BREXIT AND ITS IMPACT ON ENGLISH ANTITRUST CLAIMS

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I. INTRODUCTION

In Theresa May's memorable words, "Brexit means Brexit." But what does this mean for England's status as a favored jurisdiction for antitrust damages claims?

For complex claims with a cross border element, claimants frequently have a choice of where to file proceedings. At present, England, the Netherlands and Germany are, by a considerable margin, the claimants' jurisdictions of choice. Should a "hard" Brexit occur and should this make England a less attractive forum, then one would expect fewer claims to be filed in England, with a corresponding increase in the Netherlands and Germany.[2]

The impact of Brexit on antitrust litigation in England will, of course, be influenced by the form of Brexit that the UK eventually adopts. If, for example, the UK joins EFTA and the EEA, then we can expect limited change to antitrust litigation as Articles 53 and 54 of the EEA Agreement proscribe the same conduct as Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU"). This eventuality would not require much commentary, and so this piece considers the impact if the UK adopts a hard Brexit model.

Post hard Brexit, the cause of action for breach of Articles 101 and 102 TFEU may become unavailable, leaving claimants to file under the domestic analogues of Chapters I and II Competition Act 1998 ("CA 1998"). This may narrow the territorial scope for such claims. Also, if Commission infringement decisions are no longer binding on English courts, then claimants will need to prove liability. For claimants there are potential workarounds for these issues and, in any event, the UK is unlikely to make any material adjustments for the short to medium term.

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2 This article therefore assumes that at least one European jurisdiction, in addition to England, could take jurisdiction over the relevant dispute. The rules applied by the English courts to assessing jurisdiction may change post Brexit. There is insufficient space to examine these changes in detail, but possible outcomes include the Recast Brussels Regulation ceasing to be applied and instead for the English courts to apply the Brussels Convention or for the UK to accede to the Lugano Convention. If there is no replacement to the Recast Brussels Regulation then the English courts may apply the common law rules on jurisdiction in its place.

These changes notwithstanding, even a hard Brexit will not remove many of the features that make England an attractive jurisdiction to claimants, such as the English approach to disclosure, the relative speed of procedure and the strength of the antitrust bar. In fact, England could become more attractive in some ways. In particular, as English courts may no longer have to wait until exhaustion of rights to appeal before the European Courts, proceedings in England may be able to march ahead of those commenced in the national courts of EU Member States, allowing claimants to progress towards trial and/or push for settlement even more quickly.

II. THE PROCESS FOR "BREXITING"

"Brexiting" will have an impact both at the treaty level and also at the level of domestic law.

As to the former, the newly-famous Article 50 of the Treaty on European Union ("TEU") provides for a two-year period during which the EU and the withdrawing Member State can negotiate and conclude an agreement on the State's withdrawal.[3] If no agreement is reached to extend the negotiation period, then both the TEU and the TFEU will automatically cease to apply to the withdrawing State at the expiry of the two-year period.[4]

As to the latter, the position is less clear. On October 2, 2016, Theresa May announced that the Government would introduce a "Great Repeal Bill" to repeal the 1972 European Communities Act (the "ECA"), with the Great Repeal Act coming into force on the day of Brexit.

The Government has provided little detail on the mechanics of the Great Repeal Act, but it appears that much of extant European Law will be transposed into the domestic legal systems of the UK.[5] In the months and years that follow Brexit, the UK can progress the mammoth task of identifying and removing selected elements of European law from domestic law.

III. IMPACT OF BREXIT ON THE CAUSE OF ACTION

At present, most damages claims for international cartels are pleaded as a breach of the statutory duty imposed by the ECA to comply with Article 101 TFEU. Post hard Brexit, the TFEU will no longer apply to the UK at treaty level. Furthermore, as the Great Repeal Act will repeal the ECA, the statute underpinning the statutory duty will fall away.

Before considering the effects of the above, it is worth examining two preliminary matters. First, it seems likely that any changes to the cause of action will not take place for the short and possibly also the medium term. This is because the UK government would be cautious to remove any cause of action for claims that have already vested. Legislating in such a manner would be highly controversial as a matter of domestic law,[6] it would potentially infringe the doctrine of acquired rights set out in Protocol 1 of the European Convention of Human Rights and in addition it could expose the UK to liability in investment treaty arbitrations.

