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.

ERA-Conference: The Impact of Brexit on Commercial Dispute Resolution in London

The Academy of European Law (ERA) will host a conference on the changes which will be brought about by Brexit with regard to the UK's status under the Brussels Ia, Rome I & Rome II Regulations and the impact of those changes on commercial dispute resolution in London during the transitional period and afterwards. The seminar is organized by Dr *Angelika Fuchs* (ERA) in cooperation with the Bar Council, the European Circuit and the Hamburgischer Anwaltverein. The event will take place on **10 November 2016** in **London** and will be followed by a reception.

Key topics will be:

- the fate of prorogation clauses in favour of English courts

- cross-border enforceability of judgments
- consequences for choice of law agreements
- the future of London as a legal hub

The full conference programme is available here.

The speakers are:

- **Barbara Dohmann QC**, Barrister, Blackstone Chambers, London
- **Alexander Layton QC**, Barrister, 20 Essex Street, London
- **Matthias Lehmann**, Professor at the University of Bonn
- **Ravi Mehta**, Barrister, Blackstone Chambers, London
- **Hugh Mercer QC**, Barrister, Essex Court Chambers, London
- **Michael Patchett-Joyce**, Barrister, Outer Temple Chambers, London

For further information, please see the conference website. Registration forms are available here.

Journal of International Arbitration Special BREXIT Issue (Launch)

Wilmer Cutler Pickering Hale and Dorr LLP are delighted to invite you to the launch of the special BREXIT issue of the Kluwer *Journal of International Arbitration*.
Professor Dr. Maxi Scherer, General Editor of the Journal of International Arbitration and Dr. Johannes Koepp, Special Issue Editor, will host a discussion with the authors on the content of the Special Issue.

Topics and speakers will include:
How Brexit Will Happen: A Brief Primer on EU Law and Constitutional Law Questions Raised by Brexit – Dr. Holger P. Hestermeyer
What Does Brexit Mean for the Brussels Regime? – Sara Masters QC & Belinda

McRae
Brexit Consequences for London as a Premier Seat of International Dispute Resolution in Europe – Michael McIlwrath
Impact of Brexit on UK Competition Litigation and Arbitration –Gilbert Paul
Brexit and the Future of Intellectual Property Litigation and Arbitration – Annet van Hooft
Possible Ramifications of the UK's EU Referendum on Intra- and Extra-EU BITs – Markus Burgstaller

Date: Thursday, September 29, 2016 6–9 p.m.

Venue: 49 Park Lane, London, W1K 1PS

To register: here

(The Special Issue journal launch will be followed by a champagne reception)

Basedow on Brexit and Private International Law

Professor Dr. Dr. h.c. mult. Jürgen Basedow, Director of the Max Planck Institute for Comparative and International Private Law (Hamburg), has analyzed the challenges that Brexit poses for private and commercial law in an editorial for issue 3/2016 of the Zeitschrift für Europäisches Privatrecht. The main contents of this article have been summarized in English on the Institute's website; this abstract is reproduced here with the kind permission of Professor Basedow.

As soon as the UK notifies the European Council of its intent to leave the EU in accordance with Article 50 para. 2 TEU, a two year period shall commence within which all negotiations must be conducted. Should negotiations exceed this two year period or if the outcomes meet resistance in the UK or the EU bodies, Art. 50 para. 3 TEU stipulates that Union Treaties shall simply cease to apply, unless the Council and the UK unanimously agree to extend that period.

As sparing as the wording of Art. 50 para. 2 TEU is, it does make it very clear: should the EU and the UK not reach agreement within two years of notification, then the Treaties, including the freedom of movement they contain, cease to be in force. The possibility that access may be lost to the European single market and other guarantees provided by primary EU law puts the UK under economic and political pressure that may weaken their negotiating position against the EU. British voters were probably not aware of this consideration before the referendum.

The question of whether and how the international conventions of the EU, particularly those for a uniform system of private law, shall continue to apply is also complex. It may be that conventions like the Montreal Convention for the Unification of Certain Rules for International Carriage by Air or the Cape Town Convention on International Interests in Mobile Equipment and the Aviation Protocol will continue to apply, as they were ratified by both the UK and the EU, although relevant decisions handed down by the ECJ will no longer be binding on the UK courts. But what is the situation with regard to the Hague Jurisdiction Convention of 2005 that was ratified by the EU on behalf of all Member States, but not by the States themselves? These private and procedural law Conventions – just as all other international law agreements of the EU – must also be addressed during the exit negotiations.

