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BOOK REVIEW:
INTERNATIONAL COMMERCIAL ARBITRATION IN THE EUROPEAN UNION
BRUSSELS I, BREXIT AND BEYOND
BY CHUKWUDI OJIEGBE

Reviewed by Sarah Vasani & Daria Kuznetsova

I. INTRODUCTION

The relationship between the European Union (EU) and international arbitration has been described as “the most dramatic confrontation between two international legal regimes seen in a great many years.”¹ Although this quote was directed at international investment arbitration (and notably, the EU’s open hostility towards intra-EU BITs), EU law increasingly interacts and conflicts with international commercial arbitration as well.

EU law presently does not directly regulate commercial arbitration. Rather, a host of arbitration laws and practices exist across the EU Member States. In International Commercial Arbitration in the European Union Brussels I, Brexit and Beyond, Chukwudi Ojiegbe explores the EU’s approach to international commercial arbitration and the conflict between the EU regime on the one hand and commercial arbitration on the other.

II. THE BOOK

The book is comprised of eight chapters analyzing the interaction between international commercial arbitration and EU law and the potential impact of Brexit on commercial arbitration within the UK.

In the Introduction, Ojiegbe sets the scene by providing a brief overview of Brexit and the EU’s regulation of commercial arbitration, including the historical background to the EU arbitration/litigation interface (Chapter 1).² He explains the problems that arise when matters of international commercial arbitration interact


The author begins by examining the impact of Brexit on the EU principle of mutual trust that serves as a basis for judicial cooperation in civil and commercial matters under the Brussels I Regime (Chapter 2). 6 The mutual trust principle does not apply in the context of international arbitration because arbitral tribunals are not courts of the Member States. 7 Nevertheless, the Court of Justice of the European Union (CJEU) has employed this principle to prohibit the use of anti-suit injunctions by the Member States’ courts in support of arbitration proceedings. 8 In Ojiegbe’s view, following Brexit, UK courts are no longer bound by EU law principles such as mutual trust or the decisions of the CJEU. 9 Accordingly, one can expect the UK courts to part ways with the CJEU, and allow for the granting of anti-suit injunctions in favor of arbitration, 10 another boon for London as a preeminent seat of arbitration.

In Chapter 3, Ojiegbe provides a comprehensive analysis of the scope of the arbitration exclusion under the Brussels I Regime. He explains that despite arbitration being expressly excluded from the material scope of the Brussels I Regime, the interaction of commercial arbitration with this regime remains controversial. In

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3 September 27, 1968, 1972 O.J. (L 299) 1.
6 Id. at 42.
7 Id. at 72.
8 Id. at 40.
9 Id. at 69.
10 Id.
particular, it is unclear what aspects of arbitration-related matters resolved by Member State courts are covered by the exclusion. As a result, the jurisdiction of Member State courts and arbitral tribunals may overlap, thereby causing uncertainty and unpredictability for the arbitral process.

Chapter 4 analyzes the problem of parallel proceedings between Member State courts and arbitral tribunals, which creates the risk of conflicting decisions, as well as the mechanisms that may be deployed to resolve this problem. The author explains that while arbitral anti-suit awards, anti-arbitration injunctions, and anti-suit injunctions may halt parallel proceedings and their undesirable consequences, these mechanisms are often controversial as they are deemed to interfere with the proceedings in the foreign forum. Furthermore, Ojiegbe likewise explains that the lis pendens rule fails to resolve the problem of parallel proceedings because national courts and arbitral tribunals are not equal forums for the purpose of this rule. In the author’s view, no effective mechanism exists that can resolve the problem of parallel proceedings. He suggests that close cooperation between the Member State courts and arbitral tribunals could alleviate this problem. In particular, he suggests that Member State courts should stay the proceedings once their jurisdiction is challenged based on an arbitration agreement and arbitration proceedings are commenced. The courts then will have the opportunity to review the arbitral tribunal’s decision at the recognition and enforcement stage.

Chapter 5 deals with recasting the Brussels I Regulation and provides an overview of EU legislators' proposal to resolve the arbitration/litigation interface in the Recast.

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11 Id. at 84.
12 Id. at 77.
13 Id. at 111.
14 Id. at 112.
15 Id.
16 Id. at 160.
17 Id. at 156.
18 Id. at 158.
19 Id.
The European Commission (EC) proposed to partially delete the arbitration exclusion and give priority to either the seat court or the arbitral tribunal to determine the existence and validity of arbitration agreements, i.e., the court whose jurisdiction is contested on the basis of the existence of the arbitration agreement shall stay the proceedings in favor of the seat court or the arbitral tribunal. A number of Member States have criticized this approach because (1) it would conflict with the existing regime under the New York Convention that does not give priority to either the seat court or the arbitral tribunal in determining the validity or scope of arbitration agreements; and (2) it could result in granting the EU exclusive external competence in the area of international commercial arbitration. The Brussels I Recast, which came into force in 2015, did not include the EC’s proposal.

