Eleventh José María Cervelló Business Law Prize – Essays on Brexit

The José María Cervelló Chair of IE Law School and the ONTIER law firm announce the "Eleventh José María Cervelló Busines Law Prize".
The main purpose of the Prize is to promote legal study and research, and to facilitate access to the LLM courses of IE Law School for people who do not have the necessary financial resources.

The prize consists of the award of € 30,000 as follows:
€ 10,000 will be given to the author of the winning essay.
€ 20,000 will be assigned to the José María Cervelló Chair to be applied to its scholarship programme for the study of legal or tax courses at IE Law School.
Up to a maximum of two runner-up awards may be given to essays of sufficient quality to merit that distinction.

The subject of the essays opting for the "Eleventh José María Cervelló Business Law Prize" is: "Brexit: Legal consequences of the departure of the United Kingdom from the EU for businesses. Legal framework of the withdrawal and new Legal Framework, special reference to the problems of transitory law in respect of contracts, corporate operations and litigation"

All essays must be original, unpublished works written in Spanish or English. The length is a minimum of 25 and a maximum of 35 pages. The closing date for entries is **Monday 8th May 2017 at 23:59 p.m. (Madrid, Spain time)**. The award ceremony will take place in June or July 2017, at IE Law School. All participants will be notified in due course.

All persons or Spanish or foreign nationality who are graduates in Law, holding either a pre-Bologna "licenciatura" qualification or a degree (grado) may take part.

For further details (members of the jury; essay format; presentation) click here: Cervello Prize on Brexit

Brexit and Family Law Conference in Cambridge on 27 March 2017

The UK's withdrawal from the EU will precipitate important change in international family law. EU law has increasingly come to define key aspects of both jurisdiction and recognition & enforcement of judgments on divorce, maintenance, and disputes over children, including international child abduction, and provided new frameworks for cross-national cooperation.

Child & Family Law Quarterly and Cambridge Family Law will, therefore, host a joint seminar on 27 March 2017. International experts and practitioners will discuss the impacts of 'Brexit' on family law, from a range of national and European perspectives, and reflect on the future of international family law practice in the UK.

Academic speakers include:

- Nigel Lowe, University of Cardiff
- Anatol Dutta, University of Regensburg, Germany
- Paul Beaumont, University of Aberdeen
- Helen Stalford, University of Liverpool
- Janeen Carruthers, University of Glasgow
- Ruth Lamont, University of Manchester
- Elizabeth Crawford, University of Glasgow

Panel discussion participants include

- Rebecca Bailey-Harris, 1 Hare Court
- David Hodson, International Family Law Group
- Rachael Kelsey, Sheehan Kelsey Oswald, Edinburgh
- Gavin Smith, 1 Hare Court

Conference registration fees:

- £ 150 for practitioners

- £ 100 for academics/Civil Servants/NGO
- £ 25 for students

For more details, registration, accommodation and dinner tickets: www.fambrexit.law.cam.ac.uk/

JuristenZeitung, Issue 2 (2017): Two More Articles on the Effects of Brexit

The current issue of the JuristenZeitung features two articles dealing with the effects of Brexit on private and economic law, including private international law.

The first article, authored by Matthias Lehmann, University of Bonn, and Dirk Zetzsche, University of Liechtenstein, discusses the various options to bring about Brexit and analyses their consequences for the law of contractual and non-contractual obligations (including choice of law), corporate law, insolvency law and procedural law (*Die Auswirkungen des Brexit auf das Zivil- und Wirtschaftsrecht, pp. 62-71*).

The second article, authored by myself, sheds light on the effects Brexit will have on London as a place for settling international legal disputes (*Die Wahl englischen Rechts und englischer Gerichte nach dem Brexit. Zur Zukunft des Justizstandorts England, pp. 72-82*). It shows that Brexit creates substantial uncertainty (1) as regards the enforcement of English choice of law and English choice of forum clauses and (2) as regards the recognition and enforcement of English judgments abroad. Unless the UK and the EU agree on the continued application of the

Rome I Regulation, the Rome II Regulation and the (recast) Brussels I Regulation (or enter into a new treaty designed to enhance judicial cooperation in civil matters), Brexit will, therefore, make it less attractive to settle international disputes in London.

