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The 2020 Lords Goff and Hobhouse Memorial Lecture

Commercial Jurisdiction: the pattern of the past and the shape of the future

The Hon Mr Justice Butcher

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The 2020 Lords Goff and Hobhouse Memorial Lecture

Foreword

This lecture has been established to commemorate two of the finest commercial lawyers, Robert Goff and John Hobhouse. The lecture itself is intended to focus on issues of commercial law which are of immediate contemporary interest, whether they have been debated over years or have newly emerged.

The commercial lawyers whom this lecture is intended to honour each had the gifts of searching intellectual analysis and hard work. With these gifts, they sought to identify clearly stated principles and legal rules which would be of service to English commercial law. This is evident in their respective careers, as advocates, puisne judges, Lord Justices, and finally members of the Judicial Committee of the House of Lords.

Robert Goff was the senior lawyer, born in 1926, and after being educated at Eton and Oxford, was called to the Bar in 1951, taking silk in 1967, and was appointed to the bench in 1975, before appointment as a Lord of Appeal in Ordinary in 1986. John Hobhouse, as the younger man, followed a similar trajectory in his career, born in 1932, and after Eton and Oxford, was called to the Bar in 1955, taking silk in 1973, and was appointed to the bench in 1982, and capping his career as a member of the House of Lords in 1998, succeeding Robert Goff.

Robert Goff had started his career as a barrister at Ashton Roskill's chambers at 8 King's Bench Walk and John Hobhouse at Henry Brandon's chambers at 7 King's Bench Walk. These two sets were soon to merge. Robert Goff and John Hobhouse were fellow members of chambers over many years. They appeared as advocates against each other, apparently for the first time in 1963 (Blandy Bros & Co Lda v Nello Simoni Ltd [1963] 2 Lloyd's Rep 24, 393).

They had, however, less opportunity to sit together on the bench. They sat together twice in the House of Lords and twice in the Privy Council. In one of those cases (Attorney-General v Blake [2001] 1 AC 268), John Hobhouse dissented, perhaps reflecting the tension in commercial law which requires striking a balance between commercial certainty and flexible justice. In another case (Thomas v Baptiste [2001] 2 AC 1), in the Privy Council, Robert Goff and John Hobhouse delivered a joint dissenting opinion, explaining the relationship between the "due process of law" and international treaties. They both used their wisdom and extensive learning to allow a principled development of clear rules of commercial law, even if their approaches were, on occasion, different.

A lecture on English commercial law acknowledges the debt it owes to Lords Goff and Hobhouse.

This is a momentous year, legally and constitutionally. One of the areas affected by the United Kingdom's withdrawal from the European Union is in relation to the arrangements for the allocation of jurisdiction within and the recognition of judgments from EU Member States. That alone makes it an inviting topic for today. Less obvious is that this year marks a significant anniversary in the development of jurisdictional rules in this country. I am not referring to the 125th anniversary of the creation of the Commercial Court, which also falls this year, and in whose celebrations I hope many of you may join. I refer instead to the centenary of a rule change, which was particularly important in relation to commercial matters with an international element, which it would be regrettable to let pass unnoticed.

It is a truism to say that we cannot properly guide the future without understanding the present, or understand the present without understanding the past. This is as true of the pattern of jurisdictional rules operated by our courts as in any other sphere. What I wish to do is consider where we have come from, where we are and where we are going, and reflect on what principled attitude we can have to where international commercial disputes should be tried.

When we look at where we have come from, we can trace a long period of incremental developments as well as one transformational change. In this history, we may take as the starting point that at common law the jurisdiction of the English courts was territorial. By that I mean that the assertion of jurisdiction over any one depended on that person being within the territory of England or Wales at the commencement of suit.

Before the nineteenth century, writs in the type of actions which can sensibly be regarded as precursors to the commercial actions of today had been typically addressed to the sheriffs of the various counties, commanding them that they secure the attendance of the defendant to answer the plaintiff's complaint, necessarily confining such process to the territory of the realm.

