INTERNATIONAAL PRIVAATRECHT / DROIT INTERNATIONAL PRIVÉ

Private International Law post-Brexit: Between Plague and Cholera

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Over the course of the last two decades, the European legislature has adopted a large number of regulations dealing with private international law. As long as the UK was a member of the EU these regulations were also applicable in the UK. However, now that Brexit has actually taken place, they only apply by virtue of the Withdrawal Agreement whereas they will cease to apply as soon as the transition period provided for in the Withdrawal Agreement expires. The following contribution takes this finding as an opportunity to take a closer look at the future relationship between the EU and the UK in private international law. It analyses the corresponding British proposals and argues that the relatively best option for both the UK and the EU would be the adoption of a new bilateral agreement that either provides for continued application of the existing EU instruments or closely replicates these instruments.

RÉSUMÉ

Au cours des deux dernières décennies, le législateur européen a adopté un grand nombre de règlements traitant du droit international privé. Tant que le Royaume-Uni était membre de l'UE, ces règlements étaient également applicables au Royaume-Uni. Toutefois, maintenant que le Brexit a effectivement eu lieu, ils ne s'appliquent qu'en vertu de l'accord de retrait, alors qu'ils cesseront de s'appliquer dès que la période de transition prévue dans l'accord de retrait aura expiré. La contribution suivante profite de cette constatation pour examiner de plus près les relations futures entre l'UE et le Royaume-Uni dans le domaine du droit international privé. Elle analyse les propositions britanniques correspondantes et fait valoir que la meilleure option, tant pour le Royaume-Uni que pour l'UE, serait l'adoption d'un nouvel accord bilatéral prévoyant soit le maintien de l'application des instruments européens existants, soit la reproduction fidèle de ces instruments.

I. INTRODUCTION

For more than three years, the (close) outcome of the Brexit referendum has kept people on both sides of the Channel busy. But now – after intensive negotiations in Brussels, lively debates in the UK Parliament, two parliamentary elections and repeated extensions of the withdrawal period[2] – Brexit has actually become a reality: Since 1 February 2020 the UK is officially no longer a member of the EU.

For private international law – as for all legal fields that are dominated by European law – this marks a turning point. In fact, after two decades of integration the many regulations which the European legislature has adopted to improve judicial cooperation in civil matters, will cease to apply in the UK once the transition period provided for in the Withdrawal Agreement expires[3]. By the same token they will

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2. According to Art. 50 (3) TEU, the original withdrawal date would have been 29 April 2019. However, on 21 March 2019 this date was postponed to 12 April 2019 and 22 May 2019 respectively. On 10 April 2019, it was then agreed to postpone the exit to 31 October 2019. And on 28 October 2019 another 3 months extension was granted.
3. The transition period is currently set to end on 31 December 2020. There is, however, the possibility to extend this period for up to 2 years by a decision which must be taken by 1 July 2020. For the details see Artt. 126 and 132 of the Withdrawal Agreement (*infra*, notes 118 and 119). Note, however, that according to Section 33 of the European Union (Withdrawal Agreement) Act 2020 the UK government is not allowed to agree to an extension of the transition period.

cease to apply in the remaining Member States in relation to the UK if and to the extent that they do not cover cases involving third states. The pressing question, therefore, is: What will happen then? Which provisions will replace the current European framework for cross-border cases involving the UK, notably the Rome I Regulation[4], the Rome II Regulation[5] and the Brussels Ia Regulation[6]?

Unfortunately, discussions about this question and, hence, the future of private international law post-Brexit have not even begun, at least not on the political level. The Withdrawal Agreement[7] focuses on Brexit as such and does not comment on the post-Brexit relationship in private international law[8]. The same holds true for the Political Declaration that accompanies the Withdrawal Agreement[9] as well as for all other publications and official statements issued by the EU. In fact, Brussels has – to this date – cautiously refrained from addressing publicly any of the many private international law issues that will now have to be discussed. The UK, in contrast, has been circulating ideas and suggestions about the future relationship in private international law since 2017[10]. In addition, it has adopted a number of statutory instruments dealing with issues of choice of law, jurisdiction and recognition and enforcement over the course of the past year[11]. At least when it comes to private international law it, therefore, seems that the UK is better prepared than the EU.

