

## Introduction

This book evaluates thirty years of cases arising from the global derivatives markets. This period starts with the landmark House of Lords' decision in *Hazell v. Hammersmith and Fulham London Borough Council*,<sup>1</sup> takes us through the surge of litigation triggered by the 2008 global financial crisis and up to the United Kingdom's exit from the European Union.<sup>2</sup> The book details how these cases have evolved in line with the markets themselves, growing more complex, more international and more technically challenging over time, but it also identifies remarkably consistent legal themes. Most importantly, it finds that the process of resolving disputes between participants in the derivatives markets across this period has, after a notorious start, been a source of robust rules for this systemically significant sector of the global financial markets and has helped to shape commercial law more broadly. This study also finds, however, that are important and ongoing challenges associated with this recent manifestation of 'international business justice'.<sup>3</sup>

Today's derivatives markets are vast, global and diverse. As at the most recent data, the 'over-the-counter' (OTC)<sup>4</sup> markets have a gross notional outstanding value of over \$640 trillion,<sup>5</sup> while the dominant trade association has over 900 members from 73 countries.<sup>6</sup> This makes for a stark contrast with the state of the derivatives markets in the *Hazell* era, and the evolution since those early days has been spectacular. The first chapter of this book introduces the modern derivatives markets and it details how and why, over the timespan covered by this book, these markets have grown so dramatically in size and reach. It also shows that the users of the OTC markets have

<sup>1</sup> *Hazell v. Hammersmith and Fulham London Borough Council* [1992] 2 AC 1 (HL). ('*Hazell HL*')

<sup>2</sup> This book states the law as at 31 January 2020.

<sup>3</sup> Y. Dezalay and B. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (Chicago: University of Chicago Press, 1996) 128.

<sup>4</sup> A simplified definition of OTC deals is that they are transactions entered into between two parties privately, that is away from an organised exchange. See further Chapter 1.

<sup>5</sup> Bank for International Settlements, *OTC derivatives outstanding: Global OTC derivatives market*; H1 2019 (8 December 2019). See Chapter 1 for a discussion of this metric and for a definition of terms including 'OTC'.

<sup>6</sup> International Swaps and Derivatives Association ('ISDA'), 'About ISDA', available at [www.isda.org/about-isda/](http://www.isda.org/about-isda/) (all websites last accessed 30 March 2020).

diversified in the period; while major financial institutions continue to dominate, participants now include diverse public bodies from all over the world, pension funds and even small businesses and individuals entering into derivatives contracts as hedges for their bank loans. Coupled with the fact that derivatives are *modular* financial products, meaning that they may be combined with a wide variety of other contracts in a flexible way, the result is that the cases arising in these markets not only present diverse and novel legal problems, but they also involve highly varied subject-matter. Consequently, this study spans both the wholesale markets and the real economy, and exposes new types of connections between the two. As the book argues, this complex combination of factors poses unique challenges for the national courts.

Despite the importance and size of these markets, for the two decades from the 1980s, the OTC derivatives markets remained opaque and poorly understood by regulators. In this respect, as in so many others, the financial crisis that broke out in 2007–8 proved to be a turning point. The regulatory response to the financial crisis represented a ‘paradigm shift in the intensity with which OTC derivatives are regulated’<sup>7</sup> and measures including the clearing mandate have transformed these markets. Meanwhile, private lawyers have also turned their attention to these markets, but have largely focused their attention on a single, special aspect of the business of OTC derivatives. This is the role played by the trade association authored, standard form contract which has dominated the bilateral (uncleared)<sup>8</sup> derivatives markets since the 1980s. This ‘Master Agreement’ successfully combines an array of private law techniques including close-out netting and collateralisation, and is bolstered by legal opinions gathered from dozens of jurisdictions by the trade association. This contract has been referred to as one of the most powerful agreements in the world and it underpins trillions of dollars’ worth of cross-border transactions. So powerful are these combined effects that this agreement has become the paradigmatic example of market self-regulation by contract; indeed, it is now widely accepted that this standardised agreement has evolved from an ordinary contract into a source of privately created law for these transnational markets,<sup>9</sup> and that litigating over its terms could be a source of systemic risk.<sup>10</sup>

