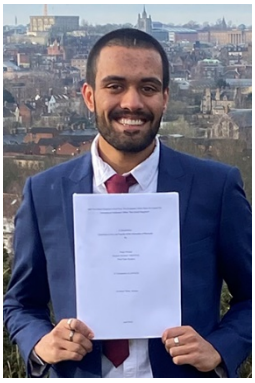

WILL THE UNITED KINGDOM'S EXIT FROM THE EUROPEAN UNION HAVE AN IMPACT ON INTERNATIONAL ARBITRATION WITHIN THE UNITED KINGDOM?

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Abstract

This article will aim to assess whether Britain's exit from the European Union will impact arbitration. This is a very topical issue as no one can accurately predict what direction this will take as there are many avenues that need to be explored. As Lord Goldsmith QC suggests: "The success of London arbitration depends in no way upon the UK's membership of the EU;"[2] although, as the New Law Journal argues: 'London will gain a distinctly competitive edge as a seat for arbitration in comparison to other European cities'[3] in relation to the resurrection of anti-suit injunctions. Examination of the many different issues at hand will provide clarity on where business and practitioners stand on their approach to arbitration within the UK and what they may expect to happen in the future depending on a no deal Brexit or otherwise. This article will focus on balancing the arguments whilst also exploring re-introducing the injunctions known as anti-suit injunctions and how they may potentially give the UK a competitive advantage; as well as views on these injunctions and what impact they may have.

Introduction

'Arbitration is a procedure where a dispute is submitted, via an agreement of the parties, where one or more arbitrators make a binding decision on the dispute.'[4] This article will explore how arbitration has developed in terms of its procedure and the

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[2] 'LCIA Morning Symposium And Lunch In Washington DC - Featuring A Keynote Address From Lord Goldsmith "2019 And All That"' (*Lcia.org*, 2019) <https://www.lcia.org/News/lord-goldsmith-keynote-address-2019-and-all-that.aspx> accessed 19 October 2019

[3] Clare Arthurs, Phillip D'Costa and Nicole Finlayson, 'The Long Farewell: Leaving The EU (Pt 2) – 167 NLJ 7757, P14' (2017)

[4] 'What Is Arbitration?' (*Wipo.int*, 2020) <https://www.wipo.int/amc/en/arbitration/what-is-arb.html> accessed 21 March 2020

development of legislation introduced to assist its function within jurisdictions. It will then go on to examine how Brexit may lead to complications within the procedure and which conventions may assist or conflict with arbitration, as well as considering the possibilities of a post-Brexit deal or no-deal with arguments to critically assess the benefits and drawbacks on each side.

Firstly, Brexit is the term given to the United Kingdom's (UK) exit from the European Union (EU).[5] This term originated from the referendum[6] in 2016 where 52% of the population voted in favour of leaving the EU and 48% to stay, triggering the departure from the EU. The UK has been negotiating with the EU Parliament since their agreed exit and negotiations are, at the time of writing, still ongoing and are not close to concluding due to disagreements of particulars on each side.[7] The UK has left with a no-deal as of the 31st January 2020 entering the transition period with potential for future negotiations to take place.[8]

1: The History of Arbitration and the Current Law

History of Arbitration and Reasons for International Arbitration

Arbitration existed for centuries before its ratification into Law. One of the earliest documented cases is from 280BC where a Roman Magistrate (The Praetor) 'held responsibility for the resolution of civil disputes between citizens.'[9] Later, as the Roman Empire thrived and they indulged in more international trade, a second magistrate (the praetor peregrinus)[10] was appointed for disputes between foreign merchants. Following the Roman Empire, the documentation of arbitration was non-existent throughout the dark ages but reappeared in the middle ages. In 1484, a case detailed the dispute between two ancient guilds, the Taylors and Skinners, over who was the most senior in the City of London.[11]

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[5] 'A Really Simple Guide To Brexit' (*BBC News*, 2020) <https://www.bbc.co.uk/news/uk-politics-32810887> accessed 21 March 2020
[6] A public vote
[7] Daniel Boffey, 'Brexit: EU's Demands In Negotiations With UK Revealed In Draft Treaty' (*the Guardian*, 2020) <https://www.theguardian.com/politics/2020/mar/13/brexit-eu-demands-uk-negotiations-draft-treaty> accessed 21 March 2020
[8] Simon Murphy, Kevin Rawlinson and Alexandra Topping, 'Brexit Day: End Of An Era As United Kingdom Leaves EU – As It Happened' (*the Guardian*, 2020) <https://www.theguardian.com/politics/live/2020/jan/31/brexit-day-britain-prepares-leave-eu-live-news-updates> accessed 9 March 2020
[9] J. Martin, H. Hunter, Arbitration procedure in England: past, present and future, vol. 1 *Arbitration International*, issue 1, page 82 (1985)
[10] Ibid
[11] Ibid. page 83

In the seventeenth century there could still be no action in the courts where an agreement for arbitration was found; it was said that arbitrators decide the cases 'not according to Law, but according to their opinion and judgement as honest men'.[12] A conflict arose between Judges and Arbitrators, judges became hostile towards arbitrators. Lord Campbell stated when reviewing the history of arbitration: 'the courts ought not to be ousted of their jurisdiction and it was contrary to public law to do so.'[13]

The first Arbitration Act was enacted in 1698, giving the courts the ability to review arbitral awards. If the courts found their judgment to be as a result of corruption or malpractice the awards would be voided. Over the next century the power balance shifted; by the nineteenth century the courts ruled that even where an arbitration agreement existed the plaintiff can sue in the courts if they wish.[14] However, The Common law Procedure Act of 1854 created a stay in courts where an arbitration agreement has already been agreed. This was seen in the landmark case of *Scott* v *Avery,*[15] decided whilst the act was being debated in parliament on the basis the statute 'must have come into effect while the case was in the lower courts.'[16] *Scott v Avery*[17] marked the point in which the courts started to recognise arbitration proceedings.[18] The judgment in this case started to move the arbitration procedure to the more contemporary approach known today. The first step forward in ensuring arbitration was independent from the courts. Moreover, the 1889 Arbitration Act section 4 confirmed that the courts held a discretionary power to stay proceedings where there was an arbitration agreement between the parties.

In 1930 Scruton LJ positively commented on arbitration, stating that arbitrators' great proficiency in the field of commercial deals and their experience would help resolve an issue cheaply and effectively compared to a judge who would listen to all the evidence in an impartial manner but have 'complete ignorance of the subject matter.'[19]

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[12] Author of Regula placitandi., *Arbitrium Redivivum, Or, The Law Of Arbitration* (Printed by the assigns of Rich and Edw Atkins, Esquires for Isaac Cleeve 1694)
[13] *Scott v Avery* (1853) 25 L.J. Ex. 308
[14] n.8 page 84
[15] n.12
[16] n.8 page 84
[17] n.12
[18] n.18 page 84
[19] *W. Naumann v. Edward Nathan & Co Ltd* (1930) 37 Lloyd's Rep. 249, atp. 250 per Scruton Lord Justice

Along with the development of the UK's laws on arbitration, the rest of the world were also coming to terms with this new-found dispute resolution procedure independent from courts. This is where the New York Convention (NYC) came in.

Present Day - The New York Convention

'The beauty of the New York Convention is that awards rendered in member jurisdictions are easily enforced in any other signatory state'.[20]

The NYC was signed in 1958 following a conference at the United Nations.[21] The UK entered the Convention on 23rd December 1975, ratifying it into statute in Section 7(2) of the Arbitration Act 1975, thus allowing for the enforcement of foreign arbitral awards.[22] It is now ratified in section 100 of the Arbitration Act 1996.

