JUDICIARY OF
ENGLAND AND WALES

LORD JUSTICE GROSS

A GOOD FORUM TO SHOP IN: LONDON AND ENGLISH LAW POST-BREXIT

35th ANNUAL DONALD O'MAY MARITIME LAW LECTURE

LONDON, 1 NOVEMBER 2017

Introduction[1]

1. London and English Law are world leaders in international dispute resolution. This is one of those areas where the United Kingdom "punches above its weight" in world affairs, to use Douglas Hurd's memorable phrase. There is every good reason why that should remain so after Brexit. The fundamentals are sound. But complacency is not warranted. There is much to be done, concerns to be addressed and false steps avoided. Action is required from Government, the Judiciary, the legal professions, Academia and the City. Our world ranking cannot be assumed; we will need to work to keep it – and it is profoundly important that we do keep it. That, in a nutshell, is my theme to be developed tonight.

2. It is a pleasure and honour to do so by way of the 35th Donald O'May lecture. As all here will know, Donald O'May was the Senior Partner of Ince & Co. from 1976 to 1988 and was foremost amongst lawyers in the marine insurance market during the 1970s and 1980s. His vision was broad, his energy considerable and he played an important role in promoting London as a leading jurisdiction for the resolution of maritime disputes. The

[1] I am most grateful to Dr John Sorabji, Principal Legal Adviser to the Lord Chief Justice and Master of the Rolls, for his considerable assistance in the preparation of this lecture.

lecture series in his name pays tribute to his work, as evidenced by the distinguished figures who have delivered lectures 1-34, covering a range of topics relevant to shipping, insurance and dispute resolution.

3. Tonight's topic is of the first importance. Let us be clear as to the figures[2]: the UK's legal services sector contributes £25.7 billion to the UK economy, or 1.6% of gross value added. It generates £3.3 billion in annual export revenue. Such figures matter in themselves. They also bolster the attractions of the City as a financial centre – a mutually supportive process, in that there can be no realistic doubt that the strength of the City is a key driver for the attractions of English legal services.[3] CityUK and LegalUK enjoy a symbiotic relationship. Before developing my main theme, I should however make it clear that the views I express are my own.

Lords Denning and Clarke

4. My starting point is *The Atlantic Star*, an admiralty collision case. The defendant sought a stay of proceedings, arguing that Antwerp rather than London was the most appropriate forum. The defendant failed at first instance and in the Court of Appeal, where arguments of *forum non conveniens* were raised. Lord Denning MR, characteristically, put the matter this way,[4]

> "*. . . we in England think differently. If a plaintiff considers that the procedure of our courts, or the substantive law of England, may hold advantages for him superior to that of any other country, he is entitled to bring his action here – provided always that he can serve the defendant, or arrest his ship, within the jurisdiction of these courts – and provided also that his action is not vexatious or oppressive. ….. This right to come here is not confined to Englishmen. It extends to any friendly foreigner. He can seek the aid of our courts if he desires to do so. You may call this 'forum-shopping" if you please, but if the forum is England, it is a good place to shop in, both for the quality of the goods and the speed of the service.*"

[2] Taken from The City UK, UK Legal Services 2016 (July 2016).
[3] *The UK Maritime Sectors Beyond Brexit*, University of Southampton Report (2017), Executive Summary, para. 1.10.
[4] [1973] 1 QB 364, at p. 382

Presaging the development of the doctrine of *forum non conveniens* in this jurisdiction, the House of Lords, by a 3 to 2 majority, took a different view and allowed the defendant's appeal. Lord Reid (one of the majority) said this of Lord Denning's observations[5]

> *". . . that seems to me to recall the good old days, the passing of which many may regret, when inhabitants of this island felt an innate superiority over those unfortunate enough to belong to other races."*

5. Lord Denning's focus went to the "quality of the goods" and the "speed of the service". It highlighted the enduring qualities of our admiralty and commercial courts. Those are standards which we seek to meet and must continue to meet, if London and English Law are to retain their attractions. Innate superiority, I fear, will not attract or retain custom – but its rightful passing should not lead to a loss of confidence in the intrinsic strengths of our courts and law.