In the early nineteenth century, writs were standardised as written commands from the Crown to a defendant to enter an appearance. It was treated as axiomatic at common law, however, that the king's writ did not run beyond the seas. Accordingly, if the writ could not be served on the defendant within the realm, then the king's courts could not exercise jurisdiction over the defendant. The corollary was that if the defendant could be served in England, then the court did have jurisdiction over him. Furthermore, and significantly, if there could be such service, then, at least in relation to actions *in personam*, the court had jurisdiction over him in respect of any cause of action in whatever country it had arisen. In the very first edition of Dicey on the Conflict of Laws examples were given: X incurs a debt to A in France; A brings an action here against X for the debt and can serve him in England; the Court has jurisdiction to entertain the action (a case of 1830 was cited as authority.) Or perhaps more strikingly, B assaults C in Paris; C brings an action in England against B for the assault and can

serve him here; the Court has jurisdiction (a case of 1862 was cited as authority.) Subject to the requirement of double actionability, so that the act must have been wrongful both by the law of the place where it was committed and by English law, the courts might adjudicate upon conduct anywhere in the world, and with however little connexion with England, and even if both plaintiff and defendant were foreign.

Thus at common law the courts were regarded as having the widest competence in respect of any case in which jurisdiction was established by service here. It was, as it has been described, a universal and a superintending jurisdiction, but with the obverse of the coin being that there was no jurisdiction over anyone who could not be served here.

This obverse started to change significantly in 1852. Putting on one side some earlier twisting of the ancient law of outlawry, a provision of the General Rules of the Court of Chancery in relation to writs of subpoena, and some steps towards permitting service in Scotland and Ireland, the important development was by ss. 18 and 19 of the 1852 Common Law Procedure Act. The first of those two sections permitted service of a writ on a British subject abroad. The second permitted service abroad of a notice of a writ on someone who was not a British subject. The distinction was drawn in order not to affront other sovereigns by service of the actual writ within their territories on their own subjects.

Thus what had happened by this Act was that Parliament had extended the jurisdiction of the courts beyond the bounds recognised historically and at common law. From the first, however, this extension was subject to an element of judicial discretion. While the precise details of the scheme set up by the 1852 Act do not need to detain us, one of its features was that to continue to judgment in an action where the writ or notice of the writ had been served or given abroad required the permission of the court.

The scheme of the 1852 Act was superseded by the arrangements made under the Judicature Acts. On this occasion the Acts themselves were silent on the issue of service outside the realm. Instead it was dealt with by way of rules of court. Initial rules were scheduled to the 1873 Judicature Act, and that Act provided for a power to make further rules by Order in Council, which had to be laid before Parliament. Though there was a debate about it at the time, it was established that these rules were made by Parliamentary authority. The rules which were scheduled to the 1875 Judicature Act provided, as Order XI, for service out. They also provided in terms, by Orders II and XI, that there needed to be the leave of the court both to issue and to serve a writ or notice of a writ out of the jurisdiction. It was thus, and expressly, made a matter for the exercise of a discretion on the part of the court.

The terms of Order XI were changed, and in a significant fashion, within eight years of being introduced, in 1883. The jurisdiction remained subject to a discretionary leave requirement. Changes were made, however, to the categories of case in which leave might be given, and these actually amounted to a marked narrowing of the

circumstances in which there could be service out. The 1875 rules had provided that there might be service out in relation to claims relating to a contract if either the contract was made in England or if there was a breach within the jurisdiction of a contract wherever made. They had also provided for service out when an act in respect of which damages were sought had been done in England, thus allowing service out of claims in tort.

The 1883 Rules of the Supreme Court were in some respects significantly more restrictive. True, they included a provision that there might be service out on a person who was domiciled or ordinarily resident here, even though he might not be here at the time of service; and they also included the very important provision that there might be service out of the jurisdiction on a person who was a necessary or proper party to an action brought against someone who had been served in England. On the other hand they limited the circumstances in which there could be service out in relation to contractual and tortious matters. No longer was there the possibility of service out in relation to a contractual matter on the basis that the contract had been made in England. There could only be service out if the contract had been breached or allegedly breached in England. Furthermore, the ground of service out based on an act having been done in England which had caused damages was swept away. Accordingly there could not be service out in relation to claims in tort, unless it fell within another rule. These were the rules which were to continue in force until 1920.

