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'.*
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> *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'.*
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> *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.

Private International Law: Embracing Diversity (Save the date!)

It is my pleasure to announce this conference, to be held on February 24th 2017 at the University of Edinburgh, to celebrate Private International Law as ethics of engaging the other. Exploring a variety of private international law themes, this one-day conference will bring together world-renowned academics and experienced private international lawyers from a wide range of jurisdictions and institutions. The experts will discuss topics such as international jurisdiction, international judicial cooperation, cross-border family issues, cross-border consumer protection, private international law of succession and labour migration, from a range of national and regional perspectives; and reflect on the role of international treaties, international institutions and national courts in the efficient management of legal diversity.

Venue: St. Trinnean’s Room, St. Leonard’s Hall – University of Edinburgh, EH16 5AY

Click here for the programme.

Registration is required – Register at: www.law.ed.ac.uk/events Attendance Fee: £40.00 per attendee.

The international protection of vulnerable adults: recent developments from Brussels and The Hague

On 10 November 2016, the French MEP Joëlle Bergeron submitted to the Committee on Legal Affairs of the European Parliament a draft report regarding the protection of vulnerable adults.

The draft report comes with a set of recommendations to the European Commission. Under the draft, the European Parliament, among other things, ‘deplores the fact that the Commission has failed to act on Parliament’s call that it should submit … a report setting out details of the problems encountered and the best practices noted in connection with the application of the Hague Convention [of 13 January 2000 on the international protection of adults], and ‘calls on the Commission to submit … before 31 March 2018, pursuant to Article 81(2) of the Treaty on the Functioning of the European Union, a proposal for a regulation designed to improve cooperation among the Member States and the automatic recognition and enforcement of decisions on the protection of vulnerable adults and mandates in anticipation of incapacity’.

A document annexed to the report lists the ‘principles and aims’ of the proposal that the Parliament expects to receive from the Commission.

In particular, following the suggestions illustrated in a study by the European Parliamentary Service, the regulation should, *inter alia*, 'grant any person who is given responsibility for protecting the person or the property of a vulnerable adult the right to obtain within a reasonable period a certificate specifying his or her status and the powers which have been conferred on him or her', and 'foster the enforcement in the other Member States of protection measures taken by the authorities of a Member State, without a declaration establishing the enforceability of these measures being required'. The envisaged regulation should also 'introduce single mandate in anticipation of incapacity forms in order to facilitate the use of such mandates by the persons concerned, and the circulation, recognition and enforcement of mandates'.

In the meanwhile, on 15 December 2016, Latvia signed the Hague Convention of 2000 on the international protection of adults. According to the press release circulated by the Permanent Bureau of the Hague Conference on Private International Law, the Convention is anticipated to be ratified by Latvia in 2017.

Conflict of Laws and Silicon Valley

See here for a fascinating post by Professor Marketa Trimble (UNLV Law). From the post:

> Now that conflict of laws has caught up with Silicon Valley and is forcing internet companies to rethink the problems that occupy this fascinating field of law, conflict-of-laws experts should catch up on the internet: they should better educate themselves about internet technology; they should prepare law students for a practice in which the internet is a common, and not a special or unusual, feature; and they should prevent conflict of laws from becoming a fragment of larger trade negotiations in which multifaceted, intricate, and crucial conflict-of-laws policy considerations can easily be overlooked or ignored.

Droit des Contrats Internationaux, 1st edition

This book authored by M.E. Ancel, P. Deumier and M. Laazouzi, and published by Sirey, is the first manual written in French solely devoted to international contracts examined through the lens of judicial litigation and arbitration. It provides a rich and rigorous presentation in light of the legal instruments recently adopted or under discussion in France, as well as at the European and international levels.

After an introduction to the general principles of the matter, the reader will be able to take cognizance of the regimes of the most frequent contracts in the international order: business contracts (sale of goods and intermediary contracts), contracts relating to specific sectors (insurance, transport), contracts involving a weaker party (labor and consumer contracts) or a public person.

Advanced students, researchers as well as practitioners will find in this volume the tools enabling them to grasp the abundant world of international contracts, to identify the different issues and to master the many sources of the discipline.

The ensemble is backed up by a highly developed set of case law and doctrinal references, updated on August 15, 2016.

