There and Back Again? – The unexpected journey of EU-UK Judicial Cooperation finally leads to The Hague

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Today marks a significant step towards the reconstruction of EU-UK Judicial Cooperation. As neither House of Parliament has raised an objection by 17 May 2024,[1] the way seems to be paved for the Government’s ambitious plans to have the HCCH 2019 Judgments Convention[2] implemented and ratified by the end of

June 2024.[3] For the first time since the withdrawal of the United Kingdom from the European Union (so-called *Brexit*) on 31 January 2020, a general multilateral instrument would thus once again be put in place to govern the mutual recognition and enforcement of judgments in civil and commercial matters across the English Channel.

We wish to take this opportunity to look back on the eventful journey that the European Union and the United Kingdom have embarked on in judicial cooperation since Brexit (I.) as well as to venture a look ahead on what may be expected from the prospective collaboration within and perhaps even alongside the HCCH system (II.).

I. From Brexit to The Hague (2016-2024)

When the former Prime Minister and current Foreign Secretary *David Cameron* set the date for the EU referendum on 23 June 2016, this was widely regarded as just a political move to ensure support for the outcome of his renegotiations of the terms of continued membership in the European Union.[4] However, as the referendum results showed 51.9% of voters were actually in favour of leaving,[5] it became apparent that *Downing Street* had significantly underestimated the level of voter mobilisation achieved by the *Vote Leave* campaign. Through the effective adoption of their alluring “take back control” slogan, the Eurosceptics succeeded in framing European integration as undermining Britain’s sovereignty – criticising *inter alia* a purportedly dominant role of the Court of Justice (CJEU) – while simultaneously conveying a positive sentiment for the United Kingdom’s future as an autonomous country[6] – albeit on the basis of sometimes more than questionable arguments.[7]

http://www.voteleavetakecontrol.org/why_vote_leave.html

Whatever the economic or political advantages of such a repositioning might be (if any at all), it proved to be a severe setback in terms of judicial cooperation. Since most – if not all – of the important developments with respect to civil and commercial matters[8]in this area were achieved within the framework of EU Private International Law (PIL) (e.g. Brussels Ibis, Rome I-II etc.), hopes were high that some of these advantages would be preserved in the subsequent negotiations on the future relationship after Brexit.[9] A period of uncertainty in forum planning for cross-border transactions followed, as it required several rounds of negotiations between EU Chief Negotiator *Michel Barnier* and his changing UK counterparts (*David Frost* served for the final stage from 2019-2020) to discuss both the Withdrawal Agreement[10] as well as the consecutive Trade and Cooperation Agreement (TCA).[11] While the first extended the applicability of the relevant EU PIL Regulations for proceedings instituted, contracts concluded or events occurred during the transition period until 31 December 2020,[12] the latter contained from that point onwards effectively no provision for these matters, with the exception of the enforcement of intellectual property rights.[13] Thus, with regard to civil judicial cooperation, the process of leaving the EU led to – what is eloquently referred to elsewhere as – a "sectoral hard Brexit".[14]

With no tailor-made agreement in place, the state of EU-UK judicial cooperation

technically fell back to the level of 1973 before the UK's accession to the European Communities. In fact, – in addition to the cases from the transition period – the choice of law rules of the Rome I and Rome II-Regulations previously incorporated into the domestic law, remained applicable as so-called *retained EU law* (REUL) due to their universal character (*loi uniforme*).[15] However, this approach was not appropriate for legal acts revolving around the principle of reciprocity, particularly in International Civil Procedure.[16] Hence, a legal stocktaking was required in order to assess how *Brexit* affected the status of those pre-existing multilateral conventions and bilateral agreements with EU Member States that had previously been superseded by EU law.

