Much has been said and written about the UK public’s decision in June 2016 to leave the European Union and the November 2016 election of President Donald Trump. It seems obvious that these momentous events will have profound socio-economic consequences, even if it is presently unclear how those consequences will play out and where they will be most felt.

Perhaps less obvious is the impact these changes will have on choices for resolving contractual disputes. In particular, arbitration looks to be an unlikely winner in both cases, albeit for different reasons.

In this article we examine the role of arbitration in the UK before Brexit and separately in the context of limiting class action proceedings in the U.S. before Trump, and the likely impact of those political events on the use of arbitration (and of class action waivers in the US) and conclude with a forecast of what lies ahead.

I. The use of arbitration in the UK

   A. Background

London is and has been for some time one of the most popular and widely used jurisdictions or seats for international arbitration, with strong legislative support in the form of the English Arbitration Act 1996. The English Courts have developed a non-interventionist approach, widely regarded as “arbitration friendly” in their interpretation of that Act. In particular, London is often considered the natural choice of jurisdiction or seat where English law governs a contract. Further, there is a considerable pool of experienced arbitrators, counsel, and experts in London, which is also home to popular arbitration institutions, such as the LCIA (London Court of International Arbitration) and CIArb (Chartered Institute of Arbitrators).

   B. Impact of Brexit on arbitration in the UK

Brexit is imminent. The British Prime Minister gave notice of the UK’s intention to withdraw from the EU (under Article 50 of the Treaty on European Union) on March 29, 2017, with the approval of the UK Parliament. Negotiations will now begin between the UK and the rest of the EU to agree on a withdrawal agreement. The UK will stop being an EU Member State on the earlier of a withdrawal agreement being concluded or two years from the date of notice. This two-year period can only be extended by the unanimous consent of the UK and all other (remaining) EU Member States. Therefore there is a prospect that the UK will exit the EU by the end of March 2019 unless the Article 50 process is extended. More detail about the implications of Brexit for businesses from a non-
political perspective can be found in our earlier Alert.

The Recast Brussels Regulation is a key EU instrument which, among other things, provides for the mutual recognition and enforcement of Court Judgments between EU Member States. The UK Government’s planned “Great Repeal Bill” will convert all EU law (at it applies in the UK) into domestic law on the day the UK leaves the EU, which should include the Recast Brussels Regulation. As a result, EU Court Judgments should, post-Brexit, continue to be recognized and enforced in the UK in the way they presently are under that Regulation. However, the reciprocal position is uncertain because, post-Brexit, UK Court Judgments will only continue to be recognized and enforced in the remaining EU Member States in the same manner as present if a specific agreement can be reached to this effect between the UK Government and the EU in the forthcoming Brexit negotiations.

By contrast, post-Brexit, arbitral awards issued by tribunals in London-seat arbitrations will continue to be enforceable under the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (more commonly known as the “New York Convention”) by virtue of the UK remaining a signatory in its own right. Currently, the New York Convention provides for the enforcement of arbitral awards on a reciprocal basis across 157 jurisdictions around the world, including all EU Member States.

Further, because the English Arbitration Act is unaffected by EU law, it will continue in force following the UK’s exit from the EU. The body of case-law that has developed in the English Courts concerning the interpretation and application of the Act will also continue to apply, providing parties currently entering into agreements with certainty on the future conduct of any London-seat arbitrations arising post-Brexit.

II. The use of arbitration in class action proceedings in the United States

A. Background

In the United States, class action litigation has for decades been a source of great attention and expense for companies across all industry sectors. Class actions have been employed by plaintiffs, including consumers, who are injured in a small enough way that bringing an individual lawsuit is simply not cost-effective. Through the use of the class action device, similarly situated class members can effectively resolve their claims. Unfortunately, the class action system has been subject to abuse by some plaintiffs’ attorneys as well as plaintiffs who have not actually suffered a concrete or redressable injury. One way in which this is accomplished is by forcing exorbitant settlements with companies that cannot afford to risk proceeding to trials on a class-wide basis. To cut down on unnecessary expenses and increase positive results for both sides, over the past decade an increasing number of companies have added to their consumer contracts provisions that require single party arbitration in lieu of class litigation or class arbitration. These arbitration provisions and class action
waivers have been subject to judicial review—including by the United States Supreme Court on several occasions—as well as media and political critique. Also see Article: Class Waiver Provisions: Where We’ve Been and Where We’re Heading.

