Harvard Law School

Online Courts: Perspectives from the Bench and the Bar

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Introduction

1. I would like to start by thanking Professor David Wilkins and Professor Richard Susskind for having invited me to speak to you today. It is both an honour and a privilege.

2. Let me first give you an overview of where I am going in this short talk. England and Wales has always been one of a number of popular jurisdictions for the resolution of international commercial disputes. Indeed, for the last 4 years I have led the Business and Property Courts in England and Wales in the Rolls Building in London. The Rolls Building is probably the biggest commercial dispute resolution court-house in the world. Pre-Covid-19, between 40 and 50 judges would sit in that building every day to resolve every kind of business dispute: shipping, construction, insolvency, financial services, banking, intellectual property, competition, tax and much more. Now, the same number sit each day, but most of them do so remotely.

3. In January 2021, as you have heard, I will be moving on to become Head of Civil Justice in England and Wales. That is a much broader canvas. In preparation for my new role, I have been thinking about civil dispute resolution more widely than I could have done from a purely commercial standpoint.

4. As everyone listening will know, judges and lawyers the world over are instinctively conservative and perhaps even rather resistant to change. Court processes have developed parochially over centuries and are driven by the culture of local societies. All court systems, whether civil or common law, were developed to resolve disputes in their own country. They were not developed to resolve international disputes, let alone those arising from borderless technologies such as the blockchain and smart contracts.

5. This essentially local foundation for justice systems explains why those that have grown to service international business such as the Business and Property Courts in England and Wales, the Singapore International Commercial Court and the courts of the Southern District of New York all face the same problems when it comes to creating justice systems fit for the 21st century. How does one square the resolution of massive disputes for international conglomerates with local dispute resolution for New Yorkers?

6. The backdrop to the delivery of justice has also changed beyond recognition now that almost every individual and business in the developed world (and many in the less developed world) can get what they want instantly with a few clicks on their smart devices.

7. As it seems to me, there are essentially three issues that underlie the creation of the 'modern' dispute resolution system:

   (1) First the emphasis should be on the "resolution" rather than the "dispute",

   (2) Secondly, we should not undertake reform by simply doing digitally what was previously analogue, and

   (3) Thirdly, we should try to approach the problem holistically.

8. I will explain in a little more detail the implications of each of these underlying principles. But first let me outline the vision as I see it for the future.

The vision

9. Justice must cater for a broad range of disputes. Leaving criminal questions to one side, that range extends from the 60 million small civil issues resolved every year by artificial intelligence on eBay, through millions of family disputes about money and children, via many more millions of administrative issues between the citizen and the state, to a range of commercially debilitating disputes faced by SMEs, and ending up with the large intractable commercial cases between multi-national corporations at the far end. Disputes are dealt with by online platforms, ombudsmen, arbitrators, mediators and sometimes, only sometimes, by municipal courts.

10. It is important to understand the range of cases that is being considered when one looks for appropriate reforms, otherwise there is a danger that the highly lawyered tail may wag the self-represented litigant dog.

11. There is, as I see it, no reason whatever why there should not be a single point of online entry for every dispute, however small or large, whether civil, family, commercial or administrative. A data set can be created from the outset, and the dispute can then be directed towards the most appropriate resolution mechanism.

12. Secondly, the process should not, I think, be governed by the concept that every case will end up in a traditional court room with all the witnesses, parties, lawyers and a judge gathered together in the same place at the same time. Some may. I am not against traditional court hearings. But when you consider the full gamut of disputes that need resolution, any *idée fixe* about the end point needs to be carefully managed.

13. Thirdly, mediation, resolution, compromise, settlement interventions, call it what you will, should not be at a single point on the journey, but should be an integrated part of the entire system. Parties that have a problem should be led

culturally to expect that the process will be about achieving a resolution, rather than about exacerbating or even necessarily always deciding who is right about the dispute that gave rise to the process.

14. Every case can enter a metaphorical online funnel. Resolution interventions will cause many of them to settle. But if they do not settle, the process will be directed at identifying and then resolving the issues that divide the parties. It should not be about formal statements of the competing hostile positions, or pleadings as lawyers call them. The process should instead itself identify and resolve issues in a logical, progressive and conciliatory manner.

15. As the online programmes are developed within the funnel for an ever-wider category of case, some will need, in the early stages to leave the online space to be dealt with under the legacy systems. The development process will take time. But the ultimate objective will be to create a ubiquitous online dispute resolution process that can resolve almost all kinds of issues at proportionate cost, in a reasonable timescale, and without the stress of unnecessarily confrontational set-piece hearings.

16. Of course, there may still be a need for remote or face-to-face meetings or hearings at some stages in some cases, but these should be tailored to resolution of specific issues, rather than being allowed to transform themselves into costly and lengthy pitched battles.

<u>How to avoid digitising the existing process?</u>

17. The common law dispute resolution process is one that developed to its present form in the 19th century. But even then, the hearings were generally much shorter and more peremptory, because there was so much less paper. Through the 20th century, the process became more complex as document reproduction took hold. Now, the volume of data is overwhelming, as a result of widely available electronic communications and social media.

18. I make these points because it is easy to think that reform of the dispute resolution process is in some way a betrayal of the history of the common law. In my view, it is quite the reverse. If we do not bring dispute resolution processes up to date, we will drown in data. Even the simplest of issues will take years to resolve. So far from promoting access to justice and the rule of law, the process itself will depreciate them.

19. It is interesting to note what has been learnt in relation to dispute resolution from the effects of the awful pandemic. In the UK, remote hearings whether by phone, Skype, Teams or Zoom replaced face-to-face hearings in the majority of cases across the civil family and administrative system almost overnight in March 2020. Judges, lawyers, witnesses and parties were quick to realise the advantages, even if there was some grumbling. Many are now seemingly reluctant to return to face-to-face hearings even when they are safely available.

