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Introduction
John McMillan
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INTRODUCTION

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 Editors

Gary Born is chair of the international arbitration group at Wilmer Cutler Pickering Hale and Dorr LLP. He is also President of the Singapore International Arbitration Centre Court of Arbitration and serves in an advisory capacity at other institutions around the world. Mr Born has served as counsel in over 675 arbitrations, including several of the largest arbitrations in ICC and ad hoc history, and has sat as arbitrator in more than 250 institutional and ad hoc arbitrations. He is a preeminent authority in the field, renowned as the author of International Commercial Arbitration (2nd ed 2014 Kluwer International), the leading treatise on the subject. He is also the author of International Arbitration: Law and Practice (2nd ed 2016), International Civil Litigation in U.S. Courts (6th ed 2018), and a number of other works. Mr. Born is an Honorary Professor of Law at the University of St. Gallen, Switzerland and Tsinghua University, Beijing and teaches widely at law schools in Europe, Asia, and North and South America.

John McMillan is a senior associate at Wilmer Cutler Pickering Hale and Dorr LLP 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 construction, technology, engineering, energy, M&A and joint venture disputes, and regularly advises government and private sector clients on international law issues. Mr McMillan has, in addition to his legal qualifications, a BA degree in Chinese from the University of Oxford.

International commerce is undergoing a period of rapid, sometimes tumultuous, change. Globalisation has created 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 turning towards protectionism. International litigation reflects these contradictory trends.

In Europe, the United Kingdom's decision to leave the EU (and the uncertainty about when, how, or if that decision will be implemented) 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 in the long term if the UK leaves the EU. That uncertainty may already be having an effect. In a 2018 survey of businesses, Thomson Reuters found that 35% of respondents had already changed contracts so that disputes would be heard in EU courts rather than English courts.

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 2018, with almost 60% of litigants coming from outside the UK and the majority of foreign litigants 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.

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. Donald Trump pulled out of the Trans-Pacific Partnership, paused negotiations of the Transatlantic Trade and Investment Partnership with the EU and has signed a new agreement to replace NAFTA (which, at the time of writing, has not been approved by Congress). The replacement treaty – the United States–Mexico–Canada Agreement – 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 unanimous decision in the recent case of Henry Schein Inc v Archer & White Sales Inc).

Wilmer Cutler Pickering Hale and Dorr LLP

49 Park Lane
London W1K 1PS
United Kingdom

WILMERHALE

Tel: +44 0 20 7872 1000
Email: gary.born@wilmerhale.com
Web: www.wilmerhale.com

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 2018 White & Case and 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 a threat to law firms, which hold sensitive commercial information. The UK's National Cyber Security Centre found that 60% of law firms reported an information security incident in 2016 to 2017. Litigators must 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, after a long period of increased international co-operation in cross-border disputes, more countries are turning inwards are not unwarranted. 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.