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Brexit, Sanctions and the Rise of Asian Arbitral Seats: Much Ado about Nothing or Reshuffling the Cards?

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The results of the UK's referendum, with a vote to leave the European Union, will not affect London's position as a leading international arbitration seat and dispute resolution centre. The recent developments do not change the fact that the UK has been and will continue to be a favoured destination for dispute resolution.

London has long enjoyed its position as a highly respected and oft-used seat for international arbitration. Recently, however, the EU-imposed sanctions and the rise of other seats, together with the perceived expense of conducting hearings in London with London-based legal representation, have led to some calling into question some of its long-held advantages. Brexit has the potential to create additional uncertainty for London as an arbitral seat, although much of this is only a matter of perception.

Very little will change with respect to London's status as a seat for international arbitration as a result of Brexit. In the short term, the results of the referendum are only the very first step towards Brexit, if that is in fact what transpires. For the time being, the *status quo* remains, and the UK is a member of the EU until it actually exits after the negotiations foreseen in Article 50 of the Treaty on European Union. At most, there is the potential for disputes to arise under existing contracts due to uncertainty associated with the Brexit vote, which may in fact result in an increase in the number of arbitral proceedings, but this possible implication does not affect London as a seat.

From a practical and logistical point of view, one advantage may be that the cost of arbitrating in London may temporarily decrease as a result of the drop in value of the British Pound. However, this is unlikely to be permanent.

In the long term and if and when Brexit becomes a reality, London will continue to enjoy its position as a leading arbitral seat. London's popularity as an arbitration seat is largely driven by reasons unrelated to its status in the EU. The English Arbitration Act is a clear and effective arbitration law, the English judiciary is pro-arbitration; there is well-established arbitration case law, and London is home to many experienced and leading arbitration practitioners. The well-established and respected status of English substantive law for international contracts often – as a matter of practice – goes hand-in-hand with a London seat. None of these advantages germane

to arbitration are likely to be affected by Brexit.

Similarly, Brexit may even bolster the popularity of arbitration usage and related court proceedings between UK-based and European companies if the application of the Brussels Regulation for the enforcement of court judgments between EU Member States is uncertain. Without the existing enforcement framework, parties may increasingly turn to international arbitration over domestic court proceedings, as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, to which the UK already is and will remain a party, provides a framework for the enforcement of arbitral awards to 156 contracting parties, including all of the EU Member States.

Commentary that the ban on anti-suit injunctions – as promulgated by the then ECJ in the *West Tankers* decision – would, with Brexit, no longer be a concern appears to address the wrong issue. While from a solely domestic perspective, English courts, once outside the EU, would be able to issue anti-suit injunctions unhampered by the provisions of the Brussels Regulation, the consequence of Brexit would be that the entire existing reciprocal framework for the enforcement of EU Member State court judgments would fall away (although note that this would likely leave the Hague Convention in its stead – see further below), leaving such questions to be decided by domestic rules and procedures. In short, while UK courts could hypothetically issue intra-EU anti-suit injunctions, so too could other EU courts as against the UK.

However, if the UK does leave the EU, it is likely that it will accede to another reciprocal enforcement regime, the 2005 Hague Convention on the Choice of Court Agreements ("Hague Convention"), as an independent contracting state.

Indeed London as a choice of seat outside the EU could be compared to arbitration-friendly Asian seats such as Hong Kong and Singapore, which have been gaining significant popularity in recent years. Intra-Asian trade is on the rise, and with China's emergence as a world superpower, bargaining power is shifting in contract negotiations.

This is highlighted by a recent survey on International Arbitration by Queen Mary University of London, which ranked Hong Kong and Singapore as the third and fourth most popular seats after London and Paris. Further, the percentage of respondents to the survey who preferred those seats exceeded the percentage of respondents who have used them the most over the past five years (by 8% for Hong Kong and 5% for Singapore). This is a greater difference in percentage than for any of the other seats in the top seven, which suggests that both seats have the potential to attract users in greater numbers in the future.

Both Hong Kong and Singapore have modern arbitration laws based on the UNCITRAL Model Law which reflect international best practice, their courts are non-interventionist, transparent, independent,[1)] and arbitration-friendly, and Asian seats have already benefited from the sanctions-related problems with EU Member States.[2)] Developments in Hong Kong, such as a consultation to allow for third party funding in arbitrations, the amendment of the Arbitration Ordinance to provide for clarification

on the arbitrability of intellectual property rights, and China's "One Belt One Road" Initiative – which has the scope to transform patterns of trade and investment for decades, will only go to promote Hong Kong as an arbitration hub.

Although there will be no Brexit-induced shift away from London as an arbitral seat, the proliferation of international trade involving Asian corporations and their increased bargaining power, the growing economic strength of Asian states, coupled with the recognition and reputation of pro-arbitration predictable seats in Asia such as Hong Kong and Singapore, may see users choose to seat their arbitrations away from traditional centres.

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References

↑1 According to the World Economic Forum's Judicial Independence Ranking 2015-16, Hong Kong is ranked 4th worldwide and 1st in Asia for judicial independence.

↑2 Paradox as it may seem, if the UK exits the EU the sanctions problem may actually disappear for UK-based arbitrations.

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