IMPACT OF BREXIT ON ATTORNEYS, THEIR PRACTICES AND THEIR CLIENTS.

WHERE ARE THE LIKELY WINNERS?

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Introduction

1. Although not by design, I prepare this paper on 29 March 2017, the day upon which the United Kingdom is to give formal notification pursuant to Article 50 TEU[1] of its intention to leave the European Union. It is a day of profound sadness for the people of Ireland. We did not and do not wish the United Kingdom to leave the European Union. We believe that it will have adverse economic consequences[2] for Ireland and may put at risk the political settlement entered into on the island of Ireland following the Good Friday Agreement.

2. Ireland is the Member State likely to be most affected by the departure of the United Kingdom from the European Union, not just because of the shared land border and extent of trade between Ireland and the United Kingdom, but because of our joint common law English speaking heritage, and the shared cultural values which underpin our common approach to many issues at the European Union 'negotiating table'.

3. Indeed, a cursory review of newspaper headlines this morning, 29 March 2017, shows wall-to-wall coverage of Article 50 across the Irish news media. By contrast, the Brexit story appears fourth on the Belgian *Le Soir* website, seventh on the French *Le Figaro* website, fourth on the Italian *Corriere della Sera* website and only second on the

[1] Treaty on European Union.

[2] 13.9% of goods exported to the UK, and 19.4% of services. However, 45.6% of food and live animal exports are to the UK. In comparison 35.4% of goods are exported to the rest of the EU and 34.6% of services. (Source *Brexit, Ireland's Priorities*, Government Publication Office)

German *Frankfurter Allgemeine Zeitung* website. On the German *Bild* website, it is so far down the list of articles as to hardly register at all.

4. If we accept the unhappy inevitability of Brexit, we must then go on to consider what implications it will have, particularly for lawyers and their clients. Given the absence of any certainty as to the settlement that will be entered into between the United Kingdom and the European Union, it is of course difficult to predict what is likely to happen in the next two to three years.

5. That said, it is possible to identify what lawyers in the United Kingdom and the European Union think likely, areas where difficulties arise in the future legal relationship of the European Union and the United Kingdom, and the many opportunities that now present for Irish lawyers, and the use of Irish law in commercial contracts in the future.

<u>The UK Legal Sector</u>

6. According to '*The Impact of Brexit on the UK-based Legal Services Sector*':

> *"The UK legal services sector – second in size only to the US – is the most international legal sector in the world, driven by the primacy of English law. Over a quarter of the world's 320 legal jurisdictions are founded on English common law principles and 40% of governing law in global corporate arbitrations is English law… The choice of English law for global contracting parties rests with its reputation for certainty, commerciality and market acceptability. It is also partly driven by the UK's reputation as a leading centre for dispute resolution, whether through litigation, arbitration*

or mediation with parties choosing to resolve disputes under English law in the UK. [3]

7. The UK is believed to account for 10% of global legal services fee revenue and a fifth of European fee revenue. Over 200 foreign law firms have offices in the UK, half of which are from the US. Four of the ten largest law firms in the world based on gross fee revenue have their main base of operations in the UK. Two of the largest law firms in the world based on headcount have their main base of operations in the UK. [4]

8. In the field of litigation, a very significant number of international commercial disputes are brought to the London based courts. According to '*Factors influencing international litigants' decisions to bring commercial claims to the London-based courts*':

> *"The most comprehensive available data on foreign litigants comes from the Admiralty and Commercial Courts. This suggested that since 2010, around 80% of all Commercial Court cases each year have involved at least one foreign party. In almost 50% of all cases, all parties are foreign."*[5]

9. According to the key findings in this report:

> *"London was considered to be a popular jurisdiction for the litigation of high value cross-border disputes. English courts were perceived as a 'natural forum' for the litigation of international commercial disputes. The popularity of English courts mostly draws on the reputation and experience of judges, and the combination of choice of court clauses with choice of law clauses in favour of English law, which is the prevalent choice of applicable law in*

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[3] Report from December 2016 at 3(11)

[4] See presentation given by Julian Makin of Freshfields Bruckhaus Deringer to a Brick Court Chambers panel discussion on the legal implications of Brexit available at https://Brexit.law/

