IMPLICATIONS OF BREXIT FOR CERTAIN ASPECTS OF EU PRIVATE INTERNATIONAL LAW

Aleksandrs Fillers[1]

Abstract

For a long time, private international law was a branch of domestic law. As a result, rules concerning court jurisdiction, applicable law and recognition and enforcement of foreign judgments varied among states. During the last decades, the EU legislator has significantly changed the landscape of private international law in Europe. Now a large part of private international law has lost its national character, becoming part and parcel of EU law.

The objective of the paper is to analyse the implications of Brexit for the legal framework in the area of private international law. While the United Kingdom is currently bound by a number of EU private international instruments, the scope of the paper is limited to three instruments: the Brussels I*bis* Regulation, the Rome I Regulation and the Rome II Regulation. The first two of these instruments have replaced prior conventions. For this reason, the author discusses three questions: negative effects that may follow once these instruments will cease to apply in the United Kingdom, the possibility of revival of the former regimes of conventions and conclusion of a separate agreement between the EU and the UK on matters of private international law.

The author comes to the conclusion that the said EU private international law instruments cannot be fully replaced even by identical domestic legislation. At the same time, it is uncertain whether the former treaty regimes may be revived as it was strongly related with membership in the European Community and later in the EU. At the end of the day, the optimal solution is to have a separate agreement between the EU and the United Kingdom establishing common private international law rules for the fields under investigation.

Keywords: EU private international law, Brexit, conflict of laws, Brussels I*bis*, Rome I, Rome II.

Introduction

2016 may be described as the year of the great divide. The United Kingdom (hereinafter: UK), having joined the European Community in 1973, is on its way to leave the European Union (hereinafter: EU[2]). The end of this marriage of convenience due to "emotional incompatibility" is producing different legal challenges.

The impact of Brexit on areas related to judicial cooperation in civil matters is among those challenges that remain obscure to a broader audience. Judicial cooperation in civil matters is a broad notion and covers all measures that the EU may adopt under Article 81 of the Treaty on the Functioning of the European Union (hereinafter: TFEU). It includes issues traditionally associated with private international law - allocation of jurisdiction, determination of the applicable law and recognition and enforcement of foreign judgments. According to the House of Lords report, EU private international law instruments, due to their technical nature, "received little public attention during the referendum campaign or subsequently."[3] This is not entirely justified as some of the consequences may be important even for the public at large.

---

[1] *PhD student, University of Antwerp (Belgium), Faculty of Law.*

[2] Hereinafter, the EU also refers to the European Community.

[3] House of Lords: European Union Committee, '17th Report of Session 2016–17: Brexit: justice for families, individuals and businesses?', 8. Available at: https://www.publications.parliament.uk/pa/ld201617/ldselect/ldeucom/134/134.pdf. The Report speaks of few particular private international law instruments, but it can be extended to all of them.

The UK has a privileged status with respect to judicial cooperation in civil matters. Pursuant to Articles 1, 3 and 4 of the Protocol No 21 to the TFEU, the UK is not bound by instruments adopted under Article 81 TFEU, unless it expresses its wish to take part in their application. Using its privileged status, the UK has cherry-picked instruments of judicial cooperation and is not bound by all instruments adopted in the context of judicial cooperation in civil matters. Nonetheless, the list of instruments binding upon the UK is rather long[4]. Still, taking into account the limited space of this paper, we will discuss the effects of Brexit on three private international law instruments: 1. The Brussels I*bis* Regulation[5]. 2. The Rome I Regulation[6] and 3. The Rome II Regulation[7].[8] These instruments are of the greatest interest for academics and practitioners, dealing with general civil and commercial law.

The article consists of four sections. Section 1 provides a general overview of the said three regulations and their history. Section 2 describes the negative effects that may arise if the UK converts EU private international law into domestic legislation, while Section 3 discusses whether the negative effects of Brexit could be mitigated via a revival of the Brussels Convention[9] and the Rome Convention[10]. Section 4 briefly touches upon the possibility for the EU and the UK to conclude a separate agreement dealing with private international law.

1. Short History of EU Private International Law

Traditionally, private international law was a branch of domestic law. Each state on its own determined jurisdiction of its courts and the applicable law and decided which judgments were to be recognized and enforced on its territory. However, private international law deals intrinsically with a cross-border element and its unilateral regulation was never entirely adequate. The EU has actively worked on elevation of private international law above its modest domestic origins toward a supranational regime.

Prior to the entry into force of the Amsterdam Treaty, the EU did not have any explicit competence for enactment of legislation dealing exclusively with private international law matters. However, this did not mean that there was no integration of private international law in Europe. Article 220 of the Treaty of Rome stated that: "Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals: [...] the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards." While Member States never concluded a convention simplifying reciprocal recognition and enforcement of arbitration awards,[11] such a convention was concluded concerning judgments.

---

[4] To mention just few: Council Regulation (EC) No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [2009] OJ L 7. Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 [2003] OJ L 338.

[5] European Parliament and Council Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L 351.

[6] European Parliament and Council Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L 177.

[7] European Parliament and Council Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L 199.

[8] Hereafter, the term "EU private international law" is used to describe these three instruments.