More likely is that we would have a transitional regime, whereby Article 101/102 TFEU remain available for claims where the underlying acts took place pre-Brexit. Given that most Article 101 TFEU activity is concealed, there can be a very long tail between infringing behavior and filing of claims. Thus, the effect of any transitional arrangements could last for many years,

3 In light of the ruling of the Supreme Court ruling of January 24, 2017, it is now clear that the UK can only trigger Article 50 following authorization by an Act of Parliament, *Miller & Anor, R (on the application of) v. Secretary of State for Exiting the European Union* [2017] UKSC 5.

4 TEU, Article 50(3).

5 In a statement to Parliament, Brexit Secretary David Davis said, "The great repeal Act will convert existing European law into domestic law, wherever practical." October 10, 2016 (Hansard Vol 615).

6 Retroactive laws are "contrary to the general principle that legislation by which the conduct of mankind is to be regulated [and] ought… to deal with future acts and ought not to change the character of past transactions carried on upon the faith of the then existing law…" *Phillips v. Eyre* (1870) LR 6 QB 1, 23.

with business as usual for claimants. Any transitional arrangements will also need to consider infringing behavior that overlaps Brexit-date and whether the totality of a single continuous infringement could be telescoped into a transitional regime that permits claims under Articles 101/102 TFEU.

Second, the UK Government will need to amend national legislation if it wishes to avoid claims under Articles 101 and 102 TFEU being brought in by the back door as a matter of domestic law. Article 1 of Regulation 1/2003[7] proscribes infringement of Articles 101 and 102 TFEU. Thus, transposition of Regulation 1/2003 into domestic law by the Great Repeal Act would lead to the curious position whereby the TFEU no longer applies to the UK at treaty level, but Articles 101 and 102 TFEU form part of UK domestic law. A claimant may even argue that the Great Repeal Act embraces the same statutory duty as the ECA, thereby introducing a cause of action of the same scope as Articles 101 and 102 TFEU. This said it would be straightforward for the UK to choose against importing Regulation 1/2003 into domestic law either at the time of Brexit or shortly thereafter.

Relatedly, section 47A of the CA 1998 imparts a statutory cause of action for breach of Articles 101 and 102 TFEU (as well as Chapters I and II of the CA 1998) before the CAT. Thus, unless the UK Government amends or repeals section 47A, the cause of action for breach of Articles 101 and 102 TFEU will remain available, albeit only before the CAT.

Although not relevant to a cause of action, the UK Government may also amend or repeal sections 58A and 60 of the CA 1998. The former provides that Commission infringement decisions are binding on the High Court and the CAT. The latter currently requires the English Courts to interpret questions arising out of the CA 1998 consistently with the treatment of corresponding questions arising under EU law in relation to competition within the European Community.

A. *What if Claims Can No Longer be Brought Under Articles 101 and 102 TFEU?*

Chapters I and II of CA 1998 are the domestic analogues to Articles 101 and 102 TFEU, but the former have narrower "territorial scope."

> Article 101 TFEU proscribes anticompetitive behavior between undertakings: which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market." Article 102 TFEU proscribes abuse of dominance "within the internal market or in a substantial part of it… in so far as it may affect trade between Member States.

Chapter I CA 1998 proscribes collusive anticompetitive behavior which "may affect trade within the UK, and … have as their object or effect the prevention or distortion of competition within the UK."[8] Chapter II CA 1998 proscribes abuse of dominance "if it may affect trade within the UK."[9] Thus, the territorial scope of Chapters I and II are restricted to the UK, whereas the territorial scope of Articles 101 and 102 TFEU extend to the internal market.

