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THE RIGHT HON. SIR GEOFFREY VOS

The McNair Lecture

The future of London as a pre-eminent dispute resolution centre: opportunities and challenges

Lincolns Inn – Wednesday 19 April 2023

Introduction

1. I did not realise until after I accepted this invitation that I had something in common with Lord McNair in whose honour this series of lectures has been established. Lord McNair, then plain old Arnold Duncan McNair read law at Gonville and Caius College, Cambridge in 1907-1908. I did so between 1973 and 1976, nearly 70 years later, and he became a fellow of Caius in 1912, and I became an Honorary Fellow there in 2014, just over 100 years later. There, probably, our commonalities end.
2. I want to speak tonight about the opportunities and challenges for London as a pre-eminent dispute resolution centre. Since I started at the Bar in 1977, it is fair, I think, to say that London has grown in status as an international dispute resolution centre, whether in arbitration, mediation or in the Business and Property Courts of our High Court of Justice. Several things have, however, changed in the last few years and I will examine the effect that these changes are having and may, in the future, be expected to have.
3. Let me start, then, by identifying the changes: First, the global backdrop to international commercial dispute resolution has changed. Secondly, the Covid-19 pandemic has changed the way business is done. Thirdly, digitisation has changed the way dispute resolution is undertaken and this will change even more as time goes by. Fourthly, generative artificial intelligence is now openly available to all, including lawyers and can be expected to play a major role in future types of dispute resolution. Fifthly, there has, of course, now been Brexit – we are more than 2 years away from the UK's departure from the EU at midnight on 31 December 2020. Let me talk about these five changes and also the procedural challenges that face dispute resolution against the background of these changes in a moment.

4. My conclusion is that, if the UK's judges and lawyers grasp the opportunities and face the challenges, the UK can become or remain one of the most attractive dispute resolution centres in the world. But it will only do so, if it acknowledges that it must adapt to the new situations I have described, so as to position itself in a favourable light as against the other jurisdictions competing for this desirable business.
5. First, by way of introduction, I should mention some of the advantages we have here in London that many other jurisdictions do not have. I mention these advantages not because I think they are in any sense knock out blows, but to make sure they are recognised early on in the debate. First, the judiciary here in England and Wales is known for its integrity and freedom from corruption. The European Network of Councils for the Judiciary (the ENCJ) has for some years undertaken and published a judicial survey. In 2022, that survey showed that nearly all judges in the UK and Ireland were sure that their colleagues were, to put it generally, free from corruption. But the only other countries in Europe in that category were Cyprus, Denmark, Finland, the Netherlands, Norway, and Sweden. In countries like Austria, Belgium, France and Germany a very small percentage of judges believed that their colleagues actually did take bribes, but 8% - 15%, not insignificant numbers, we worryingly "not sure".
6. The second advantage of the UK's jurisdictions is the simple fact that we operate here in the English language, making our justice systems accessible to the citizens of so many other countries.
7. The third advantage is the location of London within the continent of Europe and directly between the time-zones of the USA and Asia.
8. Fourthly and finally, the UK's jurisdictions mainly operate common law systems that are peculiarly well adapted to commercial dispute resolution. It is true to say that the common law provides a set of certain and predictable rules that are applicable to commercial dealings of all kinds, whether along well-known and traditional lines or in new ways embracing new technologies. It is this flexibility that tends to commend itself to commercial parties, who sometimes seek to avoid the civil law systems that are founded on the interpretation of legal codes drafted decades or centuries ago. We should not place too much emphasis on this supposed advantage, because ultimately all dispute resolution is undertaken on the basis of the law and the evidence, and that principle applies as much in civil law systems as it does in common law ones.

The global backdrop to international commercial dispute resolution

9. With that introduction, I will start with the global backdrop to international commercial dispute resolution. I have lived and worked in this environment since the 1970s. In those days, there were perhaps three 'proper' commercial chambers in London, and 'commercial' work meant mostly shipping. London's

major city firms of solicitors in the 1970s and 1980s thought that litigation was beneath them and mostly employed a managing clerk to deal with it.

