Appropriate Adjustments Post Brexit: Residual Jurisdiction and Forum Non Conveniens in UK Courts

by

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Appropriate Adjustments Post Brexit: Residual Jurisdiction and Forum Non Conveniens in UK Courts

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Abstract

International jurisdiction is fundamental to the effective resolution of cross-border disputes. Brexit invites focus on the scope and function of the UK's future approach to residual jurisdiction. These rules reflect national values while managing transaction and litigation risk. While Scottish rules are more closely aligned to the form and content of Brussels I Recast Regulation, the CPR in England enables flexibility with regard to new forms of actions. In a future where EU private international law's direct influence will shift, this article demonstrates how UK legislation and judicial approaches to international jurisdiction should adjust. Schedules 4 and 8 to the Civil Jurisdiction and Judgments Act 1982, and aspects of the English CPR, should be revised to take account of the benefits of EU IPL. The UK courts' application of the doctrine of forum non conveniens *will also become more prevalent, regardless of the defendant's domicile.*

Introduction

The period between the outcome of the UK referendum on the future membership of European Union (23 June 2016) and the eventual exit day (31 January 2020) has raised many legal questions. A particular question arising in the context of dispute resolution that must be addressed is, what should replace the EU system of direct[1] rules of international civil and commercial jurisdiction for EU defendants?[2] The UK Government's initial policy and legislative[3] response was to retain EU law, including rules on civil judicial co-operation,[4] and correct deficiencies in

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[1] Dicey, Morris and Collins, *The Conflict of Laws*, 15th edn edited by C. Morse et al. (London: Sweet & Maxwell, 2008), para.11-007. Hereafter Dicey, Morris and Collins, *The Conflict of Laws* (2008).

[2] G. Ruhl, "Judicial Cooperation in Civil and Commercial Matters Post Brexit: Which Way Forward?" (2018) 67 I.C.L.Q. 99; A. Dickinson, "Back to the Future: the UK's Exit and the Conflict of Laws" (2016) 12 J.P.I.L. 195.

[3] European Union (Withdrawal) Act 2018.

[4] Department for Exiting the EU, "Framework for the UK-EU Partnership; Civil Judicial Cooperation" 13/06/2018; Department for Exiting the EU, "Providing a Cross-Border Civil Judicial Cooperation Framework", Future Partnership Paper (22 August 2017).

retained EU law.[5] However, the Civil Jurisdiction and Judgments (EU Exit) Regulation 2019, the revised Withdrawal Agreement, Political Declaration[6] and European Council Recommendation demonstrate a shift. None of these includes reference to continuing civil judicial co-operation between EU Member States and the UK.[7] As a non-EU Member State, UK cross-border civil dispute resolution will now be principally focused on a two-step approach; the development of UK residual jurisdiction rules traditionally applicable to non-EU defendants, and the UK's accession to international instruments in place of EU instruments on civil judicial co-operation. [8]

This article focuses on the future role of UK residual jurisdiction as the first step in that approach. Brexit will impact on UK residual jurisdiction in two situations: (1) disputes involving parties situated in different parts of the United Kingdom, and (2) disputes raised by an English claimant or Scottish pursuer against a non-EU defendant. Specifically, this article focuses on the effect of Brexit on residual jurisdiction in these two situations and argues two things: first, assimilation of EU IPL connecting factors in Schs 4 and 8 to the 1982 Act,[9] as well as the English CPR, and, second, recognition that the UK courts' role in assessing *forum non conveniens* will increase regardless of the defendant's domicile.

The first section outlines the policy influence and legislative connections that co-existed between EU private international law and UK residual jurisdiction. The second section considers the function of UK residual jurisdiction and key questions for the future. The third section considers the impact of Brexit on intra-UK jurisdiction, the changes required to Sch.4 to the 1982 Act, and the compatibility between Sch.4 and the doctrine of *forum non conveniens*. The fourth section then considers the scope and content of CPR rules for proceedings in England, Sch.8 to the 1982 Act for proceedings in Scotland, and the operation of *forum non conveniens* in that context. The final section concludes that, in a post-Brexit UK, residual jurisdiction rules in CPR, Schs 4 and 8 to the 1982 Act together with English CPR and the doctrine of *forum non conveniens* will have a vital role in promoting continuity in cross border dispute resolution.

[5] European Union (Withdrawal) Act 2018 s.8.

[6] European Commission, "Revised text of the Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom as agreed at negotiators' level on 17 October 2019, to replace the one published in OJ C661 of 19.1.2019" (17 October 2019), *https://ec.europa.eu/commission/sites/beta-political/files/revised_political_declaration.pdf*; *https://ec.europa.eu/commission/publications/revised-political-declaration_en* [Both accessed 24 February 2020].

[7] European Council, "Recommendation for a Council Decision authorising the opening of negotiations for a new partnership with the United Kingdom of Great Britain and Northern Ireland", COM(2020) 35 final (Brussels, 3 February 2020). There is reference to effective enforcement through administrative and judicial proceedings for competition and employment disputes; see paras 92, 97 respectively.

[8] House of Lords, EU Justice Sub-Committee, "Dispute Resolution and Enforcement After Brexit", 15th Report (3 May 2018); "Brexit: Justice for Families, Individuals and Businesses?" Government Response (14 December 2017).

[9] European Union (Withdrawal) Act 2018 s.5A, as inserted by European Union (Withdrawal Agreement) Act 2020 s.26(1).

"Waving goodbye"[10] to EU judicial co-operation in civil matters?

Four decades ago, EC laws were premised on the reciprocal recognition of foreign judgments.[11] About two decades ago, the EU's legal and policy objectives sought close co-operation and mutual recognition. Since the referendum result, a range of policy options of cross-border civil judicial co-operation have been debated in place of the supranational scheme.[12] These were previously identified as: (1) retention of EU 1215/2012 Brussels I Recast Regulation (Brussels I Recast)[13]; (2) adoption of the Lugano Convention[14]; (3) application of the Hague Conference's Choice of Court Convention 2005,[15] and by implication the new Hague Convention on recognition and enforcement of judgments[16]; (4) application of the Brussels Convention 1980[17]; (5) a transitional agreement towards conclusion of a bilateral convention,[18]; or (6) application of UK residual rules irrespective of the defendant's domicile.

In November 2018, the UK Government and EU27 agreed a transitional arrangement. This would have continued civil judicial co-operation for a two-year period commencing 29 March 2019. Article 63 of that agreement proposed that the Brussels I Recast would continue to apply.[19] The 2018 withdrawal agreement would have provided medium-term continuity and legal certainty by continuing the distinction between international jurisdiction for EU and non-EU defendants. However, in January 2019, the UK Parliament voted to reject the proposed transitional arrangement.[20] The concern related to border[21] and customs arrangements

[10] The inspiration for this sub-heading comes from the title of Alex Halfmeier's article "Waving Goodbye to Conflict of Laws? Recent Developments in European Union Consumer Law" in C.E.F. Rickett and T.G.W. Telfer (eds), *International Perspectives on Consumers' Access to Justice* (Cambridge: Cambridge University Press, 2003).

[11] Jenard Report [1979] OJ C-59/1, p.3.

[12] For example, Institute for Government, "Dispute Resolution After Brexit", Report (6 October 2017), *https://www.instituteforgovernment.org.uk/publications/dispute-resolution-after-brexit* [Accessed 24 February 2020].

[13] Ruhl, "Judicial Cooperation in Civil and Commercial Matters Post Brexit" (2018) 67 I.C.L.Q. 99; subject to Regulation 93 for determining the applicable court or enforcing judgments for proceedings not concluded before exit day (31 January 2020), it was confirmed that EU 1215/2012 Brussels I Recast Regulation is revoked by Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations SI 479, reg.89, but remains saved during the transition/implementation period to 31 December 2020; European Union (Withdrawal Agreement) Act 2020 s.1.

[14] Civil Jurisdiction and Judgments (Amendments) (EU Exit) Regulations SI 479, reg.82(b)(ii).

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

[16] The Hague Conference on Private International Law's Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters is concerned with the recognition and enforcement of judgments, *https://www.hcch.net/en/instruments/conventions/full-text/?cid=137* [Accessed 24 February 2020].

[17] Which was less likely on the grounds that the Convention was "replaced" by the Regulation: *Anton's Private International Law*, 3rd edn, edited by P. Beaumont and P. McEleavey (UK: W. Green, 2011), para 8.06, where the authors remark that the Brussels Convention is "almost entirely redundant"; cf. an alternative view on the Brussels Convention 1968 from Andrew Dickinson, "A View from the Edge" (15 March 2019), *SSRN*, *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3356549* [Accessed 24 February 2020]. It was confirmed that the Brussels Convention 1968 and subsequent accession Conventions "cease to be recognised and available under domestic law" after 31 January 2020 through the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 SI 479 reg.82, but this remains saved during the transition/implementation period to 31 December 2020; European Union (Withdrawal Agreement) Act 2020 s.1.

[18] Now increasingly unlikely given the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 SI 479 and the subsequent lack of reference to civil judicial co-operation in the recent European Council Recommendation of 3 February 2020, fn.7.

[19] "Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community", TF 50 (2018), p.25, *https://ec.europa.eu/commission/sites/beta-political/files/draft_withdrawal_agreement_0.pdf* [Accessed 24 February 2020].

[20] cf. Department for Exiting the EU, "Withdrawal Agreement and Political Declaration on the future relationship between the UK and the EU as endorsed by leaders at a special meeting of the European Council on 25 November 2018", rejected by UK House of Commons, UK *Hansard*, cols 1122–1125 (15 January 2019).

[21] cf. European Union (Withdrawal) Act 2018 s.10.

between Northern Ireland and the Republic of Ireland, and the corresponding effect on the Good Friday Agreement. In March 2019, the UK and EU agreed an extension to art.50 of the Lisbon Treaty. On 17 October 2019, the UK and EU agreed a revised Withdrawal Agreement and Political Declaration.