[9] 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1972] OJ L 299.

[10] Convention on the Law Applicable to Contractual Obligations (Rome) [1980] OJ L 266.

[11] B. von Hoffmann, 'The Europeanization of Private International Law', in B. von Hoffmann (ed.), European Private International Law (Nijmegen: Ars Aequi Libri, 1998) 13, 28.

In 1973, the Brussels Convention, negotiated with the framework of Article 220, entered into force.[12] This instrument applied to civil and commercial matters and provided two main groups of rules: jurisdictional rules and rules on recognition and enforcement of judgments. After the entry into force of the Amsterdam Treaty, the EU obtained competence to adopt private international law instruments.[13] In 2001, using this recently obtained competence, the EU "converted" the Brussels Convention into the Brussels I Regulation.[14] In 2012, the Regulation was amended and following these amendments goes under the name of the Brussels I*bis* Regulation.

While unification of procedural rules of private international laws started early, unification of conflict of laws rules came rather late. The Treaty of Rome did not provide any specific negotiation framework for the unification of conflict of laws rules. However, in 1980 the Rome Convention was opened for signature and it entered into force in 1991.[15] The Rome Convention did not refer to Article 220[16] and, formally, was not based on any European Community instrument.[17] Nevertheless, the preamble to the Rome Convention referred to "unification of law which has already been done within the Community, in particular in the field of jurisdiction and enforcement of judgments" as an inspiration for further unification of conflict of laws. The Rome Convention contained a rather extensive set of unified conflict of laws rules for contractual obligations. After the entry into force of the Amsterdam Treaty, the EU replaced the Rome Convention by the Rome I Regulation, dealing with the same subject-matter, being based on similar principles and sharing a similar structure.

While unification of conflict of laws rules for contractual obligations was achieved through an international convention, unification of conflict of laws for non-contractual obligations was less successful. Initially, the authors of the Rome Convention wanted to unify conflict of laws rules for both contractual and non-contractual obligations. However, this idea was soon abandoned.[18] Conflict of laws rules for non-contractual obligations neither made it into the Rome Convention, nor were they unified via a separate convention, until after the entry into force of the Amsterdam Treaty when the EU itself was endowed with competence to unify conflict of laws. The EU was able to adopt such an instrument that is currently known as the Rome II Regulation. The Rome II Regulation determines the law applicable to torts, unjust enrichment, *negotiorum gestio* and *cupla in contrahendo*. Together with the Rome I Regulation it creates an almost comprehensive set of conflict of laws rules for obligations.

Once the Brexit process will be over and unless the EU and the UK agree on any specific terms in respect of the Brussels I*bis,* Rome I and Rome II Regulations, these instruments will cease to apply in the UK. This poses the following questions. Firstly, what will be the consequences and can these instruments be effectively substituted by similar domestic law provisions? Secondly, could the Brussels I*bis* Regulation and the Rome I Regulation be substituted in the UK by their predecessors: the Brussels Convention and the

---

[12] U. Magnus, 'Introduction', in U. Magnus, P. Mankowski (eds.), 'European Commentaries on Private International Law: Brussels I Regulation' (Berlin: Walter de Gruyter, 2011) 4, 14.

[13] K. Boele - Woelki, R. H. van Ooik, 'The Communitarization of Private International Law' [2002] 4 Yearbook of Private International Law 1, 11 *et seq*.

[14] A. Briggs, 'Private International Law in English Courts' (Oxford: Oxford University Press, 2014) 174.

15 Th. M. De Boer, 'The Purpose of Uniform Choice-of-Law Rules: The Rome II Regulation' [2009] 56 Netherlands International Law Review 295, 307.

[16] A. Weber, 'Die Vergemeinschaftung des internationalen Privatrechts' (Berlin: Tenea, 2004) 7.

[17] M. Wilderspin, 'New Possibilities for Cooperation with the European Union - The Transfer of Competence for Judicial Cooperation from Member States to Community Institutions: The Foundations and the Implementation of the Transfer of Competence in the Area of Judicial Cooperation in Civil Matters to the Community Institutions' [2002] 21 The Journal of Law and Commerce 181, 183.

[18] G. van Calster, 'European Private International Law' (Oxford: Hart Publishing, 2013) 151. C. M. V. Clarkson, J. Hill, 'The Conflict of Laws' (Oxford: Oxford University Press, 2006) 172.

Rome Convention? Thirdly, could the EU and UK conclude a separate agreement on matters of private international law?

2. Domestication of EU Private International Law and Its Consequences

2.1. Conflict of Laws Rules

What happens when the UK will no longer be bound by the three instruments discussed above? According to the UK government, following Brexit, the existing legal framework will be preserved for the time being, by converting it into domestic legislation.[19] However, even if the UK tries to domesticate EU private international law, domestication will bring with it a number of negative effects.[20] We will discuss just a few of them, starting by considering conflict of laws rules and afterwards looking at procedural rules.

In principle, conflict of laws rules do not require reciprocity.[21] In other words, effective application of conflict of laws rules by a national court does not require any cooperation with foreign courts. For EU Member States this means that not much will change, because most of the provisions in the Rome I and Rome II Regulations equally apply to any legal relation involving a cross-border element, irrespective of whether it has connections with Member States or third states.

