

## UK Seeks Dispute Resolution Options Outside The CJEU

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One of the thorniest topics in the Brexit negotiations is the resolution of potential disputes arising under the withdrawal agreement and enforcement of rights and obligations by individuals following the U.K.'s exit from the European Union. Since the vote to leave the EU in 2016, "taking control of [its own] affairs" and ending the jurisdiction of the Court of Justice of the European Union (CJEU) has been the redline position of the U.K. government. The EU, on the other hand, has been pressing hard to maintain the role of the CJEU as the guarantor of EU citizens' rights and insisting that the withdrawal agreement and any related disputes be subject to the law and judicial system of the EU. In an effort to resolve this impasse, the UK government has advanced ideas for alternative dispute resolution, including a new arbitration body. To date, none of this has gained any traction, leaving open the question of where this important issue will ultimately land.

In her "Plan for Britain" speech delivered on Jan. 7, 2017,[1] the U.K. prime minister, Theresa May, outlined 12 principles intended to guide the U.K. in its negotiations with the EU. The second principle entitled "Control of our own laws" underlines a stated need to end the direct jurisdiction of the CJEU and ensure that laws reflecting the interests of the U.K. are made in "London, Edinburgh, Cardiff and Belfast".

This principle is reflected in the U.K. government's 23 Aug. 23, 2017, Future Partnership Paper on Enforcement and Dispute Resolution, which seeks to explore dispute resolution options outside the CJEU.[2] Any role to be assumed by the CJEU is categorically rejected with the paper emphasizing the perceived unfairness of letting "the courts of one party [be] given direct jurisdiction over the other in order to resolve disputes between them", as well as incompatibility with the "principle of mutual respect for the sovereignty and legal autonomy of the parties to the agreement." [3] It remarks: "when entering into international agreements, no state has submitted to the direct jurisdiction of a court in which it does not have representation." Since the paper was published, the Prime Minister has reiterated the government's position that "it is British judges that will interpret [its own] laws, and it will be the British Supreme Court that will be the ultimate arbiter of those laws." [4]

To address these policy concerns, the paper cites "purely illustratively" a number of different



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alternatives to the direct jurisdiction of the CJEU without making commitments to any of these suggested models. The first is a joint committee for the settlement of disputes with participation in equal number by both parties at a governmental or diplomatic level. Although this model can be effective in the wider supervision and monitoring of the proper functioning of an international agreement, the paper recognizes the benefits of having a binding mechanism for dispute resolution in order to maximize business confidence and clarity.[5] As a second alternative, arbitration models are discussed such as those found in the EU's recent free trade agreements with Canada (CETA) and Singapore. The World Trade Organization dispute resolution system providing for consultation between the parties in dispute with the further possibility of the establishment of an arbitration panel is identified as well, with the caveat that such procedures can take too long.

It is doubtful, however, that the EU would find any of these suggestions attractive. Among other things, the WTO system is perceived to be too inflexible to accommodate potential issues post-Brexit requiring amendments to the WTO treaty with the participation of all 164 WTO members. Various EU member states' lack of sympathy for the investor-state arbitration model included in the CETA is also well known and in fact the CETA is currently under review by the CJEU for the compatibility of its dispute resolution mechanism with EU law.[6] This review will be conducted in light of CJEU's opinion earlier this year that the EU does not have exclusive competence over matters relating to investor-state dispute settlement, raising the specter that all free trade and related agreements containing such mechanisms — including conceivably now CETA — require ratification by individual EU member states.[7] Such a member state veto would present a significant procedural hurdle to any agreement between the EU and U.K.

There are additional institutional problems. As outlined briefly in the paper, EU law limits the extent which the EU can be bound by an international judicial body other than the CJEU. In this regard, the CJEU has historically taken the view that it has exclusive jurisdiction as the interpretative arbiter of the substantive content of EU law and that no separate body should be given jurisdiction to address such matters. The withdrawal agreement, and any future relationship agreement, will also have to address, and thereby incorporate to a degree in some form, past, current and future EU law on a variety of subjects.