10. There are now countless chambers that consider themselves 'proper' commercial chambers. The magic circle firms regard litigation and arbitration as being as important to them (almost) as transactional business. Indeed, they all have numerous litigation partners – something unheard of 50 years ago.
11. The type of commercial work undertaken in London and elsewhere has also changed radically. From the Lloyd's litigation and financial scandals of the 1980's and 1990's, we moved through Middle Eastern litigation, Chinese litigation and Russian litigation to what is now a more diverse and even varied diet. The Business and Property Courts remain busy, but are perhaps less noticeably dominated by one nationality of overseas litigants than they were a few years ago. This may, by the way, be a good thing as is highlighted by the concentration on rooting out SLAPPs (strategic lawsuits against public participation). As you will know the Government is currently contemplating legislation in that area.
12. Of course, the global political scene has changed just as radically. The Chinese Belt and Road initiative produced massive overseas investment and some litigation, but a new Chinese approach to Hong Kong and overseas lawyers, and the pandemic, about which I will say something more in a moment, have perhaps slowed that progression. The Russian invasion of Ukraine and the sanctions that followed have had a dramatic effect on the Russian oligarchs that used to litigate so intensively in London and on their litigation.
13. Moreover, many jurisdictions have established their own international commercial courts. This has occurred most notably in Kazakhstan, Dubai, Paris, Abu Dhabi, Amsterdam, Singapore and in several other places too. In some cases, the avowed ambition has been to attract litigation away from London. In other cases, it has been to cater for local commercial parties in a regional setting. Either way, there are more international commercial courts and international arbitral centres now than there were some years ago.
14. It is also worth mentioning a recent UK initiative, which has really taken off. In 2017, Lord Thomas established the Standing International Forum of Commercial Courts that now has some 46 jurisdictions from around the world as members. It has had 4 general meetings in London, New York, Singapore and last October in Sydney and is a thriving force for the promulgation of good practice in commercial dispute resolution and for the rule of law across the world. It is continuing to attract new members from both common law and civil law jurisdictions.
15. To cut a long story short, there are now many more options for international business when it comes to dispute resolution. That makes the environment in

which London is operating more competitive, but perhaps also more interesting and more exciting. That is certainly the case when the situation is viewed, as I shall in a minute, from a technological angle.

The Covid-19 pandemic

16. Covid-19 has actually changed the commercial dispute resolution scene far more than any of us would have imagined.
17. Overnight in March 2020, the Business and Property Courts in London pivoted from undertaking almost every hearing face-to-face to conducting every hearing remotely, initially on Skype, and then on Microsoft Teams. This was fêted as a technological revolution, when, in fact, it was no more than the laggardly adoption of 25-year old video conferencing technology.
18. But what Covid really gave to commercial dispute resolution was an understanding that it was not necessary to transport dozens of people and lawyers around the world just in order to resolve a complex piece of litigation or undertake an appeal. This has reduced the cost of much litigation, and in some cases expedited its resolution. It has also probably given something of a fillip to the new international commercial courts.
19. The lessons of Covid should allow us to rethink our commercial justice process. Indeed, I believe that those jurisdictions which fail to rise to this challenge will suffer. Jurisdictions, even well-established ones like England and Wales, will not retain their pre-eminent status if they do not modernise their procedures and provide state-of-the-art litigation processes suitable for the disputes of the 21st century and the corporations of the 21st century. This will mean that jurisdictions must find ways to make more drastic reductions in costs, delays and complexity, making maximum use of new technologies, and expediting the process to resolve disputes at a speed commensurate with every other aspect of modern digitised commercial life. I will return to this theme in a moment.
20. The prizes will go to the bold, not to those reluctant to change. Covid has undoubtedly led to the prioritisation of court-led case management. But some jurisdictions are still reluctant to change anything and, others, having changed some of their most old-fashioned court-based practices, have simply gone back to their bad old ways, now that the pandemic has abated.
21. All of this needs to be considered in the light of what I am now about to say about digitisation and generative artificial intelligence.

Digitisation and Generative artificial intelligence

22. It will surprise no one that the centrepiece of this lecture is going to be about the effect of digitisation and AI on international dispute resolution. Let me start

this part of the lecture by identifying two groups of current and future developments.

