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The Third Jonathan Hirst Memorial lecture

The Rt Hon Sir Christopher Clarke

London: the venue of choice for international disputes in the year ahead?

Introduction

1. It is a great honour to be asked to deliver the 3rd Jonathan Hirst Memorial Lecture. I did not, however, realise when I accepted the invitation that at the time when it came to be delivered the Executive of our nation would, how shall I put it, be bordering on the dysfunctional, and our Legislature consumed by a single topic in relation to which every option appeared unacceptable to a majority of our elected representatives. Much less did I realise that I would be delivering it three days before elections to a Parliament from which three years ago we were supposed to be departing.

2. In those circumstances it seemed to me that it would be desirable to look on the bright side at a functioning part of our affairs namely that part of it which is devoted to the resolution of business disputes.

London is best

3. We tend to think that our system for the resolution of business disputes is the best. And it is. I want, however, to spend some time analysing **why that is so**

Law and Judges

4. The first great benefit of our system is **English law itself**, to which subject I shall in a moment revert. The second is that we have an independent, impartial, and fair-minded **judiciary**. The combination is such that our system has a justifiably strong worldwide reputation as a result of which it enjoys a dominant position in the international legal services and dispute resolution market.

5. That our judges are independent and impartial may be thought to be no great insight. We are, however, in this, as in many other respects, the envy of less happy lands. In some jurisdictions, there is corruption or partiality of one kind or another. Sometimes it **is political** in the sense that, in matters which are deemed important to the State, or the ruling party, or powerful persons, arrangements are made to ensure that the "right" decision is made. Or, in some countries, the judiciary is reluctant to decide a case adversely to the Government or to powerful interests, either out of concern for their own position or a general timidity.

6. Sometimes corruption is purely **monetary**. One should not suppose that this is solely a non-European problem. A survey a few years ago of some 11,712 judges in 18 EU countries revealed that more than 10% of judges thought that some of their number were taking bribes, or were not sure whether they were. In some countries over 50% of the judges thought that.

7. Next, our judges who determine international business disputes are **highly competent**. This is because their members, particularly in the Commercial Court, the Chancery Division, and the TCC have usually been

highly successful practitioners with experience in the application of law in practically every business field.

8. You would expect someone like me to say that. But that does not stop it being true. In 2014 the Ministry of Justice published a report from the British Institute of International and Comparative Law on the factors that influenced international litigants' decisions to bring commercial claims to the London based courts. One of the key findings of the research was that the first and foremost reason why London was considered to be a popular and natural jurisdiction for high value cross-border disputes was *the reputation and experience of English judges alongside English law.* That reputation derives of course from their manner of trying cases and from the quality of their judgments, where you will, usually – there are exceptions to this, as to every, rule - get a clear, reasoned and well-expressed decision on the facts and the application of the law thereto.

Legal profession

9. Allied to the quality of the judiciary is the quality, size and availability of the legal profession in both of its branches. London and many other cities have a copious supply of practitioners of outstanding ability, both in independent practice and in-house, who have experience in dealing with the realities of international commerce and finance, sometimes in arcane fields. Several of them are in this room. It is no surprise that London has many of the world's leading firms and advocates, and that more than 200 overseas law firms, from some 40 jurisdictions, employing over 10,000 people practice in the UK. The UK is the largest legal service market in Europe and second only to the US globally.

10. The UK's legal services sector contributed £26bn to the UK economy in 2016, equivalent to 1.4% of Gross Value Added, and posted a trade surplus of £4.4bn in 2017. Total revenue from legal activities in the UK in 2017 was £33.4bn. Much of this was generated by the top 100 UK law firms, who earned over £24bn in 2017/18. English law was used in 40% of all global corporate arbitrations. It also forms the basis of the legal systems for 27% of the world's 320 jurisdictions.

Court system

11. The next factor in favour of dispute resolution in London is **our court system** by which I mean both the range of courts available and their physical infrastructure. As to the latter, the Rolls Building is the largest specialist centre for the resolution of financial, business and property litigation anywhere in the world; brought into being with the support and enthusiasm of the City of London.

