Lecture to the Faculty of Advocates

"The UK Jurisdictions After 2019"

20th June 2017

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Introduction

1. I am delivering this lecture at a time of great change. The General Election has produced a hung Parliament and there remains uncertainty about Brexit. Contrary to what many have said and even more think, Brexit is not just a political question, it raises intensely difficult legal issues that are worthy of careful research and debate. They are issues that the senior judiciary of England & Wales, myself included, feel are too important to ignore, and too important for the judges to stand wholly on the side-lines whilst others debate them.

2. Judges must, of course, be very conscious that they cannot and must not enter the political arena; they cannot and must not try to advise governments on what they should do in terms of legislation or treaties. But it seems to me at least in the Brexit context that judges would be failing in their duty if they did not point out to Government the legal issues that require to be addressed in the context of a seismic change to our juridical landscape on the scale of Brexit.

3. It was for this purpose that the previous Lord Chancellor established the Brexit Law Committee in order to report to Government and other interested parties on how Brexit might affect the UK legal systems, to develop with Government strategies for maintaining and enhancing the utilisation after Brexit of English law and UK legal services (including all forms of dispute resolution), and to provide a forum and a resource for consideration of and reporting on legal and commercial issues relating to Brexit.

4. What I want to focus on in this lecture is the things that judges and indeed lawyers can do to ensure that our legal systems and legal structures are as competitive on the global stage after Brexit as they have always been. The elephant in this room and the elephant in many other gatherings of legal luminaries in the UK is the competition that the UK jurisdictions and English

and Scots law face from other jurisdictions keen to attract commercial business away from the UK.

5. These jurisdictions include New York, Germany, Netherlands France, Singapore, and many in the Middle East. Just by way of an example, it is worth searching on the internet for "Made in Germany" to find a glitzy and expensive brochure explaining the advantages of German Law over the common law and the advantages of German jurisdiction over other jurisdictions including specifically the UK's jurisdictions.
(see http://www.lawmadeingermany.de/Law-Made_in_Germany_EN.pdf)

6. Many competing jurisdictions are throwing a great deal of money at the problem and setting up new commercial and business courts with magnificent facilities. If one were a cynic, one might think that some of them were hoping to capitalise on the uncertainties created by Brexit.

7. Against that background, I would like to talk first about some fundamentals of the European and domestic judicial scene:-

   (1) I will to start with some, perhaps trite, observations about the independence of the judiciary and the rule of law, since I believe that these are factors that will play a major role in maintaining the global position of UK courts and legal services.

   (2) Secondly, I will say a few words about what we are doing in England & Wales to ensure that our courts and our legal professions remain at the forefront of global court-based dispute resolution services.

   (3) Thirdly, I want to say something about ADR and arbitration in Europe, its interaction with court based dispute resolution, and how that impacts the success of the UK jurisdictions.

Part 1: The independence of the judiciary and the rule of law

8. There are few unique selling points in the law, so we should make the best of those that we have. One of the USPs that we have in the UK is the independence of our judiciary. It is worth explaining briefly what should be obvious to everyone, but is often the subject of wild misunderstandings, namely why we need an independent judiciary.

9. Judges and the judiciary must be individually and systemically independent from the State, because judges have routinely to decide cases between the State and the citizen. Both the State and the citizen must be able to have absolute confidence that such cases will be decided free from inappropriate interference from either the executive or the legislature. You do not have to spend long to identify the growing number of areas in which issues need to be decided between the citizen and the state: all criminal case, public law children cases between local authorities and parents, any number of administrative law challenges to government decisions in relation to every aspect of our lives, to name but a few.

10. In normal civil law countries, from which I exclude Scotland for this purpose, the necessary barrier between the judiciary and the other branches of the state are provided by a Council for the Judiciary, which is itself composed of judges and independent members who are responsible for the governance of the judiciary. I will not discuss today the way in which our UK jurisdictions provide this barrier, which is rather more complicated but certainly no less effective.

11. But even with the supposed protection of a Council for the Judiciary in many countries, it still cannot be said that the judges are always truly independent from the executive and legislative branches of the State. It is well known that business parties are reluctant to invest in countries where there is doubt about the independence of the court process, because it adds significant political and legal risk to that investment.

