Brexit and its Implications for International Arbitration: The Anti-Suit Injunction

By Hashem Hijjawi

On 23 June 2016 the United Kingdom's electorate voted by a slim majority to leave the European Union, resulting in a nearly three-and-a-half-year negotiation between the UK and the EU, which at the time of writing has yet to be concluded. Despite the time taken over that negotiation and the extraordinary political impact it has had in the UK, it relates merely to the transitional arrangements between the parties, and the final, long-term, legal framework governing the UK's relationship with the EU is well over the horizon.

In circumstances where not even the transitional arrangements have been agreed, let alone the long-term framework, this article must of necessity be limited in its scope to introducing the issues and some of the possible options for the UK going forward. It is fully expected that this article will be revised and the discussion revisited in future articles as the true position becomes clear.

Although Brexit may have significant implications for civil judicial cooperation between the UK and EU member states, it is not immediately obvious why it should impact the conduct of international arbitration: after all, the framework for arbitration is not derived from EU law, rather it is part of the domestic law of each member state, supported, crucially, by the international treaty obligations on enforcement which are enshrined in the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention").

However, one aspect of arbitration practice which may experience a significant shift is the treatment by English courts of anti-suit injunctions. This article will assess how Brexit could facilitate the granting once more of such injunctions by the English courts.

An anti-suit injunction is an order by a court, at the request of one party, to prevent another party from commencing (or continuing) proceedings in a particular jurisdiction in breach of a jurisdiction (or arbitration) clause agreed between the parties. The rationale behind an English court's willingness to grant an anti-suit injunction lies in their desire to uphold the parties' contractual agreement. Commencing proceedings in breach of a clause which stipulates that disputes will be settled in a particular forum (whether by way of arbitration or an exclusive jurisdiction) is a *prima facie* breach of contract.[1]

[1] *Aggeliki Charis Cia Maritima SA v Pagnan SpA (The Angelic Grace)* [1995] 1 Lloyd's Rep 87, per Millett LJ p. 96.

Anti-suit injunctions are a form of equitable relief,[2] and in granting such an order the court will exercise its own discretion with due regard to the circumstances of the case and whether it would be just and equitable to do so.[3] There must be strong reasons for a court not to grant such an injunction.[4] These include: the existence of an unreasonable delay in bringing an application; that the foreign court where proceedings had been launched is the natural and appropriate forum to resolve the dispute; or that the foreign proceedings may involve claims against multiple parties such that preventing only one party from participating carries the risk of inconsistent findings.[5]

Crucially, an English court's ability to exercise this power has been restricted in relation to foreign proceedings in an EU member state (or a Lugano Convention country) as a result of the Court of Justice of the European Union's ("CJEU") ruling in *Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc. (Case C-185/07)* ("West Tankers"), which I will discuss in further detail below.

West Tankers and the Brussels regime

Central to the decision in *West Tankers* was the Regulation on civil judicial cooperation across the EU: *Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* ("2001 Regulation"). This has since been repealed[6] and replaced by *Regulation No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)* ("Recast Regulation"), collectively referred to as the "Brussels regime".

At the heart of the 2001 Regulation and its successor is the mutual recognition and enforcement of judgments relating to civil and commercial matters across all EU member states. This is driven by EU policy, and to ensure the "sound operation of the internal market".[7] When a court of a member state has been seised for the adjudication of a matter, therefore, all other courts must give way. Arbitration was a notable exception to the 2001 Regulation, which stated that "The Regulation shall not apply to… arbitration."[8]

The arbitration exception was tested in the *West Tankers* case, which concerned proceedings brought in Italy in purported breach of a London-seated arbitration agreement and the application by the claimant for an anti-suit injunction in England to restrain the defendant from pursuing the Italian proceedings.

