Kluwer Arbitration Blog

Consequences of "Brexit" on International Dispute Resolution: Special Issue of Journal of International Arbitration

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Prime Minister Theresa May has repeatedly said, "*Brexit means Brexit*." But what does Brexit actually mean? When is Brexit going to happen? And is Brexit going to happen at all? And if it will happen, what will be the consequences for international dispute resolution? The Kluwer Journal of International Arbitration's Special Issue on "Brexit" analyses the questions in detail. The full version of the special issue #7 can be accessed here.

In a recent launching event in London, co-hosted by Wilmer Cutler Pickering Hale and Dorr LLP and Wolters Kluwer, the authors discussed their contributions. The recording of the event can be watched here.

As explained by **Dr. Holger Hestermayer** of King's College London in his introductory contribution on "*How Brexit Will Happen*", there is some force to the argument that an Act of Parliament is required before the Government provides the Article 50 notification. It is at least possible that Scotland could block the Government from pulling the trigger, says Hestermayer. Realistically, the likelihood of Parliament ignoring the outcome of the referendum may be considered as low. But if Brexit does happen, what will it mean for arbitrators and litigators with a UK focus?

The contributors to this Special Issue do not, of course, have a crystal ball. What becomes clear from their analyses, however, is that the range of potential outcomes is extremely broad. To illustrate, **Sara Masters QC and Belinda McRae** of 20 Essex Street Chambers in London, identify not less than six different solutions to replace the Brussels Recast Regulation in a post-Brexit legal landscape in their impressive attempt to answer the question "*What Does Brexit Mean for the Brussels Regime*?" This uncertainty is a problem and casts doubt on the future of London as one of the most popular fora for the resolution of international disputes.

In the wake of the referendum, most commentators said that Brexit would not affect London's popularity as a seat for international arbitration. They emphasised that the reasons for London's outstanding reputation – to wit: the excellent judiciary, the arbitration bar, the Arbitration Act, and the legal infrastructure – have never depended on membership of the EU. Wishful thinking? A fair observer would note that most of these commentators were based in the UK and perhaps not interested in talking London down. **Michael McIlwrath**, Global Chief Litigation Counsel for GE

Oil & Gas and based in Florence, Italy, looks at this question from the perspective of an in-house counsel based on the Continent and takes a more nuanced view. In his article "*An Unamicable Separation: Brexit Consequences for London as a Premier Seat of International Dispute Resolution in Europe*", he analyses why parties choose London as a seat and reaches a rather pessimistic conclusion, predicting that London "*will lose many cases to other seats*."

Prof. Dr. Mohamed S. Abdel Wahab, Chair of the Private International Law Department at Cairo University and Head of International Arbitration at Zulficar & Partners, disagrees. Siding with the majority of the commentators, he concludes that Brexit "*will presumably not affect businesses' choice of London as a seat of arbitration*." In his article "*Brexit's Chilling Effect on Choice of Law and Arbitration in the United Kingdom: Practical Reflections Between Aggravation and Alleviation*", he also considers the implications of Brexit in the field of private international law and points to post-Brexit uncertainty in relation to the law applicable to non-contractual claims – a problem that might appear relatively mundane in comparison to the task of negotiating a new free trade agreement with the EU and re-establishing links with the 163 other nations of the World Trade Organization, including in the field of investment protection. We therefore asked **Markus Burgstaller and Agnieszka Zarowna** of Hogan Lovells in London to analyse "*Possible ramifications of the UK's EU referendum on Intra- and Extra-EU BITs*". While the Government may in fact already be holding at least informal talks on such future treaties, Burgstaller and Zarowna show that as a matter of EU law, it is unclear to what extent the Government can lawfully engage in treaty negotiations with third states for as long as it is a member of the EU.

Trouble also looms on the competition law front. **Richard Kreindler, Paul Gilbert and Ricardo Zimbron** of Cleary Gottlieb in their article "*Impact of Brexit on UK Competition Litigation and Arbitration*" fear that London could become significantly less attractive to claimants in follow-on damages actions. Post-Brexit, European Commission infringement decisions may no longer be binding on English courts, and as a result, London could lose out on its hitherto very generous share of such follow-on damages actions. Similarly worrisome is the situation for IP litigators. In addition to uncertainty in relation to the territorial scope of license agreements post-Brexit, English courts may lose their ability to award pan-European relief for infringement of EU unitary rights, explains **Annet van Hooft** of Bird & Bird in Paris in her contribution "*Brexit and the Future of Intellectual Property Litigation and Arbitration*".

Not all is bleak, of course. Burgstaller and Zarowna explain that Brexit may allow investors to maximize investment treaty protection through planning or restructuring investments in a remaining EU Member State through a company incorporated in the UK. And as **Kate Davies and Valeriya Kirsey** of Allen & Overy in London point out in their article "*Anti-Suit Injunctions in Support of London Seated Arbitrations Post-Brexit: Are All Things New Just Well-Forgotten Past?*" depending on the regime that the UK and the EU will be able to agree upon, English courts might be able to grant anti-suit injunctions in respect of any foreign court proceedings going forward, unfettered from any restrictions following from the CJEU's decision in *West Tankers*. Whether this will be sufficient to counter a potentially more negative perception of London as a seat (as predicted by Michael McIlwrath) remains to be seen.

Political views as to the desirability of Brexit aside, it should be common ground that the current state of uncertainty and the Government's apparent unpreparedness is in nobody's interest. Hopefully, this Special Edition will spark debate and provide a modest contribution to the task of identifying sensible solutions for areas of law the readers of this journal are concerned with. In commercial contract negotiations, dispute resolution issues are often left to the last minute. This

mistake should not be repeated in future Brexit negotiations.

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