Forking Law

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Brexit challenges the market advantage of English law as a governing law for international financial transactions because of uncertainties about the enforceability of judgments of English courts in EU courts after Brexit. France has decided to address this issue by encouraging the resolution of English law governed disputes in French domestic courts. This move threatens to create an unprecedented fork in English law, initiating the development of a French version of English law alongside the English version of English law.

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English Law as a Dominant Law Governing International Financial Transactions

Transnational financial transactions[2] are generally governed by domestic law, rather than by international law,[3] and the laws of England and New York are dominant governing laws for these transactions.[4] Whereas English law and Swiss law have been identified by one study as leading governing laws for international commercial transactions,[5] English law and the law of New York have tended to be dominant in international financial transactions. The common law tends to emphasize freedom of contract,[6] and therefore appeals to parties who want assurance that the terms of their deals will be enforced, rather than displaced because they conflict with mandatory requirements of the law.[7] There is some competition between jurisdictions with

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[2] This article is concerned with transnational financial transactions between business entities, rather than transactions involving consumers.

[3] *Cf.* Michael Joachim Bonell, *The Law Governing International Commercial Contracts and the Actual Role of the Unidroit Principles*, 23 UNIFORM L. REV. 15 (2018). But see, e.g., John W. Head, *Evolution of the Governing Law for Loan Agreements of the World Bank and Other Multilateral Development Banks*, 90 AM. J. INT'L L 214(1996) (noting that loans by multilateral lending institutions may be governed by international law).

[4] *See, e.g.*, Raymond M. Auerback, *Governing Law Issues in International Financial Transactions*, 27 THE INT'L LAWYER 303, 305 (1993) ("Most English and U.S. lawyers consider it a happy coincidence that virtually all documentation in the major financial markets is governed either by English law or by the laws of one U.S. state or another."); Steven L. Schwarcz, *Sovereign Debt Restructuring and English Governing Law*, 12 BROOK. J. CORP. FIN. & COM. L. 73, 76 (2017) ("Most sovereign debt contracts are governed either by the debtor-state's law or by New York or English law.")

[5] *See* Gilles Cuniberti, *The International Market for Contracts: The Most Attractive Contract Laws*, 34 NW. J. INT'L L. & BUS. 455 (2014). Commercial law vs financial law.

[6] *See, e.g.*, Auerback, *supra* note 4, at 306 ("The lack of codification and the cultural bias towards freedom of contract, which are hallmarks of common law systems (though perhaps less so nowadays), allow agreements subject to those systems to be continually modified and improved as new legal problems are identified and new solutions found.")

[7] *Cf.* Jan Kleinheisterkamp, *Overriding Mandatory Laws In International Arbitration*, 67 INT'L & COMP. L. Q. 903, 903 (2018) ("In recent years, courts in EU countries have repeatedly refused to enforce arbitration clauses when judges deemed that arbitrating the disputes between the parties would allow them to evade fundamental market regulations of the forum. Crucially in these cases, parties had not only agreed on arbitration outside the EU but had also agreed on

respect to substantive rules of law. Corporate law is the prime, and most frequently cited, example, but corporate restructuring is also a matter for competition.[8] The dominance of English and New York law as the governing law for financial transactions suggests both that in the context of financial transactions some level of standardization around common rules is desirable, and that the laws of England and New York are accepted as attractive governing laws for such transactions (which could be because they are predictable, or because they are substantively preferable to other possible governing laws for other reasons).[9]

Where a small number of governing laws affect large numbers of transactions it is possible to make useful changes in the law efficiently. For example, when holdout creditors threatened to disrupt sovereign debt restructurings,[10] collective action clauses became a standard feature of sovereign debt documentation.[11] In June 2019, a number of UK Members of Parliament argued that the UK should take a leading role in developing a transparency register for loans to sovereigns because of London's status as a global financial centre and because many

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non-EU law to govern their transactions."); Bonell, *supra* note 2, at 18 ("at least in proceedings before a domestic court, the terms of the contract are binding only to the extent that they do not conflict with the mandatory rules of the otherwise applicable domestic law.") Mandatory rules of contract law tend to be implicated in consumer transactuions rather than in transactions between sophisticated commercial parties. *See, e.g.*, *id.* at 26. Kleinheisterkamp notes that "Cross-border transactions pose a particular challenge for the conceptual relationship between freedom of contract and regulatory powers." Kleinheisterkamp, loc. cit. at 909.

[8] Singapore plans to become a leading centre for international restructuring. *See, e,g.*, Ministry of Law, Public Consultation on Proposed Amendments to the Companies Act to Strengthen Singapore as an International Centre for Debt Restructuring (Oct. 2016).

[9] Financial transactions are based on the pricing of risk, and a component of the risk involved relates to whether the transaction will be enforced as the parties anticipate at the time of contracting. In some cases issues relating to enforceability may influence the decision of contracting parties to contract.

[10] *See, e.g.*, G. Mitu Gulati & Kenneth N. Klee, *Sovereign Piracy*, 56 BUS. LAW. 635, 638 (2001) (predicting disruption to sovereign debt restructurings as a result of the actions of holdout creditors).

