Ep. 19: Brexit and Dispute Resolution in the UK

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Jose Garriga: Hello, and welcome to *OnAir with Akin Gump*. I'm your host, Jose Garriga.

Brexit. The departure of the United Kingdom from the European Union is one of the most consequential public policy initiatives in the U.K.'s postwar history. There are few areas of the nation's political and economic life that are not being discussed in terms of the impact of this projected break with the EU.

On today's program, we'll be looking at one such area: international dispute resolution.

We have with us today Akin Gump London litigation partner Mark Dawkins and senior counsel Sheena Buddhdev.

They'll discuss the current state of play for Brexit and what impact it may have on London as a major forum for international dispute resolution as well as on the position of English law in international business dealings.

Welcome to the podcast.

Mark, Sheena, thank you both for appearing on the show today. I think it's safe to say the road to the U.K.'s departure from the EU has been a winding one: twists, turns, surprises at every phase of its disengagement.

So, to bring listeners up to speed, let's start with a very quick recap of where we stand in terms of the U.K. government's timetable for, and posture regarding, Brexit and then move on to why some commentators think this break might affect international dispute resolution vis-à-vis the U.K. Mark, if you would.

Mark Dawkins: Thanks, Jose, and hello, listeners. So, what is going on with Brexit? If we cut through all the posturing and politics, there are and always have been only three possible outcomes to this process: We leave with no divorce arrangement in place, or we leave with some form of divorce arrangement, which would have to compromise the number of radically different political positions, or, third, we don't leave at all.

Those are the only possible outcomes, and the default position is and always has been since the starter pistol was fired on this process that we will leave without a divorce arrangement, commonly referred to as a "no-deal Brexit." This is the default position because it is what will happen automatically if there is no political intervention or agreement by the exit date, which, as listeners may know, was extended earlier this year and is now due to expire on Halloween this year, 31st October.

This no-deal exit scenario is commonly seen as the most disruptive one and therefore let's assume, for this podcast, that that's the base case outcome that we're talking about, i.e., the one that is most disruptive to English law under the interests of the English legal profession. So, that's the first part of your question.

The second part of your question is, why do some commentators see this as affecting international dispute resolution in the U.K.? Well, to be clear, we are talking here about the preeminence of the English system of justice. That comprises two things: English law and the English courts. The simple answer is that those commentators are either wrong because Brexit won't have any meaningful impact on the preeminence of English law and English courts, or it is wishful thinking on their part because they're trying to promote the interest of competing dispute resolution centers in Europe or elsewhere.

What is true is that there will be legal consequences. For example, harmonizing data transfer and protection laws will be complicated by no-deal Brexit, but that is entirely different from the global appeal of the English justice system, and our position on that is that it will be unaffected. I appreciate that's a bold statement, but we'll come on to explain why we feel able to say that with confidence.

Jose Garriga: Thank you, Mark. Well, let's talk then a bit about English law and the English courts. Why are they so favored by international business, Sheena?

Sheena Buddhdev: Sure. So, let's first focus on English law. It is, in fact, the preferred governing law for business transactions worldwide, even those that don't have any geographic connection with the U.K. So, English law, like New York law, is based on common law. It has developed over centuries of experience with international trade and commerce by an independent and carefully selected judiciary comprising very senior lawyers with decades of experience. Many of these individuals, often very senior Queen's counsel, have been practicing for over 30 years. English law, therefore, provides certainty, predictability and transparency and is constantly evolving.

Then turning to English courts, I think, from my perspective, there are probably three key reasons why they're favored by international commercial parties. First, as I just mentioned, the judiciary in the U.K. are respected throughout the world for their impartiality and their experience and skill in dealing with complex cases. Judges decide cases according to their own judgment of the issues free from outside influence and government control, for example.

Secondly, the courts are highly experienced in dealing with complex international disputes with the development of specialist courts. For instance, the commercial court and specialist judges capable of not only dealing with highly complex matters but also matters involving multiple applicable laws in addition to English law. For instance, Mark and I have just finished working on a case where the commercial court had nothing but issues of Russian law, and it had nothing to do with English law.

Thirdly, the procedural rules for litigation are sophisticated, enabling a forensic approach to gathering evidence and its use in court. So, for instance, the English procedural rules generally require parties to disclose all documents relevant to a dispute, and this includes documents that may be harmful to one's case. Now, this is quite difficult for some clients to accept and understand, but what it leads to is transparency. You then litigate a case with one's cards on the table.

