THE FINANCIAL COURTS

In *The Financial Courts*, Jo Braithwaite analyses thirty years of cases involving the global derivatives markets, exploring the nature of these legal disputes and assessing their impact on financial markets and on commercial law more broadly. Weaving together this substantial body of cases with theoretical insights drawn from the growing literature on the internationalisation of financial law, Braithwaite offers readers a detailed and highly original contribution to the debate about the role of private law in international financial markets. This important work should be read by lawyers, economists and regulators in the field.

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The Financial Courts

ADJUDICATING DISPUTES IN DERIVATIVES MARKETS

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Preface

This book seeks to explain the role of the courts in the modern derivatives markets. In doing so, it explores three decades of cases in detail, showing how wide-ranging decisions have evolved in line with the markets themselves, growing more complex, more international and more technically challenging over time. It identifies how, after a notorious start, these cases have become a source of robust rules for a systemically significant sector of the global financial markets and have helped to shape commercial law more broadly. The study also exposes the limits to the capacity of the courts, however, in particular in light of the diversification of users of these types of financial contracts.

This study is book-ended by two landmark events. The thirty-year window opens with the notorious litigation involving Hammersmith and Fulham London Borough Council and closes with the United Kingdom's departure from the European Union in January 2020. As the first chapter of the book shows, over these three decades, nascent, opaque and relatively tiny derivatives markets evolved into markets of staggering size, global reach and dense interconnections. This transformation was poorly understood by regulators at the time, but since the global financial crisis, it has been subjected to intense scrutiny. Accordingly, we now understand much more clearly the roles of legal standardisation, globalisation, private law techniques, legal and regulatory reform, private and public actors and the dominant trade association in this remarkable transformation. What has been missing, however, is a detailed understanding of the role of the courts in this story, not only through certain high-profile decisions such as Hazell itself, but in terms of a comprehensive, contextualised account, built up from a detailed analysis of the cases themselves. To provide such an understanding is the purpose of this book.

One global crisis is integral to this study; another looms as it goes to press. Given its time-frame, a major theme of this study is the significance of the spike of litigation which followed the global financial crisis that broke out in 2007–8. Several chapters of this book explore and evaluate this deep seam of important cases in order to demonstrate the enduring legal and regulatory implications. During the publication

process, however, the world was struck by another crisis, in the form of the most devastating global health emergency in living memory. The coronavirus pandemic led to lockdown measures being imposed around the world. At the time of writing, schools, universities and offices are closed, travel restricted, gatherings banned and public events cancelled or postponed far into the future. In dozens of countries, the order is to stay at home. Normal life has become impossible and economic activity has suffered a sudden, devasting shock. As the President of the European Central Bank, Christine Lagarde, put it, '[e]ssentially, for a temporary period, a large part of the economy is being switched off'.[1] As a result, there has already been extreme volatility in the prices of financial assets and a sharp downgrading of the economic outlook around the world.[2]

At the time of writing, the 'quiet is disquieting'.[3] In the short, medium and long term, many aspects of life are deeply uncertain. The financial system itself has, thankfully, proven resilient to the economic shocks so far;[4] however, there seems little reason to doubt that, as in the aftermath of other types of crises, litigation in one form or another is likely to arise as a result of this economic collapse and the accompanying economic conditions (in the form of negative oil prices, or negative interest rates, for example). What little we know of the nature of this crisis so far suggests that elements of such litigation as arises may well track some of the patterns carved out in the wake of the last global financial crisis, as outlined in the core chapters this book. For example, where commercial contracts are contested by parties seeking to end obligations that are no longer viable, contractual interpretation will be the pivotal legal issue, and the approach applied by the courts decisive. Where contractual events of default are triggered by insolvency or non-payment, it seems likely that, as in the wake of the 2008 global financial crisis, most contracts will terminate early on lines provided for therein, but also that certain defaults will become contested in the ways outlined in this book, including, potentially on the grounds of a misuse of contractual discretion in the asset valuation process. Where government or regulators intervene in the economy, the corollary is, inevitably, the heightened prospect of judicial review, as it was in relation to 2008 nationalisation of Northern Rock, for example.[5] Where international parties are pulled into foreign courts, there may once again be litigants who seek to challenge contractual choices of law and jurisdiction in an attempt to bring their dispute 'home'. In the course of handling high volumes of crisis-related cases, we might also expect national courts to fall back on some of the valuable lessons learnt from the aftermath of the global

[1] C. Lagarde, 'Our response to the coronavirus emergency' The ECB Blog, 19 March 2020.
[2] See, for example, the Bank of England Financial Policy Committee, *Interim Financial Stability Report*, May 2020.
[3] As described in K. Russell, 'How the coronavirus has infected our vocabulary' (*The New Yorker*, 13 April 2020) available at www.newyorker.com/magazine/2020/04/13/a-temporary-moment-in-time.
[4] One of the happier findings in the Bank of England Financial Policy Committee, *Interim Financial Stability Report*, May 2020.
[5] See further Chapter 7.

financial crisis, for example, around the value of intervenors in litigation, and of streamlining large volumes of related disputes.

