Litigation trends 2017

Can London retain its litigation crown?

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Under pressure?

The only certainty at the moment is that the future is uncertain, says Julian Acratopulo a partner at Clifford Chance and LSLA vice-president. But, with the legal services industry worth around £25.7bn, the impact of Brexit, the outcome of the latest Jackson costs review and taming the "monster" of e-disclosure are of critical importance if the UK is to retain its standing as the dominant legal centre. In the latest of our exclusive series of online surveys conducted with the support of the LSLA, 280-plus litigators give their predictions for the coming year. Just over half believe the dispute resolution market will remain stable, but over a third fear a significant flight of work from the UK post-Brexit. Their responses also show little appetite for fixed recoverable costs with two thirds (66%) arguing they won't control costs, while a resounding 72% say the current disclosure regime isn't fit for purpose. Here we examine the key pressure points that risk threatening the attractiveness of the UK courts both domestically and internationally.

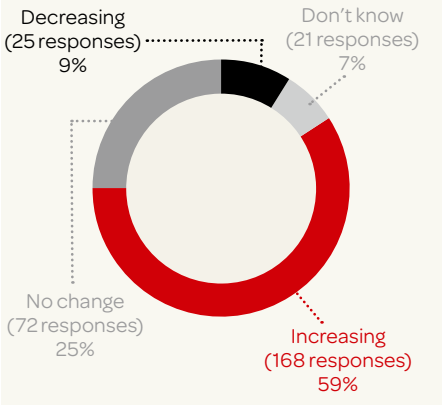
Author: Grania Langdon-Down

There is always "an air of chauvinistic arrogance" that English law and English procedure is the best in the world "but we have many competitors", warns experienced litigator David Greene—and never more so now Brexit is dominating the agenda.

Uncompromising words from Greene, *NLJ* consultant editor and senior partner at Edwin Coe, who had a unique insight into the polarised and politically charged issues around Brexit as solicitor for Deir Tozetti Dos Santos, co-claimant with Gina Miller in their successful fight to force MPs to vote on triggering Art 50.

"The world makes its home in London," says Greene, "but if we want to continue to attract it, we need to maintain the high standard of fairness of English law and its courts, remain open and welcoming to those seeking resolution of disputes and our firms need to be effective and cost efficient."

1. Do you see the cost of litigation increasing or decreasing over the next five years, assuming no other changes to the costs regime?



Given the UK's legal services industry is worth around £25.7bn, and contributes a trade surplus of £3.4bn, the stakes are clearly high.

After a rocky period between the previous Lord Chancellor Liz Truss and the judiciary, her successor David Lidington and senior judges are on the same page in promoting London as the world's legal centre.

Lord Neuberger, who retires as president of the Supreme Court in the Autumn, makes the case that Brexit could "boost" rather than undermine London's standing because the common law remains "attuned" to the needs of business. Once British judges are "left to our own common law devices", he maintains they will be able to respond "more quickly and freely" to global developments.

The Lord Chancellor was also bullish in a recent speech, saying it was time to "seize this opportunity to project English law, our courts, our judges and our legal services to the world and to new markets".

Some EU countries are jumping on the UK's departure, he acknowledged, to compete for a greater share of the international commercial contractual dispute resolution market by planning to operate English-speaking common law courts in their jurisdictions.

However, "while imitation is the sincerest form of flattery," he asked: "Why should a discerning litigant or practitioner accept an imitation when the original masterwork is still available to them?"

What future for litigation?

But how do LSLA members view the future? Asked how they see the dispute resolution market in London – in both domestic and international cases – changing over the next year, just over half believe the market will remain stable, while a fifth believe it will grow and a similar number feel it will decline (see table 5).

But the survey digs deeper, asking litigators if their response is based around the impact of Brexit. Perhaps surprisingly, nearly 100 of those who believe the market will remain stable give Brexit as the reason.

Less surprisingly, several respondents who believe the market will decline say Brexit has the potential to cause damage. But they also flag up a range of other factors including underinvestment in the courts, which are becoming "more and more chaotic", other jurisdictions, such as Singapore, "stealing a march" on London and the growth in arbitration.

There are certainly features of litigating in London that are putting off clients, agrees Ed Crosse, LSLA president and partner at Simmons & Simmons, such as the time it takes to get a case listed for trial, the "unacceptable" delays in the Court of Appeal, costs and the "burden" of disclosure.

