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British-European Relations Post-Brexit: A Legal Kaleidoscope

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Judicial Cooperation in Civil and Commercial Matters

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I. Introduction

Over the past 20 years the European legislature has devoted a lot of attention to judicial cooperation in civil and commercial matters, better known as private international law. In fact, it has – to this date – adopted a total of eighteen Regulations to improve the settlement of cross-border disputes, among them the Rome I and Rome II Regulations[2] that determine the law applicable to contractual and non-contractual obligations and Brussels Ia Regulation[3] that deals with jurisdiction, recognition and enforcement of foreign judgments in civil and commercial matters. These three Regulations – as well as nine further regulations which I will not discuss in detail – were applicable in the UK as long as the UK was a member of the EU. And, of course, they are currently applicable in the UK as a result of the Withdrawal Agreement. However, on January 1st when the transition period provided for in the Withdrawal Agreement has expires, this will essentially come to an end. I say essentially because there are exceptions. But these exceptions to not change the fact that it is high time to think about the future relationship between the EU and the UK in private international law.

The following remarks are organized in two parts. In the first part I will analyse the effects that Brexit will have on private international in the short run, i.e. as of January 1st. And in the second part I will discuss what can be done to improve the situation in the long run.

II. Short-term perspectives

As indicated earlier, the earlier mentioned European regulations, notably the Rome I and II Regulations and the Brussel Ia Regulation, will continue to apply in some cases even after expiration of the transition period. This follows from Articles 66 and 67 of the Withdrawal Agreement and is meant to ensure legal certainty and legal stability. With regard to jurisdiction, for example, the Brussels Ia Regulation will continue to apply to all legal proceedings instituted before the end of the transition period. By the same token the Brussels Ia Regulation will continue to apply with regard to recognition and

[1] The statement is based on previous publications, notably Giesela Rühl "Private International Law post-Brexit: Between Plague and Cholera", Revue de Droit Commercial Belge/Tijdschrift voor Belgisch Handelsrecht [RDC-TBH] 2020, pp. 21-16 and Giesela Rühl "Judicial Cooperation in Civil and Commercial Matters after Brexit: Which Way Forward?" International & Comparative Law Quarterly [ICLQ] 67 (2018), pp 99-128.

[2] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), [2008] OJ L 177/6; Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), [2007] OJ L 199/40.

[3] 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 (recast), [2012] OJ L 351/1.

enforcement of judgments given in legal proceedings instituted before the end of the transition period. Finally, with regard to the applicable law the Rome I and the Rome II Regulations will continue to apply to contracts that were concluded and to damaging events that occurred before the end of the transition period. European private international law will, thus, not simply go away on January 1st but will continue to play a role in the UK for some time, potentially years.

The situation is, of course, different for all cases that are not covered by the Withdrawal Agreement, i.e. all future cases, notably legal proceedings that are instituted on or after January 1st, contracts that are concluded on or after January 1st and damaging events that occur on or after that date. These cases will, as matter of principle, be governed by national rules. However, with regard to issues of choice of law in contractual and non-contractual matters the UK has decided to unilaterally apply the Rome I and II Regulations. And with regard to jurisdiction, recognition and enforcement the UK has applied for accession to the Lugano Convention of 2007 and announced its intention to sign the Hague Convention on Choice of Court Agreements of 2005.

The bottom line, thus, is: As of January 1st, the current European regime will be replaced by a patchwork of national, European and – as the case may be – international provisions. And while I have no doubts that the private international law community will somehow adjust and manage to get along, there is no denying the fact that the legal situation will become more complex and difficult to understand making it harder for parties to predict, for example, which courts will be competent to hear a case and how judgments can be enforced. In addition, the patchwork of provisions that will apply as of January 1st will fall far behind the current level of integration and harmonization. Take for example the Lugano Convention of 2007. Even if the UK manages to join – which is still unclear at this point becomes accession depends on the EU's consent – it will not compensate the loss of the Brussels Ia Regulation. This is because the Lugano Convention was never aligned with the Brussels Ia-Regulation and, therefore, does not, for example, provide for direct and immediate enforcement of judgments. Similarly, the Hague Choice of Court Convention of 2005 is far from being a full substitute for the Brussels Ia Regulation. In fact, since its scope of application is limited to (certain) choice of forum clauses, it only covers a small part of the issues covered by the Brussels Ia Regulation.

