Ireland as a seat for international arbitration post-brexit

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1. Current Dominance

Choosing the seat of arbitration is often a fundamental component of international trade. The importance of this choice was neatly stated by the US Supreme Court in Bremen *vs.* Zapata Off-Shore Co 407 U.S 1, 13-14 (1972); «the elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade».

The choice of arbitral seat has critical importance in relation to the arbitral procedure that will apply and the availability of court measures to support arbitration and regulate appeals against awards. Commercially astute parties generally want to arbitrate in a place where they know they will receive a fair, impartial and expeditious arbitration with a skilled arbitrator and representatives in a process that will be supported, if necessary by the local courts who also recognise the finality of awards.

London has undoubtedly been the most dominant choice as the seat for international arbitration taking a 45 % share of the market, according to

a survey done by Queen Mary University of London in 2015. Parties frequently chose to resolve international disputes by London seated arbitrations even where they have no connection to, and where the contract was not made or performed in the United Kingdom.

English law is the most commonly used law in international business and dispute resolution worldwide with 27 % of the world's 320 legal jurisdictions using English common law for the dispute resolution according to the survey. The popularity of London seated arbitration is largely attributable to the prevalence of English law given that the choice of English Law as governing law generally goes hand in hand with the dominant choice of London as the seat.

Reasons for this dominance include;

i. Reputation and experience of English Judges,
ii. Prevalence of choosing English law as applicable law in international commercial transactions,
iii. Efficiency of remedies available under English law,
iv. Procedural effectiveness of the English Courts,
v. Neutrality,
vi. Independence and impartiality of the judiciary,
vii. English language is the *lingua franca* of international commerce.

2. The Brexit Effect

One of the core features of the Brexit vote was the desire to take back control of UK law and bring an end to the jurisdiction of the Courts of Justice of the European Union when the UK leave the European Union –currently expected 31 January 2020–. Brexit undoubtedly poses a threat to London's dominance in the area of international arbitration. While many commentators (particularly those involved in international arbitration in London) contend that Brexit will not impede international arbitration in London and

some in fact argue that London may become more popular given the ability of English Courts to revert back to Anti-Suit Injunctions (which the Courts of Justice of the European Union outlawed in Alliance SpA & Others *vs.* West Tankers Inc. Case C-185/07) and its continued ability to enforce arbitration awards under the New York Convention which they contend will remain unaffected by Brexit.

It is true that Brexit cannot affect the UK's long established laws of contract and tort and its Arbitration Act 1996 which is a beacon of influence on how to attract to international arbitration. Notwithstanding this, Brexit will affect some parties' attitude to choosing London as the seat of arbitration. In a recent *Thomson Reuters/ Practical Law* survey, 35 % of respondents considered that Brexit had affected their approach to the selection of jurisdiction and choice of law clauses (including arbitration). Of the remaining 65 %, 39 % said that they would review these clauses in their contracts if there was no significant progress on addressing these issues in a Brexit deal. One of the principal reasons for this was a concern over enforcement of court judgments post Brexit.

3. Close Scrutiny. Enforcement

While the arbitration community in London is confident about its future and indeed has good reasons to maintain that confidence, one area of particular importance which may affect parties choosing London as a seat of arbitration is the ability to enforce the resulting award or related courts orders against the losing party in respect of its assets outside the jurisdiction of the seat of arbitration.

Indeed, the UK Ministry of Justice, in a survey completed in 2015, noted that the enforcement of a Judgment as against the assets of the counterparty was a significant and contributing factor in parties determining to choose English law and the English jurisdiction for dispute resolution. However, upon the UK leaving the European Union, it will suffer a 31 % reduction in the number of jurisdictions with whom it has reciprocal enforcement arrangements.

Traditionally, arbitration awards made in the UK have been easily converted into an English Court Judgment pursuant to Section 66(2) Arbitration Act 1996. This Court Order could then be easily enforced in other jurisdictions pursuant to international agreements held by the UK with those other jurisdictions.

Within the European Union, the Recast Brussels Regulation (introduced on 10 January 2015) provides for a very simple streamlined enforcement procedure whereby a judgment creditor is now only required to present a copy of the Judgment and a Standard Form Certificate issued by the Court which granted the Court Order and it can then begin whatever enforcement measures are available under the local law of the Member State in which it will be automatically recognised and enforceable.

Following completion of the Brexit process, the UK will be unable to rely upon this regime for recognition and enforcement of its Judgments and Orders in other Member States and it is currently not clear whether an equivalent regime can be agreed between the UK and the EU. But, the UK can continue to rely upon the New York Convention for enforcement of the arbitral award. The Convention is subscribed to by 157 States including all 28 European Union Member States.

