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POST-BREXIT RECOGNITION AND ENFORCEMENT OF JUDGEMENTS: PROBLEMS AND SOLUTIONS

by Matthew G T Bruce*

Brexit brought about significant changes to the EU legal infrastructure which had been in place for decades. One such affected area is the reciprocal recognition and enforcement of judgments between Member States' courts. This legal operation is now very different post-Brexit and there is no clear replacement for the EU framework. This article will assess the implications stemming from the loss of the Brussels I Recast Regulation (BIRR) and critically analyse the potential replacements to maintain reciprocity between Scottish and EU courts.¹ To reach a conclusion the paper will be set out over three parts. Part I will compare the BIRR to the existing Scots law covering recognition and enforcement. Part II will assess whether the Lugano II Convention could have satisfactorily replaced the BIRR.² Part III will then analyse the potential of the Hague Conventions as a replacement regime.³ The analysis will be aided by reference to international conventions, EU Regulations, case law, academic commentary and other reports on this area of law. The article will conclude by proposing the best option for future recognition and enforcement of judgments between the UK and EU: a bespoke UK-EU treaty, with the 2019 Hague Convention providing an interim framework.

Part One – The BIRR

Part One will analyse the key legal implications of the repeal of the BIRR. To show the significance and impact of the BIRR, its main provisions on recognition and enforcement of judgments will be compared to the previous Scots law regime. Three main implications will be identified and carried throughout the remainder of the article.

The BIRR was the latest in a succession of conventions, later Regulations, governing the recognition and enforcement of judgments between EU Member States.⁴ The BIRR provides for the recognition and enforcement of judgments without any special procedure.⁵ The Regulation provides for a very

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¹ 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 (recast) [2012] OJ L 351/1 (BIRR).

² Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2007] OJ L 339/3 (Lugano II).

³ Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (2019 Convention); Convention of 30 June 2005 on Choice of Court Agreements (2005 Convention).

⁴ Gerry Maher, 'Enforcing European judgments in Scotland' (2015) 27 Scots Law Times 121.

⁵ BIRR, arts 36 and 39.

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wide range of judgments to be covered by its provisions,⁶ with six express areas where the provisions do not apply.⁷ Prior to the UK jurisdictions adopting the Brussels regime, recognition and enforcement of European judgements was governed by common law and two Acts of Parliament.⁸ After the introduction of the Brussels regime, the common law and statutory law remained for non-EU Commonwealth and other countries; as well as EU countries for matters outside the scope of the Brussels regime.⁹ While there is commonality between the BIRR and existing Scots law on recognition and enforcement of judgments, there are notable differences in their operation.

Recognition and enforcement under the BIRR is founded on mutual trust between Member States.¹⁰ The rationale for the BIRR is to speed up and simplify the process of recognition and enforcement.¹¹ The BIRR impliedly sets no time limit to have a judgment recognised and enforced.¹² The judgment should, however, still be enforceable in the originating Member State.¹³ Under the Administration of Justice Act 1920 (AJA 1920), there is a twelve month time limit,¹⁴ although courts are permitted to exercise discretion where necessary.¹⁵ The limit is six years under the Foreign Judgments (Reciprocal Enforcement) Act 1933 (FJA 1933).¹⁶ Where a judgment is to be enforced under common law it must still be extant.¹⁷ The BIRR has a greater scope than the other methods of enforcement, covering any judgment in civil or commercial matters not expressly excluded.¹⁸ The AJA 1920 extends only to judgments awarding a sum of money.¹⁹ The FJA 1933 can be used for judgments for money in respect of compensation or damages.²⁰ At common law, judgements will be recognised where they are final, conclusive and for a specific sum of money.²¹ Defenders can only use express grounds for refusal under the BIRR, FJA 1933 and AJA 1920.²² Whereas courts have discretion to allow for the refusal of recognition and enforcement at common law.²³ The BIRR was, therefore, the zenith of a simplified procedure for recognition and enforcement of judgements when compared to the Scots law prior to the introduction of the Brussels regime.

⁶ BIRR, art 1(2).

⁷ BIRR, art 2.

⁸ Foreign Judgments (Reciprocal Enforcement) Act 1933 (FJA 1933) and Administration of Justice Act 1920 (AJA 1920).

