BREXIT: OPPORTUNITIES FOR POTENTIAL LITIGATION IN FINANCIAL SERVICES

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INTRODUCTION

Both prior to and since the UK referendum vote on EU membership there has been much commentary on the negative impact that Brexit will have on trade between Ireland and the United Kingdom. In particular, there has been much concern voiced about the impact that Brexit will have on the free movement of persons, goods and services, with considerable emphasis being placed on the effect that the imposition of tariffs will have on inter-state trade.

The United Kingdom and in particular the City of London, is a very significant participant in the global financial services system. In this regard the departure of the United Kingdom from the European Union will potentially have profound effects on the whole financial services centre.

Currently, an EU financial services provider with authorisation in one Member State is able to "passport" its services into the rest of the EU under the single market rules. Following Brexit, UK financial services firms will no longer be in a position to automatically rely upon their UK authorisation to carry on business throughout the European Union and it may therefore be necessary for them to relocate certain of their activities to an EU Member State and to obtain authorisation in that country if they want to be able to continue to freely provide financial services within the single market.

The converse is of course that for EU financial services companies, including Irish companies, wishing to provide financial services into the UK, they may no longer be able to rely upon their

EU authorisation in order to do business in the UK. As to whether their EU authorisation will be recognised in the UK will ultimately be a matter for UK legislation.

Whilst it is of course easy to focus on the negative impact that Brexit will have, sight should not be lost of the potential opportunities that Brexit may afford and in this regard we have already seen moves by various international financial services companies to move some of their operations from the UK to Dublin and/or to expand existing Irish operations.

In the field of commercial litigation including, in particular, financial services litigation, Brexit does afford some potential opportunities. The purpose of this paper is to focus on some of those opportunities and to discuss how best they may be exploited.

THE UK AS AN INTERNATIONAL LITIGATION CENTRE

England and Wales is probably the leading centre for dispute resolution worldwide. Furthermore, English law is the main choice of law for commercial contracts generally. In this regard, companies are twice as likely to choose English law over other governing laws for arbitrations, with a study by Queen Mary University[1] noting that English law was chosen by 40% of companies as compared with New York State law by 17% of companies. According to the CityUK,[2] gross fees generated by law firms in the UK increased by 1.3% in 2014/15 to a record of STG£30.96b, with the UK accounting for 10% of global legal services fee revenue and 20% of European legal services fee revenues.

The same publication noted that 27% of the world's 320 legal jurisdictions use English common law for their dispute resolution, meaning that English law is the most commonly used law in international business and dispute resolution worldwide.

[1] Queen Mary University, 2010 International Arbitration Survey.
[2] The CityUK, *UK Legal Services 2016*.

At the end of last year the same body[3]noted that in a survey of 500 commercial law practitioners and in-house counsel conducted by the Singapore Academy of Law in January 2016, 48% of respondents identified English law as their preferred choice of governing law in contracts, often in transactions with little or no link to the United Kingdom.

In a paper prepared by the UK Ministry of Justice in 2011,[4] reference was made to a survey carried out amongst various law firms, barristers, members of the judiciary, companies and academics located both in the UK and abroad who had occasion to litigate in the United Kingdom. The interviewees included persons and companies located both within the EU and elsewhere, including the United States, Russia and Latin America. Nearly all of those who actively litigate confirmed that they had been regularly involved in cross border claims in the previous five years, with 90% indicating that cross border work covered more than 60% of their cases and with 54% estimating that cross border work covered between 90% and 100% of their cases.

The importance of London as a centre for international commercial litigation is to be found in data coming from the Admiralty and Commercial Courts which suggests that since 2010 approximately 80% of all Commercial Court cases have involved at least one foreign party. Indeed, in almost 50% of all cases, all parties were foreign.

Business sectors where English law is frequently used include marine insurance, shipping, finance, trade, construction, energy, employment, banking, shares and debt issues and pensions. Of the 123 respondents interviewed by the UK Ministry of Justice who had chosen an English law clause in the last five years, 96 estimated that they used such a clause in between 60 and 100% of their work.

WHY HAS THE UK HERETOFORE BEEN THE FORM OF CHOICE?

