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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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