The following contribution takes this finding as an opportunity to take a closer look at the future relationship between the EU and the UK in private international law. It starts with a brief analysis of the British proposal to conclude a bespoke bilateral agreement with the EU (*infra*, II.) and then goes on to review the British plans for the – not so unlikely – case that no such agreement can be negotiated (*infra*, III.).

II. Plan A: A Bespoke Bilateral Agreement

British efforts to start a discussion about the future of private international law date back to 2017. At that time, shortly after the negotiations about an orderly withdrawal of the UK from the EU had begun, the (former) UK government published a series of "Future Partnership Papers". Two of these papers dealt with issues of private international law[12]. And they made clear that the then UK government intended to build "a new, deep and special partnership with the European Union"[13] closely reflecting "the substantive principles of cooperation under the current EU framework"[14]. In another paper, published in September 2018, the (former) UK government went on to detail its vision for the "new, deep and special partnership" and suggested to negotiate a tailor-made bilateral agreement with the EU containing a "coherent package of rules on jurisdiction, choice of jurisdiction, applicable law and recognition and enforcement of

4. Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 July 2008 on the law applicable to contractual obligations (Rome I), [2008] *OJ* L. 177/6.
5. 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.
6. 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.
7. Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, *OJ* EU 2019/C 384 I/01.
8. Note, however, that Artt. 66 and 67 of the Withdrawal Agreement regulate how the European Regulations in the field of private international law will continue to apply during the transition period foreseen by Art. 126. See for more details M. POESEN, "Civil and Commercial Private International Law in Times of Brexit: Managing the impact, and fostering the prospects of a future EU-UK Cooperation" in M. SACCO (ed.), *Brexit: A Way Forward*, Wilmington-Malaga, Vernon Press, 2019, p. 255, 277 ff.; C. TUO, "The Consequences of Brexit for Recognition and Enforcement of Judgments in Civil and Commercial Matters: Some Remarks", *Rivista di diritto internazionale privato et processuale*, 2019, p. 302, 305 ff.; J. UNGER, "Brexit von Brüssel und den anderen EU-Verordnungen zum Internationalen Privat- und Verfahresnrecht" in M. KRAMME, Ch. BALDUS and M. SCHMIDT-KESSEL (eds.), *Brexit. Privat- und wirtschaftsrechtliche Folgen*, Baden-Baden, Nomos, 2020, 606, 623 f.
9. Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom, *OJ* EU 2019/C 384 I/02.
10. HM GOVERNMENT, "Providing a cross-border civil judicial cooperation framework", August 2017, available at www.gov.uk/government/publications/providing-a-cross-border-civil-judicial-cooperation-framework-a-future-partnership-paper; HM GOVERNMENT, "Enforcement and dispute resolution", August 2017, available at www.gov.uk/government/uploads/system/uploads/attachment_data/file/639609/Enforcement_and_dispute_resolution.pdf >; HM GOVERNMENT, "The Future Relationship between the United Kingdom and the European Union", July 2018, available at www.assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/725288/The_future_relationship_between_the_United_Kingdom_and_the_European_Union.pdf; HM GOVERNMENT, "Handling civil legal cases that involve EU countries if there's no Brexit deal", September 2018, available at www.gov.uk/government/publications/handling-civil-legal-cases-that-involve-eu-countries-if-theres-no-brexit-deal/handling-civil-legal-cases-that-involve-eu-countries-if-theres-no-brexit-deal.
11. See, for example, the Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005) (EU Exit) Regulations 2018, S.I. 2018 No. 1124; The Civil Jurisdiction and Judgments (Amendments) (EU Exit) Regulations 2019, S.I. 2019 No. 479; The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019, S.I. 2019 No. 834.
12. HM GOVERNMENT, "Providing a cross-border civil judicial cooperation framework", *o.c.*; HM GOVERNMENT, "Enforcement and dispute resolution", *o.c.*
13. HM GOVERNMENT, "Providing a cross-border civil judicial cooperation framework", *o.c.*, p. 1.
14. HM GOVERNMENT, "Providing a cross-border civil judicial cooperation framework", *o.c.*, p. 6, para. 19.

