

4-30-2020

Cutting Off the EU to Spite Its Face?: How to Promulgate the UK's Contractual Choice of Law Rules to Ensure Stability Post-Brexit

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Recommended Citation

Emma Coffey, *Cutting Off the EU to Spite Its Face?: How to Promulgate the UK's Contractual Choice of Law Rules to Ensure Stability Post-Brexit*, 61 B.C.L. Rev. 1447 (2020), <https://lawdigitalcommons.bc.edu/bclr/vol61/iss4/5>

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CUTTING OFF THE EU TO SPITE ITS FACE?: HOW TO PROMULGATE THE UK'S CONTRACTUAL CHOICE OF LAW RULES TO ENSURE STABILITY POST-BREXIT

Abstract: As the UK struggles to figure out what its relationship with the world will look like after leaving the EU, scholars attempt to predict how it will answer the many remaining questions. One of the questions that the UK will face is what to do with existing EU law and, in particular, Regulation 593/2008 (Rome I). This regulation sets out the choice of law rules for any contractual agreements that are disputed in the UK. The UK must grapple with how to distinguish the laws from the EU and reinforce parliamentary sovereignty while also keeping the laws consistent to avoid chaos in the courts. The UK's choice will have wide-ranging implications; for example, it is estimated that forty percent of global commercial arbitrations are decided under English law. Given its prominence, this paper primarily focuses on English law when examining Rome I's consistency with common law, but acknowledges that the laws of Scotland and Northern Ireland will also have to be taken into consideration. The analyses of this Note centers on what changes the UK could implement to Articles 3 and 9—as case studies—to best achieve the goal of Brexit while also preserving stability.

INTRODUCTION

On January 31, 2020, the United Kingdom (UK) left the European Union (EU), an action that has become commonly known as Brexit.¹ On January 23, 2020, the Queen granted royal assent to the European Union (Withdrawal

* Thank you to Professor Frank Garcia, Boston College Law School, for inspiring this Note topic.

¹ Angela Dewan, *Brexit's Done. The UK Has Left the European Union*, CNN (Jan. 31, 2020), <https://us.cnn.com/europe/live-news/brexit-day-uk-leaves-eu-gbr-intl/index.html> [<https://perma.cc/8KW4-KSUH>]; see Jon Henley, *Brexit Weekly Briefing: UK Counts Down to 31 January Departure*, THE GUARDIAN (Jan. 7, 2020), <https://www.theguardian.com/politics/2020/jan/07/brexit-weekly-briefing-uk-counts-down-to-31-january-departure> [<https://perma.cc/TW6Q-CCAC>]; see also Bianca Britton & Rob Picheta, *Theresa May and EU Agree Brexit Delay*, CNN (Mar. 21, 2019), <https://www.cnn.com/uk/live-news/brexit-summit-delay-gbr-intl/index.html> [<https://perma.cc/37YW-PW9L>] (reporting that the UK's date to leave the EU was previously March 29, 2019, but was pushed back after lawmakers failed to ratify a Brexit deal); Thomas Colson, *Jeremy Corbyn Says UK May Have to Extend Article 50 and Delay Brexit*, BUS. INSIDER (Jan. 10, 2019), <https://www.businessinsider.com/jeremy-corbyn-says-uk-may-have-to-extend-article-50-delay-brexit-50-2019-1> [<https://perma.cc/475U-2HHF>] (reporting that an extension of Article 50 may be needed because of the inability to reach a Brexit deal); Alex Hunt & Brian Wheeler, *Brexit: All You Need to Know About the UK Leaving the EU*, BBC NEWS (Jan. 31, 2019), <https://www.bbc.com/news/uk-politics-32810887> [<https://perma.cc/9RHN-TZ6D>]; *Brexit: UK and EU Agree Delay to 31 October*, BBC NEWS (Apr. 11, 2019), <https://www.bbc.com/news/uk-politics-47889404> [<https://perma.cc/F4HM-KJDA>].

Agreement) Act 2020 (2020 Withdrawal Agreement) officially making it law.² The 2020 Withdrawal Agreement helps to establish what the UK and EU's new relationship will look like and allows for a transition period.³ The 2020 Withdrawal Agreement supplements the European Union (Withdrawal) Act 2018 (2018 Withdrawal Act), which was already passed by Parliament and given royal assent.⁴ The passage of the 2018 Withdrawal Act means that the

² *European Union (Withdrawal Agreement) Act 2020*, PARLIAMENT, <https://services.parliament.uk/bills/2019-20/europeanunionwithdrawalagreement.html> [<https://perma.cc/C9YZ-4J55>] (transforming the EU (Withdrawal Agreement) Bill into the EU (Withdrawal Agreement) Act 2020); *see Brexit: MPs Back Boris Johnson's Plan to Leave EU on 31 January*, BBC NEWS (Dec. 20, 2019), <https://www.bbc.com/news/uk-politics-50870939> [<https://perma.cc/25E5-7H8N>] (reporting that on December 20, 2019, the House of Commons in Parliament approved the EU (Withdrawal Agreement) Bill by a vote of 348 for and 234 against); Jim Lawless, *Britain's Brexit Bill Passes Final Hurdle in Parliament*, ABC NEWS (Jan. 22, 2020), <https://abcnews.go.com/International/wireStory/britains-brexit-bill-passes-final-hurdle-parliament-68462467> [<https://perma.cc/2D86-CR59>] (reporting that the House of Lords passed the EU (Withdrawal Agreement) Bill on January 22, 2020); *see also Royal Assent*, PARLIAMENT, <https://www.parliament.uk/about/how/laws/passage-bill/lords/lrds-royal-assent/> [<https://perma.cc/N43A-WJTL>] (detailing that the passage of a bill occurs only after the bill has gone through the House of Lords and the House of Commons and then receives royal assent, and that once royal assent is given "an announcement is made in both houses").

³ BBC NEWS, *MPs Back Boris Johnson's Plan*, *supra* note 2. The EU (Withdrawal Agreement) Bill allows for an approximately one-year transition period, until the end of 2020. Chris Morris, *What Is the Withdrawal Agreement Bill?*, BBC NEWS (Dec. 20, 2019), <https://www.bbc.com/news/uk-politics-50125338> [<https://perma.cc/53VS-RYTP>]. The journey to a comprehensive withdrawal agreement was long and plagued with uncertainty, as the previous three withdrawal agreements brokered between the EU and UK had been decisively struck down by Parliament. *See Britain and Brexit in Chaos: UK Parliament Rejects May's EU Deal Again*, NASDAQ (Mar. 12, 2019), <https://www.nasdaq.com/article/britain-and-brexit-in-chaos-uk-parliament-rejects-mays-eu-deal-again-20190312-00928> [<https://perma.cc/Q88H-2N5Q>] (reporting that Parliament struck down the second deal by a vote of 391 (against) to 242 (for)); Collin Dwyer & Vanessa Romo, *U.K. Parliament Rejects Theresa May's Brexit Deal in Pivotal Vote*, NPR (Jan. 15, 2019), <https://www.npr.org/2019/01/15/685100164/future-of-theresa-mays-brexit-deal-and-brexit-itself-hinges-on-pivotal-vote> [<https://perma.cc/Q628-EPRE>] (stating that Parliament voted to strike down the first withdrawal deal by a 432 to 202 vote); Jim Lawless & Danica Kirka, *U.K. Rejects Brexit Deal for 3rd Time, Leaving the Plan for Exiting the E.U. in Tatters*, TIME (Mar. 29, 2019), <http://time.com/5561242/brexit-deal-vote-no-may/> [<https://perma.cc/XC4S-TXXA>] (voting against the third Brexit deal 344 to 286); *see also* Thomas Colson & Adam Bienkov, *How Brexit Will Play Out if MP's Reject Theresa May's Deal*, BUS. INSIDER (Jan. 10, 2019), <https://www.businessinsider.com/what-happens-next-in-brexit-2019-1> [<https://perma.cc/9MGG-ESQ9>] (stating that thus far Theresa May has been unable to convince Parliament to pass her Brexit deal and outlining some of the possible next steps including an Article 50 extension, a "no deal" exit, or even holding a second referendum); Serina Sandhu, *What Is No-Deal Brexit? The Consequences of the UK Leaving the EU Without a Deal*, INEWS (Mar. 16, 2019), <https://inews.co.uk/news/brexit/no-deal-brexit-what-meaning-uk-leave-uk-consequences/> [<https://perma.cc/8M5W-ERXH>] (warning that without a deal, "consumers, businesses, and public bodies would have to respond immediately to changes as result of leaving the EU" and that there would be a lot of uncertainty created, one of the earlier rejected drafts of the withdrawal agreement built in a twenty-one month transition period); *Brexit: UK and EU Agree Delay*, *supra* note 1 (stating that Brexit has been extended to October 31, 2019).

⁴ *See* THE EUROPEAN UNION COMM., SCRUTINISING BREXIT: THE ROLE OF PARLIAMENT, 2016-1, HL 33, at 4 (UK) (holding that "Parliament will have to approve the ratification of the treaties that emerge from the negotiations and to enact the domestic legislation that is necessary to give them ef-

European Communities Act of 1972 will be revoked when the UK leaves the EU⁵ and any remaining EU laws will be transformed into UK national laws.⁶ Although on its face this seems to answer the question of what will happen to the EU law currently binding the UK, the 2018 Withdrawal Act grants Parliament the authority to modify the transformed EU laws as it sees fit.⁷ Therefore, a significant amount of uncertainty remains regarding which laws Parliament will retain in their current form and which they will modify.⁸

Current EU law covers a broad range of industries, making the retention of EU law critical to ensuring that a “black hole” is not created that would plague the UK legal system with uncertainty.⁹ Such retention also gives Par-

fect” in order to ensure that the treaties meet the goals of the Government and the public); *European Union (Withdrawal) Act 2018*, PARLIAMENT, https://services.parliament.uk/bills/2017-19/european_unionwithdrawal.html [<https://perma.cc/UY6Z-4SNN>] [hereinafter *EU Withdrawal Act Website*] (showing that the bill received Royal Assent on June 28, 2018); *Royal Assent*, *supra* note 2; *The European Union (Withdrawal) Bill and Its Implications for Wales: History*, NAT'L ASSEMBLY FOR WALES, <http://www.senedd.assembly.wales/mgIssueHistoryChronology.aspx?IID=15915> [<https://perma.cc/6XVX-AEFT>] (indicating that the bill was originally called the “Great Repeal Bill” before later being changed to the “The European Union (Withdrawal) Act 2018”); Lawless et al., *supra* note 3 (reporting that an agreement with the EU for the UK’s withdrawal has not been approved by Parliament yet). Royal assent is “when the Queen formally agrees to make the bill into an Act of Parliament (law).” *Royal Assent*, *supra* note 2.

⁵ Morris, *supra* note 3. The EU (Withdrawal Agreement) Bill alters the European Union (Withdrawal) Act 2018 by “reinstat[ing] [the European Communities Act] immediately until the end of 2020 when the transition period ends.” *Id.*

⁶ See European Union (Withdrawal) Act 2018, c. 16, §§ 1–3 (UK), http://www.legislation.gov.uk/ukpga/2018/16/pdfs/ukpga_20180016_en.pdf [<https://perma.cc/VGG8-B74U>] (stating the effect of the European Union (Withdrawal Act) is that EU law, with some adjustments, will operate as UK domestic law after they leave the EU); *European Communities Act 1972*, PARLIAMENT, <https://www.parliament.uk/about/living-heritage/evolutionofparliament/legislativescrutiny/parliament-and-europe/collections/parliament-and-europe/european-act-1972/> [<https://perma.cc/MW4F-MXFD>] (defining the European Communities Act as the legislation that legally made the United Kingdom a member of the European Economic Community); *EU Withdrawal Act Website*, *supra* note 4 (summarizing the European Union Withdrawal Act as “[a] Bill to repeal the European Communities Act 1972 and make other provision[s] in connection with the withdrawal of the United Kingdom from the EU”).

⁷ See European Union (Withdrawal) Act 2018, c. 16, § 7 (UK), http://www.legislation.gov.uk/ukpga/2018/16/pdfs/ukpga_20180016_en.pdf [<https://perma.cc/VGG8-B74U>] (stating that “[r]etained direct principal EU legislation cannot be modified by any primary or subordinate legislation other than — (a) an Act of Parliament” or other specified type of legislation). The European Union (Withdrawal Agreement) Bill did not substantively change section 7 of the European Union (Withdrawal) Act 2018, which dealt with the “status of retained EU law.” European Union (Withdrawal Agreement) Bill 2019-1, HC Bill [1] cl. 25–26 (UK).

⁸ See European Union (Withdrawal) Act 2018, c. 16, Explanatory Notes ¶ 10 (UK) (“It will then be for Parliament and, where appropriate, the devolved legislatures to make any future changes.”).

⁹ See *Departments and Executive Agencies*, EUROPEAN COMMISSION, https://ec.europa.eu/info/departments_en [<https://perma.cc/6N7Y-8XWG>] (showing that the European Commission has fifty-three departments, which range in addressing topics such as Agriculture and Rural Development, Climate Action, Health and Food Safety, Mobility and Transport, and Trade); *EU Withdrawal Act*, INST. FOR GOV'T (Nov. 7, 2018), <https://www.instituteforgovernment.org.uk/explainers/eu-withdrawal-act> [<https://perma.cc/7KHW-PUA6>] (stating that the “Act is essentially a giant ‘copy and paste exercise’” and that the point of the bill was to get the laws on the books without having to go through and make

liament time to repeal and modify the laws as it pleases.¹⁰ Time to navigate this new legal landscape is crucial because companies across the globe commonly utilize English law in their transactions.¹¹ In fact, English law is the most popular law in international contracts, and parties are three times more likely to use English law in their international contracts than French, U.S., or German law.¹²

This Note examines the UK's options regarding the choice of law rules contained in EU Regulation 593/2008, which contains the choice of law rules that govern contractual disputes.¹³ Of specific consequence to this issue is how these different options will affect both principles that have historically existed in the UK and rules that were first implemented through Regulation 593/2008 (Rome I).¹⁴ The historical principles are illustrated through an examination of

changes to each law one by one because there would not be enough time and that the Government wanted to avoid "creating a 'black hole' in the UK statute book and leading to legal uncertainty and confusion").

¹⁰ See European Union (Withdrawal) Act 2018, c. 16, Explanatory Notes ¶ 10 (UK) (stating that the purpose of the act is to maintain the status quo and allow Parliament time to make changes).

¹¹ See PROVIDING A CROSS-BORDER CIVIL JUDICIAL COOPERATION FRAMEWORK, HER MAJESTY'S GOV'T 4 (Aug. 22, 2017), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/639271/Providing_a_cross-border_civil_judicial_cooperation_framework.pdf [<https://perma.cc/A7E2-ZR52>] (stating that English law is "the most popular contract law used for conducting international transactions").

¹² See *id.*; Gilles Cuniberti, *The International Market for Contracts: The Most Attractive Contract Laws*, 34 NW. J. INT'L L. & BUS. 455, 458–59 (2014) (reporting that based on the results of a twelve-thousand participant study conducted by the International Chamber of Commerce, English law is "around three times more attractive to international commercial actors than U.S., French, or German contract laws," and despite a closer margin still more likely to be used than Swiss law).

¹³ See Practical Law Dispute Resolution, *Rome I: An Outline of the Key Provisions*, THOMSON REUTERS PRAC. L., <https://uk.practicallaw.thomsonreuters.com/7-501-0335> [<https://perma.cc/A7mA-KX4R>] [hereinafter *Rome I Website*]. Due to the prominence of English law when evaluating the language of Rome I against common law, this Note utilizes English common law, but acknowledges that Scotland and Northern Ireland have their own courts and parliamentary systems and that in some cases their laws might be different than England's. See Tom Bolam, *Common Mistakes in Choice of Law and Jurisdiction Clauses*, FLADGATE (Sept. 22, 2015), <https://www.fladgate.com/2015/09/common-mistakes-in-choice-of-law-and-jurisdiction-clauses/> [<https://perma.cc/BL85-J3MT>].

¹⁴ See Consolidated Version of the Treaty on the Functioning of the European Union art. 288, Oct. 10, 2012, 2012 O.J. (C 326) 1 [hereinafter TFEU 2012 Consolidated Version] (explaining what a regulation is in the UK); Mo Zhang, *Party Autonomy and Beyond: An International Perspective of Contractual Choice of Law*, 20 EMORY INT'L L. REV. 511, 516 (2006) (citing that the principle of party autonomy traces back to Charles Dumoulin, a Frenchman from the sixteenth century); *Rome I Website*, *supra* note 13 (stating that Rome I is a regulation and that Article 9(2) holds that "any contractual provision will not be applied to the extent that it overrides mandatory provisions," and "[t]he ECJ has held that Article 9 should be interpreted strictly"); Practical Law Dispute Resolution, *Rome Convention: An Outline of the Key Provisions*, THOMSON REUTERS PRAC. L., <https://uk.practicallaw.thomsonreuters.com/Document/Ib55545dfe83211e398db8b09b4f043e0/View/FullText.html> [<https://perma.cc/Y6TK-MWKR>] [hereinafter *Rome Convention Website*] (reporting that the UK did not adopt Article 7(1), which states "that the mandatory rules of another country (that is, a country other than the forum) with which the situation has a close connection may also be given effect to") (emphasis omitted).

Article 3 of Rome I, which defines the principle of party autonomy, and the rules implemented through Rome I are illustrated through Article 9, regarding overriding mandatory provisions.¹⁵

Part I of this Note examines the general structure and operation of EU law, focusing on the creation of Rome I and the steps the UK has taken to define its future relationship with EU law thus far.¹⁶ Part II looks at the history of the UK's decision to leave the European Union and analyzes the principles guiding the UK's negotiations with the EU.¹⁷ Part III evaluates what the UK's options are in regards to its choice of law framework after Brexit in light of its stated goals of maintaining "legal certainty" while also reasserting "parliamentary sovereignty."¹⁸

I. THE EUROPEAN UNION AND THE EVOLUTION OF CHOICE OF LAW RULES IN THE UK

This Part examines the EU legal system generally and how the UK's current choice of law rules evolved out of that EU system.¹⁹ Section A of this Part explores the structure and functioning of the European Union and its legal system.²⁰ Section B of this Part looks at the history of choice of law rules in the EU with particular focus on Articles 3 and 9 of Rome I.²¹

A. *The Establishment of the European Union and Sources of EU Law*

The foundation for the modern day European Union was established through the European Coal and Steel Community (ECSC) Treaty, enacted in 1952, and the Treaties of Rome, enacted in 1958, the latter of which consists of the European Economic Community (EEC) Treaty and the European Atomic

¹⁵ See Regulation (EC) 593/2008 of the European Parliament and of the Council (June 17, 2008) on the Law Applicable to Contractual Obligations (Rome I), 2008 O.J. (L 177) 6, 10, 13 (showing that choice of law principles regarding party autonomy are contained in Article 3 and that the choice of law principles regarding overriding mandatory provisions are contained in Article 9).