6. Those of you with long memories will recall that Lord Clarke, then Master of the Rolls, recalled – as I do today – Lord Denning's turn of phrase from *Atlantic Star* when he delivered the 25th anniversary O'May lecture in 2007. Lord Clarke asked and answered the question whether London was still '*a good forum to shop in*' with, as he put it '*a resounding yes*'[6]. The basis of his answer is telling. He concluded that there were a number of reasons why London remained and would continue to be a forum of choice for maritime and commercial dispute resolution. Those reasons were:

    - First, '*the personnel available remains as impressive as ever – perhaps even more impressive*'. In other words, '*the English legal profession continues to produce lawyers of outstanding ability both in practice and on the Bench.*'[7];

[5] [1974] AC 436, at p.453
[6] Sir Anthony Clarke MR, *Maritime Law: Is London Still a Good Forum to Ship In? (25th Annual Donald O'May Maritime Law Lecture)* (7 November 2017, unpublished) at [4].
[7] Sir Anthony Clarke MR, ibid at [15].

- Secondly, English procedure, and particularly admiralty and commercial procedure, remained '*a gold standard of procedural codes*' and is becoming the model of choice for other jurisdictions[8];

- Thirdly, improvements to the Commercial Court that were then on their way. By this he meant to refer to what would become the Rolls Building, and what would, he hoped, become '*our new Business Court*'[9], perhaps foreshadowing the new Business and Property Courts;

- Fourthly, certainty, clarity and predictability in our law and in our legal system's ability to deliver high quality justice.[10] And here he singled out English contract law as a law of choice, and English choice of law and exclusive jurisdiction clauses both for litigation and arbitration as being particularly important[11];

- And, finally, he noted how taken together these various points helped to promote '*Legal London*', both attracting business from abroad and resulting in English law and lawyers being highly sought-after, worldwide [12].

7. In other words, Lord Clarke identified the fundamentals. As I have said already, they remain sound. Confidence in this proposition is essential; the world is competitive and, perfectly understandably, rivals will exploit any self-doubt. Much has been said recently in this regard[13]. Put in my own words, the foundations fall conveniently under the following headings which I intend to examine in more detail:

---

[8] Sir Anthony Clarke MR, ibid at [16] – [17].
[9] Sir Anthony Clarke MR, ibid at [18].
[10] Sir Anthony Clarke MR, ibid at [19].
[11] Sir Anthony Clarke MR, ibid at [22].
[12] Sir Anthony Clarke MR, ibid at [21].
[13] By way of examples: *English Law, UK Courts and UK Legal Services after Brexit*, (Judicial Office, 2017) <http://www.chba.org.uk/news/brexit-memo>; *LegalUK – The Strength of English Law and the UK Jurisdiction* (Judicial Office, 2017) <https://www.judiciary.gov.uk/wp-content/uploads/2017/08/legaluk-strength-of-english-law-draft-4-FINAL.pdf>; Sir Geoffrey Vos, Chancellor of the High Court, *The UK Jurisdictions After 2019,* (Lecture to the Faculty of Advocates, 20th June, 2017) ("Vos") <https://www.judiciary.gov.uk/wp-

- The Judiciary, the Courts and the legal profession;
- The rule of law;
- The common law;
- The mutually supportive relationship with London arbitration; and
- The international role.

The Judiciary, the Courts and the legal profession

8. The Judiciary and the Courts are pivotal for our system of justice and comprise a key factor in its international reputation[14]. Though we must never be complacent, the Judiciary's independence[15], integrity and incorruptibility are beyond question. So too, its impartiality: the English Courts do not confer a "home ground" advantage and there is neither advantage nor disadvantage in being a private or a state enterprise. The figures speak for themselves: over 70% of cases in the English commercial courts involve a foreign party.[16]

9. Without independence, integrity and impartiality we would be lost. Next comes calibre and expertise, generating market confidence. To use the example with which I am most familiar, the traditional strength of the Commercial and Admiralty Courts has been the background of their Judges, almost universally drawn from outstandingly successful practitioners with a wealth of relevant knowledge of the commercial sectors from which disputes arise – and a career's experience in dealing with the litigation or arbitration of such disputes.

