

BREXIT: LESSONS LEARNED, STATUS QUO AND WAY AHEAD

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Abstract. On 23 June 2016 almost 17.5 million citizens of the United Kingdom voted to leave the European Union. The UK government invoked the relevant Article 50 of the Treaty on European Union on 29 March 2017. As authors of the said provision have admitted, it was never to be used (Fabbrini, 2017). And yet here we all are/were (depending on when you are reading it), anno domini 2020, witnessing an unprecedented event of a sovereign state “taking back control” i.e. leaving in great pain the most powerful economic and political union of sovereign states ever established, taking advantage of the procedure that had initially not only been de iure impossible, but also seemed inconceivable in and of itself.

According to Theresa May, “Brexit means Brexit”. Little help did that tautological definition bring anyone. And yet, after Brexit came, the transition period started. Written in the middle of the said transition period, the purpose of this paper is to briefly treat on Brexit in general and the near-term future related thereto. In addition, also considering the timing of this paper, i.e. May / June 2020, a particular regard will be paid to the more distant future ahead of us – certain matters pertaining to international commercial dispute resolution after Brexit.

Considering the overall uncertainty surrounding Brexit that we find ourselves in, the relevance of the topic discussed in the paper is unquestionable. In addition, relevance-wise, one could consider whether the process we are all witnessing could result in encouraging or, rather, discouraging any similar future initiatives. In this context, a broader perspective will be utilised to come to certain indicative conclusions as to whether Brexit can result in good know-how practices learned for future similar initiatives, or rather serve as an example for “never again”.

Key words: Brexit, transition period, withdrawal agreement, resurrection of BITs.

INTRODUCTION

The timing of writing of this paper was somewhat unfortunate in that the author was left with little choice but to be guessing what was about to happen during the next month or so after the paper’s submission. Employing one’s best predicting capacities, it was our initial contention that what was going to happen was the United Kingdom’s application for the extension of the post-Brexit transition period beyond 2020. Such conclusion was drawn on the basis of a few years’ analysis and observation of events surrounding the painful and lengthy Brexit Withdrawal Agreement and post-Brexit trade and partnership relationship negotiations.

Even though the said application for extension at the moment of writing was indeed not lodged and the UK officially rejected any perspective of extending the transition period, currently we couldn’t definitely exclude the possibility of some sort of ad hoc extension thereof in fact taking place some time later in the year.

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In the first part of the paper general context of where we find ourselves, at the moment of writing, in the whole Brexit process, will be briefly outlined. Second part will consider the expected likelihood of the extension of the transition period and the formal lack of the extension. In this context it will be briefly explained why some sort of an extension of the Brexit transition period was in our understanding the most likely outcome in the current scenario, even if it were to happen by way of a “deal”. In the third part of the paper few ideas in relation to international commercial litigation as affected by Brexit will be outlined. Final part will provide conclusions.

1. BREXIT STATUS QUO AND NEGOTIATIONS IN EARLY 2020

One could argue that no good Brexit-related paper can do without at least a brief reminder of the facts - past and present. In addition to what was said in the introduction, we note that this paper is written basically 4 years after the Brexit referendum took place and more than 3 years after the United Kingdom invoked Article 50 of the Treaty on European Union. Sparing the readers the details of negotiations of the withdrawal agreement, and extensions thereof, once it entered into effect early 2020, Brexit took place, United Kingdom left the European Union and the transition period, which is in play at the moment of writing, began.

Whilst during this transition period, the parties – i.e. the United Kingdom and the European Union must agree on their future relationship, be it a “deep and special partnership”, as so desired by the United Kingdom, which would resemble the so called “soft” Brexit, or something in the sort of World Trade Organisation-like tariffs and quotas regime, a “no-deal” or “hard” Brexit, this period too does have a deadline of its own. Deadline of the transition period is 31 December 2020.

