Brexit and PIL – Belgian Supreme Court confirms the application of the 2005 Hague Convention to jurisdiction clauses designating UK courts concluded after 1 October 2015

By Guillaume Croisant (Linklaters LLP)

The United Kingdom deposited an instrument of accession to the Hague Convention of 30 June 2005 on Choice of Court Agreements (the "**Convention**") on 28 September 2020. This instrument of accession became effective after the Brexit's transition period, on 1 January 2021, and gained binding force within the UK legal order following the adoption of the Private International Law (Implementation of Agreements) Act 2020.

As many readers will be aware, a controversy exists regarding the temporal scope of the Convention. It applies to exclusive choice of court agreements concluded after its entry into force for the State of the chosen court and to disputes initiated after its entry into force for the State of the seized court. EU Member States have been bound by the Hague Convention since its approval by the European Union on 1 October 2015, but what about the UK after its withdrawal from the EU?

According to a first viewpoint, reflected in the UK's instrument of accession, " *In accordance with Article 30 of the 2005 Hague Convention, the United Kingdom became bound by the Convention on 1 October 2015 by virtue of its membership of the European Union, which approved the Convention on that date.*"

Conversely, under a second viewpoint (apparently shared by the European Commission in its 'Notice to stakeholders – Withdrawal of the United Kingdom and EU rules in the field of civil justice and private international law' dated 27 August 2020, p. 9), the Convention could only apply after the United Kingdom's 'independent' ratification, which occurred on 1 January 2021. If this second

perspective were accepted, jurisdiction agreements concluded before this date would not benefit from the mutual recognition system established by the Convention.

In a judgment (in French) dated 27 March 2025 (C.24.0012.F), the Belgian Supreme Court (*Court de Cassation/Hof van Cassatie*) ruled in favour of the first viewpoint, holding that *"The Hague Convention of 30 June 2005 has been applicable to the United Kingdom as a bound State, owing to the European Union's approval of the Convention, from 1 October 2015 until 31 December 2020, and as a contracting party from 1 January 2021. The argument, in this regard, that the United Kingdom ceased to be bound by the Convention following its withdrawal from the European Union on 1 February 2020, is without legal basis."*

A Judgment is a Judgment? How (and Where) to Enforce Third-State Judgments in the EU After Brexit

In the wake of the CJEU's controversial judgment in *H Limited* (Case C-568/22), which appeared to open a wide backdoor into the European Area of Justice through an English enforcement judgments (surprisingly considered a 'judgment' in the sense of Art. 2(a), 39 Brussels Ia by the Court), international law firms had been quick to celebrate the creation of 'a new enforcement mechanism' for non-EU judgments.

As the UK had already completed its withdrawal from the European Union when

the decision was rendered, the specific mechanism that the Court seemed to have sanctioned was, of course, short-lived. But crafty judgment creditors may quickly have started to look elsewhere.

In a paper that has just been published in a special issue of the Journal of Private International Law dedicated to the work of Trevor Hartley, I try to identify the jurisdictions to which they might look.

In essence, I make two arguments:

First, I believe that the CJEU's unfortunate decision can best be explained by the particular way in which foreign decision are enforced in England, i.e. through a new action on the judgment debt. Unlike continental exequatur proceedings, this action actually creates a new, enforceable domestic judgment, albeit through proceedings that closely resemble the former. It follows, I argue, that only judgments that result from a new action based on the judgment debt (rather than a mere request to confirm the enforceability of the foreign judgment) can be considered 'judgments' in the sense of Art. 2(a) and the Court's decision *H Limited* (which also requires the decision to result from 'adversarial proceedings'). Among many reasons, I find such a limited reading easier to reconcile with the Court's earlier decision in *Owens Bank* (Case C-129/92) than a wider understanding of the decision.

Second, I believe that several European jurisdictions still offer enforcement mechanisms through which third-state judgments could realistically be transformed into European judgments (clearing both the requirement of creating a new judgment and resulting from adversarial proceedings). This applies to Ireland and Cyprus (but not Malta) as well as to the Netherlands (through its so-called *verkapte exequatur*) and Sweden.

The full paper is available here; a preprint can also be found on SSRN.