[11] *See, e.g.*, John Drage & Catherine Hovaguimian, Collective Action Clauses (Cacs): An Analysis of Provisions Included in Recent Sovereign Bond Issues, Bank of England Financial Stability Paper (Nov. 2004).

sovereign loans are governed by English law.[12]

Commercial transactions may benefit from the application of legal rules that emphasize certainty and commercial reasonableness. But financial markets, where unconnected market participants trade in financial instruments, depend also on a certain amount of standardization.[13] Some of this standardization is driven by regulation, and by the rules of the markets. Futures markets approve the characteristics of the futures products that may be sold through their markets. Sometimes differences between characteristics of the instruments traded can be altered by the addition of market rules. For example, equity securities of corporations established in different jurisdictions[14] may be traded on a stock exchange if the issuer agrees to be subject to the exchange's corporate governance requirements.[15] Over time, lawyers and financial trade associations have developed standard form documentation for particular financial transactions: the Loan Market Association (LMA) and the Loan Syndications and Trading Association (LSTA) have developed standard form loan documentation,[16] which is an important factor in the sale of interests in the loans and loan participations.[17] The International Swap Dealers' Association

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[12] Karen McVeigh, *Andrew Mitchell and Justine Greening Back Calls for Foreign Loan Transparency*, The Guardian (May 30, 2019).

[13] On standards generally, *see, e.g.*, Nils Brunsson, Andreas Rasche & David Seidl, *The Dynamics of Standardization: Three Perspectives on Standards in Organization Studies*, 33 Organization Studies 613 (2012). *Cf.* Douglas Baird, Pari Passu Clauses and the Skeuomorph Problem in Contract Law, 67 Duke L. J. Online 84, 89 (2017) ("a commodities market depends upon classification and standardization")

[14] The corporations laws of different jurisdictions vary, so shareholders' rights vary. Within the EU there has been a significant level of harmonization of corporate law.

[15] *See, e.g.*, John C. Coffee Jr., Racing Towards the Top?: *The Impact of Cross-Listing and Stock Market Competition on International Corporate Governance*, 102 COLUM. L. REV. 1757 (2002).

[16] *Cf.* Bernhard Ganglmair & Malcolm Wardlaw, Complexity, Standardization, and the Design of Loan Agreements (April 13, 2017). Available at SSRN: https://ssrn.com/abstract=2952567 or http://dx.doi.org/10.2139/ssrn.2952567

[17] *See, e.g.*, David Ansara, 10 Benefits of Standardised Loan Documentation for Corporate Borrowers, at https://www.treasury-management.com/article/4/281/2365/10-benefits-of-standardised-loan-docu

(ISDA) has developed standard form documentation for swap transactions.[18] ISDA's efforts to persuade jurisdictions around the world to recognize the legitimacy and effectiveness of contractual netting illustrate that standard form contracts may require an adjustment of domestic legal rules in multiple jurisdictions to be fully effective.[19] Uncertainty about the effect of standard form documentation may provide an opportunity for litigation,[20] but it also risks disrupting markets.

Standardization of documentation for transnational financial transactions allows market participants to focus their efforts in negotiation on key economic terms, rather than on the boilerplate. At the same time, standardization of documentation may involve documentation risk which may lead to issues of financial stability[21]. If the market commits to a standard form provision that courts decide does not have the effect that market participants expect, then the recognition of the disconnect may result in financial instability. Standardization may encourage investors to accept the surface without questioning the underlying issues.[22] As practices become embedded they become more dangerous.[23]

English lawyers like to think that English law is particularly well-adapted to dealing with

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mentation-for-corporate-borrowers.html. *Cf.* Loan Market Association, Guide to Secondary Loan Market Transactions (Apr. 2016).

[18] *See, e.g.*, Sean M. Flanagan, *The Rise of a Trade Association: Group Interactions Within the International Swaps and Derivatives Association*, 6 HARV. NEG. L. REV. 211 (2001).

[19] *See, e.g.*, ISDA,The Legal Enforceability of the Close-out Netting Provisions of the Isda Master Agreement and Their Consequences For Netting on Financial Statements.

[20] *See, e.g.*, the literature on the interpretation of pari passu clauses, and litigation relating to these clauses.

[21] Cite: documentation risk, legal risk.

[22] *Cf.* Baird, *supra* note 13.

[23] *Cf.* Libor issues. Libor was a standardized interest rate (rather than a standard contract term), and manipulation of the rate led regulators to try to reform the Libor-setting mechanism, and then to work to have the market move away from Libor. *See, e.g.*, Securities & Exchange Commission, Staff Statement on LIBOR Transition (Jul. 12, 2019).

new commercial problems[24] English law is flexible, and English judges have tended to be pragmatic. At times English judges have decided cases in ways that created uncertainties for the financial markets, as in the local authority swaps cases,[25] but other British institutions responded in order to promote legal certainty.[26] The Bank of England encouraged the formation of the Financial Law Panel to address issues of uncertainty.[27] The current Financial Markets Law Committee continues the work the Financial Law Panel began, although it stresses its independence from the Bank of England.[28] More recently the Lord Chief Justice announced that a Financial List would be established as a specialist court in the UK to deal with cases involving the financial markets and with a new test case procedure "to facilitate the resolution of market issues on which there is no previous authoritative English precedent."[29] The courts and other British institutions have worked to ensure that English law works well for financial transactions, including international transactions. English law has for a long time been seen by English lawyers, and by public authorities in the UK, as a law that is appropriate and that should be seen as appropriate for international transactions. To some extent this reflects a colonial or post-

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[24] *See, e.g.*, Sir Geoffrey Vos, Chancellor of the High Court The Law Society's Inaugural Lecture on the Future of Law (May 8, 2018).

