

Brexit? No, instead harsh Brexit and a new *Lex Argentaria Europae*

PIERRE DE GIOIA CARABELLESE: FULL PROFESSOR OF LAW OF ENGLAND AND WALES, CHAIR OF INTERNATIONAL CONTRACT LAW (ROME), ADJUNCT PROFESSOR AND RESEARCH FELLOW OF INTERNATIONAL FINANCIAL LAW (PADUA, LAW SCHOOL), VISITING RESEARCHER OF COMPANY LAW (COMPLUTENSE LAW SCHOOL, 2019), AVVOCATO (ITALY), SOLICITOR AND NOTARY PUBLIC (SCOTLAND NON-PRACTISING), GRAY'S INN (ENGLAND AND WALES).*



Last September 2018 the tenth anniversary of the financial crisis was ‘celebrated’ and, whilst these notes are being written on 17 March 2019, a significant – and increasingly notorious – deadline is approaching: the departure of the UK, *rectius*, of ‘England’, from the European Union, or at least the expiry of the two years since the process activated pursuant to Article 50 of the TFEU commenced on 29 March 2017. It was in the UK that these events sadly unfolded, now more than ten years ago, and once again they are about to raise their ugly heads, with the punctual, yet creepy, precision and inevitability of a Swiss watch. Ten years later, the images from London of the Lehmann Brothers employees, who overnight were forced to vacate their offices, are still vivid. After ten years, in the developing crisis from London, the show is being enacted once again: British politicians confused and puzzled, ultimately incompetent to deal with a divorce process that most of them did not want in the first case, and which paradoxically they are incapable of managing, particularly from a legal point of view. Sadly, this is recognized here by a British citizen who holds the title of full professor of law in England.

In dealing with financial crises and divorces, particularly those endowed with such a devastating magnitude, one might be tempted to throw one's hands up in despair; and similarly, in the aftermath of the inevitable ‘nuptial’ rows: the European Union project might not be feasible, nor perhaps worth the inevitable pain. Yet, to a jurist,

now more than ever before, and in an EU without Britain, those concepts and principles, particularly in our areas of law (banking, financial, and corporate law), are authentic, valid and reasonable. In fact, it is suggested in these brief notes that an EU without the UK may stimulate an unbelievable opportunity: the project can be revamped and will be even more successful.

The three pillars of the Banking Union, namely the single supervisory mechanism, the single resolution mechanism, and depositors’ protection, are vital and paramount, although a real evolution, starting from 29 March 2019, is needed to ensure that these mechanisms may become more effective and better shaped from the standpoint of the law. The single resolution mechanism that the EU technocrats, inspired by the Banking Act 2009, created with short-term practicality but without legal wisdom, was unceremoniously implemented within an infamous legal framework, Directive 2014/59. This piece of legislation, in turn, has transformed the banking institutions into quasi-governmental bodies: it is difficult to find in a banker now any quintessence of an entrepreneurial spirit. With so many limits currently shackling their activities, the credit institutions in the European Union can hardly be defined as businesses. The idea of the *banco*, whose legacy comes from the Florentines and whose roots lie in the Middle Ages, may not be found in the rules of the nebulous bail-in and the other horrific and monstrous resolution tools.

Following the same line of reasoning, the depositors’ protection, reformed virtually overnight in the aftermath of the 2008 financial crises with a knee-jerk reaction which led the EU legislature to increase the limit of protection from EUR 20,000 to an unrealistic EUR 100,000 threshold, has never achieved any real form of integration. With an EU legislature still incapable of creating a uniform network of protection, in what in a recent contribution the writer has called, admittedly sarcastically, a further ‘EU own goal’, the first item of the post-Brexit agenda should be the creation of an adequate level of protection for depositors, perhaps EUR 35,000. This, coupled with a genuine pan-European system, is necessary to avoid a repetition of the kind of scenes broadcast on TV in the summer of 2015: on that occasion, Greek depositors literally assaulted their

* Email: pierredegioia@gmail.com.

banks to withdraw money from their accounts, because they had no trust in their own national protection scheme – a contradiction in terms! Third, the single supervisory mechanism, which hinges upon the role of the European Central Bank, but which is still to be overhauled in some defective aspects, such as its enforcement, as highlighted by Prof. De Poli and myself in a recent contribution in this area, needs a proper system of integration: EU banks need EU secondary legislation, EU supervisors and EU enforcement. The legislation must be integrated, and in the EU banking should also engender the creation, in the banking union, of judicial supranational bodies, in the areas of banking and financial law. The precedents of a unified judicial body, rather than the widespread and contradictory *decisa* of a number of national authorities, may be instrumental in creating a supranational supervision, going beyond fragmentation.

