Guest Editorial: Fentiman on "Private International Law and the Downturn"

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Abstract

An increase in litigation in the wake of the economic downturn was widely anticipated, and with it a rise in cross-border disputes with conflicts elements. Yet the expected flood of cases has not materialised, despite a rise in claims in commercial centres such as London. There are reasons why disputes increase in any slump. But the current downturn has special features. These suggest what kind of disputes may arise, including conflicts disputes, and they explain why the number of claims is less than expected. A surge in litigation may yet occur, as initial attempts at compromise fail. But, whatever the number of disputes, private international law may have a central role in regulating the downturn's legal effects.

Private International Law and the Downturn

1. Facts and figures

Is private international law affected by the current downturn? An intuitive answer is that commercial disputes proliferate with economic contraction. Conflicts disputes increase correspondingly because so much commercial activity is transnational. This is apparently verified by recent developments in London, venue for so many commercial disputes. With the world's leading economies in recession, 2009 saw an increase of 20% on the previous year in claims initiated in the London Commercial Court. ((Financial Times, 8 April 2010.)) 1,225 claim forms were issued, close to the average in the early years of the last decade, and the highest number since 2002. ((When 1,213 claims were initiated: Admiralty and Commercial Court Report 2002-2003, [11].)) More striking still, cases submitted to the London Court of International Arbitration reached a record high in 2009, an annual increase of almost 30%. ((Financial Times, 8 April 2010.)) Many of these claims are likely to have foreign elements. Most commercial disputes in London involve foreign parties, or foreign laws, or foreign assets, or parallel foreign proceedings, or acts or omissions abroad – often in combination. ((The Commercial and Admiralty Court Report 2005-2006 records that approximately 80% of claims in that year involved at least one non-UK party.))

Such figures need cautious handling. Of course some recent cases originate in the downturn, some with conflicts implications. ((As, for example, *Jefferies International Ltd v Landsbanki Islands HF* [2009] EWHC 894 (Comm).)) But only proper investigation will reveal the true cause (or causes) of the rise in claims in London. Nor can it be a complete explanation to attribute the increase to the recession. The risk of default may have heightened, but the number of transactions from which litigation might arise increased in the preceding years of plenty, enhancing the risk of litigation, downturn or not. Nor does the increase in claims mean that conflicts issues are at stake. How many recent actions in the Commercial Court involve contested issues of private international law remains a matter of speculation until they go to trial, as many will not, given the tendency of

commercial disputes to settle. ((Commercial and Admiralty Court Report 2004-2005, 3.)) The nature of arbitrated disputes is even harder to discern, given the privacy of the process. ((Unless ancillary proceedings arise in court.))

Such caveats aside, the rise in pending disputes in London gives pause for thought, and begs intriguing questions. Has the downturn generated more disputes? Does this mean more conflicts disputes? What kind of conflicts disputes? How will they be resolved – in court, by arbitration, or by negotiation? And what of the biggest puzzle? Why has the slump not triggered still more claims? A proper response to these questions demands an empirical study, traversing the economics and sociology of litigation. The following brief remarks are no such thing, but attempt at least to capture some impressions, and suggest some possibilities.

2. Disputes and the economy

Litigation can be generated by economic growth as well as by retrenchment. Transactions multiply with economic expansion, increasing the potential for disputes. Some litigants may also be more aggressive in pursuing or defending proceedings if cushioned by prosperity from the risk of losing. But the risk of default is surely less when times are good, when credit is cheaper, and transaction costs stable. Experience confirms that economic crises spawn litigation. This is reflected in microcosm by the spike in claims in the London Commercial Court in the late 1990s. 1,808 claims were initiated in 1999, explained in large part by the implosion of the Lloyd's insurance market. ((Admiralty and Commercial Court Report 2005-2006, 5.))

