

A View from the Business and Property Courts in London

Sir Geoffrey Vos*

Introduction

1. It is an honour for me and Lord Justice Nicholas Hamblen to have been invited to address this distinguished seminar. Lord Justice Hamblen was a judge of the Commercial Court in London that sits now within the Business and Property Courts of England and Wales.

2. I should start by introducing myself, because in Europe, the word “Chancellor” is used rather differently from the way it is used in England. In England & Wales, we have three main Chancellors, excluding the many Chancellors and Vice Chancellors of Universities. They are the Lord Chancellor, who is now our Minister of Justice, but no longer head of our judiciary – a task now undertaken by the Lord Chief Justice. Then there is the Chancellor of the Exchequer, who is the Minister of Finance, and finally there is the Chancellor of the High Court, which is the post I occupy – the senior member of the judiciary, who acts as a Head of one of our three judicial divisions.

3. My role as Chancellor is to lead the Business & Property Courts, where Lord Justice Hamblen sat until he was promoted to the Court of Appeal. Both he and I hear appeals from all kinds of cases in the Business and Property Courts. Those courts include the Commercial Court, but they include also a wider variety of business and property cases including cases involving the financial markets, arbitration, insolvency and company cases, intellectual property cases, competition cases, revenue cases and technology and construction cases.

4. We introduced the Business and Property Courts in 2017 in order to bring together the jurisdictions that I have mentioned that deal with financial, business, and commercial dispute resolution. The Business and Property Courts are housed in the Rolls Building in London where some 40-50 Business & Property Courts judges sit every day. That is one of the biggest dedicated business courts in the world. The Business & Property Courts also sit in 7 regional

centres across England & Wales. One of the main purposes of the creation of the Business & Property Courts has been the objective of ensuring that high quality business judges are available across the country, not just in London.

5. In addition to our domestic roles, however, both Lord Justice Hamblen and I have a long history of working with European lawyers and judges in various respects. I was the President of the European Network of Councils for the Judiciary from 2015-2016. As some of you may know the ENCJ is really the only systemic judicial network in Europe. It brings together the Councils for Judiciary and analogous governance bodies of the judiciaries of EU member states, and candidate member states. My work for the ENCJ focused on the independence and accountability of European judiciaries. We undertook a long running project aimed at evaluating the independence of judiciaries, and at enhancing the independence and integrity of judges and judiciaries across the EU and beyond.

6. An independent judiciary, as you will all know, is crucial if businesses are to be persuaded to invest in a particular state. Amongst all the rule of law factors, a reliable judiciary and a functioning justice system are of great importance to investors. Investment is much riskier in countries where the judiciary is corrupt and where commercial people cannot be confident that their disputes will be resolved fairly and within a reasonable timescale.

7. An independent judiciary is also critical because judges decide many disputes between the citizen or business and the state. They must, therefore, be independent from that state if citizens and businesses are to have confidence in the impartiality of the justice system. That is why the Italians in the first place developed the concept of a Council for the Judiciary to provide the necessary barrier or buffer between the judiciary on the one hand and the executive and the legislature on the other.

8. In the time available this afternoon, I would like to address three specific subjects. First, I want to say something about the common law to dispel a number of misconceptions that are continuing to spread in the context of Brexit. Secondly, I would like to say something about recent developments in the Business and Property Courts in England and Wales, and thirdly, I would like to say something about the establishment of new business dispute resolution courts in Europe.

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The Common Law in the Context of Brexit

9. I know the common law is familiar to many, if not all, of you. I want to give just a brief explanation as to how the common law actually works.

10. The common law is a non-statutory system of law. It does not turn on the interpretation of codes or statutes, but rather it relies on cases that have been decided by our court hierarchy in the past. The reason why this is a system that business people have found reliable over many years is because it can accommodate frequent changes in business and commercial practice. We have found that the process of legislating in relation to business contracts is sometimes rather unsatisfactory. Such legislation caters for the problem identified at the time, but not for the problems that may arise in the future. It requires a great deal of effort to be devoted to the interpretation of a written law, which may itself have been introduced some years ago, to find solutions for the different type of problem that is being experienced by the time that the litigation is taking place.

