Article 50 And Withdrawal

Not so long ago, it seemed unlikely that any country politically was willing to contemplate leaving the European Union. Nothing illustrates this better than the fact that all of the treaties pre-Lisbon were silent on the question of withdrawal. There were a number of theories for this; partly it would have been contrary to member states' commitment to "ever closer union", partly it could have encouraged members to make the outcome more likely and partly that the process of leaving is a significant legal challenge best left unspecified in a treaty – a legal challenge made more complicated the longer member states remain within an ever integrating Union.

So in the absence of a specific provision for exit, international treaties are usually covered by Article 56(1) of the Vienna Convention on the Law on Treaties which states:

1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:

a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or
b) a right of denunciation or withdrawal may be implied by the nature of the treaty. Interestingly, and perhaps ironically, these provisions of the Vienna Treaty did not cover EEC /EU Treaties before Lisbon. The spirit and terms of those treaties as epitomised by "ever closer
union", with the long-term goal of full political and economic integration, meant the "right of denunciation or withdrawal" was never implied. Quite the opposite in fact. Thus it could've been argued therefore that exit of the EU was not specifically allowed under international law.

Crucially this was reinforced, by virtue of its absence as a

clause, that the Vienna Treaty also does not list sovereignty as a means of automatically absolving countries from their treaty obligations. There is no legal defence within the Vienna Treaty for a country who wishes to withdraw unilaterally from its obligations as it sees fit. This became especially true due to the nature of EEC/EU Treaties. The European Court of Justice has a well-established interpretation that EU treaties are permanently binding on the Member States and limit their sovereign rights as per Flaminio Costa v ENEL [1964] ECR 585 (6/64) – (my emphasis):

"By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to Community, the Member States have limited their sovereign rights and have thus created a body of law which binds both their nationals and themselves … The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights"

However the problems and arguments with Article 56(1), and pre-Lisbon, are now largely moot points, as the Lisbon Treaty explicitly makes provision for the voluntary secession of a Member State from the EU and this provision comes via Article 50. Therefore exit from the Lisbon Treaty, and subsequently from the EU, is instead covered by Article 54 of the Vienna Convention on the Law on Treaties (my emphasis):

The termination of a treaty or the withdrawal of a party may take place: (a) in conformity with the provisions of the treaty; or (b) at any time by consent of all the parties after consultation with the other contracting States.

For the first time in an EU treaty there is an exit clause and one that is backed up by international law. One should note at

this point that Article 50 does have two areas of a lack of clarity particularly for the EU – for example over the issue of more than one member wanted to withdraw at the same time, especially if there was a mass exit, and more importantly it contains no special provisions on the requirements for the withdrawal of a Member State which has adopted the euro. However these are concerns which should not affect the UK, so this piece will concentrate on a UK exit only.

One overlooked factor with Article 50 is that it actually contains two choices of withdrawal not one; it allows for a negotiated agreement where the Member State in question and the EU agree terms but it also recognises a unilateral right of withdrawal – a Member State simply hands in their notice and serves out their two year notice with no desire for negotiation whatsoever. This is clearly defined by Article 50 (3):

The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

The unilateral right of withdrawal has the added benefit of acting as a longstop – as a negotiating tool – that prevents the EU from imposing impossible conditions upon a Member State with the intention of trying to stop their exit.

So in practice, should the UK want to change its relationship with the EU, Cameron would, using the Royal Prerogative and as per Article 50 (2) notify the European Council via President Van Rompuy of our intentions. Then, as per Article 50 (2), there would begin a period of
negotiations:

In the light of the guidelines provided by the European

Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

Though it's left unsaid with Article 50, any country leaving would necessitate a new EU treaty as it would require amendments to the founding treaties. Though there is no precedent to draw on regarding a country leaving the EU under Lisbon, we can find an imperfect example with Greenland in 1985 who left the then EEC which required a treaty – unsurprisingly called The Greenland Treaty of 1985, documented by Hansard 20th July 1984. It's worth noting Teddy Taylor's comments at the time, about how very complex the whole process of leaving was:

First, my hon. Friend the Minister will agree that, judging from the papers that he and the Department kindly made available to us, the formula adopted to arrange Greenland's withdrawal from the EEC is a highly complicated one. There is a very good reason for that. There is no clear procedure in the treaty for the withdrawal of a part-member state or indeed a member state. In view of our experience with Greenland, is there not a case for saying that the Common Market should consider its rules and treaties with a view to providing a clear arrangement for the withdrawal of member states which wish to withdraw, if other member states agree?

Post EU and the Lisbon exit clause means the Greenland example is no longer really relevant; instead a better example of how we leave may lie with the process of accession treaties. Similar to Article 50 the accession clause in Lisbon – Article 49 –also does not mention specifically the need for a new

Treaty. Yet if a country applies to join the EU a new treaty is ultimately required for precisely the same reasons as leaving – that it requires amendments to the founding treaties. A recent example is the Treaty of Accession 2011 concerning Croatia's accession to the EU which comes into force 1st July 2013.

Under Article 49 a country formally applies for membership, then begins a period of negotiation mainly based on whether the country wishing to apply is able to sufficiently execute EU law. This is a process which only ends when both parties agree that Acquis Communautaire has been sufficiently implemented, then a treaty of accession will be signed, which must then be ratified by all Member States of the EU, as well as the EU itself, and the applicant's country.

This process would be remarkably similar to Article 50 but obviously for opposite intentions. The UK would formally notify intentions to leave, negotiate, and then sign the resulting treaty

which is ratified by the EU and all Member States. Those countries wishing to join the EU have the option of saying no by changing their minds if the terms aren't right, those countries wishing to leave have the option of saying no by not accepting the withdrawal agreement if the terms aren't right.

One quirk with Article 50 though is as a member of the EU – the European Council and the Council of the EU – the UK would ending up sitting on both sides of the negotiating table regarding the new treaty. So this is where Article 50 (4) comes in (my emphasis):

The member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.

This is entirely logical otherwise the UK would end up

negotiating with itself. This exclusion is entirely consistent to Article 49 where accession countries are also absent from the European Council and the Council…by virtue of not yet being EU members.

In summary Article 50 allows us to fulfill our international obligations, abide by our EU treaty agreements and allows for an orderly exit with minimum of disruption particularly with regarding trade.