Preparing for Brexit, part 3

After April Fools' Day in the House of Commons, stepping up preparations for a no-deal Brexit has become more important than ever. Insofar, it should be noted that not only the EU Commission has been active in this regard (see our earlier posts here and here), but that national legislators are bracing for the fallout from a hard Brexit as well. On 29 March 2019, the German law on Brexit-related measures in the field of taxation entered into force. In spite of its bland title, this law goes far beyond tax law and includes transitory provisions in a number of important areas of business law, ranging from banking to insurance and securities law. Most articles provide that German authorities may order that British companies will be treated like EU companies for a transition period no longer than 21 months in case of a hard Brexit. By such an extension, the German legislature hopes to buffer the economic shocks that may arise in the absence of a withdrawal agreement.

Preparing for Brexit, part 2

The European Commission has just released some new factsheets and Q&A documents regarding the consequences of a no-deal Brexit here. Inter alia, the information given concerns the rights of consumers (including the applicable law and the enforcement of judgments), of EU citizens living in the UK, of UK citizens living in the EU, and the position of EU students enrolled at UK universities. However, the date for a hard Brexit mentioned in the documents is still 29 March 2019, which is in any event no longer accurate after last week's summit (see our previous post here).

Brexit: Three modest proposals

After last Thursday's EU summit, which resulted in a double-barreled "flextension" of the date for Brexit, all cards are on the table again. Insofar, it is worth noticing that the German journalist *Harald Martenstein*, in his weekly column for the Berlin-based "Tagesspiegel", has recently offered three innovative solutions for the Brexit dilemma:

The first one may be called the "one island, two countries" proposal: Great Britain would be split into two parts, one leaving the EU, the other remaining. All Britons would then be granted double citizenship and be free to make up their minds according to their preferences.

The second solution that the columnist proposes takes up the frequently raised demand for a second referendum that should overturn the first Brexit vote. Well, if there is going to be a second referendum, why not a third or even a fourth one? Thus, *Martenstein* suggests that, in the future, a referendum should be held every year on 2 January; for the remaining part of the year, the United Kingdom would then be either in or out of the EU.

Thirdly and finally, if all else fails, *Martenstein* argues that the UK might simply turn the tables and offer the other Member States the possibility of leaving the EU as well and joining the UK instead, which would then change its name to "Greatest Britain Ever".

Obviously, the proposals made by the columnist are meant as a satirical comment. Yet, there are some elements of reality contained in his mockery: who knows whether, in case of a hard Brexit, Scotland (or Northern Ireland) would stay a part of the UK or whether a new referendum on seceding from the UK – and re-joining the EU – would be organized? And already today, numerous Britons are applying for a double citizenship in order to keep a foothold in the EU. Who knows whether a second referendum on Brexit will take place and whether it will actually settle the matter once and for all? And wasn't the EU summit an attempt by the EU-27 to avoid the Brexit populist contagion from spreading to the continent via the impending EU parliamentary elections? In sum, the situation is increasingly reminiscent of a book title by *Paul Watzlawick*: hopeless, but not serious…

Preparing for Brexit

At the moment this note is written, it is unclear whether there will be another vote in the House of Commons concerning Theresa May's deal with the EU-27 at all (see here for the latest developments). Already on 18 January 2019, the European Commission recognized that "[i]n view of the uncertainties surrounding the ratification of the Withdrawal Agreement, all interested parties are reminded of legal repercussions which need to be considered when the United Kingdom becomes a third country". In order to clarify matters, the Commission has published a so-called Preparedness Notice which is meant to give guidance to stakeholders with regard to the implications of a no-deal Brexit in the field of judicial cooperation and private international law. The full text of this notice is available here.

The complexity of the post Brexit era for English LLPs and foreign legal professionals in EU Member States: a French perspective

Written by Sophie Hunter, University of London (SOAS)

In light of the turmoil in the UK Parliament since the start of 2019, the only certain thing about Brexit is that everything is uncertain. The Law Society of England and Wales has warned that "if the UK's relationship with the rest of the EU were to change as the result of significant renegotiations, or the UK choosing to give up its membership, the effects would be felt throughout the legal profession." As a result of Brexit, British firms and professionals will no longer be

subject to European directives anymore. This foreshadows a great deal of complexity. Since British legal entities occupy a central place within the European legal market, stakes are high for both British and European lawyers. A quick overview of the challenges faced by English LLPs in France and the Paris Bar demonstrates a high level of complexity that, is not and, should be considered more carefully by politicians.

