The consequences of Brexit on existing and future commercial contracts

by Muriel Renaudin

1. INTRODUCTION

On 29 March 2017, the British Prime Minister, Mrs Theresa May served formal notice under Article 50 of The Lisbon Treaty (Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/01) to terminate the United Kingdom's (UK) membership of the European Union (EU) following the June 2016 referendum. Pursuing Article 50, the EU Treaties will cease to apply to the UK and the UK exit will take effect on 29 March 2019. The withdrawal of the UK from the EU is commonly encapsulated in the term Brexit. What Brexit means for the law governing transnational commercial contracts depends on the model legal framework which will be adopted between the EU and the UK. At the time of writing, the shape of this new legal framework is still unknown and it is possible that the negotiation of new trade agreements with the EU could take several years beyond 2019. Until an agreement is reached as to the shape of this new regulatory framework for cross-border commercial transactions with Europe and beyond, commercial actors may be confronted with legal uncertainties vis-à-vis performance and enforcement of their existing and future commercial contractual agreements. Given the level of uncertainty as to the shape of this new legal framework, the following discussion will be based on the assumption that the UK will be leaving the EU without continued membership of current EU trade and judicial cooperation agreements.

Measuring the impact of Brexit for commercial contracts is difficult to do with any precision given the current degree of uncertainty. On the one hand, one may argue that Brexit should not have any detrimental effects on English contract law because the law of contract is essentially governed by the principles of freedom of contract and sanctity of contracts; the parties are free to agree express terms and conditions to their contractual agreements and courts must enforce them (see Lord Toulson's observations in *Prime Sight Ltd v Lavarello* [2013] UKPC 22; [2014] AC 436, para 47). Given that English contract law, as a whole, has predominantly remained untouched by European legislation, some may argue that the exit of the UK from the EU should not have any significant impact on contractual agreements governed by English law. European law has only attempted to harmonise specific aspects of contract law such as consumer contracts (see the EU Consumer law acquis which includes the Doorstep Selling Directive 85/577, the Package Travel Directive 90/314, the Unfair Contract Terms Directive 93/13, the Timeshare Directive, 2008/122/EC, the Distance Selling Directive 97/7, the Price Indication Directive 98/6, the Injunctions Directive 98/27 and the Consumer Sales Directive 99/44). A more comprehensive harmonisation of general principles of contract law at European level remains limited, principally through the enactment of soft law instruments such as the European Principles of contract law (2002) (on this point see S Vogenauer and S Weatherill, "The European Community's Competence to Pursue the Harmonisation of Contract Law—an Empirical Contribution to the Debate", in S Vogenauer and S Weatherill (eds), *The Harmonisation of European Contract Law* (Hart, 2006)). Although the withdrawal of the UK from the EU and from all current EU trade agreements may not significantly impact English contract law as such, the reality is that the bargains struck by parties in their commercial contractual agreements may become adversely impacted. Indeed, the economic gain from contractual relationships may be generated and facilitated by existing EU legislations. For example, in the absence of alternative trade agreements, cross border trading tariffs may become applicable to commercial contracts trading goods. Contractual parties may also need to apply for specific export/import licences in respect of particular categories of goods which may also lead to an increase in contractual costs (on this point see European Commission 'Notice to stakeholders - withdrawal of the United Kingdom and EU rules in the field of import/export licences for certain goods' issued on 25 January 2018). This article argues that a continued membership in current trade agreements will avoid the uncertainties created by Brexit and will ensure that principles of commercial law such as predictability, security and low costs are maintained. If contractual parties are required to incur additional costs in the performance of their existing contracts as a result of Brexit, this article further considers whether financial hardship may constitute a ground for termination under English contract law.

Cross border commercial contracts may also contain clauses on jurisdiction the validity and enforcement of which may become uncertain once the UK leaves the EU and once the UK terminates its membership of relevant EU treaties underpinning cross border litigation. This article argues that leaving the current EU legal framework governing the validity and enforcement of clauses on jurisdiction may leave a significant legal vacuum likely to affect the security of cross-border commercial contracts. Not only may this legal vacuum threaten the validity and enforceability of this type of clause, it may also diminish the popularity of English contract law and of London as the choice of jurisdiction to govern cross border commercial transactions.

