Trains and boats and planes and Brexit

"Trains and boats and planes are passing by
They mean a trip to Paris or Rome
For someone else but not for me…"

Trains and boats and planes by Burt Bacharach.

Will the process of the United Kingdom resigning its membership of the European Union, commonly referred to as Brexit, mean the end of trips to Paris and Rome for British citizens or at least the end of trips that are as easy and cheap as they are at present and indeed will it be the end of easy travel to Belfast, Cardiff, Edinburgh and London for mainland EU citizens?

Incidentally, it is clear that Mr Bacharach was not a maritime lawyer[1], Commercial craft that carry cargo and passengers by sea are technically "ships" or "vessels" and not "boats" but "trains and ships and planes" is perhaps less pleasing to the ear and Mr Bacharach certainly knew about writing songs!

Over the centuries a body of law has grown to govern transport with major international Conventions to the fore, notably The Hague Rules, The Hague Visby Rules and the Hamburg Rules for shipping, the CMR for road transport and the CIM for railway transport. These conventions aspire to world-wide relevance but they are not perfect. In addition, within its borders, the European Union (EU) has developed sophisticated rules for transport with particular significance for competition, (and its connection to cost), safety and passenger compensation for breach of obligation by the carrier. Now however, the United Kingdom has decided to resign its membership of the EU and consequently to remove itself from the application of the purely EU rules. This decision has excited much attention. A major economy has never taken this step before. Can it be achieved? What will be the consequences?

There is uncertainty compounded by diplomatic and domestic political pressure.

The referendum about whether the UK should stay or leave divided the voting population almost equally into two camps and they offer weak justification in support of their positions; "Remainers", (those who have no wish to leave the EU), say that leaving has enormous constitutional significance which should not

[1] It is common to hear vessels designed to carry goods or passengers referred to as "boats" but the legal definition, albeit a rather circular one, found in the English Merchant Shipping Acts of 1894 and 1995 refers to "vessels" and "ships" and not "boats".

be left to a simple vote. They say that the wording of the referendum question was simplistic and that the process was flawed; "No-one voted for the country to be poorer" is a frequent remark from these people although the wording on the ballot paper was clear.

"Brexiteers", (those who wish the UK to leave the EU) on the other hand say, "the people have spoken" and go on to add that it would be undemocratic to overturn the referendum decision, while seemingly forgetting that there was a UK referendum in 1975 where the people "spoke" to remain within what was then called the European Economic Community, (the EEC). So much for the binding effect of referenda in the UK: the jostling and argument will continue for some time yet.

How should the remaining 27 countries act? Will Brexit damage the EU? How to maintain the cohesion of the EU while not losing trading and cooperative links with the UK is a political question but these are underpinned by legal questions.

1. Why do some Britons wish to leave the EU? The economic "liberty" argument

This is partially explained by the fact that the twentieth century history of the UK is markedly different to that of continental Europe. The drive for political unity found in many countries was absent for many in the UK. The UK's motive in international relations has always been the national self-interest and usually this means the facilitation of international trade. Consequently it, saw the Common Market, (as it was when the UK joined the group) as just that, a market; an opportunity to trade freely across national borders. The UK was attracted by the trade possibilities rather than by a political union.

It is undeniable that while the EU is a free trade area for those within its borders it is a protectionist bloc for those outside. The UK has long been motivated by the desire to trade internationally and particularly on free trade terms. Certainly, this is the case since the repeal in 1846 of UK legislation known as the Corn Laws. These was explicitly protectionist, they raised tax barriers against foreign goods and in particular focussed upon a staple of the diet of the poor; bread. The legislation prevented entry into the UK of corn, (essential for bread production) priced below 80 shillings per quarter (in weight) but allowed importation above that sum. A move clearly designed to protect the interests of landowning farmers and to the disadvantage of the poor.

For the British, the issue of tax barriers is not simply fiscal or trade connected but is directly related to liberty; a member of Parliament, Charles Villiers, consistently made this connection. It was Villiers who became famous for his annual motions to Parliament for repeal of the Corn Laws, which began in 1838 and continued through 1846[2]. He made the direct connection between free trade and liberty. In a speech to the House of Commons of the British Parliament 1838 he said:

> *"I will first ask what is this principle of the Corn Laws? [it is] protection to the landed interest…I dispute the justice of such a principle as that of protection. I care not whether it applies to land or to trade. I object to it as unjust, unless universally applied; and I say it is incapable of such an application..."*

Later in the speech he goes on to link free trade with liberty:

> *"The very principle and policy which persons are so apt to deride and so unwilling to discuss, namely free trade – for what is this freedom, but liberty for persons to provide, and the community to enjoy, that which is needful and desired at the lowest cost and at the greatest advantage? That is at once the purpose of all foreign trade, and the policy of free trade, and that is the very ground on which we now contend, in the name of justice and consistency, to be allowed to provide…"*

It seems to some that the EU is shifting towards a comprehensive political union as a main objective with free trade being relegated to the periphery and provided only to those within the Union but otherwise to be protectionist to those outside: in other words, a limitation of liberty. For some this is enough to justify leaving the EU, but it is not the only reason; there is the wide spread view that the EU is overly bureaucratic. It is suggested that there is some merit in this argument. Many Remainers would hold to this view and admit that the EU could be improved by reform in this area but that they are still prepared to stay within the Union. For Brexiteers reform of the EU by the removal of bureaucracy and the move to wider free trade is impossible; the will to achieve these things simply does not exist strongly enough amongst enough of the other EU member countries.

[2] The (unnamed) editor of "The Free Trade Speeches of the Right Hon. Charles Pelham Villiers M.P." published in 1883 writes in a political memoir, in effect an introduction, that "In 1815 the Corn Laws were passed at the point of a bayonet, and their course was marked by scenes of violence resulting, on more than one occasion, in the execution of some of those who had been driven to desperation by the suffering they endured from want of bread".

So then, the UK has long been an advocate of the liberalisation of markets but not all other EU countries appear to give this such high importance, (see in this regard the Common Agricultural Policy and the Common Fisheries Policy, which by their very support of industry with subsidy are anti-competitive but also have significant support from member states). Consequently, the impetus towards liberalisation and away from protectionism is less forceful. If true, does this matter?