Brexit and the Future of Private International Law in English Courts

Our esteemed co-editor Mukarrum Ahmed has recently published a book titled Brexit and the Future of Private International Law in English Courts with Oxford University Press. He has kindly provided us with the following summary:

This book is the first full length study of the private international law implications of Brexit in a single consolidated resource. It provides an analytical and authoritative commentary on the impact of Brexit upon jurisdiction, foreign judgments, and the applicable law in civil and commercial matters. By discussing the principal post-Brexit changes in England, this book faces towards the future of private international law in English courts. It utilises a once-in-a-generation opportunity to analyse, understand, and reframe some fundamental assumptions about private international law with a view to suggesting adjustments and law reform.

Ahmed argues that a conscious unlearning of the central precepts of EU private international law would be detrimental to the future of English private international law. The multilateral issues that lie ahead for the discipline rely on the legal epistemology of EU private international law, which also serves as a useful reference point when comparing aspects of English private international law. Unshackled from the EU's external competence constraints, the UK will have the opportunity to play a more prominent role in the development of the Hague Conference's global instruments. A methodologically pluralist approach

to English private international law may be the best route to sustain its global leadership in this field, as well as simultaneously assimilating the best private international law developments from the Commonwealth, Europe, and beyond.

CJEU on centre of main interests (COMI) and its subsequent transfer (and Brexit) under the Insolvency Regulation 2015 in the case Galapagos BidCo, C-723/20

Under the Insolvency Regulation 2015, a transfer of the centre of main interests (COMI) of the debtor after lodging of the request for opening of insolvency proceedings affects the exclusive jurisdiction of the court seised with that application prior to the transfer?

This is the legal issue that the Court addresses in the judgement delivered this morning in the case Galapagos BidCo, C-723/20.

Factual context

A holding having its registered office in Luxembourg since 2014 contemplates, in June 2019, to move its actual centre of administration to England. In August 2019, its directors lodge a request before the High Court to have insolvency proceedings opened in respect of the debtor's assets.

The following day the directors are replaced by a new one, who sets up an office for the holding in Germany.

The request to have insolvency proceedings opened before the High Court is not

withdrawn. Quite to the contrary, they seem to continue although a decision opening these proceedings has not yet been delivered.

That being said, a request for the opening of insolvency proceedings is lodged by the holding also with a German court.

This court orders preservation measures and appoints a temporary insolvency administrator. The capital market and bondholders are informed that the centre of administration of the holding have been move to Germany. However, the second instance court ruling on an appeal introduced by the creditors reverses the order of the first instance and dismisses the debtor's request to have insolvency proceedings opened, due to the lack of international jurisdiction.

Next, the creditors request to have insolvency proceedings opened, still in Germany, in respect of the debtor's assets. The German court considers that it has jurisdiction to rule on the request as the centre of main interests of the holding is situated in Germany. It orders preservation measures and appoints a temporary insolvency administrator.

A subsidiary of the holding brings an appeal against the order. It argues that the German courts lack jurisdiction as the centre of administration of the holding has been moved to England in June 2019. The appeal is dismissed by the second instance court.

An appeal on a point of law is brought before the Bundesgerichtshof, which lodges a request for a preliminary ruling before the Court of Justice.

Preliminary questions

> *Is Article 3(1) of [the Insolvency Regulation 2015] to be interpreted as meaning that a debtor company the statutory seat of which is situated in a Member State does not have the centre of its main interests in a second Member State in which the place of its central administration is situated, as can be determined on the basis of objective factors ascertainable by third parties, in the case where, in circumstances such as those in the main proceedings, the debtor company has moved that place of central administration from a third Member State to the second Member State at a time when a request to have the main*

insolvency proceedings opened in respect of its assets has been lodged in the third Member State and a decision on that request has not yet been delivered?

If Question 1 is answered in the negative:

Is Article 3(1) of [the Insolvency Regulation 2015] to be interpreted as meaning that: the courts of the Member State within the territory of which the centre of the debtor's main interests is situated at the time when the debtor lodges the request to have insolvency proceedings opened retain international jurisdiction to open those proceedings if the debtor moves the centre of its main interests to the territory of another Member State after lodging the request but before the decision opening insolvency proceedings is delivered, and such continuing international jurisdiction of the courts of one Member State excludes the jurisdiction of the courts of another Member State in respect of further requests to have the main insolvency proceedings opened received by a court of that other Member State after the debtor has moved its centre of main interests to that other Member State?

