

BREXIT: THE LEGAL IMPLICATIONS FOR BUSINESS?

A PRESENTATION BY JOHN
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INTRODUCTION

1. The legal process of leaving the EU
2. EU Law (current and future application) and post – Brexit models
3. The legal effect on financial services?
4. The legal effect on UK PLC?

1. UNRAVELLING OR DE – COUPLING

- What is Brexit and how do we Brexit?
- European Communities Act 1972
- Article 50 Lisbon Treaty –
‘Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements’ - Article 50 (1)

UNRAVELLING OR DE – COUPLING (2)

- ‘A Member State which decides to withdraw shall notify the European Council of its intention’
- ‘In the light of the guidelines provided by the European Council, the Union shall negotiate an agreement with that State, setting out the arrangements for its withdrawal...’ (Article 50 (2))

UNRAVELLING OR DE- COUPLING (3)

- ‘That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the functioning of the European Union’
Article 50 (2)

UNRAVELLING OR DE – COUPLING (4)

- ‘The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period’ (my emphasis) (Article 50 (3))

UNRAVELLING OR DE – COUPLING (5)

- But...
- If a State which has withdrawn from the Union asks to re-join, its request shall be subject to the procedure referred to in Article 49'
Article 50 (5) Lisbon Treaty

UNRAVELLING OR DE – COUPLING (6)

- Withdrawal Agreement
- 2 year longstop but can be longer with agreement of Member State and unanimous agreement of European Council
- Reality is that it could take far longer than 2 years
- More likely up to 10 years
- Article 50 is vague – no practical guidance
- Lots of difficult decisions
- Reformation re – visited?

2. EU LAW AND BREXIT

- Impact of EU law on UK
- European Communities Act 1972 (ECA) – provides for the adoption of EU law into domestic law.
- EU law implemented into UK law via primary legislation would be unaffected
- So arguably no immediate change but distinguish primary from secondary legislation

EU AND BREXIT (2)

- Extent of UK's ability to develop its own regime will depend on the approach to repeal of ECA
- Secondary legislation made under the ECA would fall away
- Which EU laws and measures do we wish to keep (secondary legislation)?

EU AND BREXIT (3)

Rome I and Rome II

- Member State Court apply same set of rules to determine governing law of both contractual and non – contractual obligations (does not matter that party not in EU)

EU AND BREXIT (4)

Hague Convention on choice of court agreements

- Gives effect to an exclusive choice of court in a contracting state
- The chosen court is obliged to hear the case
- Any other court must refuse to hear the case
- The judgment of the chosen court will be recognised and enforced in other states

EU AND BREXIT (5)

- EU directives (secondary legislation)
- Consumer rights – unfair terms
- EU financial services
- Transitional period – subject to new EU laws?

EU LAW AND BREXIT (6)

Post - Brexit models?

Five possibilities -

- EEA and EFTA
- Bilateral trade agreements and EFTA model
- Customs Union
- Free Trade Agreements
- World Trade Organisation

EU LAW AND BREXIT (7)

(1) EEA and EFTA

- Model adopted by Norway and Iceland
- UK would still obliged to permit movement of workers under EU immigration laws
- UK still obliged to contribute financially and to adopt EU laws

EU LAW AND BREXIT (8)

(2) Bilateral trade agreements and EFTA model

- Model adopted by Switzerland
- Specific sector based Treaties
- No implementation of EU legislation

EU AND BREXIT (9)

(3) Customs Union

- Model exists with Turkey and EU
- Customs restrictions and tariffs?

EU AND BREXIT (10)

(4) Free Trade Agreements

- One agreement with whole of EU rather than sector by sector specific agreements
- Freedom
- Lose internal rights in EU

EU AND BREXIT (11)

(5) World Trade Organisation

- Purest form of exit model
- Negotiate new trade deals
- UK absolute control over its trade policy and borders
- UK not required to comply or adopt EU law and regulation
- All UK goods subject to tariffs?

3. FINANCIAL SERVICES

- City of London - pre – eminent location for trading in foreign exchange markets and other wholesale markets
- The EU passport system
- A company authorised in one Member State (home state) can carry on business in another Member State (host state) without need for separate host state authorisation.
- Post - Brexit - Migration of global business away from UK to other European cities?

FINANCIAL SERVICES (2)

For Brexit

- Could UK move away from less popular EU directives such as remuneration policy for banks?
- EU legislation that has proved burdensome
- Develop parallel EU and non – EU compliant frameworks
- Maximise flexibility
- Best of both worlds post – Brexit?