Will other competitive minded countries find it more difficult to persuade the less so to continue to liberalise markets? The EU has individual treaties such as those with Norway and Switzerland but has tax barriers to the rest of the world. Is the wider EU really in favour of free trade with countries outside its home market? The experience of the EU-Canada Comprehensive Economic and Trade Agreement (CETA) negotiations suggests otherwise. However, in a press release by the European Commission on 15th February 2017 President Jean-Claude JUNCKER said:

> *"Today's vote by the European Parliament is an important milestone in the democratic process of ratification of the agreement reached with Canada and it also allows for its provisional entry into force. As a result, EU companies and citizens will start to reap the benefits that the agreement offers as soon as possible. This trade deal has been subject to an in-depth parliamentary scrutiny which reflects the increased interest of citizens in trade policy. The intense exchanges on CETA throughout this process are testimony to the democratic nature of European decision making.*
> *This progressive agreement is an opportunity to shape globalisation together and influence the setting of global trade rules."*

Later in the same press release Cecilia MALMSTRÖM, the EU Trade Commissioner is reported as saying:

> *"This vote is the start of a new era in EU-Canada relations – together we are sending a strong signal today. By building bridges rather than walls, we can face the challenges that confront our societies together. In these uncertain times, with rising protectionism around the world, CETA underlines our strong commitment to sustainable trade.*
> *Canada is a close ally of Europe. We share values and ideals, and a commitment to open markets and fair social policies."*

So, it is a significant move towards free trade. The agreement has been made and we are told that there is, "increased interest of citizens in trade policy" and warned that there is "rising protectionism around the world" but it took seven years to achieve and the increased interest in trade policy almost left the whole agreement in tatters with the Wallonia government opposing aspects of it; opposition which was nakedly protectionist. Does the EU have the will to try to secure free trade deals and if it truly does then does current structure of the EU militate against the success of negotiating them?

Is the frustration at protectionist tendencies limited to the UK? Do those states that wish for protection of significant industries in their countries form a majority; is the UK somehow isolated?

Prof Simon Hix, the Harold Laski Professor of Political Science at the London School of Economics, when commenting on data designed to see how close the positions taken by member states are to final decisions, says not[3]

> *"The dataset contains information on 331 controversial issues on 125 pieces of EU legislation between 1996 and 2008 (i.e. several issues on each piece of legislation). For each of these issues, [the University of Strathclyde team which consolidated the data] …. identified the preferred policy position of each EU government, the EU Commission, and the European Parliament. For each of these issues, the team identified a policy scale from 0 to 100, with the most extreme actors located at 0 and 100 and the other actors located at different points between the extremes.*
> *One issue, for example, concerned a controversy on a piece of legislation being negotiated in 2005 on the reduction of subsidies for sugar production. The positions ranged from stopping all subsidies (position 0 supported by Denmark and Sweden) to keeping current levels (position100 supported by Poland).*
> *The UK's position was closer to the Danish and Swedish position, as was the outcome, which meant a substantial reduction in subsidy levels."*

Was this perhaps an unusual outcome, a rare event? Professor Hix goes on to further comment on the 331 issues*:*

> *"Out of 29 EU actors (27 governments plus the Commission and Parliament), the UK was on average the fourth closest actor to final*

[3] Commenting on *Decision-Making in the European Union (DEU)*, a dataset put together by Robert Thomson, at the University of Strathclyde, and his collaborators.

> *policy outcomes, and performed much better than France, Germany and the EU commission"*

So perhaps claims that the UK has been "marginalised" are overstated and its contribution to the development of the EU not sufficiently recognised. It may just be false perception by the British, perhaps the greater number of member states are truly in favour of free trade. However, if this is not the case then when the UK leaves the Union, and in doing so gives up its right to help form the future development of the EU, the views that it might have espoused will not be so well represented within the EU and this will be something that some remaining countries might regret.

Is this the only reasons for the Referendum result?

2. Why do some Britons wish to leave? The legal sovereignty argument

There are two aspects to this: there is a preference for the law coming from UK courts over that coming from the ECJ and it has been at the root of the objection to the EU. Also, in more recent times large-scale movement of people into the UK has caused concern.

These are major points of principle, but we intend to focus on the Brexit effect upon transport issues; but not so much with train lines or shipping lines or airlines but rather with the "red lines" that Governments lay down during Brexit negotiations and which will affect transport. The UK Government in pursuance of its negotiations says that there are issues, which cannot be compromised, they are said to be points of principle; these so-called red lines. Are they? Why are they so important?

They include a reassertion of the UK's right to restriction entry into the country by non-UK citizens. Currently of course, EU citizens have the right to free movement to the UK. This issue is constantly seen by the UK news media as to do with "immigration" rather than the more neutral expression, "freedom of movement" and it has become an emotive issue in the UK but also, it should be noted, in other EU countries too, particularly following the large-scale movement of people across Europe from outside the EU notably refugees from the war in Syria and the economic migrants from Pakistan, Bangladesh and west Africa.

There is a long history of immigration and successful integration of nationals of other countries into the UK. The French Huguenots, Irish Catholics and East European Jews come most obviously to mind, but since the latter half of the twentieth century immigration from outside of Europe has taken place and at a level not experienced by any other country save perhaps other ex-imperial countries such as France and Belgium. The pace of immigration has not allowed for easy absorption and integration. Some members of the existing population appear to have felt threatened, in terms of cultural change and the competition for employment opportunities. The expansion of the EU in recent times has led to large numbers of EU citizens from the former Soviet countries coming to live in the UK and this may have added to cultural concerns. It seems that the desire to limit immigration into the country became a main relevant factor in shifting the balance in favour of the UK leaving the EU.

At the time of the referendum, EU citizens were not the major source of immigration to the UK; most immigration was from non-EU countries. There is no EU limit upon UK governmental power to control this. The Migration Survey Quarterly Report of February 2016 says that net migration of EU citizens into the UK for the quarter was estimated to be 172,000 and net migration into the UK from outside the EU was estimated to be 191,000[4].

In terms of total figures, the Office for National Statistics reports that in 2016 the resident population of EU nationals in the UK was 3.6 million and of this the largest proportion was from Poland at a figure of around 1 million.

Clearly many individuals have been prepared to come to the UK but many UK nationals also chose to take up this benefit and to live in other EU countries. Popular destinations for Britons are Spain, France and Ireland. The latest governmental data available is that in 2014 there were 151,800 UK nationals living in France[5]. In Spain, as of the first of January 2016 there were 296,600[6]. The position with Ireland is more difficult to calculate because of the historical free movement between the UK and Ireland but the latest data has 287,600 UK born residents of Ireland but only 112,090 British citizens. For the purpose of

4 The Migration Statistics Quarterly Report is a summary of the latest official long-term international migration statistics and is published by the Office for National Statistics, the Home Office and the Department for Work and Pensions. The most recent report available to us of February 2017 shows that 268,000 EU citizens, (this figure excludes returning UK citizens) and 257,000 non-EU citizens migrated to the UK.

5 Data from the French Government census carried out by the Institut de la Statistique et des Etudes Economiques (INEE).

6 Data from the Institutio Nacional de Estadistica (INE).

this data those holding dual nationality are counted as being Irish since they chose to live there[7].