We are so used to the concept of service out that it should be observed that it was a serious question at the time as to what Parliament was seeking to achieve in sanctioning service out of the jurisdiction. In particular, what useful purpose would be performed by a suit where the defendant was served abroad? The issue, of course, was that the resulting judgment could not be enforced, other than in cases where the defendant had assets here, unless foreign courts recognised and enforced the judgment. Yet, at the time when Parliament allowed for such service abroad, most foreign courts would not recognise a judgment given in an action where, in the absence of submission, service had been effected outside the territory of the courts giving the judgment. Indeed, at common law, the English courts themselves would not recognise a foreign judgment as having been given by a court of competent jurisdiction on the basis of service similar to that permitted by Order XI, unless the case was one where the defendant had been resident or present in that country, or had submitted to that jurisdiction.

So what did Parliament hope to accomplish? Clearly service out had a use in circumstances where the defendant had assets here. But the procedure was not tailored or limited to such cases. It was probably also hoped that the adoption of reasonable rules would lead to an international acceptance of resulting judgments. Yet, as was said in a leading book on Service Out in 1892, ‘Such expectation has, however, been only very partially fulfilled: such recognition has … only been accorded very grudgingly.’ Despite this as was said in the same book, ‘the abundant use which is made of the procedure testifies to the importance with which it is regarded.’ It was clearly found

to be useful and that led to its not merely surviving but developing. In this process the important role of the City of London and the scale of the contribution of England and Wales to international trade in the latter part of the nineteenth and early twentieth centuries doubtless played a major part. Many defendants had assets here; or might expect that they would come to have assets here; or might wish to sue here themselves.

The next phase of the development of the jurisdiction reflected the usefulness which litigants thought the procedure to have. This brings me to the centenary which I mentioned at the outset. 1920 was an important year in relation to jurisdictional issues.

It saw the passage of the Administration of Justice Act, which was significant in facilitating the enforcement of judgments given by courts in British dominions and protectorates. But it also, and this is what I want to commemorate, saw a significant change in the circumstances in which permission to serve out could be given under Order XI. The Rule Committee responsible for these changes, which were made on 14 July of that year, was a robust one. The first two names in the list of members were those of the Lord Chancellor and the Lord Chief Justice. The former, when Mr F.E. Smith, is supposed to have introduced the latter, when Mr Rufus Isaacs, to his wife Margaret with the words 'I may say that I consider this man quite as able as I am myself.' There could be no higher praise from that source. It was a commercially aware committee. Isaacs in particular had had extensive commercial experience at the Bar. Another member of the Committee was the Master of the Rolls, Lord Sterndale, the former Pickford J, who had been a judge of the Commercial Court.

The changes of 1920 reversed the restrictions of 1883 and instead considerably expanded the circumstances in which leave to serve out could be granted. It was now provided that there could be permission to serve out in relation to a claim regarding a contract which was made within the jurisdiction or by an agent within the jurisdiction, or which was governed by English law, in addition to the existing category of where the breach was within the jurisdiction. Further, a new Order XI rule 2A allowed for service out when the parties had agreed that the English court should have jurisdiction. Yet further, a new head was added, reversing the 1883 limitation, allowing service out when there had been a tort committed within the jurisdiction.

It was as a result of these changes, accordingly, that the rules received the form which we can still recognise as applicable to contract and tort under CPR 6BPD.3. The possibility of service on a necessary or proper party, and on a person domiciled or ordinarily resident in the jurisdiction were retained. The result, as it struck contemporaries, and as it was put in the 3rd (1922) edition of Dicey on the Conflict of Laws, was that now, in all the most important cases which were likely to arise, there could be service out.

We should pause there and consider what the position now was. The courts were regarded, by common law, as having an extremely wide competence where jurisdiction was established by service on the defendant in England and Wales.

