The enforcement of jurisdiction after Brexit

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A. Introduction

On June, 23rd 2016, approx. 52 % of British citizens voted to leave the European Union and to force their government to trigger Article 50 of the Treaty on European Union (TEU). Art. 50 TEU allows member states to withdraw their membership from the European Union after two years of negotiations on the future relationship of the leaving nation and the Union itself.

On March 29 2017 the government of the United Kingdom has officially declared its decision to leave the EU and begun to negotiate the terms and conditions of its leave. Once the exit negotiations have successfully concluded, the UK will most likely lose its (full) member status alongside the ability to profit from the unified legal provisions such as legislature on the enforcement of foreign court verdicts from another member state. Since it is crucial for any country that does international business to be a reliable partner when it comes to the enforcement of foreign jurisdiction as well as providing its own citizens with the ability to enforce claims abroad, new ways to deal with those matters need to be found.

Currently the EU has several treaties with non-member states on how to enforce foreign jurisdiction, that might be a way for the United Kingdom to maintain its ability to be a reliable partner for foreign citizens as well as its own in terms of the enforcement of a verdict.

The objective of this paper is to illustrate the status quo as well as possible approaches for the future and illustrate their advantages and problems.
B. A Bit Of History & Status Quo

Originally the recognition and enforcement of judgments (in civil and commercial cases) was accomplished by the 1968 Brussels convention. This treaty was mostly replaced by the 2001 Brussels I Regulation (Regulation (EC) No 44/2001). The Brussels I Regulation was the primary piece of legislation in the Brussels framework from 2002 until January 2015. In 2012, the EU drafted a recast Brussels I Regulation that aimed to replace the 2001 regulation. Since 10 January 2015, the (recast) Brussels I Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters applies (Regulation (EU) No 1215/2012).

The Brussels Regulation is the key European instrument on jurisdiction and enforcement issues in civil and commercial matters. It contains a jurisdictional regime: the rules which courts of European Union Member States use to determine if they have jurisdiction in cases with links to more than one country in the European Union. It is applied by the courts of all (still) 28 EU member states and covers the jurisdiction of courts and the recognition and enforcement of judgments in cross-border disputes within the EU. It applies to court proceedings initiated, produced or concluded from January 10th 2015 onwards and is non-applicable to solely national matters as well as proceedings related to arbitration.

The Brussels Ia Regulation introduced several changes compared to its predecessor in order to specifically deal with its issues.

1. New provisions in Articles 18 and 6 are aiming at strengthening the rights of consumers. Now, consumers can always bring proceedings in the court located in their place of domicile, even if the trader against which proceedings are brought is not domiciled within the territorial scope of the Brussels I Regulation. Under the 2001 Regulation that was only possible if the trader
was located within the territorial scope of the Brussels I Regulation. However, the opposite party must pursue some form of commercial activity within the European Union, even though an actual physical presence is no longer required.

2. Furthermore, the so called exequatur-proceedings have been abolished. Before the revised Regulation, the enforcement of a judgement from one member country in another required a second court (in the other member state) to declare it enforceable. This could take several months, cost additional money and provided little to no benefit to the parties involved or the justice system overall. Now Articles 36 (1) and 39 provide that no declaration of enforcement is needed any longer. The same goes for court settlements and the enforcement of authentic instruments. All that is required from the creditor now is to obtain a “certificate of enforceability” pursuant to Article 53 or Article 60 from the court that gave the ruling in the first place. However this approach poses a certain risk of unlawful enforcement for the debtor which is why the EU has implemented several mechanism to minimize potential problems. Firstly, the certificate must be translated into the language of the debtor. Secondly, the debtor has the right to appeal the enforcement according to Article 46. Lastly, national anti-enforcement actions of the state in which the ruling is supposed to be enforced are applicable.

Under the redrafted Regulation, as opposed to its 2001 predecessor, a court does not have to accept and decide a case if the same manner is already pending at another court in a non-member state. However the court is free whether or not it decides to proceed and can halt as well as continue such cases as it sees fit. The sole requirements being that the judgment of the court in the third state will be enforceable in the Member State and that the proper administration of justice is guaranteed.

C. Possible approaches

I. „Hard Brexit“

Should the negotiations between the UK and the EU end without a viable result, the UK will lose its member status without any replacement treaty in effect. This so called “Hard Brexit” would have
unpredictable effects on the economies of both the UK and the EU member states. It would remain unclear as to how the enforcement of jurisdiction could be realized without a clear legal framework to do so. The current Brussels Regime would become inapplicable.

