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BREXIT

an anti-suit
injunction

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When Life Gives You Lemons, Make Lemonade: Anti-suit Injunctions and Arbitration in London Post-Brexit (<http://kluwerarbitrationblog.com/2016/07/27/when-life-gives-you-lemons-make-lemonade-anti-suit-injunctions-and-arbitration-in-london-post-brexit/>)

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London has long been a city associated with international arbitration. In 2015, even with the UK referendum on EU membership looming, according to analysis by theCity UK, London was the seat or centre of 4,738 international commercial arbitrations, mediations and adjudications in 2015. These were conducted under the auspices of numerous institutions, with the long-established LCIA governing only a relatively small percentage. In the year preceding the referendum, according to the Queen Mary University of London International Arbitration survey (<http://www.arbitration.qmul.ac.uk/docs/164761.pdf>), 47% of participants included London amongst their top three choices of seat (Paris was the next most popular with 38%, followed by Hong Kong with 30%). Many different factors attract international parties to London as a seat of arbitration, including the legislative framework, the supportive powers of the English courts and the pro-arbitration attitude with which they are exercised, the common use of English contract law in commercial transactions (from which the choice of a London seat often follows), the infrastructure of London and the availability of legal, expert and other services to support arbitration.

The referendum outcome has inevitably led to reflection on the commercial, legal and practical effects in so many areas, arbitration included. Whilst the relationship between the UK and the EU is yet to be re-defined, it is timely to consider the ways in which Brexit may have an impact on arbitration in London, whether negative, or indeed positive.

In general terms, Brexit should not have a substantive impact. Arbitration is excluded from EU legislation regarding jurisdiction and enforcement, and a tribunal seated in London is not obliged to follow EU rules regarding choice of governing law. The UK and all other EU Member States are party to the New York Convention, and their obligations under the Convention are entirely independent of EU membership. As such, following Brexit, an agreement to arbitrate in London and a resulting award will continue to be enforceable across the EU. Likewise, an agreement to arbitrate anywhere in the EU (and indeed, in any state which is a contracting party to the New York Convention) and a resulting award will still be enforceable in the UK. And the stability, certainty and predictability of common-law made English contract law will remain unaffected, and as an excellent choice to govern contractual relationships.

But there are of course many issues to consider at a more micro level. This post focuses on an issue which has been the subject of much discussion in the last few years: the significance of the availability of anti-suit relief to halt proceedings in breach of an arbitration agreement in an EU Member State court. It also considers, among other things, whether Brexit could affect the pool of specialist arbitration practitioners which represents one of the many strengths of London as a seat of arbitration.

Going, coming and possibly going again? Anti-suit injunctions in respect of EU proceedings in breach of an arbitration agreement

As noted, arbitration has always been carved out of the Brussels regime on mutual recognition and enforcement of judgments. However, the scope of the so-called "arbitration exception" has long been under scrutiny, most famously in the *West Tankers case (Allianz SpA and Others v West Tankers Inc (Case C-185/07))*. This case was seen as bringing an end to the use of anti-suit injunctions within the EU to protect arbitration agreements.

The recast Brussels Regulation (1215/2012/EU) "clarified" the scope of the arbitration exception. Indeed, the clarification was so vehement in its removal of arbitration from the scope of the Regulation, that it led some to question whether anti-suit injunctions to protect arbitration agreements had again become a possibility in the EU. Many argue that the reciprocal respect between the Member State courts underpinning the Brussels Regime cannot accommodate anti-suit relief which has the effect of preventing a Member State court from determining whether, on the one hand, there is a valid and binding arbitration agreement or whether, on the other hand, it has jurisdiction. Others reason that, because arbitration remains outside the recast Brussels Regulation, a Member State court may issue an anti-suit injunction to deter proceedings in another Member State court in breach of an arbitration agreement. Since the recast Brussels Regulation was adopted, there has been no test case in any Member State court of which we are aware.