It is therefore "vital" the courts and procedures are "best in class", he says. He points to improvements due in the way cases are managed in the Business and Property Courts; the shorter and flexible trial scheme; the establishment of the Financial List; changes to the Court of Appeal procedures; and a review of the disclosure regime.

But, he says, ensuring these measures work just highlights the "urgent need" for more government investment in the courts and their infrastructure and in the judiciary.

For Julian Acratopulo, a partner at Clifford Chance and LSLA vice-president, the consequences of withdrawing from the EU both legally and practically are "even less clear than the London pea soupers of the 1950s. Well-funded competitor courts, such as those in Singapore, are circling and the threat to London's position is clear so there is no room for complacency".

Daniel Spendlove, partner with boutique practice Signature Litigation, has yet to see any signs of a slowdown. However, he also warns of the risk of

being complacent. "London must meet the challenges it faces head-on by continuing to innovate and make itself attractive to the widest possible international commercial audience."

There are signs that clients are increasingly deciding to litigate, despite it being a "significant investment decision", says Francesca Kaye, partner at Russell Cooke. "But whether this is due to clients being more confident or being forced into dispute resolution will become clearer over the next 12 months."

Jurisdiction & enforcement

What will be critical is the question of how the mutual recognition and enforcement of judgments continues following Brexit.

Kaye believes this should be a "relatively straightforward" issue to resolve at an early stage against the overall complexity of the Brexit negotiations in other areas.

Failure to do so, warns Greene, could be one of the damaging effects of "withdrawing into our own borders".

There are certainly some tough questions ahead, agrees Crosse. Without mutual recognition, "will it mean that a party's agreement to refer all disputes to the courts of England and Wales will no longer be respected by the EU 27?" he asks. "What impact, if any, will Brexit have on a party's agreement to have its disputes governed by English law?"

In his Mansion House speech to the judiciary earlier this month , the Lord Chief Justice, Lord Thomas, raised his concerns that the government had not yet given a clear commitment to address the steps it needs to take to minimise the impact on the courts.

"This apparent lack of direction by the government is creating increasing uncertainty and could result in clients losing confidence in England and Wales as a forum of choice," Crosse warns. "If they feel that the current position on jurisdiction and enforcement is not going to be protected, they will start to vote with their feet."

A statement from the government that it intends to sign up to the Hague Convention on Choice of Court Agreements would be a good start, he says, and wouldn't need the consent of the other member states. "That would, at least, ensure that an agreement to refer all disputes for resolution by the courts here should be respected by EU member states and by other signatories to that convention."

The potential loss of regulations, particularly the Recast Brussels Regulation with its uniform rules governing jurisdiction and enforcement across the EU, is also worrying Junior LSLA members

"Unless these are safeguarded in the exit negotiations, Brexit will have a damaging impact upon London's position as a global centre for litigation," warns Leigh Callaway, senior associate for Fladgate LLP and chair of the Junior LSLA.

Spendlove takes a pragmatic view. The general feeling, he says, is that the current arrangements around jurisdiction, governing law and enforcement/ recognition of judgments will largely be replicated in one form or another.

> *"There are features of litigating in London that are putting clients off...such as the time it takes to get a case listed & the burden of disclosure"*

"There are many other compelling reasons why London is attractive as a dispute resolution centre," he notes, singling out the quality of the judiciary and lawyers, the ability of the infrastructure to handle the largest and most complex disputes, and the prevalence of English common law: "There is no reason why any of that should change post-Brexit."

Acratopulo also doesn't anticipate Brexit will cause significant changes in the trends in dispute resolution, given the lengthy time periods involved in negotiating replacement or alternative provisions and the solutions that have been identified by the legal community to preserve the status quo.

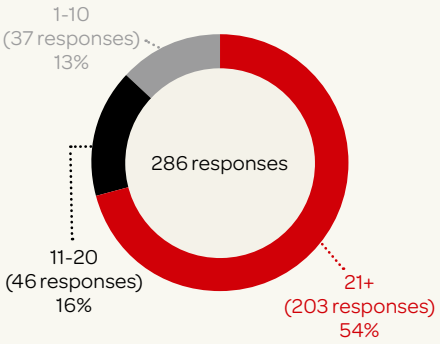
"It is also worth bearing in mind the words of Lord Thomas that Brexit doesn't affect the 'quality or certainty' of English law, or the standing of our courts or London's arbitration centres," he says.

Fight or flight?

