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# Litigation

**Introduction**
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# INTRODUCTION

***Contributed by:*** *Gary Born and Matteo Angelini,* ***Wilmer Cutler Pickering Hale and Dorr LLP***

International commerce is undergoing a period of rapid and tumultuous change. Globalisation continues to create new markets, new technologies, new competition and, with them, increased demand for effective mechanisms to resolve international disputes. At the same time, some of globalisation's champions, the USA and the UK in particular, show signs of shifting towards protectionism. The COVID-19 pandemic has accelerated this shift. It has brought an unprecedented level of disruption to the global economy and world trade and prompted governments around the world to turn to protectionist policies. International litigation now reflects these contradictory trends.

On a global level, COVID-19 has had a profound impact on the conduct of international litigation. According to a survey of 37 countries conducted by the International Bar Association Litigation Committee in 2020, COVID-19 has created a substantial backlog of hearings due to court closures in most jurisdictions. It has also led to many jurisdictions implementing new technological mechanisms to allow for litigation to be conducted remotely via video conference and other kinds of online platforms.

In Europe, on 31 January 2020, the UK left the EU and entered into a transition period during which the UK and EU are negotiating their future relationship. This transition period is due to end on 31 December 2020 unless it is extended due to the disruption caused by COVID-19 or for other reasons. The UK's decision to leave the EU (and the uncertainty about the terms of its future relationship with Europe) has led some to question London's continued dominance as a centre for cross-border disputes. The recognition of judgments in EU member states is governed by the recast Brussels Regulation and, at the time of writing, there is still uncertainty as to how this regulation will be replaced. That uncertainty may already be having an effect. In a survey of businesses, Thomson Reuters found that 64% of respondents are reviewing their dispute resolution clauses in their international contracts in preparation for Brexit.

A number of EU member states are seeking to divert business from London, recognising the economic benefits that come from being a hub for international dispute resolution. Paris, Amsterdam, Brussels and Frankfurt have opened English-language courts or are in the process of doing so, while Dublin also seeks to position itself as an alternative to the English courts. Nevertheless, according to Portland Communications, the caseload of the English Commercial Court continued to grow in 2020, with 55% of litigants coming from outside the UK and the majority of foreign litigants being from outside the EU. London also remains the leading centre for international arbitration in Europe.

The establishment of international-facing courts in Europe follows an earlier trend in the Middle East and Asia. The Dubai International Financial Centre Courts, the Qatar International Court, the Abu Dhabi Global Market Courts and, more recently, the Singapore International Commercial Court and the China International Commercial Court all seek to attract international disputes. Cases in these courts are decided by senior judges and lawyers drawn from multiple jurisdictions (except in the China International Commercial Court, where the judges are exclusively Chinese). The establishment of international courts in the Middle East and East Asia certainly reflects the eastward shift in economic growth and opportunity. It remains to be seen, however, whether the new courts in Singapore and China can compete with more established courts in Europe and the USA or – perhaps more importantly – the already-successful arbitral institutions in Singapore, Hong Kong and China.

In the USA, the "America First" trade policy of the Trump administration has broken with the traditional liberal trade policy of previous administrations. The USA has become increasingly hostile towards international trade treaties, which commit the USA to resolving disputes by arbitration or other means of international dispute resolution. The USA has withdrawn from the Trans-Pacific Partnership (TPP), paused negotiations of the Transatlantic Trade and Investment Partnership with the EU, blocked the appointment of the members of the Appellate Body of the World Trade Organisation (WTO), and renegotiated trade agreements with Mexico and Canada (NAFTA) and South Korea (KORUS). The United States–Mexico–Canada Agreement, which replaces NAFTA, entered into force on 1 July 2020 and contains more restrictive dispute resolution provisions than NAFTA.

State courts in jurisdictions such as New York and California nevertheless remain attractive choices when international litigants enter into jurisdiction agreements. Where no jurisdiction agreement exists, the US Supreme Court has scaled back US courts' power to assume jurisdiction over foreign companies in disputes that have arisen outside the USA (Goodyear Dunlop Tires Operations SA v Brown, Daimler AG v Bauman, BNSF Railway Co v Tyrrell and Bristol-Myers Squibb v Superior Court of California). The change is likely to be welcomed by foreign litigants anxious about the US courts exercising jurisdiction over disputes that have no connection to the USA. The US Supreme Court continues to be supportive of international arbitration (as in its decisions in the recent cases of Henry Schein Inc v Archer

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& White Sales Inc and GE Energy Power Conversion France SAS v Outokumpu Stainless USA LLC).