Accordingly, after the UK leaves the EU, parties may look to the English courts once more to seek to immobilise proceedings in Member State courts brought in breach of an arbitration agreement. Of course, it seems most likely that **the UK and the rest of the Member States will reach some sort of arrangement either to replicate or replace the Brussels Regime** (<http://www.herbertsmithfreehills.com/-/media/Files/PDFs/2016/Inside-arbitration-brexite-teaser-july-2016.pdf?wtr=brexit-hub-inside-arbitration-teaser>), for example as was agreed with Denmark (which has an opt-out in this area of EU law). But it is uncertain precisely what features will be retained and, significantly, whether this regime will preclude anti-suit relief even in these circumstances, as interpreted anew by the English courts.

In a not dissimilar way to the discussions that followed the referendum result, the ECJ's decision in *West Tankers* led to speculation about the implications for London as a seat of arbitration. But there was little to evidence any direct effect on parties' choice of London as a seat. Only a year after the ECJ's decision in *West Tankers*, London was revealed as the most popular seat of arbitration by international commercial parties in the Queen Mary University of

London International Arbitration Survey. Further, the English courts showed a continuing determination to protect arbitration agreements as far as EU law would allow: not only enforcing a declaratory award of the tribunal which would defeat recognition of any possible inconsistent judgment from the Italian proceedings (<http://hsfnotes.com/arbitration/2012/01/27/court-of-appeal-affirms-west-tankers-pro-arbitration-decision-endorsing-an-arbitral-award-in-the-face-of-a-possible-inconsistent-italian-judgment/>), but also leaving scope for the tribunal to award damages for a breach of an arbitration clause or to make a declaration granting an indemnity with the effect of holding harmless an innocent party for the consequences of the breach (<http://hsfnotes.com/arbitration/2012/04/18/west-tankers-saga-continues-court-rejects-tribunals-finding-that-it-did-not-have-jurisdiction-to-award-damages-for-breach-of-an-obligation-to-arbitrate/>). These are just two examples of the pro-arbitration decision-making for which the English courts have a well-earned reputation.

If anti-suit relief were to be available from the English courts to protect arbitration agreements wherever those foreign proceedings were brought, it would likely be seen as a further advantage of choosing London as a seat. But this consideration is unlikely to be the sole or even a main factor in the minds of most international commercial parties. The overall approach of the English courts to arbitration is arguably a far more attractive attribute of London as a seat.

A sound legislative framework and supportive courts

A key reason why international parties choose London as a seat is the robust procedural law – the Arbitration Act 1996 – combined with the careful exercise by the English courts of their supervisory powers under that statute. This won't change post- Brexit. Parties choosing to arbitrate disputes in London will continue to benefit from a tried and tested national arbitration law and, of course, the jurisprudence of the English courts created under that law.

Further, whilst the legislative programme of the Law Commission of England and Wales will necessarily be Brexit-dominated, there is scope for some evolution of the Act to respond to user requirements. In particular, the Law Commission has suggested in its recently opened consultation on the 2017-2020 program (<http://www.lawcom.gov.uk/arbitration/>) that it may focus on cost and efficiency of the arbitral process, including by considering whether the Act should provide for summary decision-making by arbitral tribunals.

Any exodus of international arbitration talent from London is highly unlikely

As the recent report of theCity UK (<https://www.thecityuk.com/assets/2016/Reports-PDF/UK-Legal-Services-2016.pdf>) shows, London is home to many of the world's global law firms. Many of those firms specialise in international arbitration, with teams boasting lawyers from across the world. In such an international discipline, it is unsurprising that such practices are composed of lawyers from a variety of legal backgrounds, traditions and jurisdictions. The access to specialists – both lawyers and others involved in the process, for example, experts, translators and interpreters – is just one of the reasons why London thrives as a centre of international dispute resolution.

The freedom of movement guaranteed by EU membership has undoubtedly facilitated the movement of arbitration practitioners from Europe to London, and vice versa, as business needs dictate. However, undeterred by visa or immigration restrictions, these London practices are populated by specialists from all over the world, and not just the EU. It is an open question whether free movement rights will be affected by Brexit, but in any event, any additional costs or administrative burdens of maintaining an international team of experts in London are likely to be absorbed in the same way that they are now. Indeed, such costs are already associated with maintaining arbitration practitioners in other centres of arbitration that do not enjoy the EU's free movement rights (e.g. Hong Kong, New York, Singapore).

It is early days. But in short, notwithstanding the dramatic events of the past few weeks, international arbitration in the UK seems set to continue to thrive.

The views expressed herein reflect the views of the authors.

