MASTER OF
THE ROLLS

THE RIGHT HON. SIR GEOFFREY VOS

ISDA Virtual Annual Legal Forum
Technological challenges for English law and jurisdiction

Wednesday 10th March 2021

Introduction

1. First of all, can I thank your CEO, Scott O'Malia for having invited me to deliver this talk this morning. Much as we all enjoy our new Zoom culture, I certainly hope to be able to meet many of you in person before too long.

2. My brief for this morning was to address first, the challenges to English law and jurisdiction that the judiciary is addressing and secondly, my work as chair of the UK Jurisdiction Taskforce in developing a mechanism for digital dispute resolution.

3. I took the precaution of looking back at what I said when I addressed ISDA's Technology Forum on 6 November 2019. I spoke then about 3 things. First, the uncertainty about the legal status of cryptoassets and smart contracts, which had dampened the confidence of main-stream investors in throwing their financial weight beyond these technologies. Secondly, I said that, whilst there had been much work done to develop on-chain payment methods for the wholesale banking markets, these systems were not yet widely available. Thirdly, I mentioned that no routine and simple dispute resolution process had been developed for use with smart contracts and transactions involving cryptoassets and blockchain.

4. I expressed the view on that occasion that, if these three things were readily available, it would be transformational for the industry's confidence in the use of new technologies. Each would, in their own way, give legal security to investors and traders alike.

5. It is worth revisiting briefly each of these areas.

The Legal Statement

6. First, the UKJT did indeed publish its Legal Statement on the Status of Cryptoassets and Smart Contracts at the end of 2019. I think I can say, without too great a fear of contradiction, that the Legal Statement has had the desired effect. It expressed an authoritative view that cryptoassets were properly to be regarded in English law as property and that smart contracts were legally enforceable contracts. It does not sound ground-breaking, but it actually was, because of the uncertainty that previously existed.

7. Moreover, since then, a number of courts in England & Wales, Singapore and New Zealand have quoted the Legal Statement with approval. It has, as was intended, moved the debate forward.

CBDCs

8. As regards progress towards a Central Bank Digital Currency (CBDC), that has not been as rapid as might have been expected. China has trailed its digital yuan as a retail digital currency, and other countries have experimented with wholesale CBDCs, but no central bank has yet launched a mainstream CBDC.

Digital Dispute Resolution Rules

9. There is, however, I am pleased to say, progress on the third front. The UKJT has just concluded its public consultation on its draft Digital Dispute Resolution Rules. The idea is for the Rules to be incorporated into on-chain digital relationships and smart contracts. They provide unusually for arbitral or expert dispute resolution in very short periods, arbitrators or experts to implement decisions directly on-chain using a private key, and optional anonymity of the parties. It is expected that the final Digital Dispute Resolution Rules will be published in the next 3 weeks. Once the Rules are launched, it is hoped that the market will rapidly embrace them as a new and appropriate method of resolving disputes in the crypto space.

10. The Rules themselves are simple and adaptable. The key objective is to allow those using on-chain transactions to take full advantage of the flexibility offered by UK arbitration to tailor dispute resolution procedures to the distinctive features of smart contracts and cryptoassets and to ensure that their disputes will be resolved quickly by arbitrators with appropriate expertise.

ISDA

11. Let me try to try for a moment to show how these developments can inter-relate with the excellent work that ISDA is doing in the same space. Whilst the ISDA Master Agreement makes no mention of smart contracts or of distributed ledger technology, I know that ISDA sees derivatives as fertile territory for the application of smart contracts and DLT, and has published a series of legal guidelines and white papers on smart derivatives contracts and smart contract technology. I hope, as the market starts to take up mainstream usage of on-chain derivative contracts, it will consider the UKJT's Digital Dispute Resolution Rules, as one possible and reliable method of dispute resolution.

12. A connected development is, of course, ISDA's Common Domain Model which attempts to tackle the lack of standard convention in the digital representation of each event and process in the lifecycle of a derivative trade. It is expensive and time consuming to have continually to reconcile data to ensure that parties to a trade have the same information.

Digitisation of Commercial Records

13. With these things in mind, I can perhaps move on to look more generally at the digitisation of commercial documentation. It will be recalled that the UNCITRAL Model Law on Electronic Transferable Records was concluded in 2017 and aimed to allow electronic transferable records to be utilised across borders. They replicate paper-based transferable documents and instruments including, for example, bills of lading, bills of exchange, promissory notes and warehouse receipts. In essence, the Model Law provides that an electronic transferable record is functionally equivalent to a transferable document or instrument if (a) the record contains the information required in the paper version, and (b) a reliable method is used to (i) identify that electronic record as the electronic transferable record, and (ii) render that electronic record capable of being subject to control from its creation until it ceases to have

any effect or validity; and (iii) retain the integrity of that electronic record (see articles 10 and 11 of the Model Law).

14. Control of the electronic record is the fundamental notion, because it represents the functional equivalent of possession of a transferable document or instrument.

15. Since 2017, only 3 states have enacted the Model Law: Bahrain in 2017, and Singapore and Abu Dhabi in 2021. The Singapore Parliament did so on 1 February 2021 by passing the Electronic Transactions (Amendment) Act 2021 introducing the Model Law with certain modifications.

16. On 3 September 2019, the Law Commission here in the UK published its report on the Electronic Execution of Documents recommending the establishment by the Government of an industry working group with multi-disciplinary membership to consider practical issues relating to the electronic execution of documents and deeds. That working group is now starting work under the chairmanship of Lord Justice Colin Birss, the Deputy Head of Civil Justice.

