Commercial Courts Report 2021

Portland

Portland's ninth annual Commercial Courts Report analyses judgments from the London Commercial Courts to identify notable trends - including who uses the courts, from where, and why.

Expert opinion and polling produced for this year's report also examines what Brexit may mean for the London courts; how the city measures up in an increasingly competitive international environment; and how COVID-19 is reshaping the English judicial system.

This year's report reviewed the 292 judgments handed down in the London Commercial Courts between April 2020 and March 2021.

Portland's analysis found:

1. **A record year:** The London courts had a record year, quickly recovering from last year's dip in activity, and re-establishing a six-year-long trend of growth.

2. **Brexit and international court competition:** The proportion of EU27 litigants continues to decline following Brexit, but has been offset by other foreign litigants, most notably from the US and Russia.

3. **COVID-19 and the courts:** Portland's exclusive polling reveals the UK public favour the continued use of remote hearings, as the courts adjust to the increased use of technology in dispute resolution.

Includes expert opinion on Brexit, international court competition and COVID-19:

75
COUNTRIES
4% INCREASE FROM PREVIOUS YEAR

292
JUDGMENTS HANDED DOWN
47% INCREASE FROM PREVIOUS YEAR

1,336
LITIGANTS
65% INCREASE FROM PREVIOUS YEAR

50-50
SPLIT
UK V NON-UK LITIGANTS

1 The London courts had a record year

The number of judgments handed down by the London Commercial Courts – alongside the range of nationalities and number of litigants using the courts – were all at record highs this year, when compared to the previous six years.

Over the past twelve months, the courts handed down 292 judgments, a 47 per cent increase on the previous year. The number of nationalities using the courts has also remained above 70 for the third year in a row, underlining London's reputation as an international hub for dispute resolution.

The increase in litigants was not, however, recorded equally across different regions. As chart A. indicates, Europe, the Americas and Africa all witnessed considerable increases, whereas Asia's total largely held constant and Oceania's dipped.

The substantial rise in 'European' litigants was, however, largely driven driven by an increase in the number of UK litigants. This year, UK litigants accounted for 50 per cent of total litigants, up from 45 per cent last year, and 41 per cent the year before. The rise in UK litigants also offset a reduction among EU27 litigants, a trend that has been recorded consistently since the 2016 referendum (see chart B.).

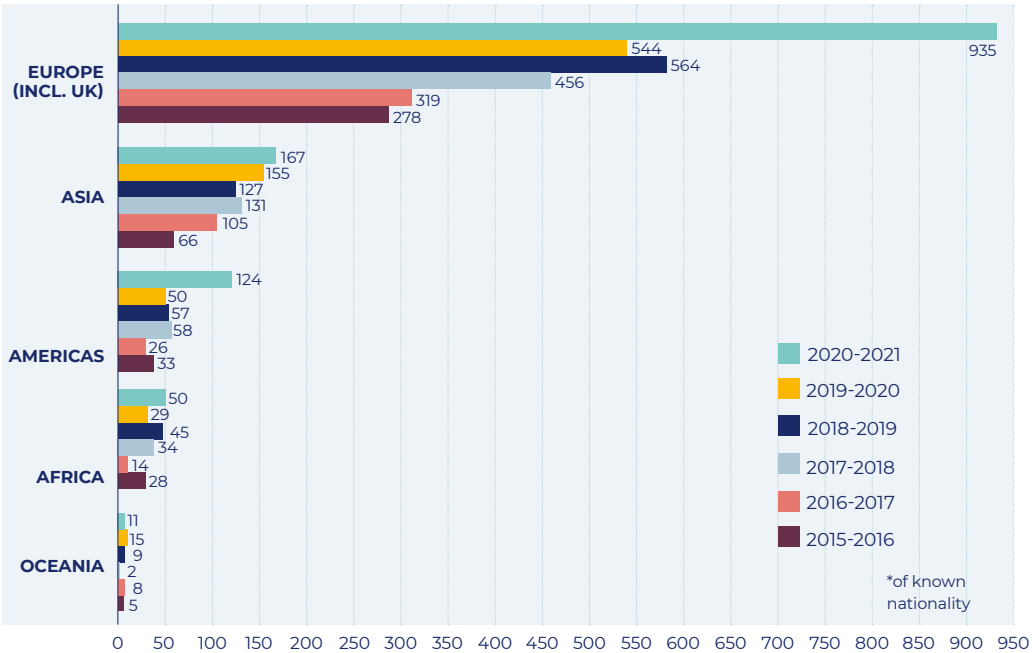
The rise in litigants from the Americas, meanwhile, was disproportionately driven by the US which saw a 75 per cent increase in the number of litigants.

The number of Asian litigants has held steady this year and did not show the substantial rise recorded across other continents.

This year's data suggests the dip recorded in 2019-2020 was an anomaly, with the London courts returning to year-on-year growth. The data also indicates that the courts have been resilient to the potential effects of the COVID-19 lockdown and the fall out from Brexit.

Nevertheless, despite the success, the increase in international court competition means the London courts cannot be complacent.

