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Financial Sector Dispute Resolution in a Post-Brexit World

What you need to know now and how we can help you plan for the future

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Time to put the ball into different courts?

The Status Quo: English Law, Language and Courts Dominate Financial Transactions

English law has traditionally been the go-to choice of governing law for financial institutions and enjoys the predominant place for a number of financial transaction types and master agreement documentation suites. Even where documentation suites have a New York law governed option, such as the International Swaps and Derivatives Association (ISDA), English law is the preferred choice for transactions with a European element. The English language has long been the *lingua franca* of these transactions.

English courts are often the preferred venue for resolving both international and domestic financial sector disputes. They are heralded for their expertise, transparency, and certainty. To put it simply, English courts work.

The attractiveness of English courts for financial sector disputes was bolstered in 2015 when the High Court established the "Financial List," a specialist court offering litigants a forum for dispute resolution by dedicated judges with financial markets expertise. Parties may submit test cases to the Financial List without a "live" dispute to receive guidance in resolving legal questions.

For so long as the UK is a member of the EU, a judgment from an English court is automatically recognized by every other EU Member State by the process known as "mutual recognition", and enforcement is virtually guaranteed and may only be denied on limited grounds (e.g., contrary to the public policy of the country in which enforcement is sought).

The Problem: Third Country Status Post-Brexit

Once the UK leaves, it will become what the EU terms a "third country." As a result, English court judgments will be treated as foreign judgments by EU jurisdictions and will no longer benefit from mutual recognition. Creditors with an English court judgment seeking to enforce it in an EU Member State (e.g., due to the location of the debtor's assets in that jurisdiction), will thus be forced to engage in the potentially lengthy and cumbersome process of recognition and enforcement of foreign judgments.

In an industry where timing and certainty is often of paramount importance, these potential delays and the uncertainty in recognition and enforcement could amount to unacceptable risks.

The use of English law for financial market transactions within the EU and the choice to resolve disputes in English is unlikely to diminish due to Brexit, but questions may arise on both sides of the divide on recognition. This is especially true if an "equivalence decision" is granted by the EU to the UK and certain financial regulatory requirements require UK third country firms to offer EU counterparties the option to have disputes resolved in an EU Member State.

Market participants affected by these changes will want to act individually and coordinate amongst peers, in particular where certain industry/trade associations have only started to consider how to Brexit-proof documentation suites.

One solution: International arbitration

Several options currently exist or are in development to circumvent the delays and uncertainty which may arise in enforcing court judgments due to the UK's future third-country status. These include:

1. The Tried and Tested Approach: International Arbitration

The dispute resolution mechanism which offers the parties to a transaction the most flexibility and opportunity to tailor the proceedings is international arbitration.

The parties have the option to shape any future disputes when selecting arbitration in their underlying documentation. This includes determining the:

- Applicable law (remaining with English law or choosing an alternative which may be more relevant to the transaction particulars)
- Seat of the proceedings
- Language of the proceedings
- Whether the proceedings are to remain confidential

If specialized expertise is desired in the decision maker(s), the Parties can require it in advance (i.e., in the arbitration clause) or after the fact (i.e., when selecting an arbitrator).

