FIDE Conference

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Brexit: Reflections

It is a very great pleasure to be here at the 2021 FIDE Conference in the Hague, and to be given the opportunity to say a few words. I would like to begin by thanking FIDE for allowing the UK Association of European Law to retain a status within the organization, notwithstanding Brexit. I would also like to pay tribute to my predecessor, Sir Alan Dashwood, who did such a sterling job as President of UKAEL, more especially given that his tenure covered the difficult Brexit period. Finally, I wish to express my thanks to the other members of the UKAEL committee, including our excellent administrator, who have been of such importance in ensuring the vitality of the organization, as attested to by the steady stream of webinars and other events staged by UKAEL. The vibrancy in this respect is reflected in our calendar for the remainder of this year, which includes two webinars, one on the *Komstroy* judgment, the other more broadly on conflicts between national courts and the CJEU. We round off the calendar year with an annual lecture by Lady Vivien Rose from the Supreme Court, who will speak on the circumstances in which the Supreme Court will depart from retained EU law. This provides a fitting link to two brief points that I would like to make concerning Brexit.

1. Law, Complexity and Obligation

There are I think very few people who would have realized the full legal complexity entailed by Brexit. This is unsurprising, given that it was a voyage on uncharted seas. There were three principal dimensions to the legal complexity. There were legal issues relating to the

Withdrawal Agreement; to the Trade and Cooperation Agreement; and to the status of EU law within the UK in a post-Brexit world.

The last of these can be taken by way of example. The UK brought the entirety of the EU acquis into UK law through the EU (Withdrawal) Act 2018. This might seem odd at first sight, given that the UK was leaving the EU. The rationale for the legislation is nonetheless readily apparent. The UK was a member of the EU from 1972, and many areas of life were regulated by EU law. It would in theory have been possible to reject all this regulatory material in the event of Brexit. This would, however, have led to chaos. The EU rules regulated matters from product safety to creditworthiness of banks, from securities markets to intellectual property and from the environment to consumer protection. There could not simply be a legal void in these areas, and pre-existing UK law would often not exist.

This was the rationale for the EUWA. The foundational premise is that the entirety of the EU legal *acquis* is converted into UK law. Parliament can then decide, in two stages, which measures to retain, amend or repeal. Stage one is to ensure that the EU rules retained as domestic law are fit for legal purpose when we left the EU, since there might be provisions that did not make sense in a post-Brexit world, such as reporting obligations to the Commission, which had to be altered by exit day. Stage two is the period post-Brexit, when parliament could decide at greater leisure whether it wished to retain these rules.

The recognition that EU law should be retained then led to a plethora of complex legal issues concerning, inter alia, the way in which different types of EU law should be retained within UK law; the status of EU law within the UK legal order; its place relative to pre and post Brexit case law; and the application of these principles within and by the devolved areas of the UK.

These and many other such issues will continue to occupy courts and academics alike for some considerable time to come. It also means that students in the UK will continue to require knowledge about EU law for the foreseeable future.

There is, however, the other legal dimension adumbrated above, which concerns law and obligation. It is captured most succinctly in the maxim pacta sunt servanda. It is axiomatically applicable to the Withdrawal Agreement and the TCA, so far as they structure UK-EU relations. It is well-established that the obligations flowing from such international obligations cannot be avoided merely because of difficulties relating to implementation of such treaties. It is equally well-established that recognized principles of treaty interpretation are applicable. It is, therefore, regrettable that the UK came close to breaching provisions in the Withdrawal Agreement in the Internal Markets Bill. It is equally regrettable that the UK elided discussion of triggering Article 16 of the Northern Ireland Protocol, with removal of the jurisdiction of the CJEU from the terrain of the Protocol, given that the latter has no connection with the former..

2. Sovereignty and Control

The considerations that informed Brexit were eclectic, including the desire to control borders, discontent with the workings of the EU and sovereignty. It was, however, sovereignty that became the principal consideration that informed the UK's negotiating discourse on the Trade and Cooperation Agreement. It played out in multiple ways, as exemplified most notably, albeit not exclusively, by the Prime Minister's push back on the idea of a level playing field. The assumption, explicit and implicit, was that Brexit meant an accretion of sovereign power compared to the status quo ante. The thinking was cast in zero-sum terms: the EU had power over certain areas that were repatriated to the UK, which took back control over its own destiny.

