracts with parties based in the EU. It was noted that:

> "Where [Brexit] has had the most impact has been at the contractual drafting stage. So Brexit has allowed people the opportunity to speculate on the effectiveness of English jurisdiction and governing law clauses. I think, as a firm, and in fact as an industry in London, we are fairly comfortable with the answer to those kind of questions and that speculation. But, there are a lot of vested interests: and so it gives arbitration lawyers the opportunity to say, "Well, you know, maybe you should think about an arbitration clause"; and Dutch lawyers to say, "Well, maybe you should think about Dutch law and some of our international courts." So clients are being pulled in different directions. And, they are asking questions about it. But, I do not think it has had an effect on actual behaviour in disputes so far."[61]

It seems that one consequence of the Brexit vote is that some legal practitioners from England and Wales are increasingly advising their clients, who "are dealing with very long-term arrangements and [their] assets are in Europe, [that it is] probably safer to go for arbitration because we know what is going to happen with arbitration; we do not know what is going to happen with court judgments."[62] Therefore, in order to minimise any Brexit uncertainty, parties' strategies would reflect the effect, which any actual and/or potential change in the legal landscape in relation to PIL would have on their access to legal remedies in cross-border cases. The management of the relevant risks might entail inclusion of appropriate choice of court agreements (and choice of law agreements) which might have a long-term (rather than short-term) impact on the attractiveness and – in turn – on the global influence of the commercial courts in London.

Although the UK policy-makers appear to have now addressed this issue (trying to minimise the impact) by acceding to the Hague Choice of Court Agreement Convention (which would potentially be a solution to the problem in cases where there are contractual disputes), there might not be enough practice on this in the first instance (and the solicitors might be somewhat guarded in recommending it initially). Moreover, the pilot study indicates that – even though the arbitration is perceived as a viable option to minimise any Brexit-driven litigation risks (with Articles II and V of the New Convention – dealing with the problems concerning parallel proceedings and the recognition and enforcement of arbitral awards), there could be real issues for SMEs.

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[61] *Interview Transcript No 5*, at 2-3.

[62] L. GLEGG, *Interview Transcript No 1*, at 4, 19, 23.

Access to effective legal remedies might be more of an issue for SMEs. There appear to be two major reasons. First, an important point – which came through in the course of the interviews – is that arbitration can be costly for some parties. This might adversely affect the accessibility to arbitral proceedings for some classes of parties and SMEs in particular. One interview respondent noted: "People complain about the cost of litigation. Arbitration is, in my experience, even more expensive. From an SME point of view, it is not really a hugely attractive option."[63]

Secondly, the political risks concerning the change in the regulatory landscape for cross-border trade and services might impact on the SMEs' business activities which may make them more willing to minimise their litigation costs. The same respondent – who deals primarily with SMEs – noted: "parties are more cautious about spending money on litigation, perhaps, because they do not know what the consequences of Brexit are going to be. Not just in terms of litigation, but in terms of their business generally."[64] There is a strong case that the Brexit impact on businesses (*e.g.* large – multinational companies; small – SMEs) might be different.

The point could be strengthened by making a reference to an open letter,[65] in which the Confederation of British Industry ("CBI") appeared to indicate that small and medium-sized enterprises ("SME") are most vulnerable by the existing level of political uncertainty. In particular, the CBI Director-General, Carolyn Fairbairn, stated:

> "Firms large and small are clear that leaving the EU with a deal is the best way forward. Short-term disruption and long-term damage to British competitiveness will be severe if we leave without one. The vast majority of firms can never be prepared for no-deal, particularly our SME members who cannot afford complex and costly contingency plans."[66]

The CBI's open letter signifies that various wider economic interests may be impacting on businesses' strategic decisions and their long-term strategies. More importantly, the letter strongly indicates that a modified trade pattern may impact differently on SMEs and multinational companies. By analogy, there is a strong case that Brexit may impact differently on the litigation strategies of the various parties (SMEs, multinational companies, individuals) as well as on their access to effective legal remedies in cross-border disputes arising out of the existing pan-European supply chains. Since SMEs (as opposed to sophisticated big companies with access to finance) would be less mobile and reluctant to litigate abroad, their access to legal remedies in cross-border cases might be limited post-Brexit. The

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[63] S. INGLIS, *Interview Transcript No 15*, at 20.

[64] *Ibid,* at 14.

[65] C. FAIRBAIRN, *Champion business – Open letter from CBI to all Conservative Party Leadership candidates*, 30 May 2019, available at: https://www.cbi.org.uk/media-centre/articles/champion-business-open-letter-from-cbi-to-all-conservative-party-leadership-candidates.

[66] *Ibid.*

issues are important, not least because such SMEs might be part of long supply chains which were promoted by the free movement of goods and services within the EU internal market.

Admittedly, access to legal remedies in cross-border cases might be less of an issue for sophisticated multinational companies which may have various other options (*e.g.* arbitration; litigation elsewhere). But, there would be another issue for UK policy-makers to consider. Such multinational companies will have access to finance and appropriate legal advice, so that they can afford to be very selective when deciding where to resolve their cross-border disputes. This means that they might strategically decide to litigate elsewhere. In view of this, it should be re-iterated that, as already noted above, the qualitative data appears to demonstrate that Brexit has intensified the level of adjudicatory competition between the courts in London and the leading national courts in some of the other EU Member States. Although this is a process which – one should say – had started in the pre-Brexit era[67] in so far as a level of adjudicatory jurisdiction had been promoted by the Brussels I/Ia framework,[68] the Brexit uncertainty has possibly added another dimension to the process of adjudicatory competition within the EU.

It appears that London's competitors may be more openly questioning the attractiveness and appropriateness of the English and Welsh courts in a post-Brexit context. The problem has been pointed out by a number of interview respondents,[69] with one interview respondent submitting that "[l]aw firms and governments – in particularly Germany, France, Belgium and Holland – see a business opportunity to try and attract some of the legal services market of London to those places."[70] One might go a step further and ask: Could Brexit also be seen by some EU Member States as an opportunity to expand the influence of their national courts (trying to diminish the influence of the English and Welsh courts in certain categories of cross-border disputes, perhaps)? These recent developments pose new challenges to be addressed by the UK policy-makers.

A real issue is that both solutions (*i.e.* Hague Choice-of Court Agreements; and arbitration) to Brexit problems would be available only in contract-based disputes. There may be issues in non-contractual types of disputes (*e.g.* tortious; regulatory[71]). Could the newly adopted Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters be an appropriate solution[72]? Also, could the forum selection process be affected by the parties' perceptions about such issues as: avoidance of parallel proceedings; swift recognition and enforcement of rendered judgments; the relevant regulatory framework which is to be used to ascertain the rights of the obligations of the parties?

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[67] See more E. LEIN *et al*. (note 8); P. BEAUMONT *et al.* (note 8).

[68] M. DANOV (note 40).

[69] *E.g. Interview Transcripts No 5 and 6*.

[70] D. HONEY, *Interview Transcript No 6*, at 2.

[71] See Section VI below.

[72] Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, available on the website of the Hague Conference on Private International Law, www.hcch.net.

IV. Parallel Proceedings: Legal Landscape – Parties' Strategies – Access to Remedies

The cross-border trade – by definition – would involve business relationships arising out of supply chains which span across a number of jurisdictions. The increasingly complex nature of cross-border economic activities and the related economic migration of individuals cumulatively indicate that there can be multiple competent courts to deal with disputes arising of such transnational ventures. The importance of the rules, which are meant to avoid parallel court proceedings, could not be questioned in a cross-border context. It is well established that the solutions advanced by the common law and EU PIL, respectively, are based on different principles. Under EU PIL, any court – other than the court which is first seised – should normally stay its proceedings.[73] One major exception to this rule concerns cases where there is an exclusive choice-of-court agreement between the parties. In such circumstances, "any court of another Member State shall stay the proceedings until such time as the court seized on the basis of the agreement declares that it has no jurisdiction under the agreement."[74]

Under the common law the judges have more discretion when deciding whether to assume jurisdiction. In order for a claim form to be served out of the jurisdiction, the claimant must demonstrate that: one of the grounds of Practice Direction 6B[75] is satisfied;[76] "the claim has a reasonable prospect of success";[77] "England and Wales is the proper place in which to bring the claim."[78] More importantly, Lord Briggs has very recently reiterated that:

> "Even if the court concludes […] that a foreign jurisdiction is the proper place in which the case should be tried, the court may nonetheless permit (or refuse to set aside) service of English proceedings on the foreign defendant if satisfied, by cogent evidence, that there is a real risk that substantial justice will not be obtainable in that foreign jurisdiction."[79]

Brexit might be an opportunity for the academic community (along with prominent legal practitioners) to consider how the balance between the *court-first-seised* rule (as developed by the EU PIL regime) and the *forum non conveniens* doctrine (as it is functioning under the English common law) is to be struck by the UK policy-makers in the post-Brexit era. The response to this question matters because it is closely connected with the risks of parallel proceedings which would inflate the

[73] See Article 29 of Brussels Ia and Article 19 of Brussels IIa.