judgments in civil, commercial, insolvency and family matters"[15]. The government also suggested to build the envisioned bilateral agreement on "the principles established in the Lugano Convention and subsequent developments at EU level"[16] and "the long history of cooperation in this field based on mutual trust in each other's legal system"[17].

Following its submission, the proposal of a new bilateral agreement for private international law based on the *acquis communautaire* was discussed in the literature. But it never really received much political attention. In addition, the UK government responsible for the proposal resigned in summer 2019 and a new government under the leadership of Boris Johnson came into office. This 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 UK's political agenda. But assuming that it is, what would be its advantages and disadvantages? And what would be its chances of success?

It goes without saying that a new bilateral agreement for private international law would hold a number of advantages for both the UK and the EU. In particular it would provide legal certainty for commercial parties and, hence, establish the legal infrastructure necessary to engage in mutually beneficial cross-border trade. In addition, it would provide a chance to organize a smooth transition to a new legal regime similar or – ideally – identical to the one that is currently in place. Nonetheless it is not clear whether the EU would be willing to enter into negotiations about a bilateral agreement for private international law[18]. In fact, the EU might not be willing to give the UK any privileged position as compared to other third States. For one it has always been the EU's position that the UK shall not be allowed to "pick cherries" and to take from EU membership what it likes while dropping what it does not like[19]. And for another the EU might be concerned that a bilateral agreement with the UK would increase the already existing fragmentation of private international law[20]. 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.

Problems, however, will also arise if the EU is generally willing to enter into negotiations about a new private international law treaty with the UK. Leaving aside all issues of substance that will eventually – and unavoidably – have to be discussed, a new bilateral agreement covering aspects of choice of law, jurisdiction as well as recognition and enforcement would need to establish a mechanism for resolving disputes about its interpretation. And while the EU would certainly want the CJEU to play a prominent role in this regard, 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"[21]. And there is virtually no hope that the current – or any future – UK government would take a less strict approach. A new bilateral agreement would, therefore, require a solution that is able to bridge the diverging positions. But where could that solution come from?

A number of authors[22] as well as the (former) UK government[23], have suggested to look to the Lugano Convention of 2007[24]. It regulates the relationship between the EU Member States on the one hand and Switzerland, Norway and Iceland on the other. As regards the question of interpretation, Article 1(1) of Protocol No 2 to the Convention[25] requires the courts of all Contracting States, including the courts of non-EU Member States, to "pay due account" to the principles laid down by any court of a Contracting State as well as the CJEU. In addition, Article 3 of Protocol No 2 allows the courts of Contracting States which are not EU Member States to submit statements of cases or written observations to the CJEU if the court of an EU Member State asks the

