London International Disputes Week

The effect of Brexit on Financial Services Disputes in London

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Introduction

1. May I start by thanking you for inviting me to join you this afternoon. I last gave a speech on this subject on 7th March 2019 to the International Bar Association's Corporate Group's London Summit. That was just 3 weeks away from Brexit day. Today, we are just under 5 months away from Brexit Day Mark III. One might be forgiven for thinking 2 things. First, that a considerable degree of uncertainty remains, and secondly that English judges remain the masters of understatement.

2. The short answer to the question of what effect Brexit will have on Financial Services Disputes in London is that it will probably not, I think, have quite the dramatic effect that some people have suggested.

3. There are a number of factors to consider, all of which you will be familiar with, as they have been discussed endlessly over the last 3 years: the newly established commercial courts in EU countries and beyond, the enforcement of UK judgments after Brexit, and the supposed reluctance of international business to specify English law and UK jurisdiction, to name but a few.

4. In this short presentation, I want to examine first some of the issues that underlie a choice of law and jurisdiction, before considering the position of English law and UK jurisdiction after Brexit. Finally, I will say something about the future,

with particular reference to the developments in FinTech, LawTech and RegTech that are about to change some of the essential foundations of international dispute resolution.

Issues underlying the choice of law and jurisdiction

5. It my surprise some of you, but I think the starting point is that the choice of law and jurisdiction for an international business engagement is in itself out of the ordinary. Of course, the English courts and the New York courts, to take two specific examples, have provided their services to international business people for many years now. But that is the exception rather than the rule.

6. Domestic legal systems are almost universally devised entirely for domestic use; they employ only the local language, municipal codes of procedure, and the local quite specific law; and they are generally not particularly well tailored to the needs of international dispute resolution. This is not a criticism, but rather an observation. There are well over 200 domestic legal systems trying criminal and civil cases in their specific countries across the world. Few of them profess to be adapted to resolve international financial disputes. One might ask rhetorically: why on earth would they?

7. What has historically set a few jurisdictions apart in this regard is that they have developed their domestic procedural and substantive rules in a way that has, as a matter of fact rather than design, attracted foreign parties to choose to use those jurisdictions for their disputes, even though those parties have no obvious connection with the specified jurisdiction. I want to explore why that may have been the case, with a view to seeing how Brexit might or might not affect those choices.

8. Let me give you an example of what I am talking about. In Belgium, they are establishing the Brussels International Commercial Court to deal with international business disputes. The project has attracted some controversy locally,

because the new court will operate only consensually, in English rather than the local languages, and will apply a newly devised set of procedural rules. Some judges in Belgium think that the whole process is illegitimate, suggesting that every court in Belgium must apply the appropriate Belgium Civil Procedural Code. I would obviously express no view on that debate, but it illustrates the local and national nature of legal systems across the globe.

9. It is worth noting in this connection that many of the new international commercial courts are in fact utilising new specially drafted sets of procedural rules rather than their local rules. This is, I think, a crucial distinction. Moreover, many of these courts require the parties to agree to the application of those rules when proceedings are commenced.

10. And consensus is itself another important feature of choice of law. In China's Belt and Road initiative, for example, there will be massive outward investment. The question will be, in some cases, what foreign legal system and what foreign law should be agreed upon to govern these investment relationships. That is not because Chinese law is not a good system of law. It is. It is because both sides to every transaction must be content with the specified law and jurisdiction.

11. The third issue underlying the choice of law concerns investor confidence. Business people are generally hesitant about investing in countries where there is a lack of trust in the legal system. This provides unacceptable systemic risk. So, there are two tiers to be considered in making any investment decision. How trustworthy is the domestic legal system in the country in which the investment is being made? And which system of law and jurisdiction should the parties choose to govern their legal relations, ***insofar as that is possible***?

12. I add that latter caveat, because it explains why the domestic legal system will be important even if another law and jurisdiction are chosen. There are some aspects of an

investment that will be affected by the local system whatever the parties have chosen. Often, for example, conflicts of law rules will apply domestic law to real property whatever the parties may have chosen.