The fact that EU conflict of laws rules are not based upon the idea of reciprocity also means that the UK may try to copy the existing EU conflict of laws rules into its domestic legislation. However, it is important to take into account that the main objective of the Rome I and Rome II Regulations is to create uniform conflict of laws rules.[22] unilateral measures cannot achieve this. Even if the UK takes into account the judgments of the Court of Justice of the European Union (hereinafter: CJEU) rendered prior to Brexit, once Brexit is executed, the UK will stop being bound by CJEU judgments. As a result, increasing discrepancy between conflict of laws rules will be inevitable.

For private persons, this means that the foreseeability of conflict of laws rules will diminish. Currently the place of litigation has very limited influence on conflict of laws in Member States applying the Rome I and Rome II Regulations. In the future, private persons will not be able to rely on uniform conflict of laws rules, but will have to consult UK domestic conflict of laws rules when planning their cross-border transactions. Likewise, often in cross-border disputes, practitioners consulting their clients must assess, at least *prima facie*, what could be the most obvious benefits and risks of starting litigation in one or another jurisdiction. With the Rome I and Rome II Regulations, a local counsel is able to determine with a high degree of certainty what law applied irrespective of the forum. Hence, the playing field is more transparent. This will change. Uncertainty will be magnified by the fact that EU rules on allocation of jurisdiction will also cease to apply in the UK, meaning that counsel will not be able to foresee with certainty whether UK courts will have jurisdiction, without consulting its domestic law.

---

[19] R. Hoyle, L. Bastin, 'Jurisdiction and Judgments: Replacement Regimes and the Default Regime (in the absence of a Replacement Regime) from the perspective of Public International Law', 6-7. Available at: https://101r4q2bpyqyt92eg41tusmj-wpengine.netdna-ssl.com/wp-content/uploads/2017/01/Brexit-Conflicts-Sub-Group-International-Law-Aspects.pdf.

[20] In order to domesticate the Rome I and Rome II Regulations, the UK does not need to introduce new domestic legislation. In fact, the UK has already transposed the Rome I and the Rome II Regulations into the domestic legal order through domestic legislative acts. Hence, leaving domestic legislation in place, after the Brexit process comes to an end, would preserve the existing conflict of laws rules. See, The Law Applicable to Non-Contractual Obligations (England and Wales and Northern Ireland) Regulations 2008, SL 2008/2986. The Law Applicable to Contractual Obligations (England and Wales and Northern Ireland) Regulations 2009, SL 2009/3064. See also, M. Harding, 'Conflict of Laws' (Oxon: Routledge, 2014) 151 and 177.

[21] *Cf.*, A. Dickinson, 'Back to the future: the UK's EU exit and the conflict of laws' [2016] 12 Journal of Private International Law 195, 203.

[22] See, Recital 6 of the Rome I Regulation and Recital 6 of the Rome II Regulation.

Another problem is the fragmentation of rights and obligations. A uniform system of conflict of laws rules means that the validity and effects of a contract are assessed identically in every Member State, because the same law is applied. Likewise, all Member States' courts apply the same law to a tort. This means that the uniformity of conflict of laws rules mitigates the influence of jurisdictional rules on substantive resolution of disputes. assessment of rights and obligations is independent from jurisdictional rules. Fragmentation of conflict of laws rules will mean that a contract that would have been valid before the EU Member States' courts may be found to be invalid before the UK courts or a tort that would have spawned liability in the EU may be found non-existent by the UK courts and *vice versa*.

Finally, EU conflict of laws instruments, besides their general objective to attain uniformity, promote multiple specific substantive policies. Let us give two examples. Article 6(1) of the Rome I Regulation, subject to certain additional requirements, applies the law of the consumer's habitual residence to consumer contracts, while Article 6(2) allows choice of law agreements in consumer contracts. however "[s]uch a choice may not, […] have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of [Article 6(1)]."[23] Application of Article 6(1) means that consumers may easily foresee the applicable law and, usually, they are most familiar with this law. Pursuant to Article 6(2) the professional party is not able to lower the level of protection provided by the law of habitual residence of the consumer, by pressuring the consumer, as a weaker party, into a choice of law agreement.

Article 7 of the Rome II Regulation offers the victim of environmental damage a choice between the law of the state where the damage occurred and where the tort was committed. The rule discriminates in favour of the person sustaining damage, giving him/her a right to choose the most favourable law.[24] At the same time, it neutralizes opportunistic behaviour of persons trying to benefit from disparities of liability standards in different substantive laws and prevents dangerous regulatory competition among Member States. If the place of tort was to determine the applicable law, potential tortfeasors would be encouraged to "set up factories in low protection states and could indeed encourage legislators in turn to lower standards in order to attract firms […]." [25] If the place where the damage occurred was to determine the applicable law, factories would have been set up "in a higher protection countr[ies] if natural conditions, such as down winds or rivers flowing across state boundaries, meant that the effects of the pollution were in fact felt elsewhere."[26] Article 7 prevents both forms of opportunistic behaviour. After Brexit it will be in the hands of the UK to determine whether these and other policies protected by EU conflict of laws rules will merit any further protection.[27] In the worst case scenario, it may turn out that they will be abandoned, leaving British society worse off.