[25] *See, e.g.*, Shahir Guindi, *Hazell v. Council of the London Borough of Hammersmith and Fulham and Others,* 25 INT'L LAWYER 1031-1041 (1991).

[26] *Cf.* Sir Geoffrey Vos, Chancellor of the High Court, Certainty v. Creativity: Some Pointers Towards the Development of the Common Law, ¶ 38 (Sep. 17, 2018) ("The commercial judges place great store by certainty in the law because that is what attracts business people across the world to make use of common law systems and common law jurisdictions. Public lawyers sometimes place greater emphasis on the justice of the outcome in the particular case, not being overly concerned by the possibility that the outcome is less predictable when it turns on judicial discretion.")

[27] *See, e.g.*, Caroline Bradley, *Private International Law-Making for the Financial Markets*, 29 FORDHAM INT'L L.J. 127, 175 (2005).

[28] *See* History of the FMLC at http://fmlc.org/about-the-fmlc/history-of-the-fmlc/ (visited Jul. 19, 2019).

[29] *See* History at https://www.judiciary.uk/you-and-the-judiciary/going-to-court/high-court/courts-of-the-chancery-division/financial-list/history/ (visited Jul. 19, 2019).

colonial perspective. It is not clear whether English law is in fact substantively better for commercial transactions or whether it derives a commercial advantage from Britain's colonial heritage.

Whatever the source of the commercial advantage of English law as a governing law for international financial transactions, Brexit challenges that market advantage.

Choice of Law and Choice of Jurisdiction after Brexit [30]

Brexit threatens the status of English law as a dominant law for international transactions, and the competitiveness of the UK legal services sector.[31] Within the EU, while the UK is a Member State, the choice of English law as a governing law for transnational contracts, and the choice of English courts as a locus for dispute resolution, is supported by EU law regimes for choice of law[32] and jurisdiction and judgments.[33] EU rules define the circumstances in which the courts of a Member State have the right to exercise jurisdiction over disputes, limit the ability of Member States to require courts of another Member State to cease exercising jurisdiction,[34] and

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[30] *Cf*. Horst Eidenmueller, Collateral Damage: Brexit's Negative Effects on Regulatory Competition and Legal Innovation in Private Law, European Corporate Governance Institute (ECGI) Law Working Paper No. 403/2018. (May 2, 2018). Available at SSRN: https://ssrn.com/abstract=3171973 or http://dx.doi.org/10.2139/ssrn.3171973 (arguing that Brexit will reduce innovation in private law in the UK and also in the EU 27).

[31] *See, e.g.*, The All-Party Parliamentary Group on Legal and Constitutional Affairs, The Effect of Brexit on Legal Services (Oct. 2018) at https://www.lawsociety.org.uk/policy-campaigns/documents/the-effect-of-brexit-on-legal-services/.

[32] Regulation No 593/2008 on the Law Applicable to Contractual Obligations (Rome I), OJ No. L 177/6 (Jul. 4, 2008).

[33] Regulation No 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, OJ No. L 351/1 (Dec. 20, 2012) (the Recast Brussels Regulation).

[34] Gasser (Case C-116/02) [2003] ECR I-14693; Turner (Case C-159/02) [2004] EUECJ C-159/02; West Tankers Inc. v Allianz SpA (Case C-185/07) [2009] EUECJ C-185/07. The Italian torpedo problem (a practice of initiating litigation in Italy which would take a very long time to resolve in order to prevent litigations elsewhere) led to changes in the rules. *See, e.g.*, David Kenny & Rosemary Hennigan, *Choice-of-Court Agreements, the Italian Torpedo, and the*

provide for the recognition of judgments of courts of other EU Member States. The system is one based on mutual trust between the EU Member States,[35] and the obligation of mutual trust requires courts in the Member States to refrain from action

As of the summer of 2019 Brexit involves a large number of uncertainties, from the timing of any Brexit to the details of what specific new rules will be in place to regulate the relationship between the UK and the EU 27. Under the Rome Regulation, EU 27 courts should continue to give effect to English choice of law clauses because the regulation adopts the principle of party autonomy.[36] The UK plans to retain much of EU law after Brexit, including this rule.[37] UK law firm publications, unsurprisingly, argue that English law will, after Brexit, have the advantages it has now.[38]

Recast of the Brussels I Regulation , 64 Int'l & Comp. L. Q. 197 (2015).

[35] See, e.g., Gasser ¶ 72 ("the Brussels Convention is necessarily based on the trust which the Contracting States accord to each other's legal systems and judicial institutions. It is that mutual trust which has enabled a compulsory system of jurisdiction to be established, which all the courts within the purview of the Convention are required to respect, and as a corollary the waiver by those States of the right to apply their internal rules on recognition and enforcement of foreign judgments in favour of a simplified mechanism for the recognition and enforcement of judgments. It is also common ground that the Convention thereby seeks to ensure legal certainty by allowing individuals to foresee with sufficient certainty which court will have jurisdiction.")

[36] Rome Regulation, Art 3(1): "A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract."

[37] European Union (Withdrawal) Act 2018, 2018 c. 16. English courts have historically been comfortable about accepting contracting parties' choice of law. *See, e.g.*,John Prebble, *Choice of Law to Determine the Validity and Effect of Contracts a Comparison of English and American Approaches to the Conflict of Laws*, 58 CORNELL L. REV. 433, 443 (1973)("in America, as in England, prime importance is accorded to the express intention of the parties. This is known as the principle of autonomy.")

