Jiří Valdhans (ed.)

COFOLA INTERNATIONAL 2020

Brexit and its Consequences

Conference Proceedings

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List of Abbreviations

Agreement on the withdrawal/Withdrawal Agreement
Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community

Art. Article / Articles

Brussels Convention
Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters

Brussels I bis Regulation
Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters

Brussels I Regulation
Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

Brussels II bis Regulation
Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000

CJEU
Court of Justice of the European Union

ECJ/Court of Justice
European Court of Justice

EFTA
European Free Trade Association

EU European Union

European Enforcement Order Regulation
Regulation (EC) No. 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European enforcement order for uncontested claims

European Payment Order Regulation
Regulation (EC) No. 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure

European Union Act 2018
European Union (Withdrawal) Act 2018 of 26 June 2018. An Act to repeal the European Communities Act 1972 and make other provision in connection with the withdrawal of the United Kingdom from the EU

European Union Act 2020
European Union (Withdrawal Agreement) Act 2020 of 23 January 2020. An Act to implement, and make other provision in connection with, the agreement between the United Kingdom and the EU under Article 50(2) of the Treaty on European Union which sets out the arrangements for the United Kingdom's withdrawal from the EU

Explanatory Memorandum to The Law Applicable to Contractual Obligations and Non-Contractual Obligations
Explanatory Memorandum to The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019 No. 834

Hague Convention on Choice of Court Agreements
Hague Convention on Choice of Court Agreements of 30 June 2005

Hague Divorce Convention
Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations

Hague Judgments Convention
Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters

Hague Maintenance Convention
Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance

HCCH
Hague Conference on Private International Law

Insolvency Model Law
UNCITRAL Model Law on Cross-Border Insolvency of 1997 should be mentioned

Insolvency Regulation
Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings

Insolvency Regulation Recast
Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings

Law applicable to contractual obligations and non-contractual obligations
2019 No. 834 Exiting the European Union Private International Law: The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019

Lugano Convention/2007 Lugano Convention
Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

Maintenance Regulation
Council Regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations

No. Number

p./pp. page / pages

para. Paragraph / Paragraphs

Proposal for Rome I
Proposal for a regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I)

Rome Convention
Convention of 19 June 1980 on the law applicable to contractual obligations

Rome I Regulation
Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations

Rome II Regulation
Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations

Rome III Regulation
Council Regulation (EU) No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation

Succession Regulation
Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European certificate of succession

TFEU
Treaty on the Functioning of the European Union

UK the United Kingdom/United Kingdom of Great Britain and Northern Ireland

UN Convention
United Nations Convention on the Assignment of Receivables in International Trade

VCLT
Vienna Convention on the Law of Treaties

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Preface

The conference "COFOLA = Conference for Young Lawyers" is annually organized by the Faculty of Law of Masaryk University from 2007. The main aim of this conference is to give the floor to the doctoral students and young scientists at their early stage of career and enable them to present the results of their scientific activities.

Since 2013 COFOLA has been enriched by a special part called "COFOLA INTERNATIONAL". COFOLA INTERNATIONAL focuses primarily on issues of international law and the regulation of cross-border relations and is also oriented to doctoral students and young scientists from foreign countries. COFOLA INTERNATIONAL contributes to the development of international cooperation between students and young scientists from different countries. It constitutes a platform for academic discussion and develops scientific and presentation skills of young scientists. Such a platform for scientific debate beyond the boundaries of one country contributes to the global view on the law, which is so vital in current days.

COFOLA INTERNATIONAL 2020 dealt with topical questions of the relationship between the European Union and the United Kingdom of Great Britain and Northern Ireland after its withdrawal from the European Union and the European Atomic Energy Community. It mainly reflected the consequences that come along with this development in the field of private international law and international civil procedure. The existing system of mutually intertwined legal relations is transforming and will have ceased to exist with the end of the transition period on 31 December 2020. Inevitably, number of questions regarding the future form of mutual relations between these players, which have been severed after almost 50 years, arise.

Following contributions present an effort to tackle selected aspects of this development and answers to series of practical and doctrinal issues of fundamental importance in respect of future changes in dealing with cross-border relations. Since this year has been deeply affected by the Covid-19 pandemic, the conference proceedings contain only a limited number of papers. Only the following papers have been submitted in written form and have been

recommended by reviewers for publication. We anticipate more participants and more contributions in the upcoming year of 2021.

Presented papers may be divided into two sections – international civil procedure, and selected aspects of applicable law.

The first contribution concerns questions of jurisdiction and recognition of foreign judgments, this time looking at the impact of Brexit upon existing regime and considering prospects for the future. The introductory part of this paper contains a chronological summary of the most critical moments of Brexit. Then this paper touches on the question of whether to conclude an agreement between the EU and the UK, or whether the UK shall accede to any of the already existing international conventions.

The second contribution to the first section concerns the question of recognition of foreign judgments and the impact of Brexit upon this area from mutual trust principle point of view. This paper discusses whether there will loss of mutual trust between the EU and the UK after Brexit. Further, the paper answers a question of how a choice of access to an international convention could affect the level of mutual trust between the UK and EU Member States.

Third contribution deals with issues of international civil procedure, comparing the regime of choice of court agreements within the Hague Convention on Choice of Court Agreements and Brussels I bis Regulation. It aims at highlighting similarities and divergences of these regimes and attempts to assess consequences for future EU-UK relations.

The first paper of the second part discusses the method the UK may adopt for solving questions of applicable law once it is not bound by EU law instruments. On the one hand, there is a strong influence of the EU law approach for solving the conflict of laws questions, on the other hand, there is a tradition under English law to rely primarily on *lex fori* approach. The question dealt with in this paper is whether English law will leave EU approaches behind and cease back to the *lex fori* principle.

The second contribution concerns the issue of the law applicable to the third-party effects of assignments of claims. There is as an ongoing process at the EU law level in the course of which the UK played an important role

with its negative stance towards the current proposal. It is such views that present how different approaches towards this issue can negatively affect the position of parties to different transactions based on an assignment of claims, mainly towards the principle of legal certainty.

It shall be noted that the following contributions were drafted in autumn 2020, at the time when it was not clear what were the EU-UK relations to look like after the transition period. This conference proceedings reflect possible approaches, considerations, and discussions that were lively on the international scene and shall therefore serve as a valuable reflection of academic debate during this shaky period.

Radovan Malachta, Jiří Valdhans

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Jurisdiction and Enforcement after Brexit under Withdrawal Agreement

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Abstract

This paper focuses on the issue of international jurisdiction and enforcement of foreign judgements after Brexit basically until the end of transition period (to 31 December 2020) according to the Withdrawal Agreement, with possible next legal regime. The withdrawal of United Kingdom from the European Union is undoubtedly a significant interference with existing European law. What dimension it takes depends, in particular, on the question of whether or not to complete a comprehensive agreement between the EU and the UK that would establish and direct the future partnership and cooperation in all relevant areas. With the aim of contributing to the discussion concerning EU and UK fundamental rules on jurisdiction and enforcement, this paper provides a view of possible questions and solutions immediately after Brexit until end of transition period. The legal regime of judicial proceedings with an international element initiated before Brexit or during transition period is still relevant under these pre-Brexit rules or Withdrawal Agreement rules. The same situation is with regard to judgements delivered before 31 December 2021. This contribution shall review the state of play immediately after Brexit under Withdrawal Agreement concerning "separation" of EU fundamental rules on jurisdiction and enforcement.

Keywords

Brexit; Withdrawal Agreement; Enforcement; European Union; Judicial Cooperation in Civil and Commercial Matters of the EU; Jurisdiction; Private International Law.

1 Introduction

One of the fundamental consequences of Brexit is its negative impact on private international law, specifically the area of European Union ("EU")

judicial cooperation in civil and commercial matters.[1] Basically, such disconnection entails the end of application of the Union rules across the United Kingdom ("UK"). EU has developed numerous regulations that unify rules of private international law and that have brought about a revolution in the different European legal systems. The fundamental pillar of this cooperation is to guarantee access to justice, the harmonisation of national legislation and the principle of mutual recognition and enforcement of judgements, while eliminating judicial and administrative obstacles and incompatibilities deriving from the idiosyncrasies of each state.[2] The fundamental advantage of EU law within this area is unified legal regime supported by unifying case law of the Court of Justice.

Following the results of the referendum on 23 June 2016 on whether the UK should remain in the EU, on 29 March 2017 Prime Minister Theresa May notified Donald Tusk, President of the European Council, in accordance with Art. 50[3] of the Treaty on European Union[4] of the UK's intention to withdraw from the EU and the European Atomic Energy Community.[5] This was followed by intense negotiations, starting on 19 June 2017, of a deal which would strengthen Britain's special status in the EU.[6] This also marked the beginning of the process where for the first time in the history of the European Communities (or later of the EU) that the process of a Member State's withdrawal from the Union had begun.

1 Judicial cooperation in civil and commercial matters is an area of EU rules which contains private international rules. Legal base of this cooperation base derives from the Art. 81 Treaty on the Functioning of the EU ("TFEU").

2 SALINAS, A. Brexit, Cooperación Judicial en Materia Civil y su Repercusión en los Acuerdos de Mediación Transforterizos. *RDUNED Revista de derecho UNED,* 2017, no. 20, pp. 559–586.

3 The Art. 50 introduced by the Lugano Treaty – for more details on the topic of European Law see SIMAN, M. and M. SLAŠŤAN. *Právo Európskej únie: inštitucionálny systém a právny poriadok Únie s judikatúrou*. Bratislava: EUROIURIS – Európske právne centrum, 2012, p. 71 et seq.

4 Consolidated version of the Treaty on European Union.

5 The Article 50 notification letter from 29. 3. 2017. *European Council* [online]. 29. 3. 2017 [cit. 8. 10. 2020]. Available at: http://data.consilium.europa.eu/doc/document/XT-20001-2017-INIT/en/pdf

6 For a thorough and detailed description of the UK's withdrawal process see SLAŠŤAN, M. Uplatňovanie medzinárodných zmlúv Spojeného kráľovstva a členských štátov Európskej Únie po Brexite. In: KYSELOVSKÁ, T., D. SEHNÁLEK and N. ROZEHNALOVÁ (eds.). *In varietate concordia: soubor vědeckých statí k poctě prof. Vladimíra Týče*. Brno: Masarykova univerzita, 2019, pp. 325–346.

Later, on 19 October 2019, the UK requested an extension of the 31 October 2019 deadline. Hence, to allow more time to finalise the ratification of the Withdrawal Agreement, the European Council came to a decision, in agreement with the UK, to extend the period under Art. 50 until 31 January 2020. With that, the UK and EU entered a transition period.[7]

This article conceived in summer 2020 seeks to identify the main challenges caused by Brexit on cross border jurisdiction, recognition, and enforcement of judgements in civil and commercial matters between the UK and the EU. The goal of this article is to clarify the issue of post Brexit legal regime under Withdrawal Agreement which is final until the end of transitional period and (dubious) envisaged evolution which was discussed before future possible agreements.

2 The Analysis of the Withdrawal Agreement and Political Declaration on the Framework of the Future Relationship

The EU and the UK agreed on a revised Withdrawal Agreement[8] on 17 October 2019. This agreement was a key legal instrument which set out the conditions for the UK's withdrawal from the EU, building on the Joint Report of EU-UK Negotiators approved in December 2017. It was the result of difficult negotiations between the European Commission and the UK and became the crucial legal instrument for maintaining relations in the immediate aftermath of Brexit. It addressed the specific issues of the UK's exit from the EU in individual EU policies. In particular, its essence is to break free from the obligations arising from EU law and to provide a smooth transition to third country status. The aim of the Agreement is to provide legal certainty for citizens and businesses on both sides. However, the agreement does not address mutual relations after

7 The EU-UK Withdrawal Agreement. *European Commission* [online]. [cit. 8. 10. 2020]. Available at: https://ec.europa.eu/info/european-union-and-united-kingdom-forging-new-partnership/eu-uk-withdrawal-agreement_en

8 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community. *EUR-Lex* [online]. 31. 1. 2020 [cit. 8. 10. 2020]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22020A0131(01)

the end of the transition period. These are broadly covered by the Political Declaration[9] on the framework for future relations, which provides for the completion of further cooperation agreements in areas such as trade, transport, foreign affairs, defence and security.

The original date of the UK's withdrawal from the EU was to be 30 March 2019, two years after the initial notification, but it has been postponed several times at the request of the UK. The deadline was finally extended to 31 January 2020. Henceforth, the UK leaves the EU on 31 January 2020 and from the 1 February 2020 is no longer a Member State of the EU, and so it becomes a third country. Whereas both the UK and the EU have approved the Agreement, in accordance with Art. 126 of the Withdrawal Agreement, and introduced a transition period from 1. 2. 2020 to 31. 12. 2020[10] which could be extended once by one or two years[11]. In light of that, at a political summit with EU officials on 15 June[12], the British Prime Minister confirmed that the UK would not request an extension by 30 June 2020 and his attitude was confirmed.

During the transition period, Union law was meant to produce the same legal effects in the UK as those which it produces within the EU and it is to be interpreted and applied in accordance with the same general methods and principles as those applicable within the EU.[13] In particular, the Court of Justice of the European Union is competent in accordance with the provisions of the Treaties.[14] The aim of the transition period is to enable

9 Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom. *EUR-Lex* [online]. 12. 11. 2019 [cit. 8. 10. 2020]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12019 W/DCL(01)&from=FR

10 Art. 126 Withdrawal Agreement.

11 Ibid., Art. 132.

12 EU-UK Statement following the High-Level Meeting on 15 June 2020. *European Council* [online]. [cit. 8. 10. 2020]. Available at: https://www.consilium.europa.eu/en/press/press-releases/2020/06/15/eu-uk-statement-following-the-high-level-meeting-on-15-june-2020/

13 Art. 127 para. 3 Withdrawal Agreement.

14 Art. 131 of the Withdrawal Agreement states: *"During the transition period, the institutions, bodies, offices and agencies of the Union shall have the powers conferred upon them by Union law in relation to the United Kingdom and to natural and legal persons residing or established in the United Kingdom. In particular, the Court of Justice of the European Union shall have jurisdiction as provided for in the Treaties."*

citizens and businesses to adapt to the necessary changes and to create time to agree on a structure for future relations.[15]

The agreement also provides for the resolution of a number of operational issues related to the departure of the UK, such as movement of goods, data exchange, the issue of nuclear materials, customs procedures, protection of geographical indications, etc. The main principle linking these issues is to provide legal certainty in cases where a process starts before the moment of withdrawal and is expected to continue after that moment.

During the transition period, the UK is bound by the EU's international agreements with third parties but cannot participate in the activities of bodies set up under them or in negotiating new international agreements between the EU and third parties. The UK will not be able to provide civilian operations leaders or military mission heads, nor use its operational headquarters for such missions.

2.1 Judicial Cooperation in Civil and Commercial Matters with Regard to the Withdrawal Agreement

As it was mentioned in the previous section, after the end of the transition period, EU secondary law will lose its binding force in relation to the UK.[16] Such a situation gives rise to a number of questions of further validity of the most important regulations in the field of judicial cooperation in civil and commercial matters.[17] As we see, the Withdrawal Agreement thoroughly responds to the question of use of European instruments concerning the issue of judicial cooperation during the transition period.

2.1.1 Jurisdiction

The assessment of the jurisdiction of the courts of Member States in civil and commercial matters is determined by the application of the so-called

15 LAGERLÖF, E. Jurisdiction and Enforcement Post Brexit. *Nordic Journal of European law*, 2020, Vol. 3, no. 1, pp. 22–35.

16 Although the UK will initially keep secondary EU law in place: European Union (Withdrawal) Bill 2017. *Parliament of the UK* [online]. [cit. 8. 10. 2020]. Available at: https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/18005.pdf

17 DICKINSON, A. Back to the future: the UK's EU exit and the conflict of laws. *Journal of Private International Law* [online]. 2016, no. 35, p. 195 [cit. 8. 10. 2020]. Available at: http://dx.doi.org/10.2139/ssrn.2786888

Brussels regime, which in the field of international jurisdiction currently consists of the Brussels I bis Regulation18 and the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("2007 Lugano Convention"). There are several *lex specialis* regulations, which shall be conform with above mentioned instruments.

It is worth bearing in mind that the participation of the UK in this regime has from the beginning been determined by the UK's privileged position to decide for every EU secondary law, whether it would like to participate or not. The UK has frequently used opt-out clauses[19] to exclude themselves from regulations or directives adopted within the EU. As examples, those that affect the social policy, the Economic and Monetary Union – Eurozone, the Charter of EU Fundamental Rights, or the Schengen Agreement.[20] Under Withdrawal Agreement a transition period created until 31 December 2020 basically means that EU law continues to apply within UK. Thus, the position here is clear. As it follows from the provisions of the Withdrawal Agreement, the rules on enforcement and jurisdiction will generally continue to apply.[21] The basic criterion is that, both in the UK and in the Member States in "situations involving the UK", the provisions now in force of the EU law on international judicial competence will be applied to all judicial proceedings initiated before the end of the transition period. Specifically, Art. 67 refers to the rules of judicial competence contained in Brussels I bis Regulation; EUTM[22], Community designs[23], Plant varieties[24],

18 Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

19 See Protocol (No. 20) on the application of certain aspects of Article 26 of the Treaty on the Functioning of the European Union to the United Kingdom and to Ireland, Protocol (No. 21) of the Lisbon Treaty, on the position of the United Kingdom and Ireland, in relation to the Area of freedom, security and justice, and Protocol (No. 25) on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland (1992), annexed to the Treaty establishing the European Community.

20 Recital 40 Brussels I bis Regulation.

21 Art. 67 Withdrawal Agreement.

22 Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark.

23 Council Regulation (EC) No. 6/2002 of 12 December 2001 on Community designs.

24 Council Regulation (EC) No. 2100/94 of 27 July 1994 on Community plant variety rights.

GDPR[25], Brussels II bis Regulation[26], Maintenance Regulation[27] and Directive 96/71/CE (Posting of workers)[28]. In addition, the application of the provisions on jurisdiction with respect to the processes or related actions under the rules on *lis pendens* and relatedness to the judicial proceedings initiated before the end of the transition period is foreseen. Specifically, for these purposes, reference is made to Art. 29, 30 and 31 of the Brussels I bis Regulation, Art. 19 of the Brussels II bis Regulation and Art. 12 and 13 of the Maintenance Regulation. Consequently, in regard to the interaction between the processes started before the end of the transition period and other processes, the aforementioned rules on *lis pendens* and connectedness will apply. This may be of special interest in relation to the primacy that Art. 31(2) Brussels I bis Regulation attributes to the procedures based on a choice of forum agreement.

As it is clear from the wording of the provisions of the Withdrawal Agreement, the jurisdiction during the transition period has not been altered, thus the Brussels regime continues to apply until the end of transition period.

2.1.2 Recognition and Enforcement

The Withdrawal Agreement also clearly regulates the issue of recognition and enforcement of judgements, in the UK, and in the Member States. Wording of Art. 67(2) of the Withdrawal Agreement establishes that, in situations concerning the UK regarding the recognition regime and the enforcement of judgements shall continue under Brussels I bis Regulation (or lex specialis instruments[29]). This fundamental instrument shall apply

25 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

26 Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000.

27 Council Regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

28 Directive 96/71/ec of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

29 Eg. Regulation (EC) No. 2201/2003, Regulation (EC) No. 4/2009, Regulation (EC) No. 805/2004.

to the recognition and enforcement of judgments given in legal proceedings instituted before the end of the transition period, and to authentic instruments formally drawn up or registered and court settlements approved or concluded before the end of the transition period.

3 Jurisdiction and Enforcement under Withdrawal Agreement after the Transition Period

Naturally, the UK's withdrawal from the EU raises a number of questions regarding possible solutions of the application of individual sources of law, as well as administrative or judicial decisions based on these sources after the end of the transition period. What still remains to be seen is whether we will be dealing with a soft Brexit[30] (in case of achieving a comprehensive agreement on future relations) or a hard Brexit[31] (in the absence of a new model of relations or its limitation to a free trade model).[32] Despite the existence of the Withdrawal Agreement, everything during 2020 indicated that it will be a hard Brexit. Uncertainty even persisted as to whether, in this area, it will be possible to establish a new framework for relations between the EU and the UK during the transition period.

The UK Government has at the earliest insisted on reaching only a free trade agreement[33] based on the one between the EU and Canada and, on the contrary, the EU offered a model of a more ambitious free trade agreement (without tariffs or quotas) but where the regulations on both sides

30 Definition of soft Brexit given by the European Parliament: *"in this scenario, the UK swiftly leaves the EU, but negotiations take place for the UK to remain part of the single market and customs union (but gives up rights over influencing single market rules)."* See Brexit glossary. *Terminology Coordination European Parliament* [online]. [cit. 8. 10. 2020]. Available at: https://termcoord.eu/2019/01/brexit-glossary/

31 Definition of hard Brexit given by the European Parliament: *"if the UK leaves EU quickly, with the likelihood of a basic free trade agreement with the EU."* See Brexit glossary. *Terminology Coordination European Parliament* [online]. [cit. 8. 10. 2020]. Available at: https://termcoord.eu/2019/01/brexit-glossary/

32 Interesting view on the issue of possible variants of Brexit deal see Antonello, M. Hard Brexit, Soft Brexit, Smooth Brexit. Definition a confront. *Iperstoria* [online]. 2020, no. 15, pp. 345–359 [cit. 8. 10. 2020]. Available at: https://iperstoria.it/article/view/605/63

33 Boris Johnson speech entitled "Unleashing Britain's Potential" on 3. 2. 2020. *GOV.UK* [online]. [cit. 8. 10. 2020]. Available at: https://www.gov.uk/government/speeches/pm-speech-in-greenwich-3-february-2020

of the channel should be aligned (level-playing field) in multiple regulatory areas (fiscal, social, environmental, etc.).

Contrary to the express rules set out in Withdrawal Agreement with clear transitional rules on cross border UK-EU civil judicial cooperation, Trade and Cooperation Agreement[34] *does not contain any new model* of relations between the UK and the EU in this area.