This outcome, even though politically desired by some, is the worst case scenario in terms of legal certainty and poses a substantial risk to creditors all over Europe as well as the UK. It cannot be stressed enough, that international trade requires the ability to easily enforce locally obtained court verdicts against debtors abroad as well as clear regulations on which court in what country is in charge if the parties involved did not choose one by themselves.

II. Entering Lugano Convention

In 1988 six members of the then European Free Trade Association (EFTA) signed the Lugano Convention with the then 12 member states of the European Union. Those EFTA-members were Norway, Iceland, Switzerland, Austria Finland and Sweden.

In 2007 the Regulation was replaced by it´s successor, the „Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters“. At this time only Iceland, Norway and Switzerland signed the treaty, because the other states had joined the European Union.

The treaty was created to regulate cross border legal disputes in the field of tort, contract and commercial law. It was negotiated on the basis of the Brussels Convention and interpreted by the European Court of Justice. There are three additional protocols to avoid a differing application of the two regulations.

Article 38 to Article 56 contain regulations on the enforcement of jurisdiction. Article 38 of the Lugano Convention regulates the canon of the enforcement:
“A judgment given in a State bound by this Convention and enforceable in that State shall be enforced in another State bound by this Convention when, on the application of any interested party, it has been declared enforceable there.

However, in the United Kingdom, such a judgment shall be enforced in England and Wales, in Scotland, or in Northern Ireland when, on the application of any interested party, it has been registered for enforcement in that part of the United Kingdom.”

The other regulations govern the application to court and the procedure after submission. Furthermore there are regulations on exclusive jurisdiction agreements.

Article 38 could provide a good expedient to the UK. Especially, because it would be possible to enforce a claim in every state bound by the Lugano Convention. Hence there will be an ample scope for every member. Though there is a special provision for the UK in Article 38, which requires a registration of enforcement in England, Wales, Scotland oder Northern Ireland. Up until now, this regulation only applied to the EFTA-members. After Brexit the UK will effectively be treated like them, so the enforcement of jurisdiction will require a special registration in a part of the UK.

A further disadvantage is be the necessity of an application. Despite the thorough regulations on the procedure for applying, it will take time and money. The biggest downside of the convention is the exequatur proceedings. They can be found in Article 39 read in conjunction with the Annex II. The application must be filed in the state of jurisdiction. That is the biggest difference to the Brussels Ia Regulation and will cause more practical problems for the UK.

Moreover a second judge has to decide and under certain circumstances the application will be rejected. Even if the judge rules in favor of the applicant there is always a possibility of an appeal from the other parties. Article 43 grants this right to the opposing parties. According to that, not only
can the jurisdiction be dismissed with an appeal, but also the enforcement itself. After such an appeal, even more time will pass before the claim can be enforced. Attention is also to be paid to the status of the Lugano Convention. It is build like the 2001 Brussels Regulation, which was replaced by the Brussels Ia Regulation. Therefore it would be a downgrade for the UK.

III. Ratifying the Hague Choice of Courts Convention

The UK could also sign the „Hague Convention on Choice of Court Agreements“. Currently, the Convention applies to the UK, because the European Union also signed it, but after the Brexit, joining this agreement will be possible and necessary.

It was drafted in 2005 and set to enter into force in respect of Mexico and the EU Member States (excluding Denmark). On October, 19 2005 a different agreement with Denmark was reached that extended to scope of the convention to Denmark as well. Finally in 2009, Singapore and the US joined this agreement.

Because of the number of states that signed this agreement, there is no significance in global terms, but a way to solve the problem of enforcement.

The chosen courts must be a regular court of the contracting state or a specific one. For instance, a general court would be „the courts of Italy/ UK/ France/ Germany“ and a specific would be „the Commercial Court of Stockholm/ Vilna/ Riga“. Then any other court must be excluded.

After signing, the UK could be given exclusive jurisdiction by the contracting parties. This is the main content of the Agreement. Every contracting states has to obey exclusive jurisdiction agreements.
This is governed in Article 5 and 6 of the agreement.

Article 5:

„The court or courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State. “

Article 6:

„A court of a Contracting State other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies unless - (...).“

Article 6 is followed by exceptions of the exclusive jurisdiction. The enforcement of the jurisdiction is regulated in Article 8:

„A judgment given by a court of a Contracting State designated in an exclusive choice of court agreement shall be recognized and enforced in other Contracting States in accordance with this Chapter. Recognition or enforcement may be refused only on the grounds specified in this Convention. “

Article 5 is not only necessary to force the Contracting States to make an agreement, but also gives a exception to the requirement that the chosen court must hear the case. However this is just possible if „the agreement is null and void under the law of the State“.