So, as I said, although clients from other legal systems without disclosure may, at times, be surprised at the breadth of disclosure required in the English system, it is one of the primary reasons why the English system is perceived as fair to both parties. And, in fact, I have some quite interesting statistics which show that London is the go-to destination for commercial international disputes. Currently, two-thirds of cases being heard in

London's commercial court involved non-U.K. litigants. According to a report produced in 2018, the number of commercial cases heard in London which involved one or more international parties rose by approximately 7 percent in the year to April 2018. The number of international litigants increased by 22 percent, with 656 parties from 69 different countries represented in 158 cases.

Jose Garriga: Thank you, Sheena, those are compelling statistics. But let's look, then, at questions that listeners might have regarding Brexit's impact. Let's start with choice of law. Should parties consider changing the governing law of their contracts, Mark?

Mark Dawkins: Absolutely not. None of the positive features of the English justice system that Sheena has described will be affected by Brexit. And I think it is notable the statistics that Sheena has just referred to are a strong indicator that international litigating parties are not seeing English courts as anything which should be avoided at the current stage notwithstanding the fact that Brexit's been on the horizon now for some time. So I think the answer is no. There's absolutely no need to change English law as the chosen law. The contract will have every reason to keep it as a chosen law for the reasons Sheena has described.

But it is worth pausing to ask yourself one particular question, which is: What if I choose English law for my contract—will that choice of law still be recognized by other countries in the EU? And that is a perfectly fair question to ask yourself. And the short answer is definitely yes, it will be. The rules that govern the recognition of contractual choices of law within the EU are governed by an EU-wide regulation known as the Rome I Regulation. And this makes it clear that EU courts must respect choice of laws in contracts, even if that choice of law is in a non-EU state. And that regulation will absolutely not change after Brexit. So there's no reason to change choice of law away from English at all.

Jose Garriga: Thank you. A reminder, listeners that we're here today talking with Akin Gump litigation partner Mark Dawkins and senior counsel Sheena Buddhdev about Brexit and its projected impact on international dispute resolution.

So, we've discussed choice of law. Let's look at choice of forum. Sheena, what do you think: Will Brexit affect the enforceability of English court judgments?

Sheena Buddhdev: The simple answer is no, but I think I ought to clarify a misconception that people may have. At the outset, we need to distinguish between the enforceability of English court judgments within the European and English court judgments around the world. Brexit will have absolutely no impact whatsoever on the enforceability of English judgments outside of the European Union. Parties who are faced with the need to enforce an English judgment elsewhere will do so in exactly the same way. So, an English court judgment to be enforced in New York will be done exactly in the same way. Insofar as the enforceability of English court judgments in the EU is concerned, while Brexit will impact the process by which they are enforced, it will not impact the ability to do so. And this is an important point. So, let me explain why this is the case.

The U.K. currently benefits from a pan-European legislation called the Recast Brussels Regulation, which enables judgments in civil and commercial matters to be easily recognized and enforced in other EU member states. Each member state has a specific streamlined process by which it will seek to enforce the judgment of another EU member state. For a handful of certain other countries, namely Switzerland, Iceland and Norway, another regime applies called the Lugano Convention, and it largely mirrors the Recast Brussels Regulation. In a no-deal situation that Mark has outlined, which is what we currently expect to happen, these mechanisms will fall away, the U.K. will no longer be party to the Recast Brussels Regulation or the Lugano Convention, and, therefore, there will no longer be a regime pursuant to which English court judgments can be enforced.

However, in order to provide for continuity and legal certainty, the U.K. government has indicated that, in a no-deal scenario, it intends to implement some form of successor regime to the repealed legislation by negotiating some form of new bilateral agreement with the EU member states. Or, in the alternative, it will seek to rejoin the Lugano Convention. Now, admittedly, its negotiating position is likely to be more difficult if the U.K. leaves Europe with no deal, but, nevertheless, we are quietly confident that some form of bilateral agreement will be implemented.

In any event, there are two saving aspects to this. The first is that the U.K. intends to accede to the 2005 Hague Choice of Court Convention in its own right. Currently, it is a party by virtue of the EU having acceded to the convention, and this is an international convention where parties to it are obliged to recognize and enable enforcement of exclusive choice of court agreements.

Secondly, and actually importantly, English court judgments are capable of enforcement under the laws of each of the EU member states now anyway. So, in the absence of some sort of bilateral agreement, it may be more difficult and longer to enforce judgment, but it will absolutely be capable of enforcement.

Mark Dawkins: So, if I can just ask you, Sheena, as we've both practiced cross-border commercial litigation for some time, I think the basic conclusion is that, worst case, enforcing an English judgment in an EU state may be a bit more clunky? Is that a fair summary?

Sheena Buddhdev: I think that's exactly it. It will be capable of enforcement, but the streamlined process will fall away. So, it may take a little bit more time. The process may not be as streamlined, but you'll be able to do so.