Any change of Great Britain's status under the Brussels I Regulation 1215/2012 is also particularly significant for private law. It is for the British courts to decide whether they will continue to observe the rules of jurisdiction. Their judgments however will no longer be automatically enforceable across the whole Union, as Art. 36 only applies to "a judgment given by the courts of a Member State". Older bilateral agreements such as that existing between Germany and Britain may go some way to bridging the gap, as will the autonomous recognition of laws, but neither will suffice completely. International legal and commercial affairs must thus return to square one. As it currently stands, the Lugano Convention (OJ 2009 L 147) is also unable to cover the shortfall, signed as it was by the EU and not the individual Member States. According to Art. 70, Great Britain is not one of the states entitled to join the Convention. This effectively removes one of the fundamental pillars supporting the remarkable rise in the number of law firms in London, with a business model based on the simple promise that stipulating London in a jurisdiction agreement would guarantee enforceability across the

whole of Europe. This model will soon be a thing of the past, if viable solutions cannot be found for the exit agreement.

The agenda for the exit negotiations will thus be immensely broad in its scope. Even if the British government should drop EU primary law for the reasons listed above, they will try to include secondary legal guarantees for access to the European single market into their exit agreement. That would require the discussion of hundreds of Directives and Regulations. Considering that the entry negotiations with nine member states, divided into over 30 negotiation chapters, took so many years to complete, it is doubtful whether negotiations in the other direction can be completed within the two years stipulated by Art. 50 para. 3 TEU. Brexit has also shaken up international commercial competition in ways that have yet to be determined.

The complete article “Brexit und das Privat- und Wirtschaftsrecht” by Professor Jürgen Basedow will be published in the forthcoming issue 3/2016 of the ZEuP – Zeitschrift für Europäisches Privatrecht.

Regulatory competition in a post-Brexit EU

Dr. Chris Thomale, University of Heidelberg, has kindly provided us with the following thoughts on the possible consequences of Brexit for European private international law.

Hitherto, academic debate is only starting to appreciate the full ambit and impact a Brexit would have on the European legal landscape. Notably, two important aspects have been neglected, despite their crucial importance in upcoming negotiations about withdrawal arrangements between the EU and the UK under Art. 50 section 2 TEU: First, the vital British interest to leave in force the fundamental freedom of establishment. Second, a possible revival of regulatory competition of corporate laws among remaining Member States, once UK Limited Companies and Limited Liability Partnerships were to lose their EU or EEA

status.

As *Hess* and *Requejo-Isidro* are correct in pointing out, Brexit will directly hit the UK judicial market. Brussels I*bis* and its ancillary instruments will cease to apply. It remains yet to be seen if and to what extent new bilateral or multilateral agreements with Member States will make up for this suspension of EU free movement of judgments. This includes an accession to the Lugano Convention, which in itself is due to be reformed. In the meantime, negotiations will have to be based on a default position, according to which not only EU secondary law on jurisdiction and enforcement but notably mutual trust with regard to its application by UK courts will be suspended. The latter aspect cannot be emphasized enough: British insolvency proceedings in particular have been displaying tendencies to find a Centre of Main Interest of companies and entire global corporate groups inside the UK, often based on hardly understandable factual assertions and the most laconic reasonings given by UK courts (see, e.g. the *Nortel* case).

The mentioned expansionist aspect of the UK judicial market neatly ties in with a similar regulatory export of corporate forms. Under the aegis of Art. 49 seqq. TFEU and Art. 31 seqq. of the EEA Agreement, UK companies profit from being recognised throughout the EEA in their original British legal form of establishment, regardless of their actual place of management. This privilege has been incentivizing a common form of legal arbitrage: Investors establish a Ltd or LLP in the UK, while doing business anywhere else inside the EEA, thereby being able to circumvent mandatory rules applying at their state of business such as laws on co-determination, minimum capital, or mandatory insurance requirements. Such setups will not be available anymore once the UK were to leave the EEA. Putting it bluntly, from the moment UK effectively leaves the EU and the EEA, British companies operating e.g. in France or Germany will be subject to the corporate laws of their administrative seat. For these countries follow the 'real seat' theory, i.e. a conflict of company laws rule that designates the substantive law of the administrative seat as the applicable company law. UK companies not having to show any registration as, say, a *Société à responsabilité limitée* at their real seat, by default will immediately be treated as partnerships, entailing, *inter alia*, unlimited shareholder liability. In order to avoid this, UK companies operating inside the EU will be well advised to reincorporate, i.e. convert into a EU legal form, which better serves their economic interests.