Leading up to the 2016 presidential election, many observers were bracing for the death knell to mandatory single arbitration provisions for two reasons. First, it appeared that a Democratic Party president would fill the vacant slot on the US Supreme Court; with a 5-4 liberal majority in place, recent pro-arbitration clause case law would stand on tenuous ground. Second, pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), the Consumer Financial Protection Bureau’s (CFPB) impending rule prohibiting these class action waivers seemed poised to proceed to final form. The election of Donald J. Trump turned conventional wisdom on its head, however, and in the process altered the future of this area of law.

B. The Shifting Political Winds in the US

1. Replacing Justice Scalia

When conservative Supreme Court Justice Antonin Scalia passed away in February 2016, most observers expected that then-President Obama’s nominee, Judge Merrick Garland, would shift the Supreme Court to a more liberal posture. Among the anticipated changes was the Court’s treatment of the issue of mandatory individual arbitration provisions. The Senate effectively blocked Judge Garland’s appointment, however, and President Trump’s win in November 2016 mooted the Garland nomination altogether.

In early March 2017, President Trump nominated Tenth Circuit Court of Appeals Judge Neil Gorsuch to the Supreme Court. Now that he has been confirmed, Justice Gorsuch will effectively replace the late Antonin Scalia in the Court’s 5-4 conservative majority that formed the backbone for most of the Supreme Court’s pro-arbitration and pro-class action waiver opinions issued over the last several years. Accordingly, what looked like a potential upheaval surrounding the relatively settled case law just months ago now seems unlikely.

2. CFPB Rule on Ice?

In May 2016, the CFPB issued a proposed rule that would, among other things, **ban enforcement of class action waivers included in arbitration agreements found in many consumer finance-related agreements**. The CFPB was created as part of the Dodd-Frank Act, which explicitly authorized the CFPB to study the effects of consumer class action waivers and issue a rule consistent with its findings. After the proposed rule was issued, companies had the option to submit comments—of both the rule and the study—prior to issuance of a final rule.

The CFPB has not yet issued a final rule, and it is now unclear if it ever will. A
bill pending in Congress would curtail the CFPB’s jurisdiction and eliminate its authority to issue a final arbitration rule. Moreover, if the CFPB were to issue a final arbitration rule, any such rule would be subject to the Congressional Review Act, which would allow Congress to overturn it before it even becomes effective. Furthermore, Director Richard Cordray, who has helmed the CFPB since its inception, will be replaced by a Trump appointee when his term expires in 2018, if not earlier. It is, therefore, unclear whether the CFPB will focus its attention on this rule before that changeover. In any event, it appears for now that the prospect of a CFPB ban on class action waivers in arbitration agreements has little chance of going into effect.

III. Implications/Forecast

It is anticipated that UK parties doing business elsewhere in the EU, EU corporations doing business in the UK, and even foreign parties in contracts which involve the UK and any EU Member State, will increasingly consider choosing London-seat arbitration clauses instead of English Court clauses. There may even be a rise in banks which operate in the EU including arbitration clauses in their loan agreements, notwithstanding their historical preference for the English Courts.

Arbitration was thriving in the UK before Brexit, and it will likely continue post-Brexit. Indeed, Brexit may improve London’s appeal as a seat for arbitration. Not only may third parties regard English law as being more certain and more neutral once the English Courts are no longer bound by decisions of the Court of Justice of the EU, but the English courts may also be willing to re-establish the use of anti-suit injunctions, currently prohibited under EU law, to prevent parties from commencing actions in EU Courts in breach of arbitration agreements.

In the US, the change in administration is more likely to result in business as usual for arbitration. The Supreme Court will almost certainly have a conservative majority for the foreseeable future, all but guaranteeing that legal challenges to consumer contract provisions prohibiting class action litigation or class arbitration will continue to fail. Moreover, even if the CFPB does ultimately issue its final rule, the uncertain future of the CFPB itself suggests that any news about the death of mandatory arbitration provisions in consumer contracts and class action waivers was greatly exaggerated.

The seismic political shifts of 2016 in London and Washington, DC are being felt around the world. For companies subject to arbitration and litigation in the US and the EU, the impact of those political shifts will be understood more fully as the dust settles in the months and years to come.

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