The reasoning behind the NYC stemmed from the dissatisfaction of the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927, which only a number of states entered into.[23] The lack of signatories was due to the system of *double exequatur*; where an award issued via arbitration must be checked for validity in the jurisdiction whose law governs the arbitration procedure. The NYC went someway to address this complication.[24]

The NYC was introduced so that parties were completely free to arbitrate knowing the courts would not intervene and that other jurisdictions would recognise the decision.[25] However, courts may intervene where there is a violation of due process,

[20] Daniel M. Kolkey, ATTACKING ARBITRAL AWARDS: RIGHTS OF APPEAL AND REVIEW IN INTERNATIONAL ARBITRATIONS, 22 Int'l Law 693 (1988). Page 693-4
[21] New York Convention, 'History Of The New York Convention » New York Convention' (*Newyorkconvention.org*, 2019) <http://www.newyorkconvention.org/travaux+preparatoires/history+1923+-+1958> accessed 17 October 2019
[22] 'The Arbitration (Foreign Awards) Order 1984' (*Legislation.gov.uk*, 2019) <http://www.legislation.gov.uk/uksi/1984/1168/made/data.html> accessed 17 October 2019
[23] '60 Years Of The New York Convention: A Triumph Of Trans-National Legal Co-Operation, Or A Product Of Its Time And In Need Of Revision?' (*Herbert Smith Freehills | Global law firm*, 2019) <https://www.herbertsmithfreehills.com/latest-thinking/60-years-of-the-new-york-convention-a-triumph-of-trans-national-legal-co-operation> accessed 17 October 2019
[24] *Y v. X*, Swiss Federal Tribunal, Switzerland, 3 January 2006, 5P.292/2005
[25] n.8 page 85

violation of public policy or if the arbitrator exceeds their authority, to name a few.[26] Despite this the NYC paved the way for arbitration to be a separate entity to the courts, intervention is only needed when the parties abuse their position. Thus, showing that the law and the NYC can run side by side. Furthermore, s.103 of the Arbitration Act 1996 includes the recognition of arbitral awards, but also highlights the situations where they will not be recognised.

The latest development of UK law is the Arbitration Act 1996, consolidating all previous laws as well as updating and clarifying the provisions applicable. The act was more of an administrative convenience to consolidate the previous case law, such as the case of *Scott v Avery,*[27] into statute. This can be seen in s.9 of the act and the recognition of the NYC in s.103. The Arbitration Act helped promote the UK as one of the leading arbitration venues.[28] The statute mentions the stay of legal proceedings which, as discussed earlier,[29] was controversial in the nineteenth century until the 1854 act.[30] This has also been consistently recognised since the case of *Scott v Avery*[31] set down the ruling that arbitration is independent until the courts need to intervene. The only slight deviation was from the Arbitration Act 1934, which overruled *Scott v Avery,*[32] but was then itself overturned by section 4 of the Arbitration Act 1950.[33]

The arbitration procedure has been discussed over many years and in the 1980s it was said that the procedure should follow 'the course of proceedings like that of a trial in court'.[34] This varies, from the language in which the countries want the arbitration to be carried out in, to which institutional rules by which they wish to abide.

Procedure

There are seven main elements of procedure that are obligatory for an international arbitration to take place.[35] Firstly, an agreement to arbitrate, Contracts should

[26] n.8 page 84
[27] n.12
[28] 'The Arbitration Act 1996 ("The Act") - Swan Turton Solicitors' (*Swan Turton Solicitors*, 2019) <https://swanturton.com/the-arbitration-act-1996-the-act/> accessed 17 October 2019
[29] Page 9
[30] The Common law Procedure Act of 1854
[31] n.12
[32] n.8 page 85
[33] n.22
[34] *Arbitration Law In Europe* (ICC Services SARL 1981). P.170
[35] Gary Born, *International Arbitration* (Kluwer Law International, 2016). Page 35

expressly refer disputes to arbitration, which in commercial contracts is often the case. Such agreements should express that arbitration is the final and binding decision and must state that arbitration is mandatory and not optional.[36]

The second element is the scope of the agreement and the categories of disputes that are vulnerable to arbitration. Parties can decide what they wish to arbitrate with specifically, for example, if it only applies to express terms in their contracts.

Generally, parties tend to draft their arbitration clauses broadly encompassing relevant dealings. This is to avoid parallel proceedings, where some are arbitrated and others litigated.[37] This has been wholly successful where most parties draft a wide range of issues that they suspect may need attention over the course of dealings, but there are examples of where narrow clauses are subjected to scrutiny and may not cover the actual issues present.[38]

Not all jurisdictions permit the same issues to be subjected to arbitration. For example, in the UK parties cannot arbitrate on insolvency, criminal matters or breach of statutory involvement rights. This compares directly with United States (US) law, where a far wider range of issues can be arbitrated – the only exception being where a party can prove congress did not want the issue to be arbitrated.[39] Additionally, parties may be from divergent jurisdictions and select proceedings in yet another jurisdiction. This would seem *prima facie* to survive the Brexit negotiations as this is mostly the country's own independent rules. Furthermore, due to the NYC, awards granted in a jurisdiction as a signatory will be recognised by all parties' jurisdictions, even if they do not allow the issues to be arbitrated upon.

The third is the various Institutional Arbitration Rules. There are three different models available to choose from: Model ICC (International Chamber of Commerce), Model SIAC (Singapore International Arbitration Centre) and Model UNCITRAL (The United Nations Commission on International Trade Law)[40] as well as many organisations

[36] *Ibid.*
[37] n.12
[38] *Lombard North Central plc and another v GATX Corporation* [2012] EWHC 1067
[39] 'Are Any Types Of Dispute Considered Non-Arbitrable? What Is The Approach Used In Determining Whether Or Not A Dispute Is Arbitrable?' (*The In-House Lawyer*, 2019) <http://www.inhouselawyer.co.uk/wgd_question/are-any-types-of-dispute-considered-non-arbitrable-what-is-the-approach-used-in-determining-whether-or-not-a-dispute-is-arbitrable/> accessed 28 October 2019
[40] n.34

such as the LCIA (London Court of International Arbitration) specifically for proceedings in England and Wales.[41] Other countries may adapt to their own rules, such as Canada forming the ADRIC (Alternative Dispute Resolution Institute of Canada).[42] Furthermore, there can be ad hoc arbitration where parties arbitrate in line with institutional rules but use a more 'tailor made' approach to forming their own rules.[43] As a cheaper alternative, this is advantageous, but has the disadvantage of being very time consuming.

It therefore follows that there will be no impact on arbitration rules post-Brexit as it is a worldwide format and not one that is governed by the courts. It is possible a situation may arise where other EU countries try to introduce their own sets of rules to compete with London, due to its favourable position,[44] but there is no evidence of this yet.