A. LITIGANTS BY REGION*



2 Brexit and international court competition

The proportion of EU27 litigants continues to decline following Brexit, but has been offset by other foreign litigants

Despite the overall increase in the number of litigants in the London courts this year, the proportion of EU27 litigants has continued to decline (see chart B.).

This year, only 11.5 per cent of total litigants were from the EU27 – a notable decrease from the high of 16.5 per cent recorded three years ago. Although the total number of EU27 litigants did increase this year, this pool of litigants is making up an increasingly smaller portion of the total each year.

While this decline may be attributed to the fall out from Brexit, it also corresponds with the establishment of international commercial courts across the EU, including in France, Germany and the Netherlands. With the added uncertainties around enforcement, there is perhaps a growing risk that European litigants may choose to settle their disputes closer to home.

Nevertheless, there remain a handful of EU27 countries whose presence has held steady in the London courts (see chart C.). Germany was the EU27 nation with the most litigants appearing in the London courts this year – with an increase of 65 per cent on last year – despite recently establishing the Chamber for International Commercial Disputes in Frankfurt. Over 60 per cent of the cases involving German litigants were against UK parties, with the majority of proceedings initiated by Germany.

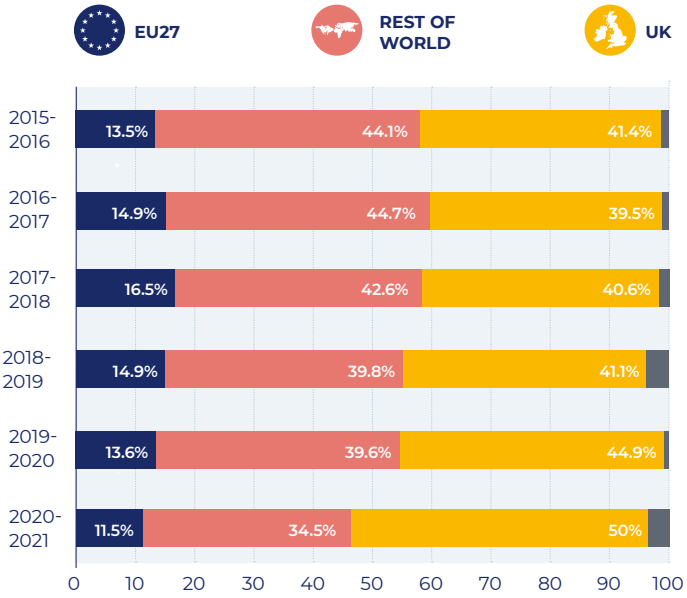
Similarly, Cyprus has maintained its prominence in the London courts – most frequently defending itself in disputes with UK litigants (see chart C.) - while Italy has re-entered the top ten for the first time in four years.

The decline in EU27 litigants has also been offset by a corresponding increase in domestic litigants, alongside a strong influx of litigants from the rest of the world, most notably Russia and the US.

Russia has maintained its dominance for the sixth year in a row, particularly in civil fraud and investigations cases. As noted in chart D., Russia was most commonly the instigator in these disputes, most frequently coming head-to-head with Ukrainian litigants.

This year also saw Ukraine return to the top ten with a record number of litigants, after briefly slipping out of the top ten last year. The country's return to the top five reaffirms that the country's high profile in the London courts is likely to continue.

B. PROPORTION OF EU27, UK AND REST OF WORLD* LITIGANTS 2015-2021



*of known nationality. Unknown in grey.

The number of US litigants soared this year, increasing by 75 per cent, with the US overtaking Russia as the second most popular nation in the London courts, building on an upward trend recorded over the past six years.

The rise in US litigants can largely be attributed to business contracts proceedings, which accounted for more than the combined total of all other US litigation types (anti-trust and competition, finance, arbitration challenges) this year.

This is unsurprising, given English law's history of being a preferred choice for governing law clauses, particularly in international commercial contracts. Over 60 per cent of the cases involving US litigants were launched by US parties, indicating the trust that US litigants have in the UK courts.

Overall, UK parties' continued trust in the domestic courts – alongside the growing pool of nationalities opting to use the London courts – suggests that London remains a popular destination for dispute resolution.

C. TOP TEN LITIGANTS APPEARING IN COURT BY NATIONALITY

1. 671 LITIGANTS
UNITED KINGDOM
(2019-20: 1ST)

2. 49 LITIGANTS
US
(2019-20: 4TH)

3. 36 LITIGANTS
RUSSIA
(2019-20: 3RD)

4. 25 LITIGANTS
UKRAINE
(2019-20: 11TH)

5. 23 LITIGANTS
INDIA (2019-20: 7TH
GERMANY (2019-20: 8TH)
SWITZERLAND (2019-20: 8TH)

6. 22 LITIGANTS
JAPAN
(2019-20: 11TH)

