English Law & UK Legal Services

Executive Summary

English contract law is widely regarded as one of the most reliable and efficient legal frameworks for international business. This is for the following reasons, explored in more detail below:

1. **Law of choice:** English law is tried and tested, and one of the most popular choices for international contracts. It is used in around 40% of the world's cross-border business and financial transactions. It is acceptable to the market, so parties do not have make a case for its adoption in deals.

2. Commercial approach: English law is designed to enable and encourage business. Shaped by practitioners, it is flexible and adaptable. It is responsive to changing business practices and technologies, making it highly suitable for commercial transactions.

3. Predictable: The reasoning of legal practitioners is respected by the courts, providing legal predictability even for entirely new business activities, and reducing the likelihood of litigation.

4. Objective and simple rules: English law has objective rules for the interpretation of contracts and applies the same rules to all contracts, avoiding unnecessary distinctions and ensuring clarity and consistency in legal outcomes. The courts will enforce a contract according to its terms.

5. Respect for all parties: The system protects both debtor and creditor interests, upholds security interests, rights of set-off and netting, and ensures even-handed treatment, respecting the agreements made by the parties.

6. Extraordinary supporting detail: With a vast volume of court decisions and a wealth of judicial precedent, English contract law offers an extraordinary level of detail and experience.

7. Expertise and experience of UK lawyers: UK lawyers working internationally specialise in particular areas of business and understand in depth how that area of business operates. Their value is not dependent on the transaction being subject to English law. They are highly skilled at working with clients on structuring, negotiating, project-managing and implementing complex business transactions and in resolving disputes.

8. Dispute resolution: London is the world's number one choice as a centre for international dispute resolution, whether by the courts or by arbitration, both for general commercial and financial disputes and for specialist maritime and commodities market disputes. UK lawyers' services are also highly sought in arbitrations around the world. English judges are not political appointees or elected. They are selected through a non-political process from among experienced practising lawyers. They are familiar with market practices and sophisticated commercial and financial transactions. There are no jury trials for non-criminal cases and no punitive damages. The English courts are even-handed in their dealings with parties, whether from the UK or from other countries.

1. LAW OF CHOICE

English law is one of the two legal systems most widely chosen to govern international contracts and is used for about 40% of the world's cross-border business and financial transactions. It is the law of choice in the international financial markets and for international shipping and commodity contracts and is commonly selected for transactional matters of all kinds, including M&A, joint ventures, international construction projects and intellectual property licences.

The widespread current and historic use of English contract law internationally is due to its commercial approach, its predictability and adaptability, and its familiarity to businesses around the world. It has a proven track record, and so avoids the risk of hidden dangers in less familiar legal systems. This makes English law desirable across global markets for transactions. In addition, English judgments are accepted almost everywhere, facilitating enforcement for parties in cross-border contracts. That proceedings are conducted in English, the language of international business, and that the law, the judgments and relevant textbooks are also in English, are big advantages for international participants.

2. COMMERCIAL APPROACH

English contract law grew out of commercial transactional and business practices and supports the expectations of commercial parties.

A commercial system. English law is designed to enable and encourage business, not to control it. The law provides stability, supported by a strong legal culture; and it constantly adapts to changing times. English contract law is shaped by practitioners. This involves the judgments of judges, limited legislative intervention, and practising lawyers developing market norms, practices, and reasoning. The courts evolve the law in the light of changing business practices and technologies, enabling it to match the modern business environment without waiting for legislative action.

Freedom of contract. Freedom of contract is a foundation of the English system. There are few mandatory rules that apply in the absence of, or despite, specific agreement between the parties. This allows parties to craft their contract to meet their commercial goals and avoids surprises.

Commercially efficient remedies. In the case of breach of contract or failure to perform:

- The courts will allow termination without extra time being granted for delayed performance.
- Damages are the usual remedy as opposed to requiring or encouraging performance by the defaulter. Damages are compensatory, not penal or punitive, and are decided by the judge, not by a jury.

