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The New World Order in Dispute Resolution

Brexit and the Trump Presidency

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Abstract

The Brexit vote and Donald J Trump as the leader of the Free world in 2016 brought in a new world order. Two hugely important and unexpected events of 2016. Both have called into question the stability of established international commercial dispute resolution schemes in the United Kingdom and the United States in our tech savvy world. As the impact of both events unfolds, adaptations made to the existing dispute resolution schemes will be negotiated and the role that technology can play in the new approaches to international commercial dispute resolution will be determined. Consequently, there has been the changing face of Western politics after the Cold War, based on traditional group identity giving way to an uncertain landscape in which the political class struggle to define. The impact and disruption of technology in politics has given everyone a voice regardless of social class. Consequently, the EU under Mr Juncker and the UK Prime Minister seem to have mutual respect in their negotiations, given that the UK has made a number of notable concessions in order to move the trade discussions forward.

Under Donald Trump presidency, the state of North America Free Trade Agreement (NAFTA) seems binary with the probing question will NAFTA survive or not. NAFTA is currently undergoing transformation, a process that incorporates Investor-State Dispute Settlement (ISDS).

Keywords: dispute resolution, Brexit, Donald Trump, technology, trade.

Two unexpected events in 2016, Brexit and the election of Donald Trump, have called into question the stability of established international commercial dispute resolution schemes in the United Kingdom and the United States. As the impact of both events unfolds, adaptations made to the existing dispute resolution schemes will be negotiated and the role that technology can play in the new approaches to international commercial dispute resolution will be determined.

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1 The United Kingdom and Brexit

The United Kingdom has long been recognized in both academic[1] and practitioner literature[2] as a prime destination for international commercial dispute resolution. There are some explanations for this. For example, the United Kingdom has a long-standing role as a citadel of legal education oriented towards international and transnational litigation and dispute resolution. In addition, UK institutions are notable for dealing with disputes that not only are complex but also involve multiple jurisdictions.[3] Data support evidence of the United Kingdom's popularity as a destination for dispute resolution. Up to 90% of disputes of a commercial nature that involve UK law firms will involve a non-UK disputant.[4] In one particular venue, a majority of disputants (over approximately 80%) at the London Court of International Arbitration were not of UK origin. The international nature of commercial dispute resolution in the United Kingdom notwithstanding, the reality is that the United Kingdom's unique position as a global centre of commercial dispute resolution is threatened by the decision of the UK government Treaty of European Union commonly referred to as Treaty of Lisbon (TEU) following the 23 June 2016 referendum,[5] which resulted in 51.9% of registered voters in the country voting in favour of leaving the European Union. There appears to be no unanimity of thought on exactly what the referendum means for government action.[6] As the debate on the legitimacy of the referendum rages, government lawyers state that all that is required is an exercise of prerogative power, that is, a non-statutory power carried out by the Executive on behalf of the Crown.[7] However, some argue there is the requirement for legislation. Consequently, practitioners believe there is a legal challenge and could make a request to the courts to examine and determine whether an act is needed to trigger Article 50.[8] Nevertheless, in accordance with the wishes of the British people Prime Minister Theresa May triggered Article 50 of the Treaty of the European Union. With the trigger of Article 50, the argument for an Act of Parliament is based on the nature of the relationship between statutory and prerogative powers.[9] The provisions of Article 50 of the TEU articulate the process by which a member

1 D. Roebuck & M. O'Reilly, 'Arbitration', *International Journal of Arbitration, Mediation and Dispute Management*, Vol. 74, No. 4, November 2008.

2 K. Barker, K. Fairweather & R. Grantham, *Private Law in the 21st Century*, 2017.

3 *Ibid*.

4 *Ibid*.

5 Referendum itself is not a decision; it is an expression of the wishes of the public. The European Union Referendum Act 2015 placed no legal requirement on the government of a state seeking to have a referendum or the legal requirement on the government to respond to the referendum. However, ignoring the wishes or the nullification of the wishes of the people would have grave political consequences.

