UNIWERSYTET ZIELONOGÓRSKI

DYSKURS PRAWNICZY I ADMINISTRACYJNY 2/2022 ISSN 2657-926X

Magdalena Wasylkowska-Michór
University of Zielona Góra
ORCID 0000-0002-5810-9186
m.wasylkowska-michor@wpa.uz.zgora.pl

Brexit and private international law. The effects of the United Kingdom's withdrawal from the European Union on the law applicable to non-contractual obligations

Keywords: Brexit, non-contractual obligations, Withdrawal Agreement, private international law, European Union, Rome II Regulation

Summary. With the expiry of 31 December 2020, Brexit has become a reality. However, already since the notification by the UK government that it intends to leave the European Union, there has been speculation as to what direction Brexit will go, *i.e.,* whether it will be so called "no deal" Brexit, or whether the EU and the UK manage to conclude a Withdrawal Agreement. The next crucial question was how the cooperation between the EU and UK in civil and private international law, would look like. The object of this article is to present a small part of this cooperation, namely in the field of determining the law applicable to non-contractual obligations. Accordingly, the article firstly presents alternative options for the arrangement of this cooperation and then deals with its successive stages. In the last part of the article the current regulations in this area are presented, *i.e.,* the main rule and the rules on the parties' choice of applicable law, regulated in the Rome II Regulation on the law applicable to non-contractual obligations.

Brexit a prawa prywatne międzynarodowe. Skutki wystąpienia Wielkiej Brytani z Unii Europejskiej dla prawa właściwego dla zobowiązań pozaumownych

Słowa kluczowe: Brexit, zobowiązania pozaumowne, umowa o odstąpieniu od umowy, prawo prywatne międzynarodowe, Unia Europejska, rozporządzenie Rzym II

Streszczenie. Wraz z upływem terminu 31 grudnia 2020 r., Brexit stał się faktem. Jednak już od momentu notyfikacji przez rząd brytyjski zamiaru opuszczenia Unii Europejskiej, pojawiały się spekulacje, w jakim kierunku pójdzie Brexit, tj. czy będzie to tzw. „no deal" Brexit, czy też UE i Wielka Brytania zdołają zawrzeć umowę o odstąpieniu od umowy. Kolejnym kluczowym pytaniem było to, jak będzie wyglądała współpraca między UE a UK w zakresie prawa międzynarodowego cywilnego i prywatnego. Przedmiotem niniejszego artykułu jest przedstawienie niewielkiego fragmentu tej współpracy, a mianowicie w zakresie określenia prawa właściwego dla zobowiązań pozaumownych. W związku z tym w artykule najpierw przedstawiono alternatywne warianty ułożenia tej współpracy, a następnie omówiono jej kolejne etapy. W ostatniej części artykułu przedstawione zostały aktualne regulacje w tym zakresie, tj. zasada główna oraz zasady wyboru przez strony prawa właściwego, uregulowane w rozporządzeniu Rzym II w sprawie prawa właściwego dla zobowiązań pozaumownych.

Introduction

Over the past decades, the United Kingdom has become a major, if not the most important, center for the settlement of international disputes – international companies are more likely to choose English law than any other one as the law applicable and on the other hand more likely to settle disputes in English courts than in other courts. The question of how Brexit will affect the legal framework of international disputes' settlement, in particular the determination of the law applicable to non-contractual obligations, is therefore of crucial importance - both for UK individuals and companies but also for the European Union. There is therefore no doubt that Brexit is one of the greatest legal challenges of recent times.

The issue of the law applicable to non-contractual obligations is currently regulated within the European Union by Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)[1].

This Regulation, of course, isn't applied anymore after the United Kingdom left the European Union. From the very beginning of the Brexit procedure, various ideas have been put forward on how to solve the problem of determining the law applicable to contractual and non-contractual obligations in the future. As one of the solutions, in the event of a so-called "no-deal Brexit"[2], it was proposed, for example, that the United Kingdom would apply the Rome Convention on the law applicable to contractual obligations of 19 June 1980 to determine the law applicable to contractual obligations[3]. In the absence of international conventions, the only solution for the UK will be to apply its own conflict of laws rules for determining the law applicable to contractual and non-contractual obligations. As a consequence, choice of law will no longer be subject to the same regime in the UK and the rest of the EU. This will make it more difficult for parties to predict which law

[1] According to Article 33 of the Polish Private International Law Act of February 4, 2011, (Journal of Laws 2015, item 1792, unified version), the law governing in respect of an obligation resulting from an event that is not an act in law shall be determined by Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) (OJ L 199, 31.07.2007, p. 40).

[2] "No-deal Brexit" is the name of situation when the withdrawal agreement is not ratified before the withdrawal date (known also as „cliff-edge scenario" or "hard Brexit").

[3] This convention differs however from the solution included in the Rome I Regulation, which is binding for the other EU Member States in the subject of determining law applicable to contractual obligations. Moreover, if instruments of EU law were to be replaced by international conventions, there would be a loophole in the area of determining the law applicable to non-contractual obligations. Currently, the only international convention in force, concerning this subject, is the Hague Convention on the Law Applicable to Traffic Accidents of 4 May 1971, (J. Ungerer, *Consequences of Brexit for European Private International Law*, "European Papers" 2019, vol. 4, no. 1, p. 404).

will be applied to cross-border disputes. They also will not be able to trust that the choice of law will be equally enforced in the UK and in other Member States. In the case of so-called "soft Brexit", four alternative solutions have been envisaged in the doctrine of law. The first and the simplest solution relays on the concluding of an agreement between the UK and the EU, the subject of which will be applying the Rome I and Rome II Regulations even after Brexit[4]. However, this option would require the consent of the EU, which the EU in turn might not give – firstly, in order to set an example to other member states which want to leave the EU and secondly, the EU's consent to the application of existing EU law would certainly be conditional on the UK accepting the case law of the Court of Justice of the European Union. Under the second option, the UK should enter into a new international agreement concluded with the EU, which would address the issues of determination of applicable law, jurisdiction and recognition and enforcement

[4] There is no single figure for how much EU law already forms part of UK law. According to EUR-Lex, the EU's legal database, there are currently over 12,000 EU regulations in force (this includes amending regulations as well as delegated and implementing regulations). In terms of domestic legislation which implements EU law such as directives, research from the House of Commons Library indicates that there have been around 7,900 statutory instruments which have implemented EU legislation, (item 2.6). Simply repealing the ECA, (The European Communities Act 1972) would lead to a confused and incomplete legal system. This is because, as described above, some types of EU law (such as EU regulations) are directly applicable in the UK's legal system. This means they have effect here without the need to pass specific UK implementing legislation. They will therefore cease to have effect in the UK once we have left the EU and repealed the ECA, leaving large holes in the statute book. To avoid this, the Bill will convert directly applicable EU laws into UK law, (item 2.4). By contrast, other types of EU law (such as EU directives) have to be given effect in the UK through national laws. This has frequently been done using section 2(2) of the ECA, which provides ministers, including in the devolved administrations, with powers to make secondary legislation to implement EU obligations. Once the ECA has been repealed, all of the secondary legislation made under it would fall away. As this would also leave a significant gap in the statute book, the Bill will also preserve the laws we have made in the UK to implement our EU obligations, (item 2.5). Equally, there are rights in the EU treaties that can be relied on directly in court by an individual, and the Great Repeal Bill will incorporate those rights into UK law. The text box overleaf on workers' rights gives an illustration of why this is important in practice, (item 2.11). The Government has been clear that in leaving the EU we will bring an end to the jurisdiction of the CJEU, (Court of Justice of the European Union) in the UK. Once we have left the EU, the UK Parliament (and, as appropriate, the devolved legislatures) will be free to pass its own legislation, (item 2.12). The Great Repeal Bill will not provide any role for the CJEU in the interpretation of that new law, and the Bill will not require the domestic courts to consider the CJEU's jurisprudence. In that way, the Bill allows the UK to take control of its own laws. We will, of course, continue to honour our international commitments and follow international law, (item 2.13), The Repeal Bill: White Paper, Policy paper, Legislating for the United Kingdom's withdrawal from the European Union, Department for Exiting the European Union, Updated 15 May 2017, (https://www.gov.uk/government/publications/the-repeal-bill-white-paper/legislating-for-the-united-kingdoms-withdrawal-from-the-european-union) (accessed on 30.05.2021).

