GEDIP, Subgroup Meeting on Brexit, 20-21 January 2017 - Minutes

I. Preliminary remarks and outline

The subgroup approached its mandate primarily with a view to ensure, as far as possible, continuity of the current European Union private international law legislation to the future relationships of the Union with the United Kingdom. The adoption of this approach did not intend to reflect in any way a political position of the GEDIP, but rather to identify ways and means to ensure continuity if this were the desire of the UK (as expressed by its Prime Minister on 16 January 2017) and of the EU (which has not made its position clear so far). Should the Parties to the negotiations concerning Brexit take a different approach, it is the view of the subgroup that it should decide at a later stage how to help in finding appropriate and viable solutions.

The subgroup identified three main approaches to guarantee continuity in private international law (PIL) after Brexit:

1. A unilateral transposition of existing EU legislation in the field of PIL. This solution might be part of the "repeal law" after Brexit.
2. A bilateral treaty between the UK and the EU that ensures the continuous application of EU legislation in the field of PIL (hereinafter: the "Danish solution" espoused by the Agreement between the EU und Denmark, OJ 2005 L 299/62).
3. A multilateral treaty-based solution requiring the UK to enter into international Conventions with the EU, such as the Lugano Convention in the field of jurisdiction (hereinafter: the "Lugano solution").

The unilateral transposition of EU Regulations such as the Rome I and Rome II Regulations into national British law could be put into effect by the "repeal law" announced; it would, however, raise the question of interpretation. Preliminary references to the CJEU do not seem to be politically viable after Brexit. However, the UK courts could be bound by CJEU judgments: Denmark has accepted a similar solution in the agreement between the EU and Denmark on jurisdiction and the recognition and enforcement of judgments. The UK could lodge a unilateral declaration to this effect in its domestic law either for pre-Brexit case law. For post-Brexit case law the UK could impose a "soft duty" on its courts to take it into account. The unilateral solution does not help with regards to Brussels I*bis*, Brussels II*bis* etc.

With regard to a treaty-based solution, the subgroup briefly considered the possibility of revitalising pre-existing Conventions, in particular the Brussels Convention which was excluded since that Convention is clearly confined to Member States. Returning to the pre-Brussels state of the law would amount to a re-bilateralisation of PIL which is highly undesirable and would petrify the law, since the remaining EU Member

States do not have treaty-making powers in the field of PIL anymore. The subgroup also mentioned the possible future role of the Hague Conference.

The subgroup underlined the importance of a transitional regime in the event that no continuity regarding the PIL rules is achievable. In jurisdictional conflicts, for example, the following issues should be considered:

- The question of *lis pendens*, for example, would arise if proceedings were commenced in the UK before Brexit and the same case was later brought before the courts of a Member State after Brexit.
- Different rules might govern recognition and enforcement: What happens if a judgment is recognised *ipso iure* under the old regime but enforcement takes place under the post-Brexit rules?

As a starting point, the subgroup discussed the degree to which the various existing EU PIL-regimes are linked to the Single Market and the four "market freedoms". Against this backdrop, the subgroup asked whether the "Lugano solution" and/or the "Danish solution" would be best with regard to choice of law (II) and jurisdiction (III).

II. Choice of law

1. Rome I and Rome II Regulations

The subgroup agreed that the Rome I and Rome II Regulations should be transposed into UK law and that it is, moreover, highly recommendable that a solution be found with regard to the interpretation of these instruments. The subgroup stressed that judgments rendered by the CJEU before Brexit should remain binding. CJEU judgments after Brexit should at least be paid due regard by UK courts; given the small number of judgments on the Rome Regulations this obligation is of paramount importance for their uniform application. Moreover, a reciprocal solution was considered that requires the CJEU and the courts of the Member States to also pay due regard to UK judgments.

The subgroup identified several provisions of the Rome I and Rome II Regulations in need of modification:

- Provided that the UK will transpose the Rome I and Rome II Regulations into British law, the precedence of EU law as enunciated in art. 3(4) Rome I and art. 14(3) Rome II may give rise to problems for UK courts.
- As regards insurance contracts, art. 7 Rome I Regulation and in particular art. 7(1) and (3) require particular attention since they refer to risks located in the Member States.

2. Company law

Under the assumption that freedom of establishment will cease to exist, the following issues will arise:

- Given the diverging rules (e.g. “real seat-theory” in Germany for third-state companies and generally in Belgium), UK companies will no longer be recognised in certain continental jurisdictions. The subgroup pointed to a previous GEDIP-proposal on PIL and company law which, if signed into law by the EU, might help. It was, moreover, called into question whether UK companies having their central administration in the remaining EU countries would really cease to exist on the Continent. French courts, for example, drew upon the ECHR to justify the continued existence of legal persons. The subgroup underscored the importance of protecting the “droits acquis”.
- The SE Regulation should continue to apply as national UK law and might therefore offer a viable solution for some companies. After Brexit, however, new SEs cannot be established with a seat in the UK.

