



Dispute Resolution Post-Exit

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Introduction

Both sides to the negotiations have already taken positions on the mechanisms for dispute settlement under the arrangements for the UK's withdrawal from, and its future relationship with, the EU. As with other aspects of the negotiations, we have to hope that more flexibility will be shown on this issue, once the hard bargaining begins, than has seemed evident in the preparatory stage.

Chapter 2 of the Government's White Paper of February this year acknowledges that "*ensuring a fair and equitable implementation of our future relationship with the EU requires provision for dispute resolution*". However, this comes immediately after a paragraph in which it is stated in terms: "*We will bring to an end the jurisdiction of the CJEU in the UK*". The chapter goes on to outline various existing dispute resolution mechanisms under international agreements to which the EU and/or the UK are parties, and these are more fully described in Annex A to the White Paper. It is noted that, "*[u]nlike decisions made by the CJEU, dispute resolution in these agreements does not have direct effect in UK law*". Any such arrangements made with the EU must, it is stressed, "*respect UK sovereignty, protect the role of our courts and maximise legal certainty, including for businesses, consumers, workers and other citizens*". So the UK's position (at least as it was in February) can be summed up in this way: recognition of the need for a dispute resolution mechanism or mechanisms; **but** no jurisdiction

for the Court of Justice, no direct effect and no element of supranationalism such as to impinge on the UK's legal sovereignty and the role of national courts; though, nevertheless, maximum legal certainty. Not necessarily objectives that are mutually compatible.

The two relevant texts on the EU side are the European Council Guidelines of 29 April 2017 and the Negotiating Directives adopted on 22 May 2017. Both of these texts envisage a distinction between dispute resolution for the purposes of the Article 50 withdrawal agreement (the so-called "divorce settlement") and for the purposes of a future agreement or agreements organising the new post-exit relations between the UK and the EU.

According to the Guidelines, the withdrawal agreement should include appropriate dispute settlement and enforcement mechanisms regarding its application and interpretation, as well as what are described as "*duly circumscribed institutional arrangements allowing for the adoption of measures necessary to deal with situations not foreseen in the withdrawal agreement*". All that, it is said, "*should be done bearing in mind the Union's interest to effectively protect its autonomy and its legal order, including the role of the Court of Justice of the European Union*".

As to the future relations agreement, the Guidelines simply state that this "*must include appropriate enforcement and dispute settlement mechanisms that do not affect the Union's autonomy, in particular its decision-making procedures*".

Since the Negotiating Directives are confined to the initial phase of the negotiations, they don't deal with dispute resolution under any future partnership between the EU and the UK. However, there's a section on the governance of the withdrawal agreement, which begins by again

recalling the Union's interest in effectively protecting its autonomy and its legal order, including the role of the Court. After referring to the institutional arrangements for dealing with unforeseen situations and for the incorporation of any relevant future amendments of EU law, the section goes on to say that the Agreement should include provisions for the settlement of disputes and for its enforcement, particularly in relation to three matters:

- continued application of EU law;
- citizens' rights; and
- the application and interpretation of other provisions of the Agreement, such as the financial settlement or measures adopted to deal with unforeseen situations.

In those matters, it is stated, "the jurisdiction of the Court of Justice of the European Union and the supervisory role of the Commission should be maintained". It's accepted that, for the interpretation and application of provisions of the Agreement other than those relating to EU law, an alternative method of dispute settlement could be envisaged, but only if it guaranteed an equivalent level of independence and impartiality.

Finally on the Negotiating Directives, I note the brief reference to possible transitional arrangements and the statement that "*[s]hould a time-limited prolongation of Union acquis be considered, this would require existing Union regulatory, budgetary, supervisory, judiciary and enforcement instruments and structures to apply*".

So for the EU there's the usual insistence on preserving the autonomy of its legal order, and in particular the role of the Court of Justice. But the

Negotiating Directives seem to go further than this by insisting that the Court's jurisdiction continue indefinitely for certain purposes, such as the protection of citizens' rights. It's here, more than anywhere, that the potential for deadlock in the negotiations on dispute settlement may be thought to lie.

I'm dividing this talk into two parts: a first part in which I'm going to discuss some existing examples of dispute settlement mechanisms under international agreements between the EU and various third countries; and a second part in which I'll consider which mechanism or mechanisms to choose in the particular case of the UK's withdrawal from the Union.

Models of dispute settlement

Beginning with the existing models.