It seems that the free movement of workers benefits the UK in terms of gaining labour and of providing opportunities for its citizens – even if this latter benefit is not employment but a place in the sun in retirement.

A second "red line" is that the UK should not be subject to the authority of the European Court of Justice (the ECJ). We have already alluded to this, why is it important? Within the UK there is a respect for the competence and independence of the British courts[8], but all member states of the EU will surely claim the same for their domestic courts, (albeit that in recent times that there has been some cause for concern that the independence of the courts of Poland is being undermined). Is this surrender of sovereignty so important? The ECJ is clearly a competent and respected forum.

It is hard not to think that for some people in the UK antagonism to the ECJ stems from a confusion in their minds between the European Court of Human Rights, (the ECHR) and the ECJ. The ECHR has for many years been an aunt sally and the subject of criticism by sections of the print media.

What have the ECHR and the ECJ done to provoke this dislike? Perhaps it is because both courts have the power to bind national Governments, in other words those national Governments must obey and put into effect the decisions of these courts.

> *"The European Court of Human Rights …. In almost fifty years the Court has delivered more than 10,000 judgments. These are binding on the countries concerned and have led governments to alter their legislation and administrative practice in a wide range of areas.*[9]*"*

One on-going source of irritation for some in the UK has been the issue as to whether or not convicted prisoners in UK prisons should have the right to vote in elections and referenda. It is the long-held view of consecutive British Governments that the loss of liberty involved in custodial sentences includes the loss of the freedom to vote. This position has been criticised and has been argued before the ECHR in a number of cases. Most notably in:

7 Data from the UK's Office for National Statistics as of 2011.
8 It should be noted that the UK does not have one uniform legal system but two main ones; England and Wales, which is a common law system and Scotland which derives its origin from the civil law, and also there is that body of law that applies separately to Northern Ireland.
9 The Council of Europe at http://www.echr.coe.int.

- *Hirst (No.2)* v. *The United Kingdom* in 2005[10];
- *Greens and MT* v. *The United Kingdom* in 2010[11]; and
- *Firth and others* v. *The United Kingdom* in 2014.[12]

In the Hirst case a prisoner serving a life sentence for manslaughter claimed that he had been disenfranchised under the UK's Representation of the People Act 1983, Section 3 of which says:

> *"A convicted person during the time that he is detained in a penal institution in pursuance of his sentence [or unlawfully at large when he would otherwise be so detained] is legally incapable of voting at any parliamentary or local government election."*

He argued that this was unlawful and in support of this additionally claimed that his rights under Article 3 of Protocol Number 1 of the Convention for the Protection of Human Rights and Fundamental Freedom had been denied in that the UK practiced a "blanket ban" i.e. a total ban and that there was, "an automatic and discriminate restriction on the Applicant's right to vote."

In Greens and MT v. The United Kingdom it was said that:

> *"The Court emphasises that it has clearly established, both in the present judgment and in its judgment in Hirst, that the prevailing situation has given rise and continues to give rise to a violation of Article 3 of Protocol No. 1 in respect of every prisoner who is unable to vote in an election to the legislature and whose ineligibility arises solely by virtue of his status of prisoner."*
>
> *And:*
>
> *"Holds that the respondent State must:*
> *(a) bring forward, within six months of the date upon which the present judgment becomes final, legislative proposals intended to amend the 1983 Act and, if appropriate, the 2002 Act in a manner which is Convention-compliant; and*
> *(b) enact the required legislation within any such period as may be determined by the Committee of Ministers."*

The Court's decision was a defeat for the UK and one that was not universally welcomed within the UK. For some people, it may be that objection is based

[10] *Hirst* v. *The United Kingdom* (No 2) [2005] ECHR 68.
[11] *Greens and MT* v. *The United Kingdom* [2010] ECHR 1826.
[12] *Firth and others* v. *The United Kingdom* [2014] ECHR 239.

upon a point of principle turning upon the UK's right to exercise its sovereignty. In other words, for those people any supra national court is objectionable.

Does this extend to any and all such supra national forum? For example, does this attitude extend to the International Court of Justice in The Hague? This is an UN body to which every UN member state is automatically a member. However, because of its existence under the UN charter and the rules about sovereignty agreed in the charter, it is possible for states to avoid the Court's decisions. Some states have chosen to either reserve the right in all cases to be subject to the Court's ruling, as in the case of the US (in 1986 following the Court's ruling in Nicaragua v the United States) or to partially restrict the remit of the Court's power, as in the case of Australia (in 2002 to withdraw in the case of some law of the sea issues).

So, is the nub of issue the fact that the ECHR and the ECJ are able to enforce their decisions? Possibly so, but we should note that this situation is not one where some imperial state seeks to impose its will upon a vassal; the UK fully takes part in both systems by sending its judges to take part in court activities.

3. The practicalities, the diplomacy and the politics

There are so many issues that will have to be faced and overcome if the UK is to leave the EU either with access to the single market and the customs union or outside both and on simple World Trade Organisation rules. We can indicate areas where difficulties will arise and suggest some possible solutions. Hard Brexit[13] would give the UK freedom to negotiate bipartite treaties around the world but in doing so will turn away from easy access to the UK's nearest market and a large market at that and in addition to that is the question of how long will they will take to be achieved.

Soft Brexit will mean some acceptance of free movement of workers and some acknowledgment of the supervision of the ECJ both, as previously mentioned, said to be "red lines". These then are the principled points that currently the UK says that it will insist upon, but negotiations if they are to mean anything require give and take so perhaps these red lines can be circumvented.

While at home the United Kingdom Government in a white paper (a consultative document) of 2017[14] has declared that a bill to be referred to as The Great

[13] In other words where the UK leaves both the free market and the customs union and there are taxation and regulatory matters to be checked by a formal border staffed by Government officials.

[14] The United Kingdom's exit from and new partnership with the European Union published in February 2017.

Repeal Bill (previously raised in Parliament in October 2016) will be brought into law and it will repeal the European Communities Act 1972, (which gives effect and supremacy of EU law in the UK) and it will change the body of law, which up until that date is complete and EU compliant, into purely domestic UK law i.e. it will mirror completely EU law at that point but henceforth may depart from EU law and will not necessarily comply with future modification and innovation in EU law and will be subject to the UK courts and not the ECJ. Consequently, passenger rights to compensation for late running trains for example would be assured but might be subject to change in the future. The point of this is that it is said to be a technique, which allows for stability while changes are made. It is a controversial step since as initially proposed the Government would have power to change rules without putting these changes to Parliament and so to pass through the normal process of scrutiny. This is a strange position for a government that insists that leaving the EU is about regaining Parliamentary sovereignty to take. The position as we write, is that Parliament would have a "meaningful vote" about any proposed agreement with the EU. It is not clear what this means, if Parliament was able to, and did, reject the plan would this inevitably lead to a hard Brexit or could the UK stay in the EU? Has it already lost that possibility would the remaining 27 states allow this to happen?

