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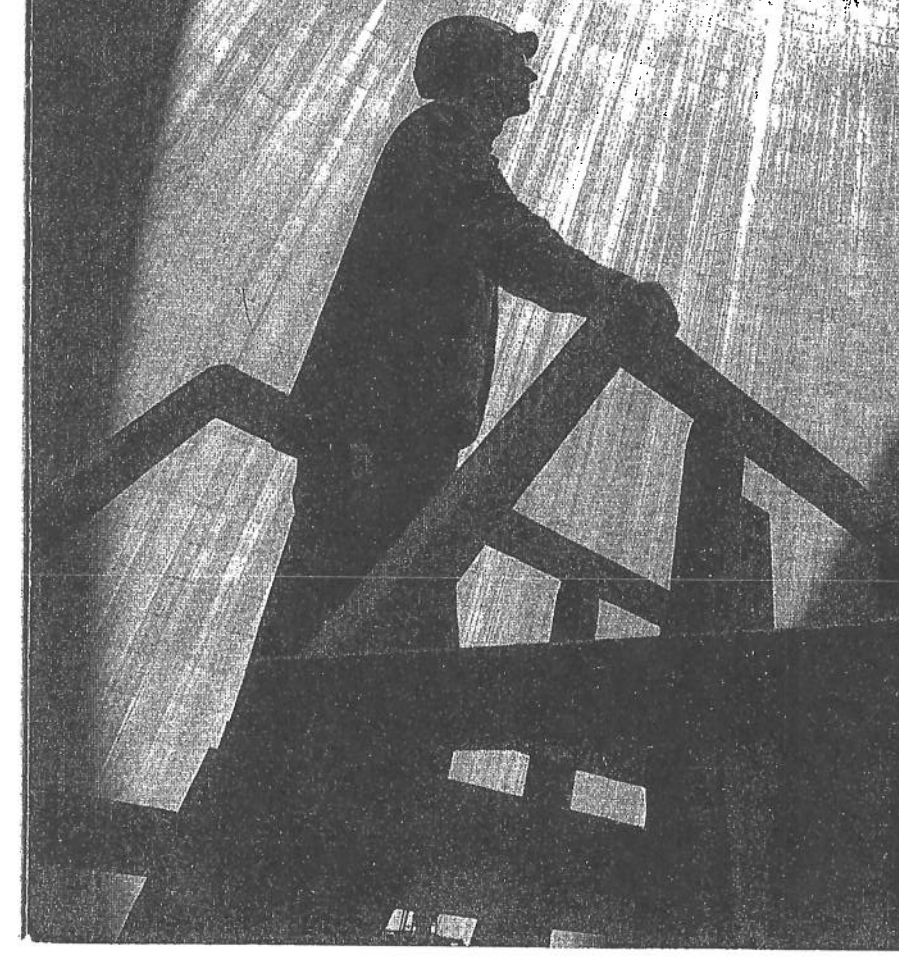

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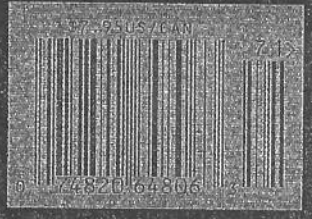