13. My final observation on the issues underlying choice of law and jurisdiction concerns the growth of the FAANGs. For the uninitiated, they are the global corporations, namely Facebook, Amazon, Apple, Netflix and Google. Over the last few years we have seen a relentless push towards ever larger international corporations and, I think very significantly, a rise in the utilisation of borderless technologies such as distributed ledger technology and smart legal contracts. These developments are to be contrasted with the seemingly inconsistent increase in nationalism and parochialism in states across the world. This enigma is perhaps best left there. What is important, however, is that the way in which our legal systems tackle the trends I have referred to will undoubtedly have an impact on their attractiveness to international parties in search of a suitable law and jurisdiction to resolve their disputes. Technology will ultimately be critical to the attractiveness of any jurisdiction in the future. I will return to that point.

14. Let me say a word now about the comparison between common law and civil law systems.

Civil law v. Common law

15. I would never suggest that common law systems are superior to civil law systems. They are just slightly different; albeit that civil and common law systems have much more in common than most people think. Both are really just the tools of a lawyer's trade, and judges in both systems have the same objective, namely to do justice in the particular case between the parties, on the basis of the evidence and the applicable law.

16. The advantage of the common law is that it is not based on a code or a statute that was written at a fixed point in time.

The common law is a set of basic principles and rules that can be applied to rapidly changing commercial circumstances. That is why it is potentially so useful in the digital era in relation to smart legal contracts and distributed ledgers. The common law and its system of precedent provides a level of certainty, predictability and consistency in decision-making. But I would not want it to be thought that I have anything but wholehearted respect for civil law systems and the judges who operate them. I have worked closely with many of those judges over many years in my involvement with the European Network of Councils for the Judiciary ("ENCJ"), of which I was President from January 2015 to June 2016.

17. Historically, as a matter of fact, common law systems have appealed to business people for the reasons I have given. It gives business people the opportunity to take informed decisions about the legal risks of their investments.

English law v. other common laws

18. Then, insofar as English law is to be compared with other common law systems, again I would not want the comparison to be regarded as a competition. It should not be. All our systems are vitally important for the reasons I have given.

19. We, in the UK, regard English law as a strong system of law for a number of specific reasons. First, we have incorruptible judges looking after our English legal system and English law. Secondly, although we do not have all that many judges, they have very relevant experience and are of high-quality across the system. But, again, we remain hugely respectful of the quality of numerous other common law systems and the integrity of the judges that care for those systems.

20. English common law is a well-developed system in important business areas such as commercial contracts, cross-border insolvency, patents and intellectual property,

construction, shipping, and of course banking and financial services. It has much to offer.

Does English law and UK Jurisdiction remain attractive after Brexit?

21. With that introduction, I come to the key question for this afternoon. Does Brexit make English law less attractive? My first point is that Brexit does not affect the English common law at all. It will remain a system bound by its well-established principles. Insofar as financial services are concerned at least, English common law is quite separate from European Union law, which is, in essence, a body of regulatory provisions designed to create and support a single market in goods and services across the member states. English common law provides the foundation for the resolution of private commercial disputes between businesses anywhere in the world. It is, as I have said predictable and consistent, and those are its primary advantages.

22. The question of whether the UK remains an attractive jurisdiction is a separate, if related, question.

23. The Business and Property Courts of England and Wales, including the London Commercial Court, have unrivalled expertise in financial, insolvency, patents, commercial, competition, corporate and property disputes. The Rolls Building in London, for which I have responsibility, has some 50 business and commercial judges sitting every day on major disputes. As such, it is one of the biggest dedicated business courts in the world, sporting as I say high quality specialised judges of the highest integrity in all these fields.

24. I come then to a sensitive area. What are the most important things for business clients and their lawyers in choosing law and jurisdiction. I have already spoken about law. But in choosing a jurisdiction, my experience suggests that the most important things are the rule of law, the integrity of the judges and the system, and the quality of the judges.

25. In 2014 and 2016, the ENCJ conducted surveys of judges across Europe. There were 11,712 respondents in 2016. Amongst judges from 14 out of some 24 countries, more than 10% either agreed or were not sure about whether they had been subjected to inappropriate pressure to decide a case in a particular way. These countries included some very well-regulated European member states,[1] but not, I am pleased to say, the UK. In relation to corruption, the survey asked whether the judges believed that in the last two years, individual judges had accepted bribes as an inducement to decide cases in a specific way. In 17 countries, more than 20% of judges agreed or were not sure about whether bribes had been taken.[2] Only in Denmark, Finland, Ireland, Netherlands, Sweden and the UK, did almost 100% of the judges think that bribes were not taken at all.