Views have also been expressed within the EU community against the need to reinvent the wheel after the U.K. leaves the bloc. The Court of Justice of the European Free Trade Association States (the "EFTA court") — which oversees access to the single market for non-EU states Iceland, Liechtenstein and Norway— has been put forward as the answer to the problem. The president of the CJEU, Koen Lenaerts, is one of the proponents of this solution, emphasizing that the EFTA court is effectively hearing and resolving disputes between the EU and nonmember third states within the bounds of international law.[8] It may be politically unrealistic to think that the U.K. could be persuaded to join EFTA and the EEA agreement. That said, the EFTA court system may potentially provide some helpful pointers for a mutually agreeable model and is worthy of further study and consideration by all sides to the debate.

There is yet another potential issue standing in the way of progress: it is difficult to see alternative dispute resolution scenarios that do not involve the CJEU post-Brexit when it comes to the protection and enforcement of individual rights and obligations under the withdrawal agreement or any future relationship agreement between the EU and the U.K. Currently, insofar as rights of EU citizens within the U.K. are concerned, the U.K.'s proposal is that such rights would be enforced by the U.K. courts and ultimately by the U.K. Supreme Court. The paper claims such rights and obligations would be underpinned by the creation of international law obligations which will flow from the agreements with the EU. Meanwhile, the paper argues on a reciprocal basis that U.K. individuals and businesses operating within the EU should similarly be provided with means to enforce their rights and obligations "within the

EU's legal order and through the courts of the remaining 27 Member States". However, given that the CJEU retains jurisdiction over the courts of the remaining 27 member states, it is difficult to see how it can be fully excluded from determining the interpretation of the withdrawal agreement or any future relationship agreement as references or requests for preliminary rulings can be made to it by member state courts. This in addition to the fact, as noted above, that EU law will necessarily be implicated to some degree in any such agreements.

The paper recognizes this difficulty and seems to be exploring the idea of a compromise where only the "direct" jurisdiction of the CJEU is eliminated. Thus, the paper accepts as it must that the CJEU is the "ultimate arbiter of EU law within the EU and its Member States" and suggests there are circumstances in which the CJEU would still come into play "in the interests of reducing or eliminating divergence of interpretation." For example, pre-agreement CJEU decisions would be given binding status and to the extent agreements between the EU and third countries (including the U.K.) replicate language which is identical in substance to EU law, it may be agreed that those terms should be interpreted and applied in line with any relevant interpretations of the CJEU. The paper also suggests that CJEU decisions/interpretations could be taken into account post-agreement when a uniform interpretation is desirable by both parties "for operational reasons such as continued close cooperation with EU agencies." This is similar to the position under the EEA agreement and EFTA court practice. The paper even contemplates a voluntary reference mechanism to the CJEU to make binding determinations on matters of substantive EU law when agreements utilize concepts of EU law.

The above efforts to accommodate the interest of the EU in maintaining a role for the CJEU in connection with post-Brexit agreements demonstrate the delicate political balancing acts required of both negotiating parties. Thus, some critics have accused Ms May and her government of a U-turn over the CJEU's role post Brexit by allowing Europe to maintain indirect control.[9] Equally, it will not be hard to find European voices unwilling to consider any diluted role for the CJEU. All of which begs the question of whether a solution is achievable. In the end, as things currently stand no clear trend or path has revealed itself. No dispute resolution scenario may be ruled out; nor, on the other hand, is it possible to speak of any meaningful preference by the Parties for the establishment of an arbitration body to resolve post-Brexit disputes. As deadlines approach, however, some flexibility may emerge. The possibility of an arbitration model where arbitral panels are empowered to apply CJEU jurisprudence or make a reference to the court in appropriate circumstances remains an interesting, and perhaps even tantalizing, one. To adopt a perhaps weary but no less apropos cliché, "watch this space."

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[1] 'The Government's Negotiating Objectives for Exiting the EU: PM Speech', Jan. 17, 2017

[2] 'Enforcement and Dispute Resolution – A Future Partnership Paper', Aug. 23, 2017

[3] *Ibid.*, para. 29.

[4] Sky News, 'May: We Will Take Back Control of Our Laws After Brexit', Aug. 23, 2017

[5] See para. 34 of the Paper.

[6] Global Arbitration Review, 'ECJ To Rule On CETA Investment Court', Sept. 6, 2017

[7] Global Arbitration Review, 'ECJ Says Member States Must Sign-Off On ISDS', May 16, 2017

[8] Open Europe, 'ECJ President Proposes EFTA Court As a Brexit Solution', Aug. 9, 2017

[9] The Guardian, 'Theresa May Accused of U-turn Over EU Court's Role After Brexit', Aug. 22, 2017