WHAT COULD BREXIT MEAN FOR THE SHIPPING INDUSTRY?
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Following the victory of the Conservative Party in last May’s general election, British Prime Minister David Cameron promised a referendum on the UK’s membership of the EU by the end of 2017. After negotiations between the UK and the other 27 EU Member States, a package of measures and reforms were recently agreed, and the Prime Minister has announced that a Referendum on EU membership will take place on Thursday, 23 June 2016. One issue that has already provoked much public debate between those supporting and opposing a British exit (“Brexit”) is whether the package of measures and reforms negotiated by Mr Cameron is legally binding: that is a political hot topic and one on which we do not intend to comment, but we at Ince & Co have been thinking about how Brexit might affect our own clients’ businesses from a practical point of view.

The EU is made up of 28 Member States and some of the world’s largest container and passenger ports are situated in its territory including Rotterdam, Hamburg, Antwerp, and Piraeus. Four of the world’s five largest shipping companies are based in the EU. According to a recent Parliamentary Briefing, the EU is the UK’s largest trading partner, accounting for around 45% of exports, and 53% of imports, of goods and services. Over three million jobs in the UK are linked, directly or indirectly, to exports to the EU. European Union law, in the form of Treaties, Regulations and Directives, affects a wide number of commercial issues including trade, environmental regulation, international trade sanctions, competition law, employment, tax, immigration and infrastructure projects.

If the electorate votes for Brexit, the UK will be the first Member State to do so since the creation of the first European “Community” in 1952, marking a new chapter in the European experiment, and sending the UK into uncharted waters. Commentators provide varying assessments of the likelihood of Brexit but it cannot be denied that it is a possibility that must be taken seriously, and now is the time for businesses to start thinking about how it might impact on them. As the debate develops and we get a better idea of the shape of any post-Brexit UK, it will be easier to assess its likely impact: the discussion below is therefore necessarily tentative but is intended to be helpful to contingency planning.

WHAT MIGHT CHANGE?

UK laws of particular importance to the shipping industry are likely to those regarding trade, insurance, environmental regulation, international sanctions, contract terms, competition law, employment, dispute resolution and trade treaties with non-EU states. We discuss some of these overleaf.

Directly: where EU Institutions create laws that are automatically incorporated into UK national law, such as Regulations, or where EU Treaties are transposed into UK law by the UK’s Parliament enacting implementing laws;

Indirectly: where the EU Institutions issue Directives setting an objective aimed at creating harmonised EU-wide rules but leaving it to Member States to adopt national laws to achieve the objectives set by the Directives; and

EU Decisions and the rulings and opinions of the EU Courts.
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Competition Law
EU competition law applies to agreements and market conduct that affect trade between Member States, and the EU Commission has primary jurisdiction to enforce EU competition law, including granting clearance to mergers and investigating cartel activity. Where the effects of an agreement or market conduct are confined to a single Member State, national laws apply. Brexit would likely lead to a separate competition regime applying to the UK and to competition enforcement in the remaining 27 Member States, leading to the need for dual clearances in the case of mergers and exposure to regulatory investigation under two parallel, but distinct, regimes. Brexit would likely mean that compliance with both UK and EU competition rules would become more complex and burdensome.

Contract Terms
Many shipping contract (for example voyage and time charters) provide for trading to certain countries or geographical regions. Should Brexit occur, there may be uncertainty as to whether a contract signed pre-Brexit (which contains such a clause) which refers to the EU will continue to include the UK. If existing contracts are drafted in a way that presumes the existence of an EU containing the UK, or makes a reference to the EU without specifically defining what that is, such contracts may give rise to disputes as to the meaning or ambit of the contract. If Brexit occurs, care will need to be taken in the event that an existing contract is renewed, as the court would likely apply the definition of EU as at the time the (renewed) contract is entered into, which might be different from the original or intended definition. The impact of Brexit on any related contracts will need to be assessed, including those intended to be on ‘back to back’ terms, in which relevant clauses may not be similarly defined.

