

Dispute Resolution in Uncertain Times

P.R.I.M.E. Finance conference, The Hague, The Netherlands

Lord Briggs, Justice of The Supreme Court

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Madam Deputy Mayor, Sir David, ladies and gentlemen, good morning.

1. It is a real pleasure and a privilege to be invited to attend and speak at this meeting of distinguished experts in finance law. I do not by any means regard myself as a qualified expert, in this or any related field. Never having been a law graduate, progression in a career as advocate and then judge has for me involved a constant widening of my legal horizons, so that I can now say with complete confidence that, having reached the most junior position in the UK Supreme Court, I am a jack of many legal trades, but master of none. And lest any of you should regard this confession of incompetence as an unreliably subjective view, just look at how comprehensively I was overruled last year by the Supreme Court in the latest round of the Lehman litigation: namely the *Waterfalls* case.
2. Nonetheless, almost 40 years' involvement in financial dispute resolution in court, in arbitration and in ADR has, until very recently, quietly imbued me with the settled perception that, in this field, there was an unstoppable move towards what I will loosely call globalism. By that I mean a many-faceted trend to treat both the dispute resolution market and the services to be provided for it as based upon a recognition that banks and other financial players live and do business on a world stage, rather than merely in jurisdictions defined by the territorial boundaries between sovereign nation states.

3. PRIME Finance may fairly be described both as a creature of this trend, and as an influential force in furthering it. I expect that most of you shared this perception of ever-increasing globalism, and could give numerous examples of instances in which you played a part in furthering it. For me, I suppose that those which stick out are, first, my many cases in which both as advocate and judge I tried to make workable sense of cross-border structures regulating jurisdiction such as the Brussels Convention (and its 2 successors), the Insolvency Regulation and the Winding up Directive. In some cases, such as *Harrods (Buenos Aires)* in 1992 I failed to do so as an advocate. It took 13 years for what turned out to be the wrong turning made by the Court of Appeal to be put right, by the CJEU in *Owusu v Jackson*. In others, such as *Re Rodenstock* in 2011, I may have made a significant contribution. The international jurisdiction of the English court to make and approve reconstructions for failing but still solvent companies which I there affirmed has survived to this day, I hope on a principled and pragmatic basis.

4. Secondly, my other life as a mediation widower (i.e someone married to a commercial mediator) means not merely waiting till the small hours for the beloved to finish her mediation in London or elsewhere in England, but enduring the much longer absences associated with her mediating, and teaching mediation, all over the world. No doubt the spouses of recently retired English commercial judges will have similar stories to tell about their partners disappearing on a frequent basis to lead, or sit in, commercial courts in the Middle and Far East, and in arbitrations almost anywhere. The recent Rule of Law conference in Qatar, attended by chief justices and distinguished lawyers from an astonishingly wide range of common law and other jurisdictions (including Iran and

China), was a vivid demonstration of a worldwide desire to share ideas and resources in the furtherance of this cause.

5. Thirdly, the inexorable advance of digitisation and the internet as the replacement for paper as the main means of communication within dispute resolution is also proceeding on a semi-global basis. By that I mean that we all share the same global technological base, and that those jurisdictions in the forefront of the digital revolution in dispute resolution, including the UK, Canada, the USA, Pakistan, China and here in the Netherlands are all collaborating and sharing experiences in the complex endeavours to digitise, and thereby make more accessible, justice in our separate national jurisdictions. I confidently predict that online courts and tribunals around the world will eventually be much more convergent in their procedure than courts which are shackled to the paper-based processes which will be replaced.
6. No-one would suggest that the long march towards globalism (called universalism in the insolvency context) has been a walk in the park, still less downhill all the way, but I do believe that most of us would, until recently, regard it as having been, with all its ups and downs, pretty near inexorable, and a necessary and inevitable response to the increasingly global nature of international business, both in trade and finance.
7. But I doubt whether, in 2018, most of us here would still take the further onward march of globalisation in dispute resolution as a given, in quite the same way as we may have done in the past. For me, the first major warning sign was the big step back from universalism in the insolvency context wrought by the UK Supreme Court in the *Rubin*

case in 2012. Universalism had been proclaimed as a goal of the common law, famously by Lord Hoffmann sitting in the Privy Council in the *Cambridge Gas* case in 2006, and again (but not in the majority) in the *HIH* case in 2008. In a recent lecture Lord Neuberger described common law universalism as having been “killed off” by *Rubin*, or at least “severely circumscribed”, depending on your point of view. The reasoning (if not the outcome) of the *Singularis* case in the Privy Council in 2014 suggests that the circumscribers are in a wafer-thin majority over the killers, although three out of the five justices involved in that case have now retired, and a fourth leaves us later this year. But we then retained the comfort that, at least within the EU, the Insolvency Regulation and the Winding-up Directive appeared to secure a large measure of universalism, consistent with the view of the intending killers of common law universalism that the underlying goal was, although desirable, best achieved through international treaty and domestic legislation rather than by judge-made development of the common law.

