The Brexit process is assuming the quality of an epic voyage, like the Odyssey. The analogy is apt, not least because Homer’s poem is one of the foundations of European civilisation.

The plot begins in the middle of the story and proceeds with flashbacks and further developments. Like Odysseus (or Ulysses in Latin), the Brexit process encounters many obstacles, calculated to prevent arrival at the intended destination:

- Hydra headed monsters - in the institutional structure of the EU;
- Storms - mostly media generated;
- Whirlpools - in the decision making process of the UK Cabinet;
- One-eyed opponents, although Ulysses only had to deal with one Cyclops;
- Whereas the one eyed opponents in the Brexit process are many;
- The complacent stupor of the Brexiteer lotus eaters;
- The sweet call of the sirens in the Brussels bureaucracy, luring one into a shipwreck.

Sometimes, the process is so slow that it feels like a single, long day in Dublin, as James Joyce adapted the Odyssey in his Ulysses. At other times it seems as frenetic as the tale of the chain gang escapee, Ulysses Everett McGill, in the Coen Brothers movie O Brother Where Art Thou.

As the Brexiteers will tell you, whatever the obstacles, the Odyssey was a journey home. As the Remainers will tell you, it took ten years.

The abbreviated, haiku version of the Odyssey put it well:

Aegean forecast—storms, chance of one-eyed giants, delays expected.

The first thing to say about the significance of Brexit for arbitration in London is that, unlike virtually every other field of commercial discourse and activity, there will be little direct impact. The New York Convention remains the basic structure of international commercial arbitration and Brexit does not impinge on that. A genuinely international, virtually universal, arrangement like the Convention is something that others in the UK might well envy. That is no reason for complacency.

There may be effects arising from the terms of the future economic arrangement between the UK and the EU - both transitional and long term. However, what they will be is still speculative and I will indulge in a little of that. The indirect effects may well prove more significant, and I will speculate on that too.
As some of you are aware, last year I delivered the annual Sir Thomas More Lecture at Lincoln’s Inn on the topic “An Australian Perspective on Brexit”. Most of that address was concerned with the complexities of negotiating the departure from the EU in the form of what is conventionally called a Free Trade Agreement or FTA. As I explained in that speech, this terminology is a politically motivated abuse of the language. Such agreements are, in essence, Preferential Trade Agreements. I prefer the acronym PTA.

The dynamics of disentangling a nation from a PTA - like the EU - are much more complex than the process of negotiating a new PTA – for example, between the UK and Australia. Brexit will involve a long, sector by sector, bargaining process. Because of established transnational supply chains and interconnected contractual relationships - by which parties do not just trade goods and services with each other, but produce goods and services with each - I compared what Brexit involves to unscrambling a hundred omelettes.

In the absence of any EU overriding regulation of commercial arbitration, that sphere of discourse is not such an omelette. Investment treaty arbitration, however, may be.

It is virtually certain that the EU will seek to include in any UK/EU PTA provision for investment treaty cases to be vested in a new bilateral court - of the kind in EU treaties with Vietnam, Canada and Singapore. The UK could be asked to terminate all existing BITs with EU States, or at least ISDS provisions in such BITs. Furthermore, the EU may try to include an eventual transfer of the jurisdiction to a new multilateral court, which the Council of the European Union publicly endorsed earlier this year and which is under consideration at UNCITRAL - in the wrong Working Group, according to Charles Brower.

It is by no means clear that British negotiators would resist this. If it slips into the transitional two year arrangement, it will almost certainly become permanent. The political dynamic which is driving the EU may well appeal to the British Cabinet. EU policies on bilateral and multilateral courts have almost certainly become permanent. The political dynamic that there is no plan, as yet, for multilateral treaties. It is not directed to determining which nations are parties to a treaty, let alone to whether the UK remains a party to every treaty to which any non-EU states are parties. Will every other nation agree without trying to extract something in return? To use a topical example. Why should Russia agree?

The assertion that an omnibus agreement covering all treaties can be negotiated with each State appears to be a desperate attempt to shorten a complex, time consuming process of negotiations with each of the more than 100 non-EU nations, who are parties to more than 750 agreements. The Technical Note describes those agreements as “an important part of the EU acquis”. And the Note concedes that there is no plan, as yet, for multilateral treaties.