¹⁶ See *infra* notes 22–88 and accompanying text.

¹⁷ See *infra* notes 93–134 and accompanying text.

¹⁸ See *infra* notes 136–265 and accompanying text. "Providing legal certainty" and asserting "Parliamentary sovereignty" are both goals that Theresa May originally laid out for Brexit. DEP'T FOR EXITING THE EUROPEAN UNION, THE UNITED KINGDOM'S EXIT FROM AND NEW PARTNERSHIP WITH THE EUROPEAN UNION, 2017, Cm. 9417, at 9, 13 (UK). The UK sought to provide legal certainty by "preserv[ing] the rights and obligations that already exist in the UK under EU law and provide a secure basis for future changes to [their] domestic law." *Id.* at 9. Asserting parliamentary sovereignty was defined as assuring that UK "laws will be made in London, Edinburgh, Cardiff, and Belfast, and will be based on the specific interests and values of the UK." *Id.* at 13.

¹⁹ See *infra* notes 22–88 and accompanying text.

²⁰ See *infra* notes 22–47 and accompanying text.

²¹ See *infra* notes 48–88 and accompanying text.

Energy Community (Euratom) Treaty.²² The ECSC was the first step toward harmonization.²³ The ECSC's purpose was to allow signatory countries to have access to coal and steel, but also to monitor the other countries' use of steel and coal and stop countries from being able to secretly mobilize military units.²⁴ The EEC built off of, and expanded, the principle of harmonization established in the ECSC.²⁵ The purpose of the EEC was to create a unified economic market in the contracting countries.²⁶ The UK joined the EEC in 1973, after multiple attempts to join the EEC in the 1960s.²⁷ After creating economic uniformity, the Member States went a step further by enacting the Single European Act (SEA) in 1987.²⁸ The SEA increased the power of the European Parliament, including the power to weigh in on proposed laws.²⁹ One of the challenges in

²² See Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 3 [hereinafter EEC Treaty] (establishing that the original signatories of the Treaty establishing the European Economic Community (EEC) were Belgium, Germany, France, Italy, Luxembourg, and the Netherlands); *Euratom Treaty*, EUR. PARLIAMENT, <http://www.europarl.europa.eu/about-parliament/en/in-the-past/the-parliament-and-the-treaties/euratom-treaty> [https://perma.cc/E8H2-TCL6] (stating that Euratom concerns the safe use of nuclear energy); *EU Treaties*, EUR. UNION, https://europa.eu/european-union/law/treaties_en [https://perma.cc/J5Q9-LN2T] (reporting that the ECSC treaty was enacted on April 18, 1951 and terminated on July 8, 2002 and that the Treaties of Rome, composed of the EEC and European Atomic Energy Community (Euratom) were enacted on January 1, 1958).

²³ See The Editors of Encyclopaedia Britannica, *European Coal and Steel Community*, ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/topic/European-Coal-and-Steel-Community> [https://perma.cc/VDA8-HVL9] (indicating that the European Coal and Steel Community was intended to be the first step towards the "United States of Europe").

²⁴ See *id.* (stating that this treaty was motivated by the belief that "a new economic and political framework was needed to avoid future Franco-German conflicts"); *Summaries of EU Legislation: Treaty Establishing the European Coal and Steel Community, ECSC Treaty*, EUR-LEX, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:xy0022> [https://perma.cc/] (summarizing that the purpose of the ECSC is monitoring countries' uses of coal to ensure compliance with agreed upon benchmarks and to allow for coal and steel to move freely between the signatory countries).

²⁵ See *EU Treaties*, *supra* note 22 (describing the main changes in the Treaties of Rome as being an "extension of European integration to include general economic cooperation").

²⁶ See EEC Treaty, *supra* note 22, at art. 2, 3 (stating in Article 2 that the aim of the EEC was "establishing a Common Market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increased stability, . . . and closer relations between its Member States" and in Article 3 that some of the actions that will be taken include removing "obstacles to the free movement of persons, services and capital" and "the establishment of a common customs tariff and a common commercial policy towards third countries").

²⁷ See *The ECC and the Single European Act*, PARLIAMENT, <https://www.parliament.uk/about/living-heritage/evolutionofparliament/legislativescrutiny/parliament-and-europe/overview/britain-and-eeec-to-single-european-act/> [https://perma.cc/5TY7-DNKV] (stating that Charles De Gaulle vetoed the UK's application to join the EU twice, once in 1961 and once in 1969).

²⁸ *Id.*

²⁹ Kathryn Good, *Institutional Reform Under the Single European Act*, 3 AM. U. INT'L L. REV. 299, 311, 313 (1988) (stating that by allowing a "second reading" of a proposed piece of legislation, through Article 149 of the Single European Act, Parliament gained more power because Parliament could now wield some power over the Council by suggesting amendments or rejecting the legislation); Jules Lonbay, *The Single European Act*, 11 B.C. INT'L & COMP. L. REV. 31, 59 (1988) (describ-

establishing a common market was the variety of rules governing important concerns, such as health and safety.³⁰ The EEC had provisions that allowed for changes to the national laws, but only if there was a unanimous vote by the Council of the European Union, a legislative body of the EU.³¹ The SEA, however, made it easier for Member States to pass legislation by implementing voting by a qualified majority.³²

The principles established in the foundational treaties were evolved and codified in two treaties which are the “constitution” of the modern European Union, the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).³³ The European Commission, which is given legal authority under the TFEU and TEU, was created in 1965 as the EU’s law-making body and is comprised of a representative from each Member State.³⁴ The European Commission is responsible for proposing the laws and then the Council of the EU and European Parliament jointly pass the laws.³⁵

ing the changes to Articles 6, 7, and 8 as giving Parliament more power regarding the passing of legislation, but explaining Parliament did not have the final say).

³⁰ Lonbay, *supra* note 29, at 39.

³¹ *See id.* at 39 & n.65 (describing the challenges to a common market and stating that Article 100 permitted some changes to Member States laws that “directly affect the establishment or functioning of the Common Market” and that Article 253 states, “[i]f action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission”); *Council of the European Union*, EUR. UNION, https://europa.eu/european-union/about-eu/institutions-bodies/council-eu_en [<https://perma.cc/J9BS-MCYU>] (explaining that the Council of the European Union now votes alongside Parliament to pass laws).

³² *See* Good, *supra* note 29, at 306–07 (reporting that the Single Act sought to fix the issues caused by the unanimous vote requirement, including “inefficiency and uncertainty,” which was exemplified by the French withholding their votes for seven months because the Council could not reach a unanimous decision about an agriculture rule on June 30, 1965); *The ECC and the Single European Act*, *supra* note 27 (stating that the implementation of voting by a qualified majority “allowed over 280 pieces of legislation to be passed”).

³³ *See* Udo Bux, *Fact Sheets on the European Union: Sources and Scope of European Union Law*, EUR. PARLIAMENT (Feb. 2020), <http://www.europarl.europa.eu/factsheets/en/sheet/6/sources-and-scope-of-european-union-law> [<https://perma.cc/R8FU-BJSE>] (stating that the TEU and TFEU are principal sources of EU Law).

³⁴ *See* Giorgio Motta, *Fact Sheets on the European Union: The European Commission*, EUROPEAN PARLIAMENT (Oct. 2019), <http://www.europarl.europa.eu/factsheets/en/sheet/25/the-european-commission> [<https://perma.cc/W626=D952>] (defining the European Commission as a body created on April 8, 1965, through the Treaty Establishing a Single Council and Single Commission of the European Communities, that has the legal authority, through Article 17 of the TEU and Articles 234, 244–250, and 290–291 of the TFEU, that promulgates EU law, and has powers which include creating and “submit[ting] to the Council and Parliament any legislative proposals (for regulations or directives) needed to implement the treaties”).

³⁵ *See Council of the European Union*, *supra* note 31 (defining the role of the Council of the EU as passing EU laws in coordination with the European Parliament, and that the Council of EU does not have “fixed members” but rather “the Council meets in 10 different configurations, each corresponding to the policy area being discussed”) (emphasis omitted); *European Parliament*, EUR. UNION, https://europa.eu/european-union/about-eu/institutions-bodies/european-parliament_en [<https://perma.cc/>].

The TFEU defines the types of legislation that can be adopted by EU bodies.³⁶ In particular, Article 288 defines what types of EU legislation are binding and cannot be altered in anyway.³⁷ For example, a regulation is a piece of legislation that once enacted is binding on all Member States, and Member States cannot opt out of any portion.³⁸ Other types of binding legislation are “decisions,” which are binding on all identified parties, and “directives,” which promulgate a goal that must be met, but leaves it up to the Member States to decide how to reach that goal.³⁹ In comparison, “recommendations” and “opinions” are not binding.⁴⁰

Another critical source of modern-day EU Law comes from cases decided by the Court of Justice of the European Union (CJEU).⁴¹ The CJEU is the highest authority on all questions of EU law, meaning that the court alone is able to resolve disputes between nations interpreting EU law differently or consider a question of conflicting national law.⁴² Article 267 of the TFEU, Article 234 of the TEC, and the “doctrine of supremacy” grant the CJEU a large amount of power over Member States.⁴³ The combined effect of these provi-

cc/Y7HF-FHZM] (discussing that the European Parliament is composed of Members of the European Parliament (MEPs) from each of the Member States and votes on legislation).

³⁶ See TFEU 2012 Consolidated Version art. 288 (defining the “legal acts of the union”).

³⁷ *Id.*

³⁸ See *id.* (promulgating in Article 288 that “a regulation shall have general application,” and that “[i]t shall be binding in its entirety and directly applicable in all Member States”).

³⁹ See *id.* (defining what a directive is in the UK).

⁴⁰ See *id.* (establishing that “recommendations and opinions shall have no binding force” in Article 288).

⁴¹ See *Court of Justice of the European Union (CJEU)*, EUROPA (Nov. 25, 2019), https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en [<https://perma.cc/PR6W-QWD3>] [hereinafter *CJEU*] (defining the role of the CJEU as “interpret[ing] EU law to make sure it is applied in the same way in all EU countries, and settles legal disputes between national governments and EU institutions”) (emphasis omitted).

⁴² See *id.* (stating that the role of the CJEU is to ensure that national courts are not interpreting the law in contradictory or different ways, provide clarification about what the proper interpretation of a law is, hold national courts accountable if they refuse to interpret the law in accordance with the CJEU, strike down EU laws if they contradict EU treaties, enact sanctions, and force EU Member States to act in certain circumstances).

⁴³ See TFEU 2012 Consolidated Version art. 267 (“The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union; Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court. If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.”); Consolidated Version of the Treaty on European Union and of the Treaty Establishing the European Community art. 234, Dec. 12, 2002, 2002 O.J. (C 325) 127 (showing that Article 234 of the TEC essentially repeats the language of Article 267 of the TFEU); Hakan Kolcak, *The Sovereignty of the European Court of Justice and the*

sions is that questions of EU law that are brought to the highest courts in Member States have to be transferred to the CJEU, and then the CJEU decides how to interpret the law.⁴⁴ The interpretation is then applicable in all Member States and trumps all national laws.⁴⁵ Thus, the precedent established by the CJEU combined with regulations and other legislation enacted through the EU's governing bodies establishes the framework for identical EU laws to be implemented throughout the Member States.⁴⁶ One of the by-products of this harmonization was the EU's choice of law rules.⁴⁷

B. History of Choice of Law Principles in the UK

The European Union adopted the Rome Convention as the first comprehensive choice of law regime in order to create a uniform standard for handling contractual choice of law issues in the EU.⁴⁸ Although enacted in 1991, the

EU's Supranational Legal System, INQUIRIES J., Vol. 6, No. 4 (2014), <http://www.inquiriesjournal.com/articles/883/the-sovereignty-of-the-european-court-of-justice-and-the-eus-supranational-legal-system> [<https://perma.cc/N9EY-5WEA>] (citing that the jurisdictional power of ECJ comes from Article 177 of the Treaty of Rome, "Article 150 of the Euratom Treaty, Article 234 [of the] TEC and . . . Article 267 [of the] TFEU" and explaining that the "doctrine of supremacy" has been interpreted by the ECJ in the cases of *Simmenthal* and *Internationale Handelsgesellschaft* to mean that EU law is "supreme to all forms of national law" and the ECJ in *Internationale Handelsgesellschaft* extended the supremacy to include supremacy over national constitutions).

⁴⁴ See MATTHEW J. HOMEWOOD, *EU LAW CONCENTRATE: LAW REVISION AND STUDY GUIDE* 45 (5th ed. 2016) (summarizing that the purpose Article 267 of the TFEU—and Article 234 of the TEC—is to ensure that "EU law has the same meaning and effect in all the Member States" and that "a question of EU law . . . raised before a national court of last resort . . . must refer it to the Court of Justice"); Kolcak, *supra* note 43 (referencing the cases of *Simmenthal* and *Internationale Handelsgesellschaft* as standing for the rule that EU law is "supreme to all forms of national law").

⁴⁵ See HOMEWOOD, *supra* note 44 (detailing the purpose of Article 267 of the TFEU and Article 234 of the TEC); Kolcak, *supra* note 43 (same).

⁴⁶ See TFEU 2012 Consolidated Version art. 288; *The ECC and the Single European Act*, *supra* note 27 (explaining that the SEA "pav[ed] the way for common EU laws based on the principle of mutual recognition among Member States"); Lonbay, *supra* note 29, at 40–41 & n.73 (describing the ECJ's decision in *Rewe v. Bundesmonopolverwaltung für Branntwein*, 1979 E. Comm. Ct. J. Rep. 649, as establishing that Member States generally have to accept other Member States' technical requirements but can put into place rules that provide obstacles to free trade only if it is considered reasonable to fulfill an important goal, such as "protect[ing] public health or the environment in the general interest"); see also ERIC DAVIES, EUROPEAN SOURCES ONLINE, INFORMATION GUIDE: COURT OF JUSTICE OF THE EUROPEAN UNION 3 (2013), http://aei.pitt.edu/74891/1/Court_of_Justice.pdf [<https://perma.cc/MEV3-LAKU>] (noting that the CJEU used to be called the European Court of Justice (ECJ) and is often still referred to as the ECJ, and that in *Costa v. ENEL*, the ECJ "ruled that Community law is supreme, taking precedence over national law").

⁴⁷ See H. Matthew Horlacher, Note, *The Rome Convention and the German Paradigm: Forecasting the Demise of the European Convention on the Law Applicable to Contractual Obligations*, 27 CORNELL INT'L L.J. 173, 174 (1994) (noting that a council was created to look at if the existing choice of law principles could be created into one code).

⁴⁸ Mo Zhang, *Party Autonomy in Non-Contractual Obligations: Rome II and Its Impacts on Choice of Law*, 39 SETON HALL L. REV. 861, 861 (2009); see *Rome Convention Website*, *supra* note

Rome Convention was the product of a project that had started back in 1967.⁴⁹ The Commission of the European Communities created the Brussels Working Group in 1967 for the purpose of investigating whether the existing choice of law principles could be unified into one cohesive code.⁵⁰ Such a code would promote legal certainty and stability, protect EU citizens' rights, and reduce forum shopping.⁵¹ Nevertheless, because the Rome Convention was formed as an international treaty, its provisions were not automatically incorporated into national law and the European Court of Justice did not have the authority to hear cases regarding the interpretation of its language.⁵² This resulted in Member States having different adaptations and interpretations of the Rome Convention.⁵³

Rome I was enacted as an EU regulation years after the Rome Convention and governs contracts executed on or after December 17, 2009.⁵⁴ Because Rome I was formed as an EU Regulation, it immediately provided greater uniformity because any modifications to Rome I would automatically be incorporated into the laws of the Member States under Article 288 of the TFEU.⁵⁵ Ad-

14 (stating the Rome Convention took effect on April 1, 1991, and it applies to all contracts made between April 1991 and December 17, 2009).

⁴⁹ Horlacher, *supra* note 47 (reporting that the Brussels Working Group, formed in 1967, was the first group tasked with investigating if the conflict of law rules could be harmonized).

⁵⁰ *See id.* at 174 & n.5 (noting that the idea came out of a proposal submitted by “Belgium, the Netherlands, and Luxembourg,” also known as the Benelux countries).

⁵¹ Council Report on the Convention on the Law Applicable to Contractual Obligations, 1980 O.J. (C 282) 1, 4–5 (quoting the speech of T. Vogelaar, the Director-General for the Internal Market and Approximation of Legislation at the Commission in February 1969 in which he stressed the advantages of having uniform choice of law rules).

⁵² *See* Dr. Volker Behr, *Rome I Regulation a — Mostly — Unified Private International Law of Contractual Relationships Within — Most — of the European Union*, 29 J.L. & COM. 233, 235–37 (2011) (explaining that because the Rome Convention was a convention, different Member States had different versions of it based on when they entered the EU, because it had undergone different transformations over time and the countries had the ability to enter reservations to the treaty, these two issues were eliminated with Rome I because it was promulgated as a regulation, therefore “the Regulation does not allow reservations . . . [and] is automatically applicable in Member States”); Ralf Michaels, *The New European Choice-of-Law Revolution*, 82 TUL. L. REV. 1607, 1618 (2008) (stating that because the Rome Convention was “a treaty . . . the European Court of Justice did not have general competence”).

⁵³ *See* Behr, *supra* note 52, at 235–37.

⁵⁴ *See Rome I Website*, *supra* note 13 (indicating that Rome I is an abbreviation of Regulation 593/2008 on the law applicable to contractual obligations).

⁵⁵ *See* TFEU 2012 Consolidated Version art. 288; Behr, *supra* note 52, at 237 (noting that Rome I, by being promulgated as a regulation, corrected the flaws of the Rome Convention because “the Regulation does not allow reservations . . . [and] is automatically applicable in Member States”); Practical Law Dispute Resolution, *Rome I and Rome II: A Summary*, THOMSON REUTERS PRAC. L., <https://uk.practicallaw.thomsonreuters.com/3-216-8958> [<https://perma.cc/2EVH-YP4G>] [hereinafter *Rome I and Rome II Website*] (summarizing that both regulations were established in part “to harmonise the rules that determine what law applies to contractual and non-contractual disputes, with the aim of ensuring that the courts in the European Union apply the same law to the same international dispute”).

ditionally, because Rome I was a piece of EU legislation the CJEU not only had the ultimate authority to resolve any questions of law that arose, but also could provide a “uniform interpretation” of Rome I since CJEU decisions trump all national courts’ interpretations.⁵⁶ Thus, all twenty-nine articles of Rome I are currently codified and interpreted in the same way in the Member States.⁵⁷

1. The Principle of Party Autonomy

The history of the principle of party autonomy traces back to the sixteenth century.⁵⁸ The principle of party autonomy challenged the existing principle of *lex loci contractus*, meaning the law governing the contract was the “law of place where the contract was made,” and quickly overtook it.⁵⁹ Over time, the principle of party autonomy has expanded in scope and complexity, but the core principle of respecting the parties’ intentions has remained the same.⁶⁰

The principle of Party Autonomy was an integral part of the Rome Convention and is currently codified in Article 3 of Rome I.⁶¹ Although the provision basically stayed the same, Article 3 contained two important modifica-

⁵⁶ See *supra* note 44 and accompanying text (summarizing the purpose of Article 267 of the TFEU, Article 234 of the TEC, and referencing the cases *Simmenthal* and *Internationale Handelsgesellschaft*); see also MINISTRY OF JUSTICE, GUIDANCE ON THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS (ROME I): OUTLINE OF THE MAIN PROVISIONS 1, 3 (Feb. 2010), <https://webarchive.nationalarchives.gov.uk/20110201153849/http://www.justice.gov.uk/publications/docs/guidance-law-contractual-obligations-romei.pdf> [<http://perma.cc/X5UA-4WJB>] (noting that the ECJ has the final say on all issues regarding the interpretation of Rome I); *CJEU*, *supra* note 41 (defining the ECJ as one of the courts of the CJEU, where the CJEU is the highest authority for interpreting EU law and is located in Luxembourg).

