INSIDE ARBITRATION: COMMERCIAL ARBITRATION IN EUROPE: WHAT DOES THE FUTURE HOLD OUTSIDE PARIS?

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Legal Briefings

In a period of change, transition and reflection across Europe, and following our article on Paris, our arbitration partners in our European offices share their thoughts on what the future holds for arbitration in their jurisdiction and more widely.

GERMANY

Many formerly London-based financial institutions have set up in Germany in the wake of the UK's Brexit referendum, with a number of banks, asset managers, traders and insurers making the move. There is the potential for this to impact on choice of governing law and arbitration, with an increasing number of financial institutions looking to Germany as a preferred seat. In the last few years more German businesses in the finance and insurance sectors have already been turning to arbitration and we expect this trend to continue, particularly in the light of moves in the financial sector as a result of Brexit.

The revised DIS rules entered into force last year and have also increased the appeal of German arbitration, enhancing the position of Germany as a seat. The Rules call on arbitrators to conduct proceedings in a manner tailored to the case in question, while continuing to encourage arbitrators to be pro-active in managing arbitrations, so as to reach a swift resolution of the dispute.

The Federal Ministry of Justice and Consumer Protection has formed a task force to further enhance the effectiveness of German arbitration law. Patricia Nacimiento of Herbert Smith Freehills is a member of the task force, which lists the declaration of enforceability of foreign awards among its key priorities. The final report is expected within 2019 and will be an important development in German arbitration. However, given the current political landscape in Germany, it is not expected that there will be any major change to German arbitral legislation in the short term.

Civil law is currently having an increased impact on international arbitration procedure more generally, with the arrival of the Prague Rules late last year. While not all civil law lawyers are in favour of every provision in the Rules, many German lawyers would agree there is some truth in the drafters' position that standard international arbitration procedure has become too stagnant and fixed. Over the next 10 years we expect to see this change as civil law approaches become more regularly adopted.

Another important development is the establishment of an English-language German commercial court in Frankfurt, which reflects Germany's intention to attract non-German speakers to Germany as a jurisdiction. While we do not expect the new court to overtake arbitration in the short term, the English-speaking court may in future offer an alternative to international arbitration. It will be interesting to see how the court's caseload develops over the next ten years.

German businesses in a number of sectors which have traditionally litigated disputes have increasingly been turning to arbitration over the last few years. We expect to see this trend continue, particularly in the finance, insurance, pharma and tech sectors.

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ENGLAND AND WALES

London has an excellent reputation and strong recognition in arbitration globally and is one of, if not the, most popular seats of arbitration in the world. The UK is a signatory to the New York Convention, has a well-drafted and clear piece of modern arbitration legislation, an impartial and well regarded judiciary, a strong track record in supporting arbitration and enforcing arbitral awards and high quality arbitrators, experts and counsel.

All of these factors are reasons that parties currently choose a London seat and will remain valid after Brexit. However, Brexit is bringing with it uncertainty, and while that uncertainty does not directly impact on arbitration itself, it may lead to some parties looking to other seats, particularly where other countries actively seek to promote their own offering as a response.

We have seen a considerable rise in the number of financial transactions that have included arbitration clauses over the past decade. London is currently leading in the arbitration of complex financial disputes, with the LCIA reporting increased use of London-seated arbitration by financial institutions in 2018. Almost a third of arbitrations filed with the LCIA in 2018 related to banking or finance. We expect this growth to continue in the short to medium term at least despite Brexit, given the ongoing strength of London as an arbitral seat and the fact that many contracts already concluded in the sector will have a London-seated arbitration clause.

London remains a strong centre for ad hoc arbitration, seeing for example over 1,500 ad hoc arbitrations taking place in LMAA arbitration alone in 2018.

Post-Brexit, we anticipate a period of reflection and an increased awareness that London cannot be complacent about its position in the arbitration universe. The recent success of events like London International Disputes Week demonstrate that understanding and London's willingness to grow and develop as an arbitral centre. In the short to medium term there is the potential for revision and updating of the Arbitration Act 1996, which is currently on hold due to the Brexit legislative timetable.

The English approach to disclosure in the courts is changing and this is likely to make the difference between English court litigation and arbitration less pronounced. This may in turn lead English lawyers to become more flexible and imaginative in their approach to document production, so that they may come to have more in common with the approach of their civil law colleagues. Also, while the IBA Rules are likely to continue to be used in the majority of London-seated arbitrations, there is interest in the Prague Rules among London-based lawyers, which may also increase civil law influence.