In the paper, referred to above, which was prepared by the UK Ministry of Justice in 2011, it was noted that more international and commercial arbitrations take place in London under English

[3] The City UK – *The impact of Brexit on the UK-based legal services sector*.
[4] Ministry of Justice, *Plan for Growth: Promoting the UK's legal services sector*.

law than in any other city in the world. However, London is not only a centre for international arbitration, but is also a destination of choice for international litigation. Reasons for this included the following:-

1. The reputation and experience of English judges.

2. English law was described as the prevalent choice of applicable law in international commercial transactions.

3. The efficiency of remedies available under English law.

4. The procedural effectiveness of the English Courts.

5. The neutrality, independence and impartiality of the judiciary.

Of the motivations for choice of English law in commercial contracts, interviewees reportedly stated that it offered advantages for international transactions due to its quality, certainty, clarity and predictability as well as its efficiency in commercial disputes. Furthermore, comments highlighted substantive aspects of the law including the unequivocal recognition of the freedom to contract, the availability of commercially orientated remedies and the reluctance of Courts to rewrite commercial contracts.

It is also of note that the same survey emphasised the importance of London as a litigation centre for the financial services world, with the point being made that the English language is the *lingua franca* of international commerce.

The attractiveness of the common law as the basis for dispute resolution in commercial contracts can also be seen from the fact that in the relatively recently established Dubai International Financial Centre Courts, common law and the English language are applied, with the procedures being largely modeled on the English Commercial Court.

THE ATTRACTIVENESS OF THE IRISH LEGAL SYSTEM

With regard to the foregoing, most, if not all of the factors that commend English law and the English legal system to international litigants may also be found in Irish law and the Irish Court system. Like English law, our legal system is rooted in the common law, with much of our statute law also reflecting UK legislation. English case law is regularly cited in and applied by the Irish courts. In this context, it may fairly be said of Irish law provides the same quality, certainty, clarity and predictability for the resolution of disputes as to be found in English law.

Moreover, the procedures operated by the Irish Courts and the remedies available under Irish law are largely the same and as commercially orientated, as those to be found in the UK Court system, with our judiciary being equally reluctant to rewrite commercial contracts that have been freely negotiated by intelligent business people.

Also, not to be ignored is the fact that English, the *lingua franca*, of business, is the *de facto* language of our Court system.

In all of the circumstances therefore, Ireland has the potential to market itself as an ideal forum for international dispute resolution.

THE IMPACT OF BREXIT FOR UK LITIGATION

It must of course be recognised that even following Brexit, the United Kingdom will remain a very important centre for international commercial litigation and in many cases, it will be a matter of irrelevance to the parties as to whether the UK is or is not a Member State of the European Union. So, for example, if Company A is contracting with Company B and both entities are outside the European Union and neither entity has assets within the European Union, it will probably continue to be a matter of indifference to them, when choosing the governing law for their contract and in choosing the jurisdiction for dispute resolution, as to whether or not the UK continues to be part of the European Union.

Equally well however, for many parties, the fact that the UK will no longer be part of the European Union will be a matter of some considerable importance and relevance. An EU company that may in the past have been happy to agree to an English choice of law and choice of jurisdiction clause, may no longer be as willing to do so, for reasons outlined below.

In this regard, the CityUK has noted[5] that a key component of a jurisdiction's international competitiveness is the extent to which its Courts' judgments will be recognised and enforced internationally. Indeed, it was noted that when the Singapore International Court was first established, many commentators highlighted the fact that Singapore was a signatory to very few reciprocal agreements with other nations in respect of the enforceability of judgments and that that was a significant factor which affected the popularity of the SICC.

As a member state of the European Union, the UK enjoys the benefit of (a) the re-cast Brussels I Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters,[6] as well as the Lugano Convention, which, between them, apply broadly speaking to the EU and the EEA. Key features of these two instruments are as follows:-

a. Subject to certain exceptions, a defendant should be sued in the Member State in which he is domiciled (ie ordinarily resident). One of the exceptions is that in contract claims, the defendant may be sued in the place for the performance of the obligation in question, so that in a claim arising out of non-delivery of goods or services, the defendant might be sued in the country in which delivery of the goods or the provision of services was meant to occur.
b. Where the parties to a contract choose a particular forum for the resolution of any disputes, the courts of that Member State will have exclusive jurisdiction, even where none of the contracting parties in domiciled in that Member State or indeed in any Member State.
c. If the courts of one Member State are properly seised of the dispute, the Courts of all other Member States must decline jurisdiction.

[5] The City UK, *The impact of Brexit on the UK-based legal services sector.*
[6] *Regulation (EU) No. 125/2012.*

d. The courts of one Member State may apply "protective measures" to assist with proceedings in the Member State in which the substantive proceedings are being heard (eg freezing a defendant's assets pending the trial).
e. Once judgment has been granted by the Courts of the Member State which is seised of the dispute, that judgment is automatically recognized and is to be enforced by the of a all other Member States. This entitlement to recognition and enforcement applies also to protective measures.

