



Brexit begins

Douglas Thomson, 29 March 2017

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UK-based arbitral institutions have insisted business is still strong as Britain delivered its formal notice of withdrawal from the European Union, triggering a two-year countdown to departure.



The UK formally notified the European Council of its intention to withdraw from the European Union through invoking Article 50 of the Lisbon Treaty in a letter signed yesterday by British prime minister Theresa May.

The notice comes after a contentious referendum last year when a narrow majority of British voters approved the state's withdrawal from the EU.

Nine months on, the consequences of the vote are still uncertain. But UK-based arbitral institutions have been trying to reassure users that those consequences will not include uncertainty over the UK's long-term desirability as a seat of arbitration.

The view from London

The LCIA is still to publish its statistics for this year but director-general **Jacomijn van Haersolte-van Hof** says the caseload is "very robust and stable, and increasingly diverse". She notes that there are usually around three or four years between the conclusion of contracts and disputes leading to arbitration and says it would be difficult to attribute any change in caseload to a political development like Brexit alone.

"The general sentiment seems to be 'Keep Calm and Carry On Arbitrating'," she says, alluding to a Second World War British propaganda slogan which in recent years has become an almost ubiquitous meme in the UK.

Haersolte-van Hof says the impact of Brexit may be similar to that of sanctions regimes against certain countries, in that some arbitral institutions will “use or abuse” it to try and entice parties to move their seats elsewhere.

“With sanctions, at least it was a very tangible development because there are simply laws and regulations that you can analyse to know how to approach them, ” she says. “With Brexit, there is still quite some uncertainty. But on balance I do believe that arbitration, and English substantive law, will come out well.”

Van Haersolte-van Hof says Brexit may pose problems in English court proceedings and raise issues relating to foreign selection clauses – but that these will help rather than hinder arbitration. “With the New York Convention in place, the enforceability of awards is assured”.

Independent arbitrator and chair of ICC UK’s arbitration committee **John Beechey**, who is based in London and Hong Kong, says he does not think arbitration has suffered since last year’s referendum. “On the contrary, anecdotal evidence would suggest that it is booming.” But he says that might be different after the terms of the UK’s exit are clear.

“In principle, there should be no reason why the quality of the arbitration services – arbitrators, courts, law firms and support services – offered in the UK, and London in particular, should take a turn for the worse, or why London as an arbitration ‘hub’ should not continue to attract business from around the world. Some might say that once the UK is free of EU regulation, it might become even more attractive as a centre.”

“But if rights of access begin to affect the ability of law firms and chambers to attract the brightest and best talent from the EU, there may be an impact. Too early to tell.”

Damian Hickman, Chief Executive Officer of the London-based hearing centre IDRC, also says he is “not sure” of the impact of Brexit but notes a 25% increase in overall business over the past year – the centre’s busiest year since it opened in 2000.

"Scotref" looms

In the UK’s other major jurisdiction, Scotland, a clear majority of voters supported continued EU membership in the referendum – leading the nation’s devolved parliament to this week approve a new referendum on independence which might enable Scotland to stay.

The Scottish Arbitration Centre’s chairman **Brandon Malone** says he does not expect an impact on arbitration in Scotland in advance of the UK’s planned withdrawal from the EU in 2019, unless uncertainty leads to a significant reduction of business levels.

In the longer term, he says that if the mutual recognition aspects of the EU’s legal regime are not retained that might lead to a rise in arbitration in post-Brexit Scotland, a matter which the centre’s chief executive **Andrew Mackenzie** has already discussed with the Scottish government.

“There is the prospect that businesses might turn to arbitration and the benefits of the New York Convention.”

A vote for Scottish independence, pre- or post-Brexit, might also lead to increased arbitration, he says. “Scotland’s emergence as an independent state with international legal personality and the capacity to treat, would in the longer term generate investment treaty arbitration, which is not something we tend to deal with at the moment.”

Malone notes that the timing of "Scotref" – a term gaining currency to refer to the Scottish independence referendum – is a subject of dispute between the British and Scottish governments, which disagree on whether it should take place before or after the UK withdraws from the EU. "Perhaps someone should offer to arbitrate."

Who stands to gain?

As the UK triggered Article 50, practitioners from around the world gathered in Milan for the GAR Awards and IBA Arbitration Day. This may be one of the seats which benefits from any decline in London's attractiveness to arbitration parties.

The Milan Chamber of Arbitration's secretary general **Stefano Azzali** agrees with the others GAR interviewed that it is too early to tell the impact of Brexit on the arbitration market.

But he says: "London is losing part of its appeal for law firms, multinationals and international organisations. It may be a superficial reaction, but it is understandable. The UK will be 'simply' a European country, but out of the EU. There is a strong feeling among business people that it will be more difficult to do business with UK counterparties, to circulate money and workers. And as one of the European 'regional' arbitration centres, LCIA may lose appeal as well. Maybe not a justified loss, but as a consequence of a more general reaction to Brexit."

He says the Milan chamber might benefit as a "real European alternative to the major international arbitral centres [such as the ICC] and non-European institutions. For instance, its role in Euro-Mediterranean arbitration may well be strengthened."

"But I sincerely hope to register an increase in our activity not because of Brexit but because of our good rules, efficient and effective administration of cases and the positive attitude of our judges and improvement of Italian law," he says.

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