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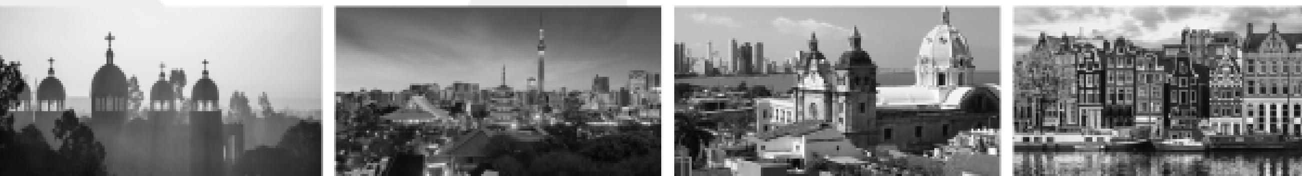

2020

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Ten Points for Choosing the Governing Law of an International Business Contract
Philip R Wood

The New Rules for Providing Financial Services in Switzerland: Fundamental Changes to the Cross-border Provision of Financial Services for Non-Swiss Financial Service Providers and Producers of Financial Instruments for the Swiss Market
Martin Liebi and Merlin Haldemann

Keeping the Freezer Stocked: Interim Relief in Aid of Foreign Proceedings before the DIFC Courts
Patrick Dillon-Malone SC

Regulation of Crowdfunding in Singapore
Adrian Ang and Samuel Kwek

Case Comment: Fiat and Starbucks: the Repurposing of Competition Law for Anti-Tax-Avoidance Schemes
Omar Asfar

Case Comment: The Prorogation Case 2019: Changing the Law to Preserve the Constitution
Charles Falconer

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MIAMI, USA, 1–6 NOVEMBER

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Ten Points for Choosing the Governing Law of an International Business Contract

Philip R Wood*

What this article is about

Lawyers routinely have to debate what law to choose to govern an international business contract. This article covers ten points worth considering in making the choice and discusses the result in relation to the main relevant jurisdictions.

The author discusses only large international business contracts between parties of comparable bargaining power, such as bank loan syndications, international bond issues, derivatives contracts, merger and acquisition agreements, joint ventures, long-term sale agreements, intellectual property licences and the like. The article is not concerned with contracts with consumers or small businesses.

Every legal issue under a contract must be determined in accordance with a system of law. An aspect of a contract cannot exist in a legal vacuum.

* Philip R Wood CBE, QC (Hon) is the author of the nine books in his revised series of works on the law and practice of international finance published in June/July 2019. He has lectured at more than 60 universities worldwide and was formerly a partner at Allen & Overy. The classification of jurisdictions in this article is based on the criteria used in those books, especially volume 1, *Principles of International Insolvency*. A more detailed back-up citation is also in those books. Volumes 2 and 4 contain summaries of certain relevant law regimes in all the jurisdictions of the world. Volume 8 deals with conflict of laws in international finance generally and contains further supporting citation. The views in this article are the author's own.

Comparison of governing laws

Ultimately, markets have a free choice. All commercial states with a proper system of law allow parties the freedom to choose the governing of their contract. There are about 321 jurisdictions to choose from – a jurisdiction is different from a sovereign state, of which there are nearly 200. Thus, there are seven legal jurisdictions in the British Isles and 51 in the US. Parties can choose anything from Tuvalu to the Vatican if they want.

The main possibilities are to choose a member of a family group whose core legal ideology matches the expectations of the parties in a particular case. The main families that are in the frame here in practice are:

- The English common law group. The group's ideology was initially developed by England. The main members of this group that might be eligible include England, Hong Kong, New South Wales, Ontario, Singapore and marginally the Cayman Islands. England, Hong Kong and Singapore are the principal jurisdictions that hold themselves out as available for international contracts, with English law far in the lead. Ireland is a contender. Kenya may be a future contender for African regional contracts, as may Nigeria and Ghana. History does not stop now and their future in this international legal territory is up to them.
- The American common law group. Most of these were originally English-based. In practice, the main jurisdiction used internationally on a large scale is New York.
- The Napoleonic group. France was the main developer of the ideology of the Napoleonic group. This group has many adherents, including Belgium, Italy, Luxembourg and Spain. French and Belgian law are not widely used in international contracts but both have signalled an intention to enter the ring and so their position should be considered. Luxembourg law is quite common in some classes of contract, especially where the main parties come from other large eurozone states and want a compromise. Italy and Spain are not considered to have ambitions in this direction at present in the author's experience. In Africa, the Ivory Coast is the centre of the OHADA group of 17 sub-Saharan African countries adopting a version of modern French business law. Parties in Member States may conceivably in the future use the law of that country for regional contracts but that remains to be seen.
- The Roman-Germanic group. Germany was the main champion of the Roman-Germanic system, which also has many adherents and major contributors, including the Netherlands, Sweden and Switzerland. All four jurisdictions quite often supply the governing law.

