Brexit Policy Paper on Providing a Cross-Border Civil Judicial Cooperation Framework – a Future Partnership

The Department for Exiting the European Union has published a policy paper on providing a cross-border civil judicial cooperation framework – a future partnership paper – as part of the negotiations with the EU on Brexit. The paper outlines the United Kingdom's position on cross-border civil judicial cooperation for the time after Brexit.

The summary reads as follows:

1. *As the United Kingdom leaves the European Union, the Government will seek a deep and special partnership with the EU. Within this partnership, cross-border commerce, trade and family relationships will continue. Building on years of cooperation across borders, it is vital for UK and EU consumers, citizens, families and businesses, that there are coherent common rules to govern interactions between legal systems.*
2. *To this end, the UK, as a non-member state outside the direct jurisdiction of the Court of Justice of the European Union (CJEU), will seek to agree new close and comprehensive arrangements for civil judicial cooperation with the EU.*
3. *We have a shared interest with the EU in ensuring these new arrangements are thorough and effective. In particular, citizens and businesses need to have continuing confidence as they interact across borders about which country's courts would deal with any dispute, which laws would apply, and know that judgments and orders obtained will be recognised and enforced in neighbouring countries, as is the case now.*
4. *Cooperation with the EU is one part of the UK's global outlook in this field. The new agreement with the EU would be integral to the UK's strategy to enhance civil judicial cooperation more widely. Beyond our relationship with the EU, the UK will remain committed to maintaining and deepening civil judicial cooperation internationally, both through*

continued adherence to existing multilateral treaties, conventions and standards, and through our engagement with the international bodies that develop new initiatives in this field.

5. *The EU has presented its position on civil judicial cooperation in the context of separation. The UK is clear that it is in the interests of both the UK and the EU for cooperation in this field to continue as part of our future partnership. Nonetheless, in response, Annex A presents the UK's view of the principles that should govern the winding down of our existing relationship in the event that no agreement on a future relationship can be reached.*

Considering the EU's position on civil judicial cooperation (see post by Giesela Ruehl on conflictoflaws.net) the "future deep and special partnership" might prove to be not more than wishful thinking and we will rather see a "winding down" of existing relationships, as Annex A suggests.

Legal Implications of Brexit: an International Conference at the University of Hagen (Germany), 8-9 November 2017

The FernUniversität Hagen, Germany's leading state-maintained institution in the field of distance learning, will host an international conference dealing with the legal implications of Brexit on 8-9 November 2017. The description of the event provided by the organizers reads as follows:

„Modelled on the philosophy of Ordo-Liberalism, an offshoot of classical liberalism, the European Union strongly relies on the existence and stable operation of a legal system that can regulate free market and help achieve the expected economic, social and political outcomes. After many decades of tight economic, social and political relations regulated by a common legal system under

the umbrella of the EU, the British withdrawal from the Union could represent a serious blow for the aspirations of stability in the Continent, especially against the backdrop of the current European crisis. Many fear this event could open up a Pandora's Box of severe problems in the EU. What impact will Brexit have on the rights of EU and UK citizens? How is it going to affect the legal regulation of present and future economic relations between the EU and the UK and how will this affect such relations in turn? These and similar questions will be addressed in this conference by four panels of international legal experts and researchers from five universities from Europe, UK and USA."

For further information and registration, please click here.

And, while we're at it, *Michael White* has published a highly interesting article on „How progress in UK/EU talks has hit an impasse over the ECJ" in the „New European". The author in particular reports on a conference that took place on 24 July 2017 at the Institute for Government (IfG) in London and which involved Michael-James Clifton, chief of staff to the President of the Court of Justice to the European Free Trade Area – the EFTA Court – Dr. Holger Hestermeyer, a German international disputes specialist at King's College, London, Catherine Barnard, professor of EU law at Cambridge and the IfG's own Raphael Hogarth.
You may read the article here.

