Basedow on Brexit and Private International Law

Professor Dr. Dr. h.c. mult. Jürgen Basedow, Director of the Max Planck Institute for Comparative and International Private Law (Hamburg), has analyzed the challenges that Brexit poses for private and commercial law in an editorial for issue 3/2016 of the Zeitschrift für Europäisches Privatrecht. The main contents of this article have been summarized in English on the Institute's website; this abstract is reproduced here with the kind permission of Professor Basedow.

As soon as the UK notifies the European Council of its intent to leave the EU in accordance with Article 50 para. 2 TEU, a two year period shall commence within which all negotiations must be conducted. Should negotiations exceed this two year period or if the outcomes meet resistance in the UK or the EU bodies, Art. 50 para. 3 TEU stipulates that Union Treaties shall simply cease to apply, unless the Council and the UK unanimously agree to extend that period.

As sparing as the wording of Art. 50 para. 2 TEU is, it does make it very clear: should the EU and the UK not reach agreement within two years of notification, then the Treaties, including the freedom of movement they contain, cease to be in force. The possibility that access may be lost to the European single market and other guarantees provided by primary EU law puts the UK under economic and political pressure that may weaken their negotiating position against the EU. British voters were probably not aware of this consideration before the referendum.

The question of whether and how the international conventions of the EU, particularly those for a uniform system of private law, shall continue to apply is also complex. It may be that conventions like the Montreal Convention for the Unification of Certain Rules for International Carriage by Air or the Cape Town Convention on International Interests in Mobile Equipment and the Aviation Protocol will continue to apply, as they were ratified by both the UK and the EU, although relevant decisions handed down by the ECJ will no longer be binding on the UK courts. But what is the situation with regard to the Hague Jurisdiction Convention of 2005 that was ratified by the EU on behalf of all Member States, but not by the States themselves? These private and procedural law Conventions –

just as all other international law agreements of the EU – must also be addressed during the exit negotiations.

Any change of Great Britain's status under the Brussels I Regulation 1215/2012 is also particularly significant for private law. It is for the British courts to decide whether they will continue to observe the rules of jurisdiction. Their judgments however will no longer be automatically enforceable across the whole Union, as Art. 36 only applies to "a judgment given by the courts of a Member State". Older bilateral agreements such as that existing between Germany and Britain may go some way to bridging the gap, as will the autonomous recognition of laws, but neither will suffice completely. International legal and commercial affairs must thus return to square one. As it currently stands, the Lugano Convention (OJ 2009 L 147) is also unable to cover the shortfall, signed as it was by the EU and not the individual Member States. According to Art. 70, Great Britain is not one of the states entitled to join the Convention. This effectively removes one of the fundamental pillars supporting the remarkable rise in the number of law firms in London, with a business model based on the simple promise that stipulating London in a jurisdiction agreement would guarantee enforceability across the whole of Europe. This model will soon be a thing of the past, if viable solutions cannot be found for the exit agreement.

The agenda for the exit negotiations will thus be immensely broad in its scope. Even if the British government should drop EU primary law for the reasons listed above, they will try to include secondary legal guarantees for access to the European single market into their exit agreement. That would require the discussion of hundreds of Directives and Regulations. Considering that the entry negotiations with nine member states, divided into over 30 negotiation chapters, took so many years to complete, it is doubtful whether negotiations in the other direction can be completed within the two years stipulated by Art. 50 para. 3 TEU. Brexit has also shaken up international commercial competition in ways that have yet to be determined.

The complete article "Brexit und das Privat- und Wirtschaftsrecht" by Professor Jürgen Basedow will be published in the forthcoming issue 3/2016 of the ZEuP – Zeitschrift für Europäisches Privatrecht.