With the negotiations proper having started in early March 2020 with a round in Brussels, considering the ambitious plan of the United Kingdom, it seemed unlikely the desired result could be achieved within the established timeline. Whatever the negotiators agree to, would still have to be approved by the European Parliament in its penultimate session of the year. Members of the European Parliament would gather for it in the final week of November 2020, according to its work schedule. The final session comes in mid-December, so it would be too late to confirm any deal reached with the UK. The agreement between the European Union and the United Kingdom must therefore be reached no later than some time in the middle of November (Blitz et al., 2020). That would mean negotiations would have to take place unimaginably fast compared to how the process progressed during the four years since the referendum. Otherwise, the EU officials admitted to the press that they currently expected more work to be put in on behalf of the United Kingdom.

Coronavirus pandemic in the first half of 2020 hit both the Brexit negotiations themselves as well as the individuals participating therein, hard. In particular, not only did the UK’s Prime Minister Boris Johnson test positive for the virus, so did the EU senior negotiator. By April 2020 instead of having two rounds of negotiations behind them, negotiating parties had merely exchanged position papers and conducted informal teleconferences. By the moment of writing, little further progress have been achieved after now four rounds (Brunsdén, Hughes, 2020).

Accordingly, with social distancing and restrictions on travelling (with initial bans thereon having been only recently lifted) being the new normal these days, the talks between the European Union and the United Kingdom have been conducted by way of teleconferencing, rather than physical meetings. The struggles of negotiating remotely during the coronavirus pandemic crisis have so far been apparent with both sides agreeing little progress has been achieved to clarify the differences between the parties. Even more so, as previously to an extent mentioned, the EU chief negotiators criticized UK for failing to engage properly with the negotiations, a claim that was obviously denied by the UK (Brunsdan, Kahn, 2020). Accordingly, quite a few of the stakeholders involved were coming to the conclusion that the extension of the transition period seemed inevitable.

2. NO EXPECTED FORMAL EXTENSION OF THE TRANSITION PERIOD

With little progress in the future partnership negotiations having been achieved so far, the overall expectation was that in most likelihood, United Kingdom would have eventually been forced to apply for the extension of the transition period. Deadline for such formal application was 30 June 2020. At the time of writing Boris Johnson denied any intention to apply for the extension. And other UK officials have been reported saying, among other things, that in the whole Brexit process “whenever a deadline was extended, the light at the end of the tunnel was replaced by more tunnel” and that the financial contribution Britain would have to make upon a prolongation could be spent on NHS – the UK public healthcare system, vital in the fight against the pandemic (Parker, Brunsdan, 2020). However, the largest political group of the European Parliament, as well as stakeholders in the United Kingdom were conscious that the request for extension seemed eventually to be inevitable and it was then only a matter of time when UK itself would have recognised that.

Initially, to satisfy the hard-Brexiters Boris Johnson achieved to have the deadline of negotiations written into English law by way of a Parliament act. Now, accordingly, for the extension to take place, the British Parliament would have to revoke or amend its relevant act (MacShane, 2020).

And yet, against pretty much all the odds, United Kingdom rejected the opportunity to extend the post-Brexit transition period on 12 June 2020.

Finally, on the basis of what we have seen so far, a third option is not impossible. With quite a few unorthodox moves from either side having taken place in the Brexit story already, we cannot definitely exclude, that the transition period could in fact be *quasi*-extended in some other way, than by the simple relevant request from the United Kingdom within the required timeline, as we now know has not happened. In this context, the transition period may formally end, but the deal reached in the meantime could only allow for additional time to agree on a more longer-term deal. This sort of a solution has already been mentioned in the media and has been referred to as “skinny” deal.

3. INTERNATIONAL COMMERCIAL LITIGATION AFTER BREXIT

After the transition period ends, whenever that is and however it happens, the relationship between the European Union and the United Kingdom will of course continue. It will continue in

many different areas and the level of cooperation will most probably vary depending on the area in question. Accordingly, it will be a trade relationship somewhere in between the World Trade Organisation tariffs and quotas regime and the deep and special partnership so desired by the United Kingdom – i.e. something much closer to a full and proper EU membership.