15. HM GOVERNMENT, "The Future Relationship between the United Kingdom and the European Union", *o.c.*, p. 42, para. 128, lit. g) and p. 46, para. 148.
16. HM GOVERNMENT, "The Future Relationship between the United Kingdom and the European Union", *o.c.*, p. 46, para. 148.
17. HM GOVERNMENT, "The Future Relationship between the United Kingdom and the European Union", *o.c.*, p. 46, para. 148.
18. A. DICKINSON, "Close the Door on Your Way out. Free Movement of Judgments in Civil Matters – A 'Brexit' Case Study", *Zeitschrift für Europäisches Privatrecht* 2017, p. 539, 563 f.; M. POESEN, *o.c.*, p. 289 f.; G. RÜHL, "Judicial Cooperation in Civil and Commercial Matters after Brexit: Which Way Forward?", *International and Comparative Law Quarterly*, 67 (2018) p. 99, 118 ff.; M. SONNENTAG, *Die Konsequenzen des Brexits für das Internationale Privat- und Zivilverfahrensrecht*, Tübingen, Mohr Siebeck, 2017, p. 96 ff.; J. UNGER, *o.c.*, p. 625. Note that the EU has to this date merely detailed when the pertaining European Regulations will stop to apply in case of a "no deal-Brexit". See EUROPEAN COMMISSION, "Notice to Stakeholders of 18 January 2019", available at www.ec.europa.eu/info/sites/info/files/file_import/civil_justice_en.pdf.
19. A. DICKINSON, *o.c.,* p. 563 f.; G. RÜHL, *o.c.*, p. 119; C. TUO, *o.c.*, p. 311.
20. G. RÜHL, *o.c.*, p. 119; C. TUO, *o.c.*, p. 314 f.
21. HM GOVERNMENT, "Enforcement and dispute resolution", *o.c.*, p. 2, para 1.
22. See, for example, R. AIKENS and A. DINSMORE, "Jurisdiction, Enforcement and the Conflict of Laws in Cross-Border Commercial Disputes: What Are the Legal Consequences of Brexit", *European Business Law Review* 27 (2016) p. 903, 904 f., 915, 917, 920; A. DICKINSON, *o.c.*, p. 558 f.
23. HM GOVERNMENT, "Enforcement and dispute resolution", *o.c.*, p. 9, para 50.
24. Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2007] *OJ* L. 339/1.
25. Protocol No. 2 on the uniform interpretation of the Convention and on the Standing Committee, [2007] *OJ* L. 339/27.

CJEU for a preliminary ruling on a question relating to the interpretation of the Lugano Convention. Protocol 2, thus, goes a long way to ensure that CJEU case law – without being binding in a strict sense – is respected in non-EU Member States. It, therefore, might provide for an acceptable – even though not perfect[26] – solution for the post-Brexit relationship between the EU and the UK[27].

But even if the Lugano solution – or some modified version of it[28] – can be agreed one problem will remain: negotiation of a new treaty will be time-consuming. Considering how many years it took to negotiate the existing EU instruments – and considering how many other issues will require regulatory attention – chances are that no such treaty can be agreed before expiration of the transition period provided for in the Withdrawal Agreement (or any possible extension)[29]. As a consequence, negotiation of a new bilateral agreement seems to be a – if at all – a long-term solution.

III. Plan B: Unilateral application of EU law and adoption of international treaties

The preceding analysis shows that it is at best unclear whether the EU and the UK will eventually agree on a bespoke bilateral agreement for private international law. In any event it is very unlikely that any such agreement will be ready to enter into force once EU law ceases to apply in the UK. What will happen in this case? Which provisions will take the place of the current European provisions? According to the various position papers published in 2017 and 2018 the UK will pursue the following strategy: It will apply some EU instruments unilaterally. And it will ratify a number of international treaties. For all remaining issues it will (have to) reactivate the traditional rules of the common law.

1. Unilateral application of EU instruments

Unilateral application of EU instruments is the dominant strategy of the UK to avoid uncertainty following the expiration of the transition period. In fact, according to the European Union (Withdrawal) Act 2018[30] as amended by the European Union (Withdrawal Agreement) Act 2020[31] EU-derived domestic legislation as well as direct EU legislation that was effective in the UK immediately before 1 February 2020 will continue to have effect once Brexit becomes fully effective[32]. Unilateral application, however, does make little sense with regard to jurisdiction as well as recognition and enforcement of judgements[33]. Why should the UK recognize choice-of-forum clauses in favour of Member States courts on the basis of the Brussels Ia Regulation if Member States courts will recognize choice-of-forum clauses in favour of UK courts only according to their – at times rather restrictive – national laws? And why should the UK (automatically) recognize and enforce judgments from EU Member States if Member States will recognize and enforce UK judgments only if the requirements of their national laws are met?