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SPAIN

Spain is working to establish itself further as a desirable seat for international arbitration involving Spanish, Portuguese and Latin American interests, particularly with the increase in LatAm arbitration. As part of this initiative, a new unified arbitration institution, the Centro Internacional de Arbitraje de Madrid, is expected to launch soon. The new arbitral institution is being formed by the three main current Spanish arbitral institutions, with the aim of promoting Madrid as a leading international seat.

The underlying legislative framework supports these efforts, as Spain is an arbitration-friendly jurisdiction, with a modern Arbitration Act based on the Model Law. Spain is also a signatory to the New York Convention.

There is a very healthy and growing domestic arbitration market, as demonstrated by the First Survey on Arbitration in Spain, published in 2018. The survey reported that 45% of Spanish companies surveyed have been involved in at least one arbitration in the previous 5 years and 47% of companies surveyed prefer arbitration to court litigation.

Spain's arbitral institutions are quick to adapt and change, as seen with the introduction of emergency arbitrator provisions in 2014. New rules are expected for the Centro Internacional de Arbitraje de Madrid, which may encourage other Spanish arbitral institutions to revise their rules.

The Spanish national courts are still seeking to strike a balance between supporting and supervising arbitral proceedings and there have been some surprising recent decisions. In 2018, for example, an award was annulled due to an unreasonable assessment of evidence, as certain evidence was not analysed in the award. In another case an award was annulled despite the parties' joint request to withdraw the annulment proceedings. This year has seen the annulment of an award on costs due to the failure to provide reasons for disregarding the rule on allocation of costs established by the Spanish Civil Procedure Act. These decisions are restricted to the Madrid High Court and more consistency is generally seen in decisions from the higher courts.

The third party funding sector is growing in Spain, particularly in certain niche areas such as private antitrust claims. Third party funding is not currently regulated and we do not expect legislation on third party funding to be introduced in the short term. However, Spanish arbitral institutions may potentially in future decide to implement rules to regulate third party funding.

The creation of a single international arbitration centre is expected to increase the prominence of Spain in the international arbitration sphere. In the last few years, Spain has seen the emergence of fast-track procedures for lower value arbitrations. New tools to deal with these lower value arbitrations are expected to continue to be developed and technology will probably play a major role in this.

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RUSSIA

The past few years have been a time of real change and development in Russian arbitration and there is likely to be more change to come. On 29 March 2019 a series of amendments to Federal Law No. 382-FZ “On Arbitration (Arbitration Proceedings) in the Russian Federation” came into force. The amendments attempt to address various issues arising from the 2016 Russian Arbitration Reform, including the arbitrability of corporate disputes and the Russian Permanent Arbitration Institutions (PAI) regime.

In April 2019 the HKIAC became the first foreign arbitral institution to achieve PAI status and the Vienna International Arbitration Centre (VIAC) will gain PAI status on or before 8 July 2019. It is likely that some other international institutions will also apply. We have recently seen a trend of increasing interest in Asian seats and expect more movement of Russian disputes from European seats to Asia, particularly given the imposition of sanctions and the registration of the HKIAC as a PAI.

Past concern about the enforceability of the ICC standard clause in Russia has now been laid to rest, with the Supreme Court issuing an "Overview" in December 2018 confirming that standard institutional arbitration clauses should be enforceable. The Supreme Court Overview also introduced increased predictability on the enforceability of unilateral option clauses. This type of option as used under many other systems of law (including English law where such clauses, if clearly drafted, are enforceable) will not be effective as a matter of Russian law. This clarification should end the sometimes contradictory approach to such clauses by Russian courts, but may in future limit both the attractiveness of Russia as a seat and of Russian governing law for sectors such as finance, where unilateral options are common.

The last year has also brought broadly positive news about enforcement of arbitral awards in Russia, with the publication in November of the Russian Arbitration Association's study. Between 2009 and 2017, the overall success rate of recognition and enforcement applications in the Russian commercial courts fluctuated between 80% and 97%. The success rate for ICC awards was only 61% and only 47% for LCIA awards, demonstrating differences in enforceability depending on the seat/institution, but this remains a positive development given the perception that enforcement in Russia may be challenging.

The recent Russian arbitration reform introduced significant changes and the arbitration market is still in a transition phase. Reaction to the reform has divided opinion in the Russian arbitration community, with commentators taking opposing views on whether the reform has enhanced Russia's appeal as an arbitral seat. The number of arbitral institutions (and accordingly also caseload) has dramatically decreased since the reform, mainly due to regulatory requirements for arbitral institutions. In the short to medium term we expect the Russian arbitration market to recover to pre-reform volumes, but anticipate that complex and high-level commercial transactions will largely continue to be handled by international arbitral institutions with a seat outside Russia.

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