Chapter 6 analyzes whether the inclusion of arbitration in the scope of the Brussels I regime would create the exclusive external competence of the EU in aspects of international arbitration. After analyzing the CJEU’s approach to EU external competence, the author answers this question affirmatively. Although the EU’s exclusive competence with respect to international commercial arbitration could harmonize arbitration within the EU and resolve the problems associated with the arbitration/litigation interface, the unique features of arbitration render the EU’s exclusive competence over these matters undesirable for its Member States. Under the current regime, Member States can legislate in the area of international arbitration. Their national laws differ with regard to the scope of arbitration agreements and/or the types of matters that may be referred to arbitration. The author interestingly observes that granting the EU exclusive competence in relation

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20 Id. at 177–78.
21 Id. at 186–88.
22 Id. at 192.
23 Id. at 193.
24 Id. at 224.
25 Id. at 225.
26 Id. at 227.
27 Id. at 226.
to arbitration could stifle competition between the arbitration seats within the EU, as well as impact the juridical stability enjoyed by the commercial arbitration regime in most Member States.\textsuperscript{28}

Chapter 7 contains a thorough overview of the Brussels I Recast and its practical effects. The Brussels I Recast updated the provisions of the Brussels I Regulation. While the Recast restates that arbitration is excluded from its scope of application, it provides guidance on the scope of the arbitration exclusion as follows:\textsuperscript{29} (i) Member State courts are permitted to rule on the existence and validity of arbitration agreements in accordance with their national laws;\textsuperscript{30} (ii) decisions by Member State courts on the existence and validity of arbitration agreements are excluded from the Brussels I Recast;\textsuperscript{31} (iii) the Member State courts’ judgments on the substance of the matter, where the arbitration agreement has been nullified, could still be enforced and recognized in accordance with the Brussels I Recast;\textsuperscript{32} and (iv) the Brussels I Recast is inapplicable to actions or ancillary proceedings relating to the establishment of the arbitral tribunal, the powers of arbitrators, the conduct of arbitration procedure, and any action or a judgment concerning the annulment, review, appeal, recognition, or enforcement of an arbitral award.\textsuperscript{33} The author argues that these clarifications fail to completely address the arbitration/litigation interface as they do not deprive Member State courts of their jurisdiction to review arbitration agreements, and they fail to establish the priority of either the arbitral tribunal or the courts at the seat of the arbitration to determine the questions of the scope, existence, and validity of arbitration agreement.\textsuperscript{34} According to Ojiegbe, further reform is needed.\textsuperscript{35}

\textsuperscript{28} Id. at 227.
\textsuperscript{29} Id. at 230.
\textsuperscript{30} Council Regulation 1215/2012, supra note Error! Bookmark not defined., at Recital 12, ¶ 1.
\textsuperscript{31} Id. at Recital 12, ¶ 2.
\textsuperscript{32} Id. at Recital 12, ¶ 3.
\textsuperscript{33} Id. at Recital 12, ¶ 4.
\textsuperscript{34} Ojiegbe, supra note 2, at 249.
\textsuperscript{35} Id.
Finally, in Chapter 8, the author summarizes his conclusions. The interaction between international commercial arbitration and the Brussels I Regime remains controversial despite the express exclusion of arbitration from the scope of the Brussels I Regime. This controversy could be lessened by allowing Member State courts with jurisdiction under the Brussels I Regime the possibility of staying litigation in favor of the arbitral tribunal.

III. CONCLUSION

International Commercial Arbitration in the European Union Brussels I, Brexit and Beyond offers an extensive structured analysis of the interaction between international commercial arbitration and the EU Brussels I Regime and thoughtfully contributes to the timely and important topic of the impact of Brexit on international commercial arbitration in the EU.

In addition to providing a comprehensive overview of the existing regulations impacting international commercial arbitration in the EU, Ojiegbe thoughtfully contextualizes this overview by setting out the historical background of the Brussels I Regime and articulating his ideas about necessary reforms to the existing regime. The book thus provides useful guidance for arbitration practitioners, academics, and legislators alike.

**SARAH VASANI** is Co-Head of International Arbitration at CMS Cameron McKenna Nabarro Olswang LLP, a role covering the UK, Central and Eastern Europe, the UAE, Singapore, Turkey, Russia, China, Brazil and Mexico. She is a seasoned international arbitration lawyer specializing in both international commercial arbitration and investor state disputes. Sarah has substantial experience in energy, oil and gas, mining, and other large scale project disputes in Africa, the Middle East, Central Asia, the Indian Subcontinent, and Latin America and represents leading global energy and construction companies. Sarah sits as party-nominated, sole, and presiding arbitrator. She is dual-qualified in England & Wales and the US and is a Solicitor-Advocate of the Higher Courts of England and Wales.

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36 Id. at 263.
37 Id. at 262.
DARIA KUZNETSOVA is Litigation & Arbitration Associate at CMS Cameron McKenna Nabarro Olswang LLP in London. Daria’s dispute resolution experience includes commercial and investment arbitrations under the LCIA, ICC, SCC, ICSID, and UNCITRAL rules. Daria’s experience covers a range of sectors, including energy, construction, and mining. Daria is qualified to practice law in Russia and admitted to the New York State Bar.
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