ENFORCEMENT OF FOREIGN DECISIONS IN CIVIL AND COMMERCIALS MATTERS IN THE UK. WHAT WILL HAPPEN AFTER BREXIT?

Written by ***Noémia Bessa Vilela* & José Caramelo Gomes*****

** Researcher at IJP - Portucalense Institute for Legal Research, UPT - Universidade Portucalense Infante D. Henrique, Porto, Portugal*

*** Full Professor of Law at the UPT - Universidade Portucalense Infante D. Henrique, Porto, Portugal*

ABSTRACT

The ongoing and long-lasting Brexit negotiations seem to be continued in the near future, with the request for the delay of the date that the umbilical cord that links UK and EU will actually be cut.

The actual proceedings in cross-border litigation are sustained by a network of courts, acting in full cooperation and based on mutual trust, assisted by advanced technology allowing evidence to be taken abroad, by the use of internet servers, online questioning of witnesses, etc.

With the decision to opt out, the UK citizens, as well as their all legal citizens will have to be submitted to a regime that falls out of the existing cooperation and network. In the present paper we analyse the options, and the consequences of such decision.

INTRODUCTION

After a – not so peaceful – referendum, the UK has voted to leave the EU. Upon the results of the referendum[i], The United Kingdom (UK), notified the European Council of its intention to leave the European Union (EU), having triggered Article 50 of the Lisbon Treaty[ii]; Putting into motion their withdrawal from the EU that is to become official after two years have passed since their notification of the intention to leave. UK is scheduled to depart EU at 11 pm UK time on Friday 29 March 2019. If it will ever happen is something no one can predict at the time of writing this chapter (1th quarter 2018), but we are inclined to stand up for what our instinct tells us and state that it is not, at all, likely that it will happen in the initially foreseen day.

Although not central to the subject matter, we feel the need to deliver a view on the so-called revocability or irrevocability of article 50 withdrawal notification. In our perspective, article 50 establishes the right of any member-state to withdraw from the Union; a right, not an obligation, inherent to the right to stay in the Union deriving from accession. The notification has, accordingly to the phrasing, two major effects: triggers the negotiation of the withdrawal agreement and sets the date for, in default of an agreement, the ceasing of application of the European Treaties and secondary legislation. The notification itself does not withdraw the member-state from the Union, as an agreement, or default thereof in two years, is required for the withdrawing to take place. As a result, it is our view that a notification of the exercise of a right withdraw that derives from the right of membership is superseded by the right to stay also deriving from membership's rights.

With the deadline for the Brexit agreement already having passed, and the months that have preceded this date it, as will the upcoming, up until the departure, will consist of severe negotiation, with interests from both parties being hindered somewhere along the way and both UK, and EU, represented by Michel Barnier, as Chief Negotiator for the 27 EU countries, target at ensuring the smoothest transition and exit possible, having the first been After the 6th round of negotiations; Still no solution had been found[iii]. Being certain that EU-UK commercial relations will need to be delineated, and modified, and part of the legislation, mostly that which arose from EU law, will require revision and amendments, the biggest challenge to arise from Brexit concerning the UK's very particular jurisdiction and enforcement framework still

remains uncertain, as all EU law may be cast aside, requiring severe changes to the in-force legislation.

THE OPTIONS

As for what the present paper is concerned, it is, as can be understood by reading through the official Negotiating documents on Article 50 negotiations with the United Kingdom[iv] is already set that the UK will soon no longer be a party to the Brussels I Recast Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (RECAST). This departure from the Regulation will take place from the day the UK ceases to be Member State of the European Union. What this means is, that from the 29th of March 2019 on, the UK no longer be a Member State of the EU, nor will it be a Contracting party to the RECAST Regulation.[v]. Then, another question arises: What does this mean for the future of EU law in the field of civil justice cooperation? The UK government position is that the current regime, or at least its effects, should be continued, by agreement with the EU27 where necessary, post-Brexit. The same opinion is not shared by the EU, which has been consecutively declining any negotiation on the matter[vi].