12. As to the former, there is a court for every business need. The **Commercial Court** has for over 120 years been the world's leading forum for the resolution of trade, shipping and insurance disputes, and is now up to its full complement of judges, after a number of years at very much below full strength. The Chancery **Division has** unrivalled experience in corporate and financial disputes. The **TCC** some time ago regained its rightful place as a leading court for the determination of construction and engineering disputes, with an admirable procedure for speedy dispute resolution by adjudication.

13. The latest data from the Commercial Court indicate (page 9) that in 2017/8 international cases accounted for some 70% of the business of the Court – a truly international court. Statistics down to March 2019 indicate

that litigants came from 78 different countries, and that there was a 63% increase in cases heard over the previous year. The vast majority of cases brought before the Court are (page 11) claims for sums well in excess of £ 10 million; the largest was for $ 3 billion with more than a dozen for over £ 100 million. Many arbitrations claim concern awards for very large, sometimes billions of pounds.

14. One has to recognize that there are potential downsides to London litigation. The cost of lawyers is high. There is a permanent risk of over egging the pudding. When one sees eight figure costs bills on each side, admittedly in billion-dollar litigation, one begins to wonder a bit. Although, to change metaphors, one can see that in that context, no stone should be left unturned. And I note from a recent article in The Times that eye-watering fees may actually attract some international clients since an ability to pay them is an exhibition of net worth.

Disclosure and cross examination

15. Another reason for choosing London is that our system involves (a) disclosure of documents; (b) oral cross examination; (c) oral advocacy; (d) the loser usually pays costs; and (e) the absence of an automatic right of appeal. I realise that something can be said against each of these, or aspects of each of these, but, in essence, the combination is a good one. And for a respectable claim there is a realistic chance of obtaining funding on a conditional fee basis. Although the ability of litigation funders to rely on the *Arkin* cap to limit their liability in respect of adverse costs to the amount of funding they contributed is no longer assured: **Davey v Money & Ors** [2019] EWHC 997.

Efficiency

16. Another reason for the selection of London is the steps taken to increase efficiency in the determination of disputes. I have in mind things such as:

    (a) the current emphasis in the Commercial Court on case management (which may contribute to the 60% settlement rate in Commercial Court cases);

    (b) the Shorter and Flexible Trial procedure in the Business & Property Courts;

    (c) the new disclosure protocol in the Commercial Court and in most other courts within the Business and Property Courts umbrella, which aims to retain disclosure but ensure that it is proportional to the issues in the case; and introduces Initial Disclosure followed, if appropriate, by Extended Disclosure in different forms; and

    (d) the working party in the Commercial Court on witness statements, which aims to address whether our practice in relation to written witness statements remains appropriate.

    (e) the introduction of the Financial List in the Business and Property Courts, it being a special court to hear cases requiring particular expertise in the financial markets, or which raise issues of general importance to those markets, or where the value at issue exceeds £ 50 million.

Arbitration

17. That is enough of courts. An equally important reason why London is and should continue to be a venue of choice for dispute resolution is its suitability as a place for arbitration. I do not propose to embark upon a comparison of the relative advantages as between curial and arbitral determination, not least because it would be possible to spend every week somewhere in the habitable globe attending a conference on the advantages of arbitration, which are very considerable, but not overwhelming. It is sufficient to draw attention to the range of arbitral facilities in London under the auspices of well know arbitral institutions such as the LCIA, the LMAA. GAFTA and others. or on an ad hoc basis. If you want an arbitrator of practically any kind you can readily find one here. We cannot tell how many awards are issued every year but it may well be well over 1,000.

18. The LCIA, for instance, had in 2018 317 arbitrations referred to it, just 9 shorts of the highest number ever, of which 271 were referred under its own rules, the highest number in that category ever recorded in a single year. The parties to these disputes came from the whole world. Only 21% of the parties were from the UK. In those claims that were quantified 56% were for up to $ 6 million, with 10% for between $ 20 and 50 million; 7% for between $ 50 and 100 million; and 11 % for over 100 million. 76% of the disputes were to be governed by English law.

19. In this connection it is relevant to observe that the Commercial Court has what has been described by Dame Elisabeth Gloster as a **symbiotic relationship** with arbitration. Roughly 25% of the claims issued in the

Commercial Court relate to arbitration, covering challenges to awards on jurisdiction, or on points of law or on irregularity grounds, together with the grant of injunctions in relation to arbitrations, particularly anti-suit injunctions, and the enforcement of awards, both of which are critical in the support of the court for arbitration.