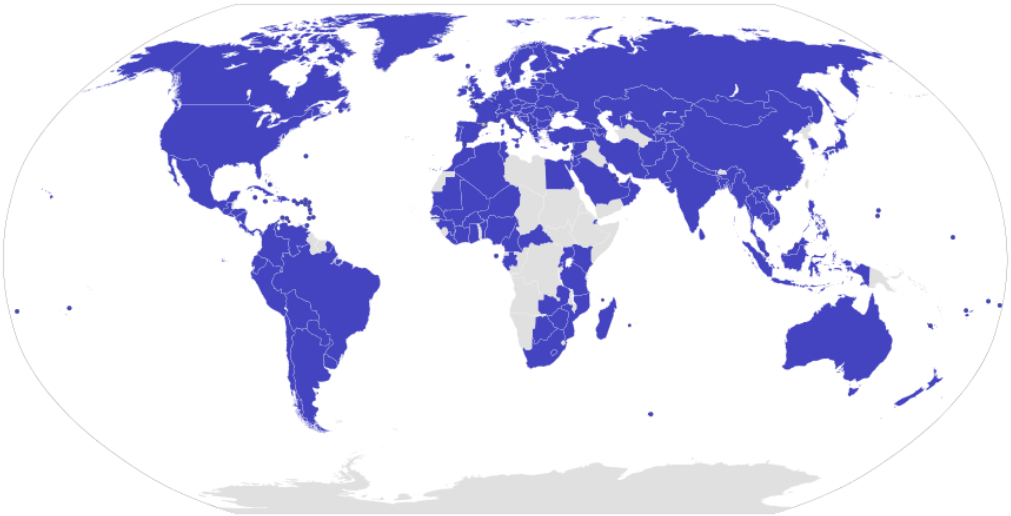
Expedited procedures may be selected, and "emergency arbitrators" are available under certain Rules.

The use of arbitration largely eliminates the recognition and enforcement issues that may arise with the UK's third country status post-Brexit.

Applicable in more than 150 countries, the "New York Convention" applies common aligned set of standards to recognition and enforcement of foreign arbitral awards. It prevents national courts from reviewing the tribunal's decision on the merits (*revision au fond*) and requires enforcement when presented with an award, the arbitration agreement and, in some instances, a translation of the award. Exceptions to enforcement are limited to enumerated grounds including an invalid arbitration clause, a violation of due process, the improper constitution of the tribunal and a violation of public policy in the country where enforcement is sought.

To prevent unnecessary delays, some national laws concentrate recognition and enforcement proceedings in special chambers or with the highest courts or courts of appeal.

Parties to the New York Convention: Virtually Global Enforcement Opportunities



Another solution: new challenger courts

2. New Initiatives: Challenger Courts

Seeking to capitalize on the UK's third-country status, several EU Member States have established, or are considering establishing, challenger courts. This trend is likely to continue.

To varying degrees, these courts will operate in English and apply English law from civil law jurisdictions. When incorporated into the national court systems, all challenger courts will benefit from mutual recognition of foreign enforcement in other EU jurisdictions.

At present, none of the challenger courts will provide the opportunity to bring test cases as the Financial List does.

- **Frankfurt's E-LG**

Frankfurt is the Continent's financial hub and is home to the European Central Bank (ECB), the European Insurance and Occupational Pensions Authority (EIOPA) and a host of other international and EU financial service firms, as well as a much broader base of non-financial corporate entities. Beginning in January 2018, the Frankfurt Landgericht has offered English language proceedings in its "English chamber for Business Affairs" (*englischsprachige Kammer für Handelssachen*, E-LG).

The E-LG applies German rules of civil procedure (ZPO) to all disputes, even those in English concerning English law.

Rights of appeal exist; however, judgments are required to be translated into German.

- **Brussel's BIBC**

Brussels, the *de facto* capital of Europe, is home to a myriad of European and international institutions such as the European Parliament, the Council of the European Union and the European Commission. It plans to open the Brussels International Business Court (BIBC) by 2020, which will operate entirely in English.

The BIBC will be a stand-alone, specialist Belgian court. It will embed arbitration into its proceedings and allow parties to choose which substantive law to apply. Procedurally, it will apply the United Nations Commission on International Trade Law's arbitration rules. Awards will be final without the possibility of appeal.

- **Amsterdam's ambition**

The Dutch Parliament is expected to pass legislation before 2019 creating the Netherlands Commercial Court. This specialized court would operate in English, but under Dutch procedural law, as a special chamber of the Amsterdam District Court and of the Amsterdam Court of Appeal. The NCC will be equipped with state-of-the-art court technology.

- **Paris' plan**

The proposal of a specialist chamber within the Tribunal de Commerce started its operations in June 2018. The chamber sits within the existing French court system in Paris, operates in English, applies English law if required but is subject to French procedural law.

