

Negotiating Brexit

Bearbeitet von

John Armour, Horst Eidenmüller, Johannes Adolff, Luis Correia da Silva, Owen Darbishire, Luca Enriques, Clemens Fuest, Andreas Hacke, Colin Mayer, Niamh Moloney, Kalypso Nicolaïdis, Thierry Philipponnat, Wolfram Prusko, Wolf-Georg Ringe, Giesela Rühl, Tom Snelling, Mark Soundy, Felix Steffek, Marco Torsello, Robert Volterra

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The Brexit Stakes for Corporate Activity

applications was developed during the last years for restructuring debt of companies domiciled all over Europe (and beyond).⁸ Its success, in my view, is based on a unique combination of English law as the preeminent jurisdiction for finance contracts and the common perception of predictable and commercially savvy courts.

Interestingly, under the current EU framework, recognition of these schemes is not achieved under the EIR.⁹ Instead, the UK Scheme of Arrangement's recognition is based on (i) its validity as a contractual arrangement under private international law following English choice of law and (ii) the recognition of the civil court decisions sanctioning these schemes with reference to the Brussels I Regulation.¹⁰

The recognition test under private international law should remain unchanged after Brexit, as the Rome I Regulation continues to determine the test for the application of English law in the remaining Member States.¹¹ Without the Brussels I Regulation, and in the absence of international treaties,¹² however, recognising the English Scheme of Arrangement as a civil court decision will be up to the laws and courts of the Member State concerned.

An aspect that may create a more challenging environment is the EU Commission's recently established agenda to develop and harmonise the out-of-court restructuring regimes in the Member States in the interest of the common capital market. A draft directive was issued in November 2016.¹³ It is doubtful whether this agenda will be fully completed and effective by the time the UK formally leaves the EU. English courts applying the UK Scheme of Arrangement will thus continue to be in an advantageous position, in particular if the current level of recognition under the applicable civil procedure regime can be maintained, for example by the UK's accession to the Lugano Convention.¹⁴ If this is not the case, continental competitors such

⁸ See, eg, more recent cases such as *CBR Fashion GmbH* [2016] EWHC 2808 (Ch); *DTEK Finance PLC* sanctioned by court order dated 21 December 2016; *Global Garden Products* [2016] EWHC 1884 (Ch); *Van Gansewinkel Groep BV* [2015] EWHC 2151 (Ch).

⁹ These schemes are not included in the EIR's Annex A, which contains a comprehensive list of all proceedings to which the EIR applies (see Art 1 EIR).

¹⁰ Council Regulation (EU) 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ 351/1.

¹¹ See Art 2 of Council Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L 177/6.

¹² For potential relevant options, see Giesela Rühl, 'The Effect of Brexit on the Resolution of International Disputes – Choice of Law and Jurisdiction in Civil and Commercial Matters' (*Oxford Business Law Blog*, 13 April 2017) <<https://www.law.ox.ac.uk/business-law-blog/blog/2017/04/brexit-negotiations-series-7-effect-brexit-resolution-international>> accessed 6 June 2017.

¹³ European Commission, 'Proposal for a directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU' COM(2016) 723 final.

¹⁴ Art 33 of the Lugano Convention provides for the recognition of court decisions issued by another contracting state's court.

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as Germany, Italy, or the Netherlands may try to step up and to wrest restructuring cases away from England with their own enhanced and EU-wide recognised restructuring processes.¹⁵

3. Market adaptation

Relying on general freedom of contracts rather than on a special statutory restructuring framework, the financial community has developed a very elaborate contractual regime for restructuring companies in distress, which in Europe regularly is governed by English law. Such arrangements are typically included in inter-creditor agreements between the various lenders and lender groups, and address the usual issues of financial restructuring on a contractual basis: waterfall distribution to give effect to priority ranking, majority creditor decisions for efficiently re-capitalising the debtor's assets, debt relief, and release of collateral and guarantees, to name only a few.¹⁶ We expect parties in the financing markets to continue to make use of such contractual arrangements in connection with and in contemplation of financial restructurings; whether or not English courts, which already have a track record in ruling on disputes thereunder, remain the preferred forums may mostly be driven by whether or not English law in general remains the preeminent jurisdiction for finance contracts. Given the flexibility of financial contracting, one would expect that any practical roadblocks preventing full effect of such arrangements after Brexit will be resolved in a rapid, evolutionary manner – which can happen in real time over the Brexit negotiation as results become apparent even before the effective date of Brexit.

*Wolfram Prusko is Partner
at Kirkland & Ellis, Munich.¹⁷*

¹⁵ In particular, the Netherlands has been discussing the introduction of a tool similar to the English scheme of arrangement since 2014 (*Wet continuïteit ondernemingen II*).