The European Union (Withdrawal) Act 2018 and European Union (Withdrawal Agreement) Act 2020 confirm continued alignment with EU laws until the expiry of the implementation period on 31 December 2020.[22] However, the revised Withdrawal Agreement and recent European Council Recommendation do not refer to cross-border co-operation in civil judicial matters. The combined effect of the Civil Jurisdiction and Judgments (EU Exit) Regulation 2019, the revised Withdrawal Agreement, Political Declaration and European Council Recommendation narrows the possible scope for EU law to influence this field in this future. In the long term, a distinction may emerge between EU private international law on the one hand and national, residual jurisdiction on the other. However, the implementation period provides a timely and important opportunity to consider how EU IPL can continue to be assimilated into residual jurisdiction. This approach supports continuity in IPL, the "level playing-field" required for a future EU-UK trade deal and certainty for legal practitioners. This article elects to focus on the systematic[23] influence of EU private international law on residual jurisdiction. In the absence of civil judicial co-operation with the remaining EU 26, and the prospect of loss of CJEU influence, two developments must occur. First, there must be amendment to Schs 4 and 8 to the 1982 Act. Such amendments should focus on improving the operation of current connecting factors through assimilation of EU IPL. Second, the UK courts will be required to have greater regard to the operation of *forum non conveniens*, regardless of where the defendant is domiciled.

Function of UK residual jurisdiction and key questions for the future

Residual jurisdiction rules are "inherently … 'directed by national interests'." [24] They represent the ability of sovereign nations to define jurisdictional competence while respecting other nations' equivalent rules.[25] Residual jurisdiction rules reflect national values through linking factors that are designed to establish a link to the given jurisdiction and generate party "confidence".[26] Residual jurisdiction enables the court to decline jurisdiction or to grant measures to protect the interests of the parties connected to, or assets situated in, the jurisdiction.[27] By underpinning and supporting national values,[28] traditions and procedures, residual jurisdiction rules

[22] European Union (Withdrawal) Act 2018 ss.2, 39(1); European Union (Withdrawal Agreement) Act 2020 s.1.

[23] T. Hartley, "The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws" (2015) 54 I.C.L.Q. 813.

[24] L. Gillies, "Creation of Subsidiary Jurisdiction Rules in the Recast of Brussels I: Back to the Drawing Board" (2012) 8 J.P.I.L. 489, 510.

[25] *Anton's Private International Law* (2011), para.2.28.

[26] P. Stone, *EU Private International Law* (Cheltenham: Edward Elgar, 2010), pp.46–47; Gillies, "Creation of Subsidiary Jurisdiction Rules in the Recast of Brussels I" (2012) 8 J.P.I.L. 489.

[27] On which see generally J.J. Fawcett (ed.), *Declining Jurisdiction in Private International Law* (Oxford: Clarendon Press, 1995).

[28] P. Hay, O. Lando and R..D Rotunda, "Conflict of Laws as a Technique of Legal Integration" in M. Cappelletti, M. Seccombe and J. Weiler (eds), *Integration Through Law, Europe and the American Federal Experience* (Berlin,

ensure access to courts where a legitimate claim exists and access to justice where particular rights merit special protection. In all instances, the objective remains twofold; to provide a pragmatic basis for supporting the claimant's interests and expectations,[29] while ensuring certainty and predictability of result for the defendant.[30] UK residual jurisdiction rules apply to two categories of cases. The first category refers to those cases involving a defendant domiciled in a non-EU Member State. The second category refers to those cases brought to a court in one part of the UK when the defendant is domiciled in another part of the UK. Consideration of the scope and content of both categories of residual jurisdiction rules can feed into future dialogue about the rationale, form and content of national rules applicable post-Brexit, and re-assert the relationship between national and EU private international law.

The United Kingdom was one of three EU Member States which mirrored or "model[led]" [31] EC law in its residual jurisdiction rules.[32] The UK Maxwell Committee Report recommended that the EU system of jurisdiction should form the basis of jurisdiction for non-EU defendants and between parties located in different parts of the United Kingdom ("intra-UK").[33] While EU private international law continues apace, in private international law terms the UK is now presented with an asymmetric future. At the end of the implementation period, the major consequence of withdrawal from the EU is removal of the Brussels I Recast as "primary legal instrument on jurisdiction".[34] Brexit invites future discussion on how UK residual jurisdiction rules may be systematically rebuilt[35] to apply to defendants regardless of domicile, and to rethink the national[36] in private international law. A re-appraisal of the scope and function of UK residual jurisdiction rules is timely, significant and necessary. While the Scottish approach is more closely aligned to the form and content of the EU 1215/2012 Brussels I Recast and may be pragmatically justified, the strength of the English approach is its flexibility to new forms of actions.

Four sub-issues have been conceptualised to contribute to the ongoing dialogue on the role and scope of residual jurisdiction. The first and overarching issue is, regardless of the defendant's domicile, on what basis should it be "appropriate and just"[37] for proceedings to be brought in England or Scotland? The second issue is Sch.4 to the 1982 Act for intra-UK disputes. This Schedule currently mirrors both the Brussels I Recast and the CJEU's interpretative approach. The third issue

New York: Walter de Gruyter, 1986); Gillies, "Creation of Subsidiary Jurisdiction Rules in the Recast of Brussels I" (2012) 8 J.P.I.L. 489; *Anton's Private International Law* (2011), para.8.15.

[29] *Anton's Private International Law* (2011), para.8.15.

[30] R. Fentiman, *International Commercial Litigation*, 2nd edn (Oxford: Oxford University Press, 2015); Gillies, "Creation of Subsidiary Jurisdiction Rules in the Recast of Brussels I" (2012) 8 J.P.I.L. 489, 494.

[31] *Anton's Private International Law* (2011), para.8.03.

[32] B. Hess, T. Pfeiffer and P. Schlosser, "Report on Application of the Brussels I Regulation in the Member States," Study JLS/C4/2005/03 (September 2007), *https://www.europarl.europa.eu/document/activities/cont/201210/20121011ATT53426/20121011ATT53426EN.pdf* [Accessed 24 February 2020]; and Gillies, "Creation of Subsidiary Jurisdiction Rules in the Recast of Brussels I" (2012) 8 J.P.I.L. 489.

[33] "Report of the Scottish Committee on Jurisdiction and Enforcement, under the Chairmanship of the Honourable Lord Maxwell".

[34] *Anton's Private International Law* (2011), para.8.06.

[35] Opposite to the "systematic dismantling" identified at the time by Hartley, "The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws" (2015) 54 I.C.L.Q. 813.

[36] A. Mills, "Private International Law and EU External Relations: Think Local, Act Global or Think Global, Act Local?" (2016) 63 I.C.L.Q. 541.

[37] P. Beaumont, "Great Britain," in J. Fawcett (ed.), *Reform and Development of Private International Law* (Oxford: Oxford University Press 2002) p.209. Word modified for syntax.

is future changes to rules for non-EU defendants under the CPR and Sch.8 to the 1982 Act for proceedings in England and Scotland respectively. Further adaptation beyond the UK Statutory Instruments is presented. With the expected future withdrawal of the Brussels I Recast and reduced influence of CJEU jurisprudence, this article proposes adaptation of Schs 4 and 8. The fourth issue is the role of doctrine of *forum non conveniens* against a non-EU defendant, either through granting permission to serve out for proceedings in England, or jurisdiction under Sch.8 to the 1982 Act for proceedings in Scotland. While Scottish rules have been traditionally aligned to the form and content of Brussels I Recast, the English approach enables flexibility to "new forms of actions".[38] In both scenarios, the scope of the *forum non conveniens* doctrine as a means to secure the "ends of justice",[39] and the English and Scottish courts' role in determining its application will become more important, irrespective of the defendant's domicile.

Intra-UK jurisdiction—Sch.4 to the 1982 Act

Schedule 4 to the Civil Jurisdiction and Judgments Act 1982 as amended contains "modified"[40] jurisdiction rules. As the "UK scheme for allocation of jurisdiction",[41] it determines which part of the UK—Scotland or England and Wales—can allocate jurisdiction in a civil and commercial matter.[42] Schedule 4 provides "simple"[43] jurisdiction rules that have been interpreted with reference to the Brussels I Recast and Official Reports.[44] However, it does not contain a "first past the post" rule for identical (*lis pendens*) or related actions, akin to arts 29 and 30 of the Brussels I Recast. This can be explained on the basis of the principle of allocation. The Regulation allocates international jurisdiction between the Member States, while Sch.4 to the 1982 Act allocates jurisdiction to a court in one part of the UK.[45] Following s.16, Sch.4 currently operates where the defendant is domiciled in a part of the UK (r.3), when the dispute falls within the scope of exclusive jurisdiction (r.11) or by analogy with art.21 of the Brussels I Recast when the parties agree jurisdiction (r.3). The key changes to Sch.4 by the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 (the 2019 Regulations) will now be considered and further amendments presented.

2019 Regulations—key changes to jurisdiction under s.16 and Sch.4

The policy objective of the 2019 Regulations was primarily intended to remove deficiencies in, rather than improve, the 1982 Act. Key to the 2019 Regulations is the amendment of s.16, which allocates jurisdiction within the UK. Section 18 of the 2019 Regulations ensures that s.16 will "give effect before exit day"[46] to

[38] *Masri v Consolidated Contractors International Co SAL* [2009] UKHL 43; [2010] 1 A.C. 90.
[39] Beaumont, "Great Britain" in *Reform and Development of Private International Law* (2002), p.208.
[40] Heading to Sch.4 1982 Act as amended.
[41] *Anton's Private International Law* (2011), para.8.28; and Dicey, Morris and Collins, *The Conflict of Laws* (2008), para-11-250.
[42] Civil Jurisdiction and Judgments Act 1982 s.17 and Sch.5 set out the exceptions to s.16, reflecting exceptions in the Regulation EU 1215/2012, the Brussels I Recast Regulation.
[43] *Cook v Virgin Media* [2015] EWCA Civ 1287, per Briggs LJ at 1680.
[44] *Sunderland Marine Mutual Insurance Co Ltd v Wiseman* [2007] 1 C.L.C. 989, per Langley J at [23].
[45] *Sunderland Marine Mutual Insurance* [2007] EWHC 1460 (Comm); [2007] 1 C.L.C. 989 at [38].
[46] Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 SI, s.28(2); exit day being 31 January 2020; European Union (Withdrawal) Act 2018 s.20(1).