Yet, the puzzle for any such account of the derivatives markets, and an important theme for this study, is why participants in these markets have for so long adhered to the two default choices of the courts of England and Wales or those of New York,

<sup>7</sup> N. Moloney, *EU Securities and Financial Markets Regulation*, 3rd ed (Oxford: Oxford University Press, 2014) 576.

<sup>8</sup> The post-trade, pre-settlement process of ‘clearing’ introduces a ‘central counterparty’ (CCP) into a market, which becomes buyer to every seller and vice versa, so that market participants’ contracts are with the CCP rather than each other. Non-cleared derivatives are therefore referred to as ‘bilateral’ derivatives. The process and post-crisis regulatory role of clearing is described further in Chapter 1.

<sup>9</sup> See further Chapter 1.

<sup>10</sup> See, for example, J. Golden, ‘The courts, the financial crisis and systemic risk’ (2009) 4(S1) *Capital Markets Law Journal* S141.

and why so many parties routinely select from these alternatives over, for example, private forms of dispute resolution. In other mercantile systems dominated by what may be thought of as ‘privatised private law’,<sup>11</sup> such as financial exchanges, disputes are routinely channelled into private regimes that are created and administered by members of those systems themselves. Members of the mercantile community resolve disputes or exercise sanctions through private governance systems and in line with the ‘internal set of rules’ of that system.<sup>12</sup> This is not the case with dispute resolution involving OTC derivatives, however, despite the self-contained features of the contractual mechanics and despite some notable recent developments around private dispute resolution that are discussed in the final chapter of this book. The default drafting in the OTC markets continues to provide for the courts, and one or other of these options is still widely selected as standard; the choice of English law and the English courts being standard in the European derivatives markets. Nor is this jurisdiction provision simply window-dressing: as this book definitively shows, this single contractual provision has resulted in a steady stream of derivatives disputes before the English courts since the early days of the markets’ development and, since 2008, it has led to an unprecedented surge of cases linked to the global financial crisis.

The combination of the scholarly tendency to emphasise the self-regulatory qualities of these global financial markets and a recent focus on the implementation of sweeping post-crisis regulatory reforms across the G20 has meant that the nature of the relationship between these global financial markets and national courts has remained comparatively overlooked. Yet, understanding the role of the courts in the global markets in a systematic way is fundamental to understanding the markets themselves. Building up a detailed analysis from the cases over this period, this book explains the development of the courts’ approach to derivatives contracts. By reference to the most significant legal issues in this set of litigation, it shows how the emergence of a distinctive approach was first gradual, then catalysed by the unprecedented numbers of financial markets cases after the crisis, but that throughout, it has been shaped by reference to the state of the markets as a whole.

Surveying the courts’ substantive decision-making across this range of legal issues, the central finding is of English law readily and often expressly developing in line with the exigencies of an international market operating on the basis of a standardised legal framework. The chapter on contractual interpretation, for example, shows how decisions interpreting market standard terms have settled into a set of ‘commercially-minded’ principles which is now routinely repeated at the start of new judgments and applied in a consistent way. This approach helps to achieve the courts’ stated aim of predictability, but this study also shows how it leaves

<sup>11</sup> R. Michaels and N. Jansen, ‘Private Law Beyond the State? Europeanization, Globalization, Privatization’ (2006) 54 *American Journal of Comparative Law* 843, 868.