Brexit: EU Position Paper on Judicial Cooperation in Civil and Commercial Matters

The European Commission Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 TEU has submitted a Position Paper on Judicial Cooperation in Civil and Commercial Matters on 28 June 2017. It claims to contain the main principles of the EU position in this regard. A closer look, however, reveals that it only deals with the temporal

application of the relevant EU instruments, notably the Brussels Ia Regulation, the Rome I Regulation and the Rome II Regulation. It suggests that all EU instruments should continue to apply to all choices of forum and choices of law made prior the withdrawal date and that judicial cooperation procedures that are ongoing on the withdrawal date should continue to be governed by the relevant provisions of Union law applicable on the withdrawal date.

The Position Paper is available here.

Now Available in English: "The Disastrous Brexit Dinner"

The recent report by the German newspaper *Frankfurter Allgemeine Sonntagszeitung* (FAS) on *Jean-Claude Juncker's* dinner with British PM *Theresa May* has already triggered a lively political debate on both sides of the channel. For those not fluent in German, it is perhaps welcome that the FAS has taken the rather unusual step of publishing the article again in an English translation on its website here. For readers interested in the legal aspects of future negotiations on Brexit, it is probably most interesting that, in the course of the dinner, *May* alluded to British opt-in rights under Protocol 36 to the TFEU as a blueprint for "a mutually beneficial reciprocal agreement, which on paper changed much, but in reality, changed little". It is not reported, though, whether the British Government would suggest a similar strategy with regard to Protocol 21 which deals with opt-in rights of the UK concerning the EU's legislative acts on private international law as well. It is difficult to imagine how such an approach could be reconciled with the UK Government's desire to be freed from the judicial surveillance by the CJEU, however. Anyway, the article states that the head of the Commission resolutely rejected any kind of legal window-dressing. So, it seems that Brexit will actually mean Brexit.

Brexit Negotiations Series on OBLB

On 17 March 2017 Horst Eidenmüller and John Armour, both from the University of Oxford, organised a one-day conference at St Hugh's College, Oxford, on 'Negotiating Brexit'. One panel focused on the effects of Brexit on the resolution of international disputes, including issues of jurisdiction, choice of law, recognition and enforcement as well as international arbitration. Two of the contributions to the conference have recently been published on the Oxford Business Law Blog:

- Giesela Rühl, *The Effect of Brexit on Choice of Law and Jurisdiction in Civil and Commercial Matters*, available here;
- Marco Torsello, *The Impact of Brexit on International Commercial Arbitration*, available here.

A third post by Tom Snelling will deal with the impact of Brexit on recognition and enforcement on foreign judgments.

The Impact of Brexit on the European Aviation Industry – Düsseldorf, Wednesday, 31 May

2017, 3.30 PM

The Düsseldorf Airport and Professor *Stephan Hobe* from the Institute of Air and Space Law at the University of Cologne, in cooperation with the international law firm Herbert Smith Freehills, have established a new series of events, which will deal with current topics of the aviation industry, involving internationally renowned experts before a selected audience.
The theme of the kick-off event could not be more up-to-date. Less than a week ago, British Ambassador Tim Barrow handed over to EU Council President Donald Tusk the first petition to trigger the application of Art. 50 TEU in the history of the European Union. The next two years will involve an unprecedented negotiating marathon in which the departure of Great Britain from the EU will be shaped.
Few areas are now as Europeanized as air transport. Air transport agreements need to be re-negotiated, the Single European Sky has to be restructured, airline ownership has to be checked – the impact of the Brexit on the aviation sector is unpredictable. The conference's aim is to start with a first inventory. To this end, the organizers have invited distinguished experts from politics, academia, aviation associations, lawyers and international airports.
For further details and registration, please click here.

Brexit, again: White Paper on the Great Repeal Bill

Since Wednesday it is official: The UK will leave the EU. What this means for judicial cooperation in cross-border matters has been the subject of an intense debate over the last months. The UK government, however, has thus far not indicated how it plans to proceed. A White Paper that was released yesterday now gives some basis for speculation:

- The UK will adopt a Great Repeal Bill that will convert the current body of

EU law, notably directly applicable EU Regulations, into UK domestic law (para. 2.4).