Overall, domestication of EU conflict of laws rules in the UK is not impossible. However, in the long run, domesticated conflict of laws rules will diverge from their EU counterparts, lacking the unifying role of the CJEU. This will lead to the weakening of legal certainty and a possible fragmentation of rights and obligations. Similarly, further changes of conflict of laws rules in the UK may lead to the abandonment of specific substantive policies promoted by EU conflict of laws rules.

2.2. Jurisdictional Rules

[23] Article 6(2) of the Rome I Regulation.

[24] Recital 25 of the Rome II Regulation.

[25] H. Muir Watt, 'European Integration, Legal Diversity and the Conflict of Laws' [2004-2005] 9 Edinburg Law Review 6, 18.

[26] *Ibid*.

[27] This is a hypothetical assumption dependent on many variables. Firstly, to what degre current conflict of laws rules will be genuinely preserved after the Brexit process and for how long. Secondly, UK may adopt formally different conflict of laws rules, preserving similar policies as the same objective may be achieved (possibly with different efficiency) by different means. The most important consideration is whether the UK will consider substantive policies of EU conflict of laws rules to be worth protecting.

EU jurisdictional rules are more dependent upon reciprocity than conflict of laws rules. Notably, certain jurisdictional rules grant exclusive jurisdiction to a court in order to ensure, *inter alia*, the protection of public interests. This protection cannot be ensured if other states do not respect these rules.

Let us consider a few examples of such rules. One important example is embodied in Article 24(1) of the Brussels I*bis* Regulation. According to this provision, in proceedings which have as their object rights *in rem* in immovable property or tenancies of immovable property, the courts of the Member State in which the property is situated have exclusive jurisdiction.[28] This rule is said to protect the public policy of the Member State where the immovable property is located.[29] Another important example are jurisdictional agreements designating UK courts. The UK is one of the principal "exporters" of its legal system, benefiting from jurisdictional agreements. The Brussels I*bis* Regulation provides that a Member State court designated in a jurisdictional agreement has exclusive jurisdiction.[30] A jurisdictional agreement is a fully recognized mechanism of transferring jurisdiction to a Member State court that otherwise lacks it.

Currently, the UK courts have exclusive jurisdiction in proceedings which have rights *in rem* in immovable property or tenancies of immovable property located in the UK as their object or when a jurisdictional agreement designates a court in the UK. Courts in other Member States must respect their jurisdiction and decline jurisdiction in favor of UK courts. However, there is no rule stating that Member States must respect jurisdiction of third state courts when the immovable property is located therein or a third state court is designated in a jurisdictional agreement.[31] If read literally, the Regulation even prohibits respecting jurisdiction of third states, because no Member State court may deny jurisdiction, granted by the Regulation in favour of a third state court, lacking an express rule to the contrary.[32] A domestic jurisdictional rule of a third state cannot impose respect for jurisdiction of its courts upon Member States.

The situation will be somewhat different, if proceedings in such cases will be first commenced in the UK. The Brussels I*bis* Regulation supplements jurisdictional rules with an indispensable rule of *lis pendens*. According to this rule, "where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established."[33] The court second seized must decline jurisdiction, if "the jurisdiction of the court first seized is established […]."[34] The *lis pendens* rule prevents positive jurisdictional conflicts where a number of courts simultaneously find themselves competent and may possibly render incompatible judgments.[35] However, this mandatory rule applies only among Member States' courts, meaning that after Brexit the jurisdiction of the UK courts will not be protected by this rule and positive jurisdictional conflicts are to be expected with both the UK and EU Member States' courts claiming to have jurisdiction.

---

[28] For an exception from this rule, see the second paragraph of Article 24(1) of the Brussels I*bis* Regulation.

[29] P. Jenard, Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, [1979] OJ C 59/1, 35.

[30] See, Article 25 of the Brussels I*bis* Regulation.

[31] In respect of jurisdictional agreements, it is necessary to note that currently the EU is a party to Hague Convention on Choice of Courts Agreements. If after Brexit, the UK will become an independent contracting state to that convention then mutual enforcement of exclusive jurisdictional agreements between the UK and EU Member States will be preserved. Hence, risks related to non-enforcement of jurisdictional agreements may turn out to be a more theoretical than practical. The same is not true for matters falling within the scope of Article 24 of the Brussels I*bis* Regulation, which currently protects exclusive jurisdiction of Member State courts.

[32] See, *Andrew Owusu v N. B. Jackson, trading as "Villa Holidays Bal-Inn Villas" and Others*, C-281/02 [2005] ECR I-01383.

[33] See, Article 29(1) of the Brussels I*bis* Regulation.

[34] See, Article 29(3) of the Brussels I*bis* Regulation.

[35] A. Briggs, 'Private International Law in English Courts' (Oxford: Oxford University Press, 2014) 301-302.

