CHANCELLOR
OF THE HIGH COURT

Presentation to ILA

A Look at the Future for Insolvency and Business Litigation in London

Sir Geoffrey Vos, the Chancellor of the High Court

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Introduction

1. It was very kind of you to invite me to speak tonight here at the Natural History Museum. I hope my short contribution will be less antediluvian than some of the exhibits we shall be amongst over dinner.

2. I am keen to speak tonight about the important work of the Rolls Building and the real value of the international reputation of our law and our judges in the post-Brexit world. But before I do let me start by saying why I will not be saying anything about the issues that have arisen recently in relation to the *Miller* decision and the independence of the judiciary. I shall not be saying anything about that for one very good reason. That is that judges do not comment publicly on court decisions or the commentary that sometimes follows them, particularly those that are still under appeal; and nor should they. Society respects judges because they are independent in every respect both individually and systemically, and because they stand apart from and do not participate in the political debate. Judges are frequently called upon to decide legal questions that arise between citizens and the government, and it is crucial that both retain absolute confidence in their impartiality.

3. When, Mr President, you invited me, you did not know, and I did not know, that I was shortly to appointed as the Chancellor of the High Court, so I am pleased to be the living embodiment of a judicial "buy one, get one free". You bought a Lord Justice of Appeal, and got the new Chancellor free. It may be that the recent increases in court fees will make you wonder whether this retail marketing approach is, as yet, completely reflected in the management of the UK's business courts.

4. Before I was appointed as Chancellor I was thinking of speaking about two subjects: the first is something that I am working on in a previous incarnation - namely the effect that the vast array of different types of alternative dispute resolution (ADR), that are now available, can have on litigants' undoubted right to expect a fair determination of their disputes by an independent judicial tribunal. This problem exists as much in insolvency situations as it does in other fields; the economic pressure to resolve a dispute by mediation or by an ombudsman process can be even more pressing for an insolvent debtor than it is for a vulnerable party in other areas of the legal arena. But I decided ultimately not to speak about ADR, which merits an entire talk on its own.

5. Next, I thought of a related topic, namely when is a party to a contract that contains an arbitration clause able to present a winding up petition in advance of obtaining an arbitration award? The question brings in to play the need to overcome section 9 of the Arbitration Act 1996, which provides, in favour of a party to an arbitration agreement, for a mandatory stay of legal proceedings "in respect of a matter which [under that agreement] is to be referred to arbitration". This too is a question that merits an entire talk, because there are many cases where a creditor might think that it can show that the debt under the contract is not disputed in good faith, but that creditor is still obliged to go ahead with a lengthy arbitration process because, if he fails to do so, he will be restrained from proceeding with his petition to wind up (see my predecessor's leading judgment in the CA decision in *Salford Estates (No 2) Limited v. Altomart Limited* [2014] EWCA Civ 1575). I expressed some views in *Changtel Solutions UK Ltd (formerly Enta Technologies Ltd) v Revenue and Customs Commissioners* [2015] EWCA Civ 29 that some have thought to be at odds with that decision. I would maintain, however, that the new Master of the Rolls made clear in *Salford* that section 9 did not apply to a winding-up petition where what was in issue was whether a debt was outstanding and due. Moreover, we decided in *Changtel* that it was not incumbent on the Companies Court to defer to the view taken by the tax tribunal as to, first, whether or not a company was unable to pay its debts and secondly, whether as a matter of discretion the petition should be dismissed or the company should be wound up. But again, all that can wait for another day.

6. Ultimately, I thought that I would try to tell you something about what is going on in the Rolls Building and in the Chancery Division as that is likely to affect more of you on a day to day basis. It is a good opportunity, for me anyway, to speak for the first time about some of the exciting developments that are taking place in our attempts to keep the business and insolvency courts of the United Kingdom at the forefront of user-friendliness.