Creditors become impatient in times of diminished liquidity. They are more likely to seek recovery through litigation rather than forgive a debt or reschedule. There is also an increased risk in a downturn that counterparties will default, or seek to escape performance, as transaction costs rise with the increased price of services and materials, and the scarcity of credit. But default is not always forced on obligors by pressures beyond their control. Some may calculate that deliberate repudiation of their obligations, with the risk of litigation, is preferable to adhering to a newly onerous bargain. With credit and liquidity reduced many litigants may have a heightened sensitivity to the cost of funding litigation, and to

the risk of losing in court. But economic adversity may also alter the balance of risk, making the cost of litigation seem more attractive than the cost of performance.

Excuses for non-performance, such as incapacity, mistake, fraud, duress or illegality, thus become important, with inevitable conflicts implications in cross-border transactions. Disputes about the identity of the applicable law are the consequence. But this will often be contractually agreed, forcing a defaulting party to argue that the contract is unenforceable by reference to another law. As cross-border litigation increases, so does reliance on overriding rules and public policy. A consequence may be more reliance on overriding prohibitions against onerous interest provisions or exemption clauses, coupled perhaps with pre-emptive litigation in courts where such prohibitions exist. ((A pre-downturn example of pre-emptive reliance on mandatory rules and public policy to invalidate provisions for the payment of interest is *JP Morgan Europe Ltd v Primacom AG* [2005] EWHC 508 (Comm).))

Just as economic adversity encourages default, so it precipitates collateral litigation against commercial partners, such as guarantors, insurers, and reinsurers, offering further potential for cross-border litigation. Such collateral disputes often concern whether the terms of a secondary contract incorporate those of a primary contract, not least terms affecting jurisdiction, arbitration and choice of law. ((Fentiman, International Commercial Litigation (Oxford: OUP, 2010), [4.71] – [4.86].))

It is also more likely in straightened times that parties to a bad bargain will allege mis-selling, or blame their advisers, perhaps suing for misrepresentation, or alleging negligence against a third party such as a broker or auditor. ((A pre-downturn example, subject to English law, but involving the alleged mis-selling of investments in complex financial instruments, is *JP Morgan Chase Bank v Springwell Navigation Corporation* [2008] EWHC 1186 (Comm).)) It becomes important to establish whether the creditworthiness of a counterparty, or the value of an asset, or the risk of a transaction, was misstated – and to address any related conflicts issues. Nor are lawyers immune from such collateral litigation ((See *Haugesund Kommune v Depfa ACS Bank* [2010] EWHC 227 (Comm) (advice as to capacity to contract).)) – not least those who gave insufficiently qualified opinions as to governing law and jurisdiction.

Allegations of fraud also increase with economic stringency – as indeed does fraud – as trading conditions worsen and liquidity deteriorates. ((Mitchell and Taylor, 'The Fraud Litigation Spiral' NLJ 6 February 2010, 175.)) Sellers misrepresent their products, straightened borrowers conceal their circumstances to obtain finance, traders lacking liquidity charge their assets (often receivables) to different lenders to obtain funds. In cross-border disputes this highlights the treatment of pre-contractual fault, and the vexed question of priority between competing assignments of the same debt. Because fraud is often associated with attempts to conceal assets, applications for transnational freezing and disclosure orders also become more frequent.

Governments also tend to respond to economic crises with protective legislation, increasing the legal regulation of businesses and markets, and restricting economically sensitive transactions. The effect is to highlight the importance of conflicts rules governing discharge and illegality, and in particular the treatment of supervening illegality in the place of performance. Old questions may also arise concerning the effect of moratorium legislation, and the expropriation of assets. ((As in *Jefferies International Ltd v Landsbanki Islands HF* [2009] EWHC 894 (Comm).))

So reasons to litigate abound in troubled times. But so does the readiness to sue. Some potential litigants may be deterred from doing so because the liquidity necessary to pursue litigation may be more limited, and the risk of failure more serious, in adverse economic conditions. But not those whose last chance to avoid closure or insolvency is a successful claim – colloquially, 'bet-all' claimants. And not liquidators, whose task is to maximize a company's assets by recovering its losses, or pursuing its debtors, or disputing disposals of its property. Liquidators are especially prone to challenge purported transfers of a company's accounts receivable – raising (again) vexed questions about the effectiveness of cross-border assignments. ((An older example is *Raiffeisen Zentralbank Osterreich AG v An Feng Steel Co Ltd.* [2001] EWCA Civ 68; [2001] QB 825.))