¹⁶ See Leo Plank and Wolfram Prusko, 'Die Intercreditor Vereinbarung als Instrument der internationalen Restrukturierung' in Hommel, Knecht and Wohlenberg (eds) *Handbuch Unternehmensrestrukturierung* (2nd ed, forthcoming).

¹⁷ This contribution reflects the personal opinion of the author and is not and cannot be attributed to Kirkland & Ellis; it was presented on the conference 'Negotiating Brexit' held in Oxford on 17 March 2017, the forum of which also determined the format of the text.

The Effect of Brexit on the Resolution of International Disputes: Choice of Law and Jurisdiction in Civil and Commercial Matters

Giesela Rühl

Over the last decades, England has become a prime, if not the prime centre for settling international disputes: international companies choose English law more often than any other law as governing law. And they choose to settle their disputes more often before English courts than before other courts. The question of how Brexit will affect the legal framework for the resolution of international disputes is, therefore, of quite some importance – both for United Kingdom ('UK') and European Union ('EU') companies. This contribution explores the ramifications of Brexit for choice of law and jurisdiction in civil and commercial matters and makes suggestions for the future legal framework, taking into account the UK government's two recent Brexit White Papers of 2 February and 30 March 2017.¹

1. Current legal framework

Choice of law and jurisdiction is currently regulated by three EU Regulations. The law applicable to contractual and non-contractual obligations is determined with the help of the Rome I Regulation² and the Rome II Regulation.³ Jurisdiction is governed by the Brussels Ia Regulation.⁴ All three regulations apply throughout the EU (with the exception of Denmark), and there is broad agreement that they establish a fairly clear and predictable legal framework for the settlement of international disputes, especially because choice of law and choice of forum clauses will be enforced under the same conditions across the EU.

¹ Department for Exiting the European Union, 'The United Kingdom's exit from and new partnership with the European Union. White Paper' (2017) <<https://www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper#history>> accessed 21 May 2017; Department for Exiting the European Union, 'Legislating for the United Kingdom's Withdrawal from the European Union. White Paper' (2017) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/604516/Great_repeal_bill_white_paper_accessible.pdf> accessed 21 May 2017.

² European Parliament and Council Regulation (EC) 593/2008 of 17 June on the law applicable to contractual obligations (Rome I), [2008] OJ L 177/6.

³ European Parliament and Council Regulation (EC) 864/2007 of 11 July on the law applicable to non-contractual obligations (Rome II), [2007] OJ L 199/40.

⁴ European Parliament and Council Regulation (EU) 1215/2012 of 12 December on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), [2012] OJ L 351/1.

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2. Future legal framework: Baseline ('Hard Brexit')

Now, what happens if the UK leaves the EU? Of course, the above-mentioned regulations will cease to apply. But which provisions will take their place? The details are disputed and a full discussion is beyond the scope of this contribution.⁵ Suffice it to say that I do not think that the Rome Convention on the law applicable to contractual obligations of 1980 or the Brussels Conventions on jurisdiction, recognition, and enforcement of judgments of 1968 may become effective and applicable again after Brexit.⁶ UK courts will, therefore, have to resort to their national (statutory or common) law to determine the applicable law and to determine jurisdiction once the Rome I, the Rome II, and the Brussels Ia Regulations cease to have effect. Courts in the remaining Member States, by contrast, will continue to apply the Rome I and II Regulations. And they will also continue to apply the Brussels Ia Regulation to the extent that it applies to third states. To the extent that the Brussels Ia Regulation does not cover third state cases, Member State courts will apply their own national rules to determine jurisdiction. In particular, they will apply their own national rules of jurisdiction to determine the validity of a choice of forum clause in favour of English courts.

As a consequence, choice of law and jurisdiction will no longer be subject to the same regime in the UK and the rest of the EU once Brexit becomes effective. This will make it harder for parties to predict which law will apply to international disputes and which court will be competent to hear a case. The worst thing, however, is that parties cannot trust anymore that choice of law and choice of forum clauses will be equally enforced in the UK and the remaining Member States.⁷ Since different legal regimes will apply, the enforceability of such clauses will essentially depend on where a lawsuit will eventually be brought.