Pan-European Enforcement Post-Brexit Excludes the UK

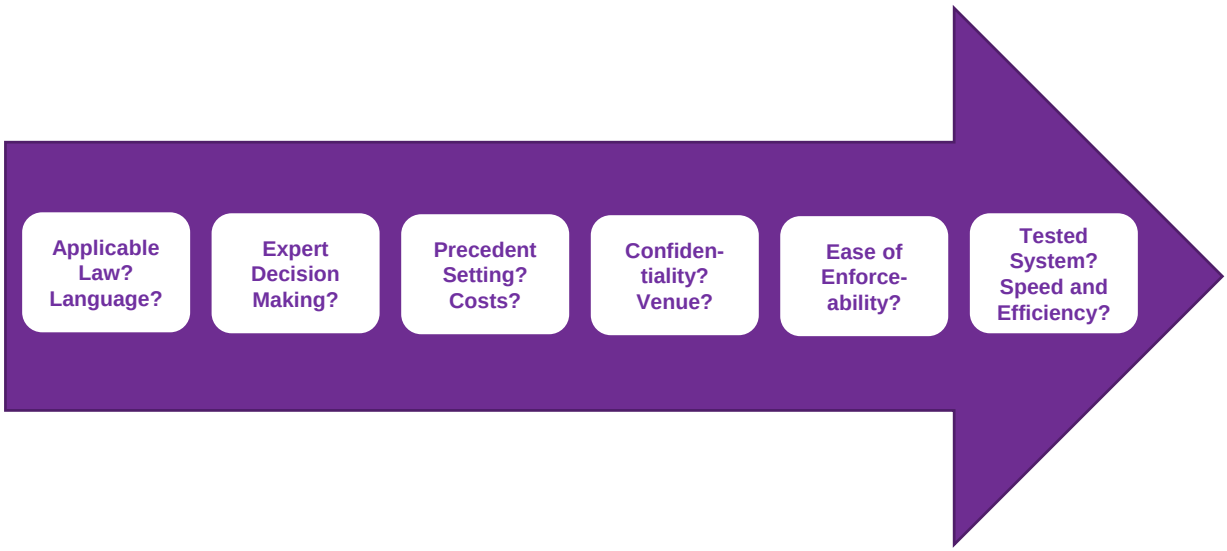
Outlook and steps to consider

Options abound

The impending challenges of Brexit add complexity to decisions that must be made in any financial transaction or exposure to a counterparty where the ability to serve/enforce is needed. English law disputes can be resolved in venues outside of England. Market participants will still have the ability to access English courts post-Brexit, but they may find that other options provide for resolving commercial and financial market related disputes and provide a faster route to recovering damages.

These choices apply both to new and post-Brexit exposures and also those that are already in existence. For existing contracts, the choice on whether to amend the dispute resolution clauses also raises questions on "contractual continuity" and required "re-papering" or "mirroring" more generally even where exposures may not be moving to different / EU-27 legal entities.

This complexity and the decision to move (English law) disputes to arbitration, challenger courts, or to remain with the English courts has both firm-specific and market-wide impact. There is no "one-size fits all approach" and no panacea on the horizon from policymakers. What is certain is that dialogue will be crucial with internal stakeholders and more importantly with financial services firms with their peers, their supervisors and their clients. That dialogue is not limited to just amending dispute resolution clauses, agreeing to exclusivity and/or fallbacks, even if this is a key part of the process, but also about mitigating any trigger of "other" regulatory obligations as well as the supervisory principles on relocations (SPoRs) and supervisory expectations of EU authorities, which are covered in a specialist series available from our **Eurozone Hub**.



We're here to help!

Our team of dedicated financial regulation and disputes specialists can help you make the right decision now in relation to a wide variety of contract types and exposures to financial and non-financial counterparties.

Our **Eurozone Hub** has particular expertise in conducing BREXIT red-flag risk reviews on business and distribution models as well as considerations that are specific to complex structured finance transactions. We are also regularly engaged to assist various market participants in setting up new or optimizing existing legal entity structures, drafting or amending contractual documentation and internal policies and procedures so that their business complies with EU, UK, US and global supervisory expectations.

Our Litigation & Dispute Resolution team can advise during contracting on the right choice for you and your firms in given transactions and remains available to guide you through the disputes process should a transaction turn adversarial.