In addition they had been given, by delegated legislation, an extremely broad, albeit discretionary, power to exercise jurisdiction over persons served abroad. Faced with that combination of two extremely broad jurisdictions, it was inevitable that the English courts should develop principles and means whereby they should try cases which could be regarded as appropriate to this forum, and should not try cases which were inappropriate to it. In doing this, they established principles on which the discretionary power under Order XI should be exercised, and also laid hold of and employed other old discretionary powers.

The essential outlines of this development will be known to most of you. I would like to draw attention to five facets.

In the first place, in relation to service out of the jurisdiction, from a very early stage the courts adopted the approach that they should be exceedingly careful about exercising a power to bring before the English courts a foreigner who owes no allegiance here, as it was put by Pearson J in Société Générale v Dreyfus in 1885. Equally, from a very early stage it was recognised in relation to service out that factors of cost and convenience in having the matter litigated here as opposed to in the alternative forum had to be taken into account; and this was so even though these were matters expressly referred to in the rules of court in relation to Scotland and Ireland, but not expressly mentioned in relation to other countries. So in Strauss v Goldschmid in 1892 Fry LJ stated that the convenience of the action being tried here or in France must be considered, including where the evidence was, and what was the governing law. In Rosler v Hilbery, decided in 1924, Sir Ernest Pollock MR stated in terms that in cases of service out, the court should consider what was the *forum conveniens*, which would involve considerations of the location of the participants, the issue involved and the law to be applied, and of course whether there was a *lis pendens* elsewhere.

Secondly, it was from a very early date recognised that the courts had power to control their own proceedings. This power could be used to stay proceedings, even if they had been commenced by service within the jurisdiction. Here was another powerful and discretionary tool to ensure that only appropriate cases were tried here. For a long period, in relation to the type of case with which we are concerned, namely those involving foreign litigants and alternative fora, the courts were cautious as to the circumstances in which there would be a stay, effectively confining the grant of such an order to cases where the English proceedings were an abuse – that is if the English proceedings were vexatious or oppressive – or where there was an agreement to litigate disputes elsewhere, which is a particular category to which I will come. That restriction on the grant of stays to cases of abuse, vexation or oppression was ultimately to be superseded, but it should not be regarded as having been obscurantist or unprincipled. One motivation for it was the reasonable desire to ensure that foreign claimants could always sue British companies, firms and individuals, and that such claimants were not at risk of being turned away without justice from the courts here unless there were very good grounds. Upholding a jurisdiction based on service here was calculated to secure this end while being simple to apply. As is well known, this approach came to be

changed, in significant part as a result of the submissions of Mr Goff as an advocate and then of his judicial decisions when he had become a judge.

In the third place, the English courts increasingly recognised, and gave practical effect to party autonomy, by enforcing agreements as to forum by staying proceedings brought otherwise than in accordance with such agreements. This was justified not only by English law's general approach to the importance to be accorded to the parties' bargains, but also by the internationally recognised principle that the courts of a country should be regarded as having jurisdiction over parties which have submitted to those courts. A jurisdiction to stay proceedings where there was an agreement to litigate elsewhere has roots going back at least into the eighteenth century, although initially it was thought that it might only apply to agreements between foreigners, or which had been made abroad, on the basis that no one in this country could exclude the jurisdiction of the king's courts. The Common Law Procedure Act 1854, however, provided for the staying of proceedings where there was an agreement for arbitration, and by the 1870s it was being said that the principle was applicable to an agreement to go before a foreign court, which was treated as or as if it were an agreement to arbitrate. By the time of The 'Eleftheria', argued in 1969 by Mr Hobhouse, this jurisdiction had been developed to recognise that, if there were such an agreement, the ordinary position was that there would be a stay, unless there were a strong cause for not imposing one.

