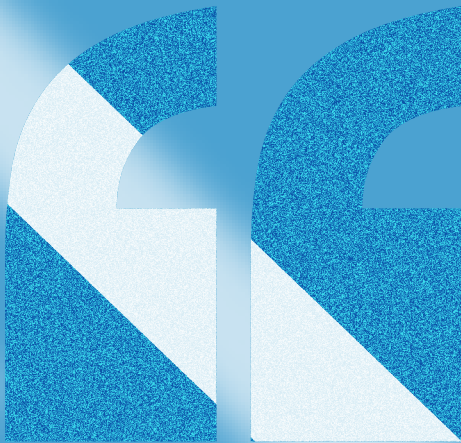


C L I F F O R D
C H A N C E



BREXIT:
CITIZENS' RIGHTS,
DISPUTE RESOLUTION
AND THE CJEU



— THOUGHT LEADERSHIP

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CITIZENS' RIGHTS, DISPUTE RESOLUTION AND THE CJEU

Finding a means to resolve direct disputes between the UK and the EU after withdrawal should be easy. The difficult part is what ability companies and individuals should have to pursue their rights under the withdrawal agreement and the agreements forming the “deep and special partnership” between the UK and the EU. The UK Government appears to reject any recourse by companies and individuals to an international tribunal (including the Court of Justice of the European Union), while the EU appears to require it. If the UK Government’s view prevails, then individuals in the UK will find that the entitlement they have today to take direct action to protect their rights under EU treaties will not apply to their rights under any withdrawal agreement, unlike individuals in the EU.

The UK Government has turned its face against the Court of Justice of the European Union having any role in resolving disputes between the UK and the EU as to compliance with the terms of the withdrawal agreement between the UK and the EU or, in the longer term, any role under the agreement(s) that will make up the relationship which the UK hopes to conclude with the EU. The UK Government accepts that, in some circumstances, an arbitral panel or an international tribunal might be able to settle disputes between the UK and the EU. But it rejects the idea that companies and individuals should have access to any international tribunal to challenge the UK’s compliance with the agreements(s). “The Withdrawal Agreement and the future partnership must respect the autonomy and integrity of both legal orders”, according to the UK Government’s paper entitled *Enforcement and dispute resolution: a future partnership paper*. “Taking back control” from the EU means that the UK Parliament will lay down UK law, and UK judges will then interpret and enforce that law.

Underlying this apparent political imperative are a number of key questions as to who will have rights under these various agreements between the EU and the UK, and how and by whom those rights will be capable of being enforced.

There is no easy answer to these questions, but an answer is needed in the near future if the negotiations between the UK and the EU are to move beyond the preliminary stage they are at now.

The starting assumption

The starting assumption is that the UK and the EU will enter into one or more agreements (whether called an agreement, a treaty, a convention, a protocol or anything else) to govern their relationship on withdrawal or for the longer term. If they cannot do so, the rights of EU persons in the UK and of UK persons in the EU will depend upon UK domestic law and EU law, respectively, enforceable in accordance with the UK’s and the EU’s legal systems. Negotiations take place against that default position.

If the UK and the EU reach agreement, the agreement (or agreements) will take effect in the realm of public international law (eg it will not contain a clause stating that it is subject to English law, German law or any other domestic law or even EU law; but it will be governed by international law). The agreement will primarily bestow rights on the parties to the agreement (the EU, perhaps the member states of the EU, and the UK in this case), but it will, in practice, also seek to confer rights on other persons, whether individual or corporate. These

rights might include the right to live and work in particular countries, the right to carry on business, the right not to suffer discrimination, the right to sell products meeting certain specifications, and so on. The rights involved might be invoked against one of the parties to the agreement (the UK, the EU and, through the EU, its member states) or against other private persons, but the primary issue is how these persons derive their rights and how they can enforce those rights – how the public international law rights under the treaty will be given practical effect.

