

BREXIT: BREAKING UP IS HARD TO DO

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Brexit update

We survey recent developments in the Brexit saga from a macro perspective and speculate on the macro implications for Singapore. We also address the impact of Brexit on the enforcement of judgments and on the status of the FTA entered into between Singapore and the EU and its application to the UK.

The Brexit summit in Brussels early last month gave the rubber stamp to the end of the first phase of negotiations. This was meant to be the easy part of Brexit. The European Union (“EU”) had said the United Kingdom (“UK”) would have to agree to pay a divorce settlement, which the UK has agreed, the UK has agreed to make a firm commitment on citizens rights and it has agreed to fudge the issue of the Northern Irish border. We now have the EU’s guidelines for phase 2 of the negotiations and the transition period that will apply after the UK leaves the EU on 29 March 2019. Transition is going to look a lot like membership apart from the fact the UK will not have any say in to what happens in Brussels. In particular, during the transition period, the UK will have to comply with EU rules and pay into the EU budget and remain part of the customs union, which will prevent the UK entering into its own trade agreements, although it will be able to negotiate them. In practice, this probably makes little difference as it is unlikely it would have been feasible for the UK to enter into any major trade agreements within this timeframe. The UK is likely to have enough to do sorting out agreements to replicate agreements the EU already has with trading partners like

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Canada and South Korea (and Singapore, if the EU manages to complete the process for ratifying the treaty with Singapore) rather than entering into ambitious new agreements with the likes of the US.

Last month also saw the first major defeat for the Theresa May government in Parliament on its Brexit legislation. Parliament will have to be given a meaningful vote on the withdrawal terms the government agrees with the EU, which will include an outline of the future relationship between the UK and the EU after the end of the transition period. Parliament has a majority in favour of a soft Brexit, i.e. maintaining closer relations with the EU, rather than the hard Brexit favoured by the left-wing of the governing Conservative party.

In mid-December, the UK cabinet has begun for the first time its own internal discussion on how the UK government sees the end state for the post-Brexit relationship with the EU that the UK should aim for in the phase 2 negotiations. The UK plans an ambitious Brexit free trade deal coupled with regulatory divergence from the EU, despite warnings from Brussels against wishful thinking. The EU is preparing to present the UK with a Canada-style trade deal, which would fall far short of what the UK is aiming for, with limited access for services, which make up a large part of the UK economy. The UK negotiators hope that there is sufficient interest in the EU in maintaining close economic ties after Brexit to ameliorate the negotiating stance of the EU. David Davis, the UK Minister in charge of Brexit, says he expects a “Canada plus plus plus” deal. In particular, many in London continue to believe the EU will not want to cut itself off from the City’s financial services and markets, which are the most efficient in Europe. This thinking has overtones of the old joke about Britain’s exceptionalist attitude to the rest of Europe, as demonstrated by a newspaper headline: “Fog in the English Channel. Continent cut off”. The EU plan is for little privileged access on services, with the “plus” involving agreements on fisheries, aviation, security and foreign policy, which were not part of the Canada-EU agreement, and a “future framework” agreement with the UK, which would simply outline the path for a future trade agreement to be negotiated after the UK has left the EU.

While it is too early to speculate exactly how and when any deal will ultimately be struck, one cannot help but remark that so far things have worked out in a way much closer to the EU’s stated game plan than the UK’s. This means that, unless the UK does better in the subsequent rounds of negotiation than it has so far, or it drops Mrs May’s negotiating “red lines” of leaving the single market (because it requires accepting freedom of movement and the jurisdiction of the European court) and the customs union (because it prevents a “global” Britain negotiating its own trade agreements with other countries), or it cancels Brexit altogether, from an EU perspective, after the end of the transition period the UK will become simply another “third country”, and not enjoy any innate advantage over any other country outside the single market and customs union when dealing with the EU. This is leaving aside the added complication of what the status of the UK will be with respect to those “third countries” even earlier since the UK will cease to be part of the EU on withdrawal day and therefore no longer covered by arrangements between the EU and “third countries”.

Although Singapore as a small country that supports free trade and multi-lateral frameworks for economic co-operation, with a long history of economic and cultural ties with the UK, would not be an advocate for

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Brexit, it cannot have escaped its notice that as it itself is a free trading, common law based economy with a heavy emphasis on financial and other services (for example technology services), the pending separation of the UK (and in particular the City of London) from Europe presents opportunities for Singapore to compete for the European and other business that currently is done in London because of the advantages it enjoys within the EU. While this may seem like idle speculation, the political and economic uncertainties that lie ahead for the UK on its path to Brexit can only enhance the appeal to business people and entrepreneurs of the, in some ways “replicant”, “scepter’d isle” in the Straits of Malacca.

