The Brexit Papers

International Arbitration

Paper 2

Bar Council Brexit
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THIRD EDITION

Brexit Paper 2: International Arbitration

Summary

For decades, London has been the seat of choice for parties seeking to resolve international commercial disputes through arbitration. But the capital's dominance as a seat for arbitration is not assured. It competes with Singapore, Hong Kong and Dubai as well as with the other well-established arbitration centres in Paris, Geneva, New York, Zurich and Stockholm. There is a risk that, if barriers to entry are created (or even appear to be created) for parties, their lawyers or for arbitrators, business will move elsewhere.

Additionally, there is an obvious risk to the continuation of English lawyers appearing as counsel or arbitrators in overseas hearings should it be made (or even appear) more difficult for English lawyers to appear in arbitrations which take place in the European Union.

- We urge the Government to preserve the rights of UK and EU lawyers under the Lawyers Services Directive 77/249/EC, and
- We further urge the Government to maintain the freedom of movement for immigration purposes for arbitrators, arbitration lawyers and clients both from the EU and to the EU as currently provided for in Articles 45, 49 and 56 TFEU and Directive 2004/38/EC.

The Impact of Brexit on International Arbitration

1. The Commercial Bar Association is the specialist association of the English and Welsh Commercial Bar. It represents over 1,500 individual members and 38 leading barristers' chambers, all of whom provide specialist advice, advocacy and mediation services in relation to commercial law for businesses, individuals and other organisations. Its members carry out work nationally and internationally, in the context of transactions, arbitration and litigation.

2. This short paper has been prepared by the Commercial Bar Association's sub-group considering the effect of Brexit on international arbitration work both in London and overseas. It supplements and supports a paper prepared by the Bar Council concerning access to the EU Legal Services Market post-Brexit – and is intended to provide some insight into the market for arbitration services in London and the EU. It is provided in advance of a more detailed paper that is intended to provide guidance more broadly on the effect of Brexit on international arbitration in London and steps that might be taken to strengthen London's position as a leading seat for the resolution of international disputes.

3. Arbitration is regarded by many now as the principal method of resolving international disputes involving states, individuals and corporations[1]. For decades London has been a dominant seat for arbitrations in the maritime and insurance sectors. Over the past 20 years London has become one of the dominant seats for the resolution of international commercial disputes of all varieties by arbitration. Respondents to a recent (2015) survey by White & Case LLP and Queen Mary, University of London[2] revealed that London was both the most used[3] and the preferred[4] seat for arbitration.

4. That position has been achieved[5] in part because of the supportive legislative and judicial environment, in part because of the high quality of the legal services market in London and in part because of the (relative) ease of access to the market. Indeed, these latter two factors explain why it is not uncommon for parties to agree that arbitrations seated outside the UK, should be heard in England.

5. The principal institutions administering arbitrations in London are the London Court of International Arbitration ("the LCIA") and the International Chamber of Commerce ("the ICC"). In addition, there is a large volume of arbitrations undertaken under the rules of the London Maritime Arbitrators' Association ("the LMAA") and a large number of ad hoc arbitrations which are not governed by any institutional rules.

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[1] *Redfern and Hunter on International Arbitration*, 6th ed, 2015, para 1.01.

[2] http://www.arbitration.qmul.ac.uk/docs/164761.pdf

[3] The ranking was London (45%), Paris (37%), Hong Kong (22%), Singapore (19%), Geneva (14%), New York (12%), Stockholm (11%).

[4] The ranking was London (47%), Paris (38%), Hong Kong (30%), Singapore (24%), Geneva (17%), New York (12%), Stockholm (11%).

[5] In addition to the factors mentioned here, London's position has doubtless been assisted by the UK's reputation as a centre for study for law students and young lawyers from overseas.

6. Commonly in an international arbitration in London neither of the parties will be English, some of the lawyers (whether counsel or lawyers instructing counsel[6]) will be based overseas and one or more of the arbitrators will be based overseas too. So far as each of these elements is concerned:

6.1 Parties: English law remains the most popular choice of law to govern international commercial contracts. The choice of English law for global commercial contracts is in part driven by the UK's reputation as the leading centre for international dispute resolution[7]. Where English law is chosen, London is a natural (but not necessary) choice of seat and venue for resolution of the dispute.

6.2 Lawyers/counsel: given that there are no restrictions on rights of audience before an arbitral tribunal, not infrequently a London-based arbitration will involve no participation from lawyers based in London. Typically, however, one or more of the English law firms or London-offices of the international law firms will appear. Frequently members of the English Bar will be instructed to appear as counsel either instructed from the UK or overseas[8].

