

Key note address given by Lord (Peter) Goldsmith, QC
at the LCIA Morning Symposium and Lunch, Washington DC
18 September 2016

2019 AND ALL THAT

I have entitled this address 2019 and all that.

2019 because that looks likely now to be the year that BREXIT will actually take place and the UK will leave the EU after 46 years of memorable if somewhat stormy membership.

And "all that" after 1066 and all that, the hugely successful parody by WC Sellar and RJ Yeatman of school history text books first published in 1930. As its subtitle announced, it was to be "A Memorable History of England, comprising all the parts you can remember, including 103 Good Things, 5 Bad Kings and 2 Genuine Dates." 1066, the date of the Norman Conquest, was of course one of the 2 Genuine Dates. You may have to rack your brains as to what was the Second Genuine Date.

It's a suitable text to take in an address in which I have been asked to bridge the gap between Europe and North America. Sellars and Yeatman's view of the start of that relationship was summed up in this description:

"One day when George III was insane he heard that the Americans never had afternoon tea. This made him very obstinate and he invited them all to a compulsory tea-party at Boston: the Americans, however, started pouring the tea into Boston harbour and went on pouring things into Boston harbour until they were quite Independent, thus causing the United States."

You will all know that the momentous result of the June 23 BREXIT Referendum is still causing shock waves. Uncertainty - as to when and as to what.

Some of the fog of uncertainty is beginning to lift. There have now dimmed the rays of hope that some wistfully encouraged (including myself) that BREXIT might not mean BREXIT after all, and that a wonderful solution to the issue would emerge like the cardboard gods in a medieval Mystery

play. The new prime Minister Theresa May gives no sign that she wants to renegotiate and put the matter back to the people in a second referendum or general election. There is no sign that the EU have repented of their intransigence and want now to offer Britain the new terms that David Cameron could not extract in his renegotiation of the EU treaty. And there is certainly no sign that the 3 Brexiteers whom May put in charge of the exit negotiations (many think as a penance for having won the vote) have found a dashing D'Artagnan to add to their Porthos Johnson, Athos Davies and Aramis Fox to swashbuckle their way out of the current crisis.

There are legal issues - notably whether a Parliamentary vote or even Act of Parliament is needed actually to ratify the referendum vote. The argument is, in short, that as we came in to Europe by Act of Parliament - the European Communities Act of 1972 - we need an Act to come out. Plainly we will need an Act to undo a lot of community law and to replace it with other provisions. But that is not the same as needing an act to trigger the process of leaving the EU. That arises under Article 50 of the Lisbon Treaty and is to be done in accordance with the Constitutional traditions of each State. In the case of the U.K, without a written constitution that expression raises questions. Executing a decision to leave the EU, which undoubtedly will need legislation - actually a lot of legislation - is not the same as approving or ratifying a decision to leave. The Government's view is that this can be done through the exercise of the Royal prerogative. In more democratic terms, that means that the power to make and unmake treaties does not need approval of the legislative branch - it is an act within the power of the executive branch. This is the same power which is used to authorise the taking of military action. And although a practice has grown up since and including the conflict in Iraq to ask Parliament to approve military action it does not yet amount to a legal obligation to do so and in any event there is no comparable growing practice in the field of international relations.

Nonetheless, there is a sustained legal debate on these issues and legal cases have been brought seeking guidance from the courts whether parliament needs to vote. A lead or test case will be heard soon and arrangements are already in place to get the case to the UK Supreme Court later in the fall. I predict that the situation will be resolved by the end of the year at the latest. I also predict, as you will have worked out from what I have said so far, that the courts will not intervene and will declare that it is a decision for the Government. So that will clear the way for the Government to give notice of our departure which will start an inexorable march towards exit which has to be completed within 2 years unless extended by the remaining Member States.

This is the timetable that leads us to exit in 2019.

In fact, even if the court does not rule the way I expect, the decision is more likely than not to end up in the same place because members of parliament, if told by the Supreme Court it is for them to decide, will still grit their teeth even if it is not their personal view, and approve exit. Anything else would raise huge issues about disregarding the views of the electorate.

