

# **BREXIT AND ITS IMPLICATIONS FOR INTERNATIONAL ARBITRATION**

## **ACICA**

**Australian Dispute Centre, Sydney, 5.30pm 24 October 2016**

I want to start by thanking ACICA for this invitation. As some of you will know I am always happy to be in Sydney – all the more so as the weather in London starts to turn wintry.

I want to speak today about BREXIT and its particular implications for arbitration.

Let me first set the scene.

You will all know that the momentous result of the June 23 BREXIT Referendum is still causing shock waves.

Not wanting to reveal her negotiating position, Prime Minister Theresa May has remained tight-lipped about the nature of Brexit. To the frustration of many, she is resolute in using the elusive proposition “Brexit means Brexit”.<sup>1</sup> One of the things which characterised the Brexit debate was a lack of clarity indeed a complete confusion about what Brexit would actually mean. The position has not improved.

There is every indication from pronouncements by both the EU and the UK that negotiations are unlikely to be easy. At the Tory party conference earlier this month, the Prime Minister promised that Britain will control immigration while keeping maximum economic access, but this has been met with disdain by European parliament president Martin Schultz, who has stated that “the fundamental freedoms are inseparable”. Last weekend, at Mrs. May’s first EU summit since becoming Prime Minister, the focus was on Russian involvement in Syria and migration issues. Mrs. May had to content herself with a 5 minute slot at 1am to deliver her speech on Brexit. Ministers from the other 27 states of the EU seem determined to adhere to the principal declared by Mr. Schultz that there is to be “no negotiation without notification”. Indeed even the language of any future negotiation is subject to debate, with the French Commissioner Michel Barnier calling for negotiations to be held in French.

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<sup>1</sup> This phrase has the opposite effect of a Japanese kōan, a riddle with a meaning which is at first unclear but, through meditation on its internal contradiction, is supposed to reveal a hidden truth. (A well known example is “what is the sound of one hand clapping?”) Theresa May's slogan may at first seem unambiguous, but ultimately only creates uncertainty.

If there were any doubt as to the difficulties of negotiating the UK's exit from the EU, this should be dispelled by viewing the challenges being experienced by Canada in finalizing a trade agreement with the EU. The Comprehensive Economic and Trade Agreement (or CETA) has been seven years in the making. Prime Minister Trudeau was planning to travel to Brussels this week to sign the deal, but it is looking increasingly unlikely that he will be able to do this. The EU, a single market of 510 million people, requires unanimity on trade deals and on Friday Wallonia, with a population of 3.5 million, blocked Belgium's government from signing the deal. The Walloons have expressed concern that their agricultural industry will be undermined by cheap Canadian imports (as well as other, more commonly heard criticisms<sup>2</sup>). This latest development gives the UK Government an indication of some of the difficulties it will face in trying to get a post-Brexit UK-EU trade deal. Indeed, earlier this week Cecelia Malmström, the EU's Trade Commissioner, went so far as to say: "If we can't make it with Canada, I don't think we can make it with the UK."

On the domestic front too, Mrs. May has much to contend with.

We now know that she is planning to trigger Article 50 in March 2017. Whilst this declaration caused the pound to fall rapidly against the dollar, one outstanding question became even more pressing: does the Prime Minister have the power to trigger the process of leaving the European Union or does she need Parliament's approval? And what will Parliament's role be in determining the UK's future relations with the EU?

Inevitably the political and the legal dimensions of these questions are being hotly debated.

The argument that an Act of Parliament is needed to ratify the referendum arises as follows: because we came into what is now the European Union by Act of Parliament - the European Communities Act of 1972 - we need an Act to come out. The Government appears to acknowledge this.<sup>3</sup> But this does not mean Parliament will have any earlier vote to pre-determine what form that deal should take or indeed and critically to authorize the Government to trigger the exit process.

