

**The consequences of the withdrawal from the European Union on the  
English conflict of laws  
(Brexit and the conflict of laws)<sup>1</sup>**

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*This paper looks at different hypotheses on the consequences that the withdrawal of the United Kingdom from the European Union may have on the discipline of the conflict of laws. Studying the different scenarios, it argues that even if European regulations were eventually incorporated into purely domestic law through statutory instruments, despite an apparent continuity of the rules, the discontinuity of their interpretation is going to prevail.*

*Cet article s'intéresse aux différentes hypothèses émises quant aux conséquences du retrait du Royaume-Uni de l'Union européenne sur le droit anglais des conflits de lois. Etudiant les différents scénarios, il apparaît que même si les règlements européens étaient in fine introduits en droit interne anglais, l'apparente continuité des règles masquerait difficilement l'inévitable discontinuité de leur interprétation.*

The result of the vote that happened in June 2016 in the United Kingdom was as unforeseen in its principle as it still is in its consequences. This paper speculates on different hypotheses regarding the effect exiting the European Union may have on the English conflict of laws. The scope of what is commonly referred to as “Brexit” will be addressed (i.) before trying to identify the issue it raises (ii.).

i. Exiting the European Union: neither Brexit nor secession

The exact qualification of this phenomenon of leaving the European Union is subject to various terminologies; not all of them are accurate enough in the legal context.

The most common one, “Brexit”, though truly efficient in its meaning and concise in its wording, is not accurate. Indeed, the adjunction of “Br” to the term “exit” refers to Britain, whereas exiting the European Union has legal

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consequences for the whole of the United Kingdom (i.e. including Northern Ireland).

A less common expression, secession, has also been used<sup>2</sup>. It is no more proper. Indeed, secession implies the European Union is a federal entity supervising its member states, and that one of them has unilaterally decided to leave. The reality is different.

First, since the Treaty of Lisbon, the European Union gave to its members the possibility to leave. Thus it is not a fully unilateral decision, but a possibility given by the European Union, and seized upon by the United Kingdom.

Second, because the European Union is not a federal entity, it is not sovereign. Its powers are attributed, and special. It does not have the “*competence de sa competence*”, which traditionally defines a sovereign entity. In other words, it is not a state.

A better term would be the withdrawal from the European Union of the United Kingdom. The term “exit” or “leave” may be used alternatively, but must designate the United Kingdom, not part of it.

## ii. The European Union and Private International Law<sup>3</sup>

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<sup>2</sup> A. Briggs, “Secession from the European Union and private international law: the cloud with a silver lining”, Commercial Bar Association, January 24<sup>th</sup> 2017, can be downloaded at <<http://www.combar.com/news/brexit-lecture-by-professor-adrian-briggs-qc-hon/>>

<sup>3</sup> On why private international law is more referred in England as conflict of laws, see A. Briggs *The Conflict of Laws*, 3<sup>rd</sup> ed., Oxford, Oxford University Press, 2013, p. 2 “Some prefer to think of our subject as “private international law”, for it is concerned almost entirely with private law in cases and matters having international elements or points of contact. The only danger is that this title may suggest a relationship with public international law, which describes or regulates relations between states, and that would be misleading. For very public international law infiltrates the subject.” Comp. A. Briggs, *Private international law in English Courts*, OUP, 2014, n°1.39 to 1.41, p. 16-18, *Contra* A. Mills, *The Private History of International Law*, *The International and Comparative Law Quarterly*, Vol. 55, No. 1 (Jan., 2006), pp. 1-49.

It is well known that the European Union has used its legislative power<sup>4</sup> to unify private international law<sup>5</sup>. In order to do so, it used both regulations specifically aimed at the conflict of laws<sup>6</sup> and the law of international jurisdiction<sup>7</sup>, as well as

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<sup>4</sup> Not without controversy on the southern part of the channel: Vincent Heuzé, « D'Amsterdam à Lisbonne, l'État de droit à l'épreuve des compétences communautaires en matière de conflits de lois », *JCP G*, 2008, vol. 30, p. 20-23 ; Paul Lagarde et Aline Tenenbaum, « De la convention de Rome au règlement Rome 1 », *Revue critique de droit international privé*, 2008, p. 727 spec. n°3 ; In the english language, see for instance Adrian Briggs, *The Conflict of Laws*, 3 edition., Oxford, Oxford University Press, 2013, p. 3 « Originally this was said to be necessary to bring about the completion of the internal market, but this justification is now less commonly heard. The harmonization of private international law across Europe is an end in itself, and England is well on the way to arriving at it. The question of whether it is a Good or a Bad Thing does not need to be answered, so it will not be addressed. »

<sup>5</sup> On the basis of article 81, 2° c) of the Treaty on the functioning of the European Union.

<sup>6</sup> Regarding conflict of jurisdiction: Regulation (EC) No. 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) ([2012] OJ L351/1) (2012 Brussels I Regulation), Council Regulation (EC) No. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 ([2003] OJ L338/1), Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters ([2001] OJ L174/1), Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) ([2007] OJ L324/79)

For the conflict of laws, Regulation (EC) No. 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I) ([2008] OJ L177/6), as applied to the UK by Commission Decision 2009/26/EC ([2009] OJ L10/22), Regulation (EC) No. 864/2007 of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II) ([2007] OJ L199/40), Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, Council Regulation (EC) No. 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, ([2009] OJ L7/1), as applied to the UK by Commission Decision 2009/451/EC ([2009] OJ L149/73).

For hybrid regulations, discussed below Council Regulation (EC) No. 1346/2000 on insolvency proceedings ([2000] OJ L160/1, to be replaced by Regulation (EU) No 2015/848 of 20 May 2015 on insolvency proceedings (recast) [2015] OJ L141/19).

<sup>7</sup> The extent to which international jurisdiction became European was more fully (and painfully) realised by the English through the decision in Case C-185/07 *West Tankers Inc v Allianz SpA (The Front Comor)* (2009) E.C.R. I-663 (2009) 1 A. C. 1138, where English courts were prevented, under the Brussels I regulation, from granting anti-suit injunctions to restrain proceedings in other European Union States brought in breach of agreements to arbitrate in London.

sectorial instruments<sup>8</sup> containing specific rules of conflict<sup>9</sup>. This article is only concerned with the future of regulations, as directives by their very nature are already implemented into domestic laws and also because most of private international law can indeed be found in regulations.

This paper addresses the issue of conflict of laws strictly construed, and is not primarily concerned with the international jurisdiction<sup>10</sup> problems arising from leaving the European Union, though comparison between both is not excluded insofar as they prove useful in the analysis of the conflict of laws issues.

However, legal instruments are quite crude and do not always bend to academic distinction as one might hopes they would. Also, probably because there is a unity of the discipline of private international law, some areas do not allow one to fully distinguish the conflict of laws from the issues of international jurisdiction; analogies with those hybrid regulations may also be used.

The current state of conflict of laws in the United Kingdom has to be developed first (I), in order to identify the two alternatives of non-implementation (II) and implementation of the standstill clause (III) of the European Union conflict of laws regulations.

## I. State of the United Kingdom

The situation for the conflict of jurisdiction (A.) is different from the one of the conflict of laws (B.), and also from what has been called “hybrid” regulations, which are concerned both with the conflict of laws and international jurisdiction (C.).

### A. *The situation for conflict of jurisdiction*

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<sup>8</sup> Both directives and regulations.

<sup>9</sup> The specificity of the sectorial rules of conflict contained in directives is the fact they can only designate the law of one of the Member States.

<sup>10</sup> On which, see Andrew Dickinson, « Back to the future: the UK’s EU exit and the conflict of laws », *Journal of Private International Law*, vol. 12:2, p. 195 ; A. Briggs, “Secession from the European Union and private international law: the cloud with a silver lining” *op. cit.* ; Masters & McRae (2016) 33 J Int Arb, Special Issue, 483 ; Horatia Muir Watt, Loïc Azoulai et Régis Bismuth, « Report on the implications of Brexit on judicial cooperation in civil and commercial matters », *RTDF*, 2017, vol. n°1, p. 3.