So we move inexorably to exit.

The consequences for the UK and for Europe itself will be massive and much of that is yet only dimly seen. In the referendum debates, predictions and counter predictions were traded like the blows between prize fighters. Will it lead to new trading opportunities for the UK or close the doors to its most popular markets; will migration levels drop as the UK takes back control of its own borders (if it does); will other European countries follow the lead of the U.K. And seek to escape the grip of Brussels and Berlin?

These are huge issues and not ones to address today.

I want to focus on a narrower question: the impact of Brexit on the legal profession and particularly the British legal profession, and the effect on dispute resolution including arbitration. My thesis will be that Brexit will not mean the demise of the British legal profession: on the contrary it will arise more vibrant and competitive. And in particular it will not lead to a diminution in the merits and popularity of London as a seat of arbitration or damage the popularity of English law as the commercial law of choice for many international transactions. To paraphrase Mark Twain, reports of the death of London arbitration are greatly exaggerated.

This is not to say that this will not have a major impact on the British legal profession. Indeed it already is having an impact. A number of leading law firms have realised that there are areas of law where an EU qualification may be of real importance. This is especially true in areas of corporate law activity including funds and investment management and data protection, and in EU and competition law. So they are encouraging their lawyers to take on an EU qualification so they can continue to practise in their chosen area after BREXIT. Applications to the Irish Bar in particular are soaring as British lawyers queue up to re-qualify there. Reports from the Irish Law Society in-

dicate that so far this year, 186 UK lawyers had applied to register, up from 100 registered during the whole of 2015. Many are competition lawyers, fearful of losing their privileges. The right to argue before EU tribunals such as the Court of Justice of the European Union is only afforded to lawyers qualified in an EU state. And Ireland is the legal jurisdiction most equivalent to the UK - both English-speaking, both common law jurisdictions and with very similar legal institutions.

Some clients will only want to deal with law firms situated in the EU. But the majority of UK firms already have offices in Europe. It may accelerate a decision to open new offices, for example, in Luxembourg to deal with PE and Funds work. Coping in that way can only enhance the reputation of UK firms with clients for flexibility and innovation. Further, there is little evidence of a rush by English law firms to move their practices from London to Dublin. No doubt this will be a comfort to the 80+ US law firms with offices in London. So, I see a bright future still for the English legal profession.

Those are principally comments on corporate transactional business. Let me turn from that to the topic which interests this audience more, which is the effect on the dispute resolution market.

No time for a land grab

Let me start by disappointing some, maybe many, in the audience. Brexit will not mean a land grab for London arbitration cases by any other centre, New York, Miami or Paris.

This is not mere bravado. Or wishful thinking from a British practitioner. It is soundly based. And those who are thinking and plotting otherwise should look at the hard facts.

Last year during its Centenary conference in London the Chartered Institute of Arbitration published a list of 10 features necessary to make for a safe, effective and above all successful seat for arbitration. They were drawn up after a detailed consultation process with experienced arbitrators and arbitration lawyers. They covered:

1. Law

A clear effective, modern International Arbitration law recognising and respecting the parties' choice of arbitration as the method for settlement of their disputes.

2. Judiciary

An independent Judiciary, competent, efficient, with expertise in International Commercial Arbitration and respectful of the parties' choice of arbitration as their method for settlement of their disputes.

3. Legal Expertise

An independent competent legal profession with expertise in International Arbitration and International Dispute Resolution providing significant choice for parties who seek representation in the Courts of the Seat or in the International Arbitration proceedings conducted at the Seat.

4. Education

An implemented commitment to the education of counsel, arbitrators, the judiciary, experts, users and students of the character and autonomy of International Arbitration and to the further development of learning in the field of arbitration.

5. Right to representation

A clear right for parties to be represented at arbitration by party representatives (including but not limited to legal counsel) of their choice whether from inside or outside the Seat.

6. Easy accessibility to the Seat, free from unreasonable constraints on entry, work and exit for parties, witnesses, and counsel in International Arbitration, and adequate safety and protection of the participants, their documentation and information.