---

content/uploads/2017/06/chc-speech-faculty-of-advocates.pdf>; The Rt. Hon. Lord Thomas of Cwmgiedd CJ *Opening of the Business and Property Courts for Wales*, , 24th July, 2017 ("Thomas") <https://www.judiciary.gov.uk/wp-content/uploads/2017/07/speech-lcj-opening-of-the-business-and-property-courts-for-wales.pdf>.

[14] Especially the Commercial Court and the other jurisdictions now part of the Business and Property Courts.

[15] See: *R (Miller) v Secretary of State for Exiting the European Union (Rev 3*) [2017] UKSC 5, [2017] 2 WLR 583 at [42],

[16] *The Economist, "Courtly competition"* (September 2nd, 2017)

10. Moreover, as nothing stands still, Judges must stay in touch with an ever-changing commercial world. Hence, the importance attached to the Financial Markets Law Committee ("FMLC"), with its wide-ranging programme covering developments in the City, together with the longstanding significance of Users Committees, so keeping the Judiciary in touch with the markets.

11. Equally, the Courts' organisational structures, practices and procedures are not moribund. There is no sense that we are resting on our laurels. On the contrary, there is a readiness to innovate and change. The creation of the Financial List for the most substantial financial services, banking and like cases – a joint venture utilising Judges from the Commercial Court and Chancery Division - provides an example here. As does the recent creation of the innovative market test case procedure, enabling parties to obtain definitive guidance on novel market issues albeit no cause of action exists between them. Again, staying with the example with which I am most familiar, the Commercial Court has a well-deserved reputation for reform of its own procedures. Thus, the Commercial Court did case management, long before the Woolf reforms and the concept of "the overriding objective" gained currency.

12. Turning away from procedural innovation, we have also embraced structural reform, creating the Business and Property Courts, bringing together all the specialist jurisdictions of the High Court in England and Wales, for tonight's purposes facilitating the appropriate cross-jurisdictional deployment of Judges with suitable experience and expertise[17] - and, likewise importantly, building on and increasing our regional strength across the country.

[17] Vos, *supra*, at para. 31

13. However, the Business and Property Courts do not exist in isolation from the rest of the court system; they too are included in the £1 billion HMCTS Reform Programme,[18] a once in a generation opportunity to modernise the delivery of justice in a manner fit for the 21st century, domestically and internationally; indeed the Business and Property Courts cannot continue to flourish if the remainder of the justice system crumbles. Returning to tonight's topic, the preparedness and ability to embrace technological change will keep the Courts up to speed as new ideas, such as "blockchain" and "Fintech" introduce the potential for major change in the conduct of various financial markets.[19] So too, the proposed new Court, backed by the City of London, to focus on fraud and cyber crime must be a welcome development.[20]

14. Lord Clarke did not simply focus on our courts and judiciary as exemplars of why London remained a good forum to shop in. He also rightly noted the importance that a world leading legal profession based in London plays, nationally and internationally. It remains the case that English lawyers and law firms are sought after across the world. It is for that reason that, as CityUK put it last year – and it remains correct today, London and its lawyers constitute a '*global centre for the provision of international legal services and dispute resolution*.'[21] It is of course from this pool of talent that the Bench draws in recruiting Judges of appropriate calibre and expertise.

The Rule of Law

15. Another fundamental strength is that the Rule of Law applies in this country. That sounds like a statement of the obvious, because we tend to take it for granted – which we should

[18] In which, as Senior Presiding Judge, I had the privilege of acting as Judicial lead, at the time of its conception and its introduction.
[19] *"Blockchain system promises a sea change in insurance market"*, The Times, September 6 2017. See too, "*Pay-per-risk",* The Economist, September 23rd 2017.
[20] See the Press Release dated 11th October, 2017, together with the associated media coverage.
[21] See <https://www.thecityuk.com/events/Event/thecityuk-legal-services-2016-report-launch>

not. From time to time, the requirements of the rule of law need forceful re-statement; a recent example is Lord Reed's *tour de force* in *R (Unison) v Lord Chancellor*[22]. But it is a very great attraction of London as a forum that the courts operate within a framework governed by the rule of law, so that, for instance, there can be no doubt that Court orders will result from a fair, independent and impartial legal process and will be respected and enforced by the Executive. There are all too many states where the rule of law does not prevail – and, self-evidently, great caution is needed before investing or doing business in a state where it does not. As Lord Bingham trenchantly expressed it:

> "*There are countries in the world where all judicial decisions find favour with the powers that be, but they are probably not places where any of us would wish to live.*"[23]

The common law

16. English commercial law has been fashioned by the genius of the common law in doing practical justice. Examples abound. Two are illustrative.