[74] See Article 31(2) of Brussels Ia.

[75] Civil Procedure Rules – Practice Direction 6B.

[76] CPR 6.36.

[77] CPR 6.37(1)(a). *AK Investment CJSC* [2011] 4 All ER 1027 [71].

[78] CPR 6.37(3).

[79] *Vedanta Resources PLC and another (Appellants) v Lungowe and others* (Respondents) [2019] UKSC 20 [88].

litigation costs, adversely affecting parties' expectations about the outcome of litigation and their access to legal remedies in cross-border cases.

There are two policy aspects which need to be considered. On the one hand, in the pre-Brexit era, the *court-first-seised* rule (which is a characteristic feature for the current EU PIL regime) was often seen as encouraging *pre-emptive* strikes by potential defendants. For example, such a party might gain a negotiating advantage by issuing proceedings and seeking a negative declaration in a jurisdiction (which may be more or less effectively/efficiently functioning rather another). As a result, the rule was occasionally criticised in the pre-Brexit literature[80] for being far too rigid, incentivising parties to be strategic in cases where there is no jurisdiction agreement.

On the other hand, the doctrine of *forum non conveniens* has a discretionary element which – albeit allowing judges to have a greater degree of flexibility by considering a number of factors in deciding on the appropriateness of the English and Welsh courts – brings a level of legal uncertainty/ambiguity which might be exploited by strategic parties. The discretionary element means that some strategic defendants may often get involved in pro-longed jurisdictional battles which may inflate the litigation costs and generate delay,[81] potentially impacting on the relevant settlement dynamics. Since the legal practitioners would naturally have a first-hand experience with both *court-first-seised* and *forum non conveniens* regimes, the pilot study was *inter alia* set to find out what the respondents' feelings and attitude were as to the appropriate way forward.

The overwhelming view appeared to be that the legal practitioners are quite comfortable with the way the *court-first-seised* rule shapes the litigants' strategies. Although one respondent in particular raised some concerns about how consistently the *court-first-seised* rule is being applied by some Member States' courts,[82] the overall impression is that the respondents are satisfied with the way the rule is functioning[83] in relation to civil and commercial matters. One respondent, who predominantly deals with non-contractual (competition law) claims went further to take the following view:

> "I probably have a very claimant focused view of this. But, from that perspective, there should be a court first seised rule because – as I say – without that you do not have certainty. It, then, becomes much less appealing to start proceedings in this country. There should be;

[80] T. HARTLEY, The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws, *ICLQ* 2005, p. 813-828; A. BRIGGS, The Impact of Recent Judgments of the European Court on English Procedural Law and Practice, available at: http://papers.ssrn.com.

[81] See the recent *Vedanta* dispute on a preliminary issue of jurisdiction which started on 31 July 2015 – *Dominic Liswaniso Lungowe & Others v Vedanta Resources Plc and Konkola Copper Mines Plc* [2016] EWHC 975 (TCC); *Dominic Liswaniso Lungowe and others v Vedanta Resources Plc and Konkola Copper Mines Plc* [2017] EWCA Civ 1528; *Vedanta Resources PLC and another (Appellants) v Lungowe and others* (Respondents) [2019] UKSC 20.

[82] D. HONEY, *Interview Transcript No 6*.

[83] *E.g. Interview Transcripts No 3*, at 5, 8, 14.

> as I say, it is claimant friendly – I think it is probably also English legal services friendly. Because if we want these claims to continue being brought here, you need certainty because otherwise claimants will not do it."[84]

The pilot study appears to capture two major issues which need to be factored in when re-designing the legal landscape in relation to PIL. *First,* it seems desirable to have some *court-first-seised* elements in a workable solution which is set to avoid parallel proceedings in cross-border cases. Because the doctrine of *forum non conveniens* might incentivise strategic defendants to challenge the jurisdiction of the English and Welsh courts. Any related level of legal uncertainty about the English courts' competence would, in turn, cause delay and inflate the litigation costs which would impede claimants' access to legal remedies, adversely affecting the attractiveness of the English and Welsh courts for certain parties which are in position to be selective.

Secondly, the pilot study sheds some light which is necessary to better understand and analyse the pre-Brexit data. In particular, in the pre-Brexit era, interview respondents would often note that the *court-first-seised* rule might occasionally be abused by strategic litigants.[85] If someone were to enter into settlement negotiations without seising a court, then there would be a significant risk for such a party to face a pre-emptive strike (*e.g.* seeking a non-liability declaration[86]) which could be initiated by their opponent in a different EU Member State to the one in which the party in question intends to litigate in. The pilot study suggest that, despite the fact the *court-first-seised* rule might be improved by an appropriate mechanism which allows judges to properly handle abusive litigants' strategies, the legal practitioners dealing with commercial law disputes appear to be content with the court-first-seised rule in principle. This means that any appropriate future solution might need to somehow endeavour to integrate a *court-first-seised* element.

The results of the pilot study in relation to the *court-first-seised* rule are even more interesting in cross-border matrimonial cases. The implications of the *court-first-seised* rule for disputes arising under Brussels IIa or Maintenance have been significant. The weaknesses of the *court-first-seised* rule were exposed in *S v S*.[87] In this case, the parties "engage[d] in […] extensive, expensive and futile manoeuvres"[88] to seise their desired courts in France and England, respectively. The wife won the jurisdictional battle by seising the English court several hours before the husband seised the French court. When assessing the significance of the *court-first-seised* rule, one respondent submitted:

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[84] *Interview Transcripts No 8*, at 8.

[85] P. BEAUMONT *et al.* (note 8).

[86] *Cooper Tire & Rubber Company v Shell Chemicals UK Limited* [2009] EWHC 2609 (Comm); *Cooper Tire & Rubber Company Europe Limited & Others* [2010] EWCA Civ 864; *McGraw-Hill International (UK) Limited v Deutsche Apotheker – und Arztebank EG, Uniqa Alternative Investments GMBH, Uniqa Capital Markets GMBH, Stichting Ratings Redress, The Royal Bank of Scotland N.V.* [2014] EWHC 2436 (Comm).

[87] *S v S* [2014] EWHC 3613 (Fam).

[88] *Ibid,* at [17].

> "[Parties] are strategic, and there is one major disadvantage. Which is that, if someone comes into my office and says, 'I am thinking of getting divorced; I still love my husband or I still love my wife, but I am not sure what to do; I am just taking advice'; and I realise that there is this potential thing – I am going to say: 'Look, it is not for me to end marriages but – I think – it could make a huge difference if you filed in France immediately. Do not let her file in England because she will get a much better order here.' What am I doing? I am killing a marriage. I have had that discussion with quite a few people and most of them go the route of filing the petition, and some of them say, 'I am not going to do that. What do I do to make the marriage better?' We then discuss that. But most say, 'You are right.' […I]t catapults people. We are not comfortable, as divorce lawyers, with that. […] I think it is really good that it is just clear, but I think it is bad that it has this – it is – a completely unintended consequence."[89]

It seems clear that *court-first-seised* rule impacts on parties' decisions whether to make a marriage works or rather whether to issue in a jurisdiction where it would be more advantageous for their own financial interests. This would be the case in high-value cross-border matrimonial because "the more money there is, the more proportionate it is to argue about things that could make a difference to the outcome".[90] In such disputes, some strategic parties would not enter into out-of-court settlement negotiations before issuing proceedings in an EU Member State.[91] This means that, in high value matrimonial disputes with an international element, a strategic party would often first issue court proceedings and only thereafter parties could enter into out-of-court settlement negotiations. Nonetheless, an interesting observation was made:

> "For us, as divorce lawyers, [the *court-first-seised* rule] is critical. It is a really big change of law because I have been practicing for about 40 years. When I started, we obviously did not have that at all. And, it was completely different. We had a forum conveniens. So when there were two petitions, it was a forum conveniens decision. Completely different. Now, it is just first past the post.
>
> […]
>
> You are talking to one of the few people who is lived through both. The court first seised rule, I did not like it when it came because it was just a change. We do not like change, as lawyers. I thought it was harsh in some situations, but – actually – it is not really. It is a

[89] P. COLLIS, *Interview Transcript No 2*, at 10.

[90] A. BULL, *Interview Transcript No 12*, at 5.

[91] M. DANOV/ S. BARIATTI (note 50).