The CJEU held that the English court could not grant such an order, as it would fall foul of the mutual trust engendering the 2001 Regulation. The Court stressed that any attempt to undermine this fundamental principle of EU law was to be treated with the utmost scrutiny, even where the subject matter of the proceedings – as in *West Tankers* – does not directly fall within the ambit of the 2001 Regulation. The effectiveness of the Brussels regime took

[2] The court's power is derived from Section 37(1) Senior Courts Act 1981.
[3] *Glencore International AG v Exter Shipping Limited and Others* [2002] EWCA Civ 528. See also *Aqaba Container Terminal (PVT) Co. v Soletanche Bachy France Sas* [2019] EWHC 471 (Comm).
[4] *Dell Emerging Markets (EMEA) Ltd & Anor v IB Maroc.com SA* [2017] EWHC 2397. See also *Donohue v Armco Inc and Others* [2002] 1 Lloyd's Rep 425.
[5] *Crescendo Maritime Co. and Another v Bank of Communications Company Limited and Others* [2015] EWHC 3364 (Comm), paras 40-61.
[6] The 2001 Regulation continues to apply to claims issued prior to 10 January 2015: Article 66 of the Recast Regulation.
[7] Preamble to the 2001 Regulation.
[8] Article 1(2)(d).

precedence, with the Court refusing to permit an act which would "run counter to the trust which member states accord to one another's legal systems and judicial institutions".[9]

Predictably, there was no dearth of commentary on the *West Tankers* decision in its immediate aftermath, with questions surrounding the utility of the arbitration exception and the long arm of the CJEU being the subject of fervent debate.[10] In 2015, the Recast Regulation entered into force and sought to clarify the relationship between arbitration and the Brussels regime. Despite its best intentions, however, the Recast Regulation remains problematic.

Recast Regulation and the risk of parallel proceedings

The relevant arbitration provisions contained within the Recast Regulation can be found in Recital 12, Article 1(2)(d) (which retained the same wording of its predecessor) and Article 73(2), which provides that "This Regulation shall not affect the application of the 1958 New York Convention". The pertinent article of the New York Convention is Article II(3), which states that:

> "The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

It is clear from Recital 12 that when a matter concerning an arbitration agreement comes before the court of a member state, that court can (i) refer the parties to arbitration; (ii) stay or dismiss the proceedings; or (iii) examine the validity of the arbitration agreement (i.e. determine whether it is null and void, inoperative or incapable of being performed).[11] Recital 12 proceeds to state that a ruling on whether or not an arbitration agreement is null and void, inoperative or incapable of being performed as delivered by a court of a member state will *not* be subject to the Recast Regulation's rules of recognition and enforcement.[12] This means that whatever the decision on the validity of the arbitration agreement by the court of a member state, other courts across the EU need not recognise and enforce that decision.

This paragraph sought to rectify the unsatisfactory consequence of *West Tankers* which meant that a party could bring proceedings in another member state in breach of its arbitration agreement and, if the court of that member state determined that the arbitration agreement was invalid, all other member states had to give effect to that ruling.

Having said that, paragraph 3 of Recital 12 states that even if a court of a member state had determined that an arbitration agreement was invalid (and therefore proceeded to rule on the merits), its consequent substantive decision *will* be subject to the Recast Regulation (such that the decision must be recognised and enforced across the EU). To further complicate matters, paragraph 3 proceeds to state that this is without prejudice to the competence of the

[9] *West Tankers*, para 30.
[10] See, for example, Daniel Rainer, *The Impact of West Tankers on Parties' Choice of a Seat of Arbitration*, 95 Cornell L. Rev. 341 (2009-2010) and Grace Gunah Kim, *After the ECJ's West Tankers: The Clash of Civilizations on the Issue of an Anti-Suit Injunction*, 12 Cardozo J. Conflict Resol. 572 (2010-2011).
[11] Recital 12, para 1.
[12] Recital 12, para 2.

courts of the member states to decide on the recognition and enforcement of arbitral awards in accordance with the New York Convention.[13]

The resultant scenario wreaks havoc with the Recast Regulation's apparent intention of achieving certainty and harmony in civil and commercial judicial matters across EU member states. Consider, for example, the following unsatisfactory scenario. A court of a member state declares an arbitration agreement invalid, proceeds to exercise its jurisdiction over the matter, and delivers its judgment which is unfavourable to one of the parties. That party then nevertheless commences arbitration pursuant to the arbitration agreement. Following the proper constitution of a tribunal, that party receives an award in its favour, and the award must, pursuant to the New York Convention, be enforced across all EU member states, including the state whose court had delivered the original unfavourable decision.