⁹ Oliver Browne and Tom Watret, *Enforcement of Foreign Judgments 2021* (Lexology 2021) 109.

¹⁰ BIRR, recital (26).

¹¹ BIRR, recital (4).

¹² Browne and Watret (n 9), 110.

¹³ C-420/07 *Apostolides v Orams* [2009] ECR I-3571.

¹⁴ AJA 1920, s 9(1); *Bank of British West Africa Ltd, Petitioners* 1931 SLT 83, 84.

¹⁵ *Ogelegbanwei v Nigeria* [2016] EWHC 8 (QB).

¹⁶ FJA 1933, s 2(1); *New Cap Reinsurance Corp Ltd (In Liquidation) v Grant* [2011] EWHC Civ 971, [61].

¹⁷ *Kuwait Oil Tanker Co SAK v Al Bader* [2008] EWHC 2432 (Comm).

¹⁸ BIRR, arts 1-2.

¹⁹ AJA 1920, s 12(1); *Strategic Technologies Pte Ltd v Procurement Bureau of the Republic of China Ministry of National Defence* [2020] EWCA Civ 1604, [51].

²⁰ FJA 1933, s 11(1).

²¹ *Barclays Bank Plc v Shetty* [2022] EWHC 19 (Comm), [75].

²² BIRR, art 45; FJA 1933, s 4; AJA 1920, s 9(2).

²³ *Adams v Cape Industries Plc* (1990) Ch 433, 494; *Geiger v D & J Macdonald Ltd* 1932 SLT 70.

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The following are three areas identified by commentators in this area of law as key implications of the repeal of the BIRR for the UK's jurisdictions. First, Scots law no longer forms part of the harmonised private international law across EU Member States.²⁴ This reduces clarity of applicable rules on cross-border recognition and enforcement.²⁵ Second, there is no longer reciprocal, automatic procedure for the recognition and enforcement for the majority of judgments between Scottish and EU Member State courts.²⁶ While Scottish courts could continue to recognise and enforce judgments from EU courts, there is no legal obligation for the latter to do the same.²⁷ Third, with the removal of the BIRR from Scots law, the scope of judgments that can be recognised and enforced under a single procedure will narrow.²⁸ These three legal implications will be carried throughout this article to ascertain which potential replacement can satisfactorily rectify their impact. Without any form of replacement for the BIRR, as detailed below, much of the law of recognition and enforcement will default to the common law and statutory provisions.²⁹

Part Two – Lugano II

The Lugano II Convention created a parallel set of laws on recognition and enforcement of judgements to the pre-recast Brussels I Regulation (BIR).³⁰ All EU Member States and four European Free Trade Association (EFTA) Member States are party to Lugano II.³¹ In its White Paper published prior to Brexit negotiations, the UK Government identified Lugano II as the preferred option for post-Brexit cooperation.³² However, the European Commission has not provided its consent to the UK's accession to Lugano II.³³ The UK, therefore, is currently unable to join.³⁴

²⁴ Elizabeth B Crawford and Janeen M Carruthers, 'Brexit: The Impact on Judicial Cooperation in Civil Matters Having Cross-border Implications – A British Perspective' (2018) 3(1) *European Papers* 183, 187.

²⁵ J M Carruthers, 'Brexit - the implications for civil and commercial jurisdiction and judgment enforcement' (2017) 21 *Scots Law Times* 105.

²⁶ *Ibid.*

²⁷ Jonathan Fitchen, 'The PIL consequences of Brexit' (2017) 3 *Nederlands Internationaal Privaatrecht* 411, 412.

²⁸ BIRR, art 45 cf n 15-17.

²⁹ Carruthers (n 25), 106.

³⁰ Carruthers (n 25), 105.

³¹ *Ibid.*

³² HM Government, *The Future Relationship Between the United Kingdom and the European Union* (White Paper Cm 9593, 2018) paras 146-147.

³³ European Commission, Assessment on the application of the United Kingdom of Great Britain and Northern Ireland to accede to the 2007 Lugano Convention (Brussels, 4.5.2021 COM(2021) 222 final).

³⁴ Lugano II, art 72(2).