Against this background it does not come as a surprise that the UK plans to limit unilateral application of EU law to the Rome I and Rome II Regulation while excluding the Brussels Ia Regulation (with the exception of the provisions relating to consumer and employment contracts)[34]: both instruments do not rest on the principle of reciprocity. And since both instruments enjoy universal application, they will also

26. See for a detailed discussion of the difficulties to apply the Lugano compromise in relation to the UK, B. Hess, "Das Lugano-Übereinkommen und der Brexit" in B. Hess, E. Jayme and H.-P. Mansel (eds.), *Liber Amicorum für Christian Kohler*, Bielefeld, Gieseking, 2018, 179, 183 ff.; B. Hess, "The Unsuitability of the Lugano Convention (2007) to Serve as a Bridge between the UK and the EU after Brexit", *MPILux Research Paper* 2018 (2), available at www.ssrn.com/abstract=3118360.

27. R. Aikens and A. Dinsmore, *o.c.*, p. 915; A. Dickinson, *o.c.*, p. 559; J. Fitchen, "The PIL Consequences of Brexit", *Nederlands Internationaal Privaatrecht*, 2017, p. 411, 418 f.; G. Rühl, *o.c.,* p. 120 f. See also the Report of the European Union Committee of the House of Lords, "Brexit: Justice for families, individuals and businesses?", *17th Report of Session 2016-2017*, HL Paper 134, 20 March 2017, p. 39, para. 127, p. 44, para. 23, available at www.publications.parliament.uk/pa/ld201617/ldselect/ldeucom/134/134.pdf, as well as the Report of the Justice Committee of the House of Commons, "Implications of Brexit for the justice system", *Ninth Report of Session 2016-2017*, HC 750, 22 March 2017, p. 3, 18, para. 35, p. 24, para. 5, available at www.publications.parliament.uk/pa/cm201617/cmselect/cmjust/750/750.pdf.

28. See the proposal by Hess, "The Unsuitability of the Lugano Convention (2007) to Serve as a Bridge between the UK and the EU after Brexit", *o.c.*, p. 9 ("stronger formular which transgresses the wording of Protocol No. 2").

29. The transition period is currently set to expire on 31 December 2020. It may however be extended for up to two years. See *supra*, note 3 for the details.

30. European Union (Withdrawal) Act 2018, c. 16.

31. European Union (Withdrawal Agreement) Act 2020, c. 1.

32. *Cf.* Sections 2 and 3 European Union (Withdrawal) Act 2018.

33. A. Dickinson, *o.c.*, p. 543; J. Fitchen, *o.c.*, p. 417 f.; G. Rühl, *o.c.*, p. 123; J. Ungerer, "Consequences of Brexit for European Private International Law", *European Papers* 4 (2019), p. 395, 401 f. See also the Report of the European Union Committee of the House of Lords, *o.c.*, p. 1 f., para. 56 ff., p. 42, para. 8 as well as the Report of the Justice Committee of the House of Commons, *o.c.*, p. 115, para. 28.

34. HM Government, "Providing a cross-border civil judicial cooperation framework", *o.c.*, p. 6, para. 19; HM Government, "Handling civil legal cases that involve EU countries if there's no Brexit deal", *o.c.* See also Section 8(1) and paragraph 21 of Schedule 7 European Union (Withdrawal) Act 2018 and The Civil Jurisdiction and Judgments (Amendments) (EU Exit) Regulations 2019, S.I. 2019 No. 479 as well as The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019, S.I. 2019 No. 834.

be applied by Member State courts in cases relating to the UK after expiration of the transition period[35].