23. First, GPT-4 was released by OpenAI on 14 March 2023, only a month ago. It is properly called “Generative Pre-trained Transformer 4”, which is a “multimodal large language model”. It is publicly available through Chat GPT, though any of you who have tried to use it will know that you need some patience to do so. GPT-4 and other advanced machine learning is likely to transform the work that lawyers need to do and possibly even, in the slightly longer term, the business of judging.
24. That much is probably uncontroversial. And I do not intend this evening to engage in the three connected and very topical debates over: (a) whether the development of AI is actually going too fast and in a direction that poses real risks to mankind, (b) whether there ought to be more concentration on aligning the use of AI with human priorities, moralities and values, and (c) whether further research in creating real artificial general intelligence (AGI) ought to be regulated internationally and perhaps even strongly controlled and ringfenced.
25. You will probably all have seen that when GPT-3.5 took the Bar exams (US ones, I imagine) not long ago, it came in the bottom 10%, but when GPT-4 took them just recently, it came in the top 10%. This demonstrates the speed at which generative AI is developing. It perhaps makes the point that there is a real possibility that AI may become more intelligent and capable than humans. It is obvious that these advances will affect the legal world as much as any other part of our society.
26. The second technological revolution relates to the adoption of digital currencies, specifically CBDCs (Central Bank Digital Currencies) and Stablecoins, smart contracts and distributed ledger technology. These developments, when considered alongside electronic transferable trade documents shortly to be validated in the UK by the Law Commission’s Electronic Trade Documents Bill, will enable digital trade in every imaginable economic sector.
27. As I have been saying for some time now, digitisation, and now generative AI, is going to change both the kinds of disputes that need to be resolved and the way in which commercial parties will want and require them to be resolved. When everything is recorded on-chain, events and facts will be harder to dispute. It seems unlikely that parties transacting instantaneously on-chain are going to want to wait years to resolve their disputes in the traditional manner.
28. The prizes will, once again, go to the jurisdictions that adapt quickly enough (a) to meet the needs of those trading digitally, and (b) to make maximum, but of course constructive, use of the developments in AI.

29. The first thing to understand, however, is about the speed of change. It is likely to be both very fast and very slow.
30. So far as trading methods are concerned, industrial, commercial and financial sectors are taking more time than might have been thought to change their trading methods. The adoption of blockchain has not yet gone at the speed predicted outside the defi sector and Bitcoin. Perhaps we were wrong to think that fundamental changes to trading methods would change everything overnight. There is an inherent conservatism in the major international industries that make up the global markets. International bankers, insurers, financial services providers, shippers, energy companies, pharmaceutical companies, and telecoms corporations will not perhaps change every aspect of the way they do business until they are satisfied that the changes will benefit them. Moreover, none of them want to jump too fast or in the wrong direction. As one leading Australian lawyer told me, they want to change one thing at a time and always for a good reason. But digitisation in every commercial and consumer sector is probably inevitable because it allows for immutable recording on-chain and speeds up and reduces the costs of transacting.
31. So far as AI is concerned, the speed of change is different. First AI is already used by all of us all the time. Certainly, AI is operating for us every time we touch our mobile devices, whether we realise it or not. Moreover, with generative AI now available to everyone and anyone, we can expect the effects of its use to become apparent very much more rapidly than many of us might have expected. That is how the three topical issues I mentioned earlier have come so rapidly to the fore since GPT-4 was released only weeks ago.
32. The second premise that I think needs to be understood is that businesses will ultimately not want to pay for things that are available free. And that applies as much to legal services and dispute resolution as to anything else. This eternal economic reality will be a significant challenge for dispute resolution. Just as we now see far fewer lawyers earning air miles than we did before Covid, legal services will need to add value, and dispute resolution will need to make as much use of generative AI as is consistent with user confidence. Digitisation will speed up transacting in all sectors, and faster transacting will, as I have said, lead to a requirement for faster dispute resolution. That was why the UK Jurisdiction Taskforce that I chair issued its streamlined Digital Dispute Resolution Rules now some 2 years ago.
33. It is hard to square the circle between these pressures, which are pushing to some extent in different directions. I am sure that, when conservative commercial, financial and consumer sectors adopt new tech, the changes will come more quickly than many now think. And now is the time to prepare. Those who fail to consider how they will adapt to the use of these technologies may

ultimately risk becoming dispensable. So some expedited hard thinking is an imperative.