20. In this connection it is noticeable how successful arbitrators in England have been so far as claims of irregularity **under s 68** are concerned – not wholly surpsingly since the section was designed so as only to be available in extreme cases. A set of figures mentioned in the Minutes of the Commercial Court Users Group in 18 March 2018 records that, in the Commercial Court, in **2015** only 1 out of 34 challenges succeeded; in **2016** none out of 31 in 2016; in **2017** none out of 48 [1]. In **2018** there have, however been at least three. The number of appeals overall whether under section 68 or 69 is a miniscule proportion of the total number of awards

21. There has of course been a continuing debate as to whether or not the right balance has been struck between avoiding unwelcome interference from the courts in arbitral decisions; and providing access to a court, which, unlike an arbitral tribunal is a source of law, so that it can deal with errors, or simply questions, of law, as well as irregularities, in arbitral proceedings. In favour of a wider approach is that it would, or could, mean that commercial law had a better chance to develop and be widely known; which is lost if decisions involving important or interesting questions of law are determined (not necessarily always in the same way) by awards

[1] There may have been at least two: ***Oldham v QBE Insurance (Europe) Limited*** [2017] EWHC 3045 (Comm) – unsuccessful party deprived of fair opportunity to say why he should not pay costs; **P v D** [2017] EWHC 3273 (Comm) – failure to secure a necessary clarification;

which, save for the occasional *samizdat* circulation, are not available for public consumption.

22. I belong to those who think that we have got the balance about right, by confining leave to appeal under section 69 of the AA 1996 (unless the parties have agreed to exclude it) to cases where:

(a) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and

(b) the decision of the tribunal on the question is obviously wrong.

That observation is subject to two qualifications. In relation to the first criterion it seems to me desirable that there should be a certain amount of elasticity in determining what is of general public importance. That test ought to be satisfied if the importance is for a particular trade, or section of a trade, or to persons who find themselves in a particular, but likely to be repeated, circumstances.

As to the second ("obviously wrong") I wonder whether it is quite right to say that this criterion means that the tribunal's reasoning must reveal "*a major intellectual aberration*" – per Arden LJ in ***HMV UK Propinvest Friar Limited Partnership*** [2011] EWCA Ci 1708 [8]; ***Reliance Industries Ltd v The Union of India*** [2018] EWHC 822 (Comm) 57. That phrase is derived from the case of ***Braes of Dune Wind Farm (Scotland) Ltd v Alfred McAlpine Business Services Ltd*** [2008] EWHA 426 TCC where Akenhead J was not, in my opinion using that phraseology as some form of synonym for obviously wrong.

Other reasons

23. There are many other good reasons for choosing London. For many business litigants it is a neutral forum. It may be particularly suitable if the litigants are from countries lacking strong rule of law principles, with an ill developed law, a weak or unreliable judiciary or unreliable lawyers. Because of London's position the subject matter of many disputes, or the assets hoped to be realised therefrom, will be London based.

24. Another reason for choosing London is the availability of high-class mediators. The range of mediation bodies and mediators, and their different competencies is considerable; and their success record remarkable. These skills are, of course, needed because ADR has now become a feature of dispute resolution in London and is often in practice required, or highly encouraged, by the courts.

English law

25. As I have said London is a prime place for the determination of business disputes because of English law itself, which has become the most commonly used law in international business and dispute resolution. But one needs, I think, to go beyond simply asserting that as a sort of USP and analyse **why** English law is good for business,

26. **Firstly, it is of high quality**. It is well developed, extends over a broad range and is, within limits, flexible in application.

27. **Why is that so?** The answer seems to me to be two-fold (a) h**istor**y and (b) **process**. England has been a trading nation for generations and has built up its law on the back of that trade. That has been helped by the establishment at the end of the C 19 of the Commercial Court and the distinguished judges who have sat in it over the decades, some of whose

names have become bywords for legal analysis. The classic subject matter of the typical commercial court dispute – shipping, banking, insurance, reinsurance, business contracts and the like - has established a whole corpus of law and led to English law being the law of multitudinous contracts.

