

“We should pay our judges more, but saying £200,000 is not a good salary isn’t a vote winner.”



DAME ELIZABETH GLOSTER | ONE ESSEX COURT

Since retiring from the Court of Appeal in 2018, Dame Elizabeth has practised as a full-time arbitrator at One Essex Court. She also chairs the cross-profession body Legal UK and is a judge of the Abu Dhabi Global Market Courts and a Justice of Bermuda’s Court of Appeal.

What have been the most significant changes in commercial disputes over the last five years?

There’s been a huge shift towards arbitration and away from commercial litigation. I am surprised by that. The amounts in dispute seem much, much larger.

What’s driving that?

The parties themselves want greater control over the process, which arbitration gives. I don’t think arbitration is any cheaper – it can be much more expensive – but parties like control and knowing their arbitral panel in a way they won’t with a judge. The trend may have something to do with solicitors feeling more comfortable appearing as counsel in arbitration.

Considering litigation, what trends have stood out to you?

It’s reflective of larger society. After the financial crash, we had a lot of insolvency cases – that reduced considerably over my time at the Court of Appeal. We had a lot of big banking cases. I suspect the picture has changed in the last three years and obviously because of Covid, but there’s still a lot of Middle and Eastern European cases where people have fallen politically out of favour and are being pursued or sued by the state.

The English courts have a reputation for supporting arbitration – you see that continuing, presumably?

Absolutely. The English courts are very keen to get their judgments out to support arbitration. *Enka v Chubb* [the 2020 dispute on the governing law of arbitration agreements] is a good example where all three courts churned out the judgments in rapid time. The English courts appreciate they are not here just to deliver wonderful models of legal judgments – they are there to provide a service to corporate businesspersons.

Will London retain its status as a global dispute resolution centre?

Absolutely. There is a lot of puff about competition elsewhere. I don’t think Brexit is going to make much difference. People traditionally come to get their business disputes resolved in London, not because the UK is a member of the EU. If we don’t sign up to Lugano [the convention on enforcing judgments], there may be a problem about mutual enforcement within the EU, but we managed perfectly well before. Member states should appreciate the need for mutuality and recognition.

“English law and dispute resolution is a huge asset to UK plc – the government needs to appreciate that.”

Where does London need to work harder as a jurisdiction?

UK decision makers, Government, the Treasury, need to appreciate the importance of English law. I'm talking about the huge asset English law and dispute resolution is to UK plc. The fact that English law and English language is used in contracts throughout the world is something that supports not just lawyers, it supports the financial industry. Parties also know they will get impartial resolution of disputes – not pro-government rulings. English judges are fiercely independent.

Quality of judges has always been seen as a bedrock of the English courts. Is the Bench getting enough investment to ensure standards for the next decade?

We should pay our judges at the higher level. I can say that now having come out the other end. You asked if there's a brain-drain – there have always been people reluctant to go on the Bench. Now the money and the pension aren't that good, but there's no votes in saying over £200,000 is not a good salary for a judge. But it is the best job in the world. I loved it and I was taking a wage cut and a lot of people think like that, but some don't. Some money could be thrown there, but I appreciate that's probably politically unacceptable.

You've been sitting in the Abu Dhabi Global Market Courts. How much scope do you see for Middle Eastern courts to develop?

It's an example of where the English commercial court business model or the Singaporean model is being replicated in places in the Middle East. Lord Hope asked me to join. I found it absolutely a riveting experience because they are setting up new systems, a new court. They're not modelling themselves on the DIFC Courts – Abu Dhabi's a very different place from Dubai. It's set up not just as a commercial court but also an arbitration centre in the same building. When one is thinking about this as a young jurisdiction, it's seeking to promote itself. The English courts can learn from this as to how one does establish a business and trumpet what one does well.

Turning to the courts and their use of technology, how well has that gone?

We were using technology in the commercial courts, way back. I did the Abramovich/Berezovsky case in 2012 and we had wonderful technology. Everything was electronic. We were doing video conferencing for trials then. The technology has been there, but the pandemic has opened our eyes to the fact that technology is not our master – it's our slave, and we can use it. It's changed the way of doing things and that is such a good thing, because people are demanding much better video platforms.

With cross-examination, there is the question of if you really can tell if someone is lying on screen. I think you can. I've done some witness actions on the screen – it's better in a way than court, because you can see them more closely.

You oversaw the Commercial Court moving to the Rolls Building – how well do you think that facility has positioned the London courts?

It was a very important promotion of the English Commercial Court, with the ability to have computers in court and to present in a modern way, rather than in the RCJ. I thought it was fantastic – I was just sad we couldn't also have an arbitration centre there.

“The English courts can learn from Abu Dhabi as to how to establish a business and trumpet what one does well.”

Is the Rolls Building slick enough? Some argue Singapore has invested more heavily.

I really don't think the Singapore court building is superior to the Rolls Building. My experience of technology in Singapore is actually not as great as I've had in arbitrations in London.

What are you expecting of disputes in the next three years?

Obviously, there's going to be a lot of insurance work arising out of the pandemic. With the fall in oil prices, there are going to be a lot more energy disputes and insolvency – a lot of issues arising out of loss of money, loss of contracts, force majeure. Also, price disputes. People fight when it's better to fight than settle.

How well will case law hold up to the pandemic? Will there be a lot of uncertainty to be resolved?

The great thing about common law is it's very flexible. English law is quite clear and the fact that the pandemic or unforeseen circumstances raise uncertainty, I don't think is going to undermine the utility of English common law. Look at the contract: what does it say about allocation of risk? The great thing is because it's so commercial, it recognises allocation-of-risk, it leaves parties to decide for themselves where the risk should lie, rather than intervening with the court's view. That is English common law's great strength.

So, you'd expect English law to retain its popularity for contracts come 2030?

Absolutely, but I would say that, wouldn't I? We can't be complacent, but there's a huge message that needs to be gotten out.

You chair Legal UK. What has it achieved so far and what are your future ambitions?

We have raised the awareness within Government of the huge value that English law and the rule of law brings to the economy. There are all kinds of ways of raising awareness. We should be hosting the most technologically advanced conferences. This is not just promoting lawyers – this is promoting the value of English law.

Any plans for projects you want to work on?

We are working on a report by economists to demonstrate the wider value of English law. It's not just looking at the money which lawyers contribute to the economy by invisible imports or exports, it's not just looking at fees directly generated. We are trying to demonstrate the wider contribution that English dispute resolution makes in supporting the economy generally. Why do financial markets have their centre in London? It's also because of the whole legal infrastructure. The project is to get funding for a report which we can share with Government, much in the same way as the fashion industry did some time ago, which demonstrated that when you're talking about the impact of fashion on GDP, you're not just talking about the business of selling clothes, there's a whole infrastructure out there.

Sir Geoffrey Vos has spoken of the need for the UK courts to stay current with areas like smart contracts, crypto assets and AI. How significant do you think those areas will be?

A huge amount of progress has been made in England with smart contracts. We are in the forefront here as a matter of law. There's a lot of research going into artificial intelligence. One's got to be at the forefront. It's all terribly exciting. If it makes lawyers redundant at the end of the day, so be it, but I don't think for a moment it will. I may have to eat my words in 10 years' time. Geoffrey's absolutely right to say we need to be using this technology.

Do you see radical change for the litigation environment?

People are always banging the table and saying: "We must have dispute avoidance!" I cannot see people are suddenly going to get all warm and fluffy and not want to litigate. The way we can do it can change, because of technology and people's need for immediate results. People's expectations about fast delivery have changed dramatically. But do I think it's going to change so we won't recognise it? No, I don't.

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