[38] *See, e.g.*, Allen & Overy, Brexit – English law and the English Courts (Jun. 2018); Clifford Chance, Brexit, English Law and the English Courts: Where Are We Now? (Aug. 2018). *Cf.* Courts and Tribunals Judiciary, English Law, UK Courts and UK Legal Services after Brexit: The View beyond 2019, 2 ("English Law is and will remain the gold standard: The certainty of English law is unrivalled. Its flexibility and incremental, judge-made development is highly valued by UK and international businesses in a wide range of sectors, who choose to have their

Enforcement of judgments is a separate issue. The UK Government has stated that it wishes to increase civil judicial co-operation generally,[39] and civil judicial co-operation with the EU is a part of this aim. But, if there is no negotiated agreement between the UK and the EU27 relating to jurisdiction and judgment, there is some uncertainty as to what rules will apply between the EU and the UK. The UK was a party to the Brussels Convention[40] before the Brussels Regulation came into effect. But if the Convention does apply to the UK after Brexit it does so only with respect to the States which were parties to that Convention — Member States before the 2004 enlargement and not the entire EU 27.[41] Commentators have suggested other relevant options for enforcing UK judgments in EU Member States after Brexit, including the Lugano Convention and the Hague Convention on Choice of Court Agreements.[42] The UK is currently a party to both of these conventions through its membership in the EU, has deposited an instrument of accession to the Hague Convention to come into force when the UK leaves the EU,[43] and might accede to the Lugano Convention in future. Neither convention works in the same way as the intra-EU Brussels Regulation system.

The Hague Convention provides a more limited regime for the enforcement of judgments than the EU regime, as it does not involve the same level of mutual trust between the contracting

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contracts governed by it.")

[39] HM Government, Providing a Cross-Border Civil Judicial Cooperation Framework (Aug. 2017) at ¶4 ("Beyond our relationship with the EU, the UK will remain committed to maintaining and deepening civil judicial cooperation internationally, both through continued adherence to existing multilateral treaties, conventions and standards, and through our engagement with the international bodies that develop new initiatives in this field.")

[40] Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Sept. 27, 1968) O.J L 299/32 (Dec. 31, 1972).

[41] *See, e.g.*, Gerard Rothschild, Jurisdiction and Brexit: Back to the Brussels Convention by default? (Jul. 8, 2016) at https://brexit.law/2016/07/08/jurisdiction-and-brexit-back-to-the-brussels-convention-by-default/

[42] Hague Convention of 30 June 2005 on Choice of Court Agreements

[43] See, e.g., https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=1318&disp=resdn (Visited Jul. 19, 2019).

parties,[44] raising the question whether a Court would be prohibited from issuing an anti-suit injunction in a Hague Convention case, or from providing a remedy in damages for breach of an exclusive jurisdiction clause In addition, the Hague Convention provides only for the recognition and enforcement of judgments where the parties have concluded an exclusive choice-of-court agreement.[45] A court seised of a dispute which is within the scope of an exclusive jurisdiction clause designating a court of a different Contracting State may only in limited circumstances decide to proceed with the case.[46]

The uncertainty about the characteristics of the post Brexit jurisdiction and judgments

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[44] *See, e.g.*, Mukarrum Ahmed & Paul Beaumont, *Exclusive Choice of Court Agreements: Some Issues on the Hague Convention on Choice of Court Agreements and its Relationship with the Brussels I Recast Especially Anti-suit Injunctions, Concurrent Proceedings and the Implications of BREXIT*, 13 JOURNAL OF PRIVATE INTERNATIONAL LAW 386-410, 388 (2017) (arguing "that the Hague Convention's system of "qualified" or "partial" mutual trust may permit the use of an anti-suit injunction, the damages remedy for breach of an exclusive choice of court agreement and an anti-enforcement injunction where such relief furthers the objective of the Convention.") See also *id.* at 395("the legal risk of pre-emptive proceedings in breach of an English exclusive choice of court agreement is reduced but not removed in cases subject to the Hague Convention on Choice of Court Agreements.")

[45] Article 1 of the Convention defines its scope of application as "in international cases to exclusive choice of court agreements concluded in civil or commercial matters." Under Article 22 of the Convention a Contracting State may declare that its courts will recognise and enforce judgments given by courts of other Contracting States on the basis of non-exclusive jurisdiction clauses.

[46] Article 6 of the Hague Convention provides: "A court of a Contracting State other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies unless – a) the agreement is null and void under the law of the State of the chosen court; b) a party lacked the capacity to conclude the agreement under the law of the State of the court seised; c) giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised; d) for exceptional reasons beyond the control of the parties, the agreement cannot reasonably be performed; or e) the chosen court has decided not to hear the case."
[Kleinheisterkamp raises some questions: If EU rules might not be able to be invoked there could be a problem - can ensure assets kept outside the eu Kleinheisterkamp, supra note 7, at 92; Kleinheisterkamp, supra note 7, at 919-920 ("Compelling a party to bring a claim on the basis of an overriding mandatory provision in a non-EU forum, when it is likely that a choice-of-law clause will mandate the application of non-EU law, is making the exercise of that right 'virtually impossible or excessively difficult'")]

regime has implications for litigation between parties to transnational transactions governed by English law. Litigating disputes in England would become less attractive if courts in the EU27 might decline to enforce an English judgment.