The public international law position

The easier end of the spectrum is a direct dispute between the UK and the EU over the meaning of the agreement. Suppose, for example, that the EU alleged that the UK was in breach of its obligations under an agreement as a result of a failure by the UK Government properly to implement the agreement or a failure by UK authorities (including the courts) to give proper effect to the rights conferred by the agreement. In these circumstances, the EU would *prima facie* have the right to take steps to seek to compel the UK to comply with its obligations. What those steps would be will depend upon the terms of the agreement. The agreement could refer disputes to an existing tribunal (such as the International Court of Justice at The Hague – though this might not be possible because the ICJ can only hear disputes between states, and the EU is not a state) or the CJEU, to a tribunal established for the purpose, or to an ad hoc tribunal established to deal with the particular dispute in question.

Any tribunal with jurisdiction to decide the parties' rights and obligations must be, and be seen to be, independent. The CJEU is not seen, from the UK's standpoint, to meet the criterion of independence because it is the EU's court, with (after withdrawal) no UK representation. The CJEU can resolve disputes between EU member states and between the EU and its member states, but that is different from resolving disputes between the EU and a non-

member state. An EU court, staffed by judges from EU member states, would not be perceived as properly disinterested in a dispute involving the EU and a non-member state. Even adding a UK judge to the CJEU for cases involving the UK is unlikely to suffice because the UK judge would be heavily outnumbered. The number of UK judges would have to match those from the EU, probably with a neutral chair. At that point, the body in question ceases to look like, or to be, the CJEU.

The reality might be that a new tribunal would be required, whether standing permanently or standing in the wings waiting to come on stage. This appears to be the UK's preference. Exactly what form that tribunal might take would be a matter for negotiation. Three judges/arbitrators, one appointed by each side and the third selected by the two appointees? Five judges/arbitrators, with one or three neutrals? Any nationality requirements or exclusions, whether for those appointed by the parties or the neutrals? The variations are considerable, but agreement should not be impossible. Indeed, agreement as to the means of resolution of disputes directly between the UK and the EU themselves should represent one of the easier problems in this area.

Direct rights for citizens

Direct disputes between the UK and the EU will represent only a small fraction of the disputes which may arise from any withdrawal or other agreement between the UK and the EU. Many more claims are likely to be made by individuals and corporates that their rights have been infringed. Their claims could be pursued on their behalf by the UK or the EU against the other, but the UK and the EU are likely to be disinclined, perhaps unable, to escalate every dispute involving one of their citizens to an international tribunal. In practice, persons who claim that they have been denied rights under the UK/EU agreement will need to pursue those rights themselves. This will mean that these parties must, initially at least, pursue their claim through the local courts in the UK or EU member states. This is the current position with EU law rights.



There are numerous international precedents that provide for inter-state dispute resolution that can be called upon for inspiration.





The CJEU is unlikely to be acceptable to the UK as the final arbiter of the meaning of an agreement between the UK and the EU.



That begs the question of what rights non-state persons, whether companies or individuals, would have as a result of an agreement between the UK and the EU. The agreement would be an instrument in public international law, and the UK adopts a “dualist” approach to public international law. This means that public international law instruments – treaties and other agreements – entered into by the UK have no effect in UK domestic law unless they are brought into UK domestic law by legislation. The mere fact that the UK has entered into an international agreement that purports to give individuals specific rights does not allow those individuals to enforce their rights in UK courts.

Individuals can only enforce rights under public international law agreements in the UK if given the ability to do so by Parliament. Parliament may choose to confer those rights by providing that the treaty has the force of law in the UK or by enacting the rights required by the treaty in more conventional legislation without direct reference to the treaty. Either way, the only rights enforceable in UK courts are those given by the legislation. In interpreting the legislation, the courts will take note of the international agreement and seek to ensure consistency, but ultimately the legislation will prevail. Even if the legislation and the treaty are consistent, the UK courts could interpret the agreement wrongly.

A person who complains of being denied rights under the UK/EU agreement, whether by the UK Government or by another private person, could therefore pursue the claim through the UK courts, ultimately to the Supreme Court, though the claim would formally rest not on the agreement itself but on the UK legislation. But what then?

