Brexit and PIL, Over and Over

The abandonment of the EU by the UK is at the root of many doubts concerning the legal regime of cross-border private relationships. Little by little the panorama begins to clear up as the expectations and objectives of the UK are made public. Regarding cross-border civil and commercial matters, several Evidence Sessions have been held from December to January at the House of Lords before the Select Committee on the European Union, Justice Sub-committee (transcripts are available here); the Final Report was published yesterday.

At the end of January, the Minister of State for Courts and Justice gave the Committee details as to the hopes on the side of the UK of the post-Brexit best case scenario, which in a nutshell would rely on two main pillars: a set of common rules -either the regulations themselves, incorporated into the Great Repeal Act; or new agreements with the EU taking up the contents of the European rules- to ensure mutuality and reciprocity; and the absence of any post-Brexit role for the Court of Justice.

To what extent is this workable?

Taking the risk of repeating what other colleagues have already said let me share some basic thoughts on the issue from the continental point of view; in light of the documents above mentioned one feels there is a need to insist on them. The ideas are complemented and developed further in a piece that will be published in a collective book – *Diversity & Integration: Exploring Ways Forward,* to be edited by Dr. Veronica Ruiz Abou-Nigm and Prof. Maria Blanca Noodt Taquela.

It is indeed sensible to have solutions on cross-border jurisdiction and recognition and enforcement of decisions which enhance certainty for the continental citizens with interests in third States; this is a general truth. The British negotiators would have to prove (with qualitative and quantitative arguments) what is so particular about the UK that an EU/UK convention is of the essence for the post-Brexit time. Moreover, and more important, the UK will have to convince the EU that the particular solutions to be agreed are those currently contained in the European regulations; and also, about the CJEU not being part of the agreement. For the endeavor to succeed fundamental obstacles must be overcome, all related to the systemic nature of the EU. Among the most obvious ones I would like to point to

the following:

.- The inadequacy of the solutions. Certain mechanisms and technical solutions of the EU civil procedural law instruments – and the way we understand and apply them- have been endorsed only for integration. There are reasons to be skeptical about the "exportability" of the far-reaching solutions, in terms of removal of obstacles to the circulation of judgments, of the current EU procedural regulations to a context not presided by the philosophy of integration. Within the EU, the sacrifices imposed by mutual trust to the right to due process of individuals are endurable in the name of integration as a greater, common good. In the absence of any integration goal there is no apparent reason for an all-embracing blind reciprocal trust (neither of the EU MS in the UK nor vice versa. By the way, the fact that the UK is considering leaving the ECHR as well will not help to automaticaly trusting the UK decisions in the future).

.- The systemic character of the *acquis communautaire.* The EU legal instruments complement and reinforce one another: any proposal to reproduce single, isolated elements of the system in a bilateral convention EU/UK ignores this fact. Ties and links among the components of legal systems may be stronger or looser. When confronted with a proposal such as the UK, one of the unavoidable questions to be answered is to what extent the PIL EU instruments can have a separate, independent life one from each other.

.- In a similar vein: the EU PIL system does not start, nor does it end, in a few regulations – those which typically come to mind. Many conflict of laws and procedural rules for cross-border cases are set in EU acts with a broader content and purpose; they interact with the PIL instruments. What about this setting?

.- MS are actors in the system: they must keep loyal to it; they cannot escape from it. When applying their laws and when legislating they are subject to the overarching obligation of making it in a way that preserves the *effet utile* of the EU rules. This creates from the outset a structural imbalance to any international agreement between the MS (the EU) and third countries: the MS enjoy very little -if at all- leeway to deviate from the constraint of keeping EU-consistent. Indeed, a similar situation would arise in connection to any other international agreement, but it is likely to be more problematic in the case of conventions which replicate the contents of the EU regulations but not their (EU) inspiration, nor their objectives.

.- International agreements concluded by the European Union (as opposed to those signed by the MS) form an integral part of its legal order and can therefore be the subject of a request for a preliminary ruling by the MS. *De iure,* once the UK is no longer an EU MS the CJEU findings will not be binding on it. The fact remains that diverging interpretations -one for the MS, another from the side of the UK- of the same bilateral instrument will jeopardize its very purpose (and I would say the Justice sub-committee has understood it, as we can read in the Final Report above mentioned: *The end of the substantive part of the CJEU's jurisdiction in the UK is an inevitable consequence of Brexit. If the UK and the EU could continue their mutually-beneficial cooperation in the ways we outline earlier without placing any binding authority at all on that Court's rulings, that could be ideal. However, a role for the CJEU in respect of essentially procedural legislation concerning jurisdiction, applicable law, and the recognition and enforcement of judgments, is a price worth paying to maintain the effective cross-border tools of justice discussed throughout our earlier recommendations. (Paragraph 35).*