As for the effective solution, none is yet foreseen, but several are, for sure, being discussed. First, and we will resort to a temporal rule[vii]:

1. The UK could choose to adhere to EFTA, the European Free Trade Association [viii],playing along other four countries, Iceland, Liechtenstein, Norway and Switzerland which would enable them to join in to the *2007 Lugano Convention*[ix] that is, in several aspects very similar to the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[x]**.** Such adhesion would result in an EEA Agreement (Agreement on the European Economic Area) that would guarantee equal rights and demand equal obligations. It would, as well require the respect for all the four freedoms set forth in the Internal Market, from which UK is trying to evade[xi].[xii] [xiii]

2. The UK could, instead, adhere to *The Hague Convention*[xivxv] *of 30 June 2005* on Choice of Court Agreements[xvi xvii xviii]. This Convention was entered into by the EU on behalf of the Member States. Its scope is very restricted as deals exclusively with both jurisdiction and enforcement related issues in those cases where the parties have beforehand agreed on an exclusive jurisdiction clause that confers jurisdiction to the courts of a Particular State. The Hague Convention is an open access Convention, meaning that the UK can join in at any time, do they so wish, but it, unfortunately, does not apply to all subject matter foreseen in the Brussels Recast Regulation.
3. Last, and least, possible output, the EU and the UK could decide to create a bilateral agreement that might be the solution to the aforementioned problems. The creation of a bilateral would undoubtedly provide for a legal framework that would regulate both jurisdiction and cross-border enforcement of judgments. The acceptance of such an agreement between the EU and one State would not be an *unprecedented* act as Denmark opted-out, as can be read in Protocol 22[xix], from EU Justice and Home affair at the time of the Amsterdam Treaty, in force in 1999. Unlike the UK, Denmark did not have any possibility of opting into any Regulation in the area of civil justice. Denmark has ever since tried to reach bilateral agreements with the EU on the application of several civil justice measures. Such agreement could finally be achieved with the entry into force of the Brussels I Regulation, as Denmark was a party to its predecessor, the Brussels Convention dating back to 1968. Opting into the Brussels I Regulation, Denmark was bound to accept the Regulation's revisions, for instance, those now into force by means of the Brussels I Recast as well as any future amendments to come. Failure to comply with such requirement would result in the immediate termination of the agreement. On the question if whether a similar agreement could, or nor, be achieved between the UK and the EU, both possibilities remain open. On the one hand, the winds seem to be in favor of such result, as the UK has been applying most EU civil justice measures. It is important to remember that, the fact that the UK opted out of the European Union, in total, and not of a specific Regulation, in particular, makes all the difference, at it will no longer be a Member State. As for Denmark, regardless of its position concerning civil justice matter, it is a Member State, while the post-Brexit United Kingdom will be a third State. On the other hand, and unlike the UK, Denmark has never tried to evade from the effects, in the Member States, of the Case Law of the

> Court of Justice of the European Union (CJEU), having always acknowledged its role, not only in jurisdictional matter but in matter regarding the functioning of the bilateral agreement. The same cannot be expected from the UK as, for many times, they have mentioned their intention to be set free from the Case Law of the Court of Justice of the European Union.

Choosing one of the first two options referred to above will enable the UK to put forward their wish to stop conferring jurisdiction on the CJEU[xx]. The same cannot be said regarding the third, and last foreseen option, that we believe to be one of the primary goals, other than to limit the free movement (entrance into the UK) of people.

THE OUTCOMES

All the three above presented scenarios are, at the moment, nothing but mere speculation. It is more important, in the scope of the present project to actually address the solution that is more likely to replace the RECAST Regulation in the absence other immediate completion of a mutual agreement or bilateral treaty[xxi] on the enforcement of Court decisions arriving from a Court of a Member State, which, in our opinion, presents itself to be the most likely setting.