6 A. Young, 'Article 50: Playing constitutional Russian roulette?', University of Oxford, 28 July 2016, available at: <www.ox.ac.uk/news-and-events/oxford-and-brexit/brexit-analysis/article-50>.

7 *Ibid*.

8 *Ibid*.

9 *Ibid*.

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state of the European Union may withdraw from the European Union. The UK government has initiated this TEU provision with the intention that the country will withdraw completely from the European Union by 30 March 2019.

With the trigger of Article 50, Britain will leave the European Union, a divorce procedure commonly referred to as Brexit, on March 29, 2019 under the premiership of Theresa May. The United Kingdom is therefore formally on its way to exiting the European Union. However, formal judicial relationship with the European Union will still be significant after March 2019, when Brexit does come into full operation.[10] Consequently, the United Kingdom is seeking to ensure there is a deeply attuned and special partnership with the European Union, as a functionally engaging relationship will be instrumental to the peaceful co-existence of the United Kingdom and the European Union. Reciprocal cooperation across borders is important for both the United Kingdom and the EU consumers who occupy the 28 Member States landscaped across Western and European Europe.[11]

The success of Brexit will be significant on issues that relate to the ability of the United Kingdom to resolve disputes on the basis of two important resolutions: first, the amicable legal agreement between the United Kingdom and the European Union, and, second, the satisfactory exit plans for UK citizens. There are communal rules to govern dealings between the UK and EU legal systems. Subsequently, with the exit of the United Kingdom, the European Communities Act (ECA) will be repealed by virtue of the Repeal Bill.[12] Therefore, as a non-member state outside the direct jurisdiction of the Court of Justice of the European Union, the United Kingdom will need to seek comprehensive arrangements for civil judicial cooperation with the European Union. Beyond the United Kingdom's relationship with the European Union, the United Kingdom will also aspire to maintain civil judicial cooperation internationally through multilateral treaties, conventions, and standards, as well as through engagement with the international bodies that develop new initiatives.[13]

Continued examination of the possible impact of the United Kingdom's withdrawal from the European Union on the country's role in international dispute resolution is important because the literature remains inconclusive on its actual impact. For example, scholars such as Professor Timothy Garton Ash[14] and Scot Peterson[15] suggest that there is a possible negative effect of this withdrawal. On the other hand, scholars such as Professor Sir John Bell[16] and Professor Sandra

10 M. Cross, *The Law Society Gazette*, ABC 102, 175, 22 August 2017.

11 HM Government, '*Providing a cross-border civil judicial cooperation framework – The Future Partnership Paper*'.

12 The Repeal Bill, which was introduced in Parliament on 13th July 2017, which contains a provision that will repeal the ECA when the United Kingdom leaves the European Union.

13 HM Government, *supra* note 11.

14 T.G. Ash, 'A year after voting for Brexit, Britain's divided, and in uncharted waters', *The Guardian*, 27 June 2017.

15 S. Peterson, 'Complex Negotiations are Dynamic and Unpredictable', Oxford University, 23 March 2017, available at: <www.ox.ac.uk/news-and-events/oxford-and-brexit/brexit-analysis/sturgeon-may-approach-to-brexit>.

16 Sir J. Bell, 'Brexit Offers Opportunities for UK Scientists', *Financial Times*, 5 September 2016.

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Fredman[17] do not anticipate any long-term negative impact on the country's role in international dispute resolution. However, the reality is that such an effect must be considered within the country's international legal obligations emanating from documents such as the EU Alternative Dispute Resolution (ADR) Directive (The European Union, 2013).