An English choice of law is generally combined with a jurisdiction clause identifying the English courts as a or the locus of litigation. After Brexit, those designing transnational transactions might choose to continue the pattern of linking choice of law and jurisdiction and displace English law in favour of the law of another jurisdiction. The International Swaps and Derivatives Association (ISDA) has produced new versions of its Master Swap Agreement to be governed by Irish law and French law in addition to existing versions governed by English law, Japanese law and New York law.[47] The Chair of the EU's Single Resolution Board has suggested that English-law-governed bonds might not be eligible instruments for the purposes of the Minimum Requirement for own funds and Eligible Liabilities (MREL) under the Bank Resolution Directive.[48] Brexit may make English law less attractive as a governing law for financial transactions.[49]

It is possible, however, that Brexit will encourage the development of a separation between choice of law and jurisdiction.[50] Parties to financial transactions might want to retain the

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[47] ISDA Press Release, ISDA Publishes French and Irish Law Master Agreements (Jul. 3, 2018).

[48] Elke König, Chair of the Single Resolution Board, Speech at the SRB Press Breakfast (Apr. 5, 2018) at https://srb.europa.eu/en/node/521 ("Just a word regarding Brexit: Clearly, banks must plan for any possible outcome in the ongoing negotiations and we are closely monitoring their plans. One topic will be the question of how to deal with bonds issues by Euro area banks under UK law. These will become third country issues and might no longer be eligible for MREL going forward.")

[49] There is an additional issue relating to the identity of parties to transactions, for example where derivatives transactions with UK based entities will need to be novated to substitute an EU based entity for the UK entity. *See, e.g.*, ISDA, Contractual Continuity in OTC Derivatives (Jul. 30, 2018) at p 4 (" some common lifecycle events may constitute regulated activities in EU-27 jurisdictions triggering local licensing requirements.")

[50] *Cf*. House of Lords European Union Committee, Brexit: Justice for Families, Individuals And Businesses? 17th Report of Session 2016–17, HL Paper 134 (Mar. 20, 2017) at ¶40 ("in its written submission, the Law Society of England and Wales pointed to "anecdotal evidence" of foreign businesses already being discouraged from using choice-of-court

benefits of an English governing law and to ensure that any judgment would be enforceable throughout the EU by providing for jurisdiction in the courts of an EU Member State. France has already acted to encourage this development by establishing new arrangements for the hearing of English-law disputes in French Courts.[51] The Paris Court of Appeal, the Tribunal de Commerce and the Paris Bar have issued two Protocols setting out procedures for cases to be brought in the International Chamber of the Paris Commercial Court (the Tribunal de Commerce) , including provisions which allow participants in the proceedings to speak English.[52] The Protocols are expressed in neutral language and not as a component of a French plan to increase Paris's significance as a leading financial centre in the EU after Brexit. But the new arrangements follow a report by the Haut Comité Juridique de la Place Financière de Paris, a Committee established at the instigation of the French Financial Markets Authority (AMF) and of the French Central Bank to promote the legal competitiveness of Paris as a financial centre.[53] The Minister for Justice charged the Committee with working out how to allow businesses to bring proceedings in France in the language of their business relationship.[54] The Committee recognized that there is an international competition between centres for dispute resolution,[55] and noted a need for France to

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agreements that name "England and Wales as the jurisdiction of choice in commercial contracts"... If this trend continued, the Law Society anticipated a "detrimental [impact on] the legal services sector in England and Wales and the economic contribution it makes to the UK economy".)

[51] The French initiative is one of a number of initiatives whereby States compete to be centres for arbitration or court resolution of international commercial disputes.

[52] *See, e.g.*, Shearman and Sterling, The International Chambers of the Paris Courts and Their Innovative Rules of Procedure (Apr. 23, 2018) (with links to English translations of the two Protocoles) at https://www.shearman.com/perspectives/2018/04/paris-courts-and-their-innovative-rules-of-procedure (visited Jul. 19, 2019).

[53] *See* http://hcjp.fr/presentation-2/

[54] Legal High Committee of Financial Markets of Paris, Recommendations for the Creation of Special Tribunals for International Business Disputes, 4 (May 3, 2017).

[55] *Id*. at 5 ("there is a worldwide, as well as European, competition between courts that, in order to protect the sovereignty of our judicial system and for economic reasons, requires French courts with jurisdiction in various business law fields to project authority and attractiveness by

develop expertise in technical legal issues relating to financial transactions,[56] and expertise in English law (although the document refers to "common law" rather than to English law.[57] France should develop courts which would apply English law, where the proceedings could take place in English to serve the interests of financial firms based in France.[58]

Domestic courts are often called on to apply foreign law in disputes subject to their jurisdiction. But the idea of a court based in one jurisdiction being charged, as a matter of policy, with deciding a number of disputes governed by a particular foreign law is unusual. It is unclear how attractive the idea of litigating English law governed disputes before the Tribunal de Commerce will be to litigants. But if litigants do decide to bring their English law disputes in Paris it is not clear that the French Tribunal will decide those disputes as an English court would do.

Since the early 1990s UK institutions have emphasized the importance of legal certainty for financial transactions,[59] and English judges have recognized this. In the UK, the Constitutional Reform Act 2005[60] established a system for selection of judges by a Judicial

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the quality of the service they provide.")

[56] *Id.* ("Another working group, tasked with studying the legal feasibility of developing an interest rate derivative trading and settlement system in Par is, has stressed the need to substantially enhance the capacities of the French financial courts in order for them to offer a credible alternative jurisdiction to the courts in London for disputes arising from these contracts that raise high ly technical legal issues.")