11. The common law aims to set out a system of judge-made principles that can be moulded to meet any business situation that may arise. In a fast-changing commercial and technological environment, we common lawyers think this has some advantages. It also provides guidance, through an established body of precedent, on commonly raised commercial issues, including the interpretation of many standard forms of contract.

12. Let me give one example of where these aspects may be useful. In the case of digital ledger technology (DLT), smart contracts and artificial intelligence (AI), the financial world is about to undergo, if not already undergoing, what is nothing short of a major revolution. Informed opinion suggests that the approximately 3 trillion (I don't claim that the figure is exact) financial deals entered into every year will be undertaken by way of smart contracts and DLT within 5 years, or if not 5, then not many more, years.

13. These smart contracts will all be self-executing and recorded on a digital ledger or blockchain. The theory is that no legal foundation will be required because everything will be written into the computer code that underlies the contracts. But that may not be realistic. I am certainly not assuming that it will be like that. My guess is that a legal basis will be required even for a self-executing smart derivatives contract recorded on a digital ledger across numerous servers. If that is the case, the world's legal systems will need to respond quickly. I would add that our business judges in London are moving swiftly to do so. We are educating ourselves to be ready to deal with the regulatory and other problems that will undoubtedly arise. The agility of the common law

should stand us all in good stead in dealing with developments of this kind.

14. What I always say about this in a civil law context is that common law and civil law judges have much more in common than there are differences between them. They are both dedicated to achieving a just outcome in a reasonable timescale at a proportionate cost, for the dispute between the parties. The type of law that they use to do so is merely one of the tools they employ.

15. But it is important also to understand that the common law is not engaged in a number of other legal areas of concern. If we are talking about regulation, whether of banks, financial services, competition or of business sectors such as energy, telecoms, and pharmaceuticals, the common law is not really relevant at all. Regulation, is by definition, imposed by and a function of statute, whether that is European legislation or domestic legislation.

16. This is why European law does not actually have an impact on the common law. European law is almost entirely about mutuality between member states and the regulation of sectors affecting the single market and trade between member states. It is a statutory system governing Member States in order to make the single market function properly. It has nothing specifically to do with the private law that those member states use to resolve disputes between individuals or businesses.

17. It is a commonly held misapprehension about Brexit that the common law is likely to become uncertain after Brexit because there will be two speeds of European law – European law as incorporated into English law on Brexit day and interpreted by our Supreme Court, and European law as determined by the Court of Justice of the European Union after the UK has left the Union. That is not something that is likely much to affect the common law. The common law is, as I have said, a system of judge-made principles that allows any novel commercial dispute situation to be resolved in a predictable manner. Of course, the common law operates against a backdrop of the regulation of the businesses and financial services institutions that are in dispute. But the common law itself will be as certain and predictable, and as able to deal with new situations after Brexit as it was before, because the EU law tapestry is only part of the backdrop to the business environment in which the common law operates to resolve disputes governed by it.

18. So, whilst it is true that English regulatory law may develop slightly differently from European law after Brexit, that will not create uncertainty for the common law or make our jurisdiction any less effective for the purposes of dispute resolution.

Recent Developments in the Business and Property Courts in England and Wales

19. First and foremost, it is absolutely vital that judges in the UK, and across Europe are not complacent about the systems they operate. Our judiciaries need, I think, to be in the vanguard of reform to the legal process.

20. As I always say, in an era when people can get every kind of service instantly or at worst the next day by calling it up on their smart phones, it is inconceivable that they will accept, in the longer term, the delays that are inherent in almost all justice systems. We will need to move fast to develop Online Dispute Resolution and other forms of speedier alternative dispute resolution, before the millennials lose faith in the way the older generation is content to deliver justice.