FINANCIAL SERVICES (3)

Against Brexit

- Market infrastructure – making it more secure
- Key aspects of EU financial services law are modelled on the UK – market abuse
- Development of the EU financial services network
- EU's financial services laws – Similar to UK
- Increased harmonisation

FINANCIAL SERVICES (4)

- Financial Crisis in 2008
- More or less likely to happen if UK is outside EU?
- Problems with Greece and Eurozone
- Corporate Governance

4. UK PLC AND BREXIT – HIGH RISK

- Imports and exports – 53 free trade deals
- Renegotiate same terms?
- Fluctuations in exchange rates impact UK trade
- EU funding – impact on research projects?

UK PLC AND BREXIT -HIGH RISK (2)

- Employees – now and in future?
- Skills gap?
- Loss of talent to other countries?
- Tax
- Cease to be part of a customs union?
- New procedures of new free trade agreements?
- Outside territorial scope of EU VAT – import VAT?
- Competitive tax regime?

UK PLC AND BREXIT - MEDIUM RISK (3)

- Finance - access to finance and cost of borrowing
- Pension Schemes – Trustees to review investment requirements – increase contingent securities
- Intellectual Property – UK to provide protection of rights?
- European Patent Convention
- International registration of TM with WIPO
- Data Protection – no repeal of DPA 1998

UK PLC AND BREXIT - LOW RISK (4)

- Public procurement
- Publication in OJEC
- EU procurement regime – *“inflexible, complex and onerous”*
- Construction
- Primary legislation
- Repeal and reform of certain parts but not wholesale reform

UK PLC AND BREXIT – LOW RISK (5)

- Insurance – Solvency II - similar to banking capital reserve requirements
- Will UK be granted formal equivalent status?
- So, a UK headquartered insurance company may be subject to group supervision both UK regime and Solvency II?

UK PLC AND BREXIT – LOW RISK (6)

- Contracts
- English contract law (and tort) largely been unaffected by the proliferation of EU law in context of general commercial contracts
- No material change in contracts between parties conducting business internationally after Brexit (my prediction)

UK PLC AND BREXIT – LOW RISK (7)

- Rome I and Rome II may no longer be applied by English courts after Brexit
- English courts would continue to respect an English choice of law clause
- Other Member States would continue to apply Rome I and Rome II to choice of English law clause whether UK in or out of EU

UK PLC AND BREXIT – LOW RISK (8)

- English governing law clause – approximately 50% of cross –border commercial contracts
- Certainty and flexibility
- Gives effect to the commercial bargain agreed between the parties
- Access to mature legal market (world – class expertise)
- Sensible if resolving disputes in English courts

UK PLC AND BREXIT – LOW RISK (9)

- English jurisdiction clauses
- Parties to contract should have an exclusive jurisdiction clause to allow enforcement under the Hague convention
- Growth in arbitration?

BOTANICAL GINGER BEER LTD

- FACTS
- Agreement to supply 1,000 bottles of ginger beer to Eiffel, a large chain of restaurants across France
- Contract (prepared by JKW Law) contains English choice of law and jurisdiction (exclusive basis) clauses
- Eiffel sued by a customer who consumed remains of a snail in one of the bottles and developed gastroenteritis
- Eiffel refuse to pay the balance due under the contract and threaten to counterclaim for damages payable to customer

BOTANICAL GINGER BEER LTD (2)

- Eiffel argue that any legal proceedings against them should be in France under EU law as that is where they are domiciled
- Company take advice and instruct JKW Law to issue proceedings in England against Eiffel (High Court in London) for balance of contract sum

BOTANICAL GINGER BEER LTD (3)

- LEGAL PROCEEDINGS
- Proceedings issued in London and served by French judicial authorities
- Eiffel challenge proceedings in French courts
- French court reject Eiffel's argument and give judgment respecting English choice of law and jurisdiction clauses under Hague Convention

BOTANICAL GINGER BEER LTD (4)

- DECISION
- Trial (liability and quantum) heard over 4 days in London.
- Factual and expert evidence re Eiffel counterclaim (DNA testing on snail)
- Eiffel argue that snail was sealed in bottle in UK and is British
- The company argue that the snail is French and bottle must have been left opened where snail found its way into bottle...

BOTANICAL GINGER BEER LTD (5)

- Enforcing the judgment
- JKW Law instruct French lawyers to enforce English judgment in France for full amount including interest and costs under Hague Convention
- Eiffel settle for full amount!
- ...The Greek Experience

HUMAN RIGHTS

- European Convention For Human Rights (ECHR)
- Adverse Press
- Hillsborough
- Bill of Rights

CONCLUSION

- Long transition period – unravelling or de – coupling – up to 10 years – soft landing?
- Prospect of keeping EU law (primary legislation) and advantageous secondary legislation (directives)
- New EU law during transition period?
- Leading financial centre even without passport system or “*very, very bad*”?

DISCLAIMER

- This presentation contains general advice and comments only and therefore specific legal advice should be taken before reliance is placed upon it in any particular circumstances.

Thank You



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