<sup>12</sup> Classically, as demonstrated in L. Bernstein, ‘Opting out of the legal system: Extralegal contractual relations in the diamond industry’ (1992) 21 *Journal of Legal Studies* 115, 115.

those claimants relying on private law facing a series of difficult and complicated legal challenges to bringing a successful claim. In this study, we therefore see smaller parties seeking refuge in schemes of regulatory redress, the boundaries of which become fiercely contested in their own right. Meanwhile, some well-advised litigants pursue experimental claims, pushing forward the development of general private law in the process, and international entities inventively challenge contractual choices around dispute resolution and governing law, making for preliminary battles that can be factually and legally complex in their own right. The decisive effect of these types of interim decisions is a powerful signal of the consistency with which disputes are resolved in the English 'Financial Courts'.

#### 1 THIRTY YEARS OF DERIVATIVES LITIGATION

The timespan covered by this book opens with the appellate court decisions in *Hazell v. Hammersmith and Fulham Borough Council*<sup>13</sup> and closes at the end of January 2020. The cut-off date need little explanation, given that it was the date of the United Kingdom's exit from the European Union. 'Brexit' may have a profound effect on the role of the English courts, both for substantive legal reasons and because of its possible effects on the geopolitical alignment of the financial markets. The fact that Brexit is considered a threat to the international reach of the English courts is discussed in the final chapter of this book.

What of the starting point? *Hazell* remains one of the best-known and most controversial cases in English private law. The case arose from a London council's dealings in the nascent swaps markets, though the implications were far broader.<sup>14</sup> In December 1983, Hammersmith and Fulham London Borough Council entered into its first swap, a novel product at the time, which referenced interest rates. Other UK local authorities started to enter into these nascent markets at about the same time. These contracts were entered into away from organised exchanges, between the councils and dealer-banks. Interest rate swaps were, at that time, one of several novel arrangements that local authorities started to experiment with in an attempt to bolster revenue against a background of central government cuts.<sup>15</sup> Initially, Hammersmith participated in a modest way in the new swaps markets, in keeping with comparable councils. Hammersmith's involvement with derivatives, however,

<sup>13</sup> The first instance decision in *Hazell* was handed down on 1 November 1989; the Court of Appeal's decision on 22 February 1990 and the House of Lords' on 24 January 1991. Respectively: *Hazell v. Hammersmith and Fulham London Borough Council* [1990] 2 WLR 17 (QBD) ('*Hazell DC*'); *Hazell v. Hammersmith and Fulham London Borough Council* [1990] 2 QB 697 (CA) ('*Hazell CA*'); and *Hazell HL*.

<sup>14</sup> The implications for the law of ultra vires and the background to the *Hazell* case are discussed in J. Braithwaite, 'Thirty years of ultra vires: Local authorities, national courts and the global derivatives markets' (2018) 71(1) *Current Legal Problems* 369.

<sup>15</sup> See further M. Loughlin, 'Innovative financing in local government: the limits of legal instrumentalism. Part 1' [1990] *Public Law* 372, 377.

changed radically in 1987, and over the period 1987–9, the council entered into 592 transactions involving a principal notional sum of £6 billion.<sup>16</sup> While there were no ‘reliable statistics’ about local authorities’ swap activities or Hammersmith’s exact market share,<sup>17</sup> it has been estimated that at the time, Hammersmith accounted for 0.5 per cent of the entire global market in derivatives<sup>18</sup> and about 10 per cent of the interest rate swap market in the United Kingdom.<sup>19</sup> Having come to the regulator’s attention, the 1987–9 contracts came to be challenged by the council’s auditor on the basis that they were outside the council’s statutory powers under the Local Government Act 1972. Unsurprisingly, given the date of this statute, it was silent on the council’s powers to enter into derivatives.