of judgments[5]. In the third option, the UK would simply unilaterally decide to apply the Rome I and Rome II Regulations. It is a very good solution for determining the applicable law[6], but at the same time it requires a commitment from the UK courts that they will respect not only the "historic" case law of the CJEU, but also future case law. Finally, under the fourth option, the UK could replace the current European system with a more global one by negotiating new treaties with non-EU countries, for example within the framework of The Hague Conference on Private International Law. However, this is a long-term solution that can be achieved after many years of negotiations[7]. There have been arguments among specialists that the best solution for both the United Kingdom and the European Union would be an agreement on the applying of existing EU law instruments or concluding a new agreement which closely replicates those instruments[8].

The research method used in this work is dogmatic-legal method. The aim of the article is first to indicate which of the above-mentioned options has been finally chosen as the most appropriate one to determine the law applicable to non-contractual obligations. Then the purpose of this article is to assess the adopted solution. The article also presents regulations in the field of determining the law applicable to non-contractual obligations, which are in force today in relations between the United Kingdom and the European Union.

---

[5] This solution was probably the closest to the UK government' s position at this stage of the negotiations, when it spoke of a "new strategic partnership with the EU" and "building new relationships with the help of a new trade deal". However, it should also be born in mind that negotiating a new international agreement will be time-consuming. Given how many years it took to negotiate existing EU legal instruments, it is unlikely that a new "deal" on Brexit could be signed and entered into force in a relatively short period of time. In addition, the UK and the EU would have to find a way to resolve disputes arising from this new regime, (G. Rühl, *Brexit Negotiations Series: The Effect of Brexit on the Resolution of International Disputes – Choice of Law and Jurisdiction in Civil and Commercial Matters,* https://www.law.ox.ac.uk/business-law-blog/blog/2017/04/brexit-negotiations-series-%E2%80%98-effect-brexit-resolution-international (accessed on 30.05.2021).

[6] This option, as well as the first option, was initially advocated by British Prime Minister Theresa May, who stated in her speech of January 17, 2017, that on leaving the European Union Great Britain would convert the acquis - a collection of existing EU law - into British law. This would give the country maximum certainty. The day after Brexit, the same rules and laws would apply as before. On the other hand, May promised that Great Britain would regain control of its law when the jurisdiction of the European Court of Justice came to end, (https://www.telegraph.co.uk/news/2017/01/17/theresa-may -brexit-12-point-plan-live /). Another problem with this option, however, is that it isn't suitable for jurisdiction and the recognition and enforcement of judgments which, unlike in the case of determination of the applicable law, are based on reciprocity, (Rühl G., *op. cit.*).

[7] *Ibidem*.

[8] S. Majakowska-Szulc, *Konsekwencje brexitu w dziedzinie prawa prywatnego międzynarodowego*, „Problemy Prawa Prywatnego Międzynarodowego", vol. 27/2020, p.140.

1. Brexit – a chronology of events

On 23 June 2016 — the British people voted in a referendum to leave the European Union. Subsequently, on 29 March 2017 the UK formally notified[9] the European Council of its intention to withdraw, and a month later the European Council's, at an extraordinary meeting, adopted guidelines[10] setting out a framework for negotiations.

What should also be stressed is that while withdrawing from the European Union, the United Kingdom has relied on the procedure introduced into the Treaty on European Union (TEU)[11] by the Treaty of Lisbon[12], *i.e.,* under Article 50. This article confirms that any Member State may decide, in accordance with its own constitutional requirements, about its withdrawing from the European Union. Such decision is an exclusive competence of the Member State, is not limited to specific situations and is subject to national law. The right to take such a decision is also a sign of State sovereignty[13]. What is more, it follows from above-mentioned Article 50[14] that the decision of a Member State to withdraw from the European

[9] A letter of 29 March 2017 from the Prime Minister of the United Kingdom to the President of the European Council, Cover Note from General Secretariat of the Council to Delegations , XT 20001/17, BXT 1 https://data.consilium.europa.eu/doc/document/XT-20001-2017-INIT/en/pdf (accessed on 30.05.2021).

[10] Note from General Secretariat of the Council to Delegations. Subject: Special meeting of the European Council (Article 50) (29 April 2017)-Guidelines, EUCO XT 20004/17, (https://www.consilium.europa.eu/media/21763/29-euco-art50-guidelinesen.pdf (accessed on 30.05.2021)).

[11] Treaty on European Union (Consolidated Version), (Official Journal C 326, 26/10/2012 P. 0001 - 0390).

[12] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, Official Journal of the European Union of 17 December 2007, (2007/C 306/01).

[13] S. Biernat (ed.), *Podstawy i źródła prawa Unii Europejskiej*, "System Prawa Unii Europejskiej", Warszawa 2020, vol. 1, p. 681.

[14] Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements, (item 1). A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament, (item 2). The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period, (item 3). The withdrawal procedure therefore consists of three stages. Firstly, the Member State notifies the European Council of its intention to withdraw. Secondly, an agreement setting out the terms of withdrawal is negotiated and concluded, taking into account the framework for the country's future relationship with the European Union. Thirdly, the withdrawal itself takes effect from the date of entry into force of that agreement or, failing that, two years after notification to the European Council, unless the European Council decides unanimously to extend that period.

Union is a unilateral and unconditional act. Similarly, since withdrawal is a unilateral act, it does not require the conclusion of an agreement[15]. A withdrawal agreement may, however, establish the date of withdrawal (*i.e.* the date on which the withdrawal agreement enters into force) and agree on other arrangements, in particular: the financial aspects of the withdrawal, the rights of nationals of the withdrawing State residing in the Union and the rights of nationals of Member States residing in the withdrawing State, the status of the nationals of the withdrawing State employed in the institutions and other bodies of the Union and the other transitional issues[16].

The first withdrawal agreement[17] was negotiated by British Prime Minister Theresa May, but it didn't gain the approval of the British Parliament. It was only on 17 October 2019 that the European Council approved the revised withdrawal agreement and accepted the revised text of the political declaration[18], and on 21 October 2019 the Council adopted Decision (EU) 2019/1750 amending Decision (EU) 2019/274 (5) on the signature of the withdrawal agreement[19]. On 19 October 2019 the United Kingdom requested an extension of the withdrawal period referred to in Article 50(3) TEU until 31 January 2020. The European Council agreed to the above-mentioned extension[20].

On 9 January 2020 the House of Commons approved the Withdrawal Agreement Bill (WAB)21. The Council subsequently adopted in written proce-

[15] S. Biernat, (ed.), *op.cit*, p. 682. However, such a withdrawal from the European Union without an agreement, may have very negative consequences for both parties, and in particular for the withdrawing State, as it leaves the question of mutual relations after withdrawal practically unregulated.