The United Kingdom is keen to reassure its citizens and immigrants that its exit from the European Union in 2019 will be smooth and simplified. To that effect, the United Kingdom will bring an end to the direct jurisdiction of the Court of Justice of the European Union (CJEU)[18] and will work towards a stronger United Kingdom in the following ways:

- maximizing certainty for individuals and businesses;
- ensuring that they can enforce their rights in a timely way;
- respecting the autonomy of the EU law and UK legal systems while taking control of our laws; and
- continuing to respect international obligations.[19]

The United Kingdom will thus take steps to implement and enforce agreements with the European Union within its legal context.

Consequently, the repeal of the ECA[20] when the United Kingdom leaves the European Union means that matters regarding domestic implementation of UK-EU agreements will be addressed through the United Kingdom's local legal process.[21] The United Kingdom and the European Union are currently working on arrangements for judicial supervision, enforcement, and dispute resolution. However, the United Kingdom considers enforcement and dispute resolution as two distinct issues, and it is not essential, or indeed common, for one body to carry out both functions in this way.[22] Therefore, the paramount issue for the United Kingdom is to uphold the rule of law and its ability to meet international obligations. Notably, dispute resolution mechanisms are common within domestic and international agreements. Usually, these arrangements vary depending on the particular agreement entered. However, the UK government is seeking a "close and comprehensive cross-border civil judicial cooperation on a reciprocal basis" with the European Union, one which reflects the substantive principles of collaboration under the current EU framework.[23] Notwithstanding Brexit, there will be

17 S. Fredman, 'Parliamentary Sovereignty', Oxford University, 25 January 2017, available at: <www.ox.ac.uk/news-and-events/oxford-and-brexit/brexit-analysis/parliamentary-sovereignty>. She argued that though the human rights implications of leaving the European Union are profound, with neither a justiciable bill of rights, nor the binding nature of EU rights, Parliament remains the last custodian of human rights in the United Kingdom.

18 HM Government, *supra* note 11.

19 *Ibid*.

20 European Communities Act (ECA), 1972. When the United Kingdom leaves the European Union, the ECA, the Treaties and the jurisdiction of the CJEU and the doctrine of direct effect will cease to apply in the United Kingdom.

21 HM Government, *supra* note 11.

22 *Ibid*.

23 Cross, 2017.

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an understanding that reflects years of existing close relationship between the United Kingdom and the European Union,[24] one that reflects where litigating on a cross-border case involving UK and EU parties, the dispute resolution process will be simpler, easier and efficient for all concerned.

2 The Trump Administration and NAFTA

Across the Atlantic, the Trump presidency is bringing uncertainty in the same mould as the uncertainty developing in the United Kingdom. The North American Free Trade Agreement (NAFTA)[25] is currently undergoing transformation, a dynamic process that incorporates Investor-State Dispute Settlement (ISDS).[26] In some ways, arbitral dispute resolution is unpredictable under the Trump administration because protectionism seems the preferred route instead of the current state of globalization.[27] The chauvinistic desire for protectionism will most likely take the form of exploring and re-negotiating international trade remedies. These international business trade remedies depending on the particular remedy being sought will be initiated at the request of an industry. This could be the US Trade Association or labour unions or even in some cases by the unique action of the US government.[28] NAFTA is preferred to Trans-Pacific Partnership (TPP) which is the largest regional trade agreement , one that was intended to create new terms for trade and business investment among the signatories to the TPP agreement. However, in November 2016 President Donald Trump withdrew the United States from the trade pact. The preference of NAFTA to TPP agreement by the Trump Administration in part is because NAFTA provides for pulling out, under Article 2205.[29] Given the current US position on NAFTA re-negotiations, one is mindful that the US Congress approved NAFTA by a congressional-executive agreement endorsed by a majority vote of each house of Congress.[30] At the moment, there is no uncomplicated understanding of the US objectives that would enable stakeholders interested in either of the two major arbitral processes under NAFTA and the Investor-State Dispute Settlement make informed decisions.[31] However, the Trump presidency has publicly hinted at plans to give the trade deal a massive overhaul, even though NAFTA has been in existence for over

24 HM Government, *supra* note 11.

25 *See* <https://assets.donaldjtrump.com/_landings/contract/O-TRU-102316-Contractv02.pdf>.