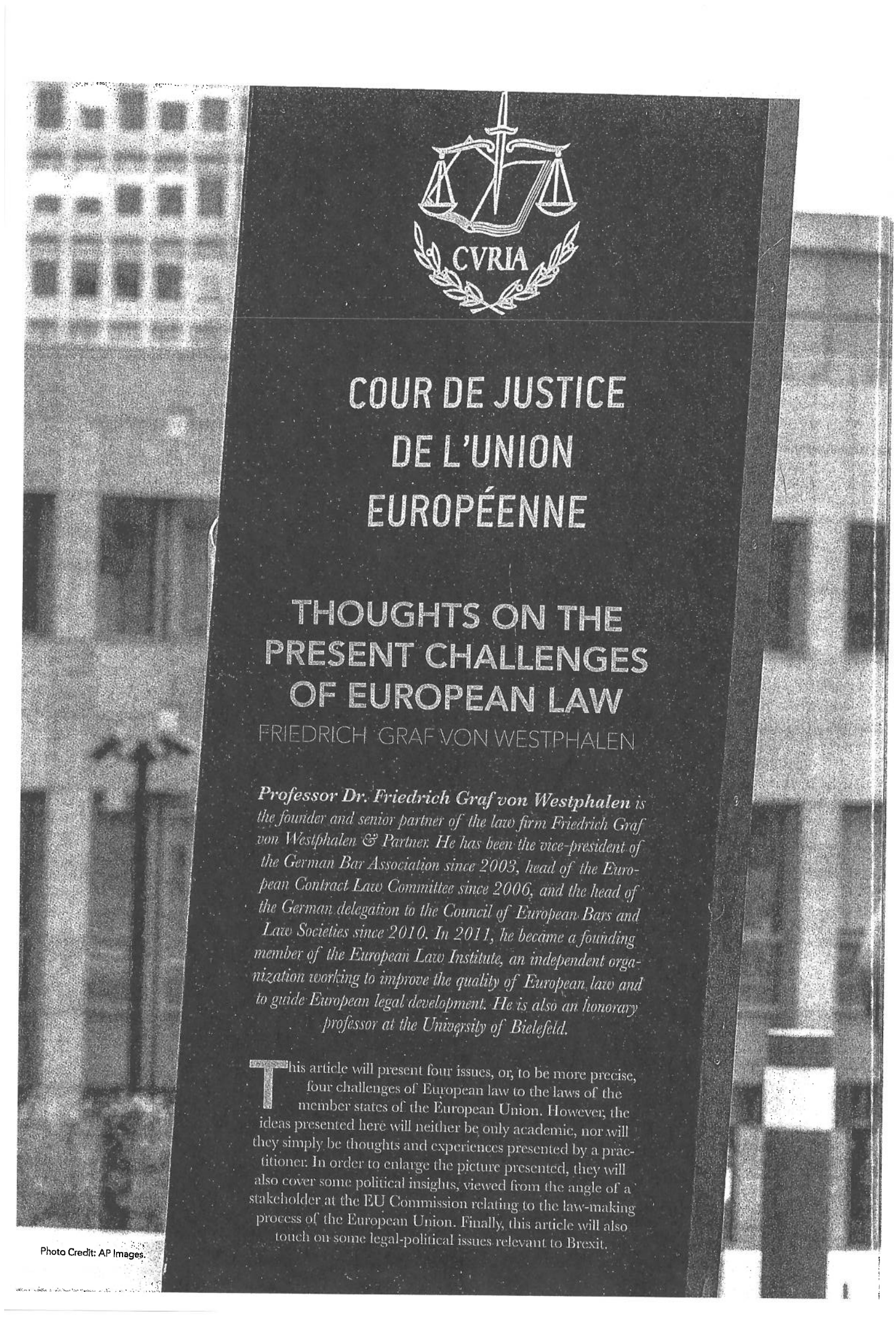

THOUGHTS ON THE PRESENT CHALLENGES OF EUROPEAN LAW

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This article will present four issues, or, to be more precise, four challenges of European law to the laws of the member states of the European Union. However, the ideas presented here will neither be only academic, nor will they simply be thoughts and experiences presented by a practitioner. In order to enlarge the picture presented, they will also cover some political insights, viewed from the angle of a stakeholder at the EU Commission relating to the law-making process of the European Union. Finally, this article will also touch on some legal-political issues relevant to Brexit.

Photo Credit: AP Images.

I. The CETA-Interim Judgment of the German Constitutional Court

On October 13, 2016, the German Constitutional Court (GCC) rendered an interim judgement approving the constitutionality of the Comprehensive Economic and Trade Agreement with Canada (CETA 2 BvR 1368/16). However, the court attached some reservations, especially with regard to investment arbitration rules, before CETA might come into full force as these rules were not covered by the provisions of the Lisbon Treaty, and therefore were not within the competency of the European Union.

This trade agreement — more or less a counterpart to the proposed Transatlantic Trade and Investment Partnership (TTIP) between the United States and Europe — has been negotiated for some seven years between the EU Commission and the Canadian government. It is now ready to be signed by the Council of Europe, the EU's supreme political body, which is composed of all the presidents and chancellors of the member states.

CETA would give European exporters improved access to the Canadian internal market (and vice versa); 98 percent of customs duties would be abolished from its application date. The preliminary implementation of CETA would, however, depend on a unanimous vote of the European member states in the European Council. Thereafter, the European Parliament must give its approval and finally, before this Agreement would come into full force, member states' national governments would have to approve it.