[16] S. Biernat, (ed.) *op. cit*., pp. 684-685.

[17] Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, TF50 (2018) 33–Commission to EU 27, https://ec.europa.eu/info/sites/default/files/draft_withdrawal_agreement.pdf (accessed on 30.05.2021).

[18] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, (2019/C 384 I/01), CI 384/1, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12019W/TXT(02)&from=PL (accessed on 30.05.2021).

[19] Council Decision (EU) 2019/1750 of 21 October 2019 amending Decision (EU) 2019/274 on the signing, on behalf of the European Union and of the European Atomic Energy Community, of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, LI 274/1, 28.10.2019, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32019D1750&from=PL (accessed on 30.05.2021).

[20] European Council Decision (EU) 2019/1810 taken in agreement with the United Kingdom of 29 October 2019 extending the period under Article 50(3)TEU, LI 278/1, 30.10.2019, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32019D1810&qid=1622750222171&-from=en (accessed on 30.05.2021).

[21] European Union (Withdrawal Agreement) Bill House of Commons Committee Stage Briefing January 2020 (https://files.justice.org.uk/wp-content/uploads/2020/01/06170033/JUSTICE-WAB-Briefing-Committee-Stage.pdf) (accesed on 30.05. 2021).

dure a decision to conclude, on behalf of the Union, an agreement on the UK's withdrawal from the EU. The European Parliament had previously given its consent in a vote on 29 January, and the EU and the UK signed the agreement on 24 January. The Council adopted the decision to conclude the Brexit agreement on behalf of the Union on 30 January 2020, which was equivalent to ratifying the agreement on behalf of the EU. From now on, the UK is no longer an EU Member State and is thus treated as a third country. On 1 February 2020, a transitional period commenced and lasted until 31 December 2020. During this time, the UK continued to apply Union law, but was no longer represented in the EU institutions22. The transitional period was therefore designed to give time to prepare for the withdrawal day.

Unless otherwise provided in this Agreement, during the transition period, any reference to Member States in the Union law applicable pursuant to paragraph 1, including as implemented and applied by Member States, shall be understood as including the United Kingdom, (article 127, paragraph 6). Without prejudice to Article 127(2), during the transition period, the United Kingdom shall be bound by the obligations stemming from the international agreements concluded by the Union, by Member States acting on its behalf, or by the Union and its Member States acting jointly, as referred to in point (a)(iv) of Article, (article 129).

2. Brexit and the law applicable to non-contractual obligations

As it was already indicated in the previous chapter, the first agreement concerning the UK's withdrawal from the EU was negotiated by Theresa May's government. According to Article 62 of that agreement, entitled applicable law in contractual and non-contractual matters, the following acts shall apply as follows: (b) Regulation (EC) No 864/2007 of the European Parliament and of the Council in respect of events giving rise to damage which occurred before the end of the transition period[23]. It follows. therefore, that above-mentioned agreement concerned only the transitional period but did not extend further for the time after the end of this period.

[22] Brexit: Council adopts decision to conclude the withdrawal agreement, https://www.consilium.europa.eu/pl/press/press-releases/2020/01/30/brexit-council-adopts-decision-to-conclude-the-withdrawal-agreement/ (accessed on 30.05.2021).

[23] Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, TF50 (2018) 33–Commission to EU 27, https://ec.europa.eu/info/sites/default/files/draft_withdrawal_agreement.pdf (accessed on 30.05.2021) .

It should be noted here that further plans to determine the law applicable to non-contractual obligations were provided for in the so-called Great Repeal Act – an Act which was intended to prepare the UK for the European Union's exit.

According to item 1.12 of above-mentioned Act in order to achieve a stable and smooth transition, the Government's overall approach is to convert the body of existing EU law into domestic law, after which Parliament (and, where appropriate, the devolved legislatures) will be able to decide which elements of that law to keep, amend or repeal once we have left the EU. This ensures that, as a general rule, the same rules and laws will apply after we leave the EU as they did before. EU regulations will not be "copied out" into UK law, regulation by regulation. Instead, the Bill will make clear that EU regulations – as they applied in the UK the moment before we left the EU – will be converted into domestic law by the Bill and will continue to apply until legislators in the UK decide otherwise, (item 2.8). The treaties are the primary source of EU law. A substantial proportion of the treaties sets out rules for the functioning of the EU, its institutions and its areas of competence. While much of the content of the treaties will become irrelevant once the UK leaves the EU, the treaties (as they exist at the moment, we leave the EU) may assist in the interpretation of the EU laws we preserve in UK law (item 2.9). For example, in interpreting an EU measure it may be relevant to look at its aim and content, as revealed by its legal basis as found in the treaties, (item 2.10).

Regarding the case law of the European Court of Justice, the UK on one hand has explicitly stressed that 2.14. However, for as long as EU-derived law remains on the UK statute book, it is essential that there is a common understanding of what that law means. The Government believes that this is best achieved by providing for continuity in how that law is interpreted before and after exit day. To maximize certainty; therefore, the Bill will provide that any question as to the meaning of EU-derived law will be determined in the UK courts by reference to the CJEU's case law as it exists on the day we leave the EU. Everyone will have been operating on the basis that the law means what the CJEU has already determined it does, and any other starting point would be to change the law. Insofar as case law concerns an aspect of EU law that is not being converted into UK law, that element of the case law will not need to be applied by the UK courts (item 2.14).

At the same time, the UK government underlined that the UK Parliament remains sovereign, and parliamentary sovereignty is the foundation of the UK constitution. As a consequence of the ECA, passed by the UK Parliament, case law makes it clear that EU law has supremacy for as long as we are a member state. National laws must give way and be misapplied by domestic courts if they are found to be inconsistent with EU law (item 2.18). Our proposed approach is that, where a conflict arises between EU-derived law and new primary legislation passed

by Parliament after our exit from the EU, then newer legislation will take precedence over the EU-derived law we have preserved. In this way, the Great Repeal Bill will end the general supremacy of EU law (item 2.19). If, after exit, a conflict arises between two pre-exit laws, one of which is an EU-derived law and the other not, then the EU-derived law will continue to take precedence over the other pre-exit law. Any other approach would change the law and create uncertainty as to its meaning, (item 2.20)[24].

The Great Repeal Bill's demands are reflected in Article 66 of the final version of the UK's Withdrawal Agreement from the EU. According to this Article in the United Kingdom, the following acts shall apply as follows: (b) Regulation (EC) No 864/2007 of the European Parliament and of the Council (72) shall apply in respect of events giving rise to damage, where such events occurred before the end of the transition period. Articles 158 and 159 of the above quoted Agreement are also worth noting, as they provide for special institutional arrangements to ensure that the United Kingdom honours its commitments towards the European Union. Where, in a case which commenced at first instance within 8 years from the end of the transition period before a court or tribunal in the United Kingdom, a question is raised concerning the interpretation of Part Two of this Agreement, and where that court or tribunal considers that a decision on that question is necessary to enable it to give judgment in that case, that court or tribunal may request the Court of Justice of the European Union to give a preliminary ruling on that question (article 158). Then there is an obligation on the UK to set up a special governmental body in order to monitor compliance with the Part Two of the Agreement, (article 159)[25].

[24] The Repeal Bill: White Paper, Policy paper, Legislating for the United Kingdom's withdrawal from the European Union, Department for Exiting the European Union, Updated 15 May 2017, https://www.gov.uk/government/publications/the-repeal-bill-white-paper/legislating-for-the-united-kingdoms-withdrawal-from-the-european-union) (accessed on 30.05.2021).