First, the UK Government has been exemplary in ensuring the "seamless continuity" of the HCCH 2005 Choice of Court Convention throughout the uncertainties of the whole withdrawal process, as evidenced by the UK's declarations and *Note Verbale* to the depositary Kingdom of the Netherlands.[17] The same applies *mutatis mutandis* to the HCCH 1965 Service Convention, to which all EU Member States are parties, and the HCCH 1970 Evidence Convention, which has only been ratified so far by 23 EU Member States. Second, some doubts arose regarding an *ipso iure* revival of the original Brussels Convention of 1968,[18] the international treaty concluded on the occasion of EU membership and later replaced by the Brussels I Regulation when the EU acquired the respective competence under the Treaty of Amsterdam.[19] Notwithstanding the interesting jurisprudential debate, these speculations were effectively put to a halt in legal practice by a clarifying letter of the UK Mission to the European Union.[20] Third, there are a number of bilateral agreements with EU Member States that could be reapplied, although these can hardly substitute for the Brussels regime, which covers most of the continental jurisdictions.[21] This is, for example, the position of the German government and courts regarding the German-British Convention of 1928.[22]

It is evident that this legal patchwork is not desirable for a major economy that wants to provide for legal certainty in cross-border trade, which is why the UK Government at an early stage sought to enter into a more specific framework with the European Union. First and foremost, the *Johnson Ministry* was dedicated to re-access the Lugano Convention[23] which extended the Brussels regime to certain Member States of the European Free Trade Association (EFTA)/European Economic Area (EEA) in its own right.[24] Given the strong resentments

Brexiteers showed against the CJEU during their campaign this move is not without a certain irony, as its case law is also crucial to the uniform interpretation of the Lugano Convention.[25] Whereas Switzerland, Iceland and Norway gave their approval, the European Commission answered the UK's application in the negative and referred to the HCCH Conventions as the "framework for cooperation with third countries".[26] What some may view as a power play by EU bureaucrats could also fairly be described as a necessary rebalancing of trust and control due to the comparatively weaker economic and in particular judicial integration with the United Kingdom *post-Brexit*.[27] At the very least, the reference to the HCCH reflects the consistent European practice in other agreements with third countries.[28]

Be that as it may, if *His Majesty's Government* implements its ratification plan as diligently as promised, the HCCH 2019 Judgments Convention may well be the first new building block in the reconstruction what has been significantly shattered on both sides by the twists and turns of *Brexit*.

II. (Prospective) Terms of Judicial Cooperation

Even if the path of EU-UK Judicial Cooperation has eventually led to The Hague, there is still a considerable leeway in the implementation of international common rules.

Fortunately, the UK Government has already put forward a roadmap for the HCCH 2019 Judgments Convention in its responses to the formal consultation carried out from 15 December 2022 to 9 February 2023[29] as well as the explanatory memorandum to the Draft Recognition and Enforcement of Judgments Regulations 2024.[30] Generally speaking, the UK Government wants to implement the HCCH Convention for all jurisdictions of the United Kingdom without raising any reservation limiting the scope of application. Being a devolved matter, this step requires the Central Government to obtain the approval of a Northern Ireland Department (*Roinn i dTuaisceart Éireann*) and the Scottish Ministers (*Mhinistearan na h-Alba*).[31] Furthermore, this approach also implies that there will be no comparable exclusion of insurance matters as under the HCCH 2005 Convention.[32] However, the Responses contemplated making use of the bilateralisation mechanism in relation to the Russian Federation upon its accession to the Convention.[33]

Technically, the Draft Statutory Instrument employs a registrations model that has already proven successful for most recognition and enforcement schemes applicable in the UK.[34] However, registration within one jurisdiction (e.g. England & Wales) will on this basis alone not allow for recognition and enforcement in another (e.g. Scotland, Northern Ireland), but is rather subject to re-examination by the competent court (e.g. Court of Session).[35] This already constitutes a significant difference compared to the system of automatic recognition under the Brussels regime. Moreover, the draft instrument properly circumvents the peculiar lack of an exemption from legalisation in the HCCH 2019 Convention by recognizing the seal of the court as sufficient authentication for the purposes of recognition and enforcement.[36] It remains to be seen if decisions of third states "domesticated" in the UK under the common law *doctrine of obligation* will be recognized as judgments within the European Union. If the CJEU extends the position taken in *J. v. H Limited* to the HCCH 2019 Judgments Convention, the UK may become an even more attractive gateway to the EU Single Market than expected.[37] Either way, the case law of the CJEU will be mandatory for 26 Contracting States and thus once again play – albeit not binding – a dominant role in the application of the HCCH legal instrument.