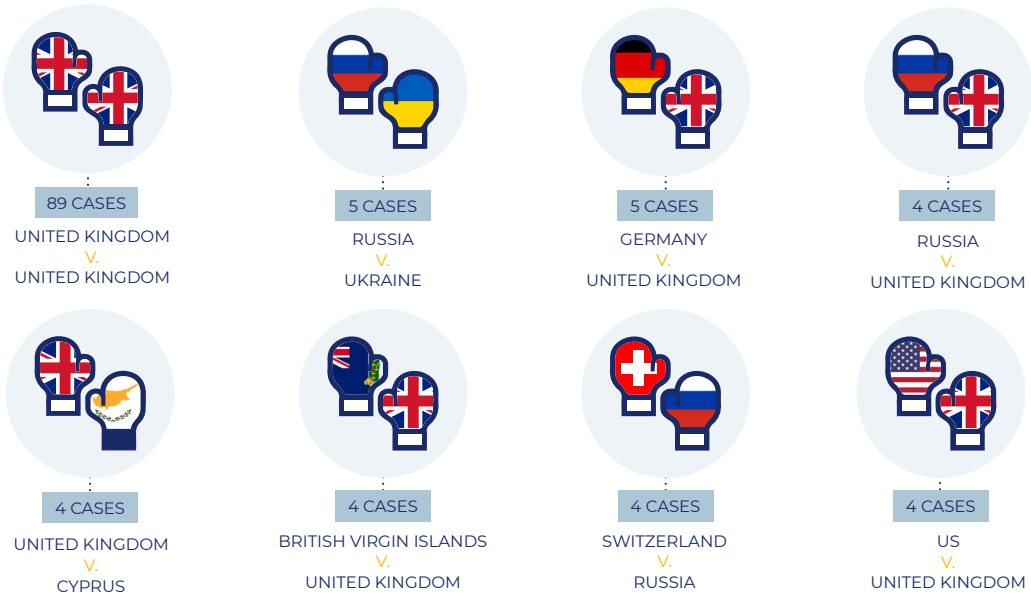
7. 21 LITIGANTS
CYPRUS (2019-20: 5TH)
UAE (2019-20: 13TH)

8. 20 LITIGANTS
SINGAPORE (2019-20: 6TH)
ITALY (2019-20: 15TH)

9. 19 LITIGANTS
KAZAKHSTAN
(2019-20: 2ND)

10. 18 LITIGANTS
PANAMA
(2019-20: 17TH)

D. TOP EIGHT PARTY PAIRINGS BY NATIONALITY



THE LONDON COMMERCIAL COURTS – RESILIENCE IN THE FACE OF CHALLENGES

Professor Alex Mills,
Faculty of Laws, University College London

Perhaps the most striking feature of this year's Report is the remarkable resilience of the London Commercial Courts, in the face of challenges both old and new. Three may be particularly singled out.

The continuing **uncertainties around Brexit** have presented perhaps the most significant challenge. Civil judicial cooperation has not so far been part of any deal between the UK and EU, and although the UK's application to join the Lugano Convention remains under consideration at the time of writing, the European Commission reportedly recommended against its acceptance on 12 April 2021. For the moment, Brexit has therefore meant the end of the regimes under which English judgments generally received recognition and enforcement throughout the EU and EFTA. Judgments in proceeding brought prior to 1 January

> It remains too soon to tell whether the potential difficulties in enforcing English judgments might lead parties to litigate elsewhere.

2021 continue to benefit from these regimes, and so it remains too soon to tell whether the potential difficulties in enforcing English judgments might lead parties to litigate elsewhere (or indeed to prefer arbitration).

The Hague Choice of Court Convention 2005, to which the UK has acceded in its own right, provides a partial solution, although comes with its own uncertainties (including as to its date of effect). There is, however, another side to this coin, which is that departure from the EU civil judicial cooperation regimes has meant a return to the common law rules of jurisdiction in 2021, expanding the range of cases in which the English courts might hear claims against EU domiciled defendants. This change also reopens the possibility for anti-suit injunctions in relation to proceedings in EU Member States, which had been prohibited under European law, potentially increasing the attractiveness of London as a forum of choice.

A second challenge has of course been presented by **COVID-19**. Unlike many other courts around the world, the London Commercial Courts have remained open throughout the pandemic, and the data reveals that they have not only maintained but significantly expanded their production of judgments. Indeed, through the adoption and widespread application of a new Remote Hearings Protocol, among other innovations, the Courts have shown impressive agility in reacting to changed circumstances.

> The fact that litigant numbers have increased by significantly more than case numbers also suggests continued success in attracting complex multi-party proceedings to London.

A third challenge to the position of the London Commercial Courts is **the rise in global competition for international commercial litigation**. Litigant numbers from Asia have only increased slightly compared with 2020, and those from Oceania have fallen, both of which could perhaps be the product of the success of the Singapore International Commercial Court. Nevertheless, the strong growth in the number of litigants overall, and European litigants in particular, is remarkable in the face of efforts to establish internationally-minded competitor courts in locations such as the Netherlands, France and Germany.

The fact that litigant numbers have increased by significantly more than case numbers also suggests continued success in attracting complex multi-party proceedings to London. The flexibility of the English common law rules of jurisdiction, which can facilitate consolidation of claims against multiple defendants in a single forum, is potentially a powerful contributing factor here.

In summary, the Report reflects a year of resilience and innovation in the face of extraordinary challenges – although the impact of these challenges is likely to continue to be felt in the years to come.

THE LONDON COMMERCIAL COURT IN GLOBAL CONTEXT

Pamela K. Bookman,
Associate Professor,
Fordham University School of Law

Will litigants choose new international commercial courts over the London Commercial Court? It is too early to tell. But these courts are worthy of attention.