12. A lack of independence takes many forms; in some countries, 99% of decisions are taken properly and according to the law and the evidence, but if government interests are affected, the judge may sometimes be told what to decide. This is exemplified by the well-known "telephone justice" that occurred over the years in the USSR and beyond. The problem is that, in such countries, commercial parties can never know when the government might perceive its interests to be affected, so the integrity of the entire system is perverted.

13. Corruption within the judiciary has a similar effect. Even if bribery is rare in a particular country, if it is known to exist at all, it fundamentally affects the confidence of those thinking of investing in that jurisdiction. That is because commercial parties cannot know when it is happening or may happen, so the independence of the system is called into question by just the possibility of its occurrence.

14. There are actually not many countries in the world that can genuinely profess to have a judiciary free from all corruption, and of absolute and undoubted integrity. Fortunately, we can say that in our 3 UK jurisdictions almost without fear of contradiction. The recent *Miller* case perhaps epitomised that independence, but it was only a single example of what happens day in and day out in our courts, namely that independent judges decide cases between citizen and state without fear or favour, and on the basis only of the established law and the evidence before the court.

15. As one previous holder of the office of Lord Chancellor certainly thought, our judges were perhaps just **too** independent.

16. This is all made good by the recent ENCJ survey of some 11,712 judges where in 18 EU countries more than 10% of judges thought that some of their colleagues either were taking bribes or were not sure whether they were. Those countries where over 50% of judges thought their colleagues either were taking bribes or were not sure were Bulgaria, Latvia, Romania, Croatia, Czech Republic, Italy, and Lithuania. That is by itself a shocking list, but when you know that even France, Germany, Belgium and Austria and Spain are included in those countries where more than 10% of judges thought their colleagues either were taking bribes or were not sure, the surprise grows considerably.

Only Sweden, the UK, Ireland and Finland and Denmark produced entirely negative results.

17. In case we become complacent, however, it is interesting also to note that 42% of judges in the UK did not think their independence had been respected by the government, and 59% of UK judges did not think their independence had been respected by the media. These figures were amongst the worst in Europe, so they are really something to be concerned about.

18. The reason for making these points is because, as I have said, if our jurisdictions are to remain at the leading edge post-Brexit, we will need to make sure that the independence of our judiciaries is properly understood and recognised amongst commercial parties globally. Only then will they appreciate the importance of choosing English or Scots law in their contracts and specifying UK jurisdictions.

19. So, our independent judiciary and our broad compliance with the Rule of Law will be important factors in the view that investors will take of our jurisdiction post-Brexit. There are other factors, of course, but those mostly relate to the dispute resolution services we offer. For that reason, I will now move on to consider what we are doing in England & Wales to keep those dispute resolution services up to date.

Part 2: What are we doing to ensure that our courts and our legal professions remain at the forefront of global court-based dispute resolution services?

20. It is worth saying something first about English law. I think there are signs that, however uncomfortable Brexit may become for lawyers, English law will remain a popular choice if not the gold standard. I say this because of its well-regarded and well-developed predictability, certainty, flexibility and commerciality. We cannot, however, just rest on our laurels by saying that English law is best – least of all here in Edinburgh!

FinTech

21. We need, instead, to move a little further forward. First, in terms of technology. There is much to play for in the modern digital world of FinTech: Information technology in the world of financial services.

22. I was told 2 weeks ago at an event in London that within 5 years distributed ledger technology (DLT) and smart contracts would be ubiquitous in the financial markets. Before you ask, DLT is better known as blockchain technology, where ledger records are no longer kept in one place but distributed over numerous data holders, so that the risks of data protection are spread across the internet. Smart contracts are contracts that are written in code rather than in any specific language, so that they execute automatically and are not supposedly subject to any law or even legal dispute.

23. The race is on to identify the code in which these contracts will be written, since they are bound to have some linguistic connection, even if written in computer code. Even post-Brexit, there must be a fair chance that that language with be English, but there is no guarantee that the underlying legal system for smart contracts will be English or UK law.

