FIDE Foundation, Madrid (Fundacion para la investigación sobre el derecho y la empresa)

ENFORCEMENT OF RIGHTS IN A POST-BREXIT UNITED KINGDOM: THE ROLE OF THE UK COURTS AND OF THE CJEU

18 September 2017: Extended summary of presentation by Christopher Muttukumaru CB, Counsel, Monckton Chambers, Gray's Inn.

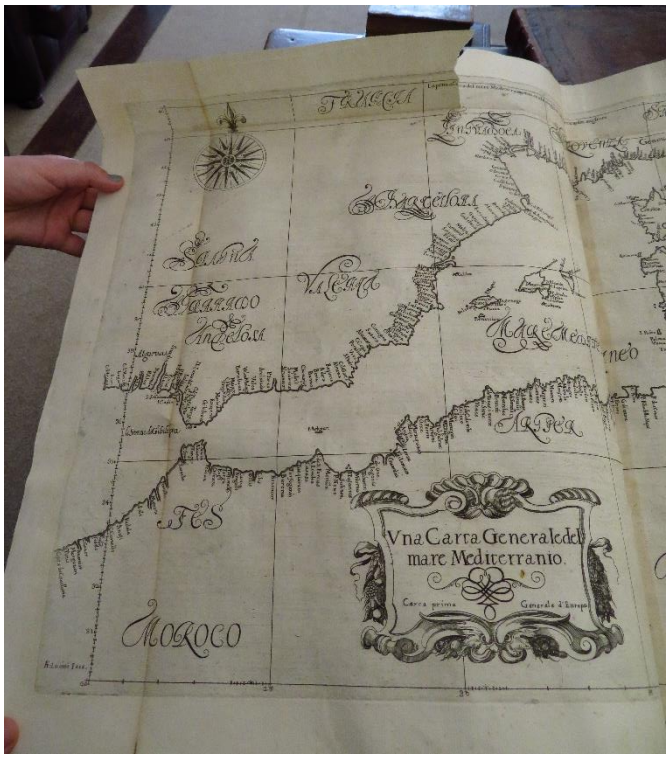

Figure 1 A Florentine map (early 17th century) showing southern Spain and northern Africa. Held in the Fellows' Library of Jesus College, Oxford – with thanks to the Principal and Fellows of the College for permitting its use.

<u>This extended summary has been updated to include the summary provided orally to attendees on 18 September. It also includes relevant references to the UK Prime Minister's speech in Florence on 22 September.</u>

Ex tempore summary on 18 September 2017: The EU acquis as it exists on the effective date of Brexit will become UK national law by virtue of the European Union (Withdrawal) Bill. But the acquis may be amended as it is converted into retained national law; moreover, it is open to the UK Parliament to make further modifications in the future. The UK considers the CJEU should not have a (direct) post-Brexit enforcement role. Nor, it seems, should the Commission. Enforcement of rights will therefore become a matter for the national courts and for any regulatory bodies which are given powers in substitution for the Commission. The national courts will be bound to give supremacy to rulings of the CJEU in respect of retained EU law provided that those rulings were given before Brexit day. But the UK Supreme Court will alone have power to refuse to follow even pre-Brexit rulings of the CJEU. For the future, the UK courts may take account of EU law, but need not do so.

Yet the UK wishes to have full access to the Single Market in the transitional period following Brexit. There is an obvious risk to the consistency of law making in a post Brexit future unless the UK can guarantee that it will follow post-Brexit laws adopted by the EU in the transitional period. There is also an obvious risk to the uniformity of approach by the courts. It seems doubtful that the EUWB, as drafted, will provide adequate assurance to the EU negotiators. For example, having regard to its deregulatory aspirations, will the UK will continue to adhere to the Single Market rules as they apply to the EU27?

1. ***Context for discussion*** Brexit is like a map whose territory has not yet been charted. Why do Spain's lawyers, officials, individuals and businesses with a UK interest need to understand the post-Brexit legal environment in the UK and how those rights will be enforced in the courts? Because, in the light of the present draft of the UK's *European Union (Withdrawal) Bill:*

   - EU law will not, as such, survive Brexit. The Bill will substitute UK national law for the current EU rules;
   - the substituted rules may subsequently be amended by the UK;
   - subject to the negotiations, neither the CJEU nor the European Commission will have a supervisory role of the kind that they presently perform in order to ensure that the rules are complied with.