Currently, 1872 foreign lawyers from 92 different citizenships are registered at the Paris Bar, according to a report by Dominic Jensen, 181 are British citizens, out of which 72 are registered under their original professional titles pursuant to the European Directive 98/5/CE (70 solicitors and 2 barristers). From 61 foreign legal entities established in France, the majority are English limited liability partnerships (LLP) which employ 1,600 lawyers. Some American law firms rely on the LLP structure as a strategy to establish themselves within the European legal market. According to the European Directive 98/5/CE, foreign legal entities of one Member State can be registered at the Bar of another Member State. The consequences of Brexit will be radical. Because the UK will no longer be part of the EU, foreign legal entities subject to English Law and established in EU Member States will no longer be recognized by the Bar of the host state, and thus will no longer be entitled to do business within its jurisdictions. For the Paris Bar, stakes are high since no other European capital has experienced such an important implementation of British and American law firms.

With the deadline of Brexit looming closer, no one has raised the topic of foreign lawyers and the exercise of their right to practice in European jurisdictions, in spite of numerous calls from The Law Society of England and Wales. While the UK is advocating for mutual recognition of professional qualifications, the French Bar led by Florent Loyseu de Grandmaison has drafted a report outlining various ways to solve this problem. According to a new ordinance published in April 2018, a foreign legal consultant can register with the Paris Bar to practice international law and any other type of law he or she is registered for, with the exception of European law and the law of Member States. The main concern of LLPs will focus primarily on how to continue to practice in France with little disruptions. LLPs owned by English solicitors will need to establish French legal entities owned and managed according to French and European Law. Most likely, English LLPs established in France will benefit from a new legal structure called AARPI, which stands for French limited partnership and mirrors the structure of LLPs. However

it is not fully implemented within French legislation yet.

In a tensed climate between the UK and the EU, the fate of foreign legal consultants and entities seem more than ever uncertain. The example of France demonstrates, first, a high degree of complexity in the legislation that prevents LLPs to easily transpose their structure into the jurisdiction post Brexit, and a lack of preparation from both LLPs and the host state to face the practical consequences of Brexit. The UK and EU Member States will need to show a great deal of flexibility to quickly adapt legislation to incorporate English LLPs within their jurisdictions. Therefore, the fear of The Law Society of England and Wales which has repeatedly warned the UK government of the consequences of a "no deal" seem justified. Regardless of whether Brexit is implemented or postponed on March 29, finding an appropriate answer to the dilemma faced by foreign legal professionals and LLPs across the continent should be a priority on the agenda.

After the Romans: Private International Law Post Brexit

Written by Michael McParland, QC, 39 Essex Chambers, London

On 10 December 2018 the Ministry of Justice published a draft statutory instrument with the pithy title of "*The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc) (EU Exit) Regulations 2018*". This indicates the current intended changes to retained EU private international law of obligations post Brexit.

These draft 2018 regulations are made in the exercise of the powers conferred by section 8(1) of, and paragraph 21(b) of Schedule 7 to, the European Union (Withdrawal) Act 2018 in order to "*address failures of retained EU law to operate effectively and other deficiencies… arising from the withdrawal of the UK from the European Union*". It is intended they will come into force on exit day.

Part 2 contains amendments to existing primary legislation in the UK. These

include amendments to the Contracts (Applicable Law) Act 1990, the UK statute that implemented the 1980 Rome Convention on the law applicable to contractual obligations. The Explanatory Memorandum now declares that "*the United Kingdom will no longer be a contracting party* [to the Rome Convention]*after exit day*". This is modestly surprising, given that the Rome Convention was not actually part of the Community *acquis*in the first place (see **Michael McParland, *"The Rome I Regulation on the Law Applicable to Contractual Obligations",*** para. 1.99). But the current desire to disentangle the UK entirely from any vestiges of things European appears to be overwhelming. Consequently, the draft 2018 regulations convert the most of the rules found into the Rome Convention into UK domestic law, and declare that they will continue to apply them to contracts entered into between 1st April 1991 and 16th December 2009 in the same way as they have done since the arrival of the Rome I Regulation. Further amendments are also made to the Prescription and Limitation (Scotland) Act 1973 and the Private International (Miscellaneous Provisions) Act 1995, the pre-Rome II statute which contains the UK's rules on choice of law in tort and delict.

