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English Law, UK Courts and UK Legal Services after Brexit

The View beyond 2019



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Introduction and Key Points

This memorandum aims to set out some key factors to have in mind when discussing with the international business community the position of UK courts and legal services in a post-Brexit world.

- **English Law is and will remain the gold standard:** The certainty of English law is unrivalled. Its flexibility and incremental, judge-made development is highly valued by UK and international businesses in a wide range of sectors, who choose to have their contracts governed by it.
- **The UK's judges are and will remain of the highest calibre:** Judges sitting in the Business and Property Courts of England & Wales (which now combine all the specialised Courts) are recruited from the most senior ranks of the legal profession. They combine outstanding intellectual ability, independence, total integrity and a wealth of commercial experience in sectors as diverse as banking and finance, shipping, insurance and reinsurance, intellectual property, insolvency and construction.
- **London will continue to provide unrivalled access to high quality legal advice, contract drafting and dispute resolution services:** London is and will remain home to many of the world's leading international law firms and advocates. In addition to UK-headquartered firms, more than 200 overseas law firms from 40 jurisdictions practise in London, including 100 US law firms that have offices in London.
- **The UK is and will remain a Global Arbitration and ADR centre:** London remains one of the world's most commonly selected arbitral seats in institutional arbitration – London Court of International Arbitration ("LCIA"), International Chamber of Commerce ("ICC"), International Centre of Dispute Resolution ("ICDR"), Permanent Court of Arbitration ("PCA") and others – and ad hoc arbitration. This is due to a highly qualified legal community, and the presence of the LCIA, one of the world's leading arbitral institutions. English arbitrations benefit from a clear legislative framework and a pro-arbitration judiciary.
- **The enforceability of UK judgments and arbitration awards:** UK judgments are highly persuasive in courts around the world and have a long-standing reputation for excellence. Even though the procedure for enforcement within the EU may change (and it may not), UK judgments will continue to be at least as readily enforceable within the EU as judgments made in the courts of any other global forum. Agreements conferring exclusive jurisdiction on the UK Courts will continue to be given effect after Brexit. The enforcement of agreements to arbitrate and arbitration awards will be unaffected by Brexit.
- **A legal system underpinned by the Rule of Law:** The UK is the cradle of human rights and the rule of law. International parties litigating in the UK can be confident that their disputes will be decided only on their intrinsic merits, without regard to nationality or politics, religion or race.

The advantages of English Law

For a long time, businesses across the world have chosen to have their contracts and relationships governed by English law and their disputes resolved in the courts of England & Wales or by arbitration in England; even where their contract or relationship has no real connection with the UK.

The reasons for this include:

- English is the language of international business. Proceedings conducted in English, interpreting English language statutes and cases, are easily accessible for international business parties.
- English commercial law is clear and built upon well-founded principles, which determine the formation of contracts and quantification of damages for breach.
- English Law is adaptable and commercial. It evolves to adapt to developing business practices and behaviour.
- English Law is predictable and certain. It follows the doctrine of precedent. Principles that have been established in earlier cases are refined, developed and extended in later cases. A decision of an appellate court binds future decisions of the same appellate court and of all lower courts until there is another authoritative statement of the law (by the legislature or a higher court). This allows commercial parties to predict the outcome of legal disputes with a high degree of certainty.
- English Law recognises that commercial parties want the flexibility of being able to agree the terms of their contractual relationships and to be confident that those terms will be applied. Contracts governed by English Law are interpreted primarily by reference to the language which the parties themselves have agreed. Stringent requirements must be met before terms will be implied into the parties' bargains and the words in a contract will not be given a meaning contrary to business common sense.
- English Law is familiar to business. It is the foundation of many legal systems across the world, and English Law concepts have been adopted into the domestic laws of other jurisdictions.
- Damages for breach of contract in English Law are calculated as the sum of money that puts the innocent party into the position in which it would have been if the contract had been duly performed; punitive damages are never awarded for a breach of contract.

Many of these benefits are not enjoyed by civil law systems.

The predictability, certainty, flexibility and commerciality of English Law will persist after Brexit.

The UK's courts serve a wide range of business sectors

Financial, International Trade, and Regulatory Cases

London has been for many years one of the principal financial, insurance and commercial centres in the world. It has developed specialist courts to meet the needs of many business sectors. Those specialist courts are now all under the umbrella of the **Business and Property Courts of England & Wales**; the specialist judges sitting in those Courts have unrivalled experience and expertise in the following sectors, amongst others:

- The **Financial List** which uses judges from both the Commercial Court and the Chancery Division is available for the most substantial financial services, banking and market disputes including test cases.
- The **Commercial Court** is the world's leading forum for the resolution of international trade disputes. It is the forum of choice for shipping and admiralty and insurance and reinsurance disputes across the World.
- The **Intellectual Property Lists and the Patents Court** are and will remain a speedy and cost-effective forum to litigate patent, trademarks and other intellectual property disputes within Europe.
- The **Technology and Construction Court** (the "TCC") deals with technical construction and engineering disputes. The TCC provides expertise, speed of resolution and a wealth of precedent which promotes greater legal certainty in terms of how particular clauses or fact scenarios will be interpreted. The concept of statutorily implied security of payment and dispute resolution by adjudication was first introduced in the UK, and has been very effective. This model has been adopted in other jurisdictions.
- The **Companies Court** and the **Insolvency List** have handled some of the biggest reconstructions and insolvencies of recent years. Cross-border cooperation between insolvency courts across the world ensure that major insolvencies are expeditiously and effectively concluded.