- When applying the EU-derived body of law UK courts will be required to give "historic" CJEU decisions, i.e. decisions that the CJEU will render up until the day of Brexit, the same binding, or precendent status as decisions of the UK Supreme Court (para. 2.14).
- To the extent that EU law cannot simply be converted into domestic law, because it is based on reciprocity, the UK will seek to secure reciprocal arrangements as a part of the new relationship with the EU (para. 3.3).

Applied to conflict of laws this suggests that the UK will most likely convert the non-reciprocal regulations, notably the Rome I and the Rome II Regulations, into domestic law and apply them unilaterally. UK courts will then be required to follow and apply relevant CJEU decisions that have been and will be rendered up to the date of Brexit. As regards regulations that rest on the principle of reciprocity, notably the Brussels Ia Regulation but also the Service and Evidence Regulation, the UK will most likely seek to secure their continued reciprocal application.

Of course, this leaves a lot of questions open. What will, for example, happen to post-Brexit CJEU decisions relating to the Rome I and the Rome II Regulation? Will they have any meaning for UK courts? And what happens to the Brussels Ia Regulation if the UK and the EU do manage to reach agreement on its continued reciprocal application?

So, stay tuned.

Brexit and PIL, Over and Over

The abandonment of the EU by the UK is at the root of many doubts concerning the legal regime of cross-border private relationships. Little by little the panorama begins to clear up as the expectations and objectives of the UK are made public. Regarding cross-border civil and commercial matters, several

Evidence Sessions have been held from December to January at the House of Lords before the Select Committee on the European Union, Justice Sub-committee (transcripts are available here); the Final Report was published yesterday.

At the end of January, the Minister of State for Courts and Justice gave the Committee details as to the hopes on the side of the UK of the post-Brexit best case scenario, which in a nutshell would rely on two main pillars: a set of common rules -either the regulations themselves, incorporated into the Great Repeal Act; or new agreements with the EU taking up the contents of the European rules- to ensure mutuality and reciprocity; and the absence of any post-Brexit role for the Court of Justice.

To what extent is this workable?

Taking the risk of repeating what other colleagues have already said let me share some basic thoughts on the issue from the continental point of view; in light of the documents above mentioned one feels there is a need to insist on them. The ideas are complemented and developed further in a piece that will be published in a collective book – *Diversity & Integration: Exploring Ways Forward,* to be edited by Dr. Veronica Ruiz Abou-Nigm and Prof. Maria Blanca Noodt Taquela.

It is indeed sensible to have solutions on cross-border jurisdiction and recognition and enforcement of decisions which enhance certainty for the continental citizens with interests in third States; this is a general truth. The British negotiators would have to prove (with qualitative and quantitative arguments) what is so particular about the UK that an EU/UK convention is of the essence for the post-Brexit time. Moreover, and more important, the UK will have to convince the EU that the particular solutions to be agreed are those currently contained in the European regulations; and also, about the CJEU not being part of the agreement. For the endeavor to succeed fundamental obstacles must be overcome, all related to the systemic nature of the EU. Among the most obvious ones I would like to point to the following:

.- The inadequacy of the solutions. Certain mechanisms and technical solutions of the EU civil procedural law instruments – and the way we understand and apply them- have been endorsed only for integration. There are reasons to be skeptical about the "exportability" of the far-reaching solutions, in terms of removal of obstacles to the circulation of judgments, of the current EU procedural

regulations to a context not presided by the philosophy of integration. Within the EU, the sacrifices imposed by mutual trust to the right to due process of individuals are endurable in the name of integration as a greater, common good. In the absence of any integration goal there is no apparent reason for an all-embracing blind reciprocal trust (neither of the EU MS in the UK nor vice versa. By the way, the fact that the UK is considering leaving the ECHR as well will not help to automaticaly trusting the UK decisions in the future).

.- The systemic character of the *acquis communautaire*. The EU legal instruments complement and reinforce one another: any proposal to reproduce single, isolated elements of the system in a bilateral convention EU/UK ignores this fact. Ties and links among the components of legal systems may be stronger or looser. When confronted with a proposal such as the UK, one of the unavoidable questions to be answered is to what extent the PIL EU instruments can have a separate, independent life one from each other.

