Brexit: No need to stop all the clocks.

Written by Jonathan Fitchen.

‘The time has come’; a common enough phrase which may, depending on the reader’s mood and temperament, be attributed variously to Lewis Carroll’s discursive Walrus, to Richard Wagner’s villainous Klingsor, or to the conclusion of Victor Hugo’s epigrammatic comment to the effect that nothing is as powerful as an idea whose time has come. In the present context however ‘the time has come’ refers more prosaically to another step in the process described as ‘Brexit’ by which the UK continues to disentangle itself from the EU.

On the 31st of January 2020 at 24.00 CET (23.00 UK time) the UK ceases to be an EU Member State. This event is one that some plan to celebrate and other to mourn. For those interested in private international law and the conflict of laws in the EU or in the legal systems of the UK, celebration is unlikely to seem apt. Whether for the mundane reason that the transition period of the Withdrawal Agreement preserves the practical application and operation of most EU law concerning our subject in the UK and within the EU27 until the projected end point of 31st December 2020, or for deeper reasons connected with the losses to the subject that the EU and the UK must each experience due to the departure of the UK from the EU. If celebration is not appropriate must we therefore opt to mourn? This post suggests that mourning is not the only option (nor if overindulged is it a useful option) and sets out some thoughts on the wider implications for the private international laws of the UK’s legal systems and the legal systems that will comprise the EU27 consequent on the UK’s departure.

This exercise is necessarily speculative and very much a matter of what one wishes to include in or omit from the equation under construction. If too little is included, the result may be of only abstract relevance; if too much is included, the equation may be incapable of solution and hence useless for the intended purpose of

calculation. Such difficulties, albeit expressed in a non-mathematical form, are familiar to private international lawyers who while engaging with their subject routinely consider the macroscopic, the microscopic and many points in between. In what remains of this post I will offer some thoughts that hopefully will provoke further thoughts while avoiding useless abstraction and (at least for present purposes) 'useless' incalculability.

The loudest calls for the UK to leave the EU did not arise from UK private international law, nor from its practitioners; few UK private international lawyers appear to have wished for Brexit as a means of reforming private international law. Whatever appeals to nostalgia may have swayed opinions in other sectors of the UK and may have induced those within them to vote to leave, they were not expressed with reference to matters of private international law. Few who remember or know the law as it stood in any of the UK's legal systems prior to the implementation of the UK's accession to the Brussels Convention of 1968 would willingly journey back to the law as it then stood and regard it as an upgrade. Mercifully, aspects of this view are, at present, apparently shared by the UK Government and account for its wish, after 'copying and pasting' most EU law and private international law into the novel domestic category of 'retained EU Law', to then amend and allow that which does not depend on reciprocity to be re-presented as a domestic private international law to be applied within and by the UK's legal systems: thus the Rome I and Rome II Regulations will be eventually so 'imitated' within the legal systems of the UK. Unfortunately, many other EU provisions do require reciprocity, and thus cannot be 'saved' in this manner; for these provisions the news in the UK is less good.

There are however other available means of salvage. Because the UK will no longer be an EU Member State at 24.00 Brussels Time it may, but for the Withdrawal Agreement, thereafter participate more fully in proceedings and projects at the Hague Conference on Private International Law. The UK plans to domestically clarify the domestic understanding of certain existing Hague conventions, e.g. 1996

Parental Responsibility Convention, via the recently announced Private International Law (Implementation of Agreements) Bill 2019. Earlier in 2018 the UK deposited instruments of accession concerning conventions it plans to ratify at the end of the Withdrawal Agreement's transition period to attempt to retain prospectively the salvageable aspects of certain reciprocity requiring EU private international law Regulations lost via Brexit: thus, the UK plans to ratify the 2005 Choice of Court Convention and the 2007 Maintenance Convention.
After these ratifications it may be that the UK will also consider the ratification of the 2019 judgment enforcement convention, particularly it the EU takes this option too. In the medium and long term however, the UK, assuming
it wishes to participate in an active sense, will have to accept the practical limitations of the HCCH as it (the UK) becomes accustomed to the differences, difficulties and frustrations of private international law reform via optional instruments that *all* the intended parties are entitled to refuse to opt-in to or ratify.

Over the medium term
and longer term, it should additionally be noted that though the UK has left the EU it has not cast-off and sailed away from continental Europe at a speed in excess of normal tectonic progress: there may therefore eventually be further developments between the two. It may be that the UK can be induced at some point in the future, when Brexit has become more mundane and less politically volatile within the UK, to cooperate in relation to private international law in a deeper sense with the EU27; whether by negotiating to join the 2007 Lugano Convention or a new convention pertaining to aspects of private international law. If this last idea seems too controversial then maybe it would be possible for the UK to eventually negotiate with an existing EU Member State as a third country via Regulation 664/2009 or Regulation 662/2009 or perhaps via another yet to be produced Regulation with a somewhat analogous effect? Brexit, considered in terms of private international law, may well re-focus a number of existing questions for the EU27 pertaining to the interaction of its private international law with third States, whether former Member States or not.

What is however
unavoidably lost by Brexit is the UK's direct influence on the development and

particularly the periodic recasting of the EU's private international law: this loss cuts both ways. For the EU27 the UK will no longer be at the negotiating table to offer suggestions, criticisms and improvements to the texts of new and recast Regulations. For the EU27 this loss is somewhat greater than it might appear from the list of Regulations that the UK did not opt-in to as the terms of the UK's involvement in these matters permitted it to so participate without having opted-in to the draft Regulation.

The suggested loss of influence will however probably be felt most acutely by the private international lawyers in the UK. Despite the momentary impetus and excitement of salvaging that which may be salvaged and ratifying that which may be ratified to mitigate the effect of Brexit on private international law, the reality is that we in the UK will have lost two of the motive forces that have seen our subject develop and flourish over decades: viz. the European Commission and the domestic political reaction thereunto. Post-Brexit, once the salvaging (etc.) is done, it seems unlikely that the UK Government will continue to regard a private international law now no longer affected by Commission initiatives or re-casting procedures as retaining its former importance or meriting any greater legislative relevance than other areas of potential law reform. The position may be otherwise in Scotland as private international law is a devolved competence that devolution entrusted to the Scottish Government. It may be that once the dust has settled and the returning UK competence related reforms have been applied that the comparatively EU-friendly Scottish Government may seek to domestically align aspects of Scots private international law with EU law equivalents.

For he who would mourn for the effect of Brexit on the subject of private international law, it is the abovementioned loss of influence of the subject at both the EU level and particularly at the domestic level that most merits a brief period of mourning. After this, the natural but presently unanswerable question of, 'What now?' occurs.

Though speculation is offered above, all in the short term will depend on the progress in negotiations over an unfortunately already shortened but technically still

extendable transition period during which the EU and UK are to attempt to negotiate a Free Trade Agreement: thereafter for the medium term and long term all
depends on the future political relationship of the EU and the UK.