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Litigation 2022

Introduction

Gary Born and Matteo Angelini
Wilmer Cutler Pickering Hale and Dorr LLP

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INTRODUCTION

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

Continued Uncertain Times for International Dispute Resolution

International commerce continues to undergo a period of rapid and tumultuous change. According to the World Trade Organization, the volume of world merchandise trade plunged 15% year-on-year in the second quarter of 2020 as countries around the world imposed lockdowns and travel restrictions to limit the spread of COVID-19. However, 2021 has seen a resurgence of global economic activity, which lifted global merchandise trade volumes above its pre-pandemic peak. This massive volatility in global trade volumes, combined with the stop-start nature of the global recovery, has led to serious global supply chain disruptions and a wave of international litigation.

Throughout the COVID-19 pandemic, globalisation has continued to create new markets, new technologies (such as the widespread adoption of e-commerce and videoconferencing), new competition and, with them, increased demand for effective mechanisms to resolve international disputes. At the same time, there is a rising tide of disquiet against free trade and globalisation. The COVID-19 pandemic has accentuated this disquiet. It has brought an unprecedented level of disruption to the global economy and world trade. This has 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 global survey of 23 jurisdictions conducted by the International Bar Association and published in *Dispute Resolution International* in 2021, the primary trend that has emerged is the development and accelerated use of online

platforms for the commencement and conduct of litigation. Online or remote hearings have become increasingly common and many jurisdictions have adopted detailed protocols for the conduct of online hearings that focus on ensuring procedural fairness, efficiency, confidentiality and security.

In Europe, on 31 January 2020, the UK left the EU and entered into a transition period during which the UK and EU negotiated their future relationship. The transition period ended on 31 December 2020 and the EU-UK Trade and Cooperation Agreement and Northern Ireland Protocol took effect on 1 January 2021. This date marked the real Brexit for most businesses and means that many GB-EU businesses now face significant new barriers to trade.

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 and suggest that the UK Commercial Courts will decrease in popularity. According to the *Portland Commercial Courts Report 2021*, which reviewed the 292 cases heard in the London Commercial Court between April 2020 and March 2021, the opposite is true. The London Commercial Court had a record year, quickly recovering from a dip in activity due to COVID-19 and re-establishing a six-year-long growth trend. The Report concludes that while the proportion of litigants from EU member states has declined following Brexit, the impact of that decline has been offset by other foreign litigants, including from the USA and Russia. London also remains the leading centre for international arbitration in Europe.

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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 all 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.

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 2021, for the very first time, Singapore was selected along with London as jointly the most preferred placed for arbitration in the world, according to the 2021 International Arbitration Survey conducted by Queen Mary University of London.

In the USA, many of the protectionist trade policies of the Trump administration have, thus far, largely remained in place under the Biden administration. 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) and has ruled out joining the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). It has also and renegotiated trade agreements with Mexico and Canada (NAFTA) and South Korea (KORUS). Former president Donald Trump's import tariffs on Chinese goods also remain in place.

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 & 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, 90% 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 168

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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 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 uncertain: fears that more countries are turning inwards as a result of the global pandemic 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 a period of de-globalisation should be welcomed or resisted. The demand among businesses for international dispute resolution is, however, unlikely to diminish any time soon. Litigators should reflect that the changing landscape of international commerce – even if tumultuous – 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.

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

Wilmer Cutler Pickering Hale & Dorr LLP

49 Park Lane
London
Greater London
UK
W1K 1PS

Tel: +44 020 7872 1000
Fax: +44 020 7839 3537
Email: gary.born@wilmerhale.com
Web: www.wilmerhale.com

