

The Framework for Private Law and Jurisdiction After Brexit

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Private International Law Aspects

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Areas of Concern After Brexit

- A. Judicial Cooperation in Civil and Commercial Matters
- B. Applicable Law to Financial Disputes
- C. Insolvency, especially of Banks and Investment Firms

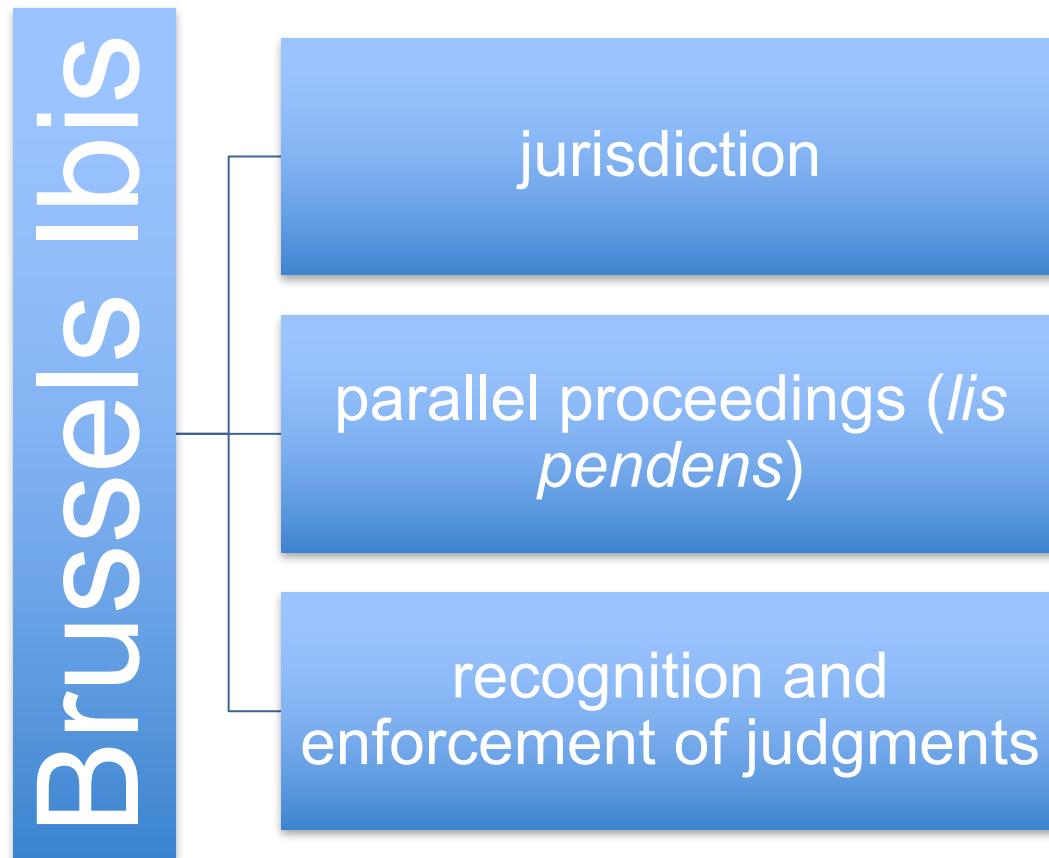
JUDICIAL COOPERATION IN CIVIL AND COMMERCIAL MATTERS

A. Judicial Cooperation

- Why is it important? Examples:
 1. An Italian citizen lodged promissory notes with Lloyds in London, which refused to return them because of their allegedly dubious origin. Where can the Italian citizen sue Lloyds? If he obtains a judgment in the EU, can he enforce it in the UK? (CJEU, *Marinari*, C-364/92)
 2. A German citizen based in Berlin opens a securities account with a brokerage house in London. All of the investor's money is lost. Where can he bring a claim? (see CJEU, *Melzer*, C-228/11)
 3. An Austrian investor buys certificates issued by Barclays. The prospectus turns out to be incorrect. Where can the investor sue? (see CJEU, *Kolassa*, C-375/13)