- The mixed common/civil law group. This comprises such jurisdictions as China, Japan, Jersey, Scotland and South Africa. All are anglicised by English common law – via the United States in the case of Japan. Japan was originally German law; Scotland was Roman law; South Africa was and is mainly Roman-Dutch. The law of Jersey was originally based on pre-Napoleonic Norman law. China appears to be positioning its commercial legal system with a view to it performing an international role.

This article compares the law of England, France, Germany and New York, as a proxy for the others. In effect, the comparison also covers many of the members of their family groups, subject to significant qualifications. You do not get exactly the same result from, say, England, Hong Kong, New South Wales, Ontario and Singapore, but the similarities are striking. This would also be broadly true of, say, Germany, the Netherlands and Switzerland, or Belgium, France and Luxembourg.

The four principal ideologies of English law (to which we must now add New York law), French law and German law have been phenomenally successful. Between them and the other contributors in their groups, they cover more than 80 per cent of the world's jurisdictions. The four jurisdictions have exceptionally sophisticated laws in our area and a colossal legal achievement to their credit. If you believe, as this author does, in the supreme importance of our legal systems nowadays as the repositories of our mainstay moral philosophies, these jurisdictions have made a huge contribution to world civilisation.

Yet, for historical reasons, French and German law, say, are very different from English law, as is New York law. This is a surprising result when one considers that they all share a common cultural inheritance and are indissolubly linked to each other, whatever the politics of the day. All four produced ideologies that no longer belong to the countries that originally sponsored them. The ideologies now belong to the countries that inherited them as a result of imperialism and emulation.

This is not a competition between nations. It is not a football match. It is a competition between universal ideologies that are above narrow patriotism.

Anecdotal evidence suggests that English and New York law enjoy a dominant position as the governing law of major international financial contracts, especially financial contracts. Those governing laws are now international public utilities – ideologies that no longer only belong to the jurisdictions that are their custodian.

The reasons for this dominance are partly historical. In the 19th century Britain was the world's largest economic power, and the US was and is the world's largest economic power, a mantle that it assumed in about 1900. Financial institutions tend to prefer their home law and so it was inevitable

that countries that gave birth to these banks and deep capital markets would see a tendency for those banks and markets to choose their own familiar law.

Nevertheless, in today's world the competition between legal systems is sharper and different choices are more widely debated.

The differences between the ideologies do not mean that one is good and the others bad. They each present a spectrum of solutions that are all within the range of what is legitimate and defensible. The question is: what ideology do parties want for their particular transactions? What is most protective of the interests the parties wish to protect? What are the risks they want to avoid in that particular case, for example, an international loan agreement for project finance? If you are riding over rough terrain, you need a mountain bike. If you are riding in a race in a velodrome, you need a slim racing bike. Your choice of bike can make a great deal of difference to your chances of winning (and keeping out of trouble). Ideologies matter.

Legal systems have to make choices, for example, between whether to protect debtors or creditors or between predictability and what the courts on the day, not the parties, think is fair. Those choices are almost always hard to make, and each has strengths and weaknesses. Whichever policy you choose, you will generally have some losers, some victims of an injustice, so the balance is often very difficult.

The ideal is that parties should choose the legal system with the most strengths for their particular deal.

When parties choose a governing law, they also typically choose the courts of the country of the governing law as well, either exclusively or non-exclusively. That means that the court is interpreting its own law and also applies its own conflict of laws doctrines: hence you know where you are. Similar principles apply to choice of law as to choice of courts, for example, commercial orientation, protection of the transaction, predictability, certainty, fairness, familiarity and the like.

