

# The UK maritime sectors beyond Brexit

A report on the impact of Brexit on UK shipping, maritime legal services, fisheries and trade by the Institute of Maritime Law and the Southampton Marine and Maritime Institute of the University of Southampton.

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## Definitions

1993 FAO Agreement	Food and Agriculture Organization Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas
2001 BOPC	2001 Bunker Oil Pollution Convention
AC(s)	Advisory Council(s)
AFSC	International Convention on the Control of Harmful Anti-fouling Systems on Ships
B <sub>MSY</sub>	biomass producing maximum sustainable yield
CCAMLR	Convention on Conservation of Antarctic Marine Living Resources
CFP	Common Fisheries Policy (Regulation (EU) No 1380/2013)
CIF	cost-insurance-freight
CJEU	Court of Justice of the European Union
CLC	1969 Civil Liability Convention
CMO	Common Market Organisation
Commission	European Commission
CPR	Civil Procedure Rules 1998
EAM(s)	Emission Abatement Method(s)
EC	European Community
ECA 1972	European Communities Act 1972
ECA 2002	Export Control Act 2002
ECA(s)	Emission Control Area(s)
ECJ	European Court of Justice
ECO 2008	Export Control Order 2008
ECSA	European Community Shipowners' Associations
EEA	European Economic Area
EEC	European Economy Community
EEDI	Energy Efficiency Design Index
EEGR	European Economic Grouping Regulations 1989
EEIGs	European Economic Interesting Groupings
EEO	European Enforcement Order
EEZ(s)	Exclusive Economic Zone(s)

EFTA	European Free Trade Association
ELD	Environmental Liability Directive (2004/35/CE)
EMFF	European Maritime Fisheries Fund 2014-2020
EOPP	European Order for Payment Procedure
ERA 1996	Employment Rights Act 1996
ESCP	European Small Claims Procedure
ESOS	Energy Savings Opportunity Scheme
EU	European Union
EUWB	European Union (Withdrawal) Bill
FA 2000	Finance Act 2000
FAL Convention	Convention on Facilitation of International Maritime Traffic
FAO	Food and Agriculture Organization of the United Nations
F <sub>MSY</sub>	fishing mortality producing the maximum sustainable yield
FOB	free on-board
FOSFA	Federation of Oils, Seeds and Fats Associations
FQA	fixed quota allocation
FTA(s)	free trade agreement(s)
GAFTA	Grain and Feed Trade Association
GATT	General Agreement on Tariffs and Trade
GFCM	General Fisheries Commission for the Mediterranean
GHG	Greenhouse Gas Emissions
GMO(s)	Genetically modified organisms
HCCH	Hague Conference on Private International Law
HL	House of Lords
IATTC	Inter-American Tropical Tuna Commission
ICCAT	International Commission for the Conservation of Atlantic Tuna
ICES	International Council for the Exploration of the Sea
ILO	International Labour Organisation
IMDG Code	International Maritime Dangerous Goods Code
IMO	International Maritime Organisation
IMSBC Code	International Maritime Solid Bulk Cargoes Code
IOPC 92	International Convention on the Establishment of an International Fund for the Compensation for Oil Pollution Damage

IOTC	Indian Ocean Tuna Commission
ISM Code	International Safety Management Code
ISPS Code	International Ship and Port Facility Security Code
IUU	illegal, unreported and unregulated
LLC	International Convention on Load Lines
LLMC	1976 Convention on Limitation of Liability for Maritime Claims
LNG	Liquefied natural gas
MAIB	Marine Accident Investigation Branch
MARPOL	International Convention for the Prevention of Pollution from Ships
MCA	Maritime and Coastguard Agency
MEPC	Marine Environment Protection Committee
MFN	most-favoured nation
MLC 2006	Maritime Labour Convention 2006
MMO	Marine Management Organisation
MoU	Memorandum of Understanding
MRV	Monitoring, reporting and verifying
MSA 1995	Merchant Shipping Act 1995
MSC	Maritime Safety Committee
MSN	Merchant Shipping Notice
MSY	maximum sustainable yield
NEAFC	North-East Atlantic Fisheries Commission
nm	nautical mile(s)
NMSW	National Maritime Single Window
OECD	Organisation for Economic Co-operation and Development
PRFD	Port Reception Facilities Directive (2000/59/EC)
RFMO	Regional Fisheries Management Organisation
RO	Recognised Organisation
SEAFO	South-East Atlantic Fisheries Organisation
SEEMP	Ship Energy Efficiency Management Plan
SI	Statutory Instrument
SIOFA	South Indian Ocean Fisheries Agreement
SOGA 1979	Sale of Goods Act 1979

SOLAS	International Convention for the Safety of Life at Sea
SOSREP	State's Representative (for maritime salvage and intervention)
SPRFMO	South Pacific Regional Fisheries Management Organisation
SR Regulations	Merchant Shipping (Registration of Ships) Regulations 1993
SRC	Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships 2009
STCW Regulations	Merchant Shipping (Standards of Training, Certification and Watchkeeping) Regulations 2015
STCW	International Convention on Standards of Training, Certification and Watch-keeping for Seafarers 1978
STECF	Scientific, Technical and Economic Committee for Fisheries
TAC	total allowable catch
TFEU	Treaty of the Functioning of the European Union
TONNAGE 1969	International Convention on Tonnage Measurement of Ships
TUPE 2006	Transfer of Undertakings Regulations 2006
UCC	Union Customs Code
UK	United Kingdom
UKSR	United Kingdom Shipping Registry
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCLOS	United Nations Convention on the Law of the Sea
UNFSA	United Nations Fish Stocks Agreement
USA	United States of America
VCLT	Vienna Convention on the Law of Treaties
WCPFC	Western and Central Pacific Fisheries Commission
WFD	Water Framework Directive (2000/60/EC)
WTO	World Trade Organisation



## Abstract

On the completion of Brexit the United Kingdom (UK) will have exclusive national competence for law making and regulation. Laws will be made through the UK Parliament alone, the UK will participate in international agreements in its own right and the implementation of those agreements will take place under UK law.

For the past 40 years several competencies were transferred either exclusively or jointly to the European Union (EU) bodies and several legal instruments reflected EU wide negotiations. Participation in international agreements, where competencies held by the EU were involved, required EU approval.

Society, policies and the associated laws have evolved significantly over this period. The current laws of the UK are harmonised to a large degree with those of other EU Member States facilitating trade and the single market.

Brexit will remove the basis for many currently applicable UK laws. The UK will deal swiftly with this by adopting, through an Act of Parliament, almost all EU laws as UK laws. This proposed Act is called the European Union (Withdrawal) Bill (EUWB). This is a first step that will facilitate everyday operations post-Brexit. However it is not without complications and transitional provisions may be needed in several sectors for this to operate efficiently. A first question for this report concerns the areas where the adoption of EU laws will not provide a sustainable solution and which require intervention.

In the longer term the option to exercise national powers to develop policies and laws will mean that the extent of harmonisation with the EU will come into question and the EU-based arrangements may be modified or discontinued. This will be a gradual process, which will develop societal dialogue between stakeholders and the UK Government. However, EU law involves both EU internal policies and international law making. Disentangling these two contributions is quite important because in contrast with the EU component, which may be re-examined and affirmed or changed, the international component is not, at the moment at least, challenged in the same way. Therefore, a second objective of this report is to separate EU and international law by identifying the EU component in existing UK legislation in the selected sectors.

In this report Brexit includes withdrawal both from the EU and the European Economic Area (EEA). This appears to be the current intention of the UK Government. If the UK remains a party to the EEA Agreement despite leaving the EU, the options for the UK are much narrower.

Although this report concerns four sectors of the maritime industry in four separate sections, the true position is that the sectors are all interconnected and linked to a greater or lesser extent by the overall trade relationship with the EU. Thus, while options in each sector will be discussed, some of them may not be viable if a close trade deal with the EU succeeds. In such a case harmonisation of laws, especially those laws affecting products and trade, will need to remain at EU standards.

The project considers the potential consequences and options of Brexit following four sectors of the marine and maritime area of activities. The first sector we discuss is that of legal services to shipping and the role of London as an international dispute resolution centre. The second sector is shipping itself, both from the aspect of the UK flag and that of shipping regulations. The third sector concerns fisheries. Finally the impact of Brexit on existing and future trade contracts is considered, as is the impact of a future trade deal with the EU on these four sectors.

A summary of the findings of this project is presented in the Executive Summary of the Project for each of the sectors. The main part of the report (titled 'Report') provides a fuller explanation of the results. The rationale for the findings and the detailed analysis of all legal instruments analysed in this report can be found in the corresponding part of the Annex.

The main results of the report were discussed in a stakeholder workshop held in London on 22 June 2017. The ‘Outcomes of the workshop’, detail of which is provided in the corresponding part of the report, concerned the commercial aspects of Brexit, namely, freedom of trade, customs, availability of talent for the UK and access to employment for UK seafarers. The overriding conclusion of the workshop was that Brexit appears to provide very few short or medium term opportunities for the sectors involved (other than fisheries), while to gain from longer term opportunities will probably need major repositioning of the UK’s commercial and shipping activities.

## Executive Summary of the project

### 1. London as an international maritime dispute resolution centre

London is a major centre for commercial and maritime dispute resolution. This is based partly on substantive characteristics (namely suitability of English law, the quality of the English judiciary and arbitrators and procedural elements) and partly on enforcement of judicial decisions. The latter has been effected for nearly four decades through the European legal framework which includes Regulation (EU) No 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast) (the Recast Jurisdiction Regulation)<sup>1</sup> and 2007 Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (the Revised Lugano Convention).<sup>2</sup>

Brexit will have some very important effects:

1.1 The 2005 Hague Convention on Choice of Court Agreements (2005 Hague Convention),<sup>3</sup> could provide a partial solution between the contracting parties to the Convention, i.e. the EU, Singapore and Mexico. The Convention will not be in force in the UK when it withdraws from the EU as it is presently adopted by the EU. Ratification is needed by the UK to ensure the recognition of English jurisdiction agreements and any resulting judgment of an English court in, for example, any other EU Member State. There are three points. First the 2005 Hague Convention only deals with jurisdiction resulting from a jurisdiction agreement and does not provide rules for which court will have jurisdiction in an international dispute where there is no such agreement., Second the 2005 Hague Convention does not apply to some maritime contracts. Third although the Convention itself poses no impediment, EU law will not allow the UK to ratify the Convention before Brexit. Therefore, unless permission is obtained from the EU for the UK to ratify before withdrawal, there would be a gap of some three months between ratification and the Convention coming into force in the UK.

1.2 The enforcement of English court judgments in EU Member States (if they are not covered by the 2005 Hague Convention) and in States party to the Revised Lugano Convention will not be possible under the existing EU framework which will cease to apply to the UK. Enforcement of some judgments may therefore be more complex and less certain, thus reducing the attractiveness of England as a forum for dispute resolution.

1.3 The creation of uncertainty may discourage parties from opting for English law and jurisdiction.

1.4 The EUWB cannot provide a solution and recognition and enforcement of English judgments in EU Member States will be uncertain.

1.5 The operation of English arbitration will not be affected.

1.6 Anti-suit injunctions to support a choice of English court jurisdiction or London arbitration proceedings where a court of an EU Member State is involved may re-emerge.

1.7 The applicable law provisions will not be immediately affected as they are not dependent on reciprocity.

1.8 Clear policy objectives in developing English law and enforcement of English court judgments are needed in order to preserve the legal services market.

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<sup>1</sup> [2012] OJ L 351/ 1.

<sup>2</sup> [2007] OJ L 339/3.

<sup>3</sup> Hague Conference on Private International Law, Convention on Choice of Court Agreements (30 June 2005) (2005) 44 ILM 1294.

The Brexit workshop identified the following issues:

1.9 The preference of English law and jurisdiction is only partly due to the enforceability of English court judgments.

1.10 A significant parameter for the preference for English legal services is linked to the co-existence with the financial services provided by the City of London. The development of alternative financial centres, if coupled with the development of supporting legal services, will adversely affect the demand for English legal services.

1.11 Even with a transitional period, there is a risk of uncertainty in the enforcement of contractual provisions and a weakening of the enforceability of English jurisdiction clauses and any resulting English judgment.

1.12 The best case scenario would be the uncertainty in the enforcement of English jurisdiction clauses leading to an increase of English arbitration.

## 2. Shipping

After Brexit, UK shipping will remain subject to International Maritime Organization (IMO) regulation while the EUWB will preserve the EU legal framework for the immediate future. At present the UK Ship Register (UKSR) is open to EU/EEA nationals and companies. The UK's international obligations as a flag and port state have been 'gold-plated'<sup>4</sup> through EU regulation.

The UK needs to decide immediately and agree through the EU negotiations:

2.1 Whether the UKSR will remain open to EU/EEA nationals and companies.

2.2 How existing EU/EEA registrations will be treated.

2.3 In the longer term UK shipping policy needs to be further developed and a decision needs to be made about the extent to which the UK wants to adhere to higher EU standards regarding shipping regulation or comply solely with the IMO regulations.

In reaching decisions on the above, the UK needs to take into account reciprocity issues, as far as the access of EU/EEA nationals to the UKSR are concerned. In respect of regulation, whether it will maintain gold-plating or not will have to be decided on a case-by-case basis. Parameters to be taken into account include the UK's competitiveness as a maritime centre, the protection of the environment and the fact that the UK fleet cannot escape EU regulation, if trading with the EU is to be preserved.

The Brexit workshop identified the following issues:

2.4 It is the tonnage tax system that has made the UK flag more attractive to shipowners rather than the applicable shipping standards. This is not expected to be changed after Brexit.

2.5 There is a possibility to make the UKSR truly open as is the case, for example, in Singapore. The benefits of following this option through need to be carefully discussed.

2.6 The resolution of the status of EU citizens and companies as shipowners, identified in 2.1 and 2.2 above, is not expected to be commercially important, although there would not appear to be much benefit from excluding them from the definition of qualified owners.

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<sup>4</sup> Gold-plating refers to the situation where EU law imposes additional requirements over and above international regulation.

2.6 Removing the gold-plating or departing from future EU gold-plating would not be beneficial for the UK fleet, because currently most of the UK-flagged ships trade with the EU.

2.7 UK shipowners are in support of the EU standards for shipping as these are currently enforced.

2.8 Brexit poses challenges to UK Classification Societies and their competencies in EU Member States as well as the rules under which they can continue operating as Recognised Organisations in the EU providing services to governments in relation to compliance with shipping regulations.

2.9 Equivalence of training certificates and qualifications is a priority. There is concern in the UK shipping industry regarding the employability of highly qualified UK seafarers to work on ships registered in EU Member States.

2.10 There is a UK training market for seafarers, shipping company employees and shipping lawyers and this needs to be strengthened.

2.11 Shipping remains a global and adaptable industry and UK shipping will adapt to any new circumstances as it has done in the past.

2.12 Brexit provides an opportunity to compete for the registration of private pleasure yachts that are both owned and flagged by non-EU entities and thereby entitled to temporary importation under EU rules for up to 18 months without payment of value added tax. This market is currently dominated by the Cayman Islands Register.

2.13 There is a possibility of reintroducing duty-free shops on-board ships going to EU destinations.

2.14 There are proposals and discussion about making the UK a place where ships will change the type of bunkers used, which could have significant impact on atmospheric pollution in the UK. However, these have not currently been considered in the depth required.

### 3. Fisheries

The UK fish market depends on imports and landings from foreign ships. About 66 per cent of the seafood value is imported from abroad or landed in the UK by foreign ships. In the year ending September 2016 fisheries imports were about £2.9 billion in value, while fisheries exports were £1.5 billion. EU Member States are included in the top list of both importers and exporters.<sup>5</sup>

Currently EU Member States' fishing vessels have access to UK fishing grounds on the same terms as UK fishing vessels and vice versa. The EU represents the majority of EU Member States' interests in international fisheries agreements. The legal framework consists of an international component, including mainly the UN Convention on the Law of the Seas (UNCLOS),<sup>6</sup> the UN Fish Stocks Agreement (UNFSA)<sup>7</sup> and numerous regional fisheries agreements, as well as the Common Fisheries Policy (CFP).<sup>8</sup>

3.1 Brexit will remove the automatic access of EU Member States' vessels to UK fishing grounds and vice versa.

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<sup>5</sup> See Market Summary (Seafish) < <http://www.seafish.org/research-economics/market-insight/market-summary> > last accessed 5 July 2017.

<sup>6</sup> United Nations Convention on the Law of the Sea (10 December 1982) 1833 UNTS 3.

<sup>7</sup> Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (4 December 1995) 2167 UNTS 3.

<sup>8</sup> Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC [2013] OJ L 354/22.

3.2 However it is uncertain whether this will indeed be the case for part of the UK territorial waters as pre-existing historical claims that have been subsumed in the CFP may re-emerge.

3.2 Brexit will remove the representation of UK fishing interests and obligations by the EU.

3.3 Brexit will remove the need to abide by legal obligations arising under the CFP and EU regulatory systems.

3.4. A policy for access to UK fishing grounds must be developed.

3.5 A policy for the registration of UK fishing vessels by EU nationals and companies must be established.

3.6 Measures for the treatment of existing UK registered fishing vessels owned by EU nationals or companies must be developed and imposed.

3.7 Policies need to be put in place for the UK to comply directly with existing obligations under the international legal framework.

Notably, exports from the UK could be subject to trade restrictions if the applicable UK law and regulations are not consistent with fishing laws and practices endorsed under international agreements on fisheries.

The Brexit workshop identified the following points:

3.8 The international law position for access to parts of the UK's territorial sea on the basis of historic rights is unclear and may pose problems for the exclusion of foreign fishing fleets.

3.9 The appropriate management of fisheries on the basis of maximum sustainable yield is highly questionable in that it does not reflect the interaction between species and the fact that each species population is not in equilibrium. Appropriate management of fisheries may need a policy of catching less now in order to catch more later, however this would go against the expectation of fishing interests who strongly supported Brexit on the expectation that exclusive access to stocks would allow larger catches.

3.10 Customs and tariffs imposed in the future are expected to have significant detrimental impact on trading in the sector for the UK.

3.11 The provision of exclusive fishing rights to UK fishing companies and UK flagged fishing vessels needs to be considered together with the general access given to EU citizens and companies to the UKSR.

3.12 The fishing sector is significantly smaller in financial terms when compared to the financial, legal and shipping services. However in the current political situation with a minority government, its strength was considered to be sufficient to prevent it from being sacrificed in wider trade negotiations.

## 4. Seaborne Trade

Seaborne trade between the UK and the EU is estimated at £511 billion<sup>9</sup> and is currently conducted under single market rules and within the EU customs union. Brexit will terminate the UK's participation in the customs union and its free access to the single market (assuming that withdrawal from the EU has the effect of putting an end to the UK's EEA membership, which is not automatic<sup>10</sup>). The Government's intention is to negotiate a free trade agreement with the EU. In the absence of an arrangement, trade between the UK and the EU will be subject to World Trade Organization (WTO) rules and the respective schedules of commitments.

4.1 A national customs policy needs to be developed.

4.2 The UK needs to propose WTO schedules reflecting the UK's commitments towards the Members of the WTO. At present, the UK's commitments are those contained in the EU schedules. The Government's intention is to replicate the current commitments in the proposed schedules.

4.3 The WTO rules, which will provide the default position in the case of no deal with the EU, will result in more restricted access of UK products to the EU market and *vice versa* due to increased cost and more complicated customs procedures.

4.4 Private parties entering into contracts or which are already involved in shipping and trading contracts need to examine their contracts in order to avoid disputes that contain EU references affecting the obligations of the parties and possible termination claims under force majeure clauses or the doctrine of frustration.

4.5 Brexit is not expected to affect current United Nations (UN) or EU sanctions applicable in the UK immediately.

4.6 Brexit is not expected to affect EU regulation relating to environmental standards for trade and the need of UK traders to comply with them immediately.

The UK's foreign policy as well as regulatory standards for trade are open to review according to national priorities. However, especially for environmental standards, decreasing the level of protection could result in trade restrictions on the part of the EU, making deviation from EU regulation an unrealistic option

The Brexit workshop identified the following issues:

4.7 The need to create awareness for existing and new contracts of the potential uncertainty in the rules applicable to the enforcement of English jurisdiction clauses could discourage the use of English law and English legal services.

4.8 None of the industries involved in the discussion could identify benefits in a Brexit without a customs union or agreement and access to the single market in the short or intermediate future.

4.9 The development of trading with non EU Member States may create some benefits in the long term but these are speculative and uncertain.

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<sup>9</sup> 'The value of goods passing through UK ports-Final Report' (MDS Transmodal, July 2016), Table 4 < [https://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=9&cad=rja&uact=8&ved=0ahUKEwiFjPudxvTTAhWDJcAKHZwNA\\_0QFghQMAg&url=http%3A%2F%2Fwww.abports.co.uk%2Fcontent%2Ffile%2Fdownloads%2FThe%2520Value%2520of%2520Goods%2520Report.pdf&usg=AFQjCNE9M4mXqvlOm\\_oKezgoNThKjh8HAnA&sig2=pgy18wRR-mbScZCKQAgxxA](https://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=9&cad=rja&uact=8&ved=0ahUKEwiFjPudxvTTAhWDJcAKHZwNA_0QFghQMAg&url=http%3A%2F%2Fwww.abports.co.uk%2Fcontent%2Ffile%2Fdownloads%2FThe%2520Value%2520of%2520Goods%2520Report.pdf&usg=AFQjCNE9M4mXqvlOm_oKezgoNThKjh8HAnA&sig2=pgy18wRR-mbScZCKQAgxxA) > last accessed 5 July 2017.

<sup>10</sup> As argued in Ulrich G Schroeter and Heinrich Nemecek, 'The (uncertain) impact of Brexit on the United Kingdom's Membership in the European Economic Area' (2016) EBLR 923.

4.10 Concerns were raised about the pressures that will be developed between the need to have sustainable economic growth outside the EU and the costs of keeping up with environmental, employment and social standards.

# Report

## Introduction to EU Law

Formal notice of the United Kingdom's intention to leave the European Union (EU) was given on 29 March 2017. That notice triggered Article 50 of the Treaty of the Functioning of the European Union (TFEU),<sup>11</sup> which gives Member States the right to withdraw from the EU in accordance with their own constitutional principles.<sup>12</sup> Article 50 thereafter prescribes a 2-year time period for the withdrawal process to take effect.

The current EU legal framework comprises Treaties, Regulations and Directives and from the UK's perspective, domestic statute, principally the European Communities Act 1972 (the ECA 1972), which grants supremacy to EU law. It also includes other domestic UK statutes which incorporate into the domestic legal order those instruments of EU law that are not directly applicable and instead require national legislative measures. It also includes considerable amounts of secondary legislation (statutory instruments), which are founded on the authority granted by primary sources of law.

Treaties, including the TFEU, will "cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification",<sup>13</sup> unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period. Without such agreement, therefore, after the expiration of the two years following formal notice of withdrawal, the TFEU will cease to have legal effect on the UK.

EU Regulations depend on the principle of direct applicability. This means that they require no domestic legislation to bring them into, in this instance, the UK legal order. However, the legal basis of Regulations are EU Treaties, principally the TFEU, which, as stated above, will no longer find application after the UK's withdrawal. Furthermore, Article 288 of the TFEU provides that "a Regulation shall have general application. It shall be binding in its entirety and directly applicable to all Member States." Clearly, once the UK has withdrawn from the UK, it will no longer be a Member State, not least for the purposes of Article 288 and therefore, EU Regulations will cease to apply in the UK. Because EU Regulations *will* cease to have effect in the UK after its withdrawal, at that stage the space vacated by the previously applicable Regulation will either be filled by existing and residually applicable domestic law, or, to the extent that this does not exist, there will a lacuna in terms of codified law if the UK does not enact domestic legislation to take the place of the prior Regulation.

Conversely, EU Directives differ from EU Regulations in that the former are *not* directly applicable. Instead, they require implementation into UK law by domestic legislation (Acts of Parliament). Acts of Parliament, which have invoked the provisions of an EU Directive, will, in principle, continue to have effect even after formal withdrawal. However, given that there will no longer be a requirement to bring EU Directives into UK law, the UK must decide the extent to which the UK statute currently in place performing this function should be repealed, amended or simply retained.

The UK has enacted a legion of domestic statutes to fulfil its Treaty obligations under what is now the TFEU and also to bring into the UK legal order, those parts of EU law that do not enjoy direct applicability (e.g. directives). The most prominent example is the ECA 1972. This statute establishes the supremacy of EU law in the UK as well as its direct applicability. It provides:

"All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under

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<sup>11</sup> Article 50(2).

<sup>12</sup> Article 50(1).

<sup>13</sup> Article 50(3).

the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly.”<sup>14</sup>

Once the UK has withdrawn from the UK, however, the “Treaties”<sup>15</sup> referred to above, will cease to apply to the UK and thus there will be no “rights, powers, liabilities, obligations and restrictions” which may be given effect in the UK. The many UK Acts of Parliament, which purport to enact obligations stemming from the TFEU or EU Directives, will remain after the UK’s withdrawal. It will then be a question whether it is most appropriate to keep these Acts in place or to repeal or amend them.

Perhaps the biggest impact of the repeal of the ECA 1972 would be its impact on secondary legislation (statutory instruments etc.). Many currently enacted instruments of secondary legislation are enacted pursuant to the power granted under s.2(a) of the ECA 1972. Without any new enactment, the repeal of the ECA 1972 would leave many of these secondary instruments without any legal foundation. These may thus be considered *ultra vires* and be denuded of legal effect for that reason. Any gap left by such instruments will either be filled by existing and residually applicable domestic law or, to the extent that this does not exist, there will be a lacuna in terms of codified law, if the UK does not enact domestic legislation on an alternative legislative footing to take the place of the prior instruments based on the authority of the ECA 1972.

## 1. The United Kingdom as a maritime dispute resolution centre

London is a leading centre for the resolution of disputes. It is the forum of choice (either court or arbitration) for a wide range of shipping and commercial contracts. EU legislation has harmonised the rules on jurisdiction and applicable law between EU Member States and enhanced the efficiency of the recognition and enforcement of judgments given by the court of any Member State within the EU including the UK courts. Although English jurisdiction and applicable law are preferred on their own merits and post-Brexit the Government intends to preserve the European *acquis* as far as practicable, withdrawal from the EU poses some concerns.

### 1.1 Supporting the choice of English Jurisdiction

1.1.1 The 2005 Hague Convention provides the conditions under which court jurisdiction agreements in private contracts should be recognised and supported by the courts of Contracting States. The 2005 Hague Convention has been approved by the EU and is in force<sup>16</sup>, but the UK has not acceded to it independently of the EU. It would therefore not be legally binding in the UK after Brexit. It is important that the UK accedes to the convention immediately when no longer an EU Member State, so that English jurisdiction agreements are recognised by the courts of EU Member States and judgments given by the court chosen in a Member State are recognised by any other EU Member State. There will be a gap of at least three months between accession and the convention coming into force in the UK.<sup>17</sup> Furthermore, some important maritime matters are excluded from the scope of the Convention, such as the carriage of passengers and goods, marine pollution and limitation of liability for maritime claims.<sup>18</sup> These are however covered by the Recast Jurisdiction Regulation.

1.1.2 The Recast Jurisdiction Regulation can only operate on a reciprocal basis. This means that even if the UK makes the regulation part of its domestic law post-Brexit, the EU Member States will not be obliged to apply the regulation in favour of the UK. The main issues arising here are the following:

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<sup>14</sup> ECA 1972, s.2(10).

<sup>15</sup> This includes the TFEU, ECA 1972 s.1(1).

<sup>16</sup> See Status table (HCCH, 2 June 2016) < <https://www.hcch.net/en/instruments/conventions/status-table/?cid=98> > last accessed 5 July 2017.

<sup>17</sup> Art 31(2)(a) of the 2005 Hague Convention.

<sup>18</sup> Art 2(2)(f), (g).

- It is arguable that the 1968 Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (the EC) Jurisdiction convention),<sup>19</sup> the convention between the original six European Economic Community (EEC) Member States, as amended by the various accession conventions when a further nine States became Members, will apply post-Brexit. However, relying on it to maintain reciprocity will not be a satisfactory solution because the convention would only bind fifteen of the current 28 EU Member States. Furthermore, the provisions of that convention, particularly on jurisdiction clauses and parallel proceedings in two or more EU Member States, are significantly less favourable than those in the Recast Jurisdiction Regulation. However, to the extent that the convention does apply, if at all, it would fill some of the gaps left open by the 2005 Hague Convention in relation to jurisdiction agreements, if the English court were chosen and first seised.
- The Revised Lugano Convention, which applies as between the EU and Iceland, Norway and Switzerland, is also based on reciprocity. Given that the UK is not a party to it in its own right but through its EU participation, the convention will cease to apply to the UK post-Brexit. It is not clear whether the 1988 Lugano Convention<sup>20</sup> (the predecessor of the Revised Lugano Convention) will apply as a matter of international law.

The EUWB cannot provide a solution post-Brexit. Unless a new agreement can be made to ensure reciprocity, jurisdiction and recognition and enforcement of judgments with the other 27 EU Member States and Iceland, Norway and Switzerland, the UK position will not be harmonised and will therefore differ from those States. It is likely that this will lead to a more complex and less clear position than the UK currently enjoys.

## 1.2 The choice of English Law

Brexit is not expected to affect choice of English law agreements. Regulation No 593/2008 on the Law Applicable to Contractual Obligations (Rome I)<sup>21</sup> and Regulation No 864/2007 on the Law Applicable to Non-Contractual Obligations (Rome II)<sup>22</sup> do not require reciprocity. EU courts are obliged to give effect to choice of law agreements, irrespective of whether the chosen law is that of an EU Member State or not. Making these two regulations part of domestic law through the EUWB would suffice to protect English choice of law agreements.

## 1.3 Arbitration

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention),<sup>23</sup> ensures the enforcement of arbitration agreements entered into by private parties. The UK and all the other EU Member States are parties to it. As a result, Brexit is not expected to have a negative impact on London as an arbitration centre. Indeed any uncertainty as to court jurisdiction (see section 1.1. above) may promote arbitration.

## 1.4 Anti-suit injunctions

Anti-suit injunctions are incompatible with the EU conventions and regulations on jurisdiction. Anti-suit injunctions could re-emerge post-Brexit to restrain a party from pursuing proceedings in the court of an EU Member State or Iceland, Norway or Switzerland in breach of an English court jurisdiction agreement or London arbitration agreement. However, it is very unlikely that such a remedy would be recognised in the courts of those States. Its effectiveness would therefore probably be limited to the

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<sup>19</sup> [1972] OJ L 299/32.

<sup>20</sup> 88/592/EEC Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1988] OJ L 319/9.

<sup>21</sup> Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L 177/6.

<sup>22</sup> Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L 199/40.

<sup>23</sup> (10 June 1958) 330 UNTS 3.

situation where the party against whom the remedy was given was in the UK or it was sought to enforce any judgment obtained in breach of the anti-suit injunction in the UK.

## 2. Shipping

### 2.1 The future of the UK flag

The UK flag ranks nineteenth internationally per share of dead-weight tonnage<sup>24</sup> and the UK flag is currently open to EU/EEA physical and legal persons. Brexit raises the following two issues in this respect:

- The position of UK flagged ships registered by EU/EEA physical and legal persons.

Existing registrations might fall short of fulfilling eligibility criteria after Brexit. Depending on what sort of interim arrangements will be put in place, existing EU/EEA owners that lose their eligibility could face termination of their registration, while other measures could come into play (forced sale of the vessels, for example).

- The future of the UK Flag

The ability of EU/EEA interests to register with the UK flag might be curtailed. Moreover, the free movement of vessels between EU registries would be problematic post-Brexit because regulation on the matter cannot be unilaterally reproduced by the UK. If it is decided to remove EU/EEA entities from the list of persons qualified to be registered as the owner of a UK flagged ship, the owner could overcome the problem by transferring ownership to a UK subsidiary company established for this purpose. As for the UK tonnage tax system (currently subject to EU rules on state aid), Brexit will not immediately affect its application as such, but it will allow the UK to revise and adjust it according to national priorities and with no reference to EU state aid rules.

### 2.2 Shipping Regulations

Shipping is internationally regulated through legal instruments agreed within the IMO, the only UN specialised agency headquartered in London. The EU implements IMO regulations in many cases going beyond the minimum standards those regulations set, resulting in the gold-plating of IMO standards. It is significant that the extra layers of regulation concern not only EU-flagged ships but any ship trading in the EU. Hence, gold-plated regulations will remain relevant for UK ships trading in EU ports post Brexit: non-compliant UK ships will not be able to trade in EU ports.

Examples where EU law has raised the standards beyond those imposed through IMO instruments include:

- Air pollution and greenhouse gas (GHG) emissions
- Criminal liability for ship-source pollution
- Liability for environmental damage
- Ship-recycling
- Vessel monitoring
- Compulsory insurance for shipowners

The EUWB is going to retain all the regulation currently in place, including any gold-plating. The UK remains bound by IMO obligations but it is presented with an opportunity to reshape its regulatory environment as regards EU prescriptions. The UK could remove the gold-plating and implement the original IMO regulations for all ships trading in its ports. While this move would not affect EU vessels

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<sup>24</sup> See 'Review of Maritime Transport 2016' (United Nations Conference on Trade and Development (UNCTAD)), 45, table 2.6, < [http://unctad.org/en/PublicationsLibrary/rmt2016\\_en.pdf](http://unctad.org/en/PublicationsLibrary/rmt2016_en.pdf) > last accessed 5 July 2017.

calling at UK ports, it would allow vessels that currently do not comply with EU regulations to trade in the UK.

However, whether EU additional standards should be preserved or not can best be assessed on a case-by-case basis in order to take account of the different issues that arise. For example:

- Removing the compulsory insurance requirements could make the recovery of damages more difficult for a whole range of claimants.
- Reducing the air pollution and GHG emission efforts would affect the UK population, particularly in ports. It would also be expected to burden the other sectors of the economy, assuming that the UK stays faithful to its commitments for GHG reductions under the Paris Agreement<sup>25</sup> together with the EU.
- The IMO's Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships 2009 (SRC)<sup>26</sup> is not yet in force and will not enter into force for some time. The UK is bound by the restrictions of the Basel Convention on hazardous wastes<sup>27</sup> and perhaps by the 1995 Amendment to the Basel Convention (Ban Amendment),<sup>28</sup> currently enacted solely by EU Regulation 1257/2013 (Ship recycling regulation)<sup>29</sup> but not in force generally. The Ship Recycling regulation enables ship recycling within a system, which resembles the IMO's SRC even if the IMO Convention is not in force. Nonetheless, the EU system has its own difficulties and it is not yet practically operational.
- Brexit opens up the possibility of introducing national UK standards going beyond those implemented by the EU or the USA. Admittedly, such an option would be fraught with difficulty, as EU ports would provide close and more easily accessible destinations for foreign ships. Thus, adopting regulation that is more stringent is a theoretical, rather than a realistic approach.

### 2.3 Port State Obligations

Port State obligations are similarly defined on a double level by IMO and EU regulations. EU ports are under additional requirements regarding:

- Port reception facilities
- Accident investigation, and
- Port inspections, which are to be effected in compliance with EU law.

It is expected that, port state control procedures will be retained for the short term at least. The UK will have the option to reduce the standards below those of the EU and comply solely with the lower standards of the IMO or consider even more strict national standards.

Evidently, any decision on the future of UK shipping regulation will need to take into account the trade-off between the possible environmental risks associated with lowering EU standards, the continued presence of EU regulation for the shipping world and the competitiveness of the UK as a maritime hub.

## 3. Fisheries

The CFP manages European fishing fleets and provides for conserving fish stocks. It is based on equal access to EU waters and fishing grounds and aims to provide fair competition between fishermen. It includes the management of fisheries, the development of EU international policy for fisheries, the

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<sup>25</sup> The Paris Agreement (12 December 2015) 55 ILM 740.

<sup>26</sup> (adopted on 15 May 2009, not yet in force) SR/CONF/45.

<sup>27</sup> Basel Convention on the Control of the Transboundary Movements of Hazardous Wastes and their Disposal (22 March 1989) 1673 UNTS 57.

<sup>28</sup> 1995 Amendment to the Basel Convention on the Control of the Transboundary Movements of Hazardous Wastes and their Disposal (22 September 1995, not yet in force).

<sup>29</sup> Regulation (EU) No 1257/2013 of the European Parliament and of the Council of 20 November 2013 on ship recycling and amending Regulation (EC) No 1003/2006 and Directive 2009/16/EC [2013] OJ L 330/1.

development of a market and trade policy and a funding mechanism to support the implementation of the agreed measures and quotas. Beyond any short-term preservation of the CFP under the EUWB, the UK needs to reshape its fisheries policy for the future. Any decision will have to be made within the legal framework of UNCLOS, UNFSA and perhaps the Food and Agriculture Organization (FAO) Compliance Agreement<sup>30</sup> and the FAO Agreement on Port State Measures,<sup>31</sup> if the UK becomes party to either or both of those. That said, the CFP remains relevant for UK fishing vessels to the extent that they continue to fish in EU waters.

### 3.1 Access to UK waters

Access to the Exclusive Economic Zone could be totally excluded for foreign fishing vessels, certainly if the allowable catch based on the maximum sustainable yield falls below the UK fleet's capacity to harvest it, and probably even if there is no such surplus, although practical considerations of reciprocity and economic benefits point against such an outcome in either case. Access to the outer band of the territorial sea (6-12 nautical miles) is subject to historic rights being established under either customary international law, which is doubtful, or the European Fisheries Convention,<sup>32</sup> if this has not been displaced by the CFP. The UK can argue that no such historic rights exist, and has moved to eliminate the possibility of such rights being invoked under the Convention by denouncing the latter, which will take effect either shortly after Brexit or at the same time.

### 3.2 Fisheries Management

The UK will be required by international law to co-operate directly with the EU and other States and Regional Fisheries Managements Organizations (RFMOs) for the management of shared stocks, straddling and highly migratory species, as opposed to being represented by the EU in most of its fisheries, as is currently the case. Besides purely national inshore fisheries, insistence on the unilateral determination of allowable catches cannot be sustained as a goal in itself because most of the stocks in UK waters fall under one or other of the abovementioned classes. Non-cooperation would likely lead to overexploitation with long-term or more rapid impact on the resources. Therefore, the UK needs to establish management agreements not just with the EU but also with near neighbours such as Norway and Denmark on behalf of the Faroe Islands.

Main factors that will impede negotiations (or even render unilateral total allowable catches unavoidable because of lack of agreement) are potential differences over how UNCLOS obligations need to be discharged (regarding how closely scientific advice should be followed, or the precautionary approach), which may be exacerbated by political pressure. If the UK regards the fisheries management currently pursued under the CFP as insufficiently precautionary, Brexit offers a good opportunity to move towards remedying this. If on the other hand the UK regards the CFP as excessively precautionary, there will be some scope under Brexit to escape its restraints, but this will entail moving even further away from compliance with the UNCLOS requirement to restore stocks to, or maintain them at, the size at which the maximum sustainable yield is generated.

### 3.3 External Relations

Post Brexit, the UK will lose its connection to the RFMOs in which it is currently represented by the EU. A decision needs to be reached on which of these the UK should join in its own right. This will depend on its fishing interests and national priorities.

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<sup>30</sup> Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (24 November 1993) 2221 UNTS 91.

<sup>31</sup> Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (22 November 2009) <[www.fao.org/fileadmin/user\\_upload/legal/docs/037t-e.pdf](http://www.fao.org/fileadmin/user_upload/legal/docs/037t-e.pdf)>.

<sup>28</sup> Fisheries Convention, (London, 9 March 1964), 581 UNTS 57.

### 3.4 Devolved administrations

Devolved administrations are responsible for the management of their fisheries and thus, they have a clear interest in shaping the future of the UK fisheries policy. However, because international matters are not devolved, it is not yet clear what the internal balance of responsibilities will be in the UK's management of shared and straddling stocks and its participation in RFMOs. An internal agreement should ideally be achieved before external negotiations take place.

### 3.5 Fish market

The issue of access of UK fish and fish products to the EU market (and vice versa) may be affected by the management agreement or the Article 50 negotiations or both. In other markets the outcome will form part of the wider negotiations on trade that the UK will be able to conduct once outside the customs union. The EU being an important fisheries market, any barriers erected to trade will negatively impact the UK fishing industry.

## 4. Seaborne Trade

A consequence of Brexit will be the withdrawal of the UK from the customs union and possibly the single market. This is subject to the possibility of the UK remaining a party to the EEA Agreement,<sup>33</sup> despite its exit from the EU.<sup>34</sup> The UK is an original party to the WTO Agreement<sup>35</sup> pursuant to articles XI and XIV: 1 and ratification of the Agreement on 30 December 1994<sup>36</sup> and as such, its status in the WTO will remain unchanged post-Brexit.

As stated in the White Paper,<sup>37</sup> after Brexit the Government will seek to negotiate a free trade agreement (FTA) with the EU, which will fall within the WTO legal framework.<sup>38</sup> In the absence of an FTA, trade relations between the EU and the UK will be based on the default WTO rules, which prescribe trade between WTO Members under Schedules of commitments. The UK's current WTO schedules are shared with the EU<sup>39</sup> and therefore, they will need to be extricated and made separate from them.

### 4.1 Contracts

English law is one commonly used law of choice for international trade contracts. Although the substantive part of English law will remain unaffected by Brexit, withdrawal is likely to have an impact on shipping and commercial contracts. More specifically, immediate effects on sale contracts and charterparties could be:

- Inability to perform contractual obligations as regards provisions with an EU reference. Examples include provisions on the description of goods, on the port of shipment or destination or a vessel's trading limits.