21. In England & Wales, we have a major court reform project that is introducing Online Dispute Resolution for small claims up to £10,000, for divorce, for guilty pleas in criminal cases, and for many tribunal claims in relation to social entitlements and other issues. We should not think that commercial disputes will not ultimately follow. We need to get our online dispute resolution processes right, so that they can take their place in the court structure to speed up the delivery of justice and bring our justice systems into the 21st century. The EU introduced its ODR platform last year, and it has had some success, but it is limited by the quality of ADR providers in different member states, and by the degree of acceptance of ADR in different member states.

22. There are other things that we, the judges, need to do if we are to make good the promise to achieve the modernisation of justice. We need to ensure that we understand the smart contracts, the DLT and the AI that I was speaking about earlier. Many observers think that the interest of lawyers and judges in smart contracts will be about regulation, to ensure that the new contractual landscape does not escape the controls that keep the financial services industry safe. But for my part, whilst acknowledging that that is one side of the equation, I want to make sure that our courts can be a part of the solution. Smart contracts will, as I have said, require a legal foundation. You cannot have 3 trillion contracts per year globally without expecting some of them to give rise to a dispute. We need to ensure that our judges are sufficiently educated in the legal basis of them, and in the computer code that underlies them, so that we can deal with these disputes and help to shape the legal environment in which these revolutionary developments will occur. We cannot just pretend that nothing is happening. Otherwise, we would not be serving the commercial community, which should be one of our overriding objectives.

23. There are other developing areas in the legal business world, with which judges need to engage. One of these is the growth in the use of predictive technology to forecast the outcome of disputes. This has been pioneered in the US, but has now very definitely arrived in Europe. My own view is that it is very useful for big business, because it can identify the most likely outcomes of uncertain litigation. It will not mean that litigation becomes a thing of the past, however, because “the” outcome as opposed to “the most likely” outcome cannot be predicted, and anyway not all decision-makers, even in large commercial concerns, are entirely rational. They will still, I am sure, in some situations want to “take their chances”, motivated probably by other less measurable factors including human judgment and bare human emotion aroused by the dispute itself.

24. One final criticism that is often made of our common law system is our enthusiasm for the extensive disclosure of documents. Businesses know how time-consuming and expensive that process can be. This point was made to senior judges in England a couple of years ago by some of the leading General Counsel in Europe and the GC100. We listened, and we are now just about to implement the recommendations of a Disclosure Working Group led by Lady Justice Gloster, which will provide an entirely new and less costly process for disclosure of documents. In essence, disclosure will only be required if it is truly necessary to achieve justice and the parties will be able to influence the disclosure regime that will be chosen so that it suits the features of the particular dispute that is being determined. This is a good development that will be piloted in the Business and Property Courts starting early next year.

25. As many of you may also know, we have introduced a Financial List to the Business and Property Courts that deals expeditiously with major market disputes, and has a procedure for determining market test cases when such determinations will assist the financial community. The Financial List has proved very popular for the biggest disputes, and I hope we shall shortly have the first market test case to consider certain important market issues concerned with smart contracts.

26. So, the judiciary in England & Wales is not standing still. I hope it is not seen as complacent. It cannot afford to be. What I want to achieve is that we face up to the challenges that Brexit provides, and work with our European colleagues to achieve solutions that work for UK and European business.

The Establishment of New Business Dispute Resolution Courts in Europe

27. The first point I want to make is that legal systems are not, and should not be, in competition. I have huge respect for my European judicial colleagues and have worked closely with them for many years.

28. I was asked by a group of judges in Wiesbaden last November what I thought of the new English speaking commercial court that is being established in Frankfurt. I answered that I wished it every success.

