【声音】英国仲裁专家Ana Stanic：对仲裁而言，脱欧或许是好消息

2016-06-20 Ana Stanic 仲裁百草园

【写在前面】英国是否将继续留在欧盟，持续已久的悬念终于在23日揭晓。全民公投的统计结果显示，约52%的英国选民投票支持英国脱离欧盟。“牵一发而动全身”,英国脱欧带给资本市场的动荡,投资风向的摆动,民众情绪的反弹,等等,在这两日均集中体现。对于仲裁而言，英国脱欧是否也会产生影响？

仲裁百草园有幸邀请到以欧盟法、国际法及仲裁为专长的英国专家Ana Stanic就此发表看法。感谢中伦律师事务所孙巍律师从中协调接洽，及中伦律师事务所张心、黄兴宇两位律师为如此精彩的翻译所付出的辛苦！

6月23日参加脱欧公投的英国选民中，51.9%选择退出欧盟。此次公投的参与率达到71.8%，共有超过3000万民众参与了投票。这也是自1992年英国下议院大选以来全英民众参与率最高的一次投票。英格兰和威尔士均强烈支持脱欧，脱欧派和留欧派的比例分别为53.4%比46.6%和52.5%比47.5%。苏格兰和北爱尔兰则支持留在欧盟，脱欧派和留欧派的比例分别为62%比38%和55.8%比44.2%。

脱欧公投结束后不久，苏格兰首席大臣妮古拉·斯特金即宣布，鉴于苏格兰强烈的留欧意向，苏格兰有可能进行第二次独立公投。也有人呼吁就爱尔兰和北爱尔兰统一举行公投。

因此，英国脱欧不管是对英国的内部结构，还是对其与欧盟或中国的外部关系均有十分重大、且难以预料的影响。

上述这种不确定性的原因之一在于，脱欧派迄今没能解释清楚脱离欧盟在法律上究竟意味着什么。例如，目前仍不清楚英国是否仍将是欧洲共同市场（European Single Market）的一部分

。挪威虽然不是欧盟的成员国，但却是欧洲经济区（European Economic Area）的一部分，为享受经济区内的特权支付着高额的会费，并且需要遵守欧盟的各项贸易指令，包括与人员自由流动相关的指令。如果英国想要留在欧洲经济区，欧盟很有可能坚持其支付与挪威相仿的会费。然而，考虑到脱欧派在英国脱欧公投前所做的各种宣传，英国政府很可能无法接受这种条件。同样的，英国可能也不愿接受人员流动自由这一政策。英国最终与欧盟达成的安排很可能与目前瑞士与欧盟之间的安排相类似。

目前唯一清楚的是，英国脱欧的过程需要遵守《里斯本条约》第50条。按该条规定，自英国正式通知欧盟其脱欧意向时起，英国和欧盟有两年的谈判时间。戴维·卡梅伦已宣布其将于2016年10月辞去英国首相一职。11月英国将下议院大选，新产生的议会将有权具体协商英国脱欧一事。这意味着《里斯本条约》第50条的程序在今年年底或明年年初时才会启动。根据第50条，除非欧洲理事会一致同意延期，否则在两年期限届满时，不论英国与欧盟之间有无达成替代性协议，英国都将自动退出欧盟。

英国脱欧对仲裁将产生什么样的影响？

首先，在退出协议生效时，或者在两年期限届满时，欧盟条约对英国均不再有效，这包括规定欧盟规则（在成员国）直接生效的《欧洲联盟运作方式条约》第288条。这意味着，从这一天起，规定英国法院和其他欧盟成员国法院之间民商事管辖权以及各成员国法院判决相互承认与执行的《布鲁塞尔民商事管辖权、承认与执行规则》（“布鲁塞尔规则一”）将不再是英国法律的一部分。除非有新的协议产生，否则1968年的《布鲁塞尔公约》将再次成为（协调该类问题）准据规则。

《布鲁塞尔规则一》在英国的废止对仲裁界而言可能是好消息。在新的制度下，英国法院有可能将重获出具禁诉令的权力，以此限制违背仲裁协议在其他欧洲国家进行的法院程序。英国最高法院在2013年的Ust-Kamenogorsk Hydropower Plant JSC v AES Ust- Kamenogorsk Hydropower Plant LLP一案中明确表示，宣告和执行仲裁协议的“不作为义务”（即明示或默示地承诺不在仲裁条款确定的管辖机构以外的地方提起法律程序的义务）是英国法院固有的管辖权，这项权利由来已久、得到了广泛承认且独立于1996年仲裁法。1996年仲裁法中没有任何条款剥夺了法院的该等权力。