26 C. Simson, 'What to Expect On Investment Arbitration in NAFTA Reboot', *LAW 360*, 23 August 2017, available at: <https://www.crowell.com/files/20170823-What-To-Expect-On-Investment-Arbitration-In-NAFTA-Reboot.pdf>.

27 G. Hussain & R. Huey, 'The Future of International Trade Litigation and the Trump Administration', *Int T.L.R.*, Vol. 23, No. 2, 2017, pp. 49-57.

28 *Ibid*.

29 G. Hussain, 'The Future of NAFTA in the Trump administration', *Int.T.L.R.*, Vol. 23, No. 1, 2017, pp. 29-35.

30 "[A] party may withdraw from this Agreement six months after it provides written notice of withdrawal to the other Parties. If a Party withdraws, the Agreement shall remain in force for the remaining Parties".

31 S. Potter, *et al.*, 'Arbitral Dispute Resolution in Flux: US positions in NAFTA Renegotiations', *The International Arbitration Blog*, 2 August 2017.

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twenty years and has tied the North American continent's economies together.[32] It is left to be seen which aspects of NAFTA will be changed and whether the Trump administration would contemplate pulling out of NAFTA as a way of pressuring Canada and Mexico to agree to pro-US concessions as part of a deal.[33] Nevertheless, regardless of how much NAFTA changes, there is the likelihood that there will be an increase in international trade litigation.[34] The promise to reform and repeal NAFTA creates a heightened possibility of the filing of international trade remedy actions, such as anti-dumping, countervailing duty and safeguard operations.[35] One would therefore wonder, given the potential rise in trade cases, what could change in the coming months.[36] International trade filings vary depending on individual factors such as general economy, the profitability of particular industries and industry inclination to seek trade relief. However, over the past few years, anti-dumping and countervailing duty filings have increased, both in numbers and in the size of the cases, which have resulted in the filing of major cases.[37]

The Trump administration has identified trade-related dispute resolution mechanisms it intends to change or even eliminate. However, there has been a strong indication that it intends to maintain US policies that favour the use of ISDS.[38] One of the powers ISDS gives to companies is the ability to bypass local courts because domestic courts do not have the time and resources to acquire an adequate level of investment trade expertise such as required from an appointed tribunal.[39] Consequently, companies would rather challenge States from the outside.[40] This automatically gives companies equal standing with States.[41] From a constitutional perspective, ISDS works well for companies with foreign direct

32 NAFTA was negotiated under the fast-track authority of the Omnibus Trade and Tariff Act of 1988, which made the termination and withdrawal provisions of s.125 of the 1974 Act applicable to NAFTA.

33 J. Bottoni, 'NAFTA, Trump and Canada: A guide to the trade file and what it could mean for you', *The Globe and Mail*, 30 August 2017, available at: <https://www.theglobeandmail.com/news/politics/trump-nafta-canada-mexico-trudeau/article33715250/>.

34 Hussain, 2017.

35 Hussain & Huey, 2017.

36 *See* United States International Trade Commission, 'Antidumping and Countervailing Duty Investigations', <www.usitc.gov/trade_remedy/731_ad_701_cvd/investigations.htm> [Accessed 15 August 2017].

37 Hussain & Huey, 2017.

38 David Earnest, 'The Trump Administration's Current Policy on ISDS', *Oxford University Press*, 24 April 2017, available at: <http://oxia.ouplaw.com/page/trump-ISDS> (accessed 16 August 2017).

39 C. Tietje & F. Baetens, *The Impact of (ISDS) in the Transatlantic Trade and Investment Partnership*, 2014, pp. 68-69, available at: <http://media.leidenuniv.nl/legacy/the-impact-of-investor-state-dispute-settlement-isds-in-the-ttip.pdf> (accessed 16 August 2017).