The assumption was that what was repatriated would accrue to the UK Parliament. This thereby increased Parliament's sovereignty and enhanced democracy by allowing our elected representatives to signal their assent or rejection of the choices placed before them. The reality was rather different.

Parliament exercised little by way of sovereign choice over the TCA itself. It did so in formal terms through enactment of the legislation required to bring the TCA into UK law, in the form of the European Union (Future Relationship) Act 2020. There were, however, severe exigencies of time, flowing from the fact that the trade negotiations continued until the 11th hour, with the consequence that MPs had only a couple of days to digest 1246 pages of dense legal text. Most did not read or understand it.

Parliament also exercises little power over the subject matter dealt with by the TCA. The issues previously regulated by the EU will henceforth be regulated through a series of bilateral treaties, such as the TCA, and Parliament has scant, if any, involvement in the decisions that are made. This is readily apparent from the TCA decision-making structure. The operative decisions are made by the Partnership Council, and the plethora of trade and specialized committees established by the TCA. There are broad powers to make binding decisions, recommendations, delegate functions, establish new committees, and the like. The decisions will largely be made by ministers aided by those with technocratic expertise in the relevant areas. There is little parliamentary involvement in any of this. The reality is that the TCA regime has diminished democratic oversight of the decisions that will be made thereunder compared to the position under EU law.

There is a further dimension of sovereignty and Parliament post-Brexit, which is the accretion of executive power entailed by the Brexit process. The Brexit political rhetoric was repeatedly framed in terms of taking back sovereign power and control, but the political and legal reality is that a considerable amount of such power resides with the executive and not Parliament. The complex Brexit legislation contains a very great number of instances where far-reaching power is accorded to ministers, with little by way of parliamentary oversight. This is then further reinforced by what are known in the constitutional jargon of the trade as Henry VIII clauses, that enable the secondary legislation crafted by ministers to modify, amend or repeal legislation, including primary statute. There are parliamentary procedures for oversight of the proposed regulations, but they provide relatively little comfort in this respect, since the political and practical reality is that it is difficult for Parliament to exercise control over the secondary legislation.

The very idea that Brexit was required in order to enhance sovereign choice was, moreover, more than a little ironic. It is true that the EU constrained choice. This is, however, the consequence of all forms of collective action. Individuals and states make choices. They can remain on their own, and maximize their autonomy. They can join clubs, treaties and the like, which perforce limit their sovereign choice in various respects, the trade-off being membership benefits, combined with the increased power that flows from other club members. The language of control, as applied to UK membership of the EU, did not moreover represent reality. This was so for a number of reasons: the UK played an active part in shaping the very nature of the EU as it developed over time, as exemplified by its role in single market initiatives, those concerning the AFSJ and financial services; the UK disagreed with relatively little EU legislation, when viewed in terms of volume over time; the UK secured Treaty opt-outs and benefited from differentiated integration in many areas that it did not wish to participate in; and

the EU tried to accommodate the special needs of the UK through the Cameron-negotiated Treaty amendments that died the death post the referendum. The idea that the UK was put upon and had to break free from chains that bound it proved terrific in terms of slogan, it just bore scant relation to reality.

The very idea that there was some foundational contrast between 'EU control' and the desired land of 'free trade' was equally misleading. The language of 'free trade' was elided with that of 'freedom', to be contrasted with the 'control' associated with the EU. This was a terrific public relations exercise, if the objective was to leave the EU. It nonetheless concealed reality. The reason is readily apparent, as pointed out by trade scholars, such as Holger Hestermeyer and Federico Ortino: trade agreements go far beyond mere tariff arrangements, and regulate a wide variety of areas, including services regulation, intellectual property and immigration. Such agreements all limit a state's sovereign choices. In this regard, the portrayal of EU law as limiting sovereignty and trade law as merely guaranteeing free trade is a fallacy. This forceful argument is fully borne out by the text of the resultant TCA.

Let me reiterate by way of conclusion my thanks on behalf of UKAEL for a continued status within FIDE. EU law will remain of continuing importance within the UK, Brexit notwithstanding. All UK companies trading in Europe will have to be cognizant of its rules, and the UK government remains bound by the Withdrawal Agreement, including the Northern Ireland Protocol, and the Trade and Cooperation Agreement.