28. And we have the immense benefit of a ***system of equity*****.** It is sometimes difficult to explain to those unfamiliar with it the operation of the fused systems of law and equity, with the latter originating in an appeal to the conscience of the Sovereign of which the Chancellor was the Keeper. But the development of equitable principles to mitigate the rigours of the law has, I think, fashioned our law well; as has, in more recent years, the impact of administrative law concepts which has, in some cases, the exact scope of which is debatable, served to circumscribe the operation of contractual discretions so as to preclude them being exercised in an arbitrary, capricious or irrational manner.

29. **By process** I refer to the fact that the common law is **not a code**. It is, in effect, a series of principles, propositions and rules whose content, scope and limitations have been worked out by their application by practitioners and judges to specific cases, the law being discerned from those cases interpreted together, and, where necessary, reconciled or developed This has proved to be a highly valuable, practice based, method of legal reasoning, which enables the common law to seek to achieve practical justice by applying and, if necessary, adapting basic principles to novel situations. A law that stand still is likely to ossify and cease to be fit for purpose.

30. **Secondly English law is relatively certain**. We have resolved quite a lot of issues over the years, although it never ceases to surprise me that there always seems to be some question which must have arisen hundreds of times which remain unanswered, at any rate at the highest level.

31. Part of the reason why English law is so suitable for business disputes is precisely because of its **content**. The parties are free to contract as they wish. Subject to any applicable statutory constraints, the function of the court is then to give effect to the commercial bargain made (whatever it may have been). The law adopts what is now a pretty well-established, and broadly satisfactory, approach to the construction of contracts. Leaving aside any question of rectification (itself a rare remedy) the words of the contract will be interpreted objectively by asking what a reasonable person in the position of the parties, possessed of all the reasonably available background information, would understand the words to mean whatever one or more of the parties may have subjectively intended. If there are two possible constructions the court is entitled to prefer the one more consistent with business common sense. If the meaning of the words is clear enough, the parties will be held to it even if the result is harsh. In essence what you write down is what you get. Frustration apart, there is in general no escape for a contracting party because fulfilment of its obligations becomes excessively onerous on account of an unforeseeable change of circumstances such as appears in Article 1195 of the new French Civil Code.

32. **Exclusion clauses** need to be clear, and construed in a manner that is not repugnant to the whole purpose of the contract. But, if they are clear, they will, subject to any statutory exceptions, take effect. **Terms will be**

implied into the contract but, leaving aside implications of law, only if it is necessary to do so, or the term in question is so obvious that it goes without saying. The parties can get relief for mistake if it was a common and fundamental mistake in relation to a critical matter or if one party is aware that the other is under a mistake and seeks unconscionably to take advantage of it. Relief is available for **misrepresentation** if it induced the contract in the sense that if it had not been made, the party to whom the misrepresentation was made would not have entered into it. The contract can **be terminated** for breach of a condition or a fundamental/repudiatory breach but otherwise the remedy is in damages, which are, with rare exceptions, compensatory not punitive. A contract can be **frustrated** but this is rarely held to be the case: the UK leaving the European Union will, as the law currently stands, not do as a frustrating event: ***Canary Wharf BP 4 (TI) Ltd v European Medicines Agency*** [2019] EWHC 335 (Ch), although that case is under appeal.

33. These points, are an indication as to the sort of ways in which English law is good for business.

34. It is not surprising, therefore, to learn from the research recorded in the Ministry of Justice report to which I refer [8] that the sectors in which businesses frequently use English law include marina, insurance shipping, trade, construction, energy, employment, banking, shares and pensions. In many of these spheres of activity English is the default law and London the default place for dispute resolution.

35. We have, of course, always to remember the benefits of **not having** some of the things that we might have, but do not. I have from time to time had the pleasure of judging a students' moot in Vienna, in which the imaginary

contract which gives rise to the moot problem is governed under a system of law which seemed to make anything admissible for the purposes of construction. By the time we had taken into account (i) the negotiations; (ii) the parties' intentions; (iii) the contractual context; (iv) the terms themselves; (v) the events after the contract, and (vi) what each party might be supposed to have known about the intentions of the other, the answers to the question of construction seemed increasing impossible to give. I know that in English law interpretation is an iterative process but under other systems the journey seems endless.