As one observer commented: “You cannot make this stuff up.” The last two words were probably not intended as a pun.

The implications for international arbitration may be limited - there are only the three EU bilateral trade agreements. However, the treaties cover a wide range of commerce - trade, regulatory cooperation, fisheries, transport, customs, nuclear and agriculture. Particular tribunals may well have to decide whether any one of them remains law in the UK. More significantly perhaps, is that this proposal is only for the transitional period of two years.

It does not appear to me to be likely that the UK will reject the proposal for removing ISDS.

In any event, this is only one of a myriad of issues on which the UK has to develop a position. It may not be given a high priority. There are many indications of the high level of British unpreparedness for the negotiations ahead.

One egregious example is the recent Foreign Office Technical Note on International Agreements during the Implementation Period. This asserts that the parties to all extant EU international agreements will be asked to confirm that the agreements continue to apply to the UK, even when it is not a member of the EU during the two year transition. They will be asked to agree to interpret references to “EU Member State” as still encompassing the UK.

The Technical Note invokes Article 31 of the Vienna Convention on the Law of Treaties. It suggests that the “context”, for interpretative purposes could extend to such an agreement. This appears to invoke Article 31(3). The Note goes on to assert that it would not be necessary to deal with each treaty separately.

I really don’t understand this. The VCLT is concerned with interpreting treaties. It is not directed to determining which nations are parties to a treaty, let alone to whether the UK remains a party to every treaty to which any non-EU states are parties. Will every other nation agree without trying to extract something in return? To use a topical example. Why should Russia agree?

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The process of negotiation between the UK and the EU to date is characterised by a lack of transparency. This, unfortunately, is typical of so-called Free Trade Agreement. Neither side wants to be judged at home on the basis of what it wanted, but didn’t get. It ruins the political value of the announcement that the negotiations were a triumph, accompanied by a list of industries that benefit. As I emphasised in my Sir Thomas More Lecture, the politics of PTAs is that the benefits are concentrated and the burdens disbursed. The general public does not realise that, in many respects, its pockets are being picked.

It is clear that the EU - particularly France and Germany - want to restrict the UK’s ability to compete in a manner which it is now constrained from doing by single market principles, for example, tax concessions, any form of state aid, lighter regulation of, for example, financial transactions, competition law or environmental protection.

The historical example of success from such a posture is Switzerland, with its secrecy laws. The contemporary example is Singapore, with its low taxation, its regulatory flexibility, for example, in the finance sector and not joining up to sanctions on Russia. I understand that the latter is not showing up yet in LCIA filings, but it will. The Commercial Court may be impacted even more.

Historically, Singapore was an entrepôt for goods. It is now an entrepôt for transactions. Access to the European market will come at a negotiated cost of restrictions on competitive conduct of this kind.

The key issue for lawyers in all this may well be what, if any, long term role there will be for the European Court of Justice. That is one of Theresa May’s red lines, as was, briefly, a customs border down the middle of the Irish Sea.

In my Sir Thomas More Lecture, I set out a warning about the ECJ. In the tension between centripetal and centrifugal forces, that is inevitable in all federal structures, national legislation that overlaps the same field.

One of the reasons for that approach is the institutional imperative of any central court to maximise its own jurisdiction. I referred to many historical examples, not least the 15th-16th Century conflicts between the Courts of Kings Bench and Common Pleas, or between all the common law courts and Chancery or the ecclesiastical courts. The judiciary is not, and never has been, insulated from what Hamlet called - in his “To be or not to be” soliloquy - “the insolence of office”.

I said in that lecture that that was a problem for the future. That proved to be wrong. Within three months, the ECJ decision in Achmea (284/16) has severely impacted intra-EU investment treaty arbitrations, precisely on the basis that tribunals, at least for the BIT involved in that case, were said to be insulated from the jurisdiction of the ECJ. The need for consistency and uniformity in the operation of the autonomous, overriding legal order of the EU was said to be so critical, that the principle of subsidiarity was not even mentioned. The constitutional principle applied by the ECJ was a centripetal force which, coincidentally maximises the authority of the ECJ.