Part 3 deals with amendments to secondary legislation which had been originally created to deal with the coming into force of the Rome I and Rome II Regulations.

Part 4 is entitled "*Amendment of retained EU Law*", this new legal category that will see EU law as at the date of the UK's departure from the EU transposed into domestic law. Part 4 deals with the proposed substantive amendments to the enacted text of both the Rome I and Rome II Regulation which are considered necessary or appropriate to take account of the UK ceasing to be an EU Member State. The full impact of the changes will have to be considered in detail against the original texts, but some brief comments can be made.

Some changes are mere housekeeping. For example, in the "universal application" provisions found in Article 2 (Rome I) and Article 3 (Rome II) which declares that "any law specified by this Regulation shall be applied whether or not it is the law of a Member State", are to be amended with reference to "a Member State" being replaced with "*the United Kingdom or a part of the United Kingdom*".

Others involve updating references to rules found in Directives to their current equivalent sin UK domestic law. So, for example, Article 4(1)(h) of the Rome I

Regulation currently provides for the applicable law in the absence of choice for:

> *(h) a contract concluded within a multilateral system which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments, as defined by Article 4(1), point (17) of Directive 2004/39/EC, in accordance with non-discretionary rules and governed by a single law, shall be governed by that law.*

The draft regulations will now replace the reference to "by Article 4(1), point (17) of Directive 2004/39/EC" with "*… in Part 1 of Schedule 2 to the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001"* which as a footnote notes is S.I.2001/544, though the relevant Schedule 2 was substituted by S.I. 2006/3384 and this itself was subsequently amended by the Financial Services and Market Act 2000 (Regulated Activities) (Amendment) S.I. 2017/488 (which took effect from 1 April 2017 and which includes a whole raft of definitional changes).

Other changes deal with the fact that exit day will formally cut the UK's version of these Regulations off from any future changes made by the EU legislator to either of those Regulations.

Part 4 of the Regulation also revokes Regulation EC No. 662/2009 which established the procedure for the negotiation and conclusion of agreements between EU Member States and third countries on the law applicable to contractual and non-contractual obligations (see ***McParland***, para. 2.100).

Potentially more interesting changes are made to the Rome II Regulation, especially in relation to Article 6(3)(b) (unfair competition and acts restricting free competition), and Article 8 (infringement of intellectual property rights).

The changes to the Rome I Regulation and their implications will feature in the second edition to my book on the subject which I am currently working on.

The Ministry of Justice's web-site can be accessed here.

Waiting for Brexit: Conference in Milan (Italy) on 19 October 2018

The result of the 2016 Brexit referendum was not only a political shock, but also and foremost a symbolic turning point in the history of the EU. The United Kingdom's foreseen withdrawal from the Union has given rise to many political, legal, economic and social debates.

The **University of Milan-Bicocca** will host the conference ***"Waiting for Brexit*: open issues in the internal market and in the AFSJ"** which will take place on **19 October 2018** with the aim of contributing to the analysis of the impact and possible effects of Brexit on both EU Law and Italian law in practice.

After a short overview of the main institutional aspects, national and international experts from various background (scholars, public officials, legal practitioners, industry representatives) will offer the audience with an insight into the changes that the withdrawal from the EU of a Member State will have on specific socio-economic areas.

In particular, the first part of the **morning session**, chaired by Prof Antonio Tizzano, will be devoted to some general overviews on the impact of Brexit on the European Union (Jacques Ziller), on the current state of the EU-UK negotiations (Carlo Curti Gialdino) and the role of the Court of Justice after the UK withdrawal (Kieran Bradley). The second part of the morning will then focus on the possible effects of Brexit on specific sectors, notably the transfer of personal data outside the EU taking into account the new GDPR (Bruno Gencarelli), as well as judicial cooperation in criminal matters in light of the recent case-law of the CJEU.