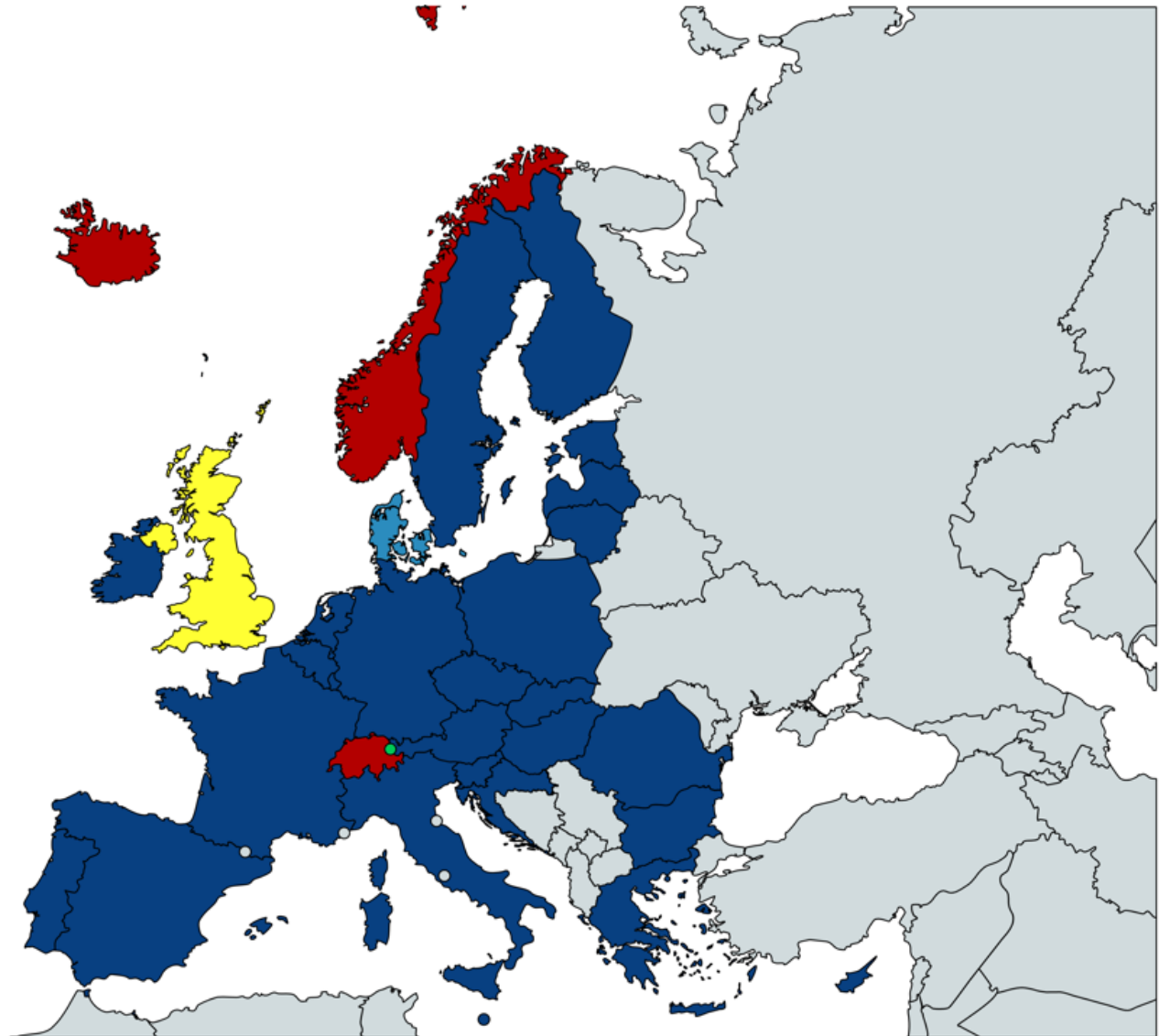
A. Judicial Cooperation

- comprises rules on:



A. Judicial Cooperation

- Brussels I Recast
- EU-Denmark Agreement
- Lugano Convention
- PIL of Liechtenstein
- UK?