Admittedly, the fact that the New York Convention will always take precedence would mean that the defendant to proceedings brought in breach of an arbitration agreement will not suffer unfair prejudice in the event they commence arbitration and obtain a favourable award, because that award will take precedence over any domestic court's decision to the contrary.[14] But this ignores the practical reality of what would be a protracted and expensive litigation process: there will be an unjustifiable burden on the defendant to mount a defence to the vexatious claim in the court proceedings, incurring substantial costs, especially if they lack any ties to or knowledge of the foreign jurisdiction. Refusing to engage with the proceedings is not a viable option, given that a court judgment on the merits delivered against the defendant will be recognised and enforced against them in any EU member state.

The defendant will therefore be in the invidious position of having to engage with illegitimate proceedings brought in breach of an arbitration agreement, while also commencing parallel arbitration proceedings with a view to securing a favourable award (which itself is not guaranteed). It is, of course, open for the defendant to apply to the tribunal, once constituted, to use its powers to prevent the other party from pursuing the foreign proceedings. This is a more attractive option given that any award by the tribunal will, under the rules of the New York Convention, be respected across all EU member states.[15] But this alternative course of action should not detract from the fact that the defendant will still have to engage with the foreign proceedings and incur significant costs and expense.

Nori Holdings and the attitude of the English courts towards anti-suit injunctions

Males J (as he then was) exposed this weakness in the recent case of *Nori Holdings*,[16] but fell short of levelling the type of criticism it deserves. *Nori Holdings* is significant, however, in that it affirms the principles of *West Tankers*. Indeed Males J concluded that "there is nothing in the Recast Regulation to cast doubt on the continuing validity of the decision in *West Tankers* which remains an authoritative statement of EU Law."[17] *Nori Holdings* is useful in confirming

[13] See also *Nori Holdings Ltd v Bank Otkritie Financial Corporation* [2018] EWHC 1343 (Comm) ("*Nori Holdings*"), paras 86-88 and Males J's interpretation therein of Recital 12 in conjunction with Articles 1(2)(d) and 73(2).
[14] The New York Convention takes precedence over the Recast Regulation: see Recital 12 and Article 73(2) of the Recast Regulation.
[15] The European Court has confirmed that any such award by a tribunal will be subject to Article II(3) of the New York Convention and will take precedence over any rules of the Regulation: *Gazprom OAO (Case C-536/13)* ("Gazprom").
[16] *Nori Holdings* (*supra* n 13).
[17] *Nori Holdings,* para 99. In fact, Males J was emphatic in his rejection of Advocate General Wathelet's Opinion in the *Gazprom* case, which concerned proceedings brought against Gazprom OAO in Lithuania purportedly in breach of an arbitration agreement. An arbitral tribunal in Stockholm issued an anti-suit injunction against Lithuania. Advocate General Wathelet was of the view that Recital 12 of the Recast Regulation reversed the decision of

that the English courts' unwillingness to grant anti-suit injunctions is grounded not in any judicial diffidence (an anti-suit injunction was granted in relation to the Russian proceedings in *Nori Holdings*) but rather in their obligation to follow EU law.