[57] *Id.* ("These general and contextual factors have led the HCJP to suggest that such specialised tribunal sections be rapidly set up within the civil and commercial courts in Paris to hear these specific disputes, and that they be staffed with judges who have extensive training and experience in these technical issues, specific expertise in the foreign law customarily applied in international commercial relationships, which is essentially the common law, and who speak the language of such law.")

[58] *Id.* ("Raising the standards of the capital's commercial courts to international levels is particularly necessary because Paris is an important, active and innovative financial market.")

[59] *See, e.g.*, text at note 27.

[60] Constitutional Reform Act 2005, 2005 c. 4. *See, e.g.*, Diana Woodhouse, the Constitutional Reform Act 2005 — Defending Judicial Independence the English Way, 5 International Journal of Constitutional Law 53 (2007).

Appointments Commission.[61] The aim of the new system for judicial appointments was to enhance the diversity and independence of the judiciary.[62] Within the UK system there are non-legally trained members of tribunals and legally trained judges.[63] However, litigation involving large value financial transactions will be brought in the High Court, and cases involving particularly complex issues, or issues which have market implications may be brought in the Financial List, and decided by judges with financial expertise. The UK's Financial List is one example of a recent trend of competition between jurisdictions to attract litigation of large value disputes.[64]

The French Tribunal de Commerce is an organ of the French state, but is staffed by judges who are not legally trained, and who are chosen from the "professional (and social) groups whose disputes they will resolve."[65] Professor Kessler writes that "such judges are expected to have the substantive expertise (and social and political legitimacy) necessary effectively to resolve disputes among group members."[66] And she notes that in France the extraordinary courts, which include the Tribunal de Commerce, are criticized "for engaging in

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[61] https://www.judicialappointments.gov.uk/ . The mechanism for selection of judges is an important component of the decisions they promulgate.

[62] There is still room for progress. *See, e.g.*, Owen Bowcott, White and Male UK Judiciary 'From Another Planet', Says Lady Hale, The Guardian (Jan 1, 2019) at https://www.theguardian.com/law/2019/jan/01/lady-hale-supreme-court-president-judges-diversity

[63] Judicial Appointments Commission, Strategic Plan 2016–20 Incorporating the Business Plan 2019–20 , at 3 (Apr. 2019) (noting objective to "[s]elect high calibre candidates on merit").

[64] *See, e.g.*, Pamela Bookman, *The Adjudication Business* (February 19, 2019). Yale Journal of International Law, Forthcoming; Temple University Legal Studies Research Paper No. 2019-08. Available at SSRN: https://ssrn.com/abstract=3338152 or http://dx.doi.org/10.2139/ssrn.3338152 .

[65] See Amalia D Kessler, *Marginalization and Myth: The Corporatist Roots of France's Forgotten Elective Judiciary*, 58 AM. J.. COMP. L 679, 681 (2010).

[66] *Id.*

corporatist self-dealing."[67]

Intuitively, the decisions of a tribunal of judges without legal training but with a background in commerce are likely to be very different from the decisions of judges whose professional life has been dedicated to the study and application of the law.[68] Even if the French judge had practical professional experience in banking, including experience of banking transactions involving English-law governed documentation, her interpretations of an English law governed loan agreement would likely not be the same as those of an English judge.

Forking the Law

Foreign law becomes applicable in a jurisdiction in different ways: through colonial and hegemonic imposition on weaker jurisdictions; through the reception of law by means of legal transplants and diffusion; through the ad hoc application of foreign law because of characteristics of litigants or their transactions; and now through new mechanisms for attracting to one jurisdiction disputes which are to be governed by the law of another jurisdiction. It is tempting to see this new development as similar to a state establishing itself as a desirable base for arbitration. But competing to attract disputes to a state's courts by focusing on disputes governed by one other state's law is very different from competing to make non-state arbitral tribunals attractive locations for the resolution of disputes.[69] The UK, as a party to the New York Convention, can expect UK arbitral awards to be enforced just as are arbitral awards from other jurisdictions. Brexit should not change this. Judgments of English courts are a different matter, and France is seeking to exploit this difference. In seeking to attract English law governed disputes to French courts, France is trying to take advantage of the strengths of English law

[67] *Id.* at 714.

[68] Kessler notes anecdotal evidence that the elected commercial judges in France may "be more equity-oriented than their bureaucratic counterparts." *Id.* at 717.

[69] *Cf.* Bookman, *supra* note 64 (specialized business courts "raise questions about what characteristics of arbitration and litigation are fundamental and the public/private divide that they are assumed to represent.")

which it has had no role in developing. It is a form of cultural appropriation.[70]

The Committee's report does not describe a French court system already prepared to be a center for the resolution of international; business disputes. Apart from noting that France has become an important centre for arbitration, rather than identifying existing strengths of the French court system that would make it ideal for the resolution of disputes relating to transactions governed by English law, the Committee focuses on what litigants might see as disadvantages of French proceedings, including a need for more technical expertise,[71] and that French proceedings involve short hearings,[72] but, overall, a slow litigation process.[73] These are defects that the Committee thinks will need to be addressed. And the Committee also suggests that French legal culture will need to change in order to make the French courts more attractive for the resolution of business disputes.[74] But making these changes is really the normal sort of

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[70] *Cf.* Vos, *supra* note 26, at ¶67 (" all this is even more important as the UK leaves the European Union. Our courts need to continue to demonstrate to the world that English law can safely be relied upon by the international business community for its certainty and dependability. As I said before, and I am not ashamed to repeat, "[w]e are the custodians of a precious commodity, and should exercise caution and restraint in the way we treat it".")

