



INSIGHT

CONSEQUENCES OF BREXIT FOR EUROPEAN PRIVATE INTERNATIONAL LAW

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ABSTRACT: International jurisdiction, recognition and enforcement of judgments in Europe will be considerably affected by Brexit. The Brussels I regime threatens to fall back from the Recast Regulation to the outdated 1968 Convention, which the Withdrawal Agreement intends to prevent. An alternative might be the UK's accession to the 2007 Lugano Convention (and perhaps rejoining EFTA). The Hague Conventions are expected to be maintained where applicable in international legal proceedings. As for conflict of laws, the Rome regime will partly change, so that there will be the risk of legal uncertainty particularly for contractual relations.

KEYWORDS: Brexit – Private international law – Brussels Regulations – 1968 Brussels Convention – 2007 Lugano Convention – Rome Regulations.

I. INTRODUCTION

Within the area of freedom, security and justice of the EU, a high degree of legal certainty and efficiency has been achieved for cross-border legal relations by the EU Regulations on private international law. In the relationship between the United Kingdom (UK) and all the remaining Member States this achievement is at stake when Brexit becomes effective at the end of March 2019. It is therefore necessary to establish which consequences European courts, citizens and companies have to expect in terms of international jurisdiction of courts and recognition and enforcement of judgments, and also with regard to conflict of laws. For this purpose, the paper will discuss the future applicability of the Brussels and Rome Regulations and their potential replacements. The paper will point out the consequences in case the UK will leave the EU without a withdrawal agreement, but it will also look at the provisions on private international law in the draft withdrawal agreement.

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II. INTERNATIONAL JURISDICTION OF COURTS AND RECOGNITION AND ENFORCEMENT OF JUDGMENTS

Focusing first on the international procedural aspects in relation to the UK, the future applicability of the Brussels regime has to be examined. Europe needs to know whether its courts will continue to apply the Brussels Regulations, or whether the 1968 Brussels Convention,¹ which is the Regulation's predecessor, and other legal instruments will fill the resulting gaps. Besides, the Lugano regime might partly serve as an alternative, and so might the 2005 Hague Convention on Choice of Court Agreements.

II.1. THE BRUSSELS REGIME

In civil and commercial matters, international jurisdiction of courts as well as recognition and enforcement of judgments are governed by the Brussels I (Recast) Regulation.² It is worth recalling that the British participation in this and the other Regulations of the Brussels regime has not arisen inevitably or unintentionally. Quite to the contrary, the UK has been enjoying the privileged position to decide for every Regulation, whether it would like to participate or not.³ Almost every time the UK voluntarily decided to opt-in.⁴

With Brexit becoming effective, and without any withdrawal agreement in this respect, the Brussels I (Recast) Regulation will cease to apply in the UK, as will the entire European *acquis*.⁵ This is particularly important for recognition and enforcement of European judgments in the UK. For recognition and enforcement of British judgments in Europe, the Regulation cannot apply either because it applies in itself only to the enforcement and recognition of judgments from other Member States.⁶ The resulting gap will be filled by the respective domestic (autonomous) regimes of private international law in the 13 "younger" Eastern Member States that have not acceded to the 1968 Brussels Convention. With regard to the 14 "old" Member States, such as Italy, France, and Germany, the situation is more complex because there is a debate whether they would have to re-apply the outdated 1968 Convention in relation to the UK.

The 1968 Convention was originally concluded by the six founding Member States of the European Economic Community (EEC), while the UK acceded later. Although the

¹ Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters ("1968 Brussels Convention" or "1968 Convention").

² Regulation (EU) 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).

³ Protocol no. 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice.

⁴ Recital 40 of Brussels I (Recast) Regulation.

⁵ For exemplary consequences see J. FITCHEN, *The Private International Law Consequences of Brexit*, in *Nederlands Internationaal Privaatrecht*, 2017, p. 424 *et seq.*

⁶ Art. 36 *et seq.* of Brussels I (Recast) Regulation.