⁵ See, however, for a detailed account, Richard Aikens and Andrew Dinsmore, 'Jurisdiction, Enforcement and the Conflict of Laws in Cross-Border commercial Disputes: What Are the Legal Consequences of Brexit?' (2016) 27 EBLR 903 ff; Guillaume Croisant, 'Fog in Channel – Continent Cut Off. Les conséquences juridiques du Brexit pour le droit international privé et l'arbitrage international' (2017) JT 24 ff; Andrew Dickinson, 'Back to the future: The UK's EU exit and the conflict of laws' (2016) J Priv Int'l L 195 ff; Burkhard Hess 'Back to the Past: BREXIT und das europäische internationale Privat- und Verfahrensrecht' (2016) IPRax 409 ff; Eva Lein, 'Unchartered Territory? A few Thoughts on Private International Law post Brexit' (2015) 17 YbPIL 33 ff; Sara Masters and Belinda McRae, 'What Does Brexit Mean for the Brussels Regime?' (2016) J Int'l Arb 483 ff; Giesela Rühl, 'Die Wahl englischen Rechts und englischer Gerichte. Zur Zukunft des Justizstandortes England' (2017) JZ 72 ff; Johannes Ungerer, 'Brexit von Brüssel und den anderen Verordnungen zum Internationalen Privat- und Verfahrensrecht' in M Kramme, Chr. Baldus and M. Schmidt-Kessel (eds), *Brexit und die Juristischen Folgen* (Nomos, Baden-Baden 2017) 296 ff.

⁶ See, for a detailed discussion, Rühl (n5) 74, 77.

⁷ See, for a detailed discussion, Rühl (n5) 76, 79.

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3. Future Legal Framework: 'Soft Brexit' scenario

What are the alternatives to the just described 'hard Brexit' scenario? I think that one may consider essentially four options. These will be presented as four separate alternatives. However, they are not necessarily mutually exclusive.

a) 1st Option: agreement on continued application of EU framework

The first – and most straightforward – option would certainly be to aim for an agreement between the UK and the EU that the Rome I, the Rome II, and the Brussels Ia Regulations will continue to apply even after Brexit.⁸ This might look counter-intuitive at first sight, but the idea of the 'Great Repeal Bill' proves that the UK government has the intention to keep at least some European rules post-Brexit. And since judicial cooperation was not on the agenda of the Brexiteers, preserving the *status quo* as regards choice of law and jurisdiction would probably not do much political harm.

The problem with the continued application of the current framework is, of course, that it requires the EU's consent. And the EU might withhold that very consent for various reasons, notably for the purpose of setting an example vis-à-vis other Member States that toy with the idea of leaving the EU.⁹ In addition, the EU's consent to continue applying the existing EU instruments will almost certainly depend on the UK accepting the jurisprudence of the Court of Justice of the European Union ('CJEU') in one form or the other. However, it was – and still is – one of the central aims of Brexit and the UK government 'to bring an end to the jurisdiction of the CJEU in the UK'.¹⁰ So, one would have to find a new arrangement to ensure uniform application and interpretation. One potential model is the mechanism enshrined in Protocol No 2 to the Lugano Convention of 2007,¹¹ which requires the courts of non-Member States to 'pay due account' to CJEU decisions (as well as decisions from other contracting states) and could be an acceptable compromise for both the UK and the EU.

⁸ Likewise, Aikens and Dinsmore (n5) 914 (as regards the Brussels Ia Regulation); Lein (n5) 41; Masters and McRae (n5) 484 (as regards the Brussels Ia Regulation); Ungerer (n5) 307. See also 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), 16 para 32; as well as 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) 11 para 23 and 42 para 1.

⁹ Croisant (n5) 28; Masters and McRae (n5) 486. See also Lein (n5) 41.

¹⁰ Department for Exiting the European Union (n1) 13.

¹¹ Aikens and Dinsmore (n8) 915. See also the Report of the European Union Committee of the House of Lords (n8) 39 para 127, 44 para 23, as well as the Report of the Justice Committee of the House of Commons (n8) 3, 18 para 35, 24 para 5.

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b) 2nd Option: negotiation of a new Treaty with the EU

The second option is as straightforward as the first, even though more difficult to implement. It consists of negotiating a new treaty with the EU on issues of choice of law and jurisdiction and, of course, recognition and enforcement. This option probably comes closest to what the UK government has in mind when it speaks of a ‘new strategic partnership with the EU’¹² and the aim of building a new relationship with the help of a new Trade Agreement. It would also allow the UK to improve the current legal framework where it is perceived to be deficient from a UK perspective. For example, it might try to renegotiate the current European position shaped by various European Court of Justice judgments as regards the doctrine of *forum non conveniens* and as regards the use of anti-suit injunctions.