The judgement of the Court

The Court decided to answer the preliminary question without first requesting its Advocate General to present an Opinion.

In its judgement, the Court focuses its attention on the second preliminary question.

Its considers that, by this question, which it is appropriate to examine first, the referring court seeks to establish, in substance, whether Article 3(1) of the Insolvency Regulation 2015 is to be interpreted as meaning that the court of a Member State to which an application for the opening of main insolvency proceedings has been made retains exclusive jurisdiction to open such proceedings where the centre of the debtor's main interests is transferred to another Member State after that application has been lodged but before that court has given a decision on it (paragraph 24).

The Court answers in the sense that **the court of a Member State seised of an**

application for the opening of main insolvency proceedings retains exclusive jurisdiction to open such proceedings where the centre of the debtor's main interests is transferred to another Member State after the application has been lodged but before that court has given a ruling on it. Consequently, and insofar as that Regulation remains applicable to that application, **the court of another Member State subsequently seised of an application made for the same purpose may not, in principle, assume jurisdiction to open main insolvency proceedings until the first court has given judgement and declined jurisdiction** (paragraph 40).

Having in mind the specificity of the case which concerns the UK, the Court makes some additional remarks as to the implications of Brexit. Indeed, the aforementioned passage relating to the fact that "the Regulation remains applicable to the application" echoes this issue.

In essence, the Court clarifies that if on the date of expiry of this transitional period (31 December 2020), High Court had still not ruled on the application for the opening of main insolvency proceedings (it seems that it is not clear whether this was the case), it would follow that Insolvency Regulation 2015 would no longer require that, as a result of this application, a court of a Member State, on the territory of which debtor's centre of main interests would be located, should refrain from declaring itself competent for the purposes of opening such proceedings (paragraphs 38 and 39)

Given the answer to the second question and having in mind that at least potentially the court seized first with the request for the opening of main insolvency proceedings may have retained its exclusive jurisdiction, the Court deems it not necessary to address the first preliminary question (paragraphs 41 to 43)

The judgement can be consulted here.

Dickinson on European Private International Law after Brexit

Just as the Commission formally announced its refusal to give consent to the UK's accession to the Lugano Convention, Andrew Dickinson has provided a comprehensive overview on the state of Private International Law for civil and commercial matters in the UK and EU, which has just been published in the latest issue of *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)* (IPRax 2021, p. 218).

The article sketches out this 'realignment of the planets' from three angles, starting with the legal framework in the UK, which will now be based on the Withdrawal Act 2018, several other statutes and multiple pieces of secondary legislation. The latter include the *Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations*, which entail a return to the rules previously applied only to non-EU defendants, and the *Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc) (EU Exit) Regulations*, which (by contrast) essentially carries over the Rome I and II Regulation. With regard to jurisdiction, the situation is of course complicated by some residual remains of the Brussels regime, some new provisions aiming to preserve certain jurisdictional advantages for consumers and employees, and the interplay with the Hague Choice of Court Convention, all of which the article also covers in detail. Interestingly, especially in the context of last week's news, Dickinson concludes the section on jurisdiction (on p. 218) as follows:

> *One might take comfort in the fact that there is nothing in the mechanisms and rules described above that is truly novel. In large part, the effect of the UK's withdrawal from the EU will be to extend to the province formerly occupied by the Brussels-Lugano regime the conflict of law rules for situations lacking an EU connection, with which many cross-border practitioners will be familiar. Some will welcome, for example, the increased role for the doctrine of forum non conveniens or the removal of fetters on the UK courts' ability to grant anti-suit injunctions. Others will see the transition to what is unquestionably a complex and piecemeal set of rules as a backward step, which nonetheless creates an opportunity to review, simplify and up- date the UK's private international law infrastructure.* ***The case for reform will grow if the UK's***

application to rejoin the 2007 Lugano Convention does not bear fruit.