The conflict of jurisdiction is in a peculiar situation, as two sets of rules are applicable depending on the domiciliation of the defendants (1.), which does not allow the discipline to be fully coherent (2.).

### 1. Distinction between conflict of jurisdiction involving European Union member states and non-member states

Regarding civil and contractual relationships<sup>11</sup>, the scope of the Brussels I recast Regulation<sup>12</sup> (“Brussels I recast”), does not extend as a principle to individuals domiciled in third country<sup>13</sup>. The article 6 of the Regulation<sup>14</sup> makes it clear that domestic law, and not the European regulation, is to regulate the issue, though the issue of the effect of proceedings before third-State courts is addressed within the regulation<sup>15</sup>.

For some, this issue is linked for some to the fact that Member States do not want their exorbitant national rules of jurisdiction and the national privileges that lies within them to be thrown away<sup>16</sup>. However, this criterion might be explained by historical<sup>17</sup> and political<sup>18</sup> reasons closely related to the external competence of the E.U. on the matter<sup>19</sup>.

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<sup>11</sup> In other field of private international law, the E.U. does not have the same distinction. See for instance the Regulation (EU) n°650/2012 of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession. Its article 4 is entitled “general jurisdiction” and is very clear about it “The courts of the Member State in which the deceased had his habitual residence at the time of death shall have jurisdiction to rule on the succession as a whole.”

<sup>12</sup> Regulation n°1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

<sup>13</sup> On which, see the developments in A. Dickinson and E. Lein, *Brussels I Regulation recast*, OUP, 2015, n°1.132.

<sup>14</sup> Article 6(1) of Brussels I recast: “If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall subject to Article 18(1), Article 21(2) and Articles 24 and 25, be determined by the law of that Member State.”

<sup>15</sup> In its article 33 and 34.

<sup>16</sup> A. Dickinson and E. Lein, *op. cit.*, n°3.17.

<sup>17</sup> The Brussels Convention did not have power to address those issues, and it was not even its objective. See, significantly, ECJ May 15 1990, point 17, case no. 365/88 *Kongress Agentur Hagen*, *Rec CJCE I-1845*, concl. Lenz: « It should be stressed that the object of the Convention is not to unify procedural rules but to determine which court has jurisdiction in disputes relating to civil and commercial matters in intra-Community relations and to facilitate the enforcement of judgments.”

<sup>18</sup> The very legality of the first version of the Brussel Regulation was questioned in its principle. For instance, P. Mayer and V. Heuzé, *Droit international privé*, Montchrestien, 9<sup>e</sup> édition, p. 242; see also the critical demonstration of Y. Lequette, “De Bruxelles à la Haye (Acte II)”, *Mélanges Gaudemet-Tallon*, Dalloz, 2008, p. 503.

<sup>19</sup> Unlike what the Court of Justice tried to argue in its Opinion 1/03 on the competence of the Community to conclude the new Lugano Convention (2006) ECR

Nevertheless, the European Union did regulate the extent of jurisdiction of national courts within the European Union, on the basis of Article 67(4)<sup>20</sup>, and points (a), (c) and (e) of Article 81(2)<sup>21</sup> of the Treaty on the Functioning of the European Union (TFEU).

This explains why all member states eventually ended up with two distinct sets of conflict of jurisdiction rules: the national ones that could still be enforced in the case the defendant is not domiciled in the European Union<sup>22</sup>, and the European Union rules that would prevail otherwise.

This distinction may adversely affect the coherence of the legal order. It can however easily be understood why the European Union did not legislate on the relationship with non-member states. At the same time, the result is unsatisfactory as it does not necessarily allow the coherence of the discipline to flourish.

## 2. Exit of the European Union and coherence of English international jurisdiction rules

One of the positive effects of leaving the European Union will be to give the possibility to English private international law to regain its coherence, and such an opportunity should be seized. This is undoubtedly an advantage. Another possible good effect is that Brussels I Regulation had the effect of limiting the scope of the jurisdiction of the English courts, a scope extremely large that explained the *forum non conveniens* exception<sup>23</sup>, and the United Kingdom would no longer be subject to that regulation.

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I-1145; see also 1/13 on the competence of the EU as to the acceptance of a non-Union country to the 1980 Hague Convention on the civil aspects of international child abduction (2014) ECLI:EU:C:2014:2303. On the issue, see F. Pocar (ed), *Ehe external competence of the European Union and Private international law* (Milan: CEDAM, 2006), and also, Y. Lequette, *op. cit.*, n°18 p. 523.

<sup>20</sup> Which states: “The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters.”

<sup>21</sup> Which respectively state the finality of the necessary measures for the “proper functioning of the internal market”: “the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases”, “the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction” and “effective access to justice”.

<sup>22</sup> Article 6(1) of Brussels I recast, *op. cit.* The Regulation contains three exceptions to that principle: if the plaintiff is a consumer (article 18), in case of exclusive jurisdiction (article 24) and in case the parties agreed to litigate in a Member State (article 25).

<sup>23</sup> The *forum non conveniens* allows an English court to “to order a stay of proceedings on the basis that England is an inappropriate forum (*forum non conveniens*)”, see Rule 38

If the Parliament in Westminster does not enact the European Union regulations into domestic law following the withdrawal from the EU, it could appear, *prima facie*, that coherence is going to be restored regardless. Indeed, from the point of view of the domestic courts, the international jurisdiction rules governing the relationships between individuals domiciled within member states of the European Union will be the same as those of non-member states.

However, this may not be quite true. First, in this field, the rules do not always come from the common law but from international conventions. It is not self-evident that the diverse range of conventions agreeing on conflict of jurisdiction rules are going to enact the same rules. But this point is eventually irrelevant. As a matter of fact, besides the question of the application of the Convention of Brussels<sup>24</sup>, which is central here, there is no other main convention.

Moreover, the continuity in the space of the private international rules will be challenged by its continuity in time. And therein lies the main issue of the non-implementation of the rules enacted in European legislation<sup>25</sup>. Going back to the common law will inevitably mean that some cases will not be subject to the same jurisdiction, and this because of the passage of time. This last point is also true for the conflict of laws.

### B. *The distinct situation of the conflict of laws*

The conflict of laws is in a very distinct situation<sup>26</sup> due to the “universal” scope of the European regulations (1.) which has basically erased the application of the English common law, arguably without any loss as the sets of rules were not as convincing (2.).

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in Lord Collins of Mapesbury and others (eds), Dicey, Morris & Collins *The Conflict of Laws* (London, Sweet & Maxwell, 15th edn, 2012), p. 533, and the commentary on the mechanism from n°12-007 to 12-010 p. 538-539.

<sup>24</sup> A. Dickinson, « Back to the future: the UK’s EU exit and the conflict of laws », *op. cit.* ; Sara Masters et Belinda McRae, « What Does Brexit Mean for the Brussels Regime? », *Journal of International Arbitration*, 2016, vol. 33, p. 483 ; A. Briggs, “Secession from the European Union and private international law: the cloud with a silver lining” *op. cit.* ; H. Muir Watt, L. Azoulai et R. Bismuth, « Report on the implications of Brexit on judicial cooperation in civil and commercial matters », *op. cit.*

<sup>25</sup> This is true for every change of legislation, but the sets of private international law rules are exceedingly important as they determinate the very application of every rule.

<sup>26</sup> H. Muir Watt, L. Azoulai et R. Bismuth, « Report on the implications of Brexit on judicial cooperation in civil and commercial matters », *op. cit.* n°1.2, converging to the same distinction (« there is a crucial difference between the two sets of regulations »), but not deducting the same consequences.

## 1. Universal scope of the regulation on the conflict of laws

The conflict of laws strictly denominated is not itself in a similar situation than the conflict of jurisdiction. Indeed, the European regulations on conflict is, literally, the new “common law”. It is common in the sense that the Regulation has a universal application<sup>27</sup>, and this divides itself into two aspects.