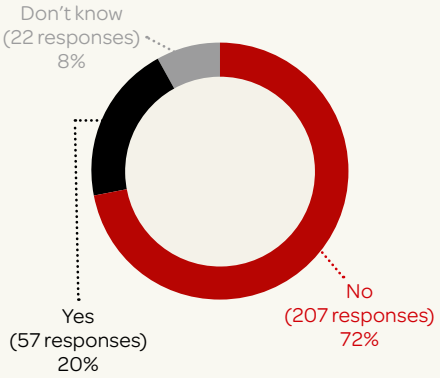
The survey identifies a fairly even split of views among litigators, with 38% fearing a significant flight of work from the UK post-Brexit, compared with 35% who believe work will stay here (see table 4).

One "obvious threat" for Crosse is the Singapore International Commercial Court (SICC), which has recruited high

2. What size is your litigation team?



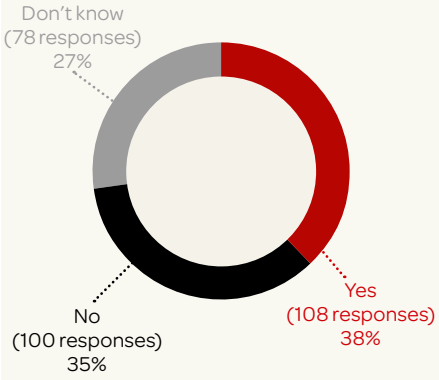
3. Do you think that the current disclosure regime is effective in controlling the burden and costs of disclosure?



Comments

- (i) Parties need to be compelled to engage more meaningfully earlier on to explain the scope of their electonic systems and the proposed searches; (ii) judges need to be allocated more time (and be more willing) to engage in disclosure disputes and force parties to engage in a discussion as to whether alternatives to standard disclosure are of value in the case (or alternatively, there could be "disclosure judges" who would deal with this issue alone). There should, however, in most (and certainly most commercial cases) be some form of disclosure, which is a very valued element of the English legal system and part of its USP in Europe.
- Abolish standard disclosure and move to request-based disclosure.
- Appoint judicial assistants with experience of litigation in a law firm to approach the parties and discuss the nature of the documentation involved and assist/advise the judiciary on the most economic form of disclsoure to order the parties to pursue.
- Care needs to be taken in reforming disl-cousre not to further discourage international litigation (in addition to the impact of Brexit).
- Concerted effort to focus on only what it necessary, avoid allowing it to become a strategic weapon, limit it to its primary purpose.
- Greater judicial intervention and direction (which is possible under the current rules).

4. Do you foresee any significant flight of work from the UK to other jurisdictions or tribunals post-Brexit?



Comments

- This is already happening—to the middle and far east for arbitration etc as they are cheaper alternatives.
- This is a significant risk given the hurdles of enforcing a UK judgment across the EU. I am not sure there is one jurisdiciton that will pick up this work. Arbitration may be the big winner.
- If people are concerned about enforcement of judgments, they won't come to the UK. They are likely to pick another jurisdiction with established jurisprudence.
- If UK leaves the Unified Patert Court, we will see a flight to Germany and the Netherlands.
- Other European and SE-Asian arbitration centres. New York for litigation.
- Other major European financial centres: Frankfurt, Paris.
- Wherever the banks (etc) relocate to - other EU jurisdictions.

quality judges from around the world, including the UK, and has benefited from significant financial investment and governmental backing.

"It not only boasts a first-rate IT infrastructure, but it can also pick and choose the most efficient and cost-effective court procedures to attract litigants who don't want the substantial expense of litigating in other jurisdictions, including the UK," he says.

"Finally, its judgments are enforceable throughout the EU as a result of Singapore being a signatory to the Hague Convention [on Choice of Court Agreements]. If the UK is to avoid losing ground to courts such as SICC, it must continue to pursue its reform programme."

Any centre that offers quality, impartiality, speed and predictability in the resolution of disputes will inevitably be attractive, says Spendlove. "But this as not a recent phenomenon," he argues. "Singapore established itself as a successful arbitration centre long before Brexit, yet London has continued to thrive."

In another move, France has said it will set up an English law court to deal with contract cases.

While the developments in France are interesting, Spendlove says it remains to be seen how successful they will be. "There would be a number of obstacles to overcome, and at this stage I would be surprised if it caused a mass exodus of cases from London."

The move is certainly an endorsement of the importance of English law to commercial parties, says Crosse. "But the idea that parties will be comfortable with English law disputes being determined by a foreign court is perhaps ambitious. It depends who France appoints as the judiciary for such cases. Maybe, like the SICC, they will attract judges from London."

