Brexit: Could Arbitration Be A Port In The Storm?

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Bianca Berardicurti (Legance Avvocati Associati)

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The Brexit clock is ticking and, under the current circumstances, the no deal scenario is being increasingly regarded at least as a concrete option – although the situation is changing on a daily basis and the extension of the two-year term under Article 50 TFEU could provide some breathing room.

In the context of the uncertainties surrounding the ratification of the withdrawal agreement, the consequences of a hard Brexit in the field of civil justice and private international law represent a major concern: It is not difficult to see that an exit of the United Kingdom (UK) from European Union (EU) without a deal would have disruptive effects especially in terms of jurisdiction and enforcement of decisions.

As matters stand, the jurisdiction, recognition and enforcement of decision across the European Union are regulated by the Recast Brussel Regulation 1215/2015 which, broadly, provides for:

1. Specific rules for determining the intra-EU jurisdiction, with a rather explicit *favor* towards parties' choice of forum;
2. A relatively fast and simple procedure for decisions issued in EU Member States to be recognized and enforced across the EU space.

In case of hard Brexit, the Recast Brussel Regulation would most likely be swept away, with no chance for the UK, as a Non Member State, to re-join it. As a result,

the fear is that no reciprocal regime would be in place between the UK and the remaining Member States for determining the jurisdiction, recognizing and enforcing decisions in civil and commercial matters.

The harsh effects of a possible no deal scenario on the civil justice field have also been quite eloquently stressed by the European Commission in its "Notice to Stakeholders: Withdrawal of the United Kingdom and EU rules in the field of civil justice and private international law" issued on January 2019. Indeed, among other issues addressed by the document, as far as jurisdiction and enforcement of decisions are concerned, it has been clearly stated that:

1. for proceedings involving a United Kingdom domiciled defendant initiated on or after the withdrawal date, international jurisdiction will be governed by the national rules of the Member State in which a Court has been seized;
2. unless a judgment of a UK court has been exequatured before the withdrawal date, the EU rules on recognition and enforcement of such judgments of the UK will not apply to a judgment of a UK court that has not been enforced prior to the withdrawal date, even where the judgment has handed down, or the enforcement proceedings commenced, before the withdrawal date;
3. for proceedings to enforce a judgment of a UK court commenced as of the withdrawal date in the EU-27, recognition and enforcement will be governed by the national rules of the Member State in which recognition or enforcement is sought.

Moreover, the European Commission invited all stakeholders to take all the above consequences "into consideration when assessing contractual choices of international jurisdiction".

In this respect, not even the "Convention of 30 June 2005 on Choice of Court Agreements" entered into by the EU, Denmark, Montenegro, Mexico and Singapore (2005 Hague Convention) (also referred by the Commission in its Notice), which was ratified by the UK in its own right in December 2018, seems to be a satisfactory tool to keep jurisdiction and enforcement of decisions unaffected by a no deal Brexit for two reasons. Firstly, there is a question as to whether the UK actually enjoyed legal standing in respect of ratifying the Hague Convention in its own right, given that the judicial cooperation in civil matters falls under the EU's

jurisdiction according to Article 81 TFEU, and the UK was still a Member State of the EU at the time of ratification. Secondly, it has to be kept in mind that the Hague Convention is far more limited in its scope than the Recast Brussels Regulation, since

1. it applies only to exclusive choice of court agreements concluded in civil or commercial matters (see Article 1, 2005 Hague Convention);
2. a number of matters are excluded from the scope of the Convention (see Article 2, 2005 Hague Convention), and
3. no detailed rules are provided for dealing the issue of parallel proceedings.

By the same token, the possibility for the UK to re-join the 2007 Lugano Convention on jurisdiction, recognition and enforcement of judgments in civil and commercial matters (the provisions of which are largely similar with the Recast Brussel Convention), in its own right is, at this stage, shrouded in uncertainty. Indeed, among other things, the agreement of all the current signatories (EU, Iceland, Norway, and Switzerland) would be needed for the UK to re-join.

In the face of all the above, not only arbitration does seem to be completely unaffected either by a withdrawal agreement being ultimately signed between the EU and the UK, or by a no deal scenario (since the validity of arbitration clauses, the arbitral tribunals' jurisdiction and the enforcement of awards largely depend on non-EU legislation); but, also, there is some room to expect a slight increase in the use of arbitration clauses in this interim phase, as well as in case of hard Brexit, or even, if the deal eventually occurs, after the transition period provided in the current draft.

This is because irrespective of Brexit, the UK and the remaining Member States will continue to be a part of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which is enacted in the UK by the 1996 Arbitration Act. As a result, the arbitration clauses will be reciprocally respected, and arbitral awards will in any event continue to be readily enforceable. Also, so far as investment treaty arbitration is concerned, the UK will still be part, inter alia, to the ICSID Convention, also enacted in the International Investment Disputes Act of 1966. On this last point, it might be also interesting to consider whether, if the UK leaves the EU with no deal, an opportunity could emerge to narrow the effects of the Achmea decision on the non-compatibility of arbitration clauses contained in intra-EU Bilateral Investment Treaties with EU law (Court of Justice of the European

Union (CJEU) Case C-284/16) for UK-based investors. Just by way of example, although CJEU case law adopted before the exit day will be retained, the UK will however not be bound by any further decision that might be handed down by the CJEU with respect to the non-compatibility of arbitrations based on the Energy Charter Treaty with European law (*see* here).

Finally, on a merits perspective, arbitration also appears to be the intelligent mid-way solution in all those circumstances where parties do not feel like deferring exclusive jurisdiction to English Courts, but English law is still deemed, for whatever reason, to be essential in the balance of the agreement – for example the purpose of narrowing certain typical (and sometimes unappealing) civil law good faith related effects on contracts.

Indeed, in such a case, the choice of an arbitration clause would not only serve to avoid the potentially awkward situation of a foreign court deciding on English law issues, but, also, would provide the parties with the opportunity of building a more "English law friendly" environment around the case. To this aim, parties would indeed have the chance to appoint arbitrators having a common law background. Also, parties could choose one of the highly reputable English arbitral institutions such as the LCIA (*see* here). It is worth noting that, practically speaking, costs and expenses in arbitration proceedings are at least comparable to the costs and expenses in the context of an English Court litigation. The consequence is that one of the main (if not *the* main) unappealing traits of arbitration in certain civil law jurisdictions is unlikely to represent an issue in the UK.

All the above being said, whilst the jurisdictional system seems to wobble under the Brexit gunfire, international arbitration stands instead. In other words, if the worst comes to the worst, arbitration can be considered as a safe port in the current Brexit storm.