Indeed recent case law has demonstrated that, in circumstances where a party launches foreign proceedings in breach of an arbitration agreement, English courts will not shy away from exercising their power to restrain those proceedings. In March of this year, the High Court granted an anti-suit injunction restraining a French company from continuing proceedings against the claimant in Jordan, given that the subject matter of the proceedings was caught by the arbitration agreement entered into between the parties, which stipulated that any dispute should be referred to the Rules of Arbitration of the ICC seated in London.[18]

Even more recently, in May of this year, an English court granted a permanent anti-suit injunction restraining Peter Little, a US resident, from pursuing proceedings against an insurance company in the US in breach of an arbitration agreement which submitted any potential disputes to LCIA Arbitration in London.[19] Popplewell J said that "the negative obligation not to commence proceedings in any other forum in relation to matters which are within the scope of the arbitration agreement is as fundamental as any positive obligation under the agreement and it gives rise to a legal right which the other party can enforce by injunction".[20] The Supreme Court was similarly forceful in its defence of this negative right: in *AES*,[21] Lord Mance said that "a regime under which the English court could no longer enforce the negative rights of a party to a London arbitration agreement by injunctive relief restraining foreign proceedings would have been, and would have been seen, as a radical diminution of the protection afforded by English law to parties to such an arbitration agreement".[22]

A post-Brexit salve for the anti-suit injunction?

Reciprocity is the defining element of the Recast Regulation. Under a no-deal Brexit, it will no longer apply to the UK.[23] Similarly, the CJEU's jurisdiction over the UK will end. Following the UK's departure, it is not inconceivable that in the absence of any equivalent regime governing civil judicial cooperation with the EU, the English courts will depart from the principles set down in *West Tankers* and adopt the same robust approach they take with non-EU cases. Conduct by parties which strikes at the heart of their contractually agreed dispute resolution clauses will not be tolerated.

Under these circumstances, a party encountering a potential breach of its arbitration agreement will be able to resort to the English courts in full confidence of their ability to deliver an injunction unencumbered by the flaws associated with the Brussels regime identified above.[24] This is encouraging, and should be welcomed. The availability of anti-

West Tankers. The ECJ did not adopt his view, and affirmed the decision in *West Tankers* as good law. *Gazprom* was decided under the rules of the 2001 Regulation, however, and it is therefore unclear how the EU Court will interpret the relationship between anti-suit injunctions and the Recast Regulation in the future. If the analysis of Males J is adopted, the position will remain the same.

[18] *Aqaba Container Terminal (PVT) Co. v Soletanche Bachy France Sas* [2019] EWHC 471 (Comm).

[19] *XL Insurance Co SE v Little* [2019] EWHC 1284 (Comm).

[20] *XL Insurance Co SE v Little* [2019] EWHC 1284 (Comm), para 13.

[21] *AES Ust-Kamenogorsk Hydropower Plant llp v Ust-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35 ("*AES*"), para 58.

[22] *AES*, para 58.

[23] If the UK leaves the EU on a no-deal basis EU instruments such as the Brussels regime will no longer have legal force in the UK.

[24] See the Supreme Court's fervent defence of its power to issue anti-suit injunctions in *AES* (*supra* n 21).

suit injunctions can promote certainty amongst commercial parties who elect arbitration as their preferred method of dispute resolution, especially since the motivation behind submitting disputes to arbitration tends to be, in part, driven by a desire to displace the jurisdiction of domestic courts.

But how will these injunctions be enforced?

There is an immediate problem that arises, paradoxically, as a result of Brexit. To what extent will an English order restraining foreign proceedings be respected by the courts of other member states, in the absence of a regime of mutual recognition and enforcement of civil judgments?

An additional difficulty (which applies to anti-suit injunctions more generally) is that there is no guarantee a counter-party will respect such an order. Non-compliance, however, would be unwise given that contempt of court – the resultant sanction – is an extremely serious offence, carrying severe consequences for an offending party who is domiciled in England or holds assets there. Indeed, as Males J once remarked, the deterrent effect equally applies to individuals with no links to the UK:

> "[t]he sanction of contempt proceedings [in England] will remain. In circumstances where [the Respondents to an order] may wish to come to this country on business or for pleasure, the prospect that their next visit may be for a more extended duration and in less comfortable accommodation than anticipated should provide a real incentive to comply with an order."[25]