In the recurrent jargon of the EU legislator, it is common to refer to the concept of ‘pillars’, including the three that currently constitute the banking union, briefly hinted at above. In keeping with the metaphor of the building, although it is undeniable that an edifice does need pillars for it to stand firm, it is also indisputable that for its habitability it needs fixtures; otherwise, it cannot provide comfortable accommodation for its owners. In other words, it is time for the EU Member States, those which are fully committed to the project, to give mandate to architects, not just engineers, to ensure that not just a skeleton is provided, but also comfortable homes to enable nations to live together.

In this scenario, in the banking and financial law area, jurists are more in demand than ever: the Continental law tradition, that of the civil law, must show its rigour by plugging the loopholes and removing the contradictions that are the legacy of fallacious regulations, not even legal, and unfortunately in more than one case inspired by, and/or borrowed from, London and its excessively loose and indulgent common law. It is not suggested in these brief notes that all the issues of the EU, and particularly the Banking Union, are attributable to the departing Member State, i.e. the United Kingdom. Nevertheless, it is undeniable that the presence of this state, and even its own legal system, based on the immobility and stagnant reality of precedents, has not facilitated the process. Ultimately, it is not that we should be moaning about the UK departure. At least from the perspective of banking and financial law, it is that we should be celebrating Europe, its strength and its legal tradition, now more than ever. What was created in Rome, in 1957, was not built in a single day, as the proverb has it: it is a more entrenched and educated idea, the *banco* and the *societas* dating back to the Middle ages and to the Romans. Can this project be upset by the confused Brexiteers that the BBC is showing us during these days? Not really. As a jurist who can only make a recommendation, in this case addressed to the EU politicians, I assert this: it is important to sever every tie with the UK, from a legal point of view: so far, the interpretation of the EU legal provisions has been

affected by the ‘opt-outs’ usually requested, *rectius* blackmailed, by the United Kingdom. The last thing we want or need is a further upset: the ‘opt-in’ requested by a third state, which would perpetuate the ‘nightmare’ of the exegesis. No opt-in, no opt-out: a legal framework, for its credibility, calls for homogeneity. Fragmentation drives a coach and horses through the same rule of law. And unfortunately, the rule of law has been derogated so many times during the forty-five years of the UK’s membership of the EU.

And what about Great Britain? In taking it for granted that my adoptive country, at least the Scottish section when it becomes an independent state, will reapply in less than a decade (but a high level of suspicion and caution would at that time be necessary before any application might be considered, certainly if it came from a still unified UK), a brief analysis of the banking and financial system from a post-Brexit point of observation is less than reassuring. In 2008, Britain boasted utterly non-existent regulation in the area of bank insolvency; there was a gigantic and useless regulator, the Financial Services Authority, which overlooked the massive failure of the supervised banks, de facto giving the green light to the global financial crisis, or at least representing the most notable contributory factor in it. In severing connections with the Continental tradition, it is possible that the ‘spoilt child’ may revert to its own vices, namely the absence of a serious *lex mercatoria*, with banking activity simply relying on practices and codes: in other words, the antithesis of the law and a return to the financial ‘Wild West’.

Paradoxically, the only beneficial thing that, unequivocally, the UK as a Member State of the EU has contributed to the banking, financial and corporate discipline in the last forty-five years seems to be the language: in a linguistically fragmented continent (for historical reasons), the enigmatic, caliginous and controversial UK association with the club (as a former UK prime minister used to define the adherence to the UK) has provided EU citizens and the same EU institutions with a much needed *lingua franca*: the one the writer, Italian by origin and Scottish by adoption, has been using for decades. This process is not expected to be reversed now perhaps, particularly in the light of the continuing presence of the Irish and Maltese, whose official language is English. Apart from that, at least in banking and financial law, it is more true than ever that people will be celebrating, perhaps with a Prosecco, as from 29 March the start of a new state, the State of Europe. More realistically, there might be the *incipit* of a new *lex argentaria*, a better integrated legislation in banking law discipline, inspired by the rigour of the civil law tradition (and mildly ‘caressed’ by the remaining common law countries, Ireland, Cyprus and Malta), and without any say being left to unconvinced Member States, which must leave for good.

Vade Retro, Britannia: Ave Europa (with the hope that Germans can be less rigid in shaping the rules applicable to the three pillars of the Banking Union!).