It makes sense, in my view, to see whether one, or perhaps more than one, of the existing models of dispute settlement could be adapted for the purposes of the withdrawal agreement and/or the future relations agreement. That's partly because there's a limit to the inventiveness of lawyers, even those of the Council and the Commission and of our own Government Legal Service. But more importantly because a mechanism that the EU authorities have either accepted or shown willingness to countenance, can be taken to satisfy the constitutional requirements of preserving the autonomy of the EU legal order and the role entrusted to the Court of Justice within that order.

These mechanisms commonly entail the establishment of a "joint committee" comprising representatives of the parties to the agreement in question, within which, initially at least, an effort must be made to resolve

any dispute by means of political/diplomatic consultations. Inevitably, there is scope for prevarication and political deal-making. If such consultations fail to produce a solution, the more developed mechanisms provide for the dispute to be referred to an arbitration panel, which may be empowered to make binding rulings. The sanction for failure by the “losing” party to comply with such a ruling may be to give the other party a right to suspend obligations under the agreement, or to compensation. The EEA model is unique in providing for a system of enforcement through permanent institutions independent of the parties.

I’m going to focus on three models, those under the Agreements between the EU and, respectively, Switzerland, Ukraine and the EEA.

Switzerland

As you know, since the rejection of membership of the EEA in a referendum in December 1992, Switzerland has developed its relationship with the EU on the basis of a large number of bilateral agreements – some 20 main ones and more than 100 other agreements. There was a first package of agreements signed in 1999 and a second in 2004. Taken together, the agreements amount to a relationship nearly equivalent to membership of the EEA. Indeed, in Case 656/11 the Court of Justice equated the position of Switzerland, under its Free Movement Agreement with the EU, to that of an EU Member State. This, it was held, justified the choice of Article 48, an internal market legal basis, for the adoption of an implementing measure on social security coordination under the Agreement.

And yet, the enforcement and dispute resolution mechanism provided for by those agreements was a typical joint committee charged with achieving a political settlement through consultations. The absence of overarching institutional arrangements has come to be regarded as problematic by both sides and, indeed, the Council of the EU has stated (and reiterated as recently as February 2017) that the conclusion of an institutional agreement is a pre-condition for any further agreements with Switzerland on market access.

Negotiations for an institutional agreement were initiated in May 2014 and are still going on. They have a fourfold objective:

- to facilitate the adaptation of individual agreements to developments in the areas of EU law which they concern;
- to ensure consistent supervision of the application of the agreements;
- to ensure consistent interpretation of the agreements; and
- to provide for the settlement of disputes

I have chosen the case of Switzerland as one of my examples, because of the insistence by the Swiss authorities on preserving their country's legal autonomy, which finds a clear echo in the February White Paper. The creation of new supranational institutions has been explicitly ruled out. I understand that the Swiss position is that each side should ensure the application of the agreements on their own territories. So it would be for the courts in Switzerland to ensure that EU law contained in the agreements be interpreted in accordance with relevant case law of the CJEU. Disputes would still fall to be resolved by the joint committees. However, in this context, either side would have an independent right to submit questions concerning the interpretation of EU law to the CJEU;

and the joint committee would then seek to reach a solution acceptable to both sides on the basis of the Court's interpretation. In the event of failure to achieve an acceptable solution, proportionate compensatory measures might be taken, up to and including the full or partial suspension of the relevant agreement. The proportionality of such compensatory measures could be submitted to the decision of an arbitral tribunal.

That, as I understand, is the deal under present consideration.

Ukraine

Turning to the Association Agreement with Ukraine, this provides for two different dispute settlement mechanisms, one relating to the general aspects of the association and the other to the Deep and Comprehensive Free Trade Area (DCFTA), which contains its core economic provisions.

For disputes relating to the interpretation or application of provisions of the Agreement apart from the DCFTA, Articles 476 to 478 of the Agreement lay down a classic diplomatic procedure by way of consultations within the Association Council, the Association Committee or some more specialised body, as appropriate. The procedure is initiated by one party sending a formal request to the other party and to the Association Council. If consultations result in an agreed settlement, this will be enshrined in a binding decision of the Association Council. If no agreement can be reached within three months, the complaining party may take what are described as "appropriate measures", such as the suspension of part of the Agreement, though not of the DCFTA.