Why is the GCC entitled to intervene? The Lisbon Treaty, the basic law of the European Union, does not create an independent sovereign state. Rather, the view taken by the GCC has long been that the legitimacy of the European Union is derived by virtue of this treaty directly from the member states. Hence, the European Union is not a federation; rather, it is a union of states to the extent that the member states have delegated parts of their independence and sovereignty to the European Union, thereby renouncing their own national sovereignty.

The Lisbon Treaty, like its predecessors, is based on four principal economic freedoms: the freedom of goods, of capital, of establishment, and of movement. These freedoms mainly relate to the realization of the political and economic goal of the European Union — to lower trade barriers and foster growth within the European market in order to render the European Union more competitive. Despite some political opposition, the EU Commission maintained that CETA will directly serve these economic goals, and thus would be beneficial to the European economy and to its citizens.

However, the issue just decided by the GCC, after some twenty thousand German citizens presented their claims alleging the illegality of CETA, was whether the (preliminary) signing of CETA by the EU Commission constituted an act within the framework of those powers that had been delegated to the EU Commission under the Lisbon Treaty. The main argument of the petitioners was that CETA is mainly concerned with issues of external, not internal, trade and that CETA has too much to do with foreign economic politics. Their claims were that the EU Commission, in negotiating and signing CETA, had acted ultra vires — that these acts were not covered by the transfer of sovereignty under the Lisbon Treaty and that because these acts went beyond the powers transferred by the member state to the European Union, they are not binding upon the member states. There is evidence that the provisions of CETA refer to issues of foreign politics and foreign trade that, as a general rule, have remained within the due competency of the member states.

The ruling of October 13, 2016, however, was only an interim award. The GCC still must finally decide the issue of whether the investment arbitration clause of CETA is within the due powers of the European Union. This clause will entitle an arbitration tribunal to decide against a government and to hold that the investor will be compensated for a possible loss of its investments under CETA, thus depriving the government of the ability to enact any new laws affecting the investment and the right to take direct recourse in its own courts. As the issues to be decided are rather complex and will need due consideration by the judges, the Court held that the German government has to secure the possibility of a unilateral right to terminate CETA if there is evidence that the European Union did not act within the scope of its legal powers. Whether all of this will have some implications for TTIP remains to be seen and may reasonably be assessed only after the GCC has rendered the final verdict in CETA.

II. The Perspective of a Practitioner

For a rather long time during the professional life of this writer, it seemed to be a well-settled rule that a practitioner hardly ever has to deal with legal issues that relate to European law. But, now — after a rather long learning phase — the opposite seems to be the case. Almost 70 percent of German national laws are nothing but the national transformation of European laws, which are subdivided into either European directives or regulations. The difference within this body of the so-called secondary European law is that a regulation, once set into force by the European Union, will be directly applicable within the framework of the national laws of the member state. On the other hand, unless a directive is transformed by national lawmakers within a given period of time, they will not be directly applicable. Such directives, however, are always sectoral laws; they only cover certain aspects of the law and try to harmonize the divergent national laws in this field.

The challenge for the practitioner results from accounting for a number of different legal principles. First, European law, be it a directive or a regulation, is superior to any national law. Second, the interpretation of such law rests on its own rules; the most important and most difficult rule is that the interpretation of European law is autonomous. This term implies that any interpretation may not rest on the language and the established law of any of the member states. They are and will remain national laws, being inferior to the superior — and independent — body of European law. Thus, any such interpretation of European law must rest on its own two feet. All twenty languages of the member states are considered to be of equal importance in order to find, by virtue of interpretation, the correct meaning of any legal term, word, or even of the true intent of the

European lawmakers. Third, the result so found and established must be evaluated against the understanding of the respective term, word, or intent of a rule the national lawmakers enacted on the basis of a European directive.

Only a few practitioners take this very long route in order to determine whether there is any discrepancy between the higher-ranking European law and its counterpart within the body of their own national law. But this exercise, at the end, might be beneficial for the respective client, as the argument may then hold that the respective rule within the national law violates European law.

However, it is up to the European Court of Justice (ECJ) in Luxembourg to finally decide whether such an argument will stand. The claimant himself is not entitled to take direct recourse to the ECJ, as it is up to him to first convince the national court that the respective issue of interpretation of the national law versus the higher-ranking European law must be referred to the ECJ for a final decision. Such reference to the ECJ is a condition sine qua non. However, it is worth mentioning that some national courts are more reluctant than others to refer any of their cases to the ECJ. And it must be added that only the member states' supreme courts are obliged by law to do so in order to receive a final and binding interpretation of their own law in respect to any European legal act (Article 267 of the Treaty on the Functioning of the European Union).