Last year's report highlighted possible competition from the new **Chinese International Commercial Courts** (CICC); the **Singapore International Commercial Court** (SICC); the international commercial court chambers in **France**, **Germany**, and **the Netherlands**; the **Astana International Financial Centre** (AIFC) court in Kazakhstan; and the **Qatar International Court and Dispute Resolution Centre** (QICDRC). Other international commercial courts in the Middle East—including the **Dubai International Financial Centre** (DIFC) and the **Abu Dhabi Global Market** (ADGM) Courts—may also, over time, siphon off cases from that region that otherwise might have gone to London.

> Arbitration still appears to be a more formidable "competitor" than the international commercial courts.

Many of these courts state explicitly that they have modeled themselves procedurally on the London Commercial Court[1] and some even hire former English judges.[2]

To date, some of these courts have had more cases than others. The CICC appears to have decided only a small handful of cases in 2020.[3] The SICC, however, issued 30 judgments in 2020, compared to 16 in 2019.[4]

The DIFC Court of First Instance announced a record 123 decided cases in 2020,[5] up from 92 cases the previous year.[6] The QICDRC, by contrast, appears to have issued only 26 decisions in 2020,[7] up from 16 in 2019.[8] The AIFC courts in Kazakhstan "resolved" a total of 291 cases in 2020, and issued nine judgments[9] (up from one judgment in 2019).[10]

In Europe, the Netherlands Commercial Court issued two judgments in 2019 and six in 2020.[11] The Paris International Commercial Court has not published any judgments on its website.[12] The related International Chamber of the Paris Court of Appeal published its first decision in May 2020.[13] In Germany, unofficial sources report that the new international commercial chambers "have not received even a handful of cases."[14]

> London's docket remains the most robust—but changing tides due to Brexit, technology, tolerance for remote proceedings, and the geopolitics of disputes may guide parties' choices in the future.

The London Commercial Court's other well-known "competition" is arbitration. Arbitral institutions have reported a steady caseload increase for decades. The London Court of International Arbitration, for example, reported hearing 444 cases in 2020, up from 406 in 2019.[15]

This review seems to reveal the slow growth of international commercial disputes in specialized courts around the globe, but also in arbitral tribunals. Arbitration still appears to be a more formidable "competitor" than the international commercial courts. Parties say they prefer arbitration for the relatively easy enforceability of awards, its flexibility, the ability to select arbitrators, and, notably, the opportunity to avoid specific legal systems or national courts.[16]

International commercial courts seek to respond to these concerns by providing more attractive domestic courts, some of which offer arbitration-like features, like flexible procedures and foreign judges.[17] Jurisdictions with these courts also tend to adopt arbitration-friendly laws, often viewing quality courts as a way to increase their share of international commercial dispute resolution more generally.[18]

Among these commercial courts, London's docket remains the most robust—but changing tides due to Brexit, technology, tolerance for remote proceedings, and the geopolitics of disputes may guide parties' choices in the future.[19] To date, forces like the reputation and expertise of English judges, the quality of substantive English law, and a dedication to legal and technological innovation, have drawn litigants to London. As international commercial courts around the world seek to replicate these features, it remains to be seen whether they will be able to draw some of those litigants away.

GLOBAL COMMERCIAL COURTS

1 Australia
2 Bahrain
3 Bermuda
4 Brazil
5 Canada
6 Cayman Islands
7 China
8 Eastern Caribbean
9 France
10 The Gambia
11 Germany
12 Ghana
13 Ireland
14 Jamaica
15 Japan
16 Kazakhstan
17 Kenya
18 Malaysia
19 Netherlands
20 New Zealand
21 Nigeria
22 Philippines
23 Qatar
24 Rwanda
25 Sierra Leone
26 Singapore
27 South Korea
28 Sri Lanka
29 Uganda
30 UAE
31 UK
32 US

Singapore cements status as Asia's international disputes hub

The Singapore International Commercial Court and the Singapore International Arbitration Centre (SIAC) both enjoyed a record 2020.

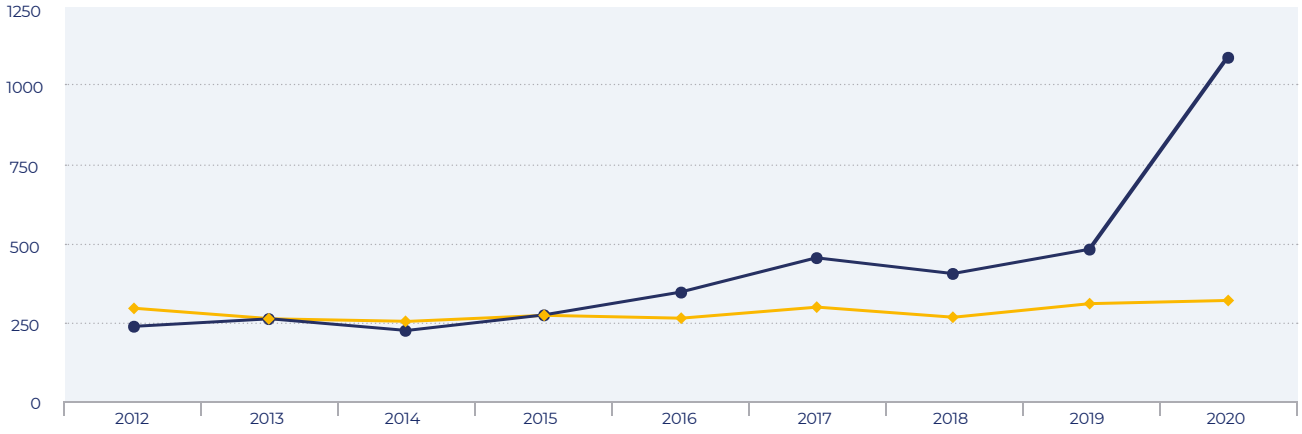
The SIAC, in particular, surpassed the 1,000-case threshold for the first time, registering a more than double-digit growth to 1,080 new case filings. Ninety-four per cent of these were international in nature, with India, US, China, Switzerland and Thailand the top foreign users. This no doubt continues to reinforce Singapore's position as Asia's leading international dispute resolution hub.

