Brexit implications for the dispute resolution and international trade lawyer

26/10/2016

Arbitration analysis: Dispute resolution practice faces a mixture of restriction and opportunity in the wake of Brexit, with freedom of movement concerns likely hindering the UK's need to develop its cadre of international trade lawyers. Laura Rees-Evans of Fietta, a law firm dedicated to public international law and international arbitration, assesses where change will be felt most keenly.

What will likely be the key impact of the plan to trigger Article 50 TEU by March 2017 (and Brexit by March 2019) for your practice area and why?

The plan to trigger Article 50 TEU by March 2017 (and Brexit by March 2019) will start the clock on negotiations on the UK's future trading relationships. The key impact for our practice area will be an increased demand for lawyers who can advise on the effect of Brexit on the UK's existing treaty obligations (both within and beyond the EU), and those who can advise on future treaty negotiations in the areas of trade and investment.

While the continuation of certain of the UK's existing treaty obligations is clear—for example, dispute resolution under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) and enforcement of arbitral awards under the New York Convention—the effect of Brexit on other treaties to which the UK is currently a party, through its membership of the EU, is far from certain.

The plan to trigger Article 50 TEU by March 2017 (and Brexit by March 2019) also casts doubt over whether proposed new trade and investment agreements (such as the EU-Vietnam Free Trade Agreement, the Comprehensive Economic and Trade Agreement (CETA) or the Transatlantic Trade and Investment Partnership) will have entered into force before Brexit is effected, particularly in the light of recent events in, among other places, Belgium's Wallonia region (Wallonia had exercised increased rights under Belgian devolution arrangements to obstruct EU approval of CETA). If they have entered into force, and if they are executed as 'mixed agreements' (whereby the EU concludes and individual Member States ratify the agreements), it is possible that the UK may remain a party even after Brexit.

What is your view on the government's legislative plan to adopt existing EU law 'where practical'?

In her speech to the Conservative Party Conference on 2 October 2016, the Prime Minister explained that '[a]s we repeal the European Communities Act, we will convert the "acquis"—that is, the body of existing EU law—into British law'. It will take years to identify existing EU laws that cannot simply be assimilated into the UK's legal system as a non-EU Member State. The government's plan to adopt existing EU law initially, with any subsequent changes to be 'subject to full scrutiny and proper Parliamentary debate', is a pragmatic one.

This proposal also finds historical precedent, particularly in the context of decolonisation in the second half of the 20th century. Where sovereignty over a territorial entity was transferred from one state to another or a territorial entity gained independence as a new state, often the laws in force before the date of transfer or independence were maintained unless and until provision was made to the contrary (eg Malaysia's formation in 1963 and the transfer of Hong Kong to the People's Republic of China in 1997).

What are the key implications of a hard Brexit versus soft Brexit for your practice area?

Brexit (of whichever type) will create opportunities for public international lawyers as the UK forges its own way outside the EU. However, since the public international law and international arbitration practice areas depend on the international legal system, not EU (or indeed UK) law, we do not believe that Brexit will have a significant impact on them.

That said, a hard Brexit may discourage talented international lawyers from other European countries from applying to practise in the UK market. To the extent that a soft Brexit maintains the status quo in relation to freedom of movement, however, the impact on the UK's competitiveness in this practice area would probably be negligible.

In the context of Brexit, does UK devolution have additional consequences in your practice area?

The question has been raised of whether a part of the UK could, without becoming independent, remain part of the EU, or retain access to the single market, for example, while the rest of the UK pursues a different path. Some commentators have suggested that the UK could negotiate a 'territorial exemption' of England and Wales from the EU. There have been other occasions in which part of the territory of a Member State has ceased to be part of the EU. In 2007, the Caribbean island archipelago of Saint Barthélemy left the EU upon gaining greater political autonomy from France. In 1982, Greenland gained greater political autonomy from Denmark and voted to leave the European Economic Community (EEC). In 1962, Algeria left the EEC upon gaining independence from France. However, judging by the Prime Minister's Conservative Party conference speech ('we will leave the European Union as one United Kingdom[, t]here is no opt-out from Brexit'), there appears to be no political appetite for such an approach for Brexit.

In Northern Ireland, Brexit threatens to undermine the maintenance of the Common Travel Area between the Republic of Ireland and Northern Ireland. Further, a legal challenge is underway in Northern Ireland highlighting the implications of Brexit for the Belfast Agreement (otherwise known as the Good Friday Agreement), an international treaty between the UK and Ireland. In Scotland, if Brexit were to trigger a second—and this time successful—referendum on independence, there would be significant uncertainty surrounding the relationship between the remaining territory of the UK and Scotland, as well as Scotland's relationships with third states and the EU.

What can lawyers and clients in your practice area do to prepare and when?

London has a well-earned reputation for being one of the world's leading centres for international arbitration (including investment treaty arbitration) and boasts a strong community of lawyers specialising in public international law. However, there will be a need in future for a greater number of international trade lawyers in the UK. International lawyers who are already well-versed in other aspects of international law may seek to broaden their practice into the field of international trade law, a field that has traditionally been based in Brussels or Geneva (due to the location of the European Commission's and World Trade Organization's headquarters). It will be incumbent upon UK-based lawyers in the public international law and international arbitration community to demonstrate how their existing skills can be utilised in the context of the needs created by Brexit in the short to medium term.

States will be well-advised to begin preparing for Brexit by reviewing the treaties they have entered into with the EU and the UK and identifying the potential implications for those treaties of Brexit. As explained earlier in this interview, it is unclear whether the UK will continue, post-Brexit, to be bound by treaty obligations entered into by the EU pre-Brexit. The answer to this question is likely to depend on the way in which the treaty was concluded (ie, as a bilateral agreement, a mixed agreement, or an 'EU-only' agreement), and the specific provisions of each treaty.

How does all this fit with other developments in your practice area? What does the future hold?

The Brexit vote has come at a time when the European Commission has been taking an increasingly active stance against bilateral investment treaties between EU Member States (intra-EU BITs) and decisions of international tribunals rendered pursuant to them. In March 2015, the European Commission blocked the payment of an arbitral award rendered against Romania (see Commission Decision (EU) 2015/1470 in *Micula v Romania*) on the ground that the award purportedly constitutes illegal state aid. Three months later, the European Commission launched infringement proceedings against five Member States (Austria, the Netherlands, Romania, Slovakia and Sweden) requesting them to terminate their intra-EU BITs. More recently, the German Federal Court of Justice referred to the Court of Justice of the European Union the question of the compatibility with EU law of investor-state arbitration clauses in intra-EU BITs (see

Request for a preliminary ruling from the Bundesgerichtshof (Germany) lodged on 23 May 2016—C-284/16: *Slovak Republic v Achmea BV*).

If the UK were to remain a Member State of the EU, there would likely have been growing uncertainty over the future of the UK's intra-EU BITs (with Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia and Slovenia). That uncertainty may be lifted by the UK's departure from the EU. Indeed, EU investors may even be attracted to structuring their investments into other EU states via the UK in order to ensure continued investment treaty protection.

Interviewed by Julian Sayarer.

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