When it comes to issues of choice law, unilateral application will, therefore, go a long way to safeguard the *status quo* which is good for both the EU and the UK. Nonetheless it comes with problems. The first relates to interpretation. Unilateral application of the Rome I and Rome II Regulations can only ensure long term uniform application – and hence legal certainty – if the UK also follows or at least "pays due account" to ECJ decisions along the lines of, for example, the Lugano Convention of 2007. However, upon expiration of the transition period, UK courts will only be under a very limited obligation to do so. In fact, according to the European Union (Withdrawal) Act 2018 only lower UK Courts will be required to decide any question as to the validity, meaning or effect of any retained EU law in accordance with any EU case law and any general principles of EU law in force before 1 February 2020[36]. The Supreme Court, in contrast, will not be bound to follow any ECJ case law[37]. And no UK court will be bound to follow ECJ case law rendered on or after the day of Brexit[38]. As a consequence, it is unclear, whether UK courts will systematically apply the Rome I and Rome II Regulations as interpreted by the ECJ and, hence as applied in the remaining Member States[39]. Another problem is related to the first and concerns a potential reform of the Rome I and Rome II Regulations. Clearly, the UK will not, at least not automatically, adopt any changes and amendments it did not have a right to vote on[40]. Against this background, chances are that unilateral application of the Rome I and the Rome II Regulations will not lead to complete uniformity in the long run[41].

2. Ratification of international treaties

In addition to the unilateral application of EU instruments the UK government plans to ratify existing international treaties dealing with issues of private international law, notably the earlier mentioned Lugano Convention of 2007 and the Hague Convention on Choice of Jurisdiction Agreements of 2005[42]. Both Conventions regulate issues of international jurisdiction, recognition and enforcement and are currently applicable in the UK by virtue of its EU membership. Since their binding effect will, hence, cease upon expiration of the transition period[43], ratification of the two Conventions by the UK in its own right will help to ensure a smooth transition from the current to the future legal regime in private international law.

This finding, however, should not lead us to believe, that all would be fine and well then. Take for example the Lugano Convention. Here the first problem is that the UK cannot just sign. According to Article 70 I lit. c) it will have to go through a fairly strict vetting procedure[44]. And all other Contracting States – including the EU – will have to agree to the UK's accession[45]. More problematic, however, is the Convention's substance. After all, it was never aligned with the recast Brussels Ia Regulation which entered into force in 2015 and introduced, among others, new *lis pendens* rules

35. G. CROISANT, "Fog in Channel – Continent Cut Off. Les conséquences juridiques du Brexit pour le droit international privé et l'arbitrage international", *JT* 24 (2017), p. 24, 31; F.JAULT-SESEKE, "Brexit et espace judiciaire européen", *European Papers* 3 (2018) p. 387, 389 f.; B. HESS, "Back to the past: Brexit und das europäische Internationale Privat- und Verfahrensrecht", *Praxis des Internationalen Privat- und Verfahrensrechts*, 2016, p. 411, 417; G. RÜHL, *o.c.*, p. 108 f.; M. SONNENTAG, *o.c.*, p. 46 ff. *Contra* M. LEHMANN and D. ZETZSCHE, "Brexit and the Consequences for Commercial and Financial Relations between the EU and the UK", *European Business Law Review* 27 (2016) p. 999, 1009 f.; E. LEIN, "Uncharatered Territory? A Few Thoughts on Private International Law Post Brexit", *Yearbook of Private International Law* 17 (2015-2016) p. 33, 42.

36. *Cf.* Section 6(3) (a) European Union (Withdrawal) Act 2018.

37. *Cf.* Section 6(4) European Union (Withdrawal) Act 2018.

38. *Cf.* Section 6(1) European Union (Withdrawal) Act 2018.