Furthermore, the Political Declaration does seem to leave behind the relevant guidance to the area of future judicial cooperation in civil and commercial matters, hence before the end of 2020 we could elaborate possible variants of future applicability of the *acquis* and international arrangements. On one hand, Brexit will undoubtedly be a significant interference with existing European law, on the other hand it provides quite a clear stage for new possible regimes of regulations of international jurisdiction and enforcement.

3.1 The Current *status quo*

During transition period rules governing jurisdiction and enforcement has applied for the UK as a EU Member State and were governed by the Brussels Regime consisting of the Brussels I bis Regulation[35] and the 2007 Lugano Convention. This system thus organically follows the principles contained in the Brussels Convention, the Brussels I Regulation and the original Lugano Convention which, in addition to the EU Member States, binds Switzerland, Norway and Iceland.

As indicated in the previous chapter relating to the Withdrawal Agreement, all the current (or pre-Brexit) regulations continued to apply during the transition period. However, their subsequent application remains a question we can further analyse.

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34 Trade and cooperation agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part. *Official Journal,* L 444, 31. 12. 2020, p. 14–1462.

35 The Brussels I bis Regulation replaced Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I Regulation"), which had, itself, replaced the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters ("Brussels Convention"), which was given the force of law in the UK by section 2(1) of the Civil Jurisdiction and Judgments Act 1982.

The Brussels I bis Regulation is a comprehensive regulation concerning the determination of international jurisdiction. The Regulation therefore applies, according to which, in the absence of a choice of court, the court of the Member State in which the defendant is domiciled, unless one of the exceptions applies. Such an exception may be, for instance, the designation of jurisdiction in the case of a claim for performance of a contract, damages, counterclaim, or special jurisdiction for insurance contracts, consumer or employment contracts, as well as exclusive jurisdiction for proceedings concerning real estate rights, public registers, industrial rights, enforcement of judgements or disputes concerning the status and internal issues of companies.

What recognition concerns, under the Brussels I bis Regulation, judgments from a Member State are, in principle, automatically recognised in the other Member States and, as such, may be enforced there.[36] Non-recognition is only possible in very narrowly defined cases, such as a breach of public policy or the presence of a previous judgment in the same case. However, it is never possible to review a recognised decision on the merits.

3.2 Possible Variants

If the UK's negotiating position has, to a large extent, been reflected in the text of the Withdrawal Agreement in regards to the terms of the separation, the same cannot be said of its claims regarding the future relationship in this area. Although, at present, the hypothesis of bilateral solutions that allow European legislation to survive under the new UK-EU Agreement seems to be largely abandoned, there is a possibility of starting negotiations on a new model of relations. There are essentially the following options:[37]

- The 2007 Lugano Convention,
- The Hague Conference on Private International Law,
- The Brussels Convention,
- Bilateral Agreements and
- National Law.

36 Art. 36 Brussels I bis Regulation.

37 SACCO, M. *Brexit: A Way Forward*. Wilmington, Delaware: United States Vernon Press, 2019, pp. 255–298.

a) The 2007 Lugano Convention

One of the existing instruments by which the UK could stay close to a favourable regime for the recognition and enforcement of judgments in the EU (and vice versa) is the 2007 Lugano Convention.

The current Lugano Convention was adopted in 2007 as an amendment and revision of the original Lugano Convention of 1988, the political aim of which was to extend the Brussels regime to the European Free Trade Association ("EFTA") States whose members are currently Iceland, Liechtenstein, Norway and Switzerland. It is, by its nature, a separate international convention with no further direct links to Community law.[38]

The positive side of the new wording of the 2007 Lugano Convention is that it reflects the state of adaptation of the Brussels I Regulation before its revision[39] and it is largely identical to the Brussels I Regulation in terms of the subject matter, scheme and content of its provisions on jurisdiction. That is to say, the Convention works with the basic possibility of suing persons in their State of residence. The special rules then apply in particular to actions arising from contracts, maintenance or unlawful acts, where, in accordance with the Brussels I Regulation, it is used as a border determinant instead of a harmful event. Specific jurisdiction can be found in disputes concerning insurance, consumer contracts and individual employment contracts. In matters relating to tenancy and property rights, the courts of the State in which the property is situated have exclusive jurisdiction. However, the Convention is limited in two crucial aspects:

The first concerning fact is that, the 2007 Lugano Convention doesn't support jurisdiction agreements unless at least one of the parties is domiciled in a Lugano state.[40] Although there is a requirement for a chosen court to be located in a Lugano state, it is insufficient.[41] In other words, English jurisdiction agreements in many international contracts are outside the scope of Lugano, whether the UK re-joins it or not.

38 LYSINA, P. and M. ĎURIŠ. *Medzinárodné právo súkromné.* Bratislava: C. H. Beck, s. r. o., 2016, pp. 221–230.

39 The Brussels I Regulation as a predecessor of the current Brussels I bis Regulation.

40 Art. 23 para. 1 the 2007 Lugano Convention.

41 The Regulation similarly supports jurisdiction agreements only where they identify the courts of one or more EU Member States. However, the domicile of the parties is irrelevant (Art 25 para. 1 the 2007 Lugano Convention).

Another emerging issue regarding the application of the 2007 Lugano Convention is the possibility of the return of the so-called Italian Torpedo. This term is used to describe a tactical initiation of legal proceedings, which seeks to obtain a negative declaratory judgement. Such proceedings are often initiated by a party who has reason to believe that infringement proceedings may be instituted against themselves in the short term. They are therefore characterised by the prompt initiation by a party of proceedings for a non-infringement judgement for a possible dispute.[42] The tactic works because Lugano (like the Brussels I bis Regulation) prevents parallel litigation by requiring all other courts to stay proceedings while the 'court first seized' decides whether or not it has jurisdiction.[43] However, the Brussels I bis Regulation makes an exception here for courts chosen in exclusive jurisdiction agreements, which are allowed to proceed with a case in any event, subject to limited exceptions.[44] Whereas Lugano makes no such exception and proceedings in the chosen court are often delayed for a long period as a result.[45]

What further becomes quite problematic is the fact that, the Lugano Convention is not open to accession by any state and the accession period takes at least three months to join which can be extended up to 1 year, so the UK's accession to the Convention may not be as straightforward as it may seem. In regard to Art. 72 of the Convention, the UK accession requires an unanimous consent of all the current contracting parties including the EU.[46] For the moment, the EFTA countries (Switzerland, Norway and Iceland) have expressed their willingness for the UK to formalise its accession before the end of the transition period, but it remains to be seen what the fundamental positions of the EU and Denmark are.[47] In practice,

42 Verón, P. ECJR Restores Torpedo Power. *Veron* [online]. [cit. 8. 10. 2020]. Dostupné z: http://www.veron.com/publications/Publications/ECJ_Restores_Torpedo_Power.pdf

43 Art. 27 Brussels I bis Regulation.

44 Art. 31 para. 2 Brussels I bis Regulation.

45 Brexit fog and UK court judgments. *Clydeco* [online]- [cit. 8. 10. 2020]. https://www.clydeco.com/en/brexit/2020/07/brexit-fog-and-uk-court-judgments

46 Art. 72 the 2007 Lugano Convention.

47 Support for the UK's intent to accede to the Lugano Convention 2007. *GOV.UK* [online]. [cit. 8. 10. 2020]. Available at: https://www.gov.uk/government/news/support-for-the-uks-intent-to-accede-to-the-lugano-convention-2007

this means that the UK should obtain the EU's and Denmark's consent to its joining, and then take the necessary procedural steps, by 1 October 2020.[48] Further to this, there is little doubt about the positive recommendation for the UK to join Lugano from the part of the EU based on the argument of the single market coherency. While there should not be any reason for continuing membership of the single market as a prerequisite to accession to the Lugano, the argument of the Commission seems to shift into political positioning and may influence the acceptance from the EU side.

It should be pointed out, that UK Government has requested to join the Lugano Convention[49] for the UK as an individual member.[50] The rules contained in the Convention are crucial for all parties when they consider which jurisdiction clauses to include in their contracts. By virtue of Art. 127 of the Withdrawal Agreement, the UK is, for the present, already a member of the Convention. If this UK accession were to occur, it certainly represents an interesting solution since the Convention would be applicable both to relations between the UK and the EU's members, and to the UK's relations with Switzerland, Norway and Iceland. However, it should be remembered that the Lugano Convention 2007 does not currently have any round of negotiations aimed at its modification and that it corresponds to the content of Brussels I Regulation, antecedent of the current Brussels I bis Regulation, so that its ratification would not fail to entail a certain technical setback in the UK's relations with the rest of the EU's members.

In either case, adherence to the Lugano Convention would not, as far as its implementation is concerned, place UK court judgements in the same situation as they are currently, in application of the Brussels I bis Regulation. Although the reasons why it is possible to oppose recognition or enforcement are, with some differences related to the control of the jurisdiction of the court of origin, substantially the same in the two texts and so are the

48 Art. 63 para. 1 the 2007 Lugano Convention.

49 Notification to the Parties of the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, concluded at Lugano on 30 October 2007. *Federal Department of Foreign Affairs FDFA* [online]. 14. 4. 2020 [cit. 8. 10. 2020]. Available at: https://www.eda.admin.ch/dam/eda/fr/documents/aussenpolitik/voelkerrecht/autres-conventions/Lugano2/200414-LUG_en.pdf

50 Current member position of the UK derives from the EU member status so after the end of transition period EU law ceases to apply.

pathways to recognition, the procedure for obtaining the execution differs: while in the Brussels I bis Regulation the requirement of exequatur for the execution of foreign sentences has been eliminated, so that it is possible to directly urge in the Member States the execution of the sentence from any other of them, corresponding the execution judge controls the opposition motives, in the Lugano text the requirement of exequatur is maintained.[51]

b) The Hague Conference on Private International Law

Another proposal that may have immediate effectiveness has been the independent ratification by the UK of those Conventions of the Hague Conference that currently bind the UK by virtue of its status as a EU Member State. The Hague Conference on Private International Law is an international governmental organisation whose purpose lies on the progressive unification of Private International Law standards.[52] As a result of its work, there have been several instruments issued (conventions, protocols, principles) governing private international law issues.[53]

For the UK, as an aspect of undoubted practical relevance, it should be remembered that prior to its withdrawal from the EU, the UK was bound by the Hague Convention on Choice of Court Agreements[54] as a member of the EU (which is a party of the aforementioned Convention). In order to continue being bound by this instrument after leaving the EU, the UK submitted its accession to it.[55]

51 En caso de *brexit* sin acuerdo, el Convenio de Lugano no será aplicable automáticamente al reconocimiento de resoluciones procedentes del Reino Unido. *GA_P* [online]. April 2020 [cit. 8. 10. 2020]. Available at: https://www.ga-p.com/wp-content/uploads/2019/04/En-caso-de-brexit-sin-acuerdo-el-Convenio-de-Lugano.pdf

52 Art. 1 Statute of the Hague Conference on Private International Law. *HCCH* [online]. [cit. 8. 10. 2020]. Available at: https://www.hcch.net/en/instruments/conventions/full-text

53 For the full list of the instruments see Conventions, Protocols and Principles. *HCCH* [online]. [cit. 8. 10. 2020]. Available at: https://www.hcch.net/en/instruments/conventions

54 Hague Convention on Choice of Court Agreements of 30 June 2005.

55 As collected by the information of the Depositary of the Agreement. Notification pursuant to Article 34 of the Convention. *Ministry of Foreign Affairs of the Kingdom of the Netherlands* [online]. [cit. 8. 10. 2020]. Available at: https://treatydatabase.overheid.nl/en/Treaty/Details/011343/011343_Notificaties_23.pdf

The Hague Convention on Choice of Court Agreements shall apply to the UK from its original entry into force date of 1 October 2015.[56]

The ratification of the Hague Convention on Choice of Court Agreements is of interest for its future application in relations between the UK and the EU's Members, in addition to Mexico, Singapore and Montenegro. What should also be considered is that it has its limitations in attention to the smaller material scope of the Convention since it is only temporarily applicable with respect to the choice of forum agreements formalised after the entry into force of the Convention itself for the State that must apply it, so the agreements of the choice of forum held prior to the Brussels I Regulation may not automatically become governed by the Hague Convention on Choice of Court Agreements.[57]

In the light of the Hague Conference of Private International Law, another instrument that may be of interest to the UK, in the long term, is the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters ("Hague Judgments Convention"). However, the Convention is not in force and only has only two signatures at the moment (Uruguay and Ukraine) and does not have any ratification or accession. As the Convention was drawn up over a process of more than a decade (after the approval of the Hague Convention on Choice of Court Agreements that would become its antecedent) considering the EU Member States' relations with third States, and particularly in relation to the US, Brexit adds an additional dimension of future to this Convention, but precisely for this reason the EU will find itself in need of further study of the implications of the ratification of this Convention.[58]

This Hague Judgments Convention simply states that the courts of the Contracting States will respect and recognise judgments handed down by the courts of the state whose jurisdiction is chosen between entrepreneurs.

56 It was given the force of law in domestic law on 1 January 2021 by the Private International Law (Implementation of Agreements) Act 2020, which also amended the Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005) (EU Exit) Regulations 2018.

57 CHECA MARTÍNEZ, M. Brexit Y Cooperación Judicial Civil Internacional: Opciones Para Gibraltar. *Cuadernos de Gibraltar* [online]. 2019, no. 3 [cit. 8. 10. 2020]. Available at: https://doi.org/10.25267/Cuad_Gibraltar.2019.i3.1306

58 Ibid.

It follows from the foregoing that the scope of that convention is very limited and cannot in itself serve as a substitute for the Brussels I Regulation or the Lugano Convention.

c) Brussels Convention Revival

In relation to the above, there is theoretically a possibility of "reviving" the old Brussels Convention. The first convention was ratified by the UK and has not been formally denounced. However, this possibility is, at least, doubtful, given that the Brussels Convention was adopted on the basis of the old Art. 220 of the Treaty establishing the European Community, which allowed Member States to conclude agreements between them – when necessary – to ensure, among other things, the simplification of the formalities to which the recognition and reciprocal execution of judgements and arbitration awards are subject.[59]

This could be alternatively used as an option, but this path is very uncertain, as it was by its nature binding only on EU Member States and, as such, has not been ratified by a number of current Member States which have acceded to it.[60]

d) Bilateral Agreements

In addition to the aforementioned conventions, the path of historical bilateral agreements shall be considered. However, in regards to the applicability of the bilateral agreements concluded between the UK and EU Member States before the existence of the EU and its *acquis*, it is crucial to examine whether the suspension of the implementation of bilateral agreements relating to jurisdiction and enforcement has not been invalidated under the rules of public international law, in particular the Vienna Convention on the Law of Treaties ("VCLT").[61]

59 In the event of a no-deal Brexit, the Lugano Convention will not automatically apply to the recognition of judgements from the UK. En caso de *brexit* sin acuerdo, el Convenio de Lugano no será aplicable automáticamente al reconocimiento de resoluciones procedentes del Reino Unido. *GA_P* [online]. April 2020 [cit. 8. 10. 2020]. Available at: https://www.ga-p.com/wp-content/uploads/2019/04/En-caso-de-brexit-sin-acuerdo-el-Convenio-de-Lugano.pdf

60 LAGERLÖF, E. Jurisdiction and Enforcement Post Brexit. *Nordic Journal of European law*, 2020, Vol. 3, no. 1, pp. 22–35.

61 Vienna Convention on the Law of Treaties. *United Nations Treaty Collection* [online]. [cit. 8. 10. 2020]. Available at: https://treaties.un.org/doc/publication/unts/volume%20 1155/volume-1155-i-18232-english.pdf

What seems relevant to the question of the continuing force of the bilateral agreements is the wording of the Art. 59 of the VCLT which describes situations in which a treaty *"shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter"*.[62] Furthermore, the Art. 59(2) of the VCLT states that the performance of an earlier contract shall be considered only as a suspension, as follows from the later contract or if it is otherwise confirmed that this was the intention of the parties.

In particular, it is questionable to what extent the term "later contract" in Art. 59 VCLT in EU law means, while the adoption of Brussels I bis Regulation (including its predecessors) and other relevant EU regulations could also be understood as such.

We assume that the bilateral agreements according to the provisions of the VCLT should not be used automatically. Instead, bilateral agreements should rather be re-established in order to be eligible for their continuing applicability. Assuming the bilateral agreements concluded before the existence of EU will not be automatically renewed, then the path of the use of national private international law rules remains.

e) National Law

In view of the above-mentioned problems of alternative variants for jurisdiction and recognition and enforcement of judgments, it must be stated that the only remaining way is probably to use the relevant rules of private international law in national legal systems. Jurisdiction of EU Member States courts with British element (basically when defendant is domiciled in UK) shall be considered always under national Private International Law (certainly as a last option and a source of law that must give a final answer to the national court). UK judgments will subsequently thus still be enforceable in other the EU-27 states under national law whether under the exequatur procedure or otherwise.[63]

62 Art. 59 VCLT.

63 The impact of Brexit on the enforcement of English court judgments in the EU and drafting the jurisdiction agreement. *Druces LLP* [online]. [cit. 8. 10. 2020]. Available at: https://www.druces.com/the-impact-of-brexit-on-the-enforcement-of-english-court-judgments-in-the-eu-and-drafting-the-jurisdiction-agreement/

As for the jurisdiction, recognition and enforcement of judgments from the UK in the Czech Republic, it will be governed by Act No. 91/2012 Coll., on Private International Law, as amended, specifically the provisions of Sections 14 to 16.[64]

The same will apply to Slovak Republic. Proceedings initiated after withdrawal will be assessed according to the provisions of the Act. No. 97/1993 Coll., on Private International Law[65], which are largely comparable to the Brussels I bis Regulation in the basic criteria.[66]

The UK will act in accordance with the national law which it applies to third countries. The above procedures will apply unless the UK becomes a Contracting Party to the Lugano Convention (on the basis of a special application).

4 Conclusion

It is undeniable that Brexit opens a new period of uncertainty for many companies, professionals and individuals with commercial and social interests in EU and the UK. The social, economic, political and legal consequences of Brexit for the EU as a whole still remain unpredictable.

The cease of application of EU law in the UK will have notable drawbacks in all areas, and fundamentally in the field of civil judicial cooperation, whose regulations and facilitation instruments have been essential in allowing its development. The Union has made a profound effort to harmonise, with the aim of creating a system of legal integration that contributes to social development. All this will affect the European procedures in civil and commercial matters, and therefore, the competition rules, the conflict rules, the recognition and enforcement of judgements, the system of notifications and transfer of documents, or the obtaining of tests, among many others.

64 Act No. 91/2012 Coll., on Private International Law (Czech Republic).

65 Act No. 97/1963 Coll., on Private International Law and Rules of International Procedure (Slovak Republic).

66 No Deal Brexit, vplyvy a opatrenia. *Ministry of Foreign Affairs of Slovak Republic* [online]. 1. 7. 2019 [cit. 8. 10. 2020]. Available at: https://www.mzv.sk/documents/10182/3774859/190701_BREXIT_brozura_datum.pdf/b08bd372-b545-42a4-8d43-115db687bea9

Indeed, leaving the Union affects European Private International Law, made up of a wide and varied set of legal instruments. The different existing regulations regarding on jurisdiction and enforcements of judgements, which we have commented throughout these pages, will cease to apply in the UK, which translates into a lack of legislative uniformity and obstacles. It is foreseeable that an effective civil judicial cooperation system will be negotiated between the two. These regulations currently provide an important degree of harmonised certainty on how to deal with the day-to-day problems that arise in EU cross-border conflicts, and Brexit will inevitably undermine this certainty.

For the most part, EU law can still continue to subsist in future British law. It could be repealed, partially amended, or conversely, there will be no substantial changes.[67] As a matter of fact, the application of English judgments in the Union or of EU judgments in the UK will in no case benefit from the privilege of automatic cross-border enforcement as provided in Art. 36 of the Brussels I bis Regulation, therefore the exequatur procedure will be required, even if the UK adheres to the 2007 Lugano Convention.

All things considered, the most feasible option in the current situation seems to be the need to use national law on both sides. However, this brings together certain complications and pitfalls, and for successful recognition and enforcement of a judgement, it will be necessary to know and follow foreign law.

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67 See eg. The Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 or Private International Law (Implementation of Agreements) Act 2020.

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Mutual Trust between the Member States of the European Union and the United Kingdom after Brexit: Overview

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Abstract

The paper follows up on the arguments introduced in the author's article Mutual Trust as a Way to an Unconditional Automatic Recognition of Foreign Judgments. This paper, titled Mutual Trust between the Member States of the European Union and the United Kingdom after Brexit: Overview discusses, whether there has been a loss of mutual trust between the European Union and the United Kingdom after Brexit. The UK, similarly to EU Member States, has been entrusted with the area of recognition and enforcement of judgements thus far. Should the Member States decrease the level of mutual trust in relation to the UK only because the UK ceased to be part of the EU after 47 years? Practically overnight, more precisely, the day after the transitional period, should the Member States trust the UK less in the light of legislative changes? The article also outlines general possibilities that the UK has regarding which international convention it may accede to. Instead of going into depth, the article presents a basic overview. However, this does not prevent the article to answer, in addition to the questions asked above, how a choice of access to an international convention could affect the level of mutual trust between the UK and EU Member States.

Keywords

Brexit; Mutual Trust; Recognition of Foreign Judgments; Private International Law.

1 Introduction

The United Kingdom ("UK") acceded to the European Economic Community on 1 January 1973 and withdrew from the European Union

("EU") on 31 January 2020. The withdrawal has brought up several questions, namely how the relations between the EU and the UK after Brexit are going to look like, as well as a question of the application of the EU regulations of private international law. It is currently foreseen that the transitional period ends on 31 December 2020 and the UK will no longer be obliged to apply EU regulations.

The main focus is the recognition and enforcement of judgments in civil and commercial matters falling within the scope of application of the Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I bis Regulation"). In April 2020, the UK applied for access to the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the so-called Lugano Convention 2007, "Lugano Convention"). This announcement at least partially ended speculation regarding the UK's return to the application of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters ("Brussels Convention"), or accession to the Hague Convention on Choice of Court Agreements of 30 June 2005 ("Hague Convention on Choice of Court Agreements")[1], or accession to the mentioned Lugano Convention. In September 2020, the UK also acceded to the Hague Convention on Choice of Court Agreements.