Convention might be regarded as having been fully and permanently replaced by the Regulation among the Member States,⁷ the opposite view is more convincing: the Convention has only been “superseded”, i.e. displaced, by the Regulation.⁸ Going beyond the wording, the systematic argument strikes for this latter interpretation: the Convention was concluded as an independent treaty under public international law,⁹ and it has not been terminated. In consequence, the Convention is still binding for the contracting states and will be revived by Brexit in order to fill the resulting Brussels I gap between the UK and the 14 “old” Member States.¹⁰ Their courts will, in cases initiated after Brexit and where a party is domiciled in the UK or where British courts are chosen, determine their international jurisdiction according to the 1968 Convention’s rules, which prevail over their domestic regimes and, in term of *lis pendens*, even over the unilateral Arts 33-34 of the Brussels I (Recast) Regulation. Continental courts will domestically recognise and enforce British judgments handed down in cases initiated after Brexit only on the basis of the 1968 Convention instead of their domestic regimes.

Regardless which view one takes on the revival of the 1968 Convention, it is clear that the Convention is subject to interpretation by the Court of Justice. This obligation arises from a separately concluded Protocol, to which the UK equally agreed and is still bound.¹¹

⁷ In English see G. RÜHL, *The Effect of Brexit on the Resolution of International Disputes: Choice of Law and Jurisdiction in Civil and Commercial Matters*, in J. ARMOUR, H. EIDENMÜLLER (eds), *Negotiating Brexit*, Munich/Oxford/Baden-Baden: C.H.Beck/Hart/Nomos, 2017, p. 62, as well as in *International & Comparative Law Quarterly*, 2018, p. 105 *et seq.*

⁸ Art. 68 of Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (“Brussels I Regulation”) corresponds to Art. 68 of Brussels I (Recast) Regulation. This view is also taken by R. AIKENS, A. DINSMORE, *Jurisdiction, Enforcement and the Conflict of Laws in Cross-Border Commercial Disputes: What Are the Legal Consequences of Brexit?*, in *European Business Law Review*, 2016, p. 908; A. DICKINSON, *Back to the Future: The UK’s EU Exit and the Conflict of Laws*, in *Journal of Private International Law*, 2016, pp. 204-205; E. LEIN, *Uncharted Territory? A Few Thoughts on Private International Law post Brexit*, in *Yearbook of Private International Law*, 2015/2016, p. 36 *et seq.*; M. LEHMANN, D. ZETZSCHE, *Brexit and the Consequences for Commercial and Financial Relations between the EU and the UK*, in *European Business Law Review*, 2006, p. 1023 *et seq.*; S. MASTERS, B. MCRAE, *What Does Brexit Mean for the Brussels Regime?*, in *Journal of International Arbitration*, 2016, p. 492 *et seq.*

⁹ See, for instance, R. GEIMER, R. SCHÜTZE, *Europäisches Zivilverfahrensrecht*, Munich: C.H.Beck, 1997, para. 14. Also B. HESS, *Back to the Past: BREXIT und das europäische internationale Privat- und Verfahrensrecht*, in *Praxis des Internationalen Privat- und Verfahrensrechts*, 2016, p. 413. For a critical view see J. FITCHEN, *The Private International Law*, cit., p. 423.

¹⁰ The UK government however seems to take the opposite view, i.e. that the UK would be able to apply its “existing domestic common law and statutory rules”, cf. Department for Business, Energy & Industrial Strategy and the Ministry of Justice, *Handling civil legal cases that involve EU countries if there’s no Brexit deal*, 13 September 2018, www.gov.uk.

¹¹ Protocol concerning the interpretation by the Court of Justice of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters.

In consequence, if and insofar the 1968 Convention will revive, the UK will by escaping the Brussels I Regulation not be able to deliver itself from the CJEU's jurisdiction.