Such considerations explain why and how litigation follows in the wake of economic crisis. But this may not occasion more trials on the merits, still less more final judgments. Nor for that reason may choice of law disputes increase. Commercial disputes are almost always settled, often when the identity of the forum becomes clear. ((Commercial and Admiralty Court Guide 2004-2005, 3.)) True to form, any additional disputes in the London Commercial Court are likely

to be interlocutory, concerning jurisdiction and interim relief, the key components in cross-border litigation. The staying of actions, the restraint of foreign proceedings, and the disclosure and freezing of foreign assets, are likely to loom large. Given the likely complexity of any disputes, orders for case-management may assume special importance – with potential cross-border implications if proceedings in different countries are involved. Moreover, at least in the European Union, where the Brussels I Regulation emphasises the importance of pre-emptive forum shopping, many disputes are likely to involve first-strike actions, often no doubt for declaratory relief. ((Fentiman, 'Parallel Proceedings and Jurisdiction Agreements in Europe', in de Vareilles-Sommières, ed, Forum Shopping in the European Judicial Area (Oxford: Hart, 2007).))

3. A different landscape

The landscape of litigation in the present downturn has novel features unconnected with the economy, which may affect the incidence and nature of disputes. Two are special to Europe but have particular significance for conflicts lawyers.

First, there are now enhanced techniques for reducing the financial risk of litigation, making it more attractive – or less unattractive. The cost of litigation determines whether to initiate or defend proceedings, and (importantly) where to do so. But the financing of litigation has been transformed in recent years by the possibility of third party funding. (('Litigation finance follows credit crunch', Financial Times 27 January 2010; Litigation and Business: Transatlantic Trends (Lloyds, 2008), 9.)) Evidence of the practice in London is scant. But a growing number of third party investors are prepared to finance claims, conditional on a share of the proceeds if the claim succeeds. In theory at least this possibility is especially appealing in a downturn, both to claimants, whose ability to finance proceedings may otherwise be compromised, and by investors, for whom the value of more conventional asset classes may seem uncertain.

Secondly, the popularity of arbitration has increased. Claims before the London Court of International Arbitration rose significantly by 131% between 2005 and 2009, a trend matched by other arbitral institutions. ((Financial Times, 16 April 2010, 11, citing figures sourced from the Singapore International Arbitration Centre. In the period 2005-2009 the international disputes administered by the

other leading centres increased as follows: ICC, Paris 57%; American Arbitration Association 44%; the Singapore International Arbitration Centre 153%; the China International Economics and Trade Arbitration Commission 31%.)) At least some of those disputes would once almost certainly have been tried in court. One explanation is the perennial concern (not always justified) that commercial litigation is excessively lengthy, complex, and costly by comparison with arbitration. ((Concerns about the efficiency of lengthy cases before the London Commercial Court prompted a review of its procedures culminating in the Admiralty and Commercial Courts Guide 2009.)) Another is the increasing tendency to include arbitration clauses in species of contract which previously would have contained jurisdiction agreements. This is especially so in financial transactions. Financial institutions are less reluctant to arbitrate than convention once dictated. This partly reflects a desire to escape the inflexibility of the Brussels jurisdiction regime, preoccupied as it is with avoiding parallel proceedings even to the detriment of jurisdiction agreements. ((Sandy and O'Shea, 'Europe, Enforcement and the English'.)) The consequence has been an increase in hybrid clauses providing in the alternative for litigation or arbitration. ((See, for example, the clause at issue in *Law Debenture Trust Corporation Plc v Elektrim Finance BV* [2005] EWHC 1412 (Ch).)) Given the prevalence of disputes between financial institutions in the downturn, the sensitivity of the transactions involved, and concerns about media scrutiny, parties faced with that choice may well favour arbitration. The effect is not, however, to rule out litigation entirely. Arbitration often generates ancillary judicial proceedings, not least concerning the restraint of foreign proceedings commenced in defiance of an arbitration clause.