The **afternoon session**, chaired by Prof Fausto Pocar, will follow on and be dedicated to the likely effects of Brexit on banking and investment law (Giovanni Sabatini), competition law (Gabriella Muscolo), intellectual property law (Paul Torremans), company law (Rafael Arenas García), and the Dublin asylum system (Michael Wilderspin).

The conference is organised by Costanza Honorati (Full Professor of EU Law and Private International Law, University of Milan-Bicocca), Serena Crespi (Aggregate Professor of EU Law, University of Milan-Bicocca) and Paolo Iannuccelli (*Référandaire* at the Court of Justice of the European Union) within the framework of the Jean Monnet Module held at the University of Milan-Bicocca.

More information is available here.

Consequences of Brexit for Private International Law and International Civil Procedure Law

What are the consequences of Brexit for Private International Law and International Civil Procedure Law? In the very first monograph in German concerning the legal ramifications of Brexit, Michael Sonnentag discusses these questions (Die Konsequenzen des Brexits für das Internationale Privat- und Zivilverfahrensrecht, Mohr Siebeck, 2017).

In the first part, the author analyses the possible options after Brexit: the Norwegian model (leaving the EU, but re-joining the EEA); the Swiss model (tailor-made solutions in all fields); the Turkish model (staying in the Customs Union); the Canadian model (free trade agreement); and finally the no-deal Brexit. It is also pointed out that with the British exit from the EU, not only will the Treaty of the European Union (TEU) and that of the Functioning of the European Union (TFEU) no longer be in force in the UK, but regulations and directives will also follow suit. Only in the exceptional case where directives have been implemented in UK Law by acts of Parliament, shall they stand after Brexit. In contrast, it is shown that, if directives have been implemented by Statutory Instruments, the SI's will fall with Brexit, because the European Communities Act 1972 as their legal basis will cease to exist.

Concerning Private International Law, the Rome I as well as the Rome II

Regulations will end in the UK after Brexit since they are EU-law irrespective of whether they are kept in force as part of British law. Sonnentag goes on to explain how, in the case of a hard Brexit, there will be an impact on the field of International Company Law: British companies will not benefit from freedom of movement anymore. Therefore, a limited company which had been founded in the UK, but moved its headquarters to Germany – whose courts traditionally apply the so-called seat theory – risks not being recognised in this Member State; consequently, the owner or shareholders could be personally liable for the debts of the company.

In the field of International Civil Procedure Law, the Brussels Ia, the Brussels IIa and the Maintenance Regulations will fall in the UK with Brexit. Sonnentag explains that the Brussels Convention will not be revived after Brexit. Furthermore, the Lugano Convention will not be applicable anymore; the UK could join it, but only as a Member State of EFTA or following an invitation by Switzerland, with support from the other Member States. In contrast, the UK could – and should – join the Hague Choice of Court Convention of 2005. Moreover, the effects on exorbitant jurisdiction, jurisdiction agreements and recognition and enforcements of judgments are described in detail. Not only does the monograph outline which rules will be applicable in Germany, but also in the UK.

Sonnentag evidences that many benefits in the fields of Private International Law and International Civil Procedure Law will end with Brexit. Furthermore, it is demonstrated that all possible Brexit scenarios will have drawbacks in comparison to a no-Brexit situation. Therefore, according to the author, the best solution for both sides would be the avoidance of Brexit altogether.

Waiting for Brexit: Open issues in

the Internal Market and in the Area of Freedom, Security and Justice

The University of Milan-Bicocca – School of Law has issued a call for papers for the Academic Conference "*Waiting for Brexit*: open issues in the internal market and in the area of freedom, security and justice". The Conference represents the closing event of the Jean Monnet course "*The EU Court of Justice: techniques and instruments*" and will be held at the University of Milan-Bicocca on Friday 19 October 2018.

Prof. Antonio Tizzano (Vice-President of the Court of Justice of the European Union) will chair the morning session and Prof. Fausto Pocar (Emeritus of International Law at the University of Milan) will chair the afternoon session.