Both articles can be downloaded here and here (behind pay wall, unfortunately).

Reminder: Brexit means Brexit, Seminar in London 26 January

This is a reminder of the Seminar on Brexit and Private International Law at King's College London on 26 January 2017.

The seminar will discuss the risks which Brexit poses for the UK as a centre for dispute resolution of civil and commercial disputes, with particular reference to Jurisdiction/Enforcement; Applicable law; Procedure; and Cross-border Insolvency law.

The Chair is Professor Jonathan Harris QC.

Speakers are:

Sir Richard Aikens: Brick Court Chambers and King's College London

Alexander Layton QC: 20 Essex Street Chambers and King's College London

Dr Manuel Penades Fons: King's College London

It will take place at King's College London – Strand Campus at 6.30 p.m.

For registration and more information, see here.

“And as the fog gets clearer…“ – May on Brexit

In her long-awaited speech on what Brexit actually means for the future application of the *acquis communautaire* in the United Kingdom, British Prime Minister *Theresa May*, on 17 January, 2017, stressed that the objective of legal certainty is crucial. She further elaborated:

“We will provide certainty wherever we can. We are about to enter a negotiation. That means there will be give and take. There will have to be compromises. It will require imagination on both sides. And not everybody will be able to know everything at every stage. But I recognise how important it is to provide business, the public sector, and everybody with as much certainty as possible as we move through the process. So where we can offer that certainty, we will do so. […] **And it is why, as we repeal the European Communities Act, we will convert the ‘acquis’ – the body of existing EU law – into British law.** This will give the country maximum certainty as we leave the EU. The same rules and laws will apply on the day after Brexit as they did before. And it will be for the British Parliament to decide on any changes to that law after full scrutiny and proper Parliamentary debate.”

At the same time, *May* promised that “we will take back control of our laws and **bring an end to the jurisdiction of the European Court of Justice** in Britain.”

(The full text of the speech is available here.)

This unilateral approach seems to imply that the EU Regulations on Private International Law shall apply as part of the anglicized “acquis” even after the Brexit becomes effective. This would be rather easy to achieve for the Rome I Regulation. In addition, a British version of Rome II could replace the Private International Law (Miscellaneous Provisions) Act of 1995, except for defamation cases and other exemptions from Rome II’s scope. At the end of the day, nothing would change very much for choice of law in British courts, apart from the fact that the Court of Justice of the European Union could no longer rule on British requests for a preliminary reference. Transplanting Brussels I*bis* and other EU

procedural instruments into autonomous British law would be more difficult, however. Of course, the UK is free to unilaterally extend the liberal Brussels regime on recognition and enforcement to judgments passed by continental courts even after Brexit. It is hard to imagine, though, that the remaining EU Member States would voluntarily reciprocate this favour by treating the UK as a *de facto* Member State of the Brussels I*bis* Regulation. Merely applying the same procedural rules in substance would not suffice for remaining in the Brussels I*bis* camp if the UK, at the same time, rejects the jurisdiction of the CJEU (which it will certainly do, according to *May*). Thus, the only viable solution to preserve the procedural acquis seems to consist in the UK either becoming a Member State of the Lugano Convention of 2007 or in concluding a special parallel agreement similar to that already existing between Denmark and the EU (minus the possibility of a preliminary reference, of course). Since only the latter option would allow British courts to apply the innovations brought by the Brussels I recast compared with the former Brussels and the current Lugano regime, it should clearly be the preferred strategy from the UK point of view – but it cannot be achieved unilaterally by the British legislature.

Brexit Means Brexit, But What Does Brexit Mean? Seminar Series

The Centre of European Law at King's College London is running a series of seminars on the meaning of Brexit and its potential impact on different areas of law. It considers the options for the new legal regime between the UK and the EU, taking into account the international legal framework.

On **26 January 2017** the topic will be **Brexit and Private International Law**. The Chair will be Professor Jonathan Harris QC.

Speakers are:

Sir Richard Aikens: Brick Court Chambers and King's College London

Alexander Layton QC: 20 Essex Street Chambers and King's College London

Dr Manuel Penades Fons: King's College London

The seminar will discuss the risks which Brexit poses for the UK as a centre for dispute resolution of civil and commercial disputes, with particular reference to Jurisdiction/Enforcement; Applicable law; Procedure; and Cross-border Insolvency law.