> practical way of cutting the argument. You have either got your petition in, or you have not."[92]

The pilot study suggests that, whilst the *court-first-seised* rule – as already noted above – might be improved by providing an appropriate mechanism which national judges could use to deal with abusive litigation strategies,[93] a significant proportion of the interview respondents dealing with family law would be content with the *court-first-seised* rule. It seems that the rule in question might work reasonably well in matrimonial proceedings (which do not concern high value financial remedies) as well as in disputes involving children.[94] That said, one interview respondent noted:

> "If I were able to make a magic wand and change things, I think I would keep the *lis alibi pendens* rule, but I would amend it. So that the country first seised with the divorce is also to be seised with all other aspects of the financial dealings unless (and to the extent that) both parties unequivocally agree that there should be a different jurisdiction to deal with their financial remedies."[95]

It seems that an important issue – which would potentially be impacting on the competence of the English and Welsh courts – concerns how effectively the problem of parallel proceedings is dealt with post-Brexit. At present, the *court-first-seised* rule is particularly valued as having "the advantage of being positive – a bright line rather than first to the finishing post – forum conveniens type of thing."[96] The pilot study appears to suggest that *forum non conveniens* might be useful for strategic defendants (and less than useful for claimants) in both cross-border family as well as in cross-border commercial disputes. However, introducing a *court-first-seised* rule might not be a solution on its own, not least because – as one respondent noted – a level of reciprocity is necessary for a *court-first-seised* rule to function effectively in cross-border cases:

> "The trouble with first seised is that it is only really terribly valuable, if the other country you are concerned with operates the same system. If you are operating the first seised and the other country is not, it does not really help you very much."[97]

Could *forum non conveniens* along with anti-suit injunctions be used to deal with the problems concerning parallel proceedings, post-Brexit? A significant proportion of the respondents appear to indicate that this might potentially be a solution in civil and commercial cases. A related consequence, however, is that this will inflate the litigation costs which may potentially have an impact on access to legal remedies in cross-border cases. It seems to this author that, if *Brussels Ia (or*

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[92] P. COLLIS, *Interview Transcript No 2*, at 9.

[93] P. BEAUMONT *et al.* (note 45).

[94] *E.g. Interview Transcripts No 4, 7 and 9.*

[95] R. CABEZA, *Interview Transcript No 7*, at 8.

[96] J. TURNER QC, *Interview Transcript No 10*, at 7.

[97] J. TURNER QC, *Interview Transcript No 10*, at 7. See also: S. TANG (note 14).

Lugano) regime were to no longer apply in England and Wales, there could be a risk for some strategic parties to start seeking anti-suit injunctions with a view to frustrating foreign proceedings. A comparative data would be needed to see how the anti-suit injunctions would impact (if at all) on the proceedings in other EU Member States (and attractiveness of their courts). Another related problem – which claimants might need to consider post-Brexit – concerns the aspects related to the service of documents. As one interview respondent noted, "if you are serving – getting out; applying for serve out the jurisdiction; going through diplomatic channels – all that kind of stuff could be a massively helpful thing for defendants."[98]

Moreover, there would be particular issues concerning costs which would need to be considered in family law proceedings because a *forum non conveniens* dispute would presuppose "preliminary hearings to determine the jurisdiction. And, that is going to increase costs for the clients, but also factor in delay."[99] Indeed, the inflexibility of the English PIL to allow English courts to apply foreign law in cross-border matrimonial proceedings means that long-lasting *forum non conveniens* disputes are likely to ensue in high value disputes before the English courts post-Brexit.

There is a strong view suggesting that anti-suit injunctions might not always be an appropriate solution in family law disputes because:

> "The courts are very loath to issue injunctions preventing people litigating abroad, if they have got a legitimate basis. Certainly, in England, in family law, they will only do it if you are misusing a power. They will not say, 'Oh, well, we think you should be litigating here; therefore, we will injunct you from proceeding anywhere else.' I mean, we will not do that, because that would be an improper fetter."[100]

This opinion may be strengthened further by powerful comity considerations.[101] Therefore, the Brexit developments strongly indicate that, in the context of parallel proceedings, there are several major questions for the UK policy-makers to address: Should there be a *court-first-seised* rule (and how could this be introduced, if at all) post-Brexit? Or should the common law concept of *forum non conveniens* be revived (and how)? Or should there be perhaps a new contemporary rule[102] to deal with parallel proceedings, post-Brexit.

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[98] CH. BURDETT, *Interview Transcript No 11*, at 17.

[99] *Interview Transcript No 13*, at 5.

[100] J. TURNER QC, *Interview Transcript No 10*, at 17. See the view of the U.S. U.S. Court of Appeal in *Laker Airways Limited v Sabena* 731 F.2d 909 at 938, 954-5 (DC Circuit, 1984).

[101] T.C. HARTLEY, Comity and the Use of Antisuit Injunctions in International Litigation, 35 *American Journal of Comparative Law* 1987, p. 487; L. COLLINS, Comity in Modern Private International Law, in J.J. FAWCETT (ed), *Reform and Development of Private International Law: Essays in Honour of Sir Peter North*, Oxford 2002, p. 89.

[102] Compare: A. ARZANDEH, Should the Spiliada Test Be Revised?, *Journal of Private International Law* 2014, p. 89-112.

V. Recognition and Enforcement: Legal Landscape – Parties' Strategies – Access to Remedies

Any Brexit-driven risks concerning parallel proceedings need to be considered along with the issues related to the subsequent recognition and enforcement of the rendered judgment.[103] A judgment rendered by an English and Welsh court would have a *res judicata* effect in another jurisdiction only after they had been duly recognised.[104] Similarly, a foreign judgment needs to be recognised and enforced in England and Wales. This would be a difficult task under the common law rules. It is well established that the current common law regime is a relatively obstructive one which is largely due to "the English courts' restrictive interpretation of international jurisdictional competence on the part of the foreign courts."[105]

It is well established that various multilateral and/or bilateral agreements for judicial cooperation may be used to facilitate the recognition and enforcement of foreign judgments in England and Wales as well as of English and Welsh judgments in other countries. Possibly, a potentially significant Brexit related issue concerns the fact that – as already noted[106] – the EU PIL framework has succeeded in facilitating the recognition and enforcement of foreign judgments within the EU internal market.[107] The issues might need to be addressed because a potential non-application of the Brussels Ia and IIa regime in the post-Brexit era can be regarded as a risk for private parties' effective access to legal remedies in cross-border cases. In particular, a change in the legal landscape in relation to PIL could depreciate the value of some English and Welsh judgments which might – in turn – impact on the forum selection process. This should explain why a number of policy options concerning the recognition and enforcement (*e.g.* common law, Brussels Ia and IIa, Lugano, The Hague Choice-of-Court Agreements) have been considered to apply post-Brexit.[108] The issue was *inter alia* considered before the Justice Sub-Committee where Mr Hugh Mercer QC noted:

> "if you are knocked down in the street in Nicosia, you can bring your claim against the Cypriot insurer in English courts. It is certainty for the little guy. The oligarchs can always afford the

[103] Compare: Article 33(1)(a) of the Brussels Ia Regulation.

[104] P. BARNETT, *Res Judicata, Estoppel and Foreign Judgments: The preclusive effects of foreign judgments in private international law,* Oxford 2001, at p. 31 and 41.

[105] A. ARZANDEH, Reformulating the common law rules on the recognition and enforcement of foreign judgments, *Legal Studies* 2019, p. 56, at 61.

[106] M. DANOV (note 40).

[107] See more: B. HESS/ T. PFEIFFER/ P. SCHLOSSER, *Study JLS/C4/2005/03 – Report on the Application of Regulation Brussels I in the Member States*, Heidelberg 2007, available at: http://ec.europa.eu/civiljustice/news/docs/study_application_brussels_1_en.pdf [52–53]; P. BEAUMONT *et al.* (note 8).

[108] House of Lords – European Union Committee, Brexit: justice for families, individuals and businesses?, HL Paper 134, available at: https://publications.parliament.uk/pa/ld201617/ldselect/ldeucom/134/134.pdf. See also A. DICKINSON (note 14); G. RÜHL (note 14); S. TANG (note 14).

> common law, but the little guy is given certainty and uniformity. It is very useful for judgments; you get your judgment against the Cypriot insurer, you can take it to Cyprus and it will be recognised automatically. You know that there is a uniform procedure for that. So when you start the litigation back in your home country, you are pretty certain that you will get the money at the end of the day."[109]

Although this type of risks could potentially be minimised through more comprehensive travel insurance policies, this opinion nicely captures the important role the EU PIL framework has played in facilitating the private parties' access to effective legal remedies within the EU.