This article is divided in three parts. The first part discusses and evaluates some of the legal consequences of Brexit on cross border commercial contracts in the event of the UK deciding not to maintain its membership of current EU trade agreements. It considers in particular the impact of Brexit on the economic viability of commercial contracts and discusses whether parties could invoke Brexit as a ground for contractual termination under English contract law. The second part addresses the impact of Brexit on the validity and enforceability of choice of jurisdiction clauses for commercial contracts. It will be argued in the light of the various possible outcomes that, from a legal perspective, continued membership to current EU trade agreements and judicial cooperation agreements will maintain predictability, security and efficiency in the performance and enforcement of transnational commercial contracts. The final part of this article supports the argument that such continued membership would also ensure the maintenance of the long-standing position of English contract law and London as the preferred forum and jurisdiction for cross border transactions.

2. THE IMPACT OF BREXIT ON THE ECONOMIC VIABILITY OF COMMERCIAL CONTRACTS

2.1 The law of contract, fuel of commerce

Although the function of contract law cannot be reduced to the sole purpose of promoting economic development, because it also aims to fulfil a wider range of interests (M Renaudin, "The modernisation of French secured credit law: law as a competitive tool in global markets" *International Company and Commercial Law Review* 24 (11) 385-92), it is undeniable that contract is intrinsically linked to the economy (see eg K W Dam, *The Law-Growth Nexus: The Rule of Law and Economic Development* (Brookings Institution Press, Washington DC, 2013)). The modern capitalism system would not be possible without the law of contract. In *An Economic Analysis of Law*, Richard A Posner explains that contract law performs a fundamental economic function. First, it enables individuals and fictional entities such as companies to exchange goods and services efficiently. Second, it provides an efficient legal framework that enables parties to engage in commercial transactions securely and at low costs. Finally, the law of contracts informs the parties of potential pitfalls that have arisen in the past, thus enabling the parties to carefully plan for the future and agree terms and conditions to ensure more predictable outcomes. Commercial actors thus expect the law of contract to promote commercial transactions by ensuring legal predictability, security and low costs in the performance and enforcement of contracts. In light of this initial postulate, businesses in the UK are thus legitimately concerned about the effect of Brexit on their existing and future contracts with the rest of Europe and beyond. The exit of the UK from the European Union may introduce hazards and uncertainties in relation to cross border commercial relationships which may impede the achievement of these paramount goals of commercial and contract law (see eg M A Crowley, O Exton and L Han "Renegotiation of Trade Agreements and Firm Exporting Decisions: Evidence from the Impact of Brexit on UK Exports" (2018) Cambridge-INET Working Paper Series No: 2018/10 Cambridge Working Papers in Economics, 1839).

2.2 Freedom of contract and the bargain struck by the parties

One may argue that the impact of Brexit on commercial contracts is likely to be neutral as to whether the UK leaves or remains in the EU. This is because contractual agreements are governed by the principle of freedom of contract and sanctity of contracts. Contracts are thus less regulated than many other areas of law and are based on the commercial bargain agreed between the parties. On the other hand, one may argue that the commercial bargain of the contract may become affected by Brexit. For example, agreements that currently rely on existing European legislation, particularly all legislation deriving from the operation of the single market such as that guaranteeing free movements of goods and services, may become less cost-effective. For example, cross-border contracts may become more costly to perform due to the introduction of import tariffs between the EU and non-EU states if no trade agreements are reached within the negotiation process (see discussion below). Cross-border contracts may become more costly if there are delays at ports because no agreement is reached with the EU. The World Bank's Doing Business database reports that the typical time to clear border checks in high-income countries can reach twelve hours and forty minutes. Restrictions on the freedom of movement of people could lead to labour shortages or increase the costs of labour, or both. Brexit may also trigger fluctuation in currency, it is possible that a depreciation of the pound sterling will make some contracts less cost- effective. There could be further changes in exchange rates, such as those that immediately followed the result of the referendum in June 2016 when the pound sterling fell sharply against the dollar and the euro. Changes in the law that relates to intellectual property rights, for example licences may also pose problems (Government's Guidance, "Exhaustion of Intellectual Property