[25] In the United Kingdom, the implementation and application of Part Two shall be monitored by an independent authority (the "Authority") which shall have powers equivalent to those of the European Commission acting under the Treaties to conduct inquiries on its own initiative concerning alleged breaches of Part Two by the administrative authorities of the United Kingdom and to receive complaints from Union citizens and their family members for the purposes of conducting such inquiries. The Authority shall also have the right, following such complaints, to bring a legal action before a competent court or tribunal in the United Kingdom in an appropriate judicial procedure with a view to seeking an adequate remedy, (paragraph 1). The European Commission and the Authority shall each annually inform the specialised Committee on citizens' rights referred to in point (a) of Article 165(1) on the implementation and application of Part Two in the Union and in the United Kingdom, respectively. The information provided shall, in particular, cover measures taken to implement or comply with Part Two and the number and nature of complaints received, (paragraph 2). The Joint Committee shall assess, no earlier than 8 years after the end of the transition period, the functioning of the Authority. Following such assessment, it may decide, in good faith, pursuant to point (f) of Article 164(4) and Article 166, that the United Kingdom may abolish the Authority, (paragraph 3), (Agreement on the withdrawal of the United Kingdom of Great Britain and North-

To summarize, the Rome II Regulation has been applied in the UK during the transitional period. At the end of the transitional period, (23.00 London time, 31 December 2020):

– The Rome II Regulation ceased to apply on a reciprocal basis, except where the events giving rise to the damage occurred before the end of the transitional period;
– Above-mentioned regulation was converted into national law;
– an instrument called The Law Applicable to Contractual and Non-Contractual Obligations (Amendment *etc.*), (UK Exit) Regulations 2019 (SI 2019/834), (the Regulations) came into force. The Regulations deal with the continued application of the Rome II Regulation as domestic law in all parts of the United Kingdom[26];
– the Regulations are amended by the Jurisdiction and Applicable Law (Amendment), (EU Exit) Regulations 2020 — the amendments relate to definitions and the question of references of the Rome II Regulation to national law and national law to the Rome II Regulation[27].

After the end of the transitional period, the English courts therefore continue to apply the regime of Rome II when determining the law applicable to non-contractual obligations. Rome II Regulation apply regardless of whether the applica-

ern Ireland from the European Union and the European Atomic Energy Community, (2019/C 384 I/01), CI 384/1, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12019W/TXT(02)&from=PL (accessed on 30.05.2021).

[26] The quoted legal act is divided into four parts. The first part contains introductory information, whereas the second part is a list of amendments that followed the implementation of the Rome I and Rome II regulations into the British legal order. They are amendments to the Prescription and Limitation (Scotland) Act 1973, the Foreign Limitation Periods Act 1984, the Contracts (Applicable Law) Act 1990, the Private International Law (Miscellaneous Provisions) Act 1995, the Consumer Rights Act 2015 and to the Foreign Limitation Periods (Northern Ireland) Order 1985. The third part is a list of amendments that took place in the so-called secondary legislation. They are amendments to the Law Applicable to Non-Contractual Obligations (England and Wales and Northern Ireland) Regulations 2008, the Law Applicable to Contractual Obligations (England and Wales and Northern Ireland) Regulations 2009, the Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2009, the Law Applicable to Non-Contractual Obligations (Scotland) Regulations 2008 and to the Law Applicable to Contractual Obligations (Scotland) Regulations 2009. The fourth part contains amendments to the very content of the Rome II Regulation. These changes do not, however, concern the rules of determining the applicable law, but are only of formal nature. Thus, the expression "Member State" has been changed to "the United Kingdom or part of the United Kingdom" or "the United Kingdom", the expression "a court in the territory of the United Kingdom" should be substituted for "a court in the territory of the defendant", *etc.* (The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019, UK Statutory Instruments 2019 no. 834, https://www.legislation.gov.uk/uksi/2019/834 (accessed on 30.05.2021).

[27] The Jurisdiction, Judgments and Applicable Law (Amendment) (EU Exit) Regulations 2020, UK Draft Statutory Instruments, ISBN 978-0-348-21268-6, https://www.legislation.gov.uk/ukdsi/2020/9780348212686/regulation/6 (accessed on 30.05.2021).

ble law is that of an EU Member State[28]. Consequently, the Rome II Regulation requires application regardless of whether the two parties are in any way connected to Member States of the European Union or whether any factual element of their relationship shows such a connection. The United Kingdom's lack of membership in the European Union will therefore not prevent the application of British law if it is applicable[29]. The Rome II Regulation is not based on the principle of reciprocity, and where the parties have chosen English law to govern their non-contractual obligations, the courts of the EU Member States would uphold that choice[30].

The law applicable to non-contractual obligations to which Rome II Regulation is not applied[31] will be determined by the Private International Law (Miscellaneous Provisions) Act 1995[32]. The main connecting factor used in this Act is the law of the place where the harmful event occurs, although in defamation cases the old, customary double rule (actionability) continues to apply[33].

---

[28] Any law specified by this Regulation shall be applied whether or not it is the law of a Member State, (Article 3 of the Rome II Regulation).

[29] M. Jóźwiak, M. Miszewska, *„Twardy" Brexit utrudni transgraniczne postępowania sądowe*, "Rzeczpospolita 23.11.2020", (https://www.rp.pl/Opinie/311239946-Maciej-Jozwiak-Malgorzata-Miszewska-Twardy-Brexit-utrudni-transgraniczne-postepowania-sadowe.html) (accessed on 30.05.2021).

[30] *Impact of Brexit on Choice of Law, Jurisdiction and Enforcement* (https://www.nortonrosefulbright.com/en/knowledge/publications/a6ec9370/impact-of-brexit-on-choice-of-law-jurisdiction-and-enforcement (accesed on 30.05.2021).

[31] According to article 1 paragraph 2 of the Rome II Regulation the following shall be excluded from the scope of this Regulation: (a) non-contractual obligations arising out of family relationships and relationships deemed by the law applicable to such relationships to have comparable effects including maintenance obligations; (b) non-contractual obligations arising out of matrimonial property regimes, property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage, and wills and succession; (c) non-contractual obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character; (d) non-contractual obligations arising out of the law of companies and other bodies corporate or unincorporated regarding matters such as the creation, by registration or otherwise, legal capacity, internal organisation or winding-up of companies and other bodies corporate or unincorporated, the personal liability of officers and members as such for the obligations of the company or body and the personal liability of auditors to a company or to its members in the statutory audits of accounting documents; (e) non-contractual obligations arising out of the relations between the settlors, trustees and beneficiaries of a trust created voluntarily; (f) non-contractual obligations arising out of nuclear damage; (g) non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation.

[32] Private International Law (Miscellaneous Provisions) Act 1995, UK Public General Acts1995 c. 42, https://www.legislation.gov.uk/ukpga/1995/42/contents (accessed on 30.05.2021).