The House of Lords and Court of Appeal reached different conclusions on the capacity of the council to participate in the derivatives markets. For its part, the Court of Appeal held that those swaps entered into by the council for risk management purposes were capable of being lawful as they were a ‘newly fashioned tool’ for pursuing the council’s traditional statutory responsibilities.<sup>20</sup> The House of Lords disagreed. According to the House of Lords, the swaps were all ‘essentially speculative’<sup>21</sup> and ‘more akin to gambling than insurance’,<sup>22</sup> and none could validly facilitate or be incidental to the statutory function of borrowing. As a result, Hammersmith’s swaps were held to be ultra vires and void and, consequently, so were the 400 or so swaps that had been entered into by an estimated 77 other UK local authorities.<sup>23</sup>

The Hazell litigation is the logical starting point for this study for several reasons. First, Hazell was the earliest significant case before the English courts involving the modern markets in derivatives entered into away from organised exchanges. As demonstrated by the share of the market represented by Hammersmith and Fulham Council alone in the late 1980s, the derivatives markets in this period were relatively tiny. No accurate measurement of their overall size was, however, available at the time. The Hazell litigation itself therefore reveals how poorly understood the markets were and how unfamiliar the contracts were to regulators and the courts alike. Tellingly, interest rate swaps were such a novelty for the courts

<sup>16</sup> While a portion of the 1987–9 transactions were interest rate swaps, the majority were more complicated varieties of interest rate derivatives as defined in Hazell DC, Appendix A.

<sup>17</sup> V. V. Veeder QC, J. Barratt and M. Reddington, ‘The Final Report of the Independent Inquiry into Capital Market Activities of the London Borough of Hammersmith and Fulham’ (July 1991) (the ‘Veeder Report’) paras 6–17 and 6–18.

<sup>18</sup> D. Campbell-Smith, *Follow the Money: The Audit Commission, Public Money and the Management of Public Services, 1983–2008* (London: Allen Lane, 2008) 192.

<sup>19</sup> Veeder Report para 6–18.

<sup>20</sup> Hazell CA, 781 (Sir Stephen Brown P).

<sup>21</sup> Hazell HL, 46 (Lord Ackner).

<sup>22</sup> Hazell HL, 35 (Lord Templeman).

<sup>23</sup> Hazell CA, 764 and see the Veeder Report para 6–17, noting that there were no reliable statistics for local authority involvement in swaps, but citing a variety of sources for the estimates reproduced above. See Chapter 9 for discussion of the Scottish dimension to the Hazell saga.

at the time that a glossary of terms is appended to the first instance decision, defining terms including ‘swaps’. The contrast with the familiarity with which derivatives documentation is handled by the English courts today is striking. We have already noted the polished set of principles of contractual interpretation now in place for standardised derivatives documentation. Even in the specific context of public bodies’ ultra vires challenges to derivatives, by 2010, a Court of Appeal judgment began with the acknowledgement that ‘History repeats itself, at least with variations.’<sup>24</sup> As is detailed later in this study, there has now been a significant set of cases involving this narrow type of claim alone.<sup>25</sup> Hazell therefore provides a useful benchmark against which to measure both the quantitative and qualitative evolution of the global derivatives markets, and the co-evolution of the English courts’ approach to the litigation arising therein.

Second, Hazell may be seen as a landmark with which to orientate this study because of the strength of the reaction provoked by the decision of the House of Lords. As a result of this 1991 judgment, bank counterparties suddenly faced vast losses on transactions that all of the parties involved had assumed were valid. There was an immediate and furious response from the City of London. Allegations abounded that the courts had permanently damaged the reputation of English law and the United Kingdom as a financial market centre. Contemporary accounts accused the English courts of being ‘ill-equipped to deal with the commercial realities of the fast-moving world of finance’<sup>26</sup> and of dragging the national legal system into disrepute. The case also had a substantive impact on several different parts of English law, in particular restitution, as banks fought to recover sums paid over to local authorities. Writing in 2000, Professors Birks and Rose described the judgment as nothing less than a ‘bombshell’ which ‘sent shock waves through the whole of English private law, exposing weaknesses, and requiring reassessment and reconstruction’.<sup>27</sup>

For market participants, the Hazell controversy was intensified by the fact that the litigation came at a pivotal time in the City’s evolution into a worldwide financial centre, as the 1986 ‘Big Bang’ deregulatory reforms were taking effect. Several strategies were therefore quickly adopted to mitigate the impact of the decision including the setting up in 1993 of the (then) Financial Law Panel.<sup>28</sup> Nonetheless,

<sup>24</sup> *Haugesund Kommune v. Depfa ACS Bank* [2010] EWCA Civ 579 at [1].