CJEU decisions and permit the courts to consider Official Reports relating to the Brussels Conventions.[47] Second, s.27 of the 2019 Regulations confirms that s.19 will continue to apply the general rule in favour of the defendant's domicile or, where applicable, exclusive jurisdiction. Third, s.26 of the 2019 Regulations inserts ss.15B and 15C for special jurisdiction over consumer and employment contracts. The 2019 Regulations retain the equivalent special jurisdiction rules for consumer and employees under the Brussels I Recast.[48] Each of these points is a welcome initial step. They ensure continuity for the duration of the implementation period. They ensure non-regression of protection for weaker parties such as English or Scottish consumers, and ensure that employees retain the choice of where to bring proceedings against employers.[49] However, this is as far as the policy of correcting deficiencies goes. We turn to what further amendments should now be made to enhance Sch.4 in future.

Proposed amendments to improve Sch.4

Brexit provides an opportunity to review and improve Sch.4, its future methodology and interaction with s.49 as the statutory enactment of the doctrine of *forum non conveniens*. There are two ways in which Sch.4 should be adapted to benefit from the lapse of Brussels I Recast after implementation completion day. First, rules on exclusive jurisdiction and prorogation can be further strengthened regardless of the defendant's domicile. Second, rules of special jurisdiction for contracts, torts and multiple parties should be adapted to reflect existing connecting factors in the Brussels I Recast, failing which CJEU jurisprudence should continue to be taken account of. In support, the doctrine of *forum non conveniens* should to apply in the interests of justice and regardless of the defendant's domicile.

First, s.16 should be further amended to give priority in allocating exclusive jurisdiction, regardless of where in the United Kingdom the parties are domiciled. This would reflect the scope of art.24 of the Brussels I Recast. Authority in support of this approach can be found from the Scottish Court of Session in *McGowan v Lloyds*,[50] *Douglas v Glenvarigill Co Ltd*,[51] and more recently in *BN Rendering Ltd v Everwarm*,[52] where the court said that the construction of the parties' agreement should determine whether jurisdiction was intended to be exclusive. It would also reflect the equivalent rules on prorogation contained in Sch.8 to the 1982 Act. There is also scope for alignment of prorogation under r.3(a).

Second, r.3, Sch.4 to the 1982 Act should be adapted or the UK courts should continue to take account of CJEU decisions. Both options will be considered. The first option is adaptation of r.3(a). It has some important differences compared with art.7(1)(b) of the Brussels I Recast. Rule 3 is not subject to any agreement

[47] 2019 Regulations s.28(4).

[48] 2019 Regulations, Explanatory Memorandum at para.2.6, p.2.

[49] On counter-claims in employment disputes, the Court of Justice confirmed the Opinion of AG Bot in *Petronas Lubricants Italy SpA v Livio Guida* (C-1/17) EU:C:2018:478; [2018] I.L.Pr. 30 that it is possible for an employer to bring a counter-claim under EC 44/2001 Brussels Regulation art.20(2) against an employee in the court where the latter's proceedings were raised, provided both claims have a "common origin" (para.4 of Opinion of 7 March 2018 and judgment of 21 June 2018 at [29], [30] and [34]).

[50] *McGowan v Summit at Lloyds* 2002 S.C. 638 at [7] and [8]; cf. [11], which remarked that the emphasis of r.11 was to internal agreements, i.e. within the UK, compared with the "international" focus of the (then) Brussels Convention 1968.

[51] *Douglas v Glenvarigill Co Ltd* [2009] CSOH 17.

[52] *Rendering Ltd v Everwarm* [2018] CSOH 45.

between the parties. As Master Fontaine in *IHP Ltd v Fleming* confirmed, while the UK legislature deliberately distinguished between Sch.4 and the Brussels I Recast, UK courts have been able to take account of CJEU jurisprudence in determining the meaning and effect of Sch.4.[53] The CJEU confirmed in *Car Trim GmbH v Key Safety Systems Srl*[54] that the distinction between contracts for the sale of goods and the provision of services is an important distinction which seeks to give priority to the place of delivery as specified in the parties' contract. This distinction was reflected in changes to the Brussels I Recast. Rule 3(a) should be further amended to distinguish between the place of performance for the sale of goods on the one hand and the provision of services on the other.

If the first option is not politically attractive, the second option is to be found in Withdrawal Act 2020. A UK Government Minister may provide specific guidance whether UK courts are permitted to take account of CJEU jurisprudence.[55] Lord Hope in *Agnew v Lansforsakringsbolagens AB*[56] referred to *Kleinwort Benson*, where he said that "in considering questions which arise under the national law in Title II of Schedule 4, the courts of this country must have regard to the principles laid down by the Court of Justice in connection with the Brussels Convention".[57] Two examples may help illustrate the point. The first example is in special jurisdiction for matters relating to contracts for multiple deliveries of goods. Many intra-UK contracts for sale of goods involve multiple places of delivery throughout the UK. Goods are frequently ordered and dispatched from distribution centres throughout England for delivery across the UK. Such contracts are analogous with *Color Drack v Lexx International*,[58] which was concerned with multiple deliveries in the same Member State. The CJEU confirmed that jurisdiction could be established at the principal place of delivery, determined on the basis of economic criteria. After the implementation period expires, UK courts will be required to consider to what extent the national[59] emphasis on the connecting factors "place of performance" and "obligation in question" should reflect the Consumer Rights Act 2015 (on the definition of goods, digital services, delivery) and the Sale and Supply of Goods and Services Act 1982. The UK courts should continue [60] to reflexively draw on CJEU jurisprudence. This approach should be used to establish which part of the UK has jurisdiction in contracts for multiple deliveries of goods.

The second example relates to r.3(c) for matters relating to tort, delict or quasi-delict. The CJEU has interpreted the Brussels I Recast independent of national considerations. Recent CJEU decisions suggest that a "one size all approach" no longer applies to establishing the connecting factor—the place of the harmful

[53] *IHP Ltd v Fleming* [2009] WLUK 279; cf. *Holgate v Addleshaw Goddard (Scotland) LLP* [2019] EWHC 1793 (Ch); [2019] I.L.Pr. 46 at [129].

[54] *Car Trim GmbH v Key Safety Systems Srl* (C-381/08) EU:C:2010:90; [2010] 2 All E.R. (Comm) 770.

[55] European Union (Withdrawal Agreement) Act 2020 s.26(1) inserting s.6(5B) into the 2018 Act.

[56] *Agnew v Lansforsakringsbolagens AB* [2001] 1 A.C. 223 HL.

[57] *Agnew* [2001] 1 A.C. 223 at 248.

[58] *Color Drack GmbH v Lexx International Vertreibs GmbH* (C-386/05) EU:C:2007:262 ;[2010] 1 W.L.R. 1909.

[59] See Opinion of Sheriff Principal Dunlop QC in *Fishers Services Ltd v All Thai'd Up Ltd (t/a Richmond House Hotel)* 2013 S.L.T. (Sh Ct) 121 at [18]–[19] who regarded that *Color Drack* did not have wider implications beyond those envisaged by art.5(1) Brussels I Recast.

[60] An autonomous interpretation of "place of performance" of a contractual obligation in Sch.4 r.3(a) was recently confirmed by the English Chancery Division in *Holgate v Addleshaw Goddard (Scotland) LLP* [2019] EWHC 1793 (Ch); [2019] I.L.Pr. 46.

event—for torts occurring online.[61] Since the decisions in *eDate Advertising GmbH v X and Société MGN Ltd*[62] and *Wintersteiger AG v Products 4U*,[63] the CJEU has distinguished between different categories of tort, including the distinction between defamation and breach of personality rights,[64] and excluded non-physical (economic) torts of the type recognised under national laws.[65] After the implementation period, UK courts should continue to recognise the different categories of torts and the nuanced interpretation of the place of the harmful event. This will enable national categorisations to continue to take account of EU approaches alongside national criteria such economic torts[66] as the concept of "serious harm"[67] under s.1 of the Defamation Act 2013.

Compatibility between Sch.4 and forum non conveniens

From time to time, the case law and academic discussion[68] have questioned the operation of *forum non conveniens* in the context of Sch.4.[69] Subject to the parties' contractual choice of law, Anton confirms that *forum non conveniens* can apply to Sch.4.[70] Section 49 sets out the parameters of the doctrine in that "[*N*]*othing in this Act shall prevent any court* in the United Kingdom from staying, sitting, striking out or dismissing any proceedings before it on the ground of forum non conveniens or otherwise …".[71] In *Spiliada Maritime Corp v Cansulex Ltd*, the plea of *forum non conveniens* was established where there is "some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for all the parties and the interests of justice".[72] The claimant must show that Scotland (Schs 4 and 8) and England (service out under the CPR) is the "natural forum".[73] In determining whether the another court is *forum conveniens*, the Scottish or English court can consider a range of factors relating to the dispute such as "the nature of the dispute, the legal and practical issues involved, such questions as local knowledge, the availability of witnesses and their evidence, and expense".[74] The claimant can then respond as to why justice would be denied in that foreign

[61] This is particularly evident in the case of torts which occur via the internet and social media; see Youseph Farah, "Jurisdictional aspects of electronic torts: in the footsteps of Shevill v Press Alliance" [2005] C.T.L.R. 196; Oren Bigos, "Jurisdiction over cross-border wrongs on the internet" (2005) 54 I.C.L.Q. 585; Graham J.H. Smith, *Internet Law and Regulation*, 4th edn (London: Thomson Reuters, 2007), para.6-028.

[62] *eDate Advertising v X* (C-509/09) EU:C:2011:685; [2012] Q.B. 654.

[63] *Wintersteiger AG v Products 4U Sondermachinenbau GmbH* (C-523/10), C 2012:220; [2013] Bus. L.R. 150.

[64] L. Gillies, "A Ubiquitous Problem with a Conflicts Solution: Determining Jurisdiction for Receipt Orientated Torts via the Internet through EU Private International Law" *SSRN*, *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3416218* [Accessed 24 February 2020].

[65] T. Hartley, "Jurisdiction for Tort Claims for Non-Physical Harm in Brussels 2012, Article 7(2)" (2018) 67 I.C.L.Q. 987.

[66] Following *Boyd v Stott* [2016] P.N.L.R. 8.

[67] Following the wording of the Defamation Act 213 s.1 for England and the Scottish Government's draft Defamation and Malicious Publications (Scotland) Bill s.1(2)(b).

[68] *Anton's Private International Law* (2011), para.12-025.

[69] M. Hemsworth, Case Comment, "Forum non conveniens, jurisdiction and civil disputes within the UK" [2016] C.J.Q. 299.

[70] *Anton's Private International Law* (2011), para.8.403.