First, there is no distinction between member states subject to the regulation and states which are not. In other words, contrary to the conflict of jurisdiction there are not two sets of conflict of laws rules: the European regulations that apply to cross-border litigation within the Union, and the common law rules of conflict that apply for the rest of the world. Indeed English courts must apply the regulation whoever are the litigants. Therefore the conflict of laws is unified, which is undoubtedly good for the coherence of the discipline.

Second, the designation of the applicable law does not rely on the enforcement in the state whose law is designated by the regulation. The designation of the law is also universal i.e. the law designated can be the one as any state in the world not just one of the EU member. This is not self-evident, as conflict of laws rules inscribed in directives do not have such a scope: they can only designate member states' laws<sup>28</sup>.

## 2. English common law of conflict of laws

In regards to the common law, it means the English common law of conflict of laws rules only come into play under two alternative scenarios: where there is no applicable conflict of laws regulations, or for events occurring before the entry into force of the regulations<sup>29</sup>.

The common law has been thought, in some aspects, to be an inferior product compared to its European equivalent<sup>30</sup>. Indeed, the common law is not at its best

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<sup>27</sup> But not a universal scope: conflict of laws for company law, or property law is not addressed by any instrument, but incidentally treated by others (especially the insolvency Regulations).

<sup>28</sup> Directives are enacted on the basis of the article 114 of the Treaty of the Functioning of the European Union (ex article 95 of the TEC) which only gives power for measures “which have as their object the establishment and functioning of the internal market”

<sup>29</sup> Case C-135/15, *Republik Griechenland v. Grigorios Nikiforidis*, 18<sup>th</sup> of October 2016. On this case, see obs. S. Lemaire and L. Perreau-Saussine, *JCP G*, n° 5, 30 Janvier 2017, 124, and C. Nourissat, *JCP G*, n° 9, 27 Février 2017, doct. 226.

<sup>30</sup> A. Briggs, *Private international law in English Courts*, OUP, 2014 p. vii, “To the surprise of one who was entirely happy as a common lawyer working at private international

in the domain of conflict of laws. For instance, with respect to contractual obligations, the doctrine of the “proper law of the contract” governing the choice of law for contract is notoriously unclear. Regarding non-contractual obligations, the treatment of complex tort issues are, to say the least, quite obscure<sup>31</sup>.

A lot more could be said, but it has already been well addressed elsewhere<sup>32</sup>. Interestingly, a similar statement had been made on the *droit commun*, i.e. non-European rules, of French private international law, which remains, unusually for France, exclusively built on case law<sup>33</sup>.

### 3. Distinct situation

Therefore, we see how distinct is the situation of the conflict of laws. On the one hand, the traditional conflict of jurisdiction rules allowed for a large international jurisdiction of the English courts, tempered by the *forum non conveniens* exception, which gave a lot of discretion to the courts. This discretion has been largely restricted as the Brussels I regulation rules are more rigid, and they allow no exception as English courts discovered<sup>34</sup>.

On the other hand, the English courts would not gain a lot by having to use the national conflict of law rules again. The fact that they can interpret them as they wish is not going to help; or not as quickly and securely as statutory rules would.

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law, it no longer seems a loss but a privilege to have been offered a second life with a new set of materials (...) even if the common law version of private international law exemplified pragmatism and common sense, it could also be elaborate, esoteric and frankly weird.” From the same author, even more strongly in his post-vote article, “Secession from the European Union and private international law: the cloud with a silver lining”, Commercial Bar Association, January 24<sup>th</sup> 2017, p. 7: “The answer is that it is hard to believe that there is a lawyer in full possession of his or her mind who would propose taking us back to these chapters of the common law. The main reason is the perfectly pragmatic one that the rules of private international law of the common law, to which one might otherwise return, are in significant parts so dreadful that they are simply unfit for purpose, at least without significant statutory repair.”

<sup>31</sup> Despite the reform to the choice of law rules for tort in Part III of the Private International Law (Miscellaneous Provisions) Act 1995. For a sharp detail of why coming back to the common law is not a very attractive option, see A. Briggs, “Secession from the European Union and private international law: the cloud with a silver lining”, Commercial Bar Association, January 24<sup>th</sup> 2017, p. 7-10. Of the same view, see Financial Law Market Committee, Issues of legal uncertainty arising in the context of the withdrawal of the U.K. from the E.U., December 2016, n°3.3

<sup>32</sup> *Ibid.*

<sup>33</sup> Y. Lequette and B. Ancel, avant-propos of *Grands arrêts de la jurisprudence de droit international privé*, Dalloz, 2006 p. X-XI.

<sup>34</sup> *Owusu v Jackson and Others* Case C-281/02, *West Tanker case*, *op. cit.* The Owusu decision was on the Brussels Convention, but is applicable to the Regulation.

It explains why the implementation of those European rules might be thought very attractive. However, it will be shown that though this seductive possibility—that should be seized—will allow a seemingly continuity of the rules, the discontinuity of their interpretation will prevail.

### C. *The case of hybrid regulations*

The issue of regulations covering not only the conflict of laws, but also with international jurisdiction and judgment enforcement, in other words those instruments<sup>35</sup> that are intrinsically concerned with both, is providing a less satisfactory solution, if any.

Indeed, because the conflict of law rules are sometimes inextricably linked to the jurisdictional rule, the following hypothesis should be extended to them. Though the following observations might apply to some of them without too much of a stretch, a case by case, or rather an instrument by instrument study of the issues at stake would be more proper, which is not the purpose of this short paper.

Furthermore, the conflict of laws rules in those instruments were enacted in the contemplation of the conflict of jurisdiction and reciprocally. Therefore, it would not necessarily make sense to divide them in order to incorporate only some of them<sup>36</sup>.

## II. Absence of implementation and the applicability of the Rome Convention

The absence of implementation of European Union regulations will not have the effect of bringing back the United Kingdom where it was a day before 31<sup>st</sup> December 1972, before gaining access to what was then the European Economic Community<sup>37</sup>.

The extent of the Great Repeal Act (A) must be studied to evaluate the effects the proposed Great Repeal Act will have on the English conflict of laws (B).

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<sup>35</sup> Insolvency and Maintenance Regulations (*cf. supra footnote 6*).

<sup>36</sup> On the consequence of which, see A. Briggs, “Secession from the European Union and private international law: the cloud with a silver lining”, Commercial Bar Association, January 24<sup>th</sup> 2017, p. 13-14.

<sup>37</sup> A. Dickinson, « Back to the future: the UK’s EU exit and the conflict of laws », art cit spec. p. 198.

### *A. Great repeal act and its extent*

The Great Repeal Act is the law the Prime Minister promised on 2<sup>nd</sup> October 2016. Its purpose is to repeal the European Communities Act 1972. Section 2(1) of the 1972 Act declares that provisions of European Union law are automatically binding in the United Kingdom<sup>38</sup>.

Exiting the European Union by triggering Article 50 of the Treaty on the European Union<sup>39</sup> as well as enacting the Great Repeal Act will not have the effect of annulling every European regulation that was ever enforced in the United Kingdom. It will only have the effect of depriving them of legal power for the future.

When the 1972 Act is repealed, directly effective European Union laws such as Rome I and Rome II will cease to have effect in the United Kingdom, unless the contrary is expressly provided for in the Great Repeal Act. The issue is not the same regarding directives, as they require implementation into domestic law.

This means, for instance, that a large part of the conflict of law rules regarding financial law will be preserved such as the Finality<sup>40</sup>, Collateral<sup>41</sup>, Tenders offers<sup>42</sup>, and Resolution directives<sup>43</sup>. This is not true regarding financial directives and

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<sup>38</sup> In the term of section 2(1) of the 1972 Act: “All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression “enforceable EU right” and similar expressions shall be read as referring to one to which this subsection applies.” We underline.

<sup>39</sup> On the process of leaving the EU, see European Company Law Experts, « The consequences of Brexit for companies and company law », *RTDF*, 2017, vol. 1, p. 16-45 spec. p. 17-19.