Rights if there's no Brexit Deal", published 24 September 2018). Insolvency and relocation of businesses as a result of Brexit may also lead to difficulties and uncertainties (see eg A Kokkinis, "The Impact of Brexit on the Legal Framework for Cross-Border Corporate Activity" (2016) 27(7) *European Business Law Review*, 959–87). As a result of the uncertainties triggered by Brexit, businesses will need to consider their exposure to risks and additional costs in existing contracts and consider how these risks could be allocated in future contracts. The following discussion provides a more detailed account of the possible impact of Brexit in the event of a "no deal" scenario for commercial contracts that currently rely on the EU single market trade agreements, particularly focusing on the uncertainties linked to the imposition of new tariffs.

2.3 Uncertainties and financial hardship for commercial contracts that currently rely on EU single market trade agreements

The EU single market provides a legal framework that guarantees the free movement of goods, services, capital and labour. The European Commission defines the European Single Market as follows:

> *The single market refers to the EU as one territory without any internal borders or other regulatory obstacles to the free movement of goods and services. A functioning Single Market stimulates competition and trade, improves efficiency, raises quality, and helps cut prices. The European single market is one of the EU's greatest achievements. It has fuelled economic growth and made the everyday life of European businesses and consumers easier.*

Businesses in the UK, EU and partner countries are eligible for a range of preferential market access opportunities under the terms of the Single market legal framework. EU trade agreements may for example include preferential duties for goods or provide a reduction in import tariff rates across a variety of goods. On Brexit day, all current EU trade agreements will cease to apply to the UK. A complete withdrawal from these trade agreements may significantly impact businesses when preferential conditions cease to apply. In 2016, the Office for National Statistics reported that EU accounted for 48 per cent of goods exported from the UK, while goods imported from the EU were worth more than imports from the rest of the world combined. UK imports in 2016 from the EU were £318 billion in comparison with £243.0 billion with the rest of the world. UK exports in 2016 were £235.8 billion to Europe and £284.1 billion from the rest of the world. The government has expressed the willingness to agree bilateral UK-third country agreements from the date the UK will leave the EU. If such bilateral treaties are not agreed, then the default rules provided by the World Trade Organisation (WTO) on tariffs and quotas will become applicable. At the time of writing, the UK's membership is currently contained within the EU schedules of concessions. The UK will thus need to regularise its WTO membership and set up its own independent schedules of concessions before current EU trade agreements cease to apply. These independent schedules of concessions will contain new applicable tariffs and quotas on goods (Art II of the WTO General Agreement on Tariffs and Trade (GATT)) and new market access committments for services (Art XVI of the General Agreement on Tariffs in Services (GATS)). Once the UK's independent schedules are set, they will require the approval of all WTO members including the EU. The latter requirement may raise some uncertainty for traders in the situation where other WTO members disagree with the new UK schedules of concessions. In order to avoid the risk of rejection, the UK might replicate the concessions already in place under the EU's schedules or may decide, more riskily, to unilaterally concede a free trade agreement. Even if the UK obtains the approval of its own schedules of concession as an independent WTO member, cross-border traders may still face significant uncertainties and additional costs.

In the absence of trade deal with the EU on Brexit day and assuming that WTO rules do apply, trade would take place on a "most-favoured nation" (MFN) basis (Art I GATT and Art II GATS). Under WTO rules, the principle of MFN treatment means that the same rate of duty, on the same goods, must be charged to all WTO members equally. Therefore the same tariff will apply, no matter if a product is imported from Australia or France. This situation may have a detrimental economic impact on businesses. For example, certain industries, such as the motor trade industry in the UK, may become significantly impacted as a result of a "no deal" Brexit. This type of industry usually relies on a complex integrated EU supply chain. In the motor trade industry, it is common that the various stages of the manufacturing process are conducted by different plants based in different EU Member States. Under WTO rules, new tariffs could be imposed at each of the various stages of the manufacturing process leading to substantial additional costs for businesses. Such a scenario could deter businesses from implanting themselves in the UK and could also encourage existing businesses to relocate somewhere else in Europe. These eventualities could be detrimental to the UK's economy and lead to substantial job losses (In November 2018, Schaeffler and Michelin, announced plans to close UK factories ahead of Brexit putting 1,400 jobs at risk). The UK Government may decide to offer subsidies to help threatened industries in the short term but this solution is clearly not sustainable and not permitted for certain industries (eg agriculture). Whether other WTO members agree to such derogations for the UK as an independent trade partner also remains unclear.