The fourth aspect is the seat or place of arbitration i.e. where the arbitration has its formal, legal or judicial seat and where the awards will be formally made. This is of great importance as the consequences are: (one) the selection of the procedural law and the national court applicable in applying said laws, (two) the national courts relating to the constitution of the tribunals and (three) the national courts responsible for issues relating to the annulment of any awards.[45]

Problems arise where one party is in a country that is a signatory to the NYC and the other is not. This becomes an issue if the awards cannot be recognised as international and in situations where the courts are likely to get involved as their particular jurisdiction may not allow a lot of autonomy, whilst others jurisdictions may advocate procedural autonomy.[46] An example of a country not a signatory of the NYC is Taiwan, who can enforce arbitral awards if the court believes it will help 'enhance

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41 Justin Williams, Hamish Lal, and Richard Hornshaw, 'Arbitration procedures and practice in the UK (England and Wales): overview' *uk.practicallaw.thomsonreuters.com*, 2019) <https://uk.practicallaw.thomsonreuters.com/4-502-1378?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1> accessed 28 October 2019

[42] William Hartnett and Michael Schafler, 'Ad Hoc V. Institutional Arbitration – Advantages And Disadvantages'. (2017)

[43] C. Stanley, 'Traps For The Unwary: The Pitfalls Of Ad Hoc Arbitration' (2012) 18 Trusts & Trustees

[44] 'How Will Brexit Impact Arbitration In England And Wales?' (*Nortonrosefulbright.com*, 2016) <https://www.nortonrosefulbright.com/en-gb/knowledge/publications/a655ac50/how-will-brexit-impact-arbitration-in-england-and-wales> accessed 9 March 2020

[45] n.34

[46] Laura Warren, 'The Seat Of Arbitration-Why Is It So Important? : Clyde & Co (En)' (*Clydeco.com*, 2019) <https://www.clydeco.com/insight/article/the-seat-of-arbitration-why-is-it-so-important> accessed 28 October 2019

and promote judicial cooperation.'[47] However, they will disregard them if they either violate public morals or cannot be arbitrated upon according to their own law.[48] Taiwanese courts have discretion as seen in *High Court Decision No. 609*[49] against the US. Brexit should not impact this, given the history it does not appear that there will be any change due to the independent jurisdictions and their signatory to the NYC that would govern this specific procedural area rather than any distinct branch of European jurisprudence.

Element five is the number, method of selection, and qualifications of the arbitrators, arguably one of the most critical components of arbitration.

If parties do not agree how many arbitrators should be involved, or fail to state, it is left to the institutional rules, or national courts. However, parties normally specify. This issue may simply be avoided by parties stating they are prepared to submit to the domestic rules of that jurisdiction's arbitrator selection process.

Sometimes agreements will specify a particular arbitrator by name or will have a clause stating designation is achieved by an 'appointing authority'. In three-person arbitrations the parties choose one each and the appointing authority chooses the last.[50] Possible issues with arbitrators is that they need to remain impartial and independent but there have been cases where an arbitrator has been used in more than one situation. In *Halliburton Company v Chubb Bermuda Insurance Ltd*[51] an arbitrator selected by the court was also acting within two other arbitration proceedings under the same incident. Popplewell J stated in the Court of Appeal:

> '… the fact that an arbitrator may be involved in an arbitration between party A and party B, whose subject matter is identical to that in an arbitration between Party B and party C does not preclude him or her from sitting on both tribunals.'[52]

This ruling would most likely be upheld post-Brexit as it is a decision of UK courts and

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[47] 'Dispute Resolution Around The World' (*Bakermckenzie.com*, 2011) <https://www.bakermckenzie.com/-/media/files/insight/publications/2016/10/dratw/dratw_taiwan_2011.pdf?la=en> accessed 3 March 2020
[48] *Ibid*
[49] *High Court Decision No. 609* (1997)
[50] n.34
[51] *Halliburton Company v Chubb Bermuda Insurance Ltd* [2018] EWCA Civ 817
[52] Ibid. p.25

thus binding. This is just an area of consideration for professionals who use selection schemes to vet the arbitrators before proceedings.

The sixth element concerns language of the arbitration. Parties must decide which language the arbitration will proceed with. If left to arbitrators, it will usually be the local language of the country they decide to arbitrate in.[53] It has been stated that English is the leading language of Arbitration and is used as the *Lingua Franca*.[54] With this in mind the question has been raised whether Brexit will lead to a new *Lingua Franca,* such as French, which dominated the language of law in history.[55] Once fully unfolded, this could pose a potential issue. On the other hand, many law firms potentially concerned with international arbitration have multi-lingual staff, meaning English will still be a viable language to arbitrate in due to it being such a common choice of language to communicate in.[56] This matter of contention is one of great importance, but following Wilske's reasoning it appears that the English language is used very often throughout arbitration proceedings and it seems likely to remain stagnant.[57] Brexit appears to have no justification in disrupting the current status quo.

The last aspect is the choice of law clause. This appears straight forward but has many implications. Parties simply select the law they want to be governed by. For example, English law or German law.[58] The main implication is what happens if the parties do not expressly add a choice of law clause in their contracts. This was questioned in a case in Singapore *BCY -v- BCZ*[59] where there was no express mention of the choice of law and the court decided to use the opportunity for academic opinion and authorities to shed light. In this case the court gave a three-stage test to combat the issue: firstly, whether there is an express term. Secondly, whether the parties implied choice from their intentions at the time of contracting. Finally, which system of law the arbitration agreement has the closest and most real connection.[60]

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[53] n.34
[54] Stephan Wilske, 'Linguistic And Language Issues In International Arbitration ─ Problems, Pitfalls And Paranoia' (2016) 9 Contemporary Asia Arbitration Journal no.2 159-196
[55] *Ibid*
[56] *Ibid*
[57] *Ibid*
[58] n.34
[59] BCY -v- BCZ [2016] SGHC 249
[60] 'Which Law Governs The Arbitration Agreement: The Law Of The Seat Or The Underlying Contract?' (*Ashurst.com*, 2019) <https://www.ashurst.com/en/news-and-insights/legal-updates/which-law-governs-the-arbitration-agreement-the-law-of-the-seat-or-the-underlying-contract/> accessed 11 November 2019

This does not appear *prima facie* to be affected by Brexit, but there is a specific case where this may not be true if the UK Parliament were to reinstate the anti-suit injunctions 'London might gain a competitive advantage as a seat of arbitration.'[61] This increase in parties wishing to arbitrate in London, as a result of Brexit, would disrupt the global marketplace and impact jurisdiction and forum shopping. This will be further explored in the coming sections.

2. The anti-suit injunction

What is an Anti-Suit injunction and the Subsequent European Union Ban?

Generally, and across jurisdictions, an anti-suit injunction is used to restrain a person or company from continuing or commencing proceedings in a foreign court if it is inequitable to do so.[62] The injunction has been referred to as a 'negative obligation in which parties will refrain from commencing proceedings in forums to which they have not agreed.'[63] This is achieved with regard to the respondent and does not harm the jurisprudence of the foreign courts, it is a discretionary remedy. The remedy may be available if the foreign proceedings appear to be a vexatious or oppressive breach of a binding contract to arbitrate.[64]

The UK courts issue anti-suit injunctions under section 37 of the Senior Courts Act 1981 where foreign proceedings have been instigated, thus breaching an arbitration agreement. As discussed in section one, if a party is to make an arbitration agreement, they must agree on the legal forum to conduct the proceedings. If breached, an anti-suit injunction may be awarded, unless there is a strong reason to conduct the proceedings in another court despite the agreement.

Some parties may depart from their agreement due to 'forum shopping' where they look for the best outcome in their favour regarding other countries' legal principles governing specific areas of law.