[33] This principle was first mentioned in The Halley (1868) judgement. This case concerned the act for which liability was provided for in the place where it was committed, but it was not provided for in English law. The English court of second instance dismissed the suit on the ground that foreign law could not be imposed in such a situation, (M. Sośniak, *Zobowiązania nie wynikające z czynności prawnych w prawie prywatnym międzynarodowym*, Katowice 1971, p. 68). Next there was a judgement in Phillips v. Eyre (1870) case, which established two basic conflict rules for tort liability. Firstly, the breach must be of such a nature as to justify an action in tort in an English court if the

3. General principle of the Rome II Regulation

3.1. Place where the damage occurred as a main principle of article 4 of the Rome II Regulation

According to Article 4, paragraph 1, unless otherwise provided for in this Regulation the law applicable to a non-contractual obligation arising out of a tort/delict shall be the low of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur. It follows from the foregoing that the authors of Rome II Regulation explicitly declared for the application of the *lex loci damni* principle (the law of the place where the damage occurred). Such a solution is differently evaluated in the doctrine. The place of the occurrence of damage is usually closer to the injured party. Application of the law that is the closest to the injured party results in a significant reduction in costs of the litigation. On the other hand, *lex loci delicti* commissi principle represents the interests of the state in terms of sanctions, which means that the damage will not be compensated properly from the perspective of the injured party[34].

Contrarily, it is also stressed in the doctrine that due to the adoption of the *lex loci damni* rule, too many legal systems would have to be taken into account, especially in the case of global sales of goods manufactured in one of the Member States and causing damage in the other one[35]. The connecting factor of the place damage's occurrence doesn't work when the damage takes place in more than one country. This means that the other law will apply to the effects of the same incident, depending on which country the effect took place. Therefore, it is in the interest of legal certainty to apply the law of the country where the event causing damage occurred[36].

Critical statements in the literature of the subject are also raised in the context of the possibility of applying the *lex loci damni* principle to commercial activities conducted via the Internet because this rule causes difficulties in the case of loca-

tort was committed in England (actionable in England). Secondly, the act should not be justifiable by the lex loci delicti. (J.G. Collier, *Conflict of Laws*, Cambridge 2001, p. 221).

[34] *Deutscher Industrie une Handelskammertag (DIHK) Commentary* (http://ec.europa.eu/justice/news/consulting_public/rome_ii/contributions/deutscher_industrie_handelskammertage_de.pdf) (accessed on 30.05.2021).

[35] *FEDMA (Federation of European Direct Marketing) Commentary* (http://ec.europa.eu/justice/news/consulting_public/rome_ii/contributions/ferder_direct_marke_en.pdf) (accessed on 30.05.2021). *Advertising Association* Commentary, (http://ec.europa.eu/justice/news/consulting_public/rome_ii/contributions/advertising_association_en.pdf) (accessed on 30.05.2021).

[36] *Die Wirtschaftskammer Österreich Commentary* (http://ec.europa.eu/justice/news/consulting_public/rome_ii/contributions/wirtschaftskammer_osterreichd_de.pdf) (accessed on 30.05.2021).

tion of Internet damage[37]. In amazon.com's opinion, the new Regulation assumes that the business entity operating lawfully in one of the EU Member States, in order to avoid future claims and liability, will also have to act in accordance with the rules on torts/delicts applicable in each of the countries in which it operates. In the case of business entities operating online, this will be impossible in practice only because the website is available from around the world[38].

Reassuming, it should be emphasised that the *lex loci damni* principle generally fails in the case of so-called multi-place (dispersed) torts/delicts. In such cases a problem arises, the law which country to use when there is more than one place of damage. What's more there is no criterion in this matter. As a result, it follows from a language of this term literal interpretation that the law of each state in which the damage occurred should be applied insofar as it occurred there.

3.2. Place of the common habitual residence

According to Article 4, paragraph 2, however, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when damage occurs, the law of that country shall apply. As it results from the above-mentioned article, the Rome II Regulation does not contain a definition of "habitual residence" of a natural person. In such a case Article 23, paragraph 2, defines their registered office only to the extent to which they run a business[39], stating that for the purposes of this Regulation, the habitual residence of a natural person acting in the course of his or her business activity shall be his or her principal place of business. It also seems that, as in the case of other legal acts of EU law, also in the case of the Rome II Regulation, it should be assumed that the term "common residence" means that the parties involved in tort/delict have their actual center of life (*faktische Lebensmittelpunkte*[40]) in the same country[41].

---

[37] *BEUC Commentary* (http://ec.europa.eu/justice/news/consulting_public/rome_ii/contributions/euro_consumer_en.pdf) (accessed on 30.05.2021).

[38] *Amazon Commentary* (http://ec.europa.eu/justice/news/consulting_public/rome_ii/contributions/amazon_com_en.pdf) (accessed on 30.05.2021).

[39] G. Wagner, *Die neue Rom II-Verordnung, Praxis des Internationalen Privat- und Verfahrensrechts* (IPRax) 2008, vol. 1, no. I/II, p. 5.

[40] Judgement of the Court of 12 July 1973, Anciens Etablissements D. Angenieux fils aîné et Caisse primaire centrale d'assurance maladie de la région parisienne v Willy Hakenberg, (C 13-73, judgement of the Court of 17 February 1977, Silvana Di Paolo v Office national de l'emploi (C 76-76), judgement of the Court of 23 April 1991, Rigsadvokaten v Nicolai Christian Ryborg (C-297/89), judgement of the Court of 12 July 2001, Paraskevas Louloudakis v Elliniko Dimosio (C-262/99), judgement of the Court of 2 April 2009, Korkein hallinto-oikeus v A. (C-523/07).

[41] Von H. Ofner, *Die Rom II-Verordnung-Neues Internationales Privatrecht für ausservertragliche Schuldverhältnisse in der Europäischen Union,* Zeitschrift für Rechtsvergleichung (ZfRV) 2008, no. 3, p. 16.

It should also be born in mind that a common habitual residence must take place at the time when the damage occurs, and not on the date of the event causing the damage or the date of the court proceedings. If the damage is sustained over a certain period of time, the earliest moment should be taken into account. Change of the residence after this time will not be relevant for the application of the principle expressed in Article 4, paragraph 2, although this may be a factor taken into account when applying Article 4, paragraph 3[42]. The provisions of Article 4 paragraph, 2 do not apply if the parties live in different countries, even when the relevant provisions of these countries' laws are the same. The connecting factor of citizenship of the parties is of no significance here, but it can be taken into account on the basis of Article 4, paragraph 3[43].

3.3. Property of the law of a manifestly closer connection

According to Article 4, paragraph 3 of the subject Regulation where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract that is closely connected with the tort/delict in question. At this point, the question arises about the nature of the relationship between the parties which can be taken into account on the basis of Article 4, paragraph 3. A language interpretation of the above-mentioned paragraph suggests that this relationship may also be of a real nature, as Article 4 ,paragraph 3, uses the term "relationship", not the "contractual relationship". What is more, the term "contract" was mentioned only as an example of the relationship between the parties, which may be relevant from the perspective of this article[44].

Law alternatively indicated by Article 4, paragraph 3, must be the law other than that indicated by paragraph 1 or 2, what means that it must be a law other than the *lex loci damni* and the law of the place of common habitual residence of the parties. It is therefore assumed that if the choice is to be made only between the *lex loci damni* and the law applicable in the place of common habitual residence, the latter will always prevail. Article 4, paragraph 3, may be considered as a tool for mediation between article 4, paragraph 1 and Article 4, paragraph 2, insofar as

[42] A. Dickinson, *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations*, Oxford University Press 2009; pp. 339-340.

[43] J. von Hein, *Europäisches Internationales Deliktsrecht nach der Rom II-Verordnung*, Zeitschrift für Europäisches Privatrecht , "ZeuP" 2009, no. 6-33, p. 17.