In two recent judgements,[10] the High Court has confirmed that restrictions on the territoriality of Article 101 TFEU apply to antitrust damages claims. For the majority of the pleaded purchases in these cases, the sales by the defendants were first made in Asia to distributers and/or direct to OEMs. The goods were then incorporated into finished products before being sold to claimant entities in Asia, who then transferred the finished goods to other claimant entities in Europe. In *iiyama CRT*, on the basis of the pleaded supply chain, the Court ruled that Article 101 TFEU has not been infringed, either on the implementation

7 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (2003) OJ L 1/1.

8 CA 1998, Section 2(1).

9 Ibid, Section 18(1).

10 *iiyama Benelux BV & Ors v. Schott AG & Ors* [2016] EWHC 1207 (Ch) ("*iiyama CRT*") and *iiyama LCD.*

test,[11] or on the "immediacy" element of the qualified effects test.[12] Similarly, in *iiyama LCD*, the Court ruled that the claim for overcharges based on indirect purchases originating in Asia did not breach Article 101 TFEU.[13]

If a post-Brexit English Court only applies Chapter I CA 1998, the scope of damages that are recoverable potentially narrows. Thus, where a corporate group buys cartelized products via different European subsidiaries, European losses may fall within the scope of Article 101 TFEU which would no longer be available in England. In contrast, UK losses would lie outside the scope of Article 101 TFEU but may be recoverable under Chapter I CA 1998.

B. *Potential Workarounds*

Most torts do not have a territorial scope, and so the causes of action dependent on Articles 101 and 102 TFEU are unusual in this regard.[14] Accordingly, claimants may try to identify other tortious causes of action without limitations on territoriality. The Court of Appeal's ruling in *Air Cargo*[15] effectively forecloses unlawful means conspiracy for cartel claims. The specific difficulty flows from the "intent" requirement of the tort. In *OBG v. Allen*[16] Lord Nicholls identified "the defendant's intention to harm the claimant" as a "key ingredient of the tort."[17] Lord Nicholls explained that the intention must be both specifically directed to the claimant and must also be the motivation behind the defendant's behavior.[18] The Court of Appeal noted that in cartels it is foreseeable that "someone" will be harmed, but on account of pass-on and the unpredictability of whom in the distribution chain will be harmed,[19] the intent element of the tort will be very difficult to meet.

Unlawful means conspiracy may however be viable for certain abuse of dominance claims. Abusive behavior performed by companies within the same corporate group may be specifically directed at an identified competitor, satisfying the intent element of the tort. This claim theory would be unlikely to work in the U.S., where the Intracorporate Conspiracy Doctrine holds that companies in the same corporate group are incapable of forming a conspiracy. However, this doctrine does not form part of English law.[20]

Another potential workaround for claimants is to argue that Article 101 or 102 TFEU is invoked on account of the applicable law for the dispute. If, on an applicable law analysis, the English court determines that the domestic law of a rump EU Member State is the applicable law, then Article 101/102 TFEU will be reintroduced.

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11 *Ahlström Osakeyhtiö v. Commission, ("Woodpulp I")* [1988] ECR I-5913.

12 *Gencor Ltd v. Commission ("Gencor")* [1999] E.C.R. II-753.

13 In *iiyama LCD* the Court ruled that an alternate theory of harm was capable of being pleaded. Namely, that had the cartel not been implemented in Europe, the claimants could have purchased LCDs at non-cartelized prices. While this way of putting the claim was capable of pleading to the strike-out standard, it raises significant hurdles on causation.

14 Unusual but not unique. Territoriality is also a concept of copyright law. Section 96 of the Copyright Designs and Patents Act 1988 ("CDPA") imparts a cause of action on copyright owners whose rights have been infringed. The CDPA sets out numerous behaviors that comprise "infringement" including, "[importing] into the UK, otherwise than for…private and domestic use, an article which is, and which he knows or has reason to believe is, an infringing copy…" CDPA, Section 22. (Emphasis added.)

15 *Air Canada & Ors v. Emerald Supplies Limited & Ors* [2015] EWCA Civ 1024.

16 *OBG v. Allen* [2007] UKHL 21.