One of the most hard-fought decisions in the case of the bankruptcy of Greece in 2012 was whether the new bonds issued by Greece in exchange of its old bonds would be governed by English law, which is what the bondholders wanted, or by one of the 17 eurozone systems of law, which is what Greece and the eurozone wanted. A legal memorandum produced at the time on behalf of the bondholders set two tests, which were essential to the structure of the deal: whether the jurisdiction had a trust and whether it had protective case law on an International Monetary Fund (IMF) agreement article allowing countries to escape their obligations by enacting exchange controls. Only English law passed both tests. None of the 17 passed both tests – some passed one of them but not the other, and some did not pass either. Germany and Luxembourg, for example, did not pass either; so, in

that case, English law was agreed by all parties to be the most suitable for the deal. English law was also used for other intergovernmental financial contracts with Greece from European Union countries, including a European Commission bond issue.

The following are ten points that are considered to be a few of the main comparative points – in fact, there are dozens of them, and many lawyers will have their own list. The weighting and importance that market participants give to one factor or another will vary. Nevertheless, debates on governing law should be reasonably specific with examples that are susceptible to review by lawyers from other legal systems. The object is to promote clarity as to what the specifics of the choices really are in important cases in which large amounts may be at stake. Clients are entitled to know what they are choosing.

The perspective here is from the point of view of English law, which is the system the author knows best. It may be remarked that Brexit is a constitutional matter, which also concerns trade, immigration, financial services passporting and the like. Brexit does not affect the private commercial English legal system significantly. The main significance of Brexit is that it has led to some EU countries offering their laws as a governing law of contracts in place of English law, especially financial contracts.

The chosen ten points are in summary:

- predictability
- insulation
- creditor orientation
- commerciality: preventing the nullity of transactions
- enforcement of judgments abroad
- freedom of contract
- international role
- language
- market acceptability
- stability, the rule of law and risk.

A mnemonic of these ten points is **Picce Films**.

Predictability

The predictability and certainty of contract terms is generally important to commercial parties.

Commercial parties normally cooperate in good faith and do not read the small print of their contracts. They normally do not call ‘snap!’ on the slightest pretext. If the relationship breaks down, this is typically after months or even years of negotiations. However, if all the effort to solve things is in vain, the parties need to know where they stand strictly. They will consider

it just and fair that they should be treated as responsible and entitled to determine their own destiny.

A key characteristics of English law is that the courts will normally uphold what the parties agreed, subject to some basic principles of contract. Banks and corporations control their own deals.

For example, in the symbolic Monday/Friday case of *The Laconia* (1977), the ship charter hire fell due on a Sunday; so, the charterer paid on Monday. The shipowner sent the money back and repossessed the ship at once on the Monday. The hire was payable in advance so it should have been paid on the Friday. This was an express event of default and the charter said that time was of the essence. It was held by the House of Lords that the shipowner was entitled to repossess. The charterer could have negotiated a grace period but did not, so what was the court to do – was the grace period to be three days, three weeks, three months, who knows? The court said it was up to the parties to agree their risks, for example, a grace period after notice as is commonly done. If there was any doubt about whether the shipowner could repossess and the shipowner was wrong, then it would be liable for very substantial damages for wrongfully taking over the ship.

This was an extreme case. One test of a legal system is whether it can cope with the occasional abuse in favour of the higher ideal of predictability and honouring the agreement that the parties negotiated.

In *Shepherd and Cooper v TSB Bank plc* [1996] 2 All ER 654 (1996), a UK bank was held entitled to accelerate and enforce a secured loan immediately on a default in payment. The bank sent in receivers one hour after demanding payment. It was held that the appointment of the receiver was valid. It was clear that the borrower could not pay.

Typically, in these cases responsible banks would have been in discussions with the borrower for many weeks and longer, until there was really no point and the position was hopeless. Responsible banks usually do not pounce. They have every interest in keeping the business going.

There is a long and consistent line of cases to the same effect. Hence, according to English law, if the contract states that it can be terminated immediately, that means immediately, not next Wednesday, not next Wednesday week. These measures are a last resort, as is normally the case in any other contract termination.

However, there are times when banks or corporations need to act swiftly, for example, in fast-moving markets where minutes or even seconds can count in relation to a close-out or sale or there is a threatened attachment or a set-off must be exercised as against a deposit being withdrawn by a borrower, or an aircraft or ship in fleeing its creditors. The legal system considers that predictability is justified because creditors should not have to run the risk

of substantial and possibly huge damages for wrongful interference or large losses in a plunging market. In addition, there must be discipline in the punctuality of payments in markets which are systemic.

Similarly, if the contract states that the arranger has no liability to a business buyer of a derivative or for statements of an issuer in an offering circular outside public issues or in a bank syndicate offering memorandum, that will be normally be upheld by the English courts, except for fraud or the like.