   This presentation will cover: the method by which the content of substituted EU law rights will be made available to UK and EU entities and citizens; the way in which the national courts will be required to approach the determination of those rights; the role, if any, of the CJEU; and the reasons why the *present* draft of the UK legislation is not fit for long term planning purposes.

2. The EUWB was introduced into the UK Parliament in July 2017. It is one of eight bills which will be introduced to give effect to Brexit. But the EUWB is the principal bill which will cover most general principles governing Brexit. It is a constitutional earthquake.

3. ***Five themes and four assumptions***

   The four assumptions

   - The draft EUWB is chasing a moving policy target set by UK Ministers. It will undoubtedly be amended in the course of its parliamentary passage.

   - Different sets of national rules will be needed to implement the different agreements that will result from the EU/UK negotiations. The eight Brexit bills will include a trade bill and an immigration bill. Those bills, which have yet to be introduced, may resolve some of the problems which will be identified.

   - In any policy area where the UK continues to seek access to the Single Market (eg Financial Services, Transport, Energy) in the short term or the long term, the 27 other Member States (EU27) are likely to demand that the UK should continue to apply the same substantive rules that apply to the EU27. *Comment: on 22 September, the UK Prime Minister, in asking for a transitional period (which she calls an implementation period) for two years beyond Brexit day,*

recognises that any such period would be based on application of "the existing structure of EU rules and regulations". On the face of these words, this is not a commitment to adherence to the rules but to the existing structure of the rules. There also remains a lack of clarity about the role of the CJEU.

- The need for legal uniformity in respect of common rules in the EU and the UK is recognised by both sides in the negotiations. *Comment: in her speech, Mrs May said that "where there is uncertainty around underlying EU law, I want the UK courts to be able to take into account the judgments of the European Court of Justice with a view to ensuring consistent interpretation". Whether this is an adequate assurance for the EU is dealt with below.*

4. The ***five themes*** which will underpin the future legal environment in the UK:

(a) The UK has a dualist tradition for incorporation of international law obligations. What the UK Parliament has given away, it can take back. The UK will "take back control" over its legislation. The existing EU acquis will become part of UK national law and called "retained EU law". But it may be amended as the acquis is converted into national law. Retained EU law may also be subsequently amended;

(b) The EU/UK withdrawal agreement which, pursuant to Article 50/TEU, gives effect to Brexit will also need to be implemented into UK national law. So will any other EU/UK agreements such as any transitional agreement pending a permanent trading agreement. *Comment: the UK Prime Minister has confirmed this.*

(c) There is a disagreement between the UK and the EU about the future role, if any, of the CJEU. In the EU's view, the provisions of the withdrawal agreement should be subject to the authoritative jurisdiction of the CJEU. By extension, if the UK wishes to have access to the Single Market in a transitional agreement, the interpretation of common rules should also be authoritatively determined by the CJEU

(d) In the UK's view, judicial interpretation of the retained EU acquis and enforcement of substituted rights and obligations in the UK will be a matter for the UK courts. While the implementation of the withdrawal agreement in the UK will be a matter for separate, secondary legislation, there is no sign that the UK foresees any role for the CJEU.

(e) The principle of supremacy of EU law will only apply to UK national law passed or made before Brexit day.

5. Aim of the EUWB

…is to provide legal certainty on the date when Brexit takes place. There is an inward-looking aspect and an outward facing aspect. If the UK existed in a national, isolated cocoon, the preservation of the EU acquis might work. But the UK wishes to trade with the EU. Does the EUWB provide a stable legal framework for long term planning?