This regional success reflected a corresponding decline in Singaporean litigants in the London Courts. These decreased by 10 per cent in 2020-2021, following the record surge last year which saw three times as many Singaporean entities in the UK as the year before.

Overall, the London courts also heard fewer cases involving Singaporean litigants, compared to 14 from the previous year. Of the 12 cases, only half involved either a Singaporean or another Asian entity on the other side of the dispute. The Trafigura Maritime Logistics Pte Ltd v Clearlake Shipping Pte Ltd dispute, which also featured in the 2019-2020 report, made up the only two cases that involved Singaporeans as the lead litigants on both sides of the dispute.

Cases were composed of a mix of business contracts and arbitration challenges, with the majority initiated by Singaporean litigants. In contrast to past year trends, there was an absence of civil fraud and investigations as well as finance disputes this year.

E. NEW CASE FILINGS AT SIAC AND HKIAC, 2012-2020



SINGAPORE HAS A RECORD-BREAKING YEAR

Gavin Margetson,
Partner, Mischon de Reya

Singapore's position as the leading dispute resolution forum in Asia, and also a major player on the world stage, was confirmed in 2020.

The headline figures from the country's primary international arbitral institution, SIAC, were impressive. SIAC received 1,080 new case filings, far in excess of its previous record of 418 new filings (set in 2019). SIAC's caseload involved a total of $8.49 billion in dispute, another record.

A large proportion of this activity may have been driven by the COVID-19 pandemic: the word-on-the-street is of nervous creditors filing claims early as a protective measure. But there must be more to it than that. HKIAC – the main regional rival in Hong Kong – did not experience a significant uptick last year. Instead, SIAC's boom in figures can be seen as part of an upwards trend of case numbers in recent years in contrast to HKIAC where the numbers have been relatively flat over the same period (see chart E.).

Even more encouragingly for SIAC, 195 of its new cases involved Chinese parties. This might reflect a transition away from HKIAC towards SIAC as the default arbitration option for commercial deals relating to China. If so, this reflects well on SIAC's overtures to the Chinese market (e.g. hiring Chinese-trained lawyers as case counsel).

Singapore's formidable dispute resolution showing in 2020 does not, however, end there. The country's legal system responded to the pandemic with decisiveness. The Ministry of Justice quickly promulgated and regularly updated the Covid (Temporary Measures) Act 2020 to provide companies and individuals with relief from the economic effects of the pandemic, and the Singapore courts set up and administered the Panel of Assessors for Covid-19 Temporary Relief.

> **Singapore did not let the pandemic stand in the way of its efforts to cement its reputation as the leading dispute resolution hub in Asia.**

Singapore did not let the pandemic stand in the way of its efforts to cement its reputation as the leading dispute resolution hub in Asia. In December 2020, the International Arbitration (Amendment) Act 2020 came into force, introducing two amendments to Singapore's international arbitration legislation: a default procedure for the appointment of arbitrators in multi-party arbitrations, and an express power for Singapore-seated tribunals (and the Singapore courts) to enforce the parties' confidentiality obligations in respect of arbitration proceedings.

Overall, the evidence suggests that there is more to Singapore's new dominance as the preferred Asian dispute resolution hub than the pandemic. The indications are that SIAC, in particular, is well placed to benefit from any further increase in dispute resolution activity as the world economy recovers – as parties have more cash on hand to fight their battles, and more confidence in their future.

RESOLVING INTERNATIONAL TRADE DISPUTES: THE POSITION UNDER THE TCA

Professor Catherine Barnard,
Professor of European Union and Labour Law, University of Cambridge

Lawyers worry not just about the substance of legal rules but how they are enforced. This is particularly a problem at international level, an issue which has come into focus now that the Trade and Cooperation Agreement (TCA) is in place post-Brexit.

In EU law there is a twin track approach to enforcement. One possibility is that the European Commission brings proceedings against a Member State which has failed to comply with EU law. Ultimately these proceedings can lead to the Member State being fined by the Court of Justice. Occasionally one Member State can also bring proceedings against another - but this is a rarity.