The text then goes on to describe the consequent changes in EU Private International Law and the effects of these changes on third states with whom the EU has concluded international agreements.

The article links up nicely with Paul Beaumont's article on The Way Ahead for UK Private International Law After Brexit, which has just been published in this year's first issue of the Journal of Private International Law and which considers the steps the UK should take to remain an effective member of international institutions such as the Hague Conference on Private International Law. Both articles can also be read in conjunction with Reid Mortensen's contribution on Brexit and Private International Law in the Commonwealth and Trevor Hartley's article on Arbitration and the Brussels I Regulation – Before and After Brexit, which appear in the same issue.

International Commercial Arbitration in the European Union – Brussels I, Brexit and Beyond

With a comprehensive and informative manuscript, in *International Commercial Arbitration in the European Union – Brussels I, Brexit and Beyond* (Edward Elgar, 2020, 320 pp.: see here a previous announcement of the publication) Chukwudi Ojiegbe provides a wide-ranging overview of the status quo of international commercial arbitration in the European Union, also duly taking into account the effects arising, in this specific area of the law, from the withdrawal of the United Kingdom from the European Union.

By means of a detailed historical and policy-oriented reconstruction, the Author assesses the history of the Brussels I Recast as it pertains to the provision on the arbitration exclusion. With careful analysis, he considers the implications of the

nuanced and debated interface between arbitration and litigation in accordance with the Brussels I Regime as well as the consequences of such interface for the EU exclusive external competence in aspects of international commercial arbitration. Against this background, and further contributing to this complex area of the law, he sets out the findings on the impact of the United Kingdom's withdrawal from the European Union.

In anticipation of a possible future recast of the Brussels I Regime, the Author argues in favour of the inclusion of specific rules that will allow the Member State court with jurisdiction under the Brussels I Regime the possibility of staying the litigation in favour of the arbitral tribunal. As he observes, the coordination between the jurisdiction of the courts of the Member States and arbitral tribunals would increase legal certainty, alleviating the problem of parallel court/arbitration proceedings and the risk of conflicting decisions.

Overall, this volume contributes clarity and advances the academic debate on the EU arbitration/litigation interface. By offering clear historical reconstructions and putting forth solutions to this longstanding problem, it will undoubtedly prove to be of interest to scholars and practitioners but it will also be a useful source for students who wish to deepen their understanding of this area of the law.

Webinar: Brexit and International Business Law/ Brexit e diritto del commercio internazionale

by Fabrizio Marrella

Event: Brexit and International Business Law/ Brexit e diritto del commercio internazionale

When: 26 March 2021, at 14.30 CET

How: Free access upon enrolment by sending an email at fondazione@ordineavvocatifirenze.eu the contact person is: Ms. Giovanna Tello.

Working languages: English and Italian with no simultaneous translation.

Short description: Webinar on the most relevant legal profiles following the process following the Referendum of 23 June 2016, which led to BREXIT on 31 January 2020. The end of the transitional period on 31 December 2020 led to the Trade and Cooperation Agreement ("TCA") of 24 December 2020 which avoided the "No Deal". Since January 1st, 2021, the United Kingdom is no longer part of the EU's customs and tax territory. The TCA creates a free trade area for goods without extra duties or quotas for products, but introduces new rules on rules of origin and labelling of Italian products exported to the United Kingdom as well as new rules for online international sales contracts. The TCA does not clearly regulate the area of financial services, nor it provides detailed regulation for automatic mutual recognition of professional qualifications. All in all, Brexit and TCA require an assessment of current and future international commercial contracts between EU and British companies as well as an evaluation of civil and commercial dispute resolution tools, including arbitration.

Here is the link : https://www.unive.it/data/agenda/3/47520

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Brexit Deal: What Happens To

Judicial Cooperation in Civil Matters?

The Brexit deal (officially the [draft] EU-UK Trade and Cooperation Agreement) was agreed upon, finally, on December 24. Relief in many quarters (except Universities participating in the Erasmus program, which is discontinued in the UK).