8. The decision of the UK to leave the EU, i.e. Brexit, makes it necessary to revisit that question. It is no exaggeration to describe the UK (and England in particular) as having performed a pivotal role in the advance of globalisation in dispute resolution. The UK has always been an important player in international organisations such as UNCITRAL and the Council of Europe. Lawyers, judges and mediators from the UK have been instrumental in spreading models of dispute resolution based upon common law and associated procedure around the world, for example assisting in the setting up of English law commercial courts in Dubai, Qatar and now Kazakhstan , training mediators to use the UK facilitative model all over the world, and of course playing a major role in international commercial arbitration. In particular, the UK’s membership of the EU was, in the view of many, the essential glue attaching the mainly civil law jurisdictions of the other member states to the common law world, including for this purpose the USA.

9. Time has (at least until now) tended to show that the strengths of the common law have largely survived the UK's membership of the EU, at least outside the areas of EU competence, such as contracts made by international traders and ISDA regulated derivatives. In fact, I would say that the respect of the common law for party autonomy in commercial transactions has if anything strengthened in England in recent years, both in the purely contractual field, as exemplified in 2015 by the *Cavendish Square / Parking Eye* case on penalties, and in 2011 on the impact of insolvency upon financial arrangements, in the *Belmont* case which, depending on your point of view, killed-off or severely circumscribed the anti-deprivation principle.
10. The third major reason for doubt about the continued march of globalism in dispute resolution may be summarised as the advance in several countries of what may be described as an "us first" approach to national engagement with global problems. In the USA it is called "America first", and manifests itself in the USA's decision to withdraw, or its consideration whether to withdraw, from major global agreements, such as NAFTA, the Pacific Trade Partnership, the Climate Change Accord and the IRAN anti-nuclear proliferation agreement, wherever it appears to suit the interests of the USA to do so. These changes may not impact directly upon dispute resolution, but they may herald a worldwide retreat from an earlier ambition to find global solutions to global problems, with adverse consequences for the continuation of the current view that a global approach to dispute resolution is a Good Thing which can safely be taken for granted.

11. But can we now say that, from 2019, the UK will continue to be a major player in the globalisation of dispute resolution? I want to look at this question under the following headings:

- a. The role and development of the common law
- b. Choice of law and applicable law
- c. Choice and Allocation of jurisdiction and the enforcement of judgments (without I hope trespassing too much upon the panel session on Brexit later this morning)
- d. Insolvency and bank failure
- e. Arbitration
- f. ADR

The Common Law.

12. I have already described the common law as having largely survived the UK's membership of the EU, at least in the many important areas unaffected by EU legislation. In fact "survived" is rather too mealy-mouthed a description of the effects of that relationship. In some respects the common law has benefited from its enforced exposure to European jurisprudence, and in important areas refreshed itself by doing so. I will give just two examples. The first is what the common law would call non-commercial confidence (i.e. rights and obligations of confidentiality outside a business context), but which European jurisprudence unashamedly calls privacy. The traditional doctrine of the common law proved to be seriously inadequate in the modern world of highly intrusive journalism. Most would say that the wholesale incorporation into the common law of the qualified right of privacy enshrined in Art 8 of the ECHR has proved a more fair and (dare I say it) equitable basis for adjudicating upon such issues.

13. The second is proportionality. This principle underlies the European approach to the enforcement of, or derogation from, qualified individual human rights in the face of Government action. The jury is still out about how far this new-ish doctrine has ousted, or may eventually oust, the traditional common law recourse in public law to the narrower principle of irrationality. But again, no-one would doubt its current importance, and few (apart perhaps from Government) would challenge its advantages as a common law tool.
14. It is to be noted that both these “refreshments” have come not from adherence to EU law as such (as laid down by the Luxembourg court), but rather from the requirement of the UK courts to “take account” of the development of Human Rights Convention jurisprudence by the Strasbourg court, imposed by the HRA. It is fair comment that whereas the common law is simply displaced where it conflicts with binding EU law, a “take account” requirement more easily allows the relevant foreign jurisprudence to be used for the development of the common law, as in the two examples given above.
15. I have no reason to think that European jurisprudence will not continue to play an important part in the further development of the common law, as it has always done. Common law was, so say many legal historians, originally an import from Europe, as part of William the Conqueror’s baggage. Most of the common law doctrines which we still call equity originated in the canon law of the then European catholic church, and from the medieval church courts which applied it. Much of our commercial law was, after its abolition as separate law, with separate courts, in the form of the *lex mercatoria* in the seventeenth century, re-imported from mainly European sources by the great Lord