<sup>25</sup> See further Chapters 2 and 9.

<sup>26</sup> P. Stewart and R. Phillips, ‘The Deals of 1991’ (January 1992) 11(1) *International Financial Law Review* 14.

<sup>27</sup> P. Birks and F. Rose, ‘Preface’ in P. Birks and F. Rose (eds), *Lessons of the Swaps Litigation* (Abingdon: Informa Law Routledge, 2013) v.

<sup>28</sup> Subsequently replaced by the Financial Markets Law Committee, established at, but independent of, the Bank of England. The FMLC’s account records that ‘In 1993, responding to concern that the wholesale financial markets were developing faster than the law regulating the activities of those markets (with potentially harmful consequences for financial stability) the Financial Law Panel (“FLP”) was established.’ See Financial Markets Law Committee, ‘History of the FMLC’ available at <http://fmlc.org/about-the-fmlc/history-of-the-fmlc/>.

even years later, the House of Lords' decision in *Hazell* continues to loom large in English law, and it is still cited as the epitome of legal risk.<sup>29</sup> For the purposes of this study, therefore, *Hazell* also serves as a warning of the profound impact which a single judgment may have, even long after the legal substance of a decision has been superseded.<sup>30</sup>

*Hazell* and Brexit therefore provide the book-ends of this project, but even with its specific focus on the OTC derivatives markets, a detailed study of three, busy decades of judicial decision-making that span a global financial crisis and its litigious aftermath, requires some parameters. As such, the principal focus of the book is the English courts and their decisions on (predominantly, but not exclusively) English law, though close reference is made throughout to concurrent litigation in other jurisdictions and to rules of foreign law which have, like English law, had extraterritorial reach. Indeed, other jurisdictions play an important part at various points in this study, especially the decisions of the New York courts which are shown to have variously converged, conflicted and concurred with related English cases. Later in the book, the effectiveness of 'defensive drafting' in financial contracts is explored in light of recent Hong Kong and Singapore cases that have begun to diverge from the English law on the reviewability of contractual remedies. The discussion of ultra vires claims in the modern derivatives spans Norwegian, Portuguese and Italian law. The final chapter in the book considers the new standard form contracts on offer to participants in these markets, providing new choices of law and forum, and it addresses the proliferation that is underway on the supply-side of the market in financial sector dispute resolution services. As much of the literature around arbitration and mediation in the financial markets acknowledges, however, the traditional preferences for English law and English courts, for the time being, remain strong.<sup>31</sup> This jurisdictional gravity is reflected by the users of the English Commercial Court: as at 2019, a reported 75 per cent of cases in the English Admiralty and Commercial Courts involved at least one international party and in 53 per cent cases, all of the parties were international.<sup>32</sup>

## 2 THE FINANCIAL COURTS

An over-arching question for this book is how to explain why there has not been a decision as notorious and controversial as *Hazell* in the course of voluminous and

<sup>29</sup> For example, R. McCormick, *Legal Risk in the Financial Markets*, 2nd ed (Oxford: Oxford University Press, 2010) [14.20]–[14.30].

<sup>30</sup> In this case, the problem of local authorities' lack of capacity was definitively addressed by the Localism Act 2011, which gave local authorities in England a 'general power of competence'. See further Chapter 9.

<sup>31</sup> See further Chapter 10.

<sup>32</sup> The CityUK, 'Legal excellence, internationally renowned: UK legal services 2019' (5 December 2019, The CityUK) 4–5, available at [www.thecityuk.com/research/legal-excellence-internationally-renowned-uk-legal-services-2019/](http://www.thecityuk.com/research/legal-excellence-internationally-renowned-uk-legal-services-2019/).

complex English derivatives litigation in the subsequent thirty years. Why, instead, have so many of the English cases involving these products and explored in these chapters expressly focused on promoting market stability and certainty for international market participants using the same standard form contracts?