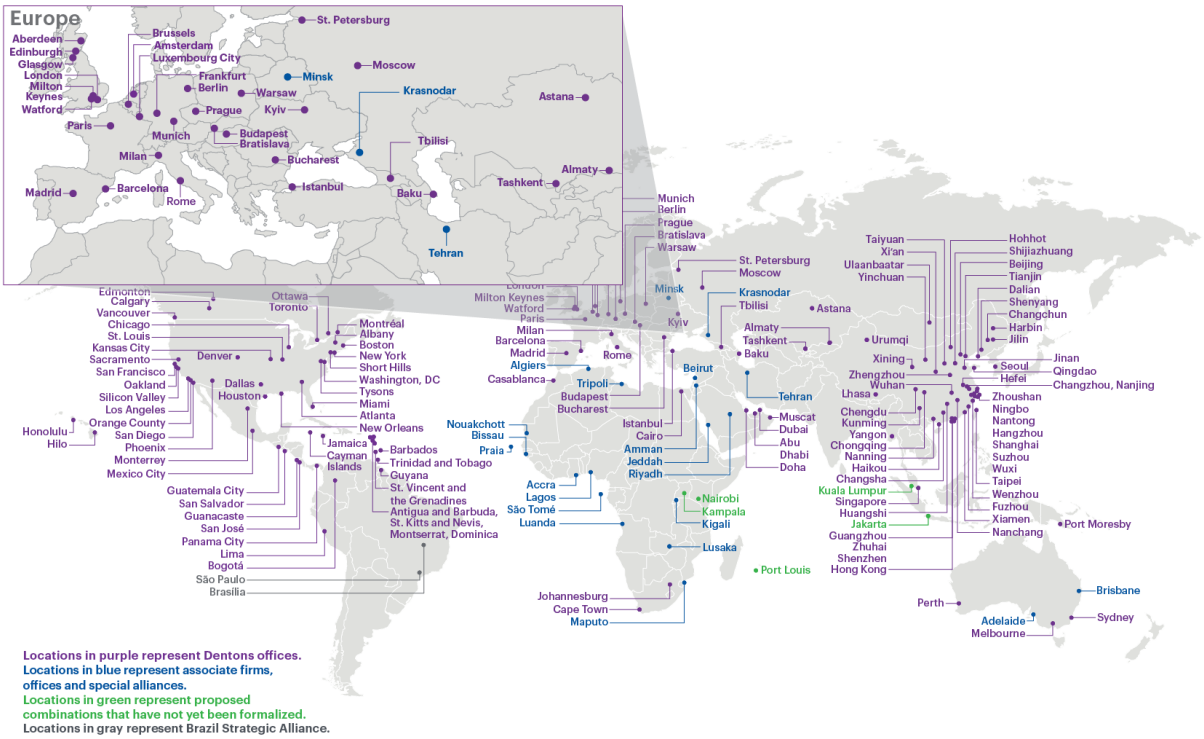
Meet the world’s largest law firm

Dentons is the world's first polycentric global law firm. A top 10 firm on the Acritas 2017 Global Elite Brand Index, the Firm is committed to challenging the status quo in delivering consistent and uncompromising quality and value in new and inventive ways.

Driven to provide clients a competitive edge, and connected to the communities where its clients want to do business, Dentons knows that understanding local cultures is crucial to successfully completing a deal, resolving a dispute or solving a business challenge. Now the world's largest law firm, Dentons' global team builds agile, tailored solutions to meet the local, national and global needs of private and public clients of any size.

Dentons offers you more than 9,000 lawyers and professionals in more than 160 locations spanning more than 70 countries. Dentons combines excellent proficiency at the interface of different locations, practice areas and industries.

We are committed to your business interests and work with you to enable and expand your possibilities and potential. You can trust our expertise for all areas of commercial and tax law. Look to Dentons for assistance with employment and labor, banking and finance, energy, corporate/M&A/private equity, life sciences/health care, intellectual property and technology, real estate, capital markets, competition and antitrust, arbitration/litigation and dispute resolution, public policy and regulation, restructuring, insolvency and bankruptcy as well as tax.