Theresa May’s red line could well be tested even by the EU policy to create a bilateral “court” in the ultimate UK/EU PTA. On the basis of Achmea, it appears clear that such a court would only be acceptable, indeed constitutional, if there was a supervisory role for the ECJ. The ECJ acknowledged in Achmea that the EU - as distinct from Member States - could enter international agreements which create a court for resolving disputes under those agreements. However, it did so under the proviso “that the autonomy of the EU and its legal order is respected” [57].

That appears to require a role for the ECJ, particularly the power under Article 267 of the TFEU - the significance of which the ECJ emphasised - for a court or tribunal to refer any matter of interpretation of EU law to the ECJ for a preliminary ruling. The EU is probably legally obliged to ensure that any dispute resolution process enables that to happen. That is best exemplified by the ECJ decision prohibiting the EU from acceding to the European Convention on Human Rights, on the basis that the ECHR, rather than the ECJ, would make rulings on European law. The ghost of Sir Edward Coke would understand. We shall see what happens to Theresa May’s red line.

An alternative, suggested by the President of the ECJ himself, is to have this role performed by the, more accommodating, EFTA Court. That is a parallel European court for other closely tied nations, who are not full members - Finland, Norway and Switzerland. Would that cross the red line?

In my speech at Lincoln’s Inn, I was pleased that I didn’t extend my criticism of the ECJ to the EFTA court. The President of that court was in the audience.

There is a limit to what I can say about Achmea, as I am on a panel in an Energy Charter Treaty case, in which an exemption for intra-EU investments is in issue. I observe merely that the reasoning is light, particularly in contrast with the 273 paragraph submission of Advocate General Wathelet, which argued for the opposite conclusion.

I also observe that the judgment will be well received by the governments of the EU, particularly the Visegrad group, three of which had sought to intervene in support of the fourth, which was a party. Those States are the most critical of the extent of the ECJ’s jurisdiction.

I can, however, make some detailed observations about the potential impact of the decision on commercial arbitrations. In two brief paragraphs, [54] – [55], the Court affirmed earlier decisions on commercial arbitration and then asserted that investment treaties were different, because the former was consensual between private parties and the latter involved acts of State. Other than this trite observation, the reasoning in the two paragraphs is virtually non-existent and is hard to reconcile internally.
The earlier decision in Eco Swiss 126/97, affirmed in Achmea, held that the restricted scope of review by the courts, in accordance with the New York Convention, could be justified because the public policy ground was sufficient to ensure the integrity of the EU legal system. The ECJ asserted that the BIT in issue in Achmea was different, because it was a treaty by which Member States agreed “to remove from the jurisdiction of their own courts … disputes which may concern the application or interpretation of EU law”.

However, the case before the ECJ had all the same characteristics as Eco Swiss. The seat was Germany and, accordingly, the German courts in Achmea could apply the same public policy exception that was available in Eco Swiss. Indeed, it was by precisely such a referral that the case came to the ECJ. Perhaps the BIT did not mandate a seat in the EU, although one was chosen, but that was not part of the reasoning.

Of particular importance for international commercial arbitration, is what the reasoning suggests is the scope of the public policy exception. As this audience is aware, that is a permissible ground under the New York Convention for intervention by the courts of the seat or of enforcement. Whenever courts have taken an expansive view of public policy that has been controversial in the arbitral community. It now appears likely that every EU court system will be forced to adopt an expansive view.

The earlier case of Eco Swiss, was clear enough, albeit wide ranging. Article 81 of the TFEU (formerly Article 85) prohibited all restraints of trade as incompatible with the single market and, significantly, declared all contravening agreements or decisions to be void.

Achmea appears to widen the scope of what the ECJ called “the fundamental provisions of EU law” [54] to such an extent, and in such terms, as to make the public policy exception not only wide, but unpredictably so.

When identifying the deficiencies of the ISDS provisions in the BIT under consideration, the Court in Achmea noted that the Tribunal: “might be called on to interpret or indeed to apply EU law, particularly the provisions concerning the fundamental freedoms, including freedom of establishment and free movement of capital” [42]. (Note the “might”). It had earlier drawn attention to “the set of common values on which the EU is founded”, referring to Article 2 of the TFEU [34].