<sup>40</sup> Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems.

<sup>41</sup> Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements.

<sup>42</sup> Directive 2004/25/EC of the European Parliament and of the Council of 21 april 2004 on takeover bids.

<sup>43</sup> Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms.

regulations that relied upon reciprocity, i.e. what is often referred to as the “European passport”<sup>44</sup>, which mostly concerns financial markets<sup>45</sup>.

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<sup>44</sup> For a more detailed explanation of those, see Wolf-Georg Ringe, The irrelevance of Brexit for European Financial Market, Legal research paper series, Paper No 3/2017, can be downloaded at <https://ssrn.com/abstract=2902715>, p. 7; *Contra* (on the relevance of Brexit to the sector), see D. Schoenmaker, The UK Financial Sector and EU Integration after Brexit: The Issue of Passporting (October 8, 2016). Forthcoming Chapter in 'The Economics of the UK- EU Relationship: From the Treaty of Rome to the Brexit Vote', edited by N. Campos and F. Coricelli, Palgrave MacMillan, London. Available at SSRN: <https://ssrn.com/abstract=2844253>

<sup>45</sup> Which includes:

- the financial instrument framework (MiFID/MiFIR) Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (MiFID II), [2014] OJ L173/349; Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 (MiFIR), [2014] OJ L173/84 (those instruments will apply from 3 January 2018);
- the Capital Requirements Directive IV (CRD IV) Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (CRD IV), [2013] OJ L176/338;
- the Payment Service Directive II (PSD II) Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC (PSD II), [2015] OJ L337/35, due to apply from 13 January 2018;
- the Second E-Money Directive (2EMD) Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC (2EMD), [2009] OJ L267/7;
- the Insurance Distribution Directive (IDD) Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (recast) (IDD), [2016] OJ L26/19, due to apply from 23 February 2018;
- the UCITS framework for funds, and the Alternative Investment Fund Managers Directive (AIFMD) Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (recast), [2009] OJ L302/32, as amended by Directive 2014/91/EU of the European Parliament and of the Council of 23 July 2014 amending Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards depositary functions, remuneration policies and sanctions, [2014] OJ L257/186.
- the Alternative Investment Fund Managers Directive (AIFMD) Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and

The “European passport” can be illustrated through the cross-border marketing of securities<sup>46</sup>. This mechanism is based on mutual trust between Member States’ regulatory authority<sup>47</sup>, which allow them to give to the prospectus a “community scope of approval”<sup>48</sup>. In a way that is not dissimilar to the conflict of jurisdiction and enforcement of judgement, the European passport mechanism relies on mutual trust, which is a different dynamic from the one the European Union entertains with third country actors<sup>49</sup>.

Though some speculate the situation will not really change<sup>50</sup>, the section below argues that without a forum in charge of the coordination of the whole legal system, such as the ECJ, it is certain that change will occur. Even more so as there is no political certainty on whether the European Union will allow such a mechanism to remain with non-member states.

*B. The effect of the Great Repeal Act: the applicability and interpretation of the Rome Convention*

Regarding the effects of the Great Repeal Act, a distinction between conflict of laws regarding civil and commercial obligations and non-contractual obligations must be drawn.

Indeed, in the former hypothesis, Rome I was superseding an international convention (the Rome convention), while in the latter one, Rome II was built from no previous instrument. This means that, insofar as the conflict of laws<sup>51</sup> are concerned, the English common law and relevant statutes will apply.

For civil and contractual obligations however, the situation is different. Indeed, the common law rules may not apply, because, as prior to the enactment of Rome

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2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (AIFMD), [2011] OJ L174/1.

<sup>46</sup> Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading.

<sup>47</sup> Articles 17 and 18 of the prospectus directive.

<sup>48</sup> It is the title of article 17 of the prospectus directive

<sup>49</sup> On which, see E. Ferran, *The UK as a Third Country Actor in EU Financial Services Regulation* available at [ssrn.com/abstract=2845374](https://ssrn.com/abstract=2845374)

<sup>50</sup> Wolf-Georg Ringe, *The irrelevance of Brexit for European Financial Market*, Legal research paper series, Paper No 3/2017, can be downloaded at <<https://ssrn.com/abstract=2902715>>.

<sup>51</sup> Not only in extra-contractual obligations, but also every other part of the conflict of law.

I, the Convention of Rome<sup>52</sup> was the main instrument of the designation of the conflict rules. And this convention is still enforced with countries who are a member of it but are not subject to Rome I, namely Denmark<sup>53</sup>.

In such a scenario, the Rome Convention is applicable in English courts (1.) and no one but the European Court of Justice has jurisdiction to interpret it (2.).

## 1. Applicability of the Rome Convention

The Rome Convention, was, in accordance with United Kingdom constitutional law, incorporated into domestic law. Therefore, the Rome Convention has a word to say about its application, as it will be argued that the Rome I Regulation<sup>54</sup> did not abolish the Convention.

*Statutory act incorporating the Rome Convention.* Undoubtedly the United Kingdom Courts are not bound by treaties or conventions that are not incorporated into domestic law<sup>55</sup>. This is why the Contract (Applicable Law) Act 1990<sup>56</sup>

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<sup>52</sup> Convention on the law applicable to contractual obligations (98/C 27/02).

<sup>53</sup> Recitals 46 of the Rome I Regulation.

<sup>54</sup> Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)

<sup>55</sup> See the general position given by Lord Oliver of Aylmerton giving the leading speech in *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, 499—500: “as a matter of the constitutional law of the UK, the Royal Prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament. Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation. So far as individuals are concerned, it is *res inter alios acta* from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations; and it is outside the purview of the court not only because it is made in the conduct of foreign relations, which are a prerogative of the Crown, but also because, as a source of rights and obligations, it is irrelevant.” This speech is explicitly referred to in the Miller case, *Regina (Miller and another) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin), [2017] UKSC 5 [2017] 2 W.L.R. 583

<sup>56</sup> Contracts (Applicable Law) Act 1990, 26<sup>th</sup> July 1990. The Act carved out Article 7(1) of the Rome Convention. The UK was opposed to a rule which would allow “mandatory rules” of a third country to override an express choice of English law under Article 3(1). For the explanation of why the UK eventually rejected article 7(1) Dicey, Morris & Collins *The Conflict of Laws* (London, Sweet & Maxwell, 15th edn, 2012), n°32-085 and 23-086 p. 1830-1831; strongly against Article 7(1) of the Convention, see. L. Collins, *Essays in international litigation and the conflict of laws*, (Clanredon Press, Oxford, 1994), p. 425-427 “first, it treats this enormous complex and practical problem with less than the attention it deserves, and, second, it enlarges

incorporated the Rome Convention, stating in its Article 2(1) that “the Conventions shall have the force of law in the United Kingdom”<sup>57</sup>.

The United Kingdom went even further, as it extended the applicability of the Convention to conflict of laws within the laws of the United Kingdom<sup>58</sup>. Indeed, the Rome Convention applies to relations between England and Wales (a single legal system), the Northern Ireland and Scottish legal systems (which are both distinct from the English and Welsh one).

From a domestic point of view, given that treaties are not self-executing as a matter of English law, the Rome Convention will continue to apply simply by virtue of having been incorporated into English law by the 1990 Act. Unless and until the 1990 Act is repealed, the Convention (as enacted) will still apply.

*The Rome Convention itself.* The Rome Convention was not meant to be eternal. It was supposed to last ten years<sup>59</sup>, but would tacitly be re-conducted for five years every five years, should there be no denunciation of it by a member state<sup>60</sup>.

As a matter of fact, the United Kingdom never denounced the Convention, and in order not to breach international law by not respecting the convention they signed, they should either respect the Convention, or denounce it.

Though the term resurrection is often used to describe what might happen to the Convention, it is utterly improper. First, the convention is not dead, and is still be enforced by Danish Courts, as Denmark did not agree to the Rome I Regulation<sup>61</sup>.