英国法院重获出具禁诉令的权力可能意味着国际合同的当事人将更愿意将仲裁地选择在英国境内。

其次，与欧盟委员会相比，英国更有可能对国际投资仲裁采取更为友好的态度。近几年来，欧盟委员会对仲裁庭在欧盟法问题上的管辖权提出过质疑，甚至曾命令罗马尼亚不得执行在Micula v. Romania案中按照《解决国家与他国国民间投资争端公约》作出的仲裁裁决。

再次，如果英国选择不跟随挪威的例子，与欧盟法院相比，英国更可能对公共政策采取不那么宽泛的解释。由此，与此前受欧盟法律限制相比，英国法院可能在以公共政策为由拒绝承认仲裁裁决一事上采取更为谨慎的态度。

最后，由于英国自己是1958年《纽约公约》和1963年《解决国家与他国国民间投资争端公约》的成员国，因此在英国进行仲裁和执行仲裁裁决不会受英国脱欧后的影响。由于1996年仲裁法

并非欧盟法，因此以伦敦为仲裁地的仲裁程序将正常进行。英国脱欧后，只要英国还是国际金融中心，其就仍将是受欢迎的争议解决中心。

鉴于英国法公平、公正、仲裁员经验丰富、裁决理据充分的名声，英国脱欧公投不太可能影响当事人（继续）选择英国法作为仲裁准据法。根据伦敦玛丽王后大学2010年的国际仲裁问卷调查，英国法是仲裁程序中当事人选择最多的仲裁实体问题准据法，其次是纽约州法律。英国法是伦敦成为“受欢迎仲裁地”的因素之一，其余的原因还包括地理位置、语言、文化和法院诉讼程序的效率等。伦敦玛丽王后大学2015年的国际仲裁问卷调查更是将伦敦列为了最受欢迎和得到最广泛选择的五个仲裁地之一。

综合上述四项原因，英国脱欧对英国仲裁界来说或许还是好消息，尽管目前尚无法作此定论。可以确定的是，英国脱欧在短期和中期内不太可能对伦敦作为仲裁地的地位造成负面影响。

Ana 简介

Ana Stanič 是一名英国事务律师，她同时是邓迪大学矿产与自然资源中心的荣誉讲师。她是E&A律所的创始合伙人，E&A律所是一家专长能源领域与欧盟法、国际法及仲裁的创新性律所。

Ana曾为国家与能源公司就海事边境纠纷、跨界油气储量纠纷、大型能源基础设施建设特许经营协议、跨境并购纠纷以及东道国政府管道建设协议纠纷提供法律服务。她同时还是欧盟能源领域在竞争、国家援助以及能源法方面的专家。她经常在投资条约包括《能源宪章条约》争议商事仲裁中担任代理人，还曾代理过欧盟法院的案件。

Ana在澳大利亚新南威尔士大学获得商科学士学位（金融与银行）及法学学士学位，在英国剑桥大学获得法学硕士学位。在个人执业之前，Ana曾于斯洛文尼亚经济关系与发展部以及中央银行任职，负责双边投资协定以及自由贸易协定的谈判工作。

Ana能够使用英语，斯洛文尼亚语，波斯尼亚/克罗地亚/塞尔维亚语，意大利语，能够理解俄语及法语。

Brexit May Be Good News for Arbitration

By Ana Stanic

On 23 June 51.9% of British voters voted to leave the EU. The referendum turnout was 71.8%, with more than 30 million people voting. It was the highest turnout in a UK-wide vote since the 1992 general election. England voted strongly for Brexit, by 53.4% to 46.6%, as did Wales, with Leave getting 52.5% of the vote and Remain 47.5%. Scotland and Northern Ireland both backed staying in the EU. Scotland backed Remain by 62% to 38%, while 55.8% in Northern Ireland voted Remain and 44.2% Leave.

Shortly after the vote the Scottish First Minister Nicola Sturgeon announced that a second referendum on the independence from the United will be held in Scotland given the strong pro-EU vote in Scotland. There have been calls for a referendum to unite Ireland and Northern Ireland.

Thus the implications of Brexit for the UK both regarding its internal configuration and external relations, be it with the rest of the EU or China are significant. They are also difficult to predict.