34. The question that will have come into all your minds in connection with AI is, of course, when, if ever, judicial decisions are likely to be taken by machines rather than judges. I think that AI will be used within digital justice systems and may, at some stage, be used to take some (at first, very minor) decisions. The controls that will be required are (a) for the parties to know what decisions are taken by judges and what by machines, and (b) for there always to be the option of an appeal to a human judge. The limiting feature is likely to be the requirement that the citizens and businesses that any justice system serves have confidence in that system. There are some decisions – like for example intensely personal decisions relating to the welfare of children, that humans are unlikely ever to accept being decided by machines. But in the commercial field, the controls that will be necessary on automated decision-making will rapidly become very complex indeed, because of the debates I mentioned earlier arising from the speed with which AI is being developed.

Brexit

35. Let me come on then to the changes in the dispute resolution world occasioned by Brexit. Perhaps we can look more dispassionately at this aspect of dispute resolution now that more than 2 years have elapsed since the UK left the European Union. I explained in a number of speeches within the EU between June 2016 and exit day why I thought that Brexit would not really affect commercial dispute resolution in England & Wales. My reasoning was, of course, that the English law of contract was and is unaffected by Brexit. European law is mostly regulatory, and municipal laws of contract across the EU have never been harmonised by EU legislation. There have been small incursions – like the Unfair Consumer Contract Terms Directive 93/13/EEC, but generally English commercial and contract law was untouched by EU law.
36. Indeed, many EU companies have continued to specify English law and jurisdiction in their contracts since Brexit. They have done that for good reasons. It is often costly, in terms of legal fees, for large corporations to acquire a detailed understanding of the consequences of utilising a new legal foundation for their standard contracts. And anyway, the certainty and predictability of English law has remained a strong pull. Some have, of course, begun to use French or German law contracts, mostly, for example, where those jurisdictions have legislated in the digital space whilst common law countries have not – or, if they have, where that legislation is less specific than the legislation enacted by European states.
37. I do not think that the essential fact of Brexit has affected the attractiveness of English law and jurisdiction as much as some predicted. I do not, for example, think that the UK's inability to accede in its own right to the Lugano convention

has actually proved as much of a deterrent to the use of English law and jurisdiction as many, including me, predicted. The reason for that is probably three-fold. First, enforcement within Europe is still permitted where the contract made an exclusive choice of the courts of England and Wales under the 2005 Hague Convention on Choice of Courts Agreements, at least where the contract was concluded since the UK acceded to that Convention in 2015. Secondly, the 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters is likely, in time, to make a significant difference. Thirdly, the ability actually to enforce judgments is not quite as fundamental to the dispute resolution process as some have thought. Enforcement is, in fact, only necessary in a tiny minority of commercial cases.

38. Brexit also perhaps provides an opportunity. There is a limited number of municipal legal systems that are likely to be attractive candidates to underpin AI and borderless transactions on-chain. It is more likely that a common law system will achieve the confidence of the mainstream digital market participants for several reasons. The legislation in civil law countries tends to be technology specific. The law in civil law countries is less flexible, when it based on a code drafted many years ago. The common law's greatest advantage is its ability to adapt to any new commercial situation.
39. If one then asks which common law system is likely to achieve prominence in the digital space, one can at least say that English law is a good candidate. Regulation in the UK may, it can be argued, be more agile post-Brexit, when freed from the EU's lengthy legislative and regulatory processes. There are, of course, other strong contenders. Singapore law, New York law, and Dubai law to name but three.
40. There is, in my view, a big opportunity for English law and the UK's jurisdictions to position themselves as digital and AI friendly environments. It will probably be desirable to legislate, as is currently being proposed in these areas by the Law Commission. But the legislation proposed will need to be both simple and uncontroversial. It will be important also to persuade other common law countries to legislate in similar – or at least compatible - ways to avoid complex conflicts of law problems as the digital economy takes hold. Good examples of such legislation are the Electronic Trade Documents Bill and the Bill proposed to entrench cryptoassets as a third species of property.