Post Brexit access to the Single Market

Access to the Single Market in Financial Services, as well as to the Single Markets in the network industries (including transport and energy), are the key areas where the UK Prime Minister has said that the UK wishes to continue to have access to the Single Market (see *point vi of the letter of 29 March 2017 from Mrs May to President Tusk*). *Comment: the UK Prime Minister has made clear that she is not seeking EEA membership (as she first said in the autumn of 2016) because it would mean that the UK would have to accept Single Market rules without any involvement in their enactment. Not is the UK seeking a Canada-EU model.*

Illustration against which to test the EUWB's provisions: The Aviation Single Market The central aim of the Aviation Single Market is to create a mutual recognition system under which licences, authorisations and permissions granted to Community air carriers in one Member State are recognised in every other Member State of the EU. That avoids the need for each carrier to meet regulatory compliance requirements in each Member State to and from which it flies

Initially there is little doubt that, at the point of exit, the UK domestic rules will in substance comply with the EU aviation acquis. But in order to benefit from continued access beyond the date of exit, the UK (including as necessary the devolved administrations) will have to demonstrate that its post-Brexit domestic rules are consistent with those that will continue to apply in the EU27.

In their turn, the EU27 will have to demonstrate that they are in a position to honour their side of the bargain.

6. *Three concepts arising from the EUWB*

Concept A*: *Retained law. What is the substantive content of the EUWB? Will the EUWB achieve adequate substantive legal certainty and conformity with EU law to satisfy the EU27?

Meaning of retained EU law the key relevant provisions of the EUWB designed to preserve EU-derived laws as UK national law at the date of Brexit are clauses 2, 3 and 4. Together these provisions comprise a body of law to be called "retained EU Law". What is "retained EU Law"?

- National laws which give effect to EU obligations;
- Converted EU laws such as regulations.

All retained laws may be amended under clause 7 (enabling powers to legislate to deal with deficiencies arising from Brexit), clause 8 (enabling powers to legislate to enable compliance with international obligations), clause 9 (enabling powers to legislate to implement the withdrawal agreement, available only up to exit day).

There are two important exceptions to the concept of preservation of the EU acquis:

- Clause 5(4) of the EUWB excludes the *Charter of Fundamental Rights* from being converted into national law;
- There will be no right in national law to damages in accordance with the rules in *Francovich* (*paragraph 4 of Schedule 1 to the EUWB*).

But general principles of EU law, previously recognised before Brexit day as being available to a litigant by the CJEU, will also be preserved as part of national law (paragraph 2 of Schedule 1 to the EUWB). This will include principles such as legal certainty, legitimate expectations, proportionality and non-retroactivity.

Retained EU law is preserved as at the date of Brexit. It is fossilised.

The UK Government's hope is that preservation of EU law as UK national law will avoid the cliff edge of legal uncertainty. However, any seasoned EU negotiating team will question whether, from an EU27 perspective, the EUWB provides adequate assurance that the common rules underpinning the Single Market would continue to be respected by the UK post-Brexit. But there are serious questions to be addressed:

- Where will future legislative control lie? In the UK.
- Can the preserved laws be amended by the UK in the short or long term? Answer: yes.
- What is the assurance for the EU if the UK is permitted to remain in the Single Market? The UK Government would argue (paragraph 16 of its Enforcement and dispute resolution position paper) that the UK would implement its future international obligations vis-a-vis the EU. Accordingly, Clause 8 enables the UK to act in compliance with its international obligations. But the UK has a government which favours deregulation (and has heavily criticised perceived EU overregulation). In fact, can the UK make any open-ended promises in respect of adoption of future EU legislative requirements not least in circumstances where it will have no control?
- **Illustrative comment: regulation *261/2004 (the Denied Boarding regulation*).** The questions that have arisen in the context of the Denied Boarding Regulation (DB Regulation) illustrate the general points made above.

7. Concept B:

Retained EU case law: will the EUWB provide adequate legal certainty?

If legal certainty is the aim of the EUWB, businesses, individuals and regulators will wish to have clarity not only about (a) which substantive rules in a post-Brexit future will continue to apply in the UK but also about (b) how those rights will be claimed in the courts and (c) how the Courts will approach the interpretation of those rules. Uniform application of the law across all 28 States which adhere to the post-Brexit settlement is critical.

