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## Keep Calm and Arbitrate? The Impact of Political Events on International Arbitration

Joe Liu (Hong Kong International Arbitration Centre ) · Wednesday, October 11th, 2017 · HK45

Recent political developments have resulted in considerable geopolitical uncertainty and presented challenges to the international order. With the UK's vote to exit the European Union, the election of Donald Trump as US president, the Western sanctions against Russia, and the rising North Korea nuclear tensions, 2017 ushers in a turbulent time where commercial parties' usual approach to dispute resolution is under challenge. This article examines the likely impact of recent political changes on international arbitration.

Brexit is imminent. With the approval of the UK Parliament, Theresa May has triggered the Article 50 exit clause of the Treaty of Lisbon that gives the UK and the EU until the end of March 2019 to reach a withdrawal agreement. While exit negotiations are ongoing, there are doubts over London's future as an international arbitration centre. The concerns arise primarily from the socio-economic consequences of Brexit, which might include the possible departure of financial institutions, increased immigration barriers for foreign talent, and the city's potential loss of its preeminence as a global financial centre. Despite these concerns, London's arbitration framework will not be affected by Brexit. The UK remains a party to the New York Convention and the ICSID Convention. The 1996 English Arbitration Act will remain in force and the body of English case law that enunciates the English courts' strong support for arbitration will continue to apply. Some commentators have even argued that London could benefit from Brexit, because the city might be perceived as a more neutral seat and the English courts would no longer be restrained by the European Court of Justice's ruling in *West Tankers* from issuing anti-suit injunctions to prevent parties from commencing court proceedings within the EU in breach of arbitration agreements.

The rise in nationalism not only pushed the UK out of the EU but also pushed Donald Trump into the White House. The Trump administration has revived the protectionist rhetoric that has caused the US's withdrawal from the TTP, a suspension of the TTIP negotiations, and a renegotiation of NAFTA which Trump described as "the worst trade deal ever". While these actions may call into question the US's legal framework for trade and investment, they have a limited impact on the arbitration system in the country. The US Supreme Court's stance on arbitration is also unlikely to be affected by Trump's appointment of Justice Neil Gorsuch to replace the late Antonin Scalia. In fact, the Court's 5-4 conservative majority has been the backbone for most of its pro-arbitration rulings in the past years. However, in June, the Court temporarily lifted part of the suspensions that lower courts had put on Trump's travel ban targeting visa applicants from six Muslim-majority countries. The Court granted an exception for people from the affected countries with "a credible claim of a bona fide relationship with a person or entity in the United States" to enter the country,

without clearly defining “bona fide relationship”. Until the Court reviews the matter in October, arbitrators, counsel, witnesses and experts from the affected countries may face difficulty or protracted procedures of obtaining visas to attend arbitration hearings in the US.

Trump’s Muslim travel ban is not the only measure that risks straining the US’s relationships with foreign powers. The sanctions imposed on Russia over its military actions in Crimea in 2014 and its alleged interference in the 2016 US presidential election pushed US-Russia relations towards a new post-Cold War low. The sanctions over Crimea were subsequently followed and repeatedly extended by the EU and a number of other Western states. One consequence of the sanctions is that Russian businesses are now revisiting their options to arbitrate disputes and some are looking to arbitrate in Asian jurisdictions with no sanctions against Russia. A survey published by the Russian Arbitration Association in 2016 indicates that, while the traditional European arbitral seats remain the most preferred venues for Russia-related disputes, Russian users increasingly view Asian arbitration centres, such as Hong Kong and Singapore, as viable alternatives.

The latest set of sanctions passed by the US Congress target not only Russia but also North Korea. Amid Pyongyang’s continued missile tests and the US and South Korea’s latest joint military exercises, tensions on the Korean Peninsula have been escalating at an unprecedented pace. While the present situation has no direct impact on the legal and arbitration system of the affected jurisdictions, the ongoing threat of insecurity and instability posed by these developments may undermine the incentives of international parties and arbitrators to travel to the region for arbitration.

Political events generally have little impact on how international arbitration operates. Parties remain entitled to appoint arbitrators of their choice who will decide on disputes in a neutral venue and whose awards are enforceable worldwide. However, political instability may sometimes create a perception of legal uncertainty, which may impair businesses’ confidence in arbitrating in the affected jurisdiction. Such perception can be alleviated by a clear demonstration of the rule of law and judicial independence. Hong Kong is a good example.

The rule of law is well entrenched in the Hong Kong society and the independence of the Hong Kong courts is constitutionally guaranteed by the Basic Law. Despite recent political events in the territory, Hong Kong’s arbitration regime remains strong and stable and the courts continue to exercise judicial powers independently, free from interference. The Hong Kong courts have no hesitation in ruling against state-owned enterprises incorporated in or outside Hong Kong. In a recent case, the city’s specialist arbitration judge decided to enforce a US\$5 million award against China Coal, rejecting the Chinese state-owned enterprise’s plea of crown immunity.

Judges in Hong Kong have also spoken out. Following the “Occupy Central” protest and the Chinese government’s release of a white paper on the “one country, two systems” policy in 2014, Lord Neuberger, former president of the UK Supreme Court and a judge of Hong Kong’s Court of Final Appeal, said that he detected “no undermining of judicial independence” in Hong Kong.

Some commentators have voiced concerns over possible changes to the “one country, two systems” principle after 2047, which may impact parties’ choice of Hong Kong as an arbitral seat for long-term contracts. In fact, top leaders of the Chinese government have repeatedly confirmed that the “one country, two systems” principle is “firm” and “unswerving” and it “would not sway or change”. During a 2016 visit to Hong Kong, Zhang Dejiang, chair of the Standing Committee of the Chinese National People’s Congress made the following comment:

“The remarks that the mainland government intends to ‘mainlandise’ Hong Kong and even turn ‘one country, two systems’ into ‘one country, one system’ are completely groundless. The majority of Hong Kong compatriots hope that ‘one country, two systems’ can continue as it is, and this is in the best interest of the nation. The central government will continue to steadfastly implement the system, and the Hong Kong community can rest assured of that.”

Commercial parties will continue to trade, invest and do business regardless of any political developments. International arbitration is a dispute resolution mechanism that is not subject to political interferences and remains the preferred mechanism to resolve cross-border commercial disputes. For these reasons, even though we are living at a highly politicized time, the impact of political events on international arbitration should not be overstated. Parties to international commercial disputes should keep calm and arbitrate.

*The opinions expressed are those of the author and do not necessarily reflect the views of the HKIAC.*

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