Since the paper focuses on mutual trust, it is necessary to make a few introductory remarks on this principle. There is no widely accepted definition of mutual trust in the context of the EU law.[2] *Arenas García* defines mutual trust on the one hand as a legal obligation, on the other hand as a fact. The former means that all authorities of a Member State trust the authorities

1 To discuss whether the Hague Convention on Choice of Court Agreements constitutes an appropriate solution instead of the Brussels I bis Regulation as far as prorogation is concerned, see e.g. ZABLOUDILOVÁ, K. Choice of Court Agreements after Brexit. In: ROZEHNALOVÁ, N. (ed.). *Universal, Regional, National – Ways of the Development of Private International Law in 21st Century*. Brno: Masaryk University, 2019, pp. 266–314.

2 KRAMER, X. Cross-Border Enforcement in the EU: Mutual Trust versus Fair Trial: Towards Principles of European Civil Procedure. *International Journal of Procedural Law,* 2011, Vol. 1, no. 2, p. 218; HAZELHORST, M. *Free movement of civil judgments in the European Union and the right to a fair trial*. The Hague: T. M. C. Asser Press, 2017, p. 41.

of another Member State. The latter refers to the issue of whether Member States genuinely trust each other.[3]

In my previous article, I dealt with the question if it was trust in justice or in legislation. I concluded that we should distinguish between trust in legislation and trust in justice (that applies legislation).[4] In general, it is trust in the legal system and judicial institutions.[5] It is primarily a matter of fundamental rights that are adequately protected throughout the EU.[6]

Within the EU, we can distinguish between different levels of mutual trust according to whether a declaration of enforceability (an exequatur) is required and whether regulations of the EU contain grounds for refusal of recognition and enforcement of judgments. The highest level of mutual trust among EU Member States is given when regulations do not require the exequatur and grounds for refusal of recognition are abolished. This model constitutes a free movement of judgments. A lower level of mutual trust is given when regulations do not require the exequatur but grounds for refusal of recognition remain. The lowest level of mutual trust is given when regulations require the exequatur and contain grounds for refusal of recognition.[7]

Following the above-mentioned, this is a matter of mutual trust among EU Member States. Until now (December 2020), mutual trust has also been applied to decisions given by the courts of the UK. However, once EU regulations cease to be applied before UK courts, will trust of EU Member States be reduced in relation to decisions given by the UK courts? Will the reduction in mutual trust be so significant?

3 ARENAS GARCÍA, R. Abolition of Exequatur: Problems and Solutions – Mutual Recognition, Mutual Trust and Recognition of Foreign Judgements: Too Many Words in the Sea. In: BONOMI, A. and G. P. ROMANO (eds.). *Yearbook of Private International Law 2010. Vol. XII*. Lausanne: Swiss Institute of Comparative Law, Munich: Sellier European Law Publishers, 2011, p. 372.

4 MALACHTA, R. Mutual Trust as a Way to an Unconditional Automatic Recognition of Foreign Judgments. In: ROZEHNALOVÁ, N. (ed.). *Universal, Regional, National – Ways of the Development of Private International Law in 21st Century*. Brno: Masaryk University, 2019, pp. 214–216.

5 Judgment of the Court of Justice (First Chamber) of 16 July 2015, Case C-681/13, para. 63.

6 HAZELHORST, M. *Free movement of civil judgments in the European Union and the right to a fair trial*. The Hague: T. M. C. Asser Press, 2017, p. 235.

7 Ibid., p. 57.

First, the following article shall present the most important areas of private international law for which there are EU regulations, and it shall consider feasible solutions for the UK regarding what regulations to apply after Brexit. Then I shall discuss whether a "mere" change in legislation will change the approach of EU Member States to mutual trust in the recognition of judgments given by the courts in the UK.

2 Legal Sources for Recognition of Judgments – Civil and Commercial Matters

The issue of recognition and enforcement of judgments in civil and commercial matters falling within the scope of application of the Brussels I bis Regulation is the most common and important issue of the European private international law. Recognition of decisions under the Brussels I bis Regulation is not truly automatic. Although the regulation does not require exequatur which has been abolished compared to the Brussels I Regulation[8], it still contains grounds for a recognition refusal. Therefore, the regulation does not work with the highest possible mutual trust among Member States.

When the transitional period ends, there are several possibilities for the application of international treaties instead of the Brussels I bis Regulation – the Brussels Convention, the Hague Convention on Choice of Court Agreements, the Lugano Convention, the Hague Judgments Convention[9]. There is also an option to conclude a bilateral international treaty between the EU and the UK, as in case of the EU and Denmark. Last but not least, the application of national rules is possible.

The UK applied for accession to the Lugano Convention in April 2020. Lugano Convention is open to any state, but it is subject to the unanimous agreement of all the contracting parties – besides the possibility that the UK will become a future member of the European Free Trade Association

8 Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

9 Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters.

("EFTA").[10] While Iceland, Norway and Switzerland gave an affirmative opinion before the UK's application for accession, the EU (and Denmark) have not yet done so.[11]

The UK has also submitted the Instrument of Accession the Hague Convention on Choice of Court Agreements with the intention of ensuring continuity of application of this Convention in September 2020.[12] Accession to the Hague Convention on Choice of Court Agreements does not require the agreement of the contracting parties. Both the Lugano Convention and the Hague Convention on Choice of Court Agreements are likely to be applied in parallel.

2.1 Hague Convention on Choice of Court Agreements

As far as the recognition and enforcement judgments are concerned, there are differences in treatment of judgments under the Brussels I bis Regulation and the Hague Convention on Choice of Court Agreements. No special procedure is required for recognition if a judgment given in a Member State is recognised in the other Member State under the Brussels I bis Regulation.[13] In practice, it means that the judgment is recognized within another procedure, for instance in enforcement proceedings. Under the Hague Convention on Choice of Court Agreements a judgment given by a court of a Contracting State *"shall be recognised and enforced in other Contracting States in accordance with this Chapter"*[14] (the Chapter III of the Convention). It is stipulated, for example, that the procedure for recognition of the judgment is governed by the law of the requested State unless this Convention provides otherwise.[15]

10 Strengthening cooperation with Switzerland, Norway and Iceland: the Lugano Convention. *EUR-Lex* [online]. 31. 7. 2018 [cit. 23. 10. 2020]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Al16029

11 Support for the UK's intent to accede to the Lugano Convention 2007. *GOV.UK* [online]. 23. 1. 2020 [cit. 23. 10. 2020]. Available at: https://www.gov.uk/government/news/support-for-the-uks-intent-to-accede-to-the-lugano-convention-2007

12 Declaration/Reservation/Notification: Entry into force. *HCCH* [online]. 28. 9. 2020 [cit. 23. 10. 2020]. Available at: https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=1318&disp=eif

13 Art. 36 Brussels I bis Regulation.

14 Art. 8 para. 1 Hague Convention on Choice of Court Agreements.

15 See Art. 14 Hague Convention on Choice of Court Agreements.

Recognition under the Hague Convention on Choice of Court Agreements is therefore not automatic if the law of the requested State makes provision for special procedure for the recognition of a foreign judgment. If the law of the requested State makes no provision for any special procedure, a judgment will be recognised automatically.[16] However, such a designation ("automatically recognised") is not exact, for the same reason that the designation of "automatic recognition" is not accurate under the Brussels I bis Regulation, although recognition is often referred to as automatic.[17]

Recognition under the Brussels I bis Regulation cannot be automatic, as the Regulation provides the grounds for non-recognition of a judgment which the court of the addressed Member State may use on the application of any interested party.[18] The Hague Convention on Choice of Court Agreements also provides the grounds for refusal of recognition.[19] However, when comparing the grounds in the Brussels I bis Regulation and in the Hague Convention on Choice of Court Agreements, it can be stated that the list of grounds is broader in the Convention. For instance, the Hague Convention on Choice of Court Agreements stipulates that recognition may be refused if the agreement was null and void under the law of the State of the chosen court (unless the chosen court has determined that the agreement is valid), when there was a lack of party's capacity or if the judgment was obtained by fraud.[20] In addition, the grounds for a recognition refusal under the Hague Convention on Choice of Court Agreements do not have to be examined on the application of any interested party, but *ex officio*.[21] Lastly, one shall be remember that the Hague Convention on Choice of Court Agreements

16 HARTLEY, T. and M. DOGAUCHI. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements. *HCCH* [online]. 8. 11. 2013, p. 79 [cit. 27. 10. 2020]. Available at: https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf

17 See MALACHTA, R. Mutual Trust as a Way to an Unconditional Automatic Recognition of Foreign Judgments. In: ROZEHNALOVÁ, N. (ed.). *Universal, Regional, National – Ways of the Development of Private International Law in 21st Century*. Brno: Masaryk University, 2019, p. 226 and the literature cited therein.

18 Art. 45 Brussels I bis Regulation.

19 Art. 9 Hague Convention on Choice of Court Agreements.

20 Art. 9 letters a), b), d) Hague Convention on Choice of Court Agreements.

21 Ibid.

only applies to choice of court agreements. For more details, I hereby refer to the available literature and Explanatory Report to the Convention.[22]

The Brussels I bis Regulation mentions the principle of mutual trust in Recitals, point 26. It is stipulated that *"mutual trust in the administration of justice in the Union justifies the principle that judgments given in a Member State should be recognised in all Member States without the need for any special procedure"*.[23]

The Hague Convention on Choice of Court Agreements does not contain the principle of mutual trust in its wording. In general, it can only be stated that the Hague Conference on Private International Law ("HCCH") refers to mutual trust in its "strengths & values" on the basis of which world experts and delegates work together.[24] It is clear that the Hague Convention on Choice of Court Agreements is based on mutual trust among the contracting states. Otherwise, the states would not have to ratify or accede to the Convention.

One of the principal reasons why a recognition of a judgment could be refused is if such recognition manifestly contradicts public policy in the state that is to recognise a judgment of another state. The public policy clause is contained in both the Brussels I bis Regulation and the Hague Convention on Choice of Court Agreements.[25] The role of the public policy is to remedy any irregularities in the State addressed that have occurred in the State of origin.[26] However, this mechanism should only be used in exceptional

22 HARTLEY, C. T. *Choice-of-court Agreements under the European and International Instruments: the Revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*. Oxford: Oxford University Press, 2013, 495 p.; HARTLEY, T. and M. DOGAUCHI. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements. *HCCH* [online]. 8. 11. 2013, 103 p. [cit. 27. 10. 2020]. Available at: https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf; ZABLOUDILOVÁ, K. Choice of Court Agreements after Brexit. In: ROZEHNALOVÁ, N. (ed.). *Universal, Regional, National – Ways of the Development of Private International Law in 21st Century*. Brno: Masaryk University, 2019, pp. 266–314.

23 Recital 26 Brussels I bis Regulation.

24 Vision and mission. *HCCH* [online]. [cit. 27. 10. 2020]. Available at: https://www.hcch.net/en/about/vision-and-mission

25 Art. 9 letter e) Hague Convention on Choice of Court Agreements; Art. 45 para. 1 letter a) Brussels I bis Regulation.

26 HESS, B. and T. PFEIFFER. Interpretation of the Public Policy Exception as referred to in EU Instruments of Private International and Procedural Law. *Directorate-General for Internal Policies* [online]. 2011, p. 20 [cit. 24. 10. 2020]. Available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2011/453189/IPOL-JURI_ET(2011)453189_EN.pdf

cases. On the one hand, public policy can be perceived as an intruder to the principle of mutual trust as it provides a way for a refusal of recognition of a foreign judgment. On the other hand, it can strengthen the principle of mutual trust since the states distrust each other. If a possibility to apply the public policy clause for the state of enforcement exists, then a state can genuinely trust other states because there is a way how a recognition of a foreign judgment could be occasionally refused.[27]

Weller points out another difference in public policy clause and the principle of mutual trust regarding these legislations.[28] Article 6 letter c) of the Hague Convention on Choice of Court Agreements determines an obligation of a court not chosen. A court of a contracting state other than that of the chosen court shall suspend or dismiss proceedings. This does not apply if giving effect to the agreement would be manifestly contrary to the public policy of the state of the court seized.[29] The Brussels I bis Regulation does not provide any similar provision, it requires to rely exclusively on a public policy control *ex post* at the stage of recognition.[30] Brussels I bis Regulation excludes any national norm by which derogation of a jurisdiction of a Member State by a jurisdiction agreement (governed by the Brussels I bis Regulation) would be invalidated. The purpose is to ensure the predictability of jurisdiction and legal certainty.[31]

To sum up the above, neither the Brussels I bis Regulation nor the Hague Convention on Choice of Court Agreements recognize judgments automatically. The recognition procedure under the Convention is less automatic because it is governed in principle by the law of the requested state which can theoretically impose recognition requirements. The reasons for a recognition refusal are also broader under the Convention, in addition they

27 MALACHTA, R. Mutual Trust as a Way to an Unconditional Automatic Recognition of Foreign Judgments. In: ROZEHNALOVÁ, N. (ed.). *Universal, Regional, National – Ways of the Development of Private International Law in 21st Century*. Brno: Masaryk University, 2019, p. 234.

28 WELLER, M. Choice of court agreements under Brussels Ia and under the Hague convention: coherences and clashes. *Journal of Private International Law,* 2017, Vol. 13, no. 1, p. 102 et seq.

29 Art. 6 letter c) Hague Convention on Choice of Court Agreements.

30 WELLER, M. Choice of court agreements under Brussels Ia and under the Hague convention: coherences and clashes. *Journal of Private International Law,* 2017, Vol. 13, no. 1, p. 107.

31 Ibid., p. 108.

are applied *ex officio*. Mutual trust under the Hague Convention on Choice of Court Agreements is therefore lower than under the union regulation.

2.2 Lugano Convention

The purpose of the Lugano Convention is to extend the EU system to some European countries (the EFTA countries), specifically to Norway, Iceland, and Switzerland. For this reason, the provisions of the Lugano Convention are like the provisions of the Brussels I bis Regulation.[32] Of course, the Lugano Convention does not reflect the changes that have been adopted in the Brussels I bis Regulation. Thus, as far as the judgment recognition is concerned, there are differences in treatment of judgments between the Brussels I bis Regulation and the Lugano Convention.

Lugano Convention is considered to be appropriate because it has a much wider material scope of application, unlike the Hague Convention on Choice of Court Agreements. The Lugano Convention shall apply in civil and commercial matters.[33] There is a list of the excluded questions. But there are fewer excluded issues than under the Brussels I bis Regulation. It is worth noting, important for further reading, that the Lugano Convention also applies to maintenance obligations.

Some authors consider the application of the Lugano Convention to be inappropriate, in particular due to Protocol no. 2 of the Lugano Convention and due to the cultural divergences between the continental and the common law – anti-suit injunctions to name one such instance.[34] I shall focus solely on the issue of automatic recognition and the principle of mutual trust.

The main difference between the Brussels I bis Regulation and the Lugano Convention is that the Lugano Convention still requires a declaration of enforceability.[35] A special paragraph concerns the treatment of decisions in the UK. A judgment shall be enforced in the UK when it has been

32 HARTLEY, C. T. *Choice-of-court Agreements under the European and International Instruments: the Revised Brussels I Regulation, the Lugano Convention, and the Hague Convention*. Oxford: Oxford University Press, 2013, pp. 15–16.

33 Art. 1 Lugano Convention.

34 See for example HESS, B. The Unsuitability of the Lugano Convention (2007) to Serve as a Bridge between the UK and the EU after Brexit. *Max Planck Institute Luxembourg for Procedural Law*, 2018, no. 2, 10 p.

35 Art. 38 para. 1 Lugano Convention.

registered for enforcement.[36] Registration is one of the forms of treatment with a foreign decision. It requires a foreign judgment to be registered with a domestic court.[37] According to the Explanatory Report of Lugano Convention, the declaration of enforceability must be in some measure automatic. In the first step, only the formalities are examined. At this stage, the State of origin is trusted to act properly. Examination of the grounds for refusal of recognition is deferred to the second step.[38] In my opinion, this can be applied by analogy to registration.

As mentioned in the previous paragraph, mutual trust between the contracting states to the Lugano Convention is indicated only in the Explanatory Report. The principle of mutual trust is explicitly stated during the phase of declaration of enforceability in the Explanatory Report. This stage of treatment of foreign judgments (exequatur) was in the Brussels I Regulation but was abolished in the Brussels I bis Regulation. The abolition of the exequatur presupposes mutual trust.[39] The grounds for a recognition refusal under both the Lugano Convention and the Brussels I bis Regulation remain almost identical.[40]

Even though the Lugano Convention corresponds, except for minor differences, with the Brussels I Regulation, which sets out the principle of mutual trust in Recital 16[41], there is no reason to presume that the same level of mutual trust should exist among the contracting states to the Lugano Convention. However, there have been changes in the Brussels I bis Regulation that the Lugano Convention does not reflect – the abolition of exequatur in particular. In this respect, it should be noted that the current EU regulation provides a higher level of mutual trust than the Lugano Convention.

36 Ibid., Art. 38 para. 2.

37 HEYER, J. Výkon cizozemských rozsudků. *Zprávy advokacie,* 1963, p. 112.

38 POCAR, F. Explanatory Report of Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. *EUR-Lex* [online]. 23. 12. 2009, point 129 [cit. 28. 10. 2020]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009XG1223(04)&from=EN

39 See for example STORSKRUBB, E. Mutual Trust and the Limits of Abolishing Exequatur in Civil Justice. In: BROUWER, E. and D. GERARD (eds.). *Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law.* EUI Working Paper MWP 2016/13. San Domenico di Fiesiole: European University Institute, 2016, p. 18.

40 Art. 34 Lugano Convention; Art. 45 Brussels I bis Regulation.

41 Recital 16 Brussels I Regulation.

2.3 Other Options

Accession to the Hague Judgments Convention may become very useful in the future. So far, only two states have signed the Hague Judgments Convention – Ukraine, Uruguay.[42] In the future, one can expect the signing and accession of a large number of actors that participated in the preparation of the Hague Judgments Convention, for example the EU, China, USA, Canada, Russia or Japan.[43] Should the Hague Judgments Convention gain a large number of contracting states, the UK would be wise to accede to this Convention as well. As of today, the UK's accession to the Hague Judgments Convention would not have solved the fundamental question of how to deal with judgments, as this Convention has not yet entered into force. When it happens, it will be necessary to resolve the relationship with other (already existing) instruments.

The principle of mutual trust is not explicitly mentioned in either the Hague Judgments Convention or the Explanatory Report.[44] We can only refer to "strengths & values" of the HCCH where mutual trust is mentioned under the importance of the trust of world experts and delegates working together.[45]

The Hague Judgments Convention shall apply to the recognition and enforcement of judgments in civil or commercial matters.[46] Material scope is defined in a similar way as in the Brussels I bis Regulation and the Lugano Convention in regards to the recognition and enforcement of judgments. However, there is a broader list of excluded questions out

42 Status Table: Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters. *HCCH* [online] [cit. 28. 10. 2020]. Available at: https://www.hcch.net/en/instruments/conventions/status-table/?cid=137

43 Nová Haagská Úmluva je na světě. *Justice.cz* [online]. 4. 7. 2019 [cit. 28. 10. 2020]. Available at: https://www.justice.cz/web/msp/tiskove-zpravy?clanek=nova-haagska-umluva-je-na-sve-1

44 GARCIMARTÍN, F. and G. SAUMIER. Explanatory Report on the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters. *HCCH* [online]. 2020, 181 p. [cit. 28. 10. 2020]. Available at: https://assets.hcch.net/docs/a1b0b0fc-95b1-4544-935 b-b842534a120f.pdf

45 Vision and mission. *HCCH* [online]. [cit. 27. 10. 2020]. Available at: https://www.hcch.net/en/about/vision-and-mission

46 Art. 1 para. 1 Hague Judgments Convention.

of scope of the Hague Judgments Convention.[47] The list of excluded questions is similar to that set out in the Hague Convention on Choice of Court Agreements.[48]

A judgment shall be recognised (and enforced) in accordance with the provisions of the Chapter II of the Hague Judgments Convention.[49] Certain requirements must be fulfilled for recognition to be eligible.[50] The Convention further sets out the grounds for a recognition refusal.[51] Among others provisions, the Convention provides that *"the procedure for recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment, are governed by the law of the requested State unless this Convention provides otherwise"*.[52] We can conclude that the recognition and enforcement of judgments is not automatic. The level of mutual trust can be compared to the level of mutual trust as in the Hague Convention on Choice of Court Agreements.

The UK has not embarked on the process of application of the Brussels Convention. This is appropriate because, among other things, not all EU Member States are contracting parties to the Brussels Convention.

A conclusion of a bilateral convention between the EU and the UK would seem to be an acceptable solution. *Hess* gives some reasons why such a way would be appropriate.[53] Even from the point of view of the principle of mutual trust this would be an optimal option, if the bilateral convention included the application of the same rules on recognition and enforcement as in the still applicable Brussels I bis Regulation. Unfortunately, it seems that such a bilateral treaty will not be implemented.

The last option allowing each EU Member State to apply its national law will not occur in case the EU agrees to UK's accession to the Lugano Convention. The elemental difference is that national legal systems (including also Czech legal system) require a precondition of reciprocity in order for a foreign

47 Ibid., Art. 1 and 2.
48 See Art. 2 Hague Convention on Choice of Court Agreements.
49 Art. 4 para. 1 Hague Judgments Convention.
50 Ibid., Art. 5.
51 Ibid., Art. 7.
52 Ibid., Art. 13 para. 1.
53 HESS, B. The Unsuitability of the Lugano Convention (2007) to Serve as a Bridge between the UK and the EU after Brexit. *Max Planck Institute Luxembourg for Procedural Law*, 2018, no. 2, 10 p.

judgment to be recognized.[54] Reciprocity is not required for the application of an EU regulation or an international convention, as the condition of reciprocity is met by mere EU membership or the signing of an international treaty.[55] Under Czech law, recognition is not automatic, there are grounds for a recognition refusal.[56] Thus, the level of mutual trust is at a quite low level.

To sum up, regardless of which of these conventions above the UK will apply after Brexit, mutual trust will be lower than under the Brussels I bis Regulation. A more detailed analysis will be given in Chapter 4 of this article.