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<sup>33</sup> Agreement on the European Economic Area (EEA) [1994] OJ L 1/3.

<sup>34</sup> As argued in Ulrich G Schroeter and Heinrich Nemecek, 'The (uncertain) impact of Brexit on the United Kingdom's Membership in the European Economic Area' (2016) EBLR 923.

<sup>35</sup> Marrakesh Agreement Establishing the World Trade Organisation (1995) 1867 UNTS 155.

<sup>36</sup> 'Status of WTO Legal Instruments- 2015 Edition' (WTO, 2015) <[https://www.wto.org/english/res\\_e/publications\\_e/legal\\_instru\\_e.htm](https://www.wto.org/english/res_e/publications_e/legal_instru_e.htm)> last accessed 5 July 2017.

<sup>37</sup> HM Government, 'The United Kingdom's exit from and new partnership with the European Union' (White Paper, Cm 9417, 2017) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/589191/The\\_United\\_Kingdoms\\_exit\\_from\\_and\\_partnership\\_with\\_the\\_EU\\_Web.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/589191/The_United_Kingdoms_exit_from_and_partnership_with_the_EU_Web.pdf)> last accessed 5 July 2017.

<sup>38</sup> More specifically art XXIV(5)(b) of the General Agreement on Tariffs and Trade (GATT) 1867 UNTS 187, which forms part of the WTO Agreement.

<sup>39</sup> EU -15 Schedule CXL (WT/Let/868, 30 October 2012).

- Options for the termination of contracts under force majeure clauses and the doctrine of frustration. Despite being unlikely, Brexit could be (depending on the circumstances and the specific contract) a force majeure or a frustrating event.
- Inefficient dispute resolution choices (see section 1 of the report).

## 4.2 Customs

Either under an FTA or under WTO schedules, border controls and the imposition of tariffs, tariff rate quotas and other non-tariff barriers are expected to be reinstated for trade between the UK and the EU. The content of a potential FTA between the UK and EU is fairly uncertain for now. As far as trading under WTO schedules is concerned, the UK's obligations can be identified in its shared schedules with the EU. Proposing its own schedules is key post-Brexit but this can be done by replicating the existing commitments, albeit with the apportionment of quantitative measures creating some difficulties.

In relation to other non-EU States, EU FTAs in which the UK is listed as a party, could possibly survive Brexit if the UK decides to rely on them, subject to the Vienna Convention on the Law of Treaties.<sup>40</sup>

Imposition of trade barriers between the UK and the EU will result in:

- The creation of a competitive disadvantage for UK exporters and importers when compared with EU or domestic competitors because of increase in the cost of goods and in the complexity of trade operations.
- Delays at the border which for shipping and trade would possibly generate demurrage and storage costs.
- Transient disturbance of established supply chains between the UK and Continental Europe which are largely based on the benefit of free trade within the single market.
- Export control regimes will probably remain intact as such but the UK will need to implement its own measures to give effect to them.

## 4.3 Trade and the Environment

Under article XX of the General Agreement on Tariffs and Trade (GATT),<sup>41</sup> a WTO Member can essentially adopt regulations in contradiction of GATT prescriptions regarding the elimination of tariffs or trade barriers between Members if such an action is justified. Environmental grounds justifying trade restrictions refer to the protection of human, animal or plant life or health<sup>42</sup> and the conservation of exhaustible natural resources.<sup>43</sup> The UK will preserve currently applicable EU regulatory requirements through the EUWB for the short-term after Brexit but it will have the option to review existing standards for the future. The possibility of restrictive measures on the part of the EU if UK regulation does not provide environmental safeguards, clearly demonstrates that Brexit does not necessarily mean freedom from EU laws.

## 4.4 Sanctions

The landscape of sanctions for security reasons, as permitted by article XXI of the GATT, is likely to remain intact despite Brexit for the short-term at least. After Brexit, the UK will continue to be under an obligation to apply UN sanctions, which are currently implemented through EU regulations. Those, together with regulations on purely EU sanctions are expected to be preserved by the EUWB. However, the UK will be free to review its foreign policy and decide whether it will align itself with the EU or

<sup>40</sup> (23 May 1969) 1155 UNTS 331.

<sup>41</sup> (adopted via a Protocol of Provisional Application 1 January 1948, now incorporated into the WTO Agreement) 55 UNTS 194.

<sup>42</sup> Art XX(b) GATT.

<sup>43</sup> Art XX(g) GATT.

not. A key consideration in this regard will be the interest of the UK to maintain or expand its trade relationships with third countries, especially since the EU market will potentially be less accessible post Brexit. Either way, EU sanctions will continue to be relevant to UK shipping due to its international character.

## 5. Conclusion

Brexit will have a significant impact on the future of UK shipping policy. The UK regulatory framework will remain subject to international obligations but implementation and legal development will be determined by national priorities as opposed to EU directions. The optimal way forward should be based on a case-by-case assessment of the available options, taking into account sectoral interests and the need to provide integrated solutions as well.

## Outcomes of the Workshop

Workshop participants:

Darren Deitz	BARBUSS
David Murray	Lloyd's Register
Dr Jingbo (Jenny) Zhang	University of Southampton
Gwilym Stone	Marine and Coastguard Agency (MCA)
Laura Ugarte	University of Southampton Alumni
Matthew Cox	National Federation of Fishermen's Organisations (NFFO)
Prof Andrew Serdy	University of Southampton
Prof Dominic Hudson	University of Southampton
Prof Mikis Tsimplis	University of Southampton
Prof Simon Quinn	University of Southampton
Richard Coles	University of Southampton
Robert Veal	University of Southampton
Sofia Syreloglou	University of Southampton
Spiros Papadas	University of Southampton
Stuart Baker	Solent Local Enterprise Partnership (LEP)
Tim Springett	UK Chamber of Shipping (UKCS)

1. The referendum result came as a surprise to everyone. The stakeholders' initial concerns included the disturbance of established European citizenship rights (freedom of movement and working rights within the EU), market integration and the complexity of the exit process. Concerns were intensified due to the political uncertainty prevailing in Europe at the time regarding the emergence of nationalist voices across the Continent.
2. One year later, the stakeholders remain quite concerned about:
  - The complexity of Brexit negotiations with the EU Member States.
  - The unclear UK negotiating objectives.
  - The doubted ability of the UK Government to negotiate in terms of personnel and financial capacity.
  - The broad spectrum of issues in need of unravelling.
  - The consequential practical difficulties and business uncertainty.

One recorded upside was that decision-making will (in the future) lie with the UK instead of the EU, which can be positive for the maritime sectors provided there is constructive and

integrated cross- sectoral dialogue with the Government. The stakeholders expected that some form of tariff for trade would be imposed.

3. The EU related aspects that will be missed are:

- a. Freedom of movement
- b. Free trade with the EU

More specifically, stakeholders will miss the vibrancy, the ease of cooperation and the access to talent, the access to the student market and research funding and the efficiency of the customs union.

It was pointed out that the markets are inter-dependent. An example provided concerned the dependency of the British super-yacht industry on spare parts which after Brexit and exit from the single market may put UK manufacturers at a disadvantage in comparison with EU manufacturers.

4. The things that Brexit will provide relief from are:

- a. EU bureaucracy
- b. Lack of sovereignty
- c. EU representation
- d. The involvement of the European Commission in legislation

5. The reciprocity of arrangements in relation to professional qualifications was also questioned with views expressed from both sides.

- A point was made that the reciprocal recognition of legal qualifications is an arrangement that needs more caution than what is currently the case and therefore, exiting the EU will be beneficial in this respect.
- By contrast, the reciprocal recognition of seafarers' qualifications is an arrangement that needs to be preserved for the benefit of UK seafarers and the UK Chamber of Shipping is campaigning towards that direction.

6. Regarding the status of the UK as a maritime centre, it was noted that:

- a. There is a long tradition of London being a maritime hub pre-dating the EU.
- b. The common law, quality of legal services, arbitration, insurance expertise and general commercial experience are believed to be quite possibly sufficient to preserve London's current status.
- c. The UK needs to be very careful regarding businesses relocating to the EU to avoid the uncertainty or the legal obstacles arising from Brexit.
- d. Some stakeholders, although not moving their operations from the UK, are gravely concerned about the regulatory landscape after Brexit.
- e. The importance of the IMO presence in London and how it attracts the establishment of other organizations was underlined. A consequence of efforts to reduce immigration by imposing visa requirements has affected delegations coming to the UK for IMO meetings. This needs to be resolved because access to and participation in international fora must be unimpeded, otherwise the prospect of the IMO (and other organisations) relocating becomes more realistic. The UK Chamber of Shipping is actively working to persuade the Government to find solutions.

7. As regards the impact of Brexit on the access of foreign vessels to UK waters the expressed opinions differed. Some thought that not much will change because the fishing sector is very narrow and access cannot be looked at in isolation from trade negotiations and international obligations on fisheries management co-operation. Others thought this is an area where massive changes are expected with exclusive access being a real possibility that will create a need for additional UK patrol forces in UK waters.
8. As to expectations regarding the UKSR and the shipping industry in general, it was thought that:
  - a. UK shipping has no intention of limiting its availability to different shipping markets including the EU. Therefore, there is no intention by UK shipowners to argue for relaxation of the currently applicable shipping regulations.
  - b. Brexit will not have a massive impact given that the UKSR has been open to non-British owners even before this was a requirement under EU law. Examples include AP Moller, which have already in the past set up a subsidiary in the UK, Maersk Co Ltd, to register part of its fleet in the UKSR.
  - c. Stakeholders agreed that the issue of British vessel ownership might be contingent on the negotiation on freedom of movement and that transitional arrangements will probably be needed in the short term after Brexit.
  - d. Immigration policies may affect the relocation of companies. It was mentioned that Evergreen is moving its operations from the UK because the Chief Executive Officer's visa has not been renewed: another indication on how migration policies affect business decisions.
  - e. The UKSR could compete with the Cayman Islands open registry, given that its services are less expensive.
  - f. Reinstating tax-free shopping on-board UK cruise ships could also provide an area of future development, although this is thought to be a controversial idea.
  - g. There is a market for training of seafarers and the UK Chamber of Shipping is lobbying in favour of increasing funding and training opportunities for seafarers in the UK.
  - h. Whether shipping will flourish depends on the trade agreement.
  - i. Flexibility in tonnage tax can contribute to the future development of UK shipping.
9. Expectations regarding Fisheries:
  - a. It was clarified that the Conservative Party has a commitment to repeal the European Fisheries Convention, the Convention that may affect the exclusivity of access to UK territorial waters by UK fishermen. This however has not been done yet probably because the Government want to keep their options open in retaining rights to the 6-12 nm zone in French waters.
  - b. Resolving quotas would be important. It was pointed out that it is impossible to achieve maximum sustainable yield (MSY) in more than one stock at the same time because of predator-prey relationships. Oversimplification is an issue when we talk about achieving MSY.
  - c. Stakeholders agreed that although the financial importance of UK fisheries is limited, their political importance is now at a peak given the election result and the pressure on the Government. Scotland has been lobbying hard and will probably continue to do so to get a satisfactory deal for fisheries. It is highly likely that political considerations will overtake financial ones.
  - d. A view expressed (not unanimously) was that the fishing sector has the potential to flourish if there are more available quotas.

10. Expectations regarding Trade:

- a. Export operations could possibly weaken because of the surrounding uncertainty.
- b. If trade operations in the UK are at a disadvantage, the maritime industries will be affected, given that trade is the driving force of shipping.

11. Priorities:

- a. Negotiating the necessary freedom of movement for professionals and services.
- b. Ensuring a good trade relationship with the EU given that shipping depends on trade.
- c. Clarifying the status of EU/EEA legal entities and the status of EU regulation within domestic law is considered a pressing issue.
- d. Clarifying the extent to which unimplemented EU directives will have to be implemented.
- e. Clarifying cross border tax implications.
- f. Dealing with uncertainty regarding the enforceability of jurisdictional clauses, as there are indications that clients are already seeking to distance themselves from English law, a move which will not only disadvantage legal services but, for example, classification societies, which benefit from protection from third party civil liability proceedings.

12. Other Risks and their mitigation:

- a. Investment in keeping the maritime sectors competitive was considered important.
- b. A risk of lowering environmental standards in order to boost shipping, trade and satisfy fishing interests was raised.
- c. Innovation in technology and digitisation was not considered vulnerable due to Brexit because of the global outreach of the market.
- d. Implementation of innovative technology may be affected in relation to the implementation of innovative EU schemes concerning autonomous ships or optimisation of regional traffic services.

13. Preparations for Brexit

- a. Due to the uncertainty of the UK position preparations are variable and being considered at company level.
- b. Lloyd's Register has been preparing for Brexit through restructuring and bringing legal entities into the EU.
- c. None of the shipping stakeholders could identify visible benefits arising from Brexit for their respective industry.

## ANNEX – LEGAL REPORT

### 1. LONDON AS A MARITIME DISPUTE RESOLUTION CENTRE

The UK is a leading centre for judicial, business and financial services to the international maritime sector. London is a forum of choice for litigation in many maritime and commercial matters, such as ship building contracts, ship sale and purchase contracts, international sale contracts, charterparties, bills of lading, salvage contracts, towage contracts, marine insurance etc. The suitability of London as such a centre depends on providing efficient services with clauses choosing English jurisdiction or arbitration and English law being upheld and strong recognition and enforcement of court judgments and arbitral awards. Because the issue of which court has jurisdiction in an international dispute with a link to the EU and recognition and enforcement of judgments given by the court of an EU Member State are such important matters for trade in general, the EU has exclusive competence in this respect. The UK had a right to opt in<sup>44</sup> and has chosen to apply almost all the EU Regulations in this field. Thus in terms of the enforcement of choice of court agreements and English court judgments, leaving the EU may put English courts at a disadvantage when compared with the other EU Member States because English choice of court agreements and English judgments will not be so easily enforceable in other EU Member States. This is a matter that will need to be addressed in negotiations concerning Brexit.

The prevalence of UK maritime judicial services in the maritime and commercial sector has led to a derivative market in education and training as well as arbitration services. The latter should not be affected as they are currently excluded from the EU jurisdiction and enforcement framework for civil and commercial matters and remains governed by an international Convention: the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).<sup>45</sup>

#### 1.1 Current regime

As a member of the EU, the UK operates under the following framework:

- Regulation No 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast)<sup>46</sup> (the Recast Jurisdiction Regulation) which is the latest version of the 1968 Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (The EC Jurisdiction Convention).<sup>47</sup> The UK acceded to the Convention and its amended 1971 Protocol<sup>48</sup> in 1978 and implemented it through the Civil Jurisdiction and Judgments Act 1982.<sup>49</sup> The Recast Jurisdiction Regulation itself is directly applicable to the UK by virtue of article 288 of the Treaty of the Functioning of the European Union (TFEU),<sup>50</sup> which in turn is enacted within the UK by the European Communities Act 1972 (ECA 1972). The Recast Jurisdiction Regulation applies to legal proceedings instituted on or after 10 January 2015.<sup>51</sup> It applies to all EU Member States, including Denmark according to the Agreement between the European Community and the

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<sup>44</sup> Protocol 21 of the Treaty of the Functioning of the EU (TFEU).

<sup>45</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958) 330 UNTS 3.

<sup>46</sup> 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 [2012] OJ L351/1.

<sup>47</sup> [1972] OJ L 299/32.

<sup>48</sup> Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters 1262 UNTS 241.

<sup>49</sup> The last accession to the Convention took place in 1996, which means that all the States that became EU Members after that date are not parties to the Convention and hence, not bound by it. Those States are Bulgaria, Croatia, Slovenia, Slovakia, Romania, Poland, Malta, Lithuania, Latvia, Hungary, Estonia, Czech Republic and Cyprus.

<sup>50</sup> [2012] OJ C 326/47.

<sup>51</sup> Art 66.

Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.<sup>52</sup>

- Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (the EC Jurisdiction Regulation) entered into force in the UK on 1 March 2002.<sup>53</sup> That Regulation replaced the latest version of the EC Jurisdiction Convention, except in relation to Denmark, to which the EC Jurisdiction Regulation applies under agreement.<sup>54</sup> The EC Jurisdiction Regulation is still in force in relation to proceedings commenced after its entry into force and before 10 January 2015. The Recast Jurisdiction Regulation applies to proceedings commenced on or after that date.
- The Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Revised Lugano Convention)<sup>55</sup>, which applies as between the EU and Iceland, Norway and Switzerland (European Free Trade Association (EFTA) States). The UK was a party to the original 1988 Lugano Convention<sup>56</sup> and was brought into the English legal system by the Civil Jurisdiction and Judgments Act 1991,<sup>57</sup> later amended to give effect to the Revised Lugano Convention.<sup>58</sup>
- The Hague Convention on Choice of Court Agreements (the 2005 Hague Convention)<sup>59</sup> to which the EU, Mexico and Singapore are parties. The Convention is open for signature by all States.<sup>60</sup>
- Regulation No 593/2008 on the Law Applicable to Contractual obligations (Rome I),<sup>61</sup> based on the 1980 Rome Convention,<sup>62</sup> which was enacted in the UK by the Contracts (Applicable Law) Act 1990. Rome I is directly applicable in the UK and applies to contracts dated as from 17 December 2009.<sup>63</sup>
- Regulation No 864/2007 on the Law Applicable to non-Contractual obligations (Rome II)<sup>64</sup> which is directly applicable as well and has displaced the Private International Law (Miscellaneous Provisions) Act 1995 for non-contractual obligations in civil and commercial

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<sup>52</sup> [2005] OJ L 299/62. The Agreement was necessary to bind Denmark because under Protocol 22 to the TFEU, Denmark has opted out from any measures adopted pursuant to Title V TFEU (Area of Freedom, Security and Justice), which includes any measure on jurisdiction and enforcement of judgments.

<sup>53</sup> [2001] OJ L 12/1. See also the Civil Jurisdiction and Judgments Order 2001.

<sup>54</sup> See n 48.

<sup>55</sup> [2007] OJ L 339/3.

<sup>56</sup> 88/592/EEC Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1988] OJ L 319/9.

<sup>57</sup> Amending the Civil Jurisdiction and Judgments Act 1982.

<sup>58</sup> By the Civil Jurisdiction and Judgments Regulations 2009 (SI 2009/3131).

<sup>59</sup> Hague Conference on Private International Law, Convention on Choice of Court Agreements (30 June 2005) (2005) 44 ILM 1294.

<sup>60</sup> Art 27(1) of the 2005 Hague Convention.

<sup>61</sup> Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L 177/6.

<sup>62</sup> Convention on the law applicable to contractual obligations (Rome Convention) [1998] OJ C 27/34. See Case 412/10 *Deo Antoine Homawoo v GMF Assurance SA* [2011] ECR I-11603.

<sup>63</sup> Art 28 of Rome I.

<sup>64</sup> Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L 199/40.

matters after its entry into force.<sup>65</sup> Rome II applies to events giving rise to damage, which occur after 11 January 2009.<sup>66</sup>

- Other regulations regarding civil procedure and more specifically the service of judicial and extrajudicial documents,<sup>67</sup> the taking of evidence,<sup>68</sup> the European Enforcement Order for Uncontested Claims (EEO),<sup>69</sup> the European Order for Payment Procedure (EOPP),<sup>70</sup> the European Small Claims Procedure (ESCP)<sup>71</sup> and insolvency proceedings<sup>72</sup> all of which are directly applicable to the UK.

After Brexit, the legal landscape on the conflicts of laws will be affected in the following ways:

- Instruments directly applicable in the UK will cease to have such an effect. The Recast Jurisdiction Regulation, the EC Jurisdiction Regulation, Rome I and Rome II and all the other Regulations will no longer apply to the UK. The EUWB can make those instruments part of domestic law, however this does not ensure that other EU Member States will apply the regulations vis-à-vis the UK. The reciprocal rules of the Regulations cannot be replicated by the EUWB.
- Treaties to which the EU is party will also cease to apply to the UK unless the UK is also a party to them and the latter would become a third State. That would be the case for the Revised Lugano Convention and the 2005 Hague Convention.
- Instruments that form part of UK law as a matter of domestic legislation as well as the international obligations that the UK has undertaken in its own name will remain unaffected.

It is important to investigate which part of the current legal framework falls into the third category, so that we can establish what the law will be after the withdrawal. The result of this investigation is necessarily subject to any withdrawal agreement that might be adopted in the negotiations envisaged by article 50 of the TFEU.

## 1.2 Jurisdiction and Enforcement

### 1.2.1 The EC Jurisdiction Convention

With the Recast Jurisdiction Regulation out of the picture, it is arguable that the EC Jurisdiction Convention could be relied on by the UK for the purpose of identifying jurisdiction and enforcing judgments within the Contracting States of the convention.<sup>73</sup> The fact that there is uncertainty<sup>74</sup> on this

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<sup>65</sup> Art 15A of the Private International Law (Miscellaneous Provisions) Act 1995.

<sup>66</sup> Arts 31-32 of Rome II.

<sup>67</sup> Council Reg (EC) No 1393/2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, replacing Reg 1345/2000 [2008] OJ L 331/21 (see CPR 6.41).

<sup>68</sup> Council Reg (EC) No 1206/2001 on the cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters [2001] OJ L 174/1.

<sup>69</sup> Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims [2004] OJ L 143/15.

<sup>70</sup> Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, OJ L 399/ 1.

<sup>71</sup> Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure [2007] OJ L 199/1.

<sup>72</sup> Council Regulation (EC) 1346/2000 of 29 May 2000 on insolvency proceedings [2000] OJ L 160/1 and Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (Recast) [2015] OJ L 141/19.

<sup>73</sup> The ratifying parties are Belgium, Germany, France, Italy, Luxembourg and the Netherlands while Spain, Portugal, Greece, Denmark, the UK, Ireland, Austria, Finland and Sweden have acceded to the Convention.

<sup>74</sup> Sara Masters and Belinda McRae, 'What Does Brexit Mean for the Brussels Regime?' (2016) 33 J Int Arb 483; Andrew Dickinson 'Back to the Future: the UK's EU exit and the Conflict of laws' (2016) 12 JPIL 195; Richard

is in itself problematical. Even if the EC Jurisdiction Convention would still apply, its provisions are not as advantageous as those of the Recast Jurisdiction Regulation.<sup>75</sup>

### 1.2.2 Bilateral Treaties between EU Member States

The EC Jurisdiction Convention<sup>76</sup> and later the EC Jurisdiction and Recast Jurisdiction Regulations<sup>77</sup> superseded a number of bilateral treaties for the matters falling under their respective scope. Nonetheless, those treaties remained in place for matters not covered by the EC Jurisdiction Convention, the EC Jurisdiction Regulation or the Recast Jurisdiction Regulation.<sup>78</sup> As a result, it seems possible that the bilateral treaties might extend back to their original scope of application once the EC Jurisdiction Regulation and the Recast Jurisdiction Regulation ceases to apply and if the EC Jurisdiction Convention does not apply.

The bilateral Conventions relating to the UK are the following:

- Convention for the reciprocal enforcement of Judgments in Civil and Commercial Matters between the UK and Belgium (signed on 2 May 1934) (1936) UK Treaty Series (UKTS) No 31.
- Convention for the reciprocal enforcement of Judgments in Civil and Commercial Matters between the UK and Italy (signed on 7 February 1964), with amending Protocol (signed on 14 July 1970) (1974) UKTS No 5.
- Convention for the reciprocal enforcement of Judgments in Civil and Commercial Matters between the UK and the Netherlands (signed on 17 November 1967) (1969) UKTS No 97.
- Convention for the reciprocal enforcement of Judgments in Civil and Commercial Matters between the UK and Austria (signed on 14 July 1961), with amending Protocol (London, 6 March 1970) (1962) UKTS No 70.
- Convention for the reciprocal enforcement of Judgments in Civil and Commercial Matters between the UK and Germany (signed on 14 July 1960) (1961) UKTS No 64.
- Convention for the reciprocal enforcement of Judgments in Civil and Commercial Matters between the UK and the French Republic (signed on 18 January 1934) (1936) UKTS No 18.

Again, the fact that there is uncertainty as to the continuing application of these treaties is problematical. Even if they do continue to apply, their terms are not as advantageous as those of the Recast Jurisdiction Regulation, or indeed the EC Jurisdiction Regulation.<sup>79</sup>

### 1.2.3 The 1988 Lugano Convention

The Revised Lugano Convention will cease to apply to the UK once it becomes a third State because it is a treaty ratified by the EU, binding its Member States. It is unclear whether the 1988 Lugano Convention would still apply.<sup>80</sup> That lack of clarity is problematical. Once again even if it does apply, its provisions are not as advantageous as the Revised Lugano Convention.

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Aikens and Andrew Dinsmore, 'Jurisdiction, Enforcement and the Conflict of laws in Cross-border Commercial Disputes: What are the legal consequences of Brexit?' (2016) 27 EBLR 7.

<sup>75</sup> As discussed at 1.2.5.

<sup>76</sup> Art 55.

<sup>77</sup> Art 69.

<sup>78</sup> Art 56 of the EC Jurisdiction Convention and art 70 of the Recast Jurisdiction Regulation.

<sup>79</sup> As discussed at 1.2.5.

<sup>80</sup> Sara Masters and Belinda McRae, 'What Does Brexit Mean for the Brussels Regime?' (2016) 33 J Int Arb 483, 494; and Andrew Dickinson, 'Back to the Future: the UK's EU exit and the Conflict of laws' [2016] 12 JPIL 195, 206.

### 1.2.4 Bilateral Treaties between the UK and EFTA States

Of relevance here is the Convention providing for the Reciprocal Recognition and Enforcement of Judgments in Civil Matters between the UK and Norway.<sup>81</sup> Article 65 of the Revised Lugano Convention provides for the Convention to be superseded to the extent that it covers the same matters. Again it is not clear that the convention would still apply. Even if it does its terms are not as advantageous as those under the Revised Lugano Convention.

### 1.2.5 Exclusive English Jurisdiction Clauses

The Recast Jurisdiction Regulation introduced important changes in relation to jurisdiction agreements. One major change made by the Recast Jurisdiction Regulation is that article 25 of that Regulation makes no distinction according to where the parties to a jurisdiction clause choosing the court of an EU Member State are domiciled. Even if neither party is domiciled in an EU Member State, the court of an EU Member State chosen must take jurisdiction, provided the jurisdiction agreement satisfies the formalities set out in article 25(1) of the Recast Jurisdiction Regulation. Article 23 of the EC Jurisdiction Regulation and Revised Lugano Convention and article 17 of the EC Jurisdiction Convention and 1988 Lugano Convention all differ from article 25 of the Recast Jurisdiction Regulation as they differentiate between the situation first where at least one of the parties to a jurisdiction agreement for an EU Member State or Contracting State is domiciled in an EU Member State or Contracting State, and secondly where none of the parties to such an agreement is domiciled in an EU Member State or Contracting State.

In the first situation, article 17(1) of the EC Jurisdiction Convention and 1988 Lugano Convention provide that the court of the EU Member State or Contracting State shall have exclusive jurisdiction. It does not matter whether it is the claimant or the defendant who is domiciled in the EU Member State or Contracting State as both parties are bound by the agreement.

In the second situation, where none of the parties is domiciled in an EU Member State or Contracting State, and they have chosen the court of an EU Member State or Contracting State, article 23(3) of the EC Jurisdiction Regulation and Revised Lugano Convention and Article 17(3) of the EC Jurisdiction Convention and 1988 Lugano Convention do not provide that the court chosen shall have jurisdiction; they do provide that the courts of other EU Member States or Contracting States shall have no jurisdiction, unless the court chosen has declined jurisdiction. In this situation, the court chosen may apply its own national law to determine whether it has jurisdiction and may decline jurisdiction.

The Recast Jurisdiction Regulation strengthens the principle of party autonomy by permitting the court chosen to determine the substantive validity of a jurisdiction clause in accordance with the law of the EU Member State chosen in the jurisdiction agreement.<sup>82</sup> It is for the national court to interpret the jurisdiction clause invoked before it in order to determine which disputes fall within its scope.<sup>83</sup>

Another important difference between the Recast Jurisdiction Regulation on the one hand and the EC Jurisdiction Regulation, Revised Lugano Convention, EC Jurisdiction Convention and 1988 Lugano Convention on the other hand, is that the *lis pendens* provisions of the former are subject to Article 31(2)<sup>84</sup>, which provides that where a court has been chosen in accordance with article 25, any court of

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<sup>81</sup> Convention between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Norway providing for the Reciprocal Recognition and Enforcement of Judgments in Civil Matters (signed 12 June 1961) (1962) UKTS No 46.

<sup>82</sup> Art 25(1) of the Recast Jurisdiction Regulation. There is no equivalent provision in the EC Jurisdiction Regulation, Revised Lugano Convention, 1988 Lugano Convention or EC Jurisdiction Convention.

<sup>83</sup> Case C-222/15 *Hoszig Kft v Alstom Power Thermal Services* EU:C:2016:525.

<sup>84</sup> *Perella Weinberg Partners UK LLP v Codere SA* [2016] EWHC 1182 (Comm) (non exclusive jurisdiction agreement); *Commerzbank Aktiengesellschaft v Liquimar Tankers Management Inc* [2017] EWHC 161 (Comm); [2017] 1 Lloyd's Rep. 27 (asymmetric jurisdiction clause). In *Dexia Crediop SpA v Provinica Brescia* [2016] EWHC 3261 (Comm) it was held that there was not the same cause of action in the Italian and English proceedings but had there been, art 31(2) would have applied.

another EU Member State shall stay its proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement.<sup>85</sup> Where the court chosen has established that it has jurisdiction, any court of another EU Member State shall decline jurisdiction in favour of that court.<sup>86</sup> Recital 22 clarifies that the designated court “has priority to decide on the validity of the agreement and on the extent to which the agreement applies to the dispute pending before it”,<sup>87</sup> even if it is second seised and irrespective of whether the other court has already decided on the stay of proceedings. Where, however, there is a conflict as to whether both courts have been chosen, then the court first seised will determine the validity of the jurisdiction clause.<sup>88</sup>

If either the EC Jurisdiction Convention or the 1988 Lugano Convention is in force, none of the changes introduced by the Recast Jurisdiction Regulation would apply which would be a retrograde step.

Part of the benefit of the Recast Jurisdiction Regulation could be sought from the 2005 Hague Convention to which the EU is a contracting party. The UK is not a party to the Convention and thus it would need to ratify it if it were to take advantage of its provisions on jurisdiction agreements. However, the 2005 Hague Convention is much more limited in scope than the Recast Jurisdiction Regulation as it only applies to jurisdiction agreements and, unlike the Recast Jurisdiction Regulation or its predecessors, does not provide for rules as to which court will have jurisdiction where there is no court chosen by the parties and the recognition or enforcement of a judgment from that court. Furthermore, even where there is a jurisdiction agreement, the 2005 Hague Convention does not apply to all maritime contracts. It expressly excludes from its scope the carriage of passengers and goods, marine pollution, limitation of liability on maritime claims, general average and emergency towage and salvage.<sup>89</sup> It would, however apply to other maritime contracts such as ship building agreements, ship sale and purchase agreements, time charterparties and marine insurance contracts.<sup>90</sup> EU law will not allow the UK to ratify the Convention before Brexit. Therefore, unless permission is obtained from the EU for the UK to ratify before withdrawal, there would be a gap of some three months between ratification and the Convention coming into force in the UK.<sup>91</sup>

Where no Convention is applicable, the English common law rules on jurisdiction will apply and the English courts will enforce jurisdiction clauses, both English and foreign, unless there is strong cause not to do so, as established in *Donohue v Armco*.<sup>92</sup> The difference with the Recast Jurisdiction Regulation is that the court has a discretion as opposed to the certainty of the Recast Jurisdiction Regulation.

### 1.2.6 Anti-suit injunctions

Anti-suit injunctions are considered incompatible with the EC Jurisdiction Convention regime<sup>93</sup> and therefore if that convention continues to apply, the English court cannot grant an anti-suit injunction to restrain a party from commencing or pursuing proceedings in the court of another EU Member State in

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<sup>85</sup> See Recital 22 and arts 29(1) and 31(2). This solution is similar to that adopted by art 6 of the 2005 Hague Convention. These provisions reverse the decision in Case C-116/02 *Erich Gasser GmbH v MISAT SRL* [2003] ECR I-14693; [2005] QB 1 which applies to the EC Jurisdiction Regulation, the Revised Lugano Convention, 1988 Lugano Convention and EC Jurisdiction Convention. They are a major improvement.

<sup>86</sup> Art 31(3) of the Recast Jurisdiction Regulation. See Yvonne Baatz, ‘How will Brexit affect exclusive English jurisdiction agreements?’ (2016) STL 6(1).

<sup>87</sup> See also Case C-352/13 *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Akzo Novel Nv and others* EU: C: 2015: 335.

<sup>88</sup> Recital 22 para 2 of the Recast Jurisdiction Regulation.

<sup>89</sup> Art 2(2) (f) and (g) of the 2005 Hague Convention.

<sup>90</sup> Yvonne Baatz, ‘How will Brexit affect exclusive English jurisdiction agreements?’ (2016) STL 6(1).

<sup>91</sup> Art 31(2)(a) of the 2005 Hague Convention.

<sup>92</sup> [2001] UKHL 64; [2002] 1 Lloyd’s Rep 425. See also Yvonne Baatz, ‘How will Brexit affect exclusive English jurisdiction agreements?’ (2016) STL 6(1)

<sup>93</sup> See Case C-159/02 *Gregory Paul Turner v Felix Fareed Ismail Grovit, Harada Ltd and Changepoint SA* EU:C:2004:228; [2004] 3 WLR 1193 at 31.

breach of an English court jurisdiction. However, the Recast Jurisdiction Regulation has probably eliminated the need for such a remedy because of articles 25 and 31(2), which recognise exclusive jurisdiction agreements in favour of a court of an EU Member State irrespective of where the parties are domiciled and provide that any court seised will stay its proceedings in favour of the court which has jurisdiction by virtue of an agreement.

If neither the Recast Jurisdiction Regulation, Revised Lugano Convention, EC Jurisdiction Regulation, EC Jurisdiction Convention or 1988 Lugano Convention applies, it may be possible for the English court to grant an anti-suit injunction to restrain a party from commencing or pursuing proceedings in the court of another EU Member State or Lugano Contracting State<sup>94</sup>, as was the case before those Regulations or Conventions came into force and as is the case, where the proceedings are in the court of a non-EU State or non-Lugano Contracting State, where the foreign proceedings would be in breach of an English jurisdiction agreement or London arbitration agreement. The effectiveness of such an injunction may depend on whether the penalties for breach of such an injunction can be enforced and where any foreign judgment is to be enforced.

### 1.3 Applicable law

The rules on applicable law in Rome I and Rome II can effectively be transposed in domestic law through the EUWB, given that they do not operate on the basis of reciprocity. Thus, if the parties choose English law to govern their contractual obligations which fall within the scope of Rome I, in accordance with article 3(1) of Rome I the courts of any other EU Member State would give effect to that choice.

### 1.4 Miscellaneous

#### 1.4.1 Service of documents and taking of evidence

Service of judicial and extrajudicial documents and taking of evidence are procedural matters that are regulated by two separate Regulations.<sup>95</sup> As mentioned in section 1.1 of this chapter, those will cease to have effect upon withdrawal.

In international law, service is dealt with in the Hague Service Convention<sup>96</sup> to which the UK is a party.<sup>97</sup> The Convention is quite similar to Regulation 1393/2007 on the service of judicial and extrajudicial documents in that it provides various methods of service, but differs in that it establishes a centralized system of dealing with service.<sup>98</sup> Currently, it applies as between the UK and third States parties to the Convention. After becoming a third State itself, the UK will also apply the Convention to its relations with EU Member States, most of which are parties to it.<sup>99</sup>

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<sup>94</sup> See section 37 of the Senior Courts Act 1981.

<sup>95</sup> See section 11 of this chapter.

<sup>96</sup> Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (15 November 1965) 658 UNTS 163.

<sup>97</sup> The UK ratified the Convention on 17 November 1967. See r 6.42 of the Civil Procedure Rules (CPR) (SI 1998/3132).

<sup>98</sup> Arts 2-5.

<sup>99</sup> The only EU Member State that has not ratified the Convention is Austria. See Status Table (HCCH, 26 April 2017) < <https://www.hcch.net/en/instruments/conventions/status-table/?cid=17> > last accessed 5 July 2017. Nonetheless, there is a bilateral agreement between the UK and Austria, see list in footnotes below. Malta has acceded to the Convention but made a declaration postponing the entry into force of the Convention until the European Council adopts a decision authorizing Malta's accession. See Declaration of 1 August 2012 (HCCH) < <https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=1101&disp=eif>.> last accessed 5 July 2017.

In addition, a number of bilateral treaties between the UK and EU Member States remain in force.<sup>100</sup> Unlike the Regulation, the Hague Convention gives priority to those in case of overlap.<sup>101</sup> Nonetheless, the need for efficiency would make the Hague Convention the preferred option most of the time, given that it is a more recent and developed instrument.<sup>102</sup>

For the cases where there is no international instrument in force, service of UK originating process proceeds according to the law of the country in which service is to be effected.<sup>103</sup> It appears that such a scenario exists only as between the UK and Malta, at least until the Hague Convention comes into force vis-à-vis the latter.

Regarding the service of foreign documents in the UK, that can be done through the Consular Channel or by post.<sup>104</sup> It is worth noting that in commercial practice, there is very often a contractual provision authorizing service on a process agent within the UK, in which case service is effected under rule 6.11 of the Civil Procedure Rules (CPR)<sup>105</sup> with no reference to any regulation or convention.<sup>106</sup> This option remains untouched by Brexit and provides a very quick and simple way of service.

In the field of obtaining evidence, the multilateral treaty in force is the 1970 Hague Convention<sup>107</sup> to which the UK is a party.<sup>108</sup> The Convention provides for a clear and centralized system dealing with letters of request to obtain evidence issued by judicial authorities.<sup>109</sup> At the moment, it is not clear whether the Convention has a mandatory character<sup>110</sup> but it is in force among more than 50 States. All EU Member States are parties with the exception of Belgium, Austria and Ireland. However, the UK has not yet agreed to the accessions of Croatia, Hungary, Lithuania, Malta, Romania and Slovenia.<sup>111</sup>

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<sup>100</sup> Regarding EU Member States, the UK has concluded bilateral conventions on legal proceedings in commercial and civil matters with Austria (1932), Portugal (1931), Poland (1931), Hungary (1935), Netherlands (1932), Italy (1930), Norway (1931), Finland (1933), Greece (1936), France (1922), Spain (1929), Germany (1980), Belgium (1922), Sweden (1930), Czech Republic (1924), Romania (1978), Estonia (1931), Denmark (1932), Latvia (1939), Lithuania (1934). There are no bilateral treaties with Slovakia, Slovenia, Malta, Croatia, Ireland or Cyprus. See also r 6.40(3)(b) of the CPR.

<sup>101</sup> See art 20 of the Regulation and art 25 of the Hague Service Convention.

<sup>102</sup> Lord Collins of Mapesbury, *Dicey, Morris and Collins on the Conflicts of Laws* (15<sup>th</sup> edn, Sweet and Maxwell, 2016) at 8-063.

<sup>103</sup> R 6.40(3)(c) of the CPR.

<sup>104</sup> Lord Collins of Mapesbury, *Dicey, Morris and Collins on the Conflicts of Laws* (15<sup>th</sup> edn, Sweet and Maxwell, 2016) at 8-066.

<sup>105</sup> Civil Procedure Rules 1998 (SI 1998/3132).

<sup>106</sup> See Andrew Sheffel, 'The Impact of Brexit on English litigation: service of process and enforcement of judgments' (2016) 4 Corporate and Commercial Disputes Review 6 <<http://www.nortonrosefulbright.com/files/corporate-and-commercial-disputes-review-issue-4-144605.pdf>> last accessed 5 July 2017.

<sup>107</sup> Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (18 March 1970) 847 UNTS 231.

<sup>108</sup> The UK ratified on 16 July 1976.

<sup>109</sup> The UK has made a reservation under art 23 of the Convention regarding Letters on obtaining pre-trial discovery of documents.

<sup>110</sup> Preliminary Document No 10: The mandatory/non-mandatory character of the Evidence Convention' (Permanent Bureau HCCH, 2008). Also, in *Partenreederei M/S Heidberg v Grosvenor Grain & Feed Co Ltd (the Heidberg No1)* [1993] 2 Lloyd's Rep 324 the UK Court confirmed an order of evidence against a French company without giving way to the Hague Convention. Also, see *Societe Nationale Industrielle Aerospatiale v US District Court for the Southern District of Iowa* 482 US 522 (1987) which held that the Convention is not a mandatory set of rules.

<sup>111</sup> Art 39 of the 1970 Hague Convention. See also 'Status Table' (HCCH, 22 June 2017) <<https://www.hcch.net/en/instruments/conventions/status-table/?cid=82>> last accessed 5 July 2017.

For the EU Member States that are not parties to the 1970 Hague Convention resort can be had to existing bilateral treaties.<sup>112</sup> In fact, because the Convention is probably not mandatory, bilateral treaties can be applied even when the other country is a Hague signatory, at least to the extent that those bilateral treaties provide for a more efficient regime. As a result, obtaining evidence could be governed by bilateral conventions as far as Belgium and Austria are concerned, although no relevant agreement exists with Ireland. As for the States to whose accessions the UK has not yet agreed, it is advisable that the UK proceeds in that direction so that the taking of evidence is subject to the 1970 Hague Convention for as many EU Member States as possible. In case the UK does not choose to do so, there are bilateral treaties in place for Hungary, Lithuania and Romania but not for Croatia, Malta or Slovenia.