It will take place at King's College London – Strand Campus at 6.30 p.m.

For registration and more information, see here.

Brexit, but rEEAmain? The Effect of Brexit on the UK's EEA Membership

Ulrich G. Schroeter, Professor of Law at the University of Mannheim (Germany) and Heinrich Nemeczek, Research Fellow at the University of Mannheim (Germany) and an Academic Visitor at the Law Faculty of the University of Oxford, have authored an article on "'The (Uncertain) Impact of Brexit on the United Kingdom's Membership in the European Economic Area". Published in issue 7 [2016] of Kluwer's *European Business Law Review*, pp. 921–958, the authors analyze how the UK's withdrawal from the EU will affect the UK's status as Contracting Party to the EEA Agreement.

The authors have kindly provided us with the following abstract:

> *Until recently, most legal analyses of Brexit have assumed that the UK's EEA membership will be terminated ipso iure should the UK decide to withdraw from the EU. According to this view, the UK subsequently could (re-)apply for EEA membership should its government so choose – an option commonly referred to as the 'Norway option'.*

Our article challenges the assumption that the UK's withdrawal from the EU will automatically result in its withdrawal from the EEA. In short, we reach the conclusion that the UK's EEA membership will continue despite of Brexit unless the UK government chooses to also unilaterally withdraw from the EEA in accordance with Article 127(1) of the EEA Agreement – a step it is not obliged to take. Its continuing EEA membership would mean that many rules of EU law would continue to apply in form of EEA law, including (subject to certain conditions) the much-discussed rules about the 'European passport' for UK financial institutions. In contrast, the Court of Justice of the EU would have no jurisdiction over the interpretation of EEA law in the UK. At the same time, the rules governing the free movement of workers are more flexible under EEA law than under EU law, potentially allowing the UK to limit this freedom by way of unilaterally imposed 'safeguard measures'.

In summary, 'Brexit' and 'rEEAmain' are in no way irreconcilable. The result may affect the negotiation positions during the upcoming Brexit negotiations in accordance with Article 50 of the TEU, as a continuing EEA membership could be viewed as an attractive alternative to a 'hard Brexit', for both businesses in the UK and the rest of the EEA.

The EEA Agreement as a 'mixed agreement'

It is an important feature of the EEA Agreement that, on the 'EU side', it neither comprises only the EU nor only its Member States as Contracting Parties, but rather the EU and each of its individual Member States, including the UK. The UK is, therefore, not merely an EEA Member because of its membership in the EU, but because the EEA Agreement's Preamble explicitly lists the UK as a separate Contracting Party. Any modification or termination of this Contracting Party status would require a basis in treaty law.

In this regard, a source of uncertainty is that the EEA Agreement does not contain any specific provision addressing the effect, if any, of a EU Member State leaving the EU. Article 50 of the TEU fails to indicate that a withdrawal from the EU would have any consequence for the withdrawing State's membership in the EEA. As we demonstrate in detail in our article, a 'Brexit' notification in accordance with Article 50 of the TEU can also not be interpreted as also resulting in a withdrawal from the EEA, inter alia because such a result would affect treaty rights of the three EFTA States within the EEA

– Iceland, Liechtenstein and Norway – that are not parties to the TEU.

As far as some provisions in the EEA Agreement only refer to 'EC Member States' and/or 'EFTA States', we argue in some detail that these terms are to be interpreted as referring to EU States and non-EU States within the EEA in accordance with both the EEA Agreement's purpose and past treaty practice under the Agreement.

No Right of Other EEA Contracting Parties to Suspend Operation or Terminate the EEA Agreement in Relation to the UK

The UK's withdrawal from the EU does not entitle other EEA Contracting Parties to suspend operation or terminate the EEA Agreement in relation UK, neither under the EEA Agreement nor under customary public international law. Under customary treaty law as codified in the 1969 Vienna Convention on the Law of Treaties (VCLT), the UK for once has committed no 'material breach' of the EEA Agreement (Article 60 of the VCLT), as Brexit is merely the use of a right explicitly granted to the UK by a different treaty, namely Article 50 of the TEU. Also, Brexit does not constitute a fundamental change according to the clausula rebus sic stantibus doctrine enshrined in Article 62 of the VCLT as the EEA Agreement's core elements can still be performed. Although the UK's withdrawal from the EU will create certain difficulties because the country's representation in organs like the EFTA Court or the EFTA Surveillance Authority requires clarification, these changes neither radically modify the obligations still to be performed under the EEA Agreement nor imperil the existence or vital development of other EEA Contracting Parties.