Originally, the anti-suit injunctions were used by English courts to restrain proceedings in their jurisdiction, but the expansion of the British Empire saw the

[61] n.43
[62] Halsbury's Laws, Arbitration (Vol. 2 2017) para 524
[63] *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35. P.21
[64] *Law Debenture Trust Corporation plc v Concord Trust and others*, [2007] EWHC 2255 (Ch)

growth of the injunction being used worldwide.[65] There are three kinds of anti-suit injunctions. Firstly, an exclusive jurisdiction clause, where parties have stated they want to conduct proceedings in a specific forum but one-party conducts proceedings in another jurisdiction and the other party brings proceedings in England to file an anti-suit injunction. Secondly, arbitration agreements, as discussed, one party goes to another jurisdiction to start proceedings contrary to the agreement. Finally, 'no-choice of forum cases' where the parties have not stated their desired forum, but one party brings proceedings in another jurisdiction and the other tries to stop this after a breach of their right not to be sued abroad.[66]

English courts still attempted to use the 100-year-old injunction even after the signing of the 1968 Brussels Convention[67] as seen in *Continental Bank v Aeakos Compania Naviera*[68] and *The Angelic Grace.* Anti-suit injunctions were blocked by the European Court of Justice (ECJ) after the introduction of the Brussels I Regulation[69] (the Regulation). The English courts ignored the Regulation, seeking to use the injunction in a number of cases, specifically, *Turner v Grovit*[70] where the ECJ subsequently blocked the anti-suit injunction from being used contrary to the Regulation due to it breaching mutual trust and respect.[71] The Regulation is based on trust between member states[72] and the blocking of any party wishing to bring an action is seen as an interference with other jurisdictions and thus incompatible with the convention. This is an issue later considered with regards to Brexit.[73] The case of *Allianz v West Tankers*[74] shows the development of the ECJ jurisprudence but also raises issues regarding arbitration. This case highlights a source of tension: that the English courts are not permitted to use an anti-suit injunction under the Regulation, but they are under the NYC. Many member states in the EU are signatories to the NYC. This could potentially lead to more arbitration proceedings in the UK following departure from the EU, provided the UK are to regain use of the anti-suit injunction.

If the court upholds the arbitration clause, the issue must be settled in arbitration as

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[65] Nikiforos Sifakis, 'Anti-Suit Injunctions In The European Union: A Necessary Mechanism In Resolving Jurisdictional Conflicts?' (2007) 13 The Journal of International Maritime Law
[66] *Ibid*
[67] *Ibid*
[68] *Continental Bank v Aeakos Compania Naviera* [1994] 1 Lloyd's Rep 505
[69] *Regulation (EU) No. 1215/2012*
[70] *Turner v Grovit* ECJ [2004] EUECJ C-159/02
[71] n.64
[72] Signatories to the European Union
[73] n.69
[74] *Allianz v West Tankers* [2009] EUECJ C-185/07

long as one-party states it within their agreements. Since 2009, English courts could not use anti-suit injunctions against other member states but still retained the ability to use them in other countries.[75] This leads to implications as, while litigation occurs in one country trying to decide whether the arbitration clause is valid, the arbitration proceedings may still be running alongside the litigation proceedings.

One of the main questions posed to the ECJ is whether they were wrong in their judgment of halting a 'useful mechanism for resolving jurisdictional conflicts'[76] or were the ECJ simply removing an outdated mechanism left behind from the British colonial times.[77]

Many member states have shown their disapproval of the anti-suit injunctions, notably in *Re The Enforcement of An English Anti-Suit Injunction,*[78] where the German courts refused to uphold an anti-suit injunction, arguing that it interfered with the sovereignty and jurisdiction of their courts.[79] Italian Courts are among other member states that regard the anti-suit injunction as being outdated.[80] If a party tries to issue the anti-suit injunction, Italian courts will ignore it and decide whether they want uphold the arbitration agreement or continue proceedings despite the agreement. They believe it goes against mutual trust and respect laid down in the Regulation.[81] It could be possible for the ECJ to allow the anti-suit injunctions to be used on a European level but reserved for the most vexatious of proceedings and not just trivial ones, taking inspiration from the US legal system and their use of the anti-suit injunctions; 'state courts are allowed to issue anti-suit injunctions to preclude parties from pursuing actions in other U.S. state courts'.[82] This can be cross applied to the EU as each member state has their own laws, much like each state differs in the US. They may take inspiration in allowing the use of anti-suit injunctions to preclude countries from continuing proceedings in another member state.

It has been argued that the anti-suit injunctions should still be kept alive regarding

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[75] *Ibid.*
[76] n.64
[77] n.64
[78] *Re the Enforcement of an English Anti-Suit Injunction Case* [1997] ILPr 320
[79] *Ibid*
[80] Colman J, *West Tankers Inc v Ras Riunione Adriatica Di Sicurta and another* 'The Front Comor' - [2005] All ER (D) 350 (Mar)
[81] *West Tankers Inc v Ras Riunione Andriatica di Sicurta (The Front Comor)* [2005] EWHC 454 (Comm) p.43
[82] S. Strong *The American Journal of Comparative Law*, Volume 66, Issue 1, July 2018

arbitration due to parties agreeing to arbitrate and avoid litigation. Also, the injunction provides 'legal certainty and avoids conflict'.[83] Furthermore, it helps to tackle the issue of forum shopping. This raises arguments about what post-Brexit may lead to with regard to the anti-suit injunction.

What May Happen with a No-Deal Brexit?

Dilworth suggested the UK 'may wish to reinvigorate the anti-suit injunction, reversing the *West Tankers* line of authority'[84] and the anti-suit injunctions may be reborn and re-used by English courts.[85] The UK is a signatory to the NYC separate from the EU and the arbitral awards that can be enforced will still be available and unchanged by the exit from the EU.

However, under the Regulation[86] the UK and other member states are under a mutual recognition and enforcement of judgments of the ECJ. Upon exiting the EU, Arthurs argues that the effect of these judgments will be void and the English courts will be free to issue the injunctions again.[87]

Although the UK could try and negotiate a similar framework as previously adopted whereby ECJ judgments are still respected by the UK and followed; the ECJ retain the power to give the final decision if a case is to be appealed toward them.[88]

Parliament acknowledged via the European Union Withdrawal Act 2018 (EUWA) section 6(4), that the UK Supreme Court has the ability to depart themselves from previous ECJ judgments, as the English Supreme Court does with its own judgements.[89]

Departure from the EU could see 'London gaining a distinctly competitive edge as a

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[83] n.64
[84] Noel Dilworth, 'Life Set Upon The Recast: The (Recent) Past And (Near) Future Of Questions Of Jurisdiction Within The EU' 31 Journal of International Banking & Financial Law. (2016)
[85] Donna Goldsworthy, In Practice – Brexit: International Disputes: How no-deal will affect UK courts - (2019) LS Gaz, 9 Sep, 26
[86] *Regulation (EU) No. 1215/2012*
[87] Clare Arthurs, Phillip D'Costa and Nicole Finlayson, 'The Long Farewell: Leaving The EU (Pt 2) – 167 NLJ 7757, P14' (2017)
[88] *ibid*
[89] David Ndolo, The role of the English courts in the enforcement of arbitration agreements, Cov. L.J. 2019, 24(1), 39-48

seat for arbitration in comparison to other European cities'.[90] As the UK leaves the EU and the anti-suit injunction is set to be re-ignited it looks advantageous for the UK, and 'London will remain the preferred choice for arbitration'.[91] This is also set to give a 'demand in the short term'[92] in the market place for LCIA arbitration clauses and use due to the novelty of the ant-suit injunction. It has been a common scholarly opinion and that of law firms themselves, that a short demand 'may increase the attractiveness of London-seated arbitration.'[93]

Evidence, as seen in *Re The Enforcement of An English Anti-Suit Injunction,*[94] shows that other European Courts are not fond of anti-suit injunctions, thus UK parliament should re-consider the enforcement of them in these courts. It is likely that the other EU member states may ignore the injunctions in light of the other parties commencing proceedings. For the UK to bring back use of the anti-suit injunctions, it would require the other EU member states to recognise them as not being oppressive or vexatious and not interfering with their individual sovereignty.