Discussions have been held, in the UK regarding what is known as "Great Repeal Bill", that, in the words of Résimont *"would repeal 1972 European Communities Acts and would convert the body of existing EU law into British Internal law withdrawing the power of precedent to the decisions of the CJEU, body to which they shall not be bond after the Brexit is final"*[xxii]. There is no technical impossibility in their will, and effective incorporation of the RECAST in the national legislation of the UK, as their legislator can choose to adopt whichever laws, they find convenient. The same can't be said regarding that diploma's effectiveness (when it would come to the UK Courts) in all the other Member States. In fact, upon the decision of triggering of Article 50 of the TFEU, the UK should have made sure they were fully aware of the consequences that would arise. The UK will no longer be a Member State of the European Union, meaning that, it will be exclusively up to the UK itself to recognize and enforce decisions in the way they sole please. As for the behaviour of the Court of the remaining

Member States, the UK will be looked at, as none but a Third State, and the Courts of the Member States, following the into force legislation will have no other option but to apply the jurisdiction rules contained in the Regulation, declining to enforce the judgments rendered in the UK, in according to the rules and principles set forth by the lettering of the Regulation, which is only applicable to the Member States. A partial solution would be to adopt Rome I[xxiii] and II[xxiv] Regulations into national law as those Regulations do not require reciprocity and have *erga omnes* effect, not by the principles of EU Law, but Private International Law. This would come to mean that Member State courts would apply, upon the exit of the UK, Rome I and II Regulations to cases with it connected to. It makes sense for the UK to do the same in order to avoid forum shopping and the possibility of different national laws being applied to the same set of facts. Copying the Rome I and II Regulations would ensure continued uniformity in the area of conflict of laws[xxv].

Regarding the possibility of the application of the Brussels Convention of 1968[xxvi], and, even though we know that this might not keep the UK aside for the Supremacy of the Court of Justice, we believe this to be the most adequate choice as there are, several valid arguments that can be used to defend the adoption of this diploma, and, in fact, if, as we point out as a third option, a bilateral treaty does not come out of the negotiations between the EU and the UK, and given the subject matter under question in the present works, we do believe that Brussels Convention on jurisdiction and enforcement of judgments in civil and commercial matters could once again become the legal document that would govern both jurisdiction and enforcement of a Court decision.

As it can be read in Article 68 of the RECAST Regulation[xxvii], it is clearly stated that RECAST "supersedes" the Brussels Convention of 1968. Besides, Article 71[xxviii] of the same diploma has come to state that it shall not affect any Conventions to which the Member States are part of and which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments. Both the Articles, 68 and 71, seem to have been written in full accordance to enable a continued application of the Brussels Convention, in those cases where it would be the only viable option.

Actually, it was surprising to ascertain that, the Brussels Convention, had never been formally denunciated or abrogated by any of the Contracting States. The lack of such action is suddenly easy to understand if we look at the fact that, this Convention, in particular, cannot be

considered to be EU legislation which implies that, upon joining or leaving the EU, the option to be part of such Convention is not dictated by rules of the European Union, resting on the States to choose to be, or remain, a party to the Convention. The UK's adhesion to the convention dates back to 1978 and, unless they decide to sign-out of the Convention, the UK shall become a Contracting State after the "final cut" from the EU takes place.[xxix].

It has been said that the Brussels Convention was left to remains in force with the sole goal of enabling Member States[xxx] to make use of it when in their relations through the overseas territories and colonies, and that the possibility that it is to be applied to/ made use by Third States was never in the picture[xxxi]. Is this to be considered the correct interpretation, that Third States cannot make use of the Brussels Convention, its post-Brexit resurgence would have to be cast aside, as we already concluded that, the initial intention of that diploma, applying to all Contracting States, was created having in mind that its main goal was to "*implement the provisions of Article 220 of that Treaty by virtue of which they undertook to secure the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals*"[xxxii]. Regardless of the lettering of this previous Article, we do not share the opinion that the Brussels Convention can't be used by Third Countries, meaning that: we don't see any limitation for the UK, after leaving the EU, making use of such diploma, specially based in the fact that, Brussels Convention[xxxiii] still remains into force in the UK at the moment, and there is no reason for it to cease to be. Given this, we believe it shall apply for as long as it is kept into force. The problem does come forward when discussing the collection of e-evidence and the questioning of witnesses by videoconference[xxxiv].

