CD corporate disputes

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PERSPECTIVES

THE EFFECT OF BREXIT ON LONDON AS A HUB FOR INTERNATIONAL DISPUTES – FROM A NON-LOCAL'S PERSPECTIVE

BY **STEPHAN WILSKE, LAURA BRÄUNINGER AND STEFAN RÜTZEL**
> GLEISS LUTZ

On 23 June 2016, the British people voted for the UK to leave the European Union (EU). In January 2017, the country's Supreme Court is expected to hand down its decision on whether new prime minister, Theresa May, requires parliamentary approval to initiate the withdrawal process provided for in Article 50 of the Treaty on European Union, which might trigger substantial delays.

However, any speculation about more than mere delays, and in particular a reversal of the Brexit vote, is likely unfounded. While the proponents of Brexit have, to some extent, played with marked cards, the Brexit vote did not come out of nowhere it was instead tied in with the UK's enduringly critical stance towards the EU. After all, the EU has never been popular within the UK, which remained reluctant and sceptical throughout the years of its

membership. Accordingly, the UK can reasonably be expected to follow through with its Brexit plans, and to turn its back on the EU within the foreseeable future. While it seemed after the Brexit vote that neither opponents nor proponents had made plans as to how Brexit was to be implemented, or even considered its far-reaching consequences, the effects of Brexit have since been the subject of countless articles and debates. Indeed, there has been a veritable flood of newsletters from London law firms warning that the mere thought that Brexit may have negative effects on London as a hub for international disputes is downright absurd. To the contrary, some firms have even predicted that Brexit would have a positive effect. Yet the passion with which this theory is advocated raises suspicion and criticism.

Having overcome the initial shock, continental Europe has tried to look ahead, instead of wallowing in nostalgia, and increasingly the EU appears to be identifying not only the legal insecurity and risks associated with Brexit, but also opportunities for the remaining Member States. Perhaps among the first to sense a unique opportunity were Frankfurt's real estate agents, who cannot wait for the consequences they expect Brexit to have, in particular in the financial industry. At the same time, there has been increasing debate on the continent about whether, in the wake of Brexit, other capitals and countries may be able to establish themselves as the next major hub for dispute resolution – at the cost of London.

Undoubtedly, court proceedings in the UK, and in particular in London, have long enjoyed virtually unrivalled popularity within the EU. More than anything, this is clear proof of London's impressive marketing talent, and its ability to claim advantages applicable across the EU for itself. In this context, reference is made to the promotional brochure of the Law Society of England and Wales of 2007 with the title 'England and Wales: The Jurisdiction of Choice'. Among other things, this brochure contained a case study involving a fictitious German company that preferred to conduct its patent litigations in UK courts – allegedly because it believed that a UK court ruling would be "highly persuasive in Germany and throughout Europe". London's popularity as a disputes hub is not self-explanatory when taking into account, not only the fact that what is advertised as a major advantage – i.e., enforcement of a UK judgement in all other EU Member States – has never been a privilege reserved to UK courts, but is a given in courts of all Member States, but also when looking at the time and cost expenditures associated with court proceedings in the UK. After all, court proceedings are traditionally considerably more expensive in the UK than in other Member States, such as Germany. A recent study has shown that, in a standard case, the total cost of court proceedings in the UK add up to 40 percent of the amount in dispute; in Germany

they usually make up no more than about 14 percent. In addition to spending more money, parties to UK court proceedings often have to spend more time in court before they obtain a final decision than they would in some other Member States.

While the time and cost expenditures associated with court proceedings in the UK are likely to remain unaffected by Brexit, the advantage of being able to have a UK court ruling easily recognised and enforced across the EU will vanish. With Brexit, the basis for the perceived special privilege of rapid enforcement of a UK judgement throughout the EU will cease to apply – without an adequate alternative in sight. While the Brussels Convention of 27 September 1968 has become outdated and almost obsolete, the Hague Choice of Court Convention has a narrow scope and has not yet passed the field test since its entry into force on 1 October 2015. Finally, an accession to the Lugano II Convention requires the consent of all parties to the Convention. It appears doubtful that leading UK politicians will be willing to follow the Canadian Minister of International Trade's example in the case of the Comprehensive Economic and Trade Agreement (CETA) and beg Belgian regional politicians and party conventions of German governing parties to agree to such an accession, let alone a more far-reaching convention ensuring EU-wide recognition and enforcement of UK court decisions. And even if UK politicians were to make that step, it is questionable whether the horse-trading associated with any

attempt to come to terms with the remaining Member States would be appreciated by the British people, given their recent vote to 'take back control'. If no viable alternative can be found before Brexit comes into effect, a UK court ruling may end up being no more than the ruling of a random third state within the EU. In this case, the fate of the painstakingly fought for and expensive UK court ruling would be decided by the national legislation of the EU's remaining 27 Member States.

By contrast, Brexit will not have immediate legal effects that are likely to adversely affect London as a place for international arbitration. After all, arbitration is exempt from EU law and instead still mainly governed by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. Indeed, some London arbitration practitioners even expect Brexit to strengthen London as a seat for international arbitration. In particular, they get enthusiastic at the prospect of UK courts being able to issue anti-suit injunctions again in order to prohibit court proceedings in other EU Member States that are initiated in breach of arbitration agreements.

Similarly, EU sanctions against third states will no longer be binding for the UK.

However, it is questionable whether international arbitration in London will benefit from Brexit. To begin with, anti-suit injunctions – as prohibited by the European Court of Justice with its West Tankers decision of 10 February 2009 – simply do not have the relevance in arbitral practice that newsletters praising the advantages of London as a place for international arbitration seek to attach to them – not to mention the fact that they are not that easy to obtain anyway. Further, it appears to be a questionable business model for the UK to waive sanctions of its allies against aggressors only to help London remain attractive for settling the disputes of oligarchs from autocratic states. Finally, what is often ignored when Brexit's effects on London as a hub for international arbitration are praised, are the perceptions of prospective users. Yet, these are essential to the success of any disputes hub. Measures such as the securing of borders have created uncertainty over whether, in the future, it will be possible for witnesses, lawyers and arbitrators

"It is questionable whether international arbitration in London will benefit from Brexit."

from abroad to enter the country at short notice, as required in many international arbitrations. Also, with regard to the choice of English law, it remains to be seen whether the current euphoria over the return to pure common law, and the renunciation of EU law as a whole, will turn out to be what a global enterprise expects from a modern disputes hub and a modern law. London, as a place for arbitration, has often previously had less of an international and more of a local flavour, sometimes highlighted by a certain 'wig and gown' approach. This is unlikely to change in the wake of Brexit.

In the meantime, the remaining Member States are determined to make the most of Brexit, and are gearing up for their new challenges. For instance, several initiatives are aimed at pointing out the high quality and cost and time efficiency of dispute resolution in Germany. This includes plans of the Frankfurt judiciary to establish chambers for international commercial matters, and the launch of the new litigation think tank ILEX, which held its inaugural conference under the title 'Germany – the New Litigation Wonderland?' on 24 November 2016 in Frankfurt. Further measures to strengthen the trust of international companies in German judges and lawyers are coming at the right time. Indeed, the UK's withdrawal from the EU may offer an opportunity many in continental Europe have been hoping for. CD

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