For Callaway, there are more challenges to UK litigation than just Brexit. The recent rulings restricting legal privilege in the Serious Fraud Office (SFO) v Eurasian Natural Resources Corporation Ltd [2017] EWHC 1017 (QB) and the RBS rights issue litigation, could make international businesses think twice before defaulting to English law/English court clauses.

There is, however, a counterpoint, he acknowledges. "Those parties considering suing large businesses will have an incentive to try to bring claims here knowing they may be able to get hold of privileged materials."

Critical costs

But, whatever happens with Brexit, there still remains the critical issue of the cost of litigation.

The survey asked if respondents see the costs of litigation increasing or decreasing over the next five years, assuming no changes to the costs regime. Just over half (59%) believe costs will rise, 25% that they will stay the same and only 9% that they will reduce (see table 1).

The next development will be Lord Justice Jackson's imminent recommendations on costs. Despite his comments that the "strong message" about cost budgeting is that it is working "much better", no one expects to escape a greater degree of fixed recoverable costs (FRCs)

From an opening gambit of FRCs on all civil claims up to £250,000, a strong hint is on a new intermediate track for claims between £25,000 and £100,000 with a compulsory FRC scheme and a completely new procedure. All fast track claims up to £25,000 are likely to be subject to fixed costs.

What isn't in doubt is that FRCs are unpopular with litigators. Two-thirds of respondents say that a fixed costs regime won't be effective in controlling costs compared with a third who believe it will. The common thread is that the amount at stake doesn't necessarily mean cases will be quicker or less complex and it doesn't reflect public interest in the case.

Those respondents opposed to fixed costs warn they are "too blunt an instrument" and "too prescriptive when litigation is too unpredictable". Fixed costs just "shift the costs risk" onto the firm when the factors that can cause costs to rise, such as complexity, availability of evidence and the other side's tactics, are outside the firm's control.

For fixed costs to work, one respondent comments, the level has to be right and they have to be part of a streamlined process.

The prospect of FRCs has, unsurprisingly, seen practitioners identify a "new-found fondness" for cost budgeting, Kaye says wryly.

The suggestion of another track with its own rules and limits—a "multi-track lite" or "fast-track heavy" is superficially attractive," she says. "However, a simpler—and more controversial—answer may be to increase the fast track limit and apply fixed costs but adapt the rules to accommodate slightly longer trials.

"This could include an overlapping jurisdiction with the ability to transfer into and out of the new upper end of the fast track in a similar way to IPEC [Intellectual Property Enterprise Court], perhaps with similar guidelines."

Crosse favours fast track procedures but without a fixed costs regime. "The expedited procedures should achieve the objective of conducting cases with speed and efficiency, not mandatory fixed costs constraints," he says, adding: "Parties are unlikely to participate in pilots if they don't believe they will be able to recover costs that have been reasonably incurred."

But few reforms come without consequences. While recoverable costs will reduce, says Kaye, the overall costs

> *"The next development will be Lord Justice Jackson's imminent recommendations on costs"*

of dispute resolution are still likely to increase.

"This will lead to affordability issues, particularly for SMEs and private individuals, and is likely to lead to a continued deterioration in access to justice," she maintains. "What we have to be cautious about is simply adding additional layers or processes in the hope that reducing recoverable costs will drive down actual costs."

The way to control legal costs, she argues, is to control the litigation process, not impose arbitrary limits on the costs that can be recovered.

Junior practitioners believe the current costs regime has bedded in sufficiently for costs to remain the same, subject to the annual increase in rates.

> *"The prospect of fixed recoverable costs has, unsurprisingly, seen practitioners identify a new found-fondness for costs budgeting"*

The only factor that might see costs decease, says Callaway, raising the third key issue canvassed in the survey, is through the better use of technology in disclosure.

But this has been the "mantra" for years, he says, "So I am sceptical because, from my experience, technology still hasn't caught up with the volume of data."

Last year, Master Matthews's decision on predictive coding in Pyrrho Investments was seen as a game-changer. But have litigators seen a change for the better in the disclosure regime in terms of controlling the scale and costs involved?

The answer, according to nearly three quarters (72%) of the survey respondents, is a resounding "no", with only 20% saying the regime is effective (see table 3).

Respondents say standard disclosure is too often adopted by default when it should be abolished or be the 'exception rather than the rule'. However, others express concern that doing away with disclosure could undermine the value and reputation of English courts.