Complementary to the Commission enforcement proceedings are the powers for 'individuals' (EU jargon for natural or legal persons) to bring proceedings in national courts to enforce their rights. They rely on the twin doctrines of direct effect and supremacy. Direct effect means they can rely on a clear, precise and unconditional provision of EU law in the national court. Supremacy means that any national provision which conflicts with EU law must be set aside. If there is uncertainty as to what EU law means, a reference can be made to the European Court of Justice.

The EU's highly integrated system of enforcement is unique in international trade agreements, and highly effective.

But Brexit has come for the UK and EU, and in place of EU law are the Withdrawal Agreement (WA) and the TCA. The former has some attributes of EU law and – in respect of matters covered by the Ireland-Northern Ireland Protocol – EU law and its system of remedies continue to apply.

> The TCA entirely eschews the EU model of enforcement. In its stead is a model found in the other free trade agreements and even under the WTO's Dispute Settlement Understanding.

The WA does, however, also make provision for a dispute resolution mechanism for when a party does not comply with the terms of the WA. This is in essence a political consultation, which – if unsuccessful – is followed by binding arbitration (with the possibility of a reference to the Court of Justice on matters concerning EU law). The arbitration panel can ultimately impose financial sanctions. In case of non-payment or persisting non-compliance by one party, the other can suspend its obligations under the WA or from the TCA, such as imposing tariffs on the imports of goods.

The TCA entirely eschews the EU model of enforcement. In its stead is a model found in the other free trade agreements and even under the WTO's Dispute Settlement Understanding. In essence, the TCA's dispute resolution mechanism (DRM) follows the structure found in the WA but without the possibility of a reference to the Court of Justice. This is because the TCA makes clear that principles of EU law do not apply to it (and therefore there is no need for the Court of Justice to have a role in interpreting its provisions). Rather it is an agreement of international law.

As such, the basic structure is that disputes are resolved first and foremost via political means (in the case of the law enforcement provisions of the TCA, the mechanism is political only). If the political route fails, cases can go to an Arbitration Tribunal. If the Tribunal finds against, say, the UK, it is given time to comply or pay compensation. If this does not happen, then the EU can take retaliatory action, usually the imposition of tariffs.

> If the victim is big and bold – a multinational, for example – they are likely to have the ear of government. By contrast, Joe Bloggs Gin Ltd, with a turnover of only a few thousand pounds, is unlikely to be listened to by anyone in government, when it discovers that the EU is not respecting its rights.

It is incorrect to say there is just one dispute resolution mechanism under the TCA. There is also a special mechanism for disputes concerning non-regression in respect of labour and environmental issues. The general Arbitration Tribunal is replaced by a Panel of Experts but ultimately the dispute can return to the mainstream DRM provisions. More dramatic is the 'rebalancing mechanism' used, for example, where there are material impacts on trade or investment due to significant divergences between the Parties concerning, for example, labour law and social protection. This mechanism is short, sharp and brutal. The time periods are contracted and retaliation can be imposed even before an Arbitration Tribunal sits.

Therefore, in the new world order regulating UK-EU relations, EU law is turned off and the DRM looks much more like those found in other international trade regimes. The problem is that individuals have been used to sorting out their disputes for themselves, if necessary by going to court and relying on the principle of direct effect and supremacy. Notions of direct effect and supremacy have, however, been preserved under the EU (Withdrawal Act) 2018 which has onshored all of EU law into UK law as 'retained EU law'. 'Retained EU law' can take precedence over conflicting pre-Brexit UK law.

In the post-Brexit world, businesses are reliant on the UK government (or the EU) to start proceedings in the case of breaches of the TCA. What is the mechanism for getting the state to help? If the victim is big and bold – a multinational, for example – they are likely to have the ear of government. By contrast, Joe Bloggs Gin Ltd, with a turnover of only a few thousand pounds, is unlikely to be listened to by anyone in government, when it discovers that the EU is not respecting its rights. Further, there is no equivalent to the Commission to complain to, to get matters sorted out.

This is one aspect of taking back control post-Brexit: control to the states, not to the individual.

3 COVID-19 and the courts

The London Commercial Courts' robust response to the challenges posed by COVID-19, and the swift transition to operating from a remote basis, underpin this year's data.

Given this, many believe COVID-19 to be a turning point for the use of online courts and tribunals.

Portland's propriety polling found that the UK public believe remote hearings serve as an essential vehicle for the administration of justice: 61 per cent of respondents said they think remote hearings should continue to be commonly used in the future (see chart F.).

Additionally, when asked whether remote hearings have a positive or negative impact on justice being delivered, 51 per cent of respondents felt that remote hearings were having an overall positive effect on the delivery of justice (see chart G.).

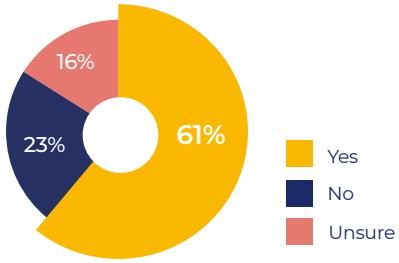
The substantial increase in cases was, in part, driven by a flurry of judgments that were handed down between April and July 2020. This was followed by a second burst in November and December 2020, coinciding with the end of the UK-EU transition period.