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I

Accession to the Lugano II Convention would provide the same benefits as being party to the BIR,³⁵ prior to its recasting in 2012.³⁶ Lugano II was drafted with the accession of third countries in mind,³⁷ which requires the unanimous consent of the existing parties.³⁸ The European Commission, exercising its competence in the area of private international law,³⁹ represents all 27 Member States in this respect.⁴⁰ The purpose of the convention is to facilitate the portability of judgments between EU and non-EU countries: albeit the current non-EU countries are all Member States of EFTA.⁴¹ Being party to Lugano II would provide a straightforward and simple solution post-Brexit, due to the previous participation of the UK's jurisdictions in the Lugano II regime.⁴² Tang opines that Lugano II would strike a balance between the new UK-EU legal relationship and need for continued participation in judicial cooperation.⁴³ Accession to Lugano II would not entail significant changes to laws of recognition and enforcement;⁴⁴ enabling cooperation in a similar way as was in place under BIRR.⁴⁵

Like the BIRR, Lugano II is reciprocal in its character.⁴⁶ Therefore, it would have satisfactorily ensured the reciprocal recognition and enforcement of judgements between Scottish and EU courts despite being outside of the Brussels regime.⁴⁷ Lugano II has been identified as working successfully to harmonise private international laws between EU and non-EU countries in line with the Brussels regime.⁴⁸ However, there are a range of concerns about the suitability of Lugano II as a replacement for the BIRR, particularly as regards the scope of its operation and *exequatur*.

³⁵ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L 12/1; Johannes Ungerer, 'Consequences of Brexit for European Private International Law' (2019) 4(1) *European Papers* 395, 399.

³⁶ Ungerer (n 35).

³⁷ Lugano II, art 70; Zheng Sophia Tang, 'UK-EU Civil Judicial Cooperation after Brexit: Five Models' (2018) 43(5) *European Law Review* 648.

³⁸ Lugano II, art 72(2).

³⁹ Consolidated Version of the Treaty on the Functioning of the European Union [2012] C 326/47 (TFEU), arts 67(4) and 81(2)(a).

⁴⁰ Opinion 1/03 *Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* [2006] ECR I-01145.

⁴¹ Oriol Espar and Jesús Castell, 'Choice of law and jurisdiction in banking and finance contracts after Brexit: a perspective from Europe' (2020) 14(2) *Law and Financial Markets Review* 121, 124.

⁴² Tang (n 37).

⁴³ *Ibid.*

⁴⁴ Erik Lagerlöf, 'Jurisdiction and Enforcement Post Brexit' (2021) 1 *Nordic Journal of European Law* 19, 33.

⁴⁵ Muriel Renaudin, 'The consequences of Brexit on existing and future commercial contracts' (2017) 112 *Amicus Curiae* 2.

⁴⁶ Tristan Baumé, 'Competence of the Community to Conclude the New Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters: Opinion 1/03 of 7 February 2006' (2006) 7(8) *German Law Journal* 681.

⁴⁷ Andrew Dickinson, 'Back to the future: the UK's EU exit and the conflict of laws' (2016) 12(2) *Journal of Private International Law* 195, 201.

⁴⁸ Anna Nyland and Magne Strandberg, 'Conclusions on Civil Procedure and Harmonisation of Law' in *Civil Procedure and Harmonisation of Law: The Dynamics of EU and International Treaties* (Intersentia 2019), 237; Poomintr Sooksripaisarnkit, 'Harmonisation of Private International Law - Is it Possible At All?' (2012) 1(1) *Journal of Civil & Legal Systems* 1.

II

The primary concern with Lugano II as a replacement regime post-Brexit is that its provisions are out of date when compared with the BIRR. Lugano II, unlike the BIRR,⁴⁹ contains an exequatur requirement prior to the enforcement of judgments.⁵⁰ There are differences in the mechanisms in place for the recognition and enforcement of EU judgments in the UK and vice versa, this adds additional complexity and time to the process under Lugano II when compared to the BIRR.⁵¹ Therefore, recognition and enforcement under Lugano II would be less streamlined and more costly than the BIRR.⁵² Lugano II also has a more limited scope than the most recent regime for recognition and enforcement under the BIRR.⁵³ There is no provision comparable to Article 54 of the BIRR which requires judgments to be enforced under the most equivalent national law in the receiving Member State where none already exists.⁵⁴ Without this express requirement, recognition and enforcement could default to the more complicated procedure of adaptation prior to recasting.⁵⁵ While the grounds for refusal of recognition and enforcement are broadly aligned between the two regimes,⁵⁶ there is concern over the lack of express reference to the European Convention on Human Rights in Lugano II.⁵⁷ Although Article 6 is seldom used as a ground for refusal,⁵⁸ and has been viewed as not being a necessary part of the BIRR,⁵⁹ it remains an important safeguard of due process.⁶⁰ Carruthers concludes that for these reasons Lugano II would not be the best replacement for the BIRR despite it being a parallel regime.⁶¹