Also, this is a massive undertaking. A large number of these legal measures will become irrelevant because they assume UK membership of the EU, a good example would be the rules relating to EU Parliamentary elections. A very significant issue for us when analysing the situation of UK transport after the UK leaves the EU is that in addition to these measures there are many laws which refer to or acknowledge the role of EU bodies in supervising or administering the effective working of a trade or industry; one example of such of a non-transport body is the European Medicines Agency, which has oversight of safety and the evaluation of medicines; clearly very important in terms of confidence.

Also, we hear recently that a UK Government minister has said that as regards fishing in waters more than six and less than twelve nautical miles from the UK's coastline this may be restricted to foreign vessels and in particular may apply to fishing vessels from the Republic of Ireland, Germany, France, Belgium and the Netherlands. The UK would do this by withdrawing from the London Fisheries Convention of 1964 and by giving the necessary two-year notice prescribed by the Convention.

The rights under the convention are:

> *Article 2*
> *The coastal State has the exclusive right to fish and exclusive jurisdiction in matters of fisheries within the belt of six miles measured from the baseline of its territorial sea.*
>
> *Article 3*
> *Within the belt between six and twelve miles measured from the baseline of the territorial sea, the right to fish shall be exercised only by the coastal State and by such other Contracting Parties, the fishing vessels of which have habitually fished in that belt between 1st January 1953 and 31st December 1962.*

Withdrawal is covered by:

> *Article 15*
> *The present Convention shall be of unlimited duration. However, at any time after the expiration of a period of twenty years from the initial entry into force of the present Convention, any Contracting Party may denounce the Convention by giving two years' notice in writing to the Government of the United Kingdom of Great Britain and Northern Ireland. The latter shall notify the denunciation to the Contracting Parties.*

Consequent upon this we presume that the UK itself is required to give the same notice.

This would also mean that the UK would lose its automatic right to fish in the similarly defined waters of these other states. It is argued that this Convention has been subsumed into the EU's Common Fisheries Policy[15] and so has no legal effect. But even if this is not a correct analysis, the two years notice of withdrawal runs to approximately the same time as the UK's, (at present) scheduled date of departure from the EU and, in the absence of any negotiated settlement providing for other measures, then the UK would leave the Common Fisheries Policy ambit of control.

So, is this a question of tidying up loose ends for the future position, after all it would be odd to exert control over the UK's full Exclusive Economic Zone,

[15] For an authoritative analysis of the Common Fisheries Policy see: *The EC Common Fisheries Policy* by Robin CHURCHILL and Daniel OWEN, Oxford University Press 2010.

(EEZ) right to 200 nautical miles, (where this does not conflict with the rights of other states) and leave the belt of six to twelve nautical miles available to the signatories to the 1964 Convention, or is it mere posturing?

These are public law matters but additionally Brexit raises important private law sea transport issues. It is true to say that rules relating to the safe navigation of ships, the safety of vessels themselves and of the crew on board them and the prevention and minimisation of pollution from ships are all covered by various internationally agreed conventions promoted by the International Maritime Organisation (the IMO), an United Nations Agency. The IMO is responsible for the drafting of such milestone conventions as the Safety of Life at Sea Convention, (SOLAS) and the Civil Liability and Fund conventions, (CLC and Fund) and the EU has no role in these. Also, it is the case that Brexit will not affect the ability of British shipowners to load and discharge cargo in EU ports and that movement from one EU port to another i.e. cabotage[16] will only affect a small number of British companies but it will affect some and they are likely to protect their business interests by "flagging out" i.e. by moving from the British Register to an "Open Registry" a common enough practice but not one that is of benefit to UK national interests.

However, the question of safety at sea does have an European dimension and one which Brexit does have an impact on.

The European Maritime Safety Agency (EMSA) provides valuable assistance to European shipping with regard to safety, ship source pollution including that from cargoes and from bunker fuel and also importantly with Port State Control[17]. Currently the UK is a member of EMSA but following Brexit the UK will have to take over total responsibility for shipping in its sphere of control; something that is not beyond the bounds of the UK's competence but something that will require significant financial resources.

At present the UK contributes to the EU's Civil Protection Mechanism, which is a method by which the EU cooperates to pool resources with which to fight and resolve major shipping incidents and of these oil pollution is a matter of great

16 "Cabotage rights" is the alternative name to the "coasting trade", a long-standing term in maritime law which refers to the rights to trade between ports in the same country. It was a concept unknown to the UK in terms of domestic law but had application within the British Empire see The Merchant Shipping Act 1894, section 736. The term cabotage is now also used in an aviation context.

17 Port State Control refers to the ability of a commercial port to examine the legal documents of every ship entering the port and if these are found wanting to detain the ship and in so doing to improve safety at sea. In this regard the port takes on the role of supervision of shipping that historically lay with the Flag State i.e. the state where the vessel is registered and whose law applies to activities on board. Port State Control has become important in the wake of the popularity of "open registers".

importance. In this regard, the Agency provides oil spill response ships and has the resources to track the location and movement of oil spills by satellite. Once it leaves the EU the UK will have to develop this expertise for itself.

The UK's Maritime and Coastguard Agency is the natural body to take on the extra responsibility but particularly since cuts in its budget over the last six years which saw the scrapping of the Maritime Incident Response Group, (a body which had developed specialism in fighting fires at sea) and the reduction of the number of emergency towing vessels from four to one this will be costly; it will need a reversal of these measures. It is possible that UK Brexit negotiators will seek to achieve associate member status of the EMSA. This will be financially attractive and retain cooperative benefits but will likely need some UK observance of EU rules, which raises the relationship with the ECJ that will need to be resolved.

4. The relationship between the UK and Ireland

Road and rail and the UK's land border with the Irish Republic are also difficult problems for the negotiating teams.

The UK is Great Britain and the islands off its coast but there is of course another nearby island, that of Ireland, which is presently shared between that part of the UK that is Northern Ireland and the Republic of Ireland. The two countries have a history characterised by violence but also by mutually beneficial trading.

The violence goes back at least to the invasion of Ireland by Strongbow, (Richard de Clare, Earl of Pembroke) in 1170 and continued sporadically through to the bombings and shootings of the 1970's and 80's. Since the Anglo-Irish Agreement brokered by the two Prime Ministers, Tony Blair and Bertie Aherne in 1998 the violence has subsided but not entirely disappeared. A major contribution to this peace has been the diplomatic support given by the EU to its two member states. While grants and subsidies, were helpful, the existence of an open border was crucial.