Intellectual Titans

36. I have mentioned a number of the advantages of English law and jurisdiction. One that I have not mentioned so far is, of course, the availability of intellectual titans at the highest levels, whose views are not always co-terminus, and give the rest of us the opportunity to puzzle out how to deal with that circumstance. For those of you who are interested in the intellectual equivalent of a heavyweight wrestling match may I commend a comparison of an article by Lord Hoffman in the 2018 LQR 553 under the heading "*Language and Lawyers*" with a lecture given by Lord Sumption in May 2017 to the Harris Society, Keble College Oxford under the heading "*A question of Taste; The Supreme Court and the Interpretation of Contracts".*

37. These impressive documents must be read for themselves since the briefest summary I am about to give cannot do justice to either. In his speech Lord Sumption describes how, to use his words, the House of Lords embarked on an ambitious attempt to free the construction of contracts from the shackles of language, using the concepts of "*the surrounding*

circumstances" and "*commercial common sense*"; and to replace them with some broader notion of intention. These attempts he ascribes in large measure to the towering figure of Lord Hoffman. He refers to Lord Diplock's ever to be quoted words in *The Antaios*, about avoiding interpretations that lead to unreasonable results. In essence he commends a reassertion of the primacy of language as opposed to using surrounding circumstances to, in effect, override the language, when the language used is the only way in which the intentions of the parties can, under our system of interpretation, which excludes evidence of prior negotiation and subjective intentions, be conveyed.

38. Lord Sumption identified the retreat from that position and a return to the primacy of language as beginning in the Supreme Court with **Arnold v Britton** [2015] AC 1619 ("*the reliance placed …on commercial common sense and surrounding circumstances. should not be invoked to undervalue the importance of the language of the provision which is to be construed*" per Lord Neuberger), although, as Lord Sumption puts it, that was in rather muffled tones. The retreat was continued in **Wood v Capita Services** [2017] UKSC 24.

39. In Lord Hoffman's article he explains why, in his view the old rules of construction were incoherent and wrong. He begins with an analysis of the way in which language is used to convey meaning; and how a distinction is to be drawn between the meaning of words ["*Word meaning*"] and what a speaker or writer means his word to mean, which he characterises as "*Speaker meaning*", the latter potentially depending on the background and context in which the speaker speaks. He gives examples of where people speak elliptically but their meaning is clear. The

process of legal interpretation is, he says, a matter of Speaker meaning. For this reason, a court can give effect to the meaning which the document would objectively convey to a reasonable person to whom it was addressed notwithstanding – and herein lies the rub - that it contains a verbal error. This circumstance would be rare and the interpretation to be derived from a conventional meaning would have to be irrational for that to happen.

40. In his essay he describes Lord Sumption as *Wigram Redivivus*, Wigram being the author of a book which will, I know, have been your bedside reading for many years, namely the "*Examination of the Rules of Law respecting the Admission of Evidence in aid of the Interpretation of Wills"* published in 1831 which laid down a particularly strict approach to the construction of wills.

41. It is not for me, a mere mortal, to arbitrate/mediate between these two deities. I suspect that the resolution is to be found in the *proposition that* a departure from the literal (or word) meaning of the words is only acceptable if that meaning produces a result so irrational or self-contradictory that the parties cannot have intended it, and that it was plain to a reasonably objective person what the parties meant (and not simply that it is clear what a reasonable person would have agreed). That, itself, would appear to me to be a business-like approach.

Cases adopting a business-like approach

42. I have so far referred to a number of Nutshell points, which are, of course the subject of realms of textbook and case law, as indicia of the suitability

of English law for business purposes. It appears to me worthwhile to consider a few cases which, to my mind, demonstrate with greater specificity how the approach of the English Courts, at the highest or the second highest level have produced results which could be said to be business friendly.

The Achilleas

43. *Transfield Shipping Inc v Mercantor Shipping Inc* [2008] UKHL 48 was concerned with a bulk carrier called "*The Achilleas*". The Charterers were bound to redeliver the vessel on **2 May 2004**. In fact, they delivered her on **11 May 2004** because, late in the day, they had sub-chartered her out; and she was delayed at her second discharge port. Meanwhile the Owners had fixed the vessel to a new charterer for a 4-6 months' hire following on from the charter which was due to come to an end on 2 May 2004. The latest date for delivery under the new charter was 8 May 2004. Since the vessel was not going to be redelivered to the Owners in time for her to be delivered by 8 May 2004, the owners had to agree with the new charterers a postponement of that cancellation date.