7. Functional facilities for the provision of services to International Arbitration proceedings including transcription services, hearing rooms, document handling and management services, and translation services.

8. Ethical standards. Professional and other norms which embrace a diversity of legal and cultural traditions, and the developing norms of international ethical principles governing the behaviour of arbitrators and counsel.

9. Enforceability

Adherence to international treaties and agreements governing and impacting the ready recognition and enforcement of foreign arbitration agreements, orders and awards made at the Seat in other countries. This is critical. Adherence to the New York Convention is what makes international arbitration work and not any EU treaty.

10. Immunity

A clear right to arbitrator immunity from civil liability for anything done or omitted to be done by the arbitrator in good faith in his or her capacity as an arbitrator.

The UK and London in particular have all these attributes in plenty. The 1996 English Arbitration Act has already been tested and implemented by a cadre of highly qualified Judges versed in arbitration law, and London has a tremendous body of arbitration practitioners.

But the important point is that none of the Principles depends on our membership of the EU. And EU membership does not figure in the list of factors. This is not happenstance, or special pleading. During the debate on the Principles, EU membership did not come up and this was at a time when BREXIT seemed impossible, so that was not a contributing factor. The success of London arbitration depends in no way upon the UK's membership of the EU. London has been a leading arbitration centre for many years before we joined the EU. And it will continue for many years after we leave.

Actually, I am increasingly of the view that though BREXIT does present its challenges, for arbitration, it may prove to be an added advantage. In fact, leaving the EU may present new opportunities for English law to enhance its usefulness and ultimate popularity even more. Let me identify two, and possibly three, reasons for that.

The first is what I will term the decontamination of English law. In many areas of law, European law has coloured and moulded traditional common law. Some of the reason for that is because English legislation and law has had to implement EU regulations and directives: in company law, in consumer law and in many other areas.

At the same time there has been a convergence of British law with European principles and concepts. I will give one example from administrative law.

Traditionally, the grounds for review of executive action under English law have been limited. Procedural defects in decision making may give rise to a challenge to an administrative decision or executive act. But the courts would not interfere with the substantive merits of the decision. The closest they came to it was in what is known as the Wednesbury test, based on the decision in *Associated Picture Houses v Wednesbury Corporation*. Under that test, a Court can strike down an executive act or administrative decision if satisfied that "no reasonable body could have reached that decision". Though it seems like a review of merits, it remains a very narrow test justified on the basis that if no reasonable body could reach that conclusion it follows that the body had failed procedurally by taking into account irrelevant facts or failing to take into account relevant facts. Even so, the court would deny it was really entering into the merits of the decision.

European Union and indeed European human rights law, however, works on a different basis, allowing a review of executive acts with a merits based test which examines the substance and allows the court to substitute its own decision. The classic statement is that the decision taken is not necessary or proportionate to the aim intended. This is a very clear merits test. And the UK Supreme Court last year in *Pham v Home Secretary* (which concerned the lawfulness of the deportation of a former Vietnamese national) held that proportionality was now to be recognised as a ground for judicial review under English law. EU law was not in play.

The result of these different changes has been to modify English law from its pure common law rights. Some people have mourned these changes. And believe English law is the poorer for these jurisprudential changes. And that as a result, the English courts no longer pronounce on pure common law. Other courts now claim that mantle. Currently the Australian High Court (its Supreme Court) has the bragging rights as the remaining pure pronouncer on matters of common law.

Whether English law regains its purity in that sense will depend on the approach that the judges take. Many have embraced the European style of decision-making so it is questionable if they could easily revert to older and more traditional approaches to decision-making. One of the reasons this approach is taken at the moment is that often decisions are subject to review by the European Court. If they touch on European Union law they may end up in the European Court of Justice in Luxembourg, and if human rights are involved, in the European Court of Human Rights in Strasbourg. Both operate on the same principle. So judges will decide these cases with an eye turned towards the European Courts. That will no longer be necessary after the UK exit from the EU.