Nevertheless, the Brussels I*bis* Regulation has also a specific *lis pendens* rule for third states. Pursuant to Article 33(1) of the Brussels I*bis* Regulation, in such a case, a Member State court has a right (though not an obligation) to stay proceedings. However, this right exists only if a long list of requirements is satisfied: 1. An action before a Member State court and that of the third state have the same cause of action and same parties. 2. Jurisdiction of a Member State court is based on Articles 4, 7, 8 or 9. 3. It is expected that the court of the third State will give a judgment capable of recognition and, where applicable, of enforcement in that Member State. 4. The Member State court is satisfied that a stay is necessary for the proper administration of justice.

The main characteristic of this provision is that it leaves the door open for the application of domestic law. Since the Brussels I*bis* Regulation does not impose an obligation upon Member States to recognize and enforce judgments rendered by third state courts, Article 33(1) functions under condition that domestic law imposes an obligation on a particular Member State to recognize and enforce a judgment rendered by a court of a particular third state. Let us apply these rules to the situation of a jurisdictional agreement designating a UK court. If one of the parties manages to commence proceedings before a UK court, then the other party will be able to commence later proceedings before a Member State court, if the latter has jurisdiction under the Brussels I*bis* Regulation, provided that the judgment rendered by the UK court will not be recognizable and enforceable in the given Member State. However, even if the judgment is to be recognizable and enforceable, the Member State court may refuse to stay the proceedings, based on considerations of the proper administration of justice. Moreover, pursuant to the text of Article 33, even if the court finds that the stay of proceedings is necessary for the proper administration of justice, it remains in the court's discretion and not an obligation.

This complicated set of cumulative requirements for the application of the *lis pendens* rule vis-à-vis a third state shows that this is a non-predictable tool. It does not impose a true obligation on Member States courts to avoid parallel litigation. In fact, it contains an express reference to the domestic law of the respective Member States. Member States that pursuant to their domestic law would not recognize and enforce judgments from the UK, would not be obliged to avoid parallel proceedings. And even in cases where such an obligation would exist, avoidance of parallel litigation would remain a discretionary matter for Member States. Therefore, Brexit will inevitably revive the risk of parallel litigation and domestication of EU jurisdictional rules in the UK will not be a viable tool to eliminate this problem.

Moreover, just like conflict of laws rules, jurisdictional rules are often aimed at protecting certain substantive policies, e.g. the protection of weaker parties. For example, subject to certain requirements, Article 18 of the Brussels I*bis* Regulation ensures that a consumer is able to sue his/her counterparty in his/her own domicile or that of the counterparty. This is an important exception from the general rule of Article 4(1), providing that the domicile of the defendant determines the forum. Such a method of protection can be ensured unilaterally. However, it is in the hands of the UK legislator to choose whether these weaker parties currently protected by the Brussels I*bis* Regulation will enjoy this protection in the future before the UK courts.

For private persons, domestication of jurisdictional rules in the UK means that the risk of parallel litigation and uncertainty will rise. Parallel litigation also involves additional expenses for the parties and often results in incompatible judgments. Planning of international transactions will become more cumbersome as parties will have to consult domestic law of the UK in addition to the Brussels I*bis* Regulation, in order to determine the competent court or courts. At the same time, protection of individual rights that are currently protected by jurisdictional rules of the Brussels I*bis* Regulation may suffer if the UK legislator decides that their protection is not worth it. For the UK, it will be more difficult to ensure protection of its public interests that are now protected by EU jurisdictional rules.

2.3. Recognition and Enforcement of Judgments

Currently, the Brussels I*bis* Regulation creates an efficient regime for recognition and enforcement of judgments rendered by a Member State court in other Member States. Once the Brexit process is over, judgments rendered by UK courts will not be covered by the provisions of the Regulation on recognition and enforcement of judgments rendered by Member State courts. Such judgments will be able to fall only within the scope of Article 33(3) and Article 45(1)(d).

Article 33(3) states that the court of the Member State shall dismiss the proceedings if the proceedings in the court of the third State are concluded and have resulted in a judgment capable of recognition and, where applicable, of enforcement in that Member State. This provision does not impose any self-standing obligation upon the Member States, as such a judgment is binding upon the Member States only if another legal instrument makes it recognizable and enforceable in the given state.

According to Article 45(1)(d), recognition of a judgment rendered by a Member State court in another Member State may be refused, provided that there is an earlier judgment involving the same cause of action and between the same parties rendered in a third state. Once again, the refusal is possible only if the earlier judgment fulfils the conditions necessary for its recognition in the respective Member State. Hence, the Brussels I*bis* Regulation does not impose an obligation to recognize and enforce a judgment rendered in a third state, but provides for certain consequences, if a judgment is recognizable in a Member State.

The UK legislator may adopt legislation imposing an obligation on its courts to recognize and enforce judgments rendered in EU Member States. However, it cannot impose such rules on other Member States. Hence, it will depend on every Member State to decide whether judgments rendered in the UK are to be recognized and enforced and under which conditions.