Dispute Resolution
The rules by which the UK courts determine jurisdiction over, and the law applicable to, the majority of disputes arising between parties within the EU (both for contractual and tortious claims) are currently determined by EU Regulations. In addition, parallel proceedings in the courts of more than one EU member state are prohibited where those proceedings involve the same or related issues, meaning that a defendant is protected from being sued in relation to the same dispute in two separate EU jurisdictions. Parties also benefit from the ease with which judgments may be enforced across EU borders. Should the UK withdraw from the EU, its courts may no longer be bound by the EU Regulations that achieve this. In the event of Brexit, it is not known whether the UK will continue to apply similar rules on applicable law and jurisdiction as the current EU rules, or whether a system similar to that adopted in relation to disputes arising with companies in states outside the EU will apply. Either way, until clarified, Brexit would leave companies unable to calculate with any degree of certainty their exposure to different legal systems should a dispute arise. An exclusive law and jurisdiction clause in all contracts therefore remains of fundamental importance.
Employment
A significant amount of UK employment law is based on EU rules, for example the Working Time Directive and the Agency Workers Directive. In the event of Brexit, it would be open to the UK to redraft any aspect of its employment law. The UK would have to negotiate appropriate arrangements in relation to residence and employment of UK nationals working in the EU and EU nationals working in the UK. Given the significant number of international employees engaged by the shipping community, both onshore and offshore, the potential changes to UK employment law may therefore have a significant impact. For maritime operators with European operations both in the UK and in the rest of the EU, unless the UK chooses to continue to apply pre-Brexit EU employment law without modification, which appears unlikely, two separate (and not necessarily complementary) employment regimes may apply to their workforce.

Insurance
Any insurer in the EU is automatically entitled to write insurance business in other member states. This means that, for example, German insurers can write business in the UK, and London underwriters can write shipping risk in Germany (and indeed all other EU states). This is known as “passporting” and the idea is that the insurer’s “home” regulator regulates that insurer’s activities, removing the need for the insurer to be regulated in each Member State. Brexit would undermine this and, unless alternative measures were introduced, may restrict the ability of insurers (and those buying insurance) to shop around and get the best price and terms for their business.

Sanctions
As a member of the EU, Britain is party to, and therefore must comply with, the sanctions regime imposed by the EU. Those sanctions are currently against states such as Russia, North Korea, Belarus, Syria, and Yemen. The situation regarding Iran is currently, as widely reported, in a state of change. It remains to be seen whether, were Brexit to occur, the UK would implement mirror legislation, or even harsher or less strict sanctions. Regardless of whether it were to impose any replacement sanctions regime, the UK would not be ‘sanctions-free’, as it would still be a party to, and therefore have to comply with, the sanctions imposed by the United Nations against several regimes.
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Trade

Under EU law, trade within the Union is liberalised as between Member States, allowing goods and services to be traded within the EU without internal customs barriers or tariffs. In addition, EU citizens can move freely, establish themselves commercially or as residents and can trade without restrictions (except for certain professional qualification rules). EU membership therefore gives UK businesses access to the EU “Single Market”. As to external trade with non-EU countries, the EU benefits from a wide range of bilateral and multilateral trade treaties, allowing preferential access to EU goods and services in these countries, as well as reducing or eliminating customs or tariffs.

Should the UK cease to be an EU Member State, UK businesses would no longer benefit from EU internal trade access without a bilateral agreement between the UK and the EU. Although it is possible to be a member of the European Economic Area (EEA) as an associate state of the EU, it is not clear whether the UK would seek to do this or seek to enter into an entirely new free trade or association agreement with the EU. Operating within the EU market may become increasingly complex and consequently potentially more expensive for UK operators, as might operating in the UK market for EU operators. Those operating in the UK and also in the rest of the EU would face the burden of having to comply with both EU and UK laws on trade, rather than complying with the current harmonised EU system.

UK businesses would also not be able to benefit from the network of EU bilateral and multilateral external trade agreements with other countries, as the UK would have to negotiate its own individual trade agreements with those countries. The UK would continue to benefit from World Trade Organisation agreements, but these would not cover the detailed preferential bilateral arrangements that exist in current EU agreements with other countries. Exporting UK goods and services would become a more complex process than at present and, during the UK’s negotiations for its own individual trade treaties as a non-EU state, there would likely be uncertainty, which could be for a lengthy period.

WHAT YOU SHOULD BE DOING AND HOW WE CAN HELP

If the UK votes to leave the EU, it will not happen overnight; under the existing Treaties, a two year exit process is envisaged. But now is the time for those who will vote in the June referendum to think about how their vote might impact on their industry and for all who may be affected by Brexit, wherever they may be, to start thinking about, and planning for, its possible implications. As the debate continues and we get a better idea of the “shape” of a possible post-Brexit UK and EU, we will provide our further thoughts and comments on its possible effect on shipping.
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