In the fourth place, the development of the jurisdiction to restrain persons subject to the jurisdiction of these courts from pursuing proceedings elsewhere, if the circumstances of the case merited it, provided another flexible tool to ensure an appropriate allocation of jurisdiction. Such orders grew out of the common injunctions which before the fusion of law and equity might be granted by the Court of Chancery to restrain litigants in common law courts from obtaining judgments 'contrary to equity and good conscience.' In the first half of the nineteenth century injunctions were being granted on these grounds to restrain proceedings in the remainder of the UK and in the British Empire, and from the 1860s in other countries as well. By the 1880s this type of injunction came generally to be justified on a basis analogous to that on which proceedings here were stayed, namely if the conduct of the defendant in pursuing proceedings elsewhere could be characterised as vexatious or oppressive. From at least the early part of the twentieth century, it was recognised that it would often be appropriate for there to be an injunction when the foreign action was brought in breach of an agreement to litigate here, because to maintain such an action would frequently count as vexation or oppression. Thus here again a discretionary jurisdiction was brought to bear in aid of a contractual arrangement.

The fifth facet is that English courts did not develop a doctrine of there being a public interest in where actions between ordinary litigants should be heard. In this they took a different path from, for example, many of the states of the United States. There public interest factors – such as the local interest in having localised controversies decided at home, the administrative difficulties flowing from court congestion, the interest of

the court in the application of specific pieces of extraterritorial legislation or, more widely, in applying its own law – have been recognised as being relevant to the analysis of *forum non conveniens*. True, several of these public interest factors can be repackaged as private interest considerations. The significant point, however, is that the English courts have not accorded weight to public interests unless they can be said to reflect the legitimate private interests of the parties. The courts would not, for example, stay proceedings here on the basis that it was inconvenient for the court to have to deal with them. As Lord Sumner said in 1926: 'Obviously the court cannot allege its own convenience, or the amount of its own business, or its distaste for trying actions which involve taking evidence in French, as a ground for refusal…' The courts just had to deal with the amount of business which might be involved, and they have of course long ceased to feel distaste for hearing evidence in languages a great deal more unfamiliar than French. The corollary, though, is that the English courts have not considered that cases should be tried here under the long arm jurisdiction of what was Order 11, because a public interest, which is not an interest of any of the parties, requires it.

By the mid-1980s the common law in relation to when the English courts should, and should not, assume jurisdiction over cases brought or sought to be brought before it, and the role of the three discretionary powers, to permit service out, to stay proceedings here, and to enjoin the pursuit of actions, were all highly developed. The process had been one which is repeatedly seen in the development of English law. Powers and remedies which had initially had other functions and uses were adopted for new purposes. A body of judicially created law supplemented a limited legislative intervention. And the result was a highly pragmatic approach focused on the circumstances of the particular case.

The role of the great judgments of Lord Goff of the mid 1980s and 1990s, and in particular Spiliada Maritime Corp v Cansulex and SNIAS v Lee Kui Jak was not so much to make major changes in the law, but to make it coherent and to emphasise a principled aim. However familiar you may think you are with Spiliada it is always worth reading it again. It is in many ways a model judgment. It is beautifully written. It is concise. It is polite, and indeed generous. It has a moment of humour, perhaps unsurprisingly deriving from Mr Rokison and Sir Christopher Staughton. It is clear and principled. The formulation of the fundamental question as being to identify the forum where the case could most conveniently be tried in the interests of all the parties and the ends of justice; and the indication that, in both service out and stay cases, albeit with different burdens of proof, it should be answered by determining whether the challenged forum is or is not the appropriate forum, is a schema which has the virtues of simplicity, memorability and practicality. It is also supremely elegant: a point I mention because in another of his judgments Lord Goff was to warn against the temptations of elegance in the development of the law. Here, however, elegance and the ends of justice could go hand in hand.

