

Conference Report: Annual meeting of the Alumni of the Hague Academy of International Law/Hamburg 2017 - Thorn and Lasthaus on Brexit and Private International Law

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On 13 October 2017, the Alumni of the Hague Academy of International Law/Hamburg, the German section of Attenders and Alumni of the Hague Academy of International Law, A.A.A., hosted their annual meeting. At the invitation of Professor Karsten Thorn (Bucerius Law School, Hamburg), who lectured a Special Course on “The Protection of Small and Medium Enterprises in Private International Law” at the Academy during the 2016 Summer Courses, the meeting was held at Bucerius Law School, Hamburg. The academic programme consisted of four presentations, two of them dealt with issues of Private International Law after Brexit.

Professor Karsten Thorn’s presentation on “European Private International Law after Brexit” was divided into two parts. In the first part he discussed direct legal consequences of Brexit on Private International Law in relations between the United Kingdom (in particular England) and Germany. He highlighted the importance of Union Law and especially the duties to recognise derived from the fundamental freedoms for the rise of England as a legal hub. Therefore, Brexit would have grave consequences for the attractiveness of England in a number of legal areas. This would apply, for example, to company law. Whereas under Union Law the recognition of a company established in accordance with the law of one Member State must not be refused by another Member State, each Member State

would apply its own rules on this issue post-Brexit. This could also impact companies established before Brexit, although it was disputed whether this would infringe their legitimate expectations and if so, whether this protection was subject to a certain time limit. In any event, the companies should act rather sooner than later to avoid any legal uncertainty. Comparable issues would arise in insolvency law. First and foremost, there would be - in contrast to the current legal situation - no duty for a Member State's court to recognise a decision of an English court on the existence of the centre of the debtor's main interests (COMI) in England anymore. Again, each Member State would apply its national rules on the recognition of foreign insolvency proceedings. Secondly, an English scheme of arrangement, a court-approved private debt restructuring solution, would likely not be recognised by the Member States after Brexit. By contrast, fewer negative consequences would arise with regard to the right to a name because even now Article 21 TFEU only guaranteed the recognition of a name rightfully obtained in the EU citizen's State of nationality or residence and this freedom is further limited by the Constitution of the recognising Member State. Finally, he highlighted the negative impact of Brexit on procedural law. Post-Brexit, English decisions will no longer benefit from mutual trust in the EU Member States. A revival of bilateral treaties with Member States or instruments of the Hague Conference could only serve as sectoral solutions. Under these conditions, he presumed an increased usage of arbitration in the UK post-Brexit, not least because the United Kingdom is a Contracting State to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Moreover, he pointed out that English courts would return to traditional instruments of the English procedural law such as anti-suit injunctions. The second part of his presentation dealt with indirect consequences of Brexit on the European Private International Law. Firstly, he submitted that a number of provisions in EU legislation can be regarded as legal transplants from English law. This applies, e.g., to Article 9 paragraph 3 Rome I Regulation and Article 6 lit. a EU Succession Regulation. In his opinion, post-Brexit at least the former provision will be discarded after a revision of the respective EU legislation. Secondly, he turned to the question of the usage of English as working language of the EU bodies. He stated that most EU legislation was drafted in English. Because legal English was very different to the legal language used in all other Member States this was still noticeable in the official translations. Therefore, English shaped the spirit of the EU legislation. Although he believed that English would still be the dominant language in the EU bodies after Brexit, he argued that the continental legal

thinking could gain more significance.

In her presentation on “Pluralism of Legal Sources with regard to International Choice of Court Agreements”, Caroline Lasthaus (Bucerius Law School, Hamburg) examined - after a brief overview of the interplay between the German autonomous national rules on jurisdiction, the Brussels I Regulation Recast, the 2007 Lugano Convention and the 2005 Hague Choice of Court Convention - options of the United Kingdom to foster the enforcement of choice of court agreements in favour of UK courts post-Brexit. An accession to the 2007 Lugano Convention would require either the membership of the United Kingdom in the European Free Trade Association or a unanimous agreement of the Contracting Parties. However, both options were, in her opinion, unlikely. Furthermore, the rules of the 2007 Lugano Convention would be outdated and the United Kingdom would have to accept the CJEU’s jurisdiction over questions of interpretation of the Convention. Therefore, she scrutinised whether an accession to the 2005 Hague Choice of Court Convention could be a suitable solution. The accession itself would not raise any difficulties, since the United Kingdom could accede to the Convention unilaterally. Hence, the decisive question was whether the Convention would serve the needs of the United Kingdom. Lasthaus argued that neither the applicability of the Convention only to international exclusive choice of court agreements nor the exclusion of agreements with a consumer would make the Convention less attractive for the United Kingdom. Moreover, both the Brussels I Regulation Recast and the 2005 Hague Choice of Court Convention would allow the choice of a neutral forum. However, she stressed that the Convention was rather strict with regard to the formal requirements of an agreement, whereas the Brussels I Regulation Recast followed a much more flexible approach. Even though a violation of formal requirements would not lead to the agreement to be null and void by virtue of the Convention, the Convention’s rules on recognition and enforcement would not apply to judgements rendered based on such an agreement. Finally, one crucial downside of the Convention would be the necessity of an exequatur procedure with regard to the judgements rendered based on a choice of court agreement. This would lead to higher costs for the litigants and to a longer procedure. As a result, she conceded that an accession to the 2005 Hague Choice of Court Convention could not mend all the consequences of the non-applicability of the Brussels I Regulation Recast post-Brexit. Nonetheless, an accession would still make sense for the United Kingdom and could also boost the conclusion of a worldwide Convention on the recognition

and enforcement of foreign judgements.

Both presentations were followed by lively discussions among the speakers and participants. It was agreed that the implementation of existing EU legislation into domestic law could not cushion the consequences of Brexit, especially because the fundamental freedoms would no longer apply to the United Kingdom. Additionally, it became clear once more that the final outcome of Brexit is still uncertain. In this vein, it is noteworthy from a Private International Law point of view that there was some disagreement on whether the United Kingdom would need to accede to the Convention at all or if it would still be a Contracting State of the Convention after Brexit by way of a succession of State.