What May Happen with a Brexit Deal?

The Lugano Convention (LC)[95] is an agreement between countries not within the EU to have a free trade association with the member states, including countries such as Switzerland, Iceland, Denmark and Norway.[96] It was previously stated that the UK will no longer be bound by the LC upon exit from the EU.[97] This is primarily due to the fact that the UK never ratified the LC and only abided by it due to their membership of the EU. Further developments see the UK wishing to ratify the LC after the transition period.[98] As of the 28th January 2020 the UK signed into the

[90] n.86
[91] n.84
[92] Iain Boyle, Short term Brexit boost for arbitration? 29 2 Construction Law 33 (2018)
[93] 'How Will Brexit Impact Arbitration In England And Wales?' (*Nortonrosefulbright.com*, 2020) <https://www.nortonrosefulbright.com/en-gb/knowledge/publications/a655ac50/how-will-brexit-impact-arbitration-in-england-and-wales> accessed 20 January 2020
[94] n.77
[95] Convention on jurisdiction and the enforcement of judgments in civil and commercial matters
[96] The Lugano Convention, (*Eur-lex.europa.eu*, 2020) <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22007A1221(03)&from=EN> accessed 20 January 2020
[97] 'Brexit To Take The UK Out Of The Lugano Convention Governing Judgments With Switzerland | Lexology' (*Lexology.com*, 2020) <https://www.lexology.com/library/detail.aspx?g=3d1f57a5-ef63-49fc-b881-c77537818a63> accessed 20 January 2020
[98] 'Support For The UK'S Intent To Accede To The Lugano Convention 2007' (*GOV.UK*, 2020) <https://www.gov.uk/government/news/support-for-the-uks-intent-to-accede-to-the-lugano-convention-2007> accessed 9 March 2020

European Economic Area (EEA) and European Free Trade Association Agreement (EFTA) with Lichtenstein, Norway and Iceland. The UK hopes to accede the convention at a later date and these countries have offered their support in doing so.[99] Currently Switzerland, a signatory to the LC, does not allow use of anti-suit injunctions under the Swiss Private International Law Act chapter 12.[100] Thus, the LC does not appear to allow for anti-suit injunctions for arbitration.[101] The LC does not allow anti-suit injunctions because it is a reflection of the Regulation and thus ECJ judgments must be considered as per protocol 2.[102] The likely outcome is that the UK will continue to remain a part of the LC, continuing to consider decisions of the ECJ and the decision in *West Tankers*[103] meaning 'the rise of anti-suit injunctions will be roundly quashed'.[104] Compared to a no deal Brexit, the 'UK may seek to unilaterally accede to the Hague Convention (HC)'.[105] This works to enforce exclusive jurisdiction clauses meaning parallel proceedings in another forum, not agreed upon, should not be sought after. This will in turn close the uncertainty of whether the Regulation would still be applicable in a no deal Brexit.[106]

Although, if the UK were to accede the HC it would not be up to the same standard of the Regulation as it would only cover the exclusive jurisdiction clauses as being binding.[107] In comparison, if the UK do not achieve a deal and revoke the previous binding of the *West Tankers case*[108] they would be able to issue anti-suit injunctions for arbitration proceedings. If the UK wanted the best route for the re-issuing of anti-suit injunctions, it is to leave with no deal or a deal unaffected by their point, and to neither join the LC nor accede the HC.

The UK, under the European Union (Withdrawal) (no. 2) Act 2019 or more commonly

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[99] *Ibid*
[100] Sebastiano Nessi, 'Anti-Suit Injunctions In International Arbitration: The Swiss Approach (Part 2/2)' (*Arbitration Blog*, 2020) <http://arbitrationblog.practicallaw.com/anti-suit-injunctions-in-international-arbitration-the-swiss-approach-part-2-2/> accessed 20 January 2020
[101] *Ibid*
[102] David Greene, 'The Lugano Convention: a good first step' 170 New Law Journal 7877, p20 (2020)
[103] n.73
[104] Peter Hirst, 'Brexit: The Return Of The EU Anti-Suit Injunction?' (*Mondaq.com*, 2020) <http://www.mondaq.com/uk/x/663992/trials+appeals+compensation/Brexit+The+Return+Of+The+EU+AntiSuit+Injunction> accessed 20 January 2020
[105] Dipti Hunter and Alex Hawley, 'Defining Uncertainty: ADR Options Post-Brexit' 168 New Law Journal 7808 P.17 (2018)
[106] Clare Francis and Richard Dickman, 'Brexit and Dispute Resolution' (*Pinsentmasons.com*, 2020) <https://www.pinsentmasons.com/out-law/analysis/brexit-and-dispute-resolution> accessed 21 January 2020
[107] *Ibid*
[108] n.73

known as the Benn Act,[109] are obliged to exit the EU with a deal. Accordingly, there could be different outcomes for the UK honouring decisions of the ECJ, adopting them and ratifying them into national law, or rejecting them.

One of the issues with a Brexit deal are the various different propositions, each with different outcomes, as to the enforcement of the EU laws and decisions of the ECJ. David Davis, the Brexit Secretary, in 2018, stated, when asked by Emma Reynolds, if the UK would be under the jurisdiction of the EU during the transition period, answered 'yes for that period'.[110] The issue is the future post-transition period. There is an argument that 'CJEU case law made before Brexit will be given the same binding, or precedent, status in UK courts as decisions of the Supreme Court.'[111]

Possible Outcomes after the Transition Period

The UK Supreme Court (UKSC) can overturn their own decisions, as seen in the 1966 Practice Statement,[112] allowing for them to 'depart from a previous judgment when it appears right to do so.' Recently seen in *Knauer v Ministry of Justice*[113] questioning the power of the UKSC after the transition period to depart from the ECJ's decision in *Allianz v West Tankers*[114] thus allowing the use of anti-suit injunctions once again. This could have an adverse effect upon the anti-suit injunction's application within the EU. Member states may potentially be reluctant to accept the injunctions and may carry out proceedings anyway. This could be adopted by all member states and thus, despite the resurrection of the anti-suit injunction in the UK, its application would be ineffectual.

The potential deal the UK could finalise is that the ECJ may hear cases on precedent they have previously set. This in turn could mean the ECJ, if the ruling in *West Tankers*[115] was to be contested in a new case and taken to the ECJ, may allow the

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[109] 'The Benn Act - UK In A Changing Europe' (*UK in a changing Europe*, 2019) <https://ukandeu.ac.uk/fact-figures/the-benn-act/> accessed 25 March 2020
[110] 'Oral Evidence - The Progress Of The UK'S Negotiations On EU Withdrawal - 24 Jan 2018' (*Data.parliament.uk*, 2020) <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/exiting-the-european-union-committee/the-progress-of-the-uks-negotiations-on-eu-withdrawal/oral/77453.html> accessed 14 February 2020
[111] -- 'Planning For Brexit, Deal Or No Deal' (2019) 8 Occupational Pensions
[112] Practice Statement HL Judicial Precedent [1966] 1 WLR 1234
[113] *Knauer v Ministry of Justice* [2016] UKSC 9
[114] n.73
[115] N.73

anti-suit injunction to be revived within the UK to respect the sovereignty of the UK. This has practical implications as the UK Parliament must first agree to this deal with the EU Parliament.

