CHANCELLOR
OF THE HIGH COURT

Presentation to a Legal Business Seminar in Frankfurt

The Future for the UK's jurisdiction and English law after Brexit

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Introduction

1. It is a pleasure and an honour for me to have been invited to speak to such a distinguished audience.

2. I should start by introducing myself, because here in Germany, the word "Chancellor" is used rather differently from the way it is used in England. In England & Wales, we have three main Chancellors, excluding the many Chancellors and Vice Chancellors of Universities. They are the Lord Chancellor, who is now our Minister of Justice, but no longer head of our judiciary – a task now undertaken by the Lord Chief Justice. Then there is the Chancellor of the Exchequer, who is the Minister of Finance, and finally there is the Chancellor of the High Court, which is the post I occupy – the senior member of the judiciary, who acts as a Head of one of our three judicial divisions.

3. My role as Chancellor is to lead the Business & Property Courts of England and Wales, that we have just introduced in order to bring together the jurisdictions that deal with financial, business, and commercial dispute resolution. The Business and Property Courts are housed in the Rolls Building in London where some 40-50 Business & Property Courts judges hearing business and commercial cases, financial services cases,

competition cases, technology and construction cases, property cases, insolvency cases, company reconstruction cases, and intellectual property cases, sit every day. That is one of the biggest dedicated business courts in the world. The Business & Property Courts also sit in 7 regional centres across England & Wales. One of the main purposes of the creation of the Business & Property Courts has been the objective of ensuring that high quality business judges are available across the country, not just in London.

4. In addition to my domestic role, however, I also have a long history of working with European lawyers and judges in our dealings with the EU and beyond. I was the last past President of the European Network of Councils for the Judiciary, which some of you may know is really the only systemic judicial network in Europe. The ENCJ brings together the Councils for Judiciary and analogous governance bodies of the judiciaries of EU member states, and candidate member states. Some member states, including Germany, do not have a Council for the Judiciary as such, but adopt a different approach to judicial governance. Those states, including Germany, are of course active observers of the ENCJ's activities.

5. My work for the ENCJ focused on the independence and accountability of European judiciaries. We undertook a long running project aimed at evaluating the independence of judiciaries, and at enhancing the independence and integrity of judges and judiciaries across the EU and beyond.

6. An independent judiciary, as you will all know, is crucial if businesses are to be persuaded to invest in a particular state. Amongst all the rule of law factors, a reliable judiciary and a functioning justice system are of great importance to investors. Investment is much riskier in countries where the judiciary is corrupt and where commercial people cannot be confident that their disputes will be resolved fairly and within a reasonable timescale.

7. An independent judiciary is also critical because judges decide many disputes between the citizen or business and the state. They must, therefore, be independent from that state if citizens and businesses are to have confidence in the impartiality of the justice system. That is why the Italians in the first place developed the concept of a Council for the Judiciary to provide the necessary barrier or buffer between the judiciary on the one hand and the executive and the legislature on the other. I will return to this aspect of the rule of law in the context of Brexit.

8. In the time available this afternoon, however, I would like to address three specific subjects. First, I want to say something about the common law to dispel a number of misconceptions that have continue to be propagated in the context of Brexit. Secondly, I would like to say something about Brexit itself and the effect that we may expect it to have on our legal processes and on the wider business community, and finally, I would like to say something about the way the judiciary in the UK sees the future.

The common law in the context of Brexit

9. So to the common law, which I know is familiar to many, if not all, of you.

10. The first point I want to make is that legal systems are not, and should not be, in competition. I have huge respect for my European judicial colleagues and have worked closely with them for many years. I was asked by a group of judges in Wiesbaden yesterday what I thought of the new English speaking commercial court that is being established in Frankfurt. I answered that I wished it every success. It is extremely important, I think, that judges in different jurisdictions collaborate and cooperate with each other, and exchange ideas and information about their justice systems. No justice system is superior. We are all trying to offer an excellent service to our domestic and international court users, whether they are businesses or individuals. And collaboration between our judges will assist in this process.