17. First, *The Moorcock* (1889) 14 PD 64; a shipping case. The *Moorcock* was moored alongside the defendants' jetty. The River Thames is tidal. The place was such that the vessel was bound to ground at low water. The vessel duly grounded and sustained damage from the uneven condition of the river bed adjoining the jetty. There was nothing in the contract relating to liability for damage so incurred on the part of those responsible for the wharf. The Court of Appeal held that the contract contained an implied term that the defendant was required to point out to the plaintiff physical risks to the ship or to take such reasonable steps as were required to protect the ship against such risks. In doing so, the court established 'business efficacy' as the basis for the implication of contractual terms into business transactions. The court did not resort to any grand theory; it based its

[22] [2017] UKSC 51; [2017] 3 WLR 409, at [66] – [85]
[23] See too, Lord Bingham, *The Rule of Law* (2010), at p.65. See too, Lord Bingham's working definition of the rule of law, at p.8.

reasoning on what '*must have been intended at all events by both parties who are businessmen*'[24]. It was a practical judgment and a practical test.

18. *Hong Kong Fir Shipping Co. Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26, concerned the obligation of seaworthiness. On delivery under the time charterparty, the vessel was not seaworthy. The Chief Engineer was inefficient and addicted to drink; the engine room complement was insufficient; many serious breakdowns resulted. The Court of Appeal rejected the doctrinaire position that the obligation of seaworthiness was only capable of interpretation either as a contractual condition strictly so called entitling the innocent party both to terminate the contract by reason of <u>any</u> breach and to claim damages, or as a warranty capable only of sounding in damages. Instead, the Court – and particularly Diplock LJ (as he then was) – took the view that, in addition to conditions and warranties, there were 'innominate terms'[25]. Depending on the gravity of the consequences of their breach, in some circumstances the effect would be the same as breach of a condition, in others, it would be the same as breach of a warranty[26]. The Court of Appeal properly recognised that practical reality and contracts are more complex than doctrinal purity might otherwise suggest.

19. These two examples highlight a wider point: that the common-law has developed in response to practical problems and has done so by, for instance, keeping a keen eye on practical developments in the business community. And it has done so through the courts developing the law "*by applying its fundamental principles to new conditions and declaring them*". [27] This adaptability enables English law to maintain its relevance as

[24] (1889) 14 PD 64 at 68.
[25] Though, intriguingly, Diplock LJ himself at no point referred to them as "innominate" or "intermediate": see, *The Spar Capella* [2016] EWCA Civ 982; [2016] 2 Lloyd's Rep. 447, at [19].
[26] *The Spar Capella (supra),* at [20]
[27] Lord Judge, *Judicial Independence and Responsibilities,* in *The Safest Shield* (2015), at p. 276.

circumstances change. In his outstanding Hamlyn Lectures, Sir John Laws explained the common-law method this way,

"*...evolution, experiment, history and distillation; its process of continuous self-correction, at once allowed and restrained by these four methods...*"[28].

This is a very great strength of English commercial law; when combined with a top calibre judiciary, applying precedent in a disciplined fashion, it provides the requisite confidence to commercial parties contracting on the basis of a settled framework of law while furnishing the flexibility necessary to deal with a constantly changing commercial world. Furthermore, as is well settled, our courts respect party autonomy; so, when interpreting contracts, the Court's task is to give effect to that bargain, not to re-write it to create the bargain the Court thinks the parties should have made. [29]

The mutually supportive relationship with London arbitration

20. English commercial law's great strength is not only a product of the common-law method, it is equally a product of the mutually supportive relationship between the English court and London arbitration. The courts and arbitration are not in competition. On the contrary, they enjoy a complementary relationship, to the benefit of both. The strength of one supports the strength of the other and vice versa.