Aside from the macro picture, which is far from clear, we can hopefully help bring some clarity on a couple of micro issues raised by Brexit. Brexit will have various potential impacts on Singapore arising from the fact that departure of the UK from the EU means that the UK will no longer be a signatory to conventions and agreements entered into by the EU with Singapore.

What is the impact of Brexit on the enforcement of judgments?

Singapore ratified the Hague Convention, which recognizes the choice of court provisions between two parties to an agreement, on 2nd June 2016 and it entered into force in Singapore on 1st October 2016. The Hague Convention provides for recognition and enforcement of a judgment given by a court of a contracting state designated in a choice of court agreement.

Commercial contracts involving Singapore and UK entities have had their choice of court agreements governed by the Hague Convention since October 2016, but the UK is only a signatory to the Hague Convention insofar as it is a member of the EU. Should the UK exit the EU, it will no longer be a contracting state under the Hague Convention.

However, the UK has confirmed that it will accede in the Hague Convention following its exit from the EU. An official statement on this can be found in the Judicial Co-operation Paper published by the UK Government in Paragraph 22. Following Brexit, the UK no longer requires the permission of the EU to participate in the Hague Convention and therefore, this is a step that can be taken very quickly after Brexit.

Therefore, on this issue of choice of court agreements, there are unlikely to be any long term changes brought about by Brexit

In the meantime, until the UK formally accedes to the Hague Convention, parties to an agreement who are concerned about enforcement can include a ‘Brexit trigger clause’ (ie, wording to enable parties to arbitrate, or use a dispute resolution forum other than the courts of England and Wales when a dispute arises, if there is no reciprocal post-Brexit arrangement for the enforcement of judgements). In so far as Singapore is concerned, there is in any case legislation in existence that provides for reciprocal enforcement of UK judgements in Singapore and vice versa, albeit not in as wide terms as under the Hague Convention. The relevant pieces of legislation here are the Reciprocal Enforcement of Commonwealth Judgments Act (“**RECJA**”) and the Reciprocal Enforcement of Foreign Judgments Act (“**REFJA**”). REFJA allows for the enforcement of foreign judgments and awards if that corresponding foreign country gives

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reciprocal treatment to judgments given in Singapore, but presently, the only party under REFJA is the Hong Kong Special Administrative Region of the People's Republic of China. RECJA, on the other hand, allows judgments obtained from superior UK courts as well as various Commonwealth jurisdictions to be registered in Singapore.

What is the impact of Brexit on the status of the FTA entered into between Singapore and the EU and its application to the UK?

Singapore concluded the European Union-Singapore Free Trade Agreement (“EUSFTA”) in December 2012, and while it was supposed to come into force in end-2015, this has yet to happen. Firstly, an issue that arises is whether the European Commission can exclusively ratify the EUSFTA on behalf of the member states of the EU. This issue was submitted to the European Court of Justice, which ruled that the EUSFTA is a “mixed agreement” whereby ratification is required not only from the European Commission but also from each individual member states’ parliaments. Simply put, for the EUSFTA to fully come into force, the approval from the 38 national and sub-national parliaments of each of the 28 member states is also required. This results in an added layer of complexity to the ratification process. Furthermore, ratification by the European Commission itself may not come anytime soon, given the pressing issue of Brexit and the immediate crisis Brexit brings about in the sphere of negotiations, pending the UK’s departure from the EU.

With the departure of the UK from EU, even if the EUSFTA is ratified by both the EU and Singapore, the UK will not be covered by this trade agreement. This means that the UK will need to negotiate new agreements with its trade partners, including Singapore. The Prime Minister of Singapore addressed this issue, post-Brexit, and stated in an interview with the BBC at the 2017 World Economic Forum that Singapore will be “ready to sign a free trade deal with Britain after it exits the EU.” That said, no further details regarding this trade agreement between the UK and Singapore have been furnished. It is unclear whether this trade agreement will be similar to the EUSFTA entered into between Singapore and the EU. But PM Lee has noted that when negotiating this new trade agreement, the UK will have less leverage but more room to manoeuvre once it exits the EU.

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