Report: BREXIT Issue Launch

On 29 September 2016, Wilmer Cutler Pickering Hale and Dorr LLP and Wolters Kluwer co-hosted a seminar in London to mark the launch of the special BREXIT issue of the Kluwer *Journal of International Arbitration*. The speakers comprised of the authors of the articles within the BREXIT issue, who discussed varied topics relating to Brexit and private international law. Leading the seminar were Professor Dr Maxi Scherer, special counsel at Wilmer Cutler Pickering Hale and Dorr LLP and the journal's general editor, and Dr Johannes Koepp, partner at Baker Botts LLP and the special issue editor.

The speakers, who were of both academic and professional acclaim, provided interesting insights and lively debate on the multifaceted impacts that Brexit could have on the UK's legal landscape. Topics included Brexit's effect on: London as a seat for international dispute resolution; recognition and enforcement of foreign judgments; UK competition litigation and arbitration; and intellectual property disputes.

This post, which has been kindly sent to me by **Reyna** Ge (BCL Candidate, University of Oxford) serves to provide an overview of the presentations and issues raised. A full recording of the seminar is available **here**, with a shortened version including the highlights of the event **here**.

London as a Seat of International Dispute Resolution in Europe

Michael McIlwrath, Global Chief Litigation Counsel of GE Oil & Gas, presented via videoconference "An Unamicable Separation: Brexit Consequences for London as a Premier Seat of International Dispute Resolution in Europe". In determining the impact that Brexit might have on London as a seat for international commercial arbitration, he suggested that London would lose cases in the short- to medium- term, while long-term growth would be subject to other assumptions. However, he also noted that Brexit would most likely not impact the trend of increased growth in the appointment of UK arbitrators.

EU Law and Constitutional Law Questions

Dr Holger Hestermeyer, Shell Reader in International Dispute Resolution, King's College London, presented "How Brexit Will Happen: A Brief Primer on EU Law

and Constitutional Law Questions Raised by Brexit". Dr Hestermeyer explained that Article 50 of the Treaty of the European Union required a Member State to make a decision to withdraw from the EU in accordance with that State's constitutional law, with the conclusion that the referendum itself was not legally binding. It is controversial whether a binding decision ought to be made by the Government on the basis of royal prerogative (as argued by the UK Government) or on the basis of a Parliamentary decision. Dr Hestermeyer also explored the process of leaving the EU, which would comprise negotiations for a "divorce agreement" and "future agreement". This raised questions concerning the conduct of negotiations, the need for ratification of such agreements by the EU Member States and the UK, and the potential involvement of the European Free Trade Association States ("EFTA States").

Brexit and the Brussels Regime

Sara Masters QC and Belinda McRae, barristers practising at 20 Essex Street Chambers in London, presented "What Does Brexit Mean for the Brussels Regime?" They examined what would be the effect of Brexit on the two main instruments on the allocation of jurisdiction and on the recognition and enforcement of foreign judgments, the Brussels I Regulation (Recast) ("Recast Regulation") and the Lugano II Convention.

McRae explained the three academic possibilities that could arise if no agreement or decisions be made in this area, and concluded that a lack of action by the government concerning this framework would be very concerning for commercial parties.

Masters QC stated that the best outcome would be to negotiate a regime that is as close to the Recast Regulation as possible. The next best alternative would be to accede to the Lugano II Convention, even though this would mean that the innovations introduced by the Recast Regulation would not be present. Otherwise, the UK could accede to the Hague Choice of Court Convention, which could be a good short-term solution as it has the advantage of not being dependent on the reciprocity of the EU.

UK Competition Litigation and Arbitration

Paul Gilbert, Counsel at Cleary Gottlieb Steen & Hamilton LLP, presented "Impact of Brexit on UK Competition Litigation and Arbitration". Gilbert

commented that there were signs that the UK government was moving toward a "hard Brexit" in relation to competition law. This would mean that more cases would be looked at within the UK, instead of providing Brussels with the sole jurisdiction over cases such as cartels.

Gilbert noted that the effect on competition litigation, in the form of follow-on actions, would be more difficult to predict. Following Brexit, EU cases would no longer be binding. Even if the UK decides to apply UK competition law consistently with EU law, future EU Commission decisions may not make further reference to the position in the UK on competition matters and thus make alignment difficult. Additionally, it was unclear what information would be released to claimants, and a finding of infringement pursuant to EU law may not necessarily be a basis for bringing a damages claim in a UK court. The implementation of the Damages Directive in the EU would also impact competition law.

Intellectual Property Litigation and Arbitration

Annet van Hooft, Partner at Bird & Bird LLP, presented "Brexit and the Future of Intellectual Property Litigation and Arbitration". She noted that Brexit has impacted the creation of the Unitary Patent Court ("UPC"). Whether the UK would ratify the UPC regime and the future of the subdivision of the UPC that was to be located in London are two examples of issues arising from Brexit. The UPC, therefore, would experience delays in implementation.

Regarding trademarks and designs, while UK trademarks and designs would be unaffected, there would be uncertainty concerning the future treatment of community trademarks and designs in the UK. Van Hooft noted further uncertainty concerning database rights, the enforcement of pan-EU relief for unitary rights, exhaustion and licenses.

Intra- and Extra-EU Bilateral Investment Treaties

Markus Burgstaller, Partner at Hogan Lovells International LLP, presented "Possible Ramifications of the UK's EU Referendum on Intra- and Extra-EU BITs". With regard to intra-EU BITs, Burgstaller argued that such BITs would likely be found to be incompatible with EU law, and noted that the European Commission had called for the termination of the intra-EU BITs as early as in 2006. However, many States had not terminated these BITs, as was the case with the UK.

Currently, the ECJ is set to rule upon the compatibility of intra-EU BITs in the case of the Netherlands-Slovakia BIT. Upon UK withdrawing from the EU, the intra-EU BITs would lose their intra-EU character.

Comments and discussion

Following presentation by the speakers, lively debate was entertained concerning the topics. The speakers and participants highlighted the importance of seeking agreement on matters such as BITs and the replacement for the Brussels Regime with the EU, for the purpose of promoting legal certainty. The potential for growth in the use of international arbitration, for the purposes of capitalising on the recognition and enforcement framework provided by the New York Convention, was also raised.