

## Complex Litigation

WWW.NYLJ.COM

VOLUME 260—NO. 93

MONDAY, MAY 20, 2019

# Is **Brexit** a **Game Changer** For the Role of English Law In **International Dispute Resolution**?



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At the date of writing this article, the EU has granted the UK a six-month extension, to Oct. 31, 2019, to leave the EU following the UK Parliament's deadlock on the terms of its withdrawal. Although it is widely hoped that the UK will

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not leave the EU without a deal, the outcome remains uncertain. Irrespective of the outcome, questions continue to be asked about whether London will remain a major forum for resolving international disputes after Brexit. This article clarifies some misconceptions and provides comfort to international users of English law and the English courts. For the reasons explained below, the clear conclusion is that Brexit will have no meaningful,

direct impact on any of the factors that contribute to English law and the English legal system being one of the two preferred systems of justice in international business dealings (the other being, of course, New York).

English law, and the courts that interpret and apply that law, have been favored by international businesses for decades. A feature of the caseload of the English commercial courts is that they deal with many

disputes between parties who have no connection with the UK apart from their desire to take advantage of English justice. According to a report released by Portland Communications in 2018, the number of international cases heard in London by the principal commercial court rose by 7% in the year to April 2018 and the number of litigants by 22%, with 565 litigants from 69 countries, up from 62 countries in 2015/2016. There is no evidence that the Brexit turmoil has had any impact on this trend.

Lest this view seem complacent, consider why English law and the English courts are favored by international business. In summary, English law—like New York law—is based on common law. As a result, it offers transparency and certainty, having developed through centuries of experience with international trade and commerce, but also flexibility to adapt to the changing world. The procedural rules for litigation are sophisticated, enabling a forensic approach to gathering evidence and its use in court, and the effective analysis of complex legal issues. Lastly, the judiciary itself is known for its long history of impartiality and quality, combined with a more recent move towards interventionist case management to ensure efficiency and proportionality of costs.

### Choice of Law

**Should parties consider changing the governing law of their contracts?** None of the positive factors

summarized above will be affected by Brexit, no matter what form it takes. The question that may be asked, however, is whether a party choosing English law under a contract can be sure that this choice will continue to be respected throughout the EU. The short answer to this question is: yes. Recognition of the parties' choice of law will continue unchanged as a result of Brexit, both in the English courts and in the courts of

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the EU member states. EU law on determining the law applicable to contracts is contained in what is known as the Rome 1 Regulation, which provides that a contract is governed by the law chosen by the parties, whether or not it is the law of an EU member state.

Post-Brexit, the Rome I Regulation (together with the Rome II Regulation, which applies to non-contractual/tortious claims) will continue to apply in the remaining EU Member States, which means that their courts will continue to give effect to commercial parties' choice of English governing law in their contracts. Furthermore, the UK government's intention to retain

the Rome 1 and II Regulations has now been confirmed by legislation. Thus, the rules for recognizing governing law in both the EU and the UK should continue to be closely aligned.

### Choice of Forum

**Will Brexit affect the enforceability of English court judgments?** The corollary to the question over choice of law is whether enforcement of English judgments will be impaired by Brexit.

For international litigants who have no need to enforce within an EU member state, Brexit will have no impact whatsoever. Where there is an EU nexus, there will be an impact but it will very likely be immaterial.

The impact arises because the UK currently benefits from being a party to a framework of EU legislation, the Recast Brussels Regulation, which enables judgments in civil and commercial matters to be easily recognized and enforced in other EU member states. This framework will cease to apply in the UK after Brexit (whether there is an agreed withdrawal or no deal).

In order to provide for continuity and legal certainty, the UK government has indicated that even in a no-deal Brexit scenario, it intends to implement successor regimes to repealed legislation by negotiating a new bilateral agreement with the EU member states or to continue to participate in the Lugano Convention (a similar regime to the Recast Brussels Regulation which currently allows civil judicial cooperation

between the EU member states on the one hand and Switzerland, Iceland and Norway on the other). Moreover, in the event of a no deal, the UK intends to accede to the 2005 Hague Choice of Court Convention, which applies to exclusive choice of court agreements, and which facilitates enforcement of judgments.

In short, although the precise mechanisms for recognition and enforcement in the EU have yet to be finalized, it is very likely that there will be a successor regime to enable stream-lined enforcement; but even if this were not to happen, English judgments would still be recognized and enforceable under the laws of the relevant EU member state (in the same way as they currently are between England the United States, where there is no international treaty for the mutual recognition and enforcement of civil judgments).

### The Future

**If Brexit isn't a risk to the dominance of the English legal system, what is?** With Brexit on the horizon, politicians in Paris, Frankfurt, Amsterdam and Brussels have sought to capitalize on the perceived future risks of litigating before the English courts by the creation of international, English-language commercial courts. So, will international litigants flee the English courts in favor of these continental courts? We doubt it. Although London needs to be alive to these opportunistic attempts to take advantage of the uncertainties presented by Brexit, there appears

to have been far too much emphasis on English as the language of the proceedings being heard in these new commercial courts than other factors that contribute to the success of the English courts.

If there are threats, they are more likely to come from other quarters. The English courts have undoubtedly benefited enormously from the dominance of London as a global financial center. Should this dominant position be seriously threatened, this would inevitably have an impact on the number of international financial disputes coming to the English courts. Although Brexit is providing opportunities for the major EU financial centers to grab a share of London's business, it is too early to say whether this will have a material impact on London as a financial center and, even if it does, for the reasons outlined above, it does not follow that English law will no longer be one of the principal laws of choice for finance contracts.

In the short term, there are more threats from new centers for resolving international disputes, such as the Dubai International Financial Centre Courts and the Singapore International Commercial Court; and from international arbitration, which is perceived to benefit from the ease and flexibility with which awards can be enforced worldwide.

In fact, the ascent of international arbitration centers such as Dubai, Singapore and Hong Kong is likely to have a far more direct impact on the English courts than Brexit, especially as there are signs that

participants in the financial markets are increasingly viewing arbitration as a better option than court proceedings.

In the face of this pressure, the English judiciary has responded in recent years in the following ways (among others) to seek to maintain the English courts' competitive edge:

- the introduction of new disclosure protocols this year that allow a more tailored and cost efficient approach to disclosure;
- the introduction of the Financial List, which provides for docketed-judges experienced in determining banking or financial disputes;
- the Shorter Trials Scheme and Flexible Trials Scheme providing for quicker and cheaper resolution of disputes for business-related litigation; and
- a package of reforms to the operation of the Court of Appeal, to clear a serious backlog of appeal cases.

In conclusion, therefore, Brexit seems very unlikely to have any direct impact upon English law and the English courts being chosen by international business people for resolving disputes. In the short term, however, there are other growing threats and in order to remain a leader in the field of international dispute resolution, the English courts will need to continue to embrace change to meet the evolving needs of the international business community.