Given that the UK will be taking a step backwards, at least in time, and comparing both enforcement procedures as regulated in RECAST Regulation and Brussels Convention[xxxv], one might say that the functions aimed at with RECAST Regulation could still be partially be guaranteed upon the continued application of the Brussels Convention. It is a fact that the Convention, dating back to the year of 1978, is outdated and in need for several improvements, but still not obsolete for matters regarding its link to those matters addressed and regulated in the RECAST Regulation, significantly younger than the Convention, but still not, in any means, flawless. Significant issues regarding the geographic scope of the older diploma may arise, as it does not cover all the scope, of the same geographic nature, of the RECAST Regulation, as many of the actual 26 Member States were not part of the EU upon the conclusion of the

Convention, nor did they join in afterwards. On the other hand, having been created under the same principles of the 1968 Brussels Convention, The RECAST Regulation contains in its lettering, very similar rules as to those in the Convention.

As for the main differences that can be identified, we can look at the precision of the text, and the lettering of the articles, that can cause interpretative problems due to lack of clarity, mostly in the oldest diploma. Improvements have been taking place since 2001, as it can be read in point 19 of the Preamble to the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[xxxvi]**:** *"…Continuity between the Brussels Convention and this Regulation should be ensured, and transitional provisions should be laid down to that end…"* and having continued in the RECAST Regulation.

At the moment, as can be read in the national report developed in the scope of the present project, *"A judgment is in principle enforceable without the need to seek permission."* With some exceptions like, *"For example, if the taking control of goods procedure is used, a writ cannot be issued without the leave of the court if six years have elapsed since the judgment was obtained.*[xxxvii] *In addition, if an attachment of earnings order has been made in the County Court, no competing method of enforcement may be used without the leave of the County Court.*[xxxviii]"[xxxix].It should also be pointed out that, *"English law recognises and enforces foreign judgments without a review of the merits of the judgment"*[xl]. If outside of the EU, it applies the Administration of Justice Act (AJA) 1920 and Foreign Judgments (Reciprocal Enforcement) Act (FJ(RE)A) 1933, that, unlike the RECAST Regulation, requires the existence of a registration procedure, the *exequatur,* abolish in the last amendment to the Regulation, aiming at speeding up the enforcement procedure, without requiring any formal recognition act to come before.

As far as enforcement is concerned, it is essential to expose that, according to Position paper on Judicial Cooperation in Civil and Commercial matters[xli], dated from 12 of June 2017, it was agreed that *"The relevant provisions of Union law applicable on the withdrawal date on recognition and enforcement of judicial decisions should continue to govern all judicial decisions given before the withdrawal date."*[xlii] And that the new solution, that is expected to be found in a very near future, shall only apply to those proceedings that are to take place after

the withdrawal. Under the Brussels Convention[xliii], a judgment rendered in another contracting State can only be enforced if there is an order for enforcement issued by the enforcing State. Such an enforcement order needs to be requested by any party that has the standing to do so. A list of all courts that have jurisdiction in each of the Contracting States can be found in the Convention itself in Section 2, on Enforcement, Articles 31 to 45. The procedure seeking enforcement, being an *ex parte* procedure, is governed by the law of the State where enforcement is sought. Just as the RECAST Regulation, the Brussels Convention also provides for, in Articles 27 and 28, limited reasons for refusing recognition of a decision from a foreign Court.

