

Brexit and Shipping

“Brexit” is the notion that the United Kingdom would leave the European Union. What would be the impact of Brexit on the shipping sector?

Introduction

On 23 June 2016, voters in the UK and Gibraltar will vote on whether the UK should leave the EU. Almost no one living in the UK today under the age of 50 years has any real sense of what it is like for the UK to operate outside the EU. Over 43 years of EU provisions, policy and philosophy have been grafted onto, or embedded into, UK law. The closest analogy is a colony gaining independence and deciding what it wants to do, or not do, with the law and institutions of the departing power.

While a great deal of the focus of the debate to date has been on what will happen on voting day – on whether the proposition will be carried or defeated – in reality, the focus needs to be on what would happen after 23 June 2016 if there was a vote to leave.

Significance of shipping in the UK and the EU

Shipping is extremely important to the EU. In 2014, more than 51.5% of EU external freight trade by value was transported by sea. More than 400 million people are transported by sea from EU ports annually. The EU’s 22 coastal Member States have more than 1,200 seaports offering direct employment to around 110,000 people and providing indirect support to around three million more. Almost 90 per cent of the EU’s external trade by volume is facilitated by seaports, as are 40 per cent of freight exchanges between member states. The EU’s seaports are the gateway for two-thirds of all goods which are imported by more than 60,000 cargo ships from non-EU countries. Over 3.8 billion tonnes of cargo are handled in these ports annually.

Shipping is also extremely important to the UK. The sector contributes around €12 billion annually to the UK economy. Around 240,000 people are employed in the sector in the UK. The UK is one of the top 10 ship owning nations according to UNCTAD with about 3% of the world tonnage.

Bringing the two strands together – the importance of shipping to the EU and to the UK – leads to some important conclusions. The rest of the EU is the UK’s biggest trading partner. Almost half of the UK’s imports are from the rest of the EU (53%) and almost half of the UK’s exports are to the rest of the EU (45%). It is believed that several million jobs in the UK are linked to trade with the rest of the EU and the most common estimate is that there are around three million people employed in this context.

No-one can suggest realistically that trade between the UK and the EU would stop if the UK left the EU but the terms of the trade would change.

EU Law and Shipping

Since the early 1970s – but particularly since the mid-1980s – the EU has become involved in the shipping sector. Over time, an enormous volume of law has been adopted – regulations, directives and decisions as well as case law. If the UK were to leave the EU then the logical question would be as to what would happen to that law vis-à-vis the UK. Answering that question is not simple given that it is not yet known whether the UK will vote to leave and, if it does vote to leave, what arrangements would be put in place to replace the current ones. It is possible that some of the legislation will remain in place (for example, because it is already part of UK law (such as

where a directive has been implemented) or because the UK has opted into that piece of legislation) or it may simply disappear from the UK legislative environment. Indeed, if the EU legislation is retained by the UK, it may be somewhat “frozen” in time if amendments or interpretations by the courts are not also taken on board. There is little doubt that EU shipping law and UK shipping law would diverge in a post-Brexit environment but it is not yet clear (and would not be for some time) as to the extent of that divergence.

So what could happen if the UK were to leave the EU?

It is clear that trade between the UK and the EU would continue but what would differ would be the terms on which that trade would occur. Today, the UK is part of the “internal market” and there are, for the very most part, no barriers to trade among the 28 Member States (whether those barriers are, for example, physical, technical or fiscal) and there is a common external customs tariff vis-à-vis the rest of the world. It is meant to be as convenient to trade between Liverpool and Lisbon as it would be to trade between Liverpool and Leeds. If the UK leaves the EU then trade will become more difficult – the degree of difficulty depends on the arrangements concluded between the UK and the EU post-Brexit. The campaigners for Brexit are probably correct in saying that there will be trade agreements between the EU and a Brexited UK but the difficulties involved and the time such arrangements would take to adopt should not be underestimated. The EU-India Bilateral Trade and Investment Agreement negotiations commenced in 2007 (nine years ago) and are stalled since March 2015. The Economic and Trade Agreement (CETA) agreement between Canada and the EU is a mammoth exercise. Work on it commenced in October 2008. The launch of negotiations was announced in 2009. An agreement in principle was signed in 2013. The negotiations were concluded in 2014. The 1,634 page agreement has to be translated into 24 EU languages and ratification has been an on-going process. In regard to the EU-US “Transatlantic Trade and Investment Partnership” (“TTIP”), the negotiations are currently in their 13th round! The Chairman of Lloyd’s of London, John Nelson, is reported as saying that it would be “fantasy” to think that bilateral negotiations on trade agreements would be simple and he also said that it would take “many, many years” to negotiate such arrangements.