However, the negotiation of a ‘new deal’ will be time-consuming. Considering how many years it took to negotiate the existing EU instruments, and considering that judicial cooperation will not be the top priority during the upcoming negotiations, it is unlikely that a new ‘deal’ could be signed and enter into force on the day of Brexit. Also, the UK and the EU would have to find a way to deal with and settle disputes arising under the new regime. The UK government suggests that one could think of creating a new settlement mechanism along the lines of other international agreements, such as the General Agreement on Tariffs and Trade (‘GATT’), the North American Free Trade Agreement (‘NAFTA’), or the EU-Canada Comprehensive Economic and Trade Agreement (‘CETA’).¹³ Yet, it is rather unclear whether the EU would be willing to build a new court system alongside the CJEU to deal with issues of choice of law and jurisdiction.

c) 3rd Option: unilateral application of EU instruments

The third option becomes attractive if the first two options fail. In this case, the UK could simply decide to apply the Rome I, the Rome II, and the Brussels Ia Regulations unilaterally. This is in line with the UK government’s idea of a ‘Great Repeal Bill’, which is supposed ‘to convert...the body of existing EU law...into domestic law’.¹⁴ However, the problem with this option is that it does not work for jurisdiction (and, I may add, it does not work at all for recognition and enforcement of judgements):¹⁵ the Brussels Ia Regulation is a measure of international civil procedure and, therefore, rests on the principle of reciprocity.

¹² Department for Exiting the European Union (n1) 35.

¹³ Department for Exiting the European Union (n1) 9. See for the details Department for Exiting the European Union (n1).

¹⁴ Department for Exiting the European Union (n1) 9. See for the details Department for Exiting the European Union (n1).

¹⁵ Ungerer (n8) 306. See also the Report of the European Union Committee of the House of Lords (n8) 21 para 56, 42 para 8, as well as the Report of the Justice Committee of the House of Commons (n8) 115 para 28.

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Unilateral application, however, works well as regards choice of law.¹⁶ And since the ‘Great Repeal Bill’ will most likely require UK courts to give ‘historic CJEU case law...the same binding, or precedent status as decisions of the UK Supreme Court’,¹⁷ unilateral application of the Rome I and II Regulations will go a long way to preserve the *status quo*. The problem that remains, though, is that unilateral application of both Regulations can ensure long term uniform application only if the UK courts are also required to follow or give ‘due account’ to *future* CJEU decisions. Should they not be so required, the third option will remain incomplete and only create the illusion of uniformity in the long run.

d) 4th Option: negotiation and adoption of international treaties

This brings me to the fourth option: The UK could replace the current European regime with a more global regime by negotiating new treaties with non-EU countries, for example in the framework of the Hague Conference on Private International Law. This, however, will take time and, therefore, is no short-term solution. A short-term solution, however, would be to sign existing international treaties such as the Lugano Convention of 2007 and the Hague Convention on Choice of Court Agreements of 2005.¹⁸ This would help to avoid at least some of the negative effects described earlier. However, it would not go all the way to preserve the benefits of the *status quo*: the Lugano Convention of 2007 has not (yet) been aligned with the Brussels Ia Regulation. The substantial improvements that the recast has brought about, some of which were introduced because the UK lobbied hard for them, would, therefore, not extend to the UK. The Hague Choice of Court Convention, for its part, covers only choice of forum clauses and does not deal with other grounds of jurisdiction – and it only covers certain choice of forum clauses. Finally, the Convention is by no means – at least not yet – the global Convention it was meant to be. In fact, it is to this day only in force and applicable in the EU (with the exception of Denmark), Mexico, and Singapore.¹⁹

¹⁶ Aikens and Dinsmore (n8) 917; Croisant (n5) 31; Dickinson (n5) 210; Lein (n8) 42. See also the recommendations of the European Union Committee of the House of Lords (n8) 38 para 125, 44 para 22 and of the Justice Committee of the House of Commons (n8) 115 para 28, 16 paras 32, 24 para 4.

¹⁷ Department for Exiting the European Union (n1) 14, 15, paras 2.14–2.17.

¹⁸ Aikens and Dinsmore (n8) 912, 915; Dickinson (n5) 209; Lein (n5) 39, 40; Masters and McRae (n5) 487, 494; Ungerer (n5) 302, 303. See also the recommendations of the European Union Committee of the House of Lords (n8) 36 para 117, 44 para 22, and of the Justice Committee of the House of Commons, (n8) 15 para 28, 16 para 32, 24 para 4.

¹⁹ See the status chart available at <<https://www.hcch.net/en/instruments/conventions/status-table/?cid=98>> accessed 21 May 2017.

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4. Conclusions

The preceding analysis shows that there is no easy and no perfect way out of the problems Brexit will create. The best short-term option for both the UK and the EU would probably be to agree on the continued application of the existing EU instruments within the framework of the withdrawal agreement, or in a separate agreement. If this turns out to be not possible, the second-best short-term option for the UK will be to apply the Rome I and Rome II Regulations unilaterally, and to sign the Lugano Convention of 2007 and the Hague Convention on Choice of Court Agreements. In the medium and long-term, the UK is probably well advised to apply a global strategy and to foster the conclusion of more international treaties in the framework of the Hague Conference on Private International Law.

*Giesela Rühl is Professor of Civil Law, Civil Procedure,
Private International Law, International Civil
Procedure, European Private Law and Comparative
Law at the Friedrich Schiller University of Jena
(Germany).*