Within the EU, three other regulations are applied for recognition and enforcement judgements in civil and commercial matters, which aim to simplify their cross-border recognition and simplify the administration related to recognition.[57] These are the Small Claims Procedure Regulation[58], the European Payment Order Regulation[59] and the European Enforcement Order Regulation[60]. The existence of these three regulations does not prevent the parties from applying the Brussels I bis Regulation within the EU. Therefore, it is assumed that instead of these three regulations, the same solution as for the Brussels I bis Regulation will be used.

54 More to the condition of reciprocity and the approach of Czech legal doctrine see SEDLÁKOVÁ SALIBOVÁ, K. Reciprocity as a Presumption for the Recognition of Foreign Decision. In: ROZEHNALOVÁ, N. (ed.). *Universal, Regional, National – Ways of the Development of Private International Law in 21st Century*. Brno: Masaryk University, 2019, p. 242 et seq.

55 VALDHANS J. Uznání a výkon soudních rozhodnutí. In: ROZEHNALOVÁ, N., K. DRLIČKOVÁ, T. KYSELOVSKÁ and J. VALDHANS. *Úvod do mezinárodního práva soukromého*. Praha: Wolters Kluwer ČR, 2017, pp. 275–276.

56 See Art. 14 et seq. Czech Private International Act.

57 DRLIČKOVÁ, K. Kapitola IV. In: ROZEHNALOVÁ, N., K. DRLIČKOVÁ, T. KYSELOVSKÁ and J. VALDHANS. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer ČR, 2018, p. 284 et seq.

58 Regulation (EC) No. 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure.

59 Regulation (EC) No. 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure.

60 Regulation (EC) No. 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims.

3 Legal Sources for Recognition of Judgments – Other Areas of Law

3.1 Maintenance Obligations

The second issue that deserves to be covered in more detail is the maintenance obligation. Recognition and enforcement of decisions in matters related to maintenance obligations is regulated at EU level by the Council Regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations ("Maintenance Regulation"). There are two ways of dealing with foreign decisions within this regulation, depending on whether the decisions given in a Member State are bound by the Hague Protocol on the law applicable to maintenance obligations[61] or not bound by that Protocol. The latter is applied to decisions given in the UK and Denmark.[62]

In the first mentioned way, followed by the majority of Member States, there is no special procedure for recognition of a judgment and there is no possibility of opposing its recognition and no need for a declaration of enforceability.[63] In other words, it constitutes an automatic recognition (free movement of decisions). In the second mentioned way, that applies to decisions given in the UK and Denmark, formal procedures such as a declaration of enforceability are required.[64] There are also grounds for refusal of a recognition.[65]

The Maintenance Regulation does not explicitly contain the principle of mutual trust in its wording. Nevertheless, it refers to the so-called Hague Programme in Recital 6. The Hague Programme (which was the European Commission's multiannual programme for years 2005–2009) underlined

61 Protocol of 23 November 2007 on the law applicable to maintenance obligations.
62 WALKER, L. *Maintenance and Child Support in Private International Law.* Oxford and Portland, Oregon: Hart Publishing, 2015, p. 97.
63 Art. 17 Maintenance Regulation.
64 Ibid., Art. 26.
65 Ibid., Art. 24.

the confidence-building and strengthening of mutual trust.[66] It is therefore clear that the regulation is based on the principle of mutual trust. However, for decisions given in the UK or Denmark, the Maintenance Regulation provides a lower level of mutual trust among Member States due to the need for more formal procedures than the approach taken for other Member States, where the Maintenance Regulation provides a very high level of mutual trust.

There has been a lower level of mutual trust in the application of EU regulations in the relation between the UK and EU. The Maintenance Regulation was prepared in parallel to the Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance ("Hague Maintenance Convention"). The Hague Maintenance Convention contains a comprehensive treatment for maintenance obligations.[67] It was ratified by the EU in 2014. The UK as a member of the EU was part of the Convention. However, after Brexit and the end of the transitional period, the UK will cease to be a party to the Convention. On 28 September 2020, the UK announced the ratification of the Hague Maintenance Convention with the intention of ensuring continuity of application of the Convention.[68]

In the previous chapter, it was stated that the UK had also applied for accession to the Lugano Convention. Maintenance does not belong to excluded questions from the material scope of the Lugano Convention, so the Lugano Convention shall also apply to the maintenance obligations.[69] The relationship between the Lugano Convention and the Hague Maintenance Convention is not explicitly stated in any of the conventions. In fact,

66 The Hague Programme: Strengthening Freedom, Security and Justice in the European Union. 2005/C 53/01. *EUR-lex* [online]. 3. 3. 2005, para. 3.2 [cit. 20. 10. 2020]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005XG0303(01)&from=EN

67 KYSELOVSKÁ, T. Kapitola V. In: ROZEHNALOVÁ, N., K. DRLIČKOVÁ, T. KYSELOVSKÁ and J. VALDHANS. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer ČR, 2018, p. 325.

68 Hague Conference on Private International Law. 38: Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance. Entry into force. *HCCH* [online]. 28. 9. 2020 [cit. 23. 10. 2020]. Available at: https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=1255&disp=eif

69 Art. 1 Lugano Convention.

the Hague Maintenance Convention does not affect any international instrument concluded before this Convention to which contracting states are parties and which contains provisions on matters governed by this Convention. The Hague Maintenance Convention also provides the most effective rule.[70] The relationship with other international conventions (generally defined) is also laid down in the Lugano Convention.[71]

Recognition and enforcement, their automaticity and mutual trust under the Lugano Convention, were discussed in the previous chapter. As with other Hague conventions, also the Hague Maintenance Convention does not contain the principle of mutual trust in its wording. It is clear that the Hague Maintenance Convention is based on mutual trust among the contracting states. Otherwise, the states would not have to ratify or accede to the Hague Maintenance Convention. Nevertheless, the Hague Maintenance Convention sets out the bases for recognition and enforcement, the grounds for refusing recognitions, as well as the procedure for application of recognitions.[72] Thus, it can be stated that mutual trust among the contracting states of the Hague Maintenance Convention is not so different from the approach taken in the Maintenance Regulation for States not bound by the Hague Protocol on the law applicable to maintenance obligations, including the UK. For a complete picture, I will add that the level of mutual trust in the Hague Maintenance Convention is significantly lower than among the EU Member States bound by the Hague Protocol on the law applicable according to the EU regulation.

To conclude, in the area of maintenance, the level of mutual trust after Brexit will remain approximately the same as before. A procedure for the recognition of judgments will be formal and non-automatic, a declaration of enforceability will be needed. At the same time, there will be grounds for the recognition refusal in both conventions – as in the Maintenance Regulation (for judgments given in the UK).

70 Art. 51 para. 1 and Art. 52 Hague Maintenance Convention.
71 Art. 68 and 69 Lugano Convention.
72 See Art. 20, 22, 23 Hague Maintenance Convention.

3.2 Insolvency

The highest level of mutual trust among EU Member States is in the area of insolvency under Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings ("Insolvency Regulation Recast"). The notion of automatic recognition is directly mentioned in its Recital.[73] In fact, the automatic recognition is immediate with no intermediate steps and is based on the principle of mutual trust. A judgment has the same legal effect in any Member State as in the State of the opening proceedings.[74] In other words, the practical consequence is that a foreign judgment has the same effect as if it was a domestic judgment.[75] Although recognition is determined as automatic, the Insolvency Regulation Recast allows one ground for a recognition refusal – public policy exception.[76] Public policy exception must be applied only in exceptional cases. This exceptionality is accentuated due its violation of the principle of mutual trust.[77]

The question which legislation will apply in the insolvency proceedings is not easy to answer. As part of the development of European insolvency law, the UNCITRAL Model Law on Cross-Border Insolvency of 1997 should be mentioned ("Insolvency Model Law").[78] As this Insolvency Model Law was prepared by the UN Commission on International Trade Law, it may be considered part of soft law. The Insolvency Model Law does not contain rules for determining international jurisdiction or applicable law but encompasses rules for recognition and enforcement. As *Carballo Piñeiro* points out, the rules are similar to those in the Insolvency Regulation Recast.[79]

73 Recital 65 Insolvency Regulation Recast.

74 Ibid., Art. 20 para. 1.

75 MAHDALOVÁ, S. *Evropské insolvenční právo – aktuální trendy, výzvy, budoucnost*. Brno: Masarykova univerzita, 2016, p. 63.

76 Art. 33 Insolvency Regulation Recast.

77 OBERHAMMER, P. Article 33. In: BORK, R. and K. Van ZWIETEN (eds.). *Commentary on the European Insolvency Regulation*. Oxford: Oxford University Press, 2016, p. 387.

78 UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation. *UNCITRAL* [online]. January 2014 [cit. 2. 11. 2020]. Available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf

79 CARBALLO PIÑEIRO, L. 'Brexit' and International Insolvency Beyond the Realm of Mutual Trust: Brexit and International Insolvency. *International Insolvency Review,* 2017, Vol. 26, no. 3, p. 274.

However, not all EU Member States have implemented the Insolvency Model Law (only four states have). If all Member States adopted it, the changes in insolvency after Brexit would not be major. In other words, implementing the Insolvency Model Law would lessen the impact of Brexit, because the sharing of common values of international insolvency would be maintained.[80] Nevertheless, recognition is not as automatic as under the Insolvency Regulation Recast. Still, there will be a loss of mutual trust after Brexit. The Insolvency Model Law provides for a much more demanding recognition and enforcement procedure than the Insolvency Regulation Recast. The effects of foreign insolvency proceedings are not equivalent to the effects in the sending states, as is the case in the Insolvency Regulation Recast.[81] In fact, the Insolvency Model Law requires application to a local court to gain recognition and relief.[82]

Since not all EU Member States have implemented the Model Law, domestic rules are likely to apply after Brexit. This seems to be the probable outcome, leaving no room for alternatives other than the application of the private international law rules of each Member State.[83] Inconsistences among Member States may be expected as their approaches will vary (due to a lack of statutory provision or developed jurisprudence).[84] Domestic rules usually stipulate several conditions for the recognition. The level of mutual trust is usually significantly lower compared to the Insolvency Regulation Recast.

3.3 Divorce

I will briefly outline the situation regarding the divorce process. Recognition of judgments relating to divorce among EU Member States is governed

80 Ibid., p. 274 and 293.

81 Ibid., p. 276.

82 UMFREVILLE, Ch., P. OMAR, H. LÜCKE et al. Recognition of UK Insolvency Proceedings Post-Brexit: The Impact of a 'No Deal' Scenario. *International Insolvency Review*, 2018, Vol. 27, no. 3, p. 427.

83 CARBALLO PIÑEIRO, L. 'Brexit' and International Insolvency Beyond the Realm of Mutual Trust: Brexit and International Insolvency. *International Insolvency Review*, 2017, Vol. 26, no. 3, p. 293; UMFREVILLE, Ch., P. OMAR, H. LÜCKE et al. Recognition of UK Insolvency Proceedings Post-Brexit: The Impact of a 'No Deal' Scenario. *International Insolvency Review*, 2018, Vol. 27, no. 3, p. 429.

84 UMFREVILLE, Ch., P. OMAR, H. LÜCKE et al. Recognition of UK Insolvency Proceedings Post-Brexit: The Impact of a 'No Deal' Scenario. *International Insolvency Review*, 2018, Vol. 27, no. 3, p. 443.

by the Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000 ("Brussels II bis Regulation"). The Brussels II bis Regulation refers to the principle of mutual trust in the recognition and enforcement of judgments.[85] Recognition is called automatic.[86] Such designation is inaccurate because the reasons for a recognition refusal are detailed within. We can only speak of an automatic recognition until it is decided that the foreign judgment cannot be recognised.[87] A declaration of enforceability for judgments relating to divorce is not required.

After Brexit, one of the possibilities for the UK courts would be the application of Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations ("Hague Divorce Convention"), which is still in force. However, not all EU Member States, unlike the UK, are Contracting States to this Convention.[88] The Hague Divorce Convention shall apply to the recognition of divorces and legal separations. It provides a similar list of grounds for a recognition refusal as the Brussels II bis Regulation. The Hague Divorce Convention does not require a declaration of enforceability. Enforcement of judgments is not regulated.[89] Considering a similar recognition process and similar grounds for a recognition refusal, the principle of mutual trust is approximately at the same level as the recognition under the Brussels II bis Regulation.

Bilateral international treaties or national law apply to states that are not parties to the Hague Divorce Convention. For the sake of completeness, in the UK, the Family Law Act 1986 plays an important role in this area as well.[90]

85 Recital 21 Brussels II bis Regulation.

86 NÍ SHÚILLEABHÁIN, M. *Cross-Border Divorce Law: Brussel II bis*. Oxford: Oxford University Press, 2010, p. 237.

87 SIEHR, K. Art. 21. In: MAGNUS, U. and P. MANKOWSKI (eds.). *European Commentaries on Private International Law (ECPIL). Commentary Brussels IIbis Regulation*. Köln: Verlag Dr. Otto Schmidt KG, 2017, p. 284.

88 Status Table Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations. *HCCH* [online]. 4. 6. 2016 [cit. 4. 11. 2020]. Available at: https://www.hcch.net/en/instruments/conventions/status-table/?cid=80

89 See Hague Divorce Convention.

90 NÍ SHÚILLEABHÁIN, M. *Cross-Border Divorce Law: Brussel II bis*. Oxford: Oxford University Press, 2010, p. 232 et seq.

3.4 Inheritance

There will be no change in matters of succession because the UK did not take part in the adoption of the Succession Regulation[91] and is not bound by it.[92] The treatment of judgments will follow the same rules as before Brexit.

4 Mutual Trust – Will It Change Significantly?

Mutual trust is one of the principles on which judicial cooperation in civil matters among EU Member States is based. The principle is stated either explicitly or by reference in individual EU regulations that apply in the field of private international law. However, mutual trust can be understood much more broadly – in general, whether one state trusts another state to apply the law properly via the court of the state of origin. It is on the latter level that the EU Member States will approach the UK after Brexit.

The main difference between mutual trust within the EU and mutual trust between the EU (or Member States) and non-EU Member States is as follows. Mutual trust within the EU is strengthened through the adoption of EU regulations that unify rules applicable to Member States. The level of mutual trust varies depending on whether the regulations require exequatur or whether they contain grounds for a recognition refusal, and the number and nature of such grounds. Analyses and evaluations of the regulations are carried out as if a declaration of enforceability is still really required or what the actual application of grounds for refusal is. For certain regulations, evaluations have already been carried out, for certain regulations not – especially those adopted in recent years.[93] It is thus possible that the declaration of enforceability will be abolished in those regulations which still require it. There will likely be no problem with changing the text of the regulations, as a new or recast EU regulations can be adopted. In general,

91 Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.

92 Recital 82 Preamble to the Succession Regulation.

93 See for example HAZELHORST, M. *Free movement of civil judgments in the European Union and the right to a fair trial.* The Hague: T. M. C. Asser Press, 2017, p. 49 and there the results of that study.

a regulation shall have general application and it shall be directly applicable in EU Member States.[94]

Mutual trust between Member States and non-Member States is strengthened by the adoption of international treaties which also unify rules for contracting states to the conventions. The principle remains the same – one contracting state trusts another state that its courts apply the law properly. In general, the level of mutual trust is lower because of the individual conventions usually provide the bases for recognition, the procedure of recognition or the grounds for a recognition refusal. Of course, the text of the conventions can be amended, which usually leads to the adoption of a new international treaty. States must accept an amendment to the convention or become a contracting party to a newly adopted convention. This may result in a small number of contracting parties. It may also result in an inconvenient situation for some states, for they can end up being bound by an older convention with stricter rules for the recognition and enforcement of judgments, while the rest enjoy a new convention with milder rules in this regard.

The relationship between the EU and the UK after Brexit will be governed either by international conventions or by national law. In both cases, mutual trust will be mostly reduced. In areas where the recognition of judgments (or insolvency proceedings) has been almost automatic so far, the change will be considerable.

However, a change in the sphere of mutual trust will not be a mere change in the application of legislation or in justice. In a way, it will be a change in the trust of the institution that works and adopts or approves the legislation. Judicial cooperation in civil matters within the EU is based on the principle of mutual trust – the principle is stated either explicitly or by reference in Recitals of the EU regulations as in secondary law.[95] It can be con-

94 Art. 288 Treaty on the Functioning of the European Union ("TFEU").

95 For an explicit statement see for example Recital 26 Brussels I bis Regulation, Recital 21 Brussels II bis Regulation, Recital 65 Insolvency Regulation Recast. For an implicit statement (by reference to the Hague Programme 2004) see for example Recital 5 Succession Regulation, Recital 6 Maintenance Regulation.

cluded that the principle is also indirectly expressed in EU primary law.[96] The Hague Conventions, which I have discussed in this article and which probably to be applied after Brexit, do not contain the principle of mutual trust in their text (neither explicitly or implicitly). The HCCH does not refer directly to the principle either, with the exception of the declared "strengths & values", where mutual trust is mentioned under the importance of the trust of world experts and delegates working together.[97]

The parties to the Hague Conventions place trust in one another to a certain degree, otherwise they would not accede to the Convention. However, the Hague Conventions lay down fairly strict rules for the recognition of judgments. For instance, they require the recognition procedure to be governed in principle by the law of the requested state, so that recognition is not automatic. In addition, some rules determine bases for recognition, some set out the procedure for the declaration of enforceability. They also contain the grounds for a recognition refusal. All this significantly reduces the level of mutual trust.

In the future, it would be helpful to consider setting minimum standards in the Hague Conventions to protect the right to a fair trial. Similarly, as minimum standards are set by some EU regulations. This is not a solution suitable only as a consequence of Brexit, but a generally conceptual solution for international conventions. As a result, setting minimum standards would prove more effective in regard to automatic recognition of judgments, thus increasing mutual trust. As the contracting states to the Hague Conventions may be from different continents, I would only keep the possibility of refusing recognition a public policy clause. Other grounds for refusing recognition could be abolished and replaced by minimum standards. If the conditions for the application of the public policy clause are observed (a manifest

96 For instance, *Prechal* subsumes mutual trust to the principle of sincere (loyal) cooperation. *Kramer* points out to the mutual respect. Both loyal cooperation and mutual respect are explicitly stated in Art. 4 para. 3 TFEU. See PRECHAL, S. Mutual Trust Before the Court of Justice of the European Union. *European Papers*, 2017, no. 1, pp. 91–92; KRAMER, X. Cross-Border Enforcement and the Brussels I-Bis Regulation: Towards a New Balance between Mutual Trust and National Control over Fundamental Rights. *Netherlands International Law Review*, 2013, p. 364; Art. 4 para. 3 TFEU.

97 Vision and mission. *HCCH* [online]. [cit. 27. 10. 2020]. Available at: https://www.hcch.net/en/about/vision-and-mission

contradiction with values of the state in which recognition is sought and which must be insisted on, sufficient intensity of the situation for the forum and its application only in exceptional cases)[98], then such a clause is not an obstacle to the automatic recognition. On the contrary, it can strengthen mutual trust. In this respect, the best solution seems to be the adoption of an agreement in the form of a bilateral convention between the UK and the EU.

5 Conclusion

The withdrawal of the UK from the EU will have an impact on judicial cooperation in civil matters in the area of recognition of judgments between the EU and the UK. Considering the principle of mutual trust, on which cooperation has continued so far, it will not change as dramatically in all matters as it might seem at first glance.

A more significant change, and thus a greater loss of mutual trust, will occur in areas where recognition has been considered (almost) automatic under EU regulations, especially in insolvency proceedings. A minor change, and thus approximately the same level of mutual trust, will occur in areas where rules for recognition of judgments have been established so far (more or less automatically) and where the regulations contain the grounds for a recognition refusal and require a declaration of enforceability. In particular, this includes matters of divorce and maintenance.

The area of natural interest is the change that will come to pass when the Brussels I bis Regulation ceases to apply before the UK courts. Whether the Hague Convention on Choice of Court Agreements or the Lugano Convention apply, in both cases the conventions work with lower mutual trust than the Brussels I bis Regulation. In the Lugano Convention, mutual trust is reduced by the requirement of a declaration of enforceability. In the Hague Convention, mutual trust is reduced by a broader list of grounds for refusing recognition that apply *ex officio* and by determining that recognition

98 ROZEHNALOVÁ, N. *Instituty českého mezinárodního práva soukromého.* Praha: Wolters Kluwer, 2016, pp. 179–180.

is governed in principle by the law of the requested state which can theoretically impose recognition requirements.

In conclusion, it remains to be seen what the very practice of recognition of judgments after Brexit will show and what the real functioning of recognition will look like.

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Is Hague Convention on Choice of Court Agreements the Way to Go?

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Abstract

The article demonstrates whether Hague Convention on Choice of Court Agreements and Brussels I bis Regulation are comparable legal instruments as far as choice of court agreements are concerned. The article analyses the mutual features of the two legal instruments as well as their divergences in terms of choice of court agreements. Therefore, the material and geographical scopes of application, the definition of "a choice of court agreement", the effects of choice of court agreements as well as the process of the recognition and enforcement under both legal regulations shall be compared. The main goal of this article is to demonstrate that Hague Convention on Choice of Court Agreements does not present a complete and comprehensive solution in terms of choice of court agreements when compared to Brussels I bis Regulation.

Keywords

Hague Convention on Choice of Court Agreements; Brussels I bis Regulation; Choice of Court Agreements.

1 Introductory Notes

The future of the direct application of provisions regarding jurisdiction and recognition and enforcement of judgments incorporated in Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I bis Regulation") seems to be coming to an end in the United Kingdom ("UK"). According to Art. 67 para. 1, 2 of Agreement on the withdrawal of the UK from

the European Union ("EU") and the European Atomic Energy Community No. 2019/C 384 /I/01 ("Withdrawal Agreement") provisions regarding jurisdiction and recognition and enforcement of judgments of Brussels I bis Regulation shall apply in the UK to legal proceedings instituted before the end of the transition period.[1] Brussels I bis Regulation, among other things, regulates choice of court agreements in its Art. 25.[2]

The UK, however, signed the Hague Convention on Choice of Court Agreements of 30 June 2005 ("Hague Convention on Choice of Court Agreements") on 28 December 2018.[3] Hague Convention on Choice of Court Agreements is an international legal instrument providing framework for rules on choice of court agreements.[4] It aims to establish an international legal regime that ensures the effectiveness of choice of court agreements between parties to commercial transactions and governs the recognition and enforcement of judgments resulting from proceedings based on such agreements.[5]

Therefore, Hague Convention on Choice of Court Agreements is perceived as an alternative jurisdictional regime for cases involving choice of court agreements.[6] This article aims to demonstrate that Hague Convention on Choice of Court Agreements does not present a complete and comprehensive solution in terms of choice of court agreements for the UK compared to Brussels I bis Regulation.