Post-Brexit situation ('rEEAmain')

In our article, we further outline the consequences that Brexit would have for the future application of the EEA Agreement. Because the UK's Contracting Party status would remain unaffected, UK companies would still have access to the EEA internal market. Inter alia, the legal capacity of UK companies with their 'real seat' elsewhere within the EEA would continue to be recognised in all other EEA States under the EEA Agreement's freedom of establishment. The same would, of course, apply in the 'opposite direction', giving continued freedom of establishment in the UK for companies from elsewhere in the EEA.

The freedom of movement for workers under Article 28 of the EEA Agreement

may be unilaterally limited by the UK by way of appropriate safeguard measures in accordance with Article 112 of the EEA Agreement (e.g. a quota system), if 'serious economic, societal or environmental difficulties' are arising – a possibility that does not exist under EU law. (It is foreseeable that the interpretation of the legal prerequisites will give rise to disputes.) In any case, safeguard measures taken by the UK may come at a price, as other EEA Contracting Parties would be authorized to take proportionate 'rebalancing measures' in order to remedy any imbalance between rights and obligations under the EEA Agreement created by the safeguard measures.

Our interpretation should not be misunderstood as indicating that no difficulties would arise under a 'rEEAmain' scenario. Such difficulties would indeed appear, primarily because certain institutional arrangements in the EEA Agreement and related agreements do not explicitly envisage an EEA Contracting Party that is neither a member state of the EU nor of the EFTA. If the UK does not accede to the EFTA Agreement and the Surveillance and Court Agreement, EEA law within the UK would have to be supervised and interpreted solely by British domestic courts and authorities. Also, the issue of financial contributions by the UK would arguably necessitate a renegotiation of protocols to the EEA Agreement: After Brexit, the UK will no longer contribute to the EU budget, but neither Article 116 of the EEA Agreement nor Protocols 38–38c explicitly provide for an obligation of the UK to contribute to the EEA Financial Mechanism. As it is difficult to argue that the UK would profit from its continuing EEA membership without contributing to the connected Financial Mechanism, the exact amount of the UK's contribution would need to be fixed through an adjustment of the Protocols 38–38c.

SAVE THE DATE: Brexit and Family Law, 27 March 2017

archa joint seminar of the Child & Family Law Quarterly and Cambridge Family Law

27 March 2017, at Trinity College, University of Cambridge

The withdrawal of the UK from the European Union will precipitate important change in the field of international family law. EU law has increasingly come to define key aspects of both jurisdiction and recognition & enforcement of judgments on divorce, maintenance, and disputes over children, including international child abduction, and provided new frameworks for cross-national cooperation. At this seminar, international experts and practitioners will discuss the impacts of 'Brexit' on family law, from a range of national and European perspectives, and reflect on the future of international family law practice in the UK.

Booking will open soon. CPD points will be available.

Please visit www.family.law.cam.ac.uk/ to join the Cambridge Family Law mailing list in order to receive an email when booking opens.

New book on the legal consequences of Brexit

Only five months after the UK Brexit Referendum the first (German) book dealing with the legal consequences of Brexit has been published ("Brexit und die juristischen Folgen, Nomos 2017, ISBN 978-3-8487-3564-8). Edited by Malte Kramme, Christian Baldus and Martin Schmidt-Kessel the book discusses the

effects Brexit will have on European private and economic law, notably contract law, corporate law, capital markets law, tax law, labour law, competition law and consumer law.

The most interesting chapter for readers of this blog is the chapter by Johannes Ungerer from the University of Bonn. It deals with the effects of Brexit on the Brussels I Regulation and other Regulations on European private international law and can be downloaded here free of charge.