But private international lawyers worry what happened to judicial cooperation in civil matters: is there any agreement at all? Peter Bert provides a detailed analysis of all available documents and finds almost no mention, which leads him to think we are facing a sectoral hard brexit. (**Update: he provides a more comprehensive analysis in German here**.) Other experts on social media do not know more. The Law Society also seems worried. There seems to be no new information on the UK application to join the Lugano Convention, let alone any of the other areas of judicial cooperation. Given the intense discussion on these matters since the day of the Brexit vote, this can hardly be an oversight, but on the other hand it seems strange that such a core issue remained unaddressed.

Any further information or analysis in the comments is welcome.

Update: more comments from Ted Folkman

Brexit: The Spectre of Reciprocity Evoked Before German Courts

The following post has been written by Ennio Piovesani, PhD Candidate at the Universities of Turin and Cologne.

While negotiations for an agreement on the future partnership between the EU

and the UK are pending, a spectre haunts Europe: reciprocity.

I. The Residual Role of the Requirement of Reciprocity

In some EU Member States, provisions of national-autonomous aliens law enshrine the requirement of reciprocity. Those provisions are largely superseded by exceptions established in international law, including international treaties (so-called "diplomatic reciprocity"). EU (primary and secondary) law establishes broad exceptions concerning EU citizens and legal persons based in the EU.

In the context of EU / UK relations, the Withdrawal Agreement relieves UK nationals and legal persons from the requirement of reciprocity in the EU Member States. However, the scope of the exception established by the Withdrawal Agreement is limited in (personal and temporal) scope. An agreement on the future partnership between the EU and the UK could establish "full reciprocity" (Cf. points 29 and 49 of the Political Declaration accompanying the Withdrawal Agreement). Instead, if new arrangements will not be made, at the end of the transition period, in cases not covered by the Withdrawal Agreement, the method of reciprocity might once more play a residual role in the context of the treatment of UK nationals and legal persons in some EU Member States.

II. German Case-Law on Reciprocity with the UK and Civil Procedure

The spectre of reciprocity, in relations with the UK, was evoked in three recent cases brought before the German courts. The three cases concern provisions of German-autonomous aliens law in the field of civil procedure, which enshrine the requirement of reciprocity.

1. § 110 ZPO (Security for Court Costs)

In particular, two of the mentioned cases concern § 110 ZPO. Pursuant to § 110(1) ZPO claimants not (habitually) residing in the EU (or in the EEA) must provide security for court costs (if the defendant requests so). § 110(2) ZPO provides exceptions to that duty. The claimant is relieved from the duty to provide security if an international treaty so provides (See § 110(2) no 1 ZPO) or if a treaty ensures the enforcement of the decision on court costs (see § 110(2) no 2 ZPO; see also the other exceptions listed in § 110(2), nos 3–5 ZPO).

In 2018 – before the UK's withdrawal from the EU –, in a case brought before the

Düsseldorf Regional Court, a German defendant sought a decision ordering the UK claimant to provide security under § 110 ZPO (Düsseldorf Regional Court, interim judgment of 27 Sept 2018 – 4c O 28/12). The Regional Court dismissed the defendant's application, since (at that time) the UK was still an EU Member State. The German court thus shun an investigation as to "whether other international treaties might relieve the claimant from the obligation of providing security for costs after the [UK's] withdrawal".

Subsequently, in 2019 – after the UK's withdrawal from the EU, during the transition period –, a German defendant sought from the Dortmund Regional Court a decision ordering the claimant seated in London to provide security under § 110 ZPO (Dortmund Regional Court, interim judgment of 15 July 2020 – 10 O 27/20). The Regional Court dismissed the defendant's application, noting that – in the light of the legal fiction created by the Withdrawal Agreement – the UK must be considered as an EU Member State until the end of 2020. The German court – like the Düsseldorf Regional Court – shun an investigation as to whether treaties other than the Withdrawal Agreement relieve UK claimants – not habitually residing in the EU (or in the EEA) – from the duty of providing security under § 110 ZPO.

It appears that, apart from the Withdrawal Agreement, a treaty establishing diplomatic reciprocity for the purposes of § 110(2) no 1 ZPO does not exist yet (cf. ECJ, judgment 20 Mar 1997 – C-323/95).