Plainly we will need an Act to undo a lot of community law and to replace it with other provisions. But that is not the same as needing an act to trigger the process of leaving the EU. That arises under Article 50 of the Lisbon Treaty and should be done in accordance with the Constitutional tradi-

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<sup>2</sup> Walloonian politicians also expressed concern that CETA will favour large corporations, and may erode environmental standards and weaken labour law protections.

<sup>3</sup> James Eadie QC stated this as the Government's view during the hearing of *M v Secretary of State/Santos v Secretary of State* and Downing Street subsequently confirmed this.

tions of each State. In the case of the U.K, without a written constitution that expression raises questions. Executing a decision to leave the EU, which undoubtedly will need legislation - actually a lot of legislation - is not the same as approving or ratifying a decision to leave. The Government's view is that this can be done through the exercise of the Royal prerogative. In more democratic terms, that means that the power to make and unmake treaties does not need approval of the legislative branch - it is an act within the power of the executive branch.

A legal case seeking guidance as to whether parliament needs to vote for Article 50 to be triggered was heard in the High Court last week.<sup>4</sup>

#### *Decision permitted by the EU Referendum Act 2015?*

The Claimants refuted the government's argument that the EU Referendum Act 2015 provides justification for exercising the prerogative power. The 2015 Act was merely advisory in nature. The Claimants argued that the failure of the 2015 Act to specify the legal consequence is fatal to the claim that it provided any legal justification for the trigger.

The Government responded that nothing in the 2015 Act suggests a need for a further Act to approve commencement of the withdrawal process. Although the 2015 Act does not prescribe steps to be taken in the event of a leave vote in the referendum that was not because Parliament or the electorate believed that the outcome of the referendum would not be given effect to: the Government had been clear in this respect.

#### *The ECA fetters prerogative power?*

The Claimant argued that notification under Article 50 using prerogative powers would be unlawful as a matter of English public law.<sup>5</sup> Lord Pannick, leading Counsel for the Claimants, sought to rely on two distinct constitutional principles in support of this proposition:

1. Prerogative powers cannot be used to pre-empt the decision of Parliament whether or not to continue with a statutory scheme.

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<sup>4</sup> Santos and M -v- Secretary of State for Exiting The European Union

<sup>5</sup> The origin of these principles may be dated back at least as far as Coke's case, in which Sir Edward Coke, the Chief Justice, stated that "the King by his proclamation or other ways cannot change any part of the common law, or statute law or the customs of the realm... Also, it was resolved, that the King hath no prerogative, but that the law of the land allows him."

2. Prerogative powers may not validly be exercised where this would frustrate or substantially undermine rights and duties established by Acts of Parliament.<sup>6</sup>

The rights and duties to be protected under the latter principle, according to the Claimants, include rights and duties established by the ECA 1972, this was the Act that approved the UK's accession into what has now become the European Union.<sup>7</sup> The decision to issue the notice to withdraw from the EU would ultimately remove a large number of rights from the law including the EU Charter of Fundamental Rights, without Parliamentary approval.<sup>8</sup> So the Claimants argued this would frustrate or substantially undermine Parliament's decision, made by the ECA (and in the other legislation), to implement European law.

The Government responded that the accession of the UK to what is now the EU was agreed by the then Government, exercising its prerogative power to conduct foreign relations.<sup>9</sup> The UK's EEC treaty obligations, which included, critically, the application of European law in the UK's domestic legal system, could only be achieved by Act of Parliament, but this does not impinge upon the Executive's prerogative power to conduct foreign relations. This is the UK's standard dualist approach to international law.<sup>10</sup> The Government further argued that the ECA does not purport to regulate the prerogative to agree or withdraw from EU-related treaties, and accordingly the withdrawal process does not conflict with certain provisions in the ECA. So the exercise of the prerogative power to commence withdrawal does not frustrate or substantially undermine rights and duties established by Acts of Parliament.

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<sup>6</sup> Lord Pannick cited *Lakers* and *ex parte Fire Brigades Union* in arguing that this principle applied to the decision to issue the notice to withdraw.

<sup>7</sup> Indeed these rights and duties take priority over inconsistent national law. *Factortame* was cited as the authority for this.