.- In a similar vein: the EU PIL system does not start, nor does it end, in a few regulations – those which typically come to mind. Many conflict of laws and procedural rules for cross-border cases are set in EU acts with a broader content and purpose; they interact with the PIL instruments. What about this setting?

.- MS are actors in the system: they must keep loyal to it; they cannot escape from it. When applying their laws and when legislating they are subject to the overarching obligation of making it in a way that preserves the *effet utile* of the EU rules. This creates from the outset a structural imbalance to any international agreement between the MS (the EU) and third countries: the MS enjoy very little -if at all- leeway to deviate from the constraint of keeping EU-consistent. Indeed, a similar situation would arise in connection to any other international agreement, but it is likely to be more problematic in the case of conventions which replicate the contents of the EU regulations but not their (EU) inspiration, nor their objectives.

.- International agreements concluded by the European Union (as opposed to those signed by the MS) form an integral part of its legal order and can therefore be the subject of a request for a preliminary ruling by the MS. *De iure,* once the UK is no longer an EU MS the CJEU findings will not be binding on it. The fact remains that diverging interpretations -one for the MS, another from the side of the UK- of the same bilateral instrument will jeopardize its very purpose (and I

would say the Justice sub-committee has understood it, as we can read in the Final Report above mentioned: *The end of the substantive part of the CJEU's jurisdiction in the UK is an inevitable consequence of Brexit. If the UK and the EU could continue their mutually-beneficial cooperation in the ways we outline earlier without placing any binding authority at all on that Court's rulings, that could be ideal. However, a role for the CJEU in respect of essentially procedural legislation concerning jurisdiction, applicable law, and the recognition and enforcement of judgments, is a price worth paying to maintain the effective cross-border tools of justice discussed throughout our earlier recommendations. (Paragraph 35).*

House of Lords EU Committee on Judicial Cooperation post-Brexit

On 20 March 2017 the European Union Committee of the House of Lords has published its Report on Judicial cooperation post-Brexit ("Brexit: Justice for families, individuals and Businesses?"). The full Report is available here. The summary reads as follows (emphasis added):

"The Brussels I Regulation (recast)

1. We acknowledge and welcome the UK's influence over the content of these three EU Regulations which are crucial to judicial cooperation in civil matters and reflect the UK's influence and British legal culture. We urge the Government to keep as close to these rules as possible when negotiating their post-Brexit application. (Paragraph 23)

2. The predictability and certainty of the BIR's reciprocal rules are important to UK citizens who travel and do business within the EU. We endorse the outcome of the Government's consultations, that an effective system of cross-border judicial cooperation with common rules is essential post-Brexit. (Paragraph 37)

3. We also note the Minister's confirmation, in evidence to us, that the important

principles contained in the Brussels I Regulation (recast) will form part of the forthcoming negotiations with the remaining EU Member States. (Paragraph 38)

4. While academic and legal witnesses differed on the post-Brexit enforceability of UK judgments, it is clear that **significant problems will arise for UK citizens and businesses if the UK leaves the EU without agreement on the post-Brexit application of the BIR.** (Paragraph 52)

5. The evidence provided to us suggests that the **loss of certainty and predictability resulting from the loss of the BIR and the reciprocal rules it engenders** will lead to an inevitable increase in cross-border litigation for UK based citizens and businesses as they continue to trade and interact with the remaining 27 EU Member States**.** (Paragraph 53)

6. We are concerned by the Law Society of England and Wales' evidence that the current uncertainty surrounding Brexit is already having an **impact on the UK's market for legal services and commercial litigation, and on the choices businesses are making as to whether or not to select English contract law as the law governing their commercial relationships.** (Paragraph 54)

7. The Government urgently needs to address this uncertainty and take steps to mitigate it. We therefore urge the Government to consider whether any interim measures could be adopted to address this problem, while the new UK-EU relationship is being negotiated in the two year period under Article 50. (Paragraph 55)

8. The evidence we received is clear and conclusive: **there is no means by which the reciprocal rules that are central to the functioning of the BIR can be replicated in the Great Repeal Bill, or any other national legislation. It is therefore apparent that an agreement between the EU and the UK on the post-Brexit application of this legislation will be required, whether as part of a withdrawal agreement or under transitional arrangements.** (Paragraph 60)