The two examples of the possible scope of EU public policy under the TFEU given by the ECJ are the prohibitions on restrictions on establishing a business and on the movement of capital. They apply not only to restrictions on trade between Member States, but also between Member States and third countries. Achmea declared them to be “fundamental laws”. Accordingly, they are within the public policy ground for review. What is their scope? What does “movement of capital encompass? What else will be declared to be “fundamental”? It seems clear that the right to privacy for the protection of data “concerning” a person is one. What else?

It now appears that European jurisdictions are likely to develop a wider conception of what falls within the public policy ground for review of tribunal decisions, whenever an issue of European law “might” arise. For the time being, there is a significant level of uncertainty with regard to the scope of that ground arising from Achmea. This is likely to have an effect on the choice of a seat under arbitration clauses involving European corporations.

Last month I attended the LSE-LCIA debate in London on my topic. It was chaired by Lord Jonathan Mance, with contributions from Claire Ambrose and Professor Massimo Benedetti. A key issue was what will London arbitrations do with mandatory EU laws. There is no settled doctrine about how arbitral tribunals should treat mandatory laws. However, life is easier if they are not from the jurisdiction of the supervisory court. Parties to a contract which will be performed in, or even have effects in multiple jurisdictions, may want to maximise their flexibility.

European apprehensions in this respect are just one example of the concern that post-Brexit the UK may be able to compete in ways that it is presently unable to do. Limiting that is, as I have suggested, likely to be a key negotiating objective of the EU in the long term PTA, particularly on issues of regulatory alignment. In my opinion, so long as it is not bargained away, Brexit may well increase the probability that corporations, including European corporations, will choose English law and an English seat, especially in the cases of investments.

One thing that neither Brexit, nor the future UK/EU agreement is likely to change, in my opinion, lies at the very core of the reasons for the frequent choice of English law and a London seat. That is the quality and flexibility of English commercial law, particularly the law of contract, and the strength of the profession and institutions that apply and develop that law. There are threats to the future quality of the judiciary of England and Wales, but that is a self-inflicted wound capable of reversal.

From an Australian perspective, it has appeared at times that the substantive and procedural law of England, as well as the attitude of bureaucrats to the status of the judiciary, has been affected by European influences. To some degree, that will continue after Brexit by reason of the Human Rights Act and the link to the ECHR in Strasbourg. However, the UK will avoid the pet projects of civil law academics - a uniform European Contract Code and, less likely, a uniform European Civil Code.

To a much higher degree that is available elsewhere, including in some other common law jurisdictions - the United States, obviously, but also others, for example, Canada - the law of England and Wales will honour and apply the detailed, indeed fulsome, texts now generally agreed for any commercial transaction of substantial size.
As some of you will be aware, over a number of years I engaged in a lengthy debate with Lennie Hoffmann - both in person and in print - over his introduction, in the Investors Compensation line of authority, of a much more open ended approach to contractual interpretation and to the scope of admissible contextual material. That is now over in England, and his approach was never fully adopted in Australia. The pendulum has swung back from context to text.

English law has fewer doctrines that can be deployed to evade the words of a text and the carefully agreed allocation of risks it contains. There are fewer doctrines that can fill gaps, many of which have been left because the parties could not agree. There are, accordingly, fewer opportunities for judges or arbitrators to indulge an instinct to allow their sense of fairness to interfere with the commercially acceptable result that the loss just lies where it falls. The common law doctrine of frustration allows fewer opportunities to rip up a contract than civil law doctrines like improprevision. There are fewer occasions for affected third parties, like financiers, who have only the text to guide them, to have their expectations disappointed by behaviour by one of the parties of which they were not, indeed could not have been, aware. (This last point was the only one that Lord Hoffmann acknowledged may be a problem.)

There are powerful commercial reasons for the certainty that the traditional approach to contracts has provided. The history of the English law of contractual interpretation has always oscillated between text and context, but never far from the former. That is a core attraction of English law and of an English seat which, if anything, will be strengthened by Brexit, again subject to any UK/EU agreement to adopt contrary EU statutes. I am not sufficiently familiar with European law to give examples, but the extended protection in agency relationships was mentioned in the LSE-LCIA debate that I attended. This is something to watch. Although the lack of transparency in the whole process is such that I doubt that the profession will get a chance. Perhaps you could come up with a list of European statutory provisions you would like to get rid of, in the interests of commercial certainty.