Second, even though the Convention would no longer be enforced, it does not mean it is no longer enforceable. The Convention was not repealed, and is thus still part of the legal orders of some of the signatories.

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the problem”. The author is mainly preoccupied by the uncertainty Article 7 might give rise to.

<sup>57</sup> With the exception stated in article s 2(2): “articles 7(1) and 10(1)(e) of the Rome Convention shall not have the force of law in the United Kingdom.” The first article refers to overriding mandatory rules, the second the consequences of the absence of execution of a contract, including the evaluation of the prejudices.

<sup>58</sup> s 2(3) of the Contract (Applicable Law) Act “Notwithstanding Article 19(2) of the Rome Convention, the Conventions shall apply in the case of conflicts between the laws of different parts of the United Kingdom”.

<sup>59</sup> Article 30 (1) of the Rome Convention.

<sup>60</sup> *Ibid.*

<sup>61</sup> Recitals 46 of the Rome I Regulation.

*Rome I and the Convention.* The very existence of the Convention is being discussed after the ambiguous words “superseded”<sup>62</sup> were used by the Rome I Regulation to describe its relationship with the Convention of Rome. Three distinct arguments can be put forward in favour of the applicability of the Convention.

First, a semantic argument may be put forward. The word “superseded” should be interpreted as concerning the relationship between the applicability of the Rome I Regulation and the Rome Convention regarding the member states, and not as enacting a normative death of another instrument<sup>63</sup>. Thus, correctly read, the Rome I Regulation does not affect the existence of the Rome Convention<sup>64</sup>.

Second, from the Regulation perspective, it could be argued that the interpretation of the words “superseded” commands that the Rome I Regulation should be applied instead of the Rome Convention. And that was the effect the Regulation was looking for. It does not mean that it erased the Rome Convention. Therefore, if the Regulation is repealed, it is only normal that the Convention of Rome should be applied again.

Third, European law, and therefore the Rome I Regulation, does not have the power to unmake a domestic UK law. Indeed, allowing European legislation to have this effect would be going much further than what section 2(1) of the 1972 European Communities Act allowed. European legislation being applicable in domestic courts and European legislation unmaking domestic legislation are two very distinct normative effects.

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<sup>62</sup> The analogy can be drawn with the Brussels Convention in regard to Article 68 of the Brussels I Regulation, see Masters & McRae (2016) 33 J Int Arb, Special Issue, 483, spec. p. 492.

<sup>63</sup> It is one thing to state the pre-eminence of one instrument over another ; it is something else to annihilate another one.

<sup>64</sup> Contra H. Muir Watt, L. Azoulay et R. Bismuth, « Report on the implications of Brexit on judicial cooperation in civil and commercial matters », art cit The authors dismiss this argument regarding the Rome convention (footnote 17) while acknowledging the exact same argument for Brussels Convention where an analogy can however be drawn (footnote 34). In the end they reject the applicability of the Brussels Convention mainly on two other arguments: link between membership of the EEC/EU and the Convention, as well as an argument based on discrimination between Member States in the EU, based on their belonging to the EEC back then. The argument based on discrimination is not relevant here in the conflict of laws – it probably is not relevant either for international jurisdiction as the discrimination principle is not about depriving Member States from their former agreements. The argument regarding the link between membership and the convention is far-reaching: it is not because one of the objectives of the convention is the establishment of a European common market than the convention is reducible to it. Certainly not to the extent of its very existence.

Finally, regulations do not have the power to unmake international conventions. The fact that regulations and international conventions might share the same forum of interpretation does not mean they have the same nature, nor that one can erase the other.

## 2. Interpretation of the Rome Convention

Once the issue of the applicability of the Rome Convention is resolved, the problem of its interpretation remains. The solution of the interpretation issue lies in the first protocol on the interpretation of the Convention of Rome and the European Court of Justice<sup>65</sup>. Until the protocol was signed and ratified, the House of Lords was in charge of the interpretation of the Convention.

However, the United Kingdom<sup>66</sup> became “anxious to prevent differences of interpretation of the Convention from impairing its unifying effect”<sup>67</sup>, and eventually gave power to the Court of Justice of the European Union (CJEU) – at the time, the Court of Justice of the European Communities – to interpret the Convention of Rome<sup>68</sup>.

Therefore, in order to extricate itself from the CJEU exclusive power to issue authoritative interpretations of the Convention, the United Kingdom has to denounce the Convention itself<sup>69</sup>. Though one could debate on the legal nature of the protocol, it is not considered as a separate entity from the Convention<sup>70</sup>. It is necessary for the United Kingdom to denounce the Convention in order to get rid of the ruling of the CJEU.

Without doing so, the European Court of Justice will inevitably keep its jurisdiction over part of the English conflict of laws.

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<sup>65</sup> Annexed to the Convention.

<sup>66</sup> The United Kingdom, as well as all of the other signatories of the Rome Convention.

<sup>67</sup> Joint Declaration of the signatories of the Convention of Rome, on signing the Convention, see annex of the Convention of Rome.

<sup>68</sup> On the basis of the first and second protocol conferring on the Court of Justice of the European Communities certain powers to interpret the Convention on the law applicable to contractual obligations; opened for signature in Rome on 19 June 1980, annexed to the consolidated version of the Convention on the law applicable to contractual obligations (98/C 27/02).

<sup>69</sup> Article 29 of the Convention.

<sup>70</sup> Article 32 of the Convention “The Protocol annexed to this Convention shall form an integral part thereof.” It would be even better if the Protocol stated in itself that it was a part of the Convention.

### III. Implementation, the need for roots<sup>71</sup> and the inevitability of the rupture

Regulations are always part of a larger legal order in which they inscribe themselves. Especially in the conflict of laws, the concepts regulations are using are eventually forged by other disciplines and, therefore, rely on them.

The European Regulations of the conflict of laws have been able to escape this mechanism only because they were ultimately interpreted not by national courts but by the CJEU. Indeed, it was argued that “it would be a serious error to approach European legislation in the same way as one might if it had been legislation made at Westminster. It is a mistake, because this legislation is not designed to amend the common law rules of private international law; it is not designed to fit within the framework evolved by the common law”<sup>72</sup>.

It is not designed to fit, and at the same time, the autonomous interpretation<sup>73</sup> does not mean it has no root in the different legal orders, as it is *in fine* inspired by the legal traditions of the European countries.

The inevitability of the rupture between implemented conflict of laws regulations with its former set of conflict of laws rules can be demonstrated by, at least, two arguments. First, the fact that incorporating European regulations in the post-Brexit United Kingdom will undoubtedly be a legal transplant<sup>74</sup>, and suffer the consequence of such a phenomenon (B.).

Second, the conflict of laws is a peculiar discipline, which is, more than others, dependent on the other branches of private law. In this respect, the legal system

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<sup>71</sup> The expression of the need for roots is borrowed to Simone Weil. Within all her inspirational work, see especially on this issue Simone Weil, *The Need for Roots*, 2 edition., London, Routledge, 2001 ; In beautiful French Simone Weil, *L'enracinement*, Paris, Gallimard, 1990.

<sup>72</sup> A. Briggs, *The Conflict of Laws*, *op. cit.*, p. 3-4.

<sup>73</sup> Mathias Audit, « L'interprétation autonome du droit international privé communautaire », *Journal du droit international (Clunet)*, 2004, vol. 3, p. 789-816.

<sup>74</sup> On which, amongst an important literature, see Michele Graziadei, « Comparative Law as the Study of Transplants and Receptions » dans *The Oxford Handbook of Comparative Law*, Oxford, OUP, 2006 ; The expression « legal transplant » first appeared in Alan Watson, *Legal transplants: an approach to comparative law*, Charlottesville, University Press of Virginia, 1974 ; Regarding the criticism of the concept, see Pierre Legrand, « The Impossibility of Legal Transplant », *Maastricht Journal of European and Comparative Law*, 1997, p. 111.

in which it inscribes itself will undoubtedly have a determining influence upon it (C.).