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Options After Brexit



Denmark Model

- would maintain status quo of judicial cooperation
- requires parallel Convention between EU and UK



Lugano Convention

- would mean a step back in time
- requires consent by all Lugano parties (EU, Switzerland, Norway, Iceland)



Hague Convention

- restricted to exclusive forum selection clauses in contractual disputes
- UK can adhere to convention by unilateral decision

APPLICABLE LAW TO FINANCIAL DISPUTES

B. Applicable Law

- Why is it important? Examples:
 1. If an EU investor who bought securities from Barclays sues in London, which law will the High Court apply?
 2. A British company enters into a standard contract account with a Dutch bank, under which monies deposited in the account are pledged to the bank as financial collateral for all debts of the customer. The Dutch bank debits a fee to the account. The British bank becomes insolvent and the liquidator does not accept the debit. He sues the Dutch bank in London. Successful?

B. Applicable Law

3. A Czech investor orders a British broker to enter into derivative transactions on the London Stock Exchange. The investor provides margins, which are held in an omnibus account by LCH as the CCP. When the broker becomes insolvent, part of the loss is debited against the omnibus account. The Czech investor claims that this is inadmissible under Art 48(7) EMIR. Will he prevail?

B. Applicable Law

Rome I and II Regulation

- will probably be copied into UK law

Finality and Financial Collateral Directive

- have been transposed into UK law

EMIR

- will probably be copied into UK law to maintain equivalence

B. Applicable Law

- However, problems occur due to Brexit:
 - UK law can be **changed unilaterally**
 - the **CJEU case law** will no longer be binding
 - **amendments** to EU law no longer apply to the UK

B. Applicable Law

Possible solution: Exclusive Member State jurisdiction and applicable law?

- Art 37(13) subpara 2 AIFMD:

*“Any disputes between the AIFM or the AIF and EU investors of the relevant AIF shall be settled **in accordance with the law of and subject to the jurisdiction of a Member State.**”*

- Art 46(6) MiFIR:

*“Third-country firms providing services or performing activities in accordance with this Article shall, before providing any service or performing any activity in relation to a client established in the Union, **offer to submit any disputes relating to those services or activities to the jurisdiction of a court or arbitral tribunal in a Member State.**”*

B. Applicable Law

Problems with exclusive Member State jurisdiction and law

- works **only for sectors with rules on third-country access** (not e.g. in banking)
- **very restrictive, also for EU clients**
- **unclear implications for validity** of choice-of-forum and choice-of-law clauses

B. Applicable Law

- Does ‘**full alignment**’ offer a solution?
- problems:
 - ‘full alignment’ is **inferior** to direct applicability
 - it **cannot prevent** the violation of private rights in individual cases
 - sanctions, such as a withdrawal of equivalence, will usually **come too late** and not benefit the individual

INSOLVENCY, ESPECIALLY OF BANKS AND INVESTMENT FIRMS

C. Insolvency

- Why is it important? Examples:
 1. British investment firm I has pledged receivables as a security to French bank F. Afterwards, I becomes insolvent and liquidation proceedings are opened in the UK. Will the British liquidator heed the pledge?
 2. The small German private bank B, with important assets in the UK, becomes insolvent. Proceedings are opened in Germany. What is their effect in the UK?
 3. The Dutch systemically important bank D has issued bonds with an English choice-of-forum and choice-of-law clause. In the course of resolution, the SRB adopts the bail-in tool. What is the effect on the English law bonds?

C. Insolvency Law

EU Insolvency Regulation

- will cease to apply, future unclear

Bank Winding-Up Directive

- unclear whether transposing British legislation will be left untouched

BRRD

- unclear whether transposing British legislation will be left untouched

Question

- Same uncertainty exists with regard to private international law framework of other third states (US, Australia, Switzerland...)
- Why do we care in the case of the UK?
 1. closeness to the EU and importance as its financial centre
 2. trading venue of securities issued by EU companies
 3. legacy issue: EU clients might assume they are still protected

Conclusions

1. EU should continue judicial cooperation with UK to serve its enlightened self-interest
2. EU should ensure continued application of EU and Member State private law in British courts
3. EU should ensure continued cooperation in the field of insolvency, including bank recovery and resolution

Proposals

- allow the UK to join the Lugano Convention
- enter into convention on applicable law and insolvency
 - covering Rome I, II, Art 9(2) Finality Directive and Art 9 Financial Collateral Directive as well as parts of EMIR
 - copying Insolvency Regulation, Bank Winding-Up Directive and BRRD
 - could be opened to other third states (Switzerland, Singapore ...)
- goal: achieve legally certain private international law framework

Thank you for your attention!

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