- The UK Courts are well equipped to deal with cases involved alleged of **major fraud** because of:
 - experienced uncorruptable judges
 - disclosure of documentation from parties and non-parties
 - availability of freezing injunctions worldwide
 - oral cross-examination of witnesses at trial
 - the choice of experienced and well-resourced law firms with international networks and asset tracing experience.

High quality contract drafting and dispute resolution services

Judiciary: In contrast to many civil law systems, there is no career judiciary in the UK. Judges in the Business and Property Courts of England & Wales are recruited from the most senior ranks of the legal profession. They combine outstanding intellectual ability with years of practical experience of acting for commercial parties. This ensures decision-making of the highest quality, as well as expertise in all sectors of commercial and business life.

The judiciary in the UK are respected throughout the world for their incorruptibility, impartiality and their experience and skill in dealing with complex cases. Judicial independence is a key principle of the UK constitution. Cases are decided by judges alone, free from outside influence or governmental control.

Judicial appointments in England and Wales are made by the Judicial Appointments Commission (the "JAC"), which is an independent non-Governmental Public Body, launched in 2006 to maintain and strengthen judicial independence. The JAC ensures that the selection of candidates for judicial office is free from any political involvement.

Arbitrators: London is renowned for its choice of specialist and experienced arbitrators. Many will be members of, or trained by, the Chartered Institute of Arbitrators, an internationally recognised body that provides high quality training for arbitrators. Many arbitrators will be highly skilled members of the legal profession. Others will be technical or industry experts. High Court judges can also be appointed as arbitrators, thus providing the benefit of their knowledge and experience in adjudicating disputes, without the need to go through a formal court process.

Mediators: The UK has a well-established body of high quality mediators. The majority of mediators have been accredited by at least one of the main mediation providers, who also offer training. A mediator who is a member of a regulated professional body, such as the Law Society or Bar Council, will be subject to their professional codes of conduct, which ensure that they have indemnity insurance and observe high standards of conduct.

Independent Bar: Barristers acting as independent sole practitioners offer specialist advisory, drafting and advocacy services. About 1,600 senior barristers are entitled to call themselves Queen's Counsel (QCs), a title that is a global byword for excellence in advocacy.

International Legal Community: English qualified solicitors and registered foreign lawyers from many jurisdictions, who are registered to practice in the UK, form an extremely strong legal community. This community enables clients to receive advice and to have their contracts drafted so as to enjoy the benefits of being subject to English law and of having disputes resolved by the the courts of England and Wales or by English arbitration. If a dispute arises, a strong body of experienced English lawyers, including a healthy body of solicitor advocates, some of whom are Queen's Counsel, are available to advise the clients through the litigation or arbitration process.

Confidentiality: English qualified lawyers are bound by their professional rules to keep the affairs of their clients, and former clients, confidential unless: (1) the information is already (properly) in the public domain; (2) the client consents to the disclosure; or (3) the disclosure is required by law or is ordered by a court of competent jurisdiction. Legal professional privilege is firmly established in English law as a fundamental human right.

Privilege: English law recognises that a client must be able to seek legal advice without that advice becoming public. As a matter of public policy, English law protects communications between a client and his lawyer from production in court or to third parties. The UK Courts have been astute to preserve the efficacy of this legal professional privilege.

Why litigate in London?

Efficient case management: UK courts adopt flexible case-management procedures to ensure that cases are concluded fairly, expeditiously and at proportionate cost. The court is under a duty to manage cases actively and judges monitor cases through to trial. Case management by the court includes: identifying disputed issues at an early stage; fixing timetables; dealing with as many aspects of the case as possible on the same occasion; controlling costs; disposing of cases summarily where they disclose no case or defence; and giving directions to ensure that the trial of a case proceeds quickly and efficiently. The court will expect the parties to co-operate with each other.

Speedy resolution of disputes: The availability of summary judgment and strike-out also means that weak cases can be disposed of more quickly than in jurisdictions which do not have these procedures. Recent innovations include the Shorter Trials Scheme, which aims to bring suitable cases to trial within ten months of issue with judgment not more than six weeks thereafter.

Deterring speculative claims through sophisticated costs rules: The 'loser pays' costs rule acts as a powerful disincentive to unmeritorious claims, discouraging speculative claims and keeping UK dispute resolution balanced as between claimants and defendants. This, together with the absence of juries and punitive damages in civil trials, has discouraged the development of a pro-plaintiff bar.

The losing party in a civil case in England and Wales generally has to pay the winning party's reasonable costs. For interim matters brought before the court, England has a 'pay as you go' system. In hearings that last one day or less (the vast majority of interim hearings) the court will summarily assess costs and the loser has to pay within a specified time frame, normally 14 days. Since its introduction, this has substantially reduced the number of interim applications. The remaining overall costs of the proceedings are usually determined on settlement of the action or at the end of a trial.

