After Brexit
—The Situation Surrounding Private International Law in the United Kingdom (summary)

Yuko OKANO
Professor Emeritus, Kwansei Gakuin University

Upon leaving the EU, the UK government announced its policy of repealing the European Communities Act 1972, which was the legal basis for applying EU law in the UK, converting existing EU law into UK domestic law, and creating the authority to amend and repeal, where necessary, EU law that has become domestic law. Following this policy, the European Union (Withdrawal) Act 2018 introduced a new category of provision called "retained EU law", which allows EU law to remain part of UK law. The UK government then pursued a policy of moving away from EU law, and in 2023, the Retained EU Law (Revocation and Reform) Act 2023 caused some retained EU law to lapse, changing the remaining "retained EU law" to "assimilated law", and abolished the principle of EU law's superiority over UK domestic law, making legal reform even easier.

In the midst of this movement, the Rome I and Rome II Regulations, which had continued to exist as "retained EU law", were not subject to repeal by the 2023 Act, but remained in the UK as "assimilated law". On the other hand, the Brussels regime was abolished because it was based on reciprocity and could not be replicated by a unidirectional rule. The UK's application to join the Lugano II Treaty was also rejected due to opposition from the EU. Thus, after Brexit, the foundation and structure of the Brussels-Lugano regime was replaced by common law rules. This paper discusses the issues that arise in this post-Brexit situation, focusing on developments in the English courts.

In the context of international jurisdiction, common law rules, which are based on the principle of judicial discretion, have a history of resistance and harmonization with EU rules, which are based on civil law and do not, in principle, recognize judicial discretion. Once the yoke of EU regime is lifted, the question arises as to how the exercise of court discretion under common law rules will be applied in cases involving EU member states. Specifically, the issues being discussed are 1) whether the UK, as a third country, can grant an anti-suit injunction under Articles 33 and 34 of the Brussels I Recast, and 2) whether an anti-suit injunction can be issued

in response to a breach of the jurisdiction agreement in the Hague Choice of Court Convention, and the view has been expressed that both will be allowed.

In terms of the recognition and enforcement of judgments, the greatest impact of the loss of the Brussels-Lugano regime has been to undermine the transferability of English judgments to Europe and vice versa. With the UK signing and ratifying the Hague Judgments Convention, it is expected that the Hague Choice of Court Convention and the Hague Judgments Convention will function effectively on this issue.

These Hague Conventions are important for the UK as standards for the recognition and enforcement of judgments, since they establish mutual recognition not only between the UK and the EU, but also between contracting states outside the EU and the UK. The UK has had a strong policy interest in maintaining its position as a leading center for cross-border private law dispute resolution. For the UK to persuade parties from other countries to continue litigating in the UK after Brexit, it needs to have confidence that judgments issued in the UK will be recognised and enforced in other countries. It has been argued that the best way to achieve this is for the UK to become a party to the Hague Judgments Convention and persuade other countries to ratify it. Regarding relations with the Commonwealth countries, it was also stated that with the UK, which still has influence in the development of common law in the Commonwealth, having ratified the Convention, it is expected that the Commonwealth countries will follow the UK in ratifying the Convention.

From the perspective of the Commonwealth countries, the UK's private international law after joining the EC has been called “Europeanized,” and it has been stated that they have felt a psychological distance from the Europeanized UK's private international law. And since Brexit is expected to improve access to the UK market, major economies in the Commonwealth are said to welcome Brexit. As improved access to the UK market stimulates cross-border trade, it has been pointed out that the introduction of new norms for the recognition and enforcement of cross-border judgments is necessary to address the associated business and legal risks. As an option, it has been argued that the Commonwealth should join the Hague Choice of Court Convention and the Hague Judgments Convention. It is interesting to note that both the UK and the Commonwealth have high hopes for the Hague Conventions, even though their respective backgrounds for these arguments are different.

The return to common law rules was brought about unintentionally by the withdrawal from the EU, and the UK is divided on how it is perceived. Some welcome the increased exercise of

discretionary power by the courts, while others see the return to complex and fragmented common law rules as a setback. However, both sides point out that this situation will create an opportunity to review and update the foundations of UK private international law. It is true that the recent changes to the rules of private international law are not simply a rewind of time. For example, the rules for service of process on defendants located outside the jurisdiction will be revised in 2021 after Brexit, and court permission will no longer be required if there is a choice of court agreement in England. The change in common law norms is likely due to the mutual influence of common law norms and EU regulations over the past 40 years. On the other hand, it will be interesting to see how the UK, having left the EU, will reconcile the sense of distance brought about by the "Europeanization" of UK private international law with the Commonwealth countries, which is another "connection."