The question of what happens with the anti-suit injunction in light of a deal is still unclear. From the foregoing it is likely to remain banned from use given obvious and sustained opposition from the rest of the EU and their disregard for its enforcement, even if the ECJ were to re-consider the injunction in light of respect for UK sovereignty post transitional period. This can, however, raise commercial concerns as to what advice law firms can give clients in these circumstances and how they may respond to the different arguments on each side.

3 Assessing the Views as to the Direction the UK Will Take Post-Brexit

Views on a Brexit Deal

There is still a lot of uncertainty as to what direction the UK will take and turning to speculations from academics, businesses and law firms distorts the image even more. These views are not concrete but can be used as groundwork to understand the common consensus as to what the future holds for the UK and arbitration.

The importance of gauging an idea on the direction the UK will take is to provide certainty to clients of law firms and commercial negotiations deciding whether arbitration is the most desirable route or not. A survey conducted by Thomoson Reuters (TR) concluded that 35% of respondents found the uncertainty of Brexit to change their approach to dispute resolution clauses, of which 10% are concerned with Arbitration clauses.[116]

Slaughter and May (SM), a leading law firm within the UK, published a document to guide clients and others as to the direction of negotiations between the UK and EU Parliament.[117] This is speculative, at the time of writing, but still be pertinent to consider for possible outcomes.
This builds upon the discussion in section two regarding the ascension to the HC as

[116] Dipti Hunter and Alex Hawley, 'Defining Uncertainty: ADR Options Post-Brexit' 168 New Law Journal 7808 P.17 (2018)
[117] Damian Taylor and Robert Brittain, *The Dispute Resolution Review* (11th edn, Law Business Research Ltd 2019) accessed on (*Slaughterandmay.com*, 2020) <https://www.slaughterandmay.com/media/2537477/the-dispute-resolution-review-eleventh-edition-brexit.pdf> accessed 30 March 2020.

well as the discussion surrounding the LC. SM state 'accession to the HC is the most straightforward of these options, because it does not require the UK to secure the consent of any other party.'[118] This can be done without an agreement with the EU as the UK can unilaterally accede this convention which works so that 'English judgments in disputes arising from qualifying exclusive jurisdiction agreements would continue to be enforceable in Member States.'[119]

The HC, much like the Regulation, does not include arbitration and arbitral awards in their scope as this is governed by the NYC. The HC prescribes, much like the NYC, a choice of courts agreement clause similar to the NYC's choice of arbitration institution agreement. This works in a similar fashion to the arbitration clause, as an exclusive jurisdiction clause must be upheld through all countries signatory to the HC. Under Article 6 of the HC, if an exclusive jurisdiction exists and a party goes to a jurisdiction not agreed, that country shall suspend or dismiss proceedings. The convention may also work to halt future ECJ judgments being binding to the UK but would also be 'inconsistent with case law'[120] for the UK to depart from previous judgments. It would be inconsistent for the UK, who subjected themselves to the supremacy of the ECJ, to then depart from a judgment based upon the views of other member states who felt that the anti-suit injunction infringed on their sovereignty. Since the case of *Allianz v West Tankers*[121] the anti-suit has been banned from use and the EU member states have worked alongside the UK to support arbitration agreements being upheld. They may be reluctant to do so if they feel their sovereignty threatened by its resurrection.

However, the HC does not provide a lot of protection for exclusive jurisdiction clauses. Where a party acts against an agreed exclusive jurisdiction clause the wronged party would have great difficulty in persuading the other court to direct the case back to the agreed jurisdiction.[122] The issue comes from the case of *Owusu v. Jackson,*[123] stating that a third-state would not be favourable for an exclusive jurisdiction clause if an EU member state brings the case in their own jurisdiction rather than an agreed jurisdiction; this was altered by the Regulation but upon exit from the EU would become effective against the UK. A third-state is defined as a state not a part of the

[118] *Ibid*
[119] *Ibid*
[120] *Ibid*
[121] *Allianz v West Tankers* [2009] EUECJ C-185/07
[122] n.115
[123] *Owusu v. Jackson* C-281/02

EU treaty.[124] The UK being a third state means that it does not have the luxury of the Regulation for protection for exclusive jurisdiction clauses. Although, an arbitration clause is different and not covered under the HC. Protection for exclusive jurisdiction clauses is important if the arbitration clause does not cover the issue. Another complication is presented via the case of *Gasser v MISAT*[125] where the first court in which a proceeding was first heard takes precedent despite the choice-of-court agreement. This was ultimately altered by the Regulation, however it seems unlikely that the Regulation will continue for the benefit of the UK post-Brexit as it is built on reciprocity and enforcing judgments between member states.[126] This means that if two other EU member states, for example Spain and Belgium, opt to have the UK as their exclusive court, the *Gasser*[127] rule will act against the HC. The Regulation takes precedent and thus the first jurisdiction the action is brought in, providing it is an EU state, will be the jurisdiction in which the case is heard in favour of a third-state. This is because the Regulation makes no provision for non-EU member states to have exclusive jurisdiction clauses and the only reference is under article 33 of the Regulation which allows for non-EU member states to conduct proceedings only if they were the first court the case was heard, otherwise it will be the first EU member court applied to following the decision in *Gasser.*[128] This raises the argument of the use of the anti-suit injunctions but, as noted before, it would be inconsistent with the HC leaving a gap where arbitration agreements may not be respected and forum shopping may start to rise.

The other option is for the UK to accede the LC but this requires agreement from all contracting EU member states.[129] As of 28th January 2020 the UK have signed into the EEA and EFTA with Lichtenstein, Norway and Iceland to protect the rights of nationals in these respective countries during the transitional period.[130] The signatories to this agreement have also supported the UK's plans to accede the convention at the end of the transnational period.[131]

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[124] Vienna Convention on the Law of Treaties (Geneva, 23 May 1969; TS 58 (1980); Cmnd 7964) art 34
[125] *Erich Gasser GmbH v MISAT Srl* (Case C-116/02)
[126] -- 'Brexit, English Law And The English Courts: Where Are We Now?' (*Cliffordchance.com*, 2018) <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2018/08/brexit-english-law-and-the-english-courts-where-are-we-now.pdf> accessed 26 March 2020
[127] n.124
[128] n.124
[129] n.115
[130] 'Support For The UK'S Intent To Accede To The Lugano Convention 2007' (*GOV.UK*, 2020) <https://www.gov.uk/government/news/support-for-the-uks-intent-to-accede-to-the-lugano-convention-2007> accessed 9 March 2020
[131] *Ibid*

The LC recognises 'the enforcement and recognition of judgments across a single legal space.'[132] However, the LC can leave parties to be subjected to 'torpedo' litigation. This is where a proceeding is started within another jurisdiction and that court decides whether it has jurisdiction to actually hear the case, wasting a lot of time and money with the 'sole purpose of frustrating English proceedings.'[133] This means it cannot produce more certainty for parties contracting with each other and agreeing on an exclusive jurisdiction to hear disputes. The parties will have to act fast or suffer delays while the first court decides if it has jurisdiction[134] whilst also having little protection for arbitration clauses. The LC does have the benefit of allowing the national courts of the signatories to take into account the decisions of the other signatories when faced with similar matter.[135] Furthermore, the LC does not make any non-EU signatories bound by ECJ jurisprudence. Although, this is paired with the idea that 'any sensible judge or tribunal takes into account any relevant CJEU judgments.'[136]