Thirdly, the downturn coincides with important changes in the European conflicts regime, with the coming into force of both the Rome I and Rome II Regulations. It is perhaps unfortunate that many of the conflicts issues which are likely to arise in the near future are governed by novel provisions, causing uncertainty, and itself generating more litigation. Foremost among these are Article 9 of Rome I (likely to become contentious as obligors plead illegality to escape performance), and Articles 4 and 12 of Rome II (regulating the likely crop of claims for mis-selling and negligent advice). It is especially regrettable that Article 14 of Rome I remains unreconstructed and ambiguous, given that the assignment of debts underlies so many contentious transactions.

Finally, any increase in litigation poses a challenge for the Brussels I Regulation, as interpreted in such recent cases as *Owusu*, ((Case C-281/02 *Owusu v Jackson* [2005] ECR I-553.)) *Gasser*, ((Case C-116/02 *Erich Gasser GmbH v MISAT Srl* [2003] ECR I-14693.)) *Turner* ((Case C-159/02 *Turner v Grovit* [2004] ECR I-3565.)) and *West Tankers*. ((C-185/07 *Allianz Spa v West Tankers Inc* [2009] 3 WLR 696.)) The inappropriateness of the Regulation for handling high-value, multi-jurisdictional disputes has often been noted, and needs no elaboration here. ((Fentiman, International Commercial Litigation (Oxford, OUP, 2010), [1.40] – [1.47].)) But a proliferation of such disputes can only impose further stress on a regime which destabilises jurisdiction and arbitration agreements, and militates against the allocation of cases to the most appropriate forum. The Brussels regime may indeed have its own role in encouraging litigation, by inciting the prudent to seise their preferred forum early so as to win the all-important battle of the courts. ((See, Fentiman, 'Parallel Proceedings and Jurisdiction Agreements in Europe', above.))

4. A different downturn

Not all slumps are the same, and the present crisis has distinctive features of particular interest to conflicts lawyers. Most obviously, this is the first downturn to affect truly global markets. The last two decades have seen an increase in cross-border transactions, encouraged by the globalization of finance, enhanced communications, and the growth of emerging markets for trade and investment. The present crisis also follows a period of unprecedented economic expansion. The downturn was preceded by an economic boom, fuelled by plentiful credit, in which the volume of global business increased – and with it the risk of cross-border litigation even in the best of times.

Again, the first effect of the crisis was an unprecedented credit drought, triggered by paralysis in the wholesale lending markets. The effect may be disputes in which the obligor's default was triggered by the denial or withdrawal of the credit necessary to fund a project, or a purchase, or an investment. There is evidence that many recent disputes in the London Court of International Arbitration concern default prompted by a lack of credit. ((Financial Times, 8 April 2010, quoting James Clanchy, LCIA deputy director-general.)) Another effect has been remarkable volatility in the financial markets, with the value of securities,

currencies and commodities not simply falling (as might be expected), but rising and falling unpredictably. ((‘Global Markets Turn Volatile’.)) Disputes about the assessment of loss may result. Market fluctuations also make it hard for potential litigants to predict whether their losses might evaporate with a market upswing, raising strategic problems for both obligors and obligees. Is it time to default; is it time to sue? ((This may further explain why less litigation has followed the downturn than expected.))

The dearth of credit has also prompted numerous business failures, leading to an increase in insolvency and associated disputes – often disputes with a foreign element, involving the collapse of multi-national businesses, and those with foreign creditors. At its simplest liquidators are likely to pursue unpaid debts and recover losses incurred by failed transactions. But they are equally likely to attack any disposals of the company’s assets. This might involve denying the effectiveness of any assignments of a business’s receivables or loan book, perhaps by challenging the proprietary effect of such disposals. Or it may involve recharacterising a transaction, by alleging perhaps that it creates a security interest, and so fails for want of form or registration. ((Fentiman, International Commercial Litigation (Oxford: OUP, 2010), [3.177] – [3.181].)) Both attacks beg choice of law questions. What law governs the effectiveness of the assignment of a debt, and the characterisation of a transaction?