8. *Retained case law: the UK Government's national perspective taken in isolation*

Here are the key points:

- Under the EUWB, judicial interpretation and enforcement of rights and obligations arising from retained EU law and retained case law will become a matter for decision by the UK courts [retained case law means (a) retained domestic case law (principles laid down by the domestic courts which relate to retained EU laws in decisions of the UK courts before exit day) and (b) retained EU case law (any decisions of the CJEU which relate to retained EU laws in decisions given before exit day)(*clause 6(7)*].

- The UK courts will no longer apply the principle of supremacy of EU law except in the context of the past
- In a similar way to the fossilisation of EU laws at the date of exit, fossilised CJEU case law is the starting point in the EUWB. A UK court is not bound "by any principles laid down, or any decisions made, on or after exit day by the [CJEU]" (*clause 6(1)]*
- As to preserved past decisions or principles laid down by the CJEU, the UK Supreme Court will have power to depart from retained EU case law. But the UK's lower courts will not;
- As to future decisions or principles laid down by the CJEU, the national courts need not follow the CJEU's case law, "but may do so if it considers it appropriate to do so." (*Clause 6(2)).*
- The national courts may no longer refer cases to the CJEU after Brexit day (clause 6(1)(a)).
- Claims arising from retained law and case law may be brought by litigants under the current procedures in UK national laws. But as for claims arising from the withdrawal agreement or any transitional agreement, the position is not clear. But an effective means of enforcement will be provided (*paragraph 17 of the Enforcement and Dispute resolution paper*).

9. *Retained case law (continued) : four points arise on lack of legal certainty in the EUWB*

- First it pre-supposes that CJEU case law at the point of exit is capable of being clearly articulated.
- Secondly, the possibility that the UK Supreme Court will decide not to follow retained case law, even if the power is likely to be used sparingly, leaves open the possibility of divergence among the courts of the EU27 and of the UK.
- Thirdly, as Lord Neuberger (president of the UK Supreme Court until now) has implied, the Supreme Court's powers to depart from retained CJEU caselaw may amount to an abrogation of Parliament's duty to legislate with clarity ("to blame the judges for making the law when parliament has failed to do so would be unfair" – *BBC 8 August 2017).*
- Fourthly, even if there remains a discretion to apply future CJEU jurisprudence (clause 6(2)), it is not obvious how the domestic courts will approach the discretion.
- **Illustrative comment**: the interpretation of the ***Denied Boarding Regulation*** by the CJEU in several cases and the resulting legal uncertainty.

10. *CONCEPT C: Authoritative resolution of disputes in respect of the meaning of the withdrawal agreement and of the EU Single Market rules, whether in retained case law or in a transitional agreement. Who decides in respect of the future – the CJEU, the UK courts or another forum? Who will decide transitional cases in the CJEU and transitional administrative proceedings before the EU institutions?*

The EU perspective

The EU negotiating mandate suggests that the protection of the CJEU's authoritative role in the context of interpretation of the withdrawal agreement is near sacrosanct (see *paragraph III.5 of the Annex to the Council Decision of 3 May 2017 authorising the commencement of negotiations with the UK*). Specifically, paragraph 41 deals with settlement of disputes and enforcement of the withdrawal agreement, in particular, in respect of continued application of EU law, citizens'

rights and other provisions of the agreement. In these matters, "the jurisdiction of the [CJEU] (and supervisory role of the Commission should be maintained)". That is hardly surprising. The same approach is likely to apply in respect of a transitional agreement if the Single Market rules continue to apply. The uniform application of common, identically worded, legal rules in respect of Single Market access should be the cornerstone of a legal system.

There is a further divergence on transitional cases and transitional administrative proceedings between the UK position and the EU's position. The EU's *Position Paper on Ongoing Judicial and Administrative Procedures (TF 50 (2017) 5)* takes as its general starting point that the CJEU and Commission should continue to have jurisdiction after exit day in respect of matters arising before exit day.