There has been much support for the LC, with some saying, 'acceding the Convention makes life a whole lot more certain and easier for business and citizens.'[137] The non-EU signatories have supported the UK in acceding the convention and now it is up to the EU to finalise this, or oppose it.[138] Although, there are arguments that the EU parliament's position for the final say in giving consent may be used as a bargaining chip in wider negotiations.[139] The best agreement that could be made is to accede both conventions, the HC would help protect for exclusive jurisdiction clauses and if

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[132] 'House Of Lords - Brexit: Justice For Families, Individuals And Businesses? - European Union Committee' (*Publications.parliament.uk*, 2017) <https://publications.parliament.uk/pa/ld201617/ldselect/ldeucom/134/13407.htm> accessed 10 March 2020

[133] Nikiforos Sifakis, 'Exclusive Jurisdiction Clauses — Articles 27 And 28 Of The Brussels I Regulation — The 'Italian Torpedo' — Anti-Suit Injunctions' 12 Journal of International Maritime Law 5 p.307-312. (2006)

[134] -- 'What Does Brexit Mean For… Dispute Resolution' (*Eversheds-sutherland.com*, 2016) <https://www.eversheds-sutherland.com/documents/services/litigation/brexit-jurisdiction-clauses-flyer.PDF> accessed 30 March 2020

[135] 'House Of Lords - Brexit: Justice For Families, Individuals And Businesses? - European Union Committee' (*Publications.parliament.uk*, 2017) <https://publications.parliament.uk/pa/ld201617/ldselect/ldeucom/134/13407.htm> accessed 10 March 2020

[136] David Greene, 'The Lugano Convention: A Good First Step' 170 New Law Journal 7877 p.20 (2020)

[137] *Ibid*

[138] *Ibid*

[139] Grania Langdon-Down, 'Litigation Futures: Strong & Stable Despite The Brexit Effect' 170 New Law Journal 7872 p.17 (2020)

a party tries to go to a court they did not agree on they could work to hear the case in an agreed court. The LC will also help for judgments to be recognised in the EU member states and other signatories to the convention. The protection for arbitration is still not there and thus the argument for the anti-suit injunction is raised once again.

Views on a No-Deal Brexit

Many academics and law firms have tried to speculate what the outcome of a no-deal scenario would likely look like. SM speculate that if the UK courts have jurisdiction over a respondent, they can prevent them from bringing parallel proceedings within the foreign courts, thus resurrecting the anti-suit injunction.[140] This has been argued as an extremely beneficial asset for the UK to heighten their position on the arbitration marketplace. As Clare Arthurs states, 'London will gain a distinctly competitive edge as a seat for arbitration in comparison to other European cities.'[141]

As discussed, one of the issues is the EU member states respecting the anti-suit injunction. This is more of a practical issue than legal issue; the injunction is used *in personam* but still requires the foreign jurisdiction to uphold this injunction and not see it as a threat to their jurisprudence or sovereignty. Although, as Ndolo argues, 'the UK Supreme Court will have the power to depart from the CJEU ruling in *West Tankers'.*[142] This does not mean they will depart from the decision and the extent to which the ECJ continues to rule upon previous precedent is yet to be seen. This could still bind the UK until a new case is heard by the UKSC. However, the UKSC may still decide to uphold the decision in *West Tankers*[143] in order to provide continuity within the EU. They may also build upon their understanding that the other countries have not respected the use of the injunction in previous case law and there is nothing to suggest they will start doing so once the UK leaves the EU.

There have been previous talks within Parliament to allow for the UK to start to 'disentangle ourselves from the EU's legal order'[144] as Boris Johnson sought to

[140] n.116
[141] Clare Arthurs, Phillip D'Costa and Nicole Finlayson, 'The Long Farewell: Leaving The EU (Pt 2) – 167 NLJ 7757, P14' (2017)
[142] David Ndolo, 'The Role Of The English Courts In The Enforcement Of Arbitration Agreements' Coventry Law Journal, 24(1) p.39-48 [2019]
[143] n.120
[144] Peter Walker, 'Lower Courts Can Roll Back EU Laws After Brexit, No 10 Confirms' (*the Guardian*, 2019) <https://www.theguardian.com/politics/2019/dec/18/lower-courts-can-roll-back-eu-laws-after-brexit-no10-johnson-confirms> accessed 9 March 2020

introduce a clause into his Withdrawal Bill,[145] allowing the UK to overrule the precedent laid down by the ECJ rulings. However, this was met by criticisms as it not only gives the UKSC the power to overrule decisions but also gives the lower courts the power to do so. Barnard[146] argued that 'there is a clear hierarchy of norms and to have a whole body of ECJ decisions whose legal status is unclear would create legal uncertainty'.[147]

There is a severe lack of clarity surrounding the possible outcomes under a no-deal exit from the EU, with many suggesting the UK Courts will be able to depart from the previous ECJ rulings;[148] while others argue the UK will continue to be bound by them.[149] The most logical solution would be for the issue to arise again once a new case is to be heard within the UK. They may then refer the case to the ECJ and argue their grounds for overruling the decision and hear the ECJ's grounds for wanting to uphold the decision. This will only be possible depending on the particulars of the deal drawn up. There is a debate to be heard on either side, and the ECJ should hear it with regard to the UK being a sovereign nation but it must be balanced with arguments from the EU members states who oppose the injunction.

Comparative Analysis between a Deal or a No-Deal and the Likely Outcome

Some professionals suggest 'Brexit is not expected to have any real impact on the English arbitration market.'[150] This is largely attributable to the fact that arbitration has very little to do with membership of the EU and the UK, along with all other countries agreeing to arbitrate, are bound by the NYC. The precedent on banning the anti-suit injunction as laid down by the ECJ may have been a favourable asset for the UK to re-obtain but in reality, is unlikely to be resurrected. However, London is already one of the leading institutions for arbitration and "the success of London arbitration

[145] *Ibid*
[146] Lecturer of EU Law at Cambridge University
[147] Emilio Casalicchio and Eleni Courea, 'UK Seeks New Powers For Judges To Reject EU Court Rulings' (*POLITICO*, 2019) <https://www.politico.eu/article/uk-new-powers-judges-reject-eu-court-rulings/> accessed 9 March 2020
[148] n.141
[149] 'How Will Brexit Impact Arbitration In England And Wales?' (*Nortonrosefulbright.com*, 2019) <https://www.nortonrosefulbright.com/en-gb/knowledge/publications/a655ac50/how-will-brexit-impact-arbitration-in-england-and-wales> accessed 19 October 2019
[150] *Ibid*

depends in no way upon the UK's membership of the EU."[151]

A no-deal would, as discussed, provide a lot of legal uncertainty as to where the UK stands with past case law, whereas a deal would help to hash out the uncertainty. One of the biggest issues are professionals guiding their clients due to conflicting sources. For example, Hunter and Hawley suggests the 'UK may seek to unilaterally accede to the HC,'[152] whereas Ndolo argues 'the UK Supreme Court will have the power to depart from the CJEU ruling in *West Tankers.'*[153] The issue is balancing the merits of each article and concluding on which appears to be the most likely outcome. This is still unknown and further negotiations are the only way for business and clients to be certain. However, this uncertainty has already drawn away business from the UK as evidenced by 10% of clients changing their perceptions about arbitration within the UK.[154]

The UK Parliament are still developing negotiations. Johnsons' statement about the lower courts being able to depart from ECJ rulings seemed to affirm Ndolo's hypothesis of departing from previous judgments. [155] However, it appears this has become outdated through new negotiations and replaced by the recent news that the UK may seek to accede the LC.[156] Accession to the LC itself was questioned stating it 'may not be realistic in the context of ongoing negotiations.'[157] Thus showing the volatility of the negotiations and how certainty at this time is not guaranteed.