40 Joost Van Dam,'A Future in Investor-State Dispute Settlement: a Good Idea or Not', *Arbitration*, Vol. 82, No. 4, 2016, pp. 363-370.

41 R. Dolzer & C. Schreuer, *Principles of International Investment Law*, Oxford University Press, 2008, p. 20.

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investment because they are being given sovereignty.[42] The ISDS is complicated and controversial,[43] but a common feature of trade and investment treaties contains ISDS provisions to provide investors who believe they are disadvantaged by a host government's actions in breach of the treaty to initiate an arbitration dispute. However, critics of ISDS argue that the system is slanted in favour of the investors.[44] The clearest indication of the Trump administration's views on ISDS is contained in a March 28, 2017 letter from the acting U.S. Trade Representative to the U.S. Senate Finance and Ways & Means Committees, which provides a draft negotiating proposal and objectives for updating NAFTA. Broadly, the letter states that the U.S. intends to "preserve U.S. rights and obligations under the NAFTA" and sets out nineteen objectives for future negotiations. One prominent objective is to eliminate Chapter 19 of NAFTA, which contains the dispute settlement process for challenging anti-dumping and countervailing measures. In contrast, under the heading 'Investment,' or Chapter 11 of NAFTA, the objective is to 'maintain' and 'improve' current ISDS procedures. Specifically, the United States intends to develop procedures to settle disputes between US investors and NAFTA countries through mechanisms that discourage the filing of frivolous claims, have procedures that ensure the proper selection of arbitrators and the expeditious disposition of claims, and contain procedures to ensure transparency and public participation in dispute settlement proceedings. For all intents and purposes, it is evident that the Trump administration currently supports the continued use of ISDS procedures.[45]

The emergence of Brexit in the United Kingdom and the Trump presidency in the United States were both unexpected. With Brexit, the United Kingdom is clear that international civil judicial cooperation is in the mutual interest of consumers, businesses, citizens and families in both the United Kingdom and the European Union. Brexit negotiators have stated the legal framework would be on a reciprocal basis, which would be tailored closely to the current EU system and would provide a clear legal basis to support cross-border matters. David Davis, Brexit Secretary, stated in "enforcement and dispute resolution" that this is the time for the United Kingdom to set out the legal regime it intends to adopt covering trade, citizens' rights, and security. The Prime Minister, Theresa May, proposed a 'new and unique' dispute resolution mechanism to oversee post-Brexit relations between the United Kingdom and the European Union.[46]

42 J. Kelsey & L. Wallach, '"Investor-State" Disputes in Trade Pacts Threaten Fundamental Principles of National Judicial Systems', 2012, pp. 1-9, available at: <https://www.citizen.org/sites/default/files/isds-domestic-legal-process-background-brief.pdf> (accessed 16 August 2017).

43 C. Welch, 'Fact or Folklore? Mythbusting Investor-State Dispute Settlement', *International Company and Commercial Law Review*, Vol. 27, No. 12, 2016, pp. 411-423.

44 Welch, 2016.

45 Earnest, 2017.

46 G. Parker, 'Davis Proposes Post-Brexit Dispute Resolution Mechanism on EU Relations', *Financial Times*, 21 August 2017, available at: <https://www.ft.com/content/7234155a-8599-11e7-8bb1-5ba57d47eff7> (accessed 21 August 2017).

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In the United States, Donald Trump's ascendancy to the office of the president seemed remote and his rhetoric on NAFTA was considered extreme.[47] Now that the Trump administration is actively working to renegotiate NAFTA, it remains to be seen what part of his campaign rhetoric was real and what part was political theatre.

47 *See* <money.cnn.com/2016/09/27/news/economy/donald-trump-nafta-hillary-clinton-debate/?iid=EL> (accessed 12 August 20).