While this is a viable mechanism for enforcement, there are a number of important considerations and potential shortcomings:

i. Even though a country may have subscribed to the New York Convention, it may not have enacted domestic legislation giving effect to these obligations, thereby rendering enforcement within the jurisdiction difficult.

ii. Where national legislation is enacted to give effect to the New York Convention, such legislation can differ from country to country. For example, the Indian Courts will only enforce foreign awards if they have been issued by a New York Convention country that has also been notified in India's Official Gazette as being a country to which the New York Convention applies.

iii. A country may have its own distinct procedures for enforcement of foreign awards with particular procedural requirements.

iv. The provisions within the New York Convention are expressed in broad general terms and do not contain definitions of key terms. Further, national courts in different countries have reached varying conclusions about what the same terms mean. Most particularly, the «public policy» ground for refusing recognition and enforcement has been interpreted in some countries in a very wide fashion, whereby certain States will refuse to enforce awards that seem contrary to the fundamental policy of their laws or international laws to which they subscribe or where such awards are contrary to justice and morality as interpreted by their Courts.

It is conceivable that if the Courts of England and Wales were to resurrect the Anti-Suit Injunction type order in conflict to the Courts of Justice of the European Union in *West Tankers*, then enforcement of the arbitration award in a Member State of the European Union thereafter, could be refused under the New York Convention on the basis that it is contrary to European Union law.

Similarly, in the event that the arbitral award made in London does not have proper regard for mandatory laws of the European Union in circumstances where they may have produced a different outcome in the case (on the basis that England and Wales will be no longer subject to those laws), then that could also be deemed a reason for refusal to recognise and enforce the resulting arbitral award in a European Union Member State.

In addition, the English Courts have broad powers in support of arbitral proceedings under the Arbitration Act 1996 in terms of facilitating the appointment of an arbitral tribunal, ordering interim measures such as injunctive relief, hearing challenges to the validity of any award and upholding the finality of an award. How far such court orders in support of arbitration will be enforceable in other Member States and beyond remains to be seen and will depend upon the arrangements agreed after Brexit. Certainly, in the event that such orders are in conflict with provisions of European Union law, then

one can see difficulties in relation to the enforcement of such orders within the European Union.

4. Other Practical Concerns

It is unclear as to how or to what extent the UK Courts, when called upon to provide support in relation to arbitral proceedings in the UK, will have any proper regard to European Union legal issues arising.

Where the English Courts are called upon to support an arbitral process in terms of making a variation to an arbitral award under Section 71 Arbitration Act 1996, enforcement of this varied award may prove difficult and not easily enforced in other jurisdictions.

The English Courts have also provided very useful assistance to complex international arbitrations under Section 45 Arbitration Act 1996 by determining preliminary points of law or seeking guidance from the Courts on a point of European Union law. One must seriously doubt whether that can be done post-Brexit. It is generally the case that arbitral tribunals themselves are not permitted to refer a point of law to the Courts of Justice of the European Union for preliminary ruling on the application of European Union law. This may well leave a deficit in relation to resolution of points of European Union law.

One of the great attractions of London as a seat for international arbitration is the availability of highly rated legal specialists including those practising in the area of European Union law. It must be acknowledged that there is a real threat to the exodus of such specialists from the UK post-Brexit. On top of that, basic travel arrangements to and out of the UK will become more complicated as a result of Brexit.

5. Arbitration in Ireland

Most of the factors that commend the English legal system to international arbitration may also be found in Irish law and the Irish Courts system. That is not to say that Ireland has anything remotely like the experience of London as a place for international arbitration.

The Irish legal system, like its English counterpart, is rooted in common law with much of its statute law reflected in UK statutes. English and Irish case law are regularly cited in each other's courts. The procedures operated by the Irish Courts and the remedies available under Irish law are similarly commercially focused to those which pertain in the UK legal system. It is also of importance that English, the *lingua francaI* of business is the *de facto* language of the Irish Courts system.

Ireland will continue to be a member of the European Union and legal proceedings before the Irish Courts continue to enjoy the benefits of the Recast Brussels Regulation and also the Lugano Convention, which will provide for:

i. Recognition of the exclusivity of jurisdiction arising out of the parties' choice of jurisdiction (irrespective of their domicile).

ii. The benefit of the *lis alibi* and *pendens* rules which prevent the Courts of other Member States from seeking to assert jurisdiction over the disputes between the parties.

iii. The availability of interim protective measures, such as merava injunctions freezing assets pending the outcome of the arbitral process, and

iv. The ready and reliable expeditious enforcement of any court orders made on foot of the arbitral process throughout the European Union without those Member States being entitled to look behind the order or to revisit the merits of the dispute.