Besides the Brussels I Regulation, which has been discussed so far, the other Regulations of the Brussels regime, which concern specific non-commercial matters, have to be considered. There is the Brussels II (Recast) Regulation on matrimonial matters and matters of parental responsibility,¹² in which the UK had also opted in.¹³ After Brexit, and without any agreement in this respect, the remaining Member States will apply this Regulation only in order to establish their own courts' international jurisdiction.¹⁴ With regard to *lis pendens* and recognition and enforcement of judgments, they will apply their domestic regimes, as far as they are not bound to international treaty law. Particularly in this area, conventions prepared by the Hague Conference of Private International Law are in place and will therefore apply: the 1970 Convention on the recognition of divorces and legal separations was ratified by the UK and some of the continental Member States, whilst all Member States acceded to the 1996 Convention on parental responsibility and measures for the protection of children and the 1980 Convention on the civil aspects of international child abduction.¹⁵

The last area regulated by the Brussels regime concerns maintenance obligations.¹⁶ When the Maintenance Regulation, in which the UK also eventually participated,¹⁷ will cease to apply after Brexit, Member States that are bound to the 1968 Brussels Convention will apply that Convention again in order to determine international jurisdiction because maintenance matters are not excluded from its scope.¹⁸ In terms of recognition and enforcement of maintenance decisions, the UK and some of the younger Member States will apply the respective 1973 Hague Convention; otherwise, their domestic regimes will be applicable.

Summing up the findings on the Brussels regime in case of a "hard Brexit" without a deal, it is clear that questions of international jurisdiction will not lessen in complexity, but in addition legal fraction and henceforth uncertainty will increase. Individuals, families or businesses that are involved in international disputes across the Channel will

¹² Council Regulation (EC) 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.

¹³ Recital 30 of Brussels II (Recast) Regulation.

¹⁴ *Argumentum a contrario* Art. 14 of Brussels II (Recast) Regulation.

¹⁵ Cf. P. BEAUMONT, *Private international law concerning children in the UK after Brexit: comparing Hague Treaty law with EU Regulations*, in *Child and Family Law Quarterly*, 2017, p. 213 *et seq.*; A. DUTTA, *Brexit and International Family Law from a Continental Perspective*, in *Child and Family Law Quarterly*, 2017, p. 199.

¹⁶ Regulation 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations ("Maintenance Regulation").

¹⁷ See, contrary to Recital 47 of the Maintenance Regulation, the Commission Decision.

¹⁸ See Art. 5, para. 2, and Art. 69, para. 1, of the 1968 Brussels Convention.

be detrimentally affected. To counteract this, the Draft Withdrawal Agreement¹⁹ provides for the continuous applicability of all the Brussels Regulations (and also of all the Regulations simplifying the service of documents and other procedures, which were not discussed here).²⁰ This would at least benefit litigation instigated during the intended transition period until the end of 2020. However, legal certainty is not only necessary for court cases pending when a “hard Brexit” becomes reality or the transition period ends, but most importantly for future disputes. They can be expected to even increase in number and diversity without the basis of EU harmonised substantive law.

II.2. THE LUGANO REGIME

The British government has expressed its interest in acceding to the Lugano regime,²¹ which was originally concluded in 1988 between the EEC Member States and the European Free Trade Association (EFTA) and which resembled the 1968 Brussels Convention. Insofar it is true that the UK would be able to enjoy the benefits which were achieved by the Brussels I Regulation, although it would still lack those improvements which the Brussels I (Recast) Regulation has brought regarding *lis pendens* and *exequatur*.

What is problematic for the UK is the fact that the EU made use of its exclusive power in foreign affairs when it ratified the 2007 Lugano Convention,²² which fully replaced its 1988 predecessor. Leaving the EU will have the effect that the UK will no longer benefit from its derived participation in the (only existing) Lugano Convention.²³ The UK would, after having become independent from the EU, need to accede to the 2007 Lugano Convention for the first time individually.