Concept and main topics of the Conference

The result of the 2016 Brexit referendum was not only a political shock, but also and foremost a symbolic turning point in the history of the EU. The United Kingdom's foreseen withdrawal from the Union has given rise to many political, legal, economic and social debates.

The main aim of the Conference is to contribute to analyse the impact and effects of Brexit on both EU Law and Italian law in practice. The "*Waiting for Brexit*" Conference – after a short overview of the main institutional aspects – will offer the audience with an insight into the changes that the withdrawal from the EU of a Member State will have on specific socio-economic areas. In particular, national and international experts (scholars, public officials, legal practitioners, industry representatives) will analyse and discuss topics such as banking and investment law, the transfer of personal data outside the EU, competition law, as well as certain aspects of judicial cooperation in civil and criminal matters.

In this context, the present Call aims to provide young researchers (*i.e.*, PhD students and fellow researchers) of all disciplines with the opportunity to present their views on specific topics such as company law, IP law, consumer law, insolvency law, family law, labour law, tax law and customs union, air and

maritime transport, relocation of EU agencies, etc. Nevertheless, the Organising Committee welcomes innovative and original contributions that cover topics already analysed by the expert speakers.

Abstract submission guidelines

Interested applicants should submit a short CV and a paper abstract in Italian or English of no more than 700 words (in .doc, .docx or .pdf format) to the attention of the Organising Committee (via e-mail at convegnobrexit.unimib@gmail.com).

The deadline for submission is 15 July 2018. Applications will be selected on the basis of the submitted abstracts and successful applicants will be informed by 6 August 2018.

Afterwards, successful applicants should send the draft papers to the Organising Committee by 15 September 2018. The final versions of the papers should be no longer than 40,000 characters (footnotes and spaces included). The Organising Committee will provide opportunity for publication of the best papers in a top-tier peer-reviewed European law journal.

Organising Committee

The Organising Committee is composed of Costanza Honorati (Full Professor of EU Law and Private International Law, University of Milan-Bicocca), Serena Crespi (Aggregate Professor of EU Law, University of Milan-Bicocca) and Paolo Iannuccelli (*Référandaire* at the Court of Justice of the European Union).

All questions and inquiries should be addressed to convegnobrexit.unimib@gmail.com. The Organising Committee is committed to answer at its earliest convenience.

Timeline for answers

- 15 July 2018 – Deadline for the submission of abstracts
- 6 August 2018 – Notifications sent to the successful applicants
- 15 September 2018 – Deadline for the submission of the draft papers
- 19 October 2018 – "*Waiting for Brexit*" Conference

Université de Lausanne/BIICL Conference on 'The UK, Switzerland, Norway and the EU: Cross-border Business Relations after Brexit'

On 17 May, the Centre de droit comparé, européen et international of the University of Lausanne will host a joint conference with the British Institute of International and Comparative Law on 'The UK, Switzerland, Norway and the EU: Cross-border Business Relations after Brexit'. The flyer can be found here. The conference, organised by Professor Eva Lein, intends to provide a forum to discuss the legal uncertainties arising from Brexit with regard to cross-border commercial relations between British, EU, Norwegian and Swiss companies companies.

It will feature the following panels:

Welcome: Eva Lein (UNIL / BIICL)

Panel 1: Trade and Services
Chair: Spyros Maniatis (BIICL / Queen Mary University of London)

- Andreas Ziegler (UNIL)
- Thomas Sebastian (Monckton Chambers)
- Kaja Sandvig (DLA Piper, Oslo)
- Federico Ortino (King's College London / Clifford Chance)

Panel 2: Company Law and Insolvencies
Chair: Adam Johnson QC (Herbert Smith Freehills)

- Stefania Bariatti (University of Milan)
- Rodrigo Rodriguez (University of Lucerne)

- John Whiteoak (Herbert Smith Freehills, London)
- Kern Alexander (University of Zurich)

Panel 3: Dispute Resolution
Chair: Andrea Bonomi (UNIL)

- Diana Wallis (former vice-President of the European Parliament / ELI)
- Trevor Hartley (London School of Economics)
- Benoît Arthur Mauron (Lalive)
- Peter Arnt Nielsen (Copenhagen Business School)
- Eva Lein (UNIL / BIICL)