<sup>8</sup> And the Great Repeal Act would not preserve EU rights in their entirety including rights that can only be conferred under EU law such as EU citizenship, the right to vote in EU parliamentary elections and rights enshrined in the EU Charter of Fundamental Rights.

<sup>9</sup> The courts have recognised this power. For example, in *McWhirter v Attorney General* [1971] 1 WLR 1037, Lord Denning states at (1040): "*The treaty-making power of this country rests not in the courts, but in the Crown; that is Her Majesty acting upon the advice of her Ministers. When her Ministers negotiate and sign a treat, even a treaty of such paramount importance as this proposed one, the act on behalf of the country as a whole. They exercise the prerogative of the Crown. Their actions in so doing cannot be challenged or questioned in these courts.*"

<sup>10</sup> The UK is a 'dualist' state, unlike many continental European countries, which are 'monist'. In dualist states a treaty ratified by the Government does not alter the laws of the state unless and until it is incorporated into national law by legislation. This is a constitutional requirement: until incorporating legislation is enacted, the national courts have no power to enforce treaty rights and obligations either on behalf of the Government or a private individual.

Arrangements are already in place for a an urgent appeal all the way to the UK Supreme Court, and the case is currently scheduled to be heard there in December.

So the situation will be resolved by the end of the year at the latest. So that will clear the way for the Government to give notice of our departure in March next year which will start an inexorable movement towards exit which has to be completed within 2 years unless extended by the remaining Member States. Since delivering this address the High Court has ruled against the Government. The matter goes by the Supreme Court.

This is the timetable that leads us to exit in 2019.

In fact, even if the court does not rule the way I expect, the decision is more likely than not to end up in the same place because members of parliament, if told by the Supreme Court it is for them to decide, will still grit their teeth even if it is not their personal view, and approve exit. Anything else would raise huge issues about disregarding the view of the electorate. There is clearly some nervousness on this point, however. There is a regional element and the risk that the SNP will derail any attempt to get this smoothly through the House of Commons. An unnamed cabinet minister has reportedly warned of the possibility of flooding the House of Lords with friendly peers if those already there undermine the drive to implement the EU referendum result.

So we move inexorably to exit.

The consequences for the UK and for Europe itself will be massive and much of that is yet only dimly seen. In the referendum debates, predictions and counter predictions were traded like the blows between prize fighters. Will it lead to new trading opportunities for the UK or close the doors to its most popular markets; will migration levels drop as the UK takes back control of its own borders (if it does); will other European countries follow the lead of the UK and seek to escape the grip of Brussels and Berlin?

These are huge issues and not ones to address today.

I want to focus on a narrower question: the impact of Brexit on international arbitration. I will consider both:

1. the impact of Brexit on London arbitration; and

2. how Brexit may play into the future development of international trade relations and, specifically, the ISDS debate.

As to the first, my thesis is that Brexit will not lead to a diminution in the merits and popularity of London as a seat of arbitration or damage the popularity of English law as the commercial law of choice for many international transactions.

This is not to say that this will not have a major impact on the British legal profession. Indeed it already is having an impact. A number of leading law firms have realised that there are areas of law where an EU qualification may be of real importance. This is especially true in areas of corporate law activity including funds and investment management and data protection, and in EU and competition law. So they are encouraging their lawyers to take on an EU qualification so they can continue to practise in their chosen area after BREXIT. Applications to the Irish Bar in particular are soaring as British lawyers queue up to re-qualify there. Reports from the Irish Law Society in August indicate that more than 700 UK lawyers had applied to register so far this year, up from 100 registered during the whole of 2015. Most are Competition lawyers, fearful of losing their privileges. The right to argue before EU tribunals such as the Court of Justice of the European Union is only afforded to lawyers qualified in an EU state. And Ireland is the legal jurisdiction most equivalent to the UK - both English-speaking, both common law jurisdictions and with almost identical legal institutions.

Some clients will also want to deal with law firms situated in the EU. But the majority of UK firms already have offices in Europe.