9. The Minister suggested that the Great Repeal Bill will address the need for certainty in the transitional period, but evidence we received called this into question. **We are in no doubt that legal uncertainty, with its inherent costs to litigants, will follow Brexit unless there are provisions in a withdrawal or transitional agreement specifically addressing the BIR.** (Paragraph 61)

10. The evidence suggests that jurisdictions in other EU Member States, and arbitrators in the UK, stand to gain from the current uncertainty over the post-Brexit application of the BIR, as may other areas of dispute resolution. (Paragraph 69)

11. With regard to arbitration, we acknowledge that the evidence points to a gain for London. But, we are also conscious of the evidence we heard on the importance of the principles of justice, in particular openness and fairness, underpinned by the publication of judgments and authorities, which are fundamental to open law. It is our view that greater recourse to arbitration does not offer a viable solution to the potential loss of the BIR. (Paragraph 70)

The Brussels IIa Regulation and the Maintenance Regulation

12. In dealing with the personal lives of adults and children, both the Brussels IIa Regulation and the Maintenance Regulation operate in a very different context from the more commercially focused Brussels I Regulation (recast). (Paragraph 81)

13. These Regulations may appear technical and complex, but the practitioners we heard from were clear that in the era of modern, mobile populations they bring much-needed clarity and certainty to the intricacies of cross-border family relations (Paragraph 82)

14. We were pleased to hear the Minister recognise the important role fulfilled by the Brussels IIa Regulation and confirm that the content of both these Regulations will form part of the forthcoming Brexit negotiations. (Paragraph 83)

15. We have significant concerns over the impact of the loss of the Brussels IIa and Maintenance Regulations post-Brexit, if no alternative arrangements are put in place. We are particularly concerned by David Williams QC's evidence on the loss of the provisions dealing with international child abduction. (Paragraph 92)

16. **To walk away from these Regulations without putting alternatives in place would seriously undermine the family law rights of UK citizens and would, ultimately, be an act of self-harm.** (Paragraph 93)

17. **It is clear that the Government's promised Great Repeal Bill will be insufficient to ensure the continuing application of the Brussels II and**

Maintenance Regulations in the UK post-Brexit: we are unaware of any domestic legal mechanism that can replicate the reciprocal effect of the rules in these two Regulations. We are concerned that, when this point was put to him, the Minister did not acknowledge the fact that the Great Repeal Bill would not provide for the reciprocal nature of the rules contained in these Regulations. (Paragraph 97)

18. We are not convinced that the Government has, as yet, a coherent or workable plan to address the significant problems that will arise in the UK's family law legal system post-Brexit, if alternative arrangements are not put in place. **It is therefore imperative that the Government secures adequate alternative arrangements, whether as part of a withdrawal agreement or under transitional arrangements** (Paragraph 98)

Options for the future

19. The balance of the evidence was overwhelmingly against returning to the common law rules, which have not been applied in the European context for over 30 years, as a means of addressing the loss of the Brussels I Regulation (recast). We note that a return to the common law would also not be the Government's choice. (Paragraph 114)

20. A return to the common law rules would, according to most witnesses, be a recipe for confusion, expense and uncertainty. In our view, therefore, the common law is not a viable alternative to an agreement between the EU and the UK on the post-Brexit application of the Brussels I Regulation (recast). (Paragraph 115)

21. Nonetheless, in contrast to key aspects of the two Regulations dealing with family law, Professor Fentiman was of the opinion that in the event that the Government is unable to secure a post-Brexit agreement on the operation of the Brussels I Regulation (recast), a return to the common law rules would at least provide a minimum 'safety net'. (Paragraph 116)

22. **The combination of UK membership of the Lugano Convention, implementation of the Rome I and II Regulations through the Great Repeal Bill, and ratification of the Hague Convention on choice-of-court agreements, appears to offer at least a workable solution to the post-Brexit loss of the BIR.** (Paragraph 126)