1 Art. 67 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community. *EUR-Lex* [online]. 12. 11. 2019 [cit. 1. 8. 2020]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1580206007232 & uri=CELEX%3A12019W/TXT%2802%29

2 Art. 25 Brussels I bis Regulation.

3 Choice of court section. *HCCH* [online]. [cit. 1. 8. 2020]. Available at: https://www.hcch.net/en/instruments/conventions/specialised-sections/choice-of-court

4 BREKOULAKIS, L. S. The Notion and the Superiority of Arbitration Agreements over Jurisdiction Agreements: Time to Abandon It? *Journal of International Arbitration,* 2007, Vol. 24, no. 4, p. 345; see also NEWING, H. and L. WEBSTER. Could the Hague Convention on Choice of Court Agreements Bring Greater Certainty for Cross-Border Disputes Post Brexit: And What Would This Mean for International Arbitration. Third-Party Funders in International. *Dispute Resolution International*, 2016, Vol. 10, no. 2, pp. 105–117.

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6 BEAUMONT, P. and M. AHMED. I thought we were exclusive? Some issues with the Hague Convention on Choice of Court Agreements on Choice of Court, Brussels Ia and Brexit. *abdn.ac.uk* [online]. 21. 9. 2017 [cit. 1. 8. 2020]. Available at: https://www.abdn.ac.uk/law/blog/i-thought-we-were-exclusive-some-issues-with-the-hague-convention-on-choic%E2%80%82e-of-court-brussels-ia-and-brexit/

Thus, the material and geographical scopes of application of both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation will be compared as well as the way the two legal instruments define the term of "a choice of court agreement". Next, the effects of choice of court agreements arising out of both legal frameworks shall be compared. Finally, the regulation of the recognition and enforcement process under both legal instruments will be considered.

2 Scopes of Application of Hague Convention on Choice of Court Agreements and Brussels I bis Regulation

To begin with, it is important to emphasize that both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation require an international element to invoke their applicability.[7]

The term "international" is understood differently concerning jurisdictional issues and recognition and enforcement matters under both legal instruments.[8] As far as the recognition and enforcement matters are concerned, both legal instruments apply if the judgment was given by a court of another member or contracting state.[9]

The jurisdictional rules of the Hague Convention on Choice of Court Agreements apply according to its Art. 1 para. 2 unless the parties are resident in the same contracting state and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the designated court, are connected only with that state.[10] In other words, the jurisdictional

7 Art. 1 para. 1 Hague Convention on Choice of Court Agreements; see also ROZEHNALOVÁ, N., K. DRLIČKOVÁ, T. KYSELOVSKÁ and J. VALDHANS. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer, 2018, p. 173.

8 BEAUMONT, P. and M. AHMED. Exclusive choice of court agreements: some issues on the Hague Convention on Choice of Court Agreements and its relationship with the Brussels I Recast especially anti-suit injunctions, concurrent proceedings and the implications of Brexit. *Journal of Private International Law*, 2017, Vol. 13, no. 2, p. 392; see also ROZEHNALOVÁ, N., K. DRLIČKOVÁ, T. KYSELOVSKÁ and J. VALDHANS. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer, 2018, p. 174.

9 Art. 1 para. 3 Hague Convention on Choice of Court Agreements; see also ROZEHNALOVÁ, N., K. DRLIČKOVÁ, T. KYSELOVSKÁ and J. VALDHANS. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer, 2018, p. 174.

10 Art. 1 para. 2 Hague Convention on Choice of Court Agreements.

rules of Hague Convention on Choice of Court Agreements apply either if the parties are not residents in the same state or if some other elements relevant to the case have a connection with some other state.[11]

Brussels I bis Regulation, however, does not specifically govern what constitutes an "international element" concerning jurisdictional issues. Thus, it must be established in each case individually.[12] Therefore, the European Court of Justice ("ECJ") in *Owusu vs. N. B. Jackson,* case C-281/02, of 1 March 2005 presumed that the application of Brussels I bis Regulation is not limited to purely intra-EU disputes.[13] In the author's view, the regulation of an international element of jurisdictional issues in Brussels I bis Regulation is more convenient as it invokes the universal application of this legal instrument.

Regarding the material scope of application of Hague Convention on Choice of Court Agreements and Brussels I bis Regulation, both these legal instruments apply in civil and commercial matters.[14] The concept of "civil and commercial matters" shall be interpreted autonomously under both legal regulations as it does not entail a reference to national laws.[15] Both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation exclude matters such as arbitration, social security, questions of status and capacity, insolvency, family law, wills, and successions out of the material

11 HARTLEY, T. and M. DOGAUCHI. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements. *HCCH* [online]. 8. 11. 2013, p. 40 [cit. 1. 8. 2020]; see also PALERMO, G. The Future of Cross-Border Disputes Settlement: Back to Litigation? In: GONZALEZ-BUENO, C. (ed.). *40 under 40 International Arbitration*. Madrid: Dykinson, 2018, p. 359.

12 HARTLEY, T. and M. DOGAUCHI. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements. *HCCH* [online]. 8. 11. 2013, p. 102 [cit. 1. 8. 2020]. Available at: https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf; see also ROZEHNALOVÁ, N., K. DRLIČKOVÁ, T. KYSELOVSKÁ and J. VALDHANS. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer, 2018, p. 174.

13 Judgment of ECJ of 1. 3. 2015, *Andrew Owusu vs. N.B. Jackson, trading as 'Villa Holidays Bal-Inn Villas'*, case C-281/02.

14 Art. 1 para. 1 Hague Convention on Choice of Court Agreements; Art. 1 para. 1 Brussels Regulation.

15 HARTLEY, T. and M. DOGAUCHI. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements. *HCCH* [online]. 8. 11. 2013, p. 42 [cit. 1. 8. 2020]. Available at: https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf; see also Judgment of ECJ of 14. 10. 1975, *LTU vs. Eurocontrol*, case C-29/76.

scope of their application.[16] Hague Convention on Choice of Court Agreements nevertheless additionally excludes consumer and employment contracts, competition law claims, personal injury, damage to property, tort claims, liability for nuclear damage, immovable property and carriage of passengers and goods which makes its material scope of application narrower compared to Brussels I bis regulation.[17]

As far as the geographical scope of application of both legal instruments is concerned, Brussels I bis Regulation applies in all the EU member states including Denmark and Ireland.[18] Hague Convention on Choice of Court Agreements also entered into force in those states and further applies in Mexico, Montenegro, the UK, and Singapore.[19] Thus, it may seem that Hague Convention on Choice of Court Agreements has a wider geographical scope of application as it entered into force in four more states.

The author believes that the fact that Hague Convention on Choice of Court Agreements applies in four more states is not entirely relevant. The reason for that relates to how the reciprocal relationship between Hague Convention on Choice of Court Agreements and Brussels I bis Regulation is governed. According to Art. 26 para. 6 of Hague Convention on Choice of Court Agreements: *"This Convention shall not affect the application of the rules of a Regional Economic Integration Organisation that is a Party to this Convention, whether adopted before or after this Convention – a) where none of the parties is resident in a contracting state that is not a member state of the Regional Economic Integration Organisation; b) as concerns the recognition or enforcement of judgments as between member states of the Regional Economic Integration Organisation."*[20] In other words, the impact of Hague Convention on Choice of Court Agreements is limited

16 Art. 1 para. 2. Brussels I bis Regulation and Art. 2 para. 2 Hague Convention on Choice of Court Agreements.

17 Art. 2 Hague Convention on Choice of Court Agreements.

18 CUNIBERTI, G. Denmark to Apply Brussels I Recast. *conflictoflaw.net* [online]. 24. 3. 2013 [cit. 1. 8. 2020]. Available at: http://conflictoflaws.net/2013/denmark-to-apply-brussels-i-recast/; see also HARTLEY, C. T. *Choice-of-court agreements under the European and international instruments: the revised Brussels I Regulation, the Lugano Convention, and the Hague Convention on Choice of Court Agreements*. Oxford: Oxford University Press, 2013, pp. 35–37.

19 Status Table: Convention of 30 June 2005 on Choice of Court Agreements. *HCCH* [online]. [cit. 1. 8. 2020]. Available at: https://www.hcch.net/en/%E2%80%82instruments/conventions/status-table/?cid=98

20 Art. 26 para. 6 Hague Convention on Choice of Court Agreements.

where a case is "regional" in terms of residence of the parties or where the court that granted the judgment or the court in which recognition is sought is located in the EU.[21] Hague Convention on Choice of Court Agreements thus gives way to Brussels I bis regulation in purely regional cases.[22]

3 A Choice of Court Agreement under Hague Convention on Choice of Court Agreements and Brussels I bis Regulation

Art. 3 of Hague Convention on Choice of Court Agreements and Art. 25 of Brussels I bis Regulation are provisions that contain certain requirements regarding a choice of court agreement.[23] Some of these requirements are almost identical under both legal regulations while some differ considerably. Let's first have a look at what Hague Convention on Choice of Court Agreements and Brussels I bis Regulation have in common as far as a choice of court agreement is concerned.

A choice of court agreement under both legal instruments is an agreement whereby parties have agreed that a court or more specific courts of one state are to have a jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship.[24]

Firstly, both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation stipulate that the designation must be to decide

21 BŘÍZA, P. Choice-of-Court Agreements: Could the Hague Choice of Court Agreements Convention and the Reform of the Brussels I Regulation be the Way out of the Gasser–Owusu Disillusion? *Journal of Private International Law*, 2009, Vol. 5, no. 3, pp. 556–558.

22 AFFAKI, G. B. and A. G. H. NAÓN. *Jurisdictional choices in times of trouble*. Paris: International Chamber of Commerce, 2015, p. 191; see also HARTLEY, T. and M. DOGAUCHI. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements. *HCCH* [online]. 8. 11. 2013, p. 58 [cit. 1. 8. 2020]. Available at: https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf; see also LANDBRECHT, J. The Singapore International Commercial Court (SICC) – an Alternative to International Arbitration? *ASA Bulletin*, 2016, Vol. 34, no. 1, p. 117; see also PALERMO, G. The Future of Cross-Border Disputes Settlement: Back to Litigation? In: GONZALEZ-BUENO, C. (ed.). *40 under 40 International Arbitration*. Madrid: Dykinson, 2018, p. 359.

23 Art. 3 Hague Convention on Choice of Court Agreements and Art. 25 Brussels I bis Regulation.

24 Art. 3 letter a) Hague Convention on Choice of Court Agreements and Art. 25 para. 1 Brussels I bis Regulation.

disputes arising in connection with a particular legal relationship, present, or future.[25]

Secondly, both legal instruments apply exclusively to a choice of court agreement designating the courts located within the geographical scope of their application.[26] In other words, a choice of court agreement designating a court or more courts of non-contracting states is not covered by these two legal instruments.[27] This stems from Art. 3 a) of Hague Convention on Choice of Court Agreements and Art. 25 para. 1 of Brussels I bis Regulation.[28]

Thirdly, both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation apply the principle of severability according to which the invalidity of the main contract does not invoke the invalidity of a choice of court agreement and vice versa.[29] This means that the court designated in a choice of court agreement may hold the main contract invalid without depriving the choice of court agreement of its validity.[30]

Next, Hague Convention on Choice of Court Agreements and Brussels I bis Regulation are only applicable if the condition of the material validity of a choice of court agreement is fulfilled.[31] This condition means that the parties have consented to a choice of court agreement as such

25 ROZEHNALOVÁ, N., K. DRLIČKOVÁ, T. KYSELOVSKÁ and J. VALDHANS. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer, 2018, p. 52.

26 HARTLEY, T. and M. DOGAUCHI. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements. *HCCH* [online]. 8. 11. 2013, p. 52 [cit. 1. 8. 2020]. Available at: https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf; see also ROZEHNALOVÁ, N., K. DRLIČKOVÁ, T. KYSELOVSKÁ and J. VALDHANS. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer, 2018, pp. 242–243.

27 HARTLEY, T. and M. DOGAUCHI. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements. *HCCH* [online]. 8. 11. 2013, p. 42 [cit. 1. 8. 2020]. Available at: https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf

28 Art. 3 letter a) Hague Convention on Choice of Court Agreements and Art. 25 para. 1 Brussels I bis Regulation.

29 Art. 3 letter d) Hague Convention on Choice of Court Agreements and Art. 25 para. 5 Brussels I bis Regulation.

30 HARTLEY, T. and M. DOGAUCHI. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements. *HCCH* [online]. 8. 11. 2013, p. 42 [cit. 1. 8. 2020]. Available at: https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf

31 Art. 3 letter a) Hague Convention on Choice of Court Agreements and Art. 25 para. 1 Brussels I bis Regulation.

an agreement cannot be established unilaterally.[32] According to Art. 3 a) of Hague Convention on Choice of Court Agreements and Art. 25 para. 1 of Brussels I bis Regulation, the material validity of a choice of court agreement is to be determined by the law of the country of the court designated in a choice of court agreement.[33] Consequently, the non-designated court is also bound by the law of the court designated in a choice of court agreement when assessing the material validity of a choice of court agreement.[34] Therefore, the concept of material validity of a choice of court agreement is regulated in a similar way under both legal instruments.

As far as the condition of the formal validity of a choice of court agreement is concerned, the two legal instruments differ. According to Art. 3 para. 1 Hague Convention on Choice of Court Agreements a choice of court agreement must be concluded or documented i) in writing; or ii) by any other means of communication which renders information accessible to be usable for subsequent reference.[35] The second condition is understood in a way that it covers electronic means of data transmission such as e-mail and fax.[36] Under Brussels I bis Regulation, however, a choice of court agreement must be i) in writing or evidenced in writing including electronic means of communication; or ii) based on practices established between the parties; or iii) arising out of international trade or commerce usages.[37] Thus, compared to Hague Convention on Choice of Court Agreements, Brussels I bis Regulation additionally provides that a choice of court agreement is formally valid if it is concluded in a form that accords with the practices established between the parties or if it in the form common for international trade

32 HARTLEY, T. and M. DOGAUCHI. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements. *HCCH* [online]. 8. 11. 2013, p. 50 [cit. 1. 8. 2020]. Available at: https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf

33 HARTLEY, C. T. *Choice-of-court agreements under the European and international instruments: the revised Brussels I Regulation, the Lugano Convention, and the Hague Convention on Choice of Court Agreements*. Oxford: Oxford University Press, 2013, p. 130; see also BŘÍZA, P. Choice-of-Court Agreements: Could the Hague Choice of Court Agreements Convention and the Reform of the Brussels I Regulation be the Way out of the Gasser–Owusu Disillusion? *Journal of Private International Law*, 2009, Vol. 5, no. 3, pp. 556–558.

34 Ibid.

35 Art. 3 letter a) i) and ii) Hague Convention on Choice of Court Agreements.

36 HARTLEY, T. and M. DOGAUCHI. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements. *HCCH* [online]. 8. 11. 2013, p. 54 [cit. 1. 8. 2020]. Available at: https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf

37 Art. 25 para. 1 and 2 Brussels I bis Regulation.

and commerce.[38] Therefore, Brussels I bis Regulation represents a more favourable regulation since a greater number of choice of court agreements is likely to be considered formally valid.

The biggest difference between the two legal regulations (as far as the definition of the term "a choice of court agreement" is concerned) consists in the fact that Hague Convention on Choice of Court Agreements only applies to exclusive choice of court agreements according to its Art. 3 a).[39] Therefore, to invoke the applicability of Hague Convention on Choice of Court Agreements the parties must designate a court or more specific courts of one state to the exclusion of any other courts.[40] If a choice of court agreement is not exclusive and provides for the courts of two or more contracting states, Hague Convention on Choice of Court Agreements will not be applicable.[41] Unlike Hague Convention on Choice of Court Agreements, however, Brussels I bis Regulation will still apply provided that parties agree on a non-exclusive choice of court agreement.[42] In other words, if parties decide that two courts of two countries shall decide their dispute, effect will be given to this under Brussels I bis Regulation.[43] In the author's view, Brussels I bis is a more convenient legal regulation as it is likely to cover more choice of court agreements.

38 Art. 3 letter a) i) and ii) Hague Convention on Choice of Court Agreements and Art. 25 para. 1 and 2 Brussels I bis Regulation.

39 Art. 3 letter a) Hague Convention on Choice of Court Agreements.

40 BORN, B. G. *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*. The Hague: Kluwer Law International, 2016, pp. 16–17; see also FRISCHKNECHT, A. A. et al. *Enforcement of Foreign Arbitral Awards and Judgements in New York*. The Hague: Kluwer Law International, 2018, p. 42; see also NEWING, H. and L. WEBSTER. Could the Hague Convention on Choice of Court Agreements Bring Greater Certainty for Cross-Border Disputes Post Brexit: And What Would This Mean for International Arbitration. Third-Party Funders in International. *Dispute Resolution International*, 2016, Vol. 10, no. 2, pp. 105–117.

41 AFFAKI, G. B. and A. G. H. NAÓN. *Jurisdictional choices in times of trouble*. Paris: International Chamber of Commerce, 2015, p. 191; see also NEWING, H. and L. WEBSTER. Could the Hague Convention on Choice of Court Agreements Bring Greater Certainty for Cross-Border Disputes Post Brexit: And What Would This Mean for International Arbitration. Third-Party Funders in International. *Dispute Resolution International*, 2016, Vol. 10, no. 2, pp. 105–117.

42 Van HOOFT, A. Brexit and the Future of Intellectual Property Litigation. *Journal of International Arbitration*, 2016, Vol. 33, no. 7, p. 559.

43 HARTLEY, C. T. *Choice-of-court agreements under the European and international instruments: the revised Brussels I Regulation, the Lugano Convention, and the Hague Convention on Choice of Court Agreements*. Oxford: Oxford University Press, 2013, p. 130.

4 Effects of a Choice of Court Agreement under Hague Convention on Choice of Court Agreements and Brussels I bis Regulation

Put simply, a choice of court agreement under both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation grants jurisdiction to the designated court and deprives a non-designated court of its jurisdiction.[44]

Furthermore, under both legal instruments, the court designated in a choice of court agreement cannot decline its jurisdiction on the ground that another court may more conveniently hear a case (*forum non conveniens*).[45] Similarly, according to both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation, the court designated in a choice of court agreement shall not dismiss proceedings if another court has been seized first in proceedings involving the same cause of action between the same parties (*lis pendens*).[46]

The difference between the two legal instruments is that Hague Convention on Choice of Court Agreements in its Art. 6 lays down five exceptions to the rule that the proceedings must be dismissed by the non-designated court.[47] The application of these exceptions may, however, jeopardize the use of choice of court agreements. In the author's view, the regulation in Brussels I bis Regulation is more favourable as it promotes the applicability of choice of court agreements and brings greater certainty to the parties of international commercial trade.

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44 Art. 5 and 6 Hague Convention on Choice of Court Agreements and Art. 25 and 31 para. 3 Brussels I bis Regulation.

45 AFFAKI, G. B. and A. G. H. NAÓN. *Jurisdictional choices in times of trouble*. Paris: International Chamber of Commerce, 2015, p. 191; see also HARTLEY, T. and M. DOGAUCHI. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements. *HCCH* [online]. 8. 11. 2013, p. 58 [cit. 1. 8. 2020]. Available at: https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf; see also LANDBRECHT, J. The Singapore International Commercial Court (SICC) – an Alternative to International Arbitration? *ASA Bulletin*, 2016, Vol. 34, no. 1, p. 117; see also PALERMO, G. The Future of Cross-Border Disputes Settlement: Back to Litigation? In: GONZALEZ-BUENO, C. (ed.). *40 under 40 International Arbitration*. Madrid: Dykinson, 2018, p. 362.

46 HARTLEY, T. and M. DOGAUCHI. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements. *HCCH* [online]. 8. 11. 2013, p. 58 [cit. 1. 8. 2020]. Available at: https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf

47 Art. 6 Hague Convention on Choice of Court Agreements.

5 Recognition and Enforcement of Judgments under Hague Convention on Choice of Court Agreements and Brussels I bis Regulation

To compare the process of recognition and enforcement of judgments given by courts designated in a choice of court agreement under Hague Convention on Choice of Court Agreements and Brussels I bis Regulation, the term judgment must be interpreted first.

Under both legal regulations "a judgment" means any decision on the merits given by a court, whatever it may be called.[48] Thus, decisions of church courts, international tribunals, and arbitral awards are excluded from the scope of both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation.[49] Moreover, under both legal regulations, procedural rulings are excluded except for decisions on costs or expenses.[50] Next, under both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation an enforceable court settlement is to be enforced in the same manner as a judgment.[51] The difference between the two legal regulations is that Brussels I bis Regulation applies to interim measures.[52]

Regarding the process of recognition and enforcement, the underlying principle incorporated in both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation is that a judgment given by a court designated in a choice of court agreement must be recognized and enforced in other contracting or member states.[53] Furthermore, the recognition and enforcement may be refused on the grounds which derive exclusively from these legal regulations and which must not be deduced from national laws.[54]

48 Art. 4 para. 1 Hague Convention on Choice of Court Agreements and Art. 2 letter a) Brussels I bis Regulation.

49 ROZEHNALOVÁ, N., K. DRLIČKOVÁ, T. KYSELOVSKÁ and J. VALDHANS. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer, 2018, p. 258.