However, will the UK simply let them go? Once Brexit becomes effective, the Directive 2005/56/EC on cross-border mergers will not apply anymore; neither will rulings rendered by the CJEU in *Cartesio* or *Vale*. Restrictions may be put into place, similar to those displayed by British authorities in *Daily Mail*, when corporate mobility required consent by UK Treasury. This may induce a corporate exodus from the UK while its EU membership is still active. Still, leaving UK company forms behind represents only one side of the deal. A second uncertainty rests with the question, exactly which new legal forms UK companies operating abroad will choose instead. Will they go for an Irish Private Company Limited by Shares, a Dutch *Besloten vennootschap met beperkte aansprakelijkheid* or a German *Gesellschaft mit beschränkter Haftung*? We could witness a revival of regulatory competition within the EU. However, even before that, Member States' interests in the Art. 50 section 2 TEU withdrawal negotiations, regarding the question of preserving or abolishing freedom of establishment between the UK and the EU, will be influenced by their individual prospects and ambitions in such regulatory competition. At this point, there is no telling, who will win the race nor whether it will lead to the top of legal reform or to the bottom of deregulation. Be this as it may, exciting days have found us – not only for game theorists.

On Mutual Trust and the Brexit (Seminar)

A new session within the series *Seminario Julio D. González Campos*, organized by the Department of Private International Law of the Universidad Autónoma de Madrid, will be held on July 8th, 2016, starting at 10:30 pm. The speaker will be Dr. Matthias Weller, Professor of Civil Law, Civil Procedural Law and Private International Law at the EBS Universität für Wirtschaft und Recht; he will address the topic "Mutual Trust: Still Corner Stone for Judicial Cooperation in Civil Matters after the Brexit?"

Venue: Seminar room V (4th Floor), Faculty of Law.

For further information please contact mariajesus.elvira@uam.es.

Just in Time: A New Volume on the Consequences of Brexit

Following the United Kingdom's popular vote to exit the European Union, a very timely book on the various legal, political and economic impacts of Brexit has just been released: "Britain Alone! The Implications and Consequences of United Kingdom Exit from the EU" (Kluwer Law International 2016), edited by Professor *Patrick Birkinshaw* (Institute of European Public Law, University of Hull) and Professor *Andrea Biondi* (King's College London), covers practical topics such as the options available to the UK, the effects of Brexit on the constitutional level, the existing and potential role of jurisprudence, post-Brexit residence and labour rights as well as financial and economic governance.

The table of contents reads as follows:

Which Way Forward for the European Banking Authority?
Pierre Schammo.

For further information, please see the publisher's website.

Brexit – Immediate Consequences on the London Judicial Market

Prof. Burkhard Hess and Prof. Marta Requejo-Isidro, Max Planck Institute Luxembourg

One of the major misunderstandings of the Brexit is that it won't influence London's importance as a major place of dispute resolution in Europe. Up until now, the adverse consequences of leaving the European Judicial Area have been insufficiently discussed. A first seminar organized by the British Institute for International and Comparative Law and the Max Planck Institute Luxembourg for Procedural Law in May illustrated that the adverse legal consequences will start immediately, even within the transitional period of two years foreseen by Article 50 of the EU Treaty. We would like to briefly summarize the main findings of this seminar which can also be found (as a video) at the websites of the MPI Luxembourg and of BIICL.

Regarding private international and procedural law, all EU instruments on common rules for jurisdiction, parallel proceedings and cross-border enforcement will cease to exist after the transitional period, not only in areas such as insolvency and family matters, but also in the core areas of civil and commercial matters. Judgments given by English courts will no longer profit from the free movement of judgments. Their recognition and enforcement will depend on (outdated) bilateral agreements which were concluded between the 1930 and 1960s. As there are only six bilateral agreements, the autonomous, piecemeal provisions of EU Member States' regimes regarding the recognition of the judgments of third States will apply. Of course, there might be negotiations on a specific regime between the Union and the United Kingdom, but the EU

Commission might be well advised to tackle the more pressing problems of the Union (i.e. the refugee crisis where no solidarity is to be expected from the UK) instead of losing time and strength in bilateral negotiations.

From the European perspective, there is now a need to carefully evaluate the benefits of a bilateral agreement with the United Kingdom on issues of private international law. The main interest of the Union won't be to maintain or to strengthen London's dominant position in the European judicial market: EU Member States might equally provide for modern and highly-qualified legal services ready to attract commercial litigants and high-value litigation & arbitration. Examples in this respect are The Netherlands and Sweden. In addition, there is a genuine interest of the Union to see mandatory EU law applied in disputes related to the Internal Market by courts operating within its regulatory framework. A perfect example in this respect, as pointed out by Dr. Matteo Gargantini, – former senior research fellow at the MPI Luxembourg – is provided by the EU legal text concerning the financial markets. Here, the so-called MiFIR provides for a dense regulatory framework where a clear distinction is made between EU Member States and third States. In the future, the United Kingdom will qualify a third State in this respect. This entails that jurisdiction and arbitration clauses providing for the jurisdiction of English courts and/or for London as a seat of arbitration cannot be agreed. The pertinent provision (Article 46 § 6) of the MiFIR reads as follows:

> "Third-country firms providing services or performing activities in accordance with this Article shall, before providing any service or performing any activity in relation to a client established in the Union, offer to submit any disputes relating to those services or activities to the jurisdiction of a court or arbitral tribunal in a Member State."