Clearly, there would be trade agreements to be negotiated – not only between the UK and the EU but between the UK and all the States with which the EU has a plethora of arrangements with various countries worldwide. So, it is not just a matter of negotiating a single trade agreement, it would be a matter of negotiating a range of agreements.

Not only would many trade agreements have to be concluded but there would also be uncertainty arising from Brexit itself which would impact on trade. Examples of that uncertainty would be currency volatility which has already commenced and may continue further.

There is also no guarantee that the Member States which remain would not seek to either strengthen their own position in the event of a Brexit or even punish the UK so as to deter others from leaving. Guy Platten, the Chief Executive of the UK’s Chamber of Shipping has said: “no one has left the European Union before, and the EU may seek to ‘punish’ the UK for leaving, in order to discourage others from leaving too. The Brexit negotiations are unlikely to be quick or easy”.

Examples of Legal Issues which would arise if Brexit were to Occur

It is impossible to enumerate every legal issue. So a sample of the issues illustrates the point.

If a contract was predicated upon continued membership of the EU or was dependent on the exercise of EU freedoms (e.g, the operation of Cabotage services) then the contract may become frustrated by Brexit occurring. There could also be challenges to the successful operation of contracts caused by volatile currency movements.

EU competition law would continue to apply to UK shipping undertakings (i.e., businesses) whenever their activities had an effect on trade between EU Member States (an easy threshold to meet in practice). Therefore, UK businesses would not be able to escape from the application of EU competition law. Indeed, many of the UK's own substantive competition law rules are the same as the EU's own substantive rules so it is quite likely that the competition law environment might not change too much in that respect. However, compliance costs could rise for business because it might not be possible to avail of the EU's Merger Control Regulation regime. Equally, businesses could be fined not only at the UK but also the EU level rather than, as is more common now, being fined only at only one level. Conversely, the EU's State aid rules may well not apply to the UK in the event of a Brexit so there could be greater freedom for the UK to provide assistance to UK shipping interests but that would be subject to international trade law and the EU's so-called dumping laws which apply to non-Member States providing assistance which damage EU interests. Ultimately, there is little doubt that competition law regime in a Brexited UK and an EU without the UK would become more complex and complicated leading to higher compliance costs and greater uncertainty for those in the shipping sector.

The rules on freedom to provide services/Cabotage may well not apply to UK entities if the UK were to leave the EU unless there was some special agreement concluded which may well prove difficult.

A Brexited UK could impose different sanctions on third States than the EU would impose. This may mean some inconsistency and divergence in terms of making compliance more complicated.

In regard to employment law, it is very likely that the employment rights of seafarers would be best protected by remaining part of the EU (and that view has been advocated by the trade union Nautilus International) but supporters of Brexit would say that reduced compliance costs would help make UK shipping more competitive.

EU environmental law would probably still remain, in practiced terms, because the EU would simply apply their rules to vessels plying in EU waters irrespective of their flag or ownership.

An area of considerable uncertainty would be in the area of litigation where many judgments and arbitral awards within the EU are easily recognised and enforced within the EU because of the EU's rules governing such matters (e.g, the so-called "Brussels Regulation"). There is no doubt that UK businesses would find it more difficult to have judgments and awards in their favour recognised and enforced within the EU were the UK to be outside (unless special arrangements could be negotiated which would prove very difficult).

More Uncertainty?

There is already considerable uncertainty in the run up to the referendum on 23 June 2016. If the UK votes to leave the EU then there would be, under Article 50 of the Treaty on the European Union, a prolonged period of negotiation on the terms of its departure. Not only would there be that period of uncertainty but there could even be a second referendum on whether or not the UK should accept the terms of the "Withdrawal Treaty". One could see the "Britremain" supporters arguing that the precise terms of the withdrawal – which were not known on 23 June 2016 – should be put to the electorate. All of this means that the uncertainty which currently exists could well be prolonged in the event of a Brexit vote and there could even be two Brexit referendums!

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