[71] Emphasis added; cf. Hemsworth, "Forum non conveniens, jurisdiction and civil disputes within the UK" [2016] C.J.Q. 299.

[72] *Spiliada Maritime Corp v Cansulex Ltd (The Spiliada)* [1987] A.C. 460 HL, per Lord Goff at 474, 467B-478E; referring to *Sim v Robinow* (1892) 19 R. 665, per Lord Kinnear at 668; Dicey, Morris and Collins, *The Conflict of Laws* (2008), para.11-143.

[73] *PJSC Commercial Bank v Privatbank v Kolomoisky* [2018] EWHC 3308, affirmed by the Court of Appeal [2018] EWCA Civ 3040.

[74] Dicey, Morris and Collins, *The Conflict of Laws* (2008), para.11-143; *Anton's Private International Law* (2011), para.8.410.

court. Each of the following cases concerns the jurisdiction of the Scottish or English courts in tort disputes and confirms that the doctrine can be applied to disputes between different parts of the UK. [75]

Support for compatibility between Sch.4 and *forum non conveniens* can be found in cases from the English, Scottish and Northern Ireland courts. In *Lennon v Scottish Daily Record and Sunday Mail*,[76] the English High Court refused to grant a stay in favour of the Scottish courts on the basis that the claim in defamation arose as a result of harm which occurred in England. The remedies available in England were no reason to grant a stay, and the strength of the case was not regarded as a relevant factor within the *Spiliada* inquiry. In *Cook v Virgin Media*,[77] Scottish-domiciled appellants suffered injuries in Scotland and raised proceedings against English-based companies in England. The companies did not dispute the court's jurisdiction and admitted liability in response to one claim. It was held that the respondents' failure to raise a challenge to the English court's jurisdiction did not prevent the court from striking out the claims on the basis that under s.49 Scotland was the appropriate forum. Judge Hughes QC at first instance and the Court of Appeal held that, since the proceedings were purely internal,[78] Sch.4 and not the Regulation applied, with the effect that the doctrine of *forum non conveniens* was not precluded. In *Guevel-Mouly v AIG Europe Ltd*,[79] the English insurer defendant applied for a stay of proceedings under English CPR r.11(1)(b), beyond the permitted time-limit, on the basis that Scotland was the natural forum. Three French claimants (mother and children) had been injured in an accident while travelling in a rented car through Scotland with their father, who was the driver of the hire car. The car had been rented through a Paris agency and insured through the English-based insurance company. French law was the applicable law of the contract. While liability was accepted, the claims were not settled. The claimants issued proceedings in England. There were two issues before the court, whether the defendants had submitted to the court's jurisdiction and could dispute it, and second the defendant's claim of *forum non conveniens* that the Scottish court was the more appropriate court, since the accident occurred there. The second point of the case is the most relevant. Having allowed the first issue to be considered, the court was not persuaded, based on the issues of the case and the fact that the claimants served proceedings as of right against the defendants, that the claimant had not discharged its role to demonstrate on an evidential basis how Scotland was clearly the more appropriate forum. Given the claimants' injuries, their consequential losses, and the proper assessment of damages under French law, the court said that the locus of the accident was of little weight taking account of other factors.

The recent case of *Boyd v Stott*[80] illustrates the Northern Ireland court's approach to adopting a fact-specific inquiry when the defendant seeks a stay on the ground of *forum non conveniens*. The dispute was whether a Scottish firm was liable to a

[75] *Cummings v Scottish Daily Record & Sunday Mail Ltd* [1995] E.M.L.R. 538, applied in *Lennon v Scottish Daily Record and Sunday Mail* [2004] EWHC 359; cf. Hemsworth, "Forum non conveniens, jurisdiction and civil disputes within the UK" [2016] C.J.Q. 299, 311.

[76] *Lennon v Scottish Daily Record and Sunday Mail* [2004] EWHC 359.

[77] *Cook v Virgin Media* [2015] EWCA Civ 1287; [2016] 1 W.L.R. 1672.

[78] Akin to *Kleinwort Benson v City of Glasgow DC* (C-346/93) EU:C:1995:85; [1996] Q.B. 57.

[79] *Guevel-Mouly v AIG Europe Ltd* [2016] EWHC 1794 (QB).

[80] *Boyd v Stott* [2016] P.N.L.R. 8.

mutual society in Northern Ireland for a negligent misstatement in the value of land contained in a report used to seek finance. Proceedings were raised in Northern Ireland, and the Scottish firm sought to argue first that the harmful event occurred in Scotland and, second, to seek a stay of the Northern Ireland proceedings disputing the court's jurisdiction. The central question was determining the place of the harmful event. The Queen's Bench Division in Northern Ireland held that the society was entitled to claim in Northern Ireland for the loss suffered in reliance of the report. The court held that the place where the harmful event occurred was the provision of the report in Northern Ireland. The court held that it was necessary to identify the jurisdiction with which the proceedings were most closely connected. To obtain a stay, the surveyors had to show not only that Northern Ireland was not the natural or appropriate forum for the trial, but that Scotland was "clearly or distinctly" a more appropriate jurisdiction. The surveyors had failed to demonstrate, per *Spiliada*,[81] that Scotland was clearly the most appropriate forum for the trial compared with Northern Ireland, which has a more real and substantial connection based on use of the surveyor report in in the decision process to lend funds. Furthermore, the Northern Ireland court confirmed that *forum non conveniens* should not be interpreted in a way that allowed plaintiffs to determine the competent court by reference to their own domicile.

More recently, the question of whether England or Scotland was the appropriate forum was considered by the English Court of Appeal in *Kennedy v National Trust for Scotland* [82] and the Scottish Court of Session in *University Court of the University of St Andrews v Student Gowns Ltd*.[83] In *Kennedy*, both parties were domiciled in Scotland, but the claimant sought to raise proceedings for defamation in England based on a publication available in the UK, two EU Member States and a non-EU Member State. At the heart of this case was whether Scotland was *forum conveniens* and whether the English proceedings should be stayed in favour of Scotland. To answer that question, it had to be determined whether the dispute fell within the scope of the Brussels I Recast.[84] The Court of Appeal confirmed [85] that the Brussels I Recast sought to establish jurisdiction of a Member State. For the purposes of the Recast, it did not matter which court within the UK had jurisdiction. This meant that the English court was not prevented from considering a stay in favour of the Scottish court. A number of important points arise from the case. First, both Justice Eady at first instance and the Court of Appeal held that the mandatory nature of Brussels I Recast does not apply to disputes that are *inherently internal* to a Member State. Second, the defendant's expectation interest is best served by raising proceedings where he is domiciled; a matter Justice Eady said was "at the forefront"[86] of assessing whether the court should grant a stay of proceedings. Third, as the matter was deemed internal to the UK, Justice Eady and Court of Appeal confirmed that the court could proceed to consider *forum non*

[81] *The Spiliada* [1987] A.C. 460.

[82] *Kennedy v National Trust for Scotland* [2017] EWHC 3368 (QB); [2019] EWCA Civ 648 (CA).

[83] *University Court of the University of St Andrews v Student Gowns Ltd* [2019] CSOH 86, per Lord Docherty at [42].

[84] *Kennedy v National Trust for Scotland* [2017] EWHC 3368 (QB) at [49].

[85] *Kennedy v National Trust for Scotland* [2019] EWCA Civ 648, application for leave to appeal to the Supreme Court refused.

[86] *Kennedy* [2017] EWHC 3368 (QB) at [65], cf. J. Stukalina, "Time for serving claim forms and issues of intra-UK jurisdiction: Kenneth v National Trust for Scotland" (2018) 27 C.J.Q. 332, who remarks that compared with the Brussels I Recast, the rules in Sch.4 are not determinative; at para.4.2.

conveniens.[87] Stukalina has questioned the Court's reliance of CJEU case authority when assessing the *forum non conveniens* criteria. [88] However, it was correct for CJEU case law to be considered. As the Court of Appeal confirmed, the Brussels I Recast precluded *forum non conveniens* when establishing international jurisdiction "of the relevant Member State",[89] not "within"[90] the Member State. Furthermore, Justice Eady confirmed the position in *Kleinwort Benson* that English and Scottish courts should consider CJEU jurisprudence, a policy which—as explained above—has been regarded as "perfectly defensible"[91] for parallel rules in Sch.4.

In *University Court of the University of St Andrews v Student Gowns Ltd*,[92] the pursuer sought an interdict (injunction) against the English defendant for breach of trade mark of the University's name and in passing off sale of gowns purported to be authorised by the University. Lord Docherty dismissed the defender's plea of *forum non conveniens* in favour of the English court. In referring to CJEU authority from *Wintersteiger*,[93] Lord Docherty confirmed that the place of the harmful event was either the place where the damage occurred or the place of the event giving rise to the damage. As a ground of special jurisdiction in Sch.4, Lord Docherty confirmed that it was for the pursuer to choose, and not for the court to determine, where to bring proceedings under r.3(c), Sch.4.[94] The defendant's online activities "directed to"[95] or targeting students in Scotland, combined with the effect of the sale of gowns to students affecting the pursuer's goodwill and trade mark in Scotland, meant that Scotland was the place of the harmful event and that the plea of *forum non conveniens* was rejected.