It could be said that those two arguments are converging not only in their conclusion, but also in their principles, and are thus similar. However they should be treated separately as the latter one addresses the structure of the conflict of laws, whereas the former one is linked to comparative law, which is here but a tool in the construction of the discipline of the conflict of laws.

Prior to developing those points, the relationship between implementation and the Great Repeal Act must be studied, as well as the possibility of a standstill clause (A.).

*A. Relationship between implementation and the Great Repeal Act, the possibility of a standstill clause*

Here, a distinction will be drawn between implementation (1.), i.e. Parliament enacting a statutory instrument on the conflict of laws, and the possibility of a standstill clause inserted within the Great Repeal Act (2.).

A standstill clause consists in enacting a *status quo* and in no way should be considered an implementation. In such a case, the United Kingdom would not incorporate legislation into its domestic law but merely allows foreign legislation to be enforceable in its legal order. Though it seems to be a technical distinction for two ways to achieve the same effect, it is argued here that both are entirely different.

## 1. The scenario of implementation

The Great Repeal Act may not be the instrument through which the European regulations on the conflict of laws are incorporated<sup>75</sup>. Therefore instruments of European regulations implementation can occur after or before the Great Repeal Act.

*Implementation before the Great Repeal Act.* Until the Great Repeal Act comes into force, the United Kingdom is still subject to European Union regulations. Thus,

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<sup>75</sup> Indeed, it is likely that there will be at least two instruments: see the Report of the House of Lords' EU Select Committee, *Withdrawing from the European Union* (11th Report of Session 2015–2016, HL Paper 138, 4 May 2016), [31].

even though implementation of instruments may occur before the Great Repeal Act, they will have no additional force of law that does beyond European Union law. In other words, until then, the European regulations will keep their superiority in the hierarchy of norms.

*Implementation after the Great Repeal Act.* This hypothesis is more dubious, as there would be three different instruments applicable depending on the time. The situation can be synthesised as follows.

Until the Great Repeal Act, the current situation would not change, the European regulations will still be enforceable under the ultimate interpretation of the European Court of Justice. Once the incorporated Rome I statute comes into force, it will be interpreted by the Supreme Court.

However, if there is a lapse of time between the entry into force of the Great Repeal Act and the implementation of European regulations, the Convention of Rome will be applicable, under the interpretation of the CJEU<sup>76</sup> (cf. *supra*).

## 2. The standstill clause

A standstill clause, enacting a *status quo*, inserted in the Great Repeal Act, cannot be excluded. According to the conception one has of a standstill clause, a convention or a ruling from the CJEU might be necessary.

*The possibility of a standstill clause.* The United Kingdom could also choose the path of a “standstill provision” in its Great Repeal Act, as proposed by some<sup>77</sup>. Such a proposition would necessitate a change in the articles concerned with a distinction between member states and non-member states<sup>78</sup>, as well as to insert the clause in its Great Repeal Act.

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<sup>76</sup> The Convention is supposed to be interpreted by the House of Lords, but the Supreme Court superseded the House in this function.

<sup>77</sup> Financial Market Law Committee, Issues of legal uncertainty arising in the context of the withdrawal of the U.K. from the E.U., December 2016, n°6.2. The document is accessible on their website [www.fmlc.org](http://www.fmlc.org). However the authors conceive the standstill clause as incorporation of the regulations into U.K. domestic law, and precise in their footnote 13 that “here will no longer be references to the CJEU from U.K. courts on the interpretation of the Regulations.” Therefore the terminology of standstill clause might not be correct, and this possibility should be referred as implementation.

<sup>78</sup> In the case of Rome I, these include Article 1(4) (definition of “Member State”), Article 2 (principle of universality) and Article 3(4) (the rule that in certain situations a choice of law by the parties does not prejudice the application of E.U. law). It also includes the distinction made for insurance contract (Article 7) between Member State

Such a standstill clause would allow the European regulations to have “force of law” within the United Kingdom, as it had under Section 2(1) of the European Communities Act. It could also allow either to ask the national courts to take into account the decisions from the CJEU, or allow the CJEU to carry its interpretation of the regulations.

*Taking into consideration decisions from the CJEU.* A clause could be inserted in the Great Repeal Act which would make it mandatory for the Courts to take into consideration the decisions from the CJEU, such as in competition law<sup>79</sup>.

Though the Courts do not necessarily need such a clause to take into account foreign decisions, it may be helpful to ensure converging interpretation of the decisions. However, it will not be enough to mitigate the disruption provoked by the withdrawal from the E.U. that will inevitably end in diverging interpretation of the rules.

Indeed, the attitude Supreme Courts have towards decisions from the European Courts of Human Rights is not one of submission<sup>80</sup>. They have to take the decisions into account<sup>81</sup>, which do not necessarily result in converging

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and non-Member State. Regarding Rome II, it includes Article 3 (principle of universality), Article 6(3)(b) (distinction for torts in competition matters between Member State’s markets and non-member State’s), Article 14(3) (the limits of the possibility of a choice-of-law)

<sup>79</sup> Section 60 from the Competition Act 1998, that deals with “principles to be applied in determining questions”:

“(1)The purpose of this section is to ensure that so far as is possible (having regard to any relevant differences between the provisions concerned), questions arising under this Part in relation to competition within the United Kingdom are dealt with in a manner which is consistent with the treatment of corresponding questions arising in Community law in relation to competition within the Community.

(2)At any time when the court determines a question arising under this Part, it must act (so far as is compatible with the provisions of this Part and whether or not it would otherwise be required to do so) with a view to securing that there is no inconsistency between—

(a)the principles applied, and decision reached, by the court in determining that question; and

(b)the principles laid down by the Treaty and the European Court, and any relevant decision of that Court, as applicable at that time in determining any corresponding question arising in Community law.

<sup>80</sup> « We do not have slavishly to follow the Strasbourg jurisprudence » Lord Bingham of Cornhill’s famous dictum in *R (Ullah) v Special Adjudicator* [2004] 2 AC 323, para 20 was cited again by Baroness Hale in *R (Keyn) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69, [2016] AC 1355, §291.

<sup>81</sup> The Supreme Court does not deny the necessity of taking into account the decisions, see for instance Lord Mance at in *Doberty v Birmingham City Council* [2008] UKHL 57,

decisions<sup>82</sup>, but more of a dialogue<sup>83</sup>. It might seem that the analogy with human rights law is a little far-fetched<sup>84</sup>, as the field of human rights law is often more political than juridical<sup>85</sup>; however, the mechanism of interpretation is comparable, and it is that tool that is analysed here.

*The necessity of a convention or a ruling from the European Court of Justice.* This scenario would require the European Court of Justice to agree to adjudicate cases from non-EU jurisdiction, as the United Kingdom would no longer be a member state. A convention between the European Union and the United Kingdom would be necessary at the end of the two years negotiation opened through article 50 of the TEU.

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[2009] AC 367 §126 “While the House is not bound to give effect to *McCann*, under section 2 of the Human Rights Act 1998 it is its duty to ‘take into account’ the decision in *McCann*.”

<sup>82</sup> On what it means for the Law Lords to take into account a decision, see for instance Lord Phillips’ statement in *R v Horncastle* [2009] UKSC 14, [2010] 2 AC 373, §11 “The requirement to ‘take into account’ the Strasbourg jurisprudence will normally result in the domestic court applying principles that are clearly established by the Strasbourg court. There will, however, be rare occasions where the domestic court has concerns as to whether a decision of the Strasbourg court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to the domestic court to decline to follow the Strasbourg decision, giving reasons for adopting this course. This is likely to give the Strasbourg court the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable dialogue between the domestic court and the Strasbourg court. This is such a case.”