26. As for quality of judges, our UK judges deciding Business and Property cases have had the benefit of having been in commercial practice as lawyers and advocates for many years. I was, for example, in practice in almost entirely business and financial cases for 32 years before becoming a judge – 16 of them as a QC.

The new Commercial Courts and the enforcement of UK judgments after Brexit

27. As I say, there is a difference between jurisdictions that use their own procedural processes to govern overseas disputes, and those that create a set of procedural rules specially for overseas disputes that are different to those they use for their own domestic disputes. The latter are more akin to arbitration than to court-based dispute resolution as we would normally understand it.

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1 France, Italy, Poland, Spain and Sweden.

2 These countries included France (22%), Italy (51%), Portugal (25%), and Spain (35%). Even Belgium was on 17%, and Austria and Germany on 10%.

28. The real key is the parties' choice. Undoubtedly, Brexit has caused many international businesses to pause for thought when choosing English law and the UK jurisdiction. Many are, we know, waiting to see. But as I see it, the strengths that I have already alluded to will not be affected by Brexit, so that the Business and Property Courts in London should remain attractive after Brexit.

29. You will perhaps be surprised to hear that we are working closely with several of the newly established commercial courts in Europe and beyond to exchange ideas and improve our systems for the benefit of international businesses generally. In June and October this year, we have three judges from the new Paris Commercial Court visiting London for two weeks each to sit with our judges.

30. As things stand today, it is unclear whether there will be an immediate agreement, after any transitional period, as to the reciprocal enforcement of judgments between EU member states and the UK. But, as it seems to me, it is to the advantage of both the EU and the UK for such an agreement to be reached, so I would not expect it to be long delayed.

31. That brings me to the subject that is close to my heart, namely the impact of the new technologies on dispute resolution.

New technologies

32. The first question is how the world's legal systems will respond to the new technologies I have mentioned. I am sure that we will need to move fast to provide effective dispute resolution once smart legal contracts take hold in the financial services industry. English judges are moving heaven and earth to be up to speed on the technological developments that will be changing the face of commercial legal problems in the coming months and years. I want the Business and Property Courts of England and Wales to be the court where smart contracts, AI, and DLT are an established part of what we do. We are fast making that a

reality, whatever political effects Brexit may or may not have.

33. To be more specific, it seems to me that there are 3 inter-connected developments. First, we are rapidly developing online courts for dispute resolution initially in smaller cases in a number of specific areas, such as money claims under £10,000. Secondly, we are considering how our mainstream court-based business dispute resolution processes should be improved so better to serve the national and international business litigants of the 21st century. We have, for example, entirely transformed and streamlined the disclosure process to avoid unnecessary legal fees. Thirdly, we need, I think, to produce a dedicated and expedited court-based dispute resolution process for issues arising from those who will enter into smart legal contracts.

34. This third aspect is perhaps the most important as there will, we are told, soon be 3 trillion borderless smart legal financial services contracts every year.

35. The UK's LawTech Delivery Panel, on which I sit, has just published a public consultation aimed at identifying the legal issues that need to be resolved in order to ensure the investor confidence necessary to allow smart legal contracts in financial services to flourish. In a few words, the legal issue in question is as to the precise legal nature of cryptoassets. Are they a known species of property, such as a chose in action or a chose in possession, and how can security be taken over them validly under English law? If we can provide these answers with a fair degree of certainty according to English law, we may hope that business will have the confidence to enter into smart legal contracts on the blockchain. I hope that the LawTech Delivery Panel will publish an authoritative legal statement on these issues later this year.

36. Other countries have approached the problem differently, but I think that, as is always the case, business needs reasonable commercial certainty as soon as possible. If we can provide

that certainty, that will be an added attraction for English law and the UK's jurisdictions.

Conclusions

37. I regard it as my responsibility in the Business and Property Courts here in England and Wales to find ways in which our arbitration and court-based dispute resolution services can best serve international businesses in the new technological era.

38. I hope that I have been able to explain briefly why the English judiciary has high hopes for the future. We are determined not to stand still. We are moving forward rapidly with the provision of online dispute resolution, and hope to be instrumental in deciding cases involving smart legal contracts and distributed ledger technology in the very near future.

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