The point which I am leading up to, however, will probably not have escaped you. It is that these approaches of the common law, which had been developing for a long time, and involved the application of judicial discretions to ensure the appropriate use and prevent the misuse of what were on their face the very broad territorial and long arm jurisdictions, came, at just the point when they were being most persuasively tied together, into contact with a very different way of achieving similar ends. Spiliada was decided on 19 November 1986. The Brussels Convention was brought fully into effect in the UK on 1 January 1987. Here was a detailed set of direct jurisdictional rules, which allocated jurisdiction amongst Member States and where certainty and uniformity of application in all Member States was prioritised over seeking the most appropriate forum for a particular case. For obvious reasons, within such a scheme, the exercise of judicial discretions as to whether or not to assume jurisdiction and whether or not to seek to prevent litigants from suing in the courts of another Member State had little place.

The past 33 years have been a fascinating time to watch English judges and lawyers, who were still applying and developing the common law rules in relation to non-EU cases including the vigorous discretionary approaches I have mentioned, also implementing the rules of the Brussels Convention and successor Regulation, and sometimes introducing approaches from the former in relation to the latter where they were not native.

The most conspicuous examples where the difference of approaches has been revealed are well known. I will simply remind you of a few. Overseas Union v New Hampshire Insurance Co. is one. There the European Court held that what is now Article 29 of the Brussels Recast Regulation (lis pendens) must be given effect to; and that, at least where the case did not involve an exclusive jurisdiction, the court second seised cannot examine whether the court first seised lacked jurisdiction, however clear that lack might be, but must stay its own proceedings. Another example is Erich Gasser v MISAT, which contradicted the position in certain English cases, in particular Continental Bank v Aeakos, in holding that the court second seised had to apply Article 29 and stay its proceedings even if it was the Court chosen in a jurisdiction agreement. A third is Turner v Grovit which found that there can be no anti-suit injunction which had the indirect effect of preventing an action from proceeding in another Member State, even if that action is brought in breach of a jurisdiction clause. The fourth is Allianz SpA v West Tankers Inc (The Front Comor) which made it clear that this prohibition of anti-suit injunctions applied even when the other action was in breach or alleged breach of an arbitration clause. The last example I want to give is Owusu v Jackson where the European Court ruled that the English court, if it has jurisdiction under what is now Article 4 (jurisdiction by reason of domicile of defendant), has no power to stay proceedings on the ground of *forum non conveniens* in favour of the courts of a non-Member State.

Yet this has not been a simple saga of the incompatibility of two approaches. One of the features of this period has been that the concerns of the English courts, and of English court users, including in particular commercial court users, as reflected in the writings of commentators and in the UK's position in European negotiations, have played a role in developing the Brussels regime. One area has been in the amendment of the provisions as to what constitutes an effective choice of court agreement which prorogues jurisdiction under what is now Article 25 of the Recast Regulation: both in the relaxation of the formal requirements, and now in the provision that it applies irrespective of whether either of the parties is domiciled in a Member State. Other aspects are apparent from the adaptations of the Brussels Regulation by the Recast Regulation, addressing, at least to some extent, some of the issues thrown up by the cases which I referred to. The issue highlighted by Erich Gasser has been addressed by Article 31(2) to (4) of the Recast Regulation. There was some strengthening of the arbitration exception in Recital (12) to the Recast Regulation, although it did not amount to a reversal of the position in The Front Comor in relation to anti-suit injunctions.

Whether there can be a stay of proceedings in favour of the courts of a non-Member State has been partially addressed in the provisions of Articles 33 and 34 of the Recast Regulation, although they are confined to litispendence or related proceedings in the courts of a non-Member State. But it may well be that, under the Recast Regulation, there can be stays of proceedings in favour of non-Member States on the basis of an analogy with the position which is applicable between Member States in cases other than litispendence and related proceedings, and in particular cases which would be governed by Articles 24 (exclusive jurisdiction) and Article 25 (prorogation of jurisdiction). This is the debate about whether or not the Recast Regulation permits a so-called 'reflexive effect'. In Gulf International v Aldwood decided on 1 July 2019 the Deputy Judge found that there had been no room under the old Brussels Regulation and was no room under the Recast Regulation for a reflexive effect and found that the court could not stay proceedings founded on Article 4 in favour of the courts of Saudi Arabia, though there was a jurisdiction clause in favour of those courts. By contrast on 15 October 2019 the Court of Appeal in Privatbank v Kolomoisky decided, in relation to the Lugano Convention, that there was indeed a principle of reflexive effect, and the English cases which had indicated that there was such an effect under the Brussels Regulation were approved. I suspect that the last word on this subject may not have been said, but the Privatbank v Kolomoisky approach gives a degree of flexibility to the Brussels regime which is not expressly provided for in the text.