A hard border would cause problems; there significant cross border trade at present with some being aimed at the markets in the two states but additionally road haulage companies in Ireland routinely use the UK as a quick route to other EU countries so road and rail transport would be affected. If the UK does leave the union will this damage the peace between the unionist and nationalist communities of the north of Ireland, (i.e. between those who wish there to be a

union with Britain and those who would prefer a one nation united Irish state for the entire island of Ireland)? As we write it is said that the parties have a negotiated compromise but it is also said that nothing is agreed until everything is agreed and there is much yet to be resolved.

5. Trains and boats

Ireland apart, Brexit will not have much effect on the operating of railways with the EU since the only points of contact are between the UK and the Republic of Ireland and the Channel Tunnel. There will be some effect upon infrastructure with the withdrawal of funding for projects such as the HS2, (the proposed high-speed rail link between Yorkshire and Lancashire and London). However, this was never likely to be a significant contribution and certainly less than 10% of the total[18].

So far, we have seen that leaving a regime where there are common agreed rules may cause delays at the borders but a more significant issue will be the regulation of the forms of transport and how they operate. The main focus for lawyers is on how the UK, when it is no longer obliged to comply with EU law and no longer able to take advantage of EU negotiated benefits, (both with EU member states and also with the rest of the world) will survive or to be more optimistic, what will it do to thrive?

The first point to note is that EU law will no longer automatically regulate UK transport, this will be for the UK itself. So how will UK law deal with this new power? It seems to us that purely domestic issues can be easily regulated and for those with an international element the UK will either have to secure agreement for a pan-national adjudication panel or court or cross one of those "red lines" and submit to the jurisdiction of the ECJ.

Secondly, for the remaining 27 countries of the EU will anything change by the fact that the UK will leave their number? In the short term only vis-a-vis transport that involves UK borders. In practice then the rail and road routes between the UK and the Republic of Ireland, the ferry crossings with Ireland, France, Belgium, the Netherlands, Germany, Sweden and Denmark, the channel tunnel crossing between the UK and France and air transport.

[18] In this regard see *HS2: Outline Business Case*, Section 4, § 78: The financial case from the UK Department for Transport, March 2014.

In the longer term the UK will no longer take part in the negotiation and subsequent framing of future law. Does this matter to the remaining member countries? In some sense, possibly not; the majority will carry on as before, but a change of personnel amongst the singers means a change to the sound of the choir.

5. …and planes

There is established jurisprudence for all major forms of transport and certainly the private law of England and Wales concerning the carriage of goods by sea has been refined over centuries and is very detailed. The law concerning carriage of goods and passengers by air has not had the same sustained legal scrutiny but nonetheless, issues of air transport have developed a high degree of complexity and we suggest that air transport is one of the main difficulties to be faced by the Brexit negotiating teams, particularly the access to airspace and airports and the safety of the aircraft themselves and their operation.

Regulatory bodies take the safety of air travel very seriously. Those who fail will find themselves excluded from operating. The EU for example maintains a list of banned airlines. Those airlines cannot operate within the EU.

The standards for safety are set by the International Civil Aviation Organisation, (an UN body) and they are then enforced by national regulators. This is the norm for individual sovereign states but for member states of the EU this regulation is the responsibility of the European Aviation Safety Agency, (EASA). It should be noted that the regulations could be applied as they stand or can be enhanced and strengthened by the national body or in the case of the EU by the EASA. This means that the EASA oversees a common set of requirements across the EU. The requirements include issues of approval of the types of aircraft, their maintenance and the licensing of individual pilots. In the EU, there is further oversight at national level; bodies such as the Civil Aviation Authority, (CAA) in the UK in turn use these rules and requirements to regulate civil aviation in their respective countries.

The EASA employs more than 700 aviation experts and administrators. If the UK were to leave the EASA then it would need to reinforce the CAA or set up a new body and to employ large numbers of similar experts and administrators but it would also need to convince the international community of regulators that this agency had the power to enforce high safety standards. Some of the current EASA experts are no doubt UK nationals but not all. More will be

needed so one presumes that there will be scope for the UK to welcome non-UK nationals, some of them perhaps from the rest of the EU into the new body or is this another red line crossed?

In addition to aircraft safety a related point is the control of the airspace above airports. An important aspect of this is the management of EU airspace as a single entity, called the Single European Sky.

The Commission notes that:

> *"Aviation is a key driver of economic growth, employment and trade and has a significant impact on the EU's economy and the life and mobility of its citizens. As such, it plays an important role in delivering on the Commission's priorities, particularly 'Jobs, Growth and Investment', 'the EU as a Global Actor' and 'Energy Union'. As a fundamental component of the aviation system, air traffic management (ATM) and – specifically, the development and implementation of the Single European Sky (SES) – makes an important contribution in this context. It addresses challenges related to connectivity, competitiveness, safety and the environment. ATM is an industrial activity that ensures the safe separation of aircraft and the smooth and orderly flow of air traffic. It involves many stakeholders, including air navigation service and system providers, aircraft operators, airports and the aeronautical manufacturing industry"*[19].

The airlines and the EU see that efficiencies can be achieved by better organised management of the air and the European Commission in 2017 says in a note on its Transport web pages:

> *"Since 2004, the European Union (EU) has gained competences in air traffic management (ATM) and the decision-making process has moved away from an intergovernmental practice to the EU framework. The EU's main objective is to reform ATM in Europe in order to cope with sustained air traffic growth and operations under the safest, most cost- and flight-efficient and environmentally friendly conditions. This implies de-fragmenting the European airspace, reducing delays, increasing safety standards and flight efficiency to reduce the aviation environmental footprint, and reducing costs related to service provision. Achievements have already been made at operational, technolog-*

[19] Report from The Commission to The European Parliament and The Council on the implementation and progress of the Single European Sky during the 2012-2014 period. Com (2015) 663 Final.

> *ical and institutional levels; efforts are ongoing to maximise the benefits of activities initiated under the SES framework…"*

Although success in this venture is to be desired and can only be truly achieved by a comprehensive system, progress is to date being made piecemeal and the UK and the Republic of Ireland are working together on what they call the Future Airspace Strategy (FAS) which was planned to come into operation by 2020.