In this context, this part of the paper shall briefly examine few specific initiatives in relation to how the adverse effect of Brexit in international commercial litigation area is likely to be mitigated. That is not to say that these ideas exhaust the topic, far from it, there are many different matters in the area of international commercial litigation affected by Brexit and the ones discussed here are only few quite straightforward and relatively simple fixes.

During the transition period, the UK government will seek to agree on new reciprocal arrangements with the EU to, among other things, facilitate civil justice cooperation. All things considered there is no definite certainty that such arrangements will be found within the relatively short timeframe. Therefore we will be looking at the UK's intent to accede to (i) the Lugano Convention 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, and (ii) the 2005 Hague Choice of Court Convention. These sensible accessions are likely at least to an extent to mitigate the cut off effects of Brexit. Finally, we will have a look at the potential of bringing back into relevance some of the long forgotten bilateral investment treaties.

3.1. Lugano Convention

Regardless of whether the transition period were extended, little time would have been left to agree on sensible reciprocal civil justice cooperation instruments. Accordingly, the UK's intent to accede to the Lugano Convention 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, as also urged by the England and Wales Bar Council, seems understandable. This convention, as many of the readers will be aware, determines which countries' courts have jurisdiction over cross-border civil and commercial disputes. The convention, which has been signed by the EU and several other European countries, also ensures that the resulting judgments can be enforced abroad. Readers will be spared a broader and lengthier discussion of how London's courts are considered as favoured global dispute resolution forum for commercial disputes, also since, it is our current contention, this is by now somewhat self-evident. Legal practitioners in the UK have admitted that lack of access to the Lugano Convention may encourage businesses to litigate elsewhere, since it would materially increase the costs and timeframes of recognition and enforcement of judgments of UK courts in the EU member states (Brunsden, Kahn, 2020).

Despite formally exiting the EU on 31 January 2020, the UK was at the moment of writing covered by the Lugano Convention through its standstill withdrawal agreement with Brussels. But once the transition period ends on 31 December 2020, unless extended, lawyers warn English court judgments risk losing their force in EU jurisdictions, a situation that could leave the UK reliant on other, more fragmented international arrangements. Those would primarily be the bilateral judicial cooperation agreements, of which there are only 6 with the European Union member states.

In order to become an independent contracting party to the Lugano Convention, in April 2020 the United Kingdom lodged their relevant accession request with the competent authority – Swiss Federal Department of Foreign Affairs. At the moment of writing the procedure of accession was yet to take place. Following Article 72(3) of the Lugano Convention, application requests are normally dealt with within around a year. The UK's accession is subject to acceptance of all current members of the convention, that is, the EU itself, Switzerland, Norway and Iceland. The three said individual parties to the convention have expressed their support to UK's accession even before the formal request has been lodged. Meanwhile, the European Union has expressed its view that the request will be analysed in detail, rather than granted almost automatically. In addition, reporters were saying the European Commission had indicated that there were clear grounds to reject the application. One of such clear arguments is the fact that all the current signatories are part of the single market and the UK is somewhat determined to leave it after the transition period expires (Brunsden et al., 2020). Nevertheless, United Kingdom hopes to be accepted in time for when the post-Brexit transition period expires (at the end of 2020), unless somehow extended, but it cannot join the convention without the approval of the Council of the European Union so there may be some convincing to be done.

Whilst accession to the Lugano Convention will solve quite a few problems, it is recognised, that some matters will still remain. In this context it is relevant to point out that the text of the convention is not as up to date as that of the Brussels I Regulation Recast. Accordingly, the House of Lords European Union Committee has admitted, that the Lugano Convention is "not as good as" the Brussels I Regulation Recast. The procedure of enforcement provided for by the convention is not as streamlined as the one established in the aforementioned regulation. The convention still requires litigants seeking enforcement of a judgement to initiate proceedings in the receiving country, while enforcement under the said regulation is quasi-automatic. Otherwise, authors consider the convention's enforcement of choice of court agreements not as effective. The convention does not prevent the parties from starting proceedings in a different court than the one that had been agreed to, for the mere purpose of frustrating a choice of court (Sacco, 2019).