<sup>83</sup> See Lord Mance, in *R (Chester) v Secretary of State for Justice* [2013] UKSC 63, [2014] AC 271, §27 “In relation to authority consisting of one or more simple chamber decisions, dialogue with Strasbourg by national courts, including the Supreme Court, has proved valuable in recent years. The process enables national courts to express their concerns and, in an appropriate case such as *R v Horncastle* [2010] 2 AC 373, to refuse to follow Strasbourg case law in the confidence that the reasoned expression of a diverging national viewpoint will lead to a serious review of the position in Strasbourg.”; or Lord Neuberger MR in *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 104 §48 “This court is not bound to follow every decision of the European court. Not only would it be impractical to do so: it would sometimes be inappropriate, as it would destroy the ability of the court to engage in the constructive dialogue with the European court which is of value to the development of Convention law”

<sup>84</sup> However, the situation where the CJEU would fetch a poor decision is not impossible. In those cases, the UKSC will gladly criticise it and not follow it, and therefore would rather pay the price of divergence than following a characterisation it does not believe in. Nevertheless, the argument is not that compelling, as the national courts of the Member States themselves can resist to the interpretation in order to help the Court of Justice to change it.

<sup>85</sup> François Chénédec, « Petite leçon de “réalisme juridique”. À propos de l’affaire Paradiso et Campanilli contre Italie », *Recueil Dalloz*, 2017, p. 663.

In the absence of a convention (in what has become known as a *hard Brexit*), the possibility agreement of a standstill clause on the European side would eventually have to be decided by the CJEU. Indeed, the Great Repeal Act is an act from the United Kingdom, and as such, it cannot coerce the Court of Justice to interpret English cases in those circumstances. In the absence of convention only the CJEU can interpret the extent of its jurisdiction.

This scenario remains unlikely, and implementation is the most probable. However, there will only seem to be a continuity of the rules, as in the long term, the discontinuity of their interpretation will prevail.

### *B. Legal transplant and the forum as its trigger*

Incorporating European regulations into domestic laws will be a legal transplant (1.). Legal transplants, even if the recipient is a fertile ground for such transplantation, will inevitably diverge from their domestic legal order (2.). This is true, even in the case of a very temporary legal transplant (3.).

#### **1. Incorporating European regulations will be a legal transplant**

Legal transplant is often referred to as “borrowing law from another legal system”<sup>86</sup>.

The rupture between the common law and the Rome I and II regulations is patent on several points. There are different sets of rules, interpreted by different courts. Indeed, though the Rome regulations have been applied by the Courts of the United Kingdom, it has always been ultimately interpreted by the European Court of Justice.

Furthermore, those regulations are issued by another legal order, of which the United Kingdom is part, but which is distinct from their own<sup>87</sup>. Therefore, incorporating a regulation of another legal order into its domestic law and substituting the ultimate forum of its interpretation seems to be qualifying such an action of legal transplant.

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<sup>86</sup> Mindy Chen-Wishart, « Legal transplant and undue influence », *International and Comparative Law Quarterly*, 2013, p. 1.

<sup>87</sup> Regarding the characterisation of the European Communities as a legal order which does not aim at regulating private relations, see the demonstration of Pierre Mayer, *Le phénomène de la coordination des ordres juridiques*, La Haye, 2007 n°57.

## 2. The distinct forum of interpretation as the trigger of Legal transplants

Legal transplants, even though the recipient is a fertile ground for such transplantation, will inevitably diverge from their home legal order. The criterion that triggers the influence of the new legal order on the transplant is the existence of a distinct forum of interpretation.

*Legal transplants, even though the recipient is a fertile ground for such transplantation, will inevitably diverge from their home legal order.* This can be shown through the example of the evolution of the *undue influence* doctrine of English contract law in Singapore. The doctrine of undue influence is a traditional English law-based doctrine of contract law, which was exported to many former colonies of the United Kingdom through the common law.

Out of those countries in which the common law still applies, Singapore shares many similarities with the English legal system, as the country was especially receptive to such a contract law transplant that would contribute in making Singapore more attractive as a business hub<sup>88</sup>. Furthermore, the similarities of the formal legal order of the recipient legal system, shaped by English structure for one hundred and fifty years, and the convergences of its informal legal order, i.e. its English-educated legal elites, make such a system fertile ground for a transplant.

Yet Prof. Chen-Wishart showed that, even in this context, the doctrine of undue influence, which is part of the general English theory of contract law, was eventually the object of a divergent interpretation from the local courts, once they were no longer submitted to the Privy Council's jurisdiction. This is explained by the author through the significant cultural differences between Singapore and England<sup>89</sup>.

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<sup>88</sup> M. Chen-Wishart, « Legal transplant and undue influence », *op. cit.*, p. 7.

<sup>89</sup> Comp. the analysis of S. Weil, *The Need for Roots*, *op. cit.* p. 122: "Frontiers, of course, are not impassable; but just as they subject the traveller to an unending series of irritating and laborious formalities, so in the same way all contact with foreign ways of thinking, in no matter what sphere, demands a mental effort in order to get across the frontier. The effort required is considerable, and quite a number of people are not prepared to make it. Even in the case of those who do, the fact that such effort has to be made prevents the formation of organic links across the frontiers." ; S. Weil, *L'enracinement*, *op. cit.* p. 158: « Les frontières, bien entendu, ne sont pas infranchissables ; mais de même que pour voyager, il faut en passer par une infinité de formalités ennuyeuses et pénibles, de même tout contact avec une pensée étrangère, dans n'importe quel domaine, demande un effort mental pour passer la frontière. C'est un effort considérable, et beaucoup de gens ne consentent pas à la fournir. Même chez

*The distinct forum as the trigger of the legal transplant.* It does not mean that legal transplant is impossible as a principle. It just means the evolution of the transplant is necessarily going to change<sup>90</sup>. It is thought that what triggers the change is the possibility to interpret the norms, which means that what triggers the evolution of the legal transplant from its home legal order is the distinct forum of the legal transplant<sup>91</sup>.

Though the author does not go that far, one could argue that if the Privy Council still heard appeals from Singapore, the interpretation of undue influence would not have changed. The forum does not make the evolution happen. This is linked to the culture the law inscribes itself in. However, the forum *allows* the changes to happen. It is the criterion of the possibility of a change; no autonomous forum, no legal changes.

The analogy with the current situation is quite striking. First, the re-enactment of the European regulation on the conflict of laws is a bit like the Singapore situation: a law that is well known to the practitioner, though it is borrowed to another legal system. Second, the change will result from a change of the ultimate jurisdiction of interpretation.

### 3. One-off (“ponctuel”) legal transplants

Regardless of the acceptance of the application by the forum of the foreign law as a form of legal transplant, the *Dallah* case provides another argument in favour

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ceux qui le fournissent, le fait qu’un effort est indispensable empêche que des liens organiques puissent être noués par-dessus les frontières. ».

<sup>90</sup> To put it in M. Chen-Wishard’s powerful words: “We need to be clear about the precise question being addressed. If it is whether legal transplants are possible, the answer, as Watson and the Singaporean experience demonstrate, is patently ‘yes’. But, if the (arguably more important) question is how the transplant develops in the recipient legal system, then focusing on the point of transplant is like preparing for parenthood by sole focus on the event of giving birth. Instead, we must turn our attention to the large number of variables that may give rise to a whole spectrum of possibilities.”, *op. cit.*, p. 27. See also the metaphor of the tomatoes in A. Watson, *Legal Transplants and European Private Law*, vol 4.4 Electronic Journal of Comparative Law, (December 2000), <<http://www.ejcl.org/ejcl/44/44-2.html>> n°VII.

<sup>91</sup> Converging to this conclusion European Company Law Experts, « The consequences of Brexit for companies and company law », art cit spec. p. 24, where the authors note, regarding the possibility for the UK, once it will be a third-country, to claim the equivalence of its Regulation in order to establish branches in the EU « However whether equivalence will open the door to establishment is disputable as the interpretation of the rules will not take place under the final authority. In the longer term, the equivalence decision will become more important, and ultimately equivalence may be lost due to regulatory changes in the EU or in the UK. »

of both the determining importance of the forum and the influence of its legal system on the issue.