As far as the other legal means of judicial cooperation are concerned, the House of Lords does not yet appear to have given up on accession to the Lugano Convention.[38] Nevertheless, it seems more promising to place one's hopes on continued collaboration within the framework of the HCCH. This involves working towards the reconstruction of the remaining foundational elements previously present in EU-UK Judicial Cooperation by strengthening the HCCH *Jurisdiction Project* and further promoting the HCCH 1970 Evidence Convention in the EU.

III. Conclusion and Outlook

After all, the United Kingdom's withdrawal from the European Union has dealt a serious blow to judicial cooperation across the English Channel. A look back at the history of *Brexit* and the subsequent negotiations has revealed that the separation process is associated with an enormous loss of trust. Neither could the parties agree on a specific set of rules under the TCA, nor was the European Union willing to welcome the United Kingdom back to the Lugano Convention.

Against this background, it is encouraging to see that both parties have finally agreed on the HCCH as a suitable and mutually acceptable forum to discuss the

future direction of EU-UK Judicial Cooperation. If *Brexit* ultimately brought about a reinvigorated commitment of the United Kingdom to the HCCH Project, this might even serve as an inspiration for other States to further advance the Hague Conference's ambitious goal of global judicial cooperation. Then the prophecies of the old songs would have turned out to be true, after a fashion. Thank goodness!

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[1] HL Int. Agreements Committee, 11th Report of 8 May 2024 "Scrutiny of international agreements: 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters" (HL Paper 113), para. 1. According to sec. 20 (1) (a) and (2) of the Constitutional Reform and Governance Act 2010 (c. 25) is a treaty not ratified unless a Minister of the Crown has laid a copy before parliament for a period of 21 sitting days.

[2] Convention on the recognition and enforcement of foreign judgments in civil or commercial matters (HCCH 2019 Judgments Convention) of 2 July 2019, UNTS I-58036 and Tractatenblad 2024, 42 (Verdragsnr. 013672).

[3] Civil Procedure Rule Committee, Minutes of 1 December 2023, para. 28

[4] See *inter alia*, *Mason*, "How did UK end up voting to leave the European Union?", The Guardian of 24 June 2016; *Boffey*, "Cameron did not think EU referendum would happen, says Tusk", The Guardian of 21 January 2019; *Duff*, "David Cameron's EU reform claims: If not 'ever closer union', what?", Blogpost of 26 January 2016 on Verfassungsblog | On Matters Constitutional; *von Lucke*, "Brexit oder: Die verzockte Demokratie", Blätter 8/2016, 5 et seq.

[5] UK Electoral Commission, "23 June 2016 referendum on the UK's membership of the European Union", Report of September 2016, p 6.

[6] Compare *Haughton*, "Ruling Divisions: The Politics of Brexit", Perspectives on Politics 19 (2021), 1258, 1260; *Özlem Atikcan/Nadeau/Bélanger*, "Framing Risky Choices: Brexit and the Dynamics of High-stakes Referendums", p. 44.

[7] E.g. *Rankin*, "Is the leave campaign really telling six lies?", The Guardian of 7 June 2016.

[8] This finding might look different for International Family Law, according to *Beaumont*, "Private International Law concerning Children in the UK after Brexit: Comparing Hague Treaty Law with EU Regulations", Child & Fam. L. Q. 29 (2017), 213, 232: "In all these matters students, practitioners and judges will be grateful to have fewer operative legal regimes post-Brexit".