If the national court finally refers the case to be decided by the ECJ, then it seems to be well-advised that any pleading before the ECJ should be left to those few lawyers who are acquainted with the prestigious atmosphere and have experience arguing a case before the ECJ in line with its rather specific rules of pleadings, such as time limits and the use of a chess clock. Such an exercise for the first or second time is hardly a good idea for newcomers, due to an apparent lack of experience and certainly because of the risk of anxiety.

III. The Role of a Stakeholder

It is fascinating to take part in the European lawmaking process, as this writer has done so in his capacity as a stakeholder for the Council of Bars and Law Societies of Europe (CCBE) since 2011. The obligation of such a stakeholder, selected by the Commission, is to help the Commission to make "good laws" by contributing their practical legal expertise. At the beginning of this writer's assignment as a stakeholder, a Common European Sales Law (CESL) was the issue to be debated in long discussion rounds. CESL was designed as an optional instrument, subject to the choice of the parties in a cross-border transaction, covering not only issues of sales contracts for consumers and the respective issues of consumer protection, but also sales contracts, entered into by traders, including the control of general conditions of contract (for further reference see Gerhard Dannemann and Stefan Vogenauer's "The Common European Sales Law in Context," published in 2013). As this project was dropped in 2013 due to unexpected but severe opposition by a number of member states, the assignment as a stakeholder was renewed in 2014, covering the new directive on "some contractual aspects for the supply of digital content" (COM 2015/634), one of the corner stones of the Digital Single Market Strategy of the European Union.

Being a stakeholder presents a number of challenges. It is, first of all, a political assignment. The question to be answered is whether there is need for a unification of national laws in order to promote the growth of the internal market, as divergent legal rules are assumed to always create barriers for free trade and the free flow of capital. The legal basis for the vast majority of new legal rules within the European Union is Article 114 of the Treaty on the Functioning of the European Union. Article 114 deals with the "approximation of laws" of the member state with regard to the "establishment and functioning of the internal market." The third paragraph states that any such approximation of the laws — be it within the scope of a regulation or of a directive — shall take "as a base a high level of protection" in the fields of health, safety, environmental protection, and consumer protection.

Needless to say, any approximation of the laws of 28 member states requires a rather deep insight into the specifics of any national law. Therefore, considerable know-how in the field of comparative law seems to be necessary in order to arrive at reasonable results. In this field, academia is of utmost importance, and the input of legal practitioners is also highly appreciated. But no common principles of the laws of the member states elaborated on the basis of comparative law will be incorporated into any new draft of European law. The challenges go far beyond this smallest denominator, because a new European law is a political undertaking. Therefore, the salient questions include what the main interests of the parties are, why they should be protected, and which overall framework should be considered. To come to a viable conclusion requires time and patience during sometimes rather lengthy debates.

It must be underlined that lobbyists play an important role in the lawmaking process in Brussels. However, in order to improve transparency within the fabric of the democratic process, any lobbyist must be registered, and thus has to disclose his specific interests at stake. To some extent, this kind of self-interest of any such lobbyist might be seen as a barrier to an open dialogue, but this is not generally the case. In order to further mitigate the influence of any self-interested group within the framework of the lawmaking process, be it on the side of the industry or on the side of consumer organizations, it is a well established practice of the Commission to arrange conferences to be held during the drafting process and after a draft has been published in order to get a better insight and understanding of the entire picture.

In this respect, it is worth mentioning that the European Law Institute (ELI), established in Vienna in 2011 along the lines of the American Law Institute, has, by now, acquired a remarkable reputation. Its members include academics from across Europe and a good number of practitioners. ELI's main task is to ensure a better lawmaking process within Europe. The significant parameter of ELI's work is to be concerned with a high degree of legal transparency within European law. This implies that inconsistencies within the text of a regulation or directive shall be avoided and, more importantly, that consistency and coherency are maintained within the growing body

of European law. Moreover, ELI looks into the future and undertakes a number of research projects. It explores new fields within the legal systems of the different member states in which European law could or should play a role in the future within the overall legal framework of the Lisbon Treaty.