Last year, the High Court sentenced a member of the Saudi royal family to 12 months' imprisonment for "flouting" an anti-suit injunction by pursuing proceedings in Saudi Arabia in breach of a London-seated arbitration agreement.[26]

In the event of a negotiated transition deal, the Recast Regulation is likely to remain in force during the transition period and there are indications that in the long-term the UK government intends to replace the Recast Regulation with a similar regime: but as with most matters around Brexit it is far from settled. In the meantime, and assuming the possibility (far from remote) that no deal is agreed with the EU in this area, it is worth discussing some possible solutions to maintaining the certainty achieved by the Brussels regime on enforcement. The UK could revert to the *1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters* ("1968 Convention"); join the *2007 Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* (the "Lugano Convention");[27] or it can accede to the *2005 Hague Convention on Choice of Court Agreements* ("Hague Convention").

1968 Convention

Could Brexit prompt the UK to revisit the 1968 Convention? Some commentators have suggested the UK could fall back on the 1968 Convention, which it acceded to in 1978 as a member of the then European Economic Community.[28] Its provisions have been largely superseded with the advent of the 2001 Regulation. Effect was given to the 1968

[25] *Cruz City 1 Mauritius Holdings v Unitech Ltd and others (No 2)* [2014] EWHC 3131 (Comm), para 38.
[26] *Mobile Telecommunications CO KSC v HRH Prince Hussam Bin Abdulaziz Au Saud* [2018] EWHC 3749 (Comm), para 31.
[27] The effects of which are similar to the Recast Regulation.
[28] Andrew Dickinson (2016) *Back to the future: the UK's EU exit and the conflict of laws*, Journal of Private International Law, 12:2, 195-210.

Convention through the Civil Jurisdiction and Judgments Act 1982, rather than the European Communities Act 1972. As it is only the latter which will be repealed post-Brexit, there may be some merit in arguing that the 1968 Convention was separate from the EU treaties which Article 50(3) of the Treaty of the European Union is set to revoke. Proponents of this view contend that in superseding the 1968 Convention, the 2001 Regulation provided that the supersession applies only "as between Member States",[29] such that the UK can, as a non-member state post-Brexit, 'fall back' on the 1968 Convention which it had properly acceded to at the time.

However, considerable weight is attached to the idea that the draftspeople of the 2001 Regulation had in mind, when drafting the supersession clause, the potential for member states to withdraw from the EU. Moreover, critics argue that for the UK to revive the 1968 Convention when it is no longer a member state post-Brexit would conflict with the aim of the 1968 Convention, which is to "strengthen in the Community the legal protection of persons therein established".[30] Much of this will depend on whether the UK could still, in order to benefit from the 1968 Convention, refer to itself as a "Contracting State" to the 1968 Convention in circumstances where the 1993 Maastricht Treaty – which gave birth to European Union – had absorbed the EEC and its "Contracting States". Furthermore, the "Community" referred to in the Convention's preamble is the European Economic Community, which has since the 2009 Lisbon Treaty ceased to exist.

In any event there are persuasive arguments on both sides and it is significant that reviving the 1968 Convention has not been suggested by either the UK or the EU in their Brexit negotiations. The fact that not all current EU member states are Contracting States to the 1968 Convention also limits the extent to which the UK can replicate the extensive territorial reach of the Recast Regulation. From an anti-suit injunctions perspective, the 1968 Convention also excludes arbitration,[31] rendering its potential revival post-Brexit of little assistance should the *West Tankers* principles apply.