[5] Ministry of Justice Analytical Series 2015 at page 10. According to TheCityUK, UK Legal Services 2016, there are approximately 1,200 claims issued in the Commercial Court every year (5 year average of table at figure 15). 17% of claims in the Technology and Construction Court, 72% of Patent Court claims and 20% of Chancery Court claims are international.

international commercial transactions due to its quality, certainty and efficiency in commercial disputes.” [6]

The Gathering Clouds

10. Notwithstanding the inevitable positive spin put on Brexit by industry representatives in the United Kingdom, it is clear that the departure of the United Kingdom from the European Union will have a very significant effect on the UK legal sector.

11. At the end of 2016, Mlex surveyed 100 legal experts in the UK to establish their opinion of how they think breaking away from the EU will impact how they operate. The report gathered the opinions of 50 senior corporate counsel at the UK’s top companies and 50 partners at law firms in the UK. The findings were very stark. 90% of partners at UK law firms were concerned that the absence of passporting into the single market would have an impact on the size of their operations and headcount. 58% of the partners at UK law firms said that their firm had plans to move elements of their operations to a jurisdiction within the EU. 65% of law firm partners and 72% of in house lawyers believed that another European city was capable of rivalling London as Europe’s leading legal centre. In the summary, the authors stated that:

“It is clear from these findings that UK law firms and corporate legal departments are making contingency plans that pre-empt international trade restrictions and a possible loss of talent to international law firms, balanced against the opportunities arising from an influx of new business enquiries regarding the hugely complex and broad range of issues surrounding Brexit.[7]

[6] Ministry of Justice Analytical Series 2015 at page 10.
[7] See Mlex Market Insight Report, *Mlex Brexit and the Legal Sector, Taking the Pulse of the Market Place*

Firms and legal teams will need to manage their headcounts very carefully and ensure that they are aligned to changes in business activity. As our study indicates, this may mean moving lawyers between practice groups or to international offices to reflect the changing nature of the UK legal sector."

12. Insofar as English law is concerned, the *Economist* stated in 2014 that:

"Just as America benefits from ensuring the world's reserve currency, America and its former colonial master, Britain, enjoy the exorbitant privilege of issuing the world's reserve law…

America and Britain reap large awards from their legal dominance. Of the world's 100 highest grossing law firms, 91 have their headquarters in one of the two. America's legal sector is bigger than the GDP of Peru; though much of that work is because of America's litigiousness, a good chunk comes from foreign work… Almost two thirds of litigants in English commercial courts are foreign. At 1.5%, the legal sector's share of British GDP is nearly double that in other big European countries…

Other bits of both countries' economies feel the ripples too. Foreigners visiting for legal hearings stay in hotels and eat in restaurants. Aspiring lawyers from around the world pay to attend their universities and spread goodwill when they get home. Dependence on American and British law firms makes it harder for deal makers to move from New York and London to Hong Kong or Frankfurt. Britain's Government describes lawyers as central to the export of other professional services such as accounting, asset management and banking…

Many other countries would like to break this duopoly…" [8]

13. In the context of Brexit, it is clear that the dominance of English law in international commerce will come under pressure. It goes without saying that some European commercial parties will no longer be willing to incorporate English as the proper law of their contract. Whether because of the failure of English law to incorporate the *acquis communautaire,* broader regulatory issues, or for more emotional reasons, there is likely to be resistance to English law from many European parties because of Brexit.

14. According to Paper 4, *Civil Jurisdiction and Judgments of the Brexit Papers* (2nd edition) produced by the Bar Council Brexit Working Group in March 2017:

> *"There is an increased risk that commercial parties' negotiated and contractually agreed English jurisdiction clauses will not be respected by the courts in Member States and that the parties are more likely to be embroiled in proceedings in a court other than the court that they have chosen. This is demonstrated by the survey conducted by members of Simmons & Simmons offices in Germany, France, Italy, Spain and The Netherlands as to their courts' approach to English jurisdiction clauses post-Brexit which revealed that over 50% of clients were considering moving away from English choice of law or jurisdiction clauses".* [9]