Absent any international agreement, as in the case of Croatia, Malta and Slovenia, the CPR will regulate the taking of evidence abroad.<sup>113</sup> The English court's power to issue a Letter of Request is discretionary.

Incoming requests for evidence by foreign Courts will fall under the Evidence (Proceedings in Other Jurisdictions) Act 1975.<sup>114</sup> This Act will apply to any kind of request, irrespective of it falling under an international Convention or not.<sup>115</sup>

#### 1.4.2 The EEO, the EOPP and the ESCP

These three regulations<sup>116</sup> aim to harmonize procedural law within the EU by setting minimum standards on the national procedural laws of the EU Member States. Their adoption does not intend to abolish domestic measures but to provide optional regimes parallel to the Recast Jurisdiction Regulation, to which the claimants could resort because of the simplicity, speed and effectiveness they offer.<sup>117</sup>

The EEO is a procedural tool through which an enforceable judgment is certified within the EU Member State of origin and can then be freely circulated within the EU without the need for extra procedure.<sup>118</sup> It concerns liquidated pecuniary claims that have not been contested by the defendant.

The EOPP leads to the issue of an enforceable decision for liquidated pecuniary claims that are unlikely to be contested. Once the 'European Payment Order' is issued it is automatically enforceable within the EU.<sup>119</sup>

The ESCP procedure relates to claims not exceeding EUR 2000 and produces judgments that are readily enforceable within any EU Member State as a domestic judgment, in a way similar to the certified judgments under the European Enforcement order.<sup>120</sup>

The optional character of the above regulations means that UK law remains unaffected once they stop applying after withdrawal. If the EC Jurisdiction Convention is in force, it will be open to the claimants to pursue the enforcement of cross-border claims of this nature through the standard Convention procedure, but this will lack the fast track merits that the regulations afford.

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<sup>112</sup> Those are the ones mentioned in n 96: the Bilateral Conventions on legal proceedings cover both matters of service and the taking of evidence.

<sup>113</sup> See r 34.13 of the CPR.

<sup>114</sup> See rr 34.16-34.21 of the CPR.

<sup>115</sup> Lord Collins of Mapesbury, *Dicey, Morris and Collins on the Conflicts of Laws* (15<sup>th</sup> edn, Sweet and Maxwell, 2016) at 8-095.

<sup>116</sup> See section 1.1 of this chapter.

<sup>117</sup> Recitals 9 and 20 of Reg (EC) No 805/2004, recitals 9 and 10 of Reg (EC) No 1896/2006, recital 8 of Reg (EC) No 861/2007.

<sup>118</sup> Recital 8 of Reg (EC) No 805/2004.

<sup>119</sup> Art 19 of Reg (EC) No 1896/2006.

<sup>120</sup> Art 20 of Reg (EC) No 861/2007.

In domestic law, the EEO was introduced in the CPR by section V of part 74,<sup>121</sup> supplemented by Practice Direction 74B to which the regulation is annexed. Arrangements for the EOPP and ESCP have been effected by adding Part 78 to the CPR,<sup>122</sup> which is supplemented by Practice Direction 78, to which the regulations are annexed. Preserving those procedures through the EUWB is not an appropriate solution because those procedures are based on reciprocity.

### 1.4.3 Insolvency

Insolvency proceedings are excluded from the scope of the Recast Jurisdiction or the EC Jurisdiction Regulations.<sup>123</sup> The recognition and enforcement of proceedings in this area of law takes place according to Council Regulation (EC) 1346/2000 on Insolvency Proceedings. For insolvency proceedings opened after 26 June 2017 Regulation (EU) 2015/848 on Insolvency Proceedings (Recast) applies.<sup>124</sup> By virtue of this regime, insolvency proceedings and related judgments of an EU Member State are automatically recognized in all other EU Member States.<sup>125</sup>

These regulations are also based on reciprocity and therefore preserving them under the EUWB will not ensure their application vis-à-vis the UK by EU Member States. Moreover, insolvency proceedings are not subject to any international Convention and thus there is no default reciprocal arrangement post-Brexit.<sup>126</sup>

A possible alternative could be the Model Law on cross-border insolvency of the UN Commission on International Trade Law (UNCITRAL) in 1997.<sup>127</sup> The instrument is implemented in the UK by the Cross Border Insolvency Regulations 2006.<sup>128</sup> Its scope is quite limited because it merely provides for the domestic recognition of foreign insolvency judgments and only a small number of EU Member States have adopted it.<sup>129</sup>

Regarding the recognition of UK insolvency proceedings in other EU Member States, this will be effected according to rules of private international law, as applicable in each respective EU Member State.

In respect of insolvency, there are two more targeted EU Directives in force: Directive 2001/17/EC of the European Parliament and of the Council of 19 March 2001 on the reorganisation and winding-up of insurance undertakings<sup>130</sup> and Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions,<sup>131</sup> both of which extend to the

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<sup>121</sup> See Civil Procedure (Amendment No.3) Rules (SI 2005/2292).

<sup>122</sup> See Civil Procedure (Amendment) Rules 2008 (SI 2008/2178).

<sup>123</sup> Art 1(2)(b) of both regulations. The EC Jurisdiction Convention also excludes these proceedings from its scope, see art 1(2).

<sup>124</sup> Art 84(1).

<sup>125</sup> Arts 19 and 32 of Reg 2015/848, arts 16 and 25 of Reg 1346/2000.

<sup>126</sup> The European Convention on certain international aspects of bankruptcy (signed on 5 June 1990, not yet in force) ETS No 136 deals with the matter but has never come into force due to lack of ratifications.

<sup>127</sup> UNCITRAL General Assembly Resolution No 158 (A/RES/52/158) Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law.

<sup>128</sup> (SI 2006/1030), reg 2(1)

<sup>129</sup> Greece, Poland, Romania, Slovenia and the UK. See 'Status on UNCITRAL on Model Law on Cross-Border Insolvency (1997) (UNCITRAL) <[http://www.uncitral.org/uncitral/en/uncitral\\_texts/insolvency/1997Model\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html)> last accessed 5 July 2017.

<sup>130</sup> [2001] OJ L 101/28.

<sup>131</sup> [2001] OJ L 125/15.

EEA.<sup>132</sup> The directives provide for a single bankruptcy procedure for creditors when an insurance company or a credit institution fail.

The UK has implemented the above instruments through the Insurers (Reorganisation and Winding-Up) Regulations 2004<sup>133</sup> and the Credit Institutions (Reorganisation and Winding Up) Regulations 2004.<sup>134</sup> Even if the EUWB retains the effect of those Directives post-Brexit, issues of reciprocity will arise with EU Member States. Finally, if membership of the EEA is preserved, the directives will remain binding on the UK.

#### 1.4.4 European Account Preservation Order

This is a new procedure introduced by Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters,<sup>135</sup> which came into force on 18 January 2017. It is an additional tool available for cross-border disputes in parallel to national procedures.<sup>136</sup> Essentially, the regulation allows the claimant to apply for a freezing order against the defendant's bank accounts within the EU. The UK has not adopted the regulation in accordance with Protocol 21 to the TFEU.<sup>137</sup>

#### 1.5 Arbitration

Giving effect to arbitration agreements and the recognition and enforcement of arbitration awards is regulated internationally under the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention.) The UK is party in its own right to the Convention. Withdrawal from the EU will not have any consequences for its application. Furthermore, the Recast Jurisdiction Regulation and its predecessors exclude arbitration from its scope.<sup>138</sup> As a result, recognition and enforcement of arbitration awards fall to be dealt with as a matter of national law of the EU Member States and Lugano Contracting States, all of which are also parties to the New York Convention.

### Conclusions

- **Jurisdiction and enforcement:** The EUWB cannot ensure reciprocity in the application of the rules under the current regulations. If the EC Jurisdiction Convention applies, this is much less advantageous than the current Recast Jurisdiction Regulation. First, the rules under the Convention have not been reformed as those under the Recast Jurisdiction Regulation have been. Furthermore, its territorial scope is likely to be restricted to 15 EU Member States. Unless the 1988 Lugano Convention applies there would be no reciprocal rules with the EFTA States, except possibly any bilateral agreement with Norway.
- **Exclusive Jurisdiction Clauses:** They may be covered by the EC Jurisdiction Convention or 1988 Lugano Convention but only if one of the parties is domiciled in an EU Member State or Lugano Contracting State. If neither are, it is a matter of national law. The UK needs to accede to the 2005 Hague Convention after Brexit but this will not apply to all maritime contracts.
- **Anti-suit injunctions:** To the extent that the EC Jurisdiction Convention or 1988 Lugano Convention applies, they remain incompatible with the regime.

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<sup>132</sup> Decision of the EEA Joint Committee No 166/2002 of 6 December 2002 amending Annex IX (Financial services) to the EEA Agreement [2003] OJ L38/26 and Decision of the EEA Joint Committee No 167/2002 of 6 December 2002 amending Annex IX (Financial services) to the EEA Agreement [2003] OJ L 38/28.

<sup>133</sup> SI 2004/353, as amended.

<sup>134</sup> SI 2004/1045, as amended.

<sup>135</sup> [2014] OJ L 189/59.

<sup>136</sup> Recital 6.

<sup>137</sup> Recital 50 of Reg 655/2014.

<sup>138</sup> Art 1(2)(d), 73(2) and Recital 12 of the Recast Jurisdiction Regulation.

- **Applicable law:** No issues of reciprocity arise so there is no need for international arrangements. The EUWB will effectively retain the legal framework as it currently stands.
- **Service and evidence:** The Hague Service Convention and the 1970 Hague Convention respectively will deal with those matters, together with a number of bilateral treaties that are still in force. Issues in respect of certain States arise.
- **EU procedural law:** The only option available will be the EC Jurisdiction Convention to the extent that it will apply.
- **Insolvency:** Within the UK, the Cross Border Insolvency Regulations 2006 will apply but the cross-border recognition of UK judgments is subject to other States' private international law. The Insurers (Reorganisation and Winding-Up) Regulations 2004 and the Credit Institutions (Reorganisation and Winding Up) Regulations 2004 may be preserved but issues of reciprocity arise.
- **Arbitration:** The New York Convention will be largely unaffected by Brexit. In order to avoid any uncertainty as to the enforceability of English court jurisdiction agreements in maritime contracts and any judgment given by the English court, arbitration may become more popular.

## 2. SHIPPING

### 2.1 THE UK Shipping Registry

The Merchant Shipping Act 1995 (MSA 1995) and the Merchant Shipping (Registration of Ships) Regulations 1993 (SR Regulations)<sup>139</sup> regulate ship registration under the UK flag. The UKSR is divided into four parts<sup>140</sup>:

- Part I for ships other than fishing vessels and ‘small ships’, owned by qualifying persons,
- Part II for fishing vessels,
- Part III for small ships<sup>141</sup> owned by individuals and not requiring registration of title, and
- Part IV for bareboat chartered vessels.

Eligibility for registration depends on the ship being owned wholly or at least mainly by one or more qualifying persons. This description includes EU Member State or EEA-State nationals<sup>142</sup>, bodies incorporated in an EEA State<sup>143</sup> and European Economic Interest Groupings (EEIGs)<sup>144</sup> formed in pursuance of Article 1 of Regulation 2137/85.<sup>145</sup>

It should be noted that in the case of fishing vessels registered in Part II of the UKSR there is, in addition to the usual list of qualifying persons<sup>146</sup> an additional requirement that the vessel must be managed and its operations controlled and directed from within the UK and that any charterer, manager or operator of the vessel must itself be qualified to be the owner of the British fishing vessel.<sup>147</sup>

The SR Regulations governing ship registration form part of domestic law adopted under powers conferred by the MSA 1995. However, they have been supplemented by the Merchant Shipping (Registration of Ships) (Amendment) Regulations 1998<sup>148</sup> in order to be compliant with EU Regulation.<sup>149</sup> The regime will not be affected by Brexit given that the SR Regulations are domestic law and the EUWB will convert the EU *acquis* into English law. However, the UK will have to resolve issues concerning the ownership criteria for UK ships, the eligibility of EU entities currently owning or operating UK flagged ships as well as the potential of new registrations by EU entities.

#### 2.1.1 Non-UK nationals (EU/EEA nationals)

The SR Regulations entitle qualified shipowners to register ships in the UKSR. The definition includes nationals of either an EU Member State or EEA Contracting State, exercising their rights under the freedom of movement for work or establishment, as stipulated respectively in the TFEU<sup>150</sup> and the EEA

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<sup>139</sup> SI 1993/3138, which expanded the definition of qualifying person to EU/EEA nationals and EEA bodies corporate.

<sup>140</sup> Reg 2 of SR Regulations.

<sup>141</sup> A small ship is one under 24 metres in length, other than a fishing vessel or a submersible vessel, see reg 88.

<sup>142</sup> Reg 7(1) (a), 12(a), 89 together with reg 1.

<sup>143</sup> Reg 7(1) (f), 12(b) together with reg 1.

<sup>144</sup> Reg 7(1) (h) and 12 (c).

<sup>145</sup> Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG) [1985] OJ L 199/1.

<sup>146</sup> Reg 12.

<sup>147</sup> Reg 14.

<sup>148</sup> SI 1998/2976.

<sup>149</sup> See below under section 2.1.1.

<sup>150</sup> Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C 115/47 .

Agreement.<sup>151,152</sup> Therefore, there are ships presently registered as UK ships by EU nationals. In addition, there is also the more general point of EU nationals being able to register ships in the UKSR.

After Brexit, the freedom of movement and establishment will cease to apply vis-a-vis the UK because the Treaties will no longer be binding on it.<sup>153</sup> The question is whether EU/EEA nationals will continue to be within the MSA's definition of qualified owner or not. The EUWB will presumably retain the right at least for the short term.

Although a change in the registration criteria is not strictly speaking necessary, the UK is free to introduce restrictions on vessel ownership based on nationality under the MSA 1995. The UK's decision will need to take into account issues of reciprocity and it will also depend on the negotiations regarding the status of EU citizens in the UK and vice versa. The same considerations apply for EEA persons and corporate bodies. However, it is not certain that rights of EU citizens and EU corporate bodies will be dealt with in the same way.

In case the qualifying criteria are changed, this will have an immediate effect on existing ship registrations. At present, when eligibility is lost, registrations may be terminated in accordance with regulation 56(1) (b) of the SR Regulations. Besides, article 4 of Schedule 1 MSA 1995 envisages the situation in which a British ship loses its British connection because of transmission of the property on her by any lawful means other than a bill of sale. Such means could include inheritance, donation, requisition or abandonment to insurers. In these cases and provided the person to whom the property was transmitted makes a relevant application, the Court might order the sale of the ship and direct the proceeds of sale to that person. Although loss of eligibility does not involve any transmission of property, the provision might give an answer to what can happen to registered ships that will lose the British connection due to withdrawal from the EU.

If the UK withdraws from the EU but remains party to the EEA Agreement<sup>154, 155</sup> it will not be entitled to change eligibility criteria excluding EU/EEA nationals.<sup>156</sup>

## 2.1.2 European Economic Interest Groupings

EEIGs are currently qualified as owners of British vessels. EEIGs are legal entities introduced into EU law by EEC Reg No 2137/85.<sup>157</sup> They are governed by the European Economic Grouping Regulations 1989 (EEGR),<sup>158</sup> covering issues that the Regulation left to national law to determine. The text of the Regulation No 2137/85 has been added to Schedule 1 of the EEGR and they are expected to be preserved by the EUWB. However those entities are a European creation and their status in UK law

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<sup>151</sup> Agreement on the European Economic Area (EEA) [1994] OJ L 1/3.

<sup>152</sup> Reg 1(2). The SR Regulations were amended by Merchant Shipping (Registration of Ships) Amendment Regulations 1998 (SI 1998/2976) to include EU/EEA Nationals after two Court of Justice of the EU (CJEU) rulings, namely C-221/89 *The Queen v Secretary of State for Transport, ex parte Factortame Ltd and others* [1991] ECR I-03905 and C-246/89 *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* [1989] ECR 03125.

<sup>153</sup> Neither the CJEU rulings in n 148 will impose obligations regarding the application of domestic law, once the UK exits the EU and the single market. As it currently stands, the Government wants to terminate jurisdiction of the European Court of Justice over the UK, despite the doubts that are being voiced. See James Blitz 'Britain's unhelpful obsession with the European Court of Justice' *Financial Times* (5 July 2017) <<https://www.ft.com/content/a0e84cb8-6177-11e7-91a7-502f7ee26895?desktop=true&conceptId=05bfd9c-e2aa-314d-99c0-d864f1c91428&segmentId=7c8f09b9-9b61-4fbb-9430-9208a9e233c8#myft.notification:daily-email:content:headline:html>> last accessed 5 July 2017.

<sup>154</sup> Art 127(1) of the EEA Agreement.

<sup>155</sup> Ulrich G Schroeter and Heinrich Nemecek, 'The (Uncertain) Impact of Brexit on the United Kingdom's Membership in the European Economic Area' [2016] EBLR 921.

<sup>156</sup> Art 28, 31 of the EEA Agreement.

<sup>157</sup> The EEIGs are forms of association between companies or other legal bodies with legal capacity distinct from their members. Their activities relate to those of their members but in an ancillary way.

<sup>158</sup> SI 1989/638.

post Brexit seems uncertain. The UK could decide to curtail the rights of EEIGs regarding vessel ownership, in which case the issues discussed under section 2.1.1 apply *mutatis mutandis* to existing and future ship registrations by EEIGs. It is also possible that these forms of association are abolished within the UK altogether. Evidently, transitional arrangements will need to be put in place to accommodate existing EEIGs.

Similar considerations to those in section 2.1.1 also apply regarding the EEA Agreement. (The EEIG Regulation is listed in Annex XXII of the EEA Agreement, therefore it applies to the Members of the EEA).

### 2.1.3 Free movement between EU Ship registries

Regulation 789/2004<sup>159</sup> provides for the elimination of technical barriers in the movement of cargo and passenger ships from one EU registry to another,<sup>160</sup> while ensuring compliance with the safety and environmental requirements of the IMO.<sup>161</sup>

Upon a ship transfer, the losing register is obliged to provide all the necessary paperwork and certificates regarding the ship's condition.<sup>162</sup> The receiving register cannot refuse to register a previously EU-flag certified ship, unless there are serious issues of security and environmental safety.<sup>163</sup> Imposing extra requirements on the ship registration process is not allowed.<sup>164</sup>

Converting the Regulation into domestic law through the EUWB would not be functional since the Regulation is based on reciprocity. The UK could only apply the easy transfer procedure unilaterally, which seems beneficial for ship transfers from other EU registries to the UKSR. Transfers the other way round would be subject by default to the specific rules of each register, as they apply currently to transfers from third countries. A risk arising is the reduction of the number of ships flying the UK flag, if existing UK ships choose to make use of the freedom of transfer just before Brexit takes place, in order to avoid uncertainty.

### 2.1.4 Registration and Tonnage

The SR Regulations on ship registration were amended by Merchant Shipping (Registration of Ships, and Tonnage) Regulations 1999<sup>165</sup> to bring UK law in line with the requirements of EEC Regulations 2930/86<sup>166</sup> and 1381/87.<sup>167</sup> The amendments refer to the defining character and marking and documentation of fishing vessels. Tonnage measurements are defined by the Merchant Shipping

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<sup>159</sup> Regulation (EC) No 789/2004 of the European Parliament and of the Council of 21 April 2004 on the transfer of cargo and passenger ships between registers within the Community and repealing Council Regulation (EEC) No 613/91 [2004] OJ L 138/19.

<sup>160</sup> The Regulation does not apply to cargo ships of less than 500 gross tonnage, ships not propelled by mechanical means, wooden ships of primitive build, pleasure yachts not engaged in trade or fishing vessels, warships, ships owned or operated by an EU Member State and used only for government non-commercial purposes and a few other categories, see art 3(2).

<sup>161</sup> Art 2(a), (b). The relevant requirements derive from the International Convention for the Safety of Life at Sea (SOLAS) (1 November 1974) 1184 UNTS 2, the International Convention on Load Lines (LLC) (5 April 1966) 640 UNTS 133, the International Convention on Tonnage Measurement of Ships (TONNAGE 1969) (23 June 1969) 1291 UNTS 3, the International Convention for the Prevention of Pollution from Ships (MARPOL) (2 November 1973) 1340 UNTS 184.

<sup>162</sup> Art 4(3) of the Regulation.

<sup>163</sup> Art 6(2) of the Regulation.

<sup>164</sup> Art 5.

<sup>165</sup> SI 1999/3206.

<sup>166</sup> Council Regulation (EEC) No 2930/86 of 22 September 1986 defining characteristics for fishing vessels [1986] OJ L 274/1.

<sup>167</sup> Commission Regulation (EEC) No 1381/87 of 20 May 1987 establishing detailed rules concerning the marking and documentation of fishing vessels [1987] OJ L 132/9.

(Tonnage) Regulations 1997 under section 19 of MSA 95.<sup>168</sup> Amendments have taken place in order to include EU requirements into the regulations.<sup>169</sup> No change is expected to the current regime, given that the EUWB will preserve the EU-derived amendments as domestic law.

### 2.1.5 Tonnage Tax Regime

Provisions regarding tonnage tax are included in Schedule 22 of the Finance Act 2000<sup>170</sup> (FA 2000) and the Tonnage Tax Regulations 2000.<sup>171</sup> The tonnage tax system provides for a form of flat rate corporate tax calculated on the basis of a notional profit according to the number and size of the fleet operated.<sup>172</sup> The regime constitutes a state aid under article 107 TFEU and as such it was approved in 2000 by the European Commission (Commission) under the 1997 Commission guidelines on State aid to Maritime Transport and then again in 2005 under the revised 2004 Guidelines.<sup>173</sup>

Section 16 of FA 2000 sets the eligibility criteria for a company to submit to the regime, whereas section 19 provides for the qualifying ships. Company eligibility is not subject to being incorporated in the UK; what is required is strategic and commercial operation taking place from within the UK. As for the ships, there is no general obligation for eligible ships to bear the UK flag. A Community flagging requirement is imposed by section 22A onwards when specific circumstances exist.<sup>174</sup>

Moreover, a company under the UK tonnage tax regime is obliged to provide training to a minimum number of cadets and ratings.<sup>175</sup> By virtue of regulation 7 of the Tonnage Tax (Training Requirement) Regulations 2000, any EEA national or British citizen from the Channel Islands or the Isle of Man is eligible for training provided that he/she ordinarily resides in the UK.

The Guidelines<sup>176</sup> against which approval was granted to the UK tonnage tax are not strictly speaking formal EU law, like regulations or directives. They rather fall under the soft law category, which can have legal consequences but not firm binding effects.<sup>177</sup> The guidelines to State aid acquire binding force within the EU because they determine the limits of permitted state aid.<sup>178</sup> Hence, the UK and all the other Member States have to comply with the guidelines in order for their respective tonnage tax schemes to be approved by the Commission under articles 107-108 TFEU.

After withdrawal, the UK will not be bound by the TFEU and therefore, no restrictions will be imposed as regards State aid in general. However, the tax tonnage system as it stands is domestic law: the legal basis of it is FA 2000, which will remain good law until Parliament decides to repeal or amend it.

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<sup>168</sup> SI 1997/1510.

<sup>169</sup> The Merchant Shipping (Tonnage) (Fishing Vessels) (Amendment) Regulations 1998 (SI 1998/1916) and the Merchant Shipping (Registration of Ships, and Tonnage) (Amendment) Regulations 1999 (SI 1999/3206) giving effect to Council Regulation (EEC) No 2930/86.

<sup>170</sup> As amended by the Finance Act 2005.

<sup>171</sup> SI 2000/2303.

<sup>172</sup> Para 4, Sch 22 of the Finance Act 2000.

<sup>173</sup> Commission Communication (97/C 205/05) Community Guidelines on State Aids to maritime transport [1997] OJ C 205/5 and Commission Communication C (2004) 43 Community Guidelines on State aid to maritime transport [2004] OJ C 013/3. See also Statement of Practice 4 (Policy Paper, HM Revenue and Customs, 1 April 2000) para 34 < <https://www.gov.uk/government/publications/statement-of-practice-4-1983/statement-of-practice-4-1983> > last accessed 5 July 2017.

<sup>174</sup> This section was added by Sch 7 of the Finance Act 2005 to bring the regime in line with the revised 2004 Guidelines. Other amendments include the inclusion of dredgers and tugs in eligible vessels under specific conditions and the obligation of non-Community flagged ships to prove compliance with safety and other standards, see ss 20A and 43A.

<sup>175</sup> See Part IV and Tonnage Tax (Training Requirement) Regulations 2000 (SI 2000/2129).

<sup>176</sup> Both the 1997 and the 2004 Community guidelines on State aid to maritime transport.

<sup>177</sup> Francis Synder, 'The effectiveness of European Community Law: Institutions, Processes, Tools and Techniques' (1993) 56 MLR 19, 32.

<sup>178</sup> Michael Blauberger, 'From Negative to Positive Integration. European State aid control through Soft and Hard Law', (Discussion Paper 4, Max Planck Institute for the Study of Societies, 2008), 16-20.

Subject to any withdrawal agreement, the UK could revert to flag neutrality (as was the case before the revised 2004 guidelines) or lift the restrictions on vessel eligibility (for example, include sea-going harbour tugs which were excluded by the 2004 guidelines<sup>179</sup>). Therefore, the UK is free to amend the existing regime in accordance with its national priorities.

## 2.2 Maritime Labour

UK employment law is, to a large extent, shaped and safeguarded by EU law (i.e. EU Treaties and EU employment regulation) and as such, it is susceptible to change once Brexit takes place.<sup>180</sup> The same is true for maritime employment but to a lesser extent: in spite of maritime labour falling under the general EU framework like any other kind of labour, it is largely regulated at a global level through the International Labour Organization (ILO) and IMO, due to its international character. Such legal requirements ought not to be impacted by withdrawal from the EU.

International standards, including those concerning maritime labour, are regularly adopted through the implementation of EU law. By and large, the EU has embraced international regulation in its own legal order for the sake of global harmonisation<sup>181</sup> by adjusting it for EU purposes. Consequently, a good deal of the EU measures the UK has implemented reflect simultaneously European and IMO/ILO requirements. The EUWB, will retain the EU *acquis* as domestic law. The UK will then need to decide whether it wishes to disapply any EU gold plating in employment laws and whether, as a matter of strategy, it will comply in the long term with the lower IMO standards or the higher regional (EU) standards. This will be linked with the general policy on employee rights after Brexit.

### 2.2.1 Manning, training and certification of seafarers

Issues of training and certification of seafarers on-board UK ships are dealt with by the Merchant Shipping (Standards of Training, Certification and Watchkeeping) (STCW) Regulations 2015.<sup>182</sup>

The Regulations provide that only seafarers qualified in accordance with the requirements of the International Convention on Standards of Training, Certification and Watch-keeping for Seafarers 1978 (STCW)<sup>183</sup> can man UK registered vessels under sections 47-57 of MSA 1995.<sup>184</sup> A qualified seafarer is one that holds a Certificate of Competence or equivalent Competence or a Certificate of Proficiency<sup>185</sup> issued by the Maritime and Coastguard Agency (MCA). The Regulations impose obligations to shipowners and masters to ensure the safe manning of their British ships but also provide for the inspection of non-British ships when in port under specified circumstances.<sup>186</sup>

The STCW Regulations comply with the international obligations imposed by the amended STCW while at the same time they implement parts of Directive 2008/106<sup>187</sup> on the minimum level of training

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<sup>179</sup> House of Commons Transport Committee, 'Transport: 2<sup>nd</sup> report of Session 2004-2005' (Transport Committee Publications, 2005) para 25 < <https://www.publications.parliament.uk/pa/cm200405/cmselect/cmtran/299/29904.htm#n25> > last accessed 5 July 2017.

<sup>180</sup> For a general overview of impact on employment rights see Michael Ford, 'Workers' rights from Europe: The impact of Brexit' (Legal Opinion to Trades Union Congress, 10 March 2016) < [https://www.tuc.org.uk/sites/default/files/Brexitper\\_cent20Legalper\\_cent20Opinion.pdf](https://www.tuc.org.uk/sites/default/files/Brexitper_cent20Legalper_cent20Opinion.pdf) > last accessed 5 July 2017.

<sup>181</sup> Although occasionally it went further than international minimum requirements.

<sup>182</sup> SI 2015/782.

<sup>183</sup> (7 July 1978), as amended by the 2010 Manila Amendments to the Annex.

<sup>184</sup> Reg 5.

<sup>185</sup> Masters and officers hold Certificates of Competency, whereas ratings hold Certificates of Proficiency, see regs 6-27.

<sup>186</sup> Reg 53.

<sup>187</sup> Directive 2008/106/EC of the European Parliament and of the Council of 19 November 2008 on the minimum level of training of seafarers (recast) [2008] OJ L 323/33, as amended by Directive 2012/35/EU of the European Parliament and of the Council of 21 November 2012 [2012] OJ L 343/78.

for seafarers.<sup>188</sup> Although not a party to the STCW, the EU based the directive on the Convention in order to establish minimum requirements for seafarers' training with a view to promoting maritime safety and pollution prevention.<sup>189</sup>

Withdrawal for the EU will leave the provisions enforcing STCW obligations intact. To the extent that the regulations have the ECA 1972 as a legal basis, the EUWB is expected to preserve them within UK law.

Generally, the Directive adopts the STCW standards without derogations. An area where the EU seemingly gold-plates the convention is the fitness for duty, where it is expressly stated that the minimum limit of daily rest cannot be diminished by collective agreement.<sup>190</sup> The Convention does not contain any such specification, although Table A-VIII/1 (9) of the STCW Code only allows exceptions to the weekly minimum rest hours. The application of this prohibition will be subject to change after withdrawal.

Another EU addition to the STCW regime is the mutual recognition of certificates within the EEA. This benefit allows UK seafarers to be engaged under any EU flag and conversely allows the UK to employ any EU/ EEA seafarer. The EUWB cannot guarantee reciprocity after Brexit. The UK being from that point third party, UK certificates need to be recognised by the Commission first before another Member State/EEA State can recognise them, while at the same time Member States/EEA States have a discretion in recognition of third State certificates.<sup>191</sup> In reality, it is unlikely that there will be practical barriers in the recognition of UK certificates by the EU, given the fact that the UK is a party to the STCW and a maritime nation with high credentials regarding the training of seafarers. Reciprocal recognition nonetheless is an arrangement that should be preserved.<sup>192</sup> The MSA 1995 does not preclude seafarers of any nationality from working on-board UK ships, although it allows for the introduction of conditions as to nationality.<sup>193</sup>

## 2.2.2 Seafarers' Rights

### 2.2.2.1 *The Maritime Labour Convention*

Employment rights of seafarers are found in the Maritime Labour Convention 2006 (MLC 2006).<sup>194</sup> The Convention came into force in August 2013 and was adopted by the ILO with a view to provide '*a single, coherent instrument embodying as far as possible all up-to-date standards of existing international maritime labour Conventions and Recommendations, as well as the fundamental principles to be found in other international labour Conventions.*'<sup>195</sup> So far the MLC 2006 has been ratified by 81 countries, including all the EU Member States.<sup>196</sup> The Convention was last amended in 2014.<sup>197</sup>

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<sup>188</sup> See explanatory note.

<sup>189</sup> See Recitals 7 and 2 of Dir 2008/106 and Dir 2012/35 respectively.

<sup>190</sup> Art 15 (11) as amended.

<sup>191</sup> Art 19(2) as amended.

<sup>192</sup> 'Blueprint for Growth' (UK Chamber of Shipping, 2016) 26 < <https://www.ukchamberofshipping.com/blueprint-growth/download-full-publication/> > last accessed 5 July 2017.

<sup>193</sup> Ss 47 (1) and (4) of the MSA 1995.

<sup>194</sup> (23 February 2006) (2006) 45 ILM 792.

<sup>195</sup> See preamble of the Convention.

<sup>196</sup> 'NORMLEX-Ratifications of Maritime Labour Convention 2006' (ILO) < [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300\\_INSTRUMENT\\_ID:312331](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312331) > last accessed 5 July 2017.

<sup>197</sup> The amendments were approved by the 103rd session of the International Labour Conference on 11 June 2014 and came into force on 18 January 2017. The UK has not yet implemented the amendments domestically but is under an obligation to do so. Currently, amendments to the existing domestic framework are in the consultation process.

The MLC 2006 forms part of EU law. Authorisation to ratify the Convention ‘*in the interests of the Community*’ was given to the Member States by virtue of Council Decision 2007/431/EC.<sup>198</sup> Such an authorisation was required because the matters addressed in the Convention fall mainly under the shared competence of EU and Member States (with a limited part on social security schemes being under EU exclusive competence).<sup>199</sup> Naturally, the Convention imposes international obligations on the signatory Member States as regards the other parties but it cannot create obligations vis-a-vis the EU, unless it is transposed into EU law. Thus, the MLC 2006 was given effect internally through the following directives.

- Directive 2009/13/EC<sup>200</sup> implementing the Social Partners Agreement on the MLC 2006. The Directive essentially adopts the same measures found in the MLC 2006 under Titles 1 to 4.<sup>201</sup>
- Directive 2013/54/EC<sup>202</sup> on flag State responsibilities for compliance and enforcement of MLC 2006. This is a stand-alone directive dealing exclusively with enforcement of flag State responsibilities emanating from the MLC 2006.
- Directive 2013/38/EC<sup>203</sup> amending Directive 2009/16/EC on port State Control to include the MLC 2006 standards.

The UK has also included the MLC 2006 in the list of Community Treaties within the meaning of 1(2) of the ECA 1972.<sup>204</sup> Nevertheless, as a party to it is under an obligation to abide by the MLC 2006 as a matter of public international law even after Brexit and the repeal of ECA 1972.<sup>205</sup>

The standards established by the Convention have been inserted in UK law in a non-systematic way. The basic statutory instruments about the MLC 2006 are the following:

The Merchant Shipping (Maritime Labour Convention) (Minimum Requirements for Seafarers etc.) Regulations 2014<sup>206</sup>

The Merchant Shipping (Maritime Labour Convention) (Recruitment and Placement) Regulations 2014<sup>207</sup>

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<sup>198</sup> Council Decision 2007/431/EC of 7 June 2007 authorizing Member States to ratify, in the interests of the European Community, the Maritime Labour Convention, 2006, of the International Labour Organization [2007] OJ L 161/63, recital 8.

<sup>199</sup> Jennifer Lavelle (ed), *The Maritime Labour Convention 2006 in the European Union* (Routledge, 2014) para 1.4.

<sup>200</sup> Council Directive 2009/13/EC of 16 February 2009 implementing the Agreement concluded by the European Community Shipowners’ Associations (ECSA) and the European Transport Workers’ Federation (ETF) on the Maritime Labour Convention, 2006, and amending Directive 1999/63/EC [2009] OJ L 124/30. The EU implemented the MLC 2006 through an agreement because it was required to do so as a matter of EU law (see Title X, art 155 TFEU). The MLC 2006 does not necessarily require a collective agreement for its implementation by its signatories; instead it allows States to give it effect in various ways (see Art IV (5) MLC 2006).

<sup>201</sup> Jennifer Lavelle (ed), *The Maritime Labour Convention 2006 in the European Union* (Routledge, 2014) para 1.36. Although the MLC 2006 makes provision for social security of seafarers, the relevant regulations were not included in the Social Partners’ agreement because they fall under the exclusive competence of the EU. See below. Nonetheless, obligations of the States party to the MLC 2006 are imposed by the Convention directly.

<sup>202</sup> Directive 2013/54/EU of the European Parliament and of the Council of 20 November 2013 concerning certain flag State responsibilities for compliance with and enforcement of the Maritime Labour Convention, 2006 [2013] OJ L 329/1.

<sup>203</sup> Directive 2013/38/EU of the European Parliament and of the Council of 12 August 2013 amending Directive 2009/16/EC on port State control [2013] OJ L 218/1.

<sup>204</sup> European Communities (Definition of Treaties) (Maritime Labour Convention) Order 2009 (SI 2009/1757).

<sup>205</sup> Arts I, V of the MLC 2006.

<sup>206</sup> SI 2014/1613.

<sup>207</sup> SI 2014/1615.

The Merchant Shipping (Hours of Work) Regulations 2002<sup>208</sup>

The Merchant Shipping (Maritime Labour Convention) (Health and Safety) (Amendment) Regulations 2014<sup>209</sup>

The Merchant Shipping (Port Control) Regulations 2011<sup>210</sup>

The Merchant Shipping (Maritime Labour Convention) (Medical Certification) Regulations 2010<sup>211</sup>

The Merchant Shipping (Maritime Labour Convention) (Survey and Certification) Regulations 2013<sup>212</sup>

The Merchant Shipping (Maritime Labour Convention) (Consequential and Minor Amendments) Regulations 2014<sup>213</sup>

The EUWB will avoid the complications that could have arisen because the above statutory instruments, except for the Recruitment and Placement Regulations 2014, have a double legal basis. More specifically, they are founded on ECA 1972 and MSA 1995 and hence, even without the EUWB they would have partly survived Brexit and the ECA 1972 repeal, but only to the extent that they implement the MLC 2006 directly.<sup>214</sup>

The EUWB will keep the implementation of the MLC 2006 intact for the period immediately after Brexit avoiding confusion and uncertainty of law. For the future, the UK will have the freedom to decide whether it wants to implement purely MLC 2006 standards avoiding any extra EU requirements currently in place. It is worth noting that a cursory comparison between the MLC 2006 and the EU Directives transposing it into EU law reveals no substantive differences. In any case, the EU directives will remain relevant for UK ships calling at EU ports post Brexit.

#### *2.2.2.2 EU derived employment law*

The EU has also introduced its own regulation for the labour market which extends to maritime labour. Currently, the adopted measures have been aligned with the MLC 2006 where there was such a need. They apply in parallel to the MLC 2006 requirements.

Directive 89/391<sup>215</sup> on the Health and safety of workers at work is a framework instrument applying to all categories of workers, setting the base for subsequent directives. In the UK, the framework together with two ‘daughter’ directives can be found in the Merchant Shipping and Fishing Vessels (Health and Safety at Work) Regulations 1997.<sup>216</sup> The Regulations give effect to the framework directive, to Directive 91/383/EEC<sup>217</sup> for fixed-duration or temporary employment relationships and Directive

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<sup>208</sup> SI 2002/2125.

<sup>209</sup> SI 2014/1616.

<sup>210</sup> SI 2011/2601.

<sup>211</sup> SI 2010/737.

<sup>212</sup> SI 2013/1785.

<sup>213</sup> SI 2014/1614.

<sup>214</sup> For example : the Merchant Shipping (Maritime Labour Convention (Recruitment and placement) Regulations 2014, implementing reg 1.4 MLC 2006; the Merchant Shipping (Maritime Labour Convention) (Medical Certification) Regulations 2010, implementing reg 1.2; the Merchant Shipping (Maritime Labour Convention) (Survey and Certification) Regulations 2013 implementing reg 5.1; the Merchant Shipping (Maritime Labour Convention) (Health and Safety) Regulations 1997, to the extent they implement reg 4.3.

<sup>215</sup> Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work [1989] OJ L 183/1.

<sup>216</sup> SI 1997/2962.

<sup>217</sup> Council Directive 91/383/EEC of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed duration employment relationship or a temporary employment relationship [1991] OJ L 206/19.

92/85/EEC<sup>218</sup> regarding employees that are pregnant/recently gave birth/breastfeeding (and have also been amended to comply with the MLC 2006 requirements by the Merchant Shipping (Maritime Labour Convention) (Health and Safety) (Amendment) Regulations 2014).

Moreover, Directive 92/29<sup>219</sup> on the medical treatment on-board vessels is brought into UK law through the Merchant Shipping and Fishing Vessels (Medical Stores) Regulations 1995.<sup>220</sup> (The MLC 2006 requirements on medical care are found in the Merchant Shipping (Maritime Labour Convention) (Minimum Requirements for Seafarers etc.) Regulations 2014).

Regarding working time for seafarers, there is Directive 1999/63<sup>221</sup> and Directive 1999/95,<sup>222</sup> which extends the former to seafarers working on-board ships calling at EU ports. Both have been transposed in the UK through the Merchant Shipping (Hours of Work) Regulations 2002. Within EU law, the working hours of seafarers have been aligned with the MLC 2006 minimum standards through the 2009 Directive. In the UK, the 2002 Regulations have been accordingly amended by the Merchant Shipping (Maritime Labour Convention) (Hours of Work) (Amendment) Regulations 2014.<sup>223</sup>

All the above statutory instruments were adopted by virtue of ECA 1972. The EUWB will presumably preserve them in UK law for the short term but they are subject to review for the future.

Regarding social security, the EU adopted Regulation 883/2004<sup>224</sup> on the co-ordination of Member States on social security systems. According to the regulation, any period of employment on-board a vessel flying an EU flag is deemed as a period of employment under the UK flag<sup>225</sup> for granting social security benefits. The regulation will stop applying after Brexit but the EUWB is expected to preserve its effect in UK law so that the eligibility of UK seafarers for social security schemes will not be affected.

Furthermore, EU law has allowed for the exclusion of seafarers from a number of social security measures. Directive 2015/1794<sup>226</sup> has amended five directives as regards those exclusions: Directive 2008/94<sup>227</sup> on insolvency of employer, Directive 2009/38<sup>228</sup> on European Works Council, Directive

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<sup>218</sup> Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding [1992] OJ L 348/1.

