

Rethinking Choice of Law and International Arbitration in Cross-border Commercial Contracts

*Written by Gustavo Becker**

During the 26th Willem C. Vis Moot, Dr. Gustavo Moser, counsel at the London Court of International Arbitration and Ph.D. in international commercial law from the University of Basel, coordinated the organization of a seminar regarding choice of law in international contracts and international arbitration. The seminar's topics revolved around Dr. Moser's recent book *Rethinking Choice of Law in Cross-Border Sales* (Eleven, 2018) which has been globally recognized as one of the most useful books for international commercial lawyers.

On April 15th, taking place at Hotel Regina, in Vienna, the afternoon seminar involved a panel organized and moderated by Dr. Moser and composed of Prof. Ingeborg Schwenzer, Prof. Petra Butler, Prof. Andrea Bjorklund, and Dr. Lisa Spagnolo. The panel addressed three core topics in the current scenario of cross-border sales contracts: Choice of law and Brexit, drafting choice of law clauses, and CISG status and prospects.

The conference started with a video presentation in which Michael McIlwrath (*Baker Hughes, GE*) addressed his perspectives on how Brexit might impact decisions from companies regarding choice of law clauses in international contracts, its effects on the recognition of London as the leading seat for dispute resolution, and the position of English law as the most applicable law in international contracts.

In Mr. McIlwrath's perspective, in spite of Brexit, London will still remain a significant place for international dispute resolution as it adopts globally recognized commercial law principles, is an arbitration friendly state and enjoys a highly praised image as a safe seat for international cases. However, in order to try to predict the impact of Brexit in international dispute resolution, Mr. McIlwrath collected data released by arbitral institutions and found that in the years leading up to the Brexit vote, London did not grow as a seat of arbitration significantly. Considerable growth nonetheless has been seen outside the

traditional centers of international arbitration. Therefore, the big issue involving Brexit, in Mr. McIlwrath's view, is the uncertainty that companies will face with the UK's unsettled political future. For this reason, the revision of contract policies is now likely to be undertaken and the choice of English law in international contracts might be affected.

Prof. Schwenger pointed out that the whole discussion about Brexit and its effects on international dispute resolution depends primarily on the type of Brexit that will be chosen and the agreements between Europe and Great Britain. In her point of view, one of the main questions is whether the UK will join the Lugano Convention, which would make the enforcement of English court decisions easier in European State-members. Prof. Schwenger also highlighted that, in terms of choice of law, there will be uncertainty issues regarding the regulations that have been imported from Europe and are now part of the English legal system. The problem might be how these rules will be developed further as the Court of Justice of the European Union will no longer be responsible for interpreting this part of English law.

Furthermore, Prof. Bjorklund stated that, whilst the choice of English law will require more caution after Brexit, the well-recognized security related to arbitration in the UK is likely to continue as long as the New York Convention, the English Arbitration Act, and the arbitration friendly character of English commercial courts will not likely change. However, in the point of view of an international arbitration counsel, certainly, the "*risks of arbitrating in the UK*" will leave some room for parties to choose arbitration in other places rather than in London or - at least - to start rethinking the classic choice for English-seated arbitration.

Concerning the choice of English law, Prof. Butler reminded the audience of two important regulations which should be analyzed in the context of Brexit: Rome I for deciding which contract law is applicable in international cases, and the Brussels Regulation to define which court is entitled to decide a case and how to enforce and recognize foreign decisions within the EU. According to Prof. Butler, under the first Brexit bill, the statutes signed within the EU regime would still apply. However, subject to confirmation from the English government, the development of these laws might no longer be applicable.

Dr. Spagnolo added that whether a country joins an international instrument

sometimes has little to do with rational factors and are often “emotional”. In this sense, one of the arguments that the political environment seems to emphasize nowadays under the notion of nationalism is the maintenance of sovereignty. According to Dr. Spagnolo, this is a dangerous consideration to be emphasized in an environment that relies on commercial sense and needs basic guarantees of international harmonization, such as the enforcement of foreign awards or the application of a uniform law.

Regarding the topic “drafting choice of law clauses”, Mr. McIlwrath highlighted the “emotional” features involving the choice of law. In his opinion, as Dr. Moser has demonstrated in his book, many choices of law decisions are driven by factors such as how many times a specific law had already been applied by a law firm or what law the attorneys involved in that contract were already familiar with. Considering this, Mr. McIlwrath understands that Brexit can make lawyers rethink the application of English law, even though this might be dependant upon whether financial institutions and companies currently based in London will or will not move away from the UK.

Prof. Schwenger highlighted that what Dr. Moser has found in his research regarding the emotional aspect of the choice of law is a proving fact of what she has experienced in practice: choice of law decisions are mostly emotionally charged and seldom rational. One example is that even though Swiss law is arguably the second most chosen law in international contracts, in Prof. Schwenger’s view, Swiss law is not predictable: in core areas of contract law, such as limitation of liability, Swiss law is not advantageous for commercial contracts in her opinion. Prof. Schwenger added that this shows that lawyers seldom analyze the pros and cons of laws deeply before applying them in international commercial contracts.

Concluding the panel discussions, Dr. Moser brought up the topic “CISG status and prospects”. While discussing this matter, all the panelists agreed upon the urgent need of global initiatives to increase awareness and improve knowledge of the CISG for both young lawyers who are sitting for the bar exam, and for judges who will face international commercial cases and might not be familiar with the CISG or even prepared to apply its set of provisions.

*With contributions from Gustavo Moser