No pre-contractual liability. There is no pre-contractual liability for the termination of negotiations unless specifically provided for. You can walk away from the deal before it has been agreed – unless the parties have decided otherwise. This is very relevant for heads of terms and mandates.

Proportionate sanctions. Regulatory sanctions are proportionate to the activity in question.

3. PREDICTABLE

English contract law provides a high degree of predictability.

Reactive to new business activity. English legal practitioners are able to map out how the law applies to new situations. Their reasoning is respected by the courts. In more difficult situations, that reasoning can be particularly nuanced. The result is to deliver legal predictability for entirely new business activity for which there is no specific pre-existing law. There is generally no need to wait for a legislator or court to create more law. In addition, legislative provisions are generally very clear.

Respect for what is agreed. The English courts will enforce what the parties have agreed to. This includes business-critical provisions such as exclusion clauses, limitations of liability, rights of termination and contractual time limits for notices and performance.

The overall approach reduces the likelihood of litigation. It helps to avoid any mis-match of risk in linked contracts, facilitating the management of risk through insurance and hedging; and it helps to make linked contracts acceptable as security for financings.

4. OBJECTIVE AND SIMPLE RULES

English contract law applies objective rules for the interpretation and application of a contract, ensuring consistency in legal outcomes.

The English courts will generally enforce the contract according to its terms. The same rules apply to all contracts regardless of their subject matter, unlike in many other systems. This approach avoids unnecessary complications such as what sort of contract it is under the law, an artificiality which can lead to uncertainty over the rules that apply. It also makes easier the drafting of contracts to deal with sophisticated, complex, or multi-party obligations.

Each party is presumed to focus on its own interests. There is no pervasive duty of good faith in the establishment or performance of the contract or any limitation (as a general matter) on the exercise of clearly drafted rights except in consumer contracts. There is no notion of the abusive exercise of rights. A right is either exercisable on its terms or it is not.

5. RESPECTS ALL PARTIES

English contract law ensures balanced protection for all parties involved in a contract.

A tool for risk allocation. English law sees the contract as a mechanism for agreeing the allocation of risk between the parties. It is concerned with the wording of the contract and not with the fairness of the bargain, the motives of the parties, or the adequacy of the price. No allowance will generally be made for subsequent changes of circumstances that have not been addressed in the contract. The risk that a contract becomes more expensive for one party to perform is something that should be dealt with by the parties in the contract itself. English law also takes a narrow view of a rule of the International Monetary Fund and will set aside currency swaps, but no other types of contract, if exchange controls are applied in the country of one of the currencies involved.

Asset protection. English law has a unique combination of protections for investor and customer assets:

- It strikes a balance in its protection of both creditor and debtor interests on an insolvency.
- English law security interests can be enforced in accordance with their terms without delay or court involvement.
- English law upholds rights of set-off and netting, allowing for the reduction of exposures. These arrangements are upheld globally, since many countries recognise the choice of English law for set-off if it is the law governing the debt owed to the insolvent party.
- English law protects trust assets. Trusts enable assets to be held for customers and other third parties without the bankruptcy risk of the assets' holder. Examples of trust structures include custodianship arrangements, where assets are held by a custodian on behalf of beneficiaries, and bondholder trustee arrangements, where a trustee is appointed to act on behalf of bondholders under a bond issuance. English law protects the beneficiaries of trusts, the terms of which are derived from the express intentions of the parties. The effectiveness of English law trusts is recognised by many countries when the governing law is English law.

6. EXTRAORDINARY SUPPORTING CASE LAW

English contract law benefits from an extensive, detailed body of precedent court decisions. A vast, non-replicable, volume of court decisions has refined and developed English contract law to its present state and is constantly being added to, enabling the overall system to deal with both simple and complex commercial and financial situations. This wealth of judicial precedent and legal reasoning provides an extraordinary level of detail and sophistication.