The pilot study strongly suggests that the eventual recognition and enforcement of an English and Welsh judgment abroad would impact on the forum selection process. In commercial cases, 100% of all our survey respondents (*i.e.* 28 respondents regarding commercial law disputes) felt that that this was the case. However, 75% of the survey respondents did indicate that the recognition and enforcement it is only a factor which needs to be considered along with the other attributes of a claim. Similarly, in family law disputes, an overwhelming majority of respondents (13 out of 14 respondents regarding family law disputes) appear to be taking the view that there might be a link between the forum selection process and the eventual non-recognition and/or non-enforcement of an English and Welsh judgment abroad. But, a significant majority 53% (*i.e.* 8 out of 14 respondents) also submitted that the potential non-recognition would only be one of the relevant factors. Hence, a significant majority of legal practitioners – specialising in both commercial law and family law – indicate that there could be other important attributes which need to be thoroughly identified and considered in individual cases.

The pilot study further indicates that the eventual non-recognition and/or non-enforcement of an English and Welsh judgment abroad would impact on the settlement negotiations. Approximately 93% of all respondents appear to take this view. Once more, a substantial proportion 82% (*i.e.* 23 out of 28) of the commercial law respondents and 42% (*i.e.* 6 out of 14) of the family law respondent, nonetheless, submitted that the potential non-recognition would only be one factor to be considered in settlement negotiations along with the other relevant factors. Since the survey responses strongly suggest that a substantial proportion of the respondents' cases settle, the research interviews turned out to be central in shedding further light on these issues.

The qualitative data shows that a very important attribute of the case – which might be considered by strategic parties – is the location of the parties' assets. More importantly, the fact that London is a business centre might be an important consideration in high value matrimonial proceedings. An interview respondent summarised this nicely by submitting:

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[109] 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, available at: http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/brexit-civil-justice-cooperation/oral/45378.html.

> "[the judgment-debtor] does really have to come back to London – from time to time – for his business. So you look at all of that – and I have had to give this advice to [client] – unless you are prepared never to return, you are going to ignore all the orders and you are not going to pay her a penny. But, you know you cannot come back to this country – you will be arrested if you do. We are lucky because London is a business centre, so that might be a factor."[110]

The increasingly global nature of the business activities (as reflected in the corporate structure of the contemporary groups of companies) appears to be another major attribute which might impact on the potential recognition and enforcement of English and Welsh judgments. This attribute – taken together with the fact that London is a global business centre – may well be a very important consideration for parties in certain cross-border commercial disputes. More specifically, the parties in some high value commercial disputes might feel that the question whether the rendered judgement will be recognised and enforced within the EU might be less of an issue because the parties may have assets in England and Wales and/or in other jurisdictions where the rendered English and Welsh judgment may be recognised. One interview respondent noted:

> "[…] currently there is a perception that certainly a judgment from the English courts – even if there are not formal recognition processes – there will be some means of enforcing the judgment somewhere in the world. Secondly, given the clients – I either act for or against – tend to have international operations, the likelihood is, as I say, that an English judgement will be able to be enforced somewhere."[111]

The fact that London is perceived as business and financial centre may indeed turn out to be a major consideration which promotes (and will continue to promote) the use of English jurisdiction and law. Since London is likely to remain an important business and financial centre for some years (to say the least), the recognition and enforcement would potentially be less of an issue in cases involving big multinational companies. There could also be cases, where the relevant reputational[112] risks for parties (or one of the parties) could force settlements, with the recognition and enforcement potentially becoming marginally important in such cases.

However, if the issues concerning parallel proceedings and potential non-recognition and enforcement are considered cumulatively in individual cases, they might – in theory – encourage strategic parties (with access to finance) to raise new preliminary PIL issues (concerning service; *forum non conveniens*; bringing strategic claims elsewhere; commencing strategic proceedings seeking anti-suit injunctions). In other words, there appears to be a risk for parties' strategies to be devised with a view to exploiting PIL issues (concerning parallel proceedings and potential non-recognition of foreign judgments). Such strategies may generate

[110] P. COLLIS, *Interview Transcript No 2*, at 7.

[111] *Interview Transcript No 14*, at 5.

[112] *Interview Transcripts No 5 and 15*.

delay and costs which could in turn adversely affect their opponents' expectations about the outcome of litigation, impeding certain parties' access to effective legal remedies in cross-border cases and adversely affecting the attractiveness/appropriateness of the English and Welsh courts. The latter issues is closely linked with the question about the parties' entitlement to legal remedies in cross-border cases which is strongly correlated with the governance issues to be addressed by UK policy-makers post-Brexit.

VI. Applicable Law: Legal Landscape – Parties' Strategies – Access to Remedies

The parties' entitlement to legal remedies would depend on the applicable law which should apply to the merits of a cross-border dispute. The pre-Brexit vote data and the recent data from the pilot study strongly indicate that strategic parties would only devote their financial resources to argue about the applicable law in cases where the application of one set of substantive law (rather than another) would impact on the outcome of their dispute.[113] Disputes about applicable could be time-consuming and resource-intensive, not least because the parties' entitlement to remedies (and indeed the aspects which would impact on the monetary value of their desired legal remedies) may be impacted by the applicable substantive law. The data from the pilot study unequivocally suggests that sophisticate parties (with access to finance) would often undertake comparative studies, in order to ascertain the remedies they would be entitled to recover under the potentially applicable rules. It is unlikely that the parties' approach would change, but would English law change?

In order to ensure that the same set of substantive laws would be used to determine the rights and obligations of the parties irrespective of where they litigate, the EU legislator harmonised the PIL rules applicable to contractual and non-contractual obligations in civil and commercial matters. To this end, the Rome I and II Regulations were adopted by the EU. Most recently, the UK policy-makers appeared to address the issues concerning the applicable laws in civil and commercial matters by adopting a statutory instrument[114] which ensures that "Rome I and Rome II (and for the purposes of certain old contracts, the Rome Convention rules) will continue to apply, as domestic law, post exit".[115] This is indeed a welcome development. But, is this enough to address the specific issues concerning the applicable law in cross-border disputes, post-Brexit?

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[113] M. DANOV (note 40). See also M. DANOV/ P. BEAUMONT (note 3) and P. BEAUMONT *et al.* (note 8).

[114] The Law Applicable to Contractual Obligations and Non- Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2018.

[115] Explanatory Memorandum to The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment, etc) (EU Exit) Regulations 2018 [2.3].

A number of academics appear to take the view that English substantive law will not change post-Brexit.[116] One interview respondent shared this view by submitting that "[a] lot of law firms are putting out in Europe a lot of misinformation about the impact of Brexit – essentially saying the English law is going to change as a consequence of Brexit."[117] The Great Repeal Bill,[118] however, indicates that it is highly likely for the English law to gradually change[119] in so far as, at present, the EU law forms part of English law. In particular, even if the English contract law were to remain the same, some of the cross-border disputes would raise regulatory aspects related to cross-border trade and services within the EU. In this context, it should be noted that the principle of mutual recognition is a major feature of legal landscape within the EU internal market.[120] It is well established that "[a]ccording to that principle, a Member State may not prohibit the sale on its territory of products which are lawfully marketed in another Member State […]".[121]

The relevant regulatory risks would inevitably impact on the various strategic decisions which are taken by businesses that operate within the UK.[122] There is a strong case that any change in the regulatory landscape would impact on the rights and obligations of the parties that are involved in cross-border economic activities. This would impact on the UK's desirability as a place for doing business which would in turn impact on the attractiveness/appropriateness of the English and Welsh courts for the resolution of certain types of disputes.

Various sectors/industries (*e.g.* manufacturing; trade; services) would be affected differently by a post-Brexit change in the regulatory framework for cross-

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[116] R. FENTIMAN, Response to Question 3, 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, available at: http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/brexit-civil-justice-cooperation/oral/44259.html. See also J. HARRIS, Brexit – choice of law, jurisdiction and enforcement, available at: http://www.nortonrosefulbright.com/knowledge/videos/143504/brexit-choice-of-law-jurisdiction-and-enforcement; A. BRIGGS – Written evidence (CJC-0002), Secession from the European Union and Private International Law, available at: http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-justice-subcommittee/brexit-civil-justice-cooperation/written/46823.html; A. BRIGGS, Secession from the European Union and private international law: the cloud with a silver lining, Lecture to the COMBAR Association – 24 January 2017, available at: https://www.blackstonechambers.com/documents/311/Secession_from_the_European_Union_and_private_international_law.pdf, at 29.

[117] D. HONEY, *Interview Transcript No 6*, at 2.

[118] European Union (Withdrawal) Bill, available at: https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/18005.pdf.

[119] HM Government, The United Kingdom's exit from and new partnership with the European Union (2017) Cm 9417, at [1.3].

[120] Art. 26 TFEU.

[121] Regulation (EC) No 764/2008 laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State.