The procedure itself differs significantly, between the Convention and this new and improved diploma that aims at regulating the same matters. Significant changes have been made over the years that aim a simplifying the procedure, and the adoption of the old Convention comes as a colossal step back in procedural matters, as the abolishing of the *exequatur*, came to speed the whole procedure, simplifying the Court's, and Judge's, work, having provided for an immediate enforceability of those judgement coming from the Courts of the Member States, increasing trust in the judiciary, and cooperation between the different Courts of the different Member States, without the need for intermediate proceedings in the enforcing State. The Protocol of 3 June 1971, annexed to the Brussels Convention, sets on the Court of Justice of the (former) European Community, now CJEU, the power and obligation of interpreting the Brussels Convention, itself. Ergo, the Brussels Convention comes to offers the same possibilities as the RECAST Regulation in regards to consistent interpretation.

CONCLUSIONS

There is massive and understandable speculation on the effective – and practical - consequences of Brexit, even if it will ever happen. As far as Brussels I Recast Regulation's functions, the question that lingers is: Will the effectiveness of the Regulation remain fulfilled after Brexit? Now, as the previous tentative agreements have failed, it does not look that there will be so.

Nonetheless, default of such an alternative, the likeliest outcome seems to be an adoption of the Brussels Convention which could safeguard both parties based in the UK and those in the one of the Member States. The three options put forward in the beginning prove themselves to be of very low probability of succeeding, even though the solution would reside, of course, in the creation of a bilateral agreement, that, at the moment, does not seem very likely to happen. We, therefore, are of the opinion that the Brussels Convention would still be a possible, although not satisfactory, solution: there are several limitations to its application, mostly of geographic nature and legal solutions provided thereof.

The odds are entirely in favor of the choice of this diploma to "solve the issue" which will result in a step backwards, as the UK, and its relation in judicial (commercial and civil) we will have been moving several years backwards, as the improvements that have been made to the text of the Brussels Convention throughout the years would be as they had never existed, not granting the UK the same rights and guarantees, as were granted in the pre- Brexit set, when the UK was a full Member State of the European Union.

The fact is that if Brexit actually takes place, it will leave a large gap in the area of civil justice and judicial cooperation. This will be the consequence of the non-applicability of EU Regulations covering this matter. Such a step back will have impact on individuals as well as companies that need to engage in cross-border litigation. The current regime cannot, in its entirety, be maintained unilaterally via a Great Repeal Bill, as the Brussels I Recast and II bis Regulations require reciprocity. This means that even if the UK would continue to enforce Member State judgments without any formalities, EU Member States would not be obliged to do the same.

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[i] On a turnout of 72.2 per cent, a majority (51.9 per cent) voted to leave.

[ii] **Article 50** 1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements. 2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament. 3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period. 4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it. A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union. 5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.

[iii] All information on the meeting and consensus reports are available online at the commissions website at: https://ec.europa.eu/commission/brexit-negotiations/negotiating-documents-article-50-negotiations-united-kingdom_en?field_core_tags_tid_i18n=351&page=1

[iv] Available online at: https://ec.europa.eu/commission/brexit-negotiations/negotiating-documents-article-50-negotiations-united-kingdom_en

[v] For further reading: Mukarrum Ahmed, *Brexit and English Jurisdiction Agreements: The Post-Referendum Legal Landscape*, 27 EUROPEAN BUSINESS LAW REVIEW 989(2016)..

[vi] See Damian Taylor; Robert Brittain, *Brexit,* in The Dispute Resolution Review - Edition 10, Chapter 1, The Law Reviwers (2018)

[vii] *Following closely Nicolas; Résimont, Jurisdiction and Enforcement of Judgments Post-Brexit: State of Play at https://www.lexology.com/237/author/Nicolas_R_simont/.*

[viii] For more information on EFTA, check, online http://www.efta.int

[ix] CONVENTION on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, also known as Lugano Convention of 16 September 1988, available online at: http://ec.europa.eu/world/agreements/downloadFile.do?fullText=yes&treatyTransId=13041

[x] available online at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001R0044:en:HTML

[xi] The 'four freedoms' of the European Union are the freedom of movement of goods, people, services and capital over borders. These key principles lie at the heart of the EU and underpin the single market, originally known as the common market. The freedoms, which are enshrined in EU treaties, aim to remove trade barriers and harmonies national rules at a EU level.