As noted previously[158] there are issues with the choice of law clause and whether the UK is a viable institution for conducting arbitration within. As for the current negotiations going ahead there is little protection for 'torpedo' litigation and agreed arbitration clauses. If broken, the HC can be used to hear the case in the agreed court through the party's exclusive jurisdiction clause but not an arbitration agreement. This does not defeat the seat for London as a preferred institution for arbitration as

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[151] 'LCIA Morning Symposium And Lunch In Washington DC - Featuring A Keynote Address From Lord Goldsmith "2019 And All That"' (*Lcia.org*, 2019) <https://www.lcia.org/News/lord-goldsmith-keynote-address-2019-and-all-that.aspx> accessed 19 October 2019
[152] n.115
[153] n.141
[154] n.115
[155] Peter Walker, 'Lower Courts Can Roll Back EU Laws After Brexit, No 10 Confirms' (*the Guardian*, 2019) <https://www.theguardian.com/politics/2019/dec/18/lower-courts-can-roll-back-eu-laws-after-brexit-no10-johnson-confirms> accessed 9 March 2020
[156] n.129
[157] n.115
[158] Page 16

evidenced by TR's survey reporting that, of 94 respondents, 63% had a preferred seat in London for arbitration.[159] The choice to arbitrate does not seem to be diminishing either, as Norton Rose Fulbright stated, Brexit may increase the attractiveness of arbitration in the short-term.[160] This was also evidence by TR as 10% of the 94 respondents were changing to arbitration rather than court litigation.[161]

As apparent from the foregoing discussions, a Brexit deal or a no-deal would be wholly different. Although, given that the UK already has a sufficient seat for arbitration Brexit will do very little to knock them down.[162]

Conclusion

The pertinent issues are whether there will be sufficient safeguards in place for parties wishing to arbitrate with each other and what may happen with the failure of the parties abiding by the agreements. This is not conclusively answered as the negotiations are still taking place, the discussion merely points to the directions that could be taken to help continue support for the UK towards arbitration. Many of the arguments may only become reality post-Brexit and only when a disagreement arises between parties.

There has been much discussion around the potential re-introduction of the anti-suit injunction into UK law to be used against EU member states and whether there will be different outcomes if there is a Brexit deal or no deal. The foregoing discussions point to a common answer: it will not be practical with either a deal or a no-deal to bring back the anti-suit injunction. While the UK may be able to depart from previous ECJ judgments, the main concern is the practicality of doing so and the collateral impact it will have upon other EU member states, many of which have already voiced their animosity towards the application of the injunction and how they feel that it interferes with their jurisprudence. The UK may argue that they have a right to use the injunction in an attempt to regain their sovereignty after being subjected to ECJ rulings, however they will subsequently fail to gain the support from the remaining

[159] Jessica Trevellick, 'London Calling Or Cooling? Post-Brexit Dispute Resolution And Arbitration Research Round-Up' (*Arbitration Blog*, 2018) <http://arbitrationblog.practicallaw.com/london-calling-or-cooling-post-brexit-dispute-resolution-and-arbitration-research-round-up/> accessed 9 March 2020
[160] n.148
[161] n.158
[162] n.148

signatories. This could potentially leave them without a valuable tool to stay proceedings in an EU member state and thus become a less desirable institution for arbitration as they cannot ensure that an arbitration clause would be upheld.

The discussion around a potential Brexit deal focused on what conventions could be acceded. The UK has already started to accede the LC meaning decisions made within UK courts will be respected within EU member states and signatories to the LC, finalities of the deal will only become apparent towards the end of the Brexit transitional period.[163] The LC also allows some sovereignty for the UK due to them not having to apply every ECJ judgment but only taking them into account when ruling upon cases. Although, when discussing the LC in line with the anti-suit injunction it is clear that it will still remain banned due to the LC mirroring that of the Regulation as ECJ judgments must be considered as per Protocol 2.[164] Meaning the decision in *West Tankers*[165] would still be upheld, and the anti-suit injunction banned. Signatories of the LC have also shown their dislike for the injunction, Switzerland banned it via statute.[166]

The other convention considered was the HC also looking at recognition of UK court judgments across signatories to the convention. Unlike the LC, this may be acceded unilaterally at any time and so remains an option for the UK at a later date, maybe towards the end of the transition period.[167] It does not offer a lot of protection with regard to the exclusive jurisdiction clauses as the UK would be classed as a third state. Meaning previous decisions, such as the decision in *Gasser,*[168] which were overruled by the Regulation, may be used against the UK if sufficient protection is not brought in to prevent this. This issue may be resolved by further negotiations with the EU Parliament. Also, similar to the LC, the anti-suit would not be applicable as it falls out of the remit of the convention.

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[163] 'Support For The UK'S Intent To Accede To The Lugano Convention 2007' (*GOV.UK*, 2020) <https://www.gov.uk/government/news/support-for-the-uks-intent-to-accede-to-the-lugano-convention-2007> accessed 9 March 2020

[164] David Greene, 'The Lugano Convention: a good first step' 170 New Law Journal 7877, p20 (2020)

[165] *Allianz v West Tankers* [2009] EUECJ C-185/07

[166] Sebastiano Nessi, 'Anti-Suit Injunctions In International Arbitration: The Swiss Approach (Part 2/2)' (*Arbitration Blog*, 2020) <http://arbitrationblog.practicallaw.com/anti-suit-injunctions-in-international-arbitration-the-swiss-approach-part-2-2/> accessed 20 January 2020

[167] Dipti Hunter and Alex Hawley, 'Defining Uncertainty: ADR Options Post-Brexit' 168 New Law Journal 7808 P.17 (2018)

[168] *Erich Gasser GmbH v MISAT Srl* (Case C-116/02)

Ultimately, arbitration is governed by the NYC setting out the rules and procedures that parties who wish to arbitrate must follow, whereas the LC and HC are in place for the eventuality that the arbitration agreement is not applicable for the issue present. These conventions may all work alongside each other, promoting security of arbitration and circumstances where parties act against the agreements. The anti-suit injunction is not a part of the convention as it is a separate entity and so the NYC cannot be used to re-integrate it within the UK to be used against EU member states. However, as arbitration is governed by the NYC Brexit will have limited impact upon the way arbitration is carried out in the UK and the rest of the EU. Therefore, arbitration will be carried out as usual and, although the anti-suit injunction may have made the UK a more desirable forum, they are already a well renowned institution for arbitration and "the success of London arbitration depends in no way upon the UK's membership of the EU."[169] Therefore, the ultimate conclusion is that Brexit will have very little impact on Arbitration within the UK.

[169] 'LCIA Morning Symposium and Lunch In Washington DC - Featuring A Keynote Address From Lord Goldsmith "2019 And All That"' (*Lcia.org*, 2019) <https://www.lcia.org/News/lord-goldsmith-keynote-address-2019-and-all-that.aspx> accessed 19 October 2019.