Again, there is a long line of English cases that uphold disclaimer clauses in business situations that clearly state that the counterparties are not to rely on the arranger and that the arranger or underwriter has no duty to check the information of the borrower or issuer. For example, in the *IFE Fund* case (2006), Goldman Sachs was held not liable to bank syndicate members for an information memorandum that was allegedly wrong but had an explicit standard disclaimer. In the *Springwell* case (2010), JPMorgan Chase was not liable to a Greek family-owned shipping company for selling notes based on Russian rouble securities, Springwell claimed $700m. The court upheld the exclusion of liability clause.

The rationale of the English courts is that in the offering circular cases, the claimant may sometimes just be looking for a big pocket to pay. The prospectus is that of the issuer, not the arranger. In the misselling cases outside the consumer arena, typically the counterparty has just lost the bet. If the counterparty did not understand the risk, the underlying rationale of the count is that the counterparty should have got its own advice and paid for it, instead of attempting to negate the deal after the event, after the horse tripped on the fence. The English view is that it would not be just that parties should incur massive liabilities of this kind where it has been explicitly agreed by sophisticated commercial parties that they would rely on their own due diligence.

The effect is that the parties are in charge of and control the documents that they negotiated. English law does not rewrite legitimate contracts.

It is suggested that the same consistent result seems not to be available in the case of, say, France, Germany or even New York. They all have statutory overrides for vague 'good faith', which in practice can on occasion be used to delay creditors, sometimes for months or (in the case of France) even years, and to override their disclaimers, for example, where the counterparty is endeavouring to evade a deal that went against it. In France, the courts are specifically authorised to defer payments for up to two years and reduce the interest rate. French contract reforms from 2016 require parties to disclose any information that is 'essential' for the other contracting part, a duty that presumably extends to a guarantee or information memorandum. In the US,

juries impose their own idea of fairness. However, if parties wish the deal that they negotiated to be upheld, then the English courts will normally honour that objective, an objective that the courts consider to be not unreasonable between commercial parties in their business dealings in the absence of some manifest vitiating factor.

Good faith is enshrined by article 134 of the France Civil Code art 1134; section 242 of the Germany Civil Code, and in the US by section 1-203 of the Uniform Commercial Code and section 205 of the Restatement (Second) of Contracts. Members of the relevant groups tend to take a similar approach. The general doctrine of good faith was explicitly reaffirmed in the French contract reforms of 2016.

The amounts at risk in these situations can be substantial – hundreds of millions or plus in the case of the US treble punitive damages.

Occasionally there are assertions in English cases of good faith, for example, *Yam Seng Pte Ltd v International Trade Corp* [2013] EWHC 111 (QB), but it is considered that the scope of application is narrow in the situations we are dealing with.

If parties prefer that good faith should apply in their contract to override its terms, then they can choose a governing law that adopts that policy. Alternatively, they could also still apply English law (or to member of the group) and insert a good faith clause and other provisions for mediation, cooling-off, grace periods, notices of action and the like. The English courts respect good faith clauses, for example, *Horn v Commercial Acceptance Ltd* [2011] EWHC 1757 (Ch). The difference is that in the case of English law, it is the parties themselves who are trusted to decide the ideology.

To ensure predictability, the English courts have a doctrine that lower courts will follow higher courts (precedent) so that you know where you are. This is specifically not the case in France or Germany (or most members of the relative groups), nor in practice is it the case in New York – largely because of jury trials and for other reasons. It may well be that in practice courts everywhere tend to follow a cluster of decisions of higher courts, but this seems less clear in the case of civil jurisdictions. The result in these other jurisdictions is that the courts seem to be inherently less predictable so that creditors are exposed to potentially large losses if they get it wrong in the eyes of the particular court – the court does not have to follow previous cases.

The French courts are particularly prone to rewriting contracts in favour of debtors and to imposing reorganisation plans on insolvency over the heads of creditors. The Civil Code expressly instructs the courts to back debtors in case of ambiguity.

Because of the duty of good faith, it is much harder under French and German law to terminate negotiations on a contract before it has been

agreed. English law generally honours 'subject to contract' clauses so that parties are not bound unless they intended to be – which is important for credit contracts, as indeed any other major contract.

Some parties will favour the protections of the good faith doctrine, so this is an issue for contract bargaining. As with many crucial issues of legal policy, the issues here attract intense debate. The idea of good faith in contract dealings is regarded by many jurisdictions as a fundamental policy of the law of contract and is applied in innumerable situations. The important point is that parties are clear on what the choices are.

