Thomas Sharpe QC

Commercial Law Post Brexit

Next steps for the UK

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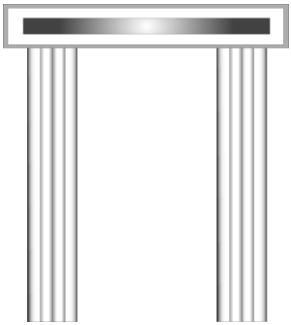

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His practice covers litigation and advice in UK and EU cartel proceedings, abuse of dominant position, state aids and UK and EU merger proceedings, spanning competition law, utility regulation, judicial review and European law. He has recently advised on many aspects of Brexit and acted in the *Miller* case in the Supreme Court.

Preface

I am not one of those who believe that Brexit is bringing forth an apocalypse. At the risk of sounding complacent, I think the economic changes will be less marked than some think. Nor do I think I am being Panglossian in saying that the economic effects of Brexit will be beneficial in the medium to long term. From my discussions with American, Japanese and German clients I do not foresee any corporate emigration from the UK; nor I do not see the UK acquiring pariah status in the competition for inward investment; I do not envisage any decline in economic activity or increase in unemployment; or any fiscal crisis. That is my view of the background to commercial law, post-Brexit.

Thomas Sharpe

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The challenges

For the Commercial Bar there are distinct challenges. At a general level, not necessarily all caused by Brexit but certainly exacerbated by the robotic and slow process of disengagement, there is no doubt that other would-be centres of litigation and legal advice are taking advantage of the uncertainty to sharpen up their acts. We know that (I am sure well-meaning) doubts have been expressed about the utility of "English choice of law" clauses going forward, fuelled by doubts about future enforcement within the EU (see below). We also know, for example, of the Dutch attempts to provide a competitor to the Commercial Court, with proceedings in English; we know of French attempts to reform their insolvency laws to attract business from London; and the German courts are keen to build on their expertise to win business in private and follow-on competition actions. This is not confined to the EU: Dubai has created a commercial court; Kazakhstan is doing so, assisted by recently retired English judges. Singapore wants to be a hub for international arbitrations (which is one reason why my own chambers opened up a highly successful annex there).

Some of this would have happened whatever. The financial rewards are just too high to be ignored. But there is little doubt that Brexit has provided opportunity, added impetus and credibility to the efforts to win a bigger slice of a major business. And, as someone who plies a modest living as a competition lawyer, I can hardly argue against competition. The UK courts have responded in various ways for cheaper and quicker procedures especially for SMEs (though many of the UK initiatives preceded Brexit). If this improves the speed and quality of adjudication, and lowers costs, everyone benefits, even clients.

London's pre-eminence

I am broadly optimistic that London will remain the preeminent commercial litigation centre in Europe, for the following principal reasons:

- The high reputation of the judiciary: they are non-political, very experienced litigators, of high intellectual quality, cannot be bought, and are hard working. These are characteristics which are not uniformly found elsewhere in the EU and cannot easily be replicated (and should not be jeopardised by short term cost savings on pay and pensions).

- Secondly, the English approach to commercial litigation is…well, commercial and, where necessary, pragmatic. People in banking, sale of goods, insurance, shipping, international trade and competition know they are dealing with judges who understand their world, and with a law that reflects it. The common law is remarkably pliable when needs must, and is supplemented by helpful procedural features such as disclosure and cross-examination which are not found everywhere. Note also the widespread multilateral adoption of English law clauses in standard industry agreements.

- Thirdly, London has a concentration of excellent legal advisers and a cohort of accountants, economists and expert witnesses, all established in the jurisdiction and familiar with it.

- Lastly, to a great degree Brexit leaves arbitration untouched and this draws on the concentration of talent I mentioned.

Tackling the problems

Brexit does however create a few problems which, ideally, will need to be addressed. I do not regard any of them as fatal to the future of London's role in commercial litigation but some resolution is desirable. Not all of them can be dealt with in this brief analysis but the more important are issues of jurisdiction and enforcement and how we continue to handle competition cases. There is also plenty of scope to deal with future trade disputes between the EU and the UK, possibly by creating a special tribunal to hear such cases.

Recognition and enforcement of judgments
Under the Brussels I Recast Regulation (Reg No. 1215/2012) – (the Brussels Reg) provides for the automatic recognition and enforcement of judgments throughout the EU. It also provides for actions to be brought in the member state of domicile as the default.

Following Brexit next year the UK will cease to be a member of the EU; the ECA72 will be repealed; the Lugano Convention (the 2007 treaty between the EU, Norway, Iceland and Switzerland) will cease to have effect on the UK's departure); Rome I (contractual obligations) and Rome II (non-contractual obligations) on choice of law will cease to have effect; and, as with all directly applicable regulations, the Brussels Reg will cease to have effect (Art 36.1-other member state courts would not enforce a judgment in accordance with its terms as the UK will no longer be a member state). Even if the UK legislated unilaterally to retain the terms of Brussels Reg in UK law, it would not be useful as the Brussels Reg is based on reciprocity and we cannot legislate to tell a foreign court what to do, possibly contrary to its own law. The Hague Convention 2005 on Choice of Court Agreements to which the EU signed on behalf of all Member States (save Denmark) would also cease to apply on the UK ceasing to be a member state. At the moment the EU, Mexico and Singapore are signatories and the USA, China and Ukraine have signed but are yet to ratify.