In light of the above uncertainties and risks of additional costs for cross border traders and businesses in the absence of a trade deal with the EU on Brexit day, it is argued that continued membership of current EU trade agreements would avoid financial adversarial risk for commercial actors and would also avoid the loss of predictability and certainty in cross border commercial agreements. If the economic viability of commercial contracts become negatively impacted

as a result of a 'no deal' Brexit, such as where tariffs become due, commercial actors may enquire into the possibility of terminating their contract.

2.4 Financial hardship caused by Brexit: available remedies

From an English law perspective, commercial actors may enquire into the possibility of Brexit providing grounds for termination of contract where the bargain struck by the parties is no longer cost-effective. Commercial parties may seek to rely on the doctrine of frustration or rely on force majeure clauses or material adverse change (MAC) clauses as grounds for termination. The success of such grounds for termination will obviously depend on upon the factual circumstances of the case and how the courts interpret the particular clause.

2.4.1 Frustration

Under English contract law, the debtor cannot in principle escape from his liability to perform the contract, no matter the reason. This is a strict liability, clearly recognised in Nicolene Ltd v Simmonds [1952] 2 Lloyd's Rep. 419 at para 425 where Sellers J explained that:

> *It does not matter whether the failure to fulfil the contract by the seller is because he is indifferent or wilfully negligent or just unfortunate. It does not matter what the reason is. What matters is the fact of performance. Has he performed or not?*

Nevertheless, English contract law is prepared to recognise in certain situations that the debtor should be excused from performance where the contract has become impossible to perform "because the circumstances in which performance is called for would render it a thing radically different from that which undertaken by the contract" (Lord Radcliffe in Davis Contractors Ltd v Fareham Urban District Council [1956] AC 696 at 729. See also E McKendrick, F*orce Majeure and Frustration of Contract* (Informa Law from Routledge, 2013), ch 2). Frustration effectively means that the contract has become impossible to perform because one essential element of the contract has been destroyed (Taylor v Caldwell [1863] 3 B&S 826). Frustration has also been accepted when performance is possible but has become pointless (Krell v Henry [1903] 2 KB 740). When a contract is frustrated, the debtor is relieved from his obligation to perform the contract. To provide relief from liability for non-performance of contractual obligations does to a certain extent undermine and contravene the principles of security and predictability of agreements and also places the risk of non-performance on the promisee. It is thus not surprising that English judges have been quite reluctant to frustrate contractual agreements on the basis of this doctrine (see eg British Movietonenews Ltd v London and District Cinema [1952] AC 166; Tsakiroglou & Co Ltd v Noblee Thorl GmbH [1962] AC 93; The Nema [1982] AC 724 and J Lauritzen AS v Wijsmuller BV (The Super Servant Two) [1990] 1 Lloyd's Rep 1). The scope of frustration being so narrow, it is arguable that a change in the contractual economic bargain struck by the parties as a result of Brexit will not excuse the debtor from performing the contract. Although, the contract may become more costly or more difficult to perform for the parties, the promisor will not be excused from performance simply because the economic bargain of the contract is adversely impacted as a result of Brexit. Unless the promisor can demonstrate that performance of the contract has become impossible because one element of the contract has been destroyed, the promisor will not be able to escape liability for non-performance. Accordingly, if the contractual parties want to expressly agree the allocation of risks, contractual parties may wish to include a force majeure or material adverse change clause into their contract to cover unexpected financial hardship caused by Brexit.