Another regulation is to find in Article 19:

„A State may declare that its courts may refuse to determine disputes to which an exclusive choice of court agreement applies if, except for the location of the chosen court, there is no connection between that State and the parties or the dispute. “
With this a state can maintain, that a dispute will not be determined if there is no without a connection between the state and the party. The UK could dispose itself from such cases. Similar regulations will be find in Article 20. This Article gives a permission to refuse to enforce a claim „if the parties were residents in the requested State and the relationship of the parties and all other elements of relevant to the dispute, (...) were connected only with the requested State“.

By signing the agreement the UK will be treated like any other non-member state. The problem will be, that this regulation is limited to instances where the parties already have agreed upon an exclusive jurisdiction agreement in favor of a court of a contracting state. Unfortunately in the current European enforcement regime, this is the general case. Furthermore the UK will feel pressured into joining a group to collaborate with the European Union. Under the certain circumstances of the political strategy in the UK it is vague to anticipate, that UK will sign new collaborations. Moreover there must be a regulation with Denmark, because they didn't sign the convention. To that effect the agreement isn't conclusively regulated enough to give a final concept for UK.

At last the biggest disadvantage will be that this regulation will on apply the jurisdiction, but the enforcement is not conclusively regulated. Therefore it cant be a possible approach for the UK.

IV. Revering the Brussels Convention on Jurisdiction and Enforcement of Judgement

On 27 September 1968, the (then) 6 Member States of the European Communities, acting under Article 220, fourth indent, of the Treaty establishing the European Economic Community, concluded the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. The “Brussels Conventions” are defined as the Brussels Convention 1968, the 1971 Protocol to that Convention, and certain related Accession Conventions.
The Convention sought to avoid parallel legal proceedings within the Community, to simplify the recognition and enforcement of judgments and to strengthen the legal protection afforded to citizens of the Member States. It included detailed rules dealing with the circumstances under which the courts in the Member States might exercise jurisdiction and rules addressing specific civil and commercial legal areas including contract, tort and maintenance. It was amended and extended on subsequent occasions following the accession of the United Kingdom and other states to the European Community.

The Convention is to be interpreted as precluding the grant of an injunction whereby a court of a Contracting State prohibits a party to proceedings pending before it from commencing or continuing legal proceedings before a court of another Contracting State, even where that party is acting in bad faith with a view to frustrating the existing proceedings.

The UK acceded to the Brussels Convention in 1978 and it became part of UK law under the Civil Jurisdiction and Judgments Act 1982. It represented an important progress in the cooperation, but reached in a form of an international convention, which brought up difficulties. For example new Member States had always the obligation to ratify the convention with all its updating, so in the end of ratification there were at the same moment different versions of it between different Member States all over the EU.

Article I stated concerning the jurisdiction:

“This Convention shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters. […]"
Article 2 stated the subject to the provisions of the Convention, namely to sue persons domiciled in a Contracting State, regardless of their nationality, before the court of that state. Persons who were not nationals of the state in which they were domiciled should be governed by the rules of jurisdiction applicable to nationals of that state. Contemplated in Article 25 concerning the recognition was, that for the purpose of the Convention, “judgment” meant any judgment given by a court or tribunal of a Contracting State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court.

Article 26 stated:

“*A judgment given in a Contracting State shall be recognized in the other Contracting States without any special procedure being required.*

[...]

The following articles stated various reasons why a judgment should not be recognised. Article 29 stated that under no circumstances a foreign judgment might be reviewed as to its substance.

Concerning the enforcement Article 31 stated:

“*A judgment given in a Contracting State and enforceable in that State shall be enforced in another Contracting State when, on the application of any interested party, it has been declared enforceable there.*

However, in the United Kingdom, such a judgment shall be enforced in England and Wales, in Scotland, or in Northern Ireland when, on the application of any interested party, it has been registered for enforcement in that part of the United Kingdom."*[Second subparagraph added by Article 15 of the 1978 Accession Convention] “
Contemplated in Article 34 is that the party against whom enforcement was sought should not at this stage of the proceedings be entitled to make any submissions on the application. The court applied should give its decision without delay. The obligor could appeal against the decision within one month of service thereof if the enforcement was authorized, respectively two months if that party is domiciled in a Contracting State other than that in which the decision authorizing enforcement was given.