15. That paper goes on to state that:

> *"Anecdotally, the Bar Council has heard of a number of cases where parties are being advised not to choose English jurisdiction clauses in their contracts, where previously this would have been an almost automatic*

[8] From the print edition May 10th 2014 in an article entitled "*Exorbitant Privilege. American and English law and lawyers have a stranglehold on cross border business. That may not last. "*
[9] At page 33

choice, because of the uncertainties surrounding the jurisdiction and judgments regime. Similarly, anecdotal evidence in September 2016 suggests that cases are already being commenced in other EU jurisdictions which would otherwise have been commenced in England due to the ultimate enforceability of an English judgment.” [10]

16. In his evidence to the House of Commons Justice Committee, Simon Gleeson, of Clifford Chance stated that:

“It is already the case that European law firms are saying to our clients, ‘Why would you want to use English law? England is moving out of Europe. English law is no longer European law. Surely you want a European Law?’ That is not true, but it is a perception that is being aggressively promulgated by European lawyers.”

17. In the House of Commons Justice Committee report printed on 15 March 2017 entitled *Implications of Brexit for the Justice System*, the Committee stated that:

“Saliently, any damage to the UK’s financial services will similarly affect the legal professions. Clifford Chance LLP observed that UK banks, insurers and other such organisations have contractual duties to perform functions based on EU membership and requiring authorisation from EU institutions. If this lapses at the moment of the UK’s departure, those duties are rendered impossible to perform—but this is unlikely to be a defence to a claim for breach of contract, making those firms liable in damages. Areas of such uncertainty include derivatives, insurance and revolving credit agreements. Clifford Chance noted this uncertainty ‘could operate as a

[10] At page 34

disincentive for EU customers to enter into contracts of this kind with UK firms', and called for clarity…"

18. In the House of Lords European Union Committee report entitled *Brexit: Justice for Families, Individuals and Businesses?* the report states that:

"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 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.'

…

This, in turn, has placed a question mark over the legal protection conferred on UK based citizens, businesses and over London's pre-eminence as a legal market…"

<u>The Knotty problems of Brexit – Legal Knots</u>

19. There are many good reasons why parties might avoid English law. It is only when a root and branch analysis of the legal implications of Brexit is undertaken that the sheer size of the task ahead for the United Kingdom becomes clear. Sector by sector, different industries and services are looking at the legal consequences of Brexit in their particular area, without any real idea of what the final arrangement will be. In the recently updated '*Brexit Papers*', the Bar Council of England and Wales has identified a number of areas where Brexit will have a real impact.

20. In relation to financial services, the Bar Council of England and Wales noted that:

> *"The financial services passport is a key benefit of the UK's membership of the EU. It is available, in respect of certain specified financial services activities and/or products to all financial institutions authorised and regulated in one of the 31 European Economic Area Member States. A passport, once obtained, may permit such a firm to:*
>
> *(a) provide certain cross-border services from its home Member State into any of the other 30 EEA States;*
>
> *(b) provide certain products cross-border from its home Member State into any of the other 30 EEA States; or*
>
> *(c) set up a branch to provide certain services in any of the other 30 EEA States.*
>
> *The passport is undeniably beneficial: it avoids the costs and requirements of setting up a subsidiary authorised and regulated in each Member State into which is it desired to do business. The Financial Conduct Authority provided figures to the House of Lords EU Committee which revealed the large number of passports used both by UK firms to access other EEA markets and by other EEA firms to access the UK market…*
>
> *There are other mechanisms that allow firms from countries outside the EEA to provide services/activities and products across the EEA. These mechanisms are the equivalence regime and the emergent third country passport. We agree with the House of Lords EU Committee that these*

existing mechanisms do not suffice to fill the gaps created by the loss of passporting. This is because:

(d) The third country passport is a new concept which has not yet been activated and currently has extremely limited availability.

(e) Utilisation of a third country passport may, based on existing precedents such as AIFMD, involve the firm in question complying with the relevant EU law requirements, potentially on a global basis.

(f) The equivalence regime is patchy and does not have the same coverage as the passport regime. For example, retail financial services is not covered.