The second advantage is to do with the system of law we now have for determining jurisdictional issues in court cases. This is the so-called Brussels regime under which the allocation of cases to national courts is not determined by the traditional inter play between broad jurisdictional reach coupled with the exercise of discretion through forum conveniens principles. These principles will be very familiar to many American lawyers but this system leads to some surprisingly unintended consequences. One of them flows from the fact that the Brussels regime operates according to rigid mechanistic rules.

They include two in particular. First that a defendant should primarily be sued in the place where he is domiciled, essentially the place of residence for a natural person and place of incorporation for a company. The second is that in a contest between two courts having jurisdiction generally it is the court first seized of the matter which takes the case. But critically, the system does not allow of forum conveniens challenges.

The system has been used to great effect recently by some lawyers bringing cases into the English courts which essentially relate to events outside England. An environmental claim relating to mining in an African country can find itself in London because the lawyers sue the parent company which is British incorporated and the African subsidiaries are brought in as necessary or proper parties. And however inappropriate London may seem as a venue, it is said that the whole case has to stay in London, because that is where, under the Brussels regime, the parent company has to be sued, and even if it seems clear that the real reason that the parent is sued is to get the subsidiaries into the London courts.

As an example, in June this year the English Court rejected jurisdiction challenges by a UK-domiciled company and its Zambian-domiciled subsidiary, allowing a group claim brought by 1,826 Zambian villagers in respect of alleged environmental pollution in Zambia to proceed against both companies: *Lungowe & others v Vedanta Resources PLC and Konkola Copper Mines PLC* [2016] EWHC 975 (TCC).

I ought to declare an interest at this point. There were, it has to be acknowledged, some special features about this case, and I declare being involved in another case where we will seek to obtain a different result.

As it currently stands, the ability to remove these cases from the English courts is limited at best. But it will be open to the United Kingdom once released from the constraints of EU membership to revert to a different system, indeed the old system of forum conveniens.

Whether they will take that course depends on many factors. It would be a bold and difficult move to make involving the whole scale repeal of existing jurisdictional legislation and setting aside of much case law.

But it is by no means impossible. There are still people (some of us) who remember the rules pre-the Brussels regime.

I was a staunch remainer. And indeed still am. But through my despair at the prospect of economic life outside the warm glow of Brussels, I am excited at the prospect of regaining our traditional approach to jurisdiction which could result in a substantial number of new cases starting or remaining in the English courts.

Let me state the position on investment arbitration. This audience will know well of the raging debate that the negotiations for TTIP have given rise to: NGOs and politicians on the left complaining in varying degrees of polemic about whether important social issues such as health issues on smoking, nuclear power, and regulation of the private sector are being taken away from the control of democratically elected governments by the current ISDS system. Despite a strong if late rally by the arbitral community against these changes, far reaching proposals for change are being considered. The current EU commission proposal would do away with our current system of international investment arbitration to replace it with a two tier system of a permanent investment court with judges appointed for 6 year terms to sit on the cases and to hear appeals.

If and when such a system is agreed with the USA no EU state will be able to operate a different system with the US as competence for negotiating trade deals with third States is now with the EU since the Lisbon Treaty. Of course elections here in the US in November may affect the likelihood of any deal with the United States.

It might be thought that being freed of the shackles of having to agree to the same system by leaving the EU would give the UK an advantage. I do not rule out that in time that could be the case. But it will take time to work out a new trade deal. And the view of the EU is that the UK cannot

even begin to negotiate such deals until we have left the EU. Indeed only this morning there are reports of a leaked Brussels paper drawing up plans to take the UK to court if it starts such negotiations.

But there is the prospect that we will see UK investment treaties as creating better dispute resolution systems.

Where does this all leave us? There is great uncertainty and worry for many aspects of UK law. But both for arbitration and for London as a seat, the advantages will not be diminished. And there are reasons to see it being even stronger.

I know some are hoping differently. They may have in mind the final sentence of 1066 and all that. It ends with the conclusion of World War I in 1918, saying that “America was thus clearly Top Nation, and history came to a .”

In 2019, the history of London arbitration will not come to a . I foresee sentences, paragraphs, pages and even full and glorious chapters to come.