50 Art. 4 para. 1 Hague Convention on Choice of Court Agreements and Art. 2 letter a) Brussels I bis Regulation.

51 Art. 12 Hague Convention on Choice of Court Agreements and Art. 59 Brussels I bis Regulation.

52 Art. 4 para. 1 Hague Convention on Choice of Court Agreements and Art. 2 letter a) Brussels I bis Regulation; see also Masters, S., McRae, B. What does Brexit mean for the Brussels Regime. *Journal of International Arbitration,* 2016, Vol. 33, no. 7, p. 496.

53 Art. 8 para. 1 Hague Convention on Choice of Court Agreements and Art. 36 and 39 Brussels I bis Regulation.

54 ROZEHNALOVÁ, N., K. DRLIČKOVÁ, T. KYSELOVSKÁ and J. VALDHANS. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer, 2018, p. 264.

Under both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation the review on merits of a judgment is not permitted.[55] Moreover, according to Art. 45 para. 3 of Brussels I bis Regulation the jurisdiction of the court that granted the judgment may not be reviewed.[56] Contrastingly, Art. 8 para. 2 of Hague Convention on Choice of Court Agreements provides that the court in which the recognition and enforcement is sought shall be bound by the findings of fact on which the court that granted the judgment based its jurisdiction.[57] The court in which the recognition and enforcement is sought is free to draw its conclusions of law from these facts when reviewing the jurisdiction of the court that granted the judgment.[58] Thus, the difference between the two legal instruments is that under Hague Convention on Choice of Court Agreements the court in which the recognition and enforcement is sought is entitled to decide whether a choice of court agreement was within the scope of the court that granted the judgment.[59] The author believes that the solution adopted in Hague Convention on Choice of Court Agreements is not a desirable one as it brings less certainty to international commercial transactions.

Moreover, the process of recognition under Brussels I bis Regulation is an automatic one, whereas under Hague Convention on Choice of Court Agreements the process of recognition is governed by the law of the state in which the recognition is sought.[60] The solution adopted in Brussels I bis Regulation seems more comprehensive and practical.[61]

55 Art. 8 para. 1 Hague Convention on Choice of Court Agreements and Art. 52 Brussels I bis Regulation.

56 Art. 45 para. 3 Brussels I bis Regulation.

57 Art. 8 para. 2 Hague Convention on Choice of Court Agreements.

58 HARTLEY, C. T. *Choice-of-court agreements under the European and international instruments: the revised Brussels I Regulation, the Lugano Convention, and the Hague Convention on Choice of Court Agreements*. Oxford: Oxford University Press, 2013, p. 197.

59 Ibid., p. 195.

60 Art. 14 Hague Convention on Choice of Court Agreements and Art. 36 para. 1 Brussels I bis Regulation; see also HOOFT, A. Van. Brexit and the Future of Intellectual Property Litigation. *Journal of International Arbitration*, 2016, Vol. 33, no. 7, p. 553; see also ROZEHNALOVÁ, N., K. DRLIČKOVÁ, T. KYSELOVSKÁ and J. VALDHANS. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer, 2018, p. 263.

61 MASTERS, S. and B. McRAE. What does Brexit mean for the Brussels Regime. *Journal of International Arbitration,* 2016, Vol. 33, no. 7, p. 496.

Next, under Brussels I bis Regulation the courts are obliged to refuse recognition and enforcement of a judgment *ex officio* in case that the criteria for non-recognition or non-enforcement are met.[62] Using the wording of "may" instead of "shall" in Art. 9 of Hague Convention on Choice of Court Agreements, however, indicates that under Hague Convention on Choice of Court Agreements the courts in which the recognition and enforcement are sought are not obliged to refuse the recognition and enforcement of a judgment. They are simply entitled to do so at their discretion.[63] The author believes that the approach adopted in Hague Convention on Choice of Court Agreements brings less certainty to commercial transactions.

As far as the grounds for non-recognition and non-enforcement are concerned, both Hague Convention on Choice of Court Agreements and Brussels I bis Regulation incorporate the following grounds: incompatibility with the public policy of the state in which the recognition and enforcement is sought;[64] insufficient notification of a defendant that the proceedings are being brought;[65] and the existence of conflicting judgments either from the state in which the recognition and enforcement is sought or from the third state.[66]

Brussels I bis Regulation further adds breach of provisions dealing with insurance, consumer and employment contracts, and exclusive jurisdiction. In these areas, however, choice of court agreements are generally not permitted.[67] Hague Convention on Choice of Court Agreements additionally stipulates that recognition and enforcement may be refused on the following grounds: nullity and voidness of a choice of court agreement;[68] the lack

62 ROZEHNALOVÁ, N., K. DRLIČKOVÁ, T. KYSELOVSKÁ and J. VALDHANS. *Mezinárodní právo soukromé Evropské unie*. Praha: Wolters Kluwer, 2018, p. 268.

63 HARTLEY, T. and M. DOGAUCHI. Explanatory Report of Convention of 30 June 2005 on Choice of Court Agreements. *HCCH* [online]. 8. 11. 2013, p. 96 [cit. 1. 8. 2020]. Available at: https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf

64 Art. 9 letter e) Hague Convention on Choice of Court Agreements and Art. 45 para. 1 letter a) Brussels I bis Regulation.

65 Art. 9 letter c) Hague Convention on Choice of Court Agreements and Art. 45 para. 1 letter b) Brussels I bis Regulation.

66 Art. 9 letters f), g) Hague Convention on Choice of Court Agreements and Art. 45 para. 1 letters c), d) Brussels I bis Regulation.

67 Art. 45 para. 1 letter e) Brussels I bis Regulation.

68 Ibid., Art. 9 letter a).

of the capacity to conclude a choice of court agreement;[69] and obtainment of the judgment by fraud.[70] In the author's opinion, the regulation adopted in Hague Convention on Choice of Court Agreements is more restrictive as far as recognition and enforcement of judgments given by courts designated in a choice of court agreements and thus less efficient.

6 Conclusion

This article aimed to demonstrate that Hague Convention on Choice of Court Agreements does not present a complete and comprehensive solution in terms of choice of court agreements compared to Brussels I bis Regulation.

Hague Convention on Choice of Court Agreements and Brussels I bis Regulation both govern choice of court agreements and are only applicable if the condition of an international element is fulfilled. The regulation of an international element of jurisdictional issues under Brussels I bis Regulation seems slightly more convenient as it invokes the universal application of this legal instrument.

As far as the scopes of application of the two legal instruments are concerned, they both apply in civil and commercial matters excluding arbitration, social security, questions of status and capacity, insolvency, family law, and wills and successions. Hague Convention on Choice of Court Agreements additionally excludes consumer and employment contracts, competition law claims, personal injury, damage to property, tort claims, liability for nuclear damage, immovable property, and carriage of passengers and goods which makes its material scope of application narrower and thus less efficient. The fact that Hague Convention on Choice of Court Agreements has a wider scope of geographical application is not entirely relevant given the fact that where a case is "regional", Brussels I bis Regulation prevails.

Furthermore, the understanding of a choice of court agreement under Hague Convention on Choice of Court Agreements is less convenient as Convention applies to purely exclusive choice of court agreement and non-exclusive choice of court agreements invoke its inapplicability.

69 Ibid., Art. 9 letter b).
70 Ibid., Art. 9 letter d).

Moreover, the regulation of formal validity of choice of court agreements under Hague Convention on Choice of Court Agreements is more restrictive compared to Brussels I bis Regulation. Thus, Brussels I bis Regulation is likely to cover more choice of court agreements which makes this legal instrument more advantageous.

Regarding the effects of choice of court agreements, both legal instruments stipulate that the court designated in choice of court agreements shall decide the case and the non-designated court shall decline its jurisdiction. Unlike Brussels I bis Regulation, however, Hague Convention on Choice of Court Agreements incorporates five exceptions to the rule that the non-designated court shall decline its jurisdiction which weakens the position of choice of court agreements.

As far as the process of recognition and enforcement is concerned, Brussels I bis Regulation presents a more suitable legal instrument for the following reasons. Firstly, unlike Hague Convention on Choice of Court Agreements, the court in which the regulation and the enforcement is sought must not review the jurisdiction of the court that granted the judgment. Secondly, unlike Hague Convention on Choice of Court Agreements, the process of recognition of a judgment under Brussels I bis Regulation is automatic and not governed by the law of the requested state. Thirdly, unlike Hague Convention on Choice of Court Agreements under Brussels I bis Regulation, the courts are obliged to refuse recognition and enforcement of a judgment *ex officio* in case that the criteria for non-recognition or non-enforcement are met; they are not entitled to decide on non-recognition or non-enforcement at their discretion. Next, Brussels I bis Regulation incorporates fewer grounds for non-recognition and non-enforcement.

For all the reasons mentioned above, the author believes that Brussels I bis Regulation presents a more favourable, comprehensive, and efficient legal instrument when compared to Hague Convention on Choice of Court Agreements. In the author's opinion, the regulation of choice of court agreements adopted in Brussels I bis Regulation brings greater certainty to international commercial transactions as this legal regulation applies to a greater number of a choice of court agreements.

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Brexit and Private International Law

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Abstract

My contribution deals with the issue concerning the question arising on the applicable law in and after the transition period set in the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community. The aim of this contribution is to analyze how the English and European laws simultaneously influence one another. This analyzation will lead to the prognosis of the impact Brexit will have on the applicable English law before English courts and the courts of the states of the European Union. The main key question is the role of *lex fori* in English law. Will English law tend to return to common law rules post-Brexit, and prefer the *lex fori*?

Keywords

Brexit; Conflict of Laws; English Law; Lex Fori; Third Country Status.

1 Introduction

This contribution serves to demonstrate and analyze the main key questions concerning the role of *lex fori* in English law, i.e. the tools used and eventually leads in most cases to the application of the *lex fori* and hence for the application of the English law by the courts. This will all be analyzed from the point of view of the European Union's ("EU") withdrawal, using the so-called and famous title "Brexit".

Lord *Mance*, former Deputy President of the Supreme Court of the United Kingdom ("UK"), in his speech about the future relationship between the EU and UK after Brexit said that the British, who are considered

traditional, conservative and pragmatic, stated that: *"Brexit is a rare example of a rather unpragmatic choice."*[1] From another perspective as *Schwarzschild* noted: *"it was a bold and admirable decision."*[2] Nevertheless, it was a decision made by the UK and it is now necessary to determine the consequences thereof.

2 Private International Law

Discussions took place regarding a future arrangement, after Brexit, similar to that of Denmark – The Denmark Agreement from 2005 following the Brussels I (Recast) Regulation.[3] It would lead to an arrangement similar to the one Denmark has as a state that is a member of the EU but does not participate in the European justice area. This solution would have the power to keep in place the cooperation in the field of recognition and enforcement and more after the withdrawal of UK. The problem would be concerning the case law of the Court of Justice of the European Union ("CJEU"), which the UK would have to abide by, something they have proven more often than not that they are not willing to do so. The UK stated that as a non-member state of the EU, it would be outside the direct jurisdiction of the CJEU after Brexit. But as historically pointed out, the UK courts traditionally will probably consider the case law of CJEU whereas the UK courts often through history consider and seek inspiration in the foreign courts case law.[4] Also the scenario of the Hague Conference on Private International Law

1 GROHMANN, N. Lord Jonathan Mance on the future relationship between the United Kingdom and Europe after Brexit. *Conflict of Laws* [online]. 20. 7. 2020, p. 2 [cit. 22. 7. 2020]. Available at: https://conflictoflaws.net/2020/lord-jonathan-mance-on-the-future-relationship-between-the-united-kingdom-and-europe-after-brexit/?print=pdf

2 SCHWARZSCHILD, M. Complicated – but Not Too Complicated: The Sunset of E.U. Law in the U.K. After Brexit. *Cardozo Law Review* [online]. 2018, Vol. 39, no. 3, p. 919 [cit. 28. 7. 2020]. Available at: http://cardozolawreview.com/complicated-but-not-too-complicated-the-sunset-of-e-u-law-in-the-u-k-after-brexit/

3 Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. *EUR-Lex* [online]. 21. 3. 2013 [cit. 2. 8. 2020]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22013A0321(01)&from=CS

4 POESEN, M. EU-UK civil judicial cooperation after Brexit: Challenges and prospects for private international law. 2nd LERU Brexit Seminar. *KU Leuven* [online]. 2017, p. 7 [cit. 2. 8. 2020]. Available at: https://limo.libis.be/primo-explore/fulldisplay?docid=LIRIAS1952161&context=L&vid=Lirias&search_scope=Lirias&tab=default_tab&lang=en_US&fromSitemap=1

("HCCH") instruments was considered.[5] But it must be pointed out that the judgments convention if it is ratified in the UK and EU, might create a risk of divergent interpretation because the interpretation of the judgement convention as others HCCH instruments will be held in the national court of the contracting states which is the opposite to the autonomous interpretation of the CJEU.[6] Also the Lugano regime was considered with the emerging risk concerning the *torpedoes issues*.[7] On the other hand, the Lugano regime same as the Denmark Agreement regime have to pay due account to the case law of the CJEU.[8]

Now the regime of transposition into the UK domestic law won the battle. Incorporation of the Rome Regulations[9] into domestic English law is also set in the Agreement on the withdrawal. Also, it is set that the English courts will have regard to the CJEU case law (problems arising from this conclusion will be demonstrated later in this article.[10]) It is clear that the main issue – as said the *"hot topic"* is the leading role of the interpretation of the CJEU case law.[11]

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5 See conventions which are in UK in force. Here I refer to HCCH: Conventions, Protocols and Principles. *HCCH* [online]. [cit. 2. 8. 2020]. Available at: https://www.hcch.net/en/instruments/conventions
In particular, pay close attention to the Convention of 30 June 2005 on Choice of Court Agreements. *HCCH* [online]. [cit. 2. 8. 2020]. Available at: https://www.hcch.net/en/instruments/conventions/specialised-sections/choice-of-court; also the HCCH jurisdiction project: Jurisdiction Project. *HCCH* [online]. [cit. 2. 8. 2020]. Available at: https://www.hcch.net/en/projects/legislative-projects/jurisdiction-project

6 POESEN, M. EU-UK civil judicial cooperation after Brexit: Challenges and prospects for private international law. 2nd LERU Brexit Seminar. *KU Leuven* [online]. 2017, p. 8 [cit. 2. 8. 2020]. Available at: https://limo.libis.be/primo-explore/fulldisplay?docid=LIRIAS1952161&context=L&vid=Lirias&search_scope=Lirias&tab=default_tab&lang=en_US&fromSitemap=1

7 Ibid.

8 Ibid., p. 9.

9 Reffering to: Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations ("Rome I Regulation"); Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations ("Rome II Regulation").

10 POESEN, M. EU-UK civil judicial cooperation after Brexit: Challenges and prospects for private international law. 2nd LERU Brexit Seminar. *KU Leuven* [online]. 2017, p. 9 [cit. 2. 8. 2020]. Available at: https://limo.libis.be/primo-explore/fulldisplay?docid=LIRIAS1952161&context=L&vid=Lirias&search_scope=Lirias&tab=default_tab&lang=en_US&fromSitemap=1

11 Ibid., pp. 9–10.

2.1 Basic Legal Framework

The UK's historically controversial relationship vis-à-vis the European integration caused the long-lasting Brexit scenario. This was caused by the lack of limitations for their own sovereignty.[12] Given the political situation in the UK at the time, a referendum was held on 23 June 2016, regarding the UK's membership in the EU.[13] Later, an agreement regarding the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and from the European Atomic Energy Community, was signed on 24 January 2020 – The agreement was drafted[14] and entered into force on 1 February 2020 ("Agreement on the withdrawal").[15] From that date onwards, the UK was no longer an EU member state and has been considered as a third world country. The Agreement concerning the withdrawal included a transition period, which will last until 31 December 2020. Until the end of this transition period, in general, the Union law will be still applicable.[16]

The supremacy of the EU law must be somehow, on the legal basic framework adopted. In 2017, the UK Government formally introduced a new law Repeal Bill[17] to revoke an accession to the EU and for the need to transpose the EU law into the UK domestic law.[18]

12 TICHÝ, L. Brexit a některé jeho následky. *Bulletin advokacie* [online]. 2018, no. 7–8, p. 39 [cit. 13. 7. 2020]. Available at: http://www.bulletin-advokacie.cz/assets/zdroje/casopis/BA_78_2018_web.pdf

13 See official results of the EU referendum by The Electoral Commission. Results and turnout at the EU referendum. *Electoral Commission* [online]. [cit. 14. 7. 2020]. Available at: https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/elections-and-referendums/past-elections-and-referendums/eu-referendum/results-and-turnout-eu-referendum

14 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community. *EUR-Lex* [online]. 31. 1. 2020 [cit. 14. 7. 2020]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22020A0131(01)

15 Notice concerning the entry into force of the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community. *EUR-Lex* [online]. 31. 1. 2020 [cit. 14. 7. 2020]. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020XG0131(01)&from=EN

16 Art. 126 and Art. 127 Agreement on the withdrawal.

17 See DONEGAN, T. Brexit: The Great Repeal Bill. *Harvard Law School Forum on Corporate Governance* [online]. 13. 8. 2017 [cit. 20. 9. 2020]. Available at: https://corpgov.law.harvard.edu/2017/08/13/brexit-the-great-repeal-bill/

18 SCHWARZSCHILD, M. Complicated – but Not Too Complicated: The Sunset of E.U. Law in the U.K. After Brexit. *Cardozo Law Review* [online]. 2018, Vol. 39, no. 3, p. 912 [cit. 28. 7. 2020]. Available at: http://cardozolawreview.com/complicated-but-not-too-complicated-the-sunset-of-e-u-law-in-the-u-k-after-brexit/

2.2 Conflict of Laws in the Transitional Period

The withdrawal the applicable law in contractual and non-contractual matters will be stated in as followed in the Agreement. As for the contractual matters, Rome I Regulation is applicable to the contracts concluded before the end of the transition period.[19] Rome II Regulation is applicable in the non-contractual matters and is applicable for events with increasing damage where such events occurred before the end of the transition period.[20] The applicable law during the transition period is clear, both Regulations will be applied before the English courts. Bear in mind, after the transition period Regulations will no longer have any direct applicability. For the EU Member States these Regulations will be applied because the Regulations of the EU have direct applicability before the application of national rules. Following this transitional period, the Regulations will no longer have an effect in the UK. Undisputedly, if the English legislature decides, by abiding to their national law, to give an indirect application of these Regulations, then those may be applicable, otherwise, we presume that afterwards it will be necessary to use the national conflict of laws of the UK.[21]

Logically, the UK will follow the case law of the CJEU when applying the EU legislation (e.g. the EU regulations from the area of private international law). This view is extended during the transition period set in the Agreement on the withdrawal. (Yet, in the past, this view was not clear, and it was the topic of discussion in the past).[22]

2.3 Conflict of Laws after the Transition Period

Regulations of the EU regarding private international law – in contractual and non-contractual obligations (the Rome I and Rome II Regulations) – are

19 Art. 66 Agreement on the withdrawal.

20 Ibid.

21 TICHÝ, L. Brexit a některé jeho následky. *Bulletin advokacie* [online]. 2018, no. 7–8, p. 43 [cit. 16. 7. 2020]. Available at: http://www.bulletin-advokacie.cz/assets/zdroje/casopis/BA_78_2018_web.pdf

22 POESEN, M. EU-UK civil judicial cooperation after Brexit: Challenges and prospects for private international law. 2nd LERU Brexit Seminar. *KU Leuven* [online]. 2017, p. 6 [cit. 2. 8. 2020]. Available at: https://limo.libis.be/primo-explore/fulldisplay?docid=LIRIAS1952161&context=L&vid=Lirias&search_scope=Lirias&tab=default_tab&lang=en_US&fromSitemap=1

raising the question of its applicability after the transition period set in the Agreement. The EU Acts of 2018 and 2020[23] specify the most significant rules regarding the application of EU instruments after the end of this period. The EU and UK came into conclusion that most of the EU instruments, like Rome I Regulation and Rome II Regulation, will be transposed into English domestic law.[24] A note is required from the author, regulations, one of the forms of EU law, are directly applicable, unlike directives. Because of the Repeal Bill the regulations may take a form inside the UK domestic law.[25]

As mentioned above, some problematic areas can be seen. For instance, the transposition of the Rome I and Rome II Regulations into English national law. It means that European law – rules from the Regulations accepted by the Member States of the EU, interpreted by the CJEU and ensuring that the law of the EU is interpreted and applied in the same way in every Member State of the EU – may also raise the *double-track* interpretation and application of the European law. The following will explain how this can happen. Consider for instance that the Regulation will be transposed into English domestic law. On the one hand, English courts will have the competence to interpret and apply the law of EU, but this law will remain to exist as English domestic law. On the other hand, the English courts are not obliged to refer a question to the CJEU for a preliminary ruling.[26]

23 European Union (Withdrawal) Act 2018 of 26 June 2018. An Act to repeal the European Communities Act 1972 and make other provision in connection with the withdrawal of the United Kingdom from the EU. *legislation.gov.uk* [online]. [cit. 22. 7. 2020]. Available at: https://www.legislation.gov.uk/ukpga/2018/16/introduction ("European Union Act 2018"); European Union (Withdrawal Agreement) Act 2020 of 23 January 2020. An Act to implement, and make other provision in connection with, the agreement between the United Kingdom and the EU under Article 50(2) of the Treaty on European Union which sets out the arrangements for the United Kingdom's withdrawal from the EU. *legislation.gov.uk* [online]. [cit. 22. 7. 2020]. Available at: https://www.legislation.gov.uk/ukpga/2020/1/introduction ("European Union Act 2020").