⁵⁷ See TFEU 2012 Consolidated Version art. 288 (providing the definition of a regulation in Article 288 and stating that a regulation is “binding in its entirety and directly applicable in all Member States”); Regulation (EC) 593/2008, at 6–16; *CJEU*, *supra* note 41.

⁵⁸ See Zhang, *supra* note 14, at 516 (citing that the principle of party autonomy traces back to Charles Dumoulin in the sixteenth century, who stated that in contracts “the will of the parties is sovereign”).

⁵⁹ See *id.* at 517–19 (explaining how the principle of party autonomy quickly expanded in scope).

⁶⁰ See *id.* at 517–19, 521 (explaining that the scope of party autonomy expanded not only to determine “the validity of the contract” but also to “the determination of the rights and duties arising out of valid contracts” and the development of “the doctrine of *dépeçage* . . . that allows different aspects of a contract to be governed by different systems of law” and that there is currently a debate over if “the whole law of a designated state or country would include that state or the country’s conflict of law rules . . . [a] problem . . . commonly characterized as *renvoi*”) (internal quotations omitted).

⁶¹ See *Rome I Website*, *supra* note 13 (“Article 3(1) provides that a contract will be governed by the law chosen by the parties. Such choice must be made expressly or clearly demonstrated by the terms of the contract or circumstances of the case.”); *Rome Convention Website*, *supra* note 14 (indicating that the “primary rule” is contained in Article 3, which promulgates the rule of party autonomy); see also Behr, *supra* note 52, at 241 (noting that Rome I, unlike some other choice of law rules, such as those of the United States, does not require the “chosen law to bear some ‘reasonable’ or ‘substantial’ relationship to the parties or the transaction”).

tions to the Rome Convention.⁶² First, it altered the standard for finding an inferred choice of law from “reasonable certainty,” based on the contents of the contract, to “clearly demonstrated.”⁶³ The Rome Convention language was unclear as to whether or not the parties had to cement their choice of law in an express provision or if the choice could be implied based on the language in the contract.⁶⁴ At the time of its adoption, the Ministry of Justice published a document to express its approval of the clarification.⁶⁵ Second, Rome I made clear that the courts should take into consideration if the parties have given a court “exclusive jurisdiction” when evaluating if the parties have made a choice of law.⁶⁶ This modification was deemed to track English law by the Ministry of Justice, and the positivity of these changes has not been questioned in the wake of Brexit.⁶⁷

2. Overriding Mandatory Provisions

Overriding Mandatory Provisions are rules that parties cannot contract around in an international context and will prevail even if the parties have chosen a law that would otherwise contradict those provisions.⁶⁸ Refusing to enforce a law based on an overriding mandatory provision is different from ex-

⁶² See MINISTRY OF JUSTICE, *supra* note 56, at 3 (“[T]he Rome I Regulation contains two useful clarifications.”).

⁶³ See *id.* (detailing that the ability to infer a choice of law was clarified in Rome I); see also Convention on the Law Applicable to Contractual Obligations, art. 3, opened for signature June 19, 1980, 1980 O.J. (C 27) 37 (“A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case.”); Regulation (EC) 593/2008, at 10 (“A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case.”) (changing the wording of the Rome Convention).

⁶⁴ See MINISTRY OF JUSTICE, *supra* note 56, at 3 (expressing that Rome I clarified that the courts can find an implied choice by the parties as to what law will govern based on the contractual terms, the ability to find an implied choice was ambiguous in the Rome Convention).

⁶⁵ See *id.*; *About Us*, MINISTRY OF JUST., <https://www.gov.uk/government/organisations/ministry-of-justice/about#priorities> [<https://perma.cc/BC74-5NTH>] (defining the Ministry of Justice as a branch of the UK government that is responsible for the “courts, prisons, probation services, and attendance centres”).

⁶⁶ See Regulation (EC) 593/2008, at 6 (stating that if the parties agree that a particular country should be the forum where the dispute is decided, the choice of forum “should be one of the factors to be taken into account in determining whether a choice of law has been clearly demonstrated”); Behr, *supra* note 52, at 243 (addressing that if the parties make a choice of forum, the courts will almost always find that the parties have made a choice of law); MINISTRY OF JUSTICE, *supra* note 56, at 3.

⁶⁷ See MINISTRY OF JUSTICE, *supra* note 56, at 3 (noting that the document by the MOJ mistakenly refers to recital 12 as recital 14).

⁶⁸ See Behr, *supra* note 52, at 259 (noting that the importance of overriding mandatory provisions comes from the fact that, despite contracts typically involving only the interests of private actors, sometimes the interests of other countries are affected in contracts); Nathalie Voser, *Current Development: Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration*, 7 AM. REV. INT’L ARB. 319, 321 (1996) (defining mandatory rules as rules that parties are unable to contract around).

cluding it on the basis of public policy.⁶⁹ Mandatory rules, unlike public policy, are found in explicit provisions, whereas matters of public policy can be found both in explicit provisions or crafted as moral standards.⁷⁰ Additionally, overriding mandatory rules can cover a broader range of issues than public policy.⁷¹

Article 9 of the Rome Regulation addresses the issue of overriding mandatory provisions.⁷² Prior to Article 9's enactment, many Member States, including the UK, had entered a reservation to Article 7(1) of the Rome Convention, which previously had addressed the issue of overriding mandatory provisions.⁷³ The UK entered the reservation because they perceived Article 7(1) to have an unacceptable amount of uncertainty.⁷⁴

The English common law perspective on mandatory overriding provisions can largely be gleaned from two cases: *Ralli Bros. v. Cia Naviera Sota y Aznar* and *Foster v. Driscoll*.⁷⁵ Under *Ralli Bros.*, a contract that involves English law

⁶⁹ See Regulation (EC) 593/2008, at 15 (citing in Article 21, separately from mandatory overriding provisions, the rules regarding the public policy of the forum stating “[t]he application of a provision of law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum”); Voser, *supra* note 68, at 322 (citing the differences between mandatory rules and public policy).

⁷⁰ See Voser, *supra* note 68, at 322 (stating that mandatory rules are defined as “explicit rules which seek application in a dispute at stake” and if the facts involve the issues that the rules cover, then they will apply) (emphasis omitted).

⁷¹ See *id.* (distinguishing mandatory rules from a public policy limitation by looking at the scope of issues that they cover).

⁷² See Regulation (EC) 593/2008, at 13 (“1. Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation. 2. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum. 3. Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.”).

⁷³ See Behr, *supra* note 52, at 259; Convention on the Law Applicable to Contractual Obligations, 1980 O.J. (C 27) at 38 (“[Article 7(1):] When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.”).

⁷⁴ See Ole Lando, *Dicey & Morris, The Conflict of Laws: A Review*, 47 INT’L & COMP. L.Q. 394, 408 (1998) (reporting that those in the UK tasked with drafting the Rome Convention thought Article 7(1) was a “recipe for confusion . . . for uncertainty etc . . . for expense . . . and for delay”) (internal citations omitted); *Rome I Website*, *supra* note 13 (noting that the UK did not adopt Article 7(1) of the Rome Convention because the UK believed it would have caused too much uncertainty).

⁷⁵ *Beijing Jianlong Heavy Indus. Grp. v. Golden Ocean Grp. Ltd., Golden Zheijiang Inc., Ship Fin. Int’l Ltd. and SFL Bulk Holding Ltd.* [2013] EWHC (Comm) 1063 [18] – [19] (Eng.) (summarizing the holdings in *Ralli Bros. v. Compania Naviera Sota y Aznar* [1920] 2 KB 287 (Eng.) and *Foster v. Driscoll* [1929] 1 KB 470 (Eng.)); MINISTRY OF JUSTICE, *supra* note 56, at 6.

is unenforceable if the contract would violate the law in the country where the contract will be performed.⁷⁶ *Foster* similarly held that a contract could be held to be unenforceable as a matter of public policy if such contract would be a “breach of a foreign law.”⁷⁷ Under the Rome Convention and the UK’s reservation of Article 7(1), it was unclear whether the decisions in *Ralli Bros* and *Foster* were still precedential in the UK or if they had been overridden.⁷⁸

Article 9 of Rome I eliminated the ambiguity in Article 7(1) and provided a clearer rule articulating when overriding mandatory provisions apply.⁷⁹ First, because Rome I is an EU regulation, it does not allow for reservations and, therefore, was binding on all Member States.⁸⁰ This eliminated the question as to whether English case law still applied.⁸¹ Second, it solidified that if the overriding mandatory provision is the “law of the forum,” then that law is always applied.⁸² This is consistent with the holding in *Ralli Bros*, in which English courts held an English contract to be performed in Spain unenforceable because the agreed upon price violated Spanish law.⁸³ Lastly, it clarified what would happen if the overriding mandatory provision came from a third country.⁸⁴ Rome I established that if the overriding mandatory provision comes

⁷⁶ See Lando, *supra* note 74, at 404–06 (summarizing the court’s dismissal of an action to recover the difference between the contract price of £50, which was established through an English contract for the shipping of jute to Barcelona, and £10, the price set by the Spanish government as the maximum price that could be charged for shipping jute).

⁷⁷ MINISTRY OF JUSTICE, *supra* note 56, at 6.

⁷⁸ See *id.* (stating that there was uncertainty about whether the *Foster* or *Ralli Bros.* decisions remained in force in the UK, “in light of the UK’s reservation in respect of Article 7(1) of the Rome Convention” and the Rome Convention’s public policy rule).

⁷⁹ See *id.* (“Article 9(3) removes the current ambiguity as to whether the European Court of Justice would consider that the old English jurisprudence would continue to be applied under the Rome Convention in light of the UK’s reservation in respect of Article 7(1) of the Rome Convention.”); *supra* note 72 (quoting Regulation (EC) 593/2008, at 13 Art. 9).

⁸⁰ *Regulations, Directives and Other Acts*, EUR. UNION, https://europa.eu/european-union/eu-law/legal-acts_en [<https://perma.cc/39LN-AEJA>] (stating that a regulation is legislation that must be “applied in its entirety across the EU”).

⁸¹ See *id.*; see also MINISTRY OF JUSTICE, *supra* note 56, at 6 (stating that Article 9(3) promulgates a clearer rule that eliminates the questions surrounding if the *Foster* and *Ralli Bros.* decisions still applied in the UK, given that the UK entered a reservation to Article 7(1) of the Rome Convention).

⁸² See Regulation (EC) 593/2008, at 13 (“Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.”).

⁸³ See Beijing Jianlong Heavy Indus. Grp., [2013] EWHC (Comm) 1063 at [18]–[19] (citing as precedent *Ralli Bros.*’ holding that “an English law contract will not be enforceable where performance of that contract is forbidden by the law of the place where it must be performed (the *lex loci solutionis*)”).

⁸⁴ See Regulation (EC) 593/2008, at 13 (EC) (“Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.”); MINISTRY OF JUSTICE, *supra* note 56, at 6–7 (summarizing that the Rome Convention provided an answer to the

from a third country, then courts are given discretion to enforce the overriding mandatory provision, if the provision affects the performance of the contract.⁸⁵ The question regarding what happens if the overriding mandatory provision is from a third country has never been explicitly addressed in English common law.⁸⁶ Nevertheless, the Ministry of Justice stated that the provision in Rome I generally tracked English common law.⁸⁷ Similar to the changes made to Article 3, the Ministry of Justice deemed these changes to be positive and they do not appear to have been substantively questioned.⁸⁸

II. BREXIT AND THE UK'S FUTURE RELATIONSHIP WITH THE EU

The UK has undergone a period of turbulence and three Prime Ministers in order to leave the EU.⁸⁹ This Part looks at the winding path that the UK took in order to successfully leave the EU and what clues it has left for what its future relationship with the EU will look like.⁹⁰ Section A of this Part examines the UK's decision to leave the EU and some of the official and unofficial goals for the UK's future relationship with the EU.⁹¹ Section B of this Part looks at what guidance the UK has published regarding which choice of law rules will be used after the UK leaves the EU as well as the proposed changes to the language of Rome I.⁹²

A. The United Kingdom's Decision to Leave the European Union

On June 23, 2016, the United Kingdom voted through a referendum to leave the European Union.⁹³ The "Leave" camp won by a slight margin, 51.9% to 48.1%, and the countries making up the UK were divided over whether the

question of whether or not to give effect to overriding mandatory provisions when the law being applied to the contract is another country's law, which had not been previously answered by UK law).

⁸⁵ Behr, *supra* note 52, at 258.

⁸⁶ See MINISTRY OF JUSTICE, *supra* note 56, at 6 (detailing that the authority for mandatory overriding provisions in English common law is primarily embodied by the holdings in *Ralli Bros.*, which holds that "a contract governed by English law, could be unenforceable in accordance with the English law relating to the frustration of contracts" and *Foster*, which allows courts not to enforce contracts that would violate another country's laws because "to do so would be against the comity of nations and therefore contrary to public policy").

⁸⁷ See *id.* (stating that the changes "generally reflect[] the English law position" and "constitute[] an improvement in terms of legal certainty").

⁸⁸ See *id.*

⁸⁹ See *infra* notes 102–109 and accompanying text.

⁹⁰ See *infra* notes 93–134 and accompanying text.

⁹¹ See *infra* notes 93–101 and accompanying text.

⁹² See *infra* notes 102–134 and accompanying text.

⁹³ Hunt & Wheeler, *supra* note 1 (reporting that 71.8% of eligible voters voted in the referendum, totaling thirty million voters).

majority of their citizens wanted to leave the EU or remain.⁹⁴ There are many explanations for why those in the UK voted to leave the EU.⁹⁵ Some have attributed the vote as being an expression of frustration and a desire for an old way of life.⁹⁶ Others believe it to be fueled by economic considerations, such as financial instability in various EU Member States.⁹⁷ Another view blames a rise of nationalism and a reaction against elitism and immigration.⁹⁸ Not all sectors of the population found these issues equally compelling, however.⁹⁹ Seventy-five percent of voters between eighteen and twenty-four opted to stay in the EU, whereas sixty-one percent of those over the age of sixty-five voted to leave.¹⁰⁰ Due to the multiple factors influencing the decision, and the sharp divide between generations, the UK is still struggling with how to move forward three years after the vote took place.¹⁰¹

⁹⁴ *Id.*; *EU Referendum: Results*, BBC NEWS, https://www.bbc.com/news/politics/eu_referendum/results [https://perma.cc/P659-FDEA]. England and Wales had a majority vote to leave, with the “leave” camp getting 53.4% of the votes and 52.5% of the votes respectively. *EU Referendum: Results, supra*. In contrast the “remain camp” had the majority in Northern Ireland and Scotland with the “remain” camp getting 55.8% and 62.0% of the votes, respectively. *Id.*

⁹⁵ See Craig Calhoun, *Populism, Nationalism and Brexit*, in BREXIT: SOCIOLOGICAL RESPONSES 57, 58–60 (William Outhwaite ed., 2017) (noting that some of the reasons why people wanted to leave the EU was wanting to return to an old way of life, separate themselves from economically struggling countries in the EU, stop immigration into the UK, and reassert “English nationalism”).

⁹⁶ See *id.* at 58 (suggesting that the majority of people voted for Brexit as an emotional act rather than “a strategic effort to secure a particular political or economic outcome”).

⁹⁷ See John Mauldin & George Friedman, *3 Reasons Brits Voted for Brexit*, FORBES (July 5, 2016), <https://www.forbes.com/sites/johnmauldin/2016/07/05/3-reasons-brits-voted-for-brexit/#7ff0ee251f9d> [https://perma.cc/TE3M-9SYB] (“Opponents of the EU argued that it is a dysfunctional economic entity.”).

⁹⁸ See Calhoun, *supra* note 95 at 58–59 (stating that those who voted for Brexit were “furious” at the effects they felt were caused by the decisions of powerful people within the UK, including difficulties in getting their kids into school or seeing a doctor); see also Mauldin & Friedman, *supra* note 97 (arguing that the fact that many believe that institutions such as “the EU, the IMF, and NATO” are no longer necessary demonstrates that there is a “rise of nationalism across the world”).

⁹⁹ See Arnau Busquets Guàrdia, *How Brexit Vote Broke Down*, POLITICO: EUR. EDITION (June 24, 2016), <https://www.politico.eu/article/graphics-how-the-uk-voted-eu-referendum-brexit-demographics-age-education-party-london-final-results/> (showing that 75% of those 18–24 voted to stay, 56% of those ages 25–49 voted to stay, 44% of those 50–64 voted to stay, and 39% of those 65+ voted to stay).

¹⁰⁰ See *id.*

¹⁰¹ See Calhoun, *supra* note 95, at 58–60 (explaining that there are a variety of factors that may have motivated UK citizens to want to leave the EU); Peter Barnes, *Brexit: What Happens Now?*, BBC NEWS (Dec. 20, 2019), <https://www.bbc.com/news/uk-politics-46393399> [https://perma.cc/Y87B-76WF] (reporting that the UK left on January 31, 2020, but that it remains to be seen if a trade deal will be ratified); Britton & Picheta, *supra* note 1 (reporting that the UK will not leave on March 29, 2019, due to the failure to ratify a deal); Guàrdia, *supra* note 99 (reporting how the different generations voted); Gaby Hinsliff, *Brexit Relies on the Will of the People. What if We Don’t Know What That Is?*, THE GUARDIAN (Nov. 6, 2018), <https://www.theguardian.com/commentisfree/2018/nov/06/brexit-will-of-the-people-channel-4-poll-remain> [https://perma.cc/7N2E-CTA6] (“[Members of Parliament’s (MPs)] constituents are increasingly exasperated with [MPs’] failure to resist and rebel It’s impossible to know for sure whether the public mood has shifted, let alone whether it’s shifted decisively enough to

B. The UK's Vision for Its Relationship with the EU and EU Law Post-Brexit

1. The UK's Stated Goals of Brexit

On the morning of June 24, 2016, a dumbstruck United Kingdom wondered what leaving the European Union really meant and who would define the path forward.¹⁰² At 8:25 that morning, David Cameron, the UK's prime minister, announced that he intended to resign.¹⁰³ Cameron had made it clear that he believed the UK should remain in the EU and therefore felt that the "UK needed fresh leadership" as it worked toward leaving the EU.¹⁰⁴ Cameron announced that the new leader should be the one to initiate the Article 50 process under the TEU, which allows a Member State to leave the EU, and work to create the new framework for the UK.¹⁰⁵

Theresa May stepped in to provide that "fresh leadership" and became prime minister on July 13, 2016, less than a month after the referendum.¹⁰⁶ The chaos of Brexit, however, claimed another prime minister when May an-

justify a second referendum."); *Brexit: UK and EU Agree Delay*, *supra* note 1 (reporting that the date to leave the European Union has been extended to October 31, 2019).