The mechanism the Ukraine Agreement provides for the settlement of disputes regarding the DCFTA is more interesting for our purposes. It's set

out in Chapter 14 of Title IV of the Agreement, at Articles 303 to 323, and is largely based on the Dispute Settlement Understanding of the WTO, though somewhat speedier.

Once again, the parties are required, in the first instance, to endeavour to resolve their dispute by entering into consultations in good faith with the aim of reaching a mutually agreed solution. If that fails, then the complaining Party may request the establishment of an arbitration panel. A panel is composed of three arbitrators. The parties have ten days to agree on its composition, otherwise the panel members are chosen by lot from a pre-established list.

The arbitration panel must notify its ruling to the Parties within 120 days of its establishment. If the panel considers that it can't meet this deadline, the period may be extended, but in no case beyond a total of 150 days. Tighter time limits apply in cases of urgency.

The rulings of arbitration panels are binding on the Parties but do not create any rights or obligations for natural or legal persons; in more familiar language, they are not directly effective. Each Party is required to take any measures necessary to comply in good faith with the ruling of the panel and they must try to agree on the time to be taken over compliance. In the absence of agreement, there is a procedure for determining what "the reasonable period of time" to comply should be. Should the Party complained against fail to notify any measure taken to comply with the ruling before the expiry of the reasonable period of time, it must, if so requested by the complaining Party, present an offer for temporary compensation; and if no agreement on compensation is reached within 10

days of the end of the reasonable period, the complaining Party is entitled to suspend obligations arising from any provision contained in the Chapter of the Agreement on the free-trade area, at a level equivalent to the nullification or impairment caused by the violation. For instance, it could temporarily re-impose the MFN tariff applicable under WTO rules.

Article 322 of the Agreement provides for a mandatory reference procedure, where an arbitration panel is faced with a dispute concerning the interpretation or application of provisions of EU law brought into play as a result of the process of approximation of legislation under the Agreement. In such a situation, the panel must request a ruling by the CJEU, suspending its proceedings in the meantime; and the Court's eventual ruling will be binding on it. This is in strong contrast to the system of non-binding referral which is currently under consideration with respect to the Swiss agreements. It's a feature of the dispute settlement mechanism about which the UK Government would seem likely to have reservations.

There is a lighter alternative to arbitration, in the form of a mediation mechanism, available as a way of resolving disputes on market access for goods. This involves the appointment of a single mediator to assist the Parties in finding a mutually agreed solution. If mediation fails, the possibility of recourse to dispute settlement by way of arbitration remains open.

[The EEA](#)

And so to the dispute settlement mechanisms of the EEA Agreement. The hallmark of the EEA's institutional system is its so-called "two-pillar" structure. Compliance by the EU Member States with the EEA Agreement

is ensured by EU institutions, the European Commission and the CJEU; while compliance by the three EFTA States belonging to the EEA – Norway, Iceland and Liechtenstein – is ensured by parallel supranational institutions, the EFTA Surveillance Authority and the EFTA Court.

On the EFTA side, judicial enforcement of the EEA Agreement is ensured in ways that mirror quite closely, though not precisely, the main heads of jurisdiction of the CJEU. The EFTA Court has jurisdiction in infraction proceedings brought by the Surveillance Authority against the three EFTA States to enforce their obligations under the Agreement, and jurisdiction to give preliminary rulings on the interpretation of EEA rules at the request of national courts (though even supreme courts are under no obligation to seek such guidance); and it also has power to review the validity of decisions of the Surveillance Authority on competition matters.

There is, in addition, provision under Article III of the EEA Agreement for any matter in dispute concerning the interpretation or application of the Agreement to be brought before the EEA Joint Committee, which could eventually result in the taking of safeguard measures, or in the partial suspension of the Agreement, if a settlement cannot be reached. However, so successful has surveillance under the two-pillar system been in avoiding disputes, that coercive measures under the machinery of Article III have never needed to be resorted to.

As I mentioned earlier, a system of parallel enforcement is also favoured by the Swiss authorities. However, the difference is the absence of independent institutions; though this would be partially compensated for by

the possibility of obtaining non-binding preliminary rulings from the Court of Justice itself.

Choosing between models

Those then are my three models. How to choose between them?

Withdrawal Agreement

Taking the Withdrawal Agreement first.

I'm not clear as to why Governance of the Agreement should be identified by the Negotiating Directives as a priority for the first phase of the negotiations. Though I suspect it's because of the connection with EU citizens' rights.