24 See Section 3 – Incorporation of direct EU legislation of the European Union Act 2018; see GROHMANN, N. Lord Jonathan Mance on the future relationship between the United Kingdom and Europe after Brexit. *Conflict of Laws* [online]. 20. 7. 2020, p. 4 [cit. 22. 7. 2020]. Available at: https://conflictoflaws.net/2020/lord-jonathan-mance-on-the-future-relationship-between-the-united-kingdom-and-europe-after-brexit/?print=pdf

25 SCHWARZSCHILD, M. Complicated – but Not Too Complicated: The Sunset of E.U. Law in the U.K. After Brexit. *Cardozo Law Review* [online]. 2018, Vol. 39, no. 3, p. 913 [cit. 28. 7. 2020]. Available at: http://cardozolawreview.com/complicated-but-not-too-complicated-the-sunset-of-e-u-law-in-the-u-k-after-brexit/

26 Art. 267 Treaty on the Functioning of the European Union ("TFEU").

Concerning this issue, a *double-track* interpretation and application development may arise.[27]

2.3.1 Double-track Interpretation and Application of the EU Law (e.g. case law)

As called, EU-derived domestic legislation[28], will come into effect after the transition period. The direct EU legislation[29] – regulations, will be transposed into English domestic law, it will have a form of English national law. When it has a form of a domestic law, it means that only the court system of the UK will have the power to interpret and apply the EU legislation. By calling the EU legislation we include the interpretation and application by the system of the CJEU, that's the judicial institution, which has the ability to interpret and apply the proper EU legislation in the same way in all Member States, it creates as we say the case law of the EU. As the UK will no longer be a Member State of the EU, and because he transposed the direct EU legislation (regulations) it also consists of huge bunch of case law of CJEU. After the transition period, the interpretation and application of the CJEU will no longer have an effect in UK,[30] only the court system of the UK will have the power to interpret and apply the retained EU case law.[31] In this matter, another question may occur, can the UK court, in same situation use and apply the interpretation given by the CJEU? Yes. The interpretation given by the CJEU will no longer have a binding effect and that for the UK courts are no longer obliged to follow the interpretation by the CJEU. But the court of the UK may still regard to actions done after the transition period by the CJEU, but only, like it *Gilier* analyses: only so far

27 GROHMANN, N. Lord Jonathan Mance on the future relationship between the United Kingdom and Europe after Brexit. *Conflict of Laws* [online]. 20. 7. 2020, pp. 4–5 [cit. 22. 7. 2020]. Available at: https://conflictoflaws.net/2020/lord-jonathan-mance-on-the-future-relationship-between-the-united-kingdom-and-europe-after-brexit/?print=pdf

28 For the meaning of the EU-derived domestic legislation see section 2(1)(2) European Union Act 2018.

29 For meaning of the direct EU legislation see section 3(2) European Union Act 2018.

30 See Section 6 European Union Act 2018.

31 GILIKER, P. Interpreting retained EU private law post-Brexit: Can commonwealth comparisons help us determine the future relevance of CJEU case law? *Common Law World Review* [online]. 2019, Vol. 48, no. 1–2, pp. 15–18 [cit. 22. 7. 2020]. Available at: https://journals.sagepub.com/doi/10.1177/1473779518823689

as it is relevant to any matter before the court.[32] This phrase sentence is mentioned in the European Union Act 2018.[33] Also during the Brexit campaign it was pointed out that the UK should not be subjected to the rulings of the CJEU and UK courts should have the final word in the UK. The EU law will be part of the English domestic law.[34] Case law concerning the EU law will be a part of the English domestic law as to date. As *Schwarzschild* notes: *"will this mean that the court's decisions will be accepted only as to the rights of the parties adjudicated in those cases, or will the court's interpretations of the EU law hitherto binding generally – be accepted as well?"*[35] It is undoubtedly clear that the phrase "so far as it is relevant to any matter before the court…" may cause unclear meaning. It is a question of what exactly it means.

Decisions made by the CJEU will no longer have an effect in the UK's court system. Decisions will be left to discretionary consideration.[36] The courts of the EU Member States will continue to apply the Rome Regulations for relations with the English international element and the results of the application of the Regulations and the fact that the UK will no longer be an EU Member State will be irrelevant.[37] The choice of an English law will have no possible consequences for using the Rome I Regulation, as the Regulation respects the choice of law made by the parties in a contract.[38] Whether the UK is inside or outside the EU, this has no effect on the application of the Regulation. Courts of the UK will uphold the clause of the English law because Rome I Regulation will be part of the English domestic law. Also, reasons for choosing the English law will still be strong, i.e. yet

32 Ibid.

33 Section 6(1-3) European Union Act 2018.

34 GILIKER, P. Interpreting retained EU private law post-Brexit: Can commonwealth comparisons help us determine the future relevance of CJEU case law? *Common Law World Review* [online]. 2019, Vol. 48, no. 1–2, pp. 15–16 [cit. 22. 7. 2020]. Available at: https://journals.sagepub.com/doi/10.1177/1473779518823689

35 SCHWARZSCHILD, M. Complicated – but Not Too Complicated: The Sunset of E.U. Law in the U.K. After Brexit. *Cardozo Law Review* [online]. 2018, Vol. 39, no. 3, p. 914 [cit. 28. 7. 2020]. Available at: http://cardozolawreview.com/complicated-but-not-too-complicated-the-sunset-of-e-u-law-in-the-u-k-after-brexit/

36 TAYLOR, D. and R. BRITTAIN. Brexit. In: TAYLOR, D. (ed.). *The Dispute Resolution Review* [online]. United Kingdom: Law Business Research Ltd, 2020, p. 6 [cit. 1. 9. 2020]. Available at: https://thelawreviews.co.uk//digital_assets/faa56b5e-9ac3-4e07-8955-79c4c1ec431c/The-Dispute-Resolution-Review-12th-ed---book.pdf

37 Ibid.

38 Art. 3 Rome I Regulation.

English law is a highly flexible and sophisticated system of law commonly used in international business relations.[39]

2.4 Possible Outcome and Applicable Law

It is necessary to state what impact Brexit will have on private international law. Also, whether the lucrative nature of choosing English law as the applicable law will be reduced.

2.4.1 Retained EU Private International Law of Obligations Post-Brexit

The Ministry of Justice presented a draft statutory instrument for the need of current intended changes to retained EU private international law of obligations post Brexit – The law applicable to contractual obligations and non-contractual obligations (Amendment, etc.) (EU Exit) Regulations 2019.[40] The purpose of this instrument is to ensure that EU rules determining the law applicable to contractual and non-contractual relations continue to function effectively in UK domestic law after the period of UK's withdrawal from the EU.[41] The rules contained in this law are contained and transposed from the Rome I Regulation and the Rome II Regulation.

Rome I and Rome II Regulations which are transposed into domestic legislation are retained under the European Union Act of 2018, will have deficiencies that needs their corrections for the effectiveness of working as a domestic UK's law.[42] The modifications (i.e. corrections) made by the law

39 TAYLOR, D. and R. BRITTAIN. Brexit. In: TAYLOR, D. (ed.). *The Dispute Resolution Review* [online]. United Kingdom: Law Business Research Ltd, 2020, p. 6 [cit. 1. 9. 2020]. Available at: https://thelawreviews.co.uk//digital_assets/faa56b5e-9ac3-4e07-8955-79c4c1ec431c/The-Dispute-Resolution-Review-12th-ed---book.pdf

40 2019 No. 834 Exiting the European Union Private International Law: The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019. *legislation.gov.uk* [online]. [cit. 20. 9. 2020]. Available at: https://www.legislation.gov.uk/uksi/2019/834/pdfs/uksi_20190834_en.pdf ("Law applicable to contractual obligations and non-contractual obligations").

41 Explanatory Memorandum to The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019 No. 834. *legislation.gov.uk* [online]. [cit. 20. 9. 2020]. Available at: https://www.legislation.gov.uk/ukdsi/2019/9780111180785/pdfs/ukdsiem_9780111180785_en.pdf ("Explanatory Memorandum to The Law Applicable to Contractual Obligations and Non-Contractual Obligations").

42 Ibid.

applicable to contractual obligations and non-contractual obligations are rather of formal and technical or updated nature.[43] For example, deleting the provisions requiring EU Member States to notify matters to European Commission or other provisions which are amended in accordance with the exit of UK (i.e. where UK is no longer a Member State of the EU), for example: replacing references to "Member State" with "Relevant State" or replacing references to "Community law" with "Retained EU law". Also it is required to add that due to Explanatory Memorandum to The Law Applicable to Contractual Obligations and Non-Contractual Obligations and due to *Dickinson*, in most cases, UK courts will continue to apply the same rules immediately after the exit day as the rules applied by national courts in the remaining EU Member States that continue to apply EU regulations. Nevertheless, in some cases due to the way the rules are formulated in EU regulations (Rome I, Rome II), the determination of the applicable law by a national court of an EU Member State applying an EU regulation may lead to a different result than in a UK court, which uses a retained version of the EU regulation.[44] For instance Art. 3 para. 4 of the Rome I Regulation. Because the UK is a non-member state from the EU's point of view, but the UK will apply non-derogable rules of the retained EU law if the parties to the dispute choose a law outside the EU Member States or a law outside the UK in circumstances exclusively connected to the UK or Member States EU.[45]

2.4.2 Lex fori as a Connecting Factor

Unification in the area of conflict of laws resulted in the creation of Rome I and Rome II Regulations in the EU area. (Although the norms are unified after a more detailed examination, it can be said that they work

43 DICKINSON, A. A View from the Edge. *Oxford Legal Studies Research Paper* [online]. 2019, no. 25, p. 3, 17. 4. 2019 [cit. 1. 10. 2020]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3356549

44 Explanatory Memorandum to The Law Applicable to Contractual Obligations and Non-Contractual Obligations; DICKINSON, A. A View from the Edge. *Oxford Legal Studies Research Paper* [online]. 2019, no. 25, p. 3–4, 17. 4. 2019 [cit. 1. 10. 2020]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3356549

45 DICKINSON, A. A View from the Edge. *Oxford Legal Studies Research Paper* [online]. 2019, no. 25, p. 3, 17. 4. 2019 [cit. 1. 10. 2020]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3356549

in different ways depending on different national approaches in general problems such as renvoi, qualification or the application of foreign law *ex officio* or not).[46] I dare say that there is no international obligation to apply foreign law, yet still the courts do not always apply *lex fori*. UK is an example of a country where foreign law is treated as a mere fact that must be proved by the party interested in applying foreign law. This is a consequence of the historical development of the English common law system. Nowadays it is clear that this approach should not be applied when the norms of conflict of laws are contained in EU regulations.[47] The UK through history of creating Rome Regulations, it had a special position. As, mentioned, regulations are directly applicable in all Member States, but UK had a unique position for adopting Rome Regulations. Rome Regulations apply to the UK only if the UK specifically opt(ed) in.[48] And it did. European private international law has changed and formed the English law in many ways.[49] The English common law of conflict of laws can be applied only in two cases. When there is no applicable conflict of laws' regulations or some addressed evens occurred before the entry into force of the regulations.[50] Norms are always created in a legal system of some State and are affected by this system. The legal rules in the regulations are the result of a "larger legal order" – compromises of individual legal systems of the Member States of the EU. European regulations could avoid this mechanism (though not in all aspects) as norms are interpreted by the CJEU, which ensures unity through the different legal orders of the Member States of the EU. Therefore, the rules

46 BOGDAN, M. Private International Law as Component of the Law of the Forum. General Course on Private International Law. In: *Recueil des cours 2010*, Leiden/Boston: Martinus Nijhoff Publishers, 2011, Vol. 348, pp. 108–114.

47 Ibid., p. 109.

48 Recitals 44 and 45 Rome I Regulation; Recital 39 the Rome II Regulation.

49 Yet, I dare say that another speculation may accour is whether English law would lose its privileged position after Brexit. I do not think that English law will lose it dominance as a main chosen law for international relations, see AL-NUEMAT, A. and A. NAWAFLEH. Brexit, Arbitration and Private International Law. *Journal of Politics and Law* [online]. 2017, Vol. 10, no. 5, pp. 119–120 [cit. 5. 10. 2020]. Available at: https://www.researchgate.net/publication/321388379_Brexit_Arbitration_and_Private_International_Law

50 GRIDEL, A. The consequences of the withdrawal from the European Union on the English conflict of laws. *Revue de droit international d'Assas (RDIA)* [online]. 2018, no. 1, p. 515 [cit. 5. 10. 2020]. Available at: https://www.u-paris2.fr/sites/default/files/document/cv_publications/27._rdia-the_consequences_of_the_withdrawal_from_the_eu.pdf

thus removed from the Rome I and Rome II Regulations and transposed into English national law are not adapted to be amended or designed to fall within the framework established by common law. These rules even that are autonomously interpreted by the CJEU, created under the inspiration of the legal traditions of the European countries. Like *Gridel* demonstrated in his research, that it can be shown that there are differences between the rules contained in the Rome I and Rome II Regulations and in the implemented rules. He states that the implementation of the rules from the Regulations into the national legal order of the UK constitutes a *legal transplant* and as such will suffer the consequences of such a phenomenon.[51] In conclusion, *Gridel* summarizes that: *"the continuity of the rules might well hide the discontinuity of the interpretation of the English conflict of laws."*[52]

In this section, the consideration can be asked in the form of a question. I might even add that this issue is analysed from an academic point of view. **Will English law tend to return to common law rules post-Brexit? And will the UK prefer its own domestic law (*lex fori*)?** Considering the courts are not bound by the CJEU's interpretation, even though the UK has taken over the rules from the Regulations, only the UK courts can provide and interpret them. Implementation in national law can have various implications also taking account of the historical point of view of the UK. Though speculation is offered above, the result will depend on the progress in negotiations between the UK and EU, no less solutions or resulting solutions can be provided, only based on court practice. Time and practise will reveal the future development of UK conflict of laws.

3 Conclusion

The question is whether or not Brexit is a step forward for the future development for UK in private international law. If we take into account that UK is considered, as *Lord Mance* stated a global and former naval power and where English individualism which has been evolved through

51 GRIDEL, A. The consequences of the withdrawal from the European Union on the English conflict of laws. *Revue de droit international d'Assas (RDIA)* [online]. 2018, no. 1, p. 525 [cit. 5. 10. 2020]. Available at: https://www.u-paris2.fr/sites/default/files/document/cv_publications/27._rdia-the_consequences_of_the_withdrawal_from_the_eu.pdf

52 Ibid., p. 536.

the history, UK is not only an essential balancing factor between the global players in the world but of course also within the EU. Brexit can be considered as a step backwards and plus a resignation of the UK from the position which it gained through development.[53] However, we should look at Brexit as a process and not as an event that is time consuming as such. Even the UK will be legally separated from the EU after Brexit, they will still be tightly bound for economic and historical reasons.[54] Like it was said above, English law has been influenced by the European law and as such will never be a full return to its before-European law shape. Also, by some going further and noting that there is no English private international law, that common law rules of private international law are losing the universality which gave them their coherence.[55] The question remains whether English law will tend to return to common law rules post-Brexit and as such using preference of the *lex fori*, considering the courts are not bound by the CJEU's interpretation, even though the UK has taken over the rules from the Regulations. It is not possible to provide an answer to solve it. Only court practice and time will show us whether English law will gradually return to the common law rules after Brexit.

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53 GROHMANN, N. Lord Jonathan Mance on the future relationship between the United Kingdom and Europe after Brexit. *Conflict of Laws* [online]. 20. 7. 2020, p. 2 [cit. 22. 7. 2020]. Available at: https://conflictoflaws.net/2020/lord-jonathan-mance-on-the-future-relationship-between-the-united-kingdom-and-europe-after-brexit/?print=pdf

54 Ibid., p. 6–7.

55 DICKINSON, A. Back to the Future – The UK's EU Exit and the Conflict of Laws. *Oxford Legal Studies Research Paper* [online]. 31. 5. 2016, No. 35/2016, pp. 1–2 [cit. 5. 10. 2020]. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2786888

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The Applicable Law for the Third-Party Effects of Assignment of Claim – the Approach of the United Kingdom

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Abstract

The European Commission proposed a new regulation related to the law applicable to third-party effects of the assignment of claims. By this regulation the European Commission is aiming at increasing cross-border transactions, investments and market integration. However, the proposal is facing negative positions of member states, especially the United Kingdom. Even though the United Kingdom will not be obliged to follow the rules from the proposal, because it will come into effect after the transition period ends, its approach on this matter will regulate the third party effects of the assignment of claims in case the of cross-border transactions between a person from a member state and from the United Kingdom. Taking into account the difference between the approaches of the European Union and the United Kingdom, persons involved may get into more legal uncertainty than before.

Keywords

Assignment of Claims; Cross-border Transactions; Third Party; United Kingdom.

1 Introduction

The area of assignment of claims contributes to global economic growth by strengthening cross-border transactions and investment and thus facilitating access to business finance. Claims are assets of economic value that are easy to transfer and good short-term source of finance for the assignor. Given the existence of an international element in these contractual relations, legal certainty and predictability between them are being undermined.

The uncertainty stems from unclear rules governing the effects of the assignment of a claim on a third party.

The EU has proposed a separate uniform rule on conflict of laws rules in the regulation on the law applicable to the effects of the assignment of claims to third parties on 12 March 2018[1]. From that date on the EU as well as the National Legislative Councils discuss the contribution of the new proposal that should ensure predictability and legal certainty in determining the ownership of a receivable that has been transferred to a third foreign party.

The conflict of laws rules governing the proprietary aspects of the assignment of a claim are currently regulated at member state level and are therefore based on different connecting factors. However, each member state has developed its conflict of laws rules based on its own experience and practice.[2] Finding one united manner for the whole EU that would respect individual concerns and market practice of each member state seems impossible.

Does the proposal for the regulation respects the different approaches of member states in the area of the applicable law to third-party effects of the assignment of claims? And how does the adoption of the proposal for a regulation change the overall legal regulation of assignment?

The proposal deals solely with the conflict of laws on the effects of the assignment of a claim. On the other hand, the Rome I Regulation[3] contains a conflict of laws rule for determining the law applicable to the relationship between the assignor and the assignee, which will remain in force even after the adoption of the draft regulation. The question, therefore, arises as to whether the legal certainty of the parties to the relationship arising from the assignment of a claim will be enhanced by introducing

1 Proposal for a Regulation of the European Parliament and of the Council on the law applicable to the third-party effects of assignments of claims COM (2018) 96 final prepared by the European Commission in March 2018.

2 The inconsistency in the determination of the law applicable to the effects of the assignment of claims results from the explanatory memorandum of the European Commission on the proposal for a Regulation of the European Parliament and of the Council on the law applicable to the effects of assignment to third parties on 12 March 2018. Poland is based on the law of the assigned claim, Belgium and France are based on the law of the assignor's habitual residence, and the conflict of laws rules of the Netherlands are based on the law of the assignment.

3 Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.

a uniform conflict of laws rules at EU level but thereby creating a duplicate legal regime for the assignment of a claim.

Even though the intention behind the proposal was to strengthen cooperation and cross-border transactions by finding one united way that would be respected by each member state, the legal development in the area of third-party effects of the assignment of claims and its results reflected in the proposal are going against the established market practice of member states. Just like the UK, each member state determines the proprietary aspects of the assignment based on its on conflict of law rules which works. Further interventions by the EU that do not respect practices of member states are superfluous and cause divisions between the member states and the Union.

Against this background, this article is divided into 5 chapters starting with the analyzation of the legal development in the area of third-party effects of the assignment of claims that has an impact on the member states and the EU. Then the revision of the current Art. 14 of the Rome I Regulation that plays a significant role in the determination of applicable law on the assignment as a whole will be made. Continuing with the analysis of the European Commission proposal for the regulation and the negative approach of the UK against the proposal.

2 The Legal Development

Because the assignment of claims is not restricted by a particular territory, the cross-border assignments are a common practice in the area of financial operations. There are no physical but legal obstacles that must be resolved. Companies and credit institutions involved in such process require legal certainty to finance its business activities by using claims and provide for such services. Nonetheless, the concept of the assignment of claims differs between jurisdictions of members states.[4]

4 See the Country reports of the British Institute of International and Comparative Law. Study on the question of the effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over a right of another person – final report. *edz.bib.uni* [online]. 2018 [cit. 10. 10. 2020]. Available at: http://edz.bib.uni-mannheim.de/daten/edz-k/gdj/12/report_assignment_en.pdf

Definitely, the different national rules regulating the third-party effects of such assignments bring the legal uncertainty about who is the owner of the claim among the parties of the assignment transaction itself as well as the market participants who are not the party to such transactions but somehow interact with the parties and therefore need to have the certainty who has the right to the claim in question.[5] Yet, the unification of the substantive law among all members states cannot be achieved because of the unique approach of each state.

The topic of the determination of the applicable law on third-party effects of assignment of claims has been discussed on different national forums. The United Nations Conventions on Assignment of Receivables in International Trade ("UN Convention"), adopted in 2001, sets an objective to *"establish principles and to adopt rules relating to the assignment of receivables that would create certainty and transparency and promote the modernization of the law relating to assignments of receivables, while protecting existing assignment practices and facilitating the development of new practices."*[6] However, it has not entered into force so far. One of the most important parts of the UN Convention deals with the impact of assignment on third parties. The UN Convention addresses the issue in Art. 22–24 through the conflict of laws rules: *"the law of the State in which the assignor is located governs the priority of the right of an assignee in the assigned receivable over the right of a competing claimant."*[7] The rule specifies that the assignor's location shall determine the applicable law since the "location" means the place of central administration and therefore it will always refer to one easily determinable jurisdiction.

The same conflict of laws rule specified in the UN Convention was proposed by the European Commission in 2005 as a part of the Proposal for Rome I[8] in Art. 13 para. 3.[9] Unfortunately, the views of the co-legislators

5 See the Commission Directorate General for Justice and Consumers and Directorate General for Financial Stability, Financial Services and Capital Markets Union. Inception Impact Assessment. *European Commission* [online]. 28. 2. 2017 [cit. 10. 10. 2020]. Available at: https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-1073039_en

6 Preamble UN Convention.

7 Art. 22 UN Convention.

8 Proposal for a regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I).

9 Ibid., Art. 13 para. 3.

of the Rome I Regulation was different. They requested further studies to determine the applicable law and therefore the question of third-party effects of claims itself was not addressed in the Rome I Regulation. Despite that the Art. 27 para. 2 of the Rome I Regulation expressly required the European Commission to submit a report on the question of the effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over a right of another person by 2010.[10]

3 What are the Third-Party Effects of the Assignment?

The third-party effects are understood as aspects of the assignment that are excluded from the application of Art. 14 of the Rome I Regulation. Generally, and in the meaning of the subject of this article, the third-party effects of the assignment of claims are (i) the effectiveness of an assignment of claims against third parties and (ii) the determination of priority of claims in case of competing assignments.[11] Both categories are connected to the aspects regarding the passing of the right or the title to the claim on another third person. Therefore, the related question that must be answered is who the third party concerning the assignment of claims is. As *Labonté* analyzed in his article, the third party are (i) creditors of the assignor, (ii) competing assignees, if there are any, and (iii) creditors of the assignee.[12]

3.1 The Rome I Regulation and its Article 14

The Art. 14 para. 1 of the Rome I Regulation currently determines the applicable law to the contractual obligation between the parties of the assignment – assignor and assignee.[13] The law between the assignor and

10 Ibid., Art. 27 para. 2.

11 Art. 27 para. 2 Rome I Regulation that requires the European Commission to submit a report on the question of the effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over a right of another person.