Let me turn from that to the topic which interests this audience more, which is the effect on the dispute resolution market.

### **No time for a land grab**

Whilst London has been one of the most popular seats for arbitrations globally for many years, we have witnessed the rise and rise of Hong Kong and Singapore over the past twenty years to become major centres for international arbitration, and the arbitration community in Australia is also thriving. Some arbitration practitioners have seen Brexit as London arbitration's loss and Asian arbitra-

tion centres' opportunity. Yet my belief is that Brexit will not mean a land grab for London arbitration cases by any other centres, Singapore, Hong Kong, Sydney and Melbourne included.

And those who are thinking and plotting otherwise should look at the hard facts.

Last year, during its Centenary conference in London, The Chartered Institute of Arbitration published a list of 10 features necessary to make for a safe, effective, and above all, successful seat for arbitration.<sup>11</sup> These were drawn up after a detailed consultation process with experienced arbitrators and arbitration lawyers. They covered:

### **1. Law**

A clear effective, modern international arbitration law recognising and respecting the parties' choice of arbitration as the method for settlement of their disputes.

### **2. Judiciary**

An independent judiciary, competent, efficient, with expertise in international commercial arbitration and respectful of the parties' choice of arbitration as their method for settlement of their disputes.

### **3. Legal expertise**

An independent, competent legal profession with expertise in international arbitration and international dispute resolution, providing significant choice for parties who seek representation in the courts of the seat, or in the international arbitration proceedings conducted at the seat.

### **4. Education**

An implemented commitment to the education of counsel, arbitrators, the judiciary, experts, users and students of the character and autonomy of international arbitration and to the further development of learning in the field of arbitration.

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<sup>11</sup> Chartered Institute of Arbitration, "CI Arb London Centenary Principles" <http://www.ciarb.org/docs/default-source/ciarbdocuments/london/the-principles.pdf?sfvrsn=4>

## **5. Right to representation**

A clear right for parties to be represented at arbitration by party representatives (including but not limited to legal counsel) of their choice whether from inside or outside the seat.

## **6. Accessibility and safety**

Easy accessibility to the seat, free from unreasonable constraints on entry, work and exit for parties, witnesses, and counsel in international arbitration, and adequate safety and protection of the participants, their documentation and information.

## **7. Facilities**

Functional facilities for the provision of services to international arbitration proceedings including transcription services, hearing rooms, document handling and management services, and translation services.

## **8. Ethics**

Professional and other norms which embrace a diversity of legal and cultural traditions, and the developing norms of international ethical principles governing the behaviour of arbitrators and counsel.

## **9. Enforceability**

Adherence to international treaties and agreements governing and impacting the ready recognition and enforcement of foreign arbitration agreements, orders and awards made at the seat in other countries.

## **10. Immunity**

A clear right to arbitrator immunity from civil liability for anything done or omitted to be done by the arbitrator in good faith in his or her capacity as an arbitrator.



The UK and London in particular have all these attributes in plenty.

Importantly, none of the criteria depend upon the UK's membership of the EU. Moreover, we can expect London to continue to embody all these attributes notwithstanding the UK's exit from the EU.

Coupled with its historical reputation for high standards of judicial integrity, the independence of its legal profession, and the efficiency of arbitral dispute resolution, for decades parties have chosen, and will continue to choose, London as a preferred seat of arbitration. Brexit will not impact on this.

The English Arbitration Act, the 1996 Act, has already been tested and implemented by a cadre of highly qualified Judges versed in arbitration law, and the UK and London in particular has a cadre of well-supported and highly experienced arbitration specialists.

