

INTERNATIONAL ARBITRATION | October 18, 2016

Brexit: Potential Implications for International Arbitration in London

Introduction

The UK electorate's 23 June 2016 vote to leave the EU has prompted widespread debate over Brexit's various implications. The reaction among international arbitration practitioners, however, has been rather muted.

Some speculate that the legal and economic uncertainty created by Brexit poses a risk that international arbitration users might hesitate to select London as the seat of arbitration in their agreements. We believe that Brexit is unlikely to have any impact on London's position as a leading centre for international arbitration. To a great extent, this is because international arbitration is regulated at the international level and thus is largely insulated from EU law. Brexit, moreover, is unlikely to affect many of the key factors that have helped make London a hub for international arbitration. In fact, the UK's decision to leave the EU might give London a competitive edge as a leading seat for international arbitration.

This note discusses the reasons why Brexit will not, in our view, adversely impact international arbitrations seated in London. It further sets out some of the areas in which international arbitration in London might gain from the UK's decision to leave the EU.

International Arbitration is Regulated at an International—not EU—Level

The enforcement of arbitration agreements and arbitral awards constitute two essential pillars of international arbitration. Both pillars are governed by the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed in New York on 10 June 1958. The "New York Convention," as it is commonly known, establishes a streamlined regime for the enforcement of international arbitration agreements and awards across the 156 Contracting States, including the UK and the other EU Member States.

Post-Brexit, the UK will remain party to the New York Convention, and thus its obligations under the treaty will not be affected by any departure from the EU. Following Brexit, agreements to arbitrate in the UK, and any resulting awards, will thus continue to be enforceable across all other Contracting States, including EU Member States. Likewise, agreements to arbitrate in any Contracting Party to the New York Convention, including in any EU Member States, and any resulting awards, will remain enforceable in the UK.

Key Factors for London's Leading Position as a Seat for International Arbitrations Will Likely Remain Unaffected by Brexit

Parties to cross-border transactions often choose English law to govern their contracts. The parties' selection of English law often results in the choice of London as the seat of arbitration for any disputes arising under that agreement. It should be noted in this regard that while parties often select a London seat because they have

chosen English law to govern their agreement, the legal seat of the arbitration is in fact unrelated to the substantive applicable law.

Brexit should not negatively impact parties' preference for English law for cross-border transactions. As discussed in our previous client notes, we expect English law to remain a strong and stable system for contractual arrangements concerning the UK, Europe and the world. Indeed, Brexit provides the UK with an opportunity to render English law even more attractive by amending or repealing parts of English law emanating from EU law deemed unfriendly to international arbitration.

The Arbitration Act 1996 is another key factor in London's pre-eminence as a seat for international arbitration. The Arbitration Act provides a robust legal framework for the conduct of arbitration in England, Wales, and Northern Ireland. English courts now have significant experience interpreting its terms, and have done so in a largely pro-arbitration fashion.

London also offers a large pool of international arbitration specialists, not just from the EU but also from across the world.

These and other factors make London an attractive seat for international arbitration and are independent of the UK's membership of the EU. There is therefore limited prospect of their being substantially impacted by the UK's decision to exit the EU.

Brexit: Potential Opportunities for International Arbitration in London

Below are examples of issues which have recently given rise to controversy among international arbitration practitioners and which, as a result of Brexit, could provide the UK with an advantage over other European cities that compete with it to attract international arbitrations.

Anti-Suit Injunctions in Favour of International Arbitration

English courts currently have limited powers to issue anti-suit injunctions within the EU. An anti-suit injunction is an order typically issued by a court preventing an opposing party from initiating or continuing a proceeding in another forum. These measures, properly applied, have been touted as an important tool in preventing forum shopping and duplicative proceedings.

In its landmark 2009 decision in the *West Tankers* case, the European Court of Justice (ECJ) ruled that the courts of EU Member States, including English courts, cannot enjoin litigants from bringing a claim before the courts of another EU Member State in breach of an arbitration clause. Such anti-suit injunctions in favour of arbitration proceedings, the ECJ determined, are incompatible with the EU regime for the recognition and enforcement of judgments, which is based on the principle of reciprocal respect between the courts of Member States.

Following Brexit, English courts can resume issuing such anti-suit injunctions to protect arbitration agreements and arbitration proceedings. Although parties are unlikely to choose London as an arbitration seat based on this consideration alone, the English courts' ability to preserve the integrity of arbitration proceedings through anti-suit injunctions provides a further advantage for London as a seat of arbitration.

Perceived Uncertainty Regarding the Enforcement of Court Judgments

EU legislation currently regulates the recognition and enforcement of judgments from the courts of EU Member States in the courts of other EU Member States. In December 2012, the European Parliament and the Council

of the European Union adopted Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

Our expectation is that there will likely continue to be a multilateral framework and, in any event, that there will be no significant change in the ability to obtain recognition and enforcement of English court judgments in the EU or EU judgments in the UK. However, the UK's decision to leave the EU inevitably has created some uncertainty which may increase the attractiveness of arbitration, the enforcement mechanism for which is unaffected.¹

The Protection of Foreign Investments in the UK Through International Arbitration

Modern international investment agreements typically allow an investor from one country to bring arbitral proceedings directly against the State in which it has invested. There are currently more than 2,600 international investment agreements in force. To date, over 700 disputes have been brought under these agreements against more than 100 States.

Following the 2009 entry into force of the Lisbon Treaty, the EU assumed exclusive competence over foreign direct investments. The EU has since begun the process of replacing bilateral investment treaties between Member States and third countries with EU agreements.

As part of that process, the EU recently jettisoned the traditional system of *ad hoc* investor-State arbitration in favour of a new "Investment Court System." The EU already included the Investment Court System in its Comprehensive Economic and Trade Agreement with Canada (CETA) (concluded in September 2014), and has proposed it for the Transatlantic Trade and Investment Partnership with the United States (currently under negotiation).

The EU investment court would be made up of judges designated by the State parties, instead of arbitrators chosen by the litigating parties. Party-appointed arbitrators traditionally have been seen as a key feature of international arbitration and an important element of party autonomy.

The Investment Court System also contemplates a two-tiered procedure, permitting appeals on points of fact and law. Awards rendered by arbitral tribunals, by contrast, typically are final and binding on the parties, reviewable on a few narrowly defined grounds. The EU's proposed investment court system thus marks a significant departure from traditional investor-State arbitration.

Post-Brexit, the UK will regain the ability to negotiate international investment agreements with its economic partners. This will allow the UK to decide whether to adopt or eschew the new Investment Court System for its new agreements. Further, the UK may decide to maintain international arbitration as the dispute settlement mechanism in the 100 or so bilateral investment treaties it already has concluded. The possibility to effectively protect investments through international arbitration could put the UK in a strategic position in the eyes of investors looking to structure their investments in a European jurisdiction.

In conclusion, there is little doubt that international arbitration will continue to thrive in London despite the UK's decision to leave the EU.

¹ See also our separate client publication on "[Brexit: Key Issues for General Counsel](#)," 15 July 2016, p. 1.

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This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

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