Insulation

As aforementioned, a fundamental reason for a choice of law that is external to the country of the borrower or counterparty is to insulate the obligation against changes in the law of the debtor country. If, say, a loan is governed by the law of the debtor's country, then normally any moratorium or the like in the debtor's country is recognised under the governing law because the parties took the risk of that law, but not if the governing law is a foreign law. See, for example, the English case of *Re Helbert Wagg* (1956), in which a German law of the 1930s in effect cancelling a foreign sterling loan from an English bank was recognised in a loan agreement governed by German law. Contrast *National Bank of Greece and Athens v Metliss* (1958), in which a Greek decree reducing the interest rate on a loan was not allowed to change an English law contract; so, you can insulate by choice of law. US case law is to the same effect, though the test is not what the governing law is, but rather where the loan is located – a less clear test, although you often get the same result.

This point was comprehensively debated and researched in the early 1970s at the time of the inception of the euromarkets. A number of Latin American countries argued that their syndicated bank credits from foreign banks should be governed by their own law and contain an arbitration clause. They said that they were not constitutionally allowed to submit to foreign law and courts, which is known as the Calvo doctrine. With very few exceptions the foreign banks refused to lend on that basis and in the end English or New York law and courts were agreed with very few exceptions. The same conversation took place in the author's experience at the time in loans to Quebec, Turkey and elsewhere, with the same outcome.

However, some countries will defeat this insulation even in the case of the choice of a foreign governing law in the case of exchange controls. A provision in the IMF agreement (article VIII 2b) requires the courts of

Member States (more or less the whole world) to recognise complying exchange controls of a Member State in the case of 'exchange contracts'. In other words, the government of the country of the borrower or issuer can unilaterally change the deal by an exchange control, which they often do on insolvency if the sovereign itself is the debtor or if the borrower is locally important. English law insulates even against these foreign intrusions by exchange controls and does not apply article VIII 2b to loans and bond issues – they are not 'exchange contracts'. See, for example, the *Terruzzi* case (1976). However, the insulation is overridden in France, Germany and Luxembourg because of case law on the article. See, for example, the German *Lessinger* case (1955), the Paris *De Boer* case (1962) and the Luxembourg *Jourdan* case (1955). In those countries the borrower can in effect unilaterally change the deal, even if governed by a foreign law.

When the economists John Maynard Keynes of the UK and Harry Dexter White of the US drafted that article in the IMF agreement, they intended to introduce for distressed sovereigns a kind of rescue plan, in effect similar to what became Chapter 11 (the US corporate rescue regime). The courts of France, Germany and Luxembourg supported this ability of sovereigns to reschedule and write down their debt unilaterally. The courts of the US, the UK and Belgium did not.

In practice, exchange controls are the most frequent way in which countries postpone or discount their foreign debt obligations. Exchange controls can block the country's whole corporate sector and its banks. They are particularly common in emerging countries, thereby striking at project finance and local corporate and bank finance. China, India and South Africa have exchange controls. In the European region, exchange controls were introduced in the past decade in Cyprus, Greece, Iceland and Ukraine. If a debt-ridden country or one of its dominant companies has financial problems, this is a way out for them, instead of negotiating an agreed restructuring.

Taking a credit risk is one thing; having a deal annulled legally so that even the piece of paper is invalid is a different situation. In this area parties do at least have the choice. Again, the protection of insulation is something that the parties need to negotiate – it is often an important issue. If a party is a debtor on the other side of the table, it is likely to prefer a governing law and courts that take a different view more protective of its own position as debtor and make it more difficult for a creditor to enforce. Conversely, that is not an approach that creditors will sympathise with.

Creditor orientation

Legal systems tend to adopt positions on whether they are pro-creditor or pro-debtor, a choice that can profoundly affect outcomes.

English law is generally respectful of the position of creditors in comparative terms. As a generalisation, it does not subordinate the interests of creditors to those of the insolvent debtor. This is dramatically shown by the super-priority granted to the triple privileged claims: insolvency set-off (and netting); a universal corporate security interest that is easily enforceable; and the universal trust, for example, for custodianship, central depositaries, client assets, syndicate agents holding collateral and bondholder trustees.