During a speech earlier this year, one senior member of the English judiciary, Lord Thomas, made some remarks which were perceived by many in the arbitration community to be an attack on commercial arbitration in London.<sup>12</sup> Lord Thomas has since denied that he was launching "an attack on arbitration" adopting a conciliatory tone, suggesting that the arbitral community and judges must work together to meet the "twin challenges" of making UK dispute resolution services "the best in the world" and keeping the law up-to-date. Nonetheless his proposals, including a suggestion to loosen the restrictions on appeal in the Arbitration Act, would undermine the attractiveness of London as a seat and are unlikely to be incorporated into UK arbitration law.<sup>13</sup>

As to the enforceability of awards in London seated arbitrations, adherence to the New York Convention is what makes international arbitration effective. It is the most widely used tool for enforcing international arbitration awards. The UK is and will remain a signatory to the Convention post-Brexit. Accordingly, London-based arbitral awards will continue to be enforceable in all countries that are signatories to the Convention – including Australia, and the 27 Member States of the EU. Finally, London is home to world-renowned institutions such as the LCIA, and provides a neutral forum in which parties of different nationalities can arbitrate disputes.

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<sup>12</sup> He stated that arbitration clauses represent "a serious impediment to common law". He also complained that parties choose arbitration to avoid the interference of the courts.

<sup>13</sup> See Lord Justice Thomas, "Launch of The City UK's Legal Services Report 2016" (20 July 2016), accessed at <https://www.judiciary.gov.uk/wp-content/uploads/2016/10/lcj-speech-launch-of-thecityuk-legal-services-report-2016.pdf>

London has been a leading arbitration centre for many years before we joined the EU. And it will continue for many years after we leave. So the success of London arbitration depends in no way upon the UK's membership of the EU.

Actually, I am increasingly of the view that though Brexit does present its challenges, for arbitration, it may present an opportunity. In fact leaving the EU will present new opportunities for English law to enhance its usefulness and ultimately popularity even more. Let me identify two reasons for that.

The first is what I will term the decontamination of English law. In many areas of law, European law has coloured traditional common law. Some of the reason for that is because English legislation and law has had to implement EU regulations and directives: in company law, in consumer law and in many other areas.

At the same time there has been a convergence of British law with European principles and concepts. I will give one example from administrative law.

Traditionally the review of executive action under English law has been limited. Procedural defects in decision making may give rise to a challenge to an administrative decision or executive act. But the courts would not interfere with the substantive merits of the decision. They came close to it in the *Wednesbury* test based on the decision in *Associated Picture Houses v Wednesbury Corporation* (a test that is of course followed in Australia). Under that test, a Court can strike down an executive act or administrative decision if satisfied that "no reasonable body could have reached that decision". Bordering on a review of merits, it remains a narrow test justified on the basis that if no reasonable body could reach that conclusion it followed that the body had failed procedurally by taking into account irrelevant facts or failing to take into account relevant facts. Even so, the court would deny it was really entering into the merits of the decision.

European Union and indeed European human rights law however works on a different basis, allowing a review of executive acts with a merits based test which examines the decision. The classic statement is that the decision taken is not necessary or proportionate to the aim intended. This is a very clear merits test. And the Supreme Court last year in *Pham v Home Secretary* (which concerned the lawfulness of the deportation of a former Vietnamese national) held that proportionality was now to be recognised as a ground for judicial review under English law.

The result of these different changes has been to modify English law from its pure common law rights. Some people have mourned these developments. And believe English law is the poorer for these jurisprudential changes.

Whether English law regains its purity in that sense again will depend on the approach that judges now take. Many have embraced the European style of decision-making so it is questionable if they could easily revert to older and more traditional approaches to decision-making. One of the reasons this approach is taken at the moment is that often decisions are subject to review by the European Court. If they touch on European Union law they may end up in the European Court of Justice in Luxembourg. If human rights are involved in the European Court of Human Rights in Strasbourg. Both operate the same principle. So judges will decide these cases with an eye towards the European Court. That will no longer be necessary after the UK exit from the EU.

The second advantage is to do with the system of law we now have for determining jurisdictional issues in court cases. This is the so-called Brussels regime under which the allocation of cases to national courts is not determined by the traditional inter play between broad jurisdictional reach coupled with the exercise of discretion through forum conveniens principles. These principles will be very familiar to many American lawyers but this system leads to some surprisingly unintended consequences. One of them flows from the fact that the Brussels regime operates according to rigid mechanistic rules.