[44] A. Dickinson, *op. cit*., p. 346., X.E.Kramer, *The Rome II Regulation on the Law Applicable top Non-Contractual Obligations: The European private international law tradition continued. Introductory Observations and General Rules*, Nederlands Internationaal Privaatrecht, "NIPR" 2008, p. 421.

factors other than the place of occurrence of the damage or the parties' common habitual residence are linking at the tort/delict with one of these states. If, on the other hand, the connecting factors from article 4, paragraphs 1 and 2 are the only ones, Article 4, paragraph 2 must be applied[45].

In particular, it is not clear whether the following two factors are relevant for the application of Article 4, paragraph 3: location of the event which is the source of the tort/delict and location of any indirect damage. Article 4, paragraph 1, states that the law applicable to a non-contractual obligation arising out of a tort/delict shall be the low of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur. It directly follows from this provision that these factors have been rejected as connecting factors and that's why they shouldn't be taken into account when applying Article 4, paragraph 3. The total exclusion of the law applicable in the country where the event giving rise to the damage occurred may also result from Article 17 because this article clearly sets the limits in which the *lex loci actus* can be applied. Therefore, accepting the exclusion of these two above-mentioned connecting factors links means a very serious weakening of the meaning of article 4, paragraph 3[46].

In the practice, a great importance for the use of the manifestly closer connection clause Great importance in the practice of the use of an accessory clause under article 4, paragraph 3, will also have its relation to Article 14 Rome II Regulation. If the parties have chosen the law applicable to their contractual relationship, an accessory connecting factor from article 4 paragraph 3 will make this choice also relevant to tort/delicts claims[47].

4. Freedom of choice law in the Rome II Regulation

According to Article 14, paragraph 1, the parties may agree to submit non-contractual obligations to the law of their choice: (a) by an agreement entered into after the event giving rise to the damage occurred; or (b) where all the parties are pursuing a commercial activity, also by an agreement freely negotiated before the event giving rise to the damage occurred. The choice shall be expressed or demon-

[45] R. Fentiman, *The Significance of Closer Connection*, (in:) J.Ahern, W.Binchy (eds.) *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations: A New International Litigation Regime*, Leiden 2009, p. 89.

[46] R. Fentiman, *op. cit*, pp. 99-100.

[47] T.K. Von Graziano, *Das auf ausservertragliche Schuldverhaeltnisse anzuwendende Recht nach Inkrafttreten der Rom II-Verordnung*, "Rabels Zeitschrift fuer auslaendisches und internationales Privatrecht" (RabelsZ) 2009, vol. 73, no. 1, p. 21.

strated with reasonable certainty by the circumstances of the case, and shall not prejudice the rights of third parties.

It follows therefore from the above-mentioned provision that, so-called implied choice of law is basically acceptable on the grounds of Rome II Regulation. The only condition is that the choice of law "shall be expressed or demonstrated with reasonable certainty by the circumstances of the case". The implied choice of law made during a process (*Prozessverhalten*) is also acceptable[48]. Moreover, it is also to cancel or change the law chosen by the parties[49]. According to the statements of some representatives of the doctrine, choice of law in favor of a third party should also not be excluded[50].

Article 14, paragraph 2 lit. b requires all parties to the choice of law contract to run a commercial activity. This requirement must be met in relation to the time of the contract's concluding and its subject matter. For these purposes, according to A. Dickinson, "commercial activity" should be understood as encompassing any activity with commercial or professional objectives. In addition, if people act partly for commercial or professional purposes and partly for their own private purposes, commercial purposes should prevail unless their scope is so limited that they are not relevant in the overall context of the contract[51].

Another condition that must be fulfilled in order to make so-called previous choice of law effective, is the free negotiation of the terms of the contract - it is not enough that the contract is "negotiated", it must be "freely negotiated" and thus satisfy an even more severe criterion. It seems that the intention of this provision was to exclude situations where the chosen law would be imposed by one of the parties on the other, without giving it the opportunity to negotiate conditions[52]. On the other hand, the fact that a contract containing a provision on the law applicable to non-contractual obligations is in a standardized form will not automatically exclude it from the scope of application of Article 14, paragraph 1 letter b, if each party has the opportunity to influence on the terms of the contract, in particular on the choice of law clause[53].

Another issue that has not been sufficiently explained under Article 14 of Rome II Regulation is the kind of law that can be chosen by the parties. It seems that Article 14, paragraph 1, only allows to apply the law of a given country, and not,

---

[48] A. Fuchs, *Zum Kommissionvorschlag einer „Rom II"-Verordnung*, "Zeitschrift für Gemeinschaftsprivatrecht" (GPR) 2003-2004, vol. 2, p. 104.

[49] J. Pazdan, *Rozporządzenie Rzym II – nowe wspólnotowe unormowanie właściwości prawa dla zobowiązań pozaumownych*, "Problemy Prawa Prywatnego Międzynarodowego" 2009, vol. 4, p. 28.

[50] H. Heiss, L.D. Loacker, *Die Vergemeinschaftung des Kollisionsrechts der außervertraglichen Schuldverhältnisse durch Rom II*, "Juristische Blätter" 2007, vol. 10, p. 623.

[51] A. Dickinson, *op. cit.*, p. 561.

[52] *Ibidem*, p. 562.

[53] *Ibidem*, p. 563.

for example, the general principles of Sharia law[54] or Principles of European Tort Law, which were submitted by the European Group on Tort Law. According to the opposite point of view, Article 14 refers only to the choice of "law" without any further references, especially to the law of particular country[55]. It seems at first glance that in relation to non-contractual obligations, the first step may be to choose the, which were submitted by the European Group on Tort Law. At this point, it is worth to pay attention to the provisions of Roman Convention and the Rome I Regulation. As well as Article 3 of the Rome Convention on the Law Applicable to Contractual Obligations of 1980, Article 3 of the Rome I Regulation also regulates the choice of law issue, while Article 13 of this act clarifies that this Regulation does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention. Although such an explanation is lacking in the Rome II Regulation, it should be noted that all these three legal acts use the term "choice of law", which seems to eliminate all references to the rules other than the rules of law of the given country.

On the other hand, according to the prevailing point of view, law applicable to the agreement on the choice of law should be determined in accordance with the Rome I Regulation. On the contrary, it is not permissible, on the grounds of Rome I Regulation, to split the law applicable to various issues arising from the same contract, for example, concerning its validity or interpretation, (so called *dépeçage*). However, the parties may choose different law applicable to different non-contractual obligations[56].

Conclusions

It follows from the considerations presented above that, having the four options for future cooperation with the European Union on the subject of determining the law applicable to non-contractual obligations, the United Kingdom has chosen to incorporate the Rome II Regulation into its own legal system. This, of course, was possible only because the Regulations Rome I and II, are not applied, unlike the regulations on jurisdictional issues, on a reciprocal basis. The Regulation claims universal applicability, just like the Rome I Regulation; but here the significant difference is that no obligation from public international law would prevent the application of the Rome II Regulation in a case involving the UK as a Third State. Moreover, the Rome II Regulation does not allow deviation from compulsory EU law where a case is only connected to British law through the parties' choice of

[54] *Ibidem*, p. 553.
[55] T.K. Von Graziano, *op. cit.*, p. 9.
[56] A. Dickinson, *op. cit.*, pp. 552-553.

this future Third State law[57]. On the one hand, this solution is desirable insofar as it makes it possible to maintain, after Brexit, to some extent the status quo in the question of the law applicable to non-contractual obligations in relations with the European Union[58].