Each of these three common law protections reduces risks massively and protects, for example, banks that are at the centre of risk and stability. On one view, banks and corporations are crucial to prosperity. The argument here is that if one strips aside all the veils of incorporation, it is not the bank that is the lender. It is the citizen who places his or her salary in the bank who is the ultimate creditor, the creditor who is being protected in substance. It is the citizen who switches on the light so in the English ideology it seems not unreasonable to protect the citizen – not an argument that is necessarily shared.

The flows in foreign exchange, derivative and securities markets go through world gross domestic product every few days. Each of this trio of super-priority creditors is a systemic issue. In England, set-off is compulsory and automatic on insolvency in all material cases. That is not so in France (and most members of the Napoleonic group), in most of which insolvency set-off is extremely limited. One can sometimes contract into the English set-off by having the debt owed *to* the insolvent governed by English law. See, for example, the EU Insolvency Regulation 2015, Article 9(1). The set-off has to be bulletproof. If we did not have the colossal risk reductions through set-off and netting in financial markets and through central counterparties, there would be nothing on the plate for breakfast. Nearly all advanced countries have installed special protections for a set-off and netting in financial markets, so it is in the regions where these over-complicated and often narrow statutes do not apply that set-off becomes an issue.

In England (and most jurisdictions in the group), anybody can declare a trust of any transferable property, present and future. This covers custodianship of securities at a depository (essential for collective schemes, central securities depositories and many others), a bondholder trustee or an agent bank holding security for the syndicate. One does not have to have untested parallel debt clauses, as in Germany. France has the Trust Law 2007,

but the trust must be registered. Germany and Switzerland have trust laws for investments.

In many cases, not only under the Hague Trusts Convention 1985, one can choose the governing law that validates the trust so parties requiring this protection can choose a system of law that has a full trust.

If the trust is not recognised, the assets of the trustee go to its private creditors, not the beneficiaries – a mournful prospect if the assets are a few hundred million. The real owner is effectively expropriated.

Most jurisdictions outside the Anglo-American group do not have *all three* super-priority claimants in that form. The German-based systems have a strong policy against trusts, outside special statutes, a policy stemming from the 19th-century Pandectist academic theory. Trusts are everywhere in financial transactions. Even a turnover subordination trust can be suspect in a non-trust country if the junior creditor is insolvent, thereby destroying the subordination in that case.

Neither German nor French law, or presumably members of their groups, allow the tracing of mistaken payments or clients' money or embezzled money through mixed bank accounts on insolvency, but English and New York law do. The availability of tort and restitution claims of this kind can be determined by choice of law under Rome II.

The US supports the priority of the three super-priority claimants, although with less conviction in the case of set-off and netting outside carve-out statutes. Otherwise, on the whole, the bankruptcy regime in the US (as is the case in France) is comparatively pro-debtor. This point was sharply accentuated by the symbolic *Lehman* cases, in about 2011 involving BNY Trustee Services as trustee, on waterfall flip clauses on identical facts in the English and New York courts. The cases involved the question of the bankruptcy policy of anti-deprivation after a bankruptcy petition. The English courts preferred to uphold what they considered to be legitimate market techniques; the New York courts sought to protect the debtor's estate in that contest. However, in litigation in 2016, a New York court modified its view on these clauses.

The more pro-debtor bias of France and Germany on insolvency is illustrated, for example, by the compulsion of directors to apply for an insolvency proceeding when the company is insolvent, thereby in many cases prejudicing the chances of a work-out or a negotiated pre-pack. The approach of English law is that it is considered that the better way of dealing with financial problems is a free private work-out agreement out of court, not the trauma of a court process. In addition, if the deal needs a court stamp on it the English courts allow that to be effected within minutes in an appropriate case.

England is the jurisdiction of choice for rescues via schemes of arrangement that are basically insolvency plans. The centre of main interests of many distressed companies has been migrated to England to take advantage of that flexibility. The English courts have jurisdiction to scheme a foreign company if the debts to be schemed are governed by English law.

English law has potent protections against the clawback of preferences, for example, in rescues or leveraged deals, protections that are generally weak in equivalent Roman-Germanic jurisdictions and even weaker in the Napoleonic jurisdictions and the US. Clawbacks can threaten the ability to carry out some highly leveraged transactions and threaten a work-out rescue by increasing the liability risks of the creditors and management. The English courts tend to support transactions, not destroy them.

France has a doctrine of abusive credit, that is, viewing it as the bank's fault for lending to rescue the company so that the bank can be held liable in damages for supporting the company.