(g) The recognition of equivalence of legislation in a particular area is uncertain, time consuming and potentially influenced by politics, so there can be no guarantee if and when equivalence will be granted.

(h) Whilst the UK's current legislative regime is equivalent to that of the EU, there can be no guarantee that this will remain the case in the future.

The WTO rules on financial services are notoriously underdeveloped and untested. Whilst the recognition of four modes of supply under the General Agreement on Trade in Services provides a basis for arrangements in some parts of the sector, the regime is still subject

to prudential carve-out permitting States to impose restrictions on cross-border supply." [11]

21. According to the written evidence from Clifford Chance LLP to the House of Commons Justice Committee:

"***Financial contracts***

The primary impact of Brexit as regards financial contracts is... likely to be the fact that regulatory approvals and permissions necessary for a firm to enter into a particular transaction in the EU may cease before that contract is performed. This could result in the situation where a firm may be obliged under contract law to perform an obligation, but is prohibited by regulatory law from performing that obligation.

...

Thus, a bank which enters into a contract which becomes illegal to perform by reason of Brexit may well be liable in damages for its non-performance to the counterparty.

The extent to which this is an issue for a particular contract depends on its form. For example, when a bank takes a deposit, it must be authorised to engage in deposit taking. However, is deposit taking a single act, which is completed when the money is received, or does the bank require to remain authorised for the whole of the period in which it holds the deposit? ...

It is surprisingly hard to obtain clear answers on the position on sudden loss of authorisation. This is because in practice regulators generally

[11] Pages 23 to 25.

continue to treat failing and failed firms as authorised in order to ensure that they remain subject to regulatory control. Thus the fact-pattern of a sudden loss of authorisation halfway through a regulated contract is extremely rare. However, we have conducted a brief review of the position in respect of certain common contract types, and the preliminary result of that work is that there appears to be a real issue here to be addressed.

Revolving credit agreements

The issue here is as to the position where a UK bank has entered into a revolving credit facility with an EU borrower. Can the bank make a further advance to the borrower once it ceases to be authorised? It seems likely in both France and Germany that a bank in this position would be in breach of local law if it made a further advance to a local borrower after ceasing to be authorised.

Derivatives

The issue here is as to the position where a UK firm has entered into an OTC derivative with an EU counterparty. Prima facie all of the major EU jurisdictions would permit payments to be made in both directions under such a derivative provided that the UK firm was appropriately authorised when the derivative was entered into. However, the issue which is raised in these jurisdictions is as to whether a substantial change in the terms of a pre-existing derivative would be viewed as entry into a new derivative, itself requiring authorisation.

Term deposits

The issue here is as to the position where a UK bank has accepted a deposit from an EU borrower. In this case there is an issue as to where the deposit is accepted – the UK bank will remain authorised in the UK and if the deposit were regarded as accepted in the UK, no issue would arise. However, if the deposit were Euro denominated, it is likely that it would be regarded as placed in the EU. In this case, we believe that at least Belgium, France, Germany and possibly Spain would regard a bank continuing to hold such a deposit past the point of loss of its licence as being in breach of their laws.

Insurance

The issue here is as to the position where a UK insurer has written a policy of insurance whose beneficiary is an EU insured. The primary difficulty here is that Solvency II makes it clear what is required to be authorised is undertakings that pursue the business of insurance and it is likely that an insurer can be said to be pursuing the business of insurance for as long as it remains on risk in respect of any particular contract. As a result it seems likely that an insurer who ceased to be authorised during the life of the contract would, if the contract were subject to the laws of an EU Member State, be in breach of those laws from the moment of loss of authorisation onwards."

22. Brexit therefore has serious implications for trade in financial services, principally driven by the future operation of European Union law. As many financial institutions must comply with that law in the future, this drives a move by those financial institutions (whether banks, insurance companies or others in the financial sector) to

move some of their operations to countries that will remain in the European Union after the departure of the United Kingdom.

