HERBERT SMITH FREEHILLS

BREXIT AND INTERNATIONAL ARBITRATION

13 November 2017 | Europe
Legal Briefings – By **Antonio Pastor, Consultant**

The United Kingdom (London) is currently a prime hub for the resolution of international economic disputes due to its favourable legal and institutional frameworks. As a result, it would be advisable to take an in-depth look at international arbitrations seated in London in a post-Brexit world.

The impact of Brexit on a specific legal or economic sector cannot be separated from the overall impact of the United Kingdom's withdrawal from the European Union (EU). However, sectors such as arbitration, which do not fall within the EU's jurisdiction, would seem, on the surface at least, to be the least affected. Indeed, arbitration is excluded from provisions such as Regulation (EU) 1215/2012, whereby EU law has no impact on the creation of an arbitral tribunal, the authority of the arbitrators, how the proceedings are run, nor on any court action or decision related to the annulment, review, appeal, recognition or enforcement of arbitral awards. The courts of the EU Member States must decide on the recognition and enforcement of arbitral awards on the basis of the New York Convention of 10 June 1958, of which 28 Member States are party.

In a post-Brexit scenario, an arbitral award delivered in London would continue to be enforceable throughout the EU. Equally, any arbitration linked to the states that are signatories to the New York Convention would be enforceable in the United Kingdom.

On the other hand, arbitration is making headway through the OECD, G20 and the EU, in a specific contexts such as international taxation. The EU Council's proposed Directive – dated February 2017 – on mechanisms to resolve double taxation disputes in the EU confirms as much. Those arbitrations do enjoy specific EU regulations and could furthermore be triggered precisely as a result of situations caused by Brexit, such as a scenario in which the United Kingdom offers companies new tax incentives.

Returning to the overall impact of Brexit, this favourable panorama of stability should materialise as British law will suffer significant changes, both formal and material, as a result of its withdrawal. It can be inferred from the Repeal Bill White Paper dated 30 March 2017 that EU law, which was binding for the United Kingdom for over 40 years, will now come to form part of national law. This is very likely to generate issues of interpretation, which are currently resolved by EU institutions. This process, known as grandfathering, will avoid a legal vacuum from appearing, but will not prevent issues emerging as regards the application of those laws.

The Withdrawal Agreement ultimately signed by the EU and the United Kingdom may foster or hinder the smooth transition towards the new legal framework that will exist in the United Kingdom. As negotiations have only just begun, the impact of such a bilateral treaty are as yet unclear. Although the intention of all the parties involved is to generate certainty and predictability, the context in which this is taking place is highly complex. As well as the Withdrawal Agreement, the parties must negotiate transitional agreements and another significant accord on the new bilateral relationship between them. The United Kingdom will pass from being subject to EU law to being bound by other international obligations that prevail over its national law.

In conclusion, as it currently stands, the United Kingdom is highly competitive in the field of arbitration due to its courts acting on the basis of the Arbitration Act of 1996 and material law, which is to a large extent a product of EU law. The United Kingdom's withdrawal from the EU generates uncertainty as to its ability to hold on to that privileged position in the international arbitration arena.

Brexit hub

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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