A further example is collective action clauses in bonds. The US Trust Indenture Act of 1939 does not permit the majority bondholders of a corporation to bind the holdouts to changes of principal and most changes of interest, so the debtor has to go into Chapter 11 to achieve creditor voting on a plan. English law has substantial case law on bondholder voting and no-action clauses that respect market practices and the benefits of a financial democracy in getting a deal through.

One could cite many other situations. Bankruptcy is a destroyer and a spoliator. One tests the views of a legal system on bankruptcy, one way or the other. The directions in fact taken by jurisdictions, though clear, are controversial. Whether a pro-creditor or pro-debtor approach is preferable as an overall policy for dealing with insolvency is a matter on which different views may reasonably be held: the issue is unquestionably one of the most important that policy-makers have to deal with in private commercial and financial law.

Again, some counterparties may prefer the protection of a pro-debtor system of law.

Commerciality: preventing the nullity of transactions

The next issue is whether the courts lean in favour of validating transactions at the risk of some impurity of strict doctrine or whether the doctrine is applied regardless of whether the transaction stands. In other words, do the courts support reasonable market practice and legitimate expectations if they can?

English law has a strong policy in favour of upholding transactions and ensuring that they are not nullified by some formality.

There are numerous illustrations. One example of this is that English law recognises title finance transactions, such as repos and finance leasing, without recharacterising them as a security interest – in which case they might be void for lack of registration or filing. Predictability is fundamental to English law. The US generally does recharacterise, as do Australia, Canada and others but not Hong Kong or Singapore. France varies on this issue. Title finance is everywhere – from the humble retention of title clause for sold goods to grand title transfers under the International Swaps and Derivatives Association (ISDA) master. Again, the legitimacy of either approach is a reasonable issue of policy.

As aforementioned, other situations relate to insolvency set-off, security interests, trusts, clawbacks (voidable preferences) and the anti-deprivation on insolvency.

Enforcement of judgments

A point worth considering is the enforceability abroad of a judgment given in the courts of the governing law.

The judgments of English courts have a good record of trusted acceptability for local enforcement in most significant countries, coupled with worldwide pre-judgment freezes. The jurisdiction benefits from a huge network of treaties. The EU Brussels Judgments Regulation adds little to that situation in practice. The important EU countries readily enforce foreign judgments for a debt outside the Regulation subject to conditions that are normally easy to fulfil, for example, a judgment based on an express jurisdiction clause in the form usually found in large contracts.

In practical terms, the enforcement of judgments in a foreign country for debt in our context is in practice fairly rare – by the time you get that far in important cases, there is a standstill or a judicial insolvency freeze that blocks individual creditor attachments.

Recognition of choices of law and courts and insolvency proceedings is settled in all the relevant significant jurisdictions and the main principles are universally accepted in the leading jurisdictions.

US judgments have a poor record for international recognition, mainly because of the jury system, punitive damages and a quite aggressive litigation system. This has not acted as a disincentive for markets to use New York law.

Case law in France has made it more difficult to satisfy the conditions of judgment enforcement abroad – one of which is typically that the court of origin had substantive jurisdiction – by outlawing one-way jurisdiction clauses

and thereby signalling less enthusiasm for party autonomy. These clauses are normal in international markets. See the Court of Cassation *Rothschild* case (2012) and the *ICH* case (2015).

The French Supreme Court construed an express waiver of sovereign immunity in the *NML v Argentina* litigation in 2013 in a way that was unusually pro-sovereign debtor and unexpectedly prevented the hedge fund creditor from enforcing a New York judgment for debt, notwithstanding the express waiver of immunity. The English Supreme Court came to a contrary view in similar litigation and allowed the hedge fund to enforce the New York judgment against Argentina. The author conjectures that what was really going on is that the French court did not approve of the hedge fund's tactics and hence did not apply accepted law, but the English courts applied the law as written.

Clearly, counterparties that are habitual debtors may not favour a legal system that provides for effective enforcement.

Freedom of contract

A question is whether the jurisdiction in general favours freedom of contract, particularly in areas where the policies favouring freedom against restriction are finely balanced and especially intense either way.

English law and its counterparts generally favour freedom of contract in financial and commercial dealings. This original approach was that any fettering or manacling of the parties is justified only if it liberates us and improves our chances. Standing back, one may say that generally the purpose of a legal restriction is to free us, just as we have rules about our societies so that we can survive.