<sup>219</sup> Council Directive 92/29/EEC of 31 March 1992 on the minimum safety and health requirements for improved medical treatment on-board vessels [1992] OJ L 113/19.

<sup>220</sup> SI 1995/1802.

<sup>221</sup> Council Directive 1999/63/EC of 21 June 1999 concerning the Agreement on the organisation of working time of seafarers concluded by the European Community Shipowners' Association (ECSA) and the Federation of Transport Workers' Unions in the European Union (FST) [1999] OJ L 167/33.

<sup>222</sup> Directive 1999/95/EC of the European Parliament and of the Council of 13 December 1999 concerning the enforcement of provisions in respect of seafarers' hours of work on-board ships calling at Community ports [2000] OJ L 1429.

<sup>223</sup> SI 2014/308.

<sup>224</sup> Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [2004] OJ L 166/1.

<sup>225</sup> Arts 6 and 11(4).

<sup>226</sup> Directive (EU) 2015/1794 of the European Parliament and of the Council of 6 October 2015 amending Directives 2008/94/EC, 2009/38/EC and 2002/14/EC of the European Parliament and of the Council, and Council Directives 98/59/EC and 2001/23/EC, as regards seafarers [2015] OJ L 263/1.

<sup>227</sup> Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer (Codified version) [2008] OJ L 28336.

<sup>228</sup> Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast)[2009] OJ L 122/28.

2002/14<sup>229</sup> on Information and Consultation of Employees, Directive 98/59<sup>230</sup> on collective redundancies and Directive 2001/23<sup>231</sup> on the transfer of undertakings. The UK has not yet transposed the 2015/1794 directive, which has to be implemented by 10 October 2017.<sup>232</sup> However, domestic law is largely in accord with the amendments because the UK has not made use of the exclusions in every instance.

- The Insolvency Directive 2008/94 is given effect by Parts XI and XII of the Employment Rights Act 1996. Merchant seamen are not eligible to claim payment from the National Insurance Fund in case their employer becomes insolvent.<sup>233</sup>
- Directive 2001/23 on transfer of undertakings is implemented by the Transfer of Undertakings Regulations 2006 (TUPE 2006)<sup>234</sup> and does not exclude seagoing ships from its scope.
- The European Works Council Directive 2009/38 is implemented by the Transnational Information and Consultation of Employees Regulations 1999<sup>235</sup> as amended, which contains a limited exception for merchant seamen.<sup>236</sup>
- The Consultation Directive 2002/14 is transposed through the Information and Consultation of Employees Regulations 2004,<sup>237</sup> which also poses a limited exception for merchant seamen.<sup>238</sup>
- The Collective Redundancies Directive 98/59 took effect through the Trade Union and Labour Relations (Consolidation) Act 1992. The Act contains a limited exclusion for mariners and share fishermen.<sup>239</sup>

Withdrawal from the EU ends the obligation of the UK to align its legal framework with the recent amendment. The point at which the obligation ceases is not clear, though. Formal withdrawal will officially happen two years after the article 50 TFEU notification to the European Council, which took place on 29 March 2017. Until that point in time, the law remains as it currently stands, including the obligation for transposition of the Directive. Whether or not such obligation will be suspended during the negotiations remains to be seen.

Brexit removes the legal basis for some of the aforementioned instruments. The measures on insolvency contained in Employment Rights Act 1996 and the Trade Union and Labour Relations (Consolidation) Act 1992 remain intact, being primary legislation. The same is true for the Information and Consultation of Employees Regulations 2004 because they come under the powers of the ERA 1996. The TUPE 2006 regulations and the Transnational Information and Consultation of Employees Regulations 1999, having the ECA 1972 as their legal basis, will need to be preserved by the EUWB. Specifically the amendment to the transfer of undertakings Directive can provide benefits to the UK shipping industry, as it clarifies that the sale of a ship as an asset does not constitute a '*transfer of undertaking*' as defined

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<sup>229</sup> Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community - Joint declaration of the European Parliament, the Council and the Commission on employee representation [2002] OJ L 80/29.

<sup>230</sup> Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies [1998] OJ L 22/16.

<sup>231</sup> Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses [2001] OJ L 82/16.

<sup>232</sup> Art 8 (1) of Dir 2015/1794.

<sup>233</sup> S 199(4) of the ERA 1996.

<sup>234</sup> SI 2006/246

<sup>235</sup> SI 1999/3323.

<sup>236</sup> Reg 46.

<sup>237</sup> SI 2004/3426.

<sup>238</sup> Reg 43.

<sup>239</sup> Ss 283,284.

by the Directive. Consequently, it provides certainty and excludes ship sales from the costly requirement of transferring the crew together with the ship. Given the important function of ship sales in generating investment and cash-flow and also in renewing or adjusting the fleet according to given business needs,<sup>240</sup> a requirement to transfer the crew together with the ship would be problematic for buyers and crew alike.<sup>241</sup>

As a conclusion, the EUWB will keep UK's maritime labour legal landscape intact after Brexit. Nonetheless, the UK is free to review its labour laws for the future always within the limits imposed by international law but without the duty of loyal cooperation with the EU.<sup>242</sup> As a result, it will be under no obligation to adhere to EU policies and objectives or refrain from action that could negatively affect them.

### 2.2.3 Dockers

There is no EU regulation specific to port labour. The European Commission initiated social dialogue between port workers and employers in 2013 but there are no results available yet. Nevertheless, national port labour regimes are subject to the EU treaties and general EU labour law, in addition to international regulation (mainly adopted by ILO and IMO).<sup>243</sup> Thus the regulations applicable to dockers as well as to other employees will become a subject of national negotiation with UK employers and UK national policy.

### 2.2.4 EEA Agreement

If the UK will continue to be a party to the EEA Agreement, EU regulation on employment and social policy continues to be binding on the UK despite Brexit.

## 2.3. Classification Societies

Classification societies are private independent legal entities performing both private and public functions. On one hand, they establish minimum technical standards for ships and provide shipowners with classification, survey and certification services to their vessels under private law contracts. Those services are important for the owners regarding the insurability and commercial operation of their ships<sup>244</sup> but also benefit other parties in the industry: insurers, cargo interests, charterers<sup>245</sup>, seafarers and coastal interests.<sup>246</sup>

On the other hand, classification societies act on behalf of the flag States to survey and certify their vessels with reference to international Convention standards, EU and national laws, thus discharging legal obligations of the States. In order to carry those 'statutory surveys', classification societies need formal authorization by the flag States, which grant them the status of Recognized Organisations (ROs).

When classification societies act as private service providers their contractual relationships are regulated by national law. However, when acting as representatives of the flag State, they are subject

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<sup>240</sup> Martin Stopford, *Maritime Economics* (3<sup>rd</sup> edn, Routledge 2009) para 5.5.

<sup>241</sup> 'Blueprint for Growth' (UK Chamber of Shipping, 2016) < <https://www.ukchamberofshipping.com/blueprint-growth/download-full-publication/> > last accessed 5 July 2017.

<sup>242</sup> Art 4(3), 13(2) of the Treaty on the European Union [2012] OJ L 326/13.

<sup>243</sup> Eric Van Hooydonk, 'Port Labour in the EU: Volume I-The EU perspective' (Portius, International and EU Port Law Centre, 8 January 2013) 55-61 and 141-147 < <http://ec.europa.eu/transport/sites/transport/files/modes/maritime/studies/doc/2013-01-08-ec-port-labour-study-vol1.pdf> > last accessed 5 July 2017.

<sup>244</sup> Juan Luis Pulido Begines, 'The EU Law on Classification Societies: Scope and liability Issues' (2005) 36 JMLC 488.

<sup>245</sup> Jan De Bruyne, 'Liability of Classification Societies: Cases, Challenges and Future Perspectives' (2014) 45 JMLC 181.

<sup>246</sup> Yvonne Baatz (ed), *Maritime Law* (3<sup>rd</sup> edn, Informa, 2014), Chapter 9, Filippo Lorenzon, *Safety and Compliance*, 363.

to IMO and EU regulation as discussed below. This part of their function is therefore of interest to the present study.

### 2.3.1 IMO Regulation

Under article 94(3) of the UNCLOS, flag States are responsible for ensuring safety at sea. International conventions such as the International Convention for the Safety of Life at Sea (SOLAS),<sup>247</sup> the International Convention for the Prevention of Pollution from Ships (MARPOL),<sup>248</sup> the International Convention on Load Lines (LLC),<sup>249</sup> the International Convention on Tonnage Measurement of Ships (TONNAGE 1969),<sup>250</sup> and the 2001 International Convention on the Control of Harmful Anti-fouling Systems on Ships (AFSC)<sup>251</sup> impose specific obligations on the flag States to perform survey and certification of their ships through their administrative officers or alternatively, to delegate their responsibilities to surveyors or ROs.<sup>252</sup>

In order to establish a uniform global regime on the assessment and criteria regarding ROs, the IMO adopted the Recognised Organisations Code (RO Code), which consolidates all the existing international instruments on the topic.<sup>253</sup> It contains the minimum requirements ROs need to comply with a) in order to be recognised and b) while performing their delegated duties. The Code also prescribes the minimum standards the flag States need to follow when authorizing ROs and gives guidance regarding the oversight of the organisations.<sup>254</sup> The Code applies generally to any organisation interested in being recognised or already recognised and to any flag State.<sup>255</sup> Moreover, it refers to statutory certification and services performed under an open-ended list of mandatory IMO instruments.<sup>256</sup>

In addition to the above instrument, the IMO adopted a Model Agreement for the Authorisation of Recognised Organisations Acting on Behalf of the Administration.<sup>257</sup> The agreement is not a mandatory instrument but it is most commonly used as the basis of authorisation agreements, supplemented by societies' terms and conditions.<sup>258</sup>

Brexit will not affect the IMO regulation on the matter and hence, the RO Code will remain applicable to the UK.

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<sup>247</sup> (1 November 1974) 1184 UNTS 2.

<sup>248</sup> (2 November 1973) 1340 UNTS 184.

<sup>249</sup> (5 April 1966) 640 UNTS 133.

<sup>250</sup> (23 June 1969) 1291 UNTS 3.

<sup>251</sup> (5 October 2001) [2008] ATS 15 / AFS/CONF/26.

<sup>252</sup> SOLAS regulation I/6, MARPOL Annex I regulation 6, MARPOL Annex II regulation 8, MARPOL Annex IV regulation 4, MARPOL Annex VI regulation 5, LLC 1966/1988 article 13, TONNAGE 1969 article 7 and AFSC 2001 Annex 4 regulation 1.

<sup>253</sup> The Code was adopted by Resolutions of the Marine Environment Protection Committee (MEPC) 237 (65) (17 May 2013) and the Maritime Security Committee (MSC) 349 (92) (21 June 2013) on Recognised Organisations, which entered into force in January 2015 through MARPOL annexes I and II, SOLAS and the 1988 Protocol relating to the LLC (4 November 1993) IMO Doc HSSC/CONF/12. . The Code consolidates pre-dating IMO resolutions A.739 (18) (4 November 1993) on Guidelines for the authorization of organizations acting on behalf of the Administration and A.789 (19) (23 November 1995) on Specifications on the survey and certification functions of recognized organizations (ROs) acting on behalf of the Administration.

<sup>254</sup> See art 2.2 Part I.

<sup>255</sup> Art 2.1.

<sup>256</sup> Art 2.3.

<sup>257</sup> Circ MSC/Circ.788/MEPC/Circ.325 (27 March 1997) which also includes Resolutions A.739 (18) and A.789 (19).

<sup>258</sup> Juan Luis Pulido Begines, 'The EU Law on Classification Societies: Scope and Liability Issues' [2005] 36 JMLC 488, 496.

### 2.3.2 EU regulation

Within the EU, rules on the recognition of classification societies are found in Directive 2009/15, Regulation 391/2009 and Regulation 788/2014.<sup>259</sup> The regime deals with inspection, survey and certification services under SOLAS, MARPOL and the LLC.<sup>260</sup> It is therefore, quite restricted in scope in comparison to the IMO regulation.

The Directive defines the mode of operation of Member States and ROs vis-à-vis each other. It allows Member States to authorize only ROs recognised by the Commission for a limited scope of activities, notably '*inspections and surveys related to statutory certificates*'.<sup>261</sup> It defines the minimum contents of the written authorisation agreement.<sup>262</sup> Furthermore, it imposes an obligation to monitor the authorised ROs, to report to the Commission cases of certified ships that pose serious threat to safety and the environment<sup>263</sup> and ensure that the ships flying the EU flag are built under the standards of recognised ROs.<sup>264</sup> The Directive is implemented domestically by Merchant Shipping Notice (MSN) 1672 Amendment 3 and a number of statutory instruments and administrative measures under ECA 1972.<sup>265</sup>

The Regulation establishes measures that the organisations need to adhere to in order to become recognised ROs. Recognition is granted only after the Commission assesses compliance with a list of minimum criteria, set out in Annex 1 of the regulation. The ROs are subject to biennial assessment by the Commission and the Flag States are obliged to provide relevant information to this end.<sup>266</sup> Non-compliance with the minimum standards can lead to the imposition of fines or penalties and ultimately withdrawal of recognition on certain grounds.<sup>267</sup> In addition, the ROs must consult and co-operate with each other as regards technical standards and transfer of class of ships.<sup>268</sup> Finally, ROs need to establish an independent quality assessment and certification entity, which will assess and certify their quality management standards; it will interpret such international standards and will aim at improving such processes internally.<sup>269</sup>

The EU regime on ROs is narrower than the IMO regime: it only concerns the delegation of certain survey and certification services under SOLAS, MARPOL and the LLC. It also makes reference to the

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<sup>259</sup> Directive 2009/15/EC of the European Parliament and of the Council of 23 April 2009 on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrations (recast), as amended [2009] OJ L 131/47; Regulation (EC) No 391/2009 of the European Parliament and of the Council of 23 April 2009 on common rules and standards for ship inspection and survey organisations [2009] OJ L 131/11; Commission Regulation (EU) No 788/2014 of 18 July 2014 laying down detailed rules for the imposition of fines and periodic penalty payments and the withdrawal of recognition of ship inspection and survey organisations pursuant to Articles 6 and 7 of Regulation (EC) No 391/2009 of the European Parliament and of the Council [2014] OJ L 214/12. The first regulation together with the Directive are the recast of Council Directive 94/57/EC of 22 November 1994 on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrations [1994] OJ L 319/20.

<sup>260</sup> Art 1(b) of Reg 391/2009 and art 2(d) of Dir 2009/15.

<sup>261</sup> Art 3(2).

<sup>262</sup> Art 5.

<sup>263</sup> Arts 9, 10.

<sup>264</sup> Art 11.

<sup>265</sup> The Merchant Shipping (Passenger Ship Construction: Ships of Classes I, II and II(A)) Regulations 1998, as amended (SI 1998/2514); the Merchant Shipping (Cargo Ship Construction) Regulations 1997, as amended (SI 1997/1509); the Merchant Shipping (High Speed Craft) Regulations 2004, as amended (SI 2004/302) and others, see National Transposition Measures communicated by the Member States concerning Directive 2009/15' (Eur-Lex) < <http://eur-lex.europa.eu/legal-content/EN/NIM/?uri=celex:32009L0015> >.

<sup>266</sup> Art 8.

<sup>267</sup> Arts 5-7 and also Reg 788/2014.

<sup>268</sup> Art 10.

<sup>269</sup> Art 11.

Model Agreement<sup>270</sup> as the base of any formalized authorisation agreement and to IMO instruments which are already part of the Code.<sup>271</sup>

Post-Brexit, the EUWB is expected to retain the effect of the Regulation and the Directive, although adaptations will need to be effected for the instruments to be operational, for example the role of the Commission in assessing and monitoring ROs must be entrusted to the UK State or other body. ROs already authorised in the UK (and currently recognised by the Commission) do not seem to be affected if the regime is preserved for the short term. The UK could decide only to apply the RO Code for the future, in which case existing ROs do not appear to be at risk because presumably they already cover the IMO standards, which are more general than the European. Quite possibly though, existing authorisation agreements between the UK and ROs will have to be re-negotiated and re-established.

It is important that UK organisations that operate in the EU, or consider doing so, will still need to comply with the EU regime even if it is abolished in the UK. Finally, the European regime of ROs will remain mandatory for the UK if EEA membership is retained.

## 2.4 Ship regulations

### 2.4.1 Air pollution

On the international level, air pollution caused by ships is the subject of Annex VI of MARPOL, which came into force in 2005. The Annex imposes limits to or even prohibits the emission of air pollutants found in ships' exhaust fumes.<sup>272</sup> It is concerned with emissions of Sulphur Oxides, Nitrogen Oxides and particulate matter and establishes Emission Control Areas (ECAs). The UK has implemented those measures through the Merchant Shipping (Prevention of Air Pollution from Ships) Regulations 2008.<sup>273</sup> The latest amendment of the Annex in October 2016 introduced a set of requirements for the reporting of fuel consumption by ships, also known as the IMO Monitoring, Reporting and Verifying (MRV) scheme for fuel consumption data, which will come into force on 1<sup>st</sup> March 2018.<sup>274</sup> The amendment forms part of a wider IMO policy to reduce GHG emissions, which has the monitoring and reporting of the CO<sub>2</sub> produced by ships as a starting point.<sup>275</sup>

Within the EU context, two instruments regulate air pollution: the Sulphur Directive<sup>276</sup> and the MRV Regulation.<sup>277</sup> The Sulphur Directive as amended in 2012 implements the IMO standards found in Annex VI MARPOL and it is brought into UK law by the Merchant Shipping (Prevention of Air Pollution from Ships) and Motor Fuel (Composition and Content) (Amendment) Regulations 2014.<sup>278</sup> The directive adopts the IMO limit of 0.1 per cent in sulphur content for emission control zones<sup>279</sup> but

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<sup>270</sup> The purpose of a Model Agreement is to delegate authority to the RO to perform a specific task, and that agreement defines the framework, scope, terms, conditions and requirements of that delegation

<sup>271</sup> Arts 5(2) (a) of Dir 2009/15 and A.7 of Annex I Reg 391/2009.

<sup>272</sup> Specifically, it limits Sulphur Oxides, Nitrogen Oxides and Volatile Organic Compounds and prohibits the deliberate emission of ozone-depleting substances.

<sup>273</sup> SI 2008/2924, later amended, see below.

<sup>274</sup> Art 3 of Resolution MEPC.278 (70) (28 October 2016) Amendments to the Annex of The Protocol of 1997 to amend The International Convention For The Prevention Of Pollution From Ships, 1973, As Modified By The Protocol Of 1978 Relating Thereto-Amendments to MARPOL Annex VI.

<sup>275</sup> See also section 2.4.1.1 below.

<sup>276</sup> Council Directive 1999/32/EC of 26 April 1999 relating to a reduction in the sulphur content of certain liquid fuels and amending Directive 93/12/EEC, as amended [1999] OJ L 121/13 and codified and replaced by Directive (EU) 2016/802 of the European Parliament and of the Council of 11 May 2016 relating to a reduction in the sulphur content of certain liquid fuels [2016] OJ L 132/58.

<sup>277</sup> Regulation 2015/757 of the European Parliament and of the Council of 29 April 2015 on the monitoring, reporting and verification of carbon dioxide emissions from maritime transport and amending Dir 2009/16/EC [2015] OJ L 123/55.

<sup>278</sup> SI 2014/3076. It amended the Annex VI provisions found in the Merchant Shipping (Prevention of Air Pollution from Ships) Regulations 2008 (SI 2008/2924).

<sup>279</sup> Art 2(h) referring to ECAs as defined by MARPOL Annex VI.

extends it to all ships within EU territorial waters and Exclusive Economic Zones (EEZs) falling within the ECAs.<sup>280</sup> It also extends the 3.5 per cent limit applying outside of ECAs to EU territorial waters and EEZs outside those areas. Moreover, it establishes a 0.5 per cent cap on emissions after 2020,<sup>281</sup> it imposes a limit of 1.5 per cent on passenger ships operating on regular services to or from EU ports and requires all ships at berth to use fuels with a 0.1 per cent limit. Last but not least, it imposes an obligation to Member States to prohibit out-of-specs marine fuels from entering their markets.<sup>282</sup> The EUWB is expected to preserve the 2008 Regulations as they currently apply, thus retaining the EU gold plating for the short term. Evidently, the UK could decide to revert to the IMO standards for the future. It is noteworthy though, that when in EU ports and territorial waters, UK flagged ships will still need to comply with EU measures, as will those of any other flag.

Furthermore, both Annex VI in Regulation 4 and the Sulphur Directive make provision for the use of equivalent measures (Emission Abatement Methods (EAMs) under the Directive) to achieve the reductions prescribed. The basic requirement in both instruments is that the use of such equivalents must produce at least equivalent results to the established emission standards.<sup>283</sup> The Directive goes further by providing for special approval procedures of such methods and allowing trials on-board EU flagged ships or in EU waters under certain conditions. The additional features<sup>284</sup> of the Directive will be retained by the EUWB. Even if the UK decided to revert to IMO standards, UK ships will not be able to avoid compliance when in EU waters or ports. EEA membership (if maintained) will preserve the binding effect of the Directive on the UK.

The Commission adopted a decision regarding criteria for the use of EAM on Liquefied Natural Gas (LNG) carriers.<sup>285</sup> The instrument will also be retained subject to review. Either way, it will continue to affect UK-flagged LNG carriers calling at EU ports. The decision will remain applicable if EEA membership is retained.

The MRV Regulation, which came into force in July 2015, is concerned with ship CO<sub>2</sub> emissions when in voyage within EU waters, to or from EU ports.<sup>286</sup> It imposes obligations on ship owners to monitor and report emissions of their ships with a view to reducing GHG emissions at EU level at a later stage. It overlaps with the IMO MRV by creating an additional obligation for ships in EU waters to report their emissions. Given the fact that the Regulation is directly applicable in the UK, the EUWB will have to convert it into domestic law to preserve its effects. UK ships with EU ports of call will remain subject to double reporting standards even if the Regulation is repealed or becomes inapplicable to the UK. Discarding EU requirements would have as a consequence that air quality at British ports will worsen unless nationally more stringent measures are imposed. The MRV Regulation will remain binding if the UK retains its EEA membership.

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<sup>280</sup> Art 6 (2) of Dir 2016/802.

<sup>281</sup> Art 6(1). The same cap was planned by the IMO, but subject to review on the availability of the relevant fuel oils the time limit could be postponed to 2025. In Resolution MEPC. 278 (70) it was announced that the cap will start applying from 2020 as originally contemplated.

<sup>282</sup> Art 6(10).

<sup>283</sup> In art 4 (c) of the Directive, the ships need to ‘*continuously*’ achieve reductions at least equivalent.

<sup>284</sup> See Merchant Shipping Notice (MSN) 1819 (M+F) Amendment 1 (Prevention of Air Pollution from Ships) for implementation.

<sup>285</sup> Commission Decision 2010/769/EU of 13 December 2010 on the establishment of criteria for the use by liquefied natural gas carriers of technological methods as an alternative to using low sulphur marine fuels meeting the requirements of Article 4b of Council Directive 1999/32/EC relating to a reduction in the sulphur content of certain liquid fuels as amended by Directive 2005/33/EC of the European Parliament and of the Council on the sulphur content of marine fuels (notified under document C(2010) 8753) [2010] OJ L 328/15.

<sup>286</sup> Recital 14 and art 1.

#### 2.4.1.1 CO<sub>2</sub> Trading scheme

The EU has adopted Directive 2003/87<sup>287</sup> establishing a trading scheme for GHG emissions, in order to fulfil its commitments under the Kyoto Protocol 1997.<sup>288</sup> The system has survived beyond the period of implementation of the Kyoto Protocol and is one of the market mechanisms used by the EU in driving towards more efficient fuel consumption. The aim of the Directive is to reduce emissions in an economically efficient way, by the operation of a carbon market. So far, it covers the energy sector, energy-intensive production industries and aviation, but not shipping.<sup>289</sup> Recently, the legislative proposal<sup>290</sup> to include shipping in the next Emission Trade Scheme reform has been approved by the European Parliament.<sup>291</sup> The EU will establish a maritime climate fund as from 2023, unless action is taken at international level, i.e. by the IMO, by 2021.

Under the Doha Amendment to the Kyoto protocol,<sup>292</sup> reductions to GHG emissions from marine bunker fuels should be pursued at an IMO level. Because the obligation is imposed essentially on developed States, there has been some stalling on the matter because developing States in the IMO do not agree with the organisation adopting a relevant agreement binding on all the members. Until now, measures adopted to tackle GHG emissions from ships are the Energy Efficiency Design Index (EEDI) for new ships and the Ship Energy Efficiency Management Plan (SEEMP) for all ships.<sup>293</sup> Both have been made mandatory through Annex VI MARPOL.<sup>294</sup> In 2016, the MECP approved a Roadmap for developing a comprehensive IMO strategy on reduction of GHG emissions of ships (IMO MRV). Initial data collection from ships will start in 2018 with a perspective to implement measures internationally in 2023.<sup>295</sup> If IMO measures are adopted, the EU will refrain from regulation. It is unclear how the UK will proceed in fulfilling its obligations undertaken under the Paris Agreement<sup>296</sup> jointly with the EU. This would be crucial in order to determine whether efforts to reduce shipping emissions in addition to whatever measures the IMO adopts would be supported.

The CO<sub>2</sub> Trading Scheme Directive and the proposed reform will remain binding for the UK if EEA membership is retained.

#### 2.4.1.2 Alternative fuels

Directive 2014/94<sup>297</sup> promotes the adoption of alternative fuels in transport and imposes on States obligations to set a national policy framework for the development of the market and the deployment

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<sup>287</sup> Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC [2003] OJ L 275/32.

<sup>288</sup> Kyoto Protocol to the 1992 United Nations Framework Convention on Climate Change (UNFCCC) (11 December 1997).

<sup>289</sup> Shipping was not included in the Kyoto Protocol or the Paris Agreement (12 December 2015) 55 ILM 740.

<sup>290</sup> European Commission, Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/87/EC to enhance cost-effective emission reductions and low-carbon investments COM (2015) 337.

<sup>291</sup> 'MEPs back plans to cut carbon emission allowances and fund low-carbon innovation' (European Parliament Press Release, 15 February 2017) < <http://www.europarl.europa.eu/news/en/news-room/20170210IPR61806/meps-back-plans-to-cut-carbon-emission-allowances-and-fund-low-carbon-innovation> > last accessed 5 July 2017.

<sup>292</sup> Doha Amendment to the Kyoto Protocol (8 December 2012, not yet in force).

<sup>293</sup> Resolution MEPC.203 (62) (July 2011) Amendments to the Annex of The Protocol of 1997 to amend The International Convention For The Prevention Of Pollution From Ships, 1973, As Modified By The Protocol Of 1978 Relating Thereto- Inclusion of Regulations on Energy Efficiency for Ships in MARPOL Annex VI.

<sup>294</sup> Ch 4 of Annex VI to MARPOL.

<sup>295</sup> Resolution MEPC. 278 (70). See also 'Greenhouse Gas Emissions' (IMO) < <http://www.imo.org/en/OurWork/environment/pollutionprevention/airpollution/pages/ghg-emissions.aspx> >.

<sup>296</sup> Paris Agreement (12 December 2015) 55 ILM 740.

<sup>297</sup> Directive 2014/94/EU of the European Parliament and of the Council of 22 October 2014 on the deployment of alternative fuels infrastructure [2014] OJ L 3071.

of infrastructure. As regards to shipping, it provides for the installation of refuelling points for LNG in ports by 2025.<sup>298</sup>

The deadline for the transposition of Directive 2014/94 was 18 November 2016.<sup>299</sup> The Department of Transport launched a consultation on the transposition of the Directive, which was completed on 23 November 2016. So far, there has been no progress in domestic implementation. The UK remains under the obligation to transpose the Directive at least until its official withdrawal from the Union.<sup>300</sup> The Directive would remain binding under EEA membership.

Following Brexit the UK may decide not to follow through this policy.

## 2.4.2 Anti-fouling systems

The use of anti-fouling systems on ships is managed under the AFSC, adopted by the IMO in 2001 and in force since 17 September 2008. The Convention requires Parties to prohibit or restrict the use of harmful anti-fouling systems on their ships or any ship under their authority or within their territory.

The EU transposed the Convention by adopting Regulation 782/2003<sup>301</sup> to prohibit the use of organotin compounds on ships. The reason for the transposition was to give the Convention effect within the EU without waiting for the Convention to come into force.<sup>302</sup> Additionally, the EU amended Directive 76/769<sup>303</sup> to restrict the marketing and use of organotin compounds within the EU.<sup>304</sup> The Regulation is directly applicable to Member States but the enforcement of its provisions takes effect in the UK by the Merchant Shipping (Anti-Fouling Systems) Regulations 2009.<sup>305</sup> Therefore, implementation of the AFSC in the UK is realized through the EU Regulation and the 2009 Regulations. Post Brexit, the EUWB retains the Regulation within domestic law and preserve the implementing Regulations, both of which give effect to its international obligations under the AFSC.

In relevance to the above, Regulation 528/2012<sup>306</sup> concerning the marketing and use of certain biocidal products prohibits a number of anti-fouling paints, the use of which is allowed by the IMO. The EUWB will preserve the Regulation for the short term. The UK could consider lifting the prohibitions and reverting to IMO standards, thus making a wider range of such products available to UK ships. This is considered to be an advantage for shipowning interests,<sup>307</sup> since the anti-fouling paints currently

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<sup>298</sup> Art 6.

<sup>299</sup> Art 11 (1).

<sup>300</sup> See section 2.2.2.2.

<sup>301</sup> Regulation (EC) No 782/2003 of the European Parliament and of the Council of 14 April 2003 on the prohibition of organotin compounds on ships [2003]OJ L 115/1, as amended by Commission Regulation (EC) No 536/2008 of 13 June 2008 giving effect to Article 6(3) and Article 7 of Regulation (EC) No 782/2003 of the European Parliament and of the Council on the prohibition of organotin compounds on ships and amending that Regulation OJ L 156/10.

<sup>302</sup> See recitals 9-11 and 27 of the Directive.

<sup>303</sup> Council Directive 76/769/EEC of 27 July 1976 on the approximation of the laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations [1976] OJ L 262/201.

<sup>304</sup> By Commission Directive 2002/62/EC of 9 July 2002 adapting to technical progress for the ninth time Annex I to Council Directive 76/769/EEC on the approximation of the laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations (organostannic compounds) [2002] OJ L 183/58.

<sup>305</sup> SI 2009/2796.

<sup>306</sup> Regulation (EU) No 528/2012 of the European Parliament and of the Council of 22 May 2012 concerning the making available on the market and use of biocidal products [2012] OJ L 167/1. See Annex V.

<sup>307</sup> ‘Blueprint for Growth’ (UK Chamber of Shipping, 2016) 24 <<https://www.ukchamberofshipping.com/blueprint-growth/download-full-publication/>> last accessed 5 July 2017.

permitted under the Regulation are not as efficient. However, there are environmental considerations to take into account.

Directive 76/769 and Regulation 528/2012 would remain binding on the UK under the EEA membership.

### 2.4.3 Ship source pollution

The prohibition of polluting ship discharges is the subject of MARPOL Annexes I and II. The standards set out in the Convention were introduced in the EU through Directive 2005/35,<sup>308</sup> which imposes penalties for relevant violations.

In the UK, the Directive was implemented through the Merchant Shipping (Implementation of Ship-Source Pollution Directive) Regulations 2009.<sup>309</sup> The Regulations amended the MSA 1995, the Merchant Shipping (Prevention of Oil Pollution) Regulations 1996<sup>310</sup> and the Merchant Shipping (Dangerous or Noxious Liquid Substances in Bulk) Regulations 1996<sup>311</sup> to bring them in line with the EU requirements.<sup>312</sup> The Directive applies to EU territorial waters, EEZ and the high seas.<sup>313</sup> It introduces criminal liability for any discharge made with intent, recklessly or with serious negligence,<sup>314</sup> while it imposes sanctions to ‘*any person who is found responsible*’ when the discharge takes place in territorial waters.<sup>315</sup> Unlike MARPOL, it allows for unlimited classes of persons to be liable for the infringements while imposing a lower threshold for liability.<sup>316</sup> Consequently, under the EU regime penalties can be imposed not just on the master or owner of the offending ship, but also on the operator, the charterer or even the classification society.<sup>317</sup>

The EUWB will retain the ship source pollution liability regime of the Directive and the domestic amendments, which otherwise would be nullified after the repeal of ECA 1972. The UK will remain subject to the MARPOL requirements, as reflected in the MSA 1995 part VI, Chapter II and it could decide to abolish the gold plating of international standards for the future.<sup>318</sup> Once more, even if it does this, UK ships will be subject to EU regulation when navigating EU waters or in EU ports.

### 2.4.4 Ballast water

The International Convention for the Control and Management of Ships' Ballast Water and Sediments<sup>319</sup> was adopted in 2004 and sets rules to control the transfer of potentially invasive species.

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<sup>308</sup> Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties for infringements [2005] OJ L 255/11, as amended.

<sup>309</sup> SI 2009/1210.

<sup>310</sup> SI 1996/2154.

<sup>311</sup> SI 1996/3010.

<sup>312</sup> The three amended instruments enforce the MARPOL standards for ship discharges.

<sup>313</sup> Art 3.

<sup>314</sup> Art 4.

<sup>315</sup> Art 8.

<sup>316</sup> Henrik Ringbom, ‘Maritime Liability and Compensation in EU law’ in Baris Soyer et al, *Pollution at Sea* (Informa,2012); Alan Khee-Jin Tan, ‘The EU Ship-source Pollution Directive and coastal State jurisdiction over ships’ [2010] LMCLQ 469. See also C-308/06 *The Queen, on the application of International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport* [2008] ECR I-4057; [2008] 2 Lloyd’s Rep 260 (on a reference from *R (INTERTANKO) v Secretary of State for Transport* [2006] EWHC 1577 (Admin); [2007] EnvLR 8).

<sup>317</sup> Mikis Tsimplis, ‘Marine pollution from shipping activities’ (2008) 14 JIML 2, 101.

<sup>318</sup> That being said, the UK had gold-plated the directive when transposing it in the first place, see--‘National Report for the UK- Evaluation Study on the Implementation of Directive 2009/123/EC on amending Directive 2005/35/EC on ship source pollution and on the introduction of penalties for infringement’ (Milieu Ltd, 2012) < [http://ec.europa.eu/justice/criminal/files/environment/nr\\_uk\\_2009\\_123\\_en.pdf](http://ec.europa.eu/justice/criminal/files/environment/nr_uk_2009_123_en.pdf) > last accessed 5 July 2017..

<sup>319</sup> (adopted on 13 February 2004, not yet in force) IMO Doc BWM/CONF/36.

The Convention will enter into force on 8 September 2017, in accordance with article 18(1).<sup>320</sup> It will gradually require ships to manage their ballast water and sediments according to specified standards, maintain ballast water record books and carry a relevant certificate on-board.

The EU has not regulated the management of ballast water but it has adopted Regulation 1143/2014<sup>321</sup> on the prevention and management of the introduction and spread of invasive alien species. The Regulation applies to any species of animals, plants, fungi or micro-organisms. It provides for the creation of a list of invasive species not to be introduced, kept transported, used or released within the EU, subject to certain exceptions. It also provides for the early eradication of such species or the management of those that are already widespread. The EUWB will retain the Regulation but it would then be a matter for the UK to decide whether it will continue giving effect to it. UK ships trading with the EU will nevertheless remain subject to the regulation irrespective of the policy chosen by the UK. .

### 2.4.5 Marine equipment

The Marine Equipment Directive<sup>322</sup> is another EU instrument aiming to improve safety and prevent marine pollution. Whenever a Convention<sup>323</sup> requires flag States to certify compliant marine equipment on-board their ships, the Directive provides for a uniform approach on behalf of the Member States.<sup>324</sup>

The UK implemented the 2014/90 Directive through the Merchant Shipping (Marine Equipment) Regulations 2016.<sup>325</sup> The Directive will be UK law through the EUWB but subject to repeal later on. The Directive will remain binding if EEA membership is revoked.

### 2.4.6 Ship Safety Standards

Directive 2001/96<sup>326</sup> harmonises the implementation of the IMO BLU Code of Practice for the safe loading and unloading of bulk carriers<sup>327</sup> within the EU. The UK implemented the Directive through the Merchant Shipping (Safe Loading and Unloading of Bulk Carrier) Regulations 2003,<sup>328</sup> which practically apply BLU Code requirements.<sup>329</sup> Although mandatory for the UK because it is part of the International Maritime Solid Bulk Cargoes Code (IMSBC Code),<sup>330</sup> the BLU Code it is not given force in its own right. The Regulations are expected to be preserved after Brexit in order to give effect to the UK's international obligations arising under the Code. The Directive is also binding under EEA membership.

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<sup>320</sup> 'Global Treaty to halt invasive aquatic species to enter into force in 2017' (IMO Press Briefing 22, 8 September 2016) < <http://www.imo.org/en/MediaCentre/PressBriefings/Pages/22-BWM-.aspx> > last accessed 5 July 2017.

<sup>321</sup> Regulation (EU) No 1143/2014 of the European Parliament and of the Council of 22 October 2014 on the prevention and management of the introduction and spread of invasive alien species [2014] OJ L 317/35.

<sup>322</sup> Directive 2014/90/EU of the European Parliament and of the Council of 23 July 2014 on marine equipment and repealing Council Directive 96/98/EC [2014] OJ L 257/146.

<sup>323</sup> SOLAS or MARPOL. See art 2(3).

<sup>324</sup> Art 3(1).

<sup>325</sup> SI 2016/1025.

<sup>326</sup> Directive 2001/96/EC of the European Parliament and of the Council of 4 December 2001 establishing harmonized requirements and procedures for the safe loading and unloading of bulk carriers [2002] OJ L 13/9, as amended.

<sup>327</sup> Adopted by Resolution A.862 (20) (adopted in December 1997) on the Code of Practice for the safe loading and unloading of bulk carriers- SOLAS VI-7 and linked with SOLAS Pt VI/7.

<sup>328</sup> SI 2003/2002.

<sup>329</sup> See 'The Safe Loading and Unloading of Bulk Carriers 2003 implementing EC Directive 2001/96 (establishing harmonised requirements and procedures for the safe loading and unloading of bulk carriers)' (MCA, 2003).

<sup>330</sup> Adopted under Resolution MSC.268 (65) (adopted 4 December 2008) on the Adoption of the International Maritime Solid Bulk Cargoes (IMSBC) Code. The Code became mandatory on 1 January 2011 under SOLAS.

Regarding safety for passenger ships, the main EU instrument is Directive 2009/45,<sup>331</sup> which extends international safety standards to passenger ships and high-speed craft on domestic voyages within EU waters. The Directive has SOLAS as the main point of reference.<sup>332</sup> Besides bringing domestic standards in line with international requirements by way of EU regulation, the Directive aims to support such harmonisation at IMO level as well.<sup>333</sup> The Directive was amended by Directive 2016/844<sup>334</sup> which the UK needs to implement by 1 July 2017.<sup>335</sup> Regarding the obligation to implement a Directive within the period before withdrawal from the EU see section 2.2.2.2.

Furthermore, Directives 1999/35<sup>336</sup> and 2003/25<sup>337</sup> supplement the passenger safety regime vis-à-vis ro-ro ferry and high-speed passenger craft services between EU ports. The former establishes mandatory surveys of ro-ro ferries and high-speed craft calling at EU ports on a regular basis, to confirm compliance with SOLAS and EU safety standards; the latter defines stability standards for ro-ro passenger ships on international voyages, calling at EU ports on a regular basis. The Directive extends the application of the 1996 Stockholm Agreement to the whole of the EU.<sup>338</sup> Last but not least, Directive 98/41<sup>339</sup> provides for an obligation to count and register the number of persons on-board ships coming to or departing from EU ports.

The above directives were transposed into UK law as follows:

- Directive 2009/45 takes effect through the Merchant Shipping (Passenger Ships on Domestic Voyages) Regulations 2000,<sup>340</sup> the Merchant Shipping (Survey and Certification) Regulations 2015<sup>341</sup> and the Merchant Shipping (High Speed Craft) Regulations 2004.<sup>342</sup>
- Directive 1999/35 was implemented by the Merchant Shipping (Mandatory Surveys for Ro-Ro Ferry and High Speed Passenger Craft) Regulations 2001.<sup>343</sup>
- Directive 2003/25 was implemented through the Merchant Shipping (Ro-Ro Passenger Ships) (Stability) Regulations 2004<sup>344</sup> and MSN 1790 Amendment 1.

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<sup>331</sup> Directive 2009/45/EC of the European Parliament and of the Council of 6 May 2009 on safety rules and standards for passenger ships (recast) [2009] OJ L 163/1, as amended.

<sup>332</sup> Recital 11.

<sup>333</sup> Recital 6 and art 1.

<sup>334</sup> Commission Directive (EU) 2016/844 of 27 May 2016 amending Directive 2009/45/EC of the European Parliament and of the Council on safety rules and standards for passenger ships [2016] OJ L 141/51.

<sup>335</sup> Art 2(1)

<sup>336</sup> Council Directive 1999/35/EC of 29 April 1999 on a system of mandatory surveys for the safe operation of regular ro-ro ferry and high-speed passenger craft services [1999] OJ L 138/1, as amended.

<sup>337</sup> Directive 2003/25/EC of the European Parliament and of the Council of 14 April 2003 on specific stability requirements for ro-ro passenger ships [2003] OJ L 123/22, as amended.