The increase was not due to the delay between hearings and judgments. Ninety-one per cent of the judgments handed down between April 2020 and March 2021 were in response to hearings heard within this period (see chart H.). This emphasises the London courts' resilience during a notably challenging year.

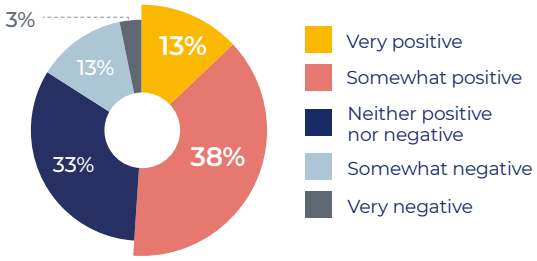
Last year, the Lord Chief Justice highlighted the widespread benefits that could be gained from the greater use of remote hearings. This – alongside calls for the greater use of technology in civil lawsuits in England and Wales – leaves reason to believe that there is perhaps no going back to some of the pre-COVID-19 ways.

This rise in virtual hearings has the potential to impact media scrutiny of legal hearings. The pool of potentially interested journalists has now grown, due to the ease of dialling into a London court hearing irrespective of where that journalist is located in the world. Litigators may need to consider the role of media and communications when tackling new cases.

F. BRITISH PUBLIC OPINION TOWARDS WHETHER REMOTE COURT HEARINGS SHOULD CONTINUE TO BE COMMONLY USED IN THE FUTURE

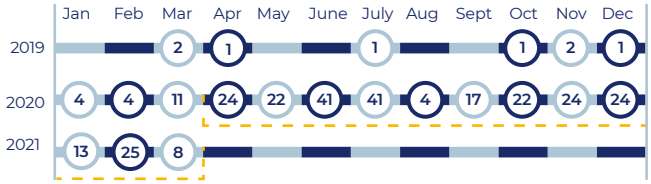


G. BRITISH PUBLIC OPINION TOWARDS WHETHER REMOTE COURT HEARINGS HAVE A POSITIVE IMPACT ON JUSTICE BEING DELIVERED



H. RECORD YEAR DRIVEN BY 2020-2021 HEARINGS

91% of judgments handed down between April 2020 - March 2021 were in response to hearings heard within the same period



INTERNATIONAL COOPERATION AND TECHNOLOGY IN A NEW WORLD

Standing International Forum of Commercial Courts

Stable legal environments are critical for commerce; a functioning dispute resolution system plays a vital role in attracting investment. This is especially the case given the economic consequences of the global COVID-19 pandemic.

The Standing International Forum of Commercial Courts (SIFoCC) was created in 2017 to bring together commercial courts from around the world, to share best practice and play its part in furthering the rule of law.

This March, SIFoCC held its third full meeting (virtually) bringing together the senior judiciary from around the globe. In total, 36 jurisdictions attended, from six continents.

A key topic of discussion was how the legal world can and should leverage technology in a new world. The use of technology in the judicial system has long been on SIFoCC's agenda, yet the global COVID-19 pandemic has accelerated its importance. This has been felt globally.

SIFoCC's success in convening judiciaries from around the world has given a unique view into how different countries are integrating technology into their legal systems

A number of jurisdictions, including **Astana International Financial Court** and **Abu Dhabi Global Markets Courts** have indicated that even before the pandemic, they had moved to being completely online, as most customers were international and sought increased accessibility with 24/7 technical support.

Brazil has leveraged the increased use of technology as a key way to address their substantial backlog. There have been gains in increased transparency.

Some countries have particularly reported how technology has advanced access to justice. There are some innovative actions, such as adding satellites into the Amazon area where there is poor internet access so that virtual hearings could take place while courts were closed due to the pandemic. Elsewhere, **China** reported that in 2020, 4.2 million cases were mediated online, which has decreased the volume of cases passing through the courts physically.

There is no telling what the future of the pandemic holds. Stability in the judicial sector will need to be maintained though as we navigate continued uncertainty. As economies emerge from the last year, they will need stable legal environments to attract much-needed investment.

Technology has clearly been at the heart of all responses to the pandemic and has been innovatively used across many judiciaries. SIFoCC and its members are excited to be bringing together these responses (see www.sifocc.org) and ensuring that, we are all learning and sharing ideas as we adapt to the new challenges we are facing.

RAPID CHANGE IN THE UK'S OLDEST INSTITUTIONS – THE IMPACT OF COVID-19 ON THE COURTROOM

Professor Suzanne Rab,
Barrister at Serle Court Chambers and Law Lecturer at the University of Oxford

The legal sector had to adapt in short order to the restrictions imposed by lockdown with significant changes to the way hearings are conducted and some areas of law having to rapidly evolve in order to remain relevant.

Virtual courtrooms

In England and Wales, as early as March 2020 courts were using technology to allow participants to attend remote hearings. The courts were certainly not starting from scratch in deploying virtual technology, for example to allow a witness to appear from another location, but this could hardly be considered to be the norm. The move towards a more digitised court environment has long been considered inevitable yet it was the 'real-life experience' of the pandemic that forced the imperative. In 2016, Lord Justice Michael Briggs evaluated the potential for online courts, noting that the legacy IT systems at the time were in need of a makeover. That observation might now seem prescient.