[9] For example, on this blog *Fitchen*, "Brexit: No need to stop all the clocks", Blogpost of 31 January 2020 or *Lutzi*, "Brexit: The Spectre of Reciprocity Evoked Before German Courts", Blogpost of 13 December 2020.

[10] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (Withdrawal Agreement) of 24 January 2020, OJ EU CI 384/1.

[11] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part (TCA) of 30 December 2020, OJ EU L 149/10.

[12] Art. 126 of the Withdrawal Agreement.

[13] Compare Chapter 3: Art. 256-273 of the TCA.

[14] *Bert*, "Judicial Cooperation in Civil Matters: Hard Brexit After All?", Blogpost of 26 December 2020 on Dispute Re§olution Germany.

[15] Sec. 3 (1) European Union (Withdrawal) Act 2018, Chapter 16/2018, sec. 10, 11 The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019, SI 2019/834; For the current status of the Retained EU Law, see House of Commons Library "The end of REUL? – Progress in reforming retained EU law", Research Briefing No.°09957 of 2 February 2024 (author: *Leigh Gibson*).

[16] Implicitly *Dickinson*, "Realignment of the Planets – Brexit and European Private International Law", IPRax 2021, 213, 217 et seq.

[17] See Notes Verbales of the United Kingdom to the Kingdom of the Netherlands in its capacity as depositary of the HCCH 2005 Judments Convention from 28 December 2018 to 28 September 2020 in the Treaty Database.

[18] Convention on jurisdiction and the enforcement of judgments in civil and commercial matter (Brussels Convention) of 27 September 1968, OJ EU L 229/31; See e.g. *Rühl*, "Judicial Cooperation in Civil and Commercial Matters after Brexit: Which Way Forward?", ICLQ 67 (2018), 99, 104 et seq.

[19] Art. 73m of the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts of 2 October 1997, OJ EU C 340/1.

[20] UK Mission to the European Union, Letter to the Council of the European Union of 29 January 2021, NO 17/2021.

[21] See, for example, the Agreement on the continued Application and Amendment of the Convention between the Government of the United Kingdom and the Government of Norway providing for the Reciprocal Recognition and Enforcement of Judgments in Civil Matters singed at London on 12 June 1961, SI 2020 No. 1338.

[22] Convention on the Facilitation of Legal Proceedings in Civil and Commercial Matters between His Majesty and the President of the German Reich of 20 March 1928; RGBl. 1928 II Nr. 47; for the position of the German Government, please refer to German Federal Government "Response to the parliamentary enquiry on judicial cooperation in civil matters with the United Kingdom post-Brexit", BT-Drucks. 19/27550 of 12 March 2021, p. 3, for a recent decision of the German Judiciary, see Higher Regional Court of Cologne, Decision of 2 March 2023, I-18 U 188/21, paras. 60 et seq.

[23] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Lugano Convention) of 30 October 2007, OJ EU L 339/3.

[24] With the notable exception of Liechtenstein.

[25] Art. 64 Lugano Convention as well as the Protocol concerning the interpretation by the Court of Justice of 3 June 1971, OJ EU L No°204/28.

[26] For the consent of the other Contracting State (except Denmark), see Swiss FDFA, "Communications by the depositary with respect to the application of accession by the United Kingdom", Notification of 28 April 2021,

612-04-04-01 – LUG3/21; for the rejection of the EU Commission, Note Verbale to the Swiss Federal Council of 22 June 2021 and, "Assessment on the application of the United Kingdom of Great Britain and Northern Ireland to accede to the 2007 Lugano Convention", COM(2021) 222 final of 4 May 2021, pp. 3 et seq. However, this decision was not without criticism, for example by the Chair-Rapporteur of the OHCHR Working Group on the issue of human rights and transnational corporations and other business enterprises in a letter to the EU Commission of 14 March 2024.