More information about the book in traditional format is available here, and here for the e-book format.

Marie-Elodie Ancel is a professor at the University Paris Est Créteil Val de Marne (UPEC), where she heads two programs in International Business Litigation and Arbitration.

Pascale Deumier is a professor at the Jean Moulin University (Lyon 3), where she is a member of the Private Law Team and coordinates the research focus on the Sources of Law.

Malik Laazouzi is a professor at the Jean Moulin University (Lyon 3), where he heads the Master 2 of Private International and Comparative Law.

Research Assistant Position at the BIICL, London

The BIICL is seeking to appoint three Research Assistants on a 0.8 FTE basis for paid internships of four months each, with the possibility of extension for a further month.

Research Assistants are expected to undertake various core tasks, including:

* Assisting in the coordination and organisation of research activities;

* Contributing to the production of high quality research in their areas including, where appropriate, assisting with desk-based research, literature reviews, data analysis, drafting of proposals and submissions, report writing and drafting of articles, social media content etc.

* Assisting in the management and co-ordination of events;

* Attending meetings with external groups/partners, including government, legal profession and NGOs; and

* Working as part of a team with other researchers.

Research Assistants will each be assigned to a Supervisor in their legal areas. For this round of applications, we are particularly looking to appoint in the areas of:

* Public International Law;

* Private International Law and/or Competition Law; and

* Rule of Law

New Book for Spanish-English Speaking Lawyers

Lawyers who speak both Spanish and English may be interested in a new book written by Professors S.I. Strong of the University of Missouri, Katia Fach Gómez of the University of Zaragoza and Laura Carballo Piñeiro of the University of Santiago de Compostela. *Comparative Law for Spanish-English Lawyers: Legal Cultures, Legal Terms and Legal Practices / Derecho comparado para abogados anglo- e hispanoparlantes: Culturas jurídicas, términos jurídicos y prácticas jurídicas* (Edward Elgar Publishing Ltd., 2016), is an entirely bilingual text that seeks to help those who are conversationally fluent in a second language achieve legal fluency in that language. The book, which is aimed primarily at private international and comparative lawyers, is appropriate for both group and individual study, and provides practical and doctrinal insights into a variety of English- and Spanish-speaking jurisdictions. The book is available in both hard copy and electronic form, and Elgar is currently offering a discount on website sales. See here for more information.

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.

Service by Mail. Certiorari Granted

I've come across this piece of news by Stacie I. Strong, and found it worth to be shared.

On Friday, the U.S. Supreme Court granted certiorari in *Water Splash, Inc.* v. *Menon* to address the question of whether the Hague Service Convention authorizes service of process by mail.

Click here to get to the initial submissions on whether the matter should be addressed by the SC.

Brussels Ibis Regulation – Changes and Challenges of the Renewed Procedural Scheme

Brussels Ibis Regulation – Changes and Challenges of the Renewed Procedural Scheme – Short Studies in Private International Law,

is the title of a book just released, edited by Vesna Lazic and Steven Stuij.

The book focuses on major amendments introduced in the Brussels I regulatory framework. The contributions scrutenise the changes introduced in the Brussels Ibis Regulation, a legal instrument that presents a core of the unification of private international law rules on the European Union level. It is one of the first publications addressing all the changes in the Brussels I regulatory scheme, which takes into consideration relevant CJEU case law up to July 2016.

The texts, written by legal scholars who have published extensively in the field of private international law and international civil procedure, will add to the development of EU private international law. In addition, the authors' critical analysis may open further discussions on the topic and so benefit a consistent and harmonised application of the Regulation. In this respect the book takes a different approach than the commentaries which have so far been published.

It is primarily meant for legal academics in private international law and practitioners who are regularly engaged in cross-border civil proceedings. It may also be of added value to advanced students and to those with a particular interest in the subject of international litigation and more generally in the area of dispute resolution.

Vesna Lazic is a Senior Researcher at the T.M.C. Asser Instituut, an Associate Professor of Private Law at Utrecht University and Professor of European Civil Procedure at the
University of Rijeka.

Steven Stuij is an expert in Private International Law and an external Ph.D. candidate at Erasmus School of Law, Rotterdam.

Click here for more information.