7. EXPERTISE AND EXPERIENCE OF UK LAWYERS REGARDLESS OF CHOSEN LAW

UK lawyers working internationally are usually specialised in particular areas of business and understand in depth how that area of business activity operates and why that is so; what is market practice, what are the risks and so on. Their knowledge and experience go far beyond just knowing the relevant law and their value is not dependent on the transaction being subject to English law. From their experience and their collaborative working with lawyers around the world they get to see and learn how things work in different countries and can bring those perspectives to bear on their work. This is made possible by the volume of business from across the world (and not just from their own country) which they handle that ensures they are constantly at the forefront of business and legal developments.

Because English law develops through the creation of argumentation and reasoning from facts and wordings, UK lawyers are used to providing valuable solutions not only for English law arrangements but for international, cross-border transactions even where those affect other legal systems. UK lawyers are highly skilled at working with clients and lawyers in other jurisdictions on structuring, negotiating,

project-managing and implementing complex business transactions and resolving disputes. The depth of this market is second to none.

8. ARBITRATIONS

The services of UK lawyers are also highly sought in arbitrations around the world. UK lawyers are involved not only in relation to commercial, financial and maritime disputes but also for investment treaty disputes, including preventative work in structuring investments for treaty protection.

London is the most popular venue for arbitration, both for general commercial disputes and for specialist maritime and commodities market disputes. 80% of international maritime arbitrations have their seat in London. The principal reasons cited for this popularity are:

- The availability of experienced specialist counsel, solicitors and experts.
- The availability of experienced specialist arbitrators.
- The experience of the English Commercial Court in exercising its supervisory jurisdiction over arbitrations, for example in ordering interim measures such as injunctions and document or property preservation orders, and robustly dealing with challenges to arbitration awards.
- Relative cost and speed.
- The wealth of English commercial and maritime case law.
- The ease of enforcement of arbitral awards under the 1958 New York Convention.

9. THE COURTS, THE JUDGES AND COURT PROCEDURES

The English court and wider disputes system is highly regarded worldwide for the independence of the judges and other adjudicators. It is a system where it is possible to win against state interests. All arguments are objectively assessed and weighed against competing arguments, without reference to national political policy or other such matters. Judges are not political appointees or elected. They are selected through a non-political process from among experienced practising lawyers. This means that they are familiar with market practices and sophisticated commercial and financial transactions. There are no jury trials for civil (non-criminal) cases. Courts are even-handed in their dealings with parties, whether from the UK or from different countries. This prized neutrality is desirable for counterparties globally. Approximately 65%-75% of the Business and Property Courts' business involves one or more international parties, and around 40% involves no UK parties.

The English courts work in the English language, making the justice system globally accessible. The location of London in the European time-zone and directly between the American and Asian time-zones makes it possible to do business in real time with all parts of the world within the working day.

The Business and Property Courts deal with disputes across the entire range of business activity with dedicated specialist judges and purpose-built courts. Their procedure is especially tailored for business disputes and gives procedural certainty. Active case management by the judiciary helps to prevent over-long trials and to guard against parties seeking to cause delay. The process of disclosure is collaborative and aimed at isolating issues and matching appropriate disclosure models to each issue. Court filings are electronic. The courts are flexible and use technology to manage proceedings as appropriate (including, for example, electronic trial aids, video conferencing and hybrid hearings). The senior judiciary is leading on adapting to and anticipating the growth of digitisation and appropriate use of AI and other innovative technologies in international dispute resolution.

Communications between a client and their lawyer (whether external or in-house) for the purpose of giving or receiving legal advice, or between a client or a third party and a lawyer in the contemplation of litigation will be privileged and not subject to disclosure in civil or regulatory proceedings.

This paper was prepared in liaison with the City of London Corporation, the Ministry of Justice and leading UK legal practitioners.

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