An example of this is that (apart from a minor exception) English law does not override non-assignment clauses in commercial and financial contracts. France, Germany, the US and many other countries, including Australia and most of Canada, do in significant cases. They do not allow the parties to decide for themselves. Clauses restricting assignments are part of the English ideology of freedom of contract. They are also the first line of defence for netting, which might otherwise be lost in the case of an assignment. They prevent the contract landing in the hands of an unfriendly counterparty or a competitor or another intervener who upsets the transaction.

This is another case where the choice of law may decide whether the parties espouse the mandatory marketability of contracts or their own freedom to choose. Both routes have a substantial body of adherents.

There are many other examples, including predictability, maintaining the commercial validity of transactions instead of the purity of a principle which is never to be eroded, and a general orientation towards markets and commerce.

International role

The English judiciary consciously recognises its role as serving the international financial and commercial community, just as the Delaware courts consciously serve the US corporate community. The English judiciary consistently implements the main tenets of its ideology. It has special courts lists to deal with financial disputes and they are centralised.

These points are considered less true of France and Germany but generally true of the New York federal courts. However, it seems unlikely that the English courts would, say, have adopted the controversial decision on *pari passu* clauses in bonds that was adopted by the New York courts in Argentina litigation in about 2012; the New York courts interpreted a standard and usually harmless clause in a way that was very unexpected by international markets, evidently to express disapproval of Argentina's conduct in relation to its bankruptcy.

The English courts are neutral. More than half the cases in the commercial court involve a non-UK party. Judicial neutrality is generally a feature of the other three jurisdictions.

Language

English is the *lingua franca* of international business. It is hard to conduct litigation or to know one's rights and protect oneself when statutes and case law are in a foreign language, as well as court proceedings. England has a large and accessible literature on international finance and the key points have been decided.

The language is historically two mainstream European language traditions bolted together and commingled – the Romance languages stemming from Rome and the Germanic languages stemming from the invaders of Rome, a symbolic fusion at this deeper level.

Market acceptability

English law has a proven track record of market acceptability. It is acceptable in all markets, which helps the deal. It has had two centuries of history performing this role. Commercial parties know what is on offer, the law is familiar from constant use by international parties and no extra investigation is required. This is not generally true of either Germany or France or indeed most other jurisdictions. New York law also has extremely high market acceptability.

By reason of the international use of English law worldwide for a couple of hundred years and its history as an economic superpower, England has built up a very large body of case law on commercial and financial transactions that is remarkably consistent with its originating principles of commerciality and freedom so that all may prosper. The motto was – and still is: 'The railways must be built'.

It was said of the original German codes that they were 'professors' law', meaning not so much that they were academic but that professors then were perhaps not altogether sympathetic to banks, traders and corporations. English law is practitioners' law.

The relevance of this point depends on the degree to which market acceptance strengthens or sells the transaction.

Stability and the rule of law

All four jurisdictions have stable legal systems in this area and a strong adherence to the rule of the law. The legal infrastructure is sound and efficient.

In addition, the English courts are known for their sense of proportion and moderation, for example, in terms of damages. They are watchful of overreaching by the authorities. This is true also of the courts in Germany and France.

The US courts have a profound adherence to the rule of law. The New York courts are exceptionally stable in their legal directions. However, in some other respects the country has legal policies that are tougher, which result in significantly greater legal risks and which are strongly supported as fundamental policies of US legal culture. For example, the US vigorously punishes banks that are alleged to infringe its economic sanctions or against money laundering. Cases involving foreign banks have been accompanied by colourful allegations from the authorities and led to very substantial administrative fines (a multiple of the fines in the UK, France or Germany) and private settlements, for example, threats to cut the bank off from the Clearing House Interbank Payments System, which meant that the bank had little ability to argue its case. The litigation system has a strong plaintiff orientation – class actions, jury trials, unlimited discovery of documents, punitive damages, very high awards of damages, no costs even if the plaintiff loses and hyperbolic accusations of criminality and racketeering. Contacts with the US via the use of New York law for transactions potentially attracts these aspects of the US legal milieu.

Conclusion

One should underline the aforementioned point that legal systems have to make choices in their policies. These choices do not suit everybody and so the positioning of a legal system is something that societies have to work out for themselves. What the situation requires is clarity on what the choices are. The result at least is that the international business community can make an informed choice between the competing ideologies on offer – which is as it should be, at least until we can achieve some measure of international harmonisation on the flash points, on a single ideology that is just and fair and serves us best. The law is our servant, not our master.