39. F.JAULT-SESEKE, *o.c.*, p. 392; G. RÜHL, *o.c.*, p. 124 f. See also the Report of the Justice Committee of the House of Commons, *o.c.*, p. 17, para. 33. See for a more optimistic view, R. AIKENS and A. DINSMORE, *o.c.*, p. 917; M. LEHMANN and N. D'SOUZA, "What Brexit means for the interpretation and the drafting of international financial contracts", *Butterworth's Journal of International Banking and Financial Law* 32 (2017), p. 101 (finding that "[t]here is reason to hope that UK and EU member state courts find mutual inspiration in their decisions and a harmonious interpretation") and M. L EHMANN and D. ZETZSCHE, *o.c.*, p. 1010 (arguing that the UK could achieve legal certainty and harmony "through deeming ECJ case law as precedents for purposes of the construction of its private international law").

40. F.JAULT-SESEKE, *o.c.*, p. 392.

41. F.JAULT-SESEKE, *o.c.*, p. 392; G. RÜHL, *o.c.*, p. 125.

42. HM GOVERNMENT, "The Future Relationship between the United Kingdom and the European Union", *o.c.*, p. 42, para. 128, p. 46, para. 127. See also HM GOVERNMENT, "Handling civil legal cases that involve EU countries if there's no Brexit deal", *o.c.*

43. See for a detailed account A. DICKINSON, "Back to the future: the UK's EU exit and the conflict of laws", *Journal of Private International Law* 12 (2016) p. 195, 200 ff.; M. LEHMANN and D. ZETZSCHE, "Brexit and the Consequences for Commercial and Financial Relations between the EU and the UK", *o.c.*, p. 1025; G. RÜHL, *o.c.*, p. 11 f.; M. SONNENTAG, *o.c.*, p. 84 f. and 89.

44. See for a more detailed discussion R. AIKENS and A. DINSMORE, *o.c.*, p. 913 f., 915; G. CROISANT, *o.c.*, p. 28; E. LEIN, *o.c.*, p. 39; S. MASTERS and B. MCRAE, "Whtat Does Brexit Mean for the Brussels Regime?", *Journal of International Arbitration* 2016, p. 483, 489; F. POCAR, "The Lugano Convention of 30 October 2007 at the test with Brexit" in B. HESS, E. JAYME and H.-P. MANSEL (eds.), *Liber Amicorum Christian Kohler*, Bielefeld, Gieseking, 2018, p. 419, 422; M. POESEN, *o.c.*, p. 291 f.; G. RÜHL, *o.c.*, p. 126 f.; J. UNGERER, *o.c.*, p. 399 f., 402.

45. While the EU's position towards the UK's accession is still unclear, Iceland, Norway and Switzerland have recently indicated their support. For more information see www.gov.uk/government/news/support-for-the-uks-intent-to-accede-to-the-lugano-convention-2007.

and the direct and immediate enforcement of judgments of other Member States. The Lugano Convention will therefore, ensure continuity only in relation to Switzerland, Norway and Iceland, while it will not compensate the loss of the Brussels Ia Regulation in relation to the remaining EU Member States[46].

The situation looks somewhat better with regard to the Hague Choice of Court Convention of 2005. According to Article 27 (1) and (3), it allows any state to accede – without the consent of the other Contracting States and without complying with further conditions. The UK can, therefore, simply sign the Convention and has expressed its intention to do so[47]. However, when it comes to the substance, the Hague Choice of Court Convention – like the Lugano Convention – is far from being a full substitute for the Brussels Ia Regulation[48]. In fact, since its scope of application is limited to (certain) choice of forum clauses, it only covers a small part of the issues regulated by the Brussels Ia Regulation[49]. The UK is, therefore, most likely to also accede to the Hague Judgments Convention that was adopted in summer 2019 and that regulates issues of recognition and enforcement of foreign judgments[50]. However, since the new Convention does not contain (direct) rules on international jurisdiction it will – like the Lugano Convention and the Hague Choice of Court Convention – only be a partial substitute for the Brussels Ia Regulation[51]. In the absence of a global convention on jurisdiction, recognition and enforcement of foreign judgment, the ratification of existing international treaties will, therefore, never result in a complete and coherent legal framework for issues of private international law.