Mark Dawkins: And in practice and from my experience, I can't recall one instance, but can you recall an instance where you have actually had to enforce an English judgment in an EU state?

Sheena Buddhdev: I did, many, many years ago in Poland, and, believe you me, it took two-and-a-half years. So, in practice, I suspect it'll be the same.

Mark Dawkins: So the key takeaway, I think, from that is that, although that is one area where there will be more difficulty in enforcement, in reality, those situations arise very rarely in cross-border litigation that we get involved in. And there's certainly not a reason to be fearful of the changes coming from Brexit.

Jose Garriga: Thank you. Well, I think both of you have given listeners a great sense of the pre-Brexit state of English law and the U.K. as forum. So question: If Brexit is not a risk to English courts' favored position as for international business dispute resolution, what is? Mark, what do you think?

Mark Dawkins: Sure, and that's a big question. And, you know, we certainly don't want to sound complacent about the English system of justice and its role in global dispute resolution. We, as U.K. practice practitioners, we depend on that system remaining at the forefront of complex cross-border disputes, and there are certainly threats. Right at the beginning, I mentioned that some commentators might be expressing wishful thinking in the hope that there'll be new competing centers of dispute resolution emerging from the post-Brexit world and it's certainly the case that politicians in some EU states have announced plans to launch what they regard as competing English-language courts.

Now, I think our view about that is good luck to them. We think they're focusing on the wrong point, which is English language. What makes the English justice system successful is not in itself English language, it is the features that Sheena's been talking about, with centuries of experience resolving complex commercial disputes, judges who are imbued in that whole process and the transparency, certainty but yet flexibility inherent in common-law systems, and the European countries all have civil law systems

which are encoded and, therefore, don't have the same transparency and flexibility that the common law system has.

So, as I say, there will be competing courts set up, but we don't think they are much of a threat. More meaningful threats are probably coming from different quarters. And the best example of that probably is international arbitration and centers like the Singapore International Court of Arbitration, which has been invested in hugely by the Singapore government now for many years. And that is really gaining traction in the international business community.

There's talk about banks introducing arbitration clauses more frequently into complex financial instruments, and, so, that creates a prospect that different arbitration fora will be used for resolving complex banking disputes, and, in time, that could affect the interest of the English courts because banking litigation has been a core staple of English dispute resolution now for many years.

So, as I say, we don't want to sound at all complacent. There are threats out there, and we need to be alive to them. I think our view is that the English judiciary is, and the government is, and they have been investing in new features in the commercial courts to make them more streamlined and to continue their competitiveness in the global market. But there are issues out there for sure.

Jose Garriga: Thank you. Just to wrap up then, Sheena, what takeaways would you offer listeners in the run-up to October 31st?

Sheena Buddhdev: I'd say to our listeners, stay calm, don't panic. As we've explained over the last few minutes, Brexit will not have the dramatic effect on the English courts and the use of English law as some people have suggested. In fact, quite recently the Chancellor of the High Court, Sir Geoffrey Vos, made this very statement in a speech during London International Disputes Week. For international parties whose contracts are governed by English law, as we've discussed, Brexit will not change anything. For parties considering recasting their contracts under another applicable law, we would say there is absolutely no need to. Similarly, Brexit is unlikely to have any substantive impact on the enforceability of English court judgments in the EU, as we have explained. We remain of the view that the English courts are the forum of choice for international commercial dispute, and that's not going to change in the long term.

So, substantively, nothing's going to change. And, as a litigator, we have some very interesting times ahead. The legal regimes that I have known since I started practicing are all going to change, and I'm actually really excited to see where we end up—it's quite fascinating. And we'd like to share the developments with our listeners, so look out for us. We'll be back after the U.K. has exited the EU, with an update on what's happening, what's being negotiated, and the general direction of travel.

Jose Garriga: Thank you. Thank you both. Listeners, you've been listening to Akin Gump litigation partner Mark Dawkins and senior counsel Sheena Buddhdev. Thank you both. It's been a fascinating overview of where London-based international dispute resolution fits into that greater Brexit puzzle.

And thank you, listeners, for your time and attention. Please make sure to subscribe to *OnAir with Akin Gump* at your favorite podcast provider to ensure you do not miss an episode. We're on, among others, iTunes, YouTube, SoundCloud, and Spotify.

To learn more about Akin Gump and the firm's work in, and thinking on, dispute resolution, look for “international arbitration and dispute resolution” on the Experience or Insights & News sections on akingump.com and take a minute to read Mark Dawkins and Sheena Buddhdev's bios on akingump.com.

Until next time.