21. The strength of the Court, in a background supervisory role, as provided by the *Arbitration Act 1996*, is a strength of London arbitration, underpinned by the respect in English law for party autonomy, as well as the certainty and predictability provided by English contract and commercial law. The dynamism of London arbitration is, in its own right, a huge

[28] Sir John Laws, *The Common Law Constitution* (2014), Preface, at p. xiii.
[29] *Arnold v Britton* [2015] UKSC 36; [2015] AC 1619, esp. at [20]; *Wood v Capita Insurance Services* [[2017] UKSC 24; [2017] 2 WLR 1095, at [10] – [15; most recently, *NHS v Silovsky* [2017] EWCA Civ 1389, at [40]

strength of Legal London and of the City of London. It is also from time to time, a source of cutting edge cases, assisting in the development of English commercial law. Historically, that was very much so and examples abound[30]. As Lord Goff famously put it, '*For the English, the characteristic commercial contract is a contract for the carriage of goods by sea*.'[31].

22. Responding to market pressures, more restrictive gateways to the Court of Appeal from arbitral proceedings were enacted in the 1996 Act, and, to be very clear, parties to commercial arbitration are under no duty (moral, legal or otherwise) to furnish appeals for the public good of developing the law. Nonetheless, cases do continue to come to the Courts and it is the judges, as gatekeepers under the Act, who have the power to strike the right balance between finality and legality.

23. By way of recent example, we can see the continued utility and efficacy of arbitral proceedings as a forum for developing the common law through *Fulton Shipping Inc v Globalia Business Travel SAU* [2017] UKSC 43; [2017] 1 WLR 2581. The dispute arose out of a time charterparty. In simplified form, the facts were these. Charterers repudiated a time charterparty by early redelivery of the vessel. Owners accepted the breach, as terminating the contract. There was no available charter market at the time. Owners made a commercial decision to sell the vessel and claimed damages for loss of profits during the remaining period of the charterparty. In the event, owners sold the vessel for a larger sum than they would have received had they sold her at the end of the charterparty period. Charterers argued that in determining owners' loss, owners should give credit for the financial gain flowing from the early sale of the vessel. The arbitrator held that credit

[30] By way of almost random selection, consider *British and Benningtons v NW Cachar Tea Company* [1923] AC 48; *The Simona* [1989] AC 788.
[31] Lord Goff of Chieveley, *The Future of the Common* Law, 46 Int'l & Comp. L.Q. (1997) 745 at 751.

should be given; the Judge in the Commercial Court disagreed; the Court of Appeal reversed the Judge; the Supreme Court allowed the appeal and restored the Judge's decision that credit should not be given. Here too, there is an example of English law being refined or developed by way of a dispute originating in arbitration; in this case, the question of whether a benefit received by a claimant was to be brought into account in assessing the damages payable for a defendant's breach of contract, with the answer turning on the sufficiency (or otherwise) of the causal link between breach and benefit.

24. What appears clear to me from this case and others like it is that arbitration and the courts continue to support each other. And, again, for my part, I am minded to think that we have that balance about right – maintaining our supervisory role, which as Lord Thomas CJ described it, rightly, was one of '*"Maximum support. Minimum interference"*'[32], when called upon to exercise it while avoiding a proliferation of appeals (the pre-1996 vice) – albeit as an appellate judge I would personally be delighted to see more commercial appeals!
25. Whether or not my wish comes true on that point, it seems to me that the strength of our arbitral and court systems will ensure that the United Kingdom, and London in particular, remains a global arbitration and ADR centre in the future; a point recently made by the Judicial Office in its (excellent) publication: *English Law, UK Courts and UK Legal Services after Brexit*[33]. There is a reservoir of talent to draw on as arbitrators; modern legislation, with a "light touch", highly respected and supportive supervisory approach; strong institutions, for example, the London Court of International Arbitration ("LCIA"), together with a wide array of facilities and venues. Most importantly too, the United Kingdom is a party to the *New York Convention*[34]. That status and the enforcement of arbitration awards under the New York Convention are wholly unaffected by Brexit.