So, for example, if a Russian company and a Brazilian company insert an English jurisdiction clause into their contract, the English Courts will have exclusive jurisdiction and this exclusive jurisdiction will have to be recognised by the Courts of all of the other Member States of the EEA. Moreover, because of the English Court's exclusive jurisdiction, if either of the contracting parties tried to litigate in the Courts of another Member State, the Court of that other Member State would be obliged to decline jurisdiction. Also, once judgment has been handed down by the English Court, that judgment will be readily enforceable n all Member States.

In circumstances where at least one of the litigating parties is located within the EEA or has assets within the EEA against which judgment might be enforced, the fact of the UK no longer being part of the European Union becomes of some considerable relevance since the recognition and enforcement provisions and the interim protection measures of the re-cast Brussels I Regulation and the Lugano Convention will no longer apply to judgments of the English Court.

The UK Ministry of Justice in its aforementioned survey in 2015[7] noted that, *inter alia*, the enforcement of the judgment as against the assets of the counterparty was a significant and contributing factor in parties determining to choose English law and the English jurisdiction for dispute resolutions.

[7] *Ministry of Justice, Factors influencing international commercial litigant's decisions to bring commercial claims to the London based courts.*

As the City UK has noted,[8] the easy enforceability of English judgments in Europe is often a reason for choosing English Courts over the Court of a non-EU jurisdiction such as New York or Dubai as a venue for dispute resolution. However, once the UK leaves the EU it will suffer a 31% reduction in the number of jurisdictions with whom it has a reciprocal enforcement arrangement. In numeric terms, this will be a fall to 60 countries compared to 87 when including the current Member States.

OPPORTUNITIES FOR THE IRISH LEGAL SECTOR

Once Brexit occurs, Ireland will be the only English speaking common law jurisdiction within the European Union. Our legal system has the potential to afford litigants all of the same benefits that they can currently enjoy through English choice of law and through choice of jurisdiction clauses. Our legal system is founded in the common law and whilst there are undoubtedly some differences between the laws of the two jurisdictions, nevertheless, there are far more similarities. Procedures and remedies are largely the same, our Judges are of equivalent caliber and independence and like the UK we have an efficient and expeditious Commercial Court populated by Judges having an experience of an expertise in commercial law. Moreover, because Ireland will continue to be a member of the EU, legal proceedings before the Irish Courts would continue to enjoy the benefits of the re-cast Brussels I Regulation and the Lugano Convention including:-

(a) Recognition of the exclusivity of jurisdiction arising out of the parties' choice of jurisdiction (irrespective of their domicile);

(b) The benefit of the lis alibi pendens rules which prevent the Courts of other Member States from seeking to assert jurisdiction over the dispute between the parties;

(c) The availability of interim protective members throughout the single market (including Mareva injunctions freezing assets pending the trial of the action); and

[8] The City UK *The impact of Brexit on the UK-based legal services sector.*

(d) The ready and relatively expeditious enforcement of the judgment throughout the single market without the Courts of the other Member States being entitled to look behind the judgment or to revisit the merits of the dispute.

Within the financial services sector, an area in which, particularly in recent years, the UK Courts have asserted a significant international jurisdiction, has been in relation to scheme of arrangement by companies seeking to effect compromises with their members and/or creditors. Under Section 221 of the UK Insolvency Act 1986, jurisdiction to sanction a scheme of arrangement may be exercised by the UK Courts in circumstances where the entity in question could be wound up in the United Kingdom as an "unregistered company". A foreign company may be an "unregistered company" but jurisdiction may only be exercised over it if a sufficiently close connection can be established between the company's business and the UK.[9]

In order to establish a sufficient connection between the company and the UK, it has not been necessary to show that the foreign company carried on business in that jurisdiction and in this regard factors that have been held by the Court to give rise to a sufficient connection with the UK so as to warrant the exercise of a jurisdiction have included the drawing down of loans in the UK.[10] So, for example, in *Re Drax Holdings Limited*[11]the fact that the company was party to contracts governed by English law was deemed to be sufficient connection so as to give the Court jurisdiction to sanction a scheme of arrangement between a company incorporated in the Cayman Islands and its international creditors.