The UK perspective in its position paper entitled *"Enforcement and Dispute Resolution – a future partnership paper",* the UK Government states: "In leaving the European Union, we will bring about an end to the direct jurisdiction of the [CJEU]…" The words "direct jurisdiction" are the first sign that the UK has at last understood the importance of uniformity of legal interpretation. *Comment: the UK Prime Minister's speech is confusing. She says: "It is of course vital that any agreement reached…[is] interpreted in the same way…. This could not mean the European Court of Justice - or indeed the UK courts- being the arbiter of disputes about implementation of the agreement between the UK and the EU…". Does she mean the final trade deal? Or does she mean the withdrawal agreement and/or a transitional deal?*

The UK Government's paper describes a range of possible options for dispute resolution. It does not favour any of them, by contrast with the EU position. Most UK options for a permanent trade agreement involve an element of interstate dispute resolution (eg, joint monitoring committee, arbitration, new court structure). None of them allow for individual claims to be brought in the courts to enforce rights arising under the future international agreement(s).

Comment: As for dispute resolution in respect of the withdrawal agreement or the transitional agreement, the UK position lacks clarity. Another Delphic statement by the UK Prime Minister lies in her speech of 22 September where, without saying what the UK proposes for dispute resolution under the withdrawal agreement or a transitional agreement, she says that "we could also agree to bring forward aspects of that future framework such as new dispute resolution mechanisms more quickly if this can be done smoothly." This seems to turn a blind eye to the EU position that the CJEU should be the court of last resort in the case of the withdrawal agreement and, in all probability, a transitional agreement.

There has been strong speculation that a model based on the EFTA Court may provide a compromise solution. What might the key principles underlying the approach of the EFTA Court be? *Comment: but this model seems to have been rejected by the UK Government*.

Finally, as for transitional cases and administrative proceedings, the UK Government identifies the range of cases that could be before the CJEU at the time of exit and offers to negotiate on the basis of a number of key principles. It seems to be prepared to be flexible in some areas ("…beyond a certain point in proceedings, where considerable time and resources have been

invested in CJEU proceedings, it may well be right that such cases continue to a CJEU decision…"). But the UK also states, in direct opposition to the view of the EU27, that it "does not consider that the CJEU should remain competent to rule on cases on which it has not been seized before the day of withdrawal, even where the facts arose before withdrawal." As for administrative proceedings before the EU institutions at the date of exit, the UK expresses no concluded view and asserts that, depending on the type of proceedings, different solutions might be apt to address each category.

11. ***Denial of Francovich claims in the EUWB.*** The proposal to deny Francovich claims after Brexit day is understandable in the context of a UK Government policy to take back control on Brexit day. But it flies in the face of the normal rule that, if the facts giving rise to a claim for wrongdoing by the Government predate the operative date of a new limitation on the availability of such a claim, the rules that applied at the date of the alleged wrongdoing should apply.

    Whether the EU negotiators would accept such a limitation on Francovich claims, making a potential mockery of a level playing field, is doubtful.

12. ***Power to create new agencies in the EUWB – a case study***

    Clause 7 of the Bill contains enabling powers which will be of considerable importance. One such power is the power to "provide for functions of EU entities or public authorities in member States (including making an instrument of a legislative character or providing funding), to be …exercisable instead by a public authority (whether or not newly established for the purpose) in the United Kingdom…" The conferral of enabling powers on the executive to create agencies with law-making powers is startling but a sign of the times.

    Let's illustrate how the powers might be used since they would affect Spain. Regulatory oversight in the EU aviation sector is split between the national designated bodies (the Civil Aviation Authority for the UK) and the European Aviation Safety Agency (EASA). On behalf of the Member States, EASA has the responsibility to certify each product used in aircraft manufacture for which a type certificate is required, as well as to certify each product for which an environmental certificate is required.

    There is a stark question for the UK Parliament in this kind of situation. The question who should provide type certification for the UK concerns grave questions about how to ensure aviation safety in a post Brexit future. The Spanish authorities have an interest in the outcome since aeroplanes have a habit of flying across international borders.

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Links to related materials

A Danish Association for European Law: Monckton Chambers Brexit blog: 12 April 2017: "Aspects of post-Brexit regulation in the Aviation sector: the last scene that ends this strange and eventful history". B FIDE Foundation, Madrid (Fundacion para la investigacion sobre el derecho y la impreso) 8 May 2017: "Will this all end in tears (or how will this strange and eventful history end?)?"