At this point I must move up to date. As everyone knows, an event of significance occurred 26 days ago. Brexit has potentially highly important implications for the jurisdictional regimes which I have been describing.

The current position, as a result of the European Union (Withdrawal Agreement) Act 2020 is that Brussels Recast continues to apply in relation to any proceedings which have been instituted before the end of the Implementation Period on 31 December 2020 (as provided for in Article 67 of the Withdrawal Agreement). The European Court

will continue to have jurisdiction to give preliminary rulings on requests from UK courts where the request is made before the end of the Implementation Period (Article 86(2)). The Withdrawal Agreement states, in Article 89, that judgments and orders of the European Court given before the end of the Implementation Period shall have binding force in the UK. It also states that judgments and orders handed down after the end of the Implementation Period in relation to cases within Article 86 shall have binding force in the UK. That therefore includes cases where preliminary rulings have been requested by UK courts before the end of the Implementation Period. There may perhaps be a debate in the future as to how Article 89 of the Withdrawal Agreement relates to s. 6(1)(a) of the European Union (Withdrawal) Act 2018, which states that UK courts and tribunals are not bound by any decisions made by the European Court after the end of the Implementation Period. Perhaps relevant to such a debate may be s. 5 of the 2020 Withdrawal Agreement Act which provides that rights, powers, liabilities, obligations, restrictions, remedies and procedures specified in the Withdrawal Agreement are to be recognised and available in domestic law, and enforced, allowed and followed accordingly.

Another issue is that, even if the European Court's preliminary rulings on requests from the UK courts relating to Brussels Recast continue to be binding even if made after the end of the Implementation Period, it nevertheless does not appear to be provided by the Withdrawal Agreement that any preliminary rulings of the Court in relation to Brussels Recast are to be binding where the request was made by the courts of another Member State and not the UK. That might give rise to what some might regard as an oddity as to the EU law which is to be binding after the end of the Implementation Period. On this basis, a decision on a reference from the UK made before the end of the Implementation Period would be binding; but a subsequent decision commenting on that decision, where the request had been made by another Member State, would not be, even if the reference was made before the end of the Implementation Period. Perhaps, however, that issue is more theoretical than real.

Doubtless of considerably more significance is the fact that international conventions by which the UK is bound by virtue of its membership of the EU, which includes the Lugano Convention and the Hague Convention on Choice of Court Agreements 2005 will continue to apply during the Implementation Period (Article 129 of the Withdrawal Agreement).

So, during the Implementation Period the position is relatively clear. After the end of the Implementation Period, as far as countries other than members of the EU and parties to the Lugano Convention are concerned, the position in relation to jurisdiction and the enforcement of judgments will be essentially unaffected. But as far as Members of the EU and parties to the Lugano Convention are concerned, at that point the Brussels Regulation Recast regime will cease to have effect and the UK will no longer be bound by obligations stemming for international agreements concluded by the EU.

What will replace the Brussels regime is not yet certain and is the subject of negotiation.

The Political Declaration of 19 October 2019 refers to judicial cooperation in matrimonial, parental responsibility and criminal matters. It makes no reference to judicial cooperation in civil and commercial matters. The position of the Government, however, and I quote, is that it 'strongly believes that … cooperation (including agreements on jurisdiction in cross border cases involving civil [and] commercial … matters) remains in the best mutual interest of the UK and the EU. The government is committed to pursuing a mutually beneficial arrangement with the EU on civil and commercial … matters (including on questions of jurisdiction). We know that this is in the best interests of both the UK and the EU, including any individual member states.'