23. In truth, much of the press commentary has focused on these issues of 'passporting' and equivalence. However, as the Brexit Papers published by the Bar Council of England and Wales makes clear, Brexit has legal implications across a range of sectors. In the context of civil jurisdiction and judgments, they state that:

> *"The ability to enforce judgments of the courts from one State in another is of vital importance for the functioning of society and for retaining the position of England and Wales as the leading dispute resolution centre in the world, with the important economic benefits that flow from this. Commercial parties require continuity and certainty. The recast Brussels Regulation... confers important advantages both in terms of recognition and enforcement which will be lost unless equivalent arrangements are entered into. ...In a globalised world... it is crucial that the judgments of one State are enforced by the courts of another. The current EU regime is effective in ensuring that this is the case amongst Member States..."* [12]

24. In the absence of transitional arrangements or a final agreement for equivalents of judgments and the recognition of respective parties' courts, it is likely that significant damage will be done to the position of the United Kingdom as a venue for the resolution of disputes. This in itself will damage the attractiveness of English law.

25. In the context of criminal justice, not only do issues arise as to whether the United Kingdom would continue to be a member of Europol, practical measures to ensure co-operation in criminal matters require the introduction of some reciprocal measures to replace the current European Arrest Warrant.

[12] Pages 30 to 31.

26. In the context of family law, the *'Brexit Papers'* state that:

> *"Huge numbers of families in which the partners are from different Member States will be affected by Brexit in relation to divorce and children matters. UK citizens have benefitted in particular from two directly applicable EU Regulations:*
>
> - *Brussels IIA (Regulation 2201/2003) which covers divorce and custody of children, both in disputes between parents and also where local authorities are involved, and*
> - *The Maintenance Regulation (Regulation 4/2009) which covers disputes about family maintenance obligations.*
>
> *These instruments provide certainty about jurisdiction, helping affected families to determine where issues concerning the welfare of children, divorce and maintenance can be resolved. They also assist with the enforcement and co-operation between authorities on the protection of children's welfare."*

27. In the context of insolvency and restructuring, the '*Brexit Papers'* note that:

> *"In general terms, the existing EU legislation governing insolvency and restructuring works well, and amendments reflected in the upcoming recast EUIR have been broadly welcomed by practitioners as sensible improvements. The UK is undoubtedly seen as a centre of excellence in this field and this can be maintained with some effort, provided that there is sufficient clarity at an early stage as to what the legal consequences of Brexit will be. As in civil and commercial matters, and perhaps even more*

so in the context of insolvency and restructuring, it is generally accepted that it is essential to have a clear and consistent basis for the allocation of jurisdiction in insolvency proceedings, and the recognition and enforcement of orders made in those proceedings."[13]

28. In the absence of a transitional provision or successor agreement to the insolvency regime presently in force:

> *"The basis upon which the UK courts can or should assume jurisdiction in respect of restructuring, management and winding up of the affairs of insolvent or financially distressed debtors will become uncertain and will require to be developed. Where a debtor's affairs are conducted in the UK and in EU Member States, there is at least a risk of a clash of jurisdictions, which is undesirable. Recognition, and the enforcement of orders and judgments made, and given in, foreign insolvency proceedings will no longer be automatic where those proceedings are being conducted in an EU Member State."*[14]

29. The list of areas in which Brexit has serious legal implications goes on and on. Market regulation, intellectual property, competition law, tax law, and other areas all require detailed analysis and in truth the task for the United Kingdom is mammoth. The potential complications for businesses and others conducting trade are myriad and impossible to enumerate.

[13] Page 61
[14] Page 65

30. Nonetheless, the UK is relentlessly optimistic as to its prospects following Brexit. In its report on *The Impact of Brexit on the UK Based Legal Services Sector*[15], TheCityUK states:

> *"Brexit offers potential opportunities as well as challenges. For example, from a legislative perspective the UK may benefit from not being party to upcoming EU regulations including the proposed harmonisation of elements of EU contract law. This could be beneficial on the international stage as Singapore has in the past positioned its law as being like English law but without the complications of the EU dimension...*
>
> *There are likely to be opportunities arising from new networks of trade and investment agreements that the UK will negotiate with its partners, and nurturing of growth areas in the financial services sector..."*

31. Time will tell as to whether the increase in work anticipated by TheCityUK will compensate for the necessary loss of work that will follow inevitably from the loss of passporting, the movement of financial institutions to other cities within the European Union, and the understandable reluctance of European Union counterparties agreeing to the insertion of English law as a contractual law in any contract.