The absence of a Hazell-like shock is not due to want of opportunity. Through a combination of factors, introduced in Chapter 2, this study shows that a steady stream of significant derivatives cases came before the English courts in the period between Hazell and the global financial crisis, which turned into a flood in the long decade between 2008 and 2019. Nor is the absence of such a shock because cases have grown more straightforward over time. Quite the opposite; later cases have brought new layers of complexity, generated by factors including the diverse and international status of the litigants and the complexity of deals into which modern derivatives have been embedded. Consequently, claims continue to present challenging and novel questions of English law and regulation, of civil procedure, of economics and of diverse foreign law, all routinely falling to be adjudicated against the background of complex and (usually) contested fact patterns. The absence of a Hazell-like shock, in such circumstances, should not be taken for granted.

The seven core chapters of this book (Chapters 3–9) explore these over-arching questions by analysing the major legal issues that have dominated derivatives litigation in this period, ranging from contractual interpretation through to mis-selling claims and defences, the exercise of contractual discretion and challenges to standardised contractual choices of law and forum. Whilst some legal background is provided in each chapter, the central objective is to explore the significance and patterns of litigation involving the derivatives markets in relation to each of these pivotal legal issues, while building up a picture of the relationship between the markets and the courts overall.

At the heart of legal issues evaluated by these core chapters is contractual interpretation, the subject of Chapter 3. This chapter demonstrates the emergence of a bespoke approach to contractual interpretation of the standardised terms that dominate the bilateral derivatives markets, which builds upon that historically deployed by English judges, particularly in shipping disputes. The link is revealing of the priorities of English courts in financial markets litigation. Shipping disputes typically feature international parties engaged in cross-border deals, documented on industry standard contracts that select English law and the English courts, and often fall to be decided in the context of periods of market volatility or even full-blown economic or political crises. There is also intense market scrutiny of judicial decisions in this sector, while awareness of this audience and its expectations can be seen having an impact upon the substance of judgments themselves. This study shows that the English courts have prioritised these same, familiar features when adjudicating derivatives disputes. In many cases this is a close fit, but the study also shows that the same, market-minded approach has also been pursued in cases



involving more diverse participants in the derivatives markets who do not closely fit this commercial paradigm.

The next core chapters trace the particular effects of the intense, post-crisis period of litigation. Chapters 4 to 6 seek to explain the nature of mis-selling claims involving OTC derivatives, starting with the regulatory landscape and then evaluating typical claims and defences. As Chapter 4 shows, UK financial regulation provides various statutory schemes of redress but they are both piecemeal and narrow in their coverage of the derivatives markets. These fragmentary protections are routinely justified by regulators on the basis that bringing a private law action in the courts is a viable supplement for those not adequately compensated by regulatory measures, or an accessible alternative for those excluded from them. Those cases explored in Chapters 5 and 6, however, show this claim to be problematic for many parties left out from schemes of regulatory redress. While the law in this area may have reached a high water mark, this robust set of private law rules were in place during the critical period between 2008 and 2019 when many claims relating to the financial crisis were being heard. These chapters show that in one of the periods when it mattered most, the courts applied and developed the law in a way that consistently looked to safeguard the certainty and stability of the financial markets overall, but which was poorly suited to the needs of smaller end-users seeking redress.

Chapters 7 to 9 are united by the fact that the types of claims outlined in each have been deployed by parties seeking to bypass the strategic problems with mis-selling litigation addressed in the previous chapters, though this is not their only relevance. Chapter 7 examines the growing importance of implied controls to contractual decision-making. The chapter explores how challenges to contractual decision-making involve the courts applying standards which owe a debt to administrative law, and are thereby less familiar for financial markets participants. Nonetheless, the cases show that these standards matter most at critical points in financial parties' contractual relations, for example, during default, close-out and the valuation of collateral. The chapter goes on to explain why there is new scope for judicial review in the derivatives markets, showing how this process leads to a different type of scrutiny by the courts and raises questions about the boundaries between public and private law.