The other issue is that the UK courts would in theory have to abide by the European Court of Justice's jurisprudence, when it comes to interpreting the convention, since this is the court ensuring its uniform application, as provided for by Article 1(2) of Protocol No. 2 to the convention. However, in this context, the United Kingdom has already expressed its view that it will reject post-Brexit CJEU jurisdiction overall. Whilst there is currently little doubt that it will eventually happen, it remains to be seen how and when will the United Kingdom actually accede to the Lugano Convention.

3.2. Hague Convention

In addition to aiming at accession to the aforementioned Lugano Convention, United Kingdom will also seek to accede to the 2005 Hague Choice of Court Convention by way of another sensible step in pursuit to resolve problems of international commercial litigation arising because of Brexit. Like with the Lugano Convention, this convention applied to the UK when it was part of the European Union

and so continues during the transition period. UK formally applied to accede to the Hague Choice of Court Convention on 2 January 2019, but has subsequently withdrawn the request. Interestingly enough, it happened the same day that Brexit happened – 31 January 2020.

In the context of the potential UK's accession to the Hague Choice of Court Convention, it is worth mentioning that the Private International Law (Implementation of Agreements) Bill had been introduced in the UK Parliament on 27 February 2020. This bill, if enacted into law will implement the Hague Choice of Court Convention as well as the 1996 Hague Convention on Parental Responsibility and Child Protection and the 2007 Hague Maintenance Convention in the United Kingdom's domestic law at the end of the transition period. At the moment of writing of this paper, the said bill awaited announcement of the report stage in the House of Lords – lower house of the UK Parliament.

Here, as well as in relation to the Lugano Convention, UK's activities in relation to withdrawal of accession documents can be qualified as negotiations' tactics or technicalities, but also as an optimistic commitment to agree on cooperation rules on matters relating to judgements and jurisdiction even more constructive than the two mentioned conventions.

3.3. Resurrection of certain BITs

United Kingdom recognises that foreign direct investments are expected to be a material source of boost for the economy following Brexit. Accordingly, it is likely that the established bilateral foreign direct investment treaties may become relevant (Sattorova, 2017). For lack of better word, we call this process a resurrection, since back into spotlight would come international agreements, the existence of which has in most likelihood been long forgotten. These are the bilateral foreign direct investment treaties between the United Kingdom and European Union member states having been entered into usually before one of their parties became an EU member state. For example, the 1993 Agreement between the government of the United Kingdom of Great Britain and Northern Ireland and the government of the Republic of Lithuania for the promotion and protection of investments.

These agreements interest us specifically from the perspective of investment arbitration, since it is by that manner that most, if not all, disputes arising from foreign direct investments are being resolved. There is a general consensus that international commercial arbitration as such shall not be materially affected by Brexit, also since it is in many aspects governed by the 1958 New York Convention, which is not a European Union law instrument. However, when it comes to investment arbitration, one cannot be that certain, thus the prospect of some of the bilateral investment treaties coming back to relevance is to be considered.

In early March 2018, the European Court of Justice delivered a ruling in the by now famous Achmea case. In this judgment the European Court of Justice in particular held that:

“Articles 267 and 344 [... of the Treaty on the Functioning of the European Union] must be interpreted as precluding a provision in an international agreement concluded between Member States, [...] under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept...”