The decade before the downturn also saw an increase in the use of complex financing techniques, and increased investment in novel investment vehicles and emerging markets. The legal structure of such techniques is largely untested, and the risk associated with such investments was often unclear. ((See eg the high-risk swap transactions involved in *Haugesund Kommune v DEPFA ACS Bank* [2009] EWHC 2227 (Comm).)) Cases probing the effectiveness of such transactions might be expected, as are claims for mis-selling, in which investors allege that the risks were either concealed or unexplained. ((A precursor is the dispute in *JP Morgan Chase Bank v Springwell Navigation Corporation* [2008] EWHC 1186 (Comm), in which the claim failed.))

Of special importance has been the use of derivatives, principally as a means to mitigate the risk of fluctuating markets, and the development of products linked to the securitization of debt. That one type of derivative, the credit default swap, functions (in effect) as insurance against default under a loan or bond, suggests that such transactions are increasingly likely to be litigated. But the potential for

disputes arising from securitization is especially instructive. Traditional 'vanilla' lending – finance in return for repayment and interest – depends on familiar contractual principles, against a tolerably stable conflicts background. So too does the straightforward issue of securities involving investment in the issuer's business. But the predominant financing technique of recent years has been securitization. This embraces a variety of structures with at their core the issue of securities in the form of bonds, backed by the bulk assignment of debt to the issuer, by legal vehicles whose only purpose is to hold the assigned assets and issue the securities. It has also spawned a parallel market in devices such as credit derivatives, effectively a means of betting on the value of securitized assets. Such structures provide finance to the owner of the underlying assets, profits for the issuer, and investment vehicles for those purchasing the securities and wagering on their value. But the legal implications have yet to be fully tested, certainly in a cross-border context. ((Numerous domestic disputes have arisen in the United States.))

Any litigation arising from such structures may seem familiar. Investors facing significant losses are likely to sue issuers for breach of warranty and misrepresentation, or claim from an issue's underwriters, or even pursue the debt's original owner (perhaps for fraud or negligence). So too the asset's original owner may face claims from an issuer. But securitization may be an especially fertile source of litigation for several reasons. ((For an account of the inter-party 'frictions' underlying securitization, each a potential source of litigation, see Ashcraft and Schuermann, *Understanding the Securitization of Subprime Mortgage Credit*, Federal Reserve Bank of New York Staff Reports, no 318 (March 2008).)) First, a typical securitization involves several contracts between different parties, creating a web of potential claims and counterclaims, involving the borrowers whose debts are securitized, the asset pool's original owner, the issuer of the securities, and the disappointed investors. Secondly, each of the relationships between the several key parties is asymmetric, in so far as one party is likely to have better information than the other concerning value and risk. ((As insightfully explained by Ashcraft and Schuermann, above.)) When one party's position sours such asymmetry leads inevitably to accusations of misrepresentation and non-disclosure. Thirdly, particular difficulty arises where the effectiveness of such arrangements is questioned, and in particular the assignment of the underlying assets to the issuer. These difficulties are magnified where those assignments involve parties from different jurisdictions, creating

intensely difficult (if all-too familiar) questions about the cross-border assignment of debts. ((It also lends particular urgency to the debate surrounding the future of the Article 14 of the Rome I Regulation.))

The present downturn also follows a period in which normal business prudence was to some extent ignored. Anecdotal evidence suggests that a combination of market pressure and easy profits meant that transactions were completed in haste, or with a degree of complacency about the legal implications. Of particular interest to conflicts lawyers, there is evidence of unthinking reliance on standardised documentation, of surprising inattention to the language of jurisdiction agreements, and a tendency to ignore qualified legal opinions as to the effectiveness of transactions.