11. But I will, still, if I may, say something by way of explanation as to how the common law actually works.

12. The common law is a non-statutory system of law. It does not turn on the interpretation of codes or statutes, but rather it relies on cases that have been decided by our court hierarchy in the past. The reason why this is a system that business people have found reliable over many years is because it can accommodate frequent changes in business and commercial practice. We have found that the process of legislating in relation to business contracts is sometimes rather unsatisfactory. Such legislation caters for the problem identified at the time, but not for the problems that may arise in the future. It requires a great deal of effort to be devoted to the interpretation of a written law, which may itself have been introduced some years ago, to find solutions for the different type of problem than is being experienced by the time that the litigation is taking place.

13. The common law aims to set out a system of judge-made principles that can be moulded to meet any business situation that may arise. In a fast-changing commercial environment, we common lawyers think this has some advantages.

14. Let me give one example of where this may be useful. In the case of digital ledger technology (DLT), smart contracts and artificial intelligence (AI), the financial world is about to undergo, if not already undergoing, what is nothing short of a major revolution. Informed opinion suggests that the approximately 3 trillion (I don't claim that the figure is exact) financial deals entered into every year will be undertaken by way of smart contracts and DLT within 5 years, or if not 5, then not many more, years.

15. These smart contracts will all be self-executing and recorded on a digital ledger or blockchain. The theory is that no legal foundation will be required because everything will be written into the computer code that underlies the contracts. But that may be over-optimistic. I am certainly not assuming that it will be like that. My guess is that a legal basis will be required even for a self-executing smart derivatives contract recorded on a digital ledger across numerous servers. If that is the case, the world's legal systems will need to respond quickly, and I would say that our business judges in London are moving swiftly to do so. We need to educate ourselves and to be ready to deal with the regulatory and other problems that will undoubtedly arise.

16. Hopefully, the agility of the common law will stand us in good stead in dealing with developments of this kind.

17. This does not, however, make the common law "better" just different from civil law systems. What I always say is that common law and civil law judges have much more in common than there are differences between them. They are both dedicated to achieving a just outcome in a reasonable timescale at a proportionate cost, for the dispute between the parties. The type of law that they use to do so is merely one of the tools they use.

18. But it is important also to understand that the common law is not engaged in a number of other areas that will be of considerable concern to you. If we are talking about regulation, whether of banks, financial services, competition or of business sectors such as energy, telecoms, and pharmaceuticals, the common law is not really relevant at all. Regulation, is by definition, imposed by and a function of statute, whether that is European legislation or domestic legislation.

19. This is why European law does not actually have an impact on the common law. European law is almost entirely about mutuality between member states and the regulation of sectors affecting the single market and trade between member states. It a statutory system governing members states in order to make the single market function properly. It has nothing specifically to do with the private law that those member states use to resolve disputes between individuals or businesses.

20. It is a commonly held misapprehension about Brexit that the common law is likely to become uncertain after Brexit because there will be two speeds of European law – European law as frozen into English law and interpreted by our Supreme Court, and European law as determined by the Court of Justice of the European Union after the UK has left the Union. That is not something that is likely much to affect the common law. The common law is, as I have said, a system of judge made principles that allows any novel commercial dispute situation to be resolved in a predictable manner. Of course, the common law operates against a backdrop of the regulation of the businesses and financial services institutions that are in dispute. But the common law itself will be as certain and predictable, and as able to deal with new situations after Brexit as it was before, because the EU law tapestry is only part of the backdrop to the business environment in which the common law operates to resolve disputes governed by it.

21. So, whilst it is true that English regulatory law may develop slightly differently from European law after Brexit, that will not create uncertainty for the common law or make English jurisdiction any less effective for the purposes of dispute resolution.

Brexit

22. So let me come on to the much vexed question of Brexit. The first thing to say is that judges cannot and should not speak about the politics of Brexit, and I would certainly never do so. We are not paid to decide what is good for the country. We leave that to the politicians. Instead, we have to deal with the hand of cards that we are dealt. It is not our place, as I often say, to try to stand in the shoes of the dealer.

23. The effect of this is that judges need to approach Brexit from the now established fact that the UK will be leaving the EU. It does not matter whether we were personally in favour of or against

that course. It is our duty to ensure that the justice system of England and Wales is as efficient and effective as possible to deal with the legal challenges created by the UK's departure from the EU.