So how are the courts handling disclosure? Twenty respondents say they have had cases where there was an order to dispense with disclosure; 32 had experience of request-based disclosure; 53 of issue-by-issue disclosure.

"Much noise has been made around disclosure orders and how the courts are designing them to fit the circumstances of the case," says Greene. "But, as yet, I've not come across anything but standard disclosure. Like it or not, clients in a dispute do not trust their opponent and I believe solicitors remain wary of the technology to conduct the search. It's a steep learning curve."

Crosse sums up the current state of play: "Standard disclosure remains the default, e-disclosure has created a monster, and the searches undertaken by parties are far too wide."

Can the "monster" be tamed?

General counsel from the GC100 group warned in 2015 that issues around disclosure were becoming so bad, they were considering litigating elsewhere, particularly for lower value cases.

This prompted the judiciary to arrange a conference in 2016 where the consensus was CPR Pt 31 was outdated with too much focus on hard copy documents. Jackson's menu of options weren't working because parties were generally only proposing standard disclosure which the courts frequently ordered as a matter of course.

The result was the establishment of the Rolls Building Disclosure Working Group, chaired by Lady Justice Gloster. Crosse is a member, along with barristers, solicitors, general counsel and e-disclosure providers.

He is also part of the sub group tasked with drawing up a substantially revised and simplified Pt 31. The group is also devising a "road map"document to replace the "old-fashioned" e-disclosure questionnaire to guide parties through the process so they can reach an agreement where possible before the CMC and, as a result, enable the court to make an informed order.

Eight firms of a range of sizes and clients are currently "road testing" it against existing cases so that improvements can be made. The next meeting of the working group is in October and, if the proposals are approved, they should go before the Civil Procedure Rules Committee in November, likely followed by a period of consultation. If endorsed, they could be introduced in 2018.

Crosse says there is a "huge amount" of work being done on these issues. "It is critical that we get this right."

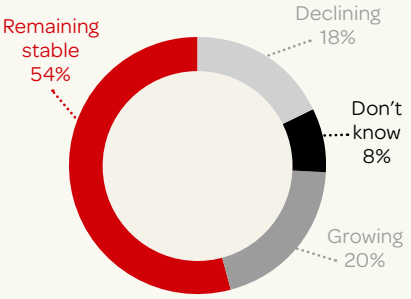
But what is also needed, he stresses, is a fundamental change in behaviour to avoid a situation where people "sleep walk" into the CMC without having identified the key issues that require disclosure or sought to discuss and agree how the scope of disclosure can be reduced. There are currently no sanctions to force a party to engage with its opponent in this way.

However, the benefits of earlier engagement are "unquestionable", he says. Parties can discuss the sources of data to be interrogated and seek to reduce the number of custodians, narrow date ranges and decide if it is really necessary to interrogate all available data sources. They can also try to agree how the data should be processed, and hosted and what keywords and technology should be used to review that data.

The earlier the engagement the better, agrees Callaway, with sanctions if they don't. "Some parties are reluctant to take the first steps to engage in a pragmatic discussion surrounding disclosure," he says.

However, both he and Crosse also stress disclosure plays a key role in the courts' reputation for transparency.

5. How do you see the market in dispute resolution (both domestic and international) performing in London over the next year?



Comments

Declining

- A combination of high cost and Brexit is likely to prevent any significant growth.
- Banking cases coming to an end / End of the bubble caused by the financial crisis
- Arbitration is growing but High Court work is in decline.
- Delays in court listing and hearing times and time taken to give judgment / Courts are becoming more and more chaotic - the cuts are too deep.
- Court fees and legal cost pressures.

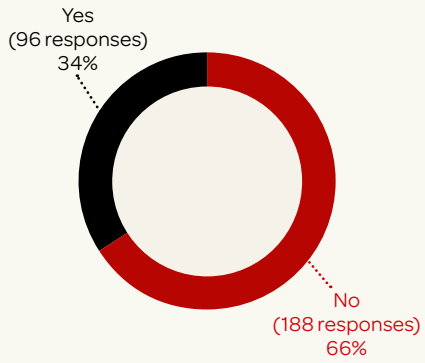
Growing

- No Brexit effect (yet)/ Whilst Brexit will impact on litigation and is likely to increase it; this may take longer than one year to feel the results.
- Work has rallied since the initial drop following Brexit / The market is busy but not excessively so.
- Pre-existing disputes / Rise in investigations.