Yet, the British accession itself is not as easy as the British government might hope for. One option for accession to the Lugano Convention would require the UK to first re-join the EFTA. The fact that the UK had left the EFTA when joining the European Community (EC), which preceded the EU, is re-emerging and haunting the UK. Nevertheless, only as an EFTA Member State, the UK could accede to the Lugano Convention without being dependent on the EU's approval.²⁴ Whether the UK would be allowed to join EFTA solely depends on the current EFTA States Iceland, Liechtenstein,

¹⁹ Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as agreed at negotiators' level on 14 November 2018, eur-lex.europa.eu.

²⁰ Arts 67-68 of the Draft Withdrawal Agreement.

²¹ UK government, *The future relationship between the United Kingdom and the European Union*, 12 July 2018, assets.publishing.service.gov.uk, paras 146-147.

²² Court of Justice, opinion 1/03 of 7 February 2006.

²³ R. AIKENS, A. DINSMORE, *Jurisdiction, Enforcement*, cit., p. 912 take the same view.

²⁴ Art. 71 of the 2007 Lugano Convention.

Norway, and Switzerland.²⁵ They might like to welcome the UK into their organization, although this British “swing-back” might not amuse the EU, whose sympathy could be more important to the EFTA States in the long term.

The other option would be the direct British accession to the 2007 Lugano Convention.²⁶ This would however require unanimous approval of all the Convention’s parties, including the EU with exclusive power on behalf of all of its Member States.²⁷ It is unlikely that the EU will easily give its approval for the renegade UK; and even if so, the EU could make an objection so that the British accession would not become valid towards the EU Member States.²⁸

After all, the UK would not be able to attain the intended total independence from the CJEU. Although Lugano has a good distance from Brussels, both regimes are related to Luxembourg. The 2007 Lugano Convention comes with the obligation to “pay due account to the principles laid down by any relevant decision concerning the provision(s)” of the Brussels Convention and the Brussels I (Recast) Regulation “rendered by the courts of the States bound by this Convention and by the Court of Justice of the European [Union].”²⁹ The UK would only be relieved from having to request preliminary rulings from the CJEU, but this relief might not even be always beneficial and would deprive the British from adjudication and participation in preliminary ruling procedures brought by others.

In the end, the 2007 Lugano Convention might be a remedy for the UK after Brexit, particularly as a tool for loss limitation. However, it would neither be easy for UK to accede to it nor any better compared to UK enjoying the Brussels Regulations as an EU Member State. In case there will be no agreement as to the future relations between the UK and the EU, the 2007 Lugano Convention could even be the only available “back up” for the UK in the area of international jurisdiction if the UK would not want to fall behind the Brussels I Regulation standards in civil and commercial litigation.

II.3. THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS

Insofar as international jurisdiction of a British court arises from a corresponding exclusive choice of court, the validity of such prorogation could be preserved by the 2005 Hague Convention on choice of court agreements.³⁰ The Convention only applies

²⁵ Accession according to Art. 56 of the EFTA Convention.

²⁶ Art. 72 of the 2007 Lugano Convention.

²⁷ Art. 216, para. 1, and Art. 3, para. 2, TFEU.

²⁸ Art. 72, para. 4, of the 2007 Lugano Convention.

²⁹ Art. 1, para. 1, of Protocol no. 2 on the uniform interpretation of the [2007 Lugano] Convention and on the Standing Committee.

³⁰ Accession would be possible according to Art. 27, para. 3, of the 2005 Hague Convention.

to prorogation agreements in civil or commercial matters concluded among companies and other professional parties.³¹

However, the UK has been participating in the Convention through the EU, which as a Regional Economic Integration Organisation ratified the Convention based on its exclusive power on behalf of all its Member States.³² Upon Brexit, the Convention will no longer apply in the UK.³³ The UK will need to accede to the Convention independently,³⁴ which will however only be possible once it has regained its external power.