¹⁰² See Sara Hobolt, *The Brexit Vote: A Divided Nation, a Divided Continent*, 23 J. EUR. PUB. POL'Y, 1259, 1259 (2016); Ben Moshinsky, *David Cameron Resigns*, BUS. INSIDER (June 24, 2016), <https://www.businessinsider.com/cameron-to-resign-2016-6> [<https://perma.cc/52XU-4S8T>].

¹⁰³ Moshinsky, *supra* note 102; *Former British PM David Cameron Resigns from Parliament*, 9 NEWS (Sept. 13, 2016), <https://www.9news.com.au/world/former-british-pm-cameron-resigns-from-parliament/30ed51a8-588d-4c34-9522-1fc80d30cdea> [<https://perma.cc/SX5R-FQD5>]. A couple of months later David Cameron also "resigned his seat in the House of Commons" on September 13, 2016, stating he did not want to be a "diversion." *Id.*

¹⁰⁴ See BBC News, *Brexit: David Cameron Resigns as UK Votes to Leave*, YOUTUBE (June 24, 2016), https://www.youtube.com/watch?time_continue=2&v=fXNV3Ad0qQ0 [<https://perma.cc/8DH5-RAXE>] (announcing in his resignation speech, "I was absolutely clear about my belief that Britain is stronger, safer, and better off inside the European Union . . . but the British people have made a very clear decision to take a different path, and as such I think the country requires fresh leadership to take it in this direction").

¹⁰⁵ See EUROPEAN PARLIAMENT, ARTICLE 50 TEU: WITHDRAWAL OF A MEMBER STATE FROM THE EU 1–2 (Feb. 2016), [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/577971/EPRS_BRI\(2016\)577971_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/577971/EPRS_BRI(2016)577971_EN.pdf) [<https://perma.cc/KF8C-F9JD>] (summarizing the procedure for leaving the European Union, laid out in Section 2 of the TEU, which reads, "[a] Member State which decides to withdraw shall notify the European Council of its intention," and "the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal"); BBC NEWS, *supra* note 104 (announcing that the new leader should be the one to trigger Article 50).

¹⁰⁶ See Cassie Werber, *Explained: Why the UK Doesn't Need an Election to Get a New Prime Minister*, QUARTZ (July 12, 2016), <https://qz.com/728849/explained-why-the-uk-doesnt-need-an-election-to-get-a-new-prime-minister/> [<https://perma.cc/4JMX-7GJ6>] (explaining that Theresa May, a member of the Conservative Party, did not have to be elected because "it was the party that was elected" not the former Prime Minister, and since all other candidates had stepped aside, May merely needed permission from the Queen).

nounced her resignation on June 7, 2019.¹⁰⁷ On July 24, 2019, Boris Johnson became Britain's prime minister with the goal of ensuring that Brexit occurred.¹⁰⁸

When May took over, the leaders of the Leave campaign did not appear to have thought through what leaving the EU would entail.¹⁰⁹ Despite this, May took the first step forward and informed the European Council that the UK wanted to leave the EU, as required under Article 50 of the TEU.¹¹⁰ In that letter, May addressed the importance of maintaining certainty as the UK negotiated to leave the EU.¹¹¹

May laid out her twelve goals for the negotiating a new relationship with the EU in a speech on January 17, 2017 and memorialized and expanded on those twelve goals in a White Paper that was presented to Parliament.¹¹² May again emphasized that the UK wanted to "provid[e] legal certainty" throughout this process and introduced the "Great Repeal Bill," later renamed the Europe-

¹⁰⁷ Stephen Castle et al., *Theresa May to Resign as U.K. Prime Minister*, N.Y. TIMES (May 24, 2019), <https://www.nytimes.com/2019/05/24/world/europe/theresa-may-resignation.html> [<https://perma.cc/4ZBP-E5V4>].

¹⁰⁸ Yaron Steinbuch, *Boris Johnson Takes Over for Theresa May as Britain's PM*, N.Y. POST (July 24, 2019), <https://nypost.com/2019/07/24/boris-johnson-takes-over-for-theresa-may-as-britains-pm/> [<https://perma.cc/VY8Z-8974>] ("[Boris Johnson] promised in a victory speech Tuesday to deliver Brexit 'in a new spirit of can-do.'").

¹⁰⁹ See Charlie Cooper, *Brexit Campaigners Admit There Is No Plan for What Comes Next as Rivals Plan Tory Leadership Bids*, INDEPENDENT (June 26, 2016), <https://www.independent.co.uk/news/uk/politics/brexit-eu-referendum-campaigners-there-is-no-plan-next-pm-tory-leadership-contest-a7104711.html> [<https://perma.cc/85N3-3UYZ>] (reporting that one senior Conservative MP admitted "there is no plan, the leave campaign have no post-Brexit plan" and that the prime minister should be the one with the plan on how to move forward).

¹¹⁰ See EUROPEAN PARLIAMENT, *supra* note 105, at 3 (stating there are no "substantive conditions for a Member State to be able to exercise its right to withdrawal, but only procedural requirements," nor does it "oblige the withdrawing Member State to state formally a reason for its decision"); Letter from Theresa May, Prime Minister, to Donald Tusk, President of the European Council (Mar. 29, 2017), http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/29_03_17_article50.pdf [<https://perma.cc/6UUP-PAVW>].

¹¹¹ Letter from Theresa May, *supra* note 110 (identifying some initial goals for the negotiation with the EU including: (1) operating with the "spirit of sincere cooperation," (2) putting the interests of the citizens of the UK and EU before all else, (3) securing a "comprehensive agreement," (4) creating an agreement that promotes certainty and "minimise[s] unnecessary disruption," (5) "prioritis[ing] the biggest challenges," and (6) "advanc[ing] and protect[ing] [their] shared European values" and combating threats).

¹¹² See DEP'T FOR EXITING THE EUROPEAN UNION, THE UNITED KINGDOM'S EXIT FROM AND NEW PARTNERSHIP WITH THE EUROPEAN UNION, 2017, Cm. 9417, at 5–6 (UK) (announcing that the 12 principles are: "1. Providing certainty and clarity; 2. Taking control of our own laws; 3. Strengthening the Union; 4. Protecting our strong historic ties with Ireland and maintaining the Common Travel Area; 5. Controlling immigration; 6. Securing rights for EU nationals in the UK and UK nationals in the EU; 7. Protecting workers' rights; 8. Ensuring free trade with European markets; 9. Securing new free trade agreements with other countries; 10. Ensuring the United Kingdom remains the best place for science and innovation; 11. Cooperating in the fight against crime and terrorism; and 12. Delivering a smooth, orderly exit from the EU").

an Union (Withdrawal Act), in an effort to transform EU law into UK domestic law.¹¹³ This approach was meant to ensure that the laws in the UK would remain the same immediately after exiting the EU and to give Parliament time to change or repeal laws ad hoc.¹¹⁴ The 2020 Withdrawal Agreement modifies the European Union (Withdrawal Act), but it does not disturb Parliament's ability to make changes to retained EU law.¹¹⁵

Both May and Johnson's governments made clear that a critical Brexit goal is to take control of the UK's laws and reinforce parliamentary sovereignty.¹¹⁶ In terms of dispute resolution mechanisms, the UK initially decided to

¹¹³ *Id.* at 3–5, 9; see European Union (Withdrawal) Act 2018, c. 16, §§ 1–3 (UK), http://www.legislation.gov.uk/ukpga/2018/16/pdfs/ukpga_20180016_en.pdf [<https://perma.cc/VGG8-B74U>] (holding on June 26 2018 that the European Communities Act of 1972 will be “repealed on exit day” and that “[d]irect EU legislation, so far as operative immediately before exit day, forms part of domestic law on and after exit day”); *European Communities Act 1972*, INST. FOR GOV'T, <https://www.instituteforgovernment.org.uk/explainers/1972-european-communities-act> [<https://perma.cc/AG48-ER7R>] (noting that the UK incorporated into the EU with the passage of the 1972 European Communities Act and the effect of that incorporation was that EU law trumps UK law); *The European Union (Withdrawal) Bill and Its Implications for Wales: History*, *supra* note 4 (indicating that the bill was originally called the “Great Repeal Bill” before later being changed to the “The European Union (Withdrawal) Act 2018”).

¹¹⁴ See DEP'T FOR EXITING THE EUROPEAN UNION, Cm. 9417, at 9 (stating the intention of the Great Repeal Bill is to “preserve the rights and obligations that already exist in the UK under EU law and provide a secure basis for future changes to our domestic law” while also giving Parliament the ability to “decide which elements of that law to keep, amend or repeal” after they have left the EU).

¹¹⁵ Section 7 of the European Union (Withdrawal) Act 2018 details the “[s]tatus of retained EU law.” See European Union (Withdrawal) Act 2018, c. 16, § 7 (UK), http://www.legislation.gov.uk/ukpga/2018/16/pdfs/ukpga_20180016_en.pdf [<https://perma.cc/VGG8-B74U>]. A complete list of the changes to section 7 by the European Union (Withdrawal Agreement) Bill are as follows: “Section 7 (status of retained EU law) is amended as follows. (2) In subsection (1)(b) for “section 2” substitute “section 1A(2) or 1B(2).” (3) After subsection (1) insert—“(1A) Anything which—(a) was, immediately before IP completion day, primary legislation of a particular kind, subordinate legislation of a particular kind or another enactment of a particular kind, and (b) continues to be domestic law on and after IP completion day by virtue of section 2, continues to be domestic law as an enactment of the same kind.” (4) In subsection (5)—(a) in paragraph (a) after “(3)” insert “and (7)”, and (b) after paragraph (b) insert—“(ba) section 7C (status of case law of European Court etc. in relation to retained EU law which is relevant separation agreement law),” (5) In subsection (6) for “exit day,” wherever it appears, substitute “IP completion day.” European Union (Withdrawal Agreement) Bill 2019-1, HC Bill [1] schedule 5, European Union (Withdrawal) Act, *supra*, at 49 (UK); see also European Union (Withdrawal Agreement) Bill 2019-1, HC Bill [1], Explanatory Notes ¶ 18 (“The Bill is designed to work in conjunction with the EU (Withdrawal) Act 2018 . . . [s]pecifically, the Bill will amend the EU (Withdrawal) Act 2018 in order to give effect to the implementation period following the repeal of the European Communities Act 1972 (ECA).”). The European Union (Withdrawal Agreement) Act 2020 became law on January 23, 2020. *European Union (Withdrawal Agreement) Act 2020*, PARLIAMENT, <https://services.parliament.uk/bills/2019-20/europeanunionwithdrawalagreement.html> [<https://perma.cc/C9YZ-4J55>].

¹¹⁶ See DEP'T FOR EXITING THE EUROPEAN UNION, Cm. 9417, at 13–14 (emphasizing that the UK should be the ones promulgating their laws and the jurisdiction of the Court of Justice of the European Union, a national court that enforces EU law, should be ended in the UK, and stating 1,056 EU-related propositions were introduced into Parliament in 2016 as evidence that Parliament's sovereignty was being undermined); NO DEAL READINESS REPORT, 2019, Cp. 179, at 3–4 (UK) (contain-

terminate the jurisdiction of the Court of Justice of the European Union (CJEU) and expressed a desire to explore alternative forms of dispute resolution with the Member States.¹¹⁷ When pondering what the new dispute resolution mechanisms would look like, the policy paper distributed by the UK government in February 2017 stated that it should not be bound to precedent, but must ensure that the arrangements provide certainty and reflect the UK's sovereignty.¹¹⁸ Later, the UK backtracked slightly on its outright rejection of the CJEU.¹¹⁹ For example, rather than declaring that no UK court would be "bound to any retained case law," the European Union (Withdrawal Agreement) Bill put into place the ability to enact regulations describing when courts are bound to prior CJEU precedent.¹²⁰

The plan to deliver a smooth exit included creating an agreement before the exit date and allowing for a period of transition.¹²¹ Although both prime ministers have appeared willing to embrace some uncertainty to ensure Brexit occurs, both recognized the need for certainty as the country moves forward.¹²²

ing a statement from Boris Johnson emphasizing that "there are many rules and procedures described in the following pages that have been laid down by the EU, but which—without Brexit—the UK on its own would have no power to vary in any way," and "after 45 years in which the pace and range of this rule-making has increased far beyond what was expected (or advertised) in 1973, it is time to come out"); Alex Morales & Ian Wishart, *Boris Johnson, Ursula Von Der Leyen Set Out Rival Red Lines for Post-Brexit*, BLOOMBERG (Jan. 8, 2020), <https://www.bloomberg.com/news/articles/2020-01-08/johnson-von-der-leyen-set-out-rival-red-lines-for-post-brexit> [<http://perma.cc/RW8M-KXT4>] (reporting that "Johnson said that 'any future partnership must not involve any kind of alignment' with EU rules and standards or be subject to the jurisdiction of the European Court of Justice" and that "Johnson [said] his 'immediate priority' is to get the Withdrawal Agreement passed into law and implemented by Jan. 31").

¹¹⁷ See DEP'T FOR EXITING THE EUROPEAN UNION, Cm. 9417, at 13–14 (stating that a new system for dispute resolution will need to be adopted after the UK leaves the EU).

¹¹⁸ *Id.* at 13, 15.

¹¹⁹ European Union (Withdrawal Agreement) Bill 2019-1, HC Bill [1], Explanatory Notes ¶¶ 23–24 ("The Bill, therefore, amends the EU (Withdrawal) Act 2018. . . . It also includes a power to allow Ministers, following consultation with the judiciary, to change how the EU (Withdrawal) Act 2018 provides for courts to interpret saved historic CJEU case law after the implementation period. Regulations may enable named members of the judiciary to determine the test (and the relevant considerations to apply to it) in deciding whether to depart from any retained EU law.").

¹²⁰ See *id.*; European Union (Withdrawal) Act 2018, c. 16, § 6(4) (UK), http://www.legislation.gov.uk/ukpga/2018/16/pdfs/ukpga_20180016_en.pdf [<https://perma.cc/VGG8-B74U>] ("But—(a) the Supreme Court is not bound by any retained EU case law, (b) the High Court of Justice is not bound by any retained EU case law . . .").

¹²¹ See European Union (Withdrawal Agreement) Bill 2019-1, HC Bill [1], Explanatory Notes ¶ 19 ("The UK and the EU have agreed that the UK's exit will be followed by a time-limited implementation period, which will last until 11.00pm on 31 December 2020 ('IP completion day')."); DEP'T FOR EXITING THE EUROPEAN UNION, Cm. 9417, at 65 (establishing that the Article 50 process will take two years, but even beyond that "a phased process of implementation, in which the UK, the EU institutions and Member States prepare for the new arrangements that will exist between us, will be in our mutual interest").

¹²² *Boris Johnson: No-Deal Only Alternative to Brexit Plan*, BBC NEWS (Oct. 2, 2019), <https://www.bbc.com/news/uk-politics-49906702> [<https://perma.cc/72SK-D5AJ>] (reporting that "Johnson

2. The UK's Statements Regarding Choice of Law Rules Post-Brexit

On August 22, 2017, the UK government published a paper titled *Providing a Cross-Border Civil Judicial Cooperation Framework: A Future Partnership Paper*, which laid out the government's vision of its relationship with existing EU law in the field of "civil judicial cooperation."¹²³ The partnership paper stressed the importance of maintaining a positive relationship between EU and UK jurisprudence because it is estimated that forty percent of all commercial arbitrations have English law as the governing law.¹²⁴ The paper expressed the UK's desire to reach an agreement with the EU that broadly preserves existing principles and ensures a positive relationship in the future.¹²⁵ The paper also expressed its intention to maintain Rome I as UK national law for the time being.¹²⁶

Reflecting this intention, the comprehensive agreement with the EU states that between January 31, 2020 and December 31, 2020, Rome I will continue

said no-deal was not an outcome the government was seeking, but 'it is an outcome for which we are ready'" and that others have responded to the plan and "branded [it] as 'extreme' and 'doomed to failure'"); *Theresa May Won't Rule Out 'No-Deal' Brexit*, BBC NEWS (Nov. 29, 2018), <https://www.bbc.com/news/uk-politics-46384207> [https://perma.cc/4ZAJ-HP5C] (reporting that Theresa May stated, "if MPs 'voted down' her deal in December 'then obviously decisions would have to be taken' and no-deal planning would be stepped up"); see also DEP'T FOR EXITING THE EUROPEAN UNION, Cm. 9417, at 9 (noting that one of the goals of Brexit is to "provid[e] legal certainty"); Joe Mayes & Greg Ritchie, *Boris Johnson Cancels 2020 Tax Cut for Businesses: U.K. Votes*, BLOOMBERG (Nov. 18, 2019), <https://www.bloomberg.com/news/articles/2019-11-18/boris-johnson-faces-questions-over-his-love-life-u-k-votes> [https://perma.cc/4SK2-VEGF] ("[Johnson] made his pitch to business leaders at the confederation of British Industry in London: let him get Brexit out of the way, and use the ensuing certainty to help the economy grow . . . [Johnson] said his Brexit deal 'gives business complete stability and certainty as [the UK] come[s] out in January.'").

¹²³ HER MAJESTY'S GOV'T, *supra* note 11, at 1 (citing that the paper reflected the Government's summary based off of research and input from third parties); see also *Position Paper on Judicial Cooperation in Civil and Commercial Matters*, at 1–2 (July 12, 2017), https://ec.europa.eu/commission/sites/beta-political/files/essential-principles-civil-commercial-matters_en_0.pdf [https://perma.cc/27PJ-R8ZS] ("The Withdrawal Agreement should ensure that the relevant provisions of Union law on jurisdiction, recognition and enforcement applicable on the withdrawal date continue to govern judicial proceedings and procedures in civil and commercial matters pending on the withdrawal date."). This partnership paper was a response to the EU's position paper on Judicial Cooperation in Civil and Commercial Matters published on July 13, 2017, in which the EU expressed that the withdrawal agreement should cover Rome I and that all relevant provisions of Rome I should continue to apply to contracts that were created before the Withdrawal date. See *id.*

¹²⁴ See HER MAJESTY'S GOV'T, *supra* note 11, at 5 (citing a 2010 International Arbitration Survey from the University of London, for the prominence of English law and noting that "Scotland and Northern Ireland have their own separate judicial systems . . . [but that the UK] will, of course, continue to work with them, and stakeholders in Scotland and Ireland, to ensure a future civil judicial cooperation agreement benefits all parts of the UK").