Part of the uncertainty relates to the fact that the Leave campaign has so far not spelt out what the exiting from the EU would look like legally. For example it is unclear at this point whether the UK will remain part of the European Single Market. Norway for example, which is part of the European Economic Area (EEA) but not the EU, pays significant contributions for the privilege and must also adhere to EU trade directives including those relating to free movement of people. It is likely that the EU will insist that the UK make contributions on a similar level to those made by Norway in return for staying in the EEA – a matter which may not be acceptable to the UK government given Leave's campaign preceding the vote for the referendum. For the same reasons Britain is likely to be reluctant to agree to continue to allow the free movement of people. The arrangement ultimately agreed between the UK and the EU is more likely to resemble the arrangement currently in place between Switzerland and the EU.

The one thing that is clear at this point is that a process regarding UK's withdrawal will be governed by Article 50 of Treaty on the Functioning of the EU. The provision provides a period of two years for negotiations between the UK and the EU from the date that the UK officially notifies the EU of its intention to withdraw. David Cameron has announced that he will resign as Prime Minister in October 2016, that UK general elections will called for November to give a new Parliament the mandate to negotiate Brexit. This means that the provisions of Article 50 will not be triggered until late this year/early next year. Pursuant to Article 50 the UK will automatically cease to be a member of the EU at the end of the two year period irrespective of whether an alternative arrangement governing EU/UK relations is in place by such date unless the European Council unanimously agreed to extend that period.

What does Brexit mean for Arbitration?

First, upon the entry into force of the withdrawal agreement, or the expiry of the two year period, the EU Treaties will no longer apply to the UK. This includes Article 288 of the TFEU, which provides for the direct application of EU Regulations. This means that, as of that moment, the Brussels I Regulation which governs both the allocation of civil and commercial jurisdiction among UK courts on the one hand and courts of other EU member state courts and the recognition and enforcement of UK judgements in the courts of other EU MS judgments and vice versa which was adopted in January 2015 will no longer be part of English law. Unless another agreement is put in place the Brussels Convention would remerge as the governing instrument in respect of these matters.

The disapplication of the Brussels I Regulation in the UK may be regarded as good news by the arbitration community. Under the new regime it is likely that English courts would regain the power to issue anti-suit injunctions restraining court proceedings brought in EU countries in violation of an arbitration agreement providing for England as a seat of arbitration. The UK Supreme Court made clear in the *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* in 2013 that English courts' general inherent jurisdiction to declare rights and to enforce the "negative obligation" of an arbitration agreement (i.e. the express or implied promise not to commence proceedings other than in the forum specified in the arbitration agreement) is long-standing and well-recognised, independent of the Arbitration Act 1996, and nothing in the 1996 Act has removed that power from the courts. The regaining of the power to grant anti-suit injunctions is likely to mean that parties to international contracts in the future favour the UK as a seat of arbitration.

Second, it is likely that the UK will take a more favourable approach to international investment treaty arbitration than that taken by the European Commission. In recent years, the Commission has challenged the jurisdiction of arbitral tribunals to rule on matters of EU law. It has gone as far as ordering Romania not to enforce an arbitral award rendered under the 1965 International Convention on the Settlement of Investment Disputes in the Micula v. Romania case.

Third, should the UK choose not to follow the Norway route, it is likely that it will take a less expansive interpretation of public policy than the Court of Justice of the European Union. In such circumstances the English courts may be more reluctant to exercise their discretion to set aside arbitral awards on the grounds of public policy than they were when they were bound by EU law.

Finally, since the UK is a signatory to the 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards and the 1965 International Convention on the Settlement of Investment Disputes in its own right the arbitral framework regarding the conduct and enforcement of arbitration in the UK will not change as a result of Brexit. Arbitration seated in London will carry on as usual as the 1996 Arbitration Act is not EU law. The UK will likely remain a preferred dispute resolution centre in the event of a Brexit for so long as it remains a global financial hub.

It is doubtful that a Brexit will have an impact on choice of English governing law for arbitrations. In the Queen Mary International Arbitration Survey for 2010, English law was the most common choice of governing law for the substance of arbitrations. English law was also a factor placing London as the “preferred seat” along with factors such as location, language, culture, and efficiency of court proceedings. The more recent Queen Mary International Arbitration Survey for 2015 ranked London amongst the five most preferred and widely used seats for arbitration.

For all these reasons Brexit may well be good news for arbitration in the UK although it is too early to say so with certainty. What is clear is that Brexit is unlikely to negatively impact London as a seat of arbitration in the short and medium term.