44. Thus, it came about that, in return for an extension of the cancelling date under the new charter from 8 May until 11 May the Owners agreed to reduce the rate of hire for the new fixture by $ 8,000 per day. (There had been a substantial fall in the market over a pretty short period). The question was whether the Owners were entitled to recover from the original charterers $8,000 per day for the whole period of the new charter, or only to the difference between the market rate and the charter rate for the 9 days from May 2nd to May 11th.

45. The House of Lords, reversing the decision of the majority arbitrators, the Commercial Court, and the Court of Appeal, held that the owners were only entitled to the 9 days damages. This was on the basis (so far as some members of the House were concerned) that although, normally, recoverability was dependent on whether the loss in question was a not unlikely result of the breach, this was only a *prima facie* assumption about what the parties may be taken to have intended, no doubt applicable in the majority of cases, but capable of rebuttal in a case in which (per Lord Hoffman):

> "*the contract, surrounding circumstances* ***or general understanding in the relevant market*** *shows that a party would not reasonably have been regarded as assuming responsibility for such loss".*

46. The decision has attracted some degree of containment/criticism. A number of later cases in England suggest that its practical application is likely to be exceptional[2]; and the Singapore Court of Appeal in a very powerful judgment has declined to follow it**: MFM Restaurants Pte Ltd and another v Fish & Co Restaurants Pte Ltd and another** [2010] SGCA 36. At the same time the Hong Kong Court of Final Appeal has unhesitatingly adopted the assumption of responsibility test; **De Monsa Investments Ltd v Richly Bright International Ltd, 823 Investment Ltd** [2015] HKCFA 36.

47. My purpose in citing it is that it seems to me an example of a development of the law which could be characterised as business friendly insofar as it

[2] *Sylvia Shipping Co Ltd v Progress Bulk Carriers Ltd* [2010] EWHC 542 (Comm); *Classic Maritime Inc v Lion Diversified Holdings Berhad Limbungan Makmur Sdn Bhd* [2009] EWHC 11 42 (Comm); *Supershield Ltd v Siemens Building Technologies FE Limited* [2010] EWCA Civ 7.

treated as a criterion for determining the limits of loss for which the parties in the relevant market should be taken to have assumed responsibility.

48. I recognize, of course, that what you might describe as business friendly may well depend on which side of the business you are on.

Cavendish v Makdessi

49. My next example is **the penalty shootout**. In 2015 in **Cavendish Square Holding BV v Talal El Makdessi** [2015] UKSC 67 our Supreme Court, sitting as a court of 7, revisited the law of penalties which was described by Lords Neuberger and Sumption as "*an ancient, haphazardly constructed edifice which has not weathered well and in the opinion of some should simply be demolished*". In that case Mr Makdessi agreed to sell to Cavendish a controlling stake in the holding company of the largest advertising and marketing communications group in the Middle East. The contract provided that if he was in breach of certain restrictive covenants against competing activities, Mr Makdessi would not be entitled to receive the final two instalments of the price paid by Cavendish (clause 5.1) and could be required to sell his remaining shares to Cavendish, at a price excluding the value of the goodwill of the business (clause 5.6). Mr Makdessi subsequently breached these covenants.

50. In essence, the Supreme Court declined either to abolish or extend the law of penalties, which has often been described as a naked interference with freedom of contract. But it severely curtailed its application. The Court (whose reasoning was not identical as between the members) said that the essential question was whether the clause was penal; but that it was not helpful to ask, as appeared to have been the law for a century or

so, whether it was intended as a deterrent (*in terrorem*). The true test, according to at least three members of the court, was whether the impugned provision was a secondary obligation which imposed a detriment on the contract breaker out of all proportion to any legitimate interest of the innocent parry in the enforcement of the primary obligation. These members of the court recognised that there could be a conditional primary obligation whereby the consideration for a sale could be reduced on account of the non-fulfilment of an obligation on the part of the seller, *i.e. a breach*, without thereby engaging the doctrine of penalties at all.

