Kluwer Arbitration Blog

What Impact Will Brexit Have On Public International Law In The UK?

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With the unfolding global pandemic, Brexit has largely taken a back seat. Yet, with the transition period due to end (at the time of writing) in just a few months, it is more important than ever to consider the implications for public international law (PIL) of the UK's departure from the European Union. Exactly four years after the UK voted to leave the EU, a webinar co-organised by the Young Public International Law Group (YPILG) and Arnold & Porter considered precisely this topic.

Five "young voices" in PIL explored a range of perspectives on PIL in the UK, post-Brexit. The event was moderated by Lucas Bastin of Essex Court Chambers and Laura Rees-Evans of Fietta LLP.

Below, we present summaries of the topics addressed during the webinar, followed by concluding observations by Laura Rees-Evans.

Post-Brexit EU-UK dispute settlement: critical and contentious issues

The dispute settlement mechanism to regulate any future EU-UK agreement has emerged as a contentious issue capable of derailing negotiations. Maria Fogdestam-Agius of Volterra Fietta addressed the positions of the two sides and their legal and political underpinnings.

The EU seeks a partnership to regulate the post-Brexit relationship in full with a dispute settlement mechanism modelled on the Withdrawal Agreement. The latter provides for arbitration with mandatory, binding referral to the Court of Justice of the European Union (CJEU) for any question of interpretation of a concept or rule of EU law. Citing the level of integration achieved during EU membership, the EU seeks to uphold "common high standards" on competition policy, trade and labour protections and environmental standards, proposing EU rules as "reference points". Were the agreement to incorporate such norms deriving from or replicating EU rules, a role for the CJEU is a constitutional requirement under EU law.

The UK prefers a separate trade agreement, supplemented by sectoral substantive agreements, each with its own governance arrangement, no role for the CJEU and no binding dispute resolution for

level-playing-field issues. Regulatory lockstep and European judicial oversight were central themes in the Brexit movement and may exclude also the possibility of relying on the EFTA Court.

Following Round 6 of negotiations, post-dating this webinar, the EU announced that progress had been made towards agreeing on a single enforcement mechanism but also that any role for the CJEU in the UK remained a "red line" for the British government.

Post-Brexit claims by individuals under public international law

Generally, individuals cannot make a public international law claim before international courts or tribunals unless a treaty gives them a right to do so. Certain investment protection agreements and trade agreements are classic examples of such treaties. Jackie McArthur, a barrister at Essex Court Chambers, discussed the effect that Brexit might have on the capacity of individuals to make international claims under treaties between the EU and non-EU States.

During the transition period, the rights and liabilities of the UK and its citizens under EU agreements with third countries are governed by Art. 129(1) of the Withdrawal Agreement, and an accompanying footnote. In compliance with those terms, the EU sent a notification to all its treaty partners that during the transition period the UK is treated as an EU member State for the purposes of all agreements with third countries. Jackie discussed the question of what it means for the UK to be treated as an EU member State, and what legal effect the notification might have in an arbitration claim brought by an individual against the non-EU country.

Following the end of the transition period, other than where the UK has ratified an EU-third country agreement in its own right, the UK will cease to be a party to EU agreements with third countries and the EU's notification will no longer apply. As Jackie explained, an individual might still be able to rely on transitional provisions or sunset clauses in those agreements to make a claim, depending on the terms of the particular treaty.

The role of UK courts in investment treaty arbitration post-Brexit

London courts are often involved in investment treaty arbitrations. Generally, this happens at the post-award stage, either when awards rendered by London-seated tribunals are challenged or in enforcement proceedings. Joel Dahlquist of Arbitration Chambers discussed to what extent this might change after the end of the transition period.

As for challenges against London-seated awards, Joel pointed out that an increasingly small number of investment treaties provide for London to be the seat. In the absence of designation in the treaty, London is instead designated by someone else (usually tribunals, based on party agreement or otherwise). Thus, for London courts to remain involved in investment treaty arbitration – in general as well as those involving intra-EU relationships –arbitrators, States and investors must be convinced that London remains an attractive seat.

Turning to enforcement, leaving the EU will not significantly affect the application of either the New York Convention or the ICSID Convention. In the case of the latter, UK courts have already demonstrated a certain level of commitment to the UK's obligations under the ICSID Convention

even in the face of possibly conflicting obligations of EU law, as evidenced by the recent Micula judgment in the UK Supreme Court.