Currently, if a person takes a claim based on EU law to the final court in a member state, that person will often then be entitled to have the case referred to the CJEU for final decision. The CJEU is the ultimate arbiter of EU law, and its decisions ensure consistency between the EU's member states, all of which are bound by the CJEU's decisions. UK courts will no longer be able to refer cases to the CJEU after withdrawal and, for the reasons identified above.

There are other options for private parties to pursue their rights, including:

- First, the decision by the national courts could be final as between the parties, leaving the UK and the EU themselves to pursue remedies in the public international law sphere, should they wish to do so. Indeed, trade agreements such as the EU-Singapore free trade agreement and the EU-Canada Comprehensive Economic and Trade Agreement make clear that they do not confer rights or impose obligations on companies and individuals, so that only the parties to the agreement have rights to use the dispute resolution mechanism in the agreement to settle any disputes as to compliance (although the agreement might establish an investor-state dispute resolution mechanism for some purposes – see below). Trade agreements are one category of dispute, but this approach is less apposite in relation to claims individuals might wish to make about infringements of their personal rights. One of the innovations of EU law (as a result of the seminal case of *Van Gend en Loos* in 1963) was the recognition that non-state actors could themselves have direct rights for breach of the EU's treaties and that the EU courts would direct national courts to override national law to protect those rights. Some might argue that a denial of direct rights to persons aggrieved by a failure properly to implement the withdrawal or other agreement, leaving the matter solely in the hands of the state actors, is retrograde and could mean that those rights are of limited value.
- Second, the decision by a national court could be final as between the parties. The parties' rights exist in domestic law, and they have exhausted those rights. But the person aggrieved could then bring a new and distinct claim against a party to the agreement – whether the UK or the EU – on the basis that the final judgment of the national court had wrongly denied it rights that it should have had under the agreement between the UK and the EU – the judgment showed that the relevant party to the agreement had not properly implemented the agreement in

domestic law. A new international tribunal would need to be established to hear such claims, similar to the tribunals that can be constituted under bilateral investment treaties that allow an investor to bring claims against a host state (of which there are more than 2000 globally, the UK being a party to over 100). Free trade agreements also often include similar investor-state dispute settlement mechanisms for investment disputes. However, these mechanisms are usually limited to specific types of investor-state disputes, such as those arising from expropriation or unfair or inequitable treatment of investments.

- Third, a new dispute resolution body could be set up to hear references from the parties' final courts in relation to the UK/EU agreement. This would provide consistency in interpretation and the parties could ensure that their courts would give effect to the decisions of the body. But it would be necessary to address the composition of the dispute resolution body to ensure balance and independence and, if there is to be equal treatment of both the UK and the EU, the body would have to be able to hear references from the CJEU as well, which may not be acceptable to the EU negotiators or the CJEU.
- Fourth, a more radical approach would be to legislate to empower the Supreme Court to ensure that the UK Government abided by its commitments under the withdrawal agreement, including the enshrinement of the rights of individuals in the UK. This would mirror the CJEU's powers in relation to the EU and each EU member state, so preserving UK-based individuals' rights post withdrawal agreement, but without affording the CJEU extra-territorial powers in the UK. It would, however, afford the Supreme Court new powers in the constitutional arena, so making the UK governmental executive subject to the Supreme Court.
- It also raises potentially awkward questions as to how these rights could be entrenched against subsequent erosion by Parliament.

If a resolution to this problem could be left to later in the day, perhaps during negotiations on the future trade relations

between the UK and the EU, it might allow a reduction in the political temperature of the debate. But the issue cannot be put on the back-burner. The EU insists that the position of EU citizens in the UK and of UK citizens in the EU is one of the three issues that must be resolved – or, at least, on which “sufficient progress” must be made – before trade and other long-term issues can be discussed (the other preliminary issues are money and Ireland). How citizens enforce whatever rights are conferred on them will be critical to this issue. Rights without remedies are meaningless.