[71] *Id.* at 17 ("The practical issues needing to be considered are, firstly, the expertise of judges in the law of international finance and commerce and their ability to apply a foreign law and work in a foreign language and, secondly, the practices adopted by the court with respect to the production of evidence and holding hearings. Lastly, consideration must be given to the human, physical and technical resources that will ensure that the process is organised in an effective manner.")

[72] *Id.* at 26 ("One of the most frequent criticisms of our judicial system is the summary nature of hearings.")

[73] *Id.* at 11 (" it was unanimously felt that to approach international standards, it is clear that our courts must raise the bar in terms of meeting the timeframes required to resolve cases with high financial stakes. In general, speed and punctuality are regarded as essential to the international appeal of a legal system, in particular when handling international commercial matters. This would require our commercial courts to reduce the duration of proceedings at all levels, by strictly enforcing timeframes through procedural mechanisms and scheduling firm dates for pronouncing judgment.")

[74] *Id.* at 36 (" This report has not addressed the substantive factors specific to our legal culture that would contribute to procuring even greater international authority to our justice system in commercial matters: the stability of the case-law, a more rigorous legal conception of

competition States engage in to attract business and investment. Deciding to establish a centre for the resolution of disputes governed by a particular foreign law in court (rather than international disputes governed by different foreign laws more generally) is less usual. This new English-law-in-French-courts initiative is rather like developing an emulator so that a game developed on one system can be played on a very different system.[75] It is different from an emulator because an emulator involves code that allows a machine to run a program designed for a different type of machine. Law may resemble code, but it is not the same as code.[76]

The French initiative is different from the standard practice of States in two ways: first, by planning for the hearing of a potentially large number of disputes governed by foreign law in court rather than by providing state resources to support the work of in-private arbitral tribunals and, second, in planning to use the State's courts to decide cases governed by a particular foreign law. With respect to the first difference, arbitration might be a way of addressing the issue of enforceability of English law governed transactions after Brexit, at least in some cases. An arbitration strategy, however, does have some disadvantages. Although the New York Convention makes arbitral awards enforceable in the courts of States which are parties to the Convention,[77] arbitration depends on the agreement of the parties, either in an arbitration agreement included in the transactional documents or a separate agreement at the time of transacting or in the context of a dispute. Thus, ensuring arbitration of disputes about English law governed transactions established before Brexit (or before the date of the referendum when Brexit was not anticipated) could be problematic. But trying to resolve an English-law governed dispute in France would also involve either an agreement about jurisdiction or risk proceedings in more than one jurisdiction.

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compliance with contractual commitments and greater realism in the assessment of damages. It is up to the courts themselves to keep these factors in mind. An increased professionalism of the courts, combined with the determination of the parties and upgraded economic and financial expertise tools, will undoubtedly contribute thereto.")

[75] James Conley, Ed Andros, Priti Chinai, Elise Lipkowitz &David Perez, *Use of a Game Over: Emulation and the Video Game Industry*, A White Paper, 2 NW.J. TECH.& INTELL.PROP.1 (2004).

[76] Lessig etc.

[77] *See* http://www.newyorkconvention.org/countries .

Arbitration may not provide the same level of certainty as to the interpretation of contractual language as court decisions can. Arbitrators may treat the decisions of other arbitrators as having precedential effect,[78] but courts do not tend to do so. Part of the advantage of English law as a governing law for international transactions is that English courts follow precedent so that the application of English law tends to be reasonably consistent and predictable over time.

Courts do apply foreign law to cases within their jurisdiction, but when they do so their decisions are not regarded as precedential abroad.[79] In common law courts foreign law is treated as a fact to be proved, rather than as law to be applied by the court.[80] In the common law, adversarial litigation system, the parties hire their own experts to give evidence as to what the law is. Judges may vary in the extent to which they want to rely on expert evidence rather than on their own assessments of foreign law.[81] But even where the court applies its own idea of what a foreign law provides with respect to the issues before the court, a common law court applying foreign law does not purport to state with precedential effect what that law provides.

The French English-law-in-French-courts initiative seems to proceed on a rather different basis. In France court decisions are required to be in French,[82] but the initiative includes

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[78] W. C. M. Weidenmaier, *Judging-Lite: How Arbitrators Use and Create Precedent*, 90 N.C. L. REV.1091 (2012).

[79] MF - a NY decision on English law would be regarded as precedent in NY.

[80] *See, e.g.*, Arthur Nussbaum, *The Problem of Proving Foreign Law*, 50 YALE L. J. 1018 (1941); Peter Hay, *The Use and Determination of Foreign Law in Civil Litigation in the United States*, 62 (Supp) AM. J. COMP. L. 213 (2014).