[27] For these arguments see EU Commission, "Assessment on the application of the United Kingdom of Great Britain and Northern Ireland to accede to the 2007 Lugano Convention", COM(2021) 222 final of 4 May 2021, p. 3 and European Parliamentary Research Service (EPRS), "The United Kingdom's possible re-joining of the 2007 Lugano Convention" Briefing PE 698.797 of November 2021 (author: *Rafa? Ma?ko*), pp. 3 et seq. For a theoretical foundation, see *M. Weller*, " 'Mutual Trust': A Suitable Foundation for Private International Law in Regional Integration Communities and Beyond", RdC 423 (2022), 37, 295 et seq.

[28] See e.g. Art. 24 of the Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other par, OJ EU No°L 161/3: "The Parties agree to facilitate further EU-Ukraine judicial cooperation in civil matters on the basis of the applicable multilateral legal instruments, especially the Conventions of the Hague Conference on Private International Law in the field of international Legal Cooperation and Litigation as well as the Protection of Children". Until recently, the regulation of judicial cooperation specifically in and for extra-EU trade relations appeared to be aout of sight, see *M. Weller*, "Judicial cooperation of the EU in civil matters in its relations to non-EU States – a blind spot?", in Alan Uzelac/Rhemco van Rhee (eds.), Public and Private Justice (PPJ) 2017: The Transformation of Civil Justice, Intersentia 2018, pp. 63 et seq.

[29] UK Ministry of Justice, The Hague 2019 – Response to Consultation of 23 November 2023 ("Responses").

[30] Draft Statutory Instruments 2024 No. XXX Private International Law: The Recognition and Enforcement of Judgments (2019 Hague Convention etc.) Regulations 2024 ("Draft Guidelines"). The competence to make regulations in that respect is based on sec. 2 (1) of the Private International Law

(Implementation of Agreements) Act 2020 (c. 24). According to sec. 2 (11) read in conjunction with sched. 6 paras. 4 (2) (a) and (d) draft regulations need to be laid before parliament for approval of each House by a resolution.

[31] Sec. 2 (12) Private International Law (Implementation of Agreements) Act 2020 (c. 24); see also Letter from the Scottish Minister for Victims and Community Safety of 19 March 202 regarding the "UK SI Notification – The Recognition and Enforcement of Judgments (2019 Hague Convention etc) Regulations 2024".

[32] See Response, para. 51; a similar discussion took place regarding "mixed litigation issues", where only certain elements are within the scope of the HCCH 2019 Judgments Convention.

[33] Responses, para. 53.

[34] See *inter alia* the Administration of Justice Act 1920, Chapter 81/1920 (Regnal. 10 & 11 Geo 5) or the Foreign Judgments (Reciprocal Enforcement) Act 1933, Chapter 13/1933 (Regnal. 23 & 24 Geo 5.

[35] Sec. 15 Draft Guidelines and Draft Explanatory Memorandum, para. 5.5.5.

[36] Sec. 12 Draft Guidelines; *Garcimartin/Saumier*, HCCH 2019 Judgments Convention: Explanatory Report, para. 307.

[37] See CJEU, Judgment of 7 April 2022, *J. v. H. Limited*, C-568/20, para. 47. However, there is a certain chance that this case law will be corrected in the upcoming revision process of the Brussels Ibis-Regulation, see e.g. *Hess/Althoff/Bens/Elsner/Järvekülg*, "The Reform of the Brussels Ibis Regulation", MPI Luxembourg Research Paper Series N.°2022 (6), proposal 15.

[38] HL Int. Agreements Committee, 11th Report of 8 May 2024 "Scrutiny of international agreements: 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters" (HL Paper 113), para. 17: "Many stakeholders have called for the Government to continue its efforts to join the Lugano Convention in addition to ratifying Hague 2019. We agree that the Government should do so."