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Courts face long-term Brexit questions

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There will be no short-term impact on the courts from the United Kingdom's decision to leave the European Union, but over time, there will be litigation and uncertainties, particularly over enforcement.

The impact of 'Brexit' – the UK's decision in last month's referendum to leave the **European Union** (EU), has been felt in every walk of life.

Within the disputes sector, while the arbitration market could potentially see some benefits, or at least no change, there is more likely to be an impact on litigation lawyers and clients, although not in the short term, at least.

"The various local and global financial crises over the last 20 years or so suggest there is usually a lag of several years between economic or political trigger events and the dispute finding its way to a court or arbitral tribunal," says **John Leadley**, London-based chair of the global dispute resolution practice at **Baker & McKenzie**.

Peter Camesasca, an EU competition partner located in Brussels and London with fellow US firm **Covington & Burling** agrees, telling *CDR* there will be "no real change to the volume [of cases] for next six to 12 months, but thereafter, a trickle which will become a steady flowing stream over the next two to five years".

"This will not be immediate. Companies are not making any immediate decisions about litigation in the wake of the Brexit vote. Most are in 'wait and see' mode," he says. "But as the positions of the UK and the EU become apparent, the potential 'battle lines' will become clearer. The dynamic will probably resemble, in terms of the uptick in litigation, the 2007 crash."

"That is to say, [there will be] a period of monitoring, followed by a fairly meaningful uptick in disputes, as the real, day-to-day implications of the Brexit vote, become apparent to businesses," he warns.

Camesasca identifies one exception, namely the complicated follow-on claims to EU cartel cases: "If claimants have been waiting to bring such claims, the risk of wholesale exit of the UK from the EU may force such companies to bring their claims now."

LOOKING MEDIUM TERM

As time goes on, it remains to be seen what exit terms the UK negotiates, and what cases and any related changes in the civil litigation system will result from it. Depending on the terms of the country's new arrangements with Europe, business relationships will have to change, says **Jonathan Harris QC of Serle Court:**

"It is inevitable that there will already be companies and individuals evaluating their options for amending or restructuring their businesses, legal obligations and tax affairs. At that point, it seems very likely that questions and disputes as to the scope of their powers to do so will arise."

Leadley agrees that there will be commercial litigation "as contracting parties explore the potential impact of a UK withdrawal on their existing relationships", and specifically predicts "that a UK withdrawal could trigger 'material adverse change' or *force majeure* clauses in contracts, or claims based on frustration", although this depends on the terms of the exit.

"Claims become more likely if any of the freedoms of movement are significantly restricted, for example goods [or] people. It must be assumed that any potential legal uncertainties over the status of EU directives, regulations and case law will be resolved prior to exit, but any remaining ambiguity may present a further source of litigation," he adds.

Although this impact will be felt across all sectors, Camesasca identifies financial services, pharmaceuticals, healthcare and manufacturing as particularly vulnerable, all of which are key industries for the UK.

Parties will not just be reacting to Brexit's impact on their existing business relationships, it will also open the door for opportunistic behaviour. Commercial clients will seize the opportunity to use Brexit to alter or sever unfavourable contracts says **Alex Leitch**, Camesasca's colleague at Covington and the firm's co-chair of European dispute resolution.

"Inevitably, commercial parties who consider that they are tied to a bad commercial bargain are likely to try to use Brexit-type issues, those are *force majeure*, material adverse change, illegality and so on, as opportunities to try to renegotiate, or even bust out of bad deals."

At the more extreme end of this, Leitch identifies "hawks" – particularly aggressive parties who will spy an opportunity to capitalise on the uncertainty and changing circumstances and "generate positive commercial leverage", who will "try to use this as a basis to advance their particular commercial interests. This will take place against the canvass of a (necessarily) changing regulatory landscape – which in and of itself will also be a further driver of disputes".

Chief executive of the Law Society of England & Wales **Catherine Dixon** wrote to the justice secretary, leading 'Leave' campaigner **Michael Gove**, offering support in future Brexit negotiations, including clarification of exactly those kind of contractual issues, saying, in a statement: "This is a time to work together in the national interest."