<u>Where will the work go?</u>

32. Prior to Brexit, the UK Ministry for Justice conducted a detailed study of the factors influencing international litigants' decisions to bring commercial claims to the London based courts. In that report, in the context of a proposal to increase court fees in England, the report noted that:

[15] December 2016.

"Respondents expressing concerns as to the impact of the suggested fee rises felt that these could upset a delicate balance in favour of litigation in the English courts. They feared that parties might opt for other jurisdictions if this were sensible from a geographical viewpoint as competing litigation centres make every effort to improve the quality, ease and speed of their proceedings and offer litigation under English law. Litigation was perceived to be an increasingly competitive market which follows the basic economic rule if prices go up demand drops."

33. In the context of competing jurisdictions, the report stated that:

"While London is considered by respondents as a natural forum for international commercial cases (especially for litigants from common law and Commonwealth States, Russia and Asia) international litigation is increasingly perceived as a competitive market where litigation centres promote themselves through intensive marketing and improved quality and speed of their court services...

Respondents who reported they would consider bringing a case under English law to another jurisdiction were asked which other jurisdictions they would consider using. The picture is relatively varied but with some preferences for certain litigation centres... Some respondents reflected that these jurisdictions might become future competitors to the English courts."

34. The jurisdictions involved included New York, Singapore, other EU Member States, and Hong Kong. In the context of other EU Member States, the study noted that:

"Respondents generally thought it cheaper to litigate in continental Europe than in the UK. Other perceived advantages were the use of inquisitorial

systems, better cost control, and quicker results. When confronted, however, with a choice between litigation in the courts of another EU Member State and the English courts... more respondents would currently always often litigate in the English courts and only occasionally in the EU Member State courts, if this was appropriate in the circumstances of the case...

The most seriously competing European jurisdictions were said to be Germany and the Netherlands and it was noted that both have improved their marketing. Respondents further remarked that in Germany lawyers' fees were more predictable, cheaper and the average duration of trials shorter. They pointed to recent initiatives to introduce English as an alternative trial language in international commercial cases. Some German courts have already initiated pilot projects allowing hearings to be held in English... the Dutch courts were perceived by respondents as efficient in hearing complex high value claims and as providing for convenient collective settlement mechanisms. Sweden was also mentioned as an alternative to England as a court venue. In Europe, but outside the EU, Switzerland was also a jurisdiction favoured by several respondents...

Respondents perceived New York as a major competitor to the English courts. This is especially true for cases involving Latin American parties, parties from the Pacific area, or cases with assets located in the US. Beyond that, respondents highlighted a general advantage of litigating in New York: it is cheaper...

New York was also considered to have good case management and it has increased its marketing to attract more London based litigation work,

especially in the financial sector. Respondents also highlighted the creation of a special arbitration court, which simplifies proceedings supporting arbitration. This might attract more arbitration work and related court proceedings to New York, to the disadvantage of London. Among the downsides of litigating in New York, respondents mentioned jury trials… onerous pre-trial discovery and the possibility to award punitive damages...

Respondents identified Singapore as a very ambitious litigation centre. It was said that Singapore has observed the developments of the London litigation market closely in an attempt to attract London's litigation business. It markets itself intensively and is likely to continue to do so..."

35. Such commentary overlooks the obvious choice for many international business parties, being Ireland and Irish law. In that regard, a number of factors are clear in the context of legal services:

   I. There is now, and there will be for at least two and possibly five years, uncertainty as to the final settlement that will be reached between the United Kingdom and the European Union. In the many areas of law identified above, and in the commentary, this inevitably makes it risky for certain parties to continue using English law.

   II. According to the United Kingdom, they will not remain part of the Single Market, part of the Customs Union, or under the jurisdiction of the Court of Justice of the European Union. To that extent, the Government of the United Kingdom have signalled their intention to make what is described as a hard Brexit.

