

# 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.*”<sup>1</sup> From another perspective as *Schwarzschild* noted: “*it was a bold and admirable decision.*”<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup> Also the scenario of the Hague Conference on Private International Law

<sup>1</sup> 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>

<sup>2</sup> 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/>

<sup>3</sup> 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](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22013A0321(01)&from=CS)

<sup>4</sup> 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](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.<sup>5</sup> 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 judgment 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.<sup>6</sup> Also the Lugano regime was considered with the emerging risk concerning the *torpedoes issues*.<sup>7</sup> 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.<sup>8</sup>

Now the regime of transposition into the UK domestic law won the battle. Incorporation of the Rome Regulations<sup>9</sup> 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.<sup>10</sup>) It is clear that the main issue – as said the “*hot topic*” is the leading role of the interpretation of the CJEU case law.<sup>11</sup>

<sup>5</sup> 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>

<sup>6</sup> 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](https://limo.libis.be/primo-explore/fulldisplay?docid=LIRIAS1952161&context=L&vid=Lirias&search_scope=Lirias&tab=default_tab&lang=en_US&fromSitemap=1)

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*, p. 9.

<sup>9</sup> Referring 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”).

<sup>10</sup> 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](https://limo.libis.be/primo-explore/fulldisplay?docid=LIRIAS1952161&context=L&vid=Lirias&search_scope=Lirias&tab=default_tab&lang=en_US&fromSitemap=1)

<sup>11</sup> *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.<sup>12</sup> 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.<sup>13</sup> 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<sup>14</sup> and entered into force on 1 February 2020 (“Agreement on the withdrawal”).<sup>15</sup> 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.<sup>16</sup>

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<sup>17</sup> to revoke an accession to the EU and for the need to transpose the EU law into the UK domestic law.<sup>18</sup>

<sup>12</sup> 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](http://www.bulletin-advokacie.cz/assets/zdroje/casopis/BA_78_2018_web.pdf)

<sup>13</sup> 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>

<sup>14</sup> 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:2020A0131\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:2020A0131(01))

<sup>15</sup> 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](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020XG0131(01)&from=EN)

<sup>16</sup> Art. 126 and Art. 127 Agreement on the withdrawal.

<sup>17</sup> 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/>

<sup>18</sup> 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.<sup>19</sup> 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.<sup>20</sup> 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.<sup>21</sup>

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).<sup>22</sup>

## 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

<sup>19</sup> Art. 66 Agreement on the withdrawal.

<sup>20</sup> Ibid.

<sup>21</sup> 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](http://www.bulletin-advokacie.cz/assets/zdroje/casopis/BA_78_2018_web.pdf)

<sup>22</sup> 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](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<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup>

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.<sup>26</sup>

<sup>23</sup> 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”).

<sup>24</sup> 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-brexite/?print=pdf>

<sup>25</sup> 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-brexite/>

<sup>26</sup> Art. 267 Treaty on the Functioning of the European Union (“TFEU”).

Concerning this issue, a *double-track* interpretation and application development may arise.<sup>27</sup>

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

As called, EU-derived domestic legislation<sup>28</sup>, will come into effect after the transition period. The direct EU legislation<sup>29</sup> – 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,<sup>30</sup> only the court system of the UK will have the power to interpret and apply the retained EU case law.<sup>31</sup> 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

<sup>27</sup> 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-brexite/?print=pdf>

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

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

<sup>30</sup> See Section 6 European Union Act 2018.

<sup>31</sup> 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.<sup>32</sup> This phrase sentence is mentioned in the European Union Act 2018.<sup>33</sup> 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.<sup>34</sup> 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?”<sup>35</sup> 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.<sup>36</sup> 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.<sup>37</sup> 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.<sup>38</sup> 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

<sup>32</sup> Ibid.

<sup>33</sup> Section 6(1-3) European Union Act 2018.

<sup>34</sup> GILKER, 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>

<sup>35</sup> 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/>

<sup>36</sup> TAYLOR, D. and R. BRITAIN. 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](https://thelawreviews.co.uk/digital_assets/faa56b5e-9ac3-4e07-8955-79c4c1ec431c/The-Dispute-Resolution-Review-12th-ed--book.pdf)

<sup>37</sup> Ibid.

<sup>38</sup> Art. 3 Rome I Regulation.



English law is a highly flexible and sophisticated system of law commonly used in international business relations.<sup>39</sup>

## 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.<sup>40</sup> 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.<sup>41</sup> 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.<sup>42</sup> The modifications (i.e. corrections) made by the law

<sup>39</sup> TAYLOR, D. and R. BRITAIN. 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](https://thelawreviews.co.uk//digital_assets/faa56b5e-9ac3-4e07-8955-79c4c1ec431c/The-Dispute-Resolution-Review-12th-ed---book.pdf)

<sup>40</sup> 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](https://www.legislation.gov.uk/uksi/2019/834/pdfs/uksi_20190834_en.pdf) (“Law applicable to contractual obligations and non-contractual obligations”).

<sup>41</sup> 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](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”).

<sup>42</sup> *Ibid.*

applicable to contractual obligations and non-contractual obligations are rather of formal and technical or updated nature.<sup>43</sup> 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.<sup>44</sup> 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.<sup>45</sup>

## 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

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<sup>43</sup> 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](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3356549)

<sup>44</sup> 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](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3356549)

<sup>45</sup> 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](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).<sup>46</sup> 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.<sup>47</sup> 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.<sup>48</sup> And it did. European private international law has changed and formed the English law in many ways.<sup>49</sup> 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.<sup>50</sup> 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

<sup>46</sup> 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.

<sup>47</sup> *Ibid.*, p. 109.

<sup>48</sup> Recitals 44 and 45 Rome I Regulation; Recital 39 the Rome II Regulation.

<sup>49</sup> Yet, I dare say that another speculation may occur is whether English law would lose its privileged position after Brexit. I do not think that English law will lose its 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](https://www.researchgate.net/publication/321388379_Brexit_Arbitration_and_Private_International_Law)

<sup>50</sup> 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](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.<sup>51</sup> In conclusion, *Gridel* summarizes that: “*the continuity of the rules might well hide the discontinuity of the interpretation of the English conflict of laws.*”<sup>52</sup>

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

<sup>51</sup> 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](https://www.u-paris2.fr/sites/default/files/document/cv_publications/27._rdia-the_consequences_of_the_withdrawal_from_the_eu.pdf)

<sup>52</sup> *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.<sup>53</sup> 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.<sup>54</sup> 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.<sup>55</sup> 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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<sup>53</sup> 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>

<sup>54</sup> *Ibid.*, p. 6–7.

<sup>55</sup> 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](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2786888)

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