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NEWS

After Brexit: the new landscape for English arbitration

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While Brexit's effect on the popularity of England-seated arbitration is still unclear, it poses significant practical difficulties for practitioners seeking to travel to participate in arbitrations in the EU. ***Stuart Dutson***, ***Jonathan Schuman***, ***William Dunning*** *and* ***Eliza Jones*** *of Simmons & Simmons in London report.*

Since the Brexit referendum in 2016, many in the London arbitration community had hoped that one biproduct might be an increase in the popularity of England-seated arbitration.

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Many speculated that one high-profile consequence of Brexit – lack of access to the Brussels and Lugano judgment enforcement regimes – would increase the appeal of English arbitration (and its straightforward routes to enforcement) at the expense of English court litigation.

More than 18 months since the UK left the EU and nearly a year since the end of the transition period, it is still unclear what impact Brexit will have on England-seated arbitration and its practitioners. Evidence from institutional statistics suggests that Brexit has had little discernible effect – positive or negative – on London's attractiveness as an arbitral seat.

The challenges that Brexit may entail for English arbitration practitioners seeking to practise in the EU/EFTA have received less attention. The covid-19 pandemic may have blurred the impact of Brexit so far, but there is little doubt that the end of free movement between the UK and the EU, and the end of the mutual recognition of professional qualifications, will create practical difficulties for those providing arbitration services between the UK and the EU.

Rights to freedom of movement and mutual recognition have been replaced by a complex framework of regulations set out in the EU-UK Trade and Cooperation Agreement (TCA) agreed on 24 December 2020. Although the TCA provides a baseline for the cross-border provision of arbitration services, the reality is that English practitioners now face a patchwork of different regimes in the EU's member states.

The practical implications of this change are largely unexplored, not least because the end of the Brexit transition period coincided with the height of the covid-19 pandemic (and accompanying restrictions on international travel). As restrictions ease, English arbitrators and counsel will need to be alive to this new framework and prepared for the pitfalls that await.

No Lugano – a quick update

Certainty remains one of the primary attractions of English law as a governing law and London, with its manifest pool of English lawyers, as a

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venue for international disputes. That certainty is likely to increase with the combination of a more positivist UK Supreme Court abandoning the more liberal views of Lord Hoffmann and the EU's civil law methodologies drifting further from the development of English law. Meanwhile, arbitrators and litigators have long accepted that Brexit will increase the appeal of English-seated arbitration compared to English court litigation. Brexit will have a significant impact on the enforceability of English judgments in the EU/EFTA, but no impact on the enforceability of English awards.

Parties choosing to litigate in the English courts now face additional challenges in enforcing judgments in the EU/EFTA. On 28 June 2021, the European Commission formally blocked the UK's accession to the Lugano Convention. Unless the European Commission reconsiders, successful UK litigants will not benefit from the Lugano framework for the enforcement of judgments, which is broadly similar to the EU's internal Brussels regime.

Without Lugano, English court judgment creditors must rely upon the Hague Convention on Choice of Court Agreements 2005 or the relevant EU/EFTA member state's individual rules on enforcement of foreign judgments. The Hague Convention is of only limited assistance: first, it applies only where there is an exclusive jurisdiction clause; second, it does not cover interim measures; and third, EU courts may treat the Hague Convention as applying only to contracts entered into after the UK's re-accession to the Convention on 1 January 2021. Many parties will therefore need to look to the patchwork of local enforcement regimes in EU/EFTA states, making the enforcement of English judgments more complicated, uncertain and expensive.

These challenges will not be encountered by parties who choose to arbitrate in England. Parties to English arbitrations will continue to benefit from enforcement under the New York Convention 1958 in all 169 signatory countries, including all 31 EU/EFTA member states. Parties may therefore increasingly favour England-seated arbitration over litigating in the English courts.

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English arbitration practitioners – travelling to and arbitrating in the EU

The practical impact of Brexit on English arbitration practitioners has seen far less discussion than the comparative merits of English arbitration and litigation post-Brexit. In fact, practical challenges are among the most significant obstacles that Brexit is likely to pose to English practitioners. The international nature of much arbitration work means that practitioners can be reliant on their ability to travel and provide legal services cross-border.

According to a recent study by the Singapore Academy of Law, English law remains the most popular governing law for cross-border transactions. English law agreements can be, and regularly are, subject to arbitration outside London, including in favoured EU/EFTA seats such as Paris, Stockholm, Geneva, The Hague and Zurich. Indeed, post-Brexit we have seen a noticeable increase in English law-governed financial instruments involving EU/EFTA counterparties being subject to arbitration in Paris. However, the legal regime that previously guaranteed the rights of English practitioners to travel and participate in arbitrations in the EU/EFTA has been upended and replaced with the TCA.

Chapter 4 of Title II of Part 2 of the TCA guarantees certain rights of temporary stay for business purposes. There are several different categories of business visitors: short-term business visitors (STBVs), contractual service suppliers (CSSs), independent professionals (IPs) and intra-corporate transferees (ICTs). Each of these groups have different criteria, allow for different periods of stay, and are subject to different conditions and qualifications.