Despite attempts by newly formed courts to attract international business, arbitration remains the preferred form of dispute resolution for businesses operating across borders. In the recent Queen Mary University of London International Arbitration Survey, 97% of respondents chose international arbitration – on its own or with other forms of ADR – as their preferred means of dispute resolution in international contracts. The cornerstone of international arbitration's success is the New York Convention, ratified by 159 states, which celebrated its 60th anniversary in 2018. The Convention protects the enforcement of arbitration agreements and awards, ensuring, with rare exceptions, that arbitral awards can be enforced against award debtors. In its global reach and in its success, the New York Convention remains unparalleled in other forms of international dispute resolution.

Increased interconnectedness also brings new challenges. Data protection regulations, such as the General Data Protection Regulation (GDPR) introduced in the EU in May 2018, can cause serious difficulties to lawyers and their clients engaged in cross-border litigation. It may be difficult or impossible to reconcile disclosure obligations to a court or tribunal in one jurisdiction with data protection obligations owed in another jurisdiction. If the wrong balance is struck, serious financial penalties could result – in the most serious cases, GDPR permits fines of EUR20 million or 4% of global annual turnover, whichever is the greater.

Cybersecurity issues also pose an increasing threat to law firms, which hold sensitive commercial information. The shift to digital working due to the COVID-19 pandemic has increased this threat. The UK's National Cyber Security Centre reported a 400% increase in cyberattacks across all businesses after lockdown and the Law Society recently issued a warning to law firms advising them of the increased risk of cybercrime targeted at law firms. Litigators must now adapt to new ways of processing and protecting the vast amount of information generated by modern disputes.

The outlook for the coming year is highly uncertain: fears that, after a long period of increased international co-operation in cross-border disputes, more countries are turning inwards are not unwarranted. The protectionist instincts brought out by COVID-19 have led many to question whether globalisation has now peaked and to ask if what follows should be welcomed or resisted. The demand among businesses for international dispute resolution is, however, unlikely to diminish any time soon. Litigators might also reflect that change – even tumultuous change – will always lead to disputes.

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**Wilmer Cutler Pickering Hale and Dorr LLP** has a global team of 500 litigators and controversy specialists who handle highly complex and sensitive matters in all aspects of litigation. The practice is geographically and substantively diverse – with 11 offices in the USA, Europe and Asia – and its lawyers appear in many types of proceedings with various pretrial, trial and appellate objectives. The firm has played an integral role in some of the most significant recent cases in the US Supreme Court and other US courts, often on behalf of non-US clients; the ECJ; the English courts, including the High Court, Court of Appeal and Supreme Court; and German national courts. Its experience covers a wide range of industry sectors, including finance, software, IT, manufacturing, oil and gas, and aviation. The broad litigation practice is divided into several more specific practice areas: appellate and Supreme Court litigation, business trial group, government and regulatory litigation, IP litigation, international arbitration, international litigation, and white-collar defence and investigations.

## Contributing Editor

**Gary Born** is chair of the international arbitration and litigation groups at WilmerHale. He has served as counsel in over 675 arbitrations, including several of the largest arbitrations in ICC and ad hoc history, and has acted as counsel in numerous international litigations around the world. Mr Born is a pre-eminent authority in all aspects of international law, known as the author of International Commercial Arbitration (2nd ed 2014, Kluwer International), the definitive treatise on the subject, and International Civil Litigation in U.S. Courts (6th ed 2018). He is also the author of International Arbitration: Law and Practice (2nd ed 2016), and a number of other works. Mr Born is an Honorary Professor of Law at the University of St. Gallen, Switzerland, Tsinghua University, Beijing, and The University of Hong Kong, and teaches widely at law schools in Europe, Asia, and North and South America.

## Assisted by

**Matteo Angelini** is an associate at WilmerHale who focuses on international arbitration and English High Court litigation, with experience of arbitrations under a variety of institutional rules (including the ICC, LCIA, SIAC and UNCITRAL rules) involving both common law and civil law disputes. He has particular experience in oil and gas, technology, M&A and joint venture disputes, and regularly advises government and private sector clients on international law issues. Mr Angelini is qualified as a barrister in England and Wales. He is a graduate of St Catherine's College, Oxford University: BA (Oxon), 2010; MLF (Oxon), 2014.

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