Addendum: As mentioned above, § 110 ZPO does not apply to claimants habitually residing in the EU or EEA. It is important to underline that this holds true even in the case of UK nationals (habitually) residing in Germany (or in any other EU Member State or in an EEA Member State). It is also important to underline that, if the German-British Convention of 20 Mar 1928 on the conduct of legal proceedings will "revive" in relations between Germany and the UK after the transition period, Art. 14 of that Convention will establish diplomatic reciprocity for the purposes of § 110 ZPO with respect to UK nationals having their "Wohnsitz" (domicile) in Germany. On the latter point see the ECJ's judgment referred to above.

2. § 917(2) ZPO (Writ for Pre-Judgment Seizure)

The third case brought before the German courts concerns § 917(2) ZPO.

Pursuant to the first sentence of § 917(2) ZPO, a writ for pre-judgment seizure can be issued if the prospective judgment will have to be enforced abroad and if "reciprocity is not granted" (*i.e.* if an international treaty does not grant that the judgment will be eligible for enforcement in the given foreign country).

In 2019 – before the UK's withdrawal from the EU –, in a case brought before the Frankfurt Higher Regional Court, a German claimant applied for a writ under § 917 ZPO against a UK defendant (Frankfurt Higher Regional Court, judgment of 3 May 2019 – 2 U 1/19). The Higher Regional Court noted that reciprocity under § 917(2) first period ZPO could have been lacking if, after the UK's withdrawal from the EU, the Brussels Ia Regulation would have not been replaced by new arrangements granting the enforcement of (German) judgments in the UK. This notwithstanding, the German court decided not to issue the writ under § 917(2) first period ZPO, since failure to conclude new agreements replacing the Brussels Ia Regulation was (at that time) unlikely. In fact, the court pointed to the then ongoing negotiations between the EU and UK, namely to Art. 67(II) of the draft Withdrawal Agreement (today's Art. 67(1)(a) Withdrawal Agreement), providing for the continued application of the Brussels Ia Regulation in the UK.

It appears that, apart from the Withdrawal Agreement, a treaty establishing diplomatic reciprocity with the UK, for the purposes of § 917(2) ZPO, does not exist yet (unless the 1960 Convention between the UK and Germany for reciprocal recognition and enforcement of judgments – or even the 1968 Brussels Convention – will "revive"). An (albeit limited) exception concerns cases covered by exclusive choice-of-court agreements in favour of German courts falling under the 2005 Hague Convention (in fact, on 28 Sept 2020, the UK has deposited its instrument of accession to the 2005 Hague Convention, which should grant continuity in the application of the same Convention in the UK after the transition period).

III. Conclusion

In conclusion, at the end of the transition period, in cases not covered by the Withdrawal Agreement, unless new arrangements are made, the requirement of reciprocity might play a residual role in the context of the treatment of UK nationals and legal persons in some EU Member States, such as Germany.

Brexit and Private International Law: Registration for the first EAPIL Virtual Seminar is now open

We are glad to announce that registration for the first (Virtual) Seminar of the European Association of Private International Law (EAPIL) is now open. If you wish to join, just fill out this form.

The Seminar will take place on 11 Dezember 2020 from 11 am to 1 pm (MET). Devoted to the impact of Brexit on Private International Law it will feature speakers from the United Kingdom and the European Continent:

- Alexander Layton (Twenty Essex Street Chambers, London)
- Eva Lein (University of Lausanne)
- Michiel Poesen (KU Leuven)
- Sir Andrew Moylan (Court of Appeal of England and Wales)
- Pietro Franzina (Catholic University of the Sacred Heart, Milan)
- Anatol Dutta (Ludwig Maximilian University Munich).

For more information see our earlier post as well as the information available on the EAPIL website.

If you have questions concerning the first EAPIL Seminar or the EAPIL Seminar Series as such please get in touch with the Secretary General of EAPIL, Giesela Rühl, at secretary.general@eapil.org.

Background:

The EAPIL (Virtual) Seminar Series seeks to contribute to the study and development of (European) Private International Law through English-language seminars on topical issues. It will provide an easily accessible and informal platform for the exchange of ideas – outside the bi-annual EAPIL conferences. At the same time, it will serve as a means for EAPIL members to connect with other

EAPIL members and non-members.