Due to the fact that the accession will take three months to become effective according to the Convention's rules, there will be an unavoidable gap in applicability during that time.³⁵ This will create the risk of legal uncertainty as to whether European courts will consider choice of court agreements valid that will have been concluded after Brexit and before the Convention enters into force again in the UK. Once the UK participates again in the Hague Convention on choice of court agreements, it will within its scope supersede the 1968 Brussels Convention,³⁶ and the domestic regimes,³⁷ which would be beneficial for British courts.³⁸

II.4. LACK OF OPPORTUNITY FOR AN AUTONOMOUS REGIME

Having considered the various available regimes, it has to be noted that Brexit will not provide the UK with a unilateral opportunity for change. The UK cannot reactivate or set up an autonomous regime for international jurisdiction and for recognition and enforcement of judgments, which the EU would need to obey by any means of public international law.³⁹ In other parts of EU law, perhaps even for conflict of laws,⁴⁰ the

³¹ Art. 1, para. 1, Art. 2, para. 1, of the 2005 Hague Convention.

³² Council Decision 2009/397/EC of 26 February 2009 on the signing on behalf of the European Community of the Convention on Choice of Court Agreements, which emphasises in Recital 4 the exclusive competence of the Union.

³³ Cf. J. FITCHEN, *The Private International Law*, cit., p. 429.

³⁴ This intention is expressed by the UK government, *The future relationship*, cit.

³⁵ Art. 31, para. 2, of the 2005 Hague Convention; A. DICKINSON, *Close the Door on Your Way Out – Free Movement of Judgements in Civil Matters*, in *Zeitschrift für Europäisches Privatrecht*, 2015, p. 560; E. LEIN, *Unchartered Territory?*, cit., p. 39. However, the UK government, *The future relationship*, cit., seems to believe there would only be a gap of the weekend 30-31 March 2019.

³⁶ Art. 26, para. 1, and Art. 6 of the 2005 Hague Convention; Art. 57, para. 1, of the 1968 Brussels Convention.

³⁷ By virtue of the primacy of public international law.

³⁸ Cf. M. AHMED, P. BEAUMONT, *Exclusive Choice of Court Agreements: Some Issues on the Hague Convention on Choice of Court Agreements and Its Relationship with the Brussels I Recast Especially Anti-Suit Injunctions, Concurrent Proceedings and the Implications of BREXIT*, in *Journal of Private International Law*, 2017, p. 386 *et seq.*

³⁹ This is similarly argued by A. DICKINSON, *Close the Door*, cit., p. 543; J. FITCHEN, *The Private International Law*, cit., p. 417; G. RÜHL, in J. ARMOUR, H. EIDENMÜLLER (eds.), cit., p. 64, and in *International & Comparative Law Quarterly*, cit., p. 123.

transformation of EU law into British law might be a feasible solution because the EU would not reject something that meets its standards, even if its standardising rules are technically not in force in the UK anymore.

However, in the area of international jurisdiction, UK will be lacking such opportunity due to the fact that reciprocity is a requirement where rules on international jurisdiction shall be binding on other states.⁴¹ Therefore, even if the UK wanted to, it could not simply transfer the Brussels Regulations into its national law and expect the remaining Member States to treat the British copy similarly to the European original.

In terms of public international law, the UK is bound to international treaties, such as the 1968 Brussels Convention, and cannot disregard its obligation under such treaties in relation to other contracting states, such as the EU Member States. Public international law, particular general treaty law of the 1969 Vienna Treaty Convention, will not be available to allow UK a “cooling off” in a different manner.⁴² European treaty law, namely Art. 50, para. 2, TEU, is *lex specialis* that exclusively applies to Brexit, so that there is no space left for public international law or principles to come into play.

II.5. INTERIM RESULTS

After all, the consequences of Brexit for international jurisdiction of courts and recognition and enforcement of judgments will be that the UK's attractiveness as location for international litigation will be diminished, not only in commercial matters. European courts will have to apply differing regimes when determining international jurisdiction for cases that involve the UK, and British judgments will equally encounter difficulties in recognition and enforcement in the remaining Member States.

The intention to temporarily retain the Brussels Regulations at least during the planned transition period shows that both the UK and the EU are interested in maintaining a high level of legal certainty for cross-border disputes. The UK's “back up” option after Brexit to accede to the 2007 Lugano Convention (and to the 2005 Hague Convention on choice of court agreements) can and will however be no adequate remedy for this ambitious purpose. The UK will be prevented from establishing autonomous rules for international jurisdiction that would be extra-territorially binding on the EU Member States. Both the Brussels and the Lugano regime imply the obligation to adhere to the CJEU directly or indirectly.