The interaction between Sch.4 and *forum non conveniens* has arisen in claims under r.5 against multiple defendants. *Craven v Bellanca*[96] offers an analogy with the discretionary component in art.8(3) of Brussels I Recast. This article provides that the court seised or original proceedings may hear a counter-claim "on the same contract or facts upon which the original claim was based in the court in which the original claim is pending".[97] The CJEU's subsequent judgment in *Northanova v Boldizsar* confirmed that the discretionary nature of art.8(3) leaves such matters to be determined by the "*procedural autonomy* of the Member States".[98] In *Craven*,[99] Weatherup J was required to consider whether group proceedings involving plaintiffs in Northern Ireland could also extend to consumers as plaintiffs domiciled in England, Scotland and the Republic of Ireland. In holding that the court did not have jurisdiction over matters concerning other plaintiffs, the court noted that r.5 of Sch.4 applied to cases involving "multiple defendants,

[87] *Kennedy* [2017] EWHC 3368 (QB) at [57], and Court of Appeal at [44].
[88] Stukalina, "Time for serving claim forms and issues of intra-UK jurisdiction: Kennedy v National Trust for Scotland" (2018) 27 C.J.Q. 332.
[89] *Kennedy v National Trust for Scotland* [2017] EWHC 3368 (QB); [2019] EWCA Civ 648 (CA) at [44].
[90] *Kennedy* [2017] EWHC 3368 (QB); [2019] EWCA Civ 648 (CA) at [45] quoting Tugendhat J in *Lennon* [2004] EWHC 359 at [15].
[91] Anon., "Forum Non Conveniens Case Comment" (2018) 23 *Communications Law* 50, 52.
[92] *University Court of the University of St Andrews v Student Gowns Ltd* [2019] CSOH 86, per Lord Docherty at [42].
[93] *Wintersteiger AG v Products 4U Sondermachinenbau GmbH* (C-523/10) EU:C:2012:220; [2013] Bus. L.R. 150.
[94] *University Court of the University of St Andrews* [2019] CSOH 86 at [21].
[95] *University Court of the University of St Andrews* [2019] CSOH 86 at [42].
[96] *Craven v Bellanca* [2012] N.I.Q.B. 58.
[97] Brussels I Recast art.8(3).
[98] *Northanova v Boldizsar* (C-306/17) EU:C:2018:360; [2018] 4 W.L.R. 96 at [29] and [30] (emphasis added).
[99] *Craven v Bellanca* [2012] N.I.Q.B. 58.

not multiple plaintiffs",[100] and that since the plaintiffs were consumers, the Northern Ireland court did not have jurisdiction over the other plaintiffs. The court also further noted that s.49 "is not a provision which permits the Court to add additional parties to the proceedings".[101] On *forum non conveniens* the court confirmed that the doctrine was compatible with domestic cases[102] and did not extend beyond to matters concerning international jurisdiction under Brussels I Recast. After the implementation period, the Brussels I Recast will cease to apply. In the absence of any future agreement on cross-border judicial co-operation, the UK courts will be able to apply *forum non conveniens*, regardless of the defendant's domicile.

Forum non conveniens has been considered in the context of special jurisdiction for consumer contracts under r.8 of Sch.4. In *Waverley Asset Management v Saha*, the Scottish Sheriff Court declined jurisdiction since the nature of the purchase was not one for goods and therefore not a consumer contract. In *Oakleaf Conservatories v Weir*,[103] the English court declined jurisdiction under r.8 on the basis that the claimants were capable of "doing business"[104] with consumers domiciled in Scotland. As the consumers were domiciled in Scotland, proceedings should have been raised against them there. In *Bateman v Birchall Blackburn LLP*,[105] consumers from Northern Ireland sued English solicitors in negligence and breach of contract. The defendants disputed the jurisdiction of the Northern Ireland court and sought a stay of proceedings. The defendants relied on a jurisdiction clause in favour of the English court. The court declined the stay in favour of the English courts. It confirmed that while the general rule in Sch.4 was the defendant's domicile, the contract between the parties was a consumer contract. The court held that the defendant's website "directed its activities" to the claimants outside England, and through its jurisdiction clause anticipated clients beyond England. The claimants had a choice to sue either where they were domiciled under r.8, where the defendants were domiciled under r.4 (as the place of performance) or r.12 (as per the contractual jurisdiction agreement). The claimant's location as witnesses combined with the same applicable law between the two venues led the court to conclude that Northern Ireland was *forum conveniens*. These cases demonstrate that in future s.15B-E of the Civil Jurisdiction and Judgments Act 1982 as amended by the 2019 Regulations will continue to support jurisdiction of the consumer's domicile, even when a defendant tries to argue *forum non conveniens* in favour of its own (contractual) jurisdiction.

This section has sought to demonstrate how the Brussels I Recast could be assimilated into s.16 and rr.3(a) and (c) of Sch.4 to the 1982 Act. In the alternative, CJEU jurisprudence should be applied to Sch.4. In either case, the doctrine of *forum non conveniens* should be a prevalent consideration, regardless of the defendant's domicile.

[100] *Craven v Bellanca* [2012] N.I.Q.B. 58 at [15].
[101] *Craven v Bellanca* [2012] N.I.Q.B. 58 at [17].
[102] *Craven v Bellanca* [2012] N.I.Q.B. 58 at [30]–[33].
[103] *Oakleaf Conservatories Ltd v Weir* [2013] EWHC 3197 (TCC).
[104] *Oakleaf Conservatories* [2013] EWHC 3197 (TCC), per Mr Justice Stuart-Smith at [17].
[105] *Bateman v Birchall Blackburn LLP* [2014] N.I.Q.B. 112.

Residual jurisdiction over non-EU defendants in the English and Scottish courts

Since the Withdrawal Agreement and Political Declaration do not refer to civil judicial co-operation, the English CPR for proceedings in England, Sch.8 to the 1982 Act for proceedings in Scotland, and the doctrine of *forum non conveniens* will operate as the principal bases of international jurisdiction, irrespective of the defendant's domicile.

The traditional approach of both English and Scottish courts has been to establish a connection between persons, property and the jurisdiction seised.[106] A particular strength of the English court's residual jurisdiction rules is its ability to "extend over persons abroad to cover new causes of actions and situations."[107] A particular strength of the Scottish court's approach is that its residual jurisdiction rules are modelled on the EU system. Both approaches apply the doctrine of *forum non conveniens*. Both approaches are already known to commercial parties, enabling continuity of litigation and transaction risk. This section considers the value in retaining both sets of rules in the interim and longer term. Analysis contributes to an emerging debate on whether a unified set of rules applicable across the UK is both necessary and justified.

Proceedings in England—service of a claim and the proper place

The English residual jurisdiction rules require the claimant to serve[108] proceedings over a defendant[109] to ensure such proceedings are "communicated to the defendant".[110]The justification of service is that England must be a court of competent jurisdiction. There must be a sufficient connection between the foreign defendant, the nature of the dispute and the English court. English residual jurisdiction rules are distinguished by two methods of service; service as of right and service outwith the permission of the court. The question arises whether these forms of service should apply irrespective of the defendant's domicile.[111] The English court's ability to serve out over foreign defendants has a long pedigree and should, in the absence of EU-UK arrangements after the expiry of the implementation period, be capable of extending to EU defendants. On that basis, the remainder of this article proposes future adaptation of existing approaches which go beyond the 2019 Regulations. The court's role in determining the proper place[112] for the claim, or *forum conveniens*, will remain a prevalent consideration.

[106] *Anton's Private International Law* (2011), para.8.00.

[107] *Masri* [2009] UKHL 43; [2010] 1 A.C. 90; P. Rogerson, *Colliers' Conflict of Laws* (Cambridge: Cambridge University Press, 2015), p.139. However, this aim must continue to be legitimate and proportionate so as to not fall foul of art.6 ECHR; see Rogerson, *Colliers' Conflict of Laws* (2015), pp.202–203.

[108] *Frampton v McGuigan* [2018] N.I.Q.B. 52.

[109] Dicey, Morris and Collins, *The Conflict of Laws* (2008), paras 11-003, 11-102.

[110] *Abela v Baadarani* [2013] UKSC 44; [2013] 1 W.L.R. 2043 at [37], referring to *Olafsson v Gissurarson* [2008] EWCA Civ 152; [2008] 1 W.L.R. 2016.

[111] Which may enable a subsequent default judgment to be enforced in that jurisdiction provided the defaulting party "had consented in advance to the submission of the foreign court"; *Vizcaya Partners Ltd v Picard* [2016] UKPC 5, referring to *SA Consortium General Textiles v Sun and Sand Agencies* [1978] 1 Ex. D. 17 and Dicey, Morris and Collins, *The Conflict of Laws* (2008), paras 14-078 and 14-079; cf. *US Mortgage Finance II LLC v Dew* [2015] EWHC 3621, n.240, which confirms that submission may arise from a jurisdiction agreement, but not from a choice of law agreement.

[112] Civil Procedure r.6.37(3); *Vedanta Resources Plc v Lungowe* [2019] UKSC 20; [2019] 2 W.l.R. 1051 at [66].

Service as of right

In the absence of a UK-EU agreement, there is an argument that the rule for a defendant to be connected "within the jurisdiction"[113] should be the same for both EU and non-EU domiciled defendants. Service as of right can occur in two ways. First, through the defendant's presence in the jurisdiction: service can be effected over an individual who is present in the jurisdiction. For companies, CPR rules provide comprehensive basis for service of proceedings at the defendant's registered office or place of business in England. A foreign company must register with Companies House to ensure service on behalf of the company through a nominated agent or foreign company's branch.[114] One point for assimilation is the requirement for a sufficient link between the cause of action, the connection with a branch,[115] or the connection between the activity of the foreign company, and the English court's jurisdiction.[116] This would reflect the special jurisdiction for agents and contracts under art.7(5) and 7(1) of Brussels I Recast respectively.

Second, service as of right can occur through the defendant's submission to the jurisdiction. There would appear to be no difficulty in principle in applying the submission rule to disputes with EU defendants. Similar to non-EU defendants, EU defendants who object to the jurisdiction on time[117] would not be held to have submitted. Submission may also occur via the parties' contract. If the parties agree in their contract to England as having exclusive jurisdiction, an agent in England must be "nominated"[118] for service to be effective.