They include two in particular. First that a defendant should primarily be sued in the place where he or she is domiciled, essentially the place of residence for a natural person and place of incorporation for a company. The second is that in a contest between two courts having jurisdiction generally it is the court first seized of the matter which takes the case. And the system does not allow of forum conveniens challenges.

The system has been used to great effect by some lawyers bringing cases into the English courts which essentially relate to events outside England. An environmental claim relating to mining in an African country can find itself in the Strand in London because the lawyers sue the parent company which is British Incorporated and the African subsidiaries are brought in as necessary or proper parties.

As an example, in June this year the English Court rejected jurisdiction challenges by a UK-domiciled company and its Zambian-domiciled subsidiary, allowing a group claim brought by

1,826 Zambian villagers in respect of alleged environmental pollution in Zambia to proceed against both companies: *Lungowe & others v Vedanta Resources PLC and Konkola Copper Mines PLC* [2016] EWHC 975 (TCC).

I ought to declare an interest at this point. I have another case where I hope to persuade the Court to reach a different result.

But it will be open to the United Kingdom once released from the constraints of EU membership to revert to a different system, indeed the old system of foreign convenience.

Whether they will take that course depends on many factors. It would be a bold and difficult move to make involving the whole sale repeal of existing jurisdictional legislation and setting aside of much case law.

One potential boon for London arbitration, if the UK remains outside of the EU and the EEA and applies WTO trading rules, would be freedom from restriction on the UK courts' ability to issue anti-suit injunctions directed at European court proceedings (with the caveat that the injunction is obviously in personam).

Anti-suit injunctions are commonly used by the English courts to protect arbitration agreements. By way of example, in *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydro-power Plant LLP*, the UK Supreme Court granted an anti-suit injunction in respect of proceedings brought in breach of an arbitration agreement, where no arbitration proceedings had been brought or contemplated.<sup>14</sup> In contrast, there has always been some uncertainty as to the legality of anti-suit injunctions in EU law. The conservative view is that EU law does not permit anti-suit injunctions restraining proceedings in the EU;<sup>15</sup> they may only be granted by EU Member States' courts to restrain proceedings brought in breach of an arbitration agreement outside of the EU.<sup>16</sup> Post-Brexit, there might be a move within the English courts to re-establish the use of anti-suit injunctions in

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<sup>14</sup> [2013] UKSC 35.

<sup>15</sup> The reasoning being that such injunctions undermine the principle of comity between EU Member States.

<sup>16</sup> Brussels (Recast) Regulation governs the jurisdiction of EU Member courts over civil and commercial matters and provides guidance on resolving conflicts of jurisdiction between courts of the various Member States. In *Allianz SpA and Ors v West Tankers Inc* (CJEU Case C-185/07) the CJEU controversially held that it was incompatible with the earlier, 'non-recast' Brussels I Regulation "for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement." This decision has been overturned by *Gazprom OAO v Lithuania* (CJEU Case C-536/13). The recast Regulation includes Recital 12 which states that there is an absolute exclusion of arbitration from its scope. However, it still remains to be seen whether *West Tankers* will survive under the recast Brussels I Regulation after *Gazprom*.

respect of proceedings before EU Member States' Courts. At present, if an Indonesian party and, say, an Italian party have a contract agreeing to arbitration of disputes in London, the Italian party could obtain an anti-suit injunction against the Indonesian party for commencing court proceedings in Indonesia, but the English court could not issue an anti-suit injunction against the Italian party if it commences litigation in the courts in Italy. After Brexit, equality of arms may be restored.

## **Brexit's implications for ISDS**

However, it is not all unalloyed excitement at new opportunities.

Let me take the position on investment arbitration.