2.4.2 Force majeure clause

Force majeure clauses, though an unfamiliar concept for the common law, is a well-established French law doctrine which excuses the promisor from performance under certain circumstances (on this point see E McKendrick, Force Majeure and Frustration of Contract, (Informa Law from Routledge, 2013), ch 2). French law defines force majeure in the Civil code at Article 1218 as an irresistible and unforeseeable event. There is no definition per se of force majeure in English law but contractual parties will often insert such clauses to escape liability for non-performance under certain circumstances. Donaldson J explained in *Thomas Borthwick (Glasgow) Ltd v Faure Fairclough Ltd* [1968] 1 Lloyd's Rep 16, at p 28, that: "The precise meaning of the term, if it has one, has eluded lawyers for years."

McEndrick further explains that:

> *An event will be force majeure event if it constitutes a legal or physical restraint on the performance of the contract (whether or not occurring through human intervention, although it must not be caused by the act, negligence, omission or default of the contracting party) which is both unforeseen and irresistible* (E McKendrick, *Force Majeure and Frustration of Contract* (Informa Law from Routledge, 2013), p 5).

Could contractual parties be able to rely on a force majeure clause in the event of Brexit to escape liability for non-performance? English courts have generally held that changes in a party's economic circumstances will not qualify as force majeure events under English law (See *Tandrin Aviation Holdings Ltd v Aero Toy Store LLC and another* [2010] EWHC 40 (Comm)). The fact that economic hardship will be suffered is not normally sufficient to claim relief from performance. The interpretation of the clause by English courts will depend on the exact wording of the applicable clause and it is possible that some types of clauses, for example, material adverse change clauses, could be wider than a standard force majeure clause and could potentially be triggered by financial hardship

suffered as a result Brexit.

2.4.3 Material adverse change clause

Material adverse change clauses (MAC) enable the parties to renegotiate the terms of their contracts or to terminate the contractual agreement upon the occurrence of certain events. The party seeking to terminate the contract has the burden of proof to demonstrate that the particular material adverse event has occurred. The changes in circumstances following the supervening event must also be material, that is sufficiently substantial and significant to trigger a change in material circumstances. It cannot be a temporary glitch. The question of whether the changes in circumstances caused by Brexit will be caught by a MAC clause will depend upon the drafting of the clause itself. For future contracts, a MAC clause can be especially drafted to capture the situation where Brexit materially changes the circumstances of the contract but for an existing contract, the outcome will depend upon the interpretation of the clause by the courts (on this point see e g H Tse, *Doing Business After Brexit: A Practical Guide to the Legal Changes*, (Bloomsbury Professional, 2017).

3 THE CONSEQUENCES OF BREXIT FOR THE DISPUTE RESOLUTION SYSTEM AND ENFORCEMENT OF CROSS BORDER COMMERCIAL CONTRACTS

Regulation (EU) 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (Brussels I Recast), currently governs the enforceability of jurisdiction clauses and judgments between EU Member States. The Brussels I Recast enables civil courts in any EU member state the power to give a judgment which can immediately be enforced in the jurisdiction of any other member state, without the intervention of the relevant court of that member state. With regards to the legal framework that governs choice of law clauses, the provisions contained under the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) and the Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) are currently applicable. Similarly, the above legal framework recognises the validity and enforcement of choice of law clauses within EU Member States. Other EU Regulations may also apply to cross-border transactions such as the cross-border service of documents and taking of evidence (Service Reg 1393/2007 and Evidence Reg 1206/2001). There are also further specialised Regulations that may apply to cross border transactions such as Regulations on jurisdiction, recognition and enforcement in the area of cross-border divorces and matters of parental responsibility (Brussels II bis Reg 2201/2003); on maintenance (Reg 4/2009) and on cross-border insolvencies (Reg 1346/2000, replaced by Reg 2015/848 (recast)).

As an EU Member State, the UK is also party to international conventions in the area of civil and commercial law matters such as the 2005 Hague Convention on Choice of Court Agreement (The Hague Convention) and the 2007 Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Law Matters (Lugano Convention) which encapsulate to a certain extent a similar legal framework as the Brussels I (Recast). The EU, Norway, Iceland and Switzerland are also parties to the latter Convention. For the purpose of this analysis, the following discussion will focus on the validity and enforcement of jurisdiction clauses following a "no deal" Brexit.