<sup>338</sup> IMO Circ Letter No 1891, 29 April 1996, Agreement concerning Specific Stability Requirements for Ro-Ro Passenger Ships undertaking Regular Scheduled International Voyages between or to or from Designated ports in North West Europe and the Baltic Sea. The agreement was concluded by 8 Northern European countries, including the UK, under the IMO Resolution 14 (adopted in the 1995 SOLAS Conference) 'Regional Agreements on Specific Stability Requirements for Ro-Ro Passenger Ships'. It provides for additional stability requirements for ro-ro ferries on regular service in the area, due to the special weather conditions.

<sup>339</sup> Council Directive 98/41/EC of 18 June 1998 on the registration of persons sailing on-board passenger ships operating to or from ports of the Member States of the Community [1998] OJ L 188/35.

<sup>340</sup> SI 2000/2687, as amended by the Merchant Shipping (Passenger Ships on Domestic Voyages)(Amendment) Regulations 2012 (SI 2012/2636).

<sup>341</sup> SI 2015/508.

<sup>342</sup> SI 2004/302.

<sup>343</sup> SI 2001/152.

<sup>344</sup> SI 2004/2884.

- Directive 98/41 is transposed by the Merchant Shipping (Counting and Registration of Persons on-board Passenger Ships) Regulations 1999.<sup>345</sup>

All the above Directives (with the exception of Directive 98/41) remain binding under EEA membership and will be retained by the operation of the EUWB. Their future operation will be a matter of UK policy to the extent they exceed IMO requirements.

The EU adopted Regulation 336/2006<sup>346</sup> on the implementation of the International Safety Management (ISM) Code within the Union. To enforce the Regulation, the UK adopted the Merchant Shipping (ISM Code) Regulations 2014.<sup>347</sup> According to the explanatory note, the Regulations also consolidate ‘*United Kingdom regulations which require ships not covered by the EU Regulation to comply with the ISM Code*’. Indeed, the 2014 Regulations revoked the Merchant Shipping (ISM Code) (Ro-Ro Passenger Ferries) Regulations 1997<sup>348</sup> and the Merchant Shipping (International Safety Management) (ISM Code) Regulations 1998,<sup>349</sup> both of which were implementing the ISM Code within the UK prior to the regulation. The EUWB will retain the 2004 Regulations so that the implementation of the ISM Code is not affected after the UK withdraws from the EU. The Regulation is binding under EEA membership.

Regulation 417/2002, as amended<sup>350</sup> provides for an acceleration of the Chapter 4 MARPOL regime on double hull standards. The regulation introduced an immediate ban on the use of single hull oil tankers for the transport of heavy grades of oil within the EU or under EU flags. Additionally, it provided for a shorter timeframe for the phasing out of the single hull, as regards other tanker categories. Post Brexit, the regulation will presumably be retained, although the UK could revert to the less strict MARPOL standards.

#### 2.4.7 Ship recycling

The recycling of ships falls under the scope of two international conventions. The first one is the Basel Convention on the Control of the Transboundary Movements of Hazardous Wastes and their Disposal,<sup>351</sup> in force since May 1992. The Basel Convention is concerned generally with hazardous waste transported between different States by land, air or sea. It sets restrictions for the transport of hazardous wastes and imposes monitoring obligations on Contracting Parties regarding the transport. Non-compliance with the Basel provisions constitutes illegal traffic. Under its 1995 amendment<sup>352</sup> (the Ban Amendment) any export of hazardous waste to a non-OECD country is completely prohibited. The protocol is not in force currently.

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<sup>345</sup> SI 1999/1869.

<sup>346</sup> Regulation (EC) No 336/2006 of the European Parliament and of the Council of 15 February 2006 on the implementation of the International Safety Management Code within the Community and repealing Council Regulation (EC) No 3051/95 [2006] OJ L 64/1. The ISM Code was adopted on 4 November 1993 Resolution A.741 (18) on the International management Code for the safe operation of ships and for pollution prevention and became mandatory at international level through chapter IX of SOLAS. It is supplemented by IMO Guidelines on the implementation of the International Safety Management (ISM) Code by Administrations, the latest amendment of which took place in December 2013 under Resolution A. 1071(28) (adopted on 4 December 2013) on Revised Guidelines on the Implementation of the International safety Management (ISM) Code by Administrations.

<sup>347</sup> SI 2014/1512.

<sup>348</sup> SI 1997/3022.

<sup>349</sup> SI 1998/1561.

<sup>350</sup> Regulation (EC) No 417/2002 of the European Parliament and of the Council of 18 February 2002 on the accelerated phasing-in of double hull or equivalent design requirements for single hull oil tankers and repealing Council Regulation (EC) No 2978/94 [2002] OJ L 64/1, as amended by Regulation (EC) No 1726/2003 of the European Parliament and of the Council of 22 July 2003 amending Regulation (EC) No 417/2002 on the accelerated phasing-in of double-hull or equivalent design requirements for single-hull oil tankers [2003] OJ L 249/1.

<sup>351</sup> (22 March 1989)1673 UNTS 57.

<sup>352</sup> 1995 Amendment to the Basel Convention on the Control of the Transboundary Movements of Hazardous Wastes and their Disposal (adopted on 22 September 1995, not yet in force).

The Convention does not exclude ships from its ambit, therefore ships sent for scrapping can be subject to the Basel regime, provided they are considered hazardous waste. However, there is a second convention regulating ship recycling specifically: the Hong Kong International Convention for the Safe and Environmentally Sound Recycling of Ships 2009 (SRC).<sup>353</sup> The Convention provides for rules regarding the design, construction and certification of ships to which it applies, it regulates the use of hazardous materials for the construction of ships<sup>354</sup> and allows ship recycling only at authorised facilities.<sup>355</sup> This contradicts the Ban Amendment. Currently, the SRC is not in force as it has not been ratified by the required number of States.

Within the EU, ship recycling is governed by Regulation 1257/2013.<sup>356</sup> The Regulation is based on the SRC but goes further regarding for example the requirements for ship recycling facilities or the prohibited materials in ship construction. It also implements the Ban Amendment within the EU. The Basel Convention itself was implemented within the Union through Regulation 1013/2006,<sup>357</sup> which is only marginally applicable to ships falling outside the scope of the SRC and the ship recycling regulation.<sup>358</sup>

Post Brexit, the UK will have the opportunity to reconsider the application of the Ban Amendment which is not internationally in force and the operation of the EU Ship Recycling Regulation. This is an area of inefficient and complicated regulation so there is certainly scope for improvement. The Ship Recycling Regulation remains binding under EEA Membership.

#### 2.4.8 Formal Reporting for ships.

Under the Convention on Facilitation of International Maritime Traffic (FAL Convention),<sup>359</sup> ships arriving in ports of contracting States need to provide certain documents prescribed by the Convention. The port authorities are obliged to accept documents conveyed by any legible and understandable medium, including written or electronically produced documents.<sup>360</sup> The Convention supports the establishment of electronic systems for the exchange of information and requires that contracting States have such systems in place until the 8<sup>th</sup> April 2019. It also prescribes a transitional period of a minimum of 12 months after the initiation of the aforementioned systems.<sup>361</sup>

The EU adopted its own measures to promote the application of the FAL Convention within the EU. Directive 2010/65<sup>362</sup> envisages the creation of a Single Window through which all maritime reporting formalities can be submitted.<sup>363</sup> It promotes the almost total abolition of paper documents regarding administrative procedures for ships arriving in and departing from EU ports. Article 4 requires the ships to notify port authorities in advance of their arrival and article 5 provides for the FAL documents to be

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<sup>353</sup> (adopted on 15 May 2009, not yet in force) SR/CONF/45.

<sup>354</sup> See Reg 2 of the Annex to the SRC.

<sup>355</sup> Arts 2.11, 4.2 and 6 SRC.

<sup>356</sup> Regulation (EU) No 1257/2013 of the European Parliament and of the Council of 20 November 2013 on ship recycling and amending Regulation (EC) No 1003/2006 and Directive 2009/16/ECO [2013] OJ C 330/1.

<sup>357</sup> Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste [2006] OJ L 190/1.

<sup>358</sup> Art 1(3) (i).

<sup>359</sup> (9 April 1965) 591 UNTS 265.

<sup>360</sup> S 2F art 2.16 of the Annex to the FAL Convention.

<sup>361</sup> See s 1C arts 1.3bis, 1.3ter and 1.3quater of Resolution FAL.12(40) (adopted on 8 April 2016) Amendments to the Annex to the Convention on Facilitation of International Maritime Traffic 1965.

<sup>362</sup> Directive 2010/65/EU of the European Parliament and of the Council of 20 October 2010 on reporting formalities for ships arriving in and/or departing from ports of the Member States and repealing Directive 2002/6/EC [2010] OJ L 283/1.

<sup>363</sup> The 'single window' idea derives from IMO's Recommended Practice suggesting the creation of a single portal for all information required for the arrival, stay and departure of ships from ports. See s 1C art 1.3quin of Resolution FAL.12 (40).

submitted exclusively in electronic format starting from 1 June 2015. Clearly, the Directive sets stricter timeframes for the transition of shipping documentation in the digital era.

The UK launched the UK National Maritime Single Window (NMSW) in order to implement the Directive in January 2016. The portal aims to *‘to simplify and digitise the process of handling legally required pre-arrival/departure paperwork, where necessary’*.<sup>364</sup> Currently, the system operates as a pilot.

The EUWB will retain EU requirements post-Brexit. Although the use of a ‘single window’ is not mandatory under the FAL Convention, its maintaining will promote the UK’s compliance with international standards and simplify the relevant procedures. However, the UK could disengage from the obligations of the Directive, such as the obligation to establish an exclusively electronic submission system before 2019. It could postpone full implementation of the NMSW and extend the adaptation period according to the FAL Convention standards, which allow reporting formalities in various formats along with the electronic format. Directive 2010/65 remains binding under EEA membership.

#### 2.4.9 The EU Energy Efficiency Directive

Directive 2012/27<sup>365</sup> is concerned with promoting energy efficiency within the EU. It provides a common framework under which Member States can achieve their respective energy efficiency targets. Among other measures, the Directive requires large companies to undergo audits for their energy consumption in order to identify how they can improve their energy efficiency.<sup>366</sup> The measure applies to enterprises employing more than 250 persons and having an annual turnover exceeding EUR 50 million, and/or an annual balance sheet total exceeding EUR 43 million.<sup>367</sup> Energy consumption includes energy for transport activities by sea.<sup>368</sup> Consequently, shipping enterprises are within the scope of the Directive.

The UK implemented the framework for mandatory audits under the Energy Savings Opportunity Scheme (ESOS) Regulations 2014,<sup>369</sup> which establish the ESOS. The EUWB will retain the system, although the UK can revise the measures. Especially for companies operating ships, abolishing mandatory audits could be advantageous, given the fact that the Directive imposes an additional level of reporting on top of the SEEMP and the MRV scheme that apply internationally. The Directive remains binding under the EEA membership.

#### 2.4.10 The EU Water Framework Directive

Directive 2000/60<sup>370</sup> aims to safeguard and improve the quality of ground and surface water, whether inland, transitional or coastal. The UK has implemented the Directive through the Water Environment

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<sup>364</sup> ‘UK National Maritime Single Window (Pilot)’ (Department for Transport, January 2016) < [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/494258/national-maritime-single-window-guidelines.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/494258/national-maritime-single-window-guidelines.pdf) > last accessed 5 July 2017.

<sup>365</sup> Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC [2012] OJ L 315/1.

<sup>366</sup> Art 8(4).

<sup>367</sup> This derived from the definition of Small-Medium Enterprises in art 2(26), to which the mandatory audits do not apply.

<sup>368</sup> Art 2(3).

<sup>369</sup> SI 2014/1643.

<sup>370</sup> Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy [2000] OJ L 327/1, as amended.

(Water Framework Directive) (England and Wales) Regulations 2003.<sup>371</sup> The EUWB will presumably retain the effect of the Directive post Brexit.

The Directive has created confusion regarding the installation of scrubbers, an abatement method allowing ships to comply with the limits imposed by the Sulphur directive.<sup>372</sup> The IMO regulation does not pose any impediment in the use of scrubbers. Given the fact that post Brexit the Sulphur and the WFD Directives will be retained, the controversy will continue to affect ships calling at UK ports. The UK could later review the measures to avoid uncertainty for ships calling at its ports; nonetheless, the lack of clarity will continue to impact UK ships travelling in the EU.

#### 2.4.11 Oil pollution liability

A number of international instruments regulate liability for oil pollution. Regarding oil pollution caused by tankers the UK has ratified the Civil Liability Convention (CLC),<sup>373</sup> amended by the 1992 Protocol<sup>374</sup> and supplemented by the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (IOPC 92).<sup>375</sup> There is also the International Oil Pollution Compensation Supplementary Fund established in 2003 by the Supplementary Fund Protocol,<sup>376</sup> which entered into force in 2005. Oil pollution by ships other than those which carry oil as cargo is covered by the Bunker Oil Pollution Convention (2001 BOPC).<sup>377</sup> All the above have been implemented in the UK and remain unaffected by Brexit.<sup>378</sup> Moreover, the MSA 1995 imposes liability for oil pollution from ships not covered by the aforementioned conventions.<sup>379</sup>

Within the EU, Directive 2004/35<sup>380</sup> (ELD) imposes liability for the prevention and remedy of environmental damage. The Directive does not create an additional regime for liability of loss of life or damage to property.<sup>381</sup> It focuses on damage caused to the environment, specifically to land, water and protected species and natural habitats.<sup>382</sup> Its scope of application does not overlap with that of the CLC,

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<sup>371</sup> SI 2003/3242. For Scotland it is the Water Environment and Water Services (Scotland) Act 2003 (WEWS Act) 2003/ASP 3, and for Northern Ireland The Water Environment (Water Framework Directive) Regulations (Northern Ireland) 2003 SI 2003/544

<sup>372</sup> 'European Community Shipowners' Associations Position Paper on the need for legal clarity and consistency on the use of the scrubbing technology in EU ports, estuaries and coastal waters' (ECSA, 6 October 2014) <[http://www.ecsa.eu/images/NEW\\_Position\\_Papers/C-8613%20Annex%201%20-%202014-10-06\\_ecsa%20position%20paper%20on%20scrubber%20systems%20washwater%20discharge%20acceptance\\_final.pdf](http://www.ecsa.eu/images/NEW_Position_Papers/C-8613%20Annex%201%20-%202014-10-06_ecsa%20position%20paper%20on%20scrubber%20systems%20washwater%20discharge%20acceptance_final.pdf)> last accessed 5 July 2017. See also Mike Burns, 'Fire and brimstone' (MRI, 15 December 2014).

<sup>373</sup> International Convention on Civil Liability for Oil Pollution Damage (29 November 1969) 973 UNTS 3.

<sup>374</sup> Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage of 29 November 1969 (27 November 1992) 1956 UNTS 255.

<sup>375</sup> (27 November 1992) 1953 UNTS 330.

<sup>376</sup> Protocol of 2003 to the International Convention on the establishment of an International Fund for Compensation for Oil Pollution Damage (16 May 2003). IMO Doc. LEG/CONF 14/20

<sup>377</sup> International Convention on Civil Liability for Bunker Oil Pollution Damage (23 March 2001) (2005) UKTS No 8.

<sup>378</sup> The CLC, the IOPC 92 and the Supplementary Fund are implemented through the MSA 1995, Ch III and IV; the 2001 BOPC is found in the Merchant Shipping (Oil Pollution) (Bunkers Convention) Regulations 2006 (SI 2006/1244).

<sup>379</sup> S 154.

<sup>380</sup> Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage [2004] OJ L 143/56.

<sup>381</sup> Art 1: an environmental liability is established.

<sup>382</sup> Art 2(1).

the IOPC 92 or the 2001 BOPC<sup>383</sup>, while the right of the operator to limit its liability under the Convention on Limitation of Liability for Maritime Claims (LLMC)<sup>384</sup> is preserved.<sup>385</sup>

The ELD Directive was implemented in the UK by the Environmental Damage (Prevention and Remediation) Regulations 2009,<sup>386</sup> recently replaced by the Environmental Damage (Prevention and Remediation) (England) Regulations 2015.<sup>387</sup> Their scope in oil pollution is admittedly limited.<sup>388</sup> Nonetheless, the Regulations apply in cases of liability for oil pollution under section 154 MSA 1995, for cases of pollution by cargo of hazardous and noxious substances<sup>389</sup> or for pollution by oils not covered by the aforementioned international Conventions. The EUWB is expected to retain the Regulations in force at least for the short term. This is another area where improvements can be made by the UK as the ELD has not been much used.

## 2.5 Limitation

Under the LLMC, shipowners and salvors can limit their liability for maritime claims arising from the operation of their ship regarding loss of life, personal injury and loss or damage to property.<sup>390</sup>

With a view to complement the LLMC regime, the EU adopted Directive 2009/20<sup>391</sup> on the insurance of shipowners for maritime claims. The Directive imposes on the owners of all ships (EU flagged and foreign flagged when in EU ports) the obligation to insure their ships for the claims covered by the LLMC and up to the limits set by the Convention.<sup>392</sup> Moreover, all ships calling at EU ports are required to carry on-board a certificate of insurance.<sup>393</sup>

The UK transposed the Directive through the Merchant Shipping (Compulsory Insurance of Shipowners for Maritime Claims) Regulations 2012.<sup>394</sup> The Regulations will remain in force on the basis of the EUWB. Even if the UK decides to abolish compulsory insurance for shipowners for the future, the obligation will remain for UK-flagged ships calling at EU ports. The Directive remains binding under EEA membership.

## 2.6 Carriage of Passengers

### 2.6.1 Liability for death/personal injury and loss/damage to property

The UK has acceded to the 2002 Protocol to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea 1974 (the 2002 Athens Convention).<sup>395</sup> The Protocol is set out in Schedule 6 of the MSA 1995 and has the force of law in the UK by virtue of sections 183-184 MSA

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<sup>383</sup> Art 4(2) and Annex IV (a-d).

<sup>384</sup> Convention on Limitation of Liability for Maritime Claims (19 November 1976) 1456 UNTS 221, as amended by the 1996 Protocol (2 May 1996). 35 ILM 1433 (1996),

<sup>385</sup> Art 4(3).

<sup>386</sup> SI 2009/153.

<sup>387</sup> SI 2015/810.

<sup>388</sup> Because it is excluded when CLC, IOPC 92 or 2001 BOPC take effect. See also Yvonne Baatz (ed), *Maritime law* (3<sup>rd</sup> edn, Informa 2014) ch 10; Mikis Tsimplis, *Marine Pollution from Shipping Activities*.

<sup>389</sup> Although the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (adopted on 3 May 1996, not yet in force) (1996) 35 ILM 1415 is among the list of Conventions that excludes the application of the ELD, it is not yet in force. Hence, the Directive takes full effect in such cases if its requirements are fulfilled.

<sup>390</sup> Art 2.

<sup>391</sup> Directive 2009/20/EC of the European Parliament and of the Council of 23 April 2009 on the insurance of shipowners for maritime claims [2009] OJ L 131/128.

<sup>392</sup> Art 4.

<sup>393</sup> Art 6.

<sup>394</sup> SI 2012/2267.

<sup>395</sup> (1 November 2002).

1995.<sup>396</sup> The 2002 Athens Convention applies to international voyages<sup>397</sup> on-board ships either registered in a contracting State or calling at ports of contracting States or under a contract of carriage concluded in a contracting State<sup>398</sup>. The Convention also applies to domestic voyages within the area of the UK, the Channel Islands and the Isle of Man.<sup>399</sup>

Even before accession, the 2002 Protocol was applicable in the UK through EU law. The EU had already acceded to the Convention and had adopted Regulation 329/2009,<sup>400</sup> implementing the Convention and making the IMO Reservation and Guidelines for the implementation of the Athens Convention binding.<sup>401</sup> The Regulation applies to international voyages on-board ships being EU-flagged or calling at EU ports or when the contract of carriage is concluded in a member State.<sup>402</sup> At the same time, the Regulation applies partly to domestic voyages.<sup>403</sup> The UK adopted the Merchant Shipping (Carriage of Passengers by Sea) Regulations 2012<sup>404</sup> in order to support the applicability of the Regulation. Because the two international instruments have an overlapping scope,<sup>405</sup> the 2002 Athens Convention has been restricted to cases where the Regulation does not apply, by virtue of section 183 (2A).<sup>406</sup>

Going beyond the Convention, the Regulation applies to certain domestic voyages,<sup>407</sup> it provides for its gradual application to national carriage of passengers<sup>408</sup> and requires carriers to make sufficient advance payments to cover the immediate economic needs of injured passengers or the relatives in the case of dead passengers.<sup>409</sup> Furthermore, it imposes on carriers an obligation to inform passengers about their rights under the Regulation and extends article 3(3) of the 2002 Athens Convention to cases of loss or damage to mobility equipment of passengers with reduced mobility.<sup>410</sup>

The EUWB will retain the effect of Regulation 329/2009 and the 2012 Regulations post Brexit. Given the overlapping of the Convention with the Regulation, the UK could decide to abolish the latter. In such a case, the 2002 Convention will extend back to its full potential of application, which will include domestic voyages (subject to change if need be).<sup>411</sup> The EU gold-plating would nevertheless be removed. The Regulation remains binding under EEA membership.

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<sup>396</sup> Amendments to the MSA 1995 were effected by the Merchant Shipping (Convention Relating to the Carriage of Passengers and their Luggage by Sea) Order 2014 (SI 2014/1361), in order to implement the 2002 Athens Convention.

<sup>397</sup> Art 1(9).

<sup>398</sup> Art 2(1).

<sup>399</sup> See the Merchant Shipping (Convention Relating to the Carriage of Passengers and their Luggage by Sea) Order 2014 (SI 2014/1361),

<sup>400</sup> Commission Regulation (EC) No 329/2009 of 22 April 2009 amending Council Regulation (EC) No 1165/98 concerning short-term statistics as regards the updating of the list of variables, the frequency of compilation of the statistics and the levels of breakdown and aggregation to be applied to the variables [2009] OJ L 103/3.

<sup>401</sup> Resolution A. 988(24) (adopted 1 December 2005) on the Protocol of 2002 to the Athens Convention: Reservation concerning the Issue and Acceptance of Insurance Certificates with Special Exceptions and Limitations and IMO Circ Letter No 2758/20 November 2006 on Guidelines for the Implementation of the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 2002.

<sup>402</sup> Art 2.

<sup>403</sup> Art 2.

<sup>404</sup> SI 2012/3152.

<sup>405</sup> Both in international voyages and domestic ones.

<sup>406</sup> The subsection was added to the MSA 1995 by The Merchant Shipping (Carriage of Passengers by Sea) Regulations 2012.

<sup>407</sup> Art 2.

<sup>408</sup> Art 2.

<sup>409</sup> Art 6.

<sup>410</sup> Art 4.

<sup>411</sup> See Order 1987/670.

## 2.6.2 Package Travel

Directive 90/314/EEC<sup>412</sup> provides passengers with additional rights of recovery. As the name suggests, it applies to packages of services under an inclusive price, combining transport, accommodation or other touristic services not related to transport or accommodation, which account for a significant proportion of the package price.<sup>413</sup> The Directive imposes on the organiser obligations regarding the contents of its brochures and the information that need to be communicated to the consumer.<sup>414</sup> Moreover, it allows for the transfer of the package from one consumer to another<sup>415</sup> and generally protects consumers from any failure of the organiser or any supplier of services to perform the contract.<sup>416</sup>

The Directive is incorporated in UK law by the Package Travel, Package Holidays and Package Tours Regulations 1992.<sup>417</sup> The Regulations are retained by the EUWB. This perpetuates the problem of conflict that exists between the Athens Convention and the Directive: the Convention, providing it is an exclusive code for passengers' claims against carriers and their servants or agents under articles 11 and 14, cannot be reconciled with the operation of the Directive.<sup>418</sup> The UK will be free to review the applicability of the Directive to solve the conflict.

The EU repealed the Directive in 2015 through Directive (EU) 2015/2302 with effect from 1 July 2018.<sup>419</sup> The deadline for transposition is 1 January 2018.<sup>420</sup> Regarding the UK's obligation to transpose the Directive before withdrawal see section 2.2.2.2.

## 2.6.3 Additional Passengers' Rights

Regulation 1177/2010<sup>421</sup> provides passengers (including disabled passengers) with the express right to claim compensation for delay or cancellation of the service. The Regulation will be preserved by the EUWB for the short term but will be open to review.

## 2.7 Port-related issues

### 2.7.1 Port reception facilities

MARPOL Annexes IV and V deal with the waste disposal of ships. At EU level, those obligations are implemented and enforced through Directive 2000/59 (PRFD).<sup>422</sup> The aim of the Directive is to provide for an efficient waste disposal system in EU ports for the discharge of ship-generated waste and cargo residues. Recently, the PRFD was amended<sup>423</sup> to include the Annex V changes regarding categorisation

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<sup>412</sup> Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours [1990] OJ L 158/59, *now repealed* by Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC [2015] OJ L 326/1. See below. The amending Directive will apply from 1 July 2018.

<sup>413</sup> Art 2.

<sup>414</sup> Art 4 (1),(2)

<sup>415</sup> Art 4(3).

<sup>416</sup> Art 15.

<sup>417</sup> SI 1992/3288.

<sup>418</sup> See also conflicting case law on the issue Yvonne Baatz, *Maritime Law* (3<sup>rd</sup> edn, Informa 2014), Chapter 6: Michael Tsimplis and Richard Shaw, *Carriage of Passengers*, 220-221.

<sup>419</sup> Art 29 of Dir 2015/2302.

<sup>420</sup> Art 28.

<sup>421</sup> Regulation (EU) No 1177/2010 of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004 [2010] OJ L 334/1.

<sup>422</sup> Directive 2000/59/EC of the European Parliament and of the Council of 27 November 2000 on port reception facilities for ship-generated waste and cargo residues [2000] OJ L 332/81.

<sup>423</sup> Commission Directive (EU) 2015/2087 of 18 November 2015 amending Annex II to Directive 2000/59/EC of the European Parliament and the Council on port reception facilities for ship-generated waste and cargo residues [2015] OJ L 302/99.

of garbage.<sup>424</sup> The deadline for transposition was on 9 December 2016. The amendment has not been transposed into UK law yet although the relevant consultation initiated by the MCA was concluded on 1 December 2016. Regarding the UK's obligation to transpose the Directive before withdrawal see section 2.2.2.2.

Within the UK, ship-waste disposal is regulated by the Merchant Shipping and Fishing Vessels (Port Waste Reception Facilities) Regulations 2003.<sup>425</sup> The instrument was adopted under the MSA 1995 Part VI, Chapter IA, but also implements the relevant Directive. Post-Brexit, the EU parts of the Regulations will be converted into domestic law by the EUWB, namely the requirement to provide information to a harbour or terminal in advance of a ship's arrival, the requirement on harbour authorities and terminal operators to charge for reception facilities and the application of the Regulations to hovercraft.<sup>426</sup> The UK is free to review the measures imposed by the Directive but if EEA membership is retained, the Directive continues to be binding.

### 2.7.2 Places of refuge

A place of refuge is '*a place where a ship in need of assistance can take action to stabilise its condition and reduce the hazards to navigation, and to protect human life and the environment*'.<sup>427</sup> This is the definition adopted by the IMO in its Guidelines on Places of Refuge for ships in need of assistance. The Guidelines provide coastal States with a list of non-exhaustive criteria to apply when deciding whether they will offer a place of refuge or not. In addition, Resolution A.950 (23) on Maritime Assistance Services,<sup>428</sup> the Guidelines on the Control of Ships in an Emergency<sup>429</sup> and the International Convention on Salvage<sup>430</sup> all serve to create a set of rules under which coastal States can deal with ships in distress in an efficient and safe way.<sup>431</sup>

The EU has built upon the international framework by adopting Directive 2002/59.<sup>432</sup> The Directive establishes a vessel traffic monitoring and information exchange system<sup>433</sup> for all ships calling at EU ports, operated by the European Maritime Safety Agency through the SafeSeaNet.<sup>434</sup> Ships bound for EU ports must notify specific information and carry certain monitoring equipment. Regarding places of refuge, the Directive requires Member States to draw up plans for the accommodation of ships in need

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<sup>424</sup> Resolution MEPC. 201(62) (adopted on 15 July 2011) Amendments to the Annex to the Protocol of 1978 relating to the International Convention for The Prevention Of Pollution From Ships, 1973-Revised MARPOL Annex V.

<sup>425</sup> SI 2003/1809. A further Commission Directive 2007/71/EC of 13 December 2007 amending Annex II of Directive 2000/59/EC of the European Parliament and the Council on port reception facilities for ship-generated waste and cargo residues [2007] OJ L 329/33, regarding the delivery of sewage to reception facilities, was implemented by Merchant Shipping and Fishing Vessels (Port Waste Reception Facilities) (Amendment) Regulations 2009 (SI 1009/1176).

<sup>426</sup> See explanatory note of the Regulations.

<sup>427</sup> Resolution A.949 (23) (adopted on 5 December 2003) Guidelines on places of refuge for ships in need for assistance.

<sup>428</sup> (5 December 2003).

<sup>429</sup> Circular MSC.1/Circ 1251 (adopted on 19 October 2007).

<sup>430</sup> (28 April 1989) 1953 UNTS 193.

<sup>431</sup> It is to be noted that when the safety of life is involved in incidents calling for a place of refuge, the International Convention on Maritime Search and Rescue (adopted on 27 April 1979, entered in force 22 June 1985) 1405 UNTS 97 takes precedence over the aforementioned instruments. See arts 1.13-1.14 of Guidelines on Places of Refuge.

<sup>432</sup> Directive 2002/59/EC of the European Parliament and of the Council of 27 June 2002 establishing a Community vessel traffic monitoring and information system and repealing Council Directive 93/75/EEC [2002] OJ L 208/10, as amended.

<sup>433</sup> Art 1.

<sup>434</sup> The European maritime platform for data sharing.

of assistance with reference to the IMO regime on places of refuge.<sup>435</sup> Moreover, a set of operational Guidelines has been adopted to supplement the Directive regarding the management by Member States of requests for places of refuge.<sup>436</sup>

In the UK, the harbour authorities or the MCA deal with requests for places of refuge. When the threat of pollution is significant, the ultimate decision lies on the Secretary of State's Representative (SOSREP) for maritime salvage and intervention, established under the Maritime Safety Act 2003.<sup>437</sup> In practice, the assessment and decision on such requests (by either the MCA or the SOSREP) are based on the IMO Guidelines.<sup>438</sup>

The UK has transposed the Directive through the Merchant Shipping (Vessel Traffic Monitoring and Reporting Requirements) Regulations 2004.<sup>439</sup> The Regulations also implement provisions of MARPOL and SOLAS. Post-Brexit the Regulations giving effect to the directive will be preserved for the short term but will be open to review. Even if the UK avoids EU gold plating, UK ships will remain under the EU requirements when calling at any EU port.

### 2.7.3 Accident investigation

At international level, IMO instruments impose obligations for investigating and reporting maritime accidents. Relevant provisions can be found in SOLAS<sup>440</sup>, the LLC<sup>441</sup> and MARPOL,<sup>442</sup> while the Casualty Investigation Code<sup>443</sup> requires a marine investigation to be conducted for 'very serious' marine casualties.<sup>444</sup>

The EU has built upon the international regime by adopting Directive 2009/18<sup>445</sup> the investigation of accidents in the maritime transport sector. The Directive requires that the Member States comply with their international obligations under the IMO instruments and establishes the baseline for accident investigations and reporting for incidents taking place within EU territory or involving EU-flagged ships or other EU interests.<sup>446</sup> It reinforces the obligation of Member States to investigate and report

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<sup>435</sup> Art 20A.

<sup>436</sup> EU Operational Guidelines on Places of Refuge' (EU Cooperation Group on Places of Refuge, January 2016) < <http://ec.europa.eu/transport/sites/transport/files/modes/maritime/digital-services/doc/por-operational-guidelines.pdf> > last accessed 5 July 2017.

<sup>437</sup> Actually, the UK model of SOSREP was the inspiration for the IMO Guidance and the EU directive. See 'Places of refuge for ships in need of assistance' (Position paper, International Chamber of Shipping and others, April 2014) < <http://www.ics-shipping.org/docs/default-source/Submissions/Other/places-of-refuge-for-ships-in-need-of-assistance40857B286F98.pdf?sfvrsn=0> > last accessed 5 July 2017.

<sup>438</sup> Anthony Morrison, *Places of Refuge for Ships in Distress: Problems and Methods of Resolution* (Martinus Nijhoff Publishers, 2012), 185-186.

<sup>439</sup> SI 2004/2110, as amended by the Merchant Shipping (Vessel Traffic Monitoring and Reporting Requirements) (Amendment) Regulations 2008 and 2011 (SI 2008/3145 and 2011/2616, respectively).

<sup>440</sup> Reg I/21.

<sup>441</sup> Art 23.

<sup>442</sup> Arts 8 and 12.

<sup>443</sup> Resolution MSC.255 (84) (adopted on 16 May 2008) Adoption of the Code of the International Standards and Recommended Practices for a Safety Investigation into a Marine Casualty Or Marine Incident (Casualty Investigation Code). Parts I and II have become mandatory through the amendment of SOLAS Chapter XI-1, whereas part III contains guidelines and explanations.

<sup>444</sup> That is casualties where death/loss/injury of a person occurs or damage to the ship/marine infrastructure is involved or severe damage/risk of such to the environment is present. Art 2.10.

<sup>445</sup> Directive 2009/18/EC of the European Parliament and of the Council of 23 April 2009 establishing the fundamental principles governing the investigation of accidents in the maritime transport sector and amending Council Directive 1999/35/EC and Directive 2002/59/EC of the European Parliament and of the Council [2009] OJ L 131/114 [2011] OJ L 328/36.

<sup>446</sup> Art 2.

serious accidents through independent bodies qualified for the cause. Regulation 1286/2011<sup>447</sup> provides the common methodology under which the investigations are to be conducted. A cursory comparison does not reveal significant derogations from the IMO regime.

In the UK, the independent body responsible for marine accident investigation is the Marine Accident Investigation Branch (MAIB), a branch of the Department of Transport which was formed in 1989 under section 267 MSA 1995. MAIB operates under the Merchant Shipping (Accident Reporting and Investigation) Regulations 2012,<sup>448</sup> which implement the 2009/18 Directive. Although the Regulations implement EU law, they do it under the powers of the MSA 1995 and thus they are not affected by the repeal of ECA 1972. Finally, the Regulation on methodology binding MAIB currently is expected to be preserved by the EUWB. Both instruments will remain nonetheless binding under EEA membership.

#### 2.7.4 Port State control

Port State control provisions are contained in conventions such as SOLAS, LLC, MARPOL and the MLC 2006. The UK being a party to them is under an obligation to inspect foreign vessels calling at its ports, in order to check compliance with international standards. To co-ordinate inspections, the IMO adopted Resolution A.682 (17) on Regional co-operation in the control of ships and discharges promoting the conclusion of regional agreements.<sup>449</sup> A number of Memoranda of Understanding (MoU) have been signed under the Resolution.<sup>450</sup> The UK, together with 26 other maritime administrations,<sup>451</sup> is party to the Paris MoU, which applies to European coastal States and to the North Atlantic basin from North America to Europe. The aim of the agreement is to establish a common system of port-state control, which will put an end to sub-standard shipping through inspections conducted on-board by port States. That being said, the MoU is not a treaty but a *regional cooperative arrangement* between the signatories.<sup>452</sup>

The EU introduced a mandatory legal framework for port state control through Directive 2009/16.<sup>453</sup> It is intended to operate in co-ordination with the Paris MoU<sup>454</sup> and has essentially the same mission: to inspect ships for compliance with international (and of course EU) standards on safety, pollution prevention, working and living conditions on-board ships calling at EU ports. It is supplemented by three Regulations which give effect to different provisions: Regulation 428/2010<sup>455</sup> implements article 14 regarding expanded inspections on ships, Regulation 801/2010<sup>456</sup> implements article 10(3) on flag

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<sup>447</sup> Commission Regulation (EU) No 1286/2011 of 9 December 2011 adopting a common methodology for investigating marine casualties and incidents developed pursuant to Article 5(4) of Directive 2009/18/EC of the European Parliament and of the Council.

<sup>448</sup> SI 2012/1743.

<sup>449</sup> (adopted on 6 November 1991).

<sup>450</sup> Specifically, nine: Europe and the north Atlantic (Paris MoU); Asia and the Pacific (Tokyo MoU); Latin America (Acuerdo de Viña del Mar); Caribbean (Caribbean MoU); West and Central Africa (Abuja MoU); the Black Sea region (Black Sea MoU); the Mediterranean (Mediterranean MoU); the Indian Ocean (Indian Ocean MoU); and the Riyadh MoU. The United States Coast Guard maintain the tenth Port State Control regime.

<sup>451</sup> Belgium, Bulgaria, Canada, Croatia, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Latvia, Lithuania, Malta, the Netherlands, Norway, Poland, Portugal, Romania, the Russian Federation, Slovenia, Spain, Sweden and the United Kingdom, see 'Organisation' (Paris MOU on Port State Control) < <https://www.parismou.org/about-us/organisation> >.

<sup>452</sup> Veronica Frank, *The European Community and Marine Environmental Protection in the International Law of the Sea: Implementing Global Obligations at the Regional Level* (Martinus Nijhoff Publishers, 2007).

<sup>453</sup> Directive 2009/16/EC of the European Parliament and of the Council of 23 April 2009 on port State control [2009] OJ L 131/57.

<sup>454</sup> See recitals 11, 12, 14.

<sup>455</sup> Commission Regulation (EU) No 428/2010 of 20 May 2010 implementing Article 14 of Directive 2009/16/EC of the European Parliament and of the Council as regards expanded inspections of ships [2010] OJ L 125/2.

<sup>456</sup> Commission Regulation (EU) No 801/2010 of 13 September 2010 implementing Article 10(3) of Directive 2009/16/EC of the European Parliament and of the Council as regards the flag State criteria [2010] OJ L 241/1.

state criteria and Regulation 802/2010<sup>457</sup> gives effect to articles 10(3) and 27 regarding company performance.

The Directive has been transposed in the UK through the Merchant Shipping (Port State Control) Regulations 2011.<sup>458</sup> Those Regulations (partially based on ECA 1972) together with the EU regulations are expected to be converted into UK law through the EUWB. The Paris MoU has been amended throughout the years to reflect the progress of EU law in the field of port State control and thus, it is in line with the latest amendment of the Directive. The Directive and the Regulations on port state control remain binding under EEA membership.

### 2.7.5 Ship and Port Facility Security

The International Ship and Port Facility Security (ISPS) Code<sup>459</sup> is the mandatory IMO instrument dedicated to regulate security for ships and port facilities internationally. The Code came into force on 1st July 2004 as an amendment to chapter XI SOLAS. It contains a mandatory (Part A) and a recommendatory (Part B) part.

Within the EU the ISPS Code and the SOLAS chapter XI-2 are implemented through Regulation 725/2004.<sup>460</sup> The Regulation gives effect to both Part A and some of Part B of the Code and extends the scope of application to more categories of ships.<sup>461</sup> In the UK implementation is based on the Regulation hence, post Brexit the EUWB will convert the Regulation into domestic law so that effect is given to the UK's international obligations under SOLAS. The Regulation remains binding under EEA membership.

## Conclusions

Leaving the EU without leaving the EEA will leave the application of EU laws intact and will not permit deviations. However, as the current intention of the UK Government is to leave both the EU and the EEA there are immediate issues to be resolved and long-term policies to be developed and implemented. The scope of such policies would need to be considered within the context of the future trade deal the UK may make with the EU.

The issues requiring immediate attention concern the current ownership of UK ships by EU and EEA nationals and companies, and the rights of EU and EEA seafarers to work onboard UK ships.

The UK flag can be strengthened by improving the taxation system and reducing the cost of shipping regulation.

Most other shipping regulations are based primarily on legal instruments adopted by the IMO. Current gold-plating by the EU will become optional for UK shipping. Removing the gold-plating will enable the UK to become a cheaper destination than competing EU ports. It could however have important consequences for employment conditions for UK seafarers as well as for the environmental impact of shipping in the UK.

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<sup>457</sup> Commission Regulation (EU) No 802/2010 of 13 September 2010 implementing Article 10(3) and Article 27 of Directive 2009/16/EC of the European Parliament and of the Council as regards company performance [2010] OJ L 241/4, as amended.

<sup>458</sup> SI 2011/2061.

<sup>459</sup> Conference Resolution 2, SOLAS/CONF.5/34 (adopted on 12 December 2002) Adoption of the International Code for the Security of Ship and of Port Facilities.

<sup>460</sup> Regulation (EC) No 725/2004 of the European Parliament and of the Council of 31 March 2004 on enhancing ship and port facility security [2004] OJ L 129/6.

<sup>461</sup> More specifically, domestic 'Class A' passenger ships, domestic ships required to comply by an EU member State's risk assessment and port facilities serving any of those ships.

There is no overriding conclusion on whether the EU gold plating should be retained or not. It should be an issue by issue approach.

The longer-term development will pose questions on whether future gold-plating should be followed or not. This will also need to be discussed on a case by case approach.

Brexit will throw open issues of employment of seafarers, taxation of shipping companies, ship safety regulations and environmental protection aspects of shipping. It will be the intra-UK negotiation and relative strength of interested stakeholders which will determine the outcome.

