Will the Brexit Result Hasten London's Decline as a Premier Seat of International Arbitration?

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Michael McIlwrath (Baker Hughes GE)

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The cover of The Hitchhikers Guide to the Galaxy famously features a "Don't Panic" button. In the weeks leading up to the Brexit vote, some English law firms posted reassuring articles on the possible effects a vote to leave would have for dispute resolution in London. "Don't panic" seemed to be a common theme.

Yet in-house counsel will naturally question whether (and how) the UK's exit from Europe will impact the dispute resolution clauses in commercial contracts being negotiated by their companies today. These clauses may not be invoked for years to come, which is why in-house lawyers seek stability and

predictability in them. London has long had a reputation for both.

In fact, the Brexit vote is unlikely to alter the preference of parties around the world who choose substantive English law to govern their commercial contracts. This is based on hundreds of years of developed principles of contract law that will not be affected by the UK exit from Europe.

But the question is more complicated when discussing reputation as a premier seat of arbitration, and London was already facing increased rivalry from cities on the continent in recent years.

On the “don’t panic” side, one possibility is that London will be unaffected as a seat. For example, Singapore and Hong Kong are now premier arbitration cities and neither are part of a broader economic framework like the EU.

An arbitration colleague in Germany even sees a potential upside for London. She believes the decision to leave could make London more attractive as a place of arbitration, as a hub for investments into the EU. This is because it would remove the risk of the European Court of Justice having any role in any arbitration challenge or anti-suit injunctions (see West Tankers).

A colleague in London felt that while the Brexit decision will spur UK-based companies to include arbitration in their contracts with EU companies. Given the uncertainty as to whether a post-exit UK court judgment will be enforceable in the EU, UK companies would instead rely on the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

And, with some dark humor, a friend who is an arbitration counsel in London said foreign companies may find her firm to be more of a bargain now, due to devaluation of the British pound and competition among London firms for diminishing legal work as businesses move to Europe to preserve access to the larger market and ensure the easy movement of employees.

On the “panic” or “panic a little” side, comparisons with Singapore and Hong Kong may be misplaced due to geographic reasons. Even without the Brexit vote, London was already facing fierce competition from cities on the continent, and it has been losing ground.

A recent study by Brunel University, funded by the European Parliament, confirmed that European businesses and counsel believe there are a number of viable transnational dispute fora across the EU; in a number of EU countries, in fact, a large percentage of respondents did not even list the UK among their “top five” places of dispute resolution.*

Forum competition has only intensified in recent years, for example with France’s strongly pro-arbitration law enacted in 2011.

The Arbitration Act of England and Wales, by contrast, has remained idiosyncratic and does not vaunt the international reputation of the country’s substantive law. (The same could be said of the Federal Arbitration Act in the USA.) Further, the Chief Justice, Lord Thomas, has expressed a certain antipathy towards the practice of arbitration.

So now Brexit.

At least in part, London derives its reputation as a place of dispute resolution from the sophisticated financial markets that call it home and the support they derive from London’s robust legal services and reliable courts. If, as a result of Brexit, the EU tries to steer Europe’s financial center to the continent (which would not be a surprise), the disputes of these businesses may follow and so may the legal services that accompany them.

Also, it is impossible to predict, or ignore, the psychological effect that the leave vote will have for companies in the EU who today agree to seat their arbitrations in London. Whether the risks associated with Brexit are real or only imagined, in-house counsel may simply be inclined to seat their arbitrations closer to home. Or, rightly or wrongly, they may interpret the vote as being hostile to Europe and its citizens, and therefore not entirely neutral as seat for resolving their disputes.

Conclusion: The Legal Impact of Brexit Is Uncertain, But Uncertainty Does Not Favor a Seat of Arbitration

From a brief survey of the reactions of my in-house counsel colleagues, the consensus is that there is no reason to panic in the short term. The decision to leave is unlikely to cause any significant risks or changes for our companies due to the long lead time and need for negotiations between the UK and Europe on the terms by which the exit will occur.

We also seem to be in agreement that it is impossible to predict the longer-term implications for London as a preferred seat of arbitration. It may be some months and possibly years before the real consequences, or lack of any, will be evident. But uncertainty, while it may not be cause for panic, is anathema to dispute resolution clauses.

Thus, even in the short term, in-house lawyers in Europe may find themselves agreeing more frequently to a seat of arbitration on the continent.

The Hitchhikers Guide is a book that starts with the earth being destroyed. Given the uncertainties the Brexit result is now generating, maybe a little panic is warranted.

*Email from Tony Cole, 24 June, 2016, reporting data from Tony Cole, et al, “Legal Instruments and Practice of Arbitration across the EU” (2015), available at http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2015)509988