⁴⁰ See *infra*, section III.3.

⁴¹ This is also acknowledged by the UK government, *The future relationship*, cit.

⁴² Cf. C. AMERASINGHE, *Principles of the institutional law of international organizations*, Cambridge: Cambridge University Press, 2005, p. 118.

III. CONFLICT OF LAWS

Turning to the Brexit consequences for European private international law in the area of conflict of laws, it is not certain that the law governing a particular cross-border legal relation will continue to do so, even if the parties have explicitly agreed upon a specific law. Trust in a choice of law, often suggested as a measure of “Brexit preparedness”, or trust in any other connecting factor, depends on the conflict of laws framework on which this trust is based. Modification to the framework of the Rome Regulations, insofar as Brexit might cause it, would be a real and unexpected game-changer.

III.1. THE REGIME FOR INTERNATIONAL CONTRACTS

For international contracts, European courts employ the Rome I Regulation in order to determine the applicable law.⁴³ Even the UK decided to opt-in in this Regulation.⁴⁴ The Regulation “replaced” its predecessor, the 1980 Rome Convention,⁴⁵ but only “in the Member States”.⁴⁶ After the UK has ceased to be such a Member State, all the remaining Member States (apart from Croatia) will have to re-apply the Convention in relation to the UK since they are bound to it by public international law.⁴⁷

Similarly to the debate concerning the Brussels regime, there is an opposite view suggesting that the Rome I Regulation would remain applicable in all remaining Member States.⁴⁸ Although the Rome I Regulation claims universal applicability (*loi uniforme*) also towards a Third State,⁴⁹ which the UK will become, the Regulation cannot overrule superior treaty obligations under public international law. It is an undisputed fact that the 1980 Rome Convention is such an international treaty and has not yet been terminated.⁵⁰

Insofar as the rules of the Rome Convention lag behind those of the Regulation, the change in the conflict of laws framework will affect international contracts which are

⁴³ Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.

⁴⁴ Different to Recital 45 of Rome I Regulation see Commission Decision 2009/26/EC of 22 December 2008 on the request from the United Kingdom to accept Regulation (EC) No 593/2008 of the European Parliament and the Council on the law applicable to contractual obligations (Rome I).

⁴⁵ Rome Convention on the law applicable to contractual obligations.

⁴⁶ Cf. Art. 24, para. 1, of Rome I Regulation.

⁴⁷ A. DICKINSON, *Back to the Future*, cit., p. 203; M. LEHMANN, D. ZETZSCHE, *Brexit and the Consequences*, cit., p. 1004 *et seq.*; M. WAHAB, *Brexit's Chilling Effect on Choice of Law and Arbitration in the United Kingdom*, in *Journal of International Arbitration*, 2016, p. 465.

⁴⁸ G. RÜHL, *The Effect of Brexit*, cit.

⁴⁹ Art. 2 of Rome I Regulation. Particularly M. SONNENTAG, *Konsequenzen des Brexits*, Tübingen: Mohr Siebeck, 2017, p. 46 *et seq.* deploys this argument.

⁵⁰ It is not impossible, though unlikely, that the contracting states of the Rome Convention will terminate it; see Art. 30 of the 1980 Rome Convention (which notably differs insofar from the 1968 Brussels Convention). Cf. R. PLENDER, M. WILDERSPIN, *European Contracts Convention*, London: Sweet & Maxwell, 2001, para. 13-02.

subjected to British laws. This will not only be of particular relevance for the banking and finance industry, as many financial instruments are issued and traded under English law, relying on a respective choice of law. Also, the change in the conflict of laws framework might affect the question of which law governs trading goods with the UK. Substantive law for the international sale of goods is harmonised by the United Nations in the Convention on Contracts for the International Sale of Goods ("CISG"),⁵¹ but the UK is one of the few states in the world that reject participation in it. Therefore, conflict of laws does matter and any changes to it will be relevant.