All in all, one cannot close the eyes to the fact that with regard to judicial cooperation in civil and commercial matters things will not change for the better on January 1st. I, therefore, believe that we need to think about what can be done to improve the situation in the long-run. And this brings me to the second part of my remarks.

III. Long-term perspectives

With regard to the long-term perspectives for private international law it deserves first to be mentioned that – thus far – no political debate about the future relationship in private international law has taken place. In fact, judicial cooperation in civil and commercial matters has not played any role in any negotiations between the EU and the UK. It is also not part of the current negotiations about a free trade agreement.

However, that does not mean that there are no one meaningful proposals. In fact, the (former) UK government, the May government, suggested as early as September 2018 the negotiation of a tailor-made bilateral agreement on matters of private international law. But in light of the drama surrounding the Withdrawal Agreement this proposal never received the political attention it would have deserved. In addition, the UK government responsible for the proposal resigned in summer 2019. And the new government has – to this date – not publicly commented on the idea of a bilateral agreement for private

international law. As a consequence, it is largely unclear whether it is still on the political agenda of the UK. But be it as it may: I think that a new bilateral agreement on matters of private international law would be beneficial for both the UK and the EU. In particular, it would provide legal certainty and, hence, establish the legal infrastructure necessary to engage in mutually beneficial cross-border trade. In addition, it would allow the EU and the UK to continue the successful judicial cooperation in civil and commercial matters based on the current level of integration. However, the negotiation of a new bilateral agreement would also face problems. For reasons of two I just want to highlight two.

The first problem would be that from the perspective of the EU a bilateral agreement – just for the relationship with the UK – would increase the already existing fragmentation of private international law. Take, for example, the rules on jurisdiction. Member State courts currently have to choose between four different legal regimes depending on whether the case has a relationship with an EU Member State, with a Lugano Convention State, with a State which is a party to the Hague Choice of Court Convention or with some other (third) State. Adding a bilateral agreement that regulates the relationship with the UK would require courts in EU Member States to apply five different legal regimes to determine whether they are internationally competent to hear a case. Needless to say, that this would not make private international law more accessible in practice.

The second problem that a new bilateral agreement would face relates to its interpretation. Here the EU would certainly want the CJEU to play a prominent role while the UK would certainly refuse to give the CJEU any form of jurisdiction. In fact, the former Prime Minister, Theresa May, stressed time and again that she wanted to "bring an end to the direct jurisdiction of the CJEU". And there is virtually no hope that the current – or any future – UK government would take a less strict approach. In the literature, it has, therefore been suggested to seek inspiration from Protocol No 2 to the earlier mentioned Lugano Convention of 2007. According to that Protocol all contracting states, including the courts of non-EU Member States, have to "pay due account" to the principles laid down by the CJEU. It, thus, goes a long way to ensure that CJEU case law – without being binding in a strict sense – is respected in contracting states that are not member states. I, therefore, believe that it could be a good compromise solution for a future agreement between the EU and the UK. However, others think that the mechanism established by Protocol No 2 would not work in relation to the UK. They argue that the UK accounts for too many cases to risk deviating decisions. As a result, the issue of interpretation remains open and unsolved.

IV. Conclusions

There can be little doubt that Brexit will be a turning point for judicial cooperation in civil and commercial matters. After two decades of integration, the many regulations which the European legislature has adopted to improve the settlement of cross-border disputes will essentially cease to apply in the UK once the transition period provided for in the Withdrawal Agreement expires. As of January 1st, issues of choice of law, jurisdiction and recognition and enforcement will, therefore, be governed by a complex patchwork of national, European and international provisions which do not keep pace with the current level of integration. Private international will, thus, become what the title of this workshop suggests: a legal kaleidoscope. The EU and the UK should, therefore, pull themselves together rather sooner than later to find solutions that will – at least in the long-run – ensure legal certainty for parties that engage in cross-border trade. I have tried to show that the negotiation of new bilateral treaty would be a good way forward – even though it would come with problems and challenges.