The Directives are insistent that the Commission have a continuing supervisory role and the Court of Justice have continuing jurisdiction, for the interpretation and application of provisions of the Agreement relating to EU law. This means, presumably, that the Commission would retain power to bring infraction proceedings under Article 258 TFEU against the UK, if it considered that, for instance, the UK had infringed rights of EU citizens guaranteed by the Agreement; and the Court of Justice would have jurisdiction to rule in such proceedings and, if necessary, to impose financial penalties under Article 260. Also that EU citizens in the UK would have continuing access to the Court of Justice in order to enforce their rights (presumably, by way of a continuation, for their exclusive benefit, of the Art 267 preliminary reference procedure).

The radical nature of this demand can be seen from the fact that it is not time-limited. In the case of EU citizens, given that rights of family members would be guaranteed, it could last for decades. And, if it applied to other elements of the withdrawal agreement, such as the arrangements relating to the external EU frontier in Ireland, indefinitely.

I can't believe that a Government of any political colour would consent to this quasi-permanent extension of the authority of institutions belonging to a constitutional order of which the UK would no longer be part; and I'm sad to say that I understand why. To put the point crudely: what's sauce for the goose is sauce for the gander. A polity so wedded to preserving its own legal autonomy ought to be a little sensitive to the desire of a departing Member State to recover its autonomy.

Withdrawal from the Union is a legitimate (if regrettable) choice, authorised by Article 50 TFEU. According to paragraph (3) of the Article, once the Withdrawal Agreement enters into force, or on 30 March 2019 at the latest (unless the time limit is extended), "the Treaties shall cease to apply" to the UK. That must mean that, perhaps after a limited transitional period in which it would effectively be half in and half out of the Union, the UK will fully assume the status of a third country.

Of course I don't exclude that the Court of Justice might be given a role in the application and enforcement of an agreement on the future relationship between the UK and the EU, negotiated at arms length outside the time pressure of Article 50. Indeed, I'm going to propose that it have such a role in at least one field of possible future collaboration. But I do consider the

demand in section III.5 of the Negotiating Directives, expressed in the *de haut en bas* style of the Commission at its worst, to be unacceptable.

On the other hand, it doesn't appear to me that a dispute resolution mechanism based on inter-governmental consultations, like the Swiss one, even if supplemented by arbitration panels, as under the Ukraine Agreement, would be apt in the case of an agreement that will have the safeguarding of citizens' rights as a central, perhaps its main, function.

What's needed is a proper system of judicial oversight, sufficiently independent to command the confidence of the EU and of nervous individual citizens; and the obvious model is that of the EEA. I'm not talking about joining the EEA. That's an option that politicians in the UK, and probably in the EFTA countries too, need a bit of time to get used to. My proposal is that, for the purposes of the Withdrawal Agreement, the UK should "borrow" the EFTA Surveillance Authority and the EFTA Court. This could be achieved quite simply (though the consent of the EFTA States concerned would, of course, be needed) by giving those institutions power to apply the Agreement, and adding a UK member to each of them in any case where such power fell to be exercised. The technical feasibility of such a solution has been recognised by no less an authority than Professor Carl Baudenbacher, the President of the EFTA Court, in a lecture that he gave under the auspices of King's College, London in October 2016, and in more recent lectures and writings.

It will be important for politicians in this country to understand that the EFTA Surveillance Authority and the EFTA Court are rather different institutions from their EU counterparts, the EU Commission and the Court

of Justice. The focus of the ESA and the EFTA Court is mainly economic, rather than political, and they are not influenced by the integrationist teleology of the EU Treaties. Nor, it can be predicted, would the EFTA Court insist on the automatic direct effect and primacy of the rules contained in the Withdrawal Agreement, any more than it has done with respect to the rules of the EEA Agreement.

A solution along the lines I'm suggesting would, I believe strike a reasonable balance between the Government's aims of respecting UK sovereignty and preserving the role of UK courts and the concern, on the EU side, to ensure that the Withdrawal Agreement is faithfully implemented. It would also strengthen legal certainty.

It's worth noting that, under the EEA Agreement, EU citizens resident in Norway, say, are protected by the Norwegian Courts, backed up by the EFTA Court. I can see no good reason why that shouldn't be regarded by the EU as satisfactory in the case of EU citizens in the UK.

The Future Relations Agreement

The choice of an appropriate Dispute Settlement Mechanism for the Agreement on the future relationship between the EU and the UK will depend on the scope and content of the Agreement.