- STBVs are (like tourists) permitted under article 142(4) of the TCA to stay visa-free within the EU for up to 90 days in any six-month period, but can only engage in a limited range of activities, which, for example, does not expressly include attendance of hearings.

- ICTs are permitted under article 141(2) of the TCA to stay for up to three years provided that they qualify as a “manager” or “specialist”.

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- CSSs and IPs are permitted under article 143(4) of the TCA to stay for the lesser of 12 months or the period of the contract under which they are engaged.

English arbitration practitioners need to become familiar with these categories and, if required to work in the EU for an extended period, carefully consider which is the most relevant to their situation. This may not be immediately clear. For example, to qualify as either a CSS or IP to stay in the EU for longer than 90 days, practitioners are required to be engaged under a contract lasting no longer than 12 months. Depending on how this requirement is applied by member states, it could require a more careful consideration of how arbitration practitioners structure their engagements.

As if this new regime were not complicated enough, these provisions of the TCA are subject to a wide range of member state-specific "non-conforming measures". As a result, requirements vary between member states. For example, Austria allows CSSs and IPs to stay for only six months in any 12-month period (instead of up to 12 months), while many member states apply economic-needs tests to CSSs and IPs.

In practice, arbitration practitioners will need to consider carefully how the provisions of the TCA have been incorporated by each relevant member state into their immigration law and policy. This is what will ultimately determine the criteria, costs and time required to obtain a visa over 90 days.

Once arbitration practitioners have made their way to their destination member state, they will also need to consider what legal services they are permitted to provide during their stay. Article 194 of the TCA gives UK lawyers the right to provide "designated legal services" using their home title. Although "legal services" are defined by article 193(g)(ii) as including "legal arbitration, conciliation and mediation services", this "does not include acting as an arbitrator". The TCA appears to be of no assistance to arbitrators, who must look directly to local law in the relevant jurisdiction.

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While English lawyers are allowed to advise on English law and on public international law, they are expressly prevented by article 193(a) of the TCA from advising on EU law. Although it is open to member states to allow UK lawyers to practise EU law in their territory, the exclusion of EU law from the scope of the TCA may create practical complications when UK lawyers participate in EU-seated arbitrations. For example, opposing counsel may employ guerrilla tactics by raising an objection to the instruction of UK counsel where the arbitration is EU-seated or dealing with matters of EU law. Alternatively, objections could be raised at the enforcement stage on public policy grounds. This is likely to prove particularly problematic at the intersection of EU and public international law, eg, where investment treaty arbitrations consider the Court of Justice of the European Union's decision in *Achmea*.

As with the rules on cross-border travel, the right to provide legal services is also subject to a catalogue of member state-specific "non-conforming measures". These measures may limit or cancel the general principle of home title practice in certain jurisdictions. In Italy, for example, English lawyers working under their home title may not represent clients in "formal" arbitration that leads to an enforceable award, but only in "informal" arbitration. There are a wide range of restrictions. While English practitioners may, for instance, need to notify a local regulator (eg, in Austria) or maintain a local address (eg, in Spain) in some member states, others – such as France, Ireland, the Netherlands and Sweden – are more liberal.

In this light, the main achievement of the TCA for legal services is arguably nothing more than greater clarity as to what the member state-specific measures actually are. It is therefore essential that English arbitration practitioners carefully consult the rules on the cross-border provision of legal services in the relevant member state. It may also be helpful to take advice from local regulators as to what specific limitations are applicable.

Serious question marks

There are serious question marks around how strictly the provisions of the TCA will be monitored and enforced in practice.

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The provision of legal services by, for example, US-qualified lawyers in EU member states on a "fly-in fly-out" basis has long been tolerated, even if not strictly permitted.

Nevertheless, there are good reasons for English arbitration practitioners to exercise caution. First, breach of the relevant national immigration laws or of the terms of a visa could have serious consequences. In the Netherlands, for instance, SBTVs who overstay the 90-day visa-exempt period risk being subject to a two-year entry ban. Second, even if the authorities in a member state take a *laissez-faire* approach to the cross-border provision of legal services, there is nothing to prevent opposing counsel from tactically reporting suspected breaches, or even raising the question of counsel's right to appear with a tribunal.

It is likely to be some years before it becomes clear how arbitration in the UK has been affected by Brexit, and it may be difficult to disentangle that impact from broader geopolitical changes. Nevertheless, it is clear that the TCA has the potential to make life more difficult for English arbitration practitioners working in the EU. The unwary may well be caught out by the patchwork of regulations that has replaced freedom of movement.

To date, these complications have been largely theoretical. The unprecedented restrictions on travel during the covid-19 pandemic, and the resulting increase in remote working have, in many ways, overshadowed Brexit and are likely to have concealed new pitfalls for English arbitration practitioners seeking to work in the EU. It remains to be seen whether arbitration practice has been changed permanently by the pandemic and to what extent regular international travel will resume.

What seems certain, however, is that London-seated arbitration will remain an attractive option to those seeking to have their dispute resolved fairly, expeditiously and with certainty, resulting in an award that can be enforced almost anywhere in the world.

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