24. There is, therefore, much to play for in the accelerating digital age. I may be old-fashioned, but I continue to believe that however code-based financial contracts may be, they will always need some legal base by which disputes can be resolved.

25. There are a series of possible adverse consequences of Brexit, but they are all no doubt capable of satisfactory solutions: whether we are talking about Euro clearing, passporting, or the future of the UK financial services sector. But even if bad things happen, it will be important to make sure that that international financial smart contracts are governed by UK-based law.

26. There are similar issues that arise in other crucial commercial sectors such as insurance and reinsurance, corporate acquisitions, energy, shipping and construction.

27. These sectors are crucial to the future of the UK economy. I have long held the view that the value of UK legal services was much misunderstood. The fact is that the UK punches far above its weight in terms of commercial legal services. Some of the biggest law firms in the world have their centre in London. Those firms are truly global now. They advise clients from all over Europe and all over the world, and they put together international projects and transactions in every imaginable sector.

28. Moreover, once a UK lawyer is instructed on an international project, there is a significantly greater chance that UK accountants, engineers, architects, and actuaries will also be instructed. In short, UK legal services drive the success of UK professional services generally. It remains crucial that we lead the world in legal services post-Brexit. Professional services are another USP for the UK and we will undervalue that USP at our peril.

The Business and Property Courts

29. I want, if I may, now to be a more parochial. Our business court-based dispute resolution has always been very popular with international parties, which is why Messrs Boris Berezovsky and Roman Abramovich chose to litigate their massive dispute in London as so many Oligarchs from all over the world have done before and since. What I never understood was why we did not call our business courts by a name that this litigating community could understand. As a result, when I became Chancellor of the High Court, I initiated a new project.

30. From 4th July 2017, the specialist jurisdictions of the High Court of England & Wales will be known as "**The Business and Property Courts of England & Wales**". That will include the Commercial Court, the Chancery Division and the Technology & Construction Court ("TCC"). We will no longer use names that our customers cannot understand. We will operate the B&PCs in

the Rolls Building and in our main regional centres in Manchester, Birmingham, Leeds, Bristol and Cardiff. All our specialist jurisdictions will be under the same intelligible umbrella. I am pleased to say that this project is well supported by both the UK government and by the main City institutions. The courts that deal with the main commercial sectors including financial services, intellectual property, competition, and insolvency will all be under the same roof.

31. The main advantages that can be expected from the new B&PCs, apart from a user-friendly understandable name for UK plc's international dispute resolution jurisdictions, are:-

(1) **Regional B&PCs will be better joined up with London**: The B&PCs will be a single umbrella for business specialist courts across England and Wales. There will be a super-highway between the B&PCs at the Rolls Building and those in the regions to ensure that international businesses and domestic enterprises are equally supported in the resolution of their disputes.

(2) **Flexible cross deployment of judges**: The B&PCs will facilitate the flexible cross-deployment of judges with suitable expertise and experience to sit in business and property cases across the newly named courts.

(3) **Familiar procedures**: The B&PCs will build on the reputation and standing of the Commercial Court, the TCC and the courts of the Chancery Division, while allowing for the familiar procedures and practices of those jurisdictions to be retained.

32. These changes will be achieved by introducing 10 B&P lists and courts, many of which exist in one form or another already. They will be the Commercial Court (QBD), the Admiralty Court (QBD), the Technology & Construction Court (QBD), the Financial List (ChD/QBD), the Business List (ChD), the Intellectual Property List (ChD), the Company & Insolvency List (ChD), the Competition List (ChD), the Property Trusts & Probate List (ChD), and the Revenue List (ChD).

33. So far as the regions are concerned, we intend to de-centralise as much as possible to enable B&PC cases to be heard wherever possible in the regions from which they originate. But the fact is that, as Lord Justice Briggs's reports have consistently recommended, and our Judicial Executive Board has accepted, no case should be too big to be tried outside London. The aim is to achieve a critical mass of specialist judges sitting in each of the Business & Property regional centres so that all classes of case can be managed and tried in those regions. At the moment, many such cases migrate to the Rolls Building for a multitude of inadequate reasons. It should become easier to transfer regional cases back to the regions for management and trial. Waiting times are considerably less in the regional centres than they are at the Rolls Building.