6.3 Arbitrators: the rules of the LCIA and the ICC impose certain nationality requirements on the selection of arbitrators (see e.g. Article 15.5 of the ICC Rules and Article 6.1 of the LCIA Rules). Thus, if one of the parties is British (or majority-owned by UK shareholders), the chairman of a tribunal appointed under those rules is likely to be from overseas.

7. Although information is still awaited from the ICC, the latest statistics from the LCIA and LMAA reveal that:

7.1 LCIA: 326 arbitrations were referred to the LCIA in 2015. So far as the parties to those arbitrations are concerned, 25% were from Europe[9], 15.6% from the UK, 14.8% from Russia and the CIS, 12% from respectively Asia and the Caribbean[10] and smaller numbers from the US, Middle East and Latin America. The LCIA does not keep statistics as to the nationalities of the lawyers involved. However, the arbitrators (other than those from the UK) came from Australia, Austria, Brazil, Belgium, Canada, China, Cyprus, Denmark, the Netherlands, France, Germany, Greece,

[6] The counsel may be, and frequently are members of the English Bar, but sometimes are specialist arbitration counsel within solicitors' offices or foreign law firms.

[7] See page 6 of The City UK "UK Legal Services Report 2016" at https://www.thecityuk.com/research/uk-legal-services-2016-report/

[8] The City UK estimates that over 1,500 members of the Bar of England and Wales now receive instructions from abroad. See page 6 of The City UK "UK Legal Services Report 2016" at https://www.thecityuk.com/research/uk-legal-services-2016-report/

[9] For these purposes Europe includes Germany, Netherlands, Cyprus, Switzerland, Eastern Europe and other Western Europe categories. The Cypriot companies are likely to be foreign-owned.

[10] Most of the Caribbean companies will be foreign-owned companies.

Hungary, Iran, Ireland, Italy, Latvia, Lebanon, New Zealand, Nigeria, Russia, Singapore, South Africa, Spain, Sweden, Switzerland, Tunisia, Ukraine, and the US[11].

7.2 LMAA: there were approximately 2,000 new arbitration references in 2015 of which probably no more than 100 were seated outside London. Approximately 85% of those cases are dealt with on documents alone – and European lawyers would be involved in about 50% of those cases. In about 5% of the cases that go to a hearing there will be overseas arbitrators and in perhaps 25-30% overseas lawyers will attend (often with English counsel).

8. It will be appreciated from this description of common practice that, despite the stable legislative and judicial environment for international arbitration in the UK, the attraction and success of London as a seat for arbitration may be affected by any restrictions to the ease of access to London for parties, lawyers and arbitrators from overseas, including the EU.

9. Moreover, London's dominance as a seat for arbitration is not assured[12]. In view of the international nature of much of the arbitration work in London, it has to compete with other (often more geographically convenient) locations, including Singapore, Hong Kong and Dubai as well as with the other well-established arbitration centres in Paris, Geneva, New York, Zurich and Stockholm. There is a risk that, if barriers to entry are created (or even appear to be created) for parties, their lawyers or for arbitrators, business will move elsewhere[13].

10. Similarly, however, given the prevalence of an English choice of law in commercial practice and the high-standing in which English lawyers are held internationally[14], it is very common for English lawyers to appear as counsel or arbitrators in hearings that are held overseas, including in Paris and Stockholm. It has not been possible in the time available to obtain any detailed figures relating to those appearances. There is an obvious risk to the continuation of some of that work should it be made (or even appear) more difficult for English lawyers to appear in arbitrations which take place in the European Union.

11. In those circumstances, although London's reputation as a leading centre for the resolution of international disputes is richly deserved and London remains a robust seat for international arbitration, it is important that the rights of UK and EU lawyers under the Lawyers Services Directive 77/249/EC are preserved and that freedom of movement for immigration purposes is maintained for arbitrators, arbitration lawyers and clients both from the EU and to the EU.

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[11] Further information can be found at http://www.lcia.org/LCIA/reports.aspx

[12] In the Queen Mary survey referred to above, London was identified as the least improved seat over the past five years. See also page 17 of The City UK "UK Legal Services Report 2016" at https://www.thecityuk.com/research/uk-legal-services-2016-report/

[13] In this context its important to bear in mind that those advising on or agreeing to the insertion of arbitration clauses do not always consult specialists in the field and may simply take what they perceive to be a "safe" approach.

[14] The high-standing in which English advocates are held is a consequence of their expertise in advocacy and in certain specialist sectors, but also their exposure to arbitration users; hence the importance of maintaining that exposure.

Recommendations

Any post-Brexit arrangement with the EU should, at the very least:

- Preserve the rights of UK lawyers under the Lawyers Services Directive 77/249/EC, and
- Maintain freedom of movement for immigration purposes for barristers (and other lawyers), as currently provided for in Articles 45, 49 and 56 TFEU and Directive 2004/38/EC.

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