29. I gave a similar answer when a delegation of French judges and officials from the new international commercial chambers in Paris, visited London last month. They, as you will already know are setting up a court made up of English-speaking judges with a mastery of the common law and who are competent to resolve international disputes. They too asked for my advice, and apart from wishing them well with their project, I advised them to focus on the information technology necessary to make their new courts work. It is crucial for any such system, new or old, to offer state of the art legal technology in terms of electronic filing and electronic case management systems, something to which I want to return in a minute.

30. It is extremely important, I think, that judges in different jurisdictions collaborate and cooperate with each other, and exchange ideas and information about their justice systems. No justice system is superior. We are all trying to offer an excellent service to our domestic and international court users, whether they are businesses or individuals. And collaboration between our judges will assist in this process. That is why I welcome this seminar so strongly, and also the strong attendance from the new European business courts at the Standing International Forum of Commercial Courts this September in New York. As you know, England and Wales has instigated SiFoCC and the next meeting will be attended by the new commercial courts in France, Germany, Ireland and the Netherlands. It will provide an important and ongoing forum for co-operation and mutual understanding.

31. My perspective is that all aspects of dispute resolution entail a balance between three factors, cost, speed and the quality of the outcome. An individual with a small dispute with a utility over €100 will want that dispute resolved quickly at no cost, and will not care much about the outcome. They will just want the matter resolved. But a bank with a €100 million dispute will care less about the cost, and even about the speed of its determination, and more about achieving the correct outcome. Judges and justice systems need to take heed of this balance, because we need to

provide a diversity of dispute resolution solutions to our citizens. This is precisely why the new European commercial courts are so much to be welcomed.

32. The question you may well ask is what are the most important things about a successful business court in Europe or perhaps the world today?

33. In my view, the answers are as follows: first and foremost the quality and integrity of the judges in the court and the lawyers who practice within it. The second most important thing is to introduce appropriate IT to make sure that the court's processes are digital from end to end. We are hoping to achieve that in all English and Welsh court systems within 4 years. The third most important thing is to make sure that appeals are limited to those that are given permission, mostly on points of law, and that, as a result, delays in the initial dispute resolution process and in any appeals allowed are limited. One of the things that has blighted commercial dispute resolution in many countries over many years is a system that allows unlimited rights of appeal all the way to the highest court in the jurisdiction. Speed is of the essence.

34. Commercial people the world over want timely effective dispute resolution. It is important also to provide court services that complement and support commercial arbitration. The Business and Property Courts in London and the Arbitration Act in the UK are friendly to the commercial parties that decide to arbitrate in London. The Commercial Court, in particular, has supervisory jurisdiction over London arbitration under the 1996 Act. The links with the arbitration community are, therefore, very strong and beneficial. That will not change when the UK leaves the EU, because we will still be a party to the New York Convention and that will not change. The vast majority of arbitration business (and, indeed, the work of the Business and Property Courts more generally) is international in nature, both European and further afield.

35. Alternative Dispute Resolution (ADR) is another thing that our judges in the UK now support very actively, and it is vital to have a strong ADR offering to support court-based dispute resolution.

36. I want to say something briefly to conclude about the enforcement of judgments, choice of law and choice of jurisdiction after Brexit. The UK Government has made clear that it intends to try to negotiate an arrangement with the EU that perpetuates Brussels Recast. I cannot comment on whether that will be achieved, but what I can say is that I would have thought that it is important to both EU member states and to the UK to have mutual enforcement in place. That applies even more strongly in the context of the new Commercial Courts we have been talking about. It is all a part of the judicial cooperation that I have been speaking about. The UK Government has also said that it intends to legislate to replicate Rome I and Rome II in English law. It has said that it intends to become a party in its own right to both the

Lugano Convention and the Hague Convention on Choice of Court 2005. The UK Prime Minister said in her Mansion House speech on 2nd March 2018 that the UK would “want our agreement to cover civil judicial cooperation, where the EU has already shown that it can reach agreement with non-member states, such as through the Lugano Convention”.