[32] The Rt Hon Lord Thomas of Cwmgiedd CJ, *Commercial Dispute Resolution: Courts and Arbitration (Beijiing 6 April 2017) ("Thomas, Beijing")*
[33] *Supra*
[34] In full, The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958

The Judiciary's International Role

26. English law, our courts and arbitral tribunals are not islands unto themselves. They form part of an international network. It is, importantly, one that rests on the mutual interest of Judiciaries across the world to build and uphold the rule of law nationally and internationally. As such, and within obvious financial and constitutional limits, together with time constraints, our Judiciary have an important role to play in promoting the rule of law internationally[35] and in building relations with other judiciaries around the world, whether through bilateral arrangements and visits, international associations, such as the Commonwealth Magistrates' and Judges' Association or international conferences.

27. In a striking and complementary manner, active engagement outside the United Kingdom is also now being facilitated through the Standing International Forum of Commercial Courts, which had its first meeting in London last May[36]. Its membership is drawn from commercial courts from across the world, and as Mr Justice Blair and Mr Justice Knowles (effectively the organisers of the Forum) explained it, it serves three purposes,

> "*First, . . . users – that is, business and markets – will be better served if best practice is shared and courts work together to keep pace with rapid commercial change.*
>
> *Second, . . . together courts can make a stronger contribution to the rule of law than they can separately, and through that contribute to stability and prosperity worldwide.*
>
> *Third, . . . this is a means of supporting developing countries long encouraged by agencies such as the World Bank to enhance their attractiveness to investors by offering effective means for resolving commercial disputes.*"[37]

[35] A recent example in this regard is the Judges' Council's support for the Polish judiciary. *Statement of the Judges' Council of England and Wales on the situation in Poland concerning judges: Media release* (8 May 2017) <https://www.judiciary.gov.uk/announcements/statement-of-the-judges-council-of-england-and-wales-on-the-situation-in-poland-concerning-judges/>

[36] See <https://www.judiciary.gov.uk/announcements/a-unique-gathering-of-commercial-courts/>

[37] ibid.

Just as our legal profession has a significant role to play internationally, so does our Judiciary in the ways outlined.

Threats

28. Like Lord Clarke before me, I have accentuated the positive. I do so without wanting, however, to downplay the risks currently faced by Legal London. They fall into two broad categories: first, judicial recruitment and retention; and, secondly, the challenges arising from Brexit that need to be addressed.

29. The strength of our courts, as noted earlier, rests to a significant degree upon the quality and experience of our judiciary. Over recent years, as the Judicial Appointments Commission noted in its 2016-2017 Annual Report, it has become increasingly difficult to attract and recruit '*sufficient, high calibre candidates*' for circuit judge and High Court judge vacancies.[38] On any view, the *Lord Chief Justice's Report* (2017) is surely right to highlight that "Any failure to address the problems of pay and pensions will have a serious impact on morale and recruitment"[39].

30. Let me be very clear. It is a privilege to be a Judge in this jurisdiction. The work is interesting, varied and stimulating; public service is rewarding as is the continuation of the old tradition of translating professional success at the very highest levels into public duty as the pinnacle of a career. There is too the reward of being part of a system greater than the individual. Yes, workloads are high and yes, working conditions must be improved and no doubt will be through the Reform Programme. There is, however, one running sore: pay and pensions. No one goes into the Judiciary to make money. But there

[38] Judicial Appointments Commission, *Annual Report 2016-2017*, at 14 <https://jac.judiciary.gov.uk/sites/default/files/sync/about_the_jac/annual-report-2016-17.pdf>; Judicial Attitude Survey 2016 <https://www.judiciary.gov.uk/wp-content/uploads/2017/02/jas-2016-england-wales-court-uk-tribunals-7-february-2017.pdf>

[39] At p.12

comes a point when pay is so far out of line with the private sector market that it endangers recruitment – of the very best – and retention. There is a danger in relying unduly on goodwill. More than the money, there is the perception that these issues reflect government not valuing the Judiciary – and even Judges do take note, as recent surveys of judicial morale have so clearly shown. Moreover and, with respect, needlessly, the matter has been significantly aggravated in recent years by the changes to judicial pensions arrangements – in particular the changes to settled arrangements imposed on some of those already in office. From my own experience as Senior Presiding Judge, no single issue was more corrosive than the introduction of those changes– i.e., impacting on serving judges and not restricted to subsequent new entrants.