Procedural challenges

41. With these developments in mind, how will litigation and arbitration procedures need to change if London is to remain a leading dispute resolution hub? My answer is a lot.
42. It is well known that, for small cases, across civil, family and tribunals, we are bringing together a domestic digital justice system which will provide hugely

expedited and low-cost dispute resolution for the bulk of civil claims across England and Wales. The process is already advanced, and will shortly be overseen by the new Online Procedure Rules Committee created by sections 22-24 of the Judicial Review and Courts Act 2022. Claimants will be able to enter the system through an app or online landing page to be directed to the pre-action online portal or ombuds process dedicated to the resolution of the issue affecting them. These pre-action portals will be provided by a mixture of public and private entities. If resolution is not achieved within the portals, the data constituting the claim will be transmitted by API (application programming interface) directly into the digital court system that is already well on its way to completion. These systems will be smart and digital and have already shown how delays in resolution can be significantly cut. The digital justice system will ultimately use AI to streamline and expedite the process, even if we are still a long way away from any of the automated decision-making I mentioned a moment ago.

43. The big question, however, is whether and, if so how, commercial litigation – and arbitration – will be subjected to similar innovations. Surely they must.
44. The Woolf reforms were now nearly 25 years ago and were undertaken largely before digitisation had begun. They certainly took no account of the use of AI. But they pointed the way in showing that continual evolution is always necessary to maintain a system which is essentially consensual.
45. If London is to retain its place as a litigation and arbitration destination of choice, it will be imperative to embrace digital innovation and AI to do what it does best, namely dealing with a complex mass of material. The clue is perhaps in the old fashioned name; it is **information** technology. Cases in arbitration and in the Business and Property Courts are not taking any less time to resolve now than they did 20 years ago. That is despite active case management, restrictions on disclosure and on the length of witness statements and other streamlining techniques. The use of video conferencing technology is not a panacea, nor is automated disclosure. We need to re-think the process for the digital age. In doing so, we will want to be sure, of course, that we do not throw the baby out with the bath water.
46. The familiar comforting procedures encapsulated in the CPR and the Commercial Court Guide do provide confidence to litigants and lawyers alike. But, there are some fundamental issues that need to be addressed: the utility and necessity of pleadings, experts report and witness statements all need to be considered afresh. They are each analogue concepts rooted in an analogue age, which may be in need of a digital makeover.
47. The central element of any dispute resolution process is to identify the issue or issues that divide the parties. That issue, even in a complex case, can often, once identified, be simple. The difficulty is getting to it quickly and early enough

to avoid massive cost. It is here that generative AI may be able to help. It may be that the power of AI could identify, from a mass of complex facts and transactions, the real issues that divide the parties and that require resolution. If that could be done, the actual resolution process itself could become shorter and less costly, particularly if on-chain recording meant that the scope for factual disputes was much reduced.

48. In addition, litigation and arbitration, and their associated mediations, tend to create and recreate the same data over and over again in pleadings, witness statement, expert reports, skeleton arguments and opening and closing written submissions. Technology can and should be used to ensure that every case has a single data set that can be used at every stage of the dispute resolution process, whether judicial, mediation or other forms of (A)DR.
49. I am not offering any kind of blueprint for reform tonight. But I am sure that if London is to remain at the forefront of international commercial dispute resolution, it will need to move fast to address these and other fundamental issues of litigation and arbitral procedure.

Conclusions

50. I can return to the question. What are the challenges and opportunities for London as a pre-eminent centre for commercial dispute resolution?
51. The challenges and opportunities are really the same. They are:
 - (1) To embrace new technologies in both the delivery of legal services and in the dispute resolution process.
 - (2) To position English law and the UK's jurisdictions as attractive and efficient for both the litigation and arbitration inevitable in a digital era.
 - (3) To capitalise on what was done well in the dispute-resolution space during the pandemic.
52. Within these quite neutral headlines, there will be some very hard decisions to be made. The creation of the digital justice system in England and Wales is a brilliant start. The real challenges will come as three things start to sink in with lawyers and judges, nationally and internationally. First, the massive advances that have already been made in generative AI. Secondly, the fact that AI, digital assets, smart contracts, and blockchain technologies are going to change the way business is done. Thirdly, these technologies will transform both the

disputes that will need to be resolved, and the way commercial people will need to have them resolved.

53. As I sometimes say, we will all have to get with the programme! Many thanks for listening.

Sir Geoffrey Vos
Master of the Rolls