Unlike many colleagues, I was faintly cheered by the indications in the White Paper and the Prime Minister's Art 50 letter that the Gov would be seeking a new relationship with the Union of real substance. These included multiple references in the Art 50 letter to the aim of creating

what it calls “a deep and special partnership” with the EU, “taking in both economic and security cooperation”.

On the side of economic cooperation, the Prime Minister’s letter envisages what is described as a “bold and ambitious free trade agreement”, which would be “of greater scope and ambition than any such agreement before it”, and also to its covering financial services and network industries. I suppose the implication is that this should go further than the recently signed Comprehensive Economic and Trade Agreement (or CETA) between the EU and Canada. CETA is certainly a very ambitious free trade agreement covering nearly all goods; its downside for the UK is that the CETA model wouldn’t provide an adequate level of access to the EU market for financial services. Nor would it enable UK businesses to qualify for “passporting”.

The DCFTA section of the Ukraine Agreement is also very ambitious, and both Agreements provide for a dispute resolution mechanism based on political consultations leading, in the event of failure, to compulsory arbitration. In my view, this would be an appropriate mechanism for the far-reaching FTA that was, and appears to remain, the joint ambition of both the UK and the EU side of the negotiations. The justification given for excluding possible recourse to the EEA model, supposedly out of respect for the EU’s position is that “the four freedoms are indivisible and there can be no ‘cherry picking’”, a reference to the UK’s wish to be able to control the free movement of people. And in Brussels on Monday Mr Davis and Mr Barnier seemed to agree that this approach hadn’t changed.

Maybe not. But the world has changed. I don't believe that a majority exists in the House of Commons for a hard Brexit. In my opinion, the UK could, and should, and I venture to suggest probably will, eventually (if not immediately) go for what I would call a Norway plus solution. By that I mean either membership of the EEA as such, or a corresponding bespoke arrangement; plus a closer relationship on internal security and on the common security policy than Norway and the other EFTA countries have, or perhaps even want. I don't see free movement of persons as an insuperable barrier. All that's needed is a lot of ingenuity and some flexibility, as the EU seemed willing to show in its negotiations with Switzerland. Of course, to achieve a sensible outcome in the negotiations, the political leaders on both sides will have to be willing to face down their fundamentalists, and I know that's a big ask.

Joining the EEA or devising a socio-economic relationship with the EU of similar depth and scope would entail the acceptance of the role of the supranational EFTA institutions. For the reasons I have given, I'm fairly confident that all but the most diehard Brexiteers could be convinced of the advantages of this solution.

However, it may not be the right solution for all the elements of the future Agreement, especially if this extends (as I hope it will) to the internal security aspects of what is now called the area of freedom, security and justice, and in particular the European Arrest Warrant (EAW).

Once again, there's help to be found in the agreement on a surrender procedure similar to the system of the EAW between two EEA members, Iceland and Norway, and the EU. This has taken a very long time to finalise

(all of 13 years) but we shouldn't be too discouraged by that fact. After all, the UK is currently a participant in the various internal security systems with which it wishes to remain connected. Interestingly, the EEA's enforcement and dispute resolution mechanisms have not been extended to this new field of cooperation – perhaps because their focus is reckoned to be too specifically economic. Instead, there's provision for disputes to be referred to a meeting of representatives of the governments of the EU and of Iceland and Norway, which is charged with resolving them within six months.

A more interesting feature of the agreement is designed to ensure uniform development of the case law on its interpretation and application, by keeping under constant review relevant decisions of the CJEU, on the one hand, and of courts in Iceland and Norway, on the other. A mechanism is to be set up to ensure regular mutual transmission of the case law.

In my opinion, this is a field of such sensitivity, and so completely based on EU law, that it would be appropriate for the Court of Justice to have jurisdiction at least to give preliminary rulings. I don't think it matters whether its rulings were legally binding or not, since I can't believe that courts in the UK would fail to give effect to them.

Conclusion

To conclude. Of course I wish we weren't having to discuss these matters and that the whole wretched Brexit business were a bad dream, from which we could wake up, like Bobby Ewing's wife in *Dallas*. But it isn't and we won't. So the only thing one can sensibly do is encourage the Government to negotiate arrangements that will preserve our country's

economic and security interests, and its international reputation, to the greatest extent possible; and lay the foundation, perhaps, for a medium-term return at least to the outer reaches of the European fold.

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24th June 2017