Service out

Where service as of right cannot be established, the claimant may seek service out with the permission of the court.[119] The question arises whether, after the implementation period, service out can and should apply to EU defendants. The requirement to obtain the court's permission to serve out is a distinctive approach compared to service as of right, the Brussels I Recast and Sch.8 to the 1982 Act. It was originally conceptualised as requiring respect for the status of the foreign system while ensuring that genuine claims have a sufficient connection with England. Today, following *Abela v Baadarani*, the Supreme Court confirmed that the approach to service out is pragmatically justifiable through a "substantial connection"[120] to England via parties' submission or other factual connection. The dispute must be meritorious, one of the gateways under the CPR 6.36 must be satisfied, and the English court must be the proper place[121] or *forum conveniens*. The requirement to first characterise the dispute supports Dicey and Morris' first

[113] *SSL International Plc v TTK LIG Ltd* [2011] EWCA Civ 1170; [2012] 1 W.L.R. 1842, following *Chellaram v Chellaram (No.2)* [2002] EWHC 632 (Ch); Dicey, Morris and Collins, *The Conflict of Laws* (2008), para 11-110.
[114] *Capital Alternative Sales and Marketing Ltd (in Liquidation) v Nabas* [2018] EWHC 3345 (Comm).
[115] Dicey, Morris and Collins, *The Conflict of Laws* (2008), para.11-117.
[116] Dicey, Morris and Collins, *The Conflict of Laws* (2008), para.11-118.
[117] *Apex Global Management Ltd v Global Torch Ltd* [2017] EWCA Civ 315, Court of Appeal.
[118] CPR r.6.11; Dicey, Morris and Collins, *The Conflict of Laws* (2008), para.11-131.
[119] CPR r.6.36, Practice Direction 6B — Service out of the Jurisdiction, para 3.1, *https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part06/pd_part06b* [Accessed 24 February 2020]; Dicey, Morris and Collins, *The Conflict of Laws* (2008), para.11-140.
[120] *Abela v Baadarani* [2013] UKSC 44 at 53; A. Dickinson, "Service Abroad — An Inconvenient Obstacle?" (2014) 130 L.Q.R. 197.
[121] *Vedanta Resources v Lungowe* [2019] UKSC 20; [2019] 2 W.L.R. 1051 at [66].

and fourth cardinal points for the English court to serve out[122] over a defendant not connected to England. In the recent case *Huawei Technologies Co Ltd v Conversant Wireless Licensing Sàrl*, Lord Floyd in the Court of Appeal confirmed the approach of Henry Carr J that the dispute must first be characterised in its "totality", taking account of both parties' views of the claim[123] as "as a matter of substance and not merely form".[124] On that basis, in principle, there should be no difficulty with extending service out to EU defendants.

There are three aspects for service out.[125] The first aspect for service out is to establish a "serious claim on the merits".[126] Traditionally this has meant that the claimant must have, on balance, the "much the better argument".[127] Authority from Supreme Court in *Goldman Sachs International v Novo Banco SA*[128] and the Court of Appeal in *Kaefer Aslamientos SA de CV v AMS Drilling Mexico SA de CV*[129] confirms that the good arguable case test requires three limbs to be satisfied: a "plausible evidential basis",[130] leading to the court's assessment of the claimant's chosen gateway and a connection between the evidence and the competing arguments. In essence, the better argument point is ticked off when the claimant has a "good arguable case and plausible evidence" to assert jurisdiction. [131]

The second aspect for service out is the claim's connection "within the jurisdiction" on one or more CPR grounds.[132] Dicey and Morris remind us that if neither the party nor the nature of the dispute is connected to the jurisdiction, then one should look to the scope of the rule to determine whether it is civil or commercial in nature,[133] and then the English court can assert jurisdiction.[134] Since exit day, s.4(2)(a) of the Civil Procedure Rules 1998 (Amendment) (EU Exit) Regulations 2019[135] amended Section II, Pt 6 of the Civil Procedure Rules 1998 to apply irrespective of the defendant's domicile. This amendment ensures compatibility between the CPR and EU defendants generally and the parallel Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 considered above. As expected, s.15(a) of the 2019 CPR Regulations removes reference to the Brussels I Recast and Lugano Conventions in CPR r.6.31 and replaces it with any Convention the UK enters into regarding service out. This leaves open the potential for application of service out until such time the UK has capacity and

[122] Dicey, Morris and Collins, *The Conflict of Laws* (2008), para.11-142.

[123] *Huawei Technologies Co Ltd v Conversant Wireless Licensing Sàrl* [2019] EWCA Civ 38; [2019] R.P.C. 6 at [32], [95], [97], [99], affirming Carr J in *Banco Turco Romana SA (In Liquidation) v Cortuk* [2018] EWHC 662; the High Court has confirmed that it would not support a claimant where full disclosure as to the circumstances of the case have not been presented. In this case, the court refused to grant continuation of without notice freezing orders against various defendants as the defendants had not been given notice of the orders.

[124] *Huawei* [2019] EWCA Civ 38; [2019] R.P.C. 6 at [40], [41].

[125] *AK Investments v Kyrgyz Mobil* [2011] UKPC 7; [2012] 1 W.L.R. 1804, per Lord Collins.

[126] *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1994] 1 A.C. 438 HL, per Lord Goff of Chieveley at 452.

[127] *Canada Trust Co v Stolzenberg (No.2)* [1998] 1 W.L.R. 547 HL, followed in *Bill Kenwright Ltd v Flash Entertainment FZ LLC* [2016] EWHC 1951 (QB); cf. Lord Sumption in *Brownlie v Four Seasons Holdings Inc* [2017] UKSC 80; [2018] 1 W.L.R. 192 at [7].

[128] *Goldman Sachs International v Novo Banco SA* [2018] UKSC 34; [2018] 1 W.L.R. 3683.

[129] *Kaefer Aslamientos SA de CV v AMS Drilling Mexico SA de CV* [2019] EWCA Civ 10; [2019] 1 W.L.R. 3514.

[130] *Kaefer* [2019] EWCA Civ 10; [2019] 1 W.L.R. 3514 followed in *Coward v Ambrosiadou* [2019] EWHC 2105 (Comm).

[131] *Kaefer* [2019] EWCA Civ 10; [2019] 1 W.L.R. 3514 at [80]; *Bill Kenwright Ltd v Flash Entertainment FZ LLC* [2016] EWHC 1951 (QB).

[132] Dicey, Morris and Collins, *The Conflict of Laws* (2008), para.11-149.

[133] Dicey, Morris and Collins, *The Conflict of Laws* (2008), para.11-136.

[134] Dicey, Morris and Collins, *The Conflict of Laws* (2008), para.11-137.

[135] The Civil Procedure Rules 1998 (Amendment) (EU Exit) Regulations 2019, SI 2019/521.

accedes to future supranational or international measures which contain agreed international jurisdiction gateways.[136]

Despite the lack of reference to civil judicial co-operation in the Withdrawal Agreement and Political Declaration, the CPR gateways have some broad similarities with the Brussels I Recast. Their continued application can offer much needed continuity for EU defendants and their advisers. Taking the structure of the Brussels I Recast, CPR r.6.33(3) provides a limited form of exclusive jurisdiction where the matters relate to an international convention and for claims involving multiple parties.[137] For example, in *Kaefer*, the court held that the good arguable case could be contrasted with the requirements to establish a valid jurisdiction agreement under art.25 of the Brussels I Recast.[138] The CPR contains a general ground of jurisdiction based on the defendant's domicile or, in the absence of domicile, through service of process where a "real issue [exists] which is reasonable for the court to try".[139] Additional grounds enable proceedings based on a contract's connection (such as through formation,[140] applicable law,[141] breach[142]) with the jurisdiction, where the tort was committed, or property located "within the jurisdiction".[143] There are also specific jurisdiction grounds over third parties, counterclaims,[144] claims over admiralty, trusts, breach of confidence[145] or misuse of private information.

However, compared with the Brussels I Recast, the CPRs neither contains special jurisdiction for weaker parties such as consumers and employees nor provision for *lis pendens*. To ensure a level playing-field, these additional gateways of jurisdiction should be included in an adapted CPRs, para.3. Each of these additional rules would bring certainty and predictability to defendants, thereby supporting Dicey and Morris' second "cardinal point".[146] They would support the scope of exclusive jurisdiction over civil and commercial proceedings, reflecting national values. They would ensure that weaker parties who can establish a sufficient connection with England are protected against foreign sellers and employers regardless of domicile and any jurisdiction agreement in the latter's favour. Alternatively, the CPR gateways may be adapted to reflect Sch.8 to the 1982 Act for all non-UK domiciled defendants, while retaining the doctrine of *forum non conveniens* under s.49 of the 1982 Act.

[136] Article 7 of the Hague Judgments Convention of 2 July 2019 on the Recognition and Enforcement of Judgments in Civil and Commercial Matters contains a ground to refuse recognition of a judgment where service is deemed incompatible with the fundamental principles of the requested State.

[137] Dicey, Morris and Collins, *The Conflict of Laws* (2008), para.11-136.

[138] *Bols Distillers BV (t/a Bols Royal Distillers) v Superior Yacht Services Ltd* [2006] UKPC 45; [2007] 1 W.L.R. 12.

[139] CPR 3.1(3)(a); *Erste Group Bank AG (London) v JSC (VMZ Red October)* [2015] EWCA Civ 379; [2015] 1 C.L.C. 706 (word in brackets added for syntax).

[140] *Brownlie v Four Seasons Holdings Inc* [2019] EWHC 2533 (QB) at [110].

[141] *Navig8 Pte Ltd v Al-Riyadh Co for Vegetable Oil Industry (The Lucky Lady)* [2013] EWHC 328 (Comm); [2013] 2 All E.R. (Comm) 145.

[142] CPR 3.6(a)-(c).

[143] CPR 3.6,9, and 11.

[144] CPR r.6.36.

[145] For acts occurring within the jurisdiction: *Conductive Inkjet Technology Ltd v Uni-Pixel Displays Inc* [2013] EWHC 2968 (Ch); [2014] 1 All E.R. (Comm) 654.

[146] Dicey, Morris and Collins, *The Conflict of Laws* (2008), para.11-142.

Service out—establishing the proper place for the claim, or forum conveniens

To balance the CPR gateways and concerns regarding exorbitant jurisdiction, the third and most significant requirement for service out is that the English court is the proper place for the claim, or *forum conveniens*.[147] The effect of a plea of *forum non conveniens* is important, not just in determining anchor proceedings but also on ancillary proceedings such as an anti-suit injunction or provision measures to seize assets[148] in the jurisdiction.[149]

Rogerson explains that the defendant may seek to object to the English courts' jurisdiction on matters of service[150] or substance.[151] It is recognised that the application of the doctrine of *forum conveniens* to disputes involving EU defendants would be a significant departure from the "distinct"[152] line that has existed between establishing jurisdiction under the Brussels I Recast on the one hand, and service out and *forum conveniens* on the other.[153] Only art.34 of the Brussels I Recast[154] has provided for a limited scope of declining jurisdiction. However, the distinction has now been removed by the 2019 Regulations. After exit day, s.51 of the 2019 Regulations amended s.49 of the 1982 Act, by removing reference to the 1968 Brussels Convention and Lugano Conventions.[155] However, given the decision in *Cooley v Ramsay*,[156] the importance of the distinction between the CPR and the Brussels I Recast may linger until the end of the implementation period. In addition, the doctrine of *forum conveniens* under s.49 will continue to be subject to the Hague Convention 1965 on Service of Judicial and Extra Judicial Documents, where it applies, and art.9 of the Hague Choice of Court Convention, when the UK becomes competent to accede as an individual Contracting State.[157]

In the seven years between the Brussels I Recast and exit day, the majority of cases concerned with service out and the proper place have been concerned with the overarching risk of multiplicity of proceedings and irreconcilable judgments or more specific issues such as the operation of choice of law and jurisdiction clauses in contractual disputes and establishing the place of damage for claims in tort such as infringement of intellectual property rights and breach of personality or defamation. For these reasons, it is useful to consider the operation of the doctrine of *forum conveniens* in service out cases, and consider application of the doctrine

[147] CPR 6.37(3), n.113; *Spiliada* [1987] A.C. 460 HL; *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1984] A.C. 50 HL; Civil Jurisdiction and Judgments Act 1982 s.49; Dicey, Morris and Collins, *The Conflict of Laws* (2008), para.11-143.