Lugano Convention

The Lugano Convention is not a viable alternative given that the express agreement of all the Convention's signatories (including the EU) would be required. Given the tortuous course of the Brexit negotiations, it cannot be ruled out that the EU might deny a UK request to accede to the Convention. In any case, the decision in *West Tankers* applies to the Lugano Convention's civil judicial cooperation regime in exactly the same way as it does to the Recast Regulation.[32]

The Hague Convention

The Hague Convention, which is intended to promote uniform rules on jurisdiction and on recognition and enforcement of foreign judgments in civil or commercial matters,[33] carries risks as well. The UK is currently a signatory by virtue of its EU membership (in addition to the bloc of EU countries, the only other ratifying members are Mexico, Montenegro and Singapore). The UK government does, however, intend to ratify the Hague Convention following its departure from the EU.[34] The question of whether the Hague Convention can deliver to the UK the same benefits of

[29] Article 68 of the 2001 Regulation.
[30] Jurgen Basedow (2017), *BREXIT and business law*, China-EU Law Journal 5:101-118, 115.
[31] Article 1(4).
[32] *Nori Holdings* (*supra* n 13), para 28.
[33] Preamble to the Hague Convention.
[34] The UK government deposited its instrument of accession in December 2018, stipulating that the Convention would come into force on 1 April 2019. As a result of the Article 50 extension, however, the UK has declared that its accession should remain suspended until 1 November 2019:

the Recast Regulation is, unsurprisingly, shrouded in uncertainty. Like the Recast Regulation, it only applies to civil and commercial matters (Article 1). But Article 1 goes further: the Convention only covers exclusive choice of court agreements (any asymmetrical or unilateral jurisdiction clauses are outside its scope).[35]

Other vulnerabilities exist: the numerous exclusions under Article 2 and the fact that, unlike the Recast Regulation, judgments are not readily enforceable (the process of enforcement is to be carried out according to the laws of each state) would suggest that the Hague Convention is not a sustainable alternative either. There are additional hurdles to surmount for a party seeking to have an English order granting an anti-suit injunction recognised and enforced in the EU. Article 2(4) of the Hague Convention states that: "This Convention shall not apply to arbitration and related proceedings." In addition, Article 7 states that "interim measures of protection are not governed by this Convention."

Article 2(4): arbitration and related proceedings

The scope of "related proceedings" is unclear, and the lack of jurisprudence in this area makes it difficult to reach any authoritative conclusions on whether anti-suit injunctions could be considered "related proceedings." This is unsurprising: the Brussels regime already governs the relationship between civil and commercial matters across the EU and there are, at present, few non-EU signatories to the Convention.

The architects of the Hague Convention did, however, intend to rectify situations where "choice of court agreements are not always respected under divergent national rules, particularly when cases are brought before a court other than the one designated by the parties."[36] In this regard, it could be argued that the purpose of anti-suit injunctions is to uphold the contractually agreed dispute resolution mechanism between the parties, not dissimilar to the Convention's purpose of ensuring that choice of court agreements are respected.

Article 7: interim measures

Another problem is whether an anti-suit injunction is captured by the term "interim measures". This is unclear, and some commentators have relied on the Hague Convention's *travaux préparatoires* to address this topic.[37] The Hague Convention's official Explanatory Report provides examples of such measures and considers "interim injunctions preventing the defendant from doing something that is alleged to be an infringement of the plaintiff's rights" as falling *outside* the scope of the Convention.[38] And yet, unlike the Explanatory Report of an earlier draft of the Hague Convention, the Report does not explicitly state in positive terms that an anti-suit injunction is an example of an interim measure falling outside the scope of the Convention.[39]

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https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=1318&disp=resdn. In light of the latest Brexit extension (until 31 January 2020), the UK's accession will presumably be further suspended until a later date.

[35] See Neil Newing and Lucy Webster (2016), *Could the Hague Convention Bring Greater Certainty for Cross-Border Disputes Post-Brexit: And What Would This Mean for International Arbitration*, 10 Dispute Resolution International, 105-118.

[36] See Outline of the Convention at: https://assets.hcch.net/docs/89be0bce-36c7-4701-af9a-1f27be046125.pdf and Neil Newing and Lucy Webster (*supra* n 35), p. 110.

[37] Mukarrum Ahmed and Paul Beaumont (2017), *Exclusive Choice of Court Agreements: Some Issues on the Hague Convention on Choice of Court Agreements and Its Relationship with the Brussels I Recast Especially Anti-Suit Injunctions, Concurrent Proceedings and the Implications of Brexit*, 13 Journal of Private International Law 386.