Ungerer shows that there can be no doubt that Brexit will have considerable effects on jurisdiction, recognition and enforcement of judgments in Europe. Particularly, this concerns the Brussels regime, which threatens to fall back from the modern Recast Regulation to the outdated 1968 Convention developed for relations between the UK and the then EEC Member States. Considering that no transition rules are in existence, this fall back could only be prevented by the withdrawal agreement, which is likely to be negotiated. An alternative might be the UK's accession to the 2007 Lugano Convention (and perhaps rejoining EFTA). The Hague Conventions are expected to be maintained where applicable in international legal proceedings. As for choice of law,
the Rome regime for contracts should basically remain unchanged, yet for non-contractual obligations there might be the risk of legal uncertainty. With regard to international insolvency, the domestic regimes of the Member States will take over from the European Insolvency (Recast) Regulation.

Conference Report: "The Impact of Brexit on Commercial Dispute Resolution in London"

By Stephan Walter, Research Fellow at the Research Center for Transnational Commercial Dispute Resolution (TCDR), EBS Law School, Wiesbaden, Germany.

On 10 November 2016, the Academy of European Law (ERA), in co-operation with

the European Circuit, the Bar Council and the Hamburgischer Anwaltverein, hosted a conference in London on "The Impact of Brexit on Commercial Dispute Litigation in London". The event aimed to offer a platform for discussion on a number of controversial issues following the Brexit referendum of 23 June 2016 such as the future rules governing recognition and enforcement of foreign judgements in the UK, the impact of Brexit on the rules determining the applicable law and London's role in the international legal world.

Angelika Fuchs (Head of Section – Private Law, ERA, Trier) and Hugh Mercer QC (Barrister, Essex Court Chambers, London) highlighted in their words of welcome the significant impact of Brexit on business and the practical necessity to find solutions for the issues discussed.

In the first presentation, Alexander Layton QC (Barrister, 20 Essex Street, London) scrutinised Brexit's "Implications on jurisdiction and circulation of titles". He noted that the Brussels I Regulation Recast will cease to apply to the UK after its withdrawal from the EU and examined possible ways to fill the resulting void. Because an agreement between the UK and the EU on retaining the Brussels I Regulation Recast seemed very unlikely, not least because of the ECJ's jurisdiction over questions of interpretation of the Regulation, he favoured a special agreement between the UK and the EU in regard to the application of the Brussels I Regulation Recast based on the Danish model. The ECJ's future role in interpreting the Regulation could be addressed by adopting a provision similar to Protocol 2 to the 2007 Lugano Convention. Yet it was disputed whether or not the participation of the UK in the Single Market would be a political prerequisite for such an arrangement. He argued that there would be no room for a revival of the 1988 Lugano Convention since the 2007 Lugano Convention terminated its predecessor. Furthermore, neither a revival of the 1968 Brussels Convention nor the accession to the 2007 Lugano Convention would lead to a satisfactory outcome as this would result in the undesired application of outdated rules. In a second step Layton discussed from an English point of view the consequences on jurisdiction and on the recognition and enforcement of judgements if at the end of the two year period set out in Article 50 TEU no agreement would be reached. Concerning jurisdiction the rules of the English law applicable to defendants domiciled in third States would also apply to cases currently falling under the Brussels I Regulation Recast. In regard to the recognition and enforcement of judgements rendered in an EU Member State pre-Brussels bilateral treaties

dealing with these questions would revive, since they were not terminated by the Brussels I Regulation and its successor. Absent a treaty between the UK and the EU Member State in question the recognition and enforcement would be governed by English common law. Likewise, the recognition and enforcement of English judgements in EU Member States would be governed by bilateral treaties or the respective national laws. In Layton's opinion, the application of these rules might lead to legal uncertainty. He concluded that both the 2005 Hague Choice of Court Convention and arbitration could cushion the blow of Brexit, but limited to certain circumstances.