IV. A Significant Precedent Recently Set by the ECJ

The role of the ECJ in shaping and developing European law cannot be understated. It is, as shown above, a major source of national law. Being superior to such laws, it influences the day-to-day activities of ordinary citizens, particularly the business community, often without their knowledge. A recent decision rendered by the Luxembourg Court on July 28, 2016 (C-191/15), is a perfect example: an Austrian consumer organization filed a lawsuit against Amazon claiming inter alia that the general conditions used were abusive. Amazon stated that the laws of Luxembourg should govern any transnational online contract with consumers, regardless of where they come from.

In its judgement, the ECJ referred to Article 6 of the Rome I Regulation, which states that the parties may choose a law governing the contract, but that such law then must take into full account the law of the home state of the consumer if the level of mandatory consumer protection rules is higher than that provided by the law chosen by the parties. Therefore, any such contract clause may not obscure the rights of the consumer relevant to its home state, but must make it abundantly clear that the consumer may not be deprived of the level of protection he is entitled to under his own consumer law. Any clause that is in conflict with this principle shall be considered null and void.

This judgement will require that any trader doing business with a consumer within Europe is forced to respect the divergent national levels of consumer protection of any of the 28 member states. This, clearly, is burdensome for many traders in their cross-border transactions. It will force them to comply with the respective levels of consumer protection in any of the member states not only for online sales, but also for all transnational contracts. The only exception is that if there is evidence that the level of such protection under the applicable law, governing the respective contract, is actually higher than the consumer protection rules in the home state of the consumer.

V. Brexit and its Impacts

Some insiders have said that Brexit will require that approximately 12,000 European acts, directives, regulations, and decisions rendered by the ECJ must be rewritten. Brexit will change the laws of the United Kingdom applicable in the future to any transactions, be they domestic or cross-border transactions. It does not really matter whether Brexit will be "hard" or rather "weak" — in other words, maintaining quite a substantial part of European law within the realm of British law or not. But there might be a further obstacle if Scotland or Northern Ireland ultimately decide to try to remain as (independent) member states of the European Union.

One of the major problems rests with long-term or mid-term contracts, entered into before Brexit and ending after. Any dispute that might arise then will pose the legal question whether the essence of the rights and obligations of the contracting parties to be adjudicated in case of a dispute after Brexit has taken place will still be in line with the intent of the parties when they entered into such contract before Brexit. It might well be that the future absence of a particular piece of EU legislation within the body of British law will have a significant impact on the rights and obligations of the parties, and therefore substantially change the contract, or even make it impossible to perform it.

This aspect might create a significant number of instances in which Brexit and its legal consequences could give rise to a right of termination of a contract. In some instances, the issue could be dealt with on the basis of the rule of a significant change of circumstances. But the risk that this rule will be applied one day jeopardizes the legal certainty that businessmen look for in their dealings. Litigation in court, which is expensive and hard to predict, might be the foreseeable result, but this would probably be more beneficial to the legal profession than to the businessmen involved.

Legal solutions might be proposed to protect the present interests of the parties that decide to continue cross-border business in view of the legal uncertainties of Brexit. For instance, it might be reasonable to insert a hardship clause, a force majeure clause, or any other clause the parties and their lawyers may think of in order to protect both parties against the potential adverse effects of Brexit. However, the adoption of such clauses might be like driving a car in the midst of heavy fog — uncertain and risky.

Needless to say, people other than British businessmen will be affected by the consequences of Brexit, as more or less the same legal problems will arise to hurt counterparts in any European cross-border transaction. It seems likely that those parties and their contracts that are not subject to British, but to any other law, will also be affected. The reason is that prospective changes of British laws due to Brexit will certainly affect the due performance of such contracts, and will have an unforeseen impact on them.

Therefore, the economic and commercial results of Brexit will almost certainly result in losses and other unexpected detrimental consequences for cross-border transactions and their respective parties. The outcome of such cases cannot fully be predicted. But one has to take into account that 70 percent of British law has been influenced and shaped one way or the other by European law during the last few decades. One way or another, this body of European law will come to an end when Brexit becomes reality, leaving only national British law in place.

European laws have become an integral part of the legal systems of the member states. The importance of this superior body of law cannot be overstated, neither in the work of a legal practitioner nor in the day-to-day life of the ordinary citizen. The political influence of European law has grown during the last decades, despite many nationalist concerns, echoed recently by Brexit. The legal consequences of this decision cannot yet be fully ascertained, as no one knows whether it will be a "hard" or a "weak" Brexit. However, given that European laws are so closely interwoven into the fabric of the national laws of all member states, it will be a difficult separation. The consequences of this decision will certainly be severe. HIR