The prospect of Brexit-related investment treaty claims

Brexit will significantly affect the UK's legal environment and UK-registered companies' ability to conduct business within the EU. Bart Wasiak of Arnold & Porter addressed the prospect of Brexit-related investment-treaty claims against the British government.

There are a variety of arguments that a foreign investor could pursue in support of a Brexit-related investment-treaty claim. For example, an investor could argue that: at the time of its investment, it held a "legitimate expectation" that it would continue to benefit from the UK's EU membership; Brexit has "radically" altered the legal regime in which the investor had invested; the British government has acted inconsistently with its earlier assurances; and/or the UK has violated its treaty obligations through specific Brexit-related decisions.

However, an investor-claimant may face several obstacles to a successful claim. The UK could counter-argue, for instance, that the decision to leave the EU was an exercise of the State's fundamental right to legislate and adapt its legal system to changing circumstances. The UK could also seek to present any disputed measures as attributable to the EU, rather than the UK alone; and/or as trade- (rather than investment-) related measures.

The scope for potential claims, and defences, is wide. Brexit is likely to give rise to interesting developments in investment-treaty arbitration jurisprudence.

The UK's post-Brexit investment policy: an opportunity for novel design choices

In February 2020, the UK announced it would seek to secure in the next three years free trade agreements with countries covering 80% of the UK's trade. Elizabeth Chan of Three Crowns explained that the ambition of the UK's trade agenda makes Brexit an important opportunity to reimagine the UK's investment policy design.

It has been more than a decade since the UK formulated its independent trade policy separate from the EU's. Most of the UK's investment treaties were negotiated in the 1980s and 1990s, with the last being signed with Colombia in 2010. The cessation of the UK's negotiation of new BITs coincided with the entry into force of the Lisbon Treaty, through which the EU obtained primary authority to negotiate and conclude investment treaties with third countries.

The UK's post-Brexit investment policy has been revealed through policy documents issued over the past year or so. In July 2019, the House of Commons' International Trade Committee called on the UK to publish an overarching investment strategy. In October 2019, the UK Government issued a Response, indicating certain policy preferences. It affirmed, *inter alia*, that investor-State dispute settlement provides an impartial process for resolving disputes. The UK's negotiating objectives with the EU (and proposed text) and the US suggest that investment policy design may ultimately be decided on a case-by-case basis.

Concluding observations

The UK formally invoked article 50 of the Treaty on European Union on 29 March 2017. Over three years later – and four years on from the referendum itself – much uncertainty remains over the impacts Brexit will have for PIL in the UK.

The five speakers at the webinar highlighted some of the wide variety of opportunities and challenges that Brexit poses, and which lie ahead. Since the date of the webinar (i.e. 23 June 2020), the UK and EU have apparently remained far apart on a wide variety of important issues in their negotiations of a future relationship. However, the outlook for the UK and EU reaching agreement on a form of dispute settlement mechanism in the new EU-UK agreement appears brighter.

Also since the webinar, on the topic of Elizabeth's presentation, a Lords Select Committee (the EU International Agreements Sub-Committee) has launched three new inquiries into the UK's ongoing trade negotiations with Japan, Australia and New Zealand (in addition to its existing inquiry into the UK-US trade negotiations). This presents the latest opportunity for stakeholders to influence the UK's investment policy in general and, in particular, the investment promotion and protection provisions of these agreements.

The end of the transition period on 31 December 2020 will bring clarity to whether or not the UK and EU have managed to reach an agreement on their future trading relationship, and what progress has been reached in the UK's other important negotiations. However, it is likely to bring little certainty to the issues highlighted by our other speakers. First, what it means for the UK to be treated as an EU member State during the transition period, and what legal effect the EU's notification has, may only become clear through those issues being brought before and decided by (international or domestic) courts and tribunals. Second, the frequency with which London is selected as the seat of arbitration will provide an indication as to whether England has retained, post-Brexit, its reputation as an arbitration-friendly jurisdiction. Third, the appetite of foreign investors in the UK to bring investment treaty claims against the British government will depend on numerous factors, including regulatory decisions the UK takes once it is no longer bound by EU law. In short, the full ramifications of Brexit on PIL in the UK will play out for many years to come.

A video recording of the event is available online.

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