Limitations to the right to appeal an English judgment: Generally, appeals against first instance decisions are not of right and permission to appeal must be obtained. This means commercial parties are likely to obtain a final decision in a relatively short period.

Modern litigation facilities: The Business and Property Courts of England & Wales are housed in the Rolls Building, a state-of-the-art centre for international dispute resolution in the heart of legal London. It is the biggest dedicated business court in the world, and around four times bigger than its nearest competitor. It includes three 'super courts' to handle the heaviest international and national high value disputes.

Mediation: UK courts recognise the benefits of mediation and other forms of Alternative Dispute Resolution (ADR) in helping parties to settle cases outside the court process. Even after litigation has commenced, there are stages when the court can stay proceedings to enable the parties to mediate. Mediation confidentiality means that even if parties fail to reach an agreement, the content of the mediation meetings generally cannot be disclosed to the judge in the proceedings.

Why arbitrate in London?

London is an abidingly popular choice of seat for international commercial arbitration. More arbitrations take place in London than in any other city in the world.

London has an international reputation for experienced and expert arbitrators to resolve international disputes.

Modern facilities: London has a wide array of suitable venues for arbitral hearings, including the International Dispute Resolution Centre, as well as a ready availability of supporting services, such as interpreters, translators, stenographers and IT services. These facilities assist the parties to protect the confidentiality of their disputes. Arbitration is particularly appropriate where the parties wish to have their disputes resolved privately, thus maintaining confidentiality of sensitive commercial information, rather than in the public area.

A neutral forum: London is often chosen as the seat of arbitration for disputes between parties of different nationalities because it is rightly perceived as being a neutral forum within which to resolve international disputes.

Modern legislation: The modern law of arbitration in England and Wales is substantially set out in a single statute, the Arbitration Act 1996. The governing principles are laid out in a logical order, expressed in user-friendly language that is clear and free of technicalities, designed to be readily understandable by non-lawyers. The fundamental principles of the 1996 Act emphasise the importance of party autonomy and the integrity and the finality of the arbitral process, the objective being to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense.

Role of the supervisory courts: the judiciary in England and Wales are pro-arbitration and exercise a 'light-touch', which can be relied on when London is the seat of arbitration. The 1996 Act revolutionised the relationship between arbitration and the courts in England and Wales. The powers of the court to hear appeals on points of law are severely constrained and may be excluded altogether by agreement of the parties. The Court can intervene to correct serious procedural irregularities that cause substantial injustice, but its power to act is designed to operate as a longstop, available only in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected. Technical and unmeritorious challenges to arbitral awards are discouraged.

One-stop shop adjudication: A generous view of arbitral jurisdiction prevails. Arbitration agreements are interpreted on the assumption that rational commercial parties are likely to have intended that all disputes arising from their relationship should be determined by the same tribunal.

Arbitral institutions: London is home to the London Court of International Arbitration ("LCIA"), one of the world's leading arbitral institutions, providing efficient, flexible and impartial administration of arbitral proceedings. Typically, over 80% of parties in pending LCIA cases are not of English nationality. Many other international arbitral institutions regularly administer proceedings seated in London, including the International Chamber of Commerce ("ICC"), Permanent Court of Arbitration ("PCA"), International Centre of Dispute Resolution ("ICDR") and others.

LCIA arbitration rules: They are universally applicable and offer a combination of the best features of the civil and common law systems, including in particular:

- maximum flexibility for parties and tribunals to agree on procedural matters
- speed and efficiency in the appointment of arbitrators, including expedited procedures
- means of reducing delays and counteracting delaying tactics
- tribunals' power to decide on their own jurisdiction
- a range of interim and conservatory measures
- tribunals' power to order security for claims and for costs
- special powers for joinder of third parties
- waiver of right of appeal
- costs computed without regard to the amounts in dispute/ payment of deposits in stages – parties are not required to pay for the whole arbitration in advance.

Enforceability of UK judgment and arbitration awards

Currently, most judgments from courts in England and Wales are directly enforceable in EU and EFTA states and most judgments of the Courts of those states are directly enforceable in the UK under arrangements put in place by the Brussels Regulation (original and recast) and the Lugano Convention. It is not yet clear whether similar arrangements will be put in place following Brexit. It would be mutually advantageous for the UK and EU and EFTA states, for that to happen and there are a number of means by which it could happen. Even if the arrangements are not replicated, judgments of the UK Courts will be in no worse a position in relation to enforcement in an EU or EFTA state than judgments of other non-EU or EFTA states.

A legal system underpinned by the Rule of Law

The Rule of Law represents the cornerstone of liberty and democracy, and is one of the main reasons that the UK attracts global businesses and investors.

Laws in the UK are:

- public (so that everyone knows what they say)
- certain (so that everyone knows where they stand)
- prospective rather than retrospective (so that they cannot be broken before they exist)

The English Courts are universally recognised to be a forum where litigants can be confident that their disputes will be determined fairly on their intrinsic merits. That will not change following Brexit.