CHANCELLOR
OF THE HIGH COURT

The Foundation for Science and Technology

Debate on how the adoption of new technology can be accelerated

to improve the efficiency of the justice system

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Sir Geoffrey Vos, Chancellor of the High Court

Introduction

1. I am honoured to have been asked to open this memorial debate to recognise the contribution made by Sir Brian Neill to the promotion and adoption of new technology by the court system. I knew Sir Brian best in his latter years when he was Chairman of the Trustees of the Slynn Foundation, of which I am still a trustee. It was extraordinary that in 2009, when I became a trustee, and for some 5 or 6 years afterwards until he was well over 90, he continued to travel widely across Europe on behalf of the Slynn Foundation on missions to enhance the justice systems in several counties in Eastern and Southern Europe. He was hugely respected and, of course, injected his enthusiasm for new technology in the legal space into his projects to improve the rule of law in these states.

2. The debate tonight asks how the adoption of new technology can be accelerated to improve the efficiency of the justice system. This is a question of huge importance in the context of the UK's departure from the European Union, the rapid development of Fintech, Legaltech and Regtech, and the fact that young people in the 21st century are unlikely to accept the delivery of justice for consumers or business at the ponderous speeds accepted as the norm in the past. You can now get everything you want in the world the same day or the next day by a few clicks on your mobile phone. It is not reasonable to expect our citizens to wait years for a just outcome to a simple dispute.

3. I want to make four introductory points before cutting to the chase to give my answers to the question set.

4. The first point is that we are already engaged in a massive court and tribunal reform project that will bring the biggest investment to the court service for decades. Her Majesty's Courts and Tribunals Service ("HMCTS") is, in effect, a joint enterprise between the government and the judiciary. Susan Acland-Hood, who is the Chief Executive of HMCTS, is speaking next and she will, I am sure, give you more details of the reform project. But it is important to note at the outset that the project will

deliver in criminal, family, civil and administrative cases the digital systems that will be required to transform the way we deal with cases. The online solutions court that is already undergoing full scale testing for divorces and for small money claims will allow claims to be started and mediated online with physical or remote hearings being reserved only for those cases that cannot be otherwise resolved.

5. The second preliminary point is in my own field of the Business and Property Courts ("B&PCs"). The B&PCs have been established to bring together the commercial, intellectual property, insolvency, technology and construction and Chancery expertise in one place. It should be noted that, since April 2017, online filing of all court documents in the B&PCs has been compulsory for professional court users. Orders are produced electronically, and some hearings employ digital case management systems that mean that everything can be done digitally without using paper at all. In a recent massive Court of Appeal case that lasted 2 weeks, and in which 15 counsel appeared, each judge had three screens in court showing the document being referred to, our own notes, any document we individually wanted to review, and the simultaneous transcript of the proceedings. I did the whole case including the judgment writing without using any paper at all. It can be done.

6. Thirdly, in the context of Brexit, we are facing hugely increased competition from business courts across the world keen to attract commercial dispute resolution and arbitration away from the UK. There are existing international commercial courts in Singapore, Dubai, Abu Dhabi and Qatar, and new ones being set up in Brussels, Amsterdam, Paris, Frankfurt and Dublin. Most of these courts will be English language based and will apply some kind of common law approach.

7. The fourth point concerns new technology in the financial services and legal sectors. We have more Fintech, Legaltech and Regtech start-ups in the UK than in the rest of Europe put together, but Paris, Berlin and Amsterdam are catching up fast. There is much EU investment in the sector. Moreover, there is an astounding diversity of ideas as to how we can use artificial intelligence to digitalise the grunt-work of lawyers and other professionals. Digital ledger technology has far greater reach than many imagine. It will be capable of use in relation to smart contracts, financial transactions generally, and in an almost unlimited number of other areas, such as land and intellectual property registers, utility billing, telecoms and transactions in almost any other field. There are some 3 trillion financial services transactions globally each year. It is said that in 5 years, these will mostly be DLT-based smart contracts. Any transaction on the blockchain is by definition borderless. This throws up risks and opportunities. I want to concentrate on the opportunities. English law and UK dispute resolution is well-placed to provide the legal foundation for many of these contracts, because in the UK, the Prudential Regulation Authority and the Financial Conduct Authority has adopted a sensible 'wait and see' approach to regulation, somewhat unlike the approach that is being followed in the USA. If history is anything to go by, in the absence of the UK, the EU's approach to regulating fintech is likely to be more interventionist than our own. Moreover, our common law system is well placed to respond to digital innovation so as to provide legal certainty in this brave new world.