17. Meanwhile, the Law Commission plans to publish a further consultation paper later this month on electronic documentation. It is likely, as I understand the position, to consider recommending decoupling tangibility from possession, so that if an electronic document meets certain criteria it will be deemed capable of possession, even if it is not regarded as tangible, even though everything, intangible or not, is not necessarily to be regarded as possessable. I hope that it may also be consulting on potential legislation to facilitate the use of electronic documentation under English law.

18. In addition, Lawtech UK, under whose auspices the UKJT operates, is looking (a) to demonstrate how machine-readable legal documents can work in practice, (b) to obtain endorsement from industry and public bodies for the use of smart contracts in certain public sector use cases, and (c) to create a strategy to scale the implementation of smart contracts across the UK.

19. The key to all these projects is to ensure that electronic documentation can be used and transferred safely and reliably, without the risk of duplication. The problem (and in some respects the benefit) of data is that it is non-rivalrous, meaning that it can be duplicated and sold to more than one buyer without necessarily losing its intrinsic value. But electronic documentation will only become accepted in the market when electronic transferees are confident that they are the one and only recipient of the valuable document of title or whatever is being electronically transferred.

20. Taken together, the developments of which I have been speaking are, I think, of considerable significance. They demonstrate the capability of English law and the UK's jurisdiction to move rapidly to adopt, and adapt to, new technologies. The objective must be to show how the UK can be one of the most attractive global jurisdictions for international financial markets and digital trade generally. The reliability of the English common law will support this objective and encourage overseas parties to continue to use English law and jurisdiction in financial market transactions and developing smart contracts.

Litigation and arbitration in London

21. I want to say something now about London as a centre for international dispute resolution – by litigation and arbitration - after the UK's departure from the European Union.

22. Once again, I think the prospects are good. None of the fundamentals that attracted the international business and financial community to the Business and Property Courts in London over the last 50 years have changed. It is always as well to recall what those fundamentals actually are. They are the integrity of the judges and the arbitrators, and the certainty and reliability of the English common law. English law also has the agility to develop incrementally to deal with new commercial situations as and when they arise. That latter aspect is of particular importance in the context of smart contracts and DLT as I have tried already to explain.

23. Some aspects of London's litigation offering are also unique. For example, our Financial List, allows parties to bring test cases speedily to resolve issues of great market significance. This was epitomised by the recent case concerning insurers' liability for business interruption caused by Covid-19 that was decided by both the Financial List and the Supreme Court within a record breaking 6 months between July 2020 and January 2021. So far as I am aware, no other jurisdiction offers this service to international financial markets.

24. In addition, our regular courts are not standing still. In my new job as Head of Civil Justice, I am hoping to create a universal online point of entry for civil cases to enable a single data set to be created, used and enhanced throughout the life of the case. This is currently being developed for small claims, damages and possession claims, but I fully expect it will be extended over time to all civil claims, both large and small. Once all claims are started and pursued in the online space, one can integrate alternative dispute resolution interventions into the process, so as to ensure that they are resolved at the earliest possible opportunity and at proportionate cost. As I see it, we must concentrate on the resolution rather than the dispute.

Artificial intelligence

25. Let me say now a few words about the use of artificial intelligence in the legal market. In this area, I would say that FinTech is ahead of LawTech. Lawyers are suspicious of artificial intelligence because they suspect that the ultimate objective is to replace legal advisers, and even judges, with algorithms. I have to say that I believe that these fears are misplaced.

26. I would accept that the creation and algorithmic processing of big data requires careful governance. There are obvious risks of bias and an inability to be able to understand or explain outcomes. But these risks do not mean that we should be afraid of technology that will transform business and access to justice.

27. Simple automation will be a great advantage within the justice system. It will allow businesses and individuals to vindicate their legal rights more expeditiously and economically. It must be remembered that the vast bulk of legal disputes are not ultimately contested. But the failure to resolve them quickly and economically has great economic cost. That is why I am so enthusiastic about online dispute resolution and online ADR. The approximately 3 million civil disputes that come to the courts or to ombudsmen or other formal dispute resolution mechanisms each year in England & Wales is to be compared with the 60 million disputes each year resolved on eBay with great user satisfaction.

28. We can resolve many more disputes more cheaply and more quickly if we embrace the appropriate use of AI. The lawyers and judges will hardly notice, because they will still be needed for the most complex and high value issues that will still inevitably require to be resolved.

29. The cost to the economy of lingering unresolved disputes in all areas of our society is an unspoken and largely hidden reality. Matrimonial and children disputes, small business disputes, and disputes with government agencies all create economic drag. They stop real people and real employees concentrating on their work and on their business. The psychological effect of dispute in all these areas is far more significant than many realise. Effective online systems that resolve disputes will improve access to justice and create economic gains.

Conclusions

30. I concluded my last contribution to an ISDA event by noticing that the public image of the judiciary is of a conservative (small 'c') group that is resistant to change. In the modern world, that is a little unfair.

31. The judiciary intends to do all it can to produce a legal system in England and Wales and a court-based dispute resolution system that embraces new technologies, and allows disputes arising from the financial markets of tomorrow to be resolved quickly and efficiently and at proportionate cost.

32. I return, as I always do, to the plea that we should allow English law to do what it does best. It can and will adapt to ever changing commercial situations in the technological space.

33. Many thanks for your attention.