[122] Compare: HM Government, The future relationship between the United Kingdom and the European Union (2018) Cm 9593 [28].

border trade. The point can be illustrated with the following examples. A European chief executive of an international bank who is anonymously cited by the Financial Times appears to submit that: "[t]he whole thing is politicised […]. There is a fight on for City jobs with the EU, and the ECB is part of Europe's armoury."[123] Also, private equity firms appear to be impacted by Brexit. It is widely perceived that "the UK is the place to be for private equity firms but [a private equity executive, Mr John Sinik] says political uncertainty about the country's future relationship with Europe is pushing it close to 'breaking point'."[124]

A change in the pattern for cross-border trade/services could impact on the litigation pattern in disputes arising out of the relevant economic activities. The point that any change in the regulatory framework for cross-border trade and/or cross-border services might subsequently lead to a change in the litigation pattern came through in the course of the interviews.

> "There are all these academic issues, which people are discussing – relating to jurisdiction, choice of law, contracts – all those kind of things. I understand that. I think from my perspective – I suppose there are two aspects, which do not necessarily get headlines. The first is inevitably it will depend on the risk of flight from London. For example – if the insurance industry – if Lloyds finds itself becoming much more Europe-centric whether that is Paris or Brussels or Munich; if the businesses come away from London and establish elsewhere […. – t]he pattern of trade or services changes – if you are based in Munich, for example, and many of your contracts and your service providers, your customers go with you; and the same for auto parts; it is the same for all these different types of sectors; then, it is much less likely that you are going to choose English law and jurisdiction because you are not here, so I can see that being a thing."[125]

It seems that it might be possible for Brexit to potentially have an impact on the choice of English law as being used to ascertain the rights and obligations of the parties in some categories of cross-border commercial disputes with a regulatory element, to say the least. This means that the broader regulatory context for particular sectors (*e.g.* insurance, finance, car manufacturing) should be primarily considered as a separate attribute. The cross-border litigation would only have a secondary role in allowing parties to transnational transactions (and/or any other cross-border interactions) to attain legal remedies in disputes arising out of these transaction/interactions which are shaped by the regulatory landscape.

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[123] S. MORRIS/ J. BRUNSDEN, How London banks are trying to dodge Brexit, *Financial Times* – 10 April 2019, available at: https://www.ft.com/content/970680cc-5abb-11e9-9dde-7aedca0a081a.

[124] J. ESPINOZA, The Brexit effect: private equity firms shun UK for Europe, *Financial Times* – 12 May 2019, available at: https://www.ft.com/content/7dbefce0-6d92-11e9-80c7-60ee53e6681d.

[125] CH. BURDETT, *Interview Transcript No 11*, at 2.

Given the Brexit context of the pilot study, a very important question was: Is the fact that EU law is part of English law seen as anyhow important by respondents' clients? The pilot study *inter alia* aimed to determine whether the fact the EU may no longer be part of English law could potentially impact on the use of English choice-of-law clauses. There was no evidence that this was a major risk, if any. As one interview respondent noted, the fact that EU law is part of English law "is an assumption that [the] clients subconsciously make [without] consciously think[ing] of it as a separate consideration."[126] Hence, it was not possible to determine how much of a factor this has been in the forum selection process and further data in a comparative context is necessary. Nonetheless, it seems clear that the fact that London is perceived as business and financial centre may indeed turn out to be a very important consideration which promoted the use of English law (and English jurisdiction clauses).

Brexit might have somewhat different initial implications in family law. As noted above, it is well established that an English and Welsh court will not normally apply foreign law/s in cross-border matrimonial disputes. In the pre-Brexit era, the correlation between the parties' entitlement to legal remedies and their strategies is reflected in the jurisdictional battles before the English and Welsh courts.[127] The fact that England and Wales is a venue of choice for high value matrimonial disputes is a strong indication that parties with access to finance would consider their entitlement to remedies under the potentially different applicable laws. This was clearly reinforced by the qualitative data from the pilot study which shows that this is unlikely to change. However, Brexit would potentially have another impact on certain cross-border family law disputes (or rather potential family law disputes) before English courts in so far as the public law concerning migration would potentially change. This would impact on the parties' migration status, shaping their litigants' strategies accordingly.

The pilot study unequivocally demonstrates that any potential change of the regulatory framework concerning migration appears to impact on parties' strategies in cross-border cases.

> "[…] a lot of clients are obviously taking advice about their immigration status; are worried about enforcement – that has certainly come up – they are worried about enforcement post Brexit. It does affect the position regarding the child arrangements; and if one parent wants to leave the jurisdiction with the children, how easy (or not) it is going to be to get them back. […] There are concerns, but it is quite difficult for anybody to do anything specific. I think the most specific thing that people are doing is applying for British nationality (if they are entitled to do so) and taking advice about that in circumstances where they would never have bothered before – they were just European. People, who might be about to lose their right to live

[126] *Interview Transcript No 14*, at 8.

[127] See *S v S* [2014] EWHC 3613 (Fam).

> in this country, are seeing where they stand – and that includes people who are married, but the marriage is not great."[128]

Therefore, there is a strong case that the legal landscape concerning cross-border economic activities (broadly defined to cover the free movement of workers and EU citizens' rights) within the EU turns out to be a very important attribute of the case. This attribute could have a significant impact on the correlation between the litigants' strategies and the applicable substantive law/s.

The point could be strengthened further by the Brexit implications in cases raising regulatory issues. There may be important issues to be addressed in the light of further comparative data because the commercial disputes are becoming more complex, involving multiple issues:

> "When you have a very complex piece of litigation – inevitably, it involves contractual and non-contractual disputes; it probably involves trust disputes; it probably involves regulatory disputes and compliance disputes. Regulatory, in our world is hugely important. And, in the finance sector, it is very rare to have a claim which does not include regulatory issues. It is hugely important. I suppose, the starting point of all of these claims is contract. That is the starting point. Although I have had fraud cases, where we have tried to found jurisdiction here where there is no prior contractual relation. But generally – rule of thumb – you start with a contract and then, everything else flows away from that."[129]

There would be complex issues (contractual, regulatory, tortious). The pilot study shows that a number of potential Brexit amendments in the UK PIL framework might impact on the litigants' strategies broadly defined to cover the forum-selection process. The so devised litigants' strategies might affect the attainability of desired remedies, with the defendants potentially questioning how the relevant EU regulatory rules should be interpreted, post-Brexit. This may in turn impact on the attractiveness/appropriateness of the English and Welsh courts in certain categories of regulatory disputes. This means that various competing law firms based in other EU jurisdictions may start devising different marketing strategies, in order to attract such high value regulatory disputes, expanding the influence of their own jurisdictions/laws.

VII. Long-Term Policy Options: Governance Aspects – Access to Justice in Cross-Border Cases

A PIL framework could only effectively pursue an appropriate governance function, if the (national/regional/global) policy-makers have devised it by taking into

[128] P. COLLIS, *Interview Transcript No 2*, at 3.

[129] CH. BURDETT, *Interview Transcript No 11*, at 4.

account the way in which PIL rules shape the litigants' strategies, and there is a mechanism which enables judges to swiftly defeat abusive litigation tactics.[130] If these issues are not carefully considered by the UK policy-makers, then there is a real risk that an ineffectively functioning PIL framework could be exploited by strategic litigants with a view to impeding their opponents' access to effective legal remedies. There is a risk that any fresh legal uncertainty which would be connected to a post-Brexit change of the PIL rules could be exploited by strategic parties. Carefully devised litigation strategies exploiting any Brexit-driven uncertainty (or rather any Brexit related speculation as the case may be) and inflating the litigation costs could – in turn – adversely affect parties' expectations about the outcome of litigation and private parties' access to legal remedies. This would impact on the attractiveness of London as a venue of choice.

However, a careful analysis of the interview data appears to suggest that the major and most immediate Brexit risk is a reputational one which might potentially diminish the global status of the English courts. This is indeed a key issue which might need to be addressed as priority. As an interviewee put it:

> "the attraction and status of the English court – in particular, the English commercial court – as an established and recognised venue for the resolution of commercial disputes will be prejudicially affected by Brexit. Because, it seems to me that there is no doubt that Brexit has diminished the status of England abroad. I mean, people cannot understand why England has voted to leave its major trading block. They see it as an act of senseless self-harm. I think there is a concern that the status of the English courts is going to be affected."[131]

An appropriately re-designed UK PIL landscape which facilitates private parties' access to justice (and access to the legal remedies in particular) in cross-border cases is much needed. This will in turn enhance the attractiveness of English and Welsh courts as a venue of choice in a global context. Therefore, a major question which needs to be considered is: If the English and Welsh courts are considered to be among the leading in the world and if the pattern of the trade changes, how could the UK PIL landscapes be re-designed, so that the English courts continue to be attractive?

The response to this question matters because the international law firms with offices in London may swiftly adjust their strategies accordingly, in order to be better placed to serve their international clients:

> "If you are mainly based in London, and you have one or two offices elsewhere, or none, could be a real problem. We have numerous offices globally – we are in every jurisdiction. For us, in terms of

[130] P. BEAUMONT *et al.* (note 8).