¹²⁵ See *id.* at 6 ("The UK will therefore seek an agreement with the EU that allows for close and comprehensive cross-border civil judicial cooperation on a reciprocal basis, which reflects closely the substantive principles of cooperation under the current EU framework").

¹²⁶ See *id.* (indicating the UK's intention to convert Rome I and Rome II into UK "domestic law").

to apply.¹²⁷ To further clarify the status of EU law, Parliament passed The 2018 Withdrawal Act and the 2020 Withdrawal Agreement.¹²⁸ The legislation outlines the initial relationship that the former EU laws will have in the UK.¹²⁹ According to the bills, EU legislation will be incorporated as domestic UK law after the UK leaves the EU.¹³⁰ Any EU case law promulgated before “exit day” that interprets an unmodified regulation must continue to be utilized by the courts.¹³¹ The European Union (Withdrawal Agreement) Bill, however, put into place the ability for “[a] Minister of the Crown” to enact regulations dictating when courts are or are not required to follow prior EU precedent.¹³² The

¹²⁷ See Practical Law Dispute Resolution, *Brexit: Implications for Civil Justice and Judicial Cooperation*, THOMSON REUTERS PRAC. L., <https://uk.practicallaw.thomsonreuters.com/w-019-0548> [<https://perma.cc/BF3N-9N8Y>] [hereinafter *Brexit Implications*] (noting that this transition phase would only go into effect if the UK leaves with a deal in place, if a “hard Brexit” occurs there will be no established time to allow for the transition); Dwyer & Romo, *supra* note 3 (reporting that the first comprehensive deal brokered between the UK and EU was rejected by Parliament by 432 to 202 on January 15, 2019).

¹²⁸ See *European Union (Withdrawal Agreement) Act 2020*, *supra* note 2 (reporting that the EU (Withdrawal Agreement) Act 2020 became law on January 23, 2020); *EU Withdrawal Act Website*, *supra* note 4 (reporting that the EU (Withdrawal) Act 2018 was given Royal Assent, or became law, on June 29, 2018).

¹²⁹ European Union (Withdrawal) Act 2018, c. 16 (UK), http://www.legislation.gov.uk/ukpga/2018/16/pdfs/ukpga_20180016_en.pdf [<https://perma.cc/VGG8-B74U>]; European Union (Withdrawal Agreement) Bill 2019-1, HC Bill [1] (UK).

¹³⁰ See European Union (Withdrawal) Act 2018, c. 16, § 3 (UK), http://www.legislation.gov.uk/ukpga/2018/16/pdfs/ukpga_20180016_en.pdf [<https://perma.cc/VGG8-B74U>] (stating that “direct EU legislation” will be transformed into UK domestic law once the UK leaves the EU and defining “direct EU legislation” as all EU regulations, subject to some limitations, but that those limitations do not apply to Rome I); European Union (Withdrawal Agreement) Bill 2019-1, HC Bill [1] cl. 25 (UK) (indicating that there were no substantive changes made to section 3).

¹³¹ See European Union (Withdrawal) Act 2018, c. 16, §§ 6(3), 6(5) (UK), http://www.legislation.gov.uk/ukpga/2018/16/pdfs/ukpga_20180016_en.pdf [<https://perma.cc/VGG8-B74U>] (stating in 6.3 that “[a]ny question as to the validity, meaning or effect of any retained EU law is to be decided, so far as that law is unmodified on or after exit day and so far as they are relevant to it—(a) in accordance with any retained case law and any retained general principles of EU law, and (b) having regard (among other things) to the limits, immediately before exit day, of EU competences”).

¹³² European Union (Withdrawal Agreement) Bill 2019-1, HC Bill [1] cl. 26 (UK) (“[A]fter subsection (5) [of the European Union (Withdrawal) Act] insert—(5A) A Minister of the Crown may by regulations provide for—(a) a court or tribunal to be a relevant court or (as the case may be) a relevant tribunal for the purposes of this section, (b) the extent to which, or circumstances in which, a relevant court or relevant tribunal is not to be bound by retained EU case law, (c) the test which a relevant court or relevant tribunal must apply in deciding whether to depart from any retained EU case law, or (d) considerations which are to be relevant to—(i) the Supreme Court or the High Court of Justiciary in applying the test mentioned in subsection (5), or (ii) a relevant court or relevant tribunal in applying any test provided for by virtue of paragraph (c) above. (5B) Regulations under subsection (5A) may (among other things) provide for—(a) the High Court of Justiciary to be a relevant court when sitting otherwise than as mentioned in subsection (4)(b)(i) and (ii), (b) the extent to which, or circumstances in which, a relevant court or relevant tribunal not being bound by retained EU case law includes (or does not include) that court or tribunal not being bound by retained domestic case law which relates to retained EU case law, (c) other matters arising in relation to retained domestic case law which relates to retained EU case law (including by making provision of a kind which could be made in relation to

latest draft of the Rome I changes needed to convert the treaty into domestic UK law were released on March 29, 2019, however, these changes were mostly stylistic in nature.¹³³ Aside from these pieces of legislation there is very little guidance on what the relationship will look like and how laws will be transformed after exit day.¹³⁴

III. THE UNITED KINGDOM'S OPTIONS FOR CHANGES TO ROME I

There are a few different ways in which the UK can consider handling the retained Rome I language post-Brexit.¹³⁵ On one end, the UK can choose to do nothing and adopt the language proposed to transform Rome I into domestic law without further review on the matter.¹³⁶ Conversely, it can conduct a complete overhaul of the regulation.¹³⁷ If the UK wishes to promote its stated goal

retained EU case law), or (d) the test mentioned in paragraph (c) of subsection (5A) or the considerations mentioned in paragraph (d) of that subsection to be determined (whether with or without the consent of a Minister of the Crown) by a person mentioned in subsection (5C)(a) to (e) or by more than one of those persons acting jointly. (5C) Before making regulations under subsection (5A), a Minister of the Crown must consult—(a) the President of the Supreme Court, (b) the Lord Chief Justice of England and Wales, (c) the Lord President of the Court of Session, (d) the Lord Chief Justice of Northern Ireland, (e) the Senior President of Tribunals, and (f) such other persons as the Minister of the Crown considers appropriate. (5D) No regulations may be made under subsection (5A) after IP completion day.”).

¹³³ See *Exiting the European Union Private International Law 2019*, SI 2019/834, art. 10 (UK), <http://www.legislation.gov.uk/ukSI/2019/834/made/data.pdf> [<https://perma.cc/33QJ-U84C>] (proposing amendments to Rome I that includes changes such as replacing “Member States” with “relevant states” in Article 3(4)); Practical Law Dispute Resolution, *The Implications of Brexit for Civil Justice and Judicial Co-operation: Toolkit*, THOMSON REUTERS PRAC. L., <https://uk.practicallaw.thomsonreuters.com/w-017-8765> [<https://perma.cc/4XYR-2V4D>] [hereinafter *Brexit Toolkit*] (indicating that the first version of the changes to be made to Rome I in order to convert it into domestic law were released on December 12, 2018 and a second version was released on January 23, 2019).

¹³⁴ See European Union (Withdrawal) Act 2018, c. 16, § 7(2) (UK), http://www.legislation.gov.uk/ukpga/2018/16/pdfs/ukpga_20180016_en.pdf [<https://perma.cc/VGG8-B74U>] (reserving the right of Parliament to change the new rules on an ad hoc basis); *Brexit Toolkit*, *supra* note 133 (citing the draft statutory instruments that have been released to convert existing EU law into “domestic law” after exit day in the field of “civil justice and judicial co-operation”); Lawless et al., *supra* note 3 (reporting that lawmakers rejected the Brexit deal for a third time); *Brexit: UK and EU Agree Delay*, *supra* note 1 (reporting that another extension was granted and the UK is now set to leave the EU on October 31, 2019).

¹³⁵ See *infra* notes 136–137 and accompanying text.

¹³⁶ See European Union (Withdrawal) Act 2018, c. 16, §§ 1, 2 (UK), http://www.legislation.gov.uk/ukpga/2018/16/pdfs/ukpga_20180016_en.pdf [<https://perma.cc/VGG8-B74U>] (holding on June 26, 2018 that the European Communities Act of 1972 will be “repealed on exit day” and that “EU-derived domestic legislation, as it has effect in domestic law immediately before exit day, continues to have effect in domestic law on and after exit day”); *Exiting the European Union Private International Law*, *supra* note 133, (detailing the proposed changes to Rome I, the latest draft of which was released in March 2019).

¹³⁷ See European Union (Withdrawal) Act 2018, c. 16, § 7(2) (UK), http://www.legislation.gov.uk/ukpga/2018/16/pdfs/ukpga_20180016_en.pdf [<https://perma.cc/VGG8-B74U>] (reserving the right of Parliament to change the retained EU law on an ad hoc basis).

of having a smooth and orderly exit from the EU, it will have to consider the effect those changes will have on the various sectors of the population, including businesses.¹³⁸ It is crucial that the choice of law rules be clearly communicated and implemented post-Brexit so that commercially contracting parties are able to assess what the default law will be, analyze the benefits and risks associated with operating under that default law, and either contract out of the provision or make other strategic decisions.¹³⁹ Without this certainty, parties may choose to avoid litigating or arbitrating cases in the UK altogether.¹⁴⁰ Therefore, the UK must carefully decide if, and how, to change their choice of law principles.¹⁴¹

Sections A through D of this Part analyze some of the UK's options in defining its choice of law rules post-Brexit.¹⁴² Specifically, they look at the implications that each option would have on Rome I's historical principles, illustrated through the principle of party autonomy, and on provisions that were first implemented through Rome I, illustrated through Rome I's rules on overriding mandatory provisions, and how the changes that would be made to these provisions align with Brexit's goals of maintaining legal certainty and reasserting parliamentary sovereignty.¹⁴³

Section A of this Part analyzes what would happen if the UK decided to do nothing and keep the retained Rome I language as is.¹⁴⁴ Section B discusses what would happen if the UK decided to rewrite the choice of law rules.¹⁴⁵ Section C considers what would happen if the UK decided to adopt another

¹³⁸ See Regulation (EC) 593/2008, at 10 (defining the scope of Rome I as applying "to contractual obligations in civil and commercial matters," except for defined categories such as "revenue, customs or administrative matters"); DEP'T FOR EXITING THE EUROPEAN UNION, THE UNITED KINGDOM'S EXIT FROM AND NEW PARTNERSHIP WITH THE EUROPEAN UNION, 2017, Cm. 9417, at 9 (UK) (noting that one of the goals of Brexit is to "provid[e] legal certainty").

¹³⁹ See Charles R. Calleros, *Toward Harmonization and Certainty in Choice-of-Law Rules for International Contracts: Should the U.S. Adopt the Equivalent of Rome I?* 28 WIS. INT'L L.J. 639, 642–43 (2011) (recognizing that in commercial contracts there is a need for certainty that allows parties to identify what the default laws are in order to contract out of them if they please, or analyze the benefits and downsides of the default laws).

¹⁴⁰ See *id.* (stressing the importance of certainty to commercially contracting parties).

¹⁴¹ See *id.* at 642 (stating that "legal systems have traditionally placed especially great weight on certainty and predictability in their bodies of contract law"); Hallie Detrick, *The Sudden Collapse of a British Airline Has Caused Chaos for Its Customers*, FORTUNE (Feb. 18, 2019), <http://fortune.com/2019/02/18/flybmi-flight-cancellation-collapse/> [<https://perma.cc/A3ZG-B7TE>] (citing the uncertainty caused by Brexit as the cause for the collapse of its airline); David Goodman & Lucy Meakin, *Carney Says U.K. Slowdown Underscores Need for Brexit Certainty*, BLOOMBERG (Feb. 12, 2019), <https://www.bloomberg.com/news/articles/2019-02-12/carney-says-u-k-slowdown-underscores-need-for-brexit-certainty> [<https://perma.cc/7MZH-5N4R>] (arguing that slow growth in the UK economy highlights "the need for certainty on Brexit").

¹⁴² See *infra* notes 148–265 and accompanying text.

¹⁴³ See *infra* notes 148–265 and accompanying text.

¹⁴⁴ See *infra* notes 148–169 and accompanying text.

¹⁴⁵ See *infra* notes 170–188 and accompanying text.

country's choice of law principles, specifically it looks at the Brazilian, U.S., and Chinese choice of law regimes.¹⁴⁶ Section D evaluates what would occur if the UK decides to return to the language in the Rome Convention or construct its choice of law rules based on common law cases.¹⁴⁷

A. Option 1: Maintain the Choice of Law Principles as They Are Written Now

Under the 2018 Withdrawal Act and 2020 Withdrawal Agreement, Rome I will be transformed into UK domestic law on the day the UK leaves the EU.¹⁴⁸ In accordance with Article 8(1) of the 2018 Withdrawal Act, which allows the UK to make modifications to EU law, the UK published changes to Rome I that will go into effect when they leave the EU.¹⁴⁹ The only proposed changes are stylistic changes and a modification eliminating the mechanism for conflict negotiation between EU countries and non-EU countries.¹⁵⁰ These changes, nevertheless, could be preserved past the proposed December 2020 deadline if the UK so chooses.¹⁵¹

¹⁴⁶ See *infra* notes 189–210 and accompanying text.

¹⁴⁷ See *infra* notes 211–265 and accompanying text.

¹⁴⁸ European Union (Withdrawal) Act 2018, c. 16, § 3(1) (UK), http://www.legislation.gov.uk/ukpga/2018/16/pdfs/ukpga_20180016_en.pdf [<https://perma.cc/VGG8-B74U>]. “Direct EU legislation, so far as operative immediately before exit day, forms part of domestic law on and after exit day.” *Id.*

¹⁴⁹ See *id.* § 8 (“(1) A Minister of the Crown may by regulations make such provision as the Minister considers appropriate to prevent, remedy or mitigate—(a) any failure of retained EU law to operate effectively, or (b) any other deficiency in retained EU law, arising from the withdrawal of the United Kingdom from the EU. (2) Deficiencies in retained EU law are where the Minister considers that retained EU law—(a) contains anything which has no practical application in relation to the United Kingdom or any part of it or is otherwise redundant or substantially redundant, (b) confers functions on, or in relation to, EU entities which no longer have functions in that respect under EU law in relation to the United Kingdom or any part of it, (c) makes provision for, or in connection with, reciprocal arrangements between—(i) the United Kingdom or any part of it or a public authority in the United Kingdom, and (ii) the EU, an EU entity, a member State or a public authority in a member State, which no longer exist or are no longer appropriate, (d) makes provision for, or in connection with, other arrangements which—(i) involve the EU, an EU entity, a member State or a public authority in a member State, or (ii) are otherwise dependent upon the United Kingdom’s membership of the EU, and which no longer exist or are no longer appropriate”); *Exiting the European Union Private International Law*, *supra* note 133 at art. 12 (detailing the proposed changes to Rome I).

¹⁵⁰ See *Exiting the European Union Private International Law*, *supra* note 133, at art. 12 (detailing the proposed changes to Rome I and the revocation of Regulation EC No 662/2009).

¹⁵¹ See European Union (Withdrawal) Act 2018, c. 16, § 7(2) (UK), http://www.legislation.gov.uk/ukpga/2018/16/pdfs/ukpga_20180016_en.pdf [<https://perma.cc/VGG8-B74U>] (reserving the right to, but not requiring, Parliament to change any retained EU legislation); European Union (Withdrawal Agreement) Bill 2019-1, HC Bill [1], Explanatory Notes ¶ 19 (“The UK and the EU have agreed that the UK’s exit will be followed by a time-limited implementation period, which will last until 11.00pm on 31 December 2020 (‘IP completion day’).”); *Brexit Implications*, *supra* note 127 (indicating what constitutes the “post-Brexit transition period”).

This would be the easiest option for Parliament to adopt.¹⁵² The benefit of retaining Rome I in its domestic form is that it would maintain certainty, at least in the short term, and promote a smooth transition.¹⁵³ There is no substantive reason to break from the Rome I principles, as the principles have not been cited as a reason to leave the EU.¹⁵⁴ In fact, the changes made in Rome I were lauded by the Ministry of Justice as positive at the time.¹⁵⁵

One perceived downside of this approach is that it does not advance the UK's goal of reinforcing parliamentary sovereignty because the UK would just be adopting the EU's language.¹⁵⁶ The English courts, however, may no longer be bound by the decisions issued by the Court of Justice of the European Union (CJEU) after they leave the EU.¹⁵⁷ The English court's interpretations of the retained language will be independent from the CJEU's.¹⁵⁸ Such uniformity with the EU, although beneficial for companies, is not necessarily one of the major goals for the UK as they attempt to navigate leaving the EU.¹⁵⁹ Thus, the uniformity and certainty are likely to erode over time because there is no guaran-

¹⁵² See European Union (Withdrawal) Act 2018, c. 16, § 2 (UK), http://www.legislation.gov.uk/ukpga/2018/16/pdfs/ukpga_20180016_en.pdf [<https://perma.cc/VGG8-B74U>] (detailing that on exit day the language of Rome I will be transformed into domestic law); Hunt & Wheeler, *supra* note 1 (addressing that there are many questions that Parliament has to answer given that there is no deal currently in place, including fundamental issues such as will citizens of other EU Member States have to move out of the UK, noticeably absent from this extensive list are choice of law issues).

¹⁵³ See DEP'T FOR EXITING THE EUROPEAN UNION, Cm. 9417, at 65 (expressing the desire for a seamless exit and wanting to avoid the country metaphorically plummeting off a cliff).

¹⁵⁴ Mauldin & Friedman, *supra* note 97 (citing that the three main reasons why Britain voted to leave the EU were "economics," "sovereignty," and "political elitism"); Giesela Rühl, *Judicial Cooperation in Civil and Commercial Matters After Brexit: Which Way Forward?* 67 INT'L & COMP. L.Q. 99, 100 (2018) (citing that judicial cooperation in civil and commercial matters is not a politically pressing topic in Brexit).

¹⁵⁵ See MINISTRY OF JUSTICE, *supra* note 56, at 3, 6 (stating that Article 3 and Article 9 of Rome I are "improvement[s]" from Article 3 and Article 7 of the Rome Convention).