The interconnectivity is recognised in the "Future of Airspace Strategy for the United Kingdom 2011 to 2030" published by the Civil Aviation Authority 30 June 2011:

> *"The UK controlled airspace system is an integral part of the European ATM network and cannot operate in a vacuum. The FAS will need to take full account of the relevance and impact of European developments on this airspace and will need to facilitate alignment and integration with key initiatives. In particular, the Strategy considers the alignment with the main strands of the Single European Sky ATM Research (SESAR) programme, the development of Functional Airspace Blocks (FAB), the Network Management Function and the Single European Sky (SES) II Performance Regime as well as European Aviation Safety Agency (EASA) ATM rule-making. To allow for effective implementation of the proposals led by the FAS, the UK needs to understand the balance between decisions taken at a European level and those taken nationally, and the interactions between the two. The FAS will form the national contribution to SESAR and deliver SES II proposals. The key messages from the FAS within the context of our engagement within wider European initiatives are:*
> *while this is a national strategy it is written fully in the context of emerging European and other international requirements and it is entirely consistent with what are known to be emerging themes."*

Clearly at the time that this was produced the idea of the UK giving up its membership of the EU was not even a possibility; it presumes unity and sees the future of as being an integrated system. Brexit throws the reality of this into doubt but does not undermine the validity of the argument that, as the Commission notes the Single European Sky: "*[It] addresses challenges related to connectivity, competitiveness, safety and the environment*", for these reasons there should be uniformity.

Norway and Switzerland have managed to join into the Single European Sky can the UK achieve the same? Who provides the regulation might again prove to be a stumbling block.

The issue of air safety presumes the existence of air travel itself. Without agreement upon post Brexit air travel rights there may be no air travel to worry about. This is an extreme position certainly but one that is the logical result of a hard Brexit.

Before the Treaty of Rome in 1957 the idea of a Common Transport Policy with a single market in transport was seen to be desirable as a method of delivering the four "freedoms", (i.e. of movement of goods, services, people and capital and not to be confused with the "Freedoms" found in aviation law, more of which later). However, possibly because of vested interest and internal pressure, not all Member States were able or willing to give up control over transport. The litigation in the European Court of Justice in 1983 between the European Parliament and the Council of Ministers where the former complained that the latter was failing to implement its treaty obligations provided an impetus to the EU.

Air transport has changed dramatically in the last thirty or so. Low cost airlines have revolutionised travel within the EU and arguably led to a greater sense of cohesion by EU citizens. Those taking part in the UK Government's Balance of Competencies Review in 2014 were mainly of the opinion that the single aviation market had removed restrictive trade and operating barriers and that this had encouraged the development of the low-cost carriers. KLM may claim to be the oldest airline still operating under its original name but Ryanair, a low-cost carrier, which was only incorporated in 1984, is now (in terms of passengers) the largest airline in the EU.

Airports Council International Europe (ACI Europe), the Brussels based European branch of the International Airports Association, which represents 500 airports in 45 European countries produces data on the number of air passengers in Europe as a whole, (i.e. not just the EU). In a press release of data on the 8th May 2017 concerning its air traffic report for the first quarter of 2017 noting that passenger traffic at airports in Europe had grown by an average of 6.9% reported that the Director General of ACI Europe, Olivier Jankovec said:

> *"The momentum for traffic growth is holding on and it may well continue to do so in the coming months. …. However, we need to be cautious in our optimism given that the wider geopolitical environment remains more instable(sic) than ever. The on-going uncertainty*

over the implications of Brexit for aviation is unlikely to be resolved quickly – and this might end-up limiting airline capacity growth and network development opportunities for some airports, especially in the UK."

Scheduled international air travel on a commercial basis started in1919 and by the 1940's the question of legal rights to fly had been raised. The Chicago Convention of 1944 set up the International Civil Aviation Organisation, (the ICAO)[20] which works with the airline industry and the 191 member States to draw up and administer Standards and Recommended Practices to ensure air safety. Member States must then ensure that airlines in their countries comply with these standards. The convention further looked at the issues of the right or otherwise to use the airspace over sovereign States and tried to provide solutions albeit with only limited success. The convention is however one of the more popular conventions; almost 200 countries have now ratified it.

The first articles of the convention set out where and to what aircraft the convention applies:

Article 1 "The contracting States recognize that every State has complete and exclusive sovereignty over the air-space above its territory."
Article 2 "For the purposes of this Convention the territory of a State shall be deemed to be the land area and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State."
Article 3 a) "This Convention shall be applicable only to civil aircraft and shall not be applicable to state aircraft.
Article 3 b) "Aircraft used in military, customs or police services shall be deemed to be state aircraft."

The convention introduced the idea of specific "freedoms", initially there were five but these have been extended to nine. However, the nine freedoms do not apply universally. Only the first two freedoms have wide application. Two multilateral agreements came out of the convention. These are, the Transit Agreement and the Transport Agreement. The former provides for the exchange between states of first and second freedom rights and has been widely adopted (131 states have done so) while the latter provides for an exchange of all of the

[20] An UN Agency.

first five freedoms. However, only 11 countries have adopted this agreement. Instead there is a worldwide network of bilateral agreements between countries and sometimes between blocks of countries. A prime example of this latter situation is the EU-US Aviation Agreement, more commonly known as "Open Skies".

The full list of these "freedoms" is:

> *The first Freedom, which is sometimes referred to as the transit freedom, it is the freedom for an aircraft to fly over a foreign country while on its way from its own home country to another country and without any landing between its point of departure and point of destination.*
>
> *The second Freedom is the freedom to land in a foreign country and one that it is not its destination in order to refuel or for technical reasons.*
>
> *The third Freedom is the freedom to land passengers cargo and mail carried from the aircraft's country of origin.*
>
> *The fourth Freedom is essentially the mirror image of the third Freedom in that it is the right to take passengers, cargo and mail from a foreign country and land them in its own.*
>
> *The fifth Freedom, is the freedom to land or take on passengers, cargo or mail in a state which has a bilateral agreement with its home state with these passengers, cargo or mail coming from or going to a third state.*
>
> *The sixth Freedom, allows an aircraft to carry passengers, goods and mail between two foreign countries if travelling from its own country.*
>
> *The seventh Freedom allows an aircraft operating outside its own country to fly into another country and there take on set down passengers, cargo or mail coming from or going to a third country.*
>
> *The eighth Freedom is often referred to as "consecutive cabotage" and it occurs where an aircraft leaves its own country and takes passengers, goods and mail from one point in another country to another point in that country.*
>
> *The ninth Freedom is purely and simply cabotage, sometimes known as "full cabotage" or "open skies" and is where an aircraft from one country has the right to carry passengers, goods and mail from one point in a foreign country to another point in that same country.*

In addition to these international convention concepts and rules there exists the European Common Aviation Area (ECAA) to which the UK belongs along with all other EU member states. A point to note is that the ECAA does not restrict membership to EU states. Members include Norway, Iceland and some non-EU Balkan states. Also, according to the EU Commission, there is an aspiration that this should be further widened so as to include as many as 55 countries. There are currently 36 members.