The role of the Court of Justice of the European Union (CJEU) in the Lugano II regime has been identified as another concern post-Brexit. Lugano II requires the courts of its parties to pay due

⁴⁹ E B Crawford and J M Carruthers, 'Brussels I bis - the Brussels Regulation recast: closure (for the foreseeable future)' (2013) 12 Scots Law Times 89, 94.

⁵⁰ Lugano II, art 38(1).

⁵¹ Lugano II, art 38(2); *Drika BVBA v Giles* [2018] CSH 42, [41]; *Cyprus Popular Bank Public Co Ltd v Vgenopoulos* [2018] EWCA Civ 1, [15].

⁵² Maher (n 4); Philippe Hovoguimian, 'The enforcement of foreign judgments under Brussels I bis: false alarms and real concerns' (2015) 11(2) Journal of Private International Law 212, 251; Laurens Je Timmer, 'Abolition of Exequatur under the Brussels I Regulation: ILL Conceived and Premature?' (2013) 9(1) Journal of Private International Law 129.

⁵³ Mateusz Pilich, 'Brexit and EU private international law: May the UK stay in?' (2017) 24(3) Maastricht Journal of European and Comparative Law 382, 384.

⁵⁴ Hovoguimian (n 52), 218.

⁵⁵ Case C-456/11 *Gothaer Allgemeine Versicherung et al v Samskip GmbH* [2013] QB 548; Case 145/86 *Horst Ludwig Martin Hoffmann v Adelheid Krieg* [1988] ECR 645; Felix M Wilke, 'The impact of the Brussels I Recast on important "Brussels" case law' (2015) 11(1) Journal of Private International Law 128, 140.

⁵⁶ BIRR, art 45 and Lugano II, art 34.

⁵⁷ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR); BIRR, recital (38); Peter Arnt Nielsen, 'The new Brussels I Regulation' (2013) 50(2) Common Market Law Review 503, 527.

⁵⁸ ECHR, art 6; *Avotins v Latvia* (17502/07) (2017) 64 EHRR 2.

⁵⁹ Paul Gragl, 'An olive branch from Strasbourg? Interpreting the European Court of Human Rights' resurrection of Bosphorus and reaction to Opinion 2/13 in the Avotins case' (2017) 13(3) European Constitutional Law Review 551.

⁶⁰ Dominik Dürsterhaus, 'The ECtHR, the CJEU and the AFSJ: a matter of mutual trust' (2017) 42(3) European Law Review 388, 400.

⁶¹ Carruthers (n 25), 109.

account to jurisprudence of the CJEU and other national courts when interpreting its provisions.⁶² Lugano II is closely aligned to the EU institutions and there is an implied adherence to CJEU jurisprudence.⁶³ Courts in the UK are no longer bound by CJEU rulings delivered after the implementation period and cannot refer any matter to the CJEU for a preliminary ruling.⁶⁴ However, for Lugano II to work effectively post-Brexit, Scottish courts would need the flexibility to make reference and align judgments when needed with those of the CJEU.⁶⁵ Prior to Brexit negotiations, the House of Lords EU Committee reported that if Lugano II were to be adopted there should be a flexible relationship between domestic courts and the CJEU.⁶⁶ With the UK as a third country, Scottish courts would not be able to make preliminary references to the CJEU when interpreting Lugano II.⁶⁷ This means that Scottish and other UK courts could not participate in the development of Lugano II jurisprudence.⁶⁸

