Can't Britain Exit Brexit?

by Edward Swaine

Yesterday, Prime Minister Theresa May had hand-delivered to Brussels—via a black Jaguar, taking a secret route!—a **notice** "in accordance with Article 50(2) of the Treaty on European Union of the United Kingdom's intention to withdraw from the European Union." Brexit is happening, even if, pending negotiations, it has not yet happened. Must it? Most Brexit questions are political, or raise questions of UK or EU law, but one interesting international law issue is the stickiness of notice under Article 50—whether (legally speaking) the UK's notice of withdrawal is irrevocable. This issue has grown steadily murkier, but now it's more relevant than ever, and the UK should make its views clearer.

Article 50 does not address revocability. Paragraphs (1)-(3) describe a process ending in an agreement or, failing that, the automatic cessation of the Treaties' application after two years, barring extension by the European Council or a different date in the withdrawal agreement. Paragraph (5) says that any state that has withdrawn and wants to rejoin has to apply again. But what if a state notifies and triggers the withdrawal process (as the UK has), but later, and prior to withdrawal's final effectuation, changes its mind? Simplifying a lot, one might argue either that omitting revocability was telling (since Article 50 does address other ways to prevent the guillotine from falling, automatically, after two years), or that if a state is entitled to decide to withdraw "in accordance with its own constitutional requirements" (per para 1), it presumptively retains its sovereign authority to change its mind through the same means. The law of treaties—which influenced the development of Article 50—suggests that withdrawing a notice of withdrawal is generally permissible, unless of course a treaty provides otherwise. Article 68 of the Vienna Convention on the Law of Treaties provides that a notification of intention to withdraw from a treaty according to its default rules "may be revoked at any time before it takes effect." South Africa's recent withdrawal of its notice relating to the Rome Statute is a case in point.

More can be said, but none of this is new. What is new is the degree to which this is treated as settled or irrelevant. UK official declarations have emphasized irreversibility, on ambiguous grounds that invite public confusion. The Justice Secretary (and Lord Chancellor) **said** that notice was "irrevocable," albeit while pitching the issue as more of a political question than a legal one. The Prime Minister also **explained to Parliament** that "This is an historic moment from which there can be no turning back"—without elaborating why that was. The President of the European Council said "We already miss you," which was bittersweet but not illuminating.

Formal legal opinion has not kept up with the political conviction. The legal issue of revocability has been apparent for years. In the Brexit context, the House of Lords solicited the views of some leading experts, who **reckoned** that nothing in Article 50 prohibited a notifying state from changing its mind within the two year period. Other views, while divided, likewise generally seemed **receptive to revocability** (while **acknowledging** that an eleventh-hour switch might make Europe "very cross").

The recent, much-discussed *Miller* litigation did not settle the question, though it is sometimes treated as though it did. The High Court's decision **reported** (para 10) that irrevocability was common ground between the parties. As matters went to the Supreme Court, it was **thought** that the UK government might argue that notification was revocable, presumably to diminish the imperative for consulting Parliament first. The government instead leaned against, but without providing guidance that would be useful outside those proceedings: it **said** simply that the parties had proceeded on the assumption of irrevocability, and the court was invited to do so too, but nothing turned on it or required its resolution in that case. The Supreme Court **followed this same path**. It reported (in para 26) that "In these proceedings, it is common ground that notice under article 50(2) . . . cannot be given in qualified or conditional terms and that, once given, it cannot be withdrawn. Especially as it is the Secretary of State's case that, even if this common ground is mistaken, it would make no difference to the outcome of these proceedings, we are content to proceed on the basis that that is correct, without expressing any view of our own on either point. It follows from this that once the United Kingdom gives Notice, it will inevitably cease at a later date to be a member of the European Union and a party to the EU Treaties." (The last line is one begging to be quoted out of context.) The Court later (in para 169) reiterated that "even if the process might be stopped, it is common ground that Ministers' power to give notice under article 50(2) has to be tested on the basis that it may not be stopped. In those circumstances, that is the basis on which this court is proceeding." Parliament subsequently approved Brexit, of course, meaning that the Secretary of State's irrevocability gambit resulted in greater political lock-in (though the Act **does not require** the Prime Minister to notify, or to maintain notification). Interestingly, the briefing paper earlier prepared by the House of Commons had dutifully **noted** that the issue of revocability under Article 50 was not resolved "but could be important."

Is it, still? The unresolved nature of the treaty question has not—unsurprisingly—remained evident to the public; British papers (not just the tabloids) emphasized the irreversibility of notice, such as **the view that** the Prime Minister had "burned the boats of a divided nation." It is remotely possible that this consensus may be interrogated; a crowdfunded lawsuit in Irish court has **sought a decision** on the issue of irrevocability, and others may follow in the wake of this and other more decisive developments. Why does it matter, if the UK government believes that withdrawal is in any event politically unavailable?

At least two reasons spring to mind. First, while it is one thing to communicate that the UK government is committed to carrying out the referendum's druthers, it is another to say that it is powerless to change regardless of intervening political or legal developments. Take, for example, the possibility of another Scottish referendum. As of now, the UK is **indicating that** it wants to postpone any such referendum until after the fruits of its negotiations with the EU are better understood. If Scotland nonetheless seized an opportunity to conduct a referendum before finalization, its independence option could be made subject to the contingency that the UK had *not* revoked its Article 50 notice—which would be material only if revocation were deemed legally available. The UK might even, conceivably, wish to reconsider matters if it encounters something calamitous in its own negotiations with the EU. It

would still be difficult, for political reasons, for it to change course, but it would be more difficult yet to if it is perceived to have taken the view that the option is legally unavailable, as opposed to being unavailable for purposes of mooting a domestic legal matter.

Second, putting Brexit aside, the UK's uncharacteristic lack of interest in legal nuance may be shortsighted. It professes to wish the EU good health in its wake, but it is at least an open question whether insinuating irrevocability for other would-be exiters serves that end—or whether it would for other treaties to which the UK is a party. Consider, for example, the possibility that a withdrawal notice from the TEU or a comparable treaty is provided by a state's leader as that leader herself leaves office. Her successors may very much wish to remain, and that may be to the UK's advantage, and to its disadvantage if it must wrestle with distinguishing its own rhetoric. Having taken this great step forward (or, ahem, backward), the UK might clarify that the irrevocability of the Brexit decision is a matter of political conviction rather than anything material to international legal practice. It could wait until it discovers whether revocation has become attractive, but its counterparts may be less flexible then.

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