



JUDICIARY OF
ENGLAND AND WALES

“Myths of Brexit”

Speech at Brexit Conference in Hong Kong

The Right Honourable Lord Justice Hamblen

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**This was a Conference organised by the Hong Kong Department of
Justice**

**entitled: “Impact of Brexit on the Development of Common Law, Dispute
Resolution and Judicial Co-operation in civil and commercial matters”**

Introduction

1. We have been asked to comment on the legal implications of Brexit on the development of the common law and legal and dispute resolution. In my talk I propose to address: “Myths of Brexit”.
2. Whether by accident or design, myths have been propagated about the likely legal impact of Brexit on English law and on the UK’s role in international dispute resolution. In particular, it has been suggested that a cloud of uncertainty has somehow descended which should affect international parties’ choice on these important matters.

3. I contend that this is a myth and I shall seek to demonstrate this by testing the myth against the essential reasons for choosing English law, English jurisdiction and English arbitration. Those reasons will remain valid regardless of Brexit.

Choice of English law

4. There is little doubt that Brexit will give rise to legal disputes.
5. Domestically there are likely to be a number of judicial review challenges and public lawyers will be kept busy. In relation to existing commercial contracts issues may arise as to the meaning and effect of contractual provisions referring to EU related matters or institutions, and, in specific areas, frustration, termination or force majeure arguments may arise, particularly connected with loss of passporting rights, if that occurs.
6. For the vast majority of international commercial agreements, however, Brexit is unlikely to make any difference to the substantive law applicable or as to whether parties should continue to choose English law as the governing law.
7. Choice of English law as the governing law of a contract means the English common law of contract. In the business field (as opposed to the consumer field or specialist areas such as financial regulation) EU law has had no discernible impact on English law and nor will leaving the EU. The river of the common law of contract will flow on regardless.
8. There are many well recognised reasons why international business parties often choose English law to govern their contracts. These include the following:
 - (1) *Party autonomy*
9. English law has always recognised the importance of the parties' freedom of contract and will strive to uphold the bargain they make. Parties may agree the terms of their

contractual relationship as they choose, and can be confident that those terms will be applied. Provided you contract in reasonably clear and intelligible terms, what you agree is what you get.

10. The scope for implying terms into a contractual agreement or rectification of a concluded agreement is limited. Other than the relatively rarely applied rule against penalties, English law does not seek to strike down or amend the parties' agreement. There is no overriding duty of good faith.

11. The parties are truly their own contractual masters.

(2) A body of precedent

12. English law has been determining cases involving international commercial disputes since the early 19th century. This has enabled it to build up a formidable body of precedent to assist parties and their advisers to know where they stand and to be able to predict the outcome of any disputes when they arise.

13. Not only are the principles of the English law of contract well established, but their application is also highly developed. So, for example, in many specialist areas such as shipping, commodities, insurance, construction and banking there is plentiful precedent and resulting guidance on the terms of commonly used international standard forms of contract. Indeed many of those standard forms have been drafted by reference to and so as to marry with English law.

14. This maturity of jurisprudence has no national equivalent elsewhere; nor could it be easily or quickly replicated.

(3) Certainty and predictability

15. English law has long recognised the importance of certainty for commercial parties. Judges are commercially minded, they seek to prioritise and promote certainty and

consistency, and to avoid hard cases making bad law. The developed state of English law enables clear legal advice to be given and costly disputes thereby avoided.

(4) Flexibility and adaptability

16. English common law is not bound by any code or prescriptive rules. It is able to and does adjust to the rapidly changing commercial world and seeks to keep up to date with modern developments and needs. It has a wide range of remedies, both legal and equitable, which assists it to do so.

17. Brexit will have no effect on any of these or other recognised strengths of English law. The reasons which exist for choosing English law as the governing law will be unaffected.

18. Nor will Brexit impact on the enforceability of the choice of English law. All EU countries remain parties to the Rome I and Rome II Regulations and thereby bound to give effect to choice of law clauses governing contractual and non-contractual obligations. The UK government has made it clear those Regulations will be adopted as part of UK domestic law, so that English law relating to conflicts of laws will remain the same.

19. Indeed, it is very possible that Brexit will promote the development of English common law. If the result of Brexit is significant trade with a far greater range of countries, that interaction is likely to stimulate and further the development of English law.

Choice of English jurisdiction

20. The reasons for choosing English law are also good reasons for choosing English jurisdiction since, for obvious reasons, English judges are regarded as best placed to decide issues of English law which may arise, particularly issues of difficulty.

21. There are other well recognised reasons for choosing English jurisdiction, which include the following:

(1) The quality, independence, impartiality and integrity of the English judiciary

22. This reflects a reputation built up over a long period of time and a proven track record. High Court judges are chosen from the foremost legal practitioners and already have extensive legal experience and expertise.

23. Neutrality is an important consideration in the choice of a tribunal to determine disputes between parties of different nationalities and the English judiciary have consistently demonstrated an ability to be objective and even handed.

(2) Specialist courts

24. Under the umbrella of the Business and Property Courts based in the Rolls Building, there are number of specialist courts able to deal with business disputes of differing kinds. These include the Commercial Court; the Admiralty Court; the Technology and Construction Court; the Financial List; the Intellectual Property List, the Insolvency and Companies List and the Competition List. This ensures that the needs of different business sectors are served by specialists.