17 Ibid, Paragraph 164.

18 "The defendant's conduct in relation to the loss must be deliberate. In particular, a defendant's foresight that his unlawful conduct may or will probably damage the claimant cannot be equated with intention for this purpose. The defendant must intend to injure the claimant. This intent must be a cause of the defendant's conduct," Ibid, at Paragraph 166.

19 A class of victims which may include "anyone in the chain down to the ultimate consumer… opens up an unknown and unknowable range of potential claimants." Ibid, at Paragraph 169.

20 *Peterson Farms v. C&M Farming* [2004] EWHC 121 (Comm), Paragraph 62.

The regime for determining the applicable law turns on when the underlying conduct took place. For conduct between May 1, 1996 and January 10, 2009, the Private International Law (Miscellaneous Provisions) Act 1995 ("PILMPA") applies.[21] The starting position under PILMPA is ***lex loci delicti***; that the applicable law is the law of the country in which the events, or the events' most significant elements, constituting the tort in question occurred.[22] There is an exception for where there is a more substantial connection to a different country. [23]

In *iiyama LCD*, after commenting that damage resulting from a tort is a necessary part of the cause of action, Mr. Justice Morgan "provisionally concluded" that such harm was suffered in the claimant's country of incorporation, and such national law would apply to the claim. Taking our example from above, a claim by a French subsidiary buying cartelized goods will be subject to French law, and will reintroduce Article 101 TFEU. On this basis, claims will be able to recover damages before an English court[24] for breach of Article 101 TFEU.

IV. SIGNIFICANCE OF EUROPEAN COMMISSION INFRINGEMENT DECISIONS POST-BREXIT

Post hard Brexit, it seems likely that infringement rulings by the Commission would no longer be binding on the English courts.[25] On the face of it, this would be bad news for claimants who would face new burdens of proving liability. After Brexit, only the findings of the CMA would be directly binding on the English courts.

However, in many situations, the fact that a Commission decision is not formally binding on the English court may have little substantive effect. Findings of fact by the Commission will likely be highly influential and a defendant who takes issue with such findings risks being given short shrift by an English court. The position that the defendant took during a Commission investigation will also be important and a leniency applicant will not realistically be able to deny underlying conduct that it admitted before the Commission.[26] Similarly, companies that participated in the settlement process with the Commission will thereby have admitted liability. An English court may however be more circumspect for defendants that are appealing the Commission's decision.

While there may be questions on whether a Commission ruling is formally admissible in evidence before an English court, claimants frequently make allusions to findings of foreign antitrust regulators in witness evidence. Even if not formally admissible, it will be difficult for judges to put such findings fully out of their minds.

In summary, although post-Brexit, Commission decisions may cease to be formally binding on English courts, this may have little practical impact. By analogy, in the U.S., although the findings of the Department of Justice ("DoJ") are not binding in civil damages proceedings, defendants that make guilty pleas to the DoJ do not typically deny liability.

21 Where the conduct was prior to May 1, 1996, the common law rules apply. Where the conduct post-dated January 11, 2009, the Rome II Regulation applies. As noted, the Great Repeal Act may incorporate Rome II into domestic law, but this is uncertain. If Rome II ceases to apply, then PILMPA will apply even for events after January 11, 2009.

22 PILMPA, Sections 11(1), 11(2)(c).

23 Ibid, Section 12.

24 Subject, of course, to the English court taking jurisdiction.

25 Provided that section 58A CA 1998 is amended and that the UK and EU do not enter a mutual recognition arrangement for the rulings of competition regulators.

26 Leniency applicants must provide, "A detailed description of the alleged cartel arrangement, including for instance its aims, activities and functioning… [and] the specific dates, locations, content of and participants in alleged cartel contacts…" Commission Notice on Immunity from fines and reductions of fines in cartel cases, 2006.

V. MANY FEATURES THAT MAKE ENGLAND ATTRACTIVE TO CLAIMANTS WILL REMAIN

Many of the features that attract claimants to file their claims in England will remain, even if a hard Brexit model is adopted.