[81] *See, e.g.*, *id.* at 228 ("In 2010, Judge Richard A. Posner wrote in Sunstar (and repeated these sentiments the same year in his concurrence in Bodum..) that, "relying on paid witnesses to spoon feed judges is justifiable only when the foreign law is the law of a country with such an obscure or poorly developed legal system that there are no secondary materials to which the judge could turn." (Footnotes omitted)

[82] Committee report, *supra* note 54, at 15 ("Court decisions in France must be in French "the case-law of the Cour de cassation (Court of Cassation) treats as a legislative act the Ordonnance de Villers-Cotterêts of 25 August 1539, whose Articles 110 and 111 have not been repealed. Based on that ordinance, which required court documents to be drafted in French rather than Latin to render them comprehensible, the Cour de cassation has developed a case-law

provisions for a translation of the decision to be produced in English at the same time as the publication of the decision. This is logical— if the proceedings may be held in English, it makes sense for the decision to be similarly accessible to the parties. But the Committee did not just have in mind the convenience of the parties in proposing publication of English translations of decisions—the Committee saw such translated opinions as being important for English language commentators to notice them:

> ... although it is not possible for judgment to be rendered in English, a sworn translation into English should be made available when judgment is pronounced. This would also enable the judgment to be immediately classified and commented on in English-language treatises.[83]

There are two points to notice here. The Committee seems to imagine that publication of information about court decisions in treatises is significant for the evolution of all law; it is in civil law systems, but not necessarily in a common law system. And the Committee seems to assume that the French English-law decisions should be seen as significant as a statement of what English law is.

It may be that in other civil law jurisdictions the French decisions on English law may come to be regarded as significant. But it is not so clear that the decisions would (or should) be regarded as significant by English courts. Common law courts are used to thinking of decisions of other common law courts on issues of common law as persuasive, although such decisions are not treated as binding.[84] An English court deciding an issue of English law on which a French court had previously issued a decision might take the French decision into account if encouraged to do so by the parties. But it is difficult to see why an English court would want to describe the French decision even as persuasive, because to do so would be to acknowledge a status of the decision which it does not have. Common law courts do not typically see decisions of other courts about foreign law as decisions of law rather than as decisions of fact.

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requiring court decisions to be drafted in French. This is a public policy requirement from which there can be no exception.")

[83] *Id.* at 13.

[84] *See*, for example, the discussion in Vos, *supra* note 26, of cases where common law courts in different jurisdictions have reached different views on the legal rules.

There is a possibility that the separate activities of French and English courts with respect to the development of English law in international transactions will create a fork in the law.[85] This could happen if courts in some jurisdictions chose to treat the French English law decisions as establishing English law and English courts did not.

English law might therefore develop two strands, which we might call English law (original version) and English law (French version). If this forking occurs, it will create uncertainty about what the rules of English law are. And, although we might think it desirable for common law systems to be, to a large extent, consistent with each other,[86] parties choose to have their contracts governed by the law of a particular common law jurisdiction, rather than by common law in general. Fragmentation of application and interpretation of the law of a single common law system is a much greater problem than the problem of fragmentation of common law generally. If the French initiative is successful such fragmentation is likely to occur. Fragmentation of the common law caused by the colonial imposition of law on conquered nations is inevitable after independence. And the coloniser should be careful about imposing or seeming to impose its view of the law on ex-colonies.[87] But the French initiative is very different from the ex-colony's interpretation and development of its own law, originally imposed through conquest. The UK does not have the same sort of moral obligation to recognize French decisions on English law as it does with respect to decisions in Singapore about what the common law is.

A range of issues may arise. And it is worth noting that litigation occurs in circumstances where the parties have different views of the law or of the facts. Applying foreign law is hard.[88]

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[85] *Cf.* literature on linux forking.

[86] *See, e.g.*, Vos, *supra* note 26, at ¶45 ("Moreover, cross-border business and the new borderless financial service technologies mean that our common law jurisdictions bear a heavy responsibility for ensuring that the common law is not arbitrarily different in different places or indeed an instrument of discretion. In the modern commercial environment, I would suggest that we cannot afford the fragmentation caused by non-aligned common laws and judicial systems. It causes added legal costs and expenses, and unaffordable delays in securing reliable legal advice and effective dispute resolution.")

[87] *Cf.* Vos *supra* note 26, at ¶63 ("We will not advance the cause of certainty and consistency by jingoism. Rather, we should, I think, be advocating considered judicialr estraint.")

[88] Bonell, *supra* note 3, at 17 ("even if a judge was prepared to apply a foreign law, it is far from granted that he or she will be in a position to interpret it properly.")

The French tribunal with jurisdiction over an English law governed financial dispute will inevitably face issues that have not previously been decided by an English court. The simplest cases will be cases relating to contract interpretation, but litigation relating to financial transactions frequently involves questions of interaction between common law and statutes which implicate complex issues of public policy. Can litigants be sure that the French court will apply the view of public policy that an English court would apply? What if the UK adopts statutes after Brexit that may conflict with French law? And might the French Tribunal apply mandatory norms of French law despite the parties' choice of an English governing law?[89]

Potential Solutions to the Fork?

A simple solution would be for the English courts to develop a procedure for the articulation of an authoritative view of what English law is with respect to a defined issue. In the absence of agreement between the UK and the EU27 with respect to enforcement of judgments some parties to transactions governed by English law may decide it makes sense to resolve disputes outside the UK in the interests of enforcing any judgment more easily. Whereas the UK has an interest in ensuring that dispute resolution with respect to English law governed disputes occurs in England it also has an interest in controlling the fragmentation of English law.

[89] But *cf* Kleinheisterkamp, *supra* note 7, at 929 ('The problem boils down to the question of why 'private' legal certainty should be given primacy over 'public' legal certainty. This becomes more tangible when considering the reproach inherent in the criticism of the European court decisions, notably that they authorize a breach of good faith by one of the parties.The fallacy is that statuta institutionalia do not, and cannot, care about individual arrangements but are concerned about ensuring the functioning of the market through their rule over the multitude of individual contracts that they regulate.That is precisely why they constitute overriding mandatory laws.") (footnotes omitted)