### 3. FISHERIES

Fisheries are regulated globally under international conventions such as the United Nations Convention on the Law of the Sea (UNCLOS)<sup>462</sup> and the UN Fish Stocks Agreement (UNFSA).<sup>463</sup> Within this framework the EU has established its own fisheries regime, the so-called Common Fisheries Policy (CFP). Although the conservation of marine biological resources under the CFP falls exclusively under the powers of the EU,<sup>464</sup> on certain other aspects of the CFP the Member States and the EU have shared competence.<sup>465</sup> The CFP is directly applicable to the UK because it consists mainly of EU regulations. Dissatisfaction with the constraints of the CFP was a significant factor underpinning support for Brexit within the fishing community, and the inclusion of a separate Fisheries Bill within the Queen's Speech at the beginning of the Parliament elected in June 2017 indicates the inevitability of further deliberations on how, post-Brexit, the UK should revise its fisheries policy in accordance with its international obligations. Pending passage of that Bill, substantial parts of the regime may be maintained intact in the short term by the EUWB if the latter is enacted first. Below, the main issues relating to the matter are considered.

#### 3.1 The Common Fisheries Policy

The CFP is a legal framework regulating fishing activities in the EU. The main instrument is Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC (the CFP Regulation).<sup>466</sup> The Regulation essentially implements the EU's international obligations under UNCLOS, the UNFSA and the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas concluded under the aegis of the Food and Agriculture Organization of the UN (FAO) (1993 FAO Agreement),<sup>467</sup> to all of which the EU is a party.<sup>468</sup> In order for the CFP to meet its objectives, the Regulation provides for the right of access to EU waters, the management of fish stocks and enforcement procedures.

#### 3.2 Access to UK waters

##### 3.2.1 Access under the CFP

The CFP allows all fishing vessels registered in the EU<sup>469</sup> to have equal access to EU waters and resources,<sup>470</sup> normally under fishing licences. The general rule has two exceptions:

a) Member States can limit access to the area within 12 nautical miles (nm) from their baselines, i.e. internal waters and territorial sea, to vessels that traditionally fish in those waters from adjacent ports,

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<sup>462</sup> United Nations Convention on the Law of the Sea (10 December 1982) 1833 UNTS 3

<sup>463</sup> Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (4 December 1995) 2167 UNTS 3.

<sup>464</sup> Art 3(1)(d) of the TFEU.

<sup>465</sup> Art 4(2)(d) of the TFEU.

<sup>466</sup> [2013] OJ L 354/22.

<sup>467</sup> (24 November 1993) 2221 UNTS 91

<sup>468</sup> See recitals 5, 6 of the CFP Regulation.

<sup>469</sup> All fishing vessels flying the flag of a Member State are registered in the Fleet Registry, a database maintained by the Commission under art 15 of the CFP Regulation. Data collection and transmission from the Member States and management of the fleet register by the Commission are governed by Commission Regulation (EC) No 26/2004 of 30 December 2003 on the Community fishing fleet register [2004] OJ L 5/25, as amended.

<sup>470</sup> EU waters are what art 4(1)(1) of the CFP Regulation defines as Union waters, that is waters under the sovereignty or jurisdiction of Member States, except the waters adjacent to overseas countries and territories found in Annex II to the TFEU. Therefore, EU waters and resources comprise the internal waters (i.e. those located landwards of the baseline), the territorial sea and the EEZs of Member States together with the resources therein.

vessels identified under existing neighbourhood relations and vessels related to fisheries as listed in Annex I to the CFP Regulation.

b) Coastal States of Europe's outermost regions can limit access to waters up to 100 nm from their baselines to vessels registered in the ports of these territories and to other EU-flagged vessels<sup>471</sup> that have traditionally fished in those waters.<sup>472</sup> Outermost regions are Member States' territories remote from Europe.<sup>473</sup> In practice, the exception does not concern the UK since there are no UK remote territories; the UK's overseas territories outside Europe are not part of the EU.

Consequently, the UK EEZ, an area beyond the 12-nm territorial sea in which by article 56 of UNCLOS the UK has extensive sovereign rights over both living and non-living resources, is presently accessible to any EU fishing vessel on uniform terms. Also, out to 12 nm, which is the limit of UK territorial waters,<sup>474</sup> the UK must allow access to fishing vessels of EU Member States with historic rights of access. A list of those rights is found in Annex I of the CFP Regulation: France, Ireland, Germany, the Netherlands and Belgium (i.e. all but one of the UK's English Channel, Irish Sea and North Sea neighbours) have historic rights of access to the 6-12 nm belt from the baseline of 31 different UK coastal areas.<sup>475</sup> As a corollary, UK vessels have rights of access to 5 areas in the 6-12 nm belt off the coasts of Ireland, France, Germany and the Netherlands. Post Brexit, the UK's obligations regarding access to its EEZ and territorial waters will be confined to those under UNCLOS, subject to any agreement or extension of the current regime.

### 3.2.2 Access under UNCLOS

Under UNCLOS, the UK's sovereignty extends to its territorial sea of 12 nm, as well as to any waters landward of straight baselines and bay- and river-closing lines, which take the status of internal waters.<sup>476</sup> Access to these waters for fishing can be regulated as the coastal state sees fit within its obligations under international law. Additionally, the UK has sovereign rights over its EEZ of 200 nm with regard to exploring, exploiting, managing and conserving the marine resources in the water column and on and under the seabed.<sup>477</sup> This means that the UK can deny fishing access to vessels of all other States if it is capable of harvesting the totality of the available living resources in the zone.<sup>478</sup> However, if there is a surplus, which it lacks the capacity to harvest, it may be obliged to admit other States to it through international agreements,<sup>479</sup> although this is difficult to enforce.<sup>480</sup>

### 3.2.3 Post-Brexit considerations

Theoretically, post-Brexit the UK is free to restrict access to its waters for fishing by all foreign vessels, subject to the rules on its harvesting capacity. Even if there is a surplus of any given stock, the coastal state has a discretion in deciding whom it will admit by using a range of criteria, a non-exhaustive list of which is included in article 62(3) of UNCLOS. Moreover, the determination of its harvesting capacity is excluded by article 297 of UNCLOS from the partial compulsory jurisdiction over fisheries

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<sup>471</sup> It is unclear whether this refers to individual vessels that used to fish in those waters or to all vessels of a Member State whose fleet traditionally fished there.

<sup>472</sup> Art 5.

<sup>473</sup> These regions are Guadeloupe, French Guiana, Réunion, Martinique, Mayotte and Saint-Martin (France), the Azores and Madeira (Portugal), and the Canary Islands (Spain).

<sup>474</sup> In accordance with art 3 of UNCLOS and s 1(1) of the Territorial Sea Act 1987.

<sup>475</sup> No historic rights of access in UK waters are in force for Denmark under the CFP Regulation.

<sup>476</sup> Arts 2, 3.

<sup>477</sup> Arts 56, 57.

<sup>478</sup> By totality we mean the totality of the allowable catches, see below. The condition does not apply to "sedentary" species, those which at the harvestable stage of their lifecycle are incapable of moving except in constant physical contact with the seabed or subsoil: arts 68, 77(4).

<sup>479</sup> Arts 62(2), 69, 70.

<sup>480</sup> Art 297(3).

disputes that otherwise exists. In effect, there seems to be no practical impediment under the Convention for complete exclusion of any rights of access for foreign vessels.<sup>481</sup>

Nonetheless, an issue arising post Brexit is whether and to what extent there are historic rights that may be asserted by the five Member States concerned (France, Ireland, Germany, the Netherlands and Belgium) in the belt of water between 6 and 12 nm from the baseline. Those historic rights are currently accommodated by the CFP Regulation, which will cease to bind the UK after withdrawal. Thus, their existence post Brexit will depend on whether they can be based independently on international law, either on the European Fisheries Convention<sup>482</sup> or customary international law.<sup>483</sup>

The historic rights now contained in the CFP essentially date from the 1950s. The Convention recognised its parties'<sup>484</sup> exclusive jurisdiction over fisheries up to 12 nm from their baselines at a time when not all of them had 12 nm territorial seas (the UK's remained at 3 nm until 1997), and when the right to exclusive fisheries jurisdiction beyond the territorial sea was still in the early stages of emergence and remained controversial. In acknowledgement of this, it allowed access in the belt between 6 and 12 nm off its parties' coasts to vessels that had been habitually fishing in that area since at least 1953.<sup>485</sup> It is not clear whether the Convention replaced those pre-existing rights, becoming their only legal basis for the future, or merely codified them. Nonetheless, the Convention was later superseded by the first EEC fisheries regulation<sup>486</sup> as contemplated by article 10 of the Convention. Under the Treaty of Accession for the UK, Denmark and Ireland, the historic rights of access were maintained as a time-limited derogation of the equal access principle.<sup>487</sup> The derogation has been subsequently renewed throughout the amendments of the CFP up until today with the current rights of access in Annex I of the CFP Regulation being largely the same as the ones under the Convention.<sup>488</sup>

If the Convention replaced the pre-existing historic rights, it forms the legal basis on which historic rights could be asserted, provided that it remains in force. The Government, however, made it known that it would denounce the Convention under article 15, a step that duly occurred on 3 July 2017 and will put an end to the UK's rights and obligations under it on the second anniversary of the denunciation in 2019, or on Brexit day if that is later.<sup>489</sup> Although the effect of supersession by the CFP Regulation is unclear, in the sense that it could mean either 'replacing' altogether or merely 'suspending' the application of the Convention, determining the exact effect of the CFP Regulation on the Convention has become all but unnecessary, now that the Convention is to be terminated in its application to the

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<sup>481</sup> Alexander Proelss (ed) James Harrison, Elisa Morgera (ch auth), *The United Nations Convention on the Law of the Sea: A Commentary* (Beck/Hart 2017), 499.

<sup>482</sup> Fisheries Convention, (London, 9 March 1964), 581 UNTS 57..

<sup>483</sup> The discussion that follows applies to the UK's historic rights in the EEZs of Ireland, France, Germany and the Netherlands, as well.

<sup>484</sup> The UK, Belgium, France, Germany, Ireland and the Netherlands were among the original parties.

<sup>485</sup> Art 3, 4 of the European Fisheries Convention.

<sup>486</sup> Regulation (EEC) No 2141/70 of the Council of 20 October 1970 laying down a common structural policy for the fishing industry [1970] OJ L 236/1.

<sup>487</sup> The derogation was a compromise reached during the negotiations for the entry of the UK, Denmark and Ireland into the EEC and is recorded in arts 100 and 101 of the Act of Accession, attached to the Treaty of Accession of Denmark, Ireland and the United Kingdom [1972] OJ L 73/14.

<sup>488</sup> Robin Churchill, 'Possible EU fisheries rights in UK waters and possible UK Fishery rights in EU waters post-Brexit' (An opinion prepared for the Scottish Fishermen's Federation, 2016) para 4 < <http://www.sff.co.uk/wp-content/uploads/2017/03/Opinion-for-SFF-2016.pdf> > last accessed 5 July 2017.

<sup>489</sup> 'Treaty record for 1964 London Fisheries Convention' (UK Treaties online) < <http://treaties.fco.gov.uk/treaties/treatyrecord.htm?tid=2459> > last accessed 5 July 2017; 'UK takes key step towards fair new fishing policy after Brexit' (Press release from Department for Environment, Food & Rural Affairs and the Rt Hon Michael Gove MP, 2 July 2017) < <https://www.gov.uk/government/news/uk-takes-key-step-towards-fair-new-fishing-policy-after-brexit> > last accessed 5 July 2017.

UK as a matter of international treaty law, as Churchill submits.<sup>490</sup> It seems quite likely that, without this step, the UK would have had to argue, not altogether convincingly, that the Convention was terminated in accordance with article 59 of the Vienna Convention on the Law of Treaties (VCLT)<sup>491</sup> (due to UNCLOS being subsequently adopted) or at least rendered inapplicable pursuant to article 30(3) VCLT (because of its incompatibility with UNCLOS), in order to prevent the five Member States relying on it to assert historic rights in the 6 nm outer belt of the UK territorial sea. Importantly, by having denounced the Convention the UK can now avoid any dispute of this kind, although the gap of a little over three months between the article 50 notification and the denunciation means that there will be a brief period in 2019 when the Convention will still be in force for the UK but the Regulation might no longer be.

On the other hand, it is possible that the Convention only codified the already established historic rights of France, Ireland, Germany, the Netherlands and Belgium in the UK belt. Consequently, the historic rights are independent of the Convention and the Member States could invoke them under general or regional customary international law. Such an argument seems unlikely though, for the following reasons.

In the first instance, historic rights, according to the tribunal that decided the South China Sea arbitration, require ‘*the continuous exercise of the claimed right by the State asserting the claim and acquiescence on the part of other affected States.*’<sup>492</sup> In the case of the UK, it was express permission rather than acquiescence that allowed the exercise of those rights: the UK allowed the exercise of those rights initially through the implementation of the European Fisheries Convention (through the Fishery Limits Act 1964) and subsequently through its participation in the EEC.<sup>493</sup> Thus, the claimed rights do not fall under the definition of ‘historic rights’ as expressed by the Tribunal, at least in respect of the need for acquiescence on the UK’s part as an affected State.

Secondly, even if historic rights can be asserted by the five Member States, such rights are incompatible with the EEZ regime established by UNCLOS. Their significance is limited to being one of the criteria on an open-ended list to be taken into account when States decide to allow access to their EEZ.<sup>494</sup> The issue was also discussed in the South China Sea Arbitration<sup>495</sup> where the Tribunal held that in the text and context of UNCLOS, historic rights in areas within EEZs have been superseded by the UNCLOS EEZ regime.<sup>496</sup> In fact, the ruling excludes the possibility of any other Member State (besides the five identified above) claiming to have historic rights in the UK EEZ generally.

Thirdly, according to the preamble of the Convention, the parties concluded the Treaty with a desire to ‘*define a regime of fisheries of a permanent character*’. The use of the word ‘define’, taken together with the fact that treaties are a way for States to alter customary rights or obligations *inter se*, points to

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<sup>490</sup> Robin Churchill, ‘Possible EU fisheries rights in UK waters and possible UK Fishery rights in EU waters post-Brexit’ (An opinion prepared for the Scottish Fishermen’s Federation, 2016) paras 7-12 < <http://www.sff.co.uk/wp-content/uploads/2017/03/Opinion-for-SFF-2016.pdf> > last accessed 5 July 2017.

<sup>491</sup> (23 May 1969,) 1155 UNTS 331.

<sup>492</sup> South China Sea Arbitration (Philippines v. China) (12 July 2016) PCA Case No 2013-13, para 265 < <http://www.pcacases.com/pcadocs/PH-CNper cent20-per cent2020160712per cent20-per cent20Award.pdf> > last accessed 5 July 2017.

<sup>493</sup> Robin Churchill, ‘Possible EU fisheries rights in UK waters and possible UK Fishery rights in EU waters post-Brexit’ (An opinion prepared for the Scottish Fishermen’s Federation, 2016) paras 15 < <http://www.sff.co.uk/wp-content/uploads/2017/03/Opinion-for-SFF-2016.pdf> > last accessed 5 July 2017 .

<sup>494</sup> Art 62(3) of UNCLOS.

<sup>495</sup> South China Sea Arbitration (12 July 2016) PCA Case No 2013-13, para 265 < <http://www.pcacases.com/pcadocs/PH-CNper cent20-per cent2020160712per cent20-per cent20Award.pdf> > last accessed 5 July 2017.

<sup>496</sup> See particularly paras 243 and 247.

the direction that the Convention had not a merely codifying purpose but instead put in place a new system for the future.

Even if it is assumed that complete closure of the EEZ to foreign fishing is possible under international law, practical considerations might nonetheless lead the UK to grant access to foreign vessels. Firstly, excluding those of EU Member States from the EEZ would almost certainly provoke a reciprocal exclusion of UK fishing vessels from EU waters. That might be against the UK's interests, since 20 per cent of UK catch is landed overseas and around 17 per cent of the value of UK fisheries is caught in EU EEZs.<sup>497</sup> Mutual benefit from reciprocity, quite apart from the obligation of cooperation discussed below, is the reason why neighbouring States often allow each other access irrespective of the absence of any surplus for harvesting.<sup>498</sup> Secondly, the UK can regulate access of foreign vessels to fish in its waters according to its own priorities. An important aspect of regulation is the ability to impose fees for fishing licences, creating revenue for the State.<sup>499</sup>

### 3.3 Fisheries Management

#### 3.3.1 Management under the CFP

Fisheries management under the CFP Regulation is based on the precautionary approach as described in article 6 of, and Annex II to, the UNFSA: this requires the adoption of target and limit reference points for each stock, with preagreed corrective action if the limits are approached or breached.<sup>500</sup> Under article 2(2) the exploitation of fish stocks must allow their biomass to remain at levels above those generating the maximum sustainable yield (MSY). However, the CFP Regulation does not fully adopt the precautionary approach, despite its rhetoric. The second paragraph of article 2(2) goes against article 7 of the UNFSA by setting the level of fishing mortality<sup>501</sup> that produces the MSY ( $F_{MSY}$ ) as a target, instead of a limit.<sup>502</sup> To this end, the EU adopts multiannual plans covering single fish stocks or geographical areas, which contain a range of conservation measures.<sup>503</sup> Notably, the plans include quantifiable targets regarding fish mortality or stock size.<sup>504</sup> The relevant quotas and total allowable catches (TACs) are set for different species through Council Regulations theoretically<sup>505</sup> according to scientific advice from the International Council for the Exploration of the Sea (ICES)<sup>506</sup> and the

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<sup>497</sup> House of Lords EU Energy and Environment Sub-committee, 'Brexit: Fisheries - Written and Oral Evidence' (2016), 55 per Dr Bryce Stewart < <https://www.parliament.uk/documents/lords-committees/eu-energy-environment-subcommittee/Brexit-fisheries/Fisheries-evidence-volume-Written-Oral.pdf> > last accessed 5 July 2017.

<sup>498</sup> That is the case for Norway and the EU, see House of Lords EU Energy and Environment Sub-committee, 'Brexit: Fisheries - Written and Oral Evidence' (2016), 55 per Prof Robin Churchill < <https://www.parliament.uk/documents/lords-committees/eu-energy-environment-subcommittee/Brexit-fisheries/Fisheries-evidence-volume-Written-Oral.pdf> > last accessed 5 July 2017.

<sup>499</sup> Andrew Serdy, 'The international legal framework for conservation and management of fisheries and marine mammals' in Markus Salomon and Till Markus (eds), *Handbook on Marine Environmental Protection* (Springer, in press), Chapter 6.2.

<sup>500</sup> Recital 8 with reference to art 6 of the UNFSA.

<sup>501</sup> Fishing mortality distinguishes the additional fish deaths caused by human exploitation of a stock from the natural mortality in an unfished stock.

<sup>502</sup> 'Maximum sustainable yield in the Common Fisheries Policy' (Client Earth, 2015) < <http://documents.clientearth.org/wp-content/uploads/library/2015-09-08-maximum-sustainable-yield-in-the-common-fisheries-policy-ce-en.pdf> > last accessed 5 July 2017.

<sup>503</sup> Art 6, 7 of the CFP Regulation.

<sup>504</sup> Art 7,9,10.

<sup>505</sup> As will be explained below this is not the case.

<sup>506</sup> ICES is an international scientific organisation, independent of the EU, originally operating informally on the basis of an exchange of letters between Denmark, Germany, Norway, Russia, Finland, the Netherlands, Sweden and the United Kingdom. It was later established by the Convention for the International Council for the Exploration of the Sea (TIAS 7628). It focuses on marine research primarily in the North Atlantic but also in the Arctic, the Mediterranean Sea, the Black Sea, and the North Pacific Ocean through different partnerships.

Scientific, Technical and Economic Committee for Fisheries (STECF).<sup>507</sup> The fishing opportunities that derive from those plans are allocated to the Member States, which in turn allocate them to their national fleets on the basis of transparent and objective criteria.<sup>508</sup> The fishing opportunities are allocated to Member States according to the relative stability principle, also known as the relative stability key, which means that while the TAC of each stock may change over time, the percentage that each Member State has of it (which varies from stock to stock) remains fixed.<sup>509</sup>

The EU encourages the regionalisation of fisheries management by allowing Member States with a direct interest in a certain geographical region to be involved in shaping conservation measures to be imposed by the Commission.<sup>510</sup> Member States can submit joint recommendations after having consulted with the relevant advisory councils,<sup>511</sup> which are stakeholder organisations established and funded by the EU.<sup>512</sup> The advisory councils act as consultants for the Commission and the Member States regarding fisheries management; they recommend solutions or point out relevant problems while also contributing to the scientific development of conservation measures.<sup>513</sup>

The fleet capacity of the Member States needs to be managed under the CFP Regulation in order to achieve the objectives of sustainability and conservation of marine resources. Member States need to have in place a system of transferable fishing concessions and a register for such concessions.<sup>514</sup> They also need to keep a balance between their fishing capacity and their fishing opportunities and in this respect they need to apply an exit/entry scheme: any entry of capacity in the fleet must be preceded by a withdrawal of at least an equal amount.<sup>515</sup> Lastly, Member States are required to keep a registry of their fishing fleets containing data on ownership, vessels, gear characteristics and activities. The data need to be submitted to the Commission for maintaining a Union fishing fleet registry.<sup>516</sup>

A number of technical measures are in force under the CFP for the regulation of fishing operations. The relevant measures refer to minimum landing sizes and minimum conservation sizes of different fish stocks,<sup>517</sup> to the design and use of fishing gear, to closed areas or seasons and more. One of these measures is the so-called landing obligation,<sup>518</sup> a measure envisaged in article 15 of the CFP Regulation

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Additionally, it acts as an advisor for international commissions and governments on marine management issues. See 'Our history' (ICES) < <http://www.ices.dk/explore-us/who-we-are/Pages/Our-history.aspx>.> last accessed 5 July 2017.

<sup>507</sup> The STECF was originally envisaged in art 26 of the CFP Regulation but it was not until much more recently that it came into being by the Commission Decision of 25 February 2016 setting up a Scientific, Technical and Economic Committee for Fisheries [2016] OJ C 74/4. It is a consulting scientific body dedicated to assist the Commission with matters of marine conservation and management as well as to monitor the development of the fisheries policy.

<sup>508</sup> Art 16, 17 of the CFP Regulation.

<sup>509</sup> For TACs and quotas see 'TACs and quotas' (European Commission, 14 June 2017) < [https://ec.europa.eu/fisheries/cfp/fishing\\_rules/tacs\\_en](https://ec.europa.eu/fisheries/cfp/fishing_rules/tacs_en) > last accessed 5 July 2017.

<sup>510</sup> Art 18 of the CFP Regulation.

<sup>511</sup> Currently, there are seven advisory councils (ACs): the Baltic Sea AC, the Long Distance AC, the Mediterranean Sea AC, the North Sea AC, the North-western Waters AC, the Pelagic Stocks AC and the South-western Waters AC.

<sup>512</sup> Art 45.

<sup>513</sup> Art 44.

<sup>514</sup> Art 21.

<sup>515</sup> Arts 22, 23.

<sup>516</sup> Art 24.

<sup>517</sup> For the definition of minimum landing sizes and minimum conservation sizes see art 4 (1) and (17).

<sup>518</sup> The landing obligation requires all catches of regulated commercial species on-board to be landed, whether or not the vessel has any quota against which to count them. It applies to all vessels fishing in European waters and to EU fishing vessels on the high seas.

to be phased in for all species subject to TACs or minimum sizes, a process due to be completed by 2019.<sup>519</sup>

Regarding the external aspect of fisheries management, the CFP Regulation provides that the EU will ‘actively support and contribute to the activities of international organisations dealing with fisheries, including [Regional Fisheries Management Organisations] RFMOs,’ and that ‘the positions of the Union in international organisations dealing with fisheries and in RFMOs shall be based on the best available scientific advice’, indirectly establishing an obligation for the EU to participate in such organisations.<sup>520</sup> The regulation also underlines the need for co-operation with organisations and third States – a category into which the UK will fall after Brexit day – for achieving compliance with international standards.<sup>521</sup> Under these general obligations, the EU has the power to adopt Sustainable Fisheries Partnership Agreements with third countries and provide to those countries financial assistance towards the cost of access to their waters and the maintenance of a governance framework for their fisheries.<sup>522</sup> As the list of such Agreements indicates,<sup>523</sup> these are for the EU’s distant-water fisheries off the coasts of developing countries, and thus unlikely to provide the model for its future fisheries relations with the UK.

Additionally, however, the EU has the power to enter into joint management agreements with third countries with which it shares fishing interests regarding shared and straddling stocks,<sup>524</sup> in order to ensure their proper management. Those powers to enter bilateral or multilateral agreements are to be exercised according to the obligations imposed by UNCLOS.<sup>525</sup> Such agreements are the Convention on Future Multilateral Co-operation in North-East Atlantic Fisheries<sup>526</sup> and the so-called ‘Northern Agreements’. The former is a multilateral instrument establishing the North-East Atlantic Fisheries Commission (NEAFC), whose parties are Denmark (in respect of the Faroe Islands and Greenland), the EU, Iceland, Norway and Russia. The latter are bilateral agreements with Norway and Denmark (in respect of the Faroe Islands). The aim of such instruments is to co-ordinate fishing activities of the parties in the region and manage living resources by determining among other things the TACs between the parties.

Besides NEAFC, the EU is a member of a number of other RFMOs. Some manage highly migratory species, primarily tuna: the International Commission for the Conservation of Atlantic Tuna (ICCAT), the Indian Ocean Tuna Commission (IOTC), the Western and Central Pacific Fisheries Commission (WCPFC), the Inter-American Tropical Tuna Commission (IATTC) and the Commission for the Conservation of Southern Bluefin Tuna. Other bodies relate to a particular species in a defined area: the North Atlantic Salmon Conservation Organization and the Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea. A third group manages fish stocks other than those for which a specialised body exists, by geographical area: the Northwest Atlantic Fisheries

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<sup>519</sup> See the list of the temporary discard plans adopted by the Commission to gradually implement the landing obligation, ‘Discarding plans and the landing obligation’ (European Commission, 5 June 2017) < [https://ec.europa.eu/fisheries/cfp/fishing\\_rules/discards\\_en#Landing%20obligation](https://ec.europa.eu/fisheries/cfp/fishing_rules/discards_en#Landing%20obligation) > last accessed 5 July 2017.

<sup>520</sup> Art 29 (3), (4) of the CFP Regulation. See below.

<sup>521</sup> Art 29, 30.

<sup>522</sup> Arts 31, 32.

<sup>523</sup> Currently, the EU has 14 partnership agreements in force with Greenland, Morocco, Gabon, Cape Verde, Mauritania, Senegal, Guinea-Bissau, Liberia, Côte d’Ivoire, Sao Tome and Principe, Madagascar, Comoros, Seychelles and Mauritius. Under those agreements, the EU fleet has access to the surplus in the respective EEZs. See ‘Bilateral agreements with countries outside the EU’ (European Commission, 5 June 2017) < [https://ec.europa.eu/fisheries/cfp/international/agreements\\_en](https://ec.europa.eu/fisheries/cfp/international/agreements_en) > last accessed 5 July 2017.

<sup>524</sup> As described in UNCLOS art 63 and below at notes 533 and 534.

<sup>525</sup> Art 33.

<sup>526</sup> (18 November 1980,) 1285 UNTS 129; [1981] OJ L 227/ 21.

The Convention replaced the North-East Atlantic Fisheries Convention (adopted 24 January 1959, entered in force 27 June 1963) 486 UNTS 157.

Organization, the South-East Atlantic Fisheries Organisation (SEAFO), the South Indian Ocean Fisheries Agreement (SIOFA), the South Pacific Regional Fisheries Management Organisation (SPRFMO), the Convention on Conservation of Antarctic Marine Living Resources (CCAMLR) and the General Fisheries Commission for the Mediterranean (GFCM).<sup>527</sup> The EU participates in RFMOs to the exclusion of its Member States.

### 3.3.2 Management under international law (EEZ and High Seas)

UNCLOS contains separate provisions for fisheries management in the EEZ and on the high seas, with conservation being the cornerstone in both cases, even though the EEZ is characterised by the presence of sovereign rights while the starting point on the high seas is the qualified freedom of fishing.

For a State exercising its sovereign rights over marine living resources in the EEZ, article 61 requires that the allowable catch is determined. The figure is decided by the State according to the best scientific advice available and with a view to avoiding overexploitation. Co-operation with international fisheries management organisations as well as the exchange of data are envisaged. States are under an obligation to take measures that maintain or restore the biomass of fish stocks to levels producing the MSY ( $B_{MSY}$ ), taking into account economic and environmental factors together with recommended international standards.

Fishing on the high seas is open to any State according to article 87(1)(e). States are required to co-operate with each other in the conservation of living resources and regulate their nationals' activities accordingly when they fish on the high seas.<sup>528</sup> Similarly to the EEZ provisions, States determine their allowable catches in the high seas on the basis of maintaining the  $B_{MSY}$  levels and by using the best scientific evidence available. Here too relevant economic and environmental considerations as well as international standards are to be taken into account. Additionally, discrimination against fishermen of any State is prohibited when conservation measures are adopted.<sup>529</sup>

The fact that many fish stocks are transboundary in nature has led to UNCLOS taking a 'species approach' to fisheries management. Specific rules apply to shared, straddling and highly migratory stocks as well as anadromous and catadromous species.<sup>530</sup> UNCLOS imposes a general obligation of co-operation between the States in whose EEZs the same stocks occur (shared stocks).<sup>531</sup> An identical obligation arises between the coastal and the fishing States for straddling and highly migratory stocks, which travel between EEZs and the adjacent or more distant high seas at different periods of their lifetime.<sup>532</sup>

Although the obligation to co-operate with regard to shared stocks is not further elaborated in UNCLOS (creating issues of enforcement<sup>533</sup>), the management of straddling and highly migratory stocks is the subject of the UNFSA, which aims to reinforce the UNCLOS obligations on the matter. The UK is party to the agreement in its own right in its respect of its overseas territories, and as a Member State of the EU otherwise. The UNFSA defines the MSY reference points such as  $B_{MSY}$  and  $F_{MSY}$  as limits, which

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<sup>527</sup> A full list of RFMOs where the EU is a member can be found in 'Regional fisheries managements Organisations (RFMOs) (European Commission, 5 June 2017) <[https://ec.europa.eu/fisheries/cfp/international/rfmo\\_en](https://ec.europa.eu/fisheries/cfp/international/rfmo_en)> last accessed 5 July 2017. Note that some of these are not strictly RFMOs, as no organisation is created; the parties meet annually to take joint decisions for the fishery, but the distinction is not significant for present purposes, as participation is still a function of becoming party to the pertinent treaty.

<sup>528</sup> Arts 117, 118.

<sup>529</sup> Art 119.

<sup>530</sup> Anadromous species migrate from the sea to fresh water to spawn (for example salmon or striped bass) while catadromous species do the opposite (for example eels).

<sup>531</sup> Art 63(1).

<sup>532</sup> Arts 63(2), 64.

<sup>533</sup> See below, section 3.5.

cannot be exceeded and requires States to take restorative action in case of breach of the limit, which should be pre-agreed.<sup>534</sup> It also provides an obligation on relevant States to ensure compatibility between EEZ and high seas management measures for the same stock.<sup>535</sup>

The UNFSA also contains important provisions on the role of RFMOs in the management of international fisheries. RFMOs were given recognition in articles 63, 64 and 118 of UNCLOS but subsequently much more firmly empowered by the UNFSA as '*the appropriate medium through which States are to cooperate so as to achieve and enforce conservation objectives both on the high seas and in areas under national jurisdiction*'.<sup>536</sup> RFMOs are a vehicle by which States essentially give effect to the UNCLOS obligation of co-operation for the conservation of straddling and highly migratory stocks by adopting conservation measures binding on all their members, as well as on any cooperating non-members. Under article 8(3) and (4) States with interests in fishing particular stocks have to become members of relevant RFMOs or apply their measures or refrain from fishing the stocks those RFMOs manage.

To deal with the issue of non-compliance with RFMO measures (usually on the part of vessels of States running open registries, often termed flags of convenience) the FAO has adopted the 1993 Agreement to Promote Compliance with the International Conservation and Management Measures by Fishing Vessels on the High Seas. The Agreement is the only binding part of the otherwise soft-law Code of Conduct for Responsible Fisheries.<sup>537</sup> The EU is party to the 1993 FAO Compliance Agreement on behalf of, and to the exclusion of, its Member States.<sup>538</sup>

### 3.3.3 Post-Brexit considerations

After Brexit, the UK's obligations regarding fisheries management will generally be determined under UNCLOS and the UNFSA at a minimum, as well as the FAO Compliance Agreement should the UK become party to it. Additionally, the UK will be subject to any treaties creating RFMOs that it chooses to join (or to which it opts to attach itself as a cooperating non-member) or of which it is already a member or cooperating non-member.

The UK will be responsible for the management of the marine resources found in its internal and territorial waters and EEZ. Within territorial and internal waters, the UK will have a more or less free hand subject to the now remote possibility of any historic rights between 6 and 12 nm. Clearly, however, regulation is still needed in the UK's own interest and the EU standards can if necessary remain in place under the EUWB until reviewed, except to the extent that catches in these waters may have to be counted towards the UK's catch limit under RFMO quotas; RFMO practice is not uniform in this regard. The UK will need to set TACs in its EEZ with reference to the  $B_{MSY}$  and by using the best scientific advice available, as directed by article 61 of UNCLOS. For purely domestic fish stocks, as a strict matter of law, it has greater freedom of manoeuvre in its territorial sea and internal waters than in its EEZ. However, given the mobility of stocks, it would have an interest in minimising or preventing altogether any difference in how it manages the fisheries in the different zones of its marine estate. On the other hand, this has to be weighed against the high risk that any changes affecting existing

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<sup>534</sup> Art 6 and Annex II to the UNFSA.

<sup>535</sup> Art 7.

<sup>536</sup> Michael Lodge and others 'Recommended Best Practices for Regional Fisheries Management Organizations: Report of an independent panel to develop a model for improved governance by RFMOs' (Chatham House, 2007), 23 < <https://www.oecd.org/sd-roundtable/papersandpublications/39374297.pdf> > last accessed 5 July 2017.

<sup>537</sup> (adopted on 31 October 1995) FAO Doc 95/20/Rev/1.

<sup>538</sup> List of parties available at 'Agreement to Promote Compliance with the International Conservation and Management Measures by Fishing Vessels on the High Seas' < [http://www.fao.org/fileadmin/user\\_upload/legal/docs/012s-e.pdf](http://www.fao.org/fileadmin/user_upload/legal/docs/012s-e.pdf) > last accessed 5 July 2017.

EU Member State quotas in the UK EEZ under the CFP will give rise to retaliatory measures affecting UK quotas in the EU EEZ.<sup>539</sup>

To the extent that stocks are shared with the EU, Norway and the Faroe Islands, the UK is under an obligation to co-operate with them in fisheries management by entering into bilateral agreements or other arrangements, according to article 63(1) of UNCLOS. It should be noted that the EU will negotiate any such agreement on behalf of all the Member States, so there is no scope for the UK to favour the fleets of certain EU Member States over others.<sup>540</sup>

TACs for shared stocks also need to be set with reference to allowing  $B_{MSY}$  to be achieved, and on the basis of science. Currently, the ICES makes recommendations to the EU for TACs, which are often varied upwards to accommodate political interests of Member States.<sup>541</sup> The UK is under no obligation to continue consulting ICES when setting TACs. It could decide to rely on scientific data and analysis from a different source. However, having the same scientific point of reference during negotiations is an efficient way to avoid over-exploitation, achieve conservation and reduce potential disagreement.

Another hurdle to the co-operation on shared stocks will be the approach that the UK will decide to take regarding the MSY and the precautionary approach to fisheries. In essence, the UK could choose between the UNFSA approach, which sets MSY reference points as limits<sup>542</sup> and the EU/UNCLOS approach, which sets those points as targets. The question will turn on the relative appetite of the UK and the EU for risk in terms of how much fishing pressure, and thus danger of collapse, each is prepared to put on stocks. It is not clear that what the EU describes as precautionary management, by which it appears to regard it as sufficient to limit the catch to the full MSY irrespective of the size of the stock, meets the standard in UNCLOS of rebuilding smaller stocks to  $B_{MSY}$  (since catching the MSY from a small stock only depletes it further), let alone the more stringent standard of the UNFSA applicable to straddling and highly migratory stocks.

Related to this, the EU's plan to ensure high long-term fishing yields for all stocks by 2020 will be one of the main elements to be taken into account during negotiations. The EU will at least in theory need to set any new TACs in line with that aim. However, the UK will not necessarily share the same objective post Brexit. At the same time, the EU itself might encounter practical difficulties in achieving the 2020 goal. This is so because high long-term yields require lower ones in the short term, which is most likely to create political friction within the both the UK and the EU.

Despite the obligation to co-operate, unilateral TACs may be hard to avoid. According to the New Economics Foundation,<sup>543</sup> the problem of TACs being set higher than the scientific advice would allow is a standard practice for EU Member States. For example, the UK for the period 2001-2017 has set TACs at an average 21 per cent in excess of ICES scientific advice in the Northeast Atlantic, ranking

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<sup>539</sup> House of Lords EU Energy and Environment Sub-committee, 'Brexit: Fisheries - Written and Oral Evidence' (2016), 107 per John Farnell.

<sup>540</sup> House of Lords EU Energy and Environment Sub-committee, 'Brexit: Fisheries - Written and Oral Evidence' (2016), 107 per John Farnell < <https://www.parliament.uk/documents/lords-committees/eu-energy-environment-subcommittee/Brexit-fisheries/Fisheries-evidence-volume-Written-Oral.pdf> > last accessed 5 July 2017.

<sup>541</sup> House of Lords EU Energy and Environment Sub-committee, 'Brexit: Fisheries - Written and Oral Evidence' (2016), 51 per Prof Robin Churchill < <https://www.parliament.uk/documents/lords-committees/eu-energy-environment-subcommittee/Brexit-fisheries/Fisheries-evidence-volume-Written-Oral.pdf> > last accessed 5 July 2017.

<sup>542</sup> The requirement is mandatory under the UNFSA for straddling and highly migratory stocks but not for shared stocks, which are the bulk of the stocks affected by Brexit.

<sup>543</sup> House of Lords EU Energy and Environment Sub-committee, 'Brexit: Fisheries - Written and Oral Evidence' (2016), 137 per New Economics Foundation < <https://www.parliament.uk/documents/lords-committees/eu-energy-environment-subcommittee/Brexit-fisheries/Fisheries-evidence-volume-Written-Oral.pdf> > last accessed 5 July 2017.

second in the highest TACs (in tonnes) beyond scientific advice after Denmark.<sup>544</sup> France, Sweden and the Netherlands complete the top five States with the highest excess of TACs (in tonnes) beyond advice.<sup>545</sup> In the light of this, there is likely to be strong pressure on the UK to maintain this policy post-Brexit from fishing industry interests. The UK fleet, hoping for short-term gains will probably not welcome measures aimed at restoring stocks to  $B_{MSY}$  by setting low TACs or limiting fishing effort in UK waters. However, reinforcing business as usual is very risky: a relevant example that it is in no one's interests to repeat is the case of the Northern cod stock off Atlantic Canada, which collapsed in 1992 after Canada encouraged the expansion of its local fishing capacity in the wake of the declaration of its EEZ.<sup>546</sup> It is thus in the UK's economic as well as environmental interest to ensure that scientific advice is being followed for setting TACs and managing fisheries post-Brexit. In short, if the UK regards the fisheries management currently pursued under the CFP Regulation as insufficiently precautionary, Brexit offers a good opportunity to move towards remedying this. If on the other hand the UK regards the CFP as excessively precautionary, there will be some scope under Brexit to escape its restraints, but this will entail moving even further away from compliance with the UNCLOS requirement to restore stocks to, or maintain them at, the size at which the MSY is generated.

The relative stability key will cease to bind the UK after withdrawal from the EU. The UK could decide to negotiate its share of TACs of shared and straddling stocks without reference to relative stability, in favour of an alternative principle such as zonal attachment (under which the UK's share would be calculated from the proportion of the stock present in its waters averaged over a year). This would not prevent the EU from continuing to adhere to relative stability internally if it wishes to do so. If that is the case, the EU will have to subtract the UK's share from the EU total of catches before dividing the remaining subtotal (forming the new EU total) according to the relative stability principle. Difficulties are expected to arise in the matter from the EU's part because changes to relative stability can disturb long-established fishing patterns and interests. This consideration is relevant for the UK as well albeit to a lesser extent, when deciding whether it will keep the relative stability principle as part of its policy, should there be enough losers from any contemplated change to dissuade it from that step.<sup>547</sup>

Quota-hopping, which is the phenomenon of EU interests owning UK fishing rights, is directly related to the freedom of establishment under the Treaties.<sup>548</sup> Thus, whether it will be possible in the future will depend on the outcome of the article 50 negotiations. The default position is that the freedom will end, though the situation of those already established may become an issue. There is a substantial difference between prohibiting quota sales to and purchases by non-UK persons after Brexit day, the less controversial option, and forcing divestment by such persons of quota they already own. Any compulsory divestment will need to be gradual if it is not to depress quota prices to the detriment of UK holders.

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<sup>544</sup> See Overall Results of the technical appendix in Griffin Carpenter 'Landing the blame: Overfishing in the Northeast Atlantic 2017' (New Economics Foundation, 12 April 2017) < <http://neweconomics.org/2017/04/landing-blame-overfishing-atlantic-2017/> > last accessed 5 July 2017.