IV. CONCLUSIONS

There is no denying the fact that Brexit will create disruptions on both sides of the Channel. In private international law these disruptions will be particularly severe if the EU and the UK do not manage to agree on a new regulatory framework before expiration of the transition period provided for in the Withdrawal Agreement (or any possible extension)[52]: Issues of choice of law, jurisdiction and recognition and enforcement will then be governed by a complex patchwork of provisions which do not keep pace with the current level of integration. It is, therefore, urgently recommended that the EU and the UK pull themselves together to find solutions that will – at least in the long-term – ensure legal certainty for parties that engage in cross-border trade. The EU in particular should rather sooner than later get involved and play a more active role in the building of a new post-Brexit framework for private international law. This holds true even though the best available option – the negotiation of a new bilateral agreement – will be a step back when compared to the *status quo*. But life is not a bowl of cherries. And sometimes you only get to choose between plague and cholera.

46. R. AIKENS and A. DINSMORE, *o.c.*, p. 913 f., 915; G. CROISANT, *o.c.*, p. 28; E. LEIN, *o.c.*, p. 39; S. MASTERS and B. MCRAE, *o.c.*, p. 489; F. POCAR, *o.c.*, p. 422; M. POESEN, *o.c.*, p. 291 f.; G. RÜHL, *o.c.,* p. 126 f.; J. UNGERER, *o.c.*, p. 400 (calling the ratification of the Lugano Convention "a tool for loss limitation"). See also the Report of the EUROPEAN UNION COMMITTEE OF THE HOUSE OF LORDS, *o.c.*, p. 39, para. 128 and p. 45, para. 33 as well as the Report of the JUSTICE COMMITTEE OF THE HOUSE OF COMMONS, *o.c.*, p. 115, para. 28.

47. The UK deposited the instrument of accession to the Hague Choice of Court Convention on 28 December 2018. However, it withdrew the instrument on 31 January 2020 as a reaction to the adoption of the Withdrawal Agreement while declaring at the same time that it would deposit a new instrument of accession before expiration of the transition period. The full declaration is available at www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=1318&disp=resdn.

48. G. CROISANT, *o.c.*, p. 29; A. DICKINSON, *o.c.*, p. 560; J. FITCHEN, *o.c.*, p. 430; B. HESS, "Back to the past: Brexit und das Europäische Internationale Privat- und Verfahrensrecht", *o.c.*, p. 415; S. MASTERS and B. MCRAE, *o.c.*, p. 495; M. POESEN, *o.c.*, p. 293 f.; G. RÜHL, *o.c.*, p. 127 f.; M. SONNENTAG, *o.c.*, p. 91.

49. G. CROISANT, *o.c.*, p. 29; A. DICKINSON, *o.c.*, p. 560; J. FITCHEN, *o.c.*, p. 430; B. HESS, "Back to the past: Brexit und das Europäische Internationale Privat- und Verfahrensrecht", *o.c.*, p. 415; S. MASTERS and B. MCRAE, *o.c.*, p. 495; G. RÜHL, *o.c.*, p. 127 f.; M. SONNENTAG, *o.c.*, p. 91.

50. Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, available at www.hcch.net. See for a first appraisal C. NORTH, "Conclusion of the HCCH Judgments Convention: The objectives and architecture of the Judgments Convention, a brief overview of some key provisions, and what's next?", Conflictoflaws.net, 2 July 2019, available at www.conflictoflaws.net/2019/conclusion-of-the-hcch-judgments-convention-the-objectives-and-architecture-of-the-judgments-convention-a-brief-overview-of-some-key-provisions-and-whats-next/; H. SCHACK, "Das neue Haager Anerkennungs- und Vollstreckungsübereinkommen", *Praxis des Internationalen Privat- und Verfahrensrechts*, 2020, p. 1 ff.

51. In a similar vein, M. POESEN, *o.c.*, p. 294 f. (in relation to an earlier draft of 2018).

52. The transition period will expire on 31 December 2020, but may be extended for 2 years. See *supra*, note 3 for the details.