The 1988 Lugano Convention is a parallel convention to the 1968 Brussels Convention. It has largely been superseded by Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the 2001 Brussels Regulation) or by Regulation (EU) 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (Recast Brussels Regulation), except in relation to matters concerning dependent territories of Brussels Convention countries. Today the convention applies between the members of the European Union before 2014 and certain territories of EU member states which are outside the Union. In the case of the French Republic, these are the French overseas territories and Mayotte, and for the Netherlands, Aruba.

The UK courts follow the Recast Brussels Regulation because it is part of EU law and the European Communities Act 1972 obliges them to do so. When the UK leaves the EU, that obligation will fall away. Parliament may choose to enact new rules post-Brexit but, if not, what rules will take the place of the Regulation by default? Section 2(1) of the Civil Jurisdiction and Judgments Act 1982 provides at least part of the answer. It states:

„The Brussels Conventions shall have the force of law in the United Kingdom, and judicial notice shall be taken of them. “
Section 1(4) of the Civil Jurisdiction and Judgments Act 1982 does purport to provide for a hierarchy of rules as between the Recast Brussels Regulation, the Brussels Conventions, the Lugano Convention and the 2005 Hague Convention. However, the UK is only bound by the Recast Brussels Regulation, the Lugano Convention and the 2005 Hague Convention to the extent that it remains a Member State of the EU. The Lugano and Hague Conventions were signed by the EU, not the UK.

So this means:

1. If Parliament were to do nothing in this area, then upon Brexit the old rules in the Brussels Convention of 1968 would re-emerge to the fore. There are substantial differences between the Brussels Convention and the Recast Brussels Regulation. Notably, states which joined the EU in 2004 and since have not acceded to the 1968 Convention.

2. The 1971 Protocol to the Brussels Convention would also re-emerge to the fore. This Protocol gives the CJEU jurisdiction to rule on questions referred to it by courts of the UK on matters concerning the Brussels Convention. It operates in much the same way as Article 267 TFEU, which gives the CJEU jurisdiction to rule more generally on preliminary references.

V. New treaty: Brussels Ia

A somewhat simple approach could be the signing of a new treaty that contains the same rules and regulations as the Brussels Ia Regulation. Such a treaty would maintain the status quo and ensure legal certainty on both the UK and the EU. However, it would effectively grant the UK rights similar to those of a member state. That outcome might not be politically viable.
VI. Non-exclusive jurisdiction in the UK

There is the possibility to give non-exclusive jurisdiction to the English courts. With this, the parties choice of courts will be hedged and at the time it will be necessary, the position can be reconsidered. If the English judgement is enforceable in the European Union, the English court can be used. If this is not the case, it will allow the use of other courts. With this system there will be a great uncertainty in the usage of a court. It will only depend on the enforceability of the judgement.

There is also a variation of the non-exclusive jurisdiction, the asymmetric or unilateral jurisdiction clauses. This is mostly used in border finance contracts. With this, one party is bound to a particular jurisdiction, while the other party is permitted to commence proceedings in any competent court. Unfortunately France's highest court declare these clauses to be invalid. The biggest objection was the contradiction to Article 23 of the Brussels I Regulation and Article 23 of the Lugano Convention. Despite an English High Court that ruled that these clauses are valid according to English law.

With this multitude of different legal opinions, this instrument will cause much trouble in terms of practical use. On the other Hand with this system the UK would not have to sign any agreements or contracts. This might prove handy to the All-Or-Nothing strategy of U.K. Prime Minister Theresa May.

VII. Ratifying New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards was adopted by a United Nations diplomatic conference on 10th June 1958 and entered into force on 7th June 1959. The Convention requires courts of contracting states to give effect to private agreements to arbitrate
and to recognize and enforce arbitration awards made in other contracting states. Though other international conventions apply to the cross-border enforcement of arbitration awards, the New York Convention is by far the most important as widely considered as one of the key instruments in international arbitration.

Parties to the convention include almost all countries in Americas, Europe, including the UK, large parts of Asia, Oceania, and about 50% of Africa. In March 2017 the convention was signed by 157 states, which include 154 of the 193 United Nations member states.