7. I would like to start by stating the obvious – namely that the reputation of the lawyers, judges and courts of the UK or England & Wales ("E&W") remains high in the international commercial community. The unique selling points (USPs) of the English courts are the integrity of our judges: i.e. the complete absence of corruption, our compliance with the rule of law, the consistently high quality of judges, and the certainty and quality of English law. These USPs and high repute do not, however, mean the UK is immune to competition from other commercial court centres seeking to prise dispute resolution business away from the UK to other jurisdictions in Europe, the US and Asia. We should take this competition very seriously indeed.

8. Court-based dispute resolution is obviously the kind with which the judiciary is most closely concerned. I will say something about that, before saying something about other forms of dispute resolution albeit not in the context that I have already mentioned.

9. So what are we doing to maintain our competitive advantage and to serve you, the users? I want to touch on a number of areas that will bring important changes.

10. First, there was the introduction of the Financial List on 1st October 2015. This has, thus far, been a huge success. The List uses the most highly qualified judges from both the Chancery Division and the Commercial Court and offers the twin advantages of speed and efficiency. It has introduced a market test-case procedure to resolve an uncertain point where resolution of the issue would benefit the financial markets. This has relevance to insolvency practitioners, because it can be used for any issue which requires expertise in the financial markets or which is of general market importance, even if it arises in the context of insolvency or re-insurance or professional negligence, or in a case falling within the normal specialist jurisdiction of

the Companies Court. So far some 22 cases have been started or transferred into the Financial List, and 4 judgments have been handed down. 4 have been resolved in other ways and 14 are still ongoing.

11. We intend to keep the procedures of the Financial List continuously under review so as to make sure that they meet the needs of the international commercial community whether based here or abroad. We will listen to what you have to say at our briefing events or through our Users Group, but also by making sure that the courts are accessible and responsive, and the IT that we are using works effectively for the users.

12. Secondly, there is the initiative of the specialist Insolvency Registrars. They are soon to be renamed Insolvency and Companies Court Judges to reflect their vital role in dealing with insolvency litigation. The initiative is the introduction of Insolvency Express Trials ("IETs") as from April 2016, alongside the new form of Shorter and More Flexible Trials Scheme which took their cue from the recommendations of Lord Justice Briggs in his Chancery Modernisation Review.

13. IETs have been a great success. Their objective is to speed up simple litigation, to curb costs, and to avoid the additional burdens of costs budgeting in appropriate cases. In insolvency cases in particular, there is often little need for interlocutory case management, because the case turns on evidence, not complex pleadings. Disclosure is usually confined, because both sides are largely dependent on common documentary sources originating from the company and in the hands of the office-holder.

14. The limits on the procedure are that it relates only to cases that can be disposed of in no more than two days, where each party's costs will not exceed £75,000, and where the case can be tried by the Registrar. In general terms, there will be just one directions hearing and an expedited hearing date at which judgment will normally be given at once. The procedure has been well-received and its uptake, just like that of the matching Shorter Trials Scheme across the Rolls Building jurisdictions is growing rapidly. The limitation on the shorter trials scheme is that the case will take no more than 4 days, but there is no financial limit. Again, that initiative has been introduced across the Rolls Buildings jurisdictions: Chancery, TCC and Commercial Court. The concurrent success of these two schemes along with the success of the Financial List has demonstrated that these reforms and new services the judiciary has devised and implemented are indeed responding to a very real need in business litigation, and that the judiciary is active in ensuring users are heard and properly catered to.

15. The new Insolvency Rules have been a long time in the making. They were originally due to come into effect in October 2016 but this has now been pushed back to April 2017. The Statutory Instrument introducing the new rules was laid before Parliament last week. In short, the new Rules consolidate the Insolvency Rules 1986 with the 28 amending instruments made since they came into force. They restructure and update the 1986 rules, and take account of the important changes made by the Deregulation Act 2015 and the Small Business, Enterprise and Employment Act 2015.