If there were to be a significant wave of litigation triggered by the global pandemic, this study potentially offers three insights. First, and most importantly, it provides a detailed account of the principal areas of private law that will be the starting point for the court's analysis in significant types of financial markets and commercial cases, where the parties have selected, or are otherwise subject to, English law and the English courts. As this book clearly shows, it has been a driving concern of the English courts over the last thirty years that commercial parties should 'know where they stand' in terms of their rights and obligations under English law. Accordingly, parties subject to English law will approach those legal questions arising in relation to this new crisis armed, in many of the relevant areas of law, with robust rules burnished over the course of recent financial markets cases. Moreover, in relation to any novel points of law, this study suggests that, in times of serious and widespread economic disruption, the English courts are particularly inclined to tackle legal questions with a market-minded, or 'macro' approach. Put another way, uncertainty in markets has tended to increase the prominence of certainty in judicial reasoning. In turn, this suggests that novel cases decided against a backdrop of economic crisis are unlikely to disrupt the track record of English law in significant ways.

Second, this study suggests that if there were to be a new wave of commercial litigation associated with the current emergency, particular attention should be paid to the effects of legal and regulatory rules that cut across different types of entities. An analogy between categories of litigants who may become caught up in a new wave of litigation, and the position of individuals and small businesses in the derivatives markets which are the subject of this study may not be exact; nonetheless, this study strongly suggests that there needs to be meaningful access to redress for individuals and small businesses that does not place undue reliance on rules and on processes better suited to more sophisticated parties. Moreover, this concern about the coverage of legal and regulatory rules may be particularly pressing, given that this crisis threatens to take a devastating toll on the corporate sector, the self-employed and the real economy more broadly. Looking further ahead, it is possible that there will be areas of private law that are re-shaped as new litigation works its way through the court system, potentially shifting the legal rules that are also applicable to major financial institutions. Indeed, Chapter 6 closes by considering how non-financial disputes may already be reshaping aspects of the rules of private law around defensive drafting relied upon by banks that were hardened by decisions handed down in the wake of the 2008 crisis. This trend could be one that is catalysed by a high volume of new cases involving the real economy.

Third, where any litigation linked to this emergency spans multiple jurisdictions, international co-ordination between regulators, including the courts and relevant trade associations, should carefully build on what worked well after the 2008 crisis,

and attempt to address what did not. Chapters 8 and 9 of this book explore the international dimension to post-2008 crisis litigation further, and observe that national courts interpreting the same contractual provisions should make more meaningful and express use of each other's decisions. As noted in Chapter 3, there are already a few signs of this type of cross-referencing in the context of contractual interpretation, providing some precedent for a more closely co-ordinated approach. The final chapter of this book explains why the answer to such complex challenges is not as simple as shifting dispute resolution from public to private forums, while acknowledging that there may be greater fragmentation of financial litigation in the future. Drawing on the work set out in this chapter on the supply-side of the market in dispute resolution, it would be interesting to compare the take-up of various new private forums, specialist courts and out-of-court redress schemes, should significant volumes of litigation arise from this crisis. While much remains uncertain at the time of writing, it therefore seems likely that there will be much scope for new research seeking to apply and develop the arguments set out in this book in a constructive and valuable way.

On a personal note, it was my great fortune to have worked on this book in a period when I had the luxury of 'in person' conversations with colleagues, financial law scholars, family and friends. Ever since joining the LSE Department of Law, I have greatly benefited from its wonderful and supportive scholarly community. I owe a particular debt to those colleagues, past and present, working in the areas of financial, commercial and corporate law, including Joanna Benjamin, Michael Bridge, Hugh Collins, Ross Cranston, Elizabeth Howell, David Kershaw, Eva Micheler, Niamh Moloney, Sarah Paterson, Philipp Paech, Edmund Schuster and Visiting Professor in Practice David Murphy. I am also very grateful to my LSE cohort including Jacco Bomhoff, Jan Kleinheisterkamp and Jo Murkens for their generosity, books and for setting the bar so high, as well to my departmental mentors including, especially, Neil Duxbury. I would also like to thank Diamond Ashiagbor (of Kent) and Lizzie Barmes and Kate Malleson (of QMUL) who have been a limitless source of wisdom and crystal clear advice. I am lucky enough to teach as well as research law at LSE, and the energy, intelligence and international perspectives that my students bring to their studies have also benefited me enormously. This book would not have been possible without any of the above.

This book has been the product of several years of thinking about and researching the role of private law in financial markets, during which I had the benefit of a term's sabbatical leave from the LSE Law Department, for which I am very grateful. I developed this project with the benefit of innumerable conversations with colleagues on these topics. Specifically, I presented a paper about the Hazell swaps saga at University College London in January 2018 as part of the Current Legal Problems lecture series, and an earlier version of the paper at the European Forum for Securities Regulation organised by Dr Edmund Schuster of LSE and Professor Martin Winner of WU Wien. Thank you to the organisers and participants on

those and other occasions for the opportunities to present my work and for the valuable feedback. All of the usual disclaimers apply as regards any errors in this book.

The work that has gone into this project would not have been possible without the patient encouragement of my friends and family. I am very grateful to my sister Sue and her wife Anne for their wonderful example, for their incredible hard work and for their joy for life. I have also had immeasurable support from my four parents. I particularly appreciate Dad and Yvonne's good humour and support for this project even while they have had far more important things going on, even by current standards. Mum and Graham have always shown us how to do things both properly and kindly. I am also fortunate to have a wonderful mother-in-law in June, who is a great source of inspiration. I wish everyone a flawless, lifelong friend like Claire; not least, telling someone with her NHS job that you have been struggling with footnotes all day certainly helps to snap things back into perspective. In total, three people in this paragraph of thank yous are currently working on the frontline of the response to the coronavirus pandemic. Their bravery and stamina are extraordinary. Thank you.

Finally, this book is dedicated to my wonderful husband Richard. Unfailing in his patience, good humour and warmth, he has managed to say all the right things at all the right times in the course of this work. No mean feat. This book is for him.

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