III.2. THE REGIME FOR INTERNATIONAL NON-CONTRACTUAL RELATIONS

The consequences of Brexit in terms of conflict of laws differ for international non-contractual relations, for instance in tort, but also in matrimonial, divorce and maintenance matters, because there are no international treaties requiring obedience. Where treaties for specific areas were prepared by the Hague Conference, such as the 1971 Convention on the law applicable to traffic accidents and the 1973 Convention on the law applicable to products liability, the UK has not ratified them, and not all of the remaining Member States either. Despite this background it cannot be deduced that the remaining Member States will employ their autonomous conflict of laws regimes.

European courts will even after Brexit continue to apply the Rome II Regulation in relation to the UK for determining the law governing non-contractual obligations.⁵² The Regulation claims universal applicability,⁵³ just like the Rome I Regulation; but here the significant difference is that no obligation from public international law would prevent the application of the Rome II Regulation in a case involving the UK as a Third State. Therefore, from the European perspective, the Rome II Regulation's achievements in harmonising the conflict of laws are preserved, so that forum shopping will not become lucrative again.⁵⁴ Moreover, the Rome II Regulation does not allow deviation from compulsory EU law where a case is only connected to British law through the parties' choice of this future Third State law.⁵⁵

In addition, with regard to the London financial market, the law governing any non-contractual liability for misconduct will be determined by the Rome II Regulation in European courts. For instance, where such a damages claim is brought in Italy or Germany, the Rome II Regulation provides for the law of the place where the financial

⁵¹ United Nations Convention on Contracts for the International Sale of Goods, 11 April 1980, 1489 UNTS 3.

⁵² Regulation (EC) 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations.

⁵³ Art. 3 of Rome II Regulation.

⁵⁴ This can be witnessed in Art. 4 and in Art. 7, para. 3, of Brussels I (Recast) Regulation approximately equal to Art. 2 and Art. 5, para. 3, of the 1968 Brussels Convention.

⁵⁵ Art. 14, para. 3, of Rome II Regulation.

loss occurred to govern the case, which can be at the place of the claimant's habitual residence or its bank account.⁵⁶ Even after Brexit, UK private international law will not have a say on the issue.

Similar to the situation of the conflict of laws regime for non-contractual obligations, the remaining Member States, which have been participating in the Regulation on the law applicable to divorce and legal separation, will continue to apply this Divorce Regulation ("Rome III") in cases involving the UK as a Third State.⁵⁷ This does however not imply any change to the pre-Brexit situation, as the UK has not been among the Member States, such as Italy or Germany, that have opted for enhanced cooperation in this area.⁵⁸

All of the remaining Member States (apart from Denmark) will also continue to apply the Regulation on the applicable law in matters of succession ("Succession Regulation")⁵⁹ as they have done before. The UK has not been participating in it.⁶⁰ Nevertheless, both the Rome III and the Succession Regulations are not prevented from claiming universal applicability also in relation to the UK as a Third State.⁶¹ The UK has and will however not be affected by the rules on international jurisdiction etc.

Although the legal construction for the conflict of laws of maintenance matters is different, as the Maintenance Regulation simply refers to the 2007 Hague Protocol,⁶² the outcome is the same again: all remaining Member States will continue to universally apply this regime.⁶³ Under public international law, there is no obligation arising from earlier treaties, such as the 1956 or 1973 Conventions on the law applicable to maintenance obligations, because the UK has not ratified them.

III.3. THE TRANSITIONAL REGIME AND A LONG-TERM AUTONOMOUS OPTION

For the duration of the transitional period proposed in the draft withdrawal agreement it is provided that the Rome Regulations in which the UK has been participating, i.e. Rome I and Rome II, shall continue to apply.⁶⁴ Parallel to the temporary continuity of

⁵⁶ Art. 4, para. 1, of Rome II Regulation. Cf. J. UNGERER, *Pure Financial Loss and International jurisdiction for Tort Under the Brussels I (Recast) Regulation*, in *Maastricht Journal of European and Comparative Law*, 2017, p. 454.