5. To sue or not to sue?

Given the severity of the downturn, and the scale of the losses incurred, a substantial increase in commercial litigation was widely anticipated. ((‘Credit crisis could lead to surge in litigation’, Timesonline, 10 August 2007.)) True, the number of claims has risen in London. But the expected deluge of litigation has not – or has not yet – materialised. As the judge responsible for the London Commercial Court has said, ‘no one has encountered what I call a tidal wave of litigation’. ((Gross J, Judge in Charge of the Commercial Court, quoted in the Financial Times, 8 April 2010.)) Why is this so?

Legal obstacles may be one reason. A spate of claims related to the mis-selling of financial products has long been expected, cast as actions for fraudulent or negligent misrepresentation. But such claims are inherently problematic, and one judge recently described a sophisticated investor’s case as a ‘fantasy’ and ‘commercially unreal’. ((*JP Morgan Chase Bank v Springwell Navigation Corporation* [2008] EWHC 1186 (Comm). It has been suggested that the US fraud proceedings recently brought by the SEC against Goldman Sachs may become a template for litigation by private claimants: ‘Wall Street beware: the lawyers are coming’, ‘Regulator’s move risks opening lawsuit floodgates’, Financial Times 18 April 2010.)) Certainly, corporate investors may have difficulty in establishing the reliance necessary to found liability, ((See Bankers Trust International Plc v PT Dharmala Sakti Sejahtera (No 2) [1996] CLC 518.)) just as fraud or negligence

may be hard to make out against financial institutions with robust practices. ((See *Luminent Mortgage Capital Inc v Merrill Lynch & Co* (20 August 2009), USDC ED Pennsylvania (Philadelphia).)) In the context of an endemic market collapse claimants may also face difficult questions of causation and remoteness in proving loss. ((A feature of recent US litigation, illustrated by *Luminent Mortgage Capital Inc v Merrill Lynch & Co*, above.)) Moreover, and of particular importance, the parties' dealings are likely to be subject to contractual disclaimers and exemption clauses designed to forestall litigation. ((JP Morgan Chase Bank v Springwell Navigation Corporation [2008] EWHC 1186 (Comm); see further, Peekay Intermark Ltd v ANZ Banking Group Ltd [2006] EWCA Civ 386; [2006] 2 Lloyd's Rep 511.))

Nor are contractual claims for breach as likely as might be supposed. Commercial contracts are not meant to be litigated, but to regulate matters of performance and discharge autonomously. Potential claimants may be stopped short by robust exemption or force majeure clauses. Or their rights may be put beyond doubt by events of default clauses and warranties, or reinforced by indemnities, making any defence unsustainable. Such drafting obstacles may not always prevent litigation, given the creativity of lawyers, and what may be at stake. But they make it harder, more costly, and more risky, so deterring claimants and persuading defendants to capitulate.

There are also special incentives to resolve disputes arising from the downturn commercially, by negotiation. Where this cannot be achieved there may be incentives to resolve the dispute without the full panoply of litigation, by arbitration (perhaps post-dispute arbitration) or other alternative means. One reason is that one or both parties may be financial institutions reluctant to see their differences aired in public in court. The sensitivity of the commercial information involved, and the likelihood of media attention, may incline such litigants to resolve their differences by negotiation. Especially in the financial markets, the inter-connectedness of business provides two further reasons for preferring the amicable settlement of disputes. The need to preserve commercial relations for the sake of future business may incline the parties towards compromise, without the hostility engendered by litigation. The inter-relatedness of the markets also suggests that the roles of the same two parties may be reversed in different disputes, the potential claimant in one being the potential defendant in another. Where cases involve claims and counter-claims between

financial institutions there is a natural tendency to seek an accounting solution by means of a negotiated set-off.