31. If we do not address pay and pensions, over time the quality of our judiciary will decline. Any such decline will not only undermine confidence in our courts but will likewise pose a threat to London as an arbitral centre.

32. It is therefore essential in the public interest that we continue to attract and retain the very best practitioners to the Bench. Work is being done in this regard both by the Judicial Appointments Commission, working with the Ministry of Justice and the Senior Judiciary. Equally, the problem of '*terms and conditions – pensions and pay*' is one that the Senior Salaries Review Board is currently examining as part of a fundamental evidence-based review. We await its independent and searching conclusions.[40]

[40] Lord Thomas CJ, evidence session, 14 September 2017, at Q25, '*The third area is what I would call terms and conditions—pensions and pay. There is no doubt that there is a problem. The SSRB is now conducting a fundamental review. I have every confidence that it will do a very thorough job. It is setting about it in a very methodical way. The problems are understood. I know that the SSRB, like any highly experienced independent body, wants evidence. It will have plenty of evidence as to the problems. As to how it will address them, it is independent and one would respect its judgment. I hope that my successors will agree with it. An awful lot of work is being done. I am confident that the SSRB will do a good job.*' <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/the-lord-chief-justices-report-for-2017/oral/70446.pdf>

33. The second threat relates to the challenges posed by Brexit. As a judge, I express no view whatever as to the politics of Brexit, one way or another and would not want to be misunderstood in that regard. There are however two areas of concern relating to our courts, with which I do wish to deal.

34. First, there is the uncertainty identified by Lords Neuberger and Thomas[41] concerning the role that EU law and decisions of the Court of Justice of the European Union will play after March 2019. In a nutshell, post-exit CJEU decisions will not overnight lose all relevance to disputes in the English Courts; consider, for instance, competition law or aspects of "retained" EU law brought into domestic law by the provisions of the EU Withdrawal Bill ("the Bill"). At present, however, there is no legislative steer as to how our Courts are to approach EU law, post-March 2019, beyond the provisions in the Bill that the Courts will not be bound by CJEU decisions after Brexit but may have regard to anything the CJEU says if the Court considers it appropriate do so. Thus an English Court would be entitled but not obliged – in its own discretion – to take account of CJEU decisions post-Brexit. If left there, this is "out-sourcing" from Parliament to the Courts on a grand scale, to use the graphic expression coined by Prof. Anthony King[42] - and would leave the Courts uncomfortably politically exposed if the Brexit litigation is anything to go by. Much thinking has been done on this and related issues by, for instance, *Justice*,[43] the Institute for Government[44], and the House of Commons' Justice Select Committee[45]. There are obvious dangers in inviting Parliament to be over-prescriptive and the Judiciary is certainly not asking Parliament to tell it how to decide individual cases; however, a

[41] Ibid at Q8 and Q9'
[42] *Who Governs Britain?* (2015), at p.273.
[43] See <https://2bquk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2017/09/JUSTICE-briefing-on-EU-Withdrawal-Bill.pdf>
[44] See <https://www.instituteforgovernment.org.uk/sites/default/files/publications/IfG_Brexit_Euro_Court_Justice_WEB.pdf>
[45] See <https://publications.parliament.uk/pa/cm201617/cmselect/cmjust/750/750.pdf> And see HM Government, *Enforcement and Dispute Resolution – A Future Partnership*, <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/639609/Enforcement_and_dispute_resolution.pdf>

legislative steer as to the operative framework would be of assistance. The most promising suggestions appear to coalesce around a duty (as distinct from a power) to take account of relevant future decisions of the CJEU. That does not mean our courts would be bound by such decisions of the CJEU but they would be under a duty, imposed by Parliament, to have regard to such decisions when relevant. In terms of "political cover" for the courts, there is obvious attraction in such an approach.