[131] *Interview Transcript No 14*, at 2. See also L. GLEGG, *Interview Transcript No 1*, at 24. Compare: D. THOMAS, Business urges next PM to repair UK's international reputation Fresh attempt by CBI to be heard in run-up to October Brexit deadline, Financial Times – 17 June 2019, available at: https://www.ft.com/content/3a0a9dc8-8ec7-11e9-a24d-b42f641eca37.

> partnership, it then becomes a balancing exercise. Do we beef up arbitration in Singapore? Do we beef up arbitration in Dubai? Do we say, 'Okay, well, it is all kind of swings and roundabouts.'? For us, as a law firm – it is not so much necessarily how do we squarely deal with the issues in London – it is how, as a global law firm, do we balance our footprint; so as to best deal with those issues; which is very exciting."[132]

In order to identify the most appropriate policy options, there are different aspects which need to be carefully considered in the Brexit context. On the one hand, it is true that the UK participation in the EU PIL framework provided the necessary legal mechanisms, which enabled London (as a major business centre) to further strengthen its dominant position on the market for cross-border adjudication services.[133] On the other hand, an appropriate analysis of the relevant policy options concerning judicial cooperation should be closely linked with the agreed framework for the future EU/UK relationship.

Depending on the future EU/UK regulatory regime for trade and service, it is necessary to consider whether the UK needs to continue to be part of an EU PIL framework which, whilst providing for a semi-automatic enforcement of the UK courts' judgments, may be less than effectively functioning, bringing about negative externalities. More specifically, being part of the EU PIL framework for judicial cooperation may not only bring advantages, but it may also produce disadvantages which may spread across, if the institutional architecture for the implementation of the adopted is less effective/efficient than desirable. The negative externalities could be significant because any system of cooperation, which is based on the principle of mutual trust,[134] is bound to export deficiencies of the national judicial systems (which may occasionally be far too slow, for example).[135]

If the Brussels I and II Regulations and/or the Service Regulation (which require a level of reciprocity) were to no longer apply post-Brexit, what are the aspects of the legal landscape in relation to PIL which need to be revised as a matter of priority? Indeed, Brexit might be an opportunity to re-consider and re-design the legal landscape in relation to PIL. Brexit might hopefully spur an institutional reform within the EU. As one interview respondent (who deals with family law disputes) puts it:

> "international jurisdiction […] is an absolute crock off – if you sat down and said, "How are we going to work out something that makes sense?" It would not be any of the stuff that we have got currently. It is just massively complicated – really, really expensive

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[132] CH. BURDETT, *Interview Transcript No 11*, at 3.

[133] B. HESS/ M. REQUEJO-ISIDRO, Brexit – Immediate Consequences on the London Judicial Market, available at: http://conflictoflaws.net/2016/brexit-immediate-consequences-on-the-london-judicial-market/. See also E. LEIN *et al*. (note 8); M. DANOV (note 40); M. DANOV/ P. BEAUMONT (note 3).

[134] Recital 26 of Brussels Ia; Recital 21 Brussels IIa.

[135] M. DANOV (note 40). See also P. BEAUMONT *et al.* (note 8).

> with potential pitfalls at every turn. And totally ignores what you are actually trying to achieve, which is what I have just spoken about."[136]

Brexit may spur a wider debate which should inform policy choices, enabling the UK policy-makers to create a more effectively functioning legal framework for judicial cooperation, post-Brexit. It is indeed high time for policy-makers to consider the long-term policy options, systematically addressing any short-term and long-term challenges. There is a strong case for the UK policy-makers to take a global perspective on the issues considering the global developments. Promoting a level of judicial cooperation in a global context is far from simple, not least because the wider economic interest in fostering international trade and far-reaching policy reasons concerning migration need to be considered when re-designing the current legal landscape in relation to PIL.[137]

Why is England and Wales well placed to take a lead along with some other leading jurisdictions (where global or pan-European business centres are being based)? The difficult issues concerning choice-of-court agreements (and/or choice-of-law clauses) are less to do with drafting of the relevant jurisdiction agreement and more to do with the complexity of the disputes which parties are being involved nowadays.[138] Resolving such complex cross-border disputes pre-suppose a well-functioning legal system which is founded on appropriately reliable procedural rules, allowing judges to robustly ascertain the relevant facts and competently apply the applicable substantive laws. As the interview data suggests:

> "Th[e litigants] want to achieve a result, but they want to achieve a result that they think is going to be fair and correct. I mean, there are I am sure jurisdictions in the world where you can get a much quicker result. But, you would not have confidence in its correctness."[139]

It is a time for the PIL scholars in this country and across the globe to consider the relevant policy options and governance aspects on the basis of a relevant empirical data by using an appropriate research methodology and theoretical model for measuring the Brexit impact in different sectors. Alternatives to the EU/EEA route to judicial cooperation in civil and commercial matters should be considered. Since the judicial cooperation in civil and commercial matters is closely linked to the pattern of trade in the post-Brexit, one should consider the global regulatory landscape. As one expert witnesses submitted in front of the House of Commons' Exiting the European Union Committee, "[y]ou have Trump's America, you have China and you have the EU"[140] or remain neutral (perhaps?).

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[136] A. BULL, *Interview Transcript No 12*, at 21.

[137] M. DANOV (note 14).

[138] *Interview Transcript No 14*, at 7

[139] *Ibid* at 6.

[140] S. OGILVIE, response to Q4226 – Oral evidence: submitted to the House of Commons' Exiting the European Union Committee, *The progress of the UK's negotiations on EU withdrawal*, HC 372, available at: http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/exiting-the-european-union-committee/the-progress-of-the-uks-negotiations-on-eu-withdrawal/oral/102216.html.

The UK policy-makers have some important decisions to make in this respect. Different policy options may be considered with a view to facilitating private parties' access to justice in cross-border cases arising in a global context which will in turn enhance the attractiveness of the English and Welsh courts. Setting up an appropriate research network, involving experienced legal practitioners, is central to re-designing the legal landscape and contributing to the debate under the auspices of the Hague Conference. As one interview respondent noted:

> "[t]here is a level of lack of practical awareness of how disputes are resolved in these discussions. I think a sense of commercial reality is often quite important as to how the enforcement regime globally is working at the moment, particularly within Europe. And the English courts and the English experience is very relevant because we see a huge amount of disputes being resolved in the English courts, much, much more than in the rest of Europe."[141]

In a post-Brexit context, the proposed socio-legal model[142] would capture the effect of various aspects of PIL rules which, for example, would impact on the claimant's decision to issue legal proceedings in England and continue with the litigation or make/accept a settlement offer. Devising a PIL regime to facilitate private parties' access to remedies in cross-border cases pre-supposes a level of cooperation between the different legal orders.[143] This means that a distinction must be drawn between what the desirable framework is and what regime actually is achievable, considering the different legal orders' "compliance costs".[144] The problems concerning the governance aspects of globalisation in general have been widely discussed in the regulatory theory,[145] with Picciotto submitting that:

> "Liberalization, privatization, and the emergence of new forms of regulation have also been international processes, and are central to what is described as globalization. National liberalization initially focused on the removal of border barriers (quotas, tariffs, and exchange controls) as the immediate obstacles to the flows of goods and finance. However, the opening up of the markets to competition created awareness of the differences between national regulatory requirements, and concerns that such differences constituted 'non-tariffs barriers'. This has led to new approaches to international regulatory coordination involving different degrees and combinations of regulatory competition and harmonization."[146]

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[141] D. HONEY, *Interview Transcript No 6*, at 25.

[142] M. DANOV (note 40).

[143] J.-P. LANGLOIS/ C.C. LANGLOIS, Dispute Settlement Design for Unequal Partners: A Game Theoretic Perspective, *International Interactions* 2007, at 347.

[144] *Ibid.,* at 362.

[145] See more literature listed in S. PICCIOTTO, Introduction: Reconceptualizing Regulation in the Era of Globalization, in S. PICCIOTTO/ D. CAMPBELL (eds), *New Directions in Regulatory Theory*, Oxford 2002, p. 1-11.

[146] *Ibid,* at 5.

This type of research will fall on the cross-roads of legal scholarship and political sciences, considering the literature about globalisation and containing an inter-disciplinary element. Nearly 45 years ago, von Mehren's proposed "special substantive rules for multistate problems"[147] which could be adapted as a truly global approach in addressing the regulatory problems in cross-border cases.[148] Given the increasingly empirical nature of the legal scholarship nowadays, there is a case for a new type of collaborative PIL research projects which consider the political processes as well as practical challenges surrounding the adoption and implementation of the PIL instruments which are to be applied regionally/globally. As part of this process, a close attention should be paid to the strategic litigants' behaviour which needs to be factored in the re-designed UK PIL framework post-Brexit.