Ireland has a long history of arbitration, its first Arbitration Act having been passed in 1698. Article 29(2) of the Irish Constitution 1937 states that «Ireland affirms its adherence to the principle of pacific settlement of international disputes by international arbitration or judicial determination». In 1981, Ireland became a contracting party to the New York Convention. In 2010, Ireland adopted a modern Arbitration Act which incorporated Uncitral Model Law on International Commercial Arbitration (1985).

In this way, Ireland has effectively modernised its arbitration laws to conform to international commercial arbitration features and practices and it has harmonised its arbitration laws with other modern arbitration countries.

Perhaps most importantly, the Irish Arbitration Act 2010 and the various pronouncements by the Superior Courts in Ireland clearly demonstrate the minimal power of the courts to intervene in the arbitral process and they exhort and mandate that Irish courts are supportive of the arbitral process. Even prior to the introduction of the 2010 Act, it was stated by the Supreme Court in Ireland in Keenan *vs.* Shield Insurance Company Limited [1989] IR 89 that;

> Arbitration is a significant feature of modern commercial life; there is an International Institute of Arbitration and the field of international arbitration is an ever expanding one. It ill becomes the Courts to show any readiness to interfere in such a process; if policy considerations are appropriate, as I believe they are in a matter of this kind then every such consideration points to the desirability of making an arbitration award final in every sense of the term.

The following features in the Arbitration Act 2010 show that Ireland treats international arbitration with absolute deference and its Courts are very reluctant to intervene:

i. In adopting Uncitral Model Law, the grounds for setting aside an award in Ireland are limited to those contained in Article 34 where there is incapacity; no proper notice of appointment; the Arbitrator exceeding the terms of the

submission to arbitrate; the composition of the Arbitral Tribunal not being in accordance with the agreement of the parties; or the award being in conflict with the public policy of the Irish State.

On the other hand, Section 69 of the Arbitration Act 1996 applicable in England and Wales permits an appeal to the English Courts on a point of law adding the potential for an additional layer of costs and delay in the arbitral process. For reasons discussed earlier, the difficulties faced by recognition and enforcement of any resulting Court Order post-Brexit adds further complexity to this arrangement.

ii. Under the Arbitration Act 2010, the High Court in Ireland is effectively a «one stop shop» when it comes to the main arbitration related applications with there being no appeal to the Court of Appeal or Supreme Court. Again, this contrasts with the potential for an appeal in England and Wales for many arbitration related applications to the Court of Appeal and then on to the Supreme Court (formerly the House of Lords).

iii. The Arbitration Act 2010 provides that the parties to an arbitration agreement choosing Ireland as the seat of arbitration may make such provision as to costs as they see fit, whereas the Arbitration Act 1996 in England and Wales provides that any agreement whereby a party is to pay the whole or part of the costs «in any event» is void unless it has been agreed after the dispute has arisen. It is submitted that the position which prevails in Ireland in this regard provides for greater respect to the autonomy of the parties.

Concluding Remarks

Broadly, there are two fundamental elements for consideration in deciding upon the seat for international arbitration. The first involves consideration of the national legal system and arbitration law and the attitude of the courts within that country. On the basis of the foregoing analysis, the advent of Brexit brings uncertainty to London's continued dominance as a forum for international arbitration, particularly having regard to the enforceability of

awards where there may be differences between the laws of England and Wales and those of the European Union or where a related court order is required to be recognised and enforced in another State.

The second element involves a consideration of non-legal and practical factors such as logistics, neutrality, convenience and familiarity and the qualifications of arbitrators and practitioners. While this element is more subjective, it is common case that being an English speaking common law jurisdiction remaining within the European Union with a well-respected legal system with many similarities to the UK legal system, Dublin as a seat for international arbitration would represent the closest comparator to London.

In the final analysis, while there is no question of Dublin replacing London as the forum of first choice for international dispute resolution, Dublin will nonetheless be an attractive alternative seat post-Brexit particularly having regard to simplified recognition and enforcement of awards within the European Union. In this way, Dublin may not so much compete with, but rather complement London as a forum for international arbitration.

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Resumen: El autor reflexiona sobre las consecuencias del Brexit en el arbitraje internacional. Concretamente, en las ventajas que ello puede representar para la jurisdicción arbitral de Irlanda, pues, este foro se mantendría dentro de la Unión Europea y tendría muchas similitudes al de Londres, pudiendo ser una excelente alternativa como un foro para el arbitraje internacional. **Palabras clave**: Irlanda, arbitraje internacional, Brexit. Recibido: 29-11-19. Aprobado: 27-12-19.