[148] *PJSC Commercial Bank v Privatbank v Kolomoisky* [2018] EWHC 3308, confirmed Court of Appeal [2018] EWCA Civ 3040.

[149] Rogerson, *Colliers' Conflict of Laws* (2015), pp.151, 213–214.

[150] *Frampton v McGuigan* [2018] N.I.Q.B. 52.

[151] Rogerson, *Colliers' Conflict of Laws* (2015), p.142; *Huawei*, [2019] EWCA Civ 38; [2019] R.P.C. 6.

[152] *Stylianou v Toyoshima* [2013] EWHC 2188 (QB), per Sir Robert Nelson QC quoting Briggs and Rees, *Civil Jurisdiction and Judgments*, 5th edn (2009). Word in quotation marks adapted for syntax.

[153] *Wink v Croatia Osiguranje DD* [2013] EWHC 1118 (QB), per Haddon-Cave J; *Gulf International Bank Plc v Aldwood* [2019] EWHC 1666 (Comm), per Deputy Judge Kimbell QC at [92].

[154] Most recently relied upon in *BB Energy (Gulf) DMCC v Al Amoudi* [2018] EWHC 2595 (Comm).

[155] 2019 Regulations s.82(1)(a) and (b).

[156] *Cooley v Ramsay* [2008] EWHC 129 (QB), applied in *Wink* [2013] EWHC 1118 (QB).

[157] On which see the Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005) (EU Exit) Regulations 2018, which had previously been given UK parliamentary approval to give effect to the Hague Choice of Court Convention 2005 after 29 March 2019. In July 2019, the UK extended its accession of the Hague Choice of Court Convention to Gibraltar: "Notification 011343 pursuant to Article 34 of the Hague Choice of Court Convention 2005, The Hague, 31/07/2019."

to such cases after the expiry of the implementation period regardless of the defendant's domicile.

In determining the proper place for the claim, the English court is required to weigh the overarching risk of multiplicity of proceedings and irreconcilable judgments relative to other factors derived from *Spiliada*. In *Vedanta Resources Plc v Lungowe*,[158] the Supreme Court was required to consider the interaction between jurisdiction for a subsidiary company as anchor defendant under art.4 of the Brussels I Recast and jurisdiction for its non-EU domiciled parent company under CPR r.6.37(3). The defendants claimed that there was an abuse of EU law in such proceedings. For the purposes of this analysis, the Supreme Court confirmed three significant points. The first point was that jurisdiction under the Brussels I Recast was unaffected by *forum conveniens*. However, the claimant's ability to establish jurisdiction over an EU domiciled anchor defendant "fetters and paralyses"[159] the English court's ability to determine if a foreign court is *forum conveniens* in relation to other defendants.[160] The second point was that the court was adamant that it was for English law to resolve the issue and not EU law. The third point was that the existence of an anchor defendant did not demonstrate that England was the proper place for trial within CPR r.6.37(3) when the claimants had the "choice" [161] to bring proceedings in England rather than Zambia. The fourth point was that the consequence of the mandatory application of Brussels I Recast meant that the "risk of irreconcilable proceedings ceases to be a trump card" as part of the *forum conveniens* assessment.[162] This case demonstrates how the English court is a venue of choice for foreign litigants. With the removal of the Brussels I Recast, the English court will have to consider the risk of multiplicity of proceedings and irreconcilable judgments as paramount considerations in determining *forum conveniens*. The point is illustrated by the more recent English Queen's Bench Division case *ED&F Man Capital Markets Ltd v Come Harvest Holdings Ltd*.[163] In *ED&F Man*, a dispute arose between the claimant and multiple defendants, all of whom were non-EU domiciled. Since jurisdiction was not based on the Brussels I Recast, *forum conveniens* could be considered. The court distinguished *Vedanta* and said that greater weight was to be placed on the risk of multiple proceedings and irreconcilable judgments. On that basis, the court confirmed that England was the proper place for the claim.

Forum non conveniens also arises in claims "in respect of a contract" under CPR PDB 3.1(6). In *Fern Computer Consultancy Ltd v Intergraph Cadworx & Analysis Solutions Inc*[164] the claim could not be served out under that CPR head since the applicable law and jurisdiction agreement in the parties' contract was that of Texas. By comparison, in *Navig8 Pte Ltd v Al-Riyadh Co for Vegetable Oil Industry (The Lucky Lady)*[165] the court confirmed that if the contract is specifically not governed by English law, this CPR gateway cannot be established

[158] *Vedanta Resources v Lungowe* [2019] UKSC 20; [2019] 2 W.L.R. 1051.
[159] *Vedanta Resources v Lungowe* [2019] UKSC 20; [2019] 2 W.L.R. 105; [2019] 2 W.L.R. 1051 at [40].
[160] *Vedanta Resources v Lungowe* [2019] UKSC 20; [2019] 2 W.L.R. 1051 at [39].
[161] *Vedanta Resources v Lungowe* [2019] UKSC 20; [2019] 2 W.L.R. 1051 at [75] (emphasis added).
[162] *Vedanta Resources v Lungowe* [2019] UKSC 20; [2019] 2 W.L.R. 105 at [84].
[163] *ED&F Man Capital Markets Ltd v Come Harvest Holdings Ltd* [2019] EWHC 1661 (Comm).
[164] *Fern Computer Consultancy Ltd v Intergraph Cadworx & Analysis Solutions Inc* [2014] EWHC 2908 (Ch).
[165] *Navig8 Pte Ltd v Al-Riyadh Co for Vegetable Oil Industry (The Lucky Lady)* [2013] EWHC 328 (Comm), applying *Alliance Bank v JSC v Aquanta Corp* [2012] EWCA Civ 1588.

to seek an injunction against proceedings in the foreign court. In this case, a quantity of palm oil was shipped from Malaysia to Jordan and sold to a buyer. The buyer disputed the condition of the goods and sued both the seller and the Singaporean company who sub-chartered the ship to the seller (as shipper) in Jordan. The Singaporean company sought service out in England for declaration of non-liability. The English court refused the buyer's application to set aside the Singaporean company's application and granted service out. On the matter of *forum non conveniens*, the court said that the principle of comity was not part of the court's consideration when the parties had selected English law as the applicable law. As Hook[166] remarks, this decision reflects earlier authority from *The Magnum* that "parties should be held to their bargain",[167] hence the value of the English choice of law clause in this case. By way of further contrast, in *Standard Chartered Bank (Hong Kong) Ltd v Independent Power Tanzania* and *AeroSale 25362 Aviation Ltd v Med-View Airline Plc*,[168] where the parties' contract contains a non-exclusive jurisdiction agreement and a *forum non conveniens* waiver, the English court will require "particularly strong or exceptional grounds"[169] to stay proceedings.

The third category of cases concern cross-border claims in tort such as intellectual property infringements, defamation and breach of personality. The recent case *Easygroup Ltd v Easy Fly Express Ltd*[170] confirmed that the claimant had to demonstrate a serious issue which had a real prospect of success. The defendant was successful in disputing the court's jurisdiction. However, the court was satisfied that the claim did not have a real prospect of success. The defendant's operations related to the transportation of live shrimps in Bangladesh; therefore it neither targeted nor intended to target[171] the EU.[172] The lack of a prospect of success meant that the English court was not *forum conveniens*.

In relation to the tort CPR ground 3.1(9), the English courts have had regard to CJEU jurisprudence from *Dumez France SA v Hessische Landesbank*[173] to determine whether damage occurred within the jurisdiction or as a result of acts committed within the jurisdiction. The case of *Ahuja v Politika Novine I Magazini D.O.O*[174] demonstrates that for the English court to be *forum conveniens*, while there must be "serious harm" established under s.9 of the Defamation Act 2013, the claimant's right to a fair trial under art.6 ECHR must be respected.[175] Even if England is prima facie *forum conveniens*, the recent case *Lloyd v Google LLC*[176] shows that to enable the tort jurisdiction gateway to be utilised, damage must occur within the

[166] Maria Hook, "The Choice of Law Agreement as a Reason for Exercising Jurisdiction" (2014) 63 I.C.L.Q. 963, 971.

[167] Hook, "The Choice of Law Agreement as a Reason for Exercising Jurisdiction" (2014) 63 I.C.L.Q. 963, 971, referring to *Seashell Shipping Corp v Mutualidad de Seguros del Instituto Nacional de Industria (The Magnum)* [1989] 1 Lloyd's Rep. 47 CA (Civ Div).

[168] *Standard Chartered Bank (Hong Kong) Ltd v Independent Power Tanzania* [2015] EWHC 1640 (Comm); [2016] 1 All E.R. (Comm) 233; *AeroSale 25362 Aviation Ltd v Med-View Airline Plc* [2017] 9 WLUK 247.

[169] *Standard Chartered* [2015] EWHC 1640 (Comm); [2016] 1 All E.R. (Comm) 233 at [104].

[170] *Easygroup Ltd v Easy Fly Express Ltd* [2018] EWHC 3155 (Ch); [2019] E.T.M.R. 13.

[171] On the point of targeting, the Court of Appeal referred to *Merck KGaA v Merck Sharp and Dohme Corp* [2017] EWCA Civ 1834; [2017] E.T.M.R. 10, which in turn considered CJEU jurisprudence in *Pammer v Reederei Karl Schulter GmbH & Co Kg* (C-585/08) [2011] 2 All E.R. (Comm) 888; see Gillies, (2011) 60 I.C.L.Q. 557.