24. I do not underestimate those challenges, but I think they are made more manageable when one removes the political gloss, and starts thinking as lawyers and judges should always think – logically – about what we can do to provide a good service to our business and other court users as much post-Brexit as we have done pre-Brexit. Judges make up the third arm of state; we have an important constitutional role in the protection of the freedoms of our citizens and the maintenance of the rule of law, but we must never forget in the business context at least, that we are there to operate a justice system that exists to serve the commercial community, whether those who bring their disputes to our courts come from England and Wales or from further afield.

25. But the challenges need to be addressed nonetheless. They are serious ones. The mainstream problems of citizens' rights, the regulation of anti-competitive practices, and the question of financial passporting and regulation, to name but a few are particularly important for businesses across the sectors, and across the EU, as well as in the UK.

26. What judges can do is to point out to politicians the problems that need to be solved. They cannot solve those problems themselves or even attempt to draft the legislation that may deliver those solutions, because judges will have to interpret the laws that are put in place to achieve the UK's withdrawal from the EU.

27. The senior judiciary in England and Wales has, therefore, been trying to help the UK Government understand the problems that will arise. I am a member of a committee established by our former Lord Chief Justice, Lord Thomas, and the former Lord Chancellor, Liz Truss, called the Brexit Law Committee. That committee brings together the legal profession, the City of London, the CityUK, and the main government departments to allow it to provide Government with a single voice of the UK legal community. It has proved a valuable body. It has looked at judicial cooperation, competition, intellectual property, and insolvency post Brexit, amongst other issues.

28. So far as arbitration is concerned, I think I can say without being accused of jingoism, that London is one of the world's respected arbitral seats, and that the language, the lawyers, the procedure,

and the place are friendly to arbitration. Most of all the courts and the Arbitration Act in the UK are friendly to the commercial parties that decide to arbitrate in London. Hopefully that will not change when the UK leaves the EU, because we will still be a party to the New York Convention and that will not change. I have heard complaints from arbitration experts about the price of hotel rooms in London, but that is something that I do not think the judiciary can influence – I am sorry about that …

29. Alternative Dispute Resolution (ADR) is another thing that our judges in the UK now support very actively, and will continue to support very actively after Brexit. I have recently been leading a European project involving the European Law Institute, which has investigated ADR across Europe. It has recommended a code of practice for judges to follow in considering whether to recommend ADR and in requiring litigating parties to engage in ADR. This is quite a controversial area in some European countries where the trust in ADR providers is low, and specifically lower than the trust in the judiciaries. Collaboration between judges in different European jurisdictions can spread the utilisation of ADR.

30. My perspective is that all aspects of dispute resolution is a balance between three factors, cost, speed and the quality of the outcome. An individual with a small dispute with a utility over €100 will want that dispute resolved quickly at no cost, and will not care much about the outcome. They will just want the matter resolved. But a bank with a €100 million dispute will care less about the cost, and even about the speed of its determination, and more about achieving the correct outcome. Judges and justice systems need to take heed of this balance, again as much before Brexit as after it, because we need to provide a diversity of dispute resolution solutions to our citizens. This again is something where Brexit will not affect the services that the UK are able to provide to national and international parties.

31. Before I leave the subject of Brexit and its ramifications, it would be wrong for me not to say something about the enforcement of judgments, choice and law and choice of jurisdiction. These subjects will be on all your minds. The UK Government has made clear that it intends to try to negotiate an arrangement with the EU that perpetuates Brussels Recast. I cannot comment on whether that will be achieved, but what I can say is that I would have thought that it is important to both EU member states and to the UK to have mutual enforcement in place. It is all a part of the judicial cooperation that I have been speaking about. The UK Government has also said that it

intends to legislate to replicate Rome I and Rome II and the Hague Convention of choice of jurisdiction into English law, so one may hope that these are now areas of less immediate concern.

The future

32. I want to say something now about the future of dispute resolution as I see it. First and foremost, it is absolutely vital that judges in the UK, and across Europe are not complacent about the systems they operate. Our judiciaries need, I think, to be in the vanguard of reform to the legal process.