The legal framework contained under the Brussels I Recast allows a judgment given by an English court to be enforceable in any other EU Member States without the need for exequatur. The system thus ensures predictability and certainty for commercial actors. Commercial actors can enforce their judgments in the jurisdiction of any other EU Member States. The system is essentially based on mutual recognition. The UK clearly acknowledges the need for a cooperation system to remain in place upon the UK leaving the EU. The House of Lords in the UK published a report on cross-border civil and commercial disputes in March 2017 (UK House of Lords, European Committee "Brexit: Justice for families, individuals and businesses" 17th Report of session 2016-2017) which clearly states that departing from the current EU legal framework would create uncertainties for businesses and will also have a negative impact on London's legal market. The European Commission echoed this finding and issued a notice to stakeholders, emphasising that the UK's exit from the EU will create "considerable uncertainty" for businesses and that practitioners should expect significant "legal repercussions" following Brexit. More recently, the UK Government published a position paper in which it sets out its priorities for a future EU-UK cross-border litigation regime (UK Government, "Providing a cross-border civil judicial cooperation framework: a Future partnership Paper"). The position paper recognises the importance of cooperation in relation to cross border litigation. Paragraph 9 of the same paper states that:

> *A close cooperative relationship between the legal systems of the UK and the EU is of mutual importance, and thousands of EU corporations have established a place of business in the UK. Companies across the EU choose to use English law to govern their affairs and it is the most popular contract law used for conducting international transactions. Research indicates that English law governs around 40 per cent of global commercial arbitrations.*

Given that London currently represents a global hub for international litigation, one can assume that the UK Government will wish to maintain that pre-eminence by retaining close links with the EU system. But while a number

of post-Brexit scenarios are possible, none offers the same degree of predictability and uniformity as the current system.

In the situation of a "no deal" scenario, Brussels I Recast will cease to apply to the UK upon the UK leaving the EU in March 2019. As explained above, the UK Government has already issued some guidance which suggests that there will be a level of co-operation between EU and UK courts, but at the time of writing this level of co-operation remains quite vague and uncertain. The government could decide to replicate the provisions contained in the Brussels I recast but the difficulty is that the Regulations depends heavily on mutual recognition between states to be imported unilaterally. As a result, the continuity of such rules to apply in the UK would require some form of international agreement treaty, either with the EU, or with Member States individually through bilateral agreements. Indeed, without a formal agreement, there would be no obligations on other EU Member States to enforce judgments rendered by UK courts. This situation may trigger substantial uncertainties for commercial parties. Alternatively, it may be possible for the UK to accede to the Hague and Lugano Conventions, but this would require the consent of all current signatory states, including all 27 EU Member States. The Hague Convention provides a similar legal framework to the Brussels I Recasts. Signatories to the Hague Convention recognise the validity of jurisdiction clauses selecting other Hague signatories, and also enforce judgments in any of the Hague jurisdictions (see guidance from the UK Ministry of Justice "Handling Civil Legal Cases that involve EU Countries if there is no Brexit deal", 13 September 2018). However, the Hague Convention offers more grounds on which a party can object to the registration of their judgment for enforcement, so enforcement may be longer and more costly than under the current Brussels I Recast. There are also some fundamental differences between Brussels I Recast and the Hague Convention. The scope of application of the Hague Convention is more restricted than the Brussels I Recast. For example, tort claims and business to consumer relationships which currently fall within the scope of Brussels I Recast are excluded from the Hague Convention. Accession to the Lugano convention may also be problematic because the UK would need to become a signatory as an independent state. There are restrictive accession criteria. If the UK decides to become a signatory of the Lugano Convention, it would also need to "pay due account" to the Court of Justice of European Union (CJEU) rulings on the interpretation of the Convention. The Lugano convention also differs in some extent from the Brussels I Recast in still requiring exequatur proceedings.