<sup>545</sup> See 'Overall Results' of the technical appendix in Griffin Carpenter 'Landing the blame: Overfishing in the Northeast Atlantic 2017' (New Economics Foundation, 12 April 2017) < <http://neweconomics.org/2017/04/landing-blame-overfishing-atlantic-2017/> > last accessed 5 July 2017.

<sup>546</sup> After the EEZ declaration, Canada excluded all foreign fishing vessels from its waters but allowed the national fleet to expand in order to replace the foreign capacity. Not until the last few years has the cod stock started to show signs of recovery.

<sup>547</sup> House of Lords EU Energy and Environment Sub-committee, 'Brexit: Fisheries - Written and Oral Evidence' (2016), 51-52 per Prof Robin Churchill and Dr Bryce Stewart < <https://www.parliament.uk/documents/lords-committees/eu-energy-environment-subcommittee/Brexit-fisheries/Fisheries-evidence-volume-Written-Oral.pdf> > last accessed 5 July 2017.

<sup>548</sup> Imposition of nationality restrictions for ownership of UK fishing vessels was held to be contrary to arts 49-55 TFEU in C-221/89 *The Queen v Secretary of State for Transport, ex parte Factortame Ltd and others* [1991] ECR I-03905 and C-246/89 *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* [1989] ECR 03125.

It is clear that participation of the UK in EU Advisory Councils will not be possible after withdrawal from the EU, mainly because of the opposing interests that will arise between the UK and the EU post-Brexit. Nonetheless, the UK will remain a member of the EU for the next two years and as such, technically it will continue to be involved in CFP planning going beyond 2019, perhaps absenting itself from discussion on different issues or fisheries at varying paces. A clean break similar to the immediate exclusion of the UK from the EU organs preparing for the article 50 negotiations seems neither achievable nor desirable, given the nature of fisheries management.<sup>549</sup> The UK needs also to devise measures for its vessels fishing on the high seas. According to the Marine Management organisation's (MMO) UK fisheries database, there were 11 vessels reporting activity in international waters in 2016.<sup>550</sup> In this regard, co-operation with other fishing States is required. This issue is discussed further below.

Moreover, post-Brexit the UK will cease to have any link to the RFMOs in which it is presently represented by the EU. This means that there needs to be a decision on which RFMOs the UK should join in its own right, according to its fishing interests.<sup>551</sup> Its location prescribes that the UK should join NEAFC in order to co-operate with other fishing interests in its immediate region. Due to its island possessions in the Pacific Ocean,<sup>552</sup> the UK is also eligible to join the WCPFC, the SPRFMO and the IATTC, while the British Indian Ocean Territory will allow participation in the SIOFA alongside the IOTC of which it is already a member. As a claimant to territory in Antarctica as well as the sub-Antarctic islands (the Falklands, South Georgia and the South Sandwich Islands) the UK is also a member of CCAMLR.<sup>553</sup> It also participates in ICCAT in respect of its island territories outside the EU (Ascension Island, St Helena and Tristan da Cunha),<sup>554</sup> which also entitle the UK to join SEAFO. Apart from the GFCM, which the UK will become eligible to join by virtue of Gibraltar, the sole UK possession outside the British Isles that is in the EU, this issue does not strictly arise as a consequence of Brexit. Even so, UK delegations currently representing these possessions in bodies of which the EU is also a member will in practice be likely to enjoy greater freedom of action than has been the case until now, as the pressure to align themselves with EU positions becomes less overwhelming.

Under any decision to join an RFMO, the UK (being a coastal or a fishing State depending on the case), in addition to having to take measures that are compatible with those on the high seas or in other EEZs in which the stocks occur,<sup>555</sup> will become bound by the measures adopted by the RFMO from that point, and possibly also by pre-existing ones.<sup>556</sup> Furthermore, negotiating its share of catch or effort quotas as

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<sup>549</sup> The debate is analogous to the one concerning the participation of the UK (for the 2-year period before Brexit day) to the free trade agreement negotiations between the EU and third countries, with which the UK might want to conclude trade agreements.

<sup>550</sup> Email from MMO to first author as an answer to a request under the Freedom of Information Act 2000 (9 May 2017).

<sup>551</sup> Arts 8(3) and (4) requires RFMOs to be open to States with a '*real interest*' in the fisheries they manage, which implies that they must not exercise any power their constitutive treaty may give them to veto its entry (e.g. WCPFC requires the concurrence of every existing member to the admission of a new one). Similarly, denial by any RFMO the UK may wish to join of the existence of a real interest would be counterproductive, as it would be tantamount to a refusal to cooperate with the UK, making it impossible for the RFMO to insist on cooperation with it by a UK involuntarily excluded from participation in its affairs. See Andrew Serdy, *The New Entrants Problem in International Fisheries Law* (Cambridge University Press, 2016).

<sup>552</sup> Pitcairn and nearby islands.

<sup>553</sup> Which forms part of the Antarctic Treaty system.

<sup>554</sup> Being already a member, the UK technically will not join ICCAT. It needs only to notify the depositary that from Brexit day it will be party also in respect of the British Isles and Gibraltar. This notification would reverse the notification that was made by the UK under article XIV(6) of the International Convention for the Conservation of Atlantic Tunas (14 May 1966,) 673 UNTS 63 when the EU became a member of the commission. No express provision is made on the matter in that Convention.

<sup>555</sup> See art 7 of the UNFSA.

<sup>556</sup> Andrew Serdy, *The New Entrants Problem in International Fisheries Law* (Cambridge University Press, 2016) 78-84.

a new member might not be without problems, given that RFMOs tend to be reluctant to allocate shares to new participants.<sup>557</sup> Ways to deal with that could be invoking its pre-1973 historical record of fishing, arguing that it is entitled to succeed to some portion of the EU quota commensurate with the scale of its recent participation in the fisheries (although this would require a firmer stance in favour of the property-like nature of such quota than most States have hitherto been prepared to embrace) or relying on articles 8 and 11 of the UNFSA.<sup>558</sup>

In respect of the EU's partnership agreements, those will cease to apply vis-à-vis the UK post-Brexit. The UK could negotiate similar agreements in its own right to the extent (if any) it has relevant fishing interests. Depending on the number of UK vessels fishing in distant waters and their dispersion in different EEZs, the UK could instead engage in direct co-operation with the third States, a more flexible approach than concluding international agreements.

Regarding its fishing fleet, the UK is under certain UNFSA obligations for vessels fishing on the high seas. Article 18(3) requires the UK to control its fleet through a system of licensing or authorisation based on procedures agreed regionally or globally. Regulations need to be in place prohibiting unauthorised fishing on the high seas or in areas under the jurisdiction of other States. The licence needs to be carried on-board and produced for authorised inspection. Moreover, the UK needs to have a national record of its vessels fishing on the high seas, to adopt internationally acceptable marking requirements for identification purposes, to record, monitor and verify fisheries data and to inspect fishing activities by inspection or observer schemes or vessel monitoring systems on a national, regional or global level. The FAO Compliance Agreement likewise requires a national authorisation system and a record to be kept of vessels fishing on the high seas.<sup>559</sup> The UK would not be bound by this agreement unless it decides to become a party post-Brexit. It may conclude, though, that joining would make little practical difference in the matter, since on most points UNFSA obligations, by which it is already bound, are far more elaborate. As discussed in section 3.1, UK fleets are already under direct CFP obligations regarding licensing, registration and other aspects. Post Brexit, the system will cease to be mandatory but there may be parts of it that the UK would find it convenient to replicate, perhaps for the long term. In any event, the UK fleet will not escape its indirect application to the extent that is permitted to continue fishing in EU waters.

An important aspect of any future UK fisheries policy is that constitutionally fisheries is a devolved matter.<sup>560</sup> That said, international obligations regarding management of fisheries is not. Hence, TACs or quotas are decided internationally through bilateral agreements or RFMOs before eventually being allocated to fishing interests within the UK. Currently, the UK quotas are apportioned to the four Administrations by the UK Government as fixed quota allocation (FQA) units under the 2012 Concordat on Management Arrangements for Fishing Opportunities and Fishing Vessel Licencing in the UK.<sup>561</sup> The Administrations further divide the FQA units between their licensed fishing vessels. Vessels need to be registered in and licensed by the Administration where they predominantly fish.<sup>562</sup> It appears therefore that UK vessels can fish anywhere in UK waters (subject of course to their licence)

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<sup>557</sup> See for example the NEAFC 'Guidelines for the Expectation of Future New Contracting Parties with regard to Fishing Opportunities in the NEAFC Regulatory Area' (NEAFC, November 2003) <<http://www.neafc.org/becomingacp>> last accessed 5 July 2017, telling potential new entrants not to expect any quota of stocks already allocated.

<sup>558</sup> Andrew Serdy, *The New Entrants Problem in International Fisheries Law* (Cambridge University Press, 2016) 37-140.

<sup>559</sup> Arts III(2) and IV.

<sup>560</sup> Under the Scotland Act 1998, the Welsh Government Act 2006 and the Northern Ireland Act 1998.

<sup>561</sup> The consultation process for changes to the 2012 Concordat was closed on 28 February 2017.

<sup>562</sup> Art 3(a), (c) 2012 Concordat, although there is an exception where a vessel is licensed by a different Administration from the one for the waters in which it fishes, due to a material and significant link. See art 3(d) 2012 Concordat.

as long as their catch is predominantly made within their administrative area. Presumably, if this is not the case, a vessel might need to be re-registered in the Administration where it predominantly fishes.

Post Brexit, devolved governments might expect to play an important role in negotiations both externally regarding TACs of shared stocks and internally for the allocation of the TACs. This is especially true for Scotland, given that 62 per cent of all landings by UK vessels are caught in the northern North Sea and west of Scotland.<sup>563</sup> Moreover, given that the 2012 Concordat does not specifically address management of stocks present on both sides of the internal boundaries because they are subject to a uniform scheme of management currently dictated at EU level, the emergence of a situation where different harvesting strategies are pursued on opposite sides of such a boundary cannot be ruled out. Ways will need to be found to deal with this, if it occurs.

## 3.4. Market and Funding

### 3.4.1 Fisheries Market and Funding under CFP

The CFP Regulation also involves the common organisation of the fisheries market within the EU.<sup>564</sup> To this end and pursuant to the CFP Regulation, Regulation 1379/2013 (CMO Regulation)<sup>565</sup> has been adopted, introducing common organisation of the market (CMO) for fisheries and aquaculture products. Among other things, the regulation allows for the establishment of producer organisations and associations,<sup>566</sup> sets conditions for their recognition by the EU Member States in order to help achieve the objectives of the CFP and the CMO,<sup>567</sup> requires them to submit production and marketing plans for approval to the national authorities,<sup>568</sup> permits the adoption of common marketing standards within the EU<sup>569</sup> and provides rules for consumer protection.<sup>570</sup> Implementing Regulation 1419/2013<sup>571</sup> was also adopted pursuant to the CMO Regulation.

Furthermore, fisheries products are traded within the EU under the freedom of movement of goods, deriving from article 28 TFEU. No tariffs, quotas or other barriers are imposed for imports or exports between Member States because the EU is a customs union.<sup>572</sup> Common customs tariff duties are fixed for trade with third countries.<sup>573</sup> Specifically for certain fisheries products, triennial systems of autonomous tariff quotas are in place to regulate imports from outside the EU. Currently, most EU tariff quotas are set at zero, with a few exceptions, the highest of which is set to a duty of 5 per cent for certain categories of herring.<sup>574</sup>

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<sup>563</sup>UK Sea Fisheries Statistics 2015' (MMO, 2017), Chart 1.8 < [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/598208/UK\\_Sea\\_Fisheries\\_Statistics\\_2015\\_full\\_report.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/598208/UK_Sea_Fisheries_Statistics_2015_full_report.pdf) > last accessed 5 July 2017.

<sup>564</sup> Art 35.

<sup>565</sup> Regulation (EU) No 1379/2013 of the European Parliament and of the Council of 11 December 2013 on the common organization of the markets in fishery and aquaculture products, amending Council Regulations (EC) No 1184/2006 and (EC) No 1224/2009 and repealing Council Regulation (EC) No 104/2000 [2013] OJ L 354/1.

<sup>566</sup> Art 6 and 9.

<sup>567</sup> Recital 7 and art 14.

<sup>568</sup> Art 28.

<sup>569</sup> Art 33.

<sup>570</sup> Part IV.

<sup>571</sup> Commission Implementing Regulation (EU) No 1419/2013 of 17 December 2013 concerning the recognition of producer organizations and inter-branch organizations, the extension of the rules of producer organizations and inter-branch organizations and the publication of trigger prices as provided for by Regulation (EU) No 1379/2013 of the European Parliament and of the Council on the common organization of the markets in fishery and aquaculture products [2013] OJ L 353/43.

<sup>572</sup> Art 30 of the TFEU.

<sup>573</sup> Art 31 of the TFEU.

<sup>574</sup> Currently in Council Regulation (EU) 2015/2265 of 7 December 2015 opening and providing for the management of autonomous Union tariff quotas for certain fishery products for the period 2016-2018 [2015] OJ L 322/4.

The EU has also a number of free trade agreements (FTAs) with third countries.<sup>575</sup> In respect of UK exports, the most important agreements are those with South Korea,<sup>576</sup> Switzerland,<sup>577</sup> Ukraine<sup>578</sup> and Norway,<sup>579</sup> which are among the largest non-EU importers of UK fish.<sup>580</sup> Generally, tariffs for imported fish in these countries are preferential or even zero for EU and WTO members.

Finally, the EU has established the European Maritime Fisheries Fund 2014-2020 (EMFF)<sup>581</sup> in order to offer financial support to the fisheries sector, together with the Member States. The aim is to fulfil the CFP's objectives by supporting fishermen to embrace sustainable fishing and coastal communities to develop their economies. The fund also contributes towards expanding the job market in the industry. The UK is allocated 243.1 million euros for the period of 2014-2020 to be managed by the MMO.

### 3.4.2 Fisheries Market and Funding Post-Brexit

After the UK withdraws from the EU the CMO Regulation, together with the implementing regulations, will cease to bind the UK. Whether the structure of market organisation will be maintained within the UK is a matter to be decided but the EU framework will remain relevant for fisheries operators wishing to export their product to the EU.

Regarding fish trade, Brexit signals the end of participation in the single market under the TFEU. However, Brexit does not necessarily mean withdrawal from the EEA Agreement by default,<sup>582</sup> and thus single market membership could be retained, at least until the UK decides to withdraw from the EEA Agreement itself. Although access to the single market under the EEA Agreement is the closest alternative to being a Member State, fisheries trade is not free within the EEA: both Norway and Iceland are subject to tariffs for certain fisheries products.<sup>583</sup> Therefore, it seems likely that even if EEA membership survives, fish trade between the UK and the EU will not be free as is currently the case.

Post Brexit, the UK ceases to be part of the customs union as well. In that respect the EEA Agreement has nothing to offer, given that the Agreement does not create or preserve a customs union. Unless a new customs union with the EU is established (which is presently ruled out by the White Paper<sup>584</sup>), the UK will be able to negotiate its trade terms directly with the EU (under the article 50 process) and with third countries. Fisheries products will be subject to the triennial tariff quotas and general tariffs under

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<sup>575</sup> For a list of FTAs, see 'Agreements' (European Commission, 31 March 2017) < [http://ec.europa.eu/trade/policy/countries-and-regions/agreements/index\\_en.htm](http://ec.europa.eu/trade/policy/countries-and-regions/agreements/index_en.htm) > last accessed 5 July 2017.

<sup>576</sup> Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part [2011] OJ L 127/6.

<sup>577</sup> Agreement between the European Economic Community and the Swiss Confederation [1972] OJ L 300/188.

<sup>578</sup> Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part [2014] OJ L 161/3.

<sup>579</sup> Agreement between the European Economic Community and the Kingdom of Norway (Brussels, 1 July 1973, OJ L171/2).

<sup>580</sup> House of Lords European Union Committee, 'Brexit: Fisheries - 8th report of session 2016-2017' (HL Paper 78, 2016), para 162 < <https://www.publications.parliament.uk/pa/ld201617/ldselect/ldecom/78/78.pdf> > last accessed 5 July 2017.

<sup>581</sup> Regulation (EU) No 508/2014 of the European Parliament and of the Council of 15 May 2014 on the European Maritime and Fisheries Fund and repealing Council Regulations (EC) No 2328/2003, (EC) No 861/2006, (EC) No 1198/2006 and (EC) No 791/2007 and Regulation (EU) No 1255/2011 of the European Parliament and of the Council [2014] OJ L 149/1.

<sup>582</sup> Ulrich G Schroeter and Heinrich Nemecek 'The (Uncertain) Impact of Brexit on the United Kingdom's Membership in the European Economic Area' [2016] EBLR 923.

<sup>583</sup> House of Lords European Union Committee, 'Brexit: Fisheries - 8th report of session 2016-2017' (HL Paper 78, 2016), paras 153-154 < <https://www.publications.parliament.uk/pa/ld201617/ldselect/ldecom/78/78.pdf> > last accessed 5 July 2017.

<sup>584</sup> See chapter 4 of the Annex.

the EU's World Trade Organization (WTO) schedules.<sup>585</sup> The problem here is the imbalance that might be caused in the access of other WTO members in the EU tariff quotas, given that up until Brexit UK fisheries products were not part of the quota, due to the fact that they were traded freely within the single market.

Moreover, the UK will need to propose its own WTO schedules for trade with the EU and third countries. Currently, the government's intention is to replicate the obligations in place for the UK under the EU schedules. No difficulty is expected for replication of tariffs but tariff quotas are problematic: the UK's share of the EU import tariff quotas needs to be identified as a matter of negotiation, together with the UK's share of tariff quotas of third countries to which the EU has access.

Another unclear point concerns the future of EU FTAs with third countries, applying to the UK. The titles of the vast majority of those FTAs suggest the UK and the other Member States are parties to it, alongside the EU.<sup>586</sup> If the UK is party in its own name to those agreements, Brexit will not automatically disapply them vis-à-vis the UK. The UK will need to decide to what extent it wants to rely on those FTAs post-Brexit. The established rules of interpretation of treaties need to be engaged<sup>587</sup> in order to define whether those Agreements can operate (if at all) as regards the UK post-Brexit, but in principle the UK should be in a good position to mount arguments for their continued application if it so chooses.

Naturally, the matter forms part of the general trade landscape post Brexit and thus, not much can be said until that point is reached. What is clear for now is that any trade barrier either by means of tariffs, quotas or non-tariff measures will have an impact on fish producers and the fish processing sector of the UK. In 2015, the UK imported around 15 per cent of its fish from the EU but more significantly, it exported more than 65 per cent of its catch to EU Member States.<sup>588</sup> The facts signify the importance of the EU market for the industry, especially for UK exporters. Although it is (at least in theory) possible that any decrease in exports to the EU could be absorbed domestically, it is not at all certain that consumer demand will rise to clear the increased supply without a significant reduction in prices, while difficulties will arise for already established supply chains.<sup>589</sup> In this regard, excluding EU vessels from UK waters, while legally permissible, may prove counterproductive if the surplus cannot be absorbed by the local market. This could be the basis for a trade-off between quota shares and market access.

As for the EMFF, Brexit will mean that the UK is no longer eligible for EU funding. Due to the relatively low sum at stake, it is not safe to predict how or even whether this issue will be handled in the article 50 negotiations, or left to be folded into any fisheries settlement.

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<sup>585</sup> According to the EU profile in the WTO website, the UK fisheries products will face an average tariff of 12 per cent. 'Statistics Database-European Union Tariff Profile' (WTO) < [http://stat.wto.org/TariffProfiles/E28\\_e.htm](http://stat.wto.org/TariffProfiles/E28_e.htm) > last accessed 5 July 2017.

<sup>586</sup> For example the Deep and Comprehensive Agreement with Ukraine or the Free Trade Agreement with South Korea. It is worth noting that both countries are amongst the largest non-EU export countries for UK fish, see House of Lords EU Energy and Environment Sub-committee, 'Brexit: Fisheries - Written and oral evidence' (2016), 98 per Department for Environment, Food and Rural Affairs < <https://www.parliament.uk/documents/lords-committees/eu-energy-environment-subcommittee/Brexit-fisheries/Fisheries-evidence-volume-Written-Oral.pdf> > last accessed 5 July 2017.

<sup>587</sup> Arts 31-33 of the VLCT.

<sup>588</sup> Richardson L and others, 'UK Sea Fisheries Statistics 2015' (MMO, 2017), Chart 4.4 < [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/598208/UK\\_Sea\\_Fisheries\\_Statistics\\_2015\\_full\\_report.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/598208/UK_Sea_Fisheries_Statistics_2015_full_report.pdf) > last accessed 5 July 2017.

<sup>589</sup> House of Lords EU Energy and Environment Sub-committee, 'Brexit: Fisheries - Written and oral evidence' (2016), 136 per New Economics Foundation < <https://www.parliament.uk/documents/lords-committees/eu-energy-environment-subcommittee/Brexit-fisheries/Fisheries-evidence-volume-Written-Oral.pdf> > last accessed 5 July 2017.

## 3.5 Enforcement

### 3.5.1 EU context

Article 36 envisages compliance with the CFP through a common fisheries control system. Regulation 1224/2009,<sup>590</sup> implemented through Commission Regulation 404/2011,<sup>591</sup> establishes a system according to which EU Member States are responsible for control and enforcement of the different obligations established under the CFP. The Regulation applies to European fishing vessels and all vessels fishing in EU waters.<sup>592</sup> It provides for specific measures for each aspect of the policy. Among those measures are fishing licences,<sup>593</sup> vessel monitoring,<sup>594</sup> the completion and submission by the masters of fishing logbooks,<sup>595</sup> the closure of fisheries when quotas are reached,<sup>596</sup> the monitoring of the engine power of fishing vessels<sup>597</sup> and the control of the use of fishing gears.<sup>598</sup> Member States are required to inspect fishing vessels to check compliance and impose appropriate sanctions in case of infringements.<sup>599</sup> To support the role of Member States in enforcing the CFP Regulation, the European Fisheries Control Agency was established under Regulation 768/2005,<sup>600</sup> with a view to co-ordinating the co-operation of Member States and assisting them in their control activities. In the UK, the authorities responsible for enforcing the CFP are the MMO for England,<sup>601</sup> Marine Scotland, the Marine and Fisheries Division of the Welsh Government and the Department of Agriculture, Environment and Rural Affairs for Northern Ireland.

In parallel to the CFP Regulation and the Community fisheries control system, the EU adopted Council Regulation (EC) No 1005/2008<sup>602</sup> against illegal, unreported and unregulated fishing (IUU fishing) and Commission Regulation (EC) No 1010/2009<sup>603</sup> containing detailed rules on the implementation of the former. IUU fishing is identified as a major threat to the objectives of CFP on conservation and sustainability. Therefore, the EU took legislative action to combat IUU fishing activities taking place within the EU, third country waters and internationally.

Post Brexit, even if the CFP ends up not applying to UK fisheries, UK fishing vessels to the extent that they continue to fish in EU waters will remain under the obligation to comply with it and will be subject to its control measures. By the same token, UK fishing vessels will be subject to inspections under articles 9 and 10 of the IUU fishing regulation when in EU ports.

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<sup>590</sup> Council Regulation (EC) No 1224/2009 of 20 November 2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy, amending Regulations (EC) No 847/96, (EC) No 2371/2002, (EC) No 811/2004, (EC) No 768/2005, (EC) No 2115/2005, (EC) No 2166/2005, (EC) No 388/2006, (EC) No 509/2007, (EC) No 676/2007, (EC) No 1098/2007, (EC) No 1300/2008, (EC) No 1342/2008 and repealing Regulations (EEC) No 2847/93, (EC) No 1627/94 and (EC) No 1966/2006 [2009] OJ L 343/1.

<sup>591</sup> Commission Implementing Regulation (EU) No 404/2011 of 8 April 2011 laying down detailed rules for the implementation of Council Regulation (EC) No 1224/2009 establishing a Community control system for ensuring compliance with the rules of the Common Fisheries Policy [2011] OJ L 112/1.

<sup>592</sup> Art 2(1) of Reg 1224/2009.

<sup>593</sup> Art 6.

<sup>594</sup> Arts 9-11.

<sup>595</sup> Art 14.

<sup>596</sup> Art 35.

<sup>597</sup> Arts 39-41.

<sup>598</sup> Art 47.

<sup>599</sup> Arts 74-80 and 89-90.

<sup>600</sup> Regulation (EU) 2016/1626 of the European Parliament and of the Council of 14 September 2016 amending Council Regulation (EC) No 768/2005 establishing a Community Fisheries Control Agency [2016] OJ L 251/80.

<sup>601</sup> Established under the Marine and Coastal Access Act 2009.

<sup>602</sup> Council Regulation (EC) No 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing [2008] OJ L 286/1.

<sup>603</sup> Commission Regulation (EC) No 1010/2009 of 22 October 2009 laying down detailed rules for the implementation of Council Regulation (EC) No 1005/2008 [2009] OJ L 280/5.

### 3.5.2 International Context

As explained under sections 2 and 3, the international framework on fisheries originates from UNCLOS, which establishes (among other things) obligations regarding access to the EEZ, harvesting capacity and management of fish stocks. It will be recalled, though, that under article 297(3)(a) a State is not obliged to submit to the compulsory procedures of UNCLOS<sup>604</sup> with regard to disputes '*relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations*'. It appears therefore that enforcement of the relevant provisions is quite weak under the Convention. The same is true for obligations regarding shared stocks unless there is a robust dispute settlement provision in the agreements the UK will need to negotiate.<sup>605</sup> For straddling and highly migratory stocks, the dispute resolution mechanisms of UNCLOS and UNFSA are stronger at least as regards the part of the stock on the high seas, although no dispute on fisheries has to date reached a decision on the merits: all were either settled (swordfish, mackerel/herring) or dismissed for lack of jurisdiction (southern bluefin tuna).<sup>606</sup>

The UNFSA has nevertheless given to the obligations for high seas management the teeth that were missing for enforcement. The agreement is a framework under which the UK will continue to have to operate once it leaves the EU, as discussed above. In article 21, the UNFSA sets out a number of flag State obligations regarding vessel compliance with RFMOs' management regimes. Additionally, it introduces extensive control and enforcement rights, the most notable of which is the right of each State member of an RFMO to board and inspect any fishing vessel of any other state party to UNFSA on the high seas in the RFMO's area of coverage, even if the other party is not a member of the RFMO. The settlement of disputes regarding the interpretation and application of the agreement takes place according to the compulsory dispute settlement provisions of UNFSA Part VIII, which adopts by reference those of Part XV of UNCLOS (including the Article 297(3)(a) exclusion). The same system applies by cross-reference to any treaty establishing an RFMO that lacks compulsory procedures of its own.

Moreover, there are two agreements adopted by the FAO, to which the EU is party to the exclusion of its Member States: the 1993 Compliance Agreement and the 2009 Port State Measures Agreement.<sup>607</sup> After withdrawal, the UK will need to decide whether it should become party to either or both of these in its own right.

### Conclusions

Beyond any short-term preservation of the CFP under the EUWB, the UK needs to reshape its fisheries policy for the future, and the Fisheries Bill foreshadowed in the Queen's Speech will be the principal vehicle for this. Any decision will have to be made within the legal framework of UNCLOS, the UNFSA and perhaps the 1993 FAO Compliance Agreement and the 2009 Port State Measures Agreement, if the UK becomes party to either or both of those. The main points are:

- Access to the EEZ could be totally excluded for foreign fishing vessels, certainly if the allowable catch based on the maximum sustainable yield falls below the UK fleet's capacity to

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<sup>604</sup> Art 286-296.

<sup>605</sup> See discussion in section 3.2 of the Annex.

<sup>606</sup> See Andrew Serdy 'The international legal framework for conservation and management of fisheries and marine mammals' in Markus Salomon and Till Markus (eds), *Handbook on Marine Environmental Protection* (Springer, in press), Chapter 6.2.

<sup>607</sup> Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (adopted on 22 November 2009)

<[www.fao.org/fileadmin/user\\_upload/legal/docs/037t-e.pdf](http://www.fao.org/fileadmin/user_upload/legal/docs/037t-e.pdf)>

harvest it, and probably even if there is no such surplus, although practical considerations of reciprocity and economic benefits point against such an outcome in either case. Access to the outer band of the territorial sea (6-12 nm) is subject to historic rights being established under either customary international law, which is doubtful, or the European Fisheries Convention, if this has not been displaced by the CFP. The UK can argue that no such historic rights exist, and has moved to eliminate the possibility of such rights being invoked under the Convention by denouncing the latter.

- The UK will be required by international law to co-operate directly with the EU and other States and RFMOs for the management of shared stocks, straddling and highly migratory species, as opposed to being represented by the EU in most of its fisheries, as currently is the case. Besides purely national inshore fisheries, insistence on the unilateral determination of allowable catches cannot be sustained as a goal in itself because most of the stocks in UK waters fall under one or other of the abovementioned classes. Non-cooperation would likely lead to overexploitation with long-term or more rapid impact on the resources. Therefore, the UK needs to establish management agreements not just with the EU but also with near neighbours such as Norway and Denmark (on behalf of the Faroe Islands).
- Main factors that will impede negotiations (or even render unilateral TACs unavoidable because of lack of agreement) are potential differences in how UNCLOS obligations need to be discharged (regarding how closely scientific advice should be followed, or the precautionary approach), which may be exacerbated by political pressure. If the UK regards the fisheries management currently pursued under the CFP as insufficiently precautionary, Brexit offers a good opportunity to move towards remedying this. If on the other hand the UK regards the CFP as excessively precautionary, there will be some scope under Brexit to escape its restraints, but this will entail moving even further away from compliance with the UNCLOS requirement to restore stocks to, or maintain them at, the size at which the maximum sustainable yield is generated.
- Post Brexit, the UK will lose its connection to the RFMOs in which it is currently represented by the EU. A decision needs to be reached on which of these the UK should join in its own right. This will depend on its fishing interests and national priorities.
- Devolved administrations are responsible for the management of their fisheries and thus, they have a clear interest in shaping the future of the UK fisheries policy. An internal agreement probably needs to be achieved before external negotiations take place.
- The issue of access of UK fish and fish products to the EU market (and vice versa) may be affected by the management agreement or the Article 50 negotiation, or both. In other markets the outcome will form part of the wider negotiations on trade that the UK will be able to conclude once outside the customs union. The EU being an important fisheries market, any barriers erected to trade will negatively impact the UK fishing industry.
- The CFP will remain relevant for UK fishing vessels to the extent that they continue to fish in EU waters.

## 4. SEABORNE TRADE

The present chapter deals with international trade, a concept that includes both trade in goods and services. However, the focus here will be on goods and more specifically, commodities traded by sea. In 2014, the total value of non-unitised goods (including dry and liquid bulk, together with other general cargo) traded through UK seaports was more than 88 billion pounds. Almost half of that, namely 42.616 billion pounds represented the value of trade of non-unitised goods with the EU.<sup>608</sup> The importance of UK-EU trade is demonstrated even more if one adds to that almost 246 billion pounds of unitized goods (for example vehicles) coming from or heading to the EU through UK ports.<sup>609</sup> It is therefore, crucial to identify the current legal situation of the UK's trade in goods and assess the possible impact of Brexit in both public policy and private contracts.

### 4.1 The current situation

The UK is an original member to the World Trade Organisation (WTO) Agreement<sup>610</sup> pursuant to articles XI and XIV:1 with ratification of the Agreement on 30 December 1994.<sup>611</sup> At the same time, it is a member of the single market, a common area where the four freedoms apply: free movement of goods, services, capital and people.<sup>612</sup> EU membership also includes participation in the customs union.<sup>613</sup> As a result, imports and exports between Member States are free from tariffs, tariff quotas and other non-tariff barriers such as additional specifications, labelling requirements or rules on origin of the products. By contrast, Member States apply a common external tariff to goods imported from third countries, while other trade barriers as the ones stated above are also in place for goods coming into the EU. Trade relations with third countries that are members of the WTO<sup>614</sup> are governed by the WTO rules and more specifically by the WTO Agreement, which contains several multilateral and plurilateral agreements as well as the members' schedules of concessions.<sup>615</sup> Currently, the UK schedules are mingled with the EU schedules as a result of its membership in the customs union. Finally, the EU has a number of FTAs with third countries, for example South Africa, Chile and Israel.<sup>616</sup> The agreements bind all Member States and thus UK trade is currently subject to them. The FTAs go beyond the WTO rules in that they establish preferential or zero tariffs and usually try to diminish trade barriers.

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<sup>608</sup> The value of goods passing through UK ports-Final Report' (MDS Transmodal, July 2016), Table 4 < [https://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=9&cad=rja&uact=8&ved=0ahUKEwiFjPudxvTTAhWDJcAKHZwNA\\_0QFghQMAg&url=http%3A%2F%2Fwww.abports.co.uk%2Fcontent%2Ffiles%2Fdownloads%2FThe%2520Value%2520of%2520Goods%2520Report.pdf&usg=AFQjCNE9M4mXqvlOm\\_oKezgoNThKjh8HAnA&sig2=pgy18wRR-mbScZCKQAgxxA](https://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=9&cad=rja&uact=8&ved=0ahUKEwiFjPudxvTTAhWDJcAKHZwNA_0QFghQMAg&url=http%3A%2F%2Fwww.abports.co.uk%2Fcontent%2Ffiles%2Fdownloads%2FThe%2520Value%2520of%2520Goods%2520Report.pdf&usg=AFQjCNE9M4mXqvlOm_oKezgoNThKjh8HAnA&sig2=pgy18wRR-mbScZCKQAgxxA) > last accessed 5 July 2017.

<sup>609</sup> The value of goods passing through UK ports-Final Report' (MDS Transmodal, July 2016), Table 4 < [https://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=9&cad=rja&uact=8&ved=0ahUKEwiFjPudxvTTAhWDJcAKHZwNA\\_0QFghQMAg&url=http%3A%2F%2Fwww.abports.co.uk%2Fcontent%2Ffiles%2Fdownloads%2FThe%2520Value%2520of%2520Goods%2520Report.pdf&usg=AFQjCNE9M4mXqvlOm\\_oKezgoNThKjh8HAnA&sig2=pgy18wRR-mbScZCKQAgxxA](https://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=9&cad=rja&uact=8&ved=0ahUKEwiFjPudxvTTAhWDJcAKHZwNA_0QFghQMAg&url=http%3A%2F%2Fwww.abports.co.uk%2Fcontent%2Ffiles%2Fdownloads%2FThe%2520Value%2520of%2520Goods%2520Report.pdf&usg=AFQjCNE9M4mXqvlOm_oKezgoNThKjh8HAnA&sig2=pgy18wRR-mbScZCKQAgxxA) > last accessed 5 July 2017.

<sup>610</sup> Marrakesh Agreement Establishing the World Trade Organisation (1995) 1867 UNTS 155.

<sup>611</sup> 'Status of WTO Legal Instruments- 2015 Edition' (WTO, 2015), 41 < [https://www.wto.org/english/res\\_e/publications\\_e/legal\\_instru\\_e.htm](https://www.wto.org/english/res_e/publications_e/legal_instru_e.htm) > last accessed 5 July 2017.

<sup>612</sup> Art 26(2) of the TFEU.

<sup>613</sup> Art 28, 30 of the TFEU.

<sup>614</sup> Currently there are 34 countries, which are not members of WTO.

<sup>615</sup> The WTO Agreement is an "umbrella" agreement, which includes the General Agreement on Tariffs and Trade (GATT) 1867 UNTS 187, together with a series of other multilateral agreements on goods, General Agreement on Services (GATS) 1869 UNTS 183, Trade-Related Aspects of Intellectual Property Rights (TRIPS) 1869 UNTS 299, Dispute Settlement Understanding (1994) 1869 UNTS 401, the Trade policy Review Mechanism and a list of plurilateral agreements. The Members' Schedules of commitments also form part of the WTO Agreement. See 'WTO Legal Texts' (WTO) < [https://www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm](https://www.wto.org/english/docs_e/legal_e/legal_e.htm) > last accessed 5 July 2017.

<sup>616</sup> A complete list can be found at 'Agreements' (European Commission, 31 March 2017) < [http://ec.europa.eu/trade/policy/countries-and-regions/agreements/index\\_en.htm](http://ec.europa.eu/trade/policy/countries-and-regions/agreements/index_en.htm) > last accessed 5 July 2017.

Irrespective of an agreement or not, once within the single market, non-EU goods move freely across borders.<sup>617</sup>

Withdrawal from the EU affects the status of the UK as a member of the single market and the customs union but leaves its membership of the WTO intact. Additionally, the UK ceases to enjoy the benefit of FTAs with third countries, to which it is a party as a result its EU representation.<sup>618</sup> The options that have generally been identified for the UK include applying for membership of the EEA (in a similar way as Norway),<sup>619</sup> negotiating an FTA with the EU or, absent any other arrangement, trading under the WTO rules, which is the baseline for international trade relations between WTO members.

At the beginning of 2017, the government clarified their negotiating plans regarding trade with the EU.<sup>620</sup> The aim is to conclude a bespoke free trade agreement, which can allow the greatest possible access in the single market, without membership in the EEA or the EU customs union. Both options were rejected because of the obligations necessarily carried with them: EEA membership would require maintaining the ‘four freedoms’ and the EFTA Court jurisdiction, whereas participating in the customs union would deprive the UK from negotiating its own trade agreements with third countries. In the event of no agreement, trade relationships will fall to be regulated by the WTO Rules.

Evidently, the outcome of any trade negotiations is far from certain at this stage. Whether the objectives set in the White Paper<sup>621</sup> will be given effect remains to be seen and even if they are, the outcome cannot be predicted in advance. Nonetheless, the government’s negotiating line provides for a yardstick against which the possible effects of Brexit in shipping could be assessed. The main considerations are as follows.

## 4.2 Customs

After Brexit, the UK will need to establish its national customs policy. Maintaining the current level of free trade with the EU appears highly unlikely either under an FTA or under the WTO rules. If the regime were to be replicated under an FTA, a significant level of integration would be required, a prospect which the UK is trying to avoid, as explained in the previous section. On the other hand, WTO trade operates according to the principle of the most-favoured nations (MFN), which prescribes that in the absence of an FTA all WTO members shall be treated equally.<sup>622</sup> Free trade between the EU and the UK would not be possible unless it also applied vis-a-vis all their WTO partners. Therefore, post-Brexit imports from and exports to the EU are about to face the same tariffs, tariff quotas and non-tariff barriers as those that presently apply to other WTO members dealing with the UK and the EU respectively.

Under the WTO rules, each member has its own schedules, that is its own commitments regarding trading with the other members (where tariffs, tariff quotas and other trade measures are included). All EU Member States have the same commitments, the EU being a customs union. After Brexit and absent an FTA, UK products will be subject to the EU schedules, part of which is the EU common tariff. As

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<sup>617</sup> Art 29 of the TFEU.

<sup>618</sup> For example the Agreement between the European Economic Community and the Swiss Confederation [1972] *OJ L 300/89*.

<sup>619</sup> However, it is not clear that withdrawal from the EU signals withdrawal from the EEA as well, as the Government maintains. See Ulrich G Schroeter Heinrich Nemeček ‘The (Uncertain) Impact of Brexit on the United Kingdom’s Membership in the European Economic Area’ [2016] *EBLR* 923.

<sup>620</sup> ‘The Government’s negotiating objectives for exiting the EU: PM Speech’ (Prime Minister’s office, 17 January 2017, last updated 3 February 2017) < <https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech> > last accessed 5 July 2017, and HM Government, ‘The United Kingdom’s exit from and new partnership with the European Union’ (White Paper, Cm 9417, 2017).

<sup>621</sup> HM Government, ‘The United Kingdom’s exit from and new partnership with the European Union’ (White Paper, Cm 9417, 2017).

<sup>622</sup> Art 1 and XXIV (5)(b) of the GATT.

regards EU products entering the UK though, the UK needs to propose its own schedules. For the time being its commitments are those in the EU schedules but the UK needs to extricate them so it can operate as an autonomous WTO member.<sup>623</sup> According to the Government,<sup>624</sup> the commitments will be replicated as far as possible so to avoid any disturbance in trade. Issues might arise regarding the apportionment of quantitative measures (for example tariff rate quotas) or whether other WTO members will oppose the proposed schedules.<sup>625</sup> However, regardless of how the process will unfold, once outside the EU customs union, the UK can and will have to operate *de facto* under its proposed schedules, pending certification by other WTO members.<sup>626</sup>

An unclear issue is the applicability of current EU FTAs to the UK after Brexit. Not all of those are about to cease to apply by default. For the FTAs where the EU is the contracting party, that would be the case. However, the majority of EU FTAs enlist the UK as a party to them along with the EU and the other Member States. Brexit cannot automatically disapply those agreement vis-à-vis the UK without more. As discussed before, the UK will need to decide to what extent it wants to rely on those FTAs post-Brexit, in accordance with Treaty law.