12 See LABONTÉ, H. Third-Party effects of the assignment of claims: new momentum from the Commission's Capital Markets Union Action Plan and the Commission's 2018 proposal. *Journal of Private International Law,* 2018, Vol. 14, no. 2, p. 328.

13 Art. 14 Rome I Regulation.

the assignee that is of a contractual claim is determined either according to the Art. 3 para. 1 of the Rome I Regulation by the parties' choice of law or according to Art. 4–8 by objective connecting factors, or if the claim is non-contractual it is determined by Rome II Regulation[14].

Para. 2 of the Art. 14 determines the applicable law regarding *"assignability, the relationship between the assignee and the debtor, the conditions under which the assignment or subrogation can be invoked against the debtor and whether the debtor's obligations have been discharged."*[15], that is the debtor protection rules. The law of the assigned claim governs (i) the conditions of the notification of the debtor about the assignment, (ii) obligations of the debtor after receipt of notification of the assignment, (iii) the conditions of set-off or pay-off of the claim, or (iv) the regime of other defenses of the debtor.[16] According to the wording, the law of the underlying assigned claim applies on above-mentioned issues that cannot be subject to the disposition of the parties because it could compromise the protection and legal certainty of the debtor.

The Rome I Regulation, therefore, covers the area of assignment of claims between the parties interested in such a relationship and should not apply to any aspects outside the circle. The member states aimed to exclude the third-party effects of assignment from the scope of the Art. 14 which was caused by a disagreement among the member states. The disagreement resulted from different approaches that were taken by the member states in this matter. Consequently, the Rome I Regulation was adopted without determination of applicable on the matter in question since its exclusion was the only way how to save the whole legal instrument.[17]

As a result, each member states determined the applicable law on the third-party effects of the assignment according to its own conflict of law

14 Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations.

15 Art. 14 para. 2 Rome I Regulation.

16 GARCIMARTÍN ALFÉREZ, F. J. Assignment of claims in the Rome I Regulation: Article 14. In: FERRARI, F. and S. LEIBLE (eds.). *Rome I Regulation: The Law Applicable to Contractual Obligations in Europe*. Munich: European Law Publishers, 2009, pp. 231–232.

17 MANKOWSKI, P. The race is on: Germ reference to the CJEU on the interpretation of Art. 14 Rome I Regulation concerning third-party effects of assignments. *Conflict of Laws* [online]. September 2018 [cit. 10. 10. 2020]. Available at: http://conflictoflaws.net/2018/the-race-is-on-german-reference-to-the-cjeu-on-the-interpretation-of-art-14-rome-i-regulation-with-regard-to-third-party-effects-of-assignments/?print=pdf

rules. The European Commission examined the laws of member states and brought to a light different conflict rules from each member state. E.g. in the UK the law of the contract between assignor and assignee governs all aspects of the assignment. On the other the hand, in Belgium the law of the assignor's habitual residence shall apply and in Sweden the *lex rei sitae*.[18]

It must be noted that confusion regarding the scope of application of the Art. 14 still exists because of wrong clarification of the issue that is further analyzed in recital 38 of the Rome I Regulation: *"In the context of voluntary assignment, the term 'relationship' should make it clear that Article 14(1) also applies to the property aspects of an assignment (…)"*.[19] Some scholars argue that such wording suggests that the Art. 14 covers even the passing of title that has third-party effects.[20] However, such a conclusion is not correct and as *Labonté* mentioned in his article, the main argument against such a meaning of the Art. 14 and recital 38 is, that this recital had been included in the Rome I Regulation already in Commission's proposal of the Rome I Regulation that counted with an explicit provision for the determination of the applicable law for the third-party effects of the assignment before it was rejected by the member states. This implies that Art. 14 of the Rome I Regulation applies solely to the relationships between the assignor and assignee and the debtor.

4 The Proposal of the European Commission

Removing barriers to cross-border transactions in claims and investment is the main objective set by the EU to be achieved by the new proposal. Nevertheless, there are still doubts whether the proposal actually eliminates the legal uncertainty or just adds more of it.[21]

As mentioned in chapter 2, the different set of national conflict rules that regulates the issue in question causes the legal uncertainty about who has the

18 See pp. 6–7 of the Report on the question of the effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over the right of another person COM (2016) 626 final, prepared by the European Commission in 2016.

19 Recital 38 Rome I Regulation.

20 LABONTÉ, H. Third-Party effects of the assignment of claims: new momentum from the Commission's Capital Markets Union Action Plan and the Commission's 2018 proposal. *Journal of Private International Law*, 2018, Vol. 14, no. 2, pp. 329–330.

21 Ibid., p. 323.

legal title to the assigned claim, what happens if third parties claim legal title over the same claim, or which member state's authority is entitled to resolve dispute related to such transaction. Consequently, this lack of certainty creates a legal risk in cross-border assignments of claims resulting in loss of legal title, higher transaction costs or complete waive of the business opportunity.[22]

4.1 The Structure of the Proposal

The proposal is parallel to the Rome I Regulation regarding the basic provision on the scope of the regulation that is taking into account all existing regulations of the EU including the Rome I Regulation. The proposal consists of the provision on universal application resulting in the possible application of a law of a third state, overriding mandatory provisions and public policy of the forum e.g. in case of mandatory obligation to register the assignment of claim in public register, the exclusion of *renvoi* and finally the relationship with other provisions of the EU law and existing international conventions. The proposal includes special new provisions regarding the applicable law and its scope.

4.2 The Applicable Law on Third-Party Effects of the Assignment of Claims

The proposal came with uniform conflict of laws rules in respect of the third-party effects of the assignment of claims defined in Art. 4. According to its recital 15, the conflict of laws rules shall govern proprietary effects of assignments of claims between all parties involved as well as in respect of third parties.[23] The scope of the Art. 4 of the proposal includes the proprietary rights not only of the third parties e.g. creditors. This provision shall apply also between the assignor and the assignee and the assignee and the debtor. However, some scholars[24] consider the wording of recital 15 in connection with Art. 4 of the proposal inconsistent with current legal rules

22 See pp. 4–5 proposal.
23 Recital 15 proposal.
24 See for example Kronke, H. Assignment of Claims and Proprietary Effects: Overview of Doctrinal Debate and the EU Commission's proposal. *Oslo Law Review,* 2019, Vol. 6, no. 1, p. 12.

provided by the Art. 14 of the Rome I Regulation. According to their opinion, Art. 14 of the Rome I Regulation implicitly covers even the proprietary rights between assignor the assignee as this conclusion results from the recital 38 of the Rome I Regulation. Reasons, why such an opinion must be rejected, are further analyzed in chapter 3.

The proposal laid down a general rule for the determination of the applicable law based on the assignor's habitual residence. In the meaning of the proposal, the *"habitual residence" "means, for companies and other bodies, corporate or unincorporated, the place of central administration; for a natural person acting in the course of his business activity, his principal place of business"*[25]. The definition is partially transposed from the Rome I Regulation, specifically its Art. 19.[26] The European Commission decided to exclude from the scope of the definition of the *"habitual residence"* the branches, because of a possible uncertainty if the same claim would be assigned by the branch as well as by the central administration.[27]

However, there is a problem linked to the habitual residence of assignor that the proposal envisaged – the potential change of assignor's central administration between individual assignments of a single claim. The rule on the conflict mobile establishes as the applicable law the law of the assignor's habitual residence that was applicable at the time when one of the assignments became effective against third parties.[28]

For fulfilment of needs of the market participants, there are two exceptions from the general rule specified in the Art. 4 para. 2 that provides the applicability of the law of the assigned claims between the assignor, the original creditor, and the debtor.

Firstly, the law of the assigned claim is applicable in case of the assignment of cash by the creditor credited to an account in the credit institution such as a bank.[29] The first contract that assigns claim is concluded between the assignor and the debtor, the bank. Such regulation strengthens the legal certainty since in many cases, the applicable law of the assigned claim

25 Art. 2 letter f) proposal.
26 Art. 19 Rome I Regulation.
27 See p. 18 proposal.
28 Ibid., Art. 4.
29 Ibid., Art. 4 para. 2 letter a).

will be the law of the state where the bank is located. If there are further assignments of the same claim, the applicable law on the third-party effects of such assignment will be determined according to the law of the contract between the assignor, and the first debtor, the bank.

The second exception is the assignment of claims arising from financial instruments.[30] The proposal uses the derivative contract, that is used mostly by investors as risk protection, as an example of the financial instruments in question. Again, the legal certainty is quite high in this case, because the law applicable to the assignment of claim is either chosen by the parties or determined in accordance with non-discretionary rules applicable to the relevant financial market.[31]

Moreover, the proposal allows an alternative for the parties given the applicable law on the third-party effects of the assignment of the claim in respect of the securitization. The parties, meaning the assignor and the assignee, may choose for the third-party effects the law applicable to the assigned claim or remain subject to the general rule, the law of the assignor's habitual residence.[32] The proposal itself provides with an explanation of why the alternative in respect of securitization and no other financial transactions exist. The current practice of some credit institutions is the application of the law of the assigned claim because then all claims in question are regardless of their assignors' habitual residence subjected to the same law.[33]

It is common that one single claim was assigned more than once and that the parties of each assignment chose a different applicable law to the third-party effects. In case of such conflict of different legal systems, the proposal determines the clear rule. Based on an objective factor that is the time aspect of the efficiency of the claim against a third-party.[34] This rule copies the rule used for the conflict mobile. And as well as in case of conflict mobile, the rule is responding to the purpose of the proposal that concerns the third-party effects.

30 Ibid., Art. 4 para. 2 letter b).
31 Ibid., p. 19.
32 Ibid., Art. 4 para. 3.
33 Ibid., p. 20.
34 Ibid., Art. 4 para. 4.

4.3 What it Means in Practice

The regime for the applicable law to third-party effects of the assignment of claims chosen by the European Commission reflects the previous negotiations between the member states that were linked to the preparation of the Rome I Regulation. In that time there were two approaches supported by the member states: the application of (i) the law of the habitual residence of the assignor and (ii) the law of the assigned claim. Since both approaches had some drawbacks, a combination of both of them was examined as well. The member states came to the following: the general rule would be the law of the assignor's habitual residence and exceptions for certain types of claims would be introduced.[35] However, the main problem in that time was to draft the exceptions and that led to the rejection of including these rules into the Rome I Regulation.

The law of the habitual residence of the assignor as governing law of the third-party effects is considered by many well-known scholars[36] to be the best and logical option. It is said that this approach is a practical solution for many forms of assignment, especially in case of assignment of future or bulk claims, the most predictable and easily ascertained by any third party and also consistent with the Insolvency Regulation[37] and the UN Convention.[38]

Taking into account that there are 2 main industries covered by the proposal – factoring and securitization, the European Commission had to even, in this case, introduce exceptions.

In case of factoring when a company assigns a bulk of claims, usually future receivables, to an assignee it is the most convenient to apply the general rule – the law of the assignor's habitual residence. The bulk of receivables

35 GARCIMARTÍN ALFÉREZ, F. J. Assignment of claims in the Rome I Regulation: Article 14. In: FERRARI, F. and S. LEIBLE (eds.). *Rome I Regulation: The Law Applicable to Contractual Obligations in Europe*. Munich: European Law Publishers, 2009, p. 246.

36 See WALSH, C. Receivables Financing and the Conflict of Laws: The UNCITRAL Draft Convention on the Assignment of Receivables in International Trade. *Dickinson Law Review*, 2001, Vol. 106, p. 174; or GOODE, R. The Assignment of Pure Intangibles in the Conflict of Laws. In: GULLIFER, L. and S. VOGENAUER (eds.). *English and European Perspectives on Contract and Commercial Law. Essays in Honour of Hugh Beale*. Oxford: Hart Publishing Ltd, 2014, p. 353, 375.

37 Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings.

38 KRONKE, H. Assignment of Claims and Proprietary Effects: Overview of Doctrinal Debate and the EU Commission's proposal. *Oslo Law Review*, 2019, Vol. 6, no. 1, p. 15.

consists of more than one future claim that may be governed by different laws. If we would apply the law of the assigned claim on the third-party effects that would mean that for each claim the assignee would have to consider different national rules.

On the other hand, the proposal offers the assignor and the assignee flexibility in relation to a securitization. When an assignor, such as a bank, does not want to be exposed to the risk that the loans it has provided will not be repaid, it assigns the claims to the assignee, that is called the *"special purpose vehicle"*, that then issues the securities and sells it to investors. In the case of large securitization transactions, the assignors are located in different states. This means that the assignee (the special purpose vehicle) will need to comply with the requirements laid down in the law that governs the assigned claims (that is, the contract between the assignor and the debtor) to ensure that it acquires legal title over the assigned claims. The law of the assigned claim corresponds to the current market practice involving large banks by applying the law of the assigned claim to the third-party effects where the assigned claims are all subject to the same law but the assignors are located in various states.

5 The diversity among member states

The divergence in the conflict rules is more than obvious and it causes an obvious problem, **the legal uncertainty that results from complexity**. Firstly, the relationship between assignor, assignee and the debtor and different understanding of the concept of the assignment among jurisdictions is already a complex and only on the substantive national law level. Such complexity transferred on the conflict of laws level results in even more confusion and adds to the growth of uncertainty. Moreover, the legal uncertainty is supported by overlapping rules of regulations adopted in the EU that may be applied at the same time. Such conflict may, for example, occur in case of an insolvency of an assignor. Firstly, Art. 14 of the Rome I Regulation clarifies the applicable law between the assignor and the assignee, however, in the event of insolvency of the assignor, the Insolvency

Regulation Recast[39] may cause a bigger uncertainty. In such a case, the law of the state where the insolvency proceedings are commenced against the assignor determines even aspects related to the assignment of claims to third-party.[40]

The absence of the general rule on the EU level leads many member states to develop a solution based on an interpretation of the Art. 14 of the Rome I Regulation. In *Brandsma qq vs. Hansa Chemie AG* the Supreme Court of Netherlands decided whether a validity of the assignment of claim, that is a question of a property rights, in that case was governed by the Rome Convention[41] (in force at that time) and whether to apply Art. 12 para. 1 of the Rome Convention (currently the equivalent to the Art. 14 of the Rome I Regulation). The Court decided that the abovementioned article covers the contractual aspects of the assignment as well as the proprietary between the assignor and the assignee.[42]

5.1 The approach of the United Kingdom

Taking into account on one hand current negotiations between the EU and UK regarding the Brexit deal and that the transition period ends on the 31 December 2020, and on the other the current impossibility and absence of negotiations on the proposal on the EU level, the UK will leave the EU before the proposal will be adopted. However, during the development of the proposal, the UK was a valid member of the EU as any other country. Therefore, its approach and opinion on the proposal for the regulation should be properly analyzed, since it can reveal the manner how the proprietary aspects of the assignment of claims in relation to the UK will be regulated.

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39 Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings.

40 See p. 8 of the Report on the question of the effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over the right of another person COM (2016) 626 final, prepared by the European Commission in 2016.

41 Convention of 19 June 1980 on the law applicable to contractual obligations.

42 HARTLEY, T. C. Choice of Law Regarding the Voluntary Assignment of Contractual Obligations under the Rome I Regulation. *International and Comparative Law Quarterly*, 2011, Vol. 60, no. 1, p. 43.

The UK expressed strong disagreement with the proposal for the regulation.[43] The imposition of a mandatory rule on the EU level that excludes the party autonomy and does not respect the current market practice reflected in the law that currently address the issue of the proprietary aspects of the assignment, was not accepted by this common law country.

As many other member states, the UK also considers the Art. 14 para. 1 of the Rome I Regulation as the main conflict of laws rule determining the law applicable to the assignment of claims in general. It regulates

- the relationship between the assignor and the assignee,
- the relationship between the assignee and the debtor, and
- the relationship between the assignor and the debtor.

The general rule is that the contractual claim is determined either according to the Art. 3 para. 1 of the Rome I Regulation by the parties' choice of law, according to Art. 4–8 by objective connecting factors, or if the claim is non-contractual it is determined by Rome II Regulation. Each aspect of the assignment is therefore determined by the same applicable law.

However, the proposal for regulation introduces a new jurisdiction law that should apply besides the general rule as stated above, the law of the assignor's habitual residence. By this approach further issues arises, that consequently lead to bigger complexity and confusion.

Firstly, the place of the *"habitual residence"* may have a different meaning under the Rome I Regulation and the proposal for the regulation. The Art. 19 of the Rome I Regulation determines the habitual residence of companies as the place of its central administration with one exemption that cannot be omitted. In case of contracts concluded by a branch, agency or other establishment, the place where the branch, agency or any other establishment is located shall be considered as the place of the habitual residence.[44] The proposal, on the other hand, does not specify such rule for determination of the habitual residence. German creditor, operating through a branch

43 Proposed EU Regulation on law applicable to the third party effects of assignment of claims – Why the UK should opt-out and work to get this proposal changed or scrapped. *The City of London Law Society* [online]. 24. 5. 2018 [cit. 18. 10. 2020]. Available at: http://www.citysolicitors.org.uk/storage/2018/05/Proposed-EU-Regulation-on-law-applicable-to-the-third-party-effects-of-assignment-of-claims-24-05-18.pdf

44 Art. 19 Rome I Regulation.

in the UK, assigns a claim governed by the English law to two assignees. Assignee A is from the UK and assignee B is from the Czech Republic. The assignment itself is regulated by the law of the claim, that is the English law. However, the determination who of the two assignees is entitled to the claim that was assigned to them will be, by applying the rules from the proposal, determined by the law of the assignor's habitual residence. The habitual residence of the assignor regardless of whether it was assigned by its branch with place of business in another jurisdiction, will be determined by the place of its central administration, which is in Germany. Therefore, we have a single contractual claim that is assigned between assignor and assignee A. The assignment itself is regulated by the law of the assigned claim, however the proprietary effects of such assignment are determined by the law of the assignor's habitual residence (if not taking into account the other two rules stated by the proposal).

Furthermore, these (at least) two legal jurisdictions may have a different impact on assignment of a future claim. The assignor must due diligence not only the possibility of the assignment under the law applicable to the claim itself, but even the law of its habitual residence.

Another issues that arises regarding the proposed rules by the European Commission is the current market practice regarding the assignment of claims. For example, in the area of syndicated loans, the assignments must always comply with a single legal jurisdiction, usually the law of the assigned claim. However, by applying new rules, different set of rules may apply on a single facility based on the residence of each assignor.

The UK itself proposes that the general conflict of law rule should be the law applicable to the assigned claim.

5.1.1 The law applicable to the assigned claim

As mentioned in the precious chapters, the law of the assigned claim is already applicable according to the Art. 14 para. 1 of the Rome I Regulation and respected by some member states such as the UK. What if the law of the assigned claim would apply even on the third-party effects? The assignor and the assignee must consider the law of the assigned claim if they choose to transfer such claim for example in question of assignability of the claim.

The claim may become non-assignable because of the protection rules of the debtor that come into the game.[45] There are more prerequisites for transfer of claim that are regulated by the law of the assigned claim and should, therefore, regulate also third-party effects of the assignment.[46] Another issue that supports this approach is the debtor position in case of a set-off. The original creditor, the assignor, rightfully assigned the claim to an assignee who chose as the applicable law to the assignment German law. However, the debtor wants to determine whether it can still exercise the set-off against the assignor. In such case, he will have to refer to the law other than the one under which his obligation arose to determine whether it is still possible to set off its debt with the original creditor, the assignor.[47] To avoid the complexity of applicable laws that apply to the whole process of the assignment, the law of the assigned claim should apply even to third-party effects.

6 Conclusion

The very existence of general rules governing the law applicable to the effects of the assignment of claims to third parties entails a certain shift in certainty in the context of financial operations in the EU. Definitely, one united manner to determine the applicable law to the third-party effects of the assignment is more than welcomed by the EU and its member states. However, it seems almost impossible to agree on it. The reason is obvious. Each member state regulates the aspects of assignment under its own conflict of law rules setting different connecting factors for the determination of the applicable law. Some of the member states found a solution on this matter by applying the same law as determined by the Art. 14 of the Rome I Regulation. The reason is to avoid the unnecessary double legal regime for the contractual aspects and the proprietary aspects of the assignment.

45 Such a case can occur for example when a debtor assigned his salary to pay off his debt but then he becomes penniless. Some of the national laws forbid the assignment of salary as a protection for the employee.

46 LABOTNÉ, H. Third-Party effects of the assignment of claims: new momentum from the Commission's Capital Markets Union Action Plan and the Commission's 2018 proposal. *Journal of Private International Law*, 2018, Vol. 14, no. 2, p. 335.

47 Ibid., p. 336.

The same applies for the UK. Even though it is no longer a member state and therefore, it will not be obliged to apply the rules from the proposal, its arguments for rejection of such proposal are understandable.

If the proposal will be adopted on the European level, it may bring more legal uncertainty than before. It seems that the UK is about to leave the EU without any deal which means that there will be no solution for uniform rules determining applicable law for any transactions, including the assignment of claims and its proprietary aspects, between them. The approach of the UK is quite clear. Even though, the UK will not be obliged to apply the new regulation after it will be adopted by the EU, some of current rules related to the assignment of claims adopted on the EU level will apply even after leaving the EU.

As a result of the European Union (Withdrawal) Act 2018 the Rome I Regulation shall continue to apply in the UK after Brexit. Therefore, the general rule for the assignment of claims shall be the one in Art. 14 of the Rome I Regulation. Regarding the third-party effects of the assignment the law governing the claim shall apply.

However, the question still is whether and within what time limit the EU will adopt the proposal. Until then the same regime between the states applies.

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