English courts can see off European usurpers

Brexit and international commercial courts opening in Paris and Amsterdam are serious but not insurmountable threats, Jonathan Harris writes

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The opening of the Paris international commercial appeal chamber, offering proceedings in English, is a salutary reminder of the appetite in other EU jurisdictions for using Brexit to lure business, including legal services, across the Channel.

The Netherlands is also planning to open a commercial court in which parties can litigate in English.

The risks that this poses - especially taken alongside the creation of international commercial courts in jurisdictions such as Singapore and Dubai - should be taken seriously.

Vast numbers of contracts currently provide that any disputes will be resolved in the English courts and be subject to English law. Any English judgment can then readily be enforced elsewhere in the EU pursuant to the relevant EU regulations, providing a gold-standard for enforcing judgment debts for those trading across borders. The European Commission recently noted that post-Brexit "judgments issued in the United Kingdom [will] no longer be recognised and enforced in EU member states under the rules of the EU instruments in the area of civil and commercial law". Meanwhile, no such uncertainty exists surrounding a judgment from a French or Dutch court: it will continue to be freely enforceable across the EU.

The EU Withdrawal Bill cannot unilaterally resolve the problem because when it comes to enforcing British judgments in the EU, and vice-versa, it takes two to tango. The obvious concern, identified in a report by the House of Lords EU select committee, is "that the current uncertainty surrounding Brexit is already having an impact on the UK's market for legal services and commercial litigation, and on the choices businesses are making as to whether or not to select English contract law as the law governing their commercial relationships".

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With so much at stake, it is perhaps not surprising that the British government is seeking agreement with the EU to maintain similar or identical co-operation arrangements around cross-border litigation. But whether that will be on offer remains doubtful, not just because of the familiar stumbling block of the role of the European Court of Justice but also precisely because other member states potentially have much to gain from enticing legal services away from the UK.

Even so, British lawyers should not be too alarmed: both the UK and the EU have expressed a desire for transitional arrangements that would protect existing agreements providing for dispute resolution in the English courts, as well as claims commenced in the English courts prior to Brexit.

More importantly, it is likely that most litigants are attracted to the English courts first and foremost by their reputation, the quality of the legal system, its procedures, the judiciary and the lawyers, and by the pre-eminent status of English law as the law of choice in commercial contracts. Many years, perhaps decades, will pass before courts in many other jurisdictions could aspire to challenge that entrenched position at the apex of the international legal system.

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