Of course Australian politicians, arbitration professionals and the wider public have been engaged in the ISDS debate for some time, particularly with the Phillip Morris plain packaging case brought against Australia so frequently being cited by critics of ISDS in general and TPP and TTIP in particular. The Australian Government policy on ISDS has changed twice in recent years,<sup>17</sup> and an ultimately unsuccessful Bill drawn up in 2014 (by Green senator Whish-Wilson), proposing a prohibition on ISDS in future treaties, has also given concerned parties in Australia another opportunity to debate the issue.<sup>18</sup>

This audience will know well of the raging debate that the negotiations for TTIP and TPP have given rise to: NGOs and politicians on the left complaining in varying degrees of polemic about

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<sup>17</sup> Australian politicians have had a difference of opinions on the merits of ISDS. Having previously tended to include ISDS in its trade agreements (21 out of 23), a Labor government led by Julia Gillard opted to end this policy in 2011, only for the policy to be quietly reinstated by the then Abbott led Liberal government in 2013. ISDS has since been included in Australia's FTA's with Korea and China (albeit not with Japan, reflecting that particular, conciliatory relationship) and as you will know well ISDS has been included in the agreed text of the Trans Pacific Partnership, albeit subject to a number of ISDS drafting reforms, such as the right to regulate in particular sectors.

<sup>18</sup> In Australia, Greens Senator Whish-Wilson introduced the Trade and Foreign Investment (Protecting the Public Interest) Bill 2014. The Bill sought to prohibit the Commonwealth of Australia from entering into an agreement with one or more foreign countries that included an ISDS provision. The Senate referred the Bill to the Foreign Affairs, Defence and Trade Legislation committee for inquiry and report, which held a public consultation, responses to which included over 11,000 emails using an online campaigning tool against ISDS. The Committee was not convinced that legislation is the best mechanism by which to address the concerns raised about risks associated with ISDS provisions, and considered that such risks could and should be managed more effectively and in ways which do not require legislation, including careful treaty drafting (of both old and new agreements) and development of a well-balanced Model Investment Treaty. It recommended that the Bill not be passed and the Bill ultimately lapsed on dissolution of the Senate in 2016 prior to the most recent general election. In late 2014, the Senate also referred the matter of Australia's treaty making process to the Foreign Affairs, Defence and Trade References Committee for inquiry. The resulting report focused on Australia's treaty making process (rather than the merits of ISDS), concluding that the process requires more transparency and public scrutiny.

whether important social issues such as health issues on smoking, nuclear power, and regulation of the private sector are taken away from the control of governments democratically elected by the current ISDS system of private and still to a large extent confidential (they would say secret) private tribunals.

Despite a strong if late rally by the arbitral community against these changes far reaching proposal for change are being considered for the Investment Chapter in TTIP. The current EU commission proposal would do away with our current system of arbitration to replace it with a two tier system of a permanent investment court with judges appointed for 6 year terms to sit on the cases.

If and when such a system is agreed with the USA no EU state will be able to operate a different system with the US as competence for negotiating trade deals with third States is now with the EU since the Lisbon Treaty. Of course elections in the United States in two weeks time may affect the likelihood of any deal with the United States.

Australia is also in the process of negotiating a free trade agreement with the EU, although discussions had been stalled by Italian objections to Australian anti-dumping duties on canned tomatoes.

It might be thought that being freed of the shackles of having to agree to the same system by leaving the EU would give the UK an advantage. I do not rule out that in time that could be the case. But it will take time to work out a new trade deal.

The view of the EU is that the UK cannot even begin to negotiate such deals until we have left the EU. Indeed, last month a leaked Brussels paper indicated that plans are being drawn up to take the UK to court if it starts such negotiations, as seemingly the UK intends to do.

This issue has been played out in UK-Australia trade relations in recent weeks.

There appears to be strong political commitment from Australia and the UK for a post-Brexit free trade deal. Following a meeting between Prime Ministers Teresa May and Malcolm Turnbull in September, a bilateral trade working group has been established to focus on considering the parameters of such an Australia-UK free trade agreement.