*The application by the forum of the foreign law as a legal transplant.* The conflict of laws allows a disjunction between the *ius* and the forum. The consequence of that is the possibility of a forum applying a foreign law. If one sticks to the definition of legal transplant as "borrowing law from another legal order"<sup>92</sup>, it could be argued that the enforcement, by a forum, of a foreign law appears to be a form of temporary, or more accurately, a one-off legal transplant; a one-off event that may, however, occur again.

Nevertheless, it could be argued that the very idea of transplantation is not deprived of *permanence*. Therefore, the idea of a one-off legal transplant does not work as the legal transplant would only concern rules, and not decisions<sup>93</sup>.

Nonetheless, if we consider the application by the forum of the foreign law as a legal transplant, one could think that temporary legal transplants would not be affected by the recipient legal order. Indeed, it is often understood that time is needed for an evolution to appear from the original legal system. However, the *Dallah* case shows that even the temporary legal transplants suffer the influence of the legal order in which they are used.

*Inevitable influence of the legal order even on a one-off legal transplant.* The *Dallah* case<sup>94</sup> is a well-known arbitration case where two courts from two different legal orders, the United Kingdom and France, applying the same domestic law to the same facts, eventually issued divergent solutions in their respective decisions.

More than the importance of the forum in charge of the interpretation of a case, the *Dallah* decisions show that even though the legal transplant is only very temporary – here, just to decide one case – its interpretation is subject to the legal order interpreting it. However short the legal transplant is going to be, however

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<sup>92</sup> M. Chen-Wishart, « Legal transplant and undue influence », *op. cit.*, p. 1.

<sup>93</sup> On this distinction, see the famous work of Pierre Mayer, *La distinction entre règles et décisions en droit international privé*, Paris, Dalloz, 1973 ; On the limits of that distinction, see Louis d'Avout, *Sur les solutions du conflit de lois en droit des biens*, Paris, Economica, 2006 n°199.

<sup>94</sup> Divergent decisions from the Parisian Court of Appeal, Paris, 17 févr. 2011, n° 09/28533 (Clunet 2011. 395, note I. Michou; Paris *Journ. intern. arb.* 2011. 433, note G. Cuniberti; LPA 2011, n° 225-226, note L.-C. Delanoy; Gaz. Pal., 15-17 mai 2011, p. 16, obs. D. Bensaude), and the Supreme Court *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46.

familiar the recipient legal order is to the original legal order, one can only observe the inevitability of the change on the transplanted law.

If the proposition of considering the application of a foreign law as a form of legal transplant is rejected<sup>95</sup>, the *Dallab* case is still very useful. Indeed, by applying the same law but diverging in its interpretation, the *Dallab* case shows the importance of the forum, and therefore its qualification as *the* criterion triggering the possibility for a legal order to actually be autonomous.

### *C. Conflict of laws is a discipline depending on other fields of law*

Law necessarily depends on culture, which shapes the perception of property, of relationships between persons, and therefore the rules that should govern them. Conflict itself is not, like other disciplines, hermetic to the culture in which it inscribes itself. However, even more than the culture in its broad sense, the conflict of laws is dependent on the other *fields of law* themselves.

It is a truism to state that the conflict of laws method relies on the characterisation process. Characterisation in the conflict of laws being influenced by characterisation of the relevant branch of private law itself, the interpretation of the incorporated Rome I regulation will eventually change (1.). The issue of characterisation of the very notion of contract in the European conflict of laws is a powerful illustration of this phenomenon (2.).

## 1. Interpretation and characterisation

If the United Kingdom chooses to implement Rome I and Rome II as statutory provisions, one major difference will remain. The ultimate interpretation will no longer be the one provided by the European Union Court of Justice, but by the Supreme Court.

Thanks to the autonomous interpretation, the unified interpretation has allowed the characterisation divergences to cease<sup>96</sup>. But these are about to reappear,

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<sup>95</sup> After all, courts often have to apply foreign law, and it was never perceived to be a form of legal transplant. Also it may be argued that legal transplant cannot affect every norm, but only rules and not decisions. The perception of the application of foreign law as a legal transplant is not utterly convincing, however the *Dallab* case undoubtedly contributes to highlight the importance of the autonomy of the forum as *the* determining criterion regarding the very possibility of a legal system.

<sup>96</sup> Which was *Bartın's* great argument. Even though the rules of conflict could be the same in the different countries, the characterisation upon which they relied would be dependant upon their own legal order. Therefore, the issue of the conflict of law was

unless the Supreme Court decides to follow, unilaterally and without being bound to do so, the European Court of Justice.

It would therefore have to argue for an autonomous interpretation of the conflict of laws concept, for the sake of a common interpretation of the conflict of laws. That is unlikely.

## 2. Illustration through the notion of contract

A famous example of this issue would be the *Jakob Handte* case<sup>97</sup>, where there were divergences on the very notion of contract itself. Though it concerns the interpretation of the Brussels Convention, the point is also relevant for the conflict of laws as it concerns an issue of delimiting concepts in the context of different legal cultures, which nevertheless agreed on a similar legal convention.

The issue was whether or not Article 5(1) of the Brussels Convention<sup>98</sup> had to be understood as applying to an action between a sub-buyer of goods and the manufacturer, who is not the seller, relating to defects in those goods or to their unsuitability for their intended purpose.

Under French law, for policy reasons<sup>99</sup>, such a relationship is considered of a contractual nature. Consequently, the direct claim<sup>100</sup> of the sub-contractor directed toward the “Maître d’oeuvre”, in case the contractor himself is insolvent, will have to be brought in front of the court designated by the French civil procedural code as competent to deal with contractual relationships, i.e. the jurisdiction of the place of the effective delivery of goods or of the provision of services.

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ultimately insoluble. Etienne Bartin, "De l'impossibilité d'arriver à la solution définitive des conflits de lois", *JDI*, 1897, p. 225.

<sup>97</sup> *Jakob Handte*, C-26/91.

<sup>98</sup> Article 5 of the Brussels Convention: “A person domiciled in a Contracting State may, in another Contracting State, be sued: 1. in matters relating to a contract, in the courts for the place of performance of the obligation in question”

<sup>99</sup> The sub-contractor used to be claimless from the point of view of contract law in the event the intermediary became insolvent. Therefore the law meant to allow an action from the sub-contractor against the “Maître d’oeuvre”, the person who originated the main contract. In the *Jakob Handte* case, the situation is unusual: it is the “Maître d’oeuvre” who is acting on a contractual basis against the subcontractor.

<sup>100</sup> Named “action directe” in French, direct because it does not have to go through tort law and its concept of unjust enrichment.

Yet such a relationship is considered by the European Court to be too much of a stretch to be considered a contract<sup>101</sup>.

### General Conclusions

Foucault<sup>102</sup> famously tried to show that history was fundamentally discontinuous, but that the great irony was that the discontinuity of history was well hidden behind the continuity of language.

Through this paper, I have tried to argue that a similar phenomenon is occurring in the English conflict of laws. The continuity of the rules might well hide the discontinuity of the interpretation of the English conflict of laws.

This discontinuity is not going to constitute a paradigm shift, in so far as the methodology of private international law is not going to change but only its sources. However, there will be an increasing divergence with not only its former recent conflict of laws but also with the rest of the European Union<sup>103</sup>.

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<sup>101</sup> Therefore, though the eventuality of French law being designated to rule the contract is quite high, which means the contractual claim is going to stand, for conflict of jurisdiction purposes at least, it is the tort jurisdiction that will be competent.

<sup>102</sup> Michel Foucault, *The Order of Things: Archaeology of the Human Sciences*, London, Routledge, 2001 ; In French Michel Foucault, *Les Mots et les choses*, Paris, Gallimard, p. 161-162.

<sup>103</sup>-The United Kingdom will slowly drift away from the continent. For example, in the field of company law, see European Company Law Experts, « The consequences of Brexit for companies and company law », *op. cit.* spec. p. 20 "Over time, legal requirements are likely to diverge".