Uncertainties aside, the imposition of tariffs is inevitable as explained above. Tariffs will indirectly result in an increase of the actual cost of goods, falling on sellers or buyers according to the contract, but ultimately on the consumer. Non-tariff barriers are expected to contribute further to the increase. The UK products specifically, might have to fulfil extra requirements, pass through origin checks and generally go through more scrutiny before entering the EU. Although not of concern for the short-term, compliance of goods with the EU requirements might also be an issue if the UK regulation does not keep up with the EU law evolution in the future. As for tariff quotas, those are also likely to create impediments to UK trade with the EU. Within the single market, UK products are not subject to tariff-quotas but are freely traded. After Brexit, the UK will need to negotiate access to the tariff-quotas with

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<sup>623</sup> House of Lords Select Committee on the European Union, ‘Oral Evidence for Brexit: future trade between the UK and the EU’ (2016), Q1 <<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-external-affairs-subcommittee/brexit-future-trade-between-the-uk-and-the-eu/oral/37864.html>> last accessed 5 July 2017 ; Lorand Bartels, ‘Understanding the UK’s position in the WTO after Brexit (Part I-The UK’s status and its schedules)’ (International Centre for Trade and Sustainable Development, 26 September 2016), <<http://www.ictsd.org/opinion/understanding-the-uk>> last accessed 5 July 2017.

<sup>624</sup> Liam Fox, ‘UK’s commitments at the World Trade Organisation: Written Statement’ (Department for International Trade, HCWS316, 5 December 2016) < <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2016-12-05/HCWS316/>> last accessed 5 July 2017.

<sup>625</sup> House of Lords Select Committee on the European Union, ‘Oral Evidence for Brexit: future trade between the UK and the EU’ (2016), Q1 <<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-external-affairs-subcommittee/brexit-future-trade-between-the-uk-and-the-eu/oral/37864.html>> last accessed 5 July 2017; Lorand Bartels, ‘Understanding the UK’s position in the WTO after Brexit (Part II-The consequences)’ (International Centre for Trade and Sustainable Development, 26 September 2016) <<http://www.ictsd.org/opinion/understanding-the-uk-0>> last accessed 5 July 2017 ; Richard Elgin and Brendan McGivern, ‘The UK and the World Trade Organisation (WTO): What happens after Brexit?’ (White and Case, 28 March 2017) < <https://www.whitecase.com/publications/alert/uk-and-world-trade-organization-wto-what-happens-after-brexit>> last accessed 5 July 2017.

<sup>626</sup> House of Lords Select Committee on the European Union, ‘Oral Evidence for Brexit: future trade between the UK and the EU’ (2016), Q3, Q4 <<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-external-affairs-subcommittee/brexit-future-trade-between-the-uk-and-the-eu/oral/37864.html>> last accessed 5 July 2017; Lorand Bartels, ‘Understanding the UK’s position in the WTO after Brexit (Part II-The consequences)’ (International Centre for Trade and Sustainable Development, 26 September 2016) <<http://www.ictsd.org/opinion/understanding-the-uk-0>> last accessed 5 July 2017 ; Richard Elgin and Brendan McGivern, ‘The UK and the World Trade Organisation (WTO): What happens after Brexit?’ (White and Case, 28 March 2017) < <https://www.whitecase.com/publications/alert/uk-and-world-trade-organization-wto-what-happens-after-brexit>> last accessed 5 July 2017.

the EU and third countries that have established their share in the EU market. The fact that the UK will claim a share of an already shrunken market will possibly make the matter contentious. As a whole, the competitiveness of UK products in the EU market and vice versa is likely to be negatively affected.

Another issue arising is the hardening of border controls between the UK and the EU. If free movement of goods is no longer the case, this means that the process of trade in goods between the UK and the EU will be more complicated. After Brexit UK exports will be subject to the Union Customs Code (UCC)<sup>627</sup> when entering the EU. It is expected that traders will face more documentary obligations and administrative burdens (for example lodging summary declarations on arrival of the goods at the customs<sup>628</sup>), while extensive controls on both sides of the border might lead to delays (goods carried by sea are placed into temporary storage for a maximum of 45 days from the day the summary declaration was lodged until they are granted approved status<sup>629</sup>). In the context of shipping, delays in ports will most likely generate demurrage claims under charter parties and sale contracts alike. Equally, storage or other port costs might be incurred. Traders and shipowners should be alert in that respect, so that they can contractually allocate the risk. The financial or staff capacity of the EU and the UK customs to deal with more complex procedures will have decisive impact on the matter, at least in the near future.

Brexit is certain to disturb long established trade operations between the UK and Continental Europe. Supply chains operating within the EU involving the UK as an intermediary station, will face problems once the UK ceases to form part of the EU single market. For instance, the UK suppliers with warehouses in the EU (e.g. the Netherlands) or continental suppliers with warehouses in the UK will no longer be able to deal freely. Third countries using the UK as a threshold to the EU market are also exposed to risks. For example, Japanese automakers such as Honda and Toyota produce cars in the UK, which then export to the EU as EU products. In fact, 75-80 per cent of their UK production is exported to the EU,<sup>630</sup> benefiting from free access to the single market. After withdrawal though, cars produced in the UK will potentially face a 10 per cent tariff.<sup>631</sup> Admittedly, the position of the UK as a business partner could be weakened. The extent of impact once more will depend on the specific negotiations and the existence of an FTA with the EU.

Of relevance to border controls is the UK export control regime. Presently, the Strategic Export Control Lists<sup>632</sup> are in force in the UK, containing items for which export licences must be issued by the UK authorities.<sup>633</sup> The lists are adopted through the Export Control Order 2008 (ECO 2008)<sup>634</sup> under the Export Control Act 2002 (ECA 2002) and the ECA 1972. The order essentially gives effect to Regulation 428/2009,<sup>635</sup> which in turn implements multilateral international agreements on the Export

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<sup>627</sup> Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code [2013] OJ L 269/1, as amended

<sup>628</sup> Art 43 of the UCC.

<sup>629</sup> Arts 49, 50 of the UCC.

<sup>630</sup> Kana Inagaki, 'Japan carmakers weigh UK options post-Brexit' *Financial Times* (Tokyo, 27 June 2016) <<https://www.ft.com/content/1bef35ac-3c44-11e6-8716-a4a71e8140b0>> last accessed 5 July 2017.

<sup>631</sup> House of Lords European Union Committee, 'Brexit: Trade in goods, 16<sup>th</sup> Report of Session 2016-2017' (HL Paper 129, 2017), 108 <[https://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjy2KHM76bUAhXLCMAKHeTuDMsQFggoMAA&url=https%3A%2F%2Fwww.publications.parliament.uk%2Fpa%2Fid201617%2Fidselect%2Fdeucom%2F129%2F129.pdf&usq=AFOjCNHJsxK4hsAbymnJPjHHm\\_ZUUIDDXQ&sig2=B4ROTFYthFemY1CTMLX3XQ](https://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjy2KHM76bUAhXLCMAKHeTuDMsQFggoMAA&url=https%3A%2F%2Fwww.publications.parliament.uk%2Fpa%2Fid201617%2Fidselect%2Fdeucom%2F129%2F129.pdf&usq=AFOjCNHJsxK4hsAbymnJPjHHm_ZUUIDDXQ&sig2=B4ROTFYthFemY1CTMLX3XQ)> last accessed 5 July 2017.

<sup>632</sup> 'UK Strategic Export Control Lists' (Department for International Trade, February 2017) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/593228/controllist20170222.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/593228/controllist20170222.pdf)> last accessed 5 July 2017.

<sup>633</sup> Mainly military and dual-use items, which are goods and technology used for peaceful and military purposes.

<sup>634</sup> SI 2008/3231.

<sup>635</sup> Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items [2009] OJ L 134/1.

Control Regimes.<sup>636</sup> The UK is a party in its own right to these agreements and therefore, Brexit does not appear to affect the Export Control lists directly.<sup>637</sup> Given that the EUWB will convert EU regulation into domestic law, the ECO 2008 will presumably remain intact. The power to impose export controls under the ECA 2002 will stay in place as well. Nonetheless, practical issues are expected to arise under Regulation 428/2009 until administrative arrangements are settled. For example, currently UK companies deal with dual-use goods trade under Union General Export Authorisations, which will need to be replaced with equivalent UK measures.<sup>638</sup>

Brexit and withdrawal from the customs union also allows the UK to establish free trade zones. Those are areas where no duties or standard customs procedures apply for goods that enter them or are re-exported from them. Free-trade areas can have significant benefits for the economy in general. Duty-free imports, especially where raw materials attract higher tariffs than finished goods, boost trading, manufacturing and processing within the zones before the goods enter the domestic market or are re-exported.<sup>639</sup> Moreover, since no duties apply in the zones, the obligation to pay tax is postponed until the goods enter the domestic market, improving the cash flow of traders.<sup>640</sup> Finally, tax and regulatory incentives usually complimenting free trade zones support local development through the creation of new economic activity.<sup>641</sup> Given the importance of seaborne trade for the UK, the creation of free trade zones in ports could be a great opportunity for the post-Brexit economy. Nonetheless, any decision should take into account the risks involved regarding competition, the WTO rules on state aid and possibly restrictions derived from the UK-EU negotiations regarding exit and future trade relations.<sup>642</sup>

### 4.3 Trade & Environment

Under article XX of the General Agreement on Tariffs and Trade (GATT),<sup>643</sup> a WTO Member can in some circumstances deviate from the rules contained in the WTO Agreement and impose measures on imports. There are various grounds to justify trade restrictions but only two are related to the

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<sup>636</sup> Those are the Waasenaar Arrangement for arms and dual use goods and technologies, the Missile Technology Control Regime against the proliferation of missiles and missile technology, the Australia Group against development of chemical and biological weapons and the Nuclear Suppliers Group against proliferation of nuclear weapons.

<sup>637</sup> Andrzej Janiszewski and others, 'Brexit, Export Controls, Preferential Trade and Sanctions Programmes-Strategies and Tactics for Success post-Brexit' (Reed Smith, 7 July 2016) < [https://www.reedsmith.com/Brexit-Export-Controls-Preferential-Trade-and-Sanctions-Programmes--Strategies-and-Tactics-for-Success-Post-Brexit-07-07-2016/?utm\\_source=Mondaq&utm\\_medium=syndication&utm\\_campaign=View-Original](https://www.reedsmith.com/Brexit-Export-Controls-Preferential-Trade-and-Sanctions-Programmes--Strategies-and-Tactics-for-Success-Post-Brexit-07-07-2016/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original) > last accessed 5 July 2017.

<sup>638</sup> Sandra Strong, 'Brexit, Embargoes, Sanctions, Export Controls and Common Security Measures' (Strong and Herd, July 2016) < <http://www.strongandherd.co.uk/international-trade-articles/brexit-embargoes-sanctions-export-controls-and-common-security-measures/> > last accessed 5 July 2017 ; Andrzej Janiszewski and others, 'Brexit, Export Controls, Preferential Trade and Sanctions Programmes-Strategies and Tactics for Success post-Brexit' (Reed Smith, 7 July 2016) < [https://www.reedsmith.com/Brexit-Export-Controls-Preferential-Trade-and-Sanctions-Programmes--Strategies-and-Tactics-for-Success-Post-Brexit-07-07-2016/?utm\\_source=Mondaq&utm\\_medium=syndication&utm\\_campaign=View-Original](https://www.reedsmith.com/Brexit-Export-Controls-Preferential-Trade-and-Sanctions-Programmes--Strategies-and-Tactics-for-Success-Post-Brexit-07-07-2016/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original) > last accessed 5 July 2017.

<sup>639</sup> Rishi Sunak, 'The free ports opportunity-How Brexit could boost trading, manufacturing and the North' (Centre for Policy Studies, 2016), 7, 9 < <http://www.cps.org.uk/files/reports/original/161114094336-TheFreePortsOpportunity.pdf> > last accessed 5 July 2017.

<sup>640</sup> Rishi Sunak, 'The free ports opportunity-How Brexit could boost trading, manufacturing and the North' (Centre for Policy Studies, 2016), 8 < <http://www.cps.org.uk/files/reports/original/161114094336-TheFreePortsOpportunity.pdf> > last accessed 5 July 2017.

<sup>641</sup> Rishi Sunak, 'The free ports opportunity-How Brexit could boost trading, manufacturing and the North' (Centre for Policy Studies, 2016), 10 < <http://www.cps.org.uk/files/reports/original/161114094336-TheFreePortsOpportunity.pdf> > last accessed 5 July 2017.

<sup>642</sup> Jason Chuah, 'Editorial: Free ports in the UK: a post Brexit prospect?' (2017) 23 JIML.

<sup>643</sup> (adopted via a Protocol of Provisional Application 1 January 1948, now incorporated into the WTO Agreement) 55 UNTS 194.

environment: the protection of human, animal or plant life or health<sup>644</sup> and the conservation of exhaustible natural resources.<sup>645</sup> The environmental exceptions are further elaborated in the multilateral WTO agreements for Sanitary and Phytosanitary measures<sup>646</sup> and Technical Barriers to Trade.<sup>647</sup> Under those legal texts, a WTO Member can essentially adopt regulations in contradiction of GATT prescriptions regarding the elimination of tariffs or trade barriers between members. For example, it could impose import restrictions on certain agricultural products or specific standards regarding quality, packaging or labelling of food or industrial products, provided the requirements set in the Agreements are met. An example of that in EU regulation would be the legal framework for Genetically Modified Organisms (GMOs), which can only be released in the EU market after authorisation has been granted by the Commission on the basis of scientific advice from the European Food Safety and scientific bodies of the Member States.<sup>648</sup> Additionally, all GMOs and GM food or animal feed are subject to specific traceability and labelling requirements.<sup>649</sup>

Due to its membership, the UK is currently compliant with EU requirements and it is expected to continue to be so for the short-term by virtue of the EUWB. After Brexit, the UK could revise its legislation and its general policy for the future and abandon the EU policy of adopting higher safeguards regarding the environment. However, such a decision will need to take into account the option of the EU under the WTO Agreement to restrict market access or take restrictive measures when justified and not arbitrary to do so. Consequently, withdrawal from the EU does not necessarily mean a freedom from EU regulation, at least if the UK wants to maintain trade relations with the EU.

#### 4.4 Sanctions

Sanctions are restrictive non-military measures imposed by the UN, the EU and individual countries to promote international peace and security. They can be broadly categorised into financial sanctions, targeting individuals or entities (e.g. asset freezes or travel bans) and trade sanctions, concerning certain products or industries (e.g. export bans on certain goods, investment bans or prohibition on the supply of certain services).

The UK being a member of the UN is under an obligation to implement the UN sanctions domestically.<sup>650</sup> This currently takes place through the EU, which collectively gives effect to the UN sanctions.<sup>651</sup> Additionally, the EU adopts sanctions in its own right either to supplement UN measures or to independently support the EU Common Foreign and Security Policy.<sup>652</sup> Sanctions are generally given effect through EU regulations,<sup>653</sup> which are directly applicable in the UK. Nonetheless, domestic

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<sup>644</sup> Art XX(b) of the GATT.

<sup>645</sup> Art XX(g) of the GATT.

<sup>646</sup> Agreement on the Application of Sanitary and Phytosanitary Measures (part of the WTO Agreement) 1867 UNTS 493.

<sup>647</sup> Agreement on Technical Barriers to Trade (part of the WTO Agreement) 1868 UNTS 120.

<sup>648</sup> Regulation (EC) No 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed [2003] OJ L 268/1, art 4(2).

<sup>649</sup> Regulation (EC) No 1831/2003 of the European Parliament and of the Council of 22 September 2003 concerning the traceability and labelling of genetically modified organisms and the traceability of food and feed products produced from genetically modified organisms and amending Directive 2001/18/EC [2003] OJ L 268/24.

<sup>650</sup> See Chapter VII of the Charter of the United Nations (26 June 1945,) TS 993.

<sup>651</sup> 'Different types of Sanctions' (European Council-Council of the European Union, 16 May 2017 < <http://www.consilium.europa.eu/en/policies/sanctions/different-types/> > last accessed 5 July 2017.

<sup>652</sup> The authority to impose sanctions rests with the European Council, see art 215 TFEU.

<sup>653</sup> A list of the measures currently in force can be found at 'European Union Restrictive measures (sanctions) in force' (European Commission, last updated 17 January 2017) < [http://ec.europa.eu/dgs/fpi/documents/restrictive\\_measures-2017-01-17-clean\\_en.pdf](http://ec.europa.eu/dgs/fpi/documents/restrictive_measures-2017-01-17-clean_en.pdf) > last accessed 5 July 2017.

implementation is needed for criminal liability to be created.<sup>654,655</sup> Post Brexit, the UK's status in the UN remains intact and thus, no significant change is expected in its position to influence international decision-making regarding sanctions.<sup>656</sup> Moreover, the UK will need to keep abiding by the UN sanctions. Although implementation is based on EU instruments, it appears that no issue of enforcement will arise given that the EUWB aims to convert the EU law into domestic law.

Presumably, EU sanctions as implemented domestically will also continue to apply under the EUWB, at least in the short term. However, Brexit will present the UK with a choice of forging its foreign policy without reference to the Common Foreign Security Policy of the EU. It could keep a united front with the EU by maintaining existing measures<sup>657</sup> and adopting future sanctions in line with EU action or it could diverge and pursue its own agenda according to national priorities. At the same time though, Brexit means that the UK will no longer have the power as an EU Member State to shape EU's foreign policy as it currently does. Indeed, the UK has been in the forefront of discussions and has played a key role in the imposition of EU sanctions against Iran and Russia in recent years.<sup>658</sup>

The future of the UK's foreign policy will depend on balancing opposing interests. On one hand, economic considerations such as trade relations might lead the UK to differentiate its stance from the EU as regards specific countries.<sup>659</sup> On the other hand, the pragmatic need for co-operation between States and avoidance of political instability in the EU, the significance of participating in international fora, security concerns and the UK's potential interest in maintaining some connection with EU policy making could be the base for coordination of respective policies.<sup>660</sup>

Even lacking direct applicability, EU sanctions will remain relevant for the UK shipping industry due to its international character. To take a common example, to the extent that UK businesses have vessels flagged in the EU Member States they will need to take into account EU restrictions because of flag State jurisdiction, even if the UK decides to differentiate its political stance.<sup>661</sup>

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<sup>654</sup> An example would be The Burundi (European Union Financial Sanctions) Regulations 2015 (SI 2015/1740), which imposes criminal penalties for breaches of the asset Freeze contained in Council Regulation (EU) No 2015/1755 concerning restrictive measures in view of the situation in Burundi [2015] OJ L 257/1.

<sup>655</sup> The UK has authority to impose sanctions under the Terrorist Asset-Freezing etc Act 2010 as well but this is not relevant to Brexit so it is beyond the scope of the discussion here.

<sup>656</sup> Ross Denton and Sunny Mann, 'Brexit: Export Controls and Sanctions Considerations (Baker & Mackenzie, 24 June 2016) < <http://brexit.bakermckenzie.com/2016/06/24/brexit-export-controls-and-sanctions-considerations/> > last accessed 5 July 2017.

<sup>657</sup> For example, sanctions to Syria, Russia or Myanmar.

<sup>658</sup> Richard Nephew and David Mortlock, 'Brexit's Implications for the UK and European Sanctions Policy' (Columbia Center on Global Energy Policy, October 2016) < [https://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&ved=0ahUKEwiR7tbA1YTAhXjJ8AKHb7nD1UQFggMAM&url=https%3A%2F%2Facademiccommons.columbia.edu%2Fdownload%2Fedor\\_a\\_content%2Fdownload%2Fac%3A206467%2FCONTENT%2FBrexit\\_s\\_Implications\\_for\\_UK\\_and\\_European\\_Sanctions\\_Policy.pdf&usq=AFQjCNGnzwK8iJxnBHSaQoJOD7qR5tkFEg&sig2=M1FAeGLF-4GZBIZ-WkJMA](https://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&ved=0ahUKEwiR7tbA1YTAhXjJ8AKHb7nD1UQFggMAM&url=https%3A%2F%2Facademiccommons.columbia.edu%2Fdownload%2Fedor_a_content%2Fdownload%2Fac%3A206467%2FCONTENT%2FBrexit_s_Implications_for_UK_and_European_Sanctions_Policy.pdf&usq=AFQjCNGnzwK8iJxnBHSaQoJOD7qR5tkFEg&sig2=M1FAeGLF-4GZBIZ-WkJMA) >

<sup>659</sup> Jason Hungerford and Paul Whitfield-Jones, 'UK sanctions and export controls: Impact of Brexit?' (Norton Rose Fulbright, 21 November 2016) < <http://www.insidebrexitlaw.com/blog/uk-sanctions-and-export-controls-impact-of-brexit> > last accessed 5 July 2017.

<sup>660</sup> Erica Moret, 'What would Brexit mean for EU sanctions Policy?' (European Council for Foreign Relations, 23 March 2016) < [http://www.ecfr.eu/article/commentary\\_what\\_would\\_brexit\\_mean\\_for\\_eu\\_sanctions\\_policy6046](http://www.ecfr.eu/article/commentary_what_would_brexit_mean_for_eu_sanctions_policy6046) > last accessed 5 July 2017; 'Brexit Briefing No 3: The implications for economic sanctions' (6KBW College Hill, 5 September 2016) < <http://www.6kbw.com/wp-content/uploads/2016/09/6KBW-College-Hill-Brexit-Briefing-No.3.pdf> > last accessed 5 July 2017.

<sup>661</sup> For a hypothetical but quite realistic scenario see Brian Perrot, 'Commodities Brexit Considerations' (Holman Fenwick Willan, 1 March 2017) < <http://www.hfw.com/Commodities-Brexit-considerations> > last accessed 5 July 2017.

## 4.5 Impact on Contracts

English law is most commonly the law of choice for international sales. The Sales of Goods Act 1979 (SOGA 1979) and the common law will not be affected by Brexit, therefore the legal framework for the international sale of goods stays in place (subject of course to any impact Brexit might have on the choice of parties as discussed in Chapter 1 of the Annex). Nonetheless, Brexit is expected to affect the sales of goods by sea in the following ways.

- Description of goods

Under section 13 of the SOGA 1979 in sales by description, the description of the goods is a condition of the contract, any breach of which allows the buyer to terminate. Commodities are a typical example of goods sold by description and origin can be one of the specifications to be stated on the contract. Assuming two parties have contracted for a certain quantity of EU goods, the buyer might be able to reject documents showing UK origin (such as certificates of origin) and the UK goods delivered after 2019 will no longer fall under the EU specification.<sup>662</sup> Another example would be where the agreed place of shipment (also being part of the description of the goods and thus, a condition of the sale<sup>663</sup>) is ‘any EU port’. Shipment from a UK port will not allow the CIF<sup>664</sup> seller to discharge its obligations under the contract; likewise, if an FOB<sup>665</sup> buyer nominates a UK port, he is in breach.

In practice, the aforementioned issues will concern primarily long-term contracts performed by instalments. Under the above examples, the parties could have been fulfilling their contracts for several years by supplying UK goods or shipping goods from UK ports or nominating UK ports. After 2019 though, the same type of goods or ports will give rise to a breach of contract. Arguably, the record of past dealings or waiver on the counterparty’s side could be used as a defence, provided that no reasonable notice was given to the opposite effect.<sup>666</sup>

- Contract of carriage

The place of shipment also relates to other obligations of the parties under the sale contract. In shipment sales, the seller or the buyer<sup>667</sup> needs to arrange for the carriage of the goods by sea. Carriage ordinarily takes place in pursuance of voyage charterparties and bills of lading, which under the common law need to be in accordance with the terms of the sale contract,<sup>668</sup> although they are distinct agreements involving different parties.

Those shipping contracts include provisions regarding loading and discharge and can potentially create problems in reference to Brexit, even if the sale contract faces no issues of its own. For instance, it is entirely possible that under the charterparty the ship will only be allowed to load or discharge at EU ports. This necessarily means that post Brexit a seller or buyer will not be able to fulfil a sale contract naming a UK port as the place of shipment. On a bigger

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<sup>662</sup> *Bowes v Shand* (1877) LR 2 App Cas 455, 480.

<sup>663</sup> *Bowes v Shand* (1877) LR 2 App Cas 455 and *Petrotrade Inc v Stinnes Handel GmbH* [1995] 1 Lloyd’s 142.

<sup>664</sup> CIF stands for the shipment sale of goods where the price for the goods includes their cost, their insurance against transit loss and the freight to the port of destination (cost, insurance and freight, CIF), all of which are arranged by the seller.

<sup>665</sup> FOB stands for the shipment sale of goods where the seller delivers the goods free on-board (FOB) at the contractual place of shipment, while the buyer arranges for the insurance and the freight.

<sup>666</sup> *Panoutsos v Raymond Hadley Corporation of New York* [1917] 2KB 473.

<sup>667</sup> Depending on whether we have a CIF or an FOB sale.

<sup>668</sup> *SIAT Di Dal Ferro v Tradax Overseas SA* [1980] 1 Lloyd’s Rep 53.

scale, head time charterparties<sup>669</sup> with specific EU trading limits could also put sub-charterers and traders down the chain in breach of their sale contracts.

An interesting issue here is the carriage of dangerous goods by sea. This is regulated internationally through the IMO and the International Maritime Dangerous Goods Code (IMDG Code)<sup>670</sup>, which is implemented under SOLAS and MARPOL. Brexit will not have an impact on the code's application for UK ships or ships calling at UK ports.

- Clauses referring to EU membership

Brexit could also affect the specific obligations of UK parties under the contract. For example, under clauses 11-12 of the standard contract No 49 of the Grain and Feed Trade Association (GAFTA) any EC export license and the relevant tariffs are for the buyer's account when the buyer is an EC Member State, otherwise it falls on the seller. Brexit will shift this obligation from the UK buyers to their EU counterparties.

- Force majeure clauses

Force majeure is not clearly defined as a concept of English law but contains specific elements. According to the discussion of the authorities in *Lebeaupin v Richard Crispin & Co*,<sup>671</sup> force majeure can either be a physical or a legal constraint like a war, a casualty or an embargo, which does not arise out of the act, negligence, omission or default of either party. It also needs to be unforeseeable, so delay due to normal bad weather or depreciation of cargo due to delay in carriage do not come within the concept of force majeure. Finally, the event needs to impede contractual performance.

Sale contracts usually include force majeure clauses which purport to discharge the parties from obligations or provide for specific arrangements (e.g. extension of time for performance) when certain events occur that prevent or delay performance. Examples of such clauses can be found in standard contracts of the GAFTA or the Federation of Oils, Seeds and Fats Associations (FOSFA).<sup>672</sup> The clauses typically (but not exclusively) include events such as '*Act of God, strike, lockout, riot or civil commotion, combination of workmen, breakdown of machinery, fire or unforeseeable and unavoidable impediment to navigation, or any other cause comprehended in the term 'force majeure'*'.<sup>673</sup>

Under English law, the construction of such clauses is usually –although, not necessarily-<sup>674</sup> subject to the *eiusdem generis* rule. This means that although the list of events is open-ended, not any kind of event can trigger the application of the clause. The triggering event needs to be of the same kind as the expressly stated events. Therefore, the assessment of Brexit as a force majeure event or not depends on the wording of the clause in question and there cannot be a safe conclusion applicable to all cases. Moreover, relying on a force majeure clause is only sustainable if Brexit can be considered an unforeseeable event at the time the parties concluded the contract. It is not entirely clear, though, whether the foreseeability needs to refer to the UK's exit or the general possibility of exit by any Member State. If the former is correct, then

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<sup>669</sup> Time charterparties will potentially face more issues regarding the place of delivery or redelivery but this is out of the scope of the chapter.

<sup>670</sup> Resolution MSC. 122(75) (24 May 2002) Adoption of The International Maritime Dangerous Goods Code.

<sup>671</sup> [1920] 2 KB 714, 719-720.

<sup>672</sup> See for example cl 14 of the GAFTA 49, cl 20 of the GAFTA 100, cl 19 of the GAFTA 122, cl 22 of the FOSFA 54.

<sup>673</sup> Cl 20 of the GAFTA 100.

<sup>674</sup> See for example *Navrom v Callitsis Ship Management S.A. (The Radauti)* [1987]2 Lloyd's Rep 276 and *Chandris v Isbrandtsen-Moller Co Inc* [1951] 1 KB 240; [1950] 2 All E.R. 618.

foreseeability was certainly established on the day of the referendum result (23 June 2016).<sup>675</sup> Arguably, the relevant date could be earlier, for example when the referendum was announced (20 February 2016) or even when the Conservative Party with a manifesto commitment to a referendum gained a majority in Parliament (7 May 2015). However, if the latter is correct, then potentially Brexit became foreseeable when the Lisbon Treaty entered into force, since this is how and when article 50 and hence the possibility of exit was first introduced.

Generally, as far as contracts are concerned, the rules of interpretation should be recalled. English law is set on the natural meaning of words as a starting point in constructing any contract, even if the result is uncommercial.<sup>676</sup> Only if there is ambiguity as to the meaning of the words chosen the court will take into account the purpose of the contract and commercial common sense in order to reach a commercially sane conclusion.<sup>677</sup> Within the present context, clauses defining the EU could be straightforward, for example by referring to EU Member States as they stand ‘from time to time’<sup>678</sup>, or less clear or abstract. In the former case, no leeway appears to exist in interpreting the clause as including the UK after withdrawal. In the latter case, it could be open for the parties to argue that for the purposes of the contract in question and based on the specific circumstances, the EU could be interpreted as including the UK even after Brexit has taken place.

Naturally, appropriate drafting can soften the potential effects of Brexit in the contracts. Due to the importance of contractual language, parties should seek to define expressly the EU as including the UK or not to avoid disputes. Moreover, they could also formulate clauses allocating the risk arising from possible effects of Brexit such as the imposition of tariffs, or perhaps giving parties an option for the performance of their obligations depending on the outcome of negotiations regarding the UK’s access to the single market.<sup>679</sup> Force majeure clauses could be drafted to include events related to the UK’s withdrawal from the EU. Actual withdrawal from the EU could even be made a cause of cancellation. By contrast, parties could expressly exclude Brexit as a cause for termination or cancellation.<sup>680</sup> Finally, inserting in long-term contracts an obligation to renegotiate post –Brexit could also prove useful, provided that the obligation is made sufficiently certain.<sup>681</sup>

- Frustration

Frustration is a common law doctrine allowing parties to avoid performance of a contract through the automatic discharge of their contractual obligations. The doctrine is the exception

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<sup>675</sup> Matthias Lehmann, ‘What Brexit means for the interpretation and drafting of commercial contracts’ (2017) 2 JIBFL 101, 102.

<sup>676</sup> *Arnold v Britton* [2015] UKSC 36; [2015] 2 WRL 1593.

<sup>677</sup> *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; [2011] 1 WLR 2900.

<sup>678</sup> Georgina Kon, ‘Brexit and Commercial Contracts-Assessing the impact’ (PLC Magazine, November 2016) < [https://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0ahUKEwj et4DI06bUAhXBL8AKHdmvDZAQFggrMAE&url=http%3A%2F%2Fwww.linklaters.com%2Fpdfs%2Fmkt%2Fflondon%2FBrexit\\_Commerical\\_Contracts.pdf&usg=AFQjCNGwFIBbc8J1aqIrYnOEDIG0hWDe3g&sig2=Pkyomyy\\_KI3vcRII9BzAZg](https://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0ahUKEwj et4DI06bUAhXBL8AKHdmvDZAQFggrMAE&url=http%3A%2F%2Fwww.linklaters.com%2Fpdfs%2Fmkt%2Fflondon%2FBrexit_Commerical_Contracts.pdf&usg=AFQjCNGwFIBbc8J1aqIrYnOEDIG0hWDe3g&sig2=Pkyomyy_KI3vcRII9BzAZg) > last accessed 5 July 2017.

<sup>679</sup> Sarah Grenfell and Guy Pendell, ‘Brexit: Implications for contracting parties’ (CMS, 21 July 2016) < [http://www.cms-lawnow.com/ealerts/2016/07/brexit-implications-for-contracting-parties?cc\\_lang=en](http://www.cms-lawnow.com/ealerts/2016/07/brexit-implications-for-contracting-parties?cc_lang=en) > last accessed 5 July 2017.

<sup>680</sup> Georgina Kon, ‘Brexit and Commercial Contracts-Assessing the impact’ (PLC Magazine, November 2016) < [https://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0ahUKEwj et4DI06bUAhXBL8AKHdmvDZAQFggrMAE&url=http%3A%2F%2Fwww.linklaters.com%2Fpdfs%2Fmkt%2Fflondon%2FBrexit\\_Commerical\\_Contracts.pdf&usg=AFQjCNGwFIBbc8J1aqIrYnOEDIG0hWDe3g&sig2=Pkyomyy\\_KI3vcRII9BzAZg](https://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0ahUKEwj et4DI06bUAhXBL8AKHdmvDZAQFggrMAE&url=http%3A%2F%2Fwww.linklaters.com%2Fpdfs%2Fmkt%2Fflondon%2FBrexit_Commerical_Contracts.pdf&usg=AFQjCNGwFIBbc8J1aqIrYnOEDIG0hWDe3g&sig2=Pkyomyy_KI3vcRII9BzAZg) > last accessed 5 July 2017.

<sup>681</sup> Matthias Lehmann, ‘What Brexit means for the interpretation and drafting of commercial contracts’ (2017) 2 JIBFL 101, 103. See also *Dany Lions Ltd v Bristol Cars Ltd* [2014] EWHC 817 (QB); [2014] BusLR D11.

to the strict liability imposed for contractual breach<sup>682</sup> and it is rarely triggered.<sup>683</sup> Frustration is applicable to contracts in general, thus it can be relevant in the present context for sales on shipping terms.

As stated by Lord Radcliffe ‘*frustration occurs whenever the law recognises that, without default of either party, a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract*’.<sup>684</sup> The frustrating circumstances or the frustrating event need to arise after the conclusion of the contract and they need to be unforeseeable by the parties, in the sense that they were not in their contemplation at the time the contract was concluded. Thus, the discussion on the foreseeability of Brexit as a force majeure event applies to frustration *mutandis mutandis*.

Frustration requires the change in performance to be radical. The test will not be satisfied if the performance is rendered merely different from what was intended,<sup>685</sup> more expensive, delayed or burdensome.<sup>686</sup> Specifically for the sale of unascertained goods (in which commodities are included), frustration applies by virtue of section 62(2) of the SOGA 1979.<sup>687</sup> Cases where the doctrine was applied include the outbreak of war, where supplying goods to the enemy was illegal,<sup>688</sup> supervening illegality of performance due to legislative changes or export/import prohibitions on goods that form the subject matter of the contract.<sup>689</sup> Brexit does not appear as falling under any of those categories: imposition of tariffs on trade with Europe could not amount to impossibility or radical change of performance, given that cost fluctuation is always present in international trade. Export or import prohibitions are also unlikely to be imposed due to UK’s withdrawal from the EU (although, the UK adopting new sanctions in the future could be a frustrating event for a long-term contract). In a similar fashion, mere increase of cost or customs delays are unlikely to frustrate charterparties. Finally, devaluation of the sterling due to Brexit would probably not lead to frustration either.<sup>690</sup>

Frustration depends on the terms of the contract in question and therefore, the answer whether Brexit can constitute a frustrating event will ultimately turn on the circumstances of each specific case.<sup>691</sup> Notably, when a contract expressly provides for the impact of certain circumstances or events on the performance of the parties (usually through a force majeure clause), frustration due to those circumstances or events cannot be relied on.<sup>692</sup> As seen in the previous section, sale contracts and charterparties normally contain such clauses, limiting the possibility of frustration.

In general, the law does not seem in favour of Brexit being a cause of frustration. Nonetheless, such a possibility exists for long-term sale contracts with periodic performance, concluded

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<sup>682</sup> *Paradine v Jane* [1647] EWHC KB J5.

<sup>683</sup> See Lord Roskill’s speech ‘*not lightly to be invoked to relieve contracting parties of the normal consequences of imprudent bargains*’ in *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema) (No.2)* [1982] AC 724,752.

<sup>684</sup> *Davis Contractors v Fareham Urban District Council* [1956] A.C. 696; [1956] 3 WRL 37. See also *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675; [1981] 2 WLR 45 per Lord Simon.

<sup>685</sup> *Tsakiroglou & Co Ltd v Noble Thorl GmbH* [1961] 2 WLR 633; [1962] AC 93.

<sup>686</sup> *Edwinton Commercial Corporation and Global Tradeways Ltd v Tsavlis Russ (Worldwide Salvage and Towage) Ltd (The "Sea Angel")* [2007] EWCA Civ 547; [2007] 2 Lloyd’s Rep 517, [111].

<sup>687</sup> Section 7 also deals with frustration of agreements to sell specific goods. Given that we deal with the trading of commodities, this section is out of the scope of our report.

<sup>688</sup> *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1942] 2 All ER 122; [1943] AC 32.

<sup>689</sup> *Société Cooperative Suisse des Céréales et Matières Fourragères v La Plata Cereal Co SA* (1947) 80 Ll LR. 530, 543.

<sup>690</sup> Michael Bridge (ed) *Benjamins Sale of Goods* (9<sup>th</sup> edn, Sweet and Maxwell, 2014) at 6-055.

<sup>691</sup> Per Lord Reid in *Davis contractors v Fareham Urban District Council* [1956] A.C. 696.

<sup>692</sup> *J Lauritzen AS v Wisjuller BV (The Super Servant Two)* [1990] 1 Lloyd’s Rep 1, 709

before the referendum result was known. In such cases, Brexit would not have been in the contemplation of the parties when agreement was reached, while performance after 2019 might become radically different, depending on the individual circumstance.

#### 4.6 Bunkers

The UK's imminent withdrawal from the EU has triggered concerns regarding the future of Gibraltar as a bunker refueling port. Gibraltar is a British overseas territory that is part of the EU and will exit the EU together with the UK. Currently, Gibraltar offers low-cost bunkers due to being a value added tax-free area and it relies on Spain for bunker storage and workforce. Exiting the single market and the customs union will likely create problems for the movement of supplies and labour, putting Gibraltar's economy and position as a bunker supply point at risk.<sup>693</sup>

Although according to the negotiating guidelines for Brexit Spain has a right to veto the participation of Gibraltar in any agreement between the UK and EU,<sup>694</sup> Gibraltar opposes such exercise of Spanish sovereignty over the country's future.<sup>695</sup> It appears that this may become a severe point of friction in the Brexit negotiations.

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<sup>693</sup> House of Lords European Union, 'Brexit: Gibraltar- 13<sup>th</sup> Report of Session 2016-2017' (HL Paper 116, 1 March 2017) < <https://www.publications.parliament.uk/pa/ld201617/ldselect/ldeucom/116/116.pdf> > last accessed 5 July 2017.

<sup>694</sup> European Council, 'Guidelines following the United Kingdom's Notification under article 50 TEU' (EUCO XT 20004/17, Brussels, 29 April 2017) < [http://www.consilium.europa.eu/en/meetings/european-council/2017/04/29-euco-guidelines\\_pdf/](http://www.consilium.europa.eu/en/meetings/european-council/2017/04/29-euco-guidelines_pdf/) > last accessed 5 July 2017.

<sup>695</sup> "Plainly obvious" EU would include Spain's Gibraltar veto in Brexit negotiating guidelines' *MercoPress* (Montevideo, 30 April 2017) < <http://en.mercoPress.com/2017/04/30/plainly-obvious-eu-would-include-spain-s-gibraltar-veto-in-brexit-negotiating-guidelines> > last accessed 5 July 2017.

## Conclusions

- Brexit will have as a result the withdrawal of the UK from the Customs Union and possibly the Single Market, subject to the possibility of the UK remaining a party to the EEA Agreement.<sup>696</sup> However, the UK is an original member to the WTO Agreement pursuant to articles XI and XIV:1 with ratification of the Agreement on 30 December 1994 and as such, its status in the WTO will remain unchanged post-Brexit.
- The Government's preferred option for UK –EU trade is to negotiate an FTA, failing which resort will be sought to WTO rules.
- Either scenario is expected to re-introduce tariffs, tariff quotas and non-tariff barriers between the UK and the EU. Consequences will be visible in the increase of cost for traders and consumers, the complication of trade operations and the resulting delays which in the shipping context are expected to generate demurrage claims. Moreover, supply chains set up between the UK and the Continent by European and international interests to take advantage of free single market access might be destabilised post-Brexit.
- Export control regimes regarding military and dual-use products are not likely to be disturbed, the UK being a party to relevant international agreements. However, the UK will have to set up its own or adapt its mechanisms of implementation.
- The landscape of trade sanctions is likely to remain intact by Brexit for the short –term at least. After Brexit, the UK will continue to be under an obligation to apply UN sanctions, which are currently implemented through EU regulations. Those, together with regulations on purely EU sanctions are expected to be preserved by the EUWB. However, the UK will be free to review its trade sanctions policy and decide whether it will align itself with the EU or not in the future. Either way, EU sanctions will continue to be relevant to the UK shipping industry due to its international character.
- Brexit will not affect the substantive English law on sales of goods. Nonetheless, impacts on contracts (especially long-term ones) are highly likely. Primarily, terms of sale contracts and charterparties with an EU reference (for example EU origin of goods, EU port of shipment or EU trading limits) can give rise to controversies post 2019, due to the UK not being an EU Member States any more. Secondly, Brexit could provide the possibility for termination of contracts either through force majeure clauses or the doctrine of frustration. Although such a possibility appears to be quite limited, it cannot be ruled out and needs to be assessed in reference with the contract in question and the specific circumstances of each case. Generally, any contractual risk could be dealt by the parties with the inclusion of appropriate provisions in the contract.
- Gibraltar might become a severe point of friction in negotiations between the UK and the EU. Brexit poses a risk on its status as a VAT-free bunker refuelling point and its general economy, which currently relies significantly on the single market freedom.

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<sup>696</sup> Ulrich G Schroeter Heinrich Nemecek 'The (Uncertain) Impact of Brexit on the United Kingdom's Membership in the European Economic Area' [2016] EBLR 923.

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## Standard Forms

Federation of Oils, Seeds and Fats Associations, FOSFA No 54

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