[xii] This would leave out Common Agriculture and Fisheries Policies (although the Agreement contains provisions on various aspects of trade in agricultural and fish products);Customs Union; Common Trade Policy; Common Foreign and Security Policy; Justice and Home Affairs (even though the EFTA countries are part of the Schengen area); or Monetary Union (EMU).

[xiii] For a deeper insight on the Lugano Convention: Brooke Adele Marshall, *Imbalanced Jurisdiction Clauses Under the Lugano Convention*, 24 ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT (2016).

[xiv] The *Hague Convention of 30 June 2005 on Choice of Court Agreements* is aimed at ensuring the effectiveness of choice of court agreements (also known as "forum selection clauses") between parties to international commercial transactions. By doing so, the Convention provides greater certainty to businesses engaging in cross-border activities and therefore creates a legal environment more amenable to international trade and investment.

[xv] Brooke Adele Marshall, *The Hague Choice of Law Principles, CISG and PICC: A Hard Look at a Choice of Soft Law*, AMERICAN JOURNAL OF COMPARATIVE LAW (2018).

[xvi] See id. at.

[xvii] Also Aude Fiorini, *Judicial Discretion in Light of the New European Rules on Jurisdiction in Civil and Commercial Matters: Reform or Continuity?* , 1 HANYANG JOURNAL OF LAW 67-93(2014).

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[xxvi] Available online at: https://curia.europa.eu/common/recdoc/convention/en/c-textes/brux-idx.htm
[xxvii] *Article 68* - 1. This Regulation shall, as between the Member States, supersede the 1968 Brussels Convention, except as regards the territories of the Member States which fall within the territorial scope of that Convention and which are excluded from this Regulation pursuant to Article 355 of the TFEU. 2. Insofar as this Regulation replaces the provisions of the 1968 Brussels Convention between the Member States, any reference to that Convention shall be understood as a reference to this Regulation.
[xxviii] Article 71 - 1. This Regulation shall not affect any conventions to which the Member States are parties and which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments. 2. With a view to its uniform interpretation, paragraph 1 shall be applied in the following manner: (a) this Regulation shall not prevent a court of a Member State which is party to a convention on a particular matter from assuming jurisdiction in accordance with that convention, even where the defendant is domiciled in another Member State which is not party to that convention. The court hearing the action shall, in any event, apply Article 28 of this Regulation; (b) judgments given in a Member State by a court in the exercise of jurisdiction provided for in a convention on a particular matter shall be recognised and enforced in the other Member States in accordance with this Regulation. Where a convention on a particular matter to which both the Member State of origin and the Member State addressed are parties lays down conditions for the recognition or enforcement of judgments, those conditions shall apply. In any event, the provisions of this Regulation on recognition and enforcement of judgments may be applied.
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[xl] idem
[xli] Available online at: https://ec.europa.eu/commission/sites/beta-political/files/essential-principles-civil-commercial-matters_en_0.pdf

[xlii]Applicable legislation: Jurisdiction and enforcement of judgments in civil/commercial matters (Regulation (EU) No 1215/2012, Regulation No 44/2001, and Union instruments referred to in Article 67 of Regulation (EU) No 1215/2012, such as the General Data Protection Regulation (EU) 2016/679);

[xliii] For more information Ksenija Vasiljeva, *1968 Brussels Convention and EU Council Regulation No. 44/2001: Jurisdiction in Consumer Contracts Concluded Online*, 10 EUROPEAN LAW JOURNAL 123-142(2004).