Remaining stable

- My experience is that litigation is usually stable.
- London is an international centre for dispute resolution, irrespective of Brexit.

6. As a proposed means of controlling costs in lower value claims, do you believe that there should be a fixed cost regime for commercial cases where the amounts at stake are less than £250,000?



Comments

- Costs do not necessarily relate to value / Value doesn't always equate with the significance of the dispute.
- Complex issues arise and need to be addressed regardless of the value of the underlying claim.
- Although controlling costs in all claims is a desirable objective, applying a fixed cost regime to claims below £250,000 might be seen as a blunt instrument and as being disproportionate. The application and enforcemenet of cost budgeting rules should adequately control costs in most cases.
- Commercial litigation is not personal Injury. Every case is different. One case may be about simply recovering a debt; another may involve complex legal issues, extensive documents/witness evidence, require several interim applications and hearings, involve experts, counsel and other third parties. You cannot allocate a fixed costs to commercial litigation. If you did there would need to be so many exceptions that in fact these would or should exceed the number of cases that fell into a fixed costs regime. It would be unworkable and would prevent access to justice.
- It addresses the wrong issues: fixed recoverable fees only affect recoverable fees and arguably reduce access to justice even further.

"The ability to obtain full disclosure in appropriate cases, such as claims involving allegations of dishonesty, is a key attraction for many litigants and must be preserved," Crosse maintains, with orders appropriate to the case.

Kaye agrees. "The ability to obtain disclosure, even at substantial cost, is considered by many to be one of the reasons for the continued dominance of the London market in dispute resolution—provided that it only applies to one's opponent.

"This is the crux of the problem for disclosure. Any attempted narrowing of the parameters by use of the menu of options or otherwise is viewed with suspicion. What is the opponent seeking to hide? What documents adversely affecting the other party's case will we be deprived of?"

What is needed, she says, is to find a way of managing that "mutual suspicion", for instance by containing the pool of documents to be reviewed and applying an appropriate test for reviewing them.

So, can technology, whether artificial intelligence or predictive coding, be the break through?

Both Greene and Callaway say the profession needs a greater understanding of the different methods of interrogating data to make the process more manageable.

"I would like to use different methods," says Greene, "but I really need to understand them to then explain them to the client who remains distrustful of the opponent. I'm probably in the same place as many others. My experience of e-documents platforms is that they are very, very expensive."

Technology has a place in this process, agrees Kaye, but it is certainly not a "quick fix" and it shouldn't be seen as the solution or as a replacement for proper analysis of the disclosure exercise that needs to be undertaken.

She argues it should be the judge who is managing the case who should make the decisions about disclosure, taking into account the overriding objective and reasonableness and proportionality, including in relation to costs.

Her view is supported by survey respondents who want to see more judicial control at an early stage, with better case management and scoping.

Two other suggestions include "disclosure judges" who are "ticketed" to deal with just this issue and judicial assistants experienced in disclosure who could liaise with both the parties and the court. The first idea prompts a resounding "no" from Greene. "That would be madness"

Judges certainly don't have enough time or resources to give proper consideration and direction in relation to disclosure, says Crosse.

"Typically, the judge will have only received the CMC bundle on the Thursday night before the hearing, and that is after a busy week of trial sittings.

"Judicial assistants might help but what is really needed is for the parties to present the court with a well thought out range of options. Without that, how can judges reasonably be expected to make detailed and prescriptive orders on disclosure?"

That specialist understanding may start to filter through over the next few years, says Callaway, as judges who have engaged actively with e-disclosure tools as part of their practice will know what a big e-disclosure exercise actually entails.

With so many challenges ahead, the response of clients to the measures to improve the litigation process will be critical.

"The word that keeps being used is "uncertainty"—not just in relation to the legal but also the social, economic and political landscapes," says Spendlove. "And clients do not like uncertainty. But I haven't yet seen any evidence of parties moving their disputes away from London because of Brexit. I suspect that most clients will see how matters develop, rather than react in a knee-jerk fashion."

So is there cause for optimism? Callaway says junior lawyers considering becoming litigators are faced with an uncertain future. But that has a positive side, he says, "in giving rise to opportunities to help shape developing areas of law".

For Greene, the sky remains blue. "Litigators are always optimistic. We are entrepreneurial and that spirit may be all important in the future." **NLJ**

Survey details: 286 LSLA members completed our online survey, which was distributed by e-mail to current LSLA members in Spring 2017.

Grania Langdon-Down is a freelance legal journalist.