Mansfield and his successors in the eighteenth century, a process which continued throughout the nineteenth century, as is exemplified in *Goodwin v Roberts* in 1875. After citing from Florentine and Venetian medieval mercantile custom and from then contemporary German and French jurisprudence, Chief Justice Cockburn said that this was a process by which proven international usage among merchants and traders could become engrafted upon the common law. More recent cases in which the common law has been shaped by having regard to European jurisprudence are legion. They include the penalties case referred to above, the development of the public law doctrine of legitimate expectation, and even Lord Diplock's now classic common law division of contracts into unilateral and synallagmatic used terms borrowed from the French Civil Code.

16. So we need have no fear that either Brexit, or the advance of "us first" attitudes to global problems will cause the law of the UK and the common law in particular, to retreat into some parochial back alley. As Lord Neuberger put it in a speech last June:

"English substantive and procedural law, our common law which is so attuned to the needs and realities of the commercial world, will remain as attuned to the demands of international business as it ever was. Indeed, left, once again, to our own devices, I would suggest that our law will in some respects be able to react more quickly and freely to changes and advances in our fast-changing world. Brexit does not alter the fact that lawyers and judges in the UK are as internationally minded and expert as they ever have been. Indeed, like any significant change, Brexit will operate, and it is already operating, as a spur to encourage all involved in the provision of legal services in London to strive to ensure that those services are even better than they already are."

Choice of Law and applicable law

17. This is something currently governed in the UK by the Rome I and II Regulations, by reason of its membership of the EU. Most commentators regard Rome I as a considerable improvement upon the Rome Convention, to which the UK might revert if it exited the EU and did nothing else. But the Government has already announced (last August) that it plans to incorporate the substance of Rome I and Rome II into domestic law. There had been some concern (particularly from the Law Society of England and Wales) that uncertainties associated with Brexit were adversely affecting the choice of English law (and jurisdiction). But I agree with Lord Neuberger's view (in the passage quoted above) that, if anything, Brexit should make English law more attractive as the chosen law in the commercial and financial context. His reason was that those who frame English law would gain the freedom to react to changes in the market place more quickly and freely than when subjected to EU law. I would add, as I have said elsewhere, that if a main reason for choosing English law is its relative predictability and certainty compared with civil law, then detachment from EU law, which is currently a development from mainly civil systems, ought to fortify those perceived advantages. This is I think a classic example of the propensity for uncertainty to cause more harm in the short term than any of the possible outcomes, once settled, will do in the long term.
18. I was surprised to discover, when the judge in charge of the *Lehman* litigation in London between about 2009 and 2013, how dominant was English law as the law of choice for ISDA governed derivatives, in fact sharing a virtual duopoly with New York law. I do not know where the statistics have trended since then. But I can see no obvious reason why that should be about to change, once the Brexit-driven uncertainties have been resolved. Of course choice of law is probably not made purely in the abstract. Rather it

is likely to be considered in conjunction with choice of jurisdiction, since it is not obviously rational to choose a system of law different from that habitually applied by the court which will resolve any relevant dispute, although the flexibility of arbitration procedures may not make that so unlikely.

Jurisdiction and the Enforcement of Judgments

19. This and the next heading are I think much the most significant aspects of the uncertainties created by Brexit, and by any more general cultural shift from globalism (or universalism) towards an “us first” approach. This is no doubt why they are a main part of the subject matter of the panel session later this morning.

20. Prior to becoming a member of what is now the EU, English law dealt with problems of jurisdiction by a combination of a wide view about jurisdiction in theory, qualified by the essentially pragmatic doctrine of *forum conveniens*. Enforcement of judgments was a very mixed bag, the main elements being arrangements originally made within what was then the British Empire, continued with some of its now dependent territories and to a lesser extent within the membership of the Commonwealth.