[172] *Easygroup Ltd* [2018] EWHC 3155 (Ch); [2019] E.T.M.R. 13.

[173] *Dumez France SA v Hessische Landesbank* (C-220/88) EU:C:1990:8; [1990] I.L.Pr. 299.

[174] *Ahuja v Politika Novine I Magazini D.O.O* [2015] EWHC 3380 (QB).

[175] L. Gillies "An Exercise of Balance: Human Rights in Residual Jurisdiction for Cross-Border Torts via Social Media" in L. Gillies and D. Mangan (eds), *The Legal Challenges of Social Media* (Cheltenham: Edward Elgar, 2017), considering Sir Michael Tugendhat in *Ahuja v Politika Novine I Magazini D.O.O* [2015] EWHC 3380 (QB) at [32].

[176] *Lloyd v Google LLC* [2018] EWHC 2599 (QB); [2019] 1 W.L.R. 1265.

jurisdiction in accordance with the applicable law. Compared with *Vidal-Hall v Google*,[177] which brought proceedings on an individual basis, proceedings in the *Lloyd* case were brought by a number of parties. This raised a problem on defining damage under the relevant national law. Section 13 of the then Data Protection Act 1998 enabled proceedings where an *individual* suffered damage in contravention of the Act. In the instant case, despite England being *forum conveniens*, the lack of specification that each individual claimant sustained damage meant that CPR 3.1(9) was not established. The case of *Eurasia Sports Ltd v Aguad*[178] concerned a dispute in contract and tort in which the defendants attempted to defraud an online gambling service in tort to the tune of $12.6 million. It showed that it is possible for more than one defendant to be sued in a forum based on the same or closely related facts under the new CPR PDB 6.31(4A), provided that England is the proper place to bring proceedings. In the Supreme Court, Lord Lloyd remarked obiter that while it was possible to reconcile the principle in *Altimo Holdings*[179] that the English court is cautious to bring foreign defendants within its jurisdiction, this caution must be balanced against Lord Sumption's remarks in *Abela v Baadarani* that "litigation *between residents of different states* was a routine incident of modern commercial life".[180]

Proceedings in Scotland: Sch.8, and forum non conveniens in s.49, 1982 Act

Section 20(1) of the 1982 Act states that proceeding against a foreign defendant may be brought to the Scottish courts under Sch.8 to the 1982 Act. In the absence of the EU-UK agreement for EU defendants, this Schedule may be considered as to whether it can be used under s.8 of the 2018 Act to establish jurisdiction over EU (as well as non-EU) defendants in combination with the doctrine of *forum non conveniens*. Compared with the approach under the English CPR, Sch.8 offers a closely structured set of jurisdiction rules based on the Brussels I Recast. Crucially, Sch.8 contains additional rules for specific claims beyond the scope of the Regulation and reflecting national objectives. These differences will now be considered.

Schedule 8 takes a different approach from Brussels I Recast to exclusive jurisdiction and the effect of appearance to the Scottish court. Rule 5 contains exclusive jurisdiction rules which apply regardless of domicile in proceedings brought in an EU Member State. Anton raises a general concern regarding r.5's "precise field of application".[181] Before exit day, the particular concern has been the reflexive effect of national rules with the Brussels I Recast. As Anton explains, the purpose of r.5 is to provide "reflex effect" to art.22 of the Brussels I Recast. This alignment is achieved through purposive interpretation of the Recast. After the expiry of the implementation period, this may constitute a "deficiency" under s.8(1)(b) of the 2018 Act for two reasons. First, as a jurisdiction rule which operates regardless of domicile, it may raise conflicts with other exclusive jurisdiction rules.

[177] *Vidal-Hall v Google Inc* [2015] EWCA Civ 311; [2016] Q.B. 1003.
[178] *Eurasia Sports Ltd v Aguad* [2018] EWCA Civ 1742; [2018] 1 W.L.R. 6089.
[179] *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7.
[180] *Eurasia* [2018] EWCA Civ 1742; [2018] 1 W.L.R. 6089 at [63]–[64]. Emphasis added.
[181] *Anton's Private International Law* (2011), para 8.31.

Second, it will not be subject to continued CJEU interpretation on the matter of exclusive jurisdiction unless directed by a UK Minister.[182] Section 31(1) of 2019 Regulations deletes s.20(5) of the 1982 Act's reference to the Brussels I Recast. Section 51 of the 2019 Regulations removes reference to both the 1968 Brussels Convention and the Lugano Convention in s.49 of the 1982 Act.

Another aspect where exclusive jurisdiction under r.5 will be important after the implementation period expires is jurisdiction over proceedings for the validity of companies. In line with art.63 of the Brussels I Recast, r.5 grants exclusive jurisdiction in the courts of the place where the company has its seat. While based on real seat theory, s.43 refers to the theory of incorporation for the purposes of determining the company's seat. Article 63 should be preserved as it is compatible with the theory of incorporation in the Companies Act 2006.

Rule 1 of Sch.8 confirms the general rule that proceedings may be brought in the defendant's domicile. [183] In a similar fashion to the rule on submission to the English court above, r.7 confirms that appearance to contest the jurisdiction of the Scottish court is not submission.[184] Rule 6 applies to jurisdiction agreements and should be retained similar to s.16 of the 1982 Act.

Rule 2 contains rules of special jurisdiction. It provides specific statutory rules over and above the Brussels I Recast in several respects, so may be buffered by any inability of the Scottish courts to refer to CJEU judgments after exit day. For example, it provides a rule for defenders of no fixed residence, covering *G v De Visser*-type[185] situations; interdicts (injunctions) concerned with threatened wrongs such as breach of copyright[186] or threat of an IP infringement via a website as in *Bonnier Media v Greg Lloyd Smith*[187]; restitution cases such as in *Kleinwort Benson*[188]; trusts, which are excluded from the material scope of the Brussels I Recast; succession, since UK did not adopt the EU Succession Regulation; multiple parties[189] and claims in liability for actions of a ship. This latter ground may be utilised to support Scotland's international trade.[190] It is also been considered most recently in determining where a company has it seat. In *Shearer v Betvictor*,[191] judicial review was rejected on the grounds that the defender, a Gibraltar company, had done business in England and had been subject to the English court's jurisdiction. The court held that Scottish proceedings were not likely to succeed. Interestingly the court distinguished *Tehrani v Secretary of State for the Home Department*[192] on the basis that the nature of the dispute was different; *Tehrani* was concerned with immigration, whereas the matter in *Betvictor* was a private dispute.

[182] The matter being reserved to Westminster; Scotland Act 1998, Sch.5, para.7.

[183] *Tehrani v Secretary of State for the Home Department* [2006] UKHL 47; [2007] 1 A.C. 251; *Thoars Judicial Factor v Ramlort Ltd* 1998 S.C. 887.

[184] *Scottish Water Business Stream Ltd v Deodat Chataroo* SA978/14 2015 WL 5785260 28/08/2015.

[185] *G v De Visser* (C-292/10) EU:C:2012:142; [2013] Q.B. 168.

[186] *Mackie (t/a 197 Aerial Photography) v Askew* 2009 S.L.T. (Sh Ct) 146.

[187] *Bonnier Media v Greg Lloyd Smith* 2003 S.C. 86 at [15].

[188] *Kleinwort* (C-346/93) EU:C:1995:85; [1996] Q.B. 57.

[189] *Compagnie Commerciale Andre AS v Artibell Shipping Co Ltd (No.1)* 1999 S.L.T. 1051 CS (OH).

[190] Law Society of Scotland, Consultation Response to Department of Transport, Maritime 2050 (May 2018),*https://www.lawscot.org.uk/media/360305/18-05-10-mar-consultation-maritime-2050-plan.pdf* [Accessed 25 February 2020].

[191] *Shearer v Betvictor* [2016] CSOH 62.

[192] *Tehrani* [2006] UKHL 47; [2007] 1 A.C. 251.

Brexit will continue to raise specific concerns regarding non-regression of human rights and social protections relating to weaker parties. While s.5(3) of the 2018 Act confirms there is no change regarding the EHCR, s.5(4) confirms that the Charter of Fundamental Rights will no longer apply after exit day. Similar to Brussels I Recast, special jurisdiction is contained in r.3 for consumers[193] and r.4 for employees [194] and the 2019 Regulation does not intend to remove these from the 1982 Act.

Conclusion

The above analysis has shown that residual jurisdiction in English CPR and Sch.8 for Scotland, together with Sch.4 to the 1982 Act are vital to allocating jurisdiction over foreign defendants in UK courts. The influence of the doctrine of *forum non conveniens* will increase and it is here that the courts will have a particular role in ensuring that doctrine supports conflicts justice, balances national interests, access to justice and parties' expectations. The broader policy question that remains to be considered is whether there is a need to distinguish between English and Scottish residual jurisdiction rules (combined, parallel approach[195]) or form a single set of rules (unitary approach[196]). That discussion should take place before the expiry of the implementation period. Thereafter, both the UK Parliament and courts have the opportunity to re-affirm the national in international private law by adjusting the existing rules to reflect the benefits of EU IPL, or assimilating jurisdiction rules with an eye towards future legislative co-operation at the international level. In addition, the UK courts' application of the doctrine of *forum non conveniens* will also become more prevalent, regardless of the defendant's domicile.

[193] *Prostar Management v Twaddle* 2003 S.L.T. (Sh Ct) 11; *Heriot-Watt University v Christian Schlamp* [2020] SC EDIN 15, a Scottish case reported post-exit day where the defender argued that his status as a consumer applied and Rule 3 of Schedule 8 "replicated the Brussels I Recast" at [13]. This case is of interest as the German domiciled defender was successful in resisting the Scottish court's jurisdiction given his status as a consumer.

[194] *Cambridge Bionutritional Ltd v VDC Plc* [2000] 1 WLUK 488.

[195] A term used in the context of distinguishing between EU and residual jurisdiction: Gillies, "Creation of Subsidiary Jurisdiction Rules in the Recast of Brussels I" (2012) 8 J.P.I.L. 489, 510.

[196] A term previously used in the context of harmonising residual jurisdiction within the proposed Brussels I Recast; Gillies, "Creation of Subsidiary Jurisdiction Rules in the Recast of Brussels I" (2012) 8 J.P.I.L. 489.