Matthias Lehmann (Professor at the University of Bonn) analysed the "Consequences for commercial disputes" laying emphasis on the impact of Brexit on the rules determining the applicable law to contracts and contracts related matters, its repercussions on pre-referendum contracts and potential pitfalls in drafting new contracts post-referendum. Turning to the first issue, he summarised the current state of play, meaning the application of the Rome I Regulation and Rome II Regulation, and stated that these Regulations would cease to apply to the UK after its withdrawal from the EU. In regard to contractual obligations this void could be filled by the 1980 Rome Convention, since the Rome I Regulation had not replaced the Convention completely. Still, this would lead to the application of outdated rules. He therefore recommended to terminate the 1980 Rome Convention altogether. Regarding non-contractual obligations the Private International Law (Miscellaneous Provisions) Act 1995 would apply. Lehmann noted that – unlike the Rome II Regulation – this Act contained no clear-cut rules on issues such as competition law or product liability. Because of these flaws he scrutinised three alternative solutions and favoured a new treaty between the UK and the EU on Private International Law. Even though disagreements over who should have jurisdiction over questions of interpretation could hinder the conclusion of such an arrangement the use of a provision similar to Protocol 2 to the 2007 Lugano Convention could be a way out. If this option failed, the next best alternative would be to copy the rules of the Rome I Regulation and the Rome II Regulation into the UK's domestic law and to apply them unilaterally. As a consequence, the UK courts would not be obliged to follow the ECJ's interpretations of the Regulations causing a potential threat to decisional harmony. Furthermore, the implementation could cause some difficulties because the Regulations' rules are based on autonomous EU law concepts. Finally, he rejected a complete return to the common law as this would lead to legal

uncertainty and potential conflicts with EU Member States' courts. Lehmann subsequently discussed Brexit's repercussions on pre-referendum contracts governed by English law. He submitted that in principle Brexit would not lead to a frustration of a contract. By contrast, hardship, force majeure or material adverse change clauses could cover Brexit, depending on the precise wording and the specific circumstances. Concerning the drafting of new contracts he pointed out that it would be unreasonable not to take Brexit into account. Attention should be paid not only to drafting provisions dealing with legal consequences in the case of Brexit but also to Brexit's implications on the contract's territorial scope when referring to the "EU". If the contract contained a choice-of-law clause in favour of English law, Lehmann suggested using a stabilization clause because English law might change significantly due to Brexit.

The conference was rounded off by a round table discussion on "The future of London as a legal hub", moderated by Hugh Mercer QC and with the participation of Barbara Dohmann QC (Barrister, Blackstone Chambers, London), Diana Wallis (Senior Fellow at the University of Hull; President of the European Law Institute, Vienna and former Member of the European Parliament), Burkhard Hess (Professor and Director of the Max Planck Institute for International, European and Regulatory Procedural Law, Luxembourg), Alexander Layton QC, Matthias Lehmann, Ravi Mehta (Barrister, Blackstone Chambers, London) and Michael Patchett-Joyce (Barrister, Outer Temple Chambers, London). Regarding the desired outcome of the Brexit negotiations and London's future role in international dispute resolution the participants agreed on the fact that a distinction had to be made between the perspectives of the UK and the EU. Concerning the latter, the efforts of some EU Member States to attract international litigants to their courts were discussed and evaluated. Moreover, Hess stressed London's role as an entry point for international disputes into the Single Market – an advantage London would likely lose after the UK's withdrawal from the EU. Patchett-Joyce argued that Brexit was not the only threat to London's future as a legal hub but that there were global risks that had to be tackled on a global level. In regard to the Brexit negotiations there was widespread consensus that the discussion on the future role of the ECJ would be decisive for whether or not an agreement between the UK and the EU could be achieved. Wallis argued that Brexit might have a very negative impact on access to justice, not least for consumers. To mend this situation, Lehmann expressed his hope to continue the judicial cooperation between the EU Member States and the

UK even post-Brexit. An accession to the 2005 Hague Choice of Court Convention was also advocated, though the Convention's success was uncertain. Turning to arbitration, since, as Mehta noted, its use increased significantly in numerous areas of law, and on a more abstract level to the privatisation of legal decision-making, Wallis and Patchett-Joyce addressed the problem of confidentiality and its repercussions on the development of the law. Furthermore, Dohmann stated that it was the duty of the state to provide an accessible justice system to everybody. It would not be enough to refer parties to the possibility of arbitration. Finally, Layton argued that in contrast to the application of foreign law which would create significant problems in practise, the importance of judgement enforcement would be overstated because most judgements were satisfied voluntarily.

It comes as no surprise that these topics sparked lively and knowledgeable debates between the speakers and attendees. Though these discussions indicated possible answers to the questions raised by the Brexit referendum it became clear once more that at the moment one can only guess how the legal landscape will look like in a post-Brexit scenario. But events like this ensure that the guess is at least an educated one.