The practical effects of this development are easy to see. Currently, a judgment rendered in the UK has "liquidity" in other Member States and *vice versa*. Rights determined by a judgment are valid in all other Member States and a judgment creditor knows this by simply looking at the text of the Brussels I*bis* Regulation. After Brexit, liquidity of UK judgments in the EU will not be self-evident, but will depend on 27 domestic legislations. Similarly, liquidity of judgments from EU Member States in the UK will depend upon domestic legislation. This will lead, at the very least, to a significant loss of legal certainty. At worst, it may mean that rights obtained in one state will not be recognized and enforced in other states, leading to parallel litigation. As a result, litigation will cost more, take more time and, in principle, will make planning of cross-border transactions more complicated.

3. Is Revival of the Former Treaty Regimes a Viable Option?

While domestication of EU private international law will probably leave everybody worse off, there is another option - revival of the Brussels Convention[36] and the Rome Convention. The option is better than domestication, but it has its own flaws, *inter alia*, that the revival seems unlikely.

Before we try to outline the possible scenario of revival of the treaty regimes, we have to specify that such an option does not exist for the Rome II Regulation. As it was said before, there was no prior international convention among EU Member States unifying conflict of laws rules for non-contractual obligations and for that reason, once the Brexit process comes to its end, conflict of laws rules for non-

[36] There is another convention - the Lugano Convention (Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2007] OJ L 339). The convention is concluded between the EU and Members of the European Free Trade Association and contains rules very similar to those in the Brussels Convention and later regulations replacing it. We will not discuss here whether this Convention could apply between the UK and EU. However, arguments against that are similar to those expressed in respect of the Brussels Convention, namely, the Convention was intended to apply between EU and states participating at the European Free Trade Association. the UK will not participate in either. For an in-depth discussion, see, in general, A. Dickinson, 'Back to the future: the UK's EU exit and the conflict of laws' [2016] 12 Journal of Private International Law 195.

contractual obligations in the UK will be determined by domestic legislation. Member States' courts will continue to apply the Rome II Regulation just as before even to cases related to the UK, since the Rome II Regulation has a universal territorial scope.

The situation is more complicated in respect of the two other instruments. Let us first take a look at the Brussels *Ibis* Regulation. Article 68(1) provides that "[t]his Regulation shall, as between the Member States, supersede the 1968 Brussels Convention, except as regards the territories of the Member States which fall within the territorial scope of that Convention and which are excluded from this Regulation pursuant to Article 355 of the TFEU." Pursuant to this provision, the Brussels Convention remains in force in respect of overseas territories of the Member States, but it is superseded in other territories by the Regulation. It means that while the Brussels I*bis* Regulation "supersedes and replaces the Brussels Convention as between Member States […] [it] neither repeals the Brussels Convention, nor forces the Member States to denounce it."[37] In other words, while the Regulation has priority over the Convention (except in some overseas territories), the latter most likely has remained in force.[38]

However even if the Brussels Convention is not terminated by the subsequent legislation, it is doubtful that it may be applied in a state outside the EU. The Brussels Convention was adopted pursuant to Article 220 of the Treaty of Rome. Hence, it was perceived as an instrument concluded by Member States of the European Community and was never joined by a non-Member State. In the Schlosser report it was stated that "[t]he Working Party was unanimous that any territory which becomes independent of the mother country thereby ceases to be a member of the European Community and, consequently, can no longer be a party to the 1968 Convention."[39] It follows from this statement that *a fortiori* a state cannot be a party to the Brussels Convention anymore, once it leaves the EU.

If we agree with the approach that the UK's accession to the Brussels Convention was conditioned upon its membership of the European Community (and later its EU membership), we must conclude that Brexit automatically means an implicit exit from the Brussels Convention.[40] This is not the only interpretation possible,[41] but it casts serious doubts over revival of the Brussels Convention.

Even if the Brussels Convention, like the phoenix, were to be reborn, we would be worse off than with the Brussels I*bis* Regulation. Member States that joined the EU in 2004 and thereafter are not parties to the Convention.[42] For these Member States there would still be no international instrument, ensuring mutual recognition and enforcement of judgments with the UK. Moreover, the Brussels Convention has a number of important weaknesses. Let us mention just one example. Currently, the Brussels I*bis* Regulation provides an important exemption from the *lis pendens* rule. Pursuant to Article 31(2), "[…] where a court of a Member State on which an agreement […] confers exclusive jurisdiction is seised, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it

---

[37] P. Mankowski, 'Article 68', in U. Magnus, P. Mankowski (eds.), 'European Commentaries on Private International Law: Brussels I Regulation' (Berlin: Walter de Gruyter, 2011) 850, 850.

[38] A. Dickinson, 'Back to the future: the UK's EU exit and the conflict of laws' [2016] 12 Journal of Private International Law 195, 204.

[39] P. Schlosser, Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice, 1978 [1979] C 59/71,143.

[40] *Cf.*, R. Hoyle, L. Bastin, 'Jurisdiction and Judgments: Replacement Regimes and the Default Regime (in the absence of a Replacement Regime) from the perspective of Public International Law', 15. Available at: https://101r4q2bpyqyt92eg41tusmj-wpengine.netdna-ssl.com/wp-content/uploads/2017/01/Brexit-Conflicts-Sub-Group-International-Law-Aspects.pdf.