¹⁵⁶ See European Union (Withdrawal) Act 2018, c. 16, § 2 (UK), http://www.legislation.gov.uk/ukpga/2018/16/pdfs/ukpga_20180016_en.pdf [<https://perma.cc/VGG8-B74U>] (detailing that on exit day the language of Rome I will be transformed into domestic law); DEP'T FOR EXITING THE EUROPEAN UNION, Cm. 9417, at 13 (asserting that the "sovereignty of Parliament is a fundamental principle of the UK constitution").

¹⁵⁷ See European Union (Withdrawal Agreement) Bill 2019-1, HC Bill [1] cl. 26 (UK) (stating that "[a] minister of the Crown may by regulations provide for . . . (b) the extent to which, or circumstances in which, a relevant court or relevant tribunal is not to be bound by retained EU case law, (c) the test which a relevant court or relevant tribunal must apply in deciding whether to depart from any retained EU case law"); see also DEP'T FOR EXITING THE EUROPEAN UNION, Cm. 9417, at 13 (asserting that one of the fundamental tenants of the UK constitution is parliamentary sovereignty).

¹⁵⁸ See European Union (Withdrawal) Act 2018, c. 16, § 6(1) (UK), http://www.legislation.gov.uk/ukpga/2018/16/pdfs/ukpga_20180016_en.pdf [<https://perma.cc/VGG8-B74U>] (detailing in section 6(1) that ECJ decisions no longer have any force in UK courts after exit day).

¹⁵⁹ See DEP'T FOR EXITING THE EUROPEAN UNION, Cm. 9417, at 9, 13 (emphasizing that "it will also be important for business in both the UK and the EU to have as much certainty as possible as early as possible" but also that it is critical to "ensure that our legislatures and courts will be the final decision makers in our country").

tee that the UK courts will interpret a legal issue the same way as the CJEU.¹⁶⁰ The likely differences that would arise in the interpretation of the retained Rome I would actually help distinguish the UK system from the EU over time.¹⁶¹

Additionally, parliamentary sovereignty would not likely be questioned with regard to historical principles, such as Article 3, because they were not created by the EU or implemented in the UK through a regulation.¹⁶² The UK consented, for example, to the principles of party autonomy existing in its choice of law scheme by adopting it in the Rome Convention and not entering a reservation.¹⁶³ Nevertheless, there is an argument to be made that accepting, for example, provisions such as Article 9, which expanded the scope of mandatory provisions beyond common law precedent, undermines parliamentary sovereignty, especially because the UK entered a reservation to its predecessor in the Rome Convention.¹⁶⁴ Without further explanation, it appears that the UK is copying and pasting EU law into its own laws without acknowledging that these provisions go beyond what it had ever previously agreed to or the trend in common law.¹⁶⁵ The counter-argument, in this case, is that the reservation to Article 7(1) in the Rome Convention was based on an objection to the level of ambiguity in the language not overriding mandatory provisions themselves.¹⁶⁶ In fact, the Ministry of Justice previously stated that Article 9 generally tracked

¹⁶⁰ See Rühl, *supra* note 154, at 119–20 (explaining that keeping EU legislation, but not interpreting that language in accordance with the ECJ seems to be a “diverging—and seemingly irreconcilable—position[]”).

¹⁶¹ See European Union (Withdrawal) Act 2018, c. 16, § 6(1) (UK), http://www.legislation.gov.uk/ukpga/2018/16/pdfs/ukpga_20180016_en.pdf [<https://perma.cc/VGG8-B74U>] (stating that UK courts “[are] not bound by any principles laid down, or any decision made, on or after exit day by the European Court”); DEP’T FOR EXITING THE EUROPEAN UNION, Cm. 9417, at 13 (stating that one of the goals of Brexit is to reassert its sovereignty).

¹⁶² See Zhang, *supra* note 14, at 516 (citing that the principle of party autonomy traces back to the sixteenth century); see also TFEU 2012 Consolidated Version art. 288 (“A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.”).

¹⁶³ See Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 333 (stating that the Vienna Convention on the Law of Treaties, allows for reservations in which a State can “purport[] to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State”); Behr, *supra* note 52, at 235–36 (explaining that the Rome Convention had to be adopted as national law in each Member State which meant Member States may have different iterations of the Rome Convention because the Convention has undergone various transformations, and that the Rome Convention allowed states to choose not to adopt certain portions of it by entering reservations).

¹⁶⁴ See *Rome I Website*, *supra* note 13 (reporting that the UK entered a reservation to Article 7(1) “on the grounds of uncertainty” and that Article 9(3) to Rome I was a “substantive change”).

¹⁶⁵ See DEP’T FOR EXITING THE EUROPEAN UNION, Cm. 9417, at 13; *EU Withdrawal Act*, *supra* note 9 (stating that the “Act is essentially a giant ‘copy and paste’ exercise”).

¹⁶⁶ See Lando, *supra* note 74 (reporting that those in the UK that were working on the Rome Convention thought Article 7(1) would cause “confusion . . . uncertainty . . . expense . . . and . . . delay”) (internal quotations omitted); *Rome I Website*, *supra* note 13 (noting that the UK did not adopt Article 7(1) of the Rome Convention because the UK believed it would have caused too much uncertainty).

English law.¹⁶⁷ This is an explanation that interested parties will have to search for if the UK leaves the Rome I language in place and does nothing further.¹⁶⁸ Additionally, other inquiries may arise, including whether the provision also aligns with Scottish and Northern Irish common law.¹⁶⁹

B. Option 2: Scrap the Entire Regulation and Start Over

Conversely, the UK could completely disregard Rome I and rewrite the entire regulation.¹⁷⁰ This approach would allow the UK to decisively separate itself from the EU and leave no question as to whether the regulation is “UK” law.¹⁷¹ Nevertheless, it is unclear, given the positive reaction by the Ministry of Justice to the changes in Rome I, what positive substantive changes would be implemented to make the new regulation distinguishable from Rome I.¹⁷²

For example, the UK could attempt to distinguish itself from the EU by adopting a contradictory approach for all, or many, of the principles.¹⁷³ The 2018 Withdrawal Act gives Parliament the power to repeal or alter any former EU laws.¹⁷⁴ For instance, the UK could decide to reject the well-established principle of party autonomy, found in Article 3 of Rome I, and return to the principle of *lex loci contractus*, meaning the law that governs is the “law of place where the contract was made.”¹⁷⁵ Yet, if these historical principles were

¹⁶⁷ See MINISTRY OF JUSTICE, *supra* note 56, at 6 (stating that although there is “no conclusive English authority as to the situation where the law applicable to the contract is not English law” that “Article 9(3) generally reflects the English law position” and constitutes an “improvement in terms of legal certainty”).

¹⁶⁸ See THE EUROPEAN UNION COMMITTEE, SCRUTINISING BREXIT: THE ROLE OF PARLIAMENT, 2016-1, HL 33, at 4 (UK) (stating that Parliament taking the time to closely review laws will create “an ‘audit trail’ for future generations”); DEP’T FOR EXITING THE EUROPEAN UNION, Cm. 9417, at 9–10 (wanting to provide certainty and to ensure that laws will not change immediately and provide certainty and information to businesses about what the changes will likely be); *EU Withdrawal Act*, *supra* note 9 (stating that the “Act is essentially a giant ‘copy and paste’ exercise”).

¹⁶⁹ See HER MAJESTY’S GOV’T, *supra* note 11, at 4–5 (citing the 2010 International Arbitration Survey: Choices in International Arbitration from the University of London and noting that “Scotland and Northern Ireland have their own separate judicial systems”).

¹⁷⁰ See European Union (Withdrawal) Act 2018, c. 16, § 7(2) (UK), http://www.legislation.gov.uk/ukpga/2018/16/pdfs/ukpga_20180016_en.pdf [<https://perma.cc/VGG8-B74U>] (“Retained direct principal EU legislation cannot be modified by any primary or subordinate legislation other than — (a) an Act of Parliament . . .”).

¹⁷¹ See DEP’T FOR EXITING THE EUROPEAN UNION, Cm. 9417, at 13 (stating that one of the main twelve goals of Brexit was for the UK to “take control” of their laws and reinforce that the “legislatures and courts [are] the final decision makers”).

¹⁷² See MINISTRY OF JUSTICE, *supra* note 56, at 3–8 (concluding that most of modifications in Rome I were “improvements” and if not improvements they struck a “satisfactory balance”).

¹⁷³ See European Union (Withdrawal) Act 2018, c. 16, § 7(2) (UK), http://www.legislation.gov.uk/ukpga/2018/16/pdfs/ukpga_20180016_en.pdf [<https://perma.cc/VGG8-B74U>] (stating that Parliament has the ability to change any former EU laws).

¹⁷⁴ *Id.*

¹⁷⁵ See Regulation (EC) 593/2008, at 10 (defining the principle of party autonomy); Zhang, *supra* note 14, at 516 (defining the principle of *lex loci contractus*).

to be cast aside, it would likely make the UK a less attractive forum.¹⁷⁶ For example, if the principle of *lex loci contractus* were to be adopted, contracting parties would no longer have the ability to choose the law that governs their contracts.¹⁷⁷ Although this would create an incredible amount of uncertainty, it would be a bold assertion of the UK's sovereignty because it would create a system of choice of law rules that are clearly distinguishable from that of the EU.¹⁷⁸

Although there may be uncertainty associated with eliminating the historical principles like Article 3, the same is not as easily said about principles that were implemented into UK law only through Rome I, such as the principle of enforcing the mandatory overriding principles of a third country.¹⁷⁹ The UK could reject this provision and instead adopt a rule that focuses on unenforceable contracts that contradict public policy.¹⁸⁰ This re-framing of the exception in terms of public policy aligns with how some other countries, including the U.S., approach the unenforceability of contracts.¹⁸¹

The UK did not have a choice about which rules would be implemented into UK law because Rome I was a regulation that was automatically "binding in its entirety."¹⁸² Therefore, if the UK were to reject any rules that did not exist in UK law before Rome I, such as those contained in Article 9, it would re-inforce parliamentary sovereignty by establishing that only those rules that had

¹⁷⁶ Yuko Nishitani, *Party Autonomy in Contemporary Private International Law*, 59 JAPANESE Y.B. INT'L L. 300, 303–04 (2016) (summarizing that in the Hague Principles on Choice of Law in International Commercial Contracts, which were adopted in March 2015 as a culmination of one hundred years of individuals and institutions trying to create uniform international laws, "set forth cardinal conflicts rules on party autonomy . . . [and] the purpose of the Hague Principles is to promote party autonomy").

¹⁷⁷ See European Union (Withdrawal) Act 2018, c. 16, § 7(2) (UK), http://www.legislation.gov.uk/ukpga/2018/16/pdfs/ukpga_20180016_en.pdf [<https://perma.cc/VGG8-B74U>] (stating that Parliament has the ability to change any former EU laws); Nishitani, *supra* note 176 (summarizing the Hague Principles on Choice of Law in International Commercial Contracts); Zhang, *supra* note 13, at 516 (defining the principle of *lex loci contractus*).

¹⁷⁸ See DEP'T FOR EXITING THE EUROPEAN UNION, Cm. 9417, at 13 (emphasizing that the UK should be making its laws, not the EU, and assert parliamentary sovereignty).

¹⁷⁹ See TFEU 2012 Consolidated Version art. 288 (stating that a regulation is binding on Member States and no changes can be made to the language); *Rome I Website*, *supra* note 13 (stating that the UK entered a reservation to Article 7(1) regarding mandatory overriding provisions and that Article 9(3), containing the overriding mandatory provisions, in Rome I was a "substantive change").

¹⁸⁰ See Voser, *supra* note 68, at 327–28 & n.42 (stating that parties' "choice of law will not be upheld if it is contrary to a 'fundamental policy' of another state whose law would otherwise be the applicable law" and that although more restrictive in an interstate situation where "the law chosen by the parties would make enforceable a contract flatly unenforceable in a state whose law would otherwise apply" the United States is less restrictive in an international context as demonstrated by the Ninth Circuit declining to uphold a Saudi decree and make a payment unenforceable, even though the payment would be "flatly unenforceable in Alabama" in *Northrop Corp v. Triad Int'l Mktg*, 811 F.2d 1265 (9th Cir. 1987).

¹⁸¹ See Voser, *supra* note 180 and accompanying text.

¹⁸² See TFEU 2012 Consolidated Version art. 288 (stating that a regulation is binding on Member States and there can be no changes to the language).

a pre-Rome I basis in the UK and were not solely retained EU law would remain following Brexit.¹⁸³

The downside of this approach is that it would produce uncertainty as businesses adjusted to the exclusions of rules that have been in place for the past decade.¹⁸⁴ Additionally, no substantive reason has been stated in support of eliminating these provisions.¹⁸⁵ Thus, these provisions would be cast aside purely because the UK wants to break from the EU.¹⁸⁶ There is a strong argument that just wanting to break from the EU is not enough reason to eliminate these choice of law rules.¹⁸⁷ Accordingly, the impact that eliminating these provisions will have on demonstrating parliamentary sovereignty is minimal.¹⁸⁸

C. Option 3: Adopt Another Country's Choice of Law Rules

Instead of trying to create an entirely new provision, the UK could incorporate the choice of law rules that another country uses to resolve international disputes into their national law.¹⁸⁹ Given that the United States is an influential common law country, one choice would be to adopt choice of law rules that tracked the United States' rules found in the Second Restatement of Conflict of Laws and the Uniform Commercial Codes.¹⁹⁰ There are other codes that the

¹⁸³ See DEP'T FOR EXITING THE EUROPEAN UNION, Cm. 9417, at 13 (emphasizing that one of the main goals of Brexit was asserting parliamentary sovereignty); *Rome I Website*, *supra* note 13 (stating that the UK entered a reservation to Article 7(1) regarding mandatory overriding provisions and that Article 9(3) in Rome I was a "substantive change").

¹⁸⁴ See DEP'T FOR EXITING THE EUROPEAN UNION, Cm. 9417, at 9 (citing that "providing legal certainty" is an important goal of Brexit); *Rome I Website*, *supra* note 13 (indicating that Rome I has applied since December 17, 2009).

¹⁸⁵ See DEP'T FOR EXITING THE EUROPEAN UNION, Cm. 9417, at 9, 13 (citing that "providing legal certainty" is an important goal of Brexit, but also reasserting parliamentary sovereignty and ensuring that the UK is the one promulgating their laws, not the EU); MINISTRY OF JUSTICE, *supra* note 56, at 3, 6 (stating that the changes made to Article 3 and Article 7 of the Rome Convention were generally "improvements" and gave the UK "legal certainty").

¹⁸⁶ See *supra* note 185 and accompanying text.

¹⁸⁷ See DEP'T FOR EXITING THE EUROPEAN UNION, Cm. 9417, at 9 (citing that one of the twelve goals of Brexit is to "provid[e] legal certainty"); *Rome I Website*, *supra* note 13 (noting that the UK did not adopt Article 7(1) of the Rome Convention because it was perceived to cause too much uncertainty); Zhang, *supra* note 14, at 516 (citing that the principle of party autonomy traces back to Charles Dumoulin, a Frenchman from the sixteenth century).

¹⁸⁸ DEP'T FOR EXITING THE EUROPEAN UNION, Cm. 9417, at 13 (stating that one of the fundamental goals of Brexit is to "take control of our own affairs" and to reestablish parliamentary sovereignty).

¹⁸⁹ See European Union (Withdrawal) Act 2018, c. 16, § 7(2) (UK), http://www.legislation.gov.uk/ukpga/2018/16/pdfs/ukpga_20180016_en.pdf [<https://perma.cc/VGG8-B74U>] ("Retained direct principal EU legislation cannot be modified by any primary or subordinate legislation other than — (a) an Act of Parliament . . .").

¹⁹⁰ See Calleros, *supra* note 139, at 665, 672 (noting that the UCC governs "the sale of goods"); Gregory E. Smith, *Choice of Law in the United States*, 38 HASTINGS L.J. 1041, 1044 (1987) (stating that the "*Restatement (Second) of Conflict of Laws*, requires a court to apply the law of that state which

UK could choose from, including codes from China or Brazil.¹⁹¹ Transplanting another system would likely have a significant effect on the substantive choice of law rules.¹⁹²

For example, historical principles, such as the principle of party autonomy, may be eliminated or modified, depending on the system adopted.¹⁹³ In most circumstances, the Brazilian choice of law rules embrace the principle of *lex loci contractus*, and the law is silent on whether it will allow parties to choose the law governing their contracts or not.¹⁹⁴ The Chinese and U.S. systems have similar conceptions of party autonomy to Rome I, but the Chinese choice of law rules regarding party autonomy do not operate in the same way

has the closest relationship to the parties and issues involved”); *see also* U.C.C. § 1-301 (AM. LAW INST. & UNIF. LAW COMM’N 2012) (explaining the parties’ power to choose applicable law); *Legal Systems of the World*, SAINT, <http://saint-claire.org/wp-content/uploads/2016/01/Legal-Systems-of-the-World.pdf> [<https://perma.cc/V8M6-L3GE>] (reporting that common law, which is the system utilized in the United States, originated in the UK).

¹⁹¹ *See* Calleros, *supra* note 139, at 666–68 (summarizing the factors that the United States uses to decide choice of law); Alice M. Vickers, *The Choice of Law Clause in Contracts Between Parties of Developing and Developed Nations*, 11 GA. J. INT’L & COMP. L. 617, 624–25 (1981) (analyzing the choice of law systems in Brazil); David Dai et al., *China Promulgates Specific Conflict Law Governing Foreign-Related Civil Relations*, MCDERMOTT WILL & EMERY (Dec. 23, 2010), <https://s3.amazonaws.com/documents.lexology.com/06fd4805-e725-40d4-9963-607409296d71.pdf> [<https://perma.cc/4KHN-3F8F>] (containing a letter published by McDermott Will & Emery announcing the creation of the Law of the Application of Law for Foreign-Related Civil Relations of the People’s Republic of China, which summarized and provided clarification to China’s existing choice of law rules); *Most Influential Countries*, U.S. NEWS & WORLD REP., <https://www.usnews.com/news/best-countries/best-international-influence> [<https://perma.cc/AA6N-N6A2>]. These countries are chosen as representative of three different ways of approaching choice of law principles: the United States, a prominent common-law country, has a system based on “factors”; China, a civil-law country, has more set rules, similar to the current Rome I standard; and Brazil’s fundamental principles differ from that of Rome I. *See* Calleros, *supra* note 139, at 666–68; Vickers, *supra*, at 624–25; David Dai et al., *supra*.

¹⁹² *See* Regulation (EC) 593/2008, at 10 (defining the principle of party autonomy); Vickers, *supra* note 191, at 624–25 (stating that Brazilian law, at least in certain circumstances, follows the principle of *lex loci contractus*, which means the law of the place where the contract was formed governs, not the parties’ choice).