(3) Modern courts and flexible court procedures

25. The Rolls Building is the largest business court centre in the world. It is a modern building with all the facilities required for 21st century litigation.

26. All the jurisdictions housed in the Rolls Building keep court procedures under constant review in order to meet the needs of users, as reflected in regular Court User meetings and the production of updated versions of the various Court Guides.

27. Recent developments include the introduction of the Financial List and procedural innovations such as the shorter trial pilot scheme, the flexible trial pilot scheme and the market test case procedure, all of which I was closely involved with.

28. The importance of learning from and with other countries has been emphasised by the initiative to establish the Standing International Forum of Commercial Courts, which had its first meeting in London last May. Its membership is drawn from commercial courts from across the world and its purposes include ensuring that best practice is shared and courts work together to keep pace with rapid commercial change.

(4) The availability of high quality legal advice and dispute resolution services

29. London is home to many of the world's leading international law firms. More than 200 overseas law firms from 40 jurisdictions practise in London, including over 100 US law firms. It has a strong independent Bar. It also has a large pool of court experts and providers of other court services such as translators, interpreters, stenographers, transcribers, IT services and electronic trial assistance. Mediation is established and encouraged and there are many experienced mediators, as well as mediating bodies, such as CEDR.

30. Brexit will have no effect on any of these or other recognised reasons for choosing English jurisdiction.

31. One area on which Brexit will have a potential effect is the recognition and enforcement of jurisdiction agreements and judgments within the EU.

32. This is an aspect which will be discussed in further detail in Session 2, but the UK government's position paper makes it clear that it will sign up to the 2005 Hague Convention on Choice of Court Agreements ("the Hague Convention") under which exclusive jurisdiction clauses are required to be recognised and enforced, including by the EU. It will also seek to sign up to the 2007 Lugano Convention ("the Lugano II

Convention”), under which jurisdiction agreements and judgments are required to be recognised and enforced within the EU. The UK is already party to both these Conventions as a member of the EU, so effectively all it is seeking is a change in its party status.

33. In addition, the position paper states that it will seek to agree a framework of civil judicial co-operation with the EU which would “mirror closely the current EU system”. In the context of general civil jurisdiction (as opposed to family law or insolvency) that means the Brussels Recast Regulation. Given that that is the status quo and that it is obviously in the mutual interests of individuals and business across the EU to continue to have these reciprocal arrangements, this should be achievable. Even if it is not, or not immediately, if the UK signs up to the Hague Convention and the Lugano II Convention that will address the main concerns which might otherwise arise in relation to recognition and enforcement. In the meantime, those contemplating choosing English jurisdiction may be well advised to agree an exclusive jurisdiction so as to be able to rely on the Hague Convention.

Choice of English arbitration

34. London is a global arbitration centre. Reasons for this include:

(1) The availability of experienced arbitrators

35. London offers a wide choice of experienced and specialist arbitrators. These include trained, full time arbitrators and senior members of the legal profession, often practising or retired barristers, solicitors and judges. Others will be technical or industry experts.

(2) Established arbitral institutions

36. Many arbitrators will be members of the Chartered Institute of Arbitrators or of other specialist arbitral bodies, such as the London Maritime Arbitrators Association, the

Society of Construction Arbitrators, or of commodity trade associations such as Grain and Feed Trade Association (“GAFTA”), the Federation of Oil, Seeds and Fats Association (“FOSFA”) or the Refined Sugar Association (“RSA”). London is the home of the London Court of International Arbitration (“LCIA”) and many other arbitral institutions regularly administer proceedings seated in London, including the International Chamber of Commerce (“ICC”), Permanent Court of Arbitration (“PCA”) and International Centre of Dispute Resolution (“ICDR”).

(3) Extensive facilities and support services

37. London has a wide array of suitable venues for arbitral hearings, including the International Dispute Resolution Centre. Long experience has enabled it to build up a reservoir of all the necessary supporting services.

(4) Modern legislation and a supportive judiciary

38. The law of arbitration is set out in the Arbitration Act 1996 which reflects modern best practice. The Act recognises the importance of party autonomy and of finality. There is a high threshold for permission to appeal on points of law and applications based on serious irregularity rarely succeed. The judiciary is pro-arbitration, exercises a “light-touch” and there is a mutually supportive relationship with London arbitration.

39. Brexit will have no effect on any of these or other recognised reasons for choosing English arbitration.

40. Arbitration law will continue to be governed by the Arbitration Acts and the established body of case law relating to those Acts.

41. Enforcement of arbitration agreements and of arbitration awards will be continue to be governed by the New York Convention.

42. None of this is impacted by EU law or Brexit.

Conclusion

43. There are and remain good reasons for choosing English law, English jurisdiction and English arbitration. Brexit will not impact on the essential reasons for so doing and you should ignore the mythmakers.
44. Whilst Brexit will bring many challenges, it will also provide opportunities. In particular, it is likely to encourage interaction with countries outside the EU, and in particular fellow common law countries and jurisdictions, such as Hong Kong. In relation to the development of the common law, and of modern, efficient and cost-effective dispute resolution procedures, there is much we can learn from each other and the furthering of mutual dialogue and co-operation can only be a positive development.

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