[41] Another approach is to perceive the Brussels Convention as an independent convention binding all its contracting states irrespective of their relations with the EU.

[42] R. Hoyle, L. Bastin, 'Jurisdiction and Judgments: Replacement Regimes and the Default Regime (in the absence of a Replacement Regime) from the perspective of Public International Law', 8. Available at: https://101r4q2bpyqyt92eg41tusmj-wpengine.netdna-ssl.com/wp-content/uploads/2017/01/Brexit-Conflicts-Sub-Group-International-Law-Aspects.pdf.

has no jurisdiction under the agreement." This exemption favours jurisdictional agreements, allowing the court designated in the agreement to be first to determine its own competence. The Brussels Convention did not contain such a rule, meaning that a claim brought before a court not designated in a jurisdictional agreement had the priority to determine its own competence, while the designated court had to stay the proceedings until the first-seized court reached the decision. This is just one example showing that a revival of the Brussels Convention is better than nothing, but is still not optimal.

Similarly to the Brussels Convention, the Rome Convention unified the conflict of laws rules for contractual obligations prior to the entry into force of the Rome I Regulation. Currently, Article 24(1) of the Rome I Regulation holds: "[t]his Regulation shall replace the Rome Convention in the Member States, except as regards the territories of the Member States which fall within the territorial scope of that Convention and to which this Regulation does not apply pursuant to Article 299 of the Treaty." Just as in respect of the Brussels Convention, there is no definitive answer whether the Convention is terminated, although it is possible to argue that partial "replacement" of the Rome Convention does not imply its termination.

At the same time, participation in the Rome Convention was strongly related to the EU membership. Although it was not adopted pursuant to any specific EU "negotiation framework", only Member States have been parties to the Rome Convention. Moreover, its preamble refers to the parties to "the Treaty establishing the European Economic Community" and regards the Convention as a complementary instrument to the unification of the jurisdictional rules and the rules on recognition and enforcement of judgments. In other words, the authors of the Rome Convention perceived this document as being intrinsically related to the EU. Hence, we can once again pose the question whether the participation in the Rome Convention is not conditioned upon EU membership.

Moreover, even if the Rome Convention revives, it would supply less developed conflict of laws rules in comparison to the Rome I Regulation. To take a simple example. Article 4(1) of the Rome I Regulation provides a number of clear-cut conflict of laws rules for typical contracts. Instead of these strict rules, Article 4 of the Rome Convention used the most closely connected country as a central connecting factor for contracts, supplemented by a set of presumptions. Before the entry into force of the Rome I Regulation, it was far from self-evident when these presumptions were to be applied and when they could be set aside. This created uncertainty about the conflict of laws rules. At the same time, it is unclear whether the UK would be bound by preliminary rulings of the CJEU on the Rome Convention rendered after the split. If this is not the case, then the UK and the EU will inevitably drift away in the practices of application of the Rome Convention and its main objective of uniformity of conflict of laws[43] will be lost.

Altogether, currently there is no clear answer as to whether the Brussels Convention and the Rome Convention could be revived. On the one hand, there is a place for an argument that they are not terminated and could revive in case the respective regulations cease to apply. On the other hand, they were adopted only by Member States and it may be argued that their application is conditioned upon the membership of the EU.

4. A Separate Agreement between the EU and the UK

Neither domestication of private international law, nor revival of the Brussels Convention and the Rome Convention are optimal options for preservation of the current private international law regime. The best option seems to be the conclusion of a separate agreement between the EU and the UK, preserving the current regime of private international law or at least maintaining it as much as possible. Such an agreement seems particularly necessary to compensate the absence of the Brussels I*bis* Regulation as this instrument

[43] See, Preamble of the Rome Convention.

is based on reciprocity and its absence will negatively affect recognition and enforcement of judgments rendered in the UK and *vice versa*.

Currently, it is too hypothetical to discuss this option in detail as it is not even known whether the EU and the UK are considering this option. Possibly this option will come to the table during the Brexit negotiations. Nevertheless, it is necessary to note that the conclusion of this agreement is much easier said than done. In particular, because without the unifying role of the CJEU, it will be difficult to achieve a uniform uniformity. Even if such a separate agreement was to reproduce *verbatim* the current EU private international law, divergence among national courts applying it would be difficult to avoid. Hence, in order for a separate agreement to ensure uniformity of private international law in relations between the EU and the UK, the CJEU must be granted the competence to interpret that instrument. Unfortunately, it is rather doubtful that the UK will be willing to subject itself to the competence of the CJEU.

Conclusions

For the general public, the effects of Brexit on EU private international law both within the UK and in the EU Member States may seem to be of secondary importance. In reality, these effects are noteworthy. Non-existence of an efficient, common regime for the recognition and enforcement of judgments will drag judicial cooperation back to a long forgotten past, where judgments in civil and commercial cases were either not recognized and enforced abroad or their recognition and enforcement was complicated and varied among jurisdictions. In addition, the non-existence of unified jurisdictional rules may lead to positive jurisdictional conflicts, parallel litigation and incompatible judgments. The relevance of the latter two problems will depend on whether judgments rendered within the EU or the UK will be mutually recognized and enforced. If this is not the case, then parallel litigation and the risk of incompatible judgments will occasionally be inevitable.