England is perceived as a relatively speedy jurisdiction for resolving damages claims. In this respect, England's competitive advantage may actually increase post-Brexit. At present, and in common with other EU Member State courts, pursuant to Regulation 1/2003[27] an English court cannot try a claim against a defendant whose conduct is under investigation by the European Commission. Not only must the national court wait for the Commission to complete its investigation,[28] but, pursuant to the pre-Brexit duty of sincere cooperation,[29] it must wait until the exhaustion of appeals against the Commission findings by any defendants before proceeding to trial.[30] Relatedly, the means for making a preliminary reference to the ECJ on questions of EU law via Article 267 TFEU would be removed. Although references are used fairly infrequently in follow-on claims, their use can slow progress to trial. Post-Brexit, trials before the English Courts could proceed significantly in advance of those in the remaining EU Member States.

The English Court's approach to disclosure is also popular with claimants. Disclosure can be important even in follow-on claims. Sometimes a publicly available infringement decision is heavily redacted and/or may not give a digestible account of the wrongdoing, and so disclosure is required for visibility on the underlying events.[31] Disclosure is also very helpful in arguing quantum. Although the Damages Directive[32] requires that national courts must be "empowered…to estimate harm,"[33] economic models that are built and tested by reference to underlying data specific to the case are more defensible than those that overly rely on proxies or generalized sector data. Thus, while economic models that rely on proxies may be expressly permissible under the Damages Directive, those that rely on hard data can carry more weight, and disclosure can assist in this process.

One of the aims of the Damages Directive is to encourage broader disclosure in the national courts of Continental EU Member States, where disclosure is traditionally limited. This may reduce the competitive advantage that disclosure has given England in the past, but it remains to be seen how the Continental courts will interpret and apply their newfound powers of disclosure. To butcher an expression: it is one thing to change the law but another to change the cultural behavior of national courts.

Indeed, broad English disclosure can allow English claims to be a "can-opener," facilitating claims in other jurisdictions. Although the collateral undertaking[34] precludes the use of documents obtained in English disclosure for purposes other than such extant proceedings, this does not give defendants complete protection. Once a claimant has learned of the existence of documents through English proceedings, it is better positioned to specifically request the same documents in related proceedings elsewhere. This can-opening effect could be expedited if the pace of claims in England is accelerated post-Brexit.

27 Council Regulation (EC) No 1/2003 of December 16, 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (2003) OJ L 1/1.

28 Ibid, Article 16.

29 TEU, Article 4(3).

30 "[The English Courts will] avoid any decision running counter to that of the Commission or the community courts," *National Grid Electricity Transmission Plc v. ABB Ltd* [2009] EWHC 1326 (Ch) at Paragraph 24.

31 For complex infringements such as bilateral information sharing, it can be difficult to understand the underlying events even with disclosure of contemporaneous documents.

32 Directive 201/14/EU of the European Parliament and of the Council of November 26, 2014.

33 Ibid, Article 17(1).

34 Civil Procedure Rule, Part 31.22.

Also, England will remain the only forum for certain categories of claim and claimant. English antitrust litigation received much attention following introduction of the opt-out claim mechanism in the Consumer Rights Act 2015 ("CRA"). Although certain other European jurisdictions such as Belgium and Portugal have opt-out mechanics, those jurisdictions are not popular for antitrust claims. Importantly, opt-out mechanisms are the only practicable way to bring a claim where individualized losses are low but aggregate losses are significant.[35] This will not change post-Brexit and, subject to resolving teething issues on the mechanism,[36] the collective redress mechanism will remain attractive for suitable claims.

England is also an attractive regime on account of its sophisticated antitrust bar and relatively specialized judiciary, both in the CAT and in the Chancery Division. There is no reason to think that these features will change post-Brexit.

VI. CONCLUSION

In summary, Brexit will be a long path and will have many uncertainties. However, even on a hard-Brexit, the features that make England so attractive to claimants are unlikely to change. While there could be changes to the territoriality of the cause of action, such changes may not take effect for many years and could leave claimants room for workarounds.

35 The mechanism is only available on an opt-out basis to claimants domiciled in the UK.

36 To date, only two claims have been filed using the new collective redress mechanism in the CRA. If these claims are certified by the CAT, it is likely that further claims will follow.