There is one aspect of legal doctrine that is worth keeping an eye on. I refer to the implication of a duty of good faith in contract law. There are many others resting in the writings of restitution scholars, but I will focus on good faith.

Many of you will have read the article in Vol 1 of 2016 Arbitration International by two civil lawyers entitled, with palpable glee: “Good faith as a ‘general organising principle’ of the common law”. The authors refer to the long line of authority - a line stretching back for centuries - rejecting any such “general principle”. They then refer to a number of first instance cases which have concluded that, contrary to earlier authority, an express clause in those terms may not be too uncertain to be enforced. That is a reasonable development of the common law and commercial negotiators can live with it.

However, the authors are particularly attracted to the cases that imply a duty of good faith in the performance of contracts, with the suggestion that it may be an inexorable trend. Those cases do suggest a convergence with the civil law doctrines of good faith in contract law.

Perhaps the most frequently cited is the decision of Mr Justice Leggatt in Yam Seng [2013] EWHC 111 (QB), an analysis which he has elaborated in a judgment handed down this year. (Sheik Tahnoon [2018] EWHC 333 (Comm)). These authorities would, if approved by higher courts, add “long term relational contracts” to the established list of contracts with such an implied term - employment and insurance contracts. These are precisely the kind of cases where detailed contractual provision has been made at the outset. The very fact that express provisions for good faith performance are now recognised, should count against any such implication.

The idea that good faith can be an “overriding principle”, does appeal to lawyers used to dealing with top-down Codes, including their restitutionist progeny in common law jurisdictions. However, it is entirely inconsistent with the bottom up tradition of the common law.

The common law has overlapping principles which remain perfectly serviceable for long term contracts, for example, an implied duty of co-operation. Such a duty has a palpable objectivity. Good faith, like beauty, is in the eye of the beholder. As Humpty Dumpty put it, no doubt for the guidance of judges and arbitrators:

“When I use a word, it means just what I chose it to mean, no more no less. The question is which is to be master - that's all".

In Germany, as I understand it, the requirement of good faith applies only to the performance of contracts. In France, case law, now included in the Code, extended the doctrine to every stage of the contracting process, including negotiations. That means that no-one can rely on the text, no matter how complete it appears to be and no matter that the bargaining power of the parties was patently equal.

We have such a problem in Australia. There is a general statutory prohibition against false and misleading conduct in trade or commerce. Originally it was contained in a part of the Act headed Consumer Protection. However, our High Court decided that the heading could be ignored and held that the section applies to every commercial transaction of any scale and between any parties. It is a mark of professional negligence if you can’t find a way to plead it.

The text of a contract, no matter how elaborate, has, ever since, been no more than a provisional ordering of the rights and obligations of the parties. The French doctrine of good faith - and quite possibly that of other jurisdictions – has the same effect.
I believe that those who negotiate detailed commercial agreements - even long term agreements - will be reluctant to choose French or, unfortunately, Australian law - as the law of the contract.

I said I would speculate on longer term effects. That can only be done in general terms. I will be brief.

I have no doubt that the preparedness of European corporations and lawyers to adopt English law and a London seat was affected by the fact that the UK was part of Europe. The relocation of some financial institutions and transactions will reinforce the loss of that inclination. Similarly, in the longer term, London may well lose some of its lustre as a global city.

None of this is positive for London arbitration. You will all just have to work harder. The first task, however, is to get involved in the detail of the divorce settlement.

Competitors of London as a seat have multiplied as rapidly as suitors for the hand of Penelope, Odysseus’ wife and assumed widow. The LCIA will continue to prosper if it adopts the strategic insight, patience and guile of Penelope in delaying Odysseus’ competitors until his return and setting the rules for their ultimate rejection. His own conduct is not a model—from winning the Trojan war by deceit, to the ruthless revenge on the suitors and Penelope’s maids after his return. In Margaret Attwood’s novella The Penelopiad, Penelope has the last word. She expresses disdain for the longevity of Odysseus’ stories, when he was a known and admitted liar. In this respect also, there are analogues in the Brexit debate.