In respect of conflict of laws, the risks are smaller. The UK could domesticate EU conflict of laws. However, taken out of their original legal framework and escaping interpretation of the CJEU, these rules will soon start to diverge from those applied in the EU. For private persons this would mean greater uncertainty in respect of the applicable law and a more complex planning of cross-border transactions and litigation. Moreover, current EU conflict of laws rules are often protecting certain substantive policies, in particular, rights of weaker parties. In the long run, it is not clear whether these policies will be preserved by the UK legislator. At the same time, this will not affect application of EU conflict of laws rules by Member States' courts.

There is also an ongoing debate about the revival of the Brussels Convention and the Rome Convention. While not impossible, such a result seems unwarranted, since both instruments are strongly related to the EU membership. Moreover, the Brussels Convention is not binding upon all Member States, hence its revival cannot truly replace the current regime.

All the previous considerations show that every attempt to preserve the current framework of private international law in relations with the UK could hardly succeed. Irrespective of whether EU private international law is domesticated or the former treaty regimes are revived, we will be in a worse state of affairs than we are now when the Brussels Ibis, Rome I and Rome II Regulations are fully operating in the UK. Hence, there is only one optimal solution – to negotiate a special agreement between the EU and the UK on private international law. Unfortunately, it is not clear whether this option will be viable in practice.

Bibliography

Legislation

1. European Parliament and Council Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L 351.

2. Council Regulation (EC) No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [2009] OJ L 7.
3. European Parliament and Council Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L 177.
4. European Parliament and Council Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L 199.
5. Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 [2003] OJ L 338.
6. Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2007] OJ L 339.
7. Convention on the Law Applicable to Contractual Obligations (Rome) [1980] OJ L 266.
8. 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1972] OJ L 299.
9. The Law Applicable to Contractual Obligations (England and Wales and Northern Ireland) Regulations 2009, SL 2009/3064.
10. The Law Applicable to Non-Contractual Obligations (England and Wales and Northern Ireland) Regulations 2008, SL 2008/2986.

Case-Law

1. *Andrew Owusu v N. B. Jackson, trading as "Villa Holidays Bal-Inn Villas" and Others*, C-281/02 [2005] ECR I-01383.

Literature

1. K. Boele - Woelki, R. H. van Ooik, 'The Communitarization of Private International Law' [2002] 4 Yearbook of Private International Law 1.
2. Th. M. De Boer, 'The Purpose of Uniform Choice-of-Law Rules: The Rome II Regulation' [2009] 56 Netherlands International Law Review 296.
3. Briggs, 'Private International Law in English Courts' (Oxford: Oxford University Press, 2014).
4. G. van Calster, 'European Private International Law' (Oxford: Hart Publishing, 2013).
5. M. V. Clarkson, J. Hill, 'The Conflict of Laws' (Oxford: Oxford University Press, 2006).
6. Dickinson, 'Back to the future: the UKB. 's EU exit and the conflict of laws' [2016] 12 Journal of Private International Law 195.
7. M. Harding, 'Conflict of Laws' (Oxon: Routledge, 2014).
8. von Hoffmann, 'The Europeanization of Private International Law', in B. von Hoffmann (ed.), European Private International Law (Nijmegen: Ars Aequi Libri, 1998) 13.
9. House of Lords: European Union Committee, '17th Report of Session 2016–17: Brexit: justice for families, individuals and businesses?'. Available at: https://www.publications.parliament.uk/pa/ld201617/ldselect/ldeucom/134/134.pdf
10. R. Hoyle, L. Bastin, 'Jurisdiction and Judgments: Replacement Regimes and the Default Regime (in the absence of a Replacement Regime) from the perspective of Public International Law'. Available at: https://101r4q2bpyqyt92eg41tusmj-wpengine.netdna-ssl.com/wp-content/uploads/2017/01/Brexit-Conflicts-Sub-Group-International-Law-Aspects.pdf.
11. P. Jenard, Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, [1979] OJ C 59/1.
12. U. Magnus, 'Introduction', in U. Magnus, P. Mankowski (eds.), 'European Commentaries on Private International Law: Brussels I Regulation' (Berlin: Walter de Gruyter, 2011) 4.

13. P. Mankowski, 'Article 68', in U. Magnus, P. Mankowski (eds.), 'European Commentaries on Private International Law: Brussels I Regulation' (Berlin: Walter de Gruyter, 2011) 850.
14. H. Muir Watt, 'European Integration, Legal Diversity and the Conflict of Laws' [2004-2005] 9 Edinburg Law Review 6.
15. P. Schlosser, Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice, 1978 [1979] C 59/71.
16. Weber, 'Die Vergemeinschaftung des internationalen Privatrechts' (Berlin: Tenea, 2004).
17. M. Wilderspin, 'New Possibilities for Cooperation with the European Union - The Transfer of Competence for Judicial Cooperation from Member States to Community Institutions: The Foundations and the Implementation of the Transfer of Competence in the Area of Judicial Cooperation in Civil Matters to the Community Institutions' [2002] 21 The Journal of Law and Commerce 181.