Chapters 8 and 9 consider challenges (broadly defined) to contractual choices of law and forum in the standard derivatives documentation. In light of the findings on mis-selling and elsewhere in the book, it is clear that some financial markets litigants may seek to bypass the legal arrangements provided for by their contract. Where parties have agreed to contracts expressly selecting English law and, in some version of a jurisdiction clause, the English courts, this may give rise to a preliminary dispute about the effects of the parties' contractual choices. These challenges are symptomatic of the wider trends in the modern derivatives markets, especially the diversification of uses and users of OTC derivatives and, as a result, novel and complex legal questions have emerged around choice of law and forum. Overall, these chapters

suggest that the English courts now hold various features of OTC derivatives contracts to be self-evident, including the seamlessly international nature of the markets, and the importance of interpreting exceptions to the fundamental principle of party autonomy as narrowly as possible. In this sense, there are strong connections between these chapters on global adjudication and the findings as to the courts' approach to other legal issues involving these markets.

In terms of addressing novel disputes produced by a combination of contractual standardisation and market globalisation, the core chapters show that this approach has served the English courts well. The book shows that there has been no repeat of the controversy sparked by the *Hazell* decision, and how rare examples of inconsistent or 'disruptive' decisions have been efficiently addressed at appellate level. Judgments have expressly acknowledged the market perspective and, in turn, received predominantly, though not exclusively, positive commentary from the markets. Commentators have, for instance, welcomed outcomes in line with market expectations on the interpretation of particular payment provisions, on mis-selling claims, and in the context of jurisdiction challenges. Looking back on the litigation in the aftermath of the Lehman Brothers collapse specifically, one senior judge found that 'English law has more or less done its stuff in relation to its stewardship of the ISDA agreement, for all those who have chosen it.'<sup>33</sup> As noted further below, however, an approach prioritising standardisation and globalisation has not been well-placed to address the implications of the diversification of the derivatives markets.

Overall, the findings of these core chapters more than justify applying the label of the 'Financial Courts' to the English courts in respect of disputes arising in the OTC derivatives markets. This term is also a reference to the specially created, cross-jurisdictional 'Financial List', which since 1 October 2015 has been part of the Business and Property Courts. As Chapter 10 explores, the new Financial List offers litigants involved in high-value financial markets litigation specially adapted civil procedure rules and a judge from a list (at the time of writing, of thirteen) with 'particular financial expertise and experience'<sup>34</sup> as well as a ground-breaking 'test case' procedure. The Financial List's core promise is that will offer specialist judges to hear claims 'which require particular expertise in the financial markets, or claims that raise issues of general importance to the financial markets', thereby responding to the contractual choices of international market participants.<sup>35</sup> In light of the findings of the core chapters of this book, however, the final section of this book argues that the setting up of a new Financial List is better understood not as an

<sup>33</sup> The Right Honourable Lord Justice Briggs, 'How has English law Coped with the Lehman Collapse?' in D. Faber and N. Vermunt (eds) *Bank Failure: Lessons from Lehman Brothers* (Oxford: Oxford University Press, 2017) 121.

<sup>34</sup> Courts and Tribunals Judiciary, Financial List, 'Work', available at [www.judiciary.uk/you-and-the-judiciary/going-to-court/high-court/courts-of-the-chancery-division/financial-list/work/](http://www.judiciary.uk/you-and-the-judiciary/going-to-court/high-court/courts-of-the-chancery-division/financial-list/work/).

<sup>35</sup> Courts and Tribunals Judiciary, Financial List, 'FAQs', available at [www.judiciary.uk/publications/financial-list-faq/](http://www.judiciary.uk/publications/financial-list-faq/).