23. The inclusion in the Lugano Convention of a requirement for national courts to "pay due account" to each other's decisions on the content of the Brussels I Regulation, without accepting the direct jurisdiction of the CJEU, could be compatible with the Government's stance on the CJEU's status post-Brexit, as long as the Government does not take too rigid a position. (Paragraph 127)

24. This approach will come at a cost. In particular, it will involve a return to the Brussels I Regulation, with all its inherent faults, which the UK as an EU Member State succeeded, after much time and effort, in reforming. (Paragraph 128)

25. In contrast to the civil and commercial field, we are particularly concerned that, save for the provisions of the Lugano Convention on cases involving maintenance, there is no satisfactory fall-back position in respect of family law. (Paragraph 135)

26. Our witnesses were unanimous that a return to common law rules for UK- EU cases would be particularly detrimental for those engaged in family law litigation. The Bar Council also suggested that an already stretched family court system would not be able to cope with the expected increase in litigation. (Paragraph 136)

27. The Bar Council specifically called for the EU framework in this field to be sustained post-Brexit. But while this may be the optimal solution in legal terms we cannot see how such an outcome can be achieved without the CJEU's oversight. (Paragraph 137)

28. Other witnesses suggested the UK rely on the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children. But the evidence suggests that this Convention offers substantially less clarity and protection for those individual engaged in family law based litigation. (Paragraph 138)

29. The Minister held fast to the Government's policy that the Court of Justice of the European Union will have no jurisdiction in the UK post-Brexit. We remain concerned, however, that if the Government adheres rigidly to this policy it will severely constrain its choice of adequate alternative arrangements. (Paragraph 142)

30. Clearly, if the Government wishes to maintain these Regulations post-Brexit, it will have to negotiate alternative arrangements with the remaining 27 Member States to provide appropriate judicial oversight. But the Minister was unable to offer us any clear detail on the Government's plans. When pressed on alternatives, he mentioned the Lugano Convention and "other arrangements". We were left unable to discern a clear policy. (Paragraph 143)

31. The other examples the Minister drew on, Free Trade Agreements with Canada and South Korea, do not deal with the intricate reciprocal regime encompassed by these three Regulations. We do not see them as offering a viable alternative. (Paragraph 144)

32. We believe that the Government has not taken account of the full implications of the impact of Brexit on the areas of EU law covered by the three civil justice Regulations dealt with in this report. In the area of family law, we are very concerned that leaving the EU without an alternative system in place will have a profound and damaging impact on the UK's family justice system and those individuals seeking redress within it. (Paragraph 145)

33. In the civil and commercial field there is the unsatisfactory safety net of the common law. But, at this time, it is unclear whether membership of the Lugano Convention, which is in itself imperfect, will be sought, offered or available. (Paragraph 146)

34. **We call on the Government to publish a coherent plan for addressing the post-Brexit application of these three Regulations, and to do so as a matter of urgency. Without alternative adequate replacements, we are in no doubt that there will be great uncertainty affecting many UK and EU citizens.** (Paragraph 147)"

Brexit: An Opportunity for

Frankfurt to Become a New Hub of Litigation in Europe?

On March 30, 2017, the Minister of Justice of the Land Hessen (Federal State of Hesse), Eva Kühne-Hörmann, will organise a conference in Frankfurt to present the „Justizinitiative Frankfurt“ (Justice Initiative Frankfurt). This initiative was launched by Professor Hess (MPI Luxembourg for Procedural Law), Professor Pfeiffer (Heidelberg University), Professor Duve (Freshfields Bruckhaus Deringer) and Professor Poseck (President of the Frankfurt Court of Appeal). It suggests strengthening the regional and the higher regional courts in order to attract more financial disputes to Frankfurt. The initiative envisages both organisational and procedural improvements in order to raise the attractiveness of the courts in Frankfurt. The government of Hessen has endorsed the proposals which will be presented and discussed at the conference. The programme of the conference, together with a registration form (to be sent the 24 March at the latest), can be found here.

Venue: Foyer des Präsidialgebäudes der Goethe-Universität Frankfurt am Main, Campus Westend, Theodor-W.-Adorno-Platz 1, 60323 Frankfurt am Main.