Certainly, EU Member States and the UK have a continuing interest in ensuring their own judgments are enforceable in the UK and in other EU jurisdictions. One would expect that the EU and the UK are likely to co-operate even if the UK does not accede to the Hague Convention and/or Lugano Convention as an independent Member State. However, given that the Brexit date is fast approaching and in the absence of a confirmed individual membership to these alternative legal frameworks, parties to international contracts may seek alternative contractual dispute resolution options to avoid the risk of uncertainty caused by Brexit. Although more expensive, commercial parties may want to rely on arbitration as a possible alternative dispute resolution system. Arbitration should not be affected by Brexit because both Brussels I Recast and the Hague Convention exclude it from their scope. A recent report from Thomson and Reuters surveyed one hundred chief financial officers across the UK and Europe which revealed that only 10 per cent of surveyed businesses have swapped jurisdiction clauses for arbitration clauses, but of those, half indicated that uncertainty over Brexit was a quite significant or very significant factor in their choice. However, the report also emphasises that despite arbitration being considered as a potentially Brexit-proof option, arbitration may not be appropriate for all cross-border disputes (Thomson Reuters report, "35% of businesses choosing EU courts over UK due to Brexit uncertainty", 23 July 2018).

4 THE CONSEQUENCES OF BREXIT ON LONDON AS THE MAJOR HUB FOR RESOLVING CROSS BORDER DISPUTES

4.1 The attractiveness of English courts in resolving cross-border commercial disputes

London boasts about being the preferred forum for resolving disputes. There are many reasons for this. First, commercial parties generally elect English law courts to resolve their commercial contractual disputes because English courts will ensure that their agreements are upheld. Indeed, English courts adopt a non-interventionist approach regarding commercial contracts. Judges adopt an objective approach in assuming equality of bargaining power between commercial parties. For example, in Belmont Park Investments *Pty Ltd v BNY Corporate Trustee Services Ltd* [2011] UKSC 38, [2012] 1 AC 383 at [103], Lord Collins explains that: "[d]espite statutory inroads, party autonomy is at the heart of English commercial law."

In *Cavendish Square Holding BV v El Makdessi* [2015] 3 WLR 1373 at [35], Lords Neuberger and Sumption stressed the need to protect party autonomy in commercial transactions as opposed to consumer transactions. This approach is justified by both the principles of freedom of contract and sanctity of contracts. Secondly, English courts have consistently favoured considerations of certainty and predictability over considerations of fairness and justice. For example, in *Vallejo v Wheeler* (1774) 1 Cowp 143 at [153], Lord Mansfield explains that:

> *[i]n all mercantile transactions the great object should be certainty: and therefore, it is of more consequence that a rule be certain, than whether the rule is established one way or the other. Because speculators in trade then know what ground to go upon.*

In *Mardorf Peach & Co Ltd v Attica Sea Carriers Corpn of Liberia, The Laconia* [1977] AC 850 at 878, Lord Salmon states that: "Certainty is of primary importance in all commercial transactions."

Finally, Lord Bingham in *The Golden Victory* [2007] UKHL 12, [2007] 2 WLR 691 at [1], states that: "[T]he [majority's] decision undermines the quality of certainty which is a traditional strength and major selling point of English commercial law."

English contract law is also said to be flexible. English courts generally recognise and take into account commercial customs and usages in interpreting commercial contracts (see eg P Devlin, "The Relation Between Commercial Law And Commercial Practice" (1951) 14 MLR 249, 251). Commercial customs and usages must be reasonable, consistent with the express terms of the contractual agreement and must be universally recognised in the trade as a binding custom.

In the event of a "no deal" Brexit, one may enquire whether commercial parties may be deterred by the uncertainties introduced by Brexit and whether they might decide to depart from English courts as their choice of jurisdiction. From the UK's perspective, it is arguable that the position of London as the major hub for resolving commercial disputes will remain unchanged after Brexit, whatever the outcome. Courts will arguably continue to provide speedy, inexpensive and efficient judgement. Courts will also continue to protect parties' autonomy, certainty and predictability. On the other hand, in the context of cross- border transactions, the recent survey by Thomson Reuters looked into the impact of Brexit on dispute resolution clauses. It found that 35 per cent of respondents said that the uncertainty around Brexit had changed their approach to dispute resolution clauses. The report provides that:

> *Of the 65% who said that they or their clients had not already changed their approach, 39% intended to review the dispute resolution clauses in their or their clients' international contracts if there is no significant progress in negotiation of the future jurisdiction and governing law regime that will apply after Brexit by March 2019. However, many respondents acknowledged compelling reasons why English jurisdiction may remain a positive choice even after Brexit—51% of those surveyed identified clarity, fairness and predictability of the substantive law to be a key factor in selecting a choice of jurisdiction, and certainly this is an area where English law still enjoys a clear lead over many EU jurisdictions* (Thomson Reuters Report "35% of businesses choosing EU courts over UK due to Brexit uncertainty", 23 July 2018)

4.2. Cross-border litigation and Brexit: new opportunities for continental courts?

In the event of a "no deal" Brexit scenario, the decisions rendered by UK courts will no longer be automatically enforced in other EU Member States and will need to be exequaturally enforced as already explained in the above discussion. Such procedure may appear burdensome for some international businesses and could introduce legal risks and uncertainties. The level of uncertainty surrounding the impact of Brexit on cross border litigation, may thus open up opportunities for other jurisdictions to become more legally attractive. The example of France may be one amongst others but will serve as illustration for the purpose of the argument.

The French Minister of Justice saw an opportunity in the prospect of Brexit and explored ways to make Paris "more attractive in the eyes of the world" as a major hub for resolving cross border litigation (Ministry of Justice press release, 12 February 2018 available at http://www.justice.gouv.fr). On 7 February 2018, a new international Chamber of Commerce was created within the Paris Court of Appeal with competence to deal with cross-border litigations. The creation of this new commercial court unquestionably follows the logic of modernisation and of rendering France and French law more attractive. France recently modernised its law of contract in an Ordinance dated 10 February 2016 to become more attractive and competitive. The Attorney General of Paris, Catherine Champrenault, commented that the London market of legal activities generated a turnover of 16 billion euros in 2016 making London the number one hub for legal and financial products and services (Le Monde du Droit, "Création d'une Chambre Internationale: Paris au centre de la résolution des litiges commerciaux", press article 9 February 2018). The Financial Markets Association of Europe estimates that €1.3 billion of banking assets are based in the UK and are associated with the cross-border supply of financial services and products to various countries' customers (Association for Financial Markets in Europe (AFME), "L'impact du Brexit sur les contrats de service financiers transfontaliers", paper published in September 2017). These services and products are supported by a considerable number of contracts that may require litigation in case of disputes.

The newly created Paris International Chamber of Commerce is competent for all disputes relating to international trade contracts subject to French law or that of another state. The use of English language will be permitted during the hearing and for exchange of documents relating to the proceedings. Nonetheless, if these documents are written in English, they will have to be accompanied by a translation into French. The use of English is not exclusive and another language may be chosen by the parties. The use of a foreign language before the French courts is not in principle prohibited. Article 23 of the Code of Civil Procedure provides that: "The judge is not obliged to use an interpreter when he knows the language in which the parties express their views." Therefore, the parties, their lawyers and the magistrates will be able to express themselves in a foreign language since a simultaneous translation can be provided if required. While the debates can take place in a foreign language, the proceedings and decisions will have to be drafted in French. Indeed, Article 2 of the French Constitution

states that "the language of the Republic is French" and since the Villers-Cotterêts Ordinance of August 1539, the French language is the only language authorised for any documents relating to proceedings as well as for case reports rendered by French courts. As a result, the new international court will have to render its decisions in French but they may be, if required, accompanied by a translation into a foreign language.

In the wake of Brexit, the flexibility to accommodate the use of foreign languages and the use of foreign laws including the English common law of contract may attract some of the international litigation to this newly created international court. The argument is not to say that one legal system is better than the other. Civil and common law jurisdictions are examples of legal systems which provide different contract and commercial law rules. Practice shows that commercial operators will choose the law of the court that is hearing the case on the basis of the contract's underpinning economic bargain. The choice made by contractual parties is based on coherent and pragmatic criteria. Indeed, the law of a particular legal system may be better suited to govern the particular commercial transaction. According to this approach, the creation of this new court may be envisioned as an opportunity to promote continental law and more specifically French law, especially since it was recently modernised to better suit the needs of commerce. The creation of this new court may only demonstrate the ability of French judges to speak English or to know English law; only time will tell whether other jurisdictions such as France can demonstrate they have competent jurisdictions that can meet the expectations and requirements of international trade actors.

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