¹⁹³ *See* Vickers, *supra* note 191, at 624–25 (stating that Brazilian law follows the principal of *lex loci contractus*, except when Brazil is the place of performance, which means that rather than the parties being able to choose which law covers their contracts under the principle of party autonomy, the law that governs is the law of the forum where the contract was made); *see also* U.C.C. § 1-301 (noting that in the United States the ability for parties to make a choice can be limited by the transaction needing to “bear[] a reasonable relation to [the] state”); Luo Junming, *Choice of Law for Contracts in China: A Proposal for the Objectivization of Standards and Their Use in Conflicts of Law*, 6 IND. INT’L & COMP. L. REV. 439, 440 (1996) (reporting that the principle of party autonomy is promulgated in Article 5 of the Law of the Peoples’ Republic of China on Economic Contracts Involving Foreign Interest and states that the parties have the ability to choose the law that applies to their contract).

¹⁹⁴ *See* Vickers, *supra* note 191, at 624–25 (clarifying that although Brazilian law follows the principle of *lex loci contractus*, it is not always clear because if performance is in Brazil, the courts will follow Brazilian law and *lex loci contractus* is only applied to contracts created outside of Brazil and where their performance will occur outside of Brazil). Further complicating the matter is the fact that Brazilian national law does not make it clear if party autonomy is permissible. *See id.*

as Rome I.¹⁹⁵ The Chinese courts have interpreted their choice of law rules to require an explicit provision in order to recognize that the parties made a choice.¹⁹⁶ This is the Chinese court's interpretation of the rule, however, and the UK would not have to interpret the language the same way.¹⁹⁷ In fact, some courts in China do recognize implied choice, but utilizing this language may reintroduce the ambiguity around the viability of implied choice that Rome I sought to eliminate in the first place.¹⁹⁸

In contrast, the U.S.'s rules around party autonomy do reflect those in Article 3, because it acknowledges both express and implied choice.¹⁹⁹ Nevertheless, just because the United States has a similar provision when it comes to the system of party autonomy does not mean its choice of law regime is similar

¹⁹⁵ See U.C.C. § 1-301 (allowing parties to make a choice regarding which law will govern their contracts); Junming, *supra* note 193, at 440–42 (reporting that the principle of party autonomy is promulgated in Article 5 of the Law of the Peoples' Republic of China on Economic Contracts Involving Foreign Interest and states that “[t]he parties to a contract may choose the proper law applicable to the settlement of contract disputes” and Chinese law breaks from other countries in its choice of law principles because the judiciary only recognizes choice of law clauses if they are contained in an express provision, however, in practice, implied choice of law choices are utilized).

¹⁹⁶ See Junming, *supra* note 193, at 441–42 (“As to the manner of choosing proper law, there is no definite regulation in Chinese law. However, in the judicial interpretation of the Supreme Court of the People's Republic of China, it is provided that the parties to the contract shall do so by means of an express choice-of-law clause.”).

¹⁹⁷ European Union (Withdrawal) Act 2018, c. 16, § 7(2) (UK), http://www.legislation.gov.uk/ukpga/2018/16/pdfs/ukpga_20180016_en.pdf [<https://perma.cc/VGG8-B74U>] (reserving the right of Parliament to change the new rules on an ad hoc basis); DEP'T FOR EXITING THE EUROPEAN UNION, Cm. 9417, at 13 (emphasizing that laws affecting the UK should be promulgated in the UK, not the EU).

¹⁹⁸ Compare Junming, *supra* note 193, at 441–42 (noting that even though the Supreme Court of the People's Republic of China stated that parties have to use an explicit choice of law clause, “the implied selection of the proper choice of law operates in practice in China but is not sanctioned under color of law”), with MINISTRY OF JUSTICE, *supra* note 56 (reporting that Rome I clarified that parties can demonstrate that they made a choice of law by making “reference to the terms of the contract or the circumstances of the case,” rather than needing to point to an explicit clause).

¹⁹⁹ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (AM. LAW INST. 1971) (“[The parties have chosen the law if: (1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue. (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, *even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue*, unless either (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties. (3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.”) (emphasis added); MINISTRY OF JUSTICE, *supra* note 56 (stating that Rome I clarified that a choice can be made if it is “clearly demonstrated by reference to the terms of the contract” and not only in express terms).

to that contained in Rome I.²⁰⁰ Although the differences noted between the Brazilian, U.S., Chinese, and UK choice of law rules are only a snapshot of how this historical principle operates in other countries, it demonstrates the danger of adopting another country's approach: elimination or modification of entrenched principles resulting in uncertainty.²⁰¹ An alternative option is that the UK could borrow from these other countries only modestly and keep the effect of the provisions substantially the same.²⁰² This does not promote the goals of Brexit, however, because merely copying another country's rules does little to establish parliamentary sovereignty and uncertainty would still arise as parties adapt to the changes and courts interpret any ambiguity.²⁰³

²⁰⁰ Compare Calleros, *supra* note 139, at 666–69 (critiquing the Second Restatement approach on how to determine choice of law in the absence of a choice for “advanc[ing] the concept of *dépeçage* by inviting courts to apply its test separately to each issue in a contracts dispute, and raising the possibility for applying the laws of different states to different issues, thus multiplying the opportunities for uncertainty and litigation” and laying out the various factors that the United States utilizes to determine choice of law, including general principles contained in Section 6 of the Restatement stating: “[a] court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law; (2) [w]hen there is no such directive, the factors relevant to the choice of the applicable rule of law include: (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied,” and the seven factors utilized to determine what law governs in the absence of a choice: “Section 188 of the Restatement: Law Governing in Absence of Effective Choice by the Parties: (1) [t]he rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6; (2) [i]n the absence of an effective choice of law by the parties (see § 187), the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include: (a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties”), with Regulation (EC) 593/2008, at 6, 11 (stating in Article 4 that if the parties have not made a choice then the contract will be governed by the law of the country where the seller lives).

²⁰¹ See DEP’T FOR EXITING THE EUROPEAN UNION, Cm. 9417, at 9. (announcing that one of the main goals of Brexit was to “provid[e] certainty and clarity”); Calleros, *supra* note 139, at 666–68 (stating that the U.S. system utilizes a variety of factors to determine which law applies); Junming, *supra* note 193, at 440–42 (reporting that the principle of party autonomy is promulgated in Article 5 of the Law of the Peoples’ Republic of China on Economic Contracts Involving Foreign Interest and states that “the parties to a contract may choose the proper law applicable to the settlement of contract disputes” and that unlike other countries, the courts only recognize a choice of law clause if it is contained in an express provision, however, implicit choice of law clauses are utilized in practice).

²⁰² See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (reflecting that parties can make a choice either explicitly or the choice can be inferred); MINISTRY OF JUSTICE, *supra* note 56 (noting that Rome I clarifies that a party can make a choice of law either expressly or the choice can be inferred from “the terms of the contract”).

²⁰³ See DEP’T FOR EXITING THE EUROPEAN UNION, Cm. 9417, at 9, 13 (citing that “providing legal certainty” is an important goal of Brexit and that if possible after Brexit the same rules will be in effect).

Similar arguments can be made when analyzing how adopting another country's laws would affect principles implemented through Rome I, but there is a stronger argument for why implementing another country's laws would actually be a good approach with regards to these principles.²⁰⁴ Taking overriding mandatory provisions as an example, few countries have a rule regarding overriding mandatory provisions and instead state that contracts will be unenforceable if they violate public policy.²⁰⁵

If the UK decides it wants to eliminate overriding mandatory provisions, it could adopt a general public policy exception, or if it wants to keep overriding mandatory provisions but in a more limited scope, it could adopt language establishing overriding mandatory provisions that apply only to UK countries.²⁰⁶ Adopting another country's language would help to provide certainty because the parties could look at how that country's courts have applied the public policy exception to gain insight into how it might be applied in the UK.²⁰⁷ Nevertheless, uncertainty could still be introduced if there is already uncertainty in the language that the UK would be looking to adopt.²⁰⁸

²⁰⁴ See Junming, *supra* note 193, at 445–46 (stating that China has a public policy exception in their choice of law rules); Vickers, *supra* note 191, at 625 (reporting that in Brazilian law public policy can circumvent an express choice made by the parties); Voser, *supra* note 68, at 327 (quoting the language of section 187 that “the choice of law will not be upheld if it is contrary to a ‘fundamental policy’ of another state whose law would otherwise be . . . applicable”).

²⁰⁵ See Junming, *supra* note 193, at 444–46 (stating that in China there are two statutory restrictions on the ability for parties to choose the law that governs their contracts, (1) in Article 5(2), the law of China applies to contracts where performance occurs in China and parties cannot contract around Chinese law through party autonomy, and (2) in Article 150 which operates as a public policy limitation, the other possible restriction comes from the courts and their ability to disregard the choice of law clause if certain prerequisites are met); Vickers, *supra* note 191, at 625 (“[In Brazil] public policy can be used as an excuse to avoid an express choice of law.”); Voser, *supra* note 68, at 327 (quoting the language of section 187 that “the choice of law will not be upheld if it is contrary to a ‘fundamental policy’ of another state whose law would otherwise be . . . applicable” and hypothesizing that in the United States “a special treatment of mandatory rules is principally not necessary, because based on an ad hoc functional approach combined with depeage, foreign mandatory rules can be taken into account and applied in the normal course of the choice-of-law process”).

²⁰⁶ See Regulation (EC) 593/2008, at 6, 15 (demonstrating that Rome I has a public policy exception, promulgated in Article 21, but it is limited to violating the “public policy (*ordre public*) of the forum”); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (“(2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied . . . unless either . . . (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.”); Junming, *supra* note 205 and accompanying text (noting that China has a public exception policy in its choice of law rules, but does have restrictions on party autonomy when performance is to occur in China).

²⁰⁷ See *Northrop Corp. v. Triad Int'l Mktg. S.A.*, 811 F.2d 1265, 1270–71 (9th Cir. 1987) (refusing to apply a Saudi decree, in the United States, that would have invalidated the contract because the commission was unenforceable in Saudi Arabia in an international context, reasoning that choice of law provisions are important to having smooth international transactions and the choice of law provisions should be upheld unless there are “strong reasons” not to); *Barnes Group, Inc. v. C & C Prods.*,

In terms of parliamentary sovereignty, because the public policy exception is so widely used, the adoption of another country's rule is less likely to be seen as undermining parliamentary sovereignty, but rather, seen as the UK making an active choice to break from the EU.²⁰⁹ Following other countries' trends gives the appearance that the UK has chosen to mold its laws to be uniform with the rest of the world, rather than the EU, which reinforces parliamentary sovereignty.²¹⁰

D. Option 4: Return to a Prior Code

If the UK was keen on rejecting Rome I, but wanted to avoid drafting a new regulation from scratch or adopting another country's rules, it could return to a prior regime of choice of law principles.²¹¹ This approach would allow for some certainty because there would be a body of English common law to look back on.²¹² Nevertheless, there could still be a period of uncertainty as parties adjusted to the changes.²¹³

This option also raises an important question: which prior laws should the UK return to? One choice under this approach would be to return to the Contracts (Applicable Law) Act 1990, which enacted the Rome Convention of

Inc., 716 F.2d 1023, 1026–27, 1032 (4th Cir. 1983) (refusing to uphold a contract that chose Ohio law because covenant's not to compete were “flatly unenforceable” in Alabama and upholding the covenants would violate a “fundamental policy” of Alabama).

²⁰⁸ See *Northrop Corp.*, 811 F.2d at 1270–71 (illustrating that American courts appear to be less likely to invalidate a contract in an international situation based on public policy, making it unclear whether it would lead to more lenient application of the public policy rule if the UK adopted this language); *Barnes Group, Inc.*, 716 F.2d at 1026–27, 1032; Voser, *supra* note 68, at 327–28 (analyzing that American courts seem to be treating choices of law made between American parties differently than choices of law made with international parties).

²⁰⁹ See DEP'T FOR EXITING THE EUROPEAN UNION, Cm. 9417, at 13 (emphasizing that the UK should be responsible for creating its own laws and that the UK had to reassert its sovereignty); Vickers, *supra* note 191, at 624–25 (noting that parties' express choices of law can be put aside for reasons of public policy); Voser, *supra* note 68, at 327 (noting that the United States does not have mandatory rules, and instead U.S. courts will strike down parties' choice if it violates a “fundamental policy of another state whose law would otherwise be . . . applicable”) (internal quotations omitted).

²¹⁰ See DEP'T FOR EXITING THE EUROPEAN UNION, Cm. 9417, at 13 (citing that one of the other fundamental goals of Brexit is to “take control of our own affairs” and to reestablish parliamentary sovereignty).

²¹¹ See European Union (Withdrawal) Act 2018, c. 16, § 7(2) (UK), http://www.legislation.gov.uk/ukpga/2018/16/pdfs/ukpga_20180016_en.pdf [<https://perma.cc/VGG8-B74U>] (stating that Parliament has the ability to alter former EU law after the UK leaves the EU).

²¹² See *The Common Law and Civil Law Traditions*, BERKELEY L. 3–4, <https://www.law.berkeley.edu/wp-content/uploads/2017/11/CommonLawCivilLawTraditions.pdf> [<https://perma.cc/2AJD-2R6W>] (reporting that common law originated in England in the Middle Ages and that William Blackstone's treatise, *Commentaries on the Laws of England*, written in the eighteenth century, was the first treatise summarizing English common law); see also DEPARTMENT FOR EXITING THE EUROPEAN UNION, Cm. 9417, at 9 (stressing that one of the goals of Brexit is to “provid[e] legal certainty”).

²¹³ See DEP'T FOR EXITING THE EUROPEAN UNION, Cm. 9417, at 9.

1980.²¹⁴ Even though the Rome Convention was partially repealed, the UK issued a draft statutory instrument detailing the changes that would occur in order to convert the Rome Convention into UK domestic law, indicating that the Rome Convention still has operative force.²¹⁵ This approach would retain the historical principles, such as party autonomy, because these principles existed before Rome I.²¹⁶ Due to the fact that the Rome Convention was a treaty, the UK had the ability to enter a reservation to provisions that they disagreed with or did not wish to adopt.²¹⁷ Therefore, provisions that were implemented through Rome I, such as mandatory overriding provisions, would be eliminated and only the Rome Convention provisions that the UK agreed to would exist.²¹⁸

The benefit of this approach is that it would reinforce parliamentary sovereignty because only the provisions that the UK chose to agree to, and not enter a reservation to, would be part of UK law.²¹⁹ Additionally, because the Rome Convention has never technically been repealed and has been operative in the UK since 1991, the amount of uncertainty caused by returning to this code would be reduced because there is a legislative and judicial history to look back on.²²⁰ The UK would be returning to a code that still exists and a

²¹⁴ See Contracts (Applicable Law) Act 1990, c. 36, § 1, Sch. 1 (Eng.), http://www.legislation.gov.uk/ukpga/1990/36/pdfs/ukpga_19900036_en.pdf [<https://perma.cc/BC2D-HAPF>] (detailing that the Rome Convention was incorporated into Schedule 1 of Contracts (Applicable Law) Act); Rühl, *supra* note 154, at 107–08 (hypothesizing that, regarding contracts, the UK will return to the Rome Convention because the Rome Convention never ceased to be in effect and that if Rome I is not retained, then the Rome Convention will be transformed into “UK national law”).

²¹⁵ See Exiting the European Union Private International Law, *supra* note 133, at art. 3; Rühl, *supra* note 154, at 108 (“[T]he Rome Convention was (partially) terminated under public international law. However, the UK belongs to those countries where application of international treaties requires implementation by national legislature . . . [Therefore,] [i]f the Rome I Regulation ceases to apply as a result of Brexit, the Rome Convention will . . . revive and become applicable before UK courts as a matter of UK national law.”) (internal quotations omitted).

²¹⁶ See Convention on the Law Applicable to Contractual Obligations, art. 3, opened for signature June 19, 1980, 1980 O.J. (C 27) 37 (recognizing the principle of party autonomy).

²¹⁷ See Vienna Convention on the Law of Treaties, *supra* note 163, 1155 U.N.T.S. at 331–33, 338 (stating the Vienna Convention on Treaties, ratified in 1969, governs all treaties and allows for reservations in which a country alters or does not adopt a provision); see *Rome I Website*, *supra* note 13 (detailing that the UK entered a reservation to Article 7(1) which was the provision that allowed for overriding mandatory provisions).

²¹⁸ See Vienna Convention on the Law of Treaties, *supra* note 163, 1155 U.N.T.S. at 332–33, 338 (stating that the Vienna Convention on treaties, signed by the UK, allows for reservations meaning that a county can alter or choose not to adopt a provision).

²¹⁹ See *id.*; *Rome I Website*, *supra* note 13 (detailing that the UK entered a reservation to Article 7(1) which was the provision that allowed for overriding mandatory provisions).

²²⁰ See DEP’T FOR EXITING THE EUROPEAN UNION, Cm. 9417, at 9 (citing that “providing legal certainty” is an important goal of Brexit); Rühl, *supra* note 154, at 108 (clarifying that the Rome Convention has not technically been repealed).

treaty that some scholars argue should apply, at least in relation to EU Member States, regardless if the UK adopts alternative choice of law language.²²¹

The downside to this approach is that it would eliminate provisions that were once seen as positive changes by the UK government.²²² For example, Article 9, defining the rule for mandatory overriding provisions, was seen as an improvement because it eliminated ambiguity in the Rome Convention.²²³ The UK would have to decide whether giving up a perceived improvement and legal certainty is worth distancing itself from the EU regulation.²²⁴

The other option would be to scrap both the Rome Convention and Rome I and return to following English common law.²²⁵ The benefit of this approach would be that the UK would only be following laws created by UK courts, which would reinforce parliamentary sovereignty.²²⁶ It would nonetheless be difficult to determine what the common law would be.²²⁷ For example, it is generally the trend in common law that some form of party autonomy will be recognized.²²⁸ Nevertheless, it is not immediately apparent which common law case details this principle or if that autonomy extends to implied choice.²²⁹ There is even less certainty surrounding provisions such as overriding manda-

²²¹ See Rühl, *supra* note 154, at 109 (citing that some scholars have looked at Denmark and concluded that, as it pertains to other EU countries, it is possible that the Rome Convention, and not Rome I, should apply based on Article 25 of Rome I, but that the majority of scholars think that Rome I, rather than the Rome Convention, should apply based on Article 24); see also Council Regulation (EC) 593/2008, at 6, 15 (stating in Article 25 that “[t]his Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to contractual obligations” and in Article 24 that “[t]his Regulation shall replace the Rome Convention in the Member States”).

²²² See MINISTRY OF JUSTICE, *supra* note 56, at 3–8 (stating generally that the modifications in Rome I were “improvements”).

²²³ See *id.* at 6 (“Article 9(3) . . . is unlikely to introduce any significant additional uncertainty into the law.”).