The EU's position

The EU's position, so far as citizens' rights under a withdrawal agreement are concerned, was set out in a position paper entitled *Essential Principles on Citizens' Rights* (TF50 (2017) 1/2, 12 June 2017). This paper says that “citizens' rights set out in the Withdrawal Agreement should be granted as directly enforceable vested rights in both the UK and the EU27” and that the “Commission should have full powers for monitoring and the Court of Justice of the European Union should have full jurisdiction corresponding to the duration of the protection of citizens' rights in the Withdrawal Agreement”. This would include a mechanism analogous to the existing arrangements for preliminary reference from UK courts to the CJEU.

The EU is therefore looking to preserve the role of the CJEU after withdrawal. Citizens will, on this proposal, continue to be able to enforce their rights as they can now – the hardest version of the third option identified above. Plus ça change, plus c'est la même chose.

The nature of the rights conferred on citizens could, as a matter of EU law, affect what agreement the EU can reach on this point. The CJEU has been insistent that it, and only it, is the final arbiter of matters of EU law (this requirement necessitated changes to the EEA agreement, and has prevented the EU from acceding to the European Convention on Human Rights) (although the Energy Charter Treaty, to which the EU is a party, arguably is an exception to this). If, therefore, EU citizens' rights in the UK after the UK's withdrawal are

rights under EU law, then the EU cannot agree any alternative form of dispute resolution. If, however, they are distinct rights under a separate international agreement – even if expressed in the same terms as EU law – then the CJEU might not have to be involved.

The UK's position

The UK Government's paper entitled *Enforcement and dispute resolution: a future partnership paper* (23 August 2017) is somewhat ambiguous, doubtless for constructive reasons, as to what the UK would like the dispute resolution mechanisms to be. The UK's paper acknowledges that the CJEU will continue to be the "ultimate arbiter of EU law within the EU and its member states" but rejects any continuing role for the Commission or the CJEU in relation to the withdrawal agreement or any longer-term agreements. The Government recognises the need to ensure that persons can "effectively enforce their rights in a timely way", while stressing that arrangements must "respect the autonomy of EU law and UK legal systems while taking control of our own laws", and, in particular, that when "the UK leaves the EU... the EU Treaties, the jurisdiction of the CJEU and the doctrine of direct effect will cease to apply in the UK".

The inference to be drawn from the paper is probably that the Government favours the first of the options referred to above – enforcement under UK law only, with no further direct recourse by private parties to another tribunal. For example, the paper says that the UK will enact domestic

legislation to give effect to any agreement with the EU, and that this will "provide an effective means for individuals to enforce their rights under the agreements". Indeed, it says that those "rights and obligations will be enforced by UK courts and *ultimately* by the UK Supreme Court" (emphasis added). "Ending the direct jurisdiction of the CJEU in the UK will not", according to the UK Government, "weaken the rights of individuals nor call into question the UK's commitment to complying with its obligations under international agreements." However, absent affording the Supreme Court power to require the Government to comply with the withdrawal agreement, (see above), the UK Government has absolute sovereignty to repeal such domestic legislation, the effect of which would be to deprive individuals of their rights with no ability to appeal or otherwise challenge the decision.

The paper goes on to say that the UK "will be bound by the agreements with the EU as a matter of international law, and will be subject to whatever international enforcement mechanisms the agreements contain" and that there must be "a new dispute resolution mechanism to address disagreements between the UK and the EU on interpretation or application". It goes on to discuss means of resolving disputes between state actors (such as arbitration), without apparently contemplating that non-state actors – citizens – might have direct access to a tribunal outside the UK or offering suggestions as to how that tribunal might be constituted.

Conclusion

The stated positions of the UK and the EU are, currently at least, some distance apart. What results from the negotiations between the UK and the EU will be a matter of give and take against a backdrop of international and domestic politics. Even if the negotiators themselves are able to reach a consensus, it does not mean that the European Council, the European Parliament and the UK Parliament, all of whose consent is required, will automatically also agree. There is a long way to go, but only a short time in which to get there.

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