On the other hand, however, it should be noted that this status quo is only to a certain extent. In the European Union legislative activity is inseparably accompanied by the case-law of the European Court of Justice, which performs primarily an interpretative function, but also gives a new direction to the European Union's law-making activity. These two activities are therefore interconnected. Moreover, Brexit will inevitably lead to the elimination of the influence of the Court of Justice's case law on the British courts' case law, also in the field of determining the law applicable to non-contractual obligations. Admittedly, under Article 158, paragraph 1, of the Withdrawal Agreement, where, in a case which commenced at first instance within 8 years from the end of the transition period before a court or tribunal in the United Kingdom, a question is raised concerning the interpretation of Part Two of this Agreement, and where that court or tribunal considers that a decision on that question is necessary to enable it to give judgment in that case, that court or tribunal may request the Court of Justice of the European Union to give a preliminary ruling on that question. Secondly, in the United Kingdom, the implementation and application of Part Two shall be monitored by an independent authority (the "Authority") which shall have powers equivalent to those of the European Commission acting under the Treaties to conduct inquiries on its own initiative concerning alleged breaches of Part Two by the administrative authorities of the United Kingdom and to receive complaints from Union citizens and their family members for the purposes of conducting such inquiries, (Article 159, paragraph 1). However, it cannot be overlooked that that above-mentioned the ECJ's control only concerns questions for a preliminary ruling, so its subject matter is limited. Secondly, it is limited also in time. Having regard to the fact that the interference of the European Court of Justice's case law in the activities of the British courts was one of the Brexit's causes[59], we should not expect that the British

[57] J. Ungerer, *op. cit.*, p.404.

[58] In addition, with regard to the London financial market, the law governing any non-contractual liability for misconduct will be determined by the Rome II Regulation in European courts. For instance, where such a damages claim is brought in Italy or Germany, the Rome II Regulation provides for the law of the place where the financial loss occurred to govern the case, which can be at the place of the claimant's habitual residence or its bank account.56 Even after Brexit, UK private international law will not have a say on the issue (J. Ungerer, *op. cit.*, pp. 404-405).

[59] In Lord J. Mance's view, too much lawmaking by the ECJ on the one hand, as well as the inconsistency of its judgments, often inspired not so much by legal but by political considerations, contributed to such unpopularity of the ECJ in the UK. In particular, the teleological approach of the ECJ and the political impact of its judgments were treated as contrary to the fundamental principles of parliamentary sovereignty and due process in the UK. Subsequently, in the United King-

courts will want to make use of the possibility offered to them by Article 158 of the Withdrawal Agreement. Conversely, in future we should rather expect that the same legal provisions of Rome II will be understood differently depending on whether they are interpreted by courts of Member States and ECJ or British courts.

Furthermore, it should be recognized that the European Union also has so-called acquis communautaire, which consists of legal instruments that complement and influence each other. A separate agreement between the European Union and the United Kingdom on the application of the one piece of this system, *i.e.*, the law applicable to non-contractual obligations, undoubtedly violates the cohesion of this system. Therefore, the question arises whether the individual elements of this system are capable of functioning separately and independently of each other on a different basis. Besides, regulations concerning the law applicable to non-contractual obligations may already be found in other instruments of EU law than the Rome II Regulation, and they may also be incorporated into them in the future. In the meantime, British regulations on the incorporation of the content of Rome II Regulation into English law do not address this issue at all.

Then, it is important to note that the Rome II Regulation can be reviewed in the future and certain of its provisions can be amended. Meanwhile, both The Law Applicable to Contractual and Non-Contractual Obligations (Amendment *etc.*), (UK Exit) Regulations 2019 (SI 2019/834), (Regulations) and Jurisdiction and Applicable Law (Amendment), (EU Exit) Regulations 2020 concern the incorporation of Rome II Regulation into the UK's legal system, but according to the current legal status. Therefore, the question arises as to what will happen if the content of Rome II changes in the future, in particular whether the British legislator decides in such a situation to revise the aforementioned legal acts. Here we have to also remember that representatives of the United Kingdom will no longer participate in negotiations concerning the adoption of the regulation in its new form, and thus will have no influence on its content. In the current state of knowledge, this question should be considered as an open one.

Finally, it should also be noted that within the United Kingdom itself, there may be differences in the legal rules applied to determine the law applicable to non-contractual obligations. In Scotland, the making of private international law instruments is a devolved competence which has been transferred to the Scottish Government. It may therefore be that the Scottish Government, which is relatively

dom lacks both a written constitution and a constitutional court. As a result, British courts are rather free in their jurisprudential activity (the common law system assumes to some extent the law making activity of the courts - author's note), and therefore reluctant to such an extensive system of control, (*Lord Jonathan Mance on the future relationship between the United Kingdom and Europe after Brexit* https://conflictoflaws.net/2020/lord-jonathan-mance-on-the-future-relationship-between-the-united-kingdom-and-europe-after-brexit/ (accessed on 30.05.2021).

EU-friendly, may seek to domestically align aspects of Scots private international law with EU law equivalents[60].

References

Ahern J., Binchy W. (ed.), *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations: A New International Litigation Regime*, Leiden 2009.

Biernat S. (ed.), *Podstawy i źródła prawa Unii Europejskiej. System Prawa Unii Europejskiej*, vol. 1, Warszawa 2020.

Collier J.G., *Conflict of Laws*, Cambridge 2001.

Dickinson A., *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations*, Oxford University Press 2009.

Fuchs A., *Zum Kommissionvorschlag einer „Rom II"-Verordnung*, "Zeitschrift für Gemeinschaftsprivatrecht" (GPR) 2003-2004, vol. 2.

Heiss H., Loacker L.D., *Die Vergemeinschaftung des Kollisionsrechts der außervertraglichen Schuldverhältnisse durch Rom II*, "Juristische Blätter" 2007, z. 10.

Jóźwiak M., Miszewska M., *„Twardy" Brexit utrudni transgraniczne postępowania sądowe*, "Rzeczpospolita" 23.11.2020, (https://www.rp.pl/Opinie/311239946-Maciej-Jozwiak-Malgorzata-Miszewska-Twardy-Brexit-utrudni-transgraniczne-postepowania-sadowe.html) (accessed on 30.05.2021).

Kramer X.E., *The Rome II Regulation on the Law Applicable top Non-Contractual Obligations: The European private international law tradition continued. Introductory Observations and General Rules*, "Nederlands Internationaal Privaatrecht" (NIPR) 2008.

Kruger T., *Brexit: No need to stop all the clocks* (https://conflictoflaws.net/2020/brexit-no-need-to-stop-all-the-clocks/) (accessed on 30.05.2021).

Majakowska-Szulc S., *Konsekwencje brexitu w dziedzinie prawa prywatnego międzynarodowego*, "Problemy Prawa Prywatnego Międzynarodowego" 2020, vol. 27.

Pazdan J., *Rozporządzenie Rzym II – nowe wspólnotowe unormowanie właściwości prawa dla zobowiązań pozaumownych*, "Problemy Prawa Prywatnego Międzynarodowego" 2009, vol. 4.

Rühl G., *Brexit Negotiations Series: The Effect of Brexit on the Resolution of International Disputes – Choice of Law and Jurisdiction in Civil and Commercial Matters*, (https://www.law.ox.ac.uk/business-law-blog/blog/2017/04/brexit-negotiations-series-%E2%80%98-effect-brexit-resolution-international) (accessed on 30.05.2021).