²²⁴ See DEP’T FOR EXITING THE EUROPEAN UNION, Cm. 9417, at 9, 13 (citing that “providing legal certainty” is an important goal of Brexit and that if possible the laws will be the same after Brexit and that one of the main goals of Brexit is parliamentary sovereignty).

²²⁵ See *Beijing Jianlong Heavy Indus. Grp. v. Golden Ocean Grp. Ltd., Golden Zheijiang Inc., Ship Fin. Int’l Ltd. and SFL Bulk Holding Ltd.* [2013] EWHC (Comm) 1063 [18]–[19] (Eng.) (citing to the cases of *Ralli Bros v. Cia Naviera Sota y Aznar* [1920] 2 KB 287 and *Foster v. Driscoll* [1929] 1 KB 470 as examples of English case law regarding overriding mandatory provisions); see also *The Common Law and Civil Law Traditions*, *supra* note 212 (noting that the English common law has existed since the Middle Ages).

²²⁶ See DEP’T FOR EXITING THE EUROPEAN UNION, Cm. 9417, at 13 (stating that one of the fundamental goals of Brexit is to “take control of our own affairs” and to reestablish parliamentary sovereignty because “it has not always felt like that”).

²²⁷ See *infra* notes 228–236 and accompanying text.

²²⁸ Practical Law Dispute Resolution, *Governing Law and Jurisdiction Clauses*, THOMSON REUTERS PRAC. L., <https://uk.practicallaw.thomsonreuters.com/Document/I8abc55e1c9a11e38578f7ccc38dcbee/View/FullText.html> [<https://perma.cc/7QGC-KGD5>] (reporting that courts will generally utilize and respect the parties’ choice of law).

²²⁹ See MINISTRY OF JUSTICE, *supra* note 56, at 3 (stating that Rome I clarified that the choice of law can be inferred from the contract).

tory provisions because there is no general understanding that this principle should be upheld as common law.²³⁰ Instead, the UK will have to cobble together different cases to see how much is supported by existing law and how much was innovated by Rome I.²³¹ The Ministry of Justice started on this analysis in regards to Article 9, determining that there is currently no clear authority detailing if English courts should respect the overriding mandatory provisions of a foreign country.²³² In this situation, the English government would have to decide either through subsequent cases or legislation whether provisions like overriding mandatory provisions should extend to foreign nations rather than just the UK.²³³

Further complicating the matter is the fact that one legal system does not govern the entirety of the UK, instead, there are three: English (governing England and Wales), Northern Irish, and Scottish.²³⁴ This would lead to a lot of uncertainty, as the three different systems would have to either agree to one set of cases to follow or risk having different laws in different parts of the UK.²³⁵ This will likely increase the cost of doing business as it would make it more difficult for companies to evaluate the risk of doing business in the UK, due to uncertainty about which law applies.²³⁶

²³⁰ See *id.* at 6 (stating that English common law has not addressed what to do about mandatory provisions if the law governing the contract is not English).

²³¹ See *id.* at 6–7 (stating that “Article 9(3) generally reflects the English law position” when it comes to a “contract governed by English law, could be unenforceable in accordance with the English law” but there is “no conclusive English authority as to the situation where the law applicable to the contract is not English law,” although there is some authority that enforcing a contract that would breach foreign law would be “contrary to English public policy” under *Foster*, [1929] 1 KB 470).

²³² See *id.* (stating that there is some authority, in *Foster*, for not enforcing contracts whose performance would breach foreign law under the principle of comity).

²³³ See *id.* (defining the scope of Article 9(3) as focusing on the “discretionary application of certain rules of the country where a contract is to be, or has been, performed and which renders contractual performance unlawful”); Suzanne Rab, *Legal Systems in UK (England and Wales): Overview*, THOMAS REUTERS PRAC. L., <https://uk.practicallaw.thomsonreuters.com/5-636-2498> [<https://perma.cc/5DTS-QS3Q>] (stating that the UK law is primarily promulgated by Acts of Parliament and the judicial branch).

²³⁴ See Bolam, *supra* note 13 (explaining that the UK, Scotland, and Northern Ireland all have their own laws and the courts “operate separately from the courts of England,” except that the “decisions of the Court of Session, the highest court in Scotland, are subject to appeal to the Supreme Court of the United Kingdom in London”).

²³⁵ See DEP’T FOR EXITING THE EUROPEAN UNION, Cm. 9417, at 9 (stressing that one of the goals of Brexit is to “provid[e] legal certainty”); Bolam, *supra* note 13 (explaining that in the UK, the Scottish, Northern Irish, and English legal systems are all “separate and distinct”).

²³⁶ See Calleros, *supra* note 139, at 643 (certainty allows parties to “draft around [default rules] by framing their obligations or by choosing a different domestic governing law, or at least . . . assess their risks if they allow the default rules to apply”); see also HER MAJESTY’S GOV’T, *supra* note 11, at 3 (emphasizing that the current relationship with the EU provides “predictability and certainty” which helps to avoid extra costs).

*E. Proposed Solution: Weigh Keeping Each Provision
Against if It Undermines UK Law*

The final option, and the one supported by this Note, is rather than just keeping the Rome I language automatically, a weighing test should be applied to each provision.²³⁷ The test would balance the UK's two major goals regarding any changes made to the legal system: providing certainty and reinforcing parliamentary sovereignty.²³⁸

Performing a weighing test ensures that the goals of Brexit are being upheld.²³⁹ Even if Parliament ends up choosing not to change any laws, this option would still meet the goal of reestablishing parliamentary sovereignty by demonstrating that Parliament considered each part of the regulation independently for the purpose of enacting only those parts they felt advanced the interests of the UK.²⁴⁰ The downside is that it will take time to review each provision and it is unclear if Parliament would be willing to take the time to perform such review.²⁴¹ Although this process would be similar to the process the UK went through when it chose to enter a reservation to the Rome Convention, subjecting each provision to the weighing test is nevertheless a large project for Parliament to undertake.²⁴² The Ministry of Justice, however, has al-

²³⁷ See DEP'T FOR EXITING THE EUROPEAN UNION, Cm. 9417, at 9, 13 (citing that "providing legal certainty" is an important goal of Brexit and that "wherever practical and appropriate, the same rules and laws will apply on the day after we leave the EU as they did before" and contrasting the desire to maintain consistency in the laws with the UK's desire to reassert parliamentary sovereignty).

²³⁸ European Union (Withdrawal) Act 2018, c. 16, § 7(2) (UK), http://www.legislation.gov.uk/ukpga/2018/16/pdfs/ukpga_20180016_en.pdf [<https://perma.cc/VGG8-B74U>] (reserving the right of Parliament to change the new rules on an ad hoc basis); DEP'T FOR EXITING THE EUROPEAN UNION, Cm. 9417, at 9, 13, 15 (stating that one of the goals is to "provid[e] certainty and clarity" in recognition of "how important it is to provide business, the public sector and the public with as much certainty as possible" and another goal is "[t]aking control of our own laws" because "[t]he sovereignty of Parliament is a fundamental principle of the UK constitution" but also recognizing that any agreements regarding dispute resolution must also "maximize legal certainty, including for businesses, consumers, workers and other citizens").

²³⁹ DEP'T FOR EXITING THE EUROPEAN UNION, Cm. 9417, at 7–8 (citing that three of the twelve goals of Brexit are to give those in the UK legal certainty, to reassert parliamentary sovereignty by ensuring that laws affecting the UK are made in the UK, and "delivering a smooth, orderly exit from the EU").

²⁴⁰ See *id.* at 13 (stressing the importance of reasserting parliamentary sovereignty).

²⁴¹ See *id.* at 10 (summarizing the purpose of the Great Repeal Bill as "preserv[ing] EU law where it stands at the moment . . . Parliament (and, where appropriate, the devolved legislatures) will then be able to decide which elements of that law to keep, amend, or repeal once we have left the EU"); Letter from Theresa May, *supra* note 110 (stating that the UK government intends to focus on "the biggest challenges" first before focusing on more specialized areas); Hunt & Wheeler, *supra* note 1 (addressing that given that there is no deal currently in place, there are critical questions that the UK must address, but noticeably absent is mention of choice of law questions).

²⁴² See Letter from Theresa May, *supra* note 110 (noting that the UK government should "prioritise the biggest challenges").

ready provided a broad summary of the changes and, although it is not exhaustive, it serves as a good starting point to identify the major changes.²⁴³

The weighing test may help to preserve some legal certainty because it is likely that relatively few—if any—provisions will be changed.²⁴⁴ The only way the provisions could change is if the provision failed the test and the benefit of repealing or modifying the rule to reinforce parliamentary sovereignty outweighs the uncertainty that would be caused by such a change.²⁴⁵ Evaluating different circumstances, including what would happen with Article 3 and Article 9, helps to demonstrate what this would look like in practice.²⁴⁶

A provision could fail the weighing test if the rule is one that the UK substantively disagrees with or was hurting UK citizens or businesses.²⁴⁷ In such instances, the benefits of changing the rule would outweigh the uncertainty.²⁴⁸ Historical provisions, such as Article 3, fall on the other end of the spectrum in that they “pass” the weighing test with relative ease. The principle of party autonomy has existed since the sixteenth century and is recognized by English common law.²⁴⁹ The changes made by Rome I were largely stylistic in nature, although it implemented a few substantive changes, and sought to eliminate ambiguity.²⁵⁰ Here, the benefits of modifying or eliminating these provisions do

²⁴³ See MINISTRY OF JUSTICE, *supra* note 56 (“The purpose of this guidance is to provide a brief summary of the most important provisions in the Regulation . . . This outline is not comprehensive in nature.”).

²⁴⁴ See *id.* at 3–8 (summarizing that generally the changes made in Rome I were “improvements” from the Rome Convention and helped to give the UK “legal certainty”).

²⁴⁵ See DEP’T FOR EXITING THE EUROPEAN UNION, Cm. 9417, at 9, 13 (citing that “providing legal certainty” is an important goal of Brexit and that if possible, the “same rules and laws will apply on the day after [the UK] leave[s] the EU as they did before” but that the government is also seeking to reassert parliamentary sovereignty and ensure that laws affecting the rights of UK citizens are being made in the UK).

²⁴⁶ See *infra* notes 248–265 and accompanying text.

²⁴⁷ See DEP’T FOR EXITING THE EUROPEAN UNION, Cm. 9417, at 9, 13, 15 (citing that some of the government’s goals in Brexit are to give certainty to businesses and to reassert parliamentary sovereignty and that any “arrangements must be ones that respect UK sovereignty, protect the role of our courts and maximize legal certainty, including for businesses, consumers, workers and other citizens”).

²⁴⁸ See *id.* at 15 (citing that one of the major goals of Brexit is to “provid[e] legal certainty”).

²⁴⁹ See Zhang, *supra* note 14, at 516 (citing that the principle of party autonomy traces back to Charles Dumoulin, from the sixteenth century); see also COURTS AND TRIBUNALS JUDICIARY, THE STRENGTH OF ENGLISH LAW AND THE UK JURISDICTION, <https://www.judiciary.uk/wp-content/uploads/2017/08/legaluk-strength-of-english-law-draft-4-FINAL.pdf> [<https://perma.cc/YJW9-5UYN>] (reassuring parties that under English common law, their choice regarding which law governs their contracts will be respected).

²⁵⁰ Exiting the European Union Private International Law, *supra* note 133 at art. 10 (demonstrating that the changes to Rome I to convert it into domestic law are largely stylistic in nature). For example, it details changes such as replacing “Member States” with “relevant states” in Article 3(4), the authority for this provision came from “the powers conferred by section 8(1) of, and paragraph 21(b) of Schedule 7 to, the European Union (Withdrawal) Act 2018(a).” *Id.*; see also Rome I and Rome II Website, *supra* note 55 (stating that the practical effect of Rome I was similar to the Rome Conven-

not outweigh the uncertainty caused by changing it because all Rome I did was alter the wording while maintaining the same practical effect.²⁵¹ Overturning or changing these longstanding principles would only disrupt the system.²⁵² Therefore, historical provisions such as Article 3 should be maintained post-Brexit.²⁵³

The more difficult cases are provisions, such as Article 9, which were implemented into UK law through Rome I and do not mirror the Rome Convention or past precedent.²⁵⁴ Article 9 extended the principle of overriding mandatory provisions in a way that was not based in English precedent and was also a provision that the UK had previously entered a reservation to.²⁵⁵

One way to analyze the test would be to point to the reservation of Article 7(1) in the Rome Convention and say that the UK's sovereignty was undermined when it was forced to enact a provision under the EU regulation that it had previously objected to and, therefore, that provision should be eliminated.²⁵⁶ Although this may appear to be a strong reason to eliminate a principle, this argument ignores the reason that the UK entered its reservation in the first place.²⁵⁷ The reservation was entered simply because Article 7(1) contained an unacceptable amount of ambiguity, not because the UK fundamentally disagreed with extending the doctrine of overriding mandatory provisions to third countries.²⁵⁸ In fact, the Ministry of Justice declared Article 9 to be a clearer iteration of Article 7(1).²⁵⁹ Article 9 actually produced certainty and although it

tion, however, it did make "some substantive changes [to the provisions], such as Article 9.3" but that "Rome I [sought] to enhance certainty . . . by converting mere presumptions into fixed rules").

²⁵¹ See MINISTRY OF JUSTICE, *supra* note 56, at 3 ("The effect of Article 3 of the Regulation should result in there being very little difference to that of the Rome Convention.").

²⁵² See Convention on the Law Applicable to Contractual Obligations, 1980 O.J. (C 27) at 37 (recognizing the principle of party autonomy); see also DEP'T FOR EXITING THE EUROPEAN UNION, Cm. 9417, at 9 (stressing that one of the goals of Brexit is to "provid[e] legal certainty"); Zhang, *supra* note 14, at 516 (noting that the principle of party autonomy traces back to the sixteenth century).

²⁵³ See *supra* notes 249–252 and accompanying text.

²⁵⁴ See *Rome I Website*, *supra* note 13 (explaining that the Rome Convention contained a provision in Article 7(1) regarding overriding mandatory provisions but that the UK did not incorporate it into law and entered a reservation); see also MINISTRY OF JUSTICE, *supra* note 56, at 6 (citing to *Foster v. Driscoll* as generally supporting the extension of overriding mandatory provision but also noting that Article 9(3) provided the answer to what to do with the overriding mandatory provisions of foreign countries where there was "no such clarity under English law").

²⁵⁵ See MINISTRY OF JUSTICE, *supra* note 56, at 6 ("There is no conclusive English authority as to the situation where the law applicable to the contract is not English law."); *Rome I Website*, *supra* note 13 (explaining that the Rome Convention contained a provision in Article 7(1) regarding overriding mandatory provisions, but that the UK did not incorporate it into law and entered a reservation).

²⁵⁶ See *Rome I Website*, *supra* note 13 (detailing that the UK entered a reservation to Article 7(1) in the Rome Convention).

²⁵⁷ See *id.* (stating that the reservation to Article 7(1) "was not given effect . . . by the UK . . . on the grounds of uncertainty").

²⁵⁸ See *id.*

²⁵⁹ See MINISTRY OF JUSTICE, *supra* note 56, at 6–7 (stating that "Article 9(3) is formulated in terms that are sufficiently broad to cover situations of unlawful contractual performance where the

extended beyond English common law, it generally reflected the English Court's position at the time.²⁶⁰ Therefore, the provision should pass the weighing test because there is not enough evidence of this provision "undermining sovereignty" to assert that it should be eliminated.²⁶¹ Unless, UK businesses and citizens provided Parliament with an explanation of why this provision was harming them and should be changed.²⁶²

Although the weighing test might not determine that all the Rome I provisions should be kept, it appropriately balances the dual goals of Brexit articulated by Parliament shortly after the vote.²⁶³ It would meet the goal of reasserting parliamentary sovereignty because Parliament will have taken an active role in deciding which provisions to keep and considered those provisions in light of what is the best for the UK and its businesses.²⁶⁴ Equally as important, the weighing test advocates for a comprehensive review of each provision that would be published before any legal changes take effect and therefore would provide a clear map for businesses to follow and give them legal certainty.²⁶⁵

CONCLUSION

The UK is facing down a long and complicated process in attempting to untangle itself from the EU. The reasons for wanting to leave the EU are com-

applicable law is foreign" and "removes the current ambiguity" and "constitutes an improvement in terms of legal certainty").

²⁶⁰ See *id.* (stating that although there is "no conclusive English authority as to the situation where the law applicable to the contract is not English law" that "Article 9(3) generally reflects the English law position," and "constitutes an improvement in terms of legal certainty").

²⁶¹ See DEP'T FOR EXITING THE EUROPEAN UNION, Cm. 9417, at 5 (citing that two of the main goals of Brexit are to "provid[e] certainty and clarity" and reassert sovereignty).

²⁶² See *Notice and Comment*, JUSTIA, <https://www.justia.com/administrative-law/rulemaking-writing-agency-regulations/notice-and-comment/> [<https://perma.cc/4DY7-GG8S>] (describing the notice and comment process, including the ability for the public to "submit 'written data, views, or arguments' regarding a proposed rule"). The process proposed here is one that is similar to the notice and comment procedure utilized by administrative agencies in the United States. See *id.*

²⁶³ See DEP'T FOR EXITING THE EUROPEAN UNION, Cm. 9417, at 9, 13 (emphasizing that one of the main goals of Brexit is parliamentary sovereignty, thus the UK should promulgate its own laws, not the EU, and the jurisdiction of the Court of Justice of the European Union, the court that enforces EU law, should be ended because, as shown by the introduction of "1,056 EU-related documents" to Parliament in 2016 alone, Parliament's sovereignty has been undermined, but also stressing that legal certainty is important to the smooth functioning of businesses).

²⁶⁴ See *id.* at 9, 15 (noting that any "dispute resolution mechanisms" that are adopted must take into account parliamentary sovereignty and if the arrangement will "provid[e] legal certainty" to businesses and UK citizens).

²⁶⁵ See THE EUROPEAN UNION COMMITTEE, SCRUTINISING BREXIT: THE ROLE OF PARLIAMENT, 2016-1, HL 33, at 4 (UK) (stating that "effective parliamentary scrutiny will help to ensure that there is an 'audit trail' for future generations"); DEP'T FOR EXITING THE EUROPEAN UNION, Cm. 9417, at 9-10 (wanting to provide certainty and to "allow[] businesses to continue trading in the knowledge that the rules will not change significantly overnight" and to understand the "key issues for business . . . ahead of the negotiations").

plex and it has been made ever present that even those that voted to leave cannot agree on a way forward. Nevertheless, this hurdle does not excuse the government from just adopting the rules that are easiest without giving thought to their implementation. If the UK is going to undertake this hurdle it should do so thoughtfully, weighing the effects of its modifications against its goals of certainty and sovereignty and providing detailed conclusions as a way to direct businesses and help the courts in interpreting the retained language. Otherwise, the relic of Rome I will be thrust on the courts to deal with and create uncertainty and chaos in its wake.

EMMA COFFEY