16. The new rules separate out the winding-up provisions into long-overdue separate parts for members' voluntary liquidations, creditors' voluntary liquidations and compulsory liquidations. The decision-making provisions will in future apply to all insolvency proceedings. The new procedures aim to remove unnecessary regulatory burdens to reduce the cost of administering insolvency proceedings. For example, the new rules permit an office-holder to send a notice to creditors making clear that all future documents will be made available on a website. The internet has finally made its mark on insolvency procedures. There will be fixed reporting requirements for all insolvency processes. Meetings will be removed as the default mechanism for

creditors' decisions. There will a process of deemed consent, except where more than 10% object. Final meetings, which nobody ever attended will also be abolished. The official receiver will now be appointed as trustee on the making of a bankruptcy order. Again, the tremendous amount of work that goes into drafting these new rules is illustrative of the judiciary's and MoJ's desire to keep our procedures as simple and user-friendly as possible.

17. And so I come to the business offering of the UK courts post-Brexit. Much has, however, already been written by lawyers and politicians about what Brexit will mean for our legal system, our legal businesses and particularly our international legal dispute resolution work business.

18. We all understand that whether we are dealing with business litigation generally, or general insolvencies or restructuring, ultimately the client has a choice. It may be more difficult to switch jurisdictions for the insolvency of a trading group based in England than it is to change a contract so that it provides for New York rather than English arbitration and is governed by New York rather than English law, but with appropriate planning, it can be done. But choice is good for us, because it drives continuous improvement and our competitive edge.

19. Of course, Brexit presents a challenge, but it is not one that should defeat us. We have to deal with the obvious problems of ensuring that our judgments can be enforced within the EU when we are no longer members of the EU and no longer bound by the Brussels I Regulation. We have to deal with the fact that we will no longer be bound by the EU Insolvency Regulation, or the revised version that will come into force next June, so that our insolvency proceedings will no longer be automatically recognised in the EU Member States. We may wish to consider the applicability of the Rome I and Rome II regulations on applicable law. But these and many other questions can be resolved and while no final determinations have yet been made, you may rest assured that these issues are being given careful and detailed consideration by the judiciary and by the government, who are looking for simple and practical solutions.

20. Once those and many other similar problems are solved, the question will still remain whether our law and our courts can cut the mustard. This will only be the case if we maintain the quality of our judges and the quality of our lawyers. We will need to move with the times. But we have a very good position from which to start.

21. As regards arbitration, the UK has always been a world leader. Whatever those promoting other jurisdictions for international commercial arbitration may say, I see no reason why that should change, provided that commercial parties are still prepared to continue to choose English law and English jurisdiction. I think they will – and I say that because of the USPs I mentioned earlier. The rule of law and the integrity of judges is a vital component for businessmen in all fields when choosing where to resolve their disputes. There is nothing as destabilising as the possibility of inappropriate government intervention. I am put in mind of what someone said at a recent seminar I attended where the magnificent advantages of other courts and other jurisdictions were being feted. Someone said *sotto voce* to me: what would you prefer: the rule of law or better IT?

22. Moreover, the quality and certainty of English law is something that will continue to attract business people to choose it for their disputes. That quality is not going away any time soon. It has stood us in good stead since the 19th century.

23. We must not, of course, be complacent. But we will still have a lot to offer here in London in addition to our English law. The judicial system remains strong and uncorrupted and uncorruptable. There are many countries that cannot say the same.

Conclusion

24. So, I want to end by asking all of you to join with the judges in being positive about the future for UK PLC. It is easy to be defeatist, but less easy to sometimes to rise above the pressing problems of the day to have a vision of the future. It is even more difficult to make that vision come true. But I believe that our English legal system has such inherent unbreakable strengths that we will be able to maintain and enhance London as the "go to" centre for international dispute resolution – both in the courts and in arbitration.

25. To achieve this, lawyers, judges, city institutions, professional bodies and a range of government departments will need to work together. I for one am optimistic that that can be achieved.

26. Many thanks for your attention. I hope that you all have a most enjoyable evening.

9th November 2016