The case for a new approach in the PIL theory could be strengthened by considering how the national sovereignty interrelates with the process of globalisation, enabling the English and Welsh courts to dispense justice in a global context. There are several aspects of globalisation which have been considered by Agnew,[149] in order to demonstrate the "complexity of sovereignty"[150] in this day and age, whilst referring to the *Tajik Aluminium Plant* litigation.[151] This was a high value dispute involving "the biggest industrial enterprise in Tajikistan [which] accounts for a significant proportion of the country's GDP."[152] The proceedings were issued in London by the Tajikistan legal entity (which was responsible for the business administration of the plant). The defendants included the plants' former director, Abdukadir Ermatov, who allegedly entered into some illegitimate/corrupt contractual arrangements with another individual from Tajikistan, Avaz Nazarov. Interestingly, the jurisdiction was not challenged,[153] with all parties being content for the English courts to hear and determine their dispute. With this in mind, Agnew submits:

> "[…] three thousand miles away from the [plant] in question and under a foreign jurisdiction, a legal case of major importance to Tajikistan – the smelter is one of the country's only major industrial assets – will be eventually determined. This examples indicates several features of contemporary sovereignty and globalization. One is that London is a global center in litigation because of its specialized law firms and the reputation of its courts. […] But, it also suggests, of course, that Tajikistan, 'independent' from the former

[147] A.T. VON MEHREN, Special Substantive Rules for Multistate Problems: Their role and significance in contemporary choice of law methodology, *Harvard L. Rev.* 1974–75, at 347.

[148] M. DANOV, Global Competition Law Framework: A Private International Law Solution Needed, 12 *J. of Private Int'l L.* 2016, p. 77.

[149] J. AGNEW (note 2).

[150] *Ibid,* at 2.

[151] *Tajik Aluminium Plant v Ermativ and others* [2005] EWHC 2241 (Ch.)

[152] *Ibid,* at [1].

[153] *Ibid,* at [5].

> Soviet Union since 1992, has only a nominal sovereignty in many respects over its own territory. Other actors have varying degrees of effective control over its territory. Even authority can be outsourced. Indeed, the decision of a London court can have greater legitimacy, because it is plausibly based on greater transparency, than more local ones."[154]

Whilst this example would no doubt capture the phenomenon of globalisation (limiting sovereignty) from the perspective of political scientists, it also shows that it is largely the private parties' trust in the credibility and the reputation of a given forum (which is broadly defined to cover the expertise of the judges and legal practitioners as well as procedural rules) that is the major factor that impacts the forum selection process.[155] Therefore, enhancing the reputation of the UK as a place for doing business is central to boosting the attractiveness of London as a venue for dispute resolution in cross-border cases.

The point was captured by the former Lord Chancellor notes, in his report, that the English and Welsh "commercial courts are recognized as pre-eminent. International litigators come here because they know they will be treated fairly […]. That confidence translated into a £25.7 billion contribution to the UK economy by legal services in 2015."[156] This means that the UK international law firms might have an important role to play in contributing to the development of the relevant legal landscape by advising on the drafting of the different choice of court and choice of law agreements which might gradually become a norm for particular industries.[157] Such a governance perspective could be taken in the light of the recent research on the role of private rules in the process of the global rule-making.[158] The legal theory has broadly identified how these developments could bring forward new players who could aid in shaping the development of the relevant global landscape, with Snyder submitting that:

> "Viewed from a political standpoint, globalisation has witnessed the rise of new political actors such as multinational firms, non-governmental organisations and social movements. It has tended to weaken, fragment, and sometimes even restructure the state, but has not by any means destroyed or replaced it. Globalisation has also radically altered the relationship to which we have become accustomed in recent history between governance and territory. It has thus blurred and splintered the boundaries between the domestic and external spheres of nation-states and of regional integration organisations, fostered the articulation of systems of multi-level governance, interlocking politics and policy networks, and helped to render

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[154] J. AGNEW (note 2), at 3.

[155] *Ibid*.

[156] Lord Chancellor *et al*. (note 12), at 3.

[157] See International Swaps and Derivatives Association, *ISDA Brexit Briefings,* available at: https://www2.isda.org/functional-areas/legal-and-documentation/uk-brexit/

[158] T. BUTHE/ W. MATTLI, *The New Global Rulers: The Privatization of Regulation in the World Economy,* Princeton 2011.

> universal the discourse of, and claims for, human rights. In many political and legal settings, such as the European Union, it has raised serious questions about the nature and appropriate form of contemporary governance."[159]

The UK experience in shaping the development of the EU PIL regime (through the negotiations of the relevant PIL instruments at governmental level) and its implementation (through the application of the EU PIL instruments) appears to suggest that devising a regional PIL regime may be a complex task. Should the UK policy-makers and law firm join forces to enhance the attractiveness of London as venue of a choice? Could there be new opportunities, post-Brexit? In the course of the research interviews in London, one respondent submitted:

> "[…] what is quite exciting and has not had enough coverage is the government promise to establish a new court in the City, dealing with financial fraud. Although – of course – the commercial court already does, it is going to be a very specialist court – specialist judges, dealing with all these kind of – money laundering, fraud – issues. Actually, I think that is going to be quite a good forum for these kind of cases. I think that that in itself may encourage English law and jurisdiction for a particular type of transaction. It may also encourage – where you do not necessarily have a law and jurisdiction clause – people maybe much more keen to pursue some of these cases in this new court in the City. Now, goodness knows how that will play out in practice. It is fine words, we are going to establish this great court. But, potentially, if it works and it has teeth, then that could be a real attraction for litigants."[160]

One could add that there is already a specialised Competition Appeal Tribunal which could be made even more attractive to resolve global antitrust disputes in the post-Brexit era. The UK is further well placed to seek to play a more central role in shaping the global landscape in relation to PIL through the Hague Conference on Private International Law.

VIII. Conclusion – Important Issues to be Addressed

Since the EU has incentivised economic integration by liberalising cross-border trade and services, there is an increasingly dense network of pan-European supply chains (or even global supply chains[161]) which span across the EU, including multi-

[159] F. SNYDER, Governing Economic Globalisation: Global Legal Pluralism and European Law, *European L. J.* 1999, at 336.

[160] CH. BURDETT, *Interview Transcript No 11*, at 2.

[161] See the complex disputes regarding global supply chains: *The LCD Appeals* [2018] EWCA Civ 220; *Motorila Mobility LLC v AU Optronics Corp* 775 F.3d 816, 824 (7th Cir. 2015). See also G. TASSEY, Competing in Advanced Manufacturing: The Need for

national companies, large national distributors/purchasers, SMEs and consumers from the EU and UK. The resolution of cross-border civil and commercial disputes in the EU is not a new issue, but Brexit has pushed it up on the agenda. Because Brexit poses new challenges for EU/UK policy-makers who should consider how the existing framework for judicial cooperation within the EU would need to be re-designed.[162] That said, determining the *Brexit* impact is not an easy issue.

If the EU Civil Justice framework[163] – which is set to facilitate the resolution of disputes arising out of these supply chains – were not to apply in England and Wales, the parties down the chain of the distribution might face some difficulties in accessing appropriate legal remedies. It should be stressed that any Brexit-driven change in the legal landscape would impact differently on the diverse parties' (SMEs', multinational companies', consumers') access to appropriate legal remedies cross-border disputes arising out of the pan-European supply chains. Systematically ascertaining the Brexit implications for different parties' access to legal remedies is central to devising a comprehensive and well-functioning PIL framework post-Brexit.

The issues are important because, following the Brexit vote, any potential change in the legal landscape in relation to PIL (which presupposes a level of reciprocity for various rules to apply in different Member States) could bring fresh uncertainty which would inflate litigation costs, impacting on the settlement dynamics. In theory, there are three different perspectives concerning uncertainty which could be considered:

> "First, uncertainty may concern what cognitive and affect-driven goals are relevant in a situation. What do I want to achieve and strive for? Second, uncertainty may exist concerning how the goals determined by affect and values should be mapped on the decision alternatives. How do I assign attractiveness to the alternatives given my goals? Third, uncertainty may concern outcome uncertainty. What is the likelihood for this or that event to follow a decision? Usually, the last of these uncertainties has been modelled in decision theories, exemplified by theories based on the expected utility concept."[164]

The Brexit-driven uncertainties might be exploited by strategic parties to impede their opponents' access to legal remedies in so far as such strategies might impact on parties' expectations about the outcome of a cross-border dispute. The parties' strategies will be devised and developed in the course of the litigation proceedings and every success/failure of litigants at different junctures in this process would have a bearing on the settlement negotiations and *vice versa.* In order to set out an

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Improved Growth Models and Policies, *Journal of Economic Perspectives* 2014, at 31–35; D.K. NANTO, Globalized Supply Chains and U.S. Policy, Congressional Research Service (Jan. 27, 2010), available at: http://assets. opencrs.com/rpts/R40167_20100127.pdf.