   III. As a consequence, there is a real risk that the judgments of the Courts of England and Wales will not be recognised in European courts in a relatively short

period of time. In addition, their ability to manage insolvency and restructuring business will be seriously affected.

IV. In contrast to the United Kingdom, Ireland will remain the only English speaking common law jurisdiction fully integrated into the European legal order once Brexit takes effect. There are now compelling reasons for international businesses to:

1. Incorporate Irish law as the governing law of contracts, in the place of English law,

2. To designate Ireland as the forum for the resolution of any disputes in relation to those contracts, whether by way of litigation or arbitration, and

3. To use Irish lawyers to advise on European law.

36. According to Lyndon MacCann SC in "*Brexit: Opportunities For Potential Litigation In Financial Services*"[16] :

> *"Our legal system has the potential to afford litigants all of the same benefits that they can currently enjoy through English choice of law and through choice of jurisdiction clauses. Our legal system is founded in the common law and whilst there are undoubtedly some differences between the laws of the two jurisdictions, nevertheless, there are far more similarities. Procedures and remedies are largely the same, our Judges are of equivalent calibre and independence and like the UK we have an efficient and expeditious Commercial Court populated by Judges having an experience of an expertise in commercial law. Moreover, because Ireland will continue to be a member*

[16] Paper delivered to an Irish Centre for European Law Seminar on Brexit, Implications for the Irish financial services sector, 22 February, 2017.

of the EU, legal proceedings before the Irish Courts would continue to enjoy the benefits of the re-cast Brussels I Regulation and the Lugano Convention including:-

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

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

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

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

……………...

Ireland is well placed to showcase itself as an ideal venue for commercial litigation, including financial services litigation post-Brexit. It is a country with an experienced and independent judiciary, applying common law principles, which are themselves the legal principles preferred by a majority of contracting parties worldwide and has the benefit of a speedy, experienced and efficient Commercial Court whose proceedings and judgments benefit

from the provisions of the re-cast Brussels I Regulation and the Lugano Convention and its judgments are readily enforceable throughout the European Union.

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

37. Although much of the debate in terms of the transfer of legal business out of the United Kingdom and away from English law centres on the possibility that parties will want to move to New York, the reality is that one of the reasons for a move away from English jurisdiction and English law clauses is the absence of a connection to the EU legal order. To that extent, it is unlikely that there will be a universal transfer of international commercial law from England to New York. On the contrary, there will be many contracts which must remain subject to European law clauses.

38. Further, many international companies are more comfortable with a legal system in English, and for some companies the common law system offers advantages over the civil law system present in Germany, France and the Netherlands. To that extent, Irish law retains all the benefits of the common law, but remains in the European Union, is an obvious choice. Indeed, the common law belongs just as much to Ireland as it does to England and Wales.

39. The White Paper on Brexit published by the UK Government acknowledges that there may have to be a dispute resolution procedure to resolve future disputes between the United Kingdom and the European Union. As a neutral country, remaining in the European Union but with deep links to the United Kingdom, Dublin would ideal as a seat for such a tribunal.

40. Many of the large firms in London recognise the necessity to build a relationship in Ireland. By December 2016, Freshfields had 117 solicitors registered in Ireland, followed by Eversheds with 86 solicitors and Slaughter May with 40 solicitors. Some 30 UK firms had more than four solicitors registered in Ireland since the Brexit vote in June 2016. According to media commentary, a number of international law firms (including both US and UK firms) intend opening significant presences in Dublin. The move has already begun.

41. It is worth repeating the sentiments set out at the beginning of this paper. Ireland does not and did not wish the United Kingdom to leave the European Union. We would prefer if it never happened. If, however, it is to happen, we offer English and international lawyers a familiar legal system, which is close to the City of London. We offer the certainty of the common law system together with an advanced legal profession who can provide services across a range of sectors underpinned by an efficient court system and an experienced arbitration community.

42. If legal business is to leave the UK, Irish law and Irish lawyers are ideally placed to provide the certainty that international commercial clients have often sought in English law. The Bar of Ireland are currently engaging with the Government and a range of stakeholders in order to promote Irish law and Irish lawyers and looks forward to actively pursuing this initiative in the coming months.

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