Part Two Conclusions

Lugano II provides a well-established regime for recognition and enforcement as an alternative to the BIRR. Like the BIRR, it is reciprocal in its nature and harmonises private international law among its signatory countries. However, when compared to the BIRR it is out of date in key areas such as exequatur which would result in a more complex process for the recognition and enforcement of judgements. Its scope is more limited than the BIRR and contains notable differences which are not desirable. A requirement for some form of alignment with the CJEU appears unlikely under the current UK-EU legal relationship. Commentators, including the European Commission, view Hague Conference conventions as a more suitable bridge between the UK and EU post-Brexit.⁶⁹

Part Three – Hague Conventions

The Hague Conference on International Private Law has adopted two conventions which are mooted as potential replacements for the Brussels regime post-Brexit. Part Three will analyse the efficacy of these conventions compared to the BIRR and conclude with an assessment on the short to medium term period ahead for recognition and enforcement of judgements between Scotland and the EU.

⁶² Lugano II, protocol 2, art 1(1).

⁶³ Mukarrum Ahmed, 'Brexit and English Jurisdiction Agreements: The Post-Referendum Legal Landscape' (2017) 27(2) European Business Law Review 989; Ungerer (n 35), 402.

⁶⁴ European Union (Withdrawal) Act 2018 (EUWA 2018), s 6(1).

⁶⁵ Crawford and Carruthers (n 24).

⁶⁶ European Union Committee, *Brexit: justice for families, individuals and businesses?* (HL 2016-17, 134), para 127.

⁶⁷ Ungerer (n 35), 400.

⁶⁸ *Ibid.*

⁶⁹ Ungerer (n 35), 396; Crawford and Carruthers (n 24), 200; European Commission (n 33), 4.

I

The Convention on Choice of Courts Agreements (2005 Convention) is the first Hague convention considered to be part of the new post-Brexit regime.⁷⁰ The 2005 Convention is in force in both the EU and UK,⁷¹ where it was previously part of UK private international law through EU membership.⁷² Its provisions ensure reciprocal recognition and enforcement of judgments within its scope and harmonise the rules across contracting states.⁷³ As an international instrument the 2005 Convention can be entered into more nations than the Brussels regime.⁷⁴ Commentators, however, highlight the much more limited scope of the 2005 Convention compared to the BIRR. The 2005 Convention is limited to cross-border cases involving an exclusive choice of court agreement.⁷⁵ Where there is a choice of court agreement, there are many more areas of law excluded than are in the BIRR.⁷⁶ The legal mechanism for the recognition and enforcement of judgments in such cases also differs. Unlike the BIRR's automatic recognition and enforcement, the 2005 Convention requires this to be done in accordance with the requested state's national law.⁷⁷ As such there is no exclusion of the *exequatur* procedure.⁷⁸ Unlike the BIRR, contracting states are afforded the power to limit the recognition and enforcement of judgments within their jurisdictions.⁷⁹

Hague conventions are noted for being much simpler for the UK to enter into post-Brexit as there is no need for unanimous consent of existing parties.⁸⁰ The very limited scope of the 2005 Convention means it cannot replace the BIRR by itself. There has been limited legal development and experience of its provisions in practice compared to the BIRR.⁸¹ The legal force of the 2005 Convention is weaker than the BIRR due to the nature of the primacy of EU law and option for countries to limit their participation in the 2005 Convention.⁸² Two pre-Brexit parliamentary reports recognised the benefits of the incorporation of the 2005 Convention but opined that it would work best as part of a

⁷⁰ n 3.

⁷¹ Civil Jurisdiction and Judgments Act 1982 (CJJA 1982), s 3D; Department for Foreign and Commonwealth Affairs, *Convention on Choice of Court Agreements* (Cm 9723, 2018).

⁷² TFEU, art 216.

⁷³ Mukarrum Ahmed and Paul Beaumont, 'Exclusive choice of court agreements: some issues on the Hague Convention on choice of court agreements and its relationship with the Brussels I recast especially anti-suit injunctions, concurrent proceedings and the implications of BREXIT' (2017) 13(2) *Journal of Private International Law* 386, 393.

⁷⁴ 'Status Table: Convention of 30 June 2005 on Choice of Court Agreements' (*Hague Conference on Private International Law*) <<https://www.hcch.net/en/instruments/conventions/status-table/?cid=98>> accessed 14 May 2022.

⁷⁵ 2005 Convention, art 1(1); *Motacus Constructions Ltd v Paolo Castelli SPA* [2021] EWHC 356 (TCC).