Any airline owned by a company that is EU based is able to fly without restriction in any of the countries within the ECAA. When the UK finally leaves the EU its membership of the ECCA will lapse. This will mean that UK owned airlines will lose the benefit of access to the ECCA. They will no longer be "Community carriers" under the provisions of EU Regulation 1008/2008. It is true that an option for those airlines is to seek "nationality" of a remaining EU member state by changing its ownership structure. This is easier said than done. The airline would need to obtain an Air Operator Certificate, (an AOC) from an EU member state and to get this it would need to show that it complied with the EU requirement that:

Its principal place of business was within an EU State.

"Principal place of business" as defined by Regulation 1008/2008 of the European Parliament and Council on common rules for the operation of air services in the Community (Recast) (Regulation 1008):

> *"…means the head office or registered office of a Community air carrier in the Member State within which the principal financial functions and operational control, including continued airworthiness management, of the Community air carrier are exercised."*

This would damage the UK in terms of tax receipts, prestige and influence in the aviation industry but it would also adversely affect the remaining EU members and indeed the US. These are reciprocal rights and the UK leaving the ECAA would also mean that EU and US flights would be unable to access UK airports. EU airlines in particular will want access to London Heathrow and the high volume of non-EU international flights that use that airport.

Without a new set of agreements, we would see a return to the position as it stood previously i.e. a return to the previous framework of individually negotiated bilateral agreements. We would argue that these have not been lost but remained dormant when they were overtaken by the EU regime although there

is not universal agreement on this view. However, even if they still exist they give only partial help. In terms of the nine "Freedoms" the old systems might provide for most aspects of third and fourth Freedoms but probably no more; the cabotage freedoms would be particularly severely excluded.

If we assume that Brexit will actually happen then with it goes the integration that has been so beneficial to the airlines, the citizens of the EU and the aspiration to a cohesive Europe. Can integration be retained in a post Brexit Europe, or in the absence of that something close to integration? The present satisfactory position is based on three factors: shared legislation, the European Aviation Safety Agency as a common regulator and recourse to a common court, which will apply consistently the same rules.

So, leaving pure political advantage to one side (if that is ever possible) and assuming that both the EU and the UK truly want to achieve a mutually beneficial outcome, what are the possible options and do they come with difficulties attached, and if so what are these?

Firstly, that the UK retains its membership of the ECCA.

Secondly, that the UK and the EU enter into a bilateral agreement.

Thirdly, would it be possible to negotiate an agreement similar in nature to the "Open Skies" agreement that the EU presently has with the US?

All three offer possible solutions. If the UK were to retain its membership of ECCA there would in effect be a maintenance of the status quo. It would require the agreement of all remaining members and this might not be forthcoming. Why would this be so? Norway has membership by virtue of its membership of the European Economic Area (the EAA) and the EU Commission seems willing to acknowledge expansion of ECCA and maintaining the size of the area will surely be welcome? On the face of it this seems to be true. However, this will be part of negotiations and in these circumstances the vested interests of each of the members becomes important. As was the case with CETA where negotiations were nearly derailed at the last moment. Members might indeed welcome the entry into ECAA of countries that would make the grouping a bigger market. The countries under consideration at present will add to potential passenger numbers but offer little in the way of competition to the airlines already within the ECCA. The position is not the same with the UK; it is true that the population of the UK forms an attractive market but it is also true that the UK has large developed airlines, including what some might say are aggressively competitive

low-cost carriers? In the light of this perhaps the UK would not be welcomed in. There is after all a history of protectionism in some EU states. Some might see this as an opportunity for its airlines and so a reason to deny continued opportunity to UK competitors.

A further consideration might be the status of Gibraltar. The UK sees it as a British Overseas Territory; Spain sees it as a part of Spain and denies that the UK has any form of sovereignty over it. This might lead to opposition and the exercise of a veto by Spain over legal agreements that imply that an airport on Gibraltar is under UK control. This has the potential to upset all possible solutions and not just this first one.

Yet another problem will be that ECCA membership will require the UK to be subject to EU aviation law. This is a difficulty for the UK since it involves one of those red lines which the Government says cannot be crossed. It is true that in recent years such statements have been ignored but the British Prime Minister, Mrs May will have great difficulty in domestic policy if she were to negotiate away this issue.

Is it possible for some accommodation to be reached on joint regulation between the ECJ and UK courts with difficulties being adjudicated by a neutral, international body? There are precedents and this sort of solution has been achieved in the past. However, existing arrangements for air travel disputes are not encouraging. Currently the EU and Switzerland have an agreement of this nature in the Air Transport Agreement[21]

> *Article 21*
>
> *1. A committee composed of representatives of the Contracting Parties, to be known as the "Community/Switzerland Air Transport Committee" (hereinafter referred to as the Joint Committee), is hereby established which shall be responsible for the administration of this Agreement and shall ensure its proper implementation. For this purpose it shall make recommendations and take decisions in the cases provided for in this Agreement. The decisions of the Joint Committee shall be put into effect by the Contracting Parties in accordance with their own rules. The Joint Committee shall act by mutual agreement.*

[21] An Agreement between the European Community and the Swiss Confederation on Air Transport, which came into force on the 1st of June 2002.

Mutual agreement suggests flexibility; perhaps we are being too pessimistic and an acceptable compromise between the UK and the EU is possible, but on closer examination that expression "mutual agreement" might prove to be a sticking point. What would happen in the event of a failure to reach such mutual agreement and how would a decision then be achieved? The Agreement with Switzerland has no provision for a third party ruling by an umpire or international body, clearly a potential problem and so it has proved to be.

The Agreement was tested in a dispute between Germany and Switzerland over aircraft noise levels at Zurich Airport. This was a long running dispute but one that intensified in 2003. Germany claimed that the proximity of Zurich Airport caused excessive disturbance in Germany. Agreement between the two States could not be achieved but even so a decision was made by the European Commission. Switzerland did not agree and so the matter was referred to the CJEU at both levels of the Court but notably was decided by the EU's courts without input from Switzerland. If the issue of the ECJ's power continues to be a red line for the UK then it could not accept a similar outcome applying to it in the future.

It is self-evident that a supervisory single body has the merit of ensuring a single approach and a comprehensive result. In this case using the single authority is the ECJ. The UK Government has repeatedly made the point that an essential reason for leaving the EU is so that it can reassert the supremacy of its courts. It therefore seems that the UK will be unwilling, and probably will find it politically impossible to allow UK air transport to be subject to the ECJ. The White Paper referred to above suggests that a negotiated independent international tribunal comprised of members from, in this case the EU and the UK might provide an acceptable compromise solution.