[162] P. BEAUMONT *et al.* (note 45), p. 831.

[163] Recital 3 Brussels Ia.

[164] O. SVENSON, Values, Affect, and Processes in Human Decision Making: A Consolidation Theory Perspective, in S.L. SCHNEIDER/ J. SHANTEAU (eds), *Emerging Perspectives on Judgment and Decision Research*, Cambridge 2003, at 319.

effectively functioning PIL regime post-Brexit, the strategic litigants' decision-making must be analysed in the light of the relevant political processes surrounding the adoption of multilateral PIL instruments which are to be applied globally by national judges, sharing different legal traditions and legal heritages.

Different aspects of the relevant PIL regimes (*e.g. court-first-seised* rule under Brussels Ia; *forum non conveniens* under the English common law) must be factored in along with the various attributes (*e.g.* value; litigation costs) of the relevant claims which will impact differently on the claimants/defendants' strategies in individual cases. In other words, a distinction must be drawn between the aspects of the PIL landscape (including the relevant body of case law dealing with the contentious PIL issues), on the one hand, and the broader attributes (eg types of parties – individuals, SMEs, multinational companies; desired remedy – including its monetary value, if any; facts of the cases; relevant substantive laws; costs – including cost-shifting rule and defendant's access to finance), on the other hand. Indeed, many cross-border disputes may raise a mixture of issues (*contractual, tortious, IP, competition and other regulatory* aspects) and involve multiple parties, respectively, as claimants and defendants. In each individual case (considering the relevant attributes of the claim), strategic parties would be singling out the applicable PIL rules which could be exploited post-Brexit (by them or their opponents) with a view to devising their strategies and/or neutralising their opponents' strategies, in order to attain their desired legal remedies.

Furthermore, the decision of the UK to leave the EU appears to spur a level of adjudicatory competition[165] which may reasonably be expected in view of the fact that one of the leading jurisdictions in the EU is leaving the EU civil justice system for judicial cooperation in civil and commercial matters. There should be incentives for some of the other EU Member States' law firms and perhaps the jurisdictions (where they are based) to attract high value claims which are being dealt with by the English courts at present. Since there is now an increase in English-speaking courts in other EU jurisdictions, these wider factors might well be very important. Indeed, some very original suggestions have been put forward by Rühl:

> "[W]hat can the remaining Member States do to offer European and other companies an attractive post-Brexit forum to settle their disputes? In a soon to be published study for the European Parliament I suggest a package of measures, one of which envisions the establishment of a European Commercial Court. This Court would complement the courts of the Member States and offer commercial litigants one more forum for the settlement of international commercial disputes. It would come with a number of advantages that national courts are not able to offer."[166]

[165] P. BEAUMONT *et al*. (note 45).

[166] G. RÜHL, Towards a European Commercial Court? *Conflict of Laws.net: New and Views in Private International Law* – 11 August 2018, available at http://conflicoflaws.net (accessed 30 September 2018).

The case for an EU commercial court is strengthened in Rühl's study, entitled "Building Competence in Commercial Law in the Member States".[167] It has been suggested that, "at the level of the EU, the European legislature should seek to establish a European Commercial Court […]."[168] Whilst the idea to create an EU commercial court is – without any doubt – a very original one, there are three major issues which need to be carefully considered as part of appropriate comparative studies which are set to consider other policy choices. First, given that there is no EU commercial law (as such), it seems that the new supranational court will apply French, German or any other national law to deal with the merits of the dispute.

Secondly, creating a specialised supranational commercial EU court would pre-suppose for the EU policy-makers to devise a new set of civil procedure rules which would potentially generate some fresh uncertainty (initially, to say the least). This poses the question whether such a solution would fully address the problems concerning private parties' access to legal remedies in cross-border cases in the EU. It is questionable whether German Bank A would trust a new European commercial court to resolve its multi-billion dispute with French Bank B. It might be preferable for the parties to go to Luxembourg, or Amsterdam, or Dublin.

Thirdly, a proposal for a specialised EU commercial court may not be fully taking account of the political processes. The political science literature which appears to suggest that the *Brexit* vote might be reflecting the revolt against "[t]he [p]ower of International "Governance" Elites."[169] To address more comprehensively these issues, Brexit calls for a new socio-legal model (that sets out the foundation for *inter-disciplinary research*). On this basis, more appropriate solutions might be provided in a post-Brexit context..[170]

If there was no case for an EU commercial court (in so far as there is no EU commercial law as yet), there may be a strong case for a specialised EU competition court where public and private enforcement proceedings could be consolidated to provide a pan-European redress mechanism, facilitating injured parties' access to effective legal remedies in cross-border competition law disputes.[171] Hence, a diversified approach is desirable with a view to facilitating private parties' access to appropriate legal remedies. Because what works for cross-border competition law disputes may not work for international sale of goods contract and vice versa. Hence, a long-term strategy is needed.

The pilot study appears to shows that it will take a while before any Brexit impact will have materialised. This means that – once the UK/EU trade relationships have been finalised – UK/EU policy-makers, PIL scholars and legal

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[167] G. RÜHL, Study for the JURI Committee, *Building Competence in Commercial Law in the Member States* – Legal and Parliamentary Affairs Directorate General for Internal Policies of the Union, Policy Department for Citizens' Rights and Constitutional Affairs – PE 604.980- September 2018. G. RÜHL (note 166).

[168] Study for the JURI Committee (note 167), at [2.2.4].

[169] R. EATWELL/ N. GOODWIN (note 32), at 96.

[170] J.-P. LANGLOIS/ C.C. LANGLOIS (note 143), at 362.

[171] M. DANOV/ F. BECKER/ P. BEAUMONT, *Cross-border EU Competition Law Actions*, Hart Publishing – Competition Law Series, Oxford 2013.

practitioners would have some time to re-design the legal landscape in relation to PIL. An analysis of litigants' strategies in cross-border cases (which is set to capture the dynamics of the cross-border litigation pattern) could be used to inform policy choices which UK/EU policy-makers need to make, in order to achieve broader public policy interests concerning trade and migration in the post-Brexit era. To this end, achieving a level of constructive alignment between the parties' legitimate goals and the policy-makers' objectives in devising a legal landscape in relation to PIL is a necessary pre-condition for devising an appropriate institutional framework in cross-border cases post-Brexit.

The pilot study further shows that the major issue at present appears to be a reputational one, with the status of the English and Welsh courts potentially diminished by the prolonged Brexit negotiations. There is continuous uncertainty as to how cross-border pan-European business activities (trade and services) would be regulated post-Brexit. This inevitably has spillover effects, posing questions about the private parties' access to legal remedies in the post-Brexit era as well as about the attractiveness/appropriateness of the English and Welsh courts. The correlation between the parties' strategies (which factor in any Brexit-driven uncertainty) and litigants' access to legal remedies in cross-border cases is a very important indicator as to how best to re-design the legal landscape when considering long-term policy options.

Given the nature of the pilot study, it is concluded that a major empirical study is needed to appropriately ascertain the actual Brexit impact on parties' access to legal remedies in cross-border cases in England and Wales. There are several key PIL matters which need to be appropriately considered. They concern the following issues: parallel proceedings (and their avoidance); recognition and enforcement of English and Welsh courts' judgments within the EU; the applicable law in relation to cross-border regulatory disputes. All these aspects (jointly and severally) might potentially be impacting on the parties' strategies, inflating the litigation costs and impeding their access to legal remedies in cross-border cases. There is a strong case for the UK policy-makers to set out a detailed strategy specifying how the UK PIL landscape should be re-designed by comprehensively dealing with these issues.

Similarly, comparative studies which cover different jurisdictions that share different legal traditions – are important to examine whether Brexit would have any impact on the functioning of the EU Civil Justice framework and on private parties' access to effective legal remedies in the EU. The following questions must be addressed in a long-run by the UK/EU policy-makers in a post-Brexit context: Will Brexit reduce the overall effectiveness of the EU Civil Justice system? What are the appropriate long-term policy choices that should be made by the UK/EU policy-makers to facilitate the private parties' access to appropriate legal remedies? The answers to these questions should inform policy choices and facilitate private parties' access to appropriate legal remedies in cross-border cases, post-Brexit.

Therefore, robust research projects are needed to consider the practical challenges (regarding access to effective legal remedies) as well as the political processes (regarding different interests shared by stakeholders) in the design of an effectively functioning framework for judicial cooperation which facilitates

parties' access to effective legal remedies in the post-Brexit era. Such research studies are central to devising a well-functioning framework for judicial cooperation which facilitates private parties' access to legal remedies, enhancing the attractiveness/ appropriateness of the English and Welsh courts for resolution of cross-border disputes arising in a global context.