The short term transitional provisions are clear and agreed-existing rules should apply to proceedings started before withdrawal-both in contracts and tort (non-contractual liability).

After that: the UK wants to agree "*new close and comprehensive arrangements for civil cooperation with the EU*" (in its statement of 22 August 2017, para 2) which will reflect the current arrangements but outside the jurisdiction of the CJEU. The plan is for Rome I and II to be incorporated into domestic law on choice of law and applicable law and to accede to the Hague Convention, as the UK would be free to do so.

There is no argument that the absence of the provisions of the Brussels Reg would be unhelpful for all concerned. It would add to the costs of enforcement, deny UK claimants the right easily to secure an award in another member state; it might involve parallel proceedings in other jurisdictions as Art 31(2) which provides for a compulsory stay if proceedings have been started in another member state would disappear.

It would be left to the national laws of each member state to determine the enforceability of judgments made in a third country as, of course, they do for judgments made in the USA and elsewhere. But, and this is important, it would also expose undertakings domiciled in the EU to the possibility of being sued in London. This is difficult at the moment given the primacy of "domicile" under the Brussels Reg.

To resolve this, the UK could accede to the Lugano Convention without re-joining EFTA but only with the consent of the other contracting parties and maintain the status quo. This is a less satisfactory regime than the Brussels Reg and the national courts would have to pay "*due regard*" to judgments of the CJEU and national courts of the states bound by the Convention. And, as I mentioned, the UK could accede to the Hague Convention on Choice of Court proceedings in its own right.

The problem lies with the UK's unwillingness to accept direct CJEU jurisdiction in this area. An obvious (perhaps too obvious) answer is

to adopt the so-called Danish option-Denmark is not bound by the Brussels Reg-but applies this taking "*due regard*" of CJEU jurisprudence but, in the end, Danish courts have the right or duty in certain situations to refer matters to the CJEU.

That option would not be open to the UK as a non-member state, even if it were desirable. In its place the UK could press for a treaty between the UK and EU encapsulating the relevant terms of the Brussels Reg but to be judged in accordance with the principles of international law. It is, of course, highly likely in a cross border dispute involving an EU undertaking, for the matter to get to the CJEU one way or another at the behest of one of the EU parties. We should have no illusions about that.

In my view, it is not the end of the world if no agreement is reached. First, I doubt if easy enforcement within the EU, while highly desirable, is the decisive factor in choosing London as a venue in all but a few cases. There are so many other reasons to do so, as I have described. Absent the Brussels Reg we will move to the more flexible system which applies to existing litigation involving parties outside the EU, namely, seeking permission to serve outside the jurisdiction (Part 6.37 of the CPR and the gateways under PD 6B); enjoy more flexibility to invoke forum conveniens arguments to attract cases to London; and rejoice in the revival of the anti-suit injunction preventing parties from litigating abroad. EU domiciled defendants would routinely be brought before the UK courts or joined in proceedings and be subject to UK court judgments which, I guess, few would seek to ignore or avoid.

Competition cases and continuity

A similar but less important issue arises in competition law. The Competition Act 1998 is based upon what are now Arts 101 and 102 TFEU. Section 60 requires the Competition and Markets Authority, the Competition Appeals Tribunal and the courts to follow the CJEU so far as is possible and take account of the decisional practice of the Commission. Despite some alarmist nonsense that Brexit will mean a

relaxation of the UK competition rules, I know of no plans for any changes and none are justified.

The missing ingredient is the extent to which the UK courts and CMA will follow EU practice. Section 60 will, I think, be repealed but I suspect it will be replaced by a formula such as taking "*due regard*" or "*due account*" of EU law and practice if only to encourage continuity. Some regard this attempt at "*regulatory alignment*" as problem free. I think they are somewhat optimistic in thinking that this is a fairly low or shallow test. "*Have regard*" means (after the *Brompton Oratory* case) that you will need a good reasoned case to depart from the Euro-norm, whatever that may be. Over time, I hope the good law emerging from other competition jurisdictions, for example, Australia, New Zealand, South Africa, as well as the USA, will get due attention.

And there is another missing link in that at present the UK courts must follow EU Decisions in follow-on actions in the UK courts for damages, leaving only issues such as the quantum of damages to be decided. There is much to be said, pragmatically, for retaining this as it avoids litigation on matters which may well have been decided exhaustively in the Commission and in the European Courts though I have not always agreed with the outcomes of either body. This will further encourage litigation in London as the UK courts are traditionally welcoming to litigation by foreign parties and, to risk understatement, do not always require too strong a link to the UK before allowing proceedings.

The Commercial Bar, preparations and prospects

But in the great scheme of things, I cannot get too alarmed by the future prospects for the Commercial Bar. I do not share the thinly disguised pessimism of the Bar Council or Combar's views on provisions post-Brexit. Prudently, we should assume the worst and anticipate failure to reach an agreement on jurisdiction and plan accordingly: dust off our conflict of laws books, re-read the cases on *forum conveniens*, recover old pleadings on anti-suit injunctions (if by

chance we have retained them post-data protection) and perhaps look forward to many more EU domiciled defendants being brought before the UK courts. At the moment about 50% of all Commercial Court cases are between *wholly* foreign parties and from my (inevitably imperfect) observation, the majority of these are non-EU parties.) At the same time, we should acknowledge that there are many other jurisdictions that would love to have a fraction of London's litigation and legal services revenues and the biggest challenges to London lie outside the EU.

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