> *"We recognise that ensuring a fair and equitable implementation of our future relationship with the EU requires provision for dispute resolution. Dispute resolution mechanisms ensure that all parties share a single understanding of an agreement, both in terms of interpretation and application. These mechanisms can also ensure uniform and fair enforcement of agreements."*

The White Paper points out that in the wider international context

> *"Dispute resolution mechanisms are also common in other international agreements. Under the main dispute settlement procedure in the North American Free Trade Agreement (NAFTA), the govern-*

> *ments concerned aim to resolve any potential disputes amicably, but if that is not possible, there are expeditious and effective panel procedures. Similarly, under the treaties establishing Mercosur,[22] disputes are in the first instance resolved politically, but otherwise the parties can submit the dispute to an ad hoc arbitration tribunal. Decisions of the tribunal may be appealed on a point of law to a Permanent Review Tribunal Under the New Zealand-Korea Free Trade Agreement, where the focus is also on cooperation and consultation to reach a mutually satisfactory outcome. The agreement sets out a process for the establishment of an arbitration panel. The parties must comply with its findings and rulings, otherwise compensation may be payable or the benefits of the FTA may be suspended."*

It also noted that:

> *"The UK already has a number of dispute resolution mechanisms in its international arrangements. The same is true for the EU. Unlike decisions made by the CJEU, dispute resolution in these agreements does not have direct effect in UK law."*

It is clear that the dominance of its legal system is very important to both the EU and the UK would both parties compromise? It is the case that the EU in its recent trade deal with Canada does agree a compromise for dispute resolution. The White paper again notes this:

> *"Such mechanisms are common in EU-Third Country agreements. For example, the new EU-Canada Commercial Economic and Trade Agreement (CETA) established a "CETA Joint Committee" to supervise the implementation and application of the agreement. Parties can refer disputes to an ad hoc arbitration panel if necessary. The Joint Committee can decide on interpretations that are binding on the interpretation panels."*

And an annex to the White Paper provides several examples of dispute settlement mechanism involving the EU.

The second possibility is the negotiation of bilateral agreements. There is a precedent for this; as we noted above, Switzerland has such an agreement. It is not as comprehensive as the first option. Switzerland has access to only seven of the

[22] Mercosur is the South American customs union and free trading bloc.

"Freedoms" of the air. This is still a workable solution but just not as attractive. It would limit the routes that the UK based companies could fly, making them less competitive and less financially secure. A bilateral agreement between the UK and the EU is more likely than a series of separate agreements between the UK and individual countries or groups of countries because questions of competence would arise; are individual countries competent to make such agreements while remaining as EU members i.e. do they have the legal right to individually negotiate agreements? We suggest that they do not.

The third possibility is a full-blown "Open Skies" agreement similar to that existing between the EU and the US. There are practical problems here; if continued membership of ECCA cannot be achieved how can even greater liberalisation be possible? Also, the question of safety standards and legal oversight would again need to be answered.

The UK Government is presenting a show of confidence that economic self-interest will triumph over any ill feeling at the UK's departure.

In November 2016, the UK Secretary of State for Transport, the Secretary of State for Exiting the EU and the Chief Executive of Airlines UK, (the body which is the trade body of UK registered airlines), released a joint statement on air transport issues:

> *"… we have the largest aviation network in Europe and the third largest in the world, handling over 250 million passengers and 2.3 million tonnes of cargo last year. The UK has direct connections to over 370 international destinations, more than any other EU country. … Market access remains a top priority, and we want to make sure we have liberal access to European aviation markets. We will also work closely to explore new opportunities for further liberalisation."*[23]

This statement does make clear that there is ambition to seek to negotiate access and also a hint that the UK does not see itself as a supplicant at the mercy of the powerful but rather as a country that has economic power and one that if it were to be excluded would not simply feel loss but would inflict loss on the wider EU. It is worth noting in this regard that the UK benefits from participation in The EU US Open Skies and would no longer do so when it leaves the EU. This agree-

[23] More recent figures from the Civil Aviation Authority show that passenger numbers continue to rise and that in 2016 all the five so called London Airports reported year-end figures to be greater for each of them than in 2015 and that the total of all five for the year was 154,356,819.

ment was hard won and is highly prized by both the EU and the US; the first stage took seven years to achieve. Is it possible that the UK could negotiate quickly a bi-party agreement with the US on Open Skies terms?

Alternatively, perhaps the US might not find the existing deal so attractive if its partner, the EU, no longer included the UK. The opportunities presented to US airlines to enter the UK market was clearly one of the attractions when the agreement was being negotiated, since at that time the UK amounted to approximately 40% of the air carriage between the US and the EU. Would they want to continue on the same terms without the participation of UK? The remaining 27 states still represent a large market for the US and it would not make economic sense to put this at risk, but will the current incumbent of the White House see things that way?

Trains and boats and planes may still be going to Paris and Rome but the basis on which they carry goods and passengers may change: Negotiations on the issue of the UK's access to the Single Open Sky look set to be interesting.

6. …wish and dreams come true…

To conclude, all the issues raised here could be resolved by goodwill and pragmatism by the negotiating parties but inherent in this will be the need for compromise. "Red lines" make compromise impossible. The UK will continue to need young, talented or just simply willing workers to come into the country and so while rejecting the free movement of such workers, they could still find a welcome through a regulated system.

As for the role of the ECJ, this seems to us to be more difficult. It will be stumbling block. Dispute settlement will pose problems. The EU has shown that it wants the ECJ to regulate agreements made between itself and other states. This is the case in the case of the trade agreement with Norway. Is the UK in a stronger position to achieve its aims than Norway? It is certainly a bigger economy and a bigger market and it is a country with a sophisticated intelligence gathering facility and a large military force which it has used to support EU activities such as convoy duties for shipping to protect against pirates in the Horn of Africa. Would the EU wish to lose these things? On the other hand, if accommodations are made for the UK there is the fear that the EU might start to unravel so can the EU afford to concede these things?

If the UK were to accept the pre-eminence of the ECJ then a major reason for Brexit would have been jettisoned and in that case the question would be raised;

why leave? What of the possibility of some joint internationally supervised tribunal to be constructed; could goodwill and pragmatism stretch this far? Is it conceivable that the EU and the UK could reach a genuine compromise with regard to regulatory security? Could some creative agreement give joint supervisory power to both the ECJ and the Supreme Court of the UK? As we have noted there are instances of such joint supervision albeit that they often seem not to be robust enough. But perhaps with rigorous drafting now is the moment for such an agreement to be devised.

What is the likelihood of success of these possible solutions? Politics will decide to what extent it is that the negotiators have freedom for manoeuvre; if the UK holds to its "red lines" and the EU to its insistence that it maintains all of the "freedoms" and also the supremacy of the ECJ in legal decisions then none is possible; a poor state of affairs for all concerned.

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