51. This case, too, seems to me a good example of the way in which the Court has moved towards a result which promotes a solution acceptable to business. But I doubt that Mr Makdesi thought that was so: since the primary obligation of which he was in breach was pretty insignificant and his loss was in the tens of millions.

Lies

52. I turn then to lies. Before 2016 it appeared to be the case that you would forfeit your claim against insurers not only if you dishonestly claimed more than your claim was worth, in which case you would recover nothing, but also if you made some false statement as to the circumstances of the accident ("collateral lies"), knowing that it was untrue or reckless as to its truth or falsity, even if it turned out at trial, that the claim was entirely valid.

53. In ***Versloot Dredging BV v HDI Gerling Industrie Versicherung AG*** [2016] UKSC 45, the Supreme Court, by a 4-1 majority, with the powerful dissent of Lord Mance, reversing the decision of the Court of Appeal and the

Commercial Court, and notwithstanding earlier authority, including in the PC[3], held that the forfeiture rule did not apply to justified claims supported by collateral lies. A policy of deterrence did not justify the application of the rule in those circumstances [26] – that was a step too far and a legal sledgehammer to a nut [100]. This, itself, was a business-like approach. Although the insurance industry did not see it that way.

Other examples

54. There are many other examples of cases where the courts have developed a sort of "justice fit for business" approach. **One** of those is the recognition that parties are free to agree that a certain state of affairs shall form the basis of a given transaction – **Peekay Intermark Ltd v Australia and New Zealand Banking Group** *[2006] EWCA Civ 386*, whether that state of affairs be the case or not - sometimes, perhaps inaccurately, described as the doctrine of contractual estoppel, from roots in the middle of the nineteenth century: ***Prime Sight Ltd v Lavarello*** [2014] AC 436; **JP *Morgan Bank v Springwell Navigation Corp*** [2008] EWHC 1186 (Comm); **First Tower Trustees v CDS & Anor (Superstores International) Ltd** [2018] EWCA Civ 1396.

55. **A second** is the recognition (e.g. in **Inntrepeneur Pub Co (GL) v East Crown Ltd** [2000] 2 Lloyd's Rep 61 [7]) of the validity (subject to the possible application of an estoppel) of **entire agreement clauses** which are designed to preclude attempts to get round the unwelcome wording of a contract by reference to some supposed statement made in the

[3] **Agapitos v Agnew** ("The Aegeon") [2002] EWCA Civ 247; **Stemson v AMP General Insurance (NZ) Ltd** [2006] Lloyd's Rep IR 852; **Fairclough Homes Ltd v Summers** [2012] UKSC 26 [29].

course of the negotiations for the contract in which the clause is contained.

56. **A third example** of a business-like approach is the rejection by the Courts of some universal or general duty of good faith in the performance of contracts, save in well-established circumstances such as insurance and partnership, coupled with a guarded but developmental approach to implying a duty of good faith or some similar duty in particular cases: see the seminal judgment of Leggatt J, as he then was in **Yam Seng Pte Ltd v ITC 1** [2013] EWHC 111 (QB) in respect of "relational" contracts; considered by the Court of Appeal in **Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd** [2013] EWCA Civ 200 ***; MSC Mediterranean Shipping Company SA v Cottonex Install*** *[2016] EWCA Civ 789; and* **Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd** [2016] EWCA Civ 396

57. Many civil law systems (such as France, Germany. Switzerland) import some form of general requirement of good faith in the making and performance of contracts, as do those States in the USA which adopt the Uniform Commercial Code). (Good faith is a somewhat elastic concept, the requirements of which are opaque and never fully defined.*)* There are, however, dangers for business in this context since, as Moore-Bick LJ said in **MSC Mediterranean** case "*there is … a real danger that if a general principle of good faith were established it would be invoked as often to undermine as to support the terms in which the parties have reached agreemen*t".

58. **A fourth** example is the recognition by the Supreme Court, overturning a unanimous decision of the Court of Appeal, of the validity, subject to any

question of estopppel, of no oral variation clauses: **MWB Business Exchange Centres Ltd** v **Rock Advertising Ltd** [2018] UKSC 24. In that case Lord Sumption observed that there were legitimate commercial reasons for such clauses and said, rightly, that the law of contract does not normally obstruct the legitimate intentions of businessman except for overriding reasons of public policy and that NOV clauses do not frustrate or contravene any policy of the law [12].