33. As I always say, in an era when people can get every kind of service instantly or at worst the next day by calling it up on their smart phones, it is inconceivable that they will accept, in the longer term, the delays that are inherent in almost all justice systems. We will need to move fast to develop Online Dispute Resolution and other forms of speedier alternative dispute resolution, before the millennials lose faith in the way the older generation is content to deliver justice.

34. In England & Wales, we have a major court reform project that is introducing Online Dispute Resolution for small claims up to £25,000, for divorce, for guilty pleas in criminal cases, and for many tribunal claims in relation to social entitlements and other issues. We should not kid ourselves that commercial disputes will not ultimately follow. We need to get our online dispute resolution processes right, so that they can take their place in the court structure to speed up the delivery of justice and bring our justice systems into the 21st century. The EU introduced its ODR platform last year, and it has had some success, but it is limited by the quality of ADR providers in different member states, and by the degree of acceptance of ADR in different member states.

35. There are other things that we, judges, need to do if we are to make good the promise to achieve the modernisation of justice. We need to ensure that we understand the smart contracts, the DLT and the AI that I was speaking about earlier. Many observers think that the interest of lawyers and judges in smart contracts will be about regulation, to ensure that the new contractual landscape does not escape the controls that keep the financial services industry safe. But for my part, whilst acknowledging that that is one side of the equation, I want to make sure that our courts can be a part of the solution. Smart contracts will, as I have said, require a legal foundation. You

cannot have 3 trillion contracts per year globally without expecting some of them to give rise to a dispute. We need to ensure that our judges are sufficiently educated in the legal basis of them, and in the computer code that underlies them, so that we can deal with these disputes and help to shape the legal environment in which these revolutionary developments will occur. We cannot just pretend that nothing is happening. Otherwise, we would not be serving the commercial community, which should be one of our overriding objectives.

36. There are other developing areas in the legal business world, with which judges need to engage. One of these is the growth in the use of predictive technology to forecast the outcome of disputes. This has been pioneered in the US, but has now very definitely arrived in Europe. My own view is that it is very useful for big business, because it can identify the most likely outcomes of uncertain litigation. It will not mean that litigation becomes a thing of the past, however, because "the" outcome as opposed "the most likely" outcome cannot be predicted, and anyway not all decision-makers, even in large commercial concerns, are entirely rational. They will still, I am sure, in some situations want to 'take their chances', motivated probably by other less measurable factors including human judgment and bare human emotion aroused by the dispute itself.

37. One final criticism that is often made of our common law system is our enthusiasm for the extensive disclosure of documents. Businesses know how time-consuming and expensive that process can be. This point was made to senior judges in England a couple of years ago by some of the leading General Counsel in Europe and the GC100. We listened, and we now have the recommendations of a Disclosure Working Group led by Lady Justice Gloster, which recommends an entirely new and less costly process for disclosure of documents. In essence, disclosure will only be required if it is truly necessary to achieve justice and the parties will be able to influence the disclosure regime that will be chosen so that it suits the features of the particular dispute that is being determined. This is a good development that will be piloted in the Business and Property Courts starting early next year.

38. As many of you may also know, we have introduced a Financial List to the Business and Property Courts that deals expeditiously with major market disputes, and has a procedure for determining market test cases when such determinations will assist the financial community. The Financial List has proved very popular for the biggest disputes, and I hope we shall be able to demonstrate our ability to resolve quickly and efficiently even

the most sensitive commercial issues as well after Brexit as before.

Conclusions

39. So, what I would like to say in conclusion is that the judiciary in England & Wales is not standing still. I hope it is not seen as complacent. It cannot afford to be. What I want to achieve is that we face up to the challenges that Brexit provides, and work with our European colleagues to achieve solutions that work for UK and European business.

40. I know how emotional a subject Brexit can be. I hope I will not have disappointed you by refusing to discuss the political aspects of Brexit. I have tried to explain why judges simply have to keep away from that debate. We will be deciding many cases in future about the legislation that gives effect to Brexit and about the problems that it throws up. We need to be able to do so independently. I can assure you we will live up that that expectation.

41. I have tried this evening, however, to put some flesh on the bones. We do, I hope, understand the problems, which should be the first step towards solving them. I would be glad to try to answer any questions you may have.

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