21. Signing up to the Brussels Convention introduced virtually automatic reciprocal enforcement of judgments as the agreed quid pro quo for a common and (supposedly) predictable allocation of jurisdiction, with *lis alibi pendens* as the tie breaker. It was certainly a shock to the system, and produced odd and I think largely unforeseen results when the contest for jurisdiction lay between a UK court and the court of a non-member state. But I think most would agree that *forum conveniens* was (however perfect in theory) so unpredictable and expensive to operate that the rather strict rules of the Convention were preferable most of the time, even if they led to various forms of abuse, such as the

claim for a negative declaration in a jurisdiction with long waiting lists and slower procedure (sometimes known as the Italian torpedo). Eventually the UK became a vigorous participant in the reform and refinement of the Brussels regime, particularly in favour of the recognition of party choice of jurisdiction, now reflected in the Recast Brussels Regulation. No one would doubt that the reciprocal enforcement of judgments has been beneficial.

22. But this regime is expressly based upon the essentially EU notion that the territory of the member states is, despite its varieties of national law and procedure, best regarded as a single jurisdictional area. Furthermore the exclusive jurisdiction of the CJEU in its interpretation is also a foundation stone which is unlikely to be disturbed. The Brexit process is, at least probably, antipathetic to both those concepts, because of the large part played by the goal of regaining, rather than sharing, British sovereignty. The available choices appear to lie between a Danish style solution, by which the UK would voluntarily join the Brussels Regulation regime, a Lugano type solution, or the reversion to common law rules, only slightly fortified by rejoining the Hague Convention 2005, as a member separate from the EU.

23. The current thinking of the UK Government, which largely concurs with the view of the House of Lords EU Committee, favours a Brussels type regime in principle, but its implementation faces the formidable obstacle constituted by the probable demand of the EU 27 that the CJEU retain its suzerainty, while at the same time deprived of UK involvement, either in the form of members of the court (including Advocates General) or the locus standi of the UK Government to make submissions, which it has traditionally done with great vigour. That is what Denmark and (to a lesser extent) the non-EU members of the Lugano convention have signed up to. The current form of the

Lugano convention critically lacks the benefit of improved recognition of party choice of jurisdiction now to be found in the recast Brussels Regulation. An attempt to join either of those regimes will require the other members' consent to the terms. Meanwhile a reversion to the common law rules, coupled with the loss of EU wide reciprocal enforcement of judgments, has been described by commentators as a recipe for confusion, expense and uncertainty.

24. There are some, like my namesake (but not relation) Professor Adrian Briggs QC from Oxford, who think (my words not his) that this is all a storm in a teacup, and that there will be no adverse impact from Brexit either upon English private international law or upon London as a dispute resolution centre.

25. Certainly there is a lot being done at present to add to London's attractions, principally by the welcome recent creation of the Business and Property Courts of England and Wales, based in the Rolls Building and with outposts in major cities, linking together the formerly disparate but overlapping services of the Chancery Division, the Commercial Court and the Technology and Construction Court, with more convergent, modernised procedures, electronic issue and filing, (and eventually trial), and with the new specialist Financial List at the heart of it.

26. If I may be permitted a little plug for the UK Supreme Court and Privy Council, we already broadcast all our hearings live around the world on the internet. We are equipped to conduct all our hearings without the use of paper (although how far to use screens rather than paper in each case is a matter of choice for both advocates and justices, both screens and paper being available in every case). We are now encouraging

parties from overseas in our Privy Council jurisdiction to use video conferencing from their own countries, rather than undertake the expense of coming to a face to face hearing in London. It's a bit of a culture shock for all concerned, but it works fairly, even if one party is present and the other attends by video.

27. It is not for me to speculate about the outcome of the jurisdiction and enforcement of judgment difficulties associated with Brexit, and I will listen avidly to the panel discussion which follows. All I would say is that getting the right solution is a complex and difficult task, in the furtherance of which the experts in PRIME Finance could and indeed do play a very influential part.