35. Secondly, there is the urgent need for clarification on a number of issues, where our current arrangements hinge on membership of the EU[46]. Such clarification would give effect to the thinking underlying the position paper of HMG, "*Providing a cross-border civil judicial cooperation framework: a future partnership paper*", advocating "close and comprehensive cross-border civil judicial cooperation on a reciprocal basis, which reflects closely the substantive principles of cooperation under the current EU framework"[47]. Three such issues merit particular emphasis:

    (i) One, the Rome I and Rome II instruments, dealing respectively with applicable law in contracts and non-contractual obligations, should be incorporated into domestic law. Fortunately, this already appears to be the intention of HMG.[48]

    (ii) Two, this audience needs no reminder of the importance of ensuring that jurisdiction clauses are respected. Currently, the United Kingdom participates in the *2005 Hague Convention on Choice of Court Agreements* ("the Hague Convention") by virtue of EU Contracting Party status. There is or must be an unanswerable case for the UK acceding to the Hague Convention as a Contracting State.

    (iii) Three, there is the question of the mutual recognition and enforcement of judgments from March 2019. Our current arrangements (also extending to choice

[46] Already much emphasised by Lord Thomas CJ
[47] At para. 19
[48] *Ibid*

of jurisdiction clauses) have evolved from the 1968 Brussels Convention and the 1988 Lugano Convention and are now contained in Regulation 1215/2012, Brussels I Recast ("Brussels I"). The difficulty is that the UK will cease to be a party to Brussels I when it leaves the EU. The simple solution of incorporation into domestic law does not work here; the Brussels I Regulation requires reciprocity. From a UK perspective, it is of course necessary to underpin the attractiveness of London as a forum of choice by continuing to ensure the recognition and enforcement of judgments given here. Fortunately and plainly, the EU27 and the UK have a shared interest in ensuring the reciprocal, simple, flexible and ready recognition and enforcement of judgments after Brexit. Precisely how remains an open question[49] and it is one of those topics on which valuable work is being undertaken by the Brexit Law Committee, established by the previous Lord Chancellor and on which the Judiciary is represented. Its role, as has been noted by others, is to help the Government devise strategies to maintain the attractiveness and utility of English law and the UK's legal systems post-Brexit.[50] Of some questions it can be said, it is necessary that we succeed. This is one of them.

36. Lest it be thought that I am simply focusing on the challenges occasioned by Brexit, it is right that I flag some apparent opportunities as well. Thus, an end to CJEU jurisdiction means no time-consuming waits for References to that Court. Further, there may be scope for the increased use of anti-suit injunctions, somewhat in abeyance under the Brussels (and successor) regimes. Still further, as a recent *Tradewinds* article[51] suggests, there are signs that the shipping industry is being heard afresh, though there I am straying very much into commercial matters more the province of others.

[49] Suggestions have included a bespoke treaty, continuation in some form of the Brussels I regime, reactivation of the Lugano regime.
[50] Vos at [3].
[51] *The case for British shipping is cutting through the fog of Brexit,* 14th September, 2017.

37. Moreover, it is important to maintain perspective, lest Brexit becomes an all-consuming single issue. Looking beyond Brexit, we need to ensure that we in this jurisdiction remain ahead of the game in addressing the ever-increasing pace of technological change that will assuredly alter the way business is done. We must and can do so; for the reasons already suggested, we have the right fundamentals; we also enjoy great advantages in terms of both language and time-zone.

Conclusion

38. Where does this leave us? The answer is: confident, not complacent. Confident in the fundamental strength of our legal system and its attractiveness now and in the future as a forum of choice. Not complacent, given the threats I have outlined and the need for those who are considering how to overcome them to achieve the requisite outcomes. I am confident they will do so. We have a history of meeting challenges and overcoming them; a history of resilience and of success. Importantly, we need to keep our nerve and sense of perspective - to make London a still more attractive forum to shop in post-Brexit through the choices we make to meet the current threats and the longer-term challenges.
39. Pulling some threads together, we need action from:
    - *Government:* to ensure that judicial office remains properly attractive to the best and most able practitioners, and that our legal system retains its attractiveness post-Brexit;
    - *The Judiciary:* continued insistence on the highest quality standards, while embracing reform and technology to improve the delivery and cost effectiveness of justice;
    - *The Professions:* a like insistence on quality and a keen eye for competitiveness;
    - *Academia:* to assist Government, the Judiciary and the Professions in devising sound solutions to the challenges I have outlined[52];

[52] Very much including contributions such as the University of Southampton's 2017 Report, *supra*

- *City UK and Legal UK:* building on the strength of City UK, working together to maintain and enhance Legal UK's world ranking..

40. Thank you.