This will be an important treaty for both countries. Australia's export figures show the UK to be one of its most important trading partners. The UK is also Australia's second largest source of for-

eign direct investment behind the US<sup>19</sup> and Australia's top export market within the European Union.<sup>20</sup>

On the other side, Australia is presently the 20<sup>th</sup> largest export market for the UK,<sup>21</sup> but UK-Australia relations may, mutually, become more significant in a post-Brexit environment.

For example, Wine Australia (the Australian Government's industry body for wine) has speculated in a recent paper on Brexit that in leaving the EU, the UK would be able to negotiate its own import taxes and as a consequence Australian wine producers may enjoy a level playing field with European wine producing countries such as France and Italy that previously had a competitive advantage in the UK wine market.

In a joint statement (also made in September), the UK trade minister Liam Fox and his Australian counterpart Steven Ciobo declared that the working group will aim to "ensure the expeditious transition to FTA negotiations when the UK has formally completed its negotiations to exit the EU". The group will meet twice a year, with the first meeting expected to take place in early 2017 and further discussions scheduled for later this year. As a gesture of good intent, Australia has also offered to lend the UK some of its expert trade negotiators, since British trade negotiators are in short supply (although there was talk of this being part of a trade for the Rugby Lions' expertise and knowhow).

However, since Brussels expressed its view that the UK cannot even negotiate trade deals until it formally leaves the European Union, the Australian government has taken a more cautious tone, making clear that even negotiations with the UK cannot begin until the UK leaves the European Union, and saying that the bilateral working group will focus on the parameters of a free trade agreement rather than formal negotiations.<sup>22</sup>

It remains to be seen what trade deals the UK will enter into will look like.

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<sup>19</sup> The UK accounts A\$500 billion worth of investment (16.5% of all foreign investment) in Australia in 2015

<sup>20</sup> Overall exports of goods and services places the UK as Australia's eight largest export market for 2014 (A\$8.3 billion), with the UK accounting for 37.4% of Australia's total exports to the EU.

<sup>21</sup> As 20<sup>th</sup> largest export market Australia represent only 1.2% of the UK's total exports. Australia ranks 36<sup>th</sup> as an import source to the UK (0.5% of total imports).

<sup>22</sup> Steven Ciobo has opined that "the UK is unable to negotiate or sign an agreement prior to the formal exit from the EU." Accordingly, the remit of the bilateral working group appears to have been reduced to preliminary discussion "scoping out the parameters of a future ambitious and comprehensive Australia-UK free trade agreement" rather than formal negotiations. See <https://www.theguardian.com/politics/2016/sep/07/no-free-trade-deal-until-brexit-settled-australian-minister-steven-ciobo>

However, whatever form the UK's trade deals take, Brexit will have implications for the ISDS debate. It is quite plausible that, even if the US agrees to the Investment Court model in TTIP, it continues to opt for conventional ISDS in its other trade deals, in which case we may not see the inexorable rise and rise of the Investment Court system. The UK's decision to opt for one model or the other will also influence the course of the debate, particularly as the UK will have to become one of the more active trade negotiating states globally in the coming years.

### **Concluding remarks**

Traditionally the links between the Australian and English legal systems have been strong: we see it in our common legal heritage, in our shared use of the great decisions of brilliant common lawyers from both the UK and Australia and in the steady number of young and enthusiastic Australian lawyers who come to England to study, to work for a while and some time to stay. I have several in my own office. Our embrace of Europe did not stop that though it slowed and weakened it. But now that we have decided as a nation to row our own path in the world outside the EU is it time to look to strengthen and reinforce these links – not to go back to the days pre 1972 when we took the path to Brussels but to force a new and invigorated cooperation in the field of the common law as equal partners.

If it is time to do that it will not be for Governments or political parties but for we lawyers. So now is the time to examine closely areas for greater cooperation and collaboration – in training, in development of the law and in finding better ways to serve our clients. Now that the last vestiges of hope some had that Brexit would not happen are gone we should look to the opportunities that lie ahead.

Meanwhile and irrespective of Brexit, London will remain a leading arbitration hub. The course that the ISDS story will take is still unclear, but Brexit will inevitably also have an impact on the landscape of investment treaty arbitration.