Arbitration in a Post-Brexit World

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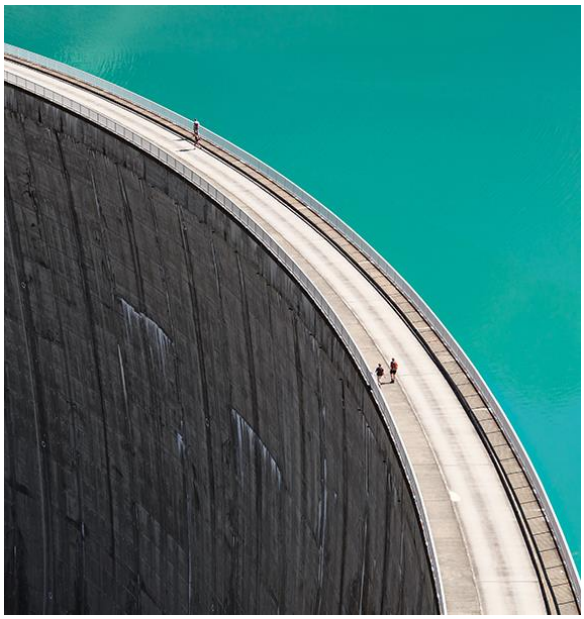

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This article considers what the arbitration landscape will look like when (or perhaps if!) the UK leaves the EU and concludes that big changes are unlikely.

Irrespective of the type of Brexit that the Government chooses, many commentators believe that there will be little change to arbitration in the UK in a post-Brexit world. Arbitration is, after all, one of the areas that is not directly governed by EU law. Arbitration is excluded from EU law by Regulation (EU) 1215/2012. Matters such as the composition, creation and authority of an arbitral tribunal as well as the arbitral proceedings and challenges to the award are not governed by EU law and so will not be affected by any form of Brexit.

The July 2018 Thomson Reuters report on the impact of Brexit on dispute resolution clauses indicated that many people thought that arbitration might increase at the expense of litigation following Brexit. This was because of a feeling of uncertainty in enforcing a court judgment in Europe post-Brexit and the view that the New York Convention 1958 would not be affected by Brexit. All member States of the EU are signatories to the New York Convention.

Oral and non-commercial arbitration agreements

It is correct that the New York Convention 1958 will not be affected by any form of Brexit. However, not all arbitration awards can be enforced internationally by using the New York Convention. There are six[1] EU member states which have ratified the New York Convention with the "commercial" reservation. In cases where a party needed to enforce a non-commercial arbitration in one of these states it would first need to have the award registered as a judgment at the seat of the arbitration and then enforced as a judgment. Non-commercial disputes would include employment, media, sports and family arbitrations. Similarly, an arbitration agreement must be in writing if recognition and enforcement under the New York Convention is to be obtained.[2] If the arbitration agreement is not in writing then any subsequent award cannot be enforced under the New York Convention. However, an award made under an oral arbitration agreement, or a non-commercial award may be recognized as a judgment and enforced by the courts.

The UK Government proposes repealing most of the Brussels Regime in the event of a no-deal Brexit.3 The Government's draft regulations would make the Brussels Regime redundant (except during the transition period) and *"jurisdiction and the recognition and enforcement of judgments will be determined by a combination of the existing common law and statute which currently applies to cases to which the Brussels regime does not apply"*.[4] It may therefore be more difficult in a post-Brexit world to enforce awards that are non-commercial or where the arbitration

[1] These countries are Cyprus, Denmark, Romania, Slovenia, Hungary, and Poland

[2] New York Convention 1958, Art. IV.I(b)

[3] See the draft Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 issued on 12 December 2018

[4] See [7.2] of the Explanatory Memorandum to the draft Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019

agreement is not in writing in EU Member States if these need to be enforced as judgments of the court.

Further, there will be instances where a party to an arbitration will need the assistance of the courts in the arbitration procedure. There are two areas where a no-deal Brexit will have an effect of the court's powers to assist the arbitration procedure.

Anti-suit injunctions

The first instance relates to anti-suit injunctions. In the *West Tankers case*[5] the Court of Justice of the EU held that an anti-suit injunction issued by an English court to prevent court proceedings progressing where there was an arbitration clause was contrary to EC Regulation 44/2001. At the time the UK Government sought to have the decision overturned by a change to the Brussels I Regulation, but this was rejected. If a no-deal Brexit occurs the Court of Justice of the EU will no longer have direct jurisdiction in the UK. In such a case the English courts *could* issue anti-suit injunctions where proceedings are started in any EU Member State in breach of an arbitration agreement. There will be no reason why the UK courts would treat EU Member States differently to how they treat the courts of any other non-EU jurisdiction. As stated in C v D :[6]

> "Time and again the English courts have granted an injunction to restrain a … breach of an arbitration agreement where the rights of the parties are clear."

This statement was recently approved in *Atlas Power Ltd & Ors v National Transmission and Despatch Co Ltd*[7], where the High Court granted an anti-suit injunction to restrain a defendant from challenging in the Pakistan courts a partial final LCIA award issued in a London arbitration.

Worldwide freezing orders

The second instance relates to worldwide freezing orders. The power of the courts in England and Wales to issue freezing orders in support of arbitration proceedings is given in s.44(2)(e) of the Arbitration Act 1996. Here the courts may, in certain circumstances, issue an interim injunction in support of the arbitral proceedings. The elements required before a court will issue a freezing order include: (1) a good arguable case; (2) whether the order will be effective over the respondent's assets; (3) whether there is a real risk of dissipation of assets; (4) whether the granting of the injunction is just and reasonable.[8] Further, the applicant will need to show that the Arbitral Tribunal is unable to act effectively. The main problem with worldwide freezing orders is that, to be effective, often they require the support of the courts where the assets are located.

The current position of EU courts is to enforce worldwide freezing orders. The issue was considered in *Meroni v Recoletos Ltd* (Case C-559/14). The European Court found that it was not contrary to public policy to allow the worldwide freezing order to be enforced. It found that the court in which registration of the worldwide freezing order was sought could not review any findings of fact or law, and could not refuse to recognise or enforce a judgment from another EU state unless that would constitute *"a manifest breach of a rule of law recognised as essential in the legal order of the Member State in which enforcement is sought…"* Once Brexit occurs the obligation for one Member State to enforce judgments or orders in another Member State on this basis may no longer apply. Therefore, unless the UK and the EU enter into a further agreement for the recognition and enforcement of judgments, there may be a risk that the effectiveness of worldwide freezing orders will be reduced when they are directed towards an EU Member State.

Comment

There will be very few changes to arbitration law in the UK resulting from any form of Brexit. However, where the UK courts are required to assist in supporting the arbitration proceedings then some changes may occur. This will be more pronounced where a no-deal Brexit occurs. Some of these changes may give the courts more power, as they will not be subject to EU law; however, it is also possible that the effectiveness of some court orders may be reduced because the UK is no longer part of the EU.

[5] *Allianz SpA v West Tankers* Case C-185/07

[6] [2007] 2 Lloyd's Rep 367

[7] [2018] EWHC 1052

[8] *Belair v Bassel LLC* [2009] EWHC 725, *Dadourian Group International Inc v Simms (No 1)* [2006] 1 WLR 2499 and *Mobil Cerro Negro Ltd v PDVSA* [2008] 1 CLC 542