3. Unitary intellectual property rights (IP rights)

The subgroup underlined the economic importance of unitary IP rights such as the Community Trademark. The subgroup concluded that such IP rights registered before Brexit should continue to be recognised in the UK and discussed ways of protecting IP rights after Brexit.

The subgroup identified problematic issues and in particular jurisdictional questions after Brexit: Under the present system, for example, procedures for contesting a Community Trademark involve the Office for Harmonisation in the Single Market as well as the CJEU.

The subgroup proposed that the solution presently envisaged for the EU Patent should be extended to other unitary IP rights.

4. Posting of Workers Directive

The subgroup underlined that the rules of the Directive 96/71 on the posting of workers are closely linked to free movement. As regards PIL, two issues may arise:

- The Directive contains special provisions on jurisdiction, art. 6. This raises the question whether this regime would apply after Brexit.
- Since the UK would be a third country after Brexit, courts in the EU Member States apply UK labour law neither on the basis of the Directive nor arguably by drawing from art. 9(3) Rome I Regulation: UK provisions protecting workers (e.g. minimum wages) are unlikely to render a contract “unlawful”. The subgroup discussed whether the Member States’ courts could take UK provisions into account when interpreting national substantive law (cf. CJEU Case 135/15 – *Nikiforidis*).

III. Jurisdiction

1. Brussels I bis Regulation

The subgroup favoured a “Danish solution” requiring an “opt-in” by the UK. References to “Member States” in the Regulation should be interpreted, by an

appropriate provision, as referring to a "Member State or the UK". The subgroup agreed that the UK should, in addition, accede to the Lugano Convention, possibly after acceding to the European Free Trade Association first.

With regards to individual provisions the subgroup identified several problematic issues: some provisions such as art. 63(2) Brussels I*bis* Regulation would have to be modified.

2. Brussels II bis Regulation

The subgroup also favoured a "Danish solution" with regard to the Brussels II*bis* Regulation. However, several problematic issues were identified:

- The Regulation will be subject to a recast.
- The "procédure préjudicielle d'urgence" (PPU) would no longer be available after Brexit. It would be desirable and might be acceptable for the UK that the CJEU continues to act as defender of the "best interests of the child" (cf. art. 12 II b Brussels II bis Regulation).
- Certain articles must be modified, e.g. art. 3(1)(b) and (2) art. 6 (b); art. 7 (2) Brussels II*bis* Regulation.

3. Service of Documents Regulation and Taking of Evidence Regulation

The subgroup preferred a "Danish solution" given that the service of documents is important for, inter alia, Brussels I*bis*. However, the Taking of Evidence Regulation is less closely connected to Brussels I*bis* Regulation.
The subgroup also pointed to the Hague Conventions regarding the service of documents and the taking of evidence.

4. Insolvency Regulation

The subgroup made the following preliminary observations:

- The Insolvency Regulation is closely linked to the Single Market. Its fate is therefore tied to the question whether there will be freedom of establishment in the future.
- Although there is a connection between the "Danish" Brussels I*bis* solution and the Insolvency Regulation, only the latter really depends on the former. By contrast, the "Danish" Brussels I*bis* solution can exist without a similar solution for cross-border insolvencies.
- UK insolvency law is based on the UNCITRAL model law whereas the Member States' laws usually are not (three exceptions: Greece, Romania, and Poland). Thus, the solutions concerning in particular the recognition of foreign proceedings might differ on both sides of the Channel.

The subgroup discussed a "Danish solution" for insolvency and identified several issues:

- Important choice-of-law provisions are, inter alia, art. 8 (rights in rem), art. 10 (set-off), and art. 13 (employment contracts)

- Problematic provisions on jurisdiction and recognition and enforcement are, inter alia, art. 6(2), art. 32 and Recital (7)

5. "Minor" Regulations on jurisdiction

The subgroup agreed that once a decision is taken on the Brussels I*bis* Regulation, it is also going to affect "minor" Regulations on jurisdiction such as the

- EU Small Claims Procedure Regulation
- EU Enforcement Order for Uncontested Claims Regulation
- EU Payment Order Regulation

6. Fate of Conventions signed and ratified by the EU

As regards Conventions relating to PIL that have been signed and ratified by the EU, such as the Choice of Court Convention, the UK might become a party to these instruments in its own right.

If the "Danish solution" for the Brussels I*bis* Regulation cannot be implemented, the subgroup identified possible transitional problems in view of the Hague Choice of Court Convention: There might be a three-month gap unless the EU authorises the UK to join the Choice of Court Convention before Brexit.