⁷⁶ 2005 Convention, art 2 cf BIRR, art 45.

⁷⁷ 2005 Convention, arts 8 and 14.

⁷⁸ 2005 Convention, art 14; Trevor Hartley and Masato Dogauchi, *Convention of 30 June 2005 on Choice of Court Agreements: Explanatory Report* (Permanent Bureau of the Conference 2005), para 216.

⁷⁹ 2005 Convention, art 20.

⁸⁰ Giesela Rühl, 'Judicial Cooperation in Civil and Commercial Matters After Brexit: Which Way Forward?' (2018) 67(1) *International and Comparative Law Quarterly* 99, 127.

⁸¹ *Ibid.*, 128.

⁸² European Union Committee (n 66), [28].

combination of international instruments including Lugano II.⁸³ It can be concluded that the 2005 Convention is effective in its niche area of operation and comes with the benefit of already being in force post-Brexit without the need for transitional requirements.⁸⁴

II

The second Hague convention under consideration is the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (2019 Convention).⁸⁵ The 2019 Convention was not yet agreed for much of the Brexit negotiations and, therefore, could not be considered by much of the academic commentary and reports above. Nonetheless it now provides another potential option for cross-border recognition and enforcement of judgments post-Brexit.

The 2019 Convention broadly mirrors the Brussels regime in its aims and legal mechanisms.⁸⁶ Like the 2005 Convention and BIRR, the 2019 Convention harmonises laws across the contracting states and achieves reciprocal on recognition and enforcement between them.⁸⁷ However, unlike the BIRR, *exequatur* will be required for EU countries where this forms part of their private international law.⁸⁸ There is a much larger list of exclusions from the scope of the 2019 Convention than the BIRR and contracting parties can limit the extent of recognition and enforcement within their jurisdictions.⁸⁹ The eligibility for recognition and enforcement is more complex than the BIRR.⁹⁰ The 2019 Convention is due to come into force in the EU later in 2023, but the UK has yet to sign up.⁹¹ The 2019 Convention must be instituted in both contracting jurisdictions to facilitate cooperation.⁹² The 2019 Convention is instituted after a period of one year following notification plus one month.⁹³ Although the European Commission has ratified the 2019 Convention,⁹⁴ there will likely be a period of years before it is operational between the UK and EU.⁹⁵

⁸³ European Union Committee (n 66), [126]; Justice Committee, *Implications of Brexit for the justice system* (HC 2016-17, 750), 28 and 32.

⁸⁴ Crawford and Carruthers (n 24), 202.

⁸⁵ n 3.

⁸⁶ Reid Mortensen, 'Brexit and private international law in the Commonwealth' (2021) 17(1) *Journal of International Private Law* 18, 52.

51.

⁸⁷ Nielsen (n 57), 207.

⁸⁸ 2019 Convention, art 13; Franciso Garcimartín and Geneviève Saumier, *Explanatory Report on the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters* (HCCH Permanent Bureau 2020), para 303.

⁸⁹ 2019 Convention, arts 2 and 17; Garcimartín and Saumier (n 88), paras 310 – 311; Nielsen (n 57), 237.

⁹⁰ 2019 Convention, art 5.

⁹¹ 'Status Table: Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters' (*Hague Conference on Private International Law*)

<<https://www.hcch.net/en/instruments/conventions/status-table/?cid=137>> accessed 15 February 2023.

⁹² 2019 Convention, art 29.

⁹³ 2019 Convention, arts 28(1) and 29(2).

⁹⁴ European Commission, Proposal for a Council Decision on the accession by the European Union to the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (COM(2021) 388 final).

⁹⁵ Garcimartín and Saumier (n 88), paras 328 – 330.