20. Remote hearings have gone well. They are not ideal for the resolution of every issue, but generally they operate efficiently and save time and expense. But they are not in themselves a solution. They simply replicate the old process in a technologically enabled form. Likewise, the digitisation of bundles of documents and the court record is necessary and appropriate, but not a solution in itself.

21. In order to create a justice system that can genuinely resolve the wide range of disputes that arise in our society, we need a fresh approach that takes account of existing circumstances. Those circumstances bear no relation to those that existed in either the 19th or the 20th centuries. Those circumstances are the ready availability of the internet to all our businesses and citizens, the massive accumulation of data affecting every aspect of our commercial and personal lives, and the availability of smart systems and artificial intelligence that can process that data and assist us in every aspect of our experience.

22. None of these circumstances is going away. Technology will grow, rather than recede. Moreover, disputes will themselves

become more technological in nature. In financial services alone, there are likely to be trillions of smart contracts recorded on the blockchain. And blockchain technology is likely to affect every aspect of consumers' lives, once it is in regular use by utilities, land and intellectual property registries, central bank digital currencies, telecoms, and corporations and industries in every sector.

23. Once one realises the kind of society for which dispute resolution is required in the future, it becomes obvious that it would not be sufficient to put our existing procedures online. Why, for example, would one want an online process that simply required the same old pleadings and formal documents to be drafted and uploaded to the dispute resolution platform, when simple programming can arrive at the issue in an ordinary case far more efficiently. In most cases, the issue is very simple: was the car going too fast? Did John lend Mary $500? Did the defendant pay the mortgage instalments that were due? The objective in all cases must be to identify the real issues in dispute by the quickest possible route. That route may vary, but the objective should remain.

24. The part of this analysis that is most contentious with lawyers is the part that suggests that, in many cases, traditional oral hearings may not be necessary. I have already said twice that I accept the need for some hearings even in a reformed online process.

25. What, I think, one needs, however, is the streamlining that aims to resolve online as large a percentage of the cases as possible using a series of targeted interventions. We have experience in the UK of parties to small claims thinking that, because they have paid a fee to issue their claim, they are entitled to a hearing by a judge, and implicitly, a judgment in their favour. I would prefer them to think of any fee they may pay as a fee for the solution to a problem, not for the hearing of a dispute. Moreover, this also affects commercial cases, where the ultimate trial becomes a goal in itself with mediated interventions side-lined and under-valued.

Where would an online process leave the lawyers?

26. There is no doubt that many lawyers, whilst acknowledging the sense of what is proposed in this talk, hope that the comfortable dispute resolution processes of yesteryear may continue at least until they retire.

27. In my view, lawyers should be more ambitious. Precisely the same parameters that make a new dispute resolution process essential ensure that lawyers and legal advice will thrive in the coming century.

28. The advance of technology, big data, the blockchain and smart contracts will lead to different, perhaps more complicated, personal and business relationships. Lawyers should always concentrate on adding value for their clients. They will be needed more than ever as the complexities of everyday life and commerce increase. There is no need for lawyers to specialise, for example, in drafting repetitive court documentation, when the issues that divide parties can be distilled and resolved online in half the time and at a quarter of the cost. But there is, and will always be, a need for lawyers to advise their clients on their future commercial decisions, their transactions past and present, and the merits of their disputes, and to assist the courts whether online or not in resolving them. The issues arising in relation to families and between the individual and the state are hardly likely to become any more straightforward in a technological era.

What about international arbitration and major commercial disputes?

29. I turn then to the commercial lawyers litigating massive disputes in international arbitration or in commercial courts in the UK, the US, Singapore and elsewhere. How can my perspective possibly apply to them? Surely the case with millions of documents, dozens of witnesses, and billions of

dollars at stake will always take many weeks or months to resolve in a physical courtroom. My answer is maybe.

30. These were the kinds of cases that I was involved in when I was at the Bar. However voluminous the documentation, I always found that even the most complex cases boiled down to an analysis of a very few documents and perhaps one or two difficult points of law. We see that as cases progress up the appellate ladder. They become more focused and simpler. As appellate judges are fond of saying: it was argued quite differently before us – we only saw a single point.

31. The trick, I think, is to identify the single point (or the very few real points) whether evidential or legal, at an early stage. Artificial intelligence and the legal discipline of experienced lawyers can help with this. There is a tendency for lawyers to want to argue every point: good, bad or indifferent – whether from fear of being sued themselves or simply to impress their clients. This is a tendency that should be resisted, and would, I think, be a tactic that would be harder to pursue if the process were put substantially online.

Conclusions

32. So, let me attempt to draw a few of the threads together. I do not think that judges and lawyers have a choice about the direction of travel. The only real question is when they 'get with the program'. Our present method of court-house based dispute resolution is not fit for the present era. It cannot cope with massive data, smart technologies, the blockchain, smart contracts, and the artificial intelligence that epitomises the world in which we all now live.

33. I believe that we owe it to the generations that have grown up with technology to use our experience to fashion new online dispute resolution mechanisms that can provide what my generation never had: namely access to justice for all, for all levels of dispute, whether trivial and soluble by Amazon

or eBay, or serious and requiring the attention of a state judiciary.

34. It should go without saying that there are three parameters on which we cannot – and will not - compromise: first the integrity of the judges and the system itself, secondly, the imperative that any new approach to justice must command the confidence and respect of our populations, and thirdly the quality of justice delivered.

35. The new processes will instead provide better justice for a new generation with different expectations. Justice cannot be so expensive and so delayed that it is, in truth, unattainable.

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