What has been recommended by very many interested bodies in the UK is that, if possible, an EU – UK Agreement should be reached which continues the operation of the Brussels Recast Regulation. This reflects the fact that, whatever the tensions in relation to the operation of certain parts of the scheme in particular cases, there has been wide appreciation of the extent to which it has reduced competing actions and enhanced enforcement of judgments within Europe. The agreement in place between the EU and Denmark, originally made in 2005 and updated to take account of Brussels Recast, has been suggested as a model for an agreement which the UK might seek to make with the EU. It may be that it will not be an acceptable model in all respects in that it provides that the Danish courts shall still make requests for preliminary rulings to the European Court in circumstances under which other Members States' courts would make references. What has been suggested, however, is that its provision that the Danish courts should 'take due account' of decisions of the European Court could be a model for provisions as to the role of future European Court jurisprudence under an EU – UK Agreement.

If no such agreement can be made, more significance would attach to two other courses which the Government has previously indicated will be pursued. The first is that the UK will seek to accede to the Lugano Convention in its own right. The UK Government has in the past indicated that it is committed to joining the Lugano Convention in all Exit scenarios. It would be necessary even if there were a bespoke agreement with the EU, if existing arrangements with the states which are not Members of the EU but which are party to the Lugano Convention are to be continued. In the absence of a bespoke agreement it would, however, be a matter of potentially far greater significance. Joinder of the Lugano Convention would depend on the consent of the present parties to the Lugano Convention.

The provisions of its Protocol 2, meaning that the courts of the Contracting States are to 'pay due account' to the decisions of the European Court, may well be regarded as compatible with the provisions of the European Union (Withdrawal) Act. The English courts are already used, when considering the Lugano Convention, to 'paying due account' to decisions of the European Court: as occurred in Privatbank v Kolomoisky and in the Supreme Court's decision in JSC BTA Bank v Khrapunov. The drawback of the Lugano Convention is, however, that it does not embody what were seen as the significant improvements constituted by the Recasting of the Brussels Regulation.

The other course is the UK adhering in its own right, instead of as a Member of the EU, to the 2005 Hague Convention on Choice of Court Agreements. This Convention has been of relatively little significance because only a few countries, other than Members of the EU, have adhered to it. It would, however, be significant in protecting the jurisdiction of the English courts, and the enforceability of judgments, when they have been chosen by the parties in exclusive jurisdiction agreements.

Thus though we can see part of the shape of the future reasonably distinctly, there is not as yet complete definition as to what will take the place of the Brussels regime and this will depend on the results of a process of negotiation which will involve issues other than civil jurisdiction and judgments. What can nevertheless be said with almost complete certainty is that England and London in particular will remain as an important jurisdiction for commercial disputes only if they continue to earn and deserve that role. Long gone are any ideas of an innate superiority of English law or English jurisdiction.

It is apparent that we are tending towards a global market place for dispute resolution. Parties are increasingly able and willing to choose and courts around the world are increasingly willing to fill the demand. Competition in this field cannot be avoided. The existence of such competition accords with the principled, rather than the self-interested, concern in this area, which is that litigants should be able to access a system of justice, whether here or elsewhere, which is characterised by integrity, efficiency and effectiveness and which is trusted by its users.

The more choice the more likely that aim is to be fulfilled. Only by having a culture with the rule of law at its heart, and by maintaining the highest standards of probity and quality in the legal professions, and in the courts will London and the English courts compete in that market place. What is to be hoped, however, is that there will be the greatest possible enforceability of judgments where jurisdiction is founded on consent; for that is consistent with party autonomy and is best calculated to raise standards. That above all is what one may hope is aimed for in any new arrangements for the period after the end of the Implementation Period.

Whatever exactly emerges, the key to the continued relevance of this jurisdiction is excellence. Through the long jurisdictional vicissitudes, some of which I have sketched tonight, this forum has garnered a great deal of experience and expertise in relation to international and commercial transactions and litigation. If standards are maintained and driven upwards, it should, under whatever precise jurisdictional framework is in place, remain widely attractive as a place where disputes can be managed, resolved and adjudicated.

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