The convention has 2 goals:

- Recognition and enforcement of arbitration agreement in Article II (3):

  
  “The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.“

- Recognition and enforcement of foreign arbitral award in Article III:

  “Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.“

By an arbitration agreement a party undertakes:
- to refer any disputes to arbitration
- to take part in the proceedings in good faith
- to carry out the rendered award

Under the Convention, an arbitration award issued in any other state can generally be freely enforced in any other contracting state, only subject to certain, limited defenses which are written down in Article V. These defenses are:

1. a party to the arbitration agreement was, under the law applicable to him, under some incapacity, or the arbitration agreement was not valid under its governing law;

2. a party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings, or was otherwise unable to present its case;

3. the award deals with an issue not contemplated by or not falling within the terms of the submission to arbitration, or contains matters beyond the scope of the arbitration (subject to the proviso that an award which contains decisions on such matters may be enforced to the extent that it contains decisions on matters submitted to arbitration which can be separated from those matters not so submitted);

4. the composition of the arbitral tribunal was not in accordance with the agreement of the parties or, failing such agreement, with the law of the place where the hearing took place (the "lex loci arbitri");

5. the award has not yet become binding upon the parties, or has been set aside or suspended by a competent authority, either in the country where the arbitration took place, or pursuant to
the law of the arbitration agreement;

6. the subject matter of the award was not capable of resolution by arbitration; or

7. enforcement would be contrary to "public policy".

Additionally, there are three types of reservations that countries may apply:

1. Conventional Reservation - some countries only enforce arbitration awards issued in a Convention member state.

2. Commercial Reservation – some countries only enforce arbitration awards that are related to commercial transactions.

3. Reciprocity reservation – some countries may choose not to limit the Convention to only awards from other contracting states, but may however limit application to awards from non-contracting states such that they will only apply it to the extent to which such a non-contracting state grants reciprocal treatment.

States may make any or all of the above reservations. Because there are two similar issues conflated under the term "reciprocity", it is important to determine which such reservation (or both) an enforcing state has made.

Post-Brexit, the UK will remain party to the New York Convention, and thus its obligations under the treaty will not be affected by any departure from the EU. Following Brexit, agreements to arbitrate
in the UK, and any resulting awards, will thus continue to be enforceable across all other 156 Contracting States, including EU Member States. Likewise, agreements to arbitrate in any Contracting Party to the New York Convention, including in any EU Member States, and any resulting awards, will remain enforceable in the UK.

D. Summary and conclusion

All of the above mentioned approaches provide more or less benefit.

With the “Hard Brexit” approach, only the New York Convention will define the rules on jurisdiction with an EU Member State. However the convention only applies to arbitral cases. Therefore it will not be a sufficient approach to regulate the whole system in terms of jurisdiction and enforcement. Like aforementioned, this will be the worst scenario for the UK, but is certainly a possible outcome.

A better solution would be to sign a new contract or join an already existing one. But which treaty provides the most advantages for the signing parties?

The Hague Convention is not a sufficient approach. Not only is Denmark not included and would require another agreement, also there must be exclusive jurisdiction agreements every time. This is somewhat easier for the EU Member States, because there are only three nations that require an agreement. On the other side the UK will be confronted with all other EU Member States. The UK is in a different position like Mexico and Singapore. They are far more reliant on the EU. There will be quite a few more agreements necessary than with the other states. According to that this solution isn't much practical.

The same goes for a non-exclusive jurisdiction approach. Because of its uncertain usability this solution is not fitting.

Revering in the Brussels I Convention on Jurisdiction and Enforcement of Judgement could be a solution, but is more than a downgrade for the UK. The rules that will apply are older than the current ones. Therefore all innovations of the Brussels regulation to the Brussels Ia Regulation from 1968 to
2001 would be invalid for UK. Furthermore the fact that some member states didn't acceded to the 1968 convention will cause a lot of problems for practical use.

A better way would be to enter the Lugano Convention. Those regulations are far more up to date than all other, except for the Brussels Ia Convention. But as was mentioned beforehand, the Lugano Convention has a big disadvantage: the exequatur proceedings. Those proceedings were dismissed in the Brussels Ia Regulation as mentioned above.

The result is, that a new treaty with the same regulations as the Brussels Ia Regulation would be the final and most practical approach.

The UK will most likely become independent from the European Union and all of its rules and regulations. However the economically most suitable solution would be for the UK as well as the members of the European Union to maintain a status that is at least comparable to the pre-Brexit situation. But that is not what certain political forces want to achieve. It is more certain, that they will accept a downgrade in terms of practicability regarding jurisdiction and enforcement, than staying in the current relationship to the European Union.

By considering that the best way isn't the most likely in terms of politics, the next possible and logical step is to simply enter the Lugano Convention, in order to find an acceptable solution to the problem of jurisdiction and enforcement after Brexit.