8. So, that is the background. We have come a long way already, but we need to do much more if we are to provide effective court-based and non-court-based dispute resolution services to individuals and businesses in the technological post-Brexit world. So how can the adoption of new technology be accelerated to improve the efficiency of the justice system? I want to answer that in the business context because that is my expertise. Others will be able to look at the consumer, family and criminal position.

9. The first thing we need is a change of culture. Judges, arbitrators and lawyers are quickly learning the benefits of working digitally instead of on paper. And I would say that this change cannot come quickly enough. The justice system will be more relevant and effective if it provides a digital service to clients and court users who have long since reduced their reliance on paper.

10. Secondly, we need to make a very careful evaluation of when we really need physical hearings with a judge, the parties and their lawyers, and the witnesses all in attendance in the same place at the same time. There will, I am sure, always be the need for some real-time court hearings, but I think there are a number of technological options to reduce the occasions on which they are required in order to achieve justice. I will return to those options in a moment.

11. Thirdly, lawyers and judges will need different training if they are to resolve modern day business disputes. They will need to understand the technology, not so as to become computer code experts themselves, but so as to be able to resolve a dispute arising from a transaction on the blockchain that some argue will not require any legal foundation at all. It is remarkable that basic legal training has not changed very much since I started reading law at university in 1973 – now 45 years ago.

12. I want to ask you now to imagine a truly digital business justice system delivering speedy and dependable outcomes for hard-pressed commercial parties, at a proportionate cost. That should surely be the objective. What would it look like and how can we get there?

13. It is perfectly obvious that claims in such a system must be started and conducted online. The participants each need to have appropriate access to the case record which, as I understand it, is the concept of the Common Platform being developed for criminal cases within the current HMCTS reform project.

14. It is equally obvious, I think, that there are several available options for case determination apart from the traditional physical hearing. I am sure that some preliminary or interlocutory issues could quite easily be resolved entirely justly without gathering all the parties at a physical hearing weeks or months after the case has begun. The lawyers' task in business disputes should be to simplify the issues to enable them to be resolved in the most appropriate cost-effective manner.

15. Professor Richard Susskind will be talking shortly. But he has suggested that asynchronous hearings would be far quicker and more efficient. His thesis is that very few issues truly require everyone to be in the same room.

16. There is no reason why hearing participants cannot log on when they have the time to do so within a time window. They can make their submissions online. Questions can then be asked by the judge online and responded to online. There is no need for much delay as a result. Just think how often we check our mobile phones every day just in case someone is contacting us. There really may not always need to be 14 days allowed for every interaction between the parties or between the parties and the judge. In this way, everyone's voice can be heard without spending the large sums needed to fly witnesses in from far away. We can resolve many cases and some aspects of the more complex cases without paying for partners in law firms, assistant solicitors and barristers all to sit, sometimes for hours or days on end, listening to material they can pick up online in far less time.

17. Business travel is far less acceptable today. Some of the biggest global professional firms ban their staff from travelling internationally, requiring them instead to conduct overseas business meetings by skype, facetime or telepresence. Those of you

that have participated in a telepresence meeting will know that you see the other participants, often physically present in several different countries, seemingly sitting across the table from you.

18. We can apply a combination of these mechanisms to business dispute resolution. Take two common situations. The case where interim relief is sought in a business case and the case where factual and legal issues need to be resolved at what we now call a "trial".