Locations in purple represent Dentons offices.
Locations in blue represent associate firms, offices and special alliances.
Locations in green represent proposed combinations that have not yet been formalized.
Locations in gray represent Brazil Strategic Alliance.

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Eurozone Hub: what we do and how we can help you

Our Eurozone Hub can deliver value to you by solving regulatory issues and using regulation to your advantage.

We cover all regulatory topics under EU and national-level rulebooks.

We design, structure and implement new or evaluate existing regulatory capital instruments, financial products and trading documentation.

We help financial institutions during investigations from national and EU level regulators/ supervisory agencies.

We advise on acquisitions and divestitures of regulated businesses.

We lead on financial service license applications and other regulatory approvals.

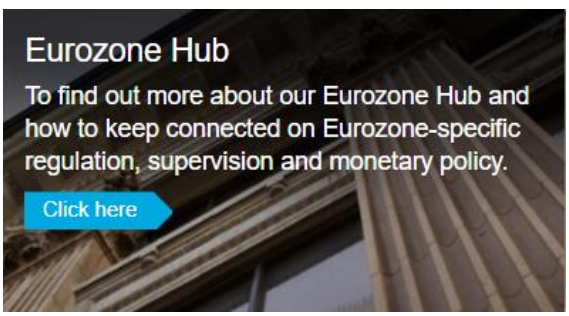
We help clients participate and shape the debate amongst policymakers by representing needs of clients.

We are fully familiar with the financial supervisory culture and expectations at every level across the EU.

We help clients in the design, implementation and auditing of compliance with internal policies and procedures in a manner that meets Eurozone, EU and global requirements.

We deliver workable solutions to address all “hot” key regulatory topics under global, EU and national rulebooks such as compliance, governance, risk management and cyber security.

We help clients when faced with supervisory examinations, thematic reviews, sanctions or otherwise to “defend files”.



Litigation and dispute resolution

Dentons leads the way in complex commercial dispute resolution. We provide bespoke teams of dedicated practitioners offering the highest calibre innovative, strategic and pragmatic advice geared towards your business needs in complex and hard-fought international and domestic disputes.

Litigation

Our litigation practitioners are recognized globally for their expertise. We regularly act on cross-border financial disputes, contentious restructuring and insolvencies and work with a wide variety of corporates, accountants and lenders. The value we deliver comes not only from our impressive record of courtroom success and the tested firepower of our litigators, but from our deep understanding of our clients and the industries in which they operate.

Arbitration

In addition, our commercial and investment arbitration specialists have the unique experience, skills and insight to understand your business and objectives, and possess a keen knowledge of the rules – written and unwritten – that govern arbitration proceedings in established and emerging markets. We know the arbitrators who decide the cases, and we often sit as arbitrators ourselves.

We have appeared before tribunals applying all major arbitral rules including those of the:

- American Arbitration Association (AAA)
- China International Economic and Trade Arbitration Commission (CIETAC)
- International Chamber of Commerce (ICC)
- International Centre for Dispute Resolution (ICDR)
- International Centre for Settlement of Investment Disputes (ICSID)
- London Court of International Arbitration (LCIA)
- Stockholm Chamber of Commerce (SCC)
- Singapore International Arbitration Centre (SIAC)

We also have extensive experience with *ad hoc* arbitration, including under the United Nations Commission on International Trade Law (UNCITRAL) rules and many regional arbitration institutions such as the German Arbitration Institute (DIS) and Vienna International Arbitral Centre (VIAC).

We look forward to continuing the conversation!

In addition to Client Alerts, Background Briefings and other updates from our Eurozone Hub, our wider Eurozone Group lawyers regularly publish in various journals to contribute or lead on advancing the debate amongst practitioners and stakeholders on the future evolution of the Banking Union, Capital Markets Union and monetary policy activity. To receive the latest updates, details on forthcoming public events, private roundtables or to join us in the conversation shaping the future of financial services, please do speak to any of our Eurozone Hub contacts.

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