This provision only applies to professional investors. For retail investors, Member States can even mandate that the investment firm establishes a branch in their territory, which of course would impact jurisdiction (also in the light of limitations to jurisdiction agreement vis-à-vis consumers). Here, the relevant provision is Art. 39 MiFID II, which says:

> "A Member State may require that a third-country firm intending to provide investment services or perform investment activities with or without any ancillary services to retail clients or to professional clients within the meaning

of Section II of Annex II in its territory establish a branch in that Member State."

These provisions entail direct and immediate consequences. Jurisdiction and arbitration clauses in contracts will apply to future controversies, and as such, their validity will be scrutinized at the moment when a dispute arises. An agreement made today to establish London as the place of dispute resolution will no longer guarantee the validity of that respective clause in two years' time. In other words, law firms would be well advised to no longer agree to these clauses as their validity will be challenged in every civil court within the European Union. Sending anti-suit injunctions abroad won't help either: firstly, their recognition by the courts of EU Member States is not guaranteed (and will depend on the fragmented autonomous laws of EU Member States). Secondly, mandatory EU law (the pertinent articles of MiFID II, for example) will certainly forbid any recognition within the Union. As a result, parties will lose additional money for unnecessary satellite litigation. Finally, the ratification of the Hague Choice of Court Convention or the Lugano Convention will not provide a means to overcome the problem as the MiFIR/MiFID will apply independently from any international framework. This example demonstrates that there might be much more interest on the English side in negotiating with the Union than the other way around. It also shows that there is a need to consider most carefully the immediate consequences of the Brexit.

Post Brexit: The Fate of Commercial Dispute Resolution in London and on the Continent

A joint conference of the Max Planck Institute for Procedural Law (Luxembourg) and the British Institute for International and Comparative Law will be held on May 26th in London, within the framework of a series of BIICL events on the Brexit.

This particular seminar will look at the potential impact of a Brexit on cross-border commercial dispute resolution and on the role of London as a center for international litigation and arbitration. Speakers will address selected questions such as the legal framework for the transitional period; the validity of choice of court agreements and future frequency of choice of court agreements in favour of English courts; the different approaches in England and under the Brussels I Recast as to parallel proceedings; the cross-border circulation of titles; the Swiss position as to commercial dispute resolution between Member States and third States. A roundtable discussion will place a particular focus on London's future as a centre for commercial dispute resolution post Brexit.

Speakers:

- Burkhard Hess, Max Planck Institute Luxembourg
- Richard Fentiman, University of Cambridge
- Andrew Dickinson, University of Oxford
- Marta Requejo Isidro, Max Planck Institute Luxembourg/University of Santiago de Compostela
- Trevor Hartley, London School of Economics
- Alexander Layton QC, 20 Essex Street
- Tanja Domej, University of Zurich
- Thomas Pfeiffer, University of Heidelberg
- Paul Oberhammer, University of Vienna
- Adam Johnson, Herbert Smith Freehills
- Martin Howe QC, 8 New Square
- Karen Birch, Allen and Overy
- Diana Wallis, President of the European Law Institute and former Vice-President of the European Parliament
- Deba Das, Freshfields Bruckhaus Deringer LLP

Time: 15:30-19:00 (followed by a drinks reception)

Venue: British Institute of International and Comparative Law, Charles Clore House, 17 Russell Square, London WC1B 5JP

The program is available here; for registration click here.

Impact of Brexit on English Choice of Law and Jurisdiction Clauses

Karen Birch and Sarah Garvey from Allen & Overy have published two papers dealing with the likely/possible effects of the UK leaving the European Union on choice of law clauses in favor of English law and jurisdiction clauses in favor of English courts. The authors essentially argue that Brexit would not make a big difference and that commercial parties could (and should) continue to include English choice of law and jurisdiction clauses in their contracts: English courts (as well as other Member States' courts) would continue to recognize and enforce such clauses. And English judgments would continue to be enforced in EU Member States (even though the procedure might be more complex in some cases).

In essence, the authors thus argue that giving up the current unified European regime for choice of law, jurisdiction, recognition and enforcement of foreign judgments, service of process, taking of evidence would not matter too much for commercial parties. I am not convinced.

The papers are available here and here.