34. These developments may seem parochial, but they are a significant part of a Post-Brexit strategy aimed at keeping our court based dispute resolution services at the forefront of the international litigation market.

Part 3: ADR and arbitration in Europe and its interaction with court-based dispute resolution

35. ADR is another area where we cannot stand still. It seems obvious that Brexit will not affect the popularity of London (and Edinburgh) as an arbitral centre. The UK will continue as a contracting state to each of the New York and Washington Conventions which govern the enforcement of relevant arbitral awards in both the private and public international law spheres. The Arbitration Act 1996 is not part of the European acquis, and so is unaffected by Brexit. It is impossible to imagine that there will be any impediment to arbitrators, legal representatives and parties visiting the UK for the purpose of participating in arbitration.

36. All that said, there is much work to be done to ensure that UK lawyers can continue to practice in Europe in court and in arbitrations as they have in the past. This may not affect the Faculty of Advocates here in Edinburgh as much as it does the magic circle firms of solicitors in London, but it is a serious issue that is being addressed by another group called, catchily, the Mutual Market Access Working Group.

37. What I want to talk about under this heading is, however, rather different. It is the impact of ADR in different parts of Europe and its importance to the UK's post-Brexit offering. I am chairing a joint project between the Eeuropean Network of Councils for the Judiciary (of which I was President until this time last year) and the European Law Institute which aims to look at the interactions between court-based and non-court-based dispute resolution processes across Europe. What has struck me is the vast difference between the take-up of ADR processes in different parts of Europe. Here in the UK, we have ombudsmen dealing with small cases in almost every sector: financial services, banking, transport, travel, energy, telecoms etc. We have a vibrant mediation sector and we are about to introduce the Online Solutions Court for small disputes in England & Wales. The EU has already opened its Online Dispute Resolution site that directs consumers to accredited mediators in their country in relation to unsatisfactory online purchases in the EU.

38. In many parts of Eastern Europe, however, ADR and ODR is only at a formative stage. Once again, this is something where the UK can and should lead the way. But there are very different approaches to ADR, which are not always entirely helpful. In my view, the objective of any dispute resolution model ought to be to offer a process that suits each of the parties in terms of cost, speed and the justice of the outcome. This needs a little unpacking. For a small dispute, a consumer may be happy with a speedy procedure at low cost that will produce a rough and ready outcome. For a high-value commercial dispute, the parties may demand **the** correct outcome and will be less concerned at what that costs and how long it takes – to reach, say, the Supreme Court, or the CJEU. But there are all stages in between and more

variables than three main ones I have mentioned. There is a serious problem of availability of a sufficiently wide range of ADR choices in many parts of Europe.

39. Ultimately, however, two things are certain, there needs to be choice available in dispute resolution, and there needs to be clarity about where consumers and commercial parties can go to be informed about those choices.

40. ADR is a vast subject, but it will have a serious bearing on the attractiveness of the UK as a jurisdiction of choice post-Brexit. We are capable of offering state of the art ADR and ODR processes and we must do so if we are to stay at the leading edge of international dispute resolution. I hazard that ADR providers and experts need to be rather more connected with the providers of court-based dispute resolution. The two must work together, so that consumers and commercial people have the right choices that cater to all their needs. Ultimately, ADR too, is a critical part of an independent justice system – once again, a piece in the jigsaw that is required if overseas investors are to have the confidence to invest in post-Brexit Britain.

Conclusions

41. You may think that I have majored this afternoon on some grandiose plan to demonstrate that UK law and jurisdiction should take over the world. That would be unfair. I do, however, feel very strongly that our judges must be at the forefront of the efforts that must be made to keep the UK jurisdictions fit for purpose, if not world leaders, after Brexit.

42. I have used the expression before, but we cannot just rest on our laurels and hope that the international business community will be prepared to take a chance on the UK's legal systems. We need to be pro-active and we need to be prepared to take active steps to improve our offering if the clarion call that Britain is open for business post-Brexit is going to be taken seriously.

43. Many thanks for your attention.

20th June 2017