Sośniak M., *Zobowiązania nie wynikające z czynności prawnych w prawie prywatnym międzynarodowym*, Katowice 1971.

von Graziano T.K., Das *auf ausservertragliche Schuldverhaeltnisse anzuwendende Recht nach Inkrafttreten der Rom II-Verordnung*, "Rabels Zeitschrift fuer auslaendisches und internationales Privatrecht" (RabelsZ) 2009, vol. 73, no. 1.

von Hein J., *Europäisches Internationales Deliktsrecht nach der Rom II-Verordnung,* "Zeitschrift für Europäisches Privatrecht" (ZeuP) 2009, no. 6-33.

von Ofner H., *Die Rom II-Verordnung-Neues Internationales Privatrecht für ausservertragliche Schuldverhältnisse in der Europäischen Union*, "Zeitschrift für Rechtsvergleichung" (ZfRV) 2008, no. 3.

Ungerer J., *Consequences of Brexit for European Private International Law*, "European Papers" 2019, vol. 4, no. 1.

Wagner G., *Die neue Rom II-Verordnung*, "Praxis des Internationalen Privat- und Verfahrensrechts" (IPRax) 2008, vol. 1, no. I/II.

[60] T. Kruger, *Brexit: No need to stop all the clocks*, https://conflictoflaws.net/2020/brexit-no-need-to-stop-all-the-clocks/ (accessed on 30.05.2021).

Legal acts

Polish Private International Law Act of February 4, 2011 (Journal of Laws of 2015, item 1792, unified version).

Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) (OJ L 199, 31.07.2007, p. 40).

The Repeal Bill: White Paper, Policy paper, Legislating for the United Kingdom's withdrawal from the European Union, Department for Exiting the European Union, Updated 15 May 2017, (https://www.gov.uk/government/publications/the-repeal-bill-white-paper/legislating-for-the-united-kingdoms-withdrawal-from-the-european-union) (accessed on 30.05.2021).

Treaty on European Union (Consolidated Version) (Official Journal C 326, 26/10/2012 P. 0001-0390).

Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, Official Journal of the European Union of 17 December 2007 (2007/C 306/01).

Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, TF50 (2018) 33–Commission to EU 27, https://ec.europa.eu/info/sites/default/files/draft_withdrawal_agreement.pdf (accessed on 30.05.2021).

Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (2019/C 384 I/01), CI 384/1, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12019W/TXT(02)&from=PL (accessed on 30.05.2021).

A letter of 29 March 2017 from the Prime Minister of the United Kingdom to the President of the European Council, Cover Note from General Secretariat of the Council to Delegations , XT 20001/17, BXT 1, https://data.consilium.europa.eu/doc/document/XT-20001-2017-INIT/en/pdf (accessed on 30.05.2021).

Note from General Secretariat of the Council to Delegations. Subject: Special meeting of the European Council (Article 50) (29 April 2017)-Guidelines, EUCO XT 20004/17, https://www.consilium.europa.eu/media/21763/29-euco-art50-guidelinesen.pdf (accessed on 30.05.2021).

Council Decision (EU) 2019/1750 of 21 October 2019 amending Decision (EU) 2019/274 on the signing, on behalf of the European Union and of the European Atomic Energy Community, of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, LI 274/1, 28.10.2019, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32019D1750&from=PL (accessed on 30.05.2021).

European Council Decision (EU) 2019/1810 taken in agreement with the United Kingdom of 29 October 2019 extending the period under Article 50(3)TEU, LI 278/1, 30.10.2019, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32019D1810&qid=1622750222171&from=en (accessed on 30.05.2021).

Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, TF50 (2018) 33–Commission to EU 27, https://ec.europa.eu/info/sites/default/files/draft_withdrawal_agreement.pdf (accessed on 30.05.2021).

The Repeal Bill: White Paper, Policy paper, Legislating for the United Kingdom's withdrawal from the European Union, Department for Exiting the European Union, Updated 15 May 2017, https://www.gov.uk/government/publications/the-repeal-bill-white-paper/legislating-for-the-united-kingdoms-withdrawal-from-the-european-union (accessed on 30.05.2021).

Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (2019/C 384 I/01), CI 384/1, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12019W/TXT(02)&from=PL (sccessed on 30.05.2021).

The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019, UK Statutory Instruments 2019 No. 834 (https://www.legislation.gov.uk/uksi/2019/834) (accessed on 30.05.2021).

The Jurisdiction, Judgments and Applicable Law (Amendment) (EU Exit) Regulations 2020, UK Draft Statutory Instruments, ISBN 978-0-348-21268-6 https://www.legislation.gov.uk/ukdsi/2020/9780348212686/regulation/6 (accessed on 30.05.2021).
Private International Law (Miscellaneous Provisions) Act 1995, UK Public General Acts1995 c. 42, https://www.legislation.gov.uk/ukpga/1995/42/contents (accessed on 30.05.2021).

Judgements

The Halley (1868).
Phillips v. Eyre (1870).
Judgement of the Court of 12 July 1973, Anciens Etablissements D. Angenieux fils aîné et Caisse primaire centrale d'assurance maladie de la région parisienne v Willy Hakenberg (C 13-73).
Judgement of the Court of 17 February 1977, Silvana Di Paolo v Office national de l'emploi (C 76-76).
Judgement of the Court of 23 April 1991, Rigsadvokaten v Nicolai Christian Ryborg (C-297/89).
Judgement of the Court of 12 July 2001, Paraskevas Louloudakis v Elliniko Dimosio (C-262/99).
Judgement of the Court of 2 April 2009 r., Korkein hallinto-oikeus v A. (C-523/07).

Other sources

European Union (Withdrawal Agreement) Bill House of Commons Committee Stage Briefing January 2020, https://files.justice.org.uk/wp-content/uploads/2020/01/06170033/JUSTICE-WAB-Briefing-Committee-Stage.pdf (accessed on 30.05.2021).
Brexit: Council adopts decision to conclude the withdrawal agreement, https://www.consilium.europa.eu/pl/press/press-releases/2020/01/30/brexit-council-adopts-decision-to-conclude-the-withdrawal-agreement/ (accessed on 30.05.2021).
Impact of Brexit on Choice of Law, Jurisdiction and Enforcement https://www.nortonrosefulbright.com/en/knowledge/publications/a6ec9370/impact-of-brexit-on-choice-of-law-jurisdiction-and-enforcement (accessed on 30.05.2021).
Deutscher Industrie une Handelskammertag (DIHK) Commentary (http://ec.europa.eu/justice/news/consulting_public/rome_ii/contributions/deutscher_industrie_handelskammertage_de.pdf) (accessed on: 30.05.2021).
FEDMA (Federation of European Direct Marketing) Commentary (http://ec.europa.eu/justice/news/consulting_public/rome_ii/contributions/ferder_direct_marke_en.pdf) (accessed on: 30.05.2021).
Advertising Association Commentary (http://ec.europa.eu/justice/news/consulting_public/rome_ii/contributions/advertising_association_en.pdf) (accessed on: 30.05.2021).
Die Wirtschaftskammer Österreich Commentary (http://ec.europa.eu/justice/news/consulting_public/rome_ii/contributions/wirtschaftskammer_osterreichd_de.pdf) (accessed on: 30.05.2021).
BEUC Commentary (http://ec.europa.eu/justice/news/consulting_public/rome_ii/contributions/euro_consumer_en.pdf) (accessed on: 30.05.2021).
Amazon Commentary (http://ec.europa.eu/justice/news/consulting_public/rome_ii/contributions/amazon_com_en.pdf) (accessed on: 30.05.2021).
Lord Jonathan Mance on the future relationship between the United Kingdom and Europe after Brexit, https://conflictoflaws.net/2020/lord-jonathan-mance-on-the-future-relationship-between-the-united-kingdom-and-europe-after-brexit/ (accessed on: 30.05.2021).