Insolvency, Reconstruction and Bank failure

28. My last comment is even more true of this subject, which is, in a sense, a sub-set, but a very important one, of the last. It is an enormous subject, and if we get the solutions wrong, we do so at our peril. Time, and the need to leave the field clear for the panel speakers, prevents me even from an overview. But I would offer just this one (perhaps optimistic) reflection, based on my *Lehman* experience. That was an international bank failure of hitherto unprecedented proportions, in which the achievement of cross-border dispute resolution without conflict between different jurisdictions was both vital, and unsupported to any great extent by jurisdiction conventions, regulations or treaties. Judges like me and my distinguished colleague Judge Peck from New York, here today, could easily have been, figuratively speaking, at each others' throats. But this simply didn't happen (or at least not in my London-based experience). There was some cross-border judicial consultation, but the main reason why disputes about the insolvency of a global business centred in the USA, the UK, the Far East and elsewhere were (and

continue to be) adjudicated without judicial conflict about jurisdiction appears, to me at least, to have stemmed mainly from the professionalism and common sense of the office-holders and major litigants concerned. That cannot of course be guaranteed, and the recent descent of Carillion into an old-fashioned compulsory liquidation in the UK, with the Official Receiver as liquidator, and with a very substantial overseas business, may provide a testing ground in which the recent departure of the common law from full-blooded universalism may produce a very different outcome. Let's wait and see.

Arbitration

29. I cannot see why Brexit, or any more general "us first" move from a global to a national approach to global problems should stand in the way of the further advance of arbitration as a, or even the, preferred method of choice for international commercial and financial dispute resolution, at least outside the field of insolvency and corporate reconstruction. On the contrary. Whereas the reciprocal enforcement of national judgments may raise the hackles of those determined to preserve national sovereignty from what they call foreign bondage, arbitration awards carry no stamp of origin in any particular national justice system. They are the means of determination of a dispute which have been freely agreed by the parties. It is therefore no surprise that the New York Convention now makes arbitral awards more easily enforced across borders around the world than any judgments convention or arrangement between member states for the reciprocal recognition and enforcement of the judgments and orders of their national courts.

Mediation and other ADR

30. The same may be said of agreements reached during mediation and other types of ADR, at least for as long as the process itself remains voluntary, (as mediation still is in the UK's civil procedure despite proposals to make it compulsory). Even if the process becomes compulsory, an agreement reached at the end of it is still the parties' own chosen resolution of the dispute, unless the process itself can properly be described as imposing coercion or duress. It is true that there have been some EU initiatives to strengthen mediation, such as the Mediation Directive, but these have been of less effect in member states like the UK which were already leaders in the mediation field, than in states where mediation has yet to take firm root.
31. But I must end with a word of warning. If one effect of the present uncertainties is that there is a large shift in the current balance between Courts on one hand and Arbitration and ADR on the other, in favour of the latter, for the resolution of cross-border commercial and financial disputes, then transparency and open justice will be the inevitable victim, because privacy lies at the heart of both arbitration and ADR, (and mediation in particular), while arbitration thrives upon restricting avenues of appeal. The just determination of disputes by independent judges in public courtrooms, and the publication of the reasons for their judgments, is a corner stone of the rule of law, as much in the commercial and financial spheres as it is in crime and public law. However complex the law has become, there can be no rule of law unless its development takes place in public, for all to be able to see and learn what the law is, and for academics to be able to apply and proclaim their invaluable criticism of judicial thought processes.
32. This is in particular true of the common law, which develops by the creation of firm precedent in the published judgments of the higher courts in those countries which use

it. This process is what guarantees both the relative predictability of the common law, and its ability to respond flexibly to change in the business and financial world.

33. I am not suggesting that the current balance between public and private means of dispute resolution in the financial and commercial sphere has yet seriously impacted upon the transparent development of the common law. But there have been times when it has in other spheres. For example there came a time in a nameless common law jurisdiction on the far side of the world when almost all determinations of quantum in personal injury disputes occurred in mediation, to the point where no-one outside the staff in the key insurers or the few specialist practitioners knew the price of a leg, and arm or an eye. This cannot be good for the rule of law, or for the common law as a system of choice.

34. If the advance of “us first”, whether because of Brexit or other moves away from sharing jurisdiction, does lead to private arbitration and private ADR taking over from public courts as the main means for the resolution of cross-border commercial and financial disputes, then ways will need to be found to remedy the deficit in transparency that will come to pass as a result. This may perhaps include the newly created (but as yet unused) jurisdiction in the Business and Property Courts to determine by declaration legal issues of strategic market importance without there being an underlying dispute. It may call for a freeing up of routes of appeal from arbitrators on questions of law of general public importance, or some relaxation of privacy which might, for example, permit the publication of anonymised awards.

35. These problems of reduced transparency lie, at the moment, in the future. But PRIME Finance, and this conference in particular, bring together a unique body of international experts well qualified to address these challenging questions. They are unlikely to yield to quick or easy solutions. So let us not bury our heads in the sand, but rather start work on them now, even if the concerns which I have outlined do not in fact materialise.