Similarly in *Re Metro Vacesa SA*[12] (a Spanish company listed on the Madrid Stock Exchange with no assets in England), *Re TeleCollumbus*,[13] *Re Rodenstock*,[14]and *Re PrimaCom*[15] (three German companies with no assets in England) and *Re NEF Telecom Company BV*[16](a Dutch

[9] *International Westminster Bank v Okeanos* [1987] BCLC 450; *Banco Nacional de Cuba v Cosmos Trading Corporation* [2000] 1 BCLC 116: *Stocznia Gdanska SA v Latreefers Inc (No. 2)* [2001] BCLC 11; *Re OJSC Ank Yugraneft* [2009] 1 BCLC 298.
[10] *Re A Company (No. 003102 of 1991) Ex Parte Nyckelyn Finance Company Limited* [1991] BCLC 539.
[11] [2004] 1 BCLC 10.
[12] (UK High Court of Justice, Vos J., 29th March 2011).
[13] (UK High Court of Justice, December 2010).
[14] [2011] EWHC 1104 Ch.
[15] [2012] EWHC 164 (Ch).
[16] (UK High Court of Justice, Vos J., 6th September 2012).

company and a Bulgarian company with no assets in England), the Court found sufficient connection on the basis of an English law governed credit agreement and inter creditor agreement and the non-exclusive submission to jurisdiction to the English Courts in those agreements.

These scheme of arrangement provisions have been utilized in relation to various types of foreign companies, including foreign insurance companies.[17]

In this jurisdiction we have an almost identical legislative regime allowing for the application of scheme of arrangement provisions to foreign companies. In this regard, Section 1430 of the Companies Act 2014 applies the scheme of arrangement provisions in Part 9 to, *inter alia*, unregistered companies.

So, for example, if a foreign financial services company were to apply Irish law to relevant and material contracts entered into by it, that choice of law would afford the Irish Courts sufficient jurisdiction to sanction schemes of arrangement that the foreign company might ultimately wish to enter into with its members and/or creditors. Moreover, any scheme of arrangement, once sanctioned by the Irish Court, would be recognised and enforceable throughout the entirety of the EEA.

According to a survey conducted by members of Simmons & Simmons' offices in Germany, France, Italy, Spain and the Netherlands, 50% of their clients are already considering moving away from English choice of law or choice of jurisdiction clauses. This accords with anecdotal evidence obtained by the Bar Council of England and Wales which suggests that in a number of cases parties are being advised not to choose English jurisdiction clauses in their contracts in circumstances where previously English jurisdiction would have been the almost automatic choice of the parties. In this regard advice that has been given to clients is apparently motivated by the uncertainty regarding the jurisdiction and judgments regime that will apply to the UK post-Brexit.

[17] *Re Sovereign Marine and General Insurance Company Limited* [2007] 1 BCLC 228.

This anecdotal evidence compiled by the Bar Council of England and Wales accords with the anecdotal evidence in this jurisdiction as well. It is widely known that large numbers of English Solicitors have been taking out practising certificates in this jurisdiction in recent months and it is understood that in certain of the larger UK firms advice is now being given to consider Irish choice of law and choice of jurisdiction clauses for commercial contracts.

Ireland is well placed to show case itself as an ideal venue for commercial litigation, including financial services litigation post-Brexit. It is a country with an experienced and independent judiciary, applying common law principles, which are themselves the legal principles preferred by a majority of contracting parties worldwide and has the benefit of a speedy, experienced and efficient Commercial Court whose proceedings and judgments benefit from the provisions of the re-cast Brussels I Regulation and the Lugano Convention and its judgments are readily enforceable throughout the European Union.

In this regard, Ireland already has a strong presence in terms of international commercial contracts, with involvement in banking, insurance, reinsurance, aircraft leasing, funds and software. In many instances, companies operating within this sector in Ireland will already be applying Irish choice of law and choice of jurisdiction clauses, but where this does not already occur, greater effort should be made both by the legal community and by the Government and State agencies to promote Ireland as the appropriate forum for international dispute resolution.

Moreover, the marketing of Ireland as such a forum ought not to be confined solely to companies trading from Ireland and to companies trading with Irish companies. Instead, the marketing should be extended internationally to parties who have perhaps, as little connection with Ireland as they do with England but who have, heretofore adopted English choice of law and choice of jurisdiction clauses in their contracts.

To conclude therefore, whilst there can be no question of Dublin supplanting London as the forum for international dispute resolution, nevertheless, Ireland will have significant advantages over the United Kingdom post-Brexit in terms of the recognition and enforcement of its judgments as well as in terms of the availability of pre-trial protective measures which, if

carefully and properly marketed, have the potential to afford very significant opportunities in relation to the bringing of valuable international litigation into Ireland.

If this can be achieved, then the benefits which will accrue to the legal services sector in Ireland have the potential to be very significant indeed and will help to project Ireland as a forum for international business including, in particular, the provision of international financial services.