National Bank of Kazakhstan & Anor v The Bank of New York Mellon & ors [2020] EWHC 916 (Comm) is an early example of how technology was deployed in a virtual hearing. In anticipation of a lockdown, the parties were directed to attend a hearing on 19 March 2020 and against the defendants' submissions that the trial should be adjourned. This case is symptomatic of a 'no nonsense' approach to moving to full virtual trials, in appropriate circumstances. On 24 March 2020, the Supreme Court conducted its first ever remote hearing in Fowler (Respondent) v Commissioners for Her Majesty's Revenue and Customs [2020] UKSC 22. The first judgment to be handed down remotely was Elgizouli (Appellant) v Secretary of State for the Home Department (Respondent) [2020] UKSC 10.

Responses to the pandemic have tested the courts' digital preparedness. While remote hearings or appearances happened pre-pandemic – with video links being used where a physical hearing was not needed – there were concerns about the capacity of video links to meet increased demands, especially if they are being used for evidence.

The pandemic has seen the growth of comprehensive commercial virtual trial solutions, comprising services such as video-conferencing, live streaming, e-bundling and transcription. There is a multiplicity of providers, including Epiq Global, Opus2 and Sparq have developed their pre-pandemic offerings to cater for the increased demand. The courts in England and Wales have yet to declare a provider of choice. There is some reason to suppose some reticence in so doing, not least to preserve a level-playing field and competition and to minimise the risk of being wedded to a particular provider in a dynamic environment. We can expect that factors such as reliability, security, confidentiality and comprehensiveness will govern technology choices.

Evolving laws and case loads

In addition to affecting the way hearings are conducted, COVID-19 also led to intensified growth in specific areas of law, which are more important post-pandemic than ever.

Government regulations inevitably led to businesses finding it impossible or extremely difficult to perform their contractual duties. Whether disputes will arise within supply and production contracts depends largely on the underlying contractual framework. Each case will turn on its own facts. Parties affected by the pandemic may find relief if their contractual agreements include "Force Majeure" clauses. In the absence of such protective clauses, many businesses find themselves in breach of their arrangements unless they can rely on general doctrines such as that of frustration.

In addition to COVID-related disputes, legal technology and social media regulation are other previously under-explored areas of law that may see growth. There is an imperative to have digital solutions to deal with disputes with customers over cancellations and delays, employment disputes, education law disputes and with the inevitable economic hit, insolvency, mental health law and family law. The virus has led to unprecedented peace-time restrictions on public liberty and enjoyment.

The pandemic crisis is also a representation of how dynamic the judicial landscape is. The courtroom has seen a transition in the type of cases in the last year and the last few months suggest these trends are not relenting: cases of increased commercial disputes, cyber-fraud, financial services disputes, and data-privacy breaches are some visible changes which courtrooms can anticipate in terms of subject-matter in a post-coronavirus world and which the writer anticipates are not a temporary aberration. Of relevance to these issues, in the areas of cybercrime, cyber-war and surveillance, for example, is the case of Big Brother Watch and Others v United Kingdom (Application no. 58170/13) concerning the right to a fair trial under Article 6, privacy under Article 8, freedom of expression under Article 10 and non-discrimination under Article 14 of the European Convention on Human Rights.

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The future of the courtroom

With any process of technology adoption and deployment each case will be managed according to its circumstances. The oral tradition in advocacy in England and Wales means that we are not yet seeing the 'mainstreaming' of virtual courtrooms for the foreseeable future.

The pandemic has however shown that technology can and does yield efficiencies which would have been scarcely believable only eighteen months ago and this is here to stay. The move to virtual environments is not a linear move to ubiquitous virtual hearings but, rather, a transition to a more hybridised courtroom with enhanced digitised functionality. This embraces what technology has to offer in supporting, or in some cases replacing, a face-to face interaction. Despite the exigencies of the pandemic, the courts of England and Wales have remained open for business, albeit in a more digitised form and having had a dose of realism. In the London commercial courts in 2020/21, there were 292 cases and 1,336 litigants, a substantial increase on last year, where there were 198 and 808 respectively. This suggests some resilience not only in addressing the immediate situation of the pandemic, but some cause for optimism that the attractions of litigating in the jurisdiction will continue.

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Methodology and Sources

Portland's Commercial Courts Report 2021 analysed data provided by The Lawyer's Litigation Tracker database for the period from March 2015 to March 2021. This ongoing data analysis process is periodically revised to minimise duplication, rectify data omissions and remove anomalies. Research from primary and secondary sources supplemented our litigation analysis.

This report includes exclusive data from Portland's propriety polling on issues relating to COVID-19. Portland polled 1,000 UK adults, who were sampled to the UK ONS 2016 census for age, gender and region. Portland's online polling offer is accredited by the British Polling Council.

Portland would like to thank Professor Alex Mills, Professor Pamela Bookman, Gavin Margetson, Professor Catherine Barnard, Professor Suzanne Rab and the Standing International Forum of Commercial Courts for their contributions to this year's report.

Please contact Portland's Litigation and Disputes practice for additional data and analysis, or to use the findings in this report.

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