IMPACTING THE SYSTEM

Whether there will be a wider impact on the civil justice system itself, remains to be seen. The court system in England and Wales, particularly in London, is a premier litigation destination for disputes from all over the world, which are a major source of work, but Leadley is confident it will be unaffected: "The English civil litigation system will retain all the attractions to international litigants it has always had." While clients will always make decisions over the seat of any litigation, the same line has been put forward by both the Bar Council and Law Society.

He points out that in England and Wales, the civil procedure rules are "largely unrelated to EU law, with a few exceptions such as the rules on service and certain aspects of enforcement". The same is true for Scotland and Northern Ireland's courts.

The precedent-based common law system which prevails, particularly in areas of law such as contracts and tort, is also unlikely to be significantly affected, "there are likely to be changes, but the substance is unlikely to change much", he says.

Harris disagrees, arguing that "a swathe of other areas are the subject of European regulations: including those which determine the validity and effects of a clause stipulating that English law applies to a contract, cross-border torts and the EU Insolvency Regulation".

Similarly, he highlights regulations relating to the serving of documents and taking of evidence, and says that although equivalents could be introduced as replacements, "one should expect that some or all of these areas may be subject to radical change".

JURISDICTION AND ENFORCEMENT CONCERNS

Leitch also foresees more of an impact, in the event that there is an absence of further legislation to fill in gaps left by the absence of EU law: "We will have to pick back up the common law, in place of the Brussels Regulation, to understand how jurisdiction will be allocated and decided within the EU."

What will concern litigators and their clients are questions over the future of the EU-wide enforcement of UK rulings under the Brussels Convention. Although such rulings are routinely enforced in many non-EU jurisdictions, the change from an existing regime presents an element of the unknown.

"We will also have to consider how to enforce judgments across the EU," says Leitch, in the absence of "the reciprocal recognition and enforcement regime which currently runs throughout the EU". Harris expands on this concern, observing that "the landscape of English civil litigation is unrecognisable" from that which existed prior to the UK joining the forerunner of the EU in 1972.

He says the convention and successor regulations "contain harmonised rules of jurisdiction which regulate, for instance, the effects of an English jurisdiction clauses and limit the discretion of the English courts whether to hear cross-border disputes in many cases".

The UK would expect to be able to negotiate a similar arrangement, which other European states outside the EU – Norway, Switzerland and Iceland have done, but the terms would depend on the negotiation to follow.

LOOKING TO THE FUTURE

"It seems almost inevitable that great swathes of European rules affecting cross-border litigation will no longer apply," says Harris, summing up. "That has pros, for instance in giving judges greater control over the types of cases that can and should be brought in England, but also cons, for instance in leading to less predictability for litigants in cross-border cases."

However, both he and Leadley are keen to counsel calm. The Baker & McKenzie man says: "The main risk at this stage comes from over-reaction caused by uncertainty." Harris adds: "I do not think that one should overstate the overall effect on the English litigation market."

They insist the legal profession is well-prepared, with Leadley adding: "We have been watching this issue carefully for some time, and we see no general reason at this stage for any changes to clients' litigation or arbitration strategies." He believes that Brexit will not detract from clients' reasons for choosing the courts of England and Wales.

"Many of the highest profile cross-border cases heard in England in recent years have involved claims against defendants domiciled outside of the European Union, where European rules have not been applicable. Litigants will continue to be attracted to England for the quality and independence of the legal process and of English law itself," concludes the QC.

The Scottish and Northern Irish professions will also be affected, with Scotland's First Minister keen to state Scotland's pro-EU credentials, while cross-border legal work in Ireland will be impacted – including litigation.

In the meantime, there will be no shortage of activity in the courts, says Leitch: "Brexit will increase business for litigators. In Shakespearean terms, the nation is truly in 'disorder'. Everyone is searching for answers to a decision that affects the very walls or fabric of commercial life, and to a large extent, the UK courts are, in the absence of anyone else, inevitably going to be forced to deliver those answers."