19. In the case of a claim for, say, a freezing order to prevent a defendant from putting his assets out of reach of the claimant, the claim is already lodged online in the Business and Property Courts. The relief could also be granted online. The judge could consider the material filed online, ask any questions he wanted, receive the answers, and then make the appropriate order. The party seeking the order would, of course, need to provide full and frank disclosure to the court just as he does today. A real-time hearing whether electronic or in person could be convened only in the cases where it was truly necessary. Another advantage is that the record would show what the court had been told, so that once the defendant was informed of the order, it could apply to set aside the injunction by the same process if it felt it had been wrongly granted.

20. Even cases involving multiple parties and witnesses could be resolved wholly or partially in a similar way. Preliminary issues could be resolved by online argument, questions and answers and a judicial determination occurring without costly court attendances by the parties and by lawyers. Even evidence could be given in writing online or remotely by skype.

21. I understand that in some cases, time in court really is crucial, and I would not be suggesting that in such cases real time hearings should not still take place. But there are many cases where parts of the trial process are costly and unnecessary. Why, for example, do we still (sometimes if not always) have the written submissions reiterated orally before and after the oral evidence? Why do we need days of evidence, when in reality there are very rarely more than a handful of substantive factual disputes, and even those are often borne of misunderstanding or mistrust rather than substantive disagreement as to what has actually occurred? In many cases, a good proportion of the factual disputes are irrelevant to the outcome, and could be avoided altogether if the matter had been considered in sufficient detail at an earlier stage.

22. If the judges were more participative online, asking questions, directing evidence and resolving cases stage by stage, they could probably resolve or decide the majority of even lengthy trials by an iterative online process. We are probably too hidebound by our procedural rules and our long-established practices. Greater flexibility and imagination could cut through the most difficult questions and mean that oral evidence at a synchronous hearing could become the exception rather than the rule. When it was needed, such a hearing would be efficient and business-like. It would be conducted by a judge who was already totally *au fait* with the issues and the stage that her online "trial" had reached and what she truly needed to know to resolve the issues that really divided the parties in the case.

23. It is very unlikely I think that, once smart contracts and DLT become ubiquitous in financial services, banking, insurance, intellectual property, employment, and almost every other legal field imaginable, the parties to a dispute over these engagements will want it resolved by a trial in a traditional court room with everyone flying in from round the world to be present in the same space and time. Financial business is

already largely global and will be totally global once borderless digital ledger technology takes hold.

24. Despite my unbounded enthusiasm for digital solutions, I would add two important caveats.

25. First, the simultaneous transcription services and the case management systems that allow for paperless trials are expensive and, at the moment, are paid for by the parties. It is important to ensure that we consider how digital processes can be made available to business litigants in the biggest cases as well as the smaller ones.

26. My second caveat concerns the need to respect a number of core principles of our justice system, which are elements of the rule of law itself. The most obviously relevant of these principles are open justice and access to justice. If court hearings were no longer to be the norm, we would need to find ways of ensuring appropriate public access to the digital judicial process. Under no circumstances can justice be delivered behind closed doors. Moreover, whilst access to justice is generally enhanced by smart procedures, we must keep a wary eye on ensuring that the use of technology does not exclude the vulnerable or the less wealthy.

27. All that said, I think that our Business and Property Courts are doing well in terms of operational efficiency and providing state of the art litigation processes. There is some way to go, but we are well on track. We need to continue to think imaginatively about our civil procedure in the context of both Brexit and the digital revolution. We are well placed in the UK to deliver justice in a world-leading way, but to do that we will need to continue to invest in reform, and closely evaluate the innovations emanating from our Legaltech start-ups.

28. In the course of evening, I much look forward to hearing your ideas on how new technology can be used to improve our justice system. I hope I will be able take away a fund of brilliant proposals to consider.

29. Let me finish as I started by paying tribute to Sir Brian's unrivalled contribution to the use of technology in the law.