A negotiated solution is especially attractive because of the degree to which litigation in the present climate may itself impair the parties' commercial effectiveness. A feature of the downturn is the pervasiveness of its effects. The scale of the crisis, and the number of transactions affected, makes its impact systemic, or at least ubiquitous. This has particular consequences. A party faced with default by numerous counterparties is more likely to resolve its problems by negotiation. It is one thing to pursue a single claim, quite another to embark on multiple actions involving different parties, which may come to dominate a company's business. The widespread nature of the crisis also means that the claimant in one dispute may be the defendant in another. Many potential claimants may themselves have defaulted in other transactions. To pursue and defend both actions would be to fight on two fronts. The cost and complexity of such litigation, consuming a company's business, is deeply unattractive. Companies may be willing to litigate one or even several matters where this represents a sound investment, and the benefit outweighs the cost, but not to amend their business plan by devoting their resources largely to pursuing and defending claims.

This is not to ignore the recent increase in proceedings in London. But the rise in claims is compatible with suggesting that most will be resolved by negotiation. Whatever the incentives to achieve a commercial solution a claimant may initiate proceedings to preserve its position. To commence proceedings was once regarded as a hostile act, as a last resort as likely to impair compromise as encourage it. But, at least in Europe, Articles 27 and 28 of the Brussels Regulation compel the parties to initiate proceedings early – indeed, prematurely – by giving priority in parallel proceedings to the court first seised. Many of the claims recently initiated in the London Commercial Court (as in other Member States) may have just this pre-emptive purpose. Whether the presence of such holding claims will impair the chances of reaching a commercial solution in particular cases remains to be seen. But to sue is not at odds with a desire for compromise.

To say that fewer disputes have gone to law than many expected requires, however, three important qualifications. First, pre-dispute legal business is booming. It is apparent that many commercial parties have sought legal advice to

establish their rights and liabilities in the wake of the downturn. Secondly, many companies, both sellers and investors, have set aside funds to cover the costs of potential litigation. In that sense, the legal impact of the downturn is already significant. Thirdly, what will happen next is unclear. There will be cases in which any hope of a commercial solution will evaporate as positions harden. There will be others in which such a solution is impossible because the legal position is uncertain. There may even be some where the parties' differences turn on questions of private international law. Such cases may yet become contested actions before courts or arbitrators. As this suggests, it is too early to tell what the true consequences of the downturn will be, for cross-border litigation, and for the conflict of laws. But there is growing awareness amongst practitioners that a new phase is about to begin, as it becomes clearer which disputes can be resolved amicably and which cannot – a phase of adjudication not compromise. In that sense, the story of the downturn's impact on cross-border disputes cannot yet be written.

6. Private international law and the downturn

It is important to ask whether cross-border disputes will increase with the downturn. Any rise in litigation or arbitration matters to the parties, and to the arbitrators, courts and lawyers whose business is adjudication. It has a public policy dimension, concerning the use of judicial resources. It also has economic effects. The cost of litigation and the ability of parties to recover their commercial losses are financial consequences of the downturn as much as those more commonly reported. The legal impact of any rise in cross-border cases may also be significant, not least for private international law. Litigation creates law. The more issues there are before the courts, the more the law evolves at the hands of the judges. It is perverse to wish for more cases. But when they arise old questions are answered, and new ones posed.

In the end, however, the importance of the downturn for private international law does not depend entirely on the volume of cross-border disputes. It does not turn alone on the work load of courts and arbitrators, or any increase in contentious conflicts questions, or even on whether the parties disagree at all. Which court has jurisdiction, which law governs, whether a judgment is enforceable, whether

an injunction is available, are matters which may frame the parties' negotiations, or underpin the advice of lawyers to their clients. The rules of private international law have a special importance in cross-border relations in establishing both the procedural position of the parties and their rights and obligations – matters of importance whether or not they are contested, and whether or not they go to court or arbitration. One way or another, private international law has a role in managing the effects of the downturn. One way or another, that role may be central.

I am grateful to Sarah Garvey of Allen & Overy, who kindly shared her views on these issues, but is absolved from responsibility for the opinions here expressed. *The following remarks are concerned only with private litigation, not with proceedings initiated by regulators.*