59. These cases and many others like them are but examples of the way in which English law is good for business. Our courts, particularly at the highest level, have developed the law based on broad considerations of policy, proportion and justice in a manner which is alive to the needs of the business community.

60. There are, of course, exceptions to every proposition. I abstain from any consideration of the law of illegality in the light of the decision of the Supreme Court in **Patel** v **Mirza** [2016] UKSC 42, in which the reasoning of the majority is described, in effect, by one Law Lord [Sumption] as substituting a new mess for the previous one. But the decision that, generally speaking, an action for the restitution of property transferred under an illegal transaction , at any rate if it is not carried into effect[4] (payment to Mirza of £ 620,000 to bet on transactions with insider knowledge which Mirza did not get) will not be barred by illegality, because it does not give effect to the illegal transaction but, effectively, undoes it, is a commercially acceptable result. But where exactly we are as to the circumstances in which a claim which **is** based on illegality, or

[4] Some of the judgments indicate that there can be recovery even if the illegality is carried into effect on the basis that the receipt of the payment by the payee is unjust and the payment is made under a contract which is void or legally ineffective.

which would give effect to an illegal transaction, may succeed, and the relevant factors to be considered for that purpose, and, indeed the precise status of Patel on that topic is unclear.

Brexit

61. You will notice that I have not yet not mentioned the B word. I have no idea what is going to happen in relation to our link to the EU. There are many complications in relation to what will be the rules as to applicable law, currently established by Rome 1 and Rome 2, and as to jurisdiction and recognition of judgments, currently established by Brussels 1 Recast. A galaxy of commentators has examined the options and potential consequences, which lie beyond the scope of this lecture. It seems to me however that questions of applicable law and jurisdiction are capable of sensible resolution when some modicum of sense returns.

62. But one thing we should not belittle, or doubt, is the continued role of the English courts and English law, together with English law practitioners, in making London the major centre for the resolution of business disputes whether in court or by arbitration. Whatever happens on Brexit the EU Member States will be important trading partners. Counterparties based in EU countries are still likely to sue and be sued here. Many litigants come here who have no relevant European connection at all, and no need to enforce judgments in the countries of the European Union, particularly in the shipping, oil and gas and financial fields.

63. The pervasive use of English law and its attraction to the business community, coupled with the fantastic skills of our legal community – judges, solicitors and barristers - mean that our courts and arbitral tribunals will continue to have plenty of work to do. The City will remain

a global finance centre. People do not choose to arbitrate in London because the UK is a member of the EU. The enforcement of agreements to arbitrate and of arbitration awards – governed by the New York Convention – will be unaffected by Brexit. What interest there will be for English language common law commercial courts in Paris or Amsterdam remains to be seen,

64. The beauty of English law; the quality of our judicial and court system; and the plentiful supply of highly talented lawyers, whether they be judges, arbitrators, or practising lawyers, will not change. Whilst we should never rest on our laurels, an uncomfortable position at the best of times, we should not allow our English reserve to prevent us from declaiming from the rooftops, particularly in the presence and hearing of the merchants of doom and rumour mongers, the solid virtues of our courts, our arbitrators, our law , our lawyers and our system.

Finale

65. It may be that, in extolling the virtues of London as a centre for the resolution of business disputes I have taken too rosy a view. But such a view is wholly appropriate for this lecture since Jonathan was disposed to take a roseate view of life. Many in this room will know the several stories that illustrate that disposition. The classic one of them is that, in a case where Jonathan came second – some of us do not use the word "lost" in these Chambers - he was asked by another member how he had done. He is said to have replied something like "*Well, the judge, quite rightly in my view, found entirely against us. But we gave them a jolly good fright and a good biffing*". Oh, Jonathan how exactly was that, his interlocutor inquired: "*Well we avoided indemnity costs"*.

66. It is our continuing sorrow that we now have Jonathan with us only in memory. But the memory is an enduring one and a good one. It shall not fade.

20.5.19 **Christopher Clarke**