The 2019 Convention was not originally considered by the UK, with parliamentary research signalling a possible conflict between it and Lugano II had the UK acceded to both.⁹⁶ This concern has not manifested. While the mechanisms of the 2019 Convention have been praised for the judgments that can be recognised and enforced within its scope,⁹⁷ its much-reduced scope when compared to the BIRR is of concern.⁹⁸ However, while the 2019 Convention is not as extensive as the BIRR, it is certainly the most promising available option for continued cooperation between Scottish and EU courts.⁹⁹ Due to the flexibility of the 2019 Convention's application, it acts as a minimum standard for harmonisation which can be expanded if ratified by the UK.¹⁰⁰ This may then encourage others to do the same.¹⁰¹ Due to the greater reach of the 2019 Convention, its provisions could also be used to replace the older, more complex system for recognition and enforcement between Commonwealth nations.¹⁰² Ultimately the success of the 2019 Convention will depend on the willingness for nations to join it.¹⁰³ If there is widespread ratification, the 2019 Convention could achieve on an international scale what the Brussels regime has achieved for the EU.¹⁰⁴

Part Three Conclusions

Post-Brexit, there is no convention which is directly comparable to the BIRR. Cooperation in recognition and enforcement between the UK and EU will need to be facilitated by multiple conventions, each with their own strength. While the 2005 Convention is an effective solution, it would not suffice on its own. A combination of the 2005 and 2019 Conventions is a promising solution, but it will take some time for the latter convention to come to fruition between the UK and EU. Even if Lugano II was successfully adopted, the Hague conventions would still likely be required to fill any gaps left by the BIRR.

Conclusions

While the removal of the BIRR brings with it a significant change to the UK's private international law, this article has detailed the various options available to replace it. The article has critically analysed the reciprocity, harmonisation, scope and procedures of these potential replacements. Lugano II was the obvious replacement due to it being parallel to the Brussels regime; its provisions adequately cover

⁹⁶ Joann Dawson, *Private International Law (Implementation of Agreements) Bill 2019- 2021* (Briefing Paper No 8700, House of Commons Library 2020) 8.

⁹⁷ Nielsen (n 57), 225.

⁹⁸ Nielsen (n 57), 212 and 245.

⁹⁹ Paul Beaumont, 'Some reflections on the way ahead for UK private international law after Brexit' (2021) 17(1) *Journal of International Private Law* 1, 4; Mortensen (n 86), 51.

¹⁰⁰ Beaumont (n 99), 5.

¹⁰¹ *Ibid.*

¹⁰² Mortensen (n 86), 51.

¹⁰³ Nielsen (n 57), 246.

¹⁰⁴ BIRR, recital (26); David P Stewart, 'The Hague Conference Adopts a Convention on the Recognition and Enforcement of Foreign Judgements in Civil or Commercial Matters' (2019) 113(4) *The American Journal of International Law* 772, 781-782.

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reciprocity and harmonisation. However, Lugano II would also be a step back from the BIRR as it has not been updated to mirror the former's recasting and requires adherence to CJEU jurisprudence. The two Hague conventions are simpler to accede to and ensure reciprocity and harmonisation between its parties. Their scope is limited when compared to the BIRR, particularly the 2005 Convention. The 2019 Convention would be a key development in cooperation between the UK and EU post-Brexit despite its limitations. The sooner the 2019 Convention is in force in the UK and EU, the sooner it will be able to facilitate recognition and enforcement between courts.

In the meantime, judgments that do not contain an exclusive choice of court agreement will need to be recognised and enforced using the old common law and statutory regimes detailed in Part One. The Scots law regime would also have to be employed to fill in gaps left by the 2005 and 2019 Conventions. Although the common law regime is workable, it is much more costly and time consuming than harmonised private international law.¹⁰⁵ Whatever method is adopted going forward there will be a change in the recognition and enforcement of judgements between Scottish and EU courts. In the longer term, however, commentators believe a bespoke UK-EU recognition and enforcement agreement is the best option.¹⁰⁶ The EU already has a bespoke agreement with Denmark.¹⁰⁷ The Danish government opted out of the BIRR and instead implements the provisions of the BIRR as international law rather than EU law.¹⁰⁸ Such an agreement would require the political will on both sides to negotiate and would not be effective in the short to medium term. That interim period should be covered by the 2019 Convention.¹⁰⁹

¹⁰⁵ *Barclays* (n 21); *Drika* (n 51), [3]; *Adams* (n 23).

¹⁰⁶ Carruthers (n 25), 108; Rühl (n 80), 121; Crawford and Carruthers (n 24), 197; Tang (n 37), 655.

¹⁰⁷ BIRR, recital (41).

¹⁰⁸ Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2013] OJ L 79/4.

¹⁰⁹ Nielsen (n 57).

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