Thus, the ECJ took the view that the European Union law should take precedence over the bilateral investment treaties concluded between member states (intra-EU BITs). Accordingly, in the consequent declaration of 5 January 2019 the governments of the EU member states have, among other things, recognized the said precedence of the Union law over the intra-EU BITs, as well as expressed their intention to terminate the intra-EU BITs. Finally, on 5 May 2020, the 23 participating EU member states signed the relevant agreement to terminate the intra-EU BITs between them. Consequently, around 200 intra-EU BITs have been terminated and many investment arbitrations affected. Overall this initiative dates back to 2015, when the European Commission asked member states to terminate intra-EU BITs since investments in Central and Eastern Europe did not merit privileged treatment anymore and the non-discriminatory measures of EU law itself should suffice. Authors voice the view that during the last decade courts in Central and Eastern Europe have grown stronger in their independence and professionalism to be able to resolve investment disputes themselves, without resorting to arbitration (Martinkutė, 2020). Interestingly enough, Austria, Ireland, Finland and Sweden all decided not to join the said agreement on termination of the intra-EU BITs.

In the context of the aforementioned documents from 2019 and 2020, it is relevant to note that whilst the United Kingdom was party to the 2019 declaration, it did not participate in the 2020 agreement. The particular reason for that being that the UK, as already mentioned, left the European Union earlier in 2020. Based on the sources available and examined, one is safe to say that UK maintained its position as expressed in the 2019 declaration – intra-EU BITs had to be terminated. However, now that the United Kingdom is not itself an EU member state, the bilateral investment treaties it has with current EU member states, since Brexit happened, are not anymore intra-EU BITs. These treaties have been signed long time ago, before the counterparties, usually coming from Central and Eastern Europe, joined the EU, as, for example, the already mentioned one with Lithuania. In this context, we find authors who argue that investors may be interested in structuring their investments in a way that would allow them to benefit from the protection granted by such treaties (Taton, Croisant, 2020). This would be somewhat in line with the at times present but not so pleasant nor ethical international investment law practice of treaty-shopping. On the other hand, by means of private enforcement, the United Kingdom may find itself at the receiving end and become a respondent as recipient of investments. This is something it managed to previously avoid by claiming precedence of the European Union law (Sattorova, 2017).

In conclusion, bilateral investment treaties that United Kingdom had signed with EU member states, will once again become relevant. And it remains to be seen, first, to what extent private parties will use the aforementioned treaties in enforcing their rights, and second, whether United Kingdom will not in fact suffer from this development landing at the receiving end – i.e. as the recipient of the investments to be protected by the treaties.

CONCLUSIONS

Since the Brexit referendum, we have seen many twists and turns in the story. Based on these experiences, it would not come as a surprise if the United Kingdom and the European Union, also

considering the impact of coronavirus in the first half of 2020, agreed in the last minute on some sort of an informal extension of the transition period. This might even happen by way of an agreement to find an agreement in the future.

When considering how negative effects of Brexit on international commercial litigation could be mitigated, the United Kingdom should make the sensible move and accede to the 2007 Lugano Convention and 2005 Hague Choice of Court Convention. It is our contention, that whatever the negotiators agree for the post-transition period, it will not be as favourable and straightforward a regime as that provided for by the two aforementioned conventions.

The investment treaties concluded by the United Kingdom with countries in Central and Eastern Europe will be remembered and may be used by investors to enforce their rights in the relevant investment arbitrations. It cannot be excluded, that United Kingdom may eventually find itself on the receiving end of these arbitrations, as recipient of investments.

By way of an ultimate concluding remark, not only of the paper, but of the whole Brexit process as witnessed and examined in depth so far, one can be allowed expressing a broader and more general idea. 4 years after the Brexit referendum one can still only guess, whether it will be a hard-Brexit or a soft-Brexit. Accordingly, one can be excused for being a euro-optimist, but with what we have seen so far, it is safe to say it is impossible for us to see any other EU member state venturing into the exit from the EU exercise in the foreseeable future. Whilst this obviously merits a study of its own, it is our current contention that although coronavirus hit EU unity hard, great pain of Brexit will serve as lesson and the EU member states will rather continue to stick together. Especially since, as we have already seen in the past, the European Union is known to have underperformed at length without actually breaking up into pieces.

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