⁵⁷ Council Regulation (EU) 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation.

⁵⁸ Recital 6 of Rome III Regulation.

⁵⁹ Regulation (EU) 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.

⁶⁰ Recital 82 of Succession Regulation.

⁶¹ Art. 20 of Succession Regulation.

⁶² Protocol of 23 November 2007 on the law applicable to maintenance obligations.

⁶³ Art. 2 of the Protocol of 23 November 2007, cit.

⁶⁴ Art. 66 of the Draft Withdrawal Agreement, cit.

the Brussels Regulations drafted for the withdrawal agreement, this would benefit citizens and companies in terms of cross-border legal relations that are entered into or arise before the end of 2020.

Indeed, this is nothing more than delaying the real consequences of Brexit, which are mainly detrimental for the British side because its participation in the harmonised regime for conflict of laws is abandoned. Falling back onto the Rome Convention for contractual relations cannot be regarded as a positive development. UK's loss of both the harmonised substantive law and the harmonised conflict of laws of the EU will result in significantly increasing the number of conflicting laws, whilst the UK will not gain much power and leeway to establish an independent and advantageous regime.

Modelled on the Swiss way of "autonomous implementation" of EU law in other areas,⁶⁵ the UK could in the long term implement the Rome Regulations into its national law to keep following the same conflict rules as all the remaining Member States if they approve that the 1980 Rome Convention is superseded.⁶⁶ In contrast to the situation of international jurisdiction and recognition and enforcement of judgments, this unilateral option is practicable for the UK because conflict of laws is not based on reciprocity. Of course, this autonomous implementation would mean that nothing will be achieved in conflict of laws through Brexit; in fact, loss limitation would be the only achievable aspect insofar. It is clear and inevitable that Brexit will deprive UK of its seat at the European table where the conflict of law instruments are debated and where future law reforms will be drafted. Also, British courts would need to "autonomously" take account of the CJEU case law, though without being able to initiate a preliminary ruling procedure in Luxembourg.

III.4. INTERIM RESULTS

Summing up the Brexit consequences for European conflict of laws, the outlook is slightly less dramatic than for international jurisdiction and recognition and enforcement of judgments. This is true for European courts that will be able to mainly continue applying the current regime in relation to the UK after Brexit. In turn, however, Brexit will not provide the UK with much opportunity to establish independent rules. The successful European harmonisation of the conflict of laws proves to be a stable system that will not be damaged by the UK's split-off. It would therefore be advisable for the UK to keep adhering to the Rome Regulations and to follow the CJEU case law autonomously.

⁶⁵ See, for instance, F. MAIANI, *Lost in translation: euro-compatibility, legal security, and the autonomous implementation of EU law in Switzerland*, in *European Law Reporter*, 2013, p. 29.

⁶⁶ This seems to be the UK government's intention, according to the document UK government, *The future relationship*, cit.

IV. CONCLUSION

In conclusion, European private international law will be considerably affected by Brexit, although the UK will be hit more severely than the remaining Member States. In the area of international jurisdiction, recognition and enforcement, the Brussels regime will change to the worse insofar as the outdated 1968 Brussels Convention will be revived for the relations between the UK and the “old” Member States; only the “younger” Member States will employ their respective domestic regimes. An option might be the UK’s accession to the 2007 Lugano Convention, perhaps after rejoining EFTA, but this is not unproblematic in itself and also because the Lugano regime is much narrower in scope. The Hague Conventions are expected to be maintained where applicable in international proceedings, particularly for choice of court agreements and in child protection law. Conflict of laws in European courts will see fewer changes. The Rome I Regulation for contracts will be displaced again by its predecessor, the 1980 Rome Convention, and non-contractual obligations will still be governed by the Rome II Regulation. British courts will face greater problems if the legislator will not transfer the Rome Regulations into national law.