[38] Permanent Bureau of the Conference, Convention of 30 June 2005 on Choice of Court Agreements: Text and Explanatory Report by Trevor Hartley and Masato Dogauchi (HCCH Publications 2013) http://www.hcch.net/upload/expl37final.pdf , para 160.

[39] See Mukarrum Ahmed and Paul Beaumont (*supra* n 37).

This may suggest that anti-suit injunctions, given their propensity to achieve the stated aims of the Convention, fall within its scope. The official Explanatory Report also states that "if an interim measure – for example, an injunction – granted by that court is subsequently made permanent, it will be enforceable under the Convention in other Contracting States".[40] As with most injunctions, anti-suit injunctions are usually awarded on an *ex parte* basis upon the urgent request of the applicant, and are later granted in permanent form once the court has had a chance to listen to both parties.[41]

Provided, therefore, the court awards a permanent anti-suit injunction, it could fall within the Convention's scope and become enforceable (though not automatically) across all its signatories' jurisdictions. However, as stated above, there is no authority to support this. In the absence of an international court with adjudicating authority testing such issues, any reliance on the official Explanatory Report is far from certain.

Life after Brexit

At the time of writing (and the position is changing daily), if the Withdrawal Agreement on the future relationship between the UK and the EU is not ratified by 31 January 2020 the UK will leave the EU on a "no-deal" basis by automatic operation of law.[42] Whether that actually happens – not least given neither 'do' nor 'die' appear to have materialised – will be driven by the political machinations of the incumbent government rather than the strict letter of the law.

Assuming a no-deal Brexit, the English courts will no longer be bound to follow the jurisprudence of the CJEU and the indications are that they may once again see fit to exercise their discretion to award anti-suit injunctions restraining proceedings in EU member states' courts, where appropriate in all the circumstances.

As a result, Britain's exit from the EU will bolster arbitration as parties will be confident that, in the event of a breach of an arbitration agreement, an English court will not hesitate to restrain the breaching party and uphold the parties' contractually agreed terms. However, for those of us eagerly anticipating the resurrection of anti-suit injunctions, it should be borne in mind that enforcing these awards will be difficult as a result of Brexit. The iconoclast may well point out that any boost in anti-suit injunctions is offset by the attendant uncertainty concerning the civil judicial regime between the UK and EU post-Brexit. In a way, this uncertainty is a microcosm of the more general Brexit-fuelled unpredictability of private international law rules governing cross-border disputes.

Nonetheless, it is likely that, far from undermining arbitration, Brexit militates in favour of its adoption. This would be entirely sensible. Parties will want to refrain from deferring jurisdiction to an English court in circumstances where it would be impracticable to enforce any resultant judgment. By entrusting the resolution of prospective disputes to arbitration, operating as it always has been under the auspices of the New York Convention, parties will be more confident in enforcing their awards against their opponents in other jurisdictions.[43]

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[40] Explanatory Report (*supra* n 38), para 162.
[41] Recent case law supports this*: Aqaba Container Terminal (PVT) Co. v Soletanche Bachy France Sas* [2019] EWHC 471 (Comm).
[42] See David Allen Green's use of the term in https://www.ft.com/content/1761d0c0-fec6-11e8-ac00-57a2a826423e and other publications.
[43] Having said that, a state's failure to adhere to its New York Convention obligations is by no means rare. See, for example: Susan Choi, *Judicial Enforcement of Arbitration Awards under the ICSID and New York Conventions*, 28 NYU Journal of International Law and Politics 175 (1995-1996); Henry Kronke, Patricia Nacimiento, Dirk Otto and Nicola Christine Port, *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary*

If you require any further information on this Report please contact:

Hashem Hijjawi
Solicitor

hashem.hijjawi@carter-ruck.com
+44 20 7353 5005

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on the New York Convention (Kluwer Law International 2010); and Peter Sanders, *A Twenty Years' Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 13 International Law 269 (1979).