THE SLYNN FOUNDATION LECTURE 2018

The approach to the complex issues that arise in the context of Brexit and of the importance of legal services and dispute resolution to the UK economy

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Introduction

1. As you all know, the Slynn Foundation has as its aim the improvement of justice systems in the rule of law, the enhancement of the professional understanding of human rights, mediation, and European law and practice. It has over the years done so much for other countries.

2. Over the past few months three of its great protagonists have died – Sir Henry Brooke, Sir Brian Neill and David Vaughan. Each was indefatigable in striving for what they believed in and each achieved a great deal. Of David Vaughan's many achievements, his establishment of the Bar European Group in the 1970s and his overseeing of its subsequent development was hugely influential; as a very young junior I recall the almost universal disinterest in the future effect on our law of entering into the then Common Market and his stalwart determination in the face of that disinterest. You can go nowhere in Eastern Europe without praise for the work of Sir Henry Brooke and Sir Brian Neill each vigorously fought for justice. Henry Brooke was engaged in this to the very last; his tweets and blog were always to the point and his contribution to the examination of access to justice for the Bach Commission was rigorous in its analysis. Sir Brian's contribution was especially important in the field of digitalisation; that interest never waned; it was wonderful to see him last summer at a hackathon where ideas for access to justice through digitalisation were tested.

The scope of the lecture

3. When invited to give this lecture last year, the Slynn Foundation and I agreed the title S*ome aspects of the legal issues and implications of Brexit for the UK and for Europe*. We did so because we could not predict at what stage the negotiations would be on 5 March 2018 - the date fixed for the lecture. I am very glad we were so cautious, particularly as I am delivering this lecture when the Withdrawal Bill is on the fourth day (out of at least 10) of its Committee Stage in the House of Lords and the nature of the future relationship with the EU is unresolved – indeed the negotiations on this are yet to begin.

4. The subject is, in any event, a vast one as it becomes increasingly patent how large are the number of important issues which arise, how they will affect almost every aspect of life and how complex some of them are. It is perhaps striking that the matter on which the greatest clarity has emerged over the past months is how difficult, multifaceted and complex the issues are. I therefore decided that what might be most useful is to look at the issues from the perspective of the importance of legal services and dispute resolution to the UK economy, the importance of the work that UK lawyers do in strengthening the rule of law and access to justice worldwide and the need to resolve our future working relationship as lawyers with the EU and other European states.

5. Even after narrowing the subject in that way, I want to narrow the scope still further, as what I want to do is to look at the way in which the UK should approach identifying the major factors which will impact on the economic position of legal services, the international work done to strengthen legal systems and our future working relationships with Europe. I will therefore look at what I think is fundamental, even at this very late stage of the process of Brexit, namely the right approach to issues rather than setting out an extensive analysis of views on them. There are three reasons for this.

    (1) The only real area where policy has been set out in detail as it affects legal issues relates to the EU Withdrawal Bill. It has a very narrow purpose – putting the UK statute book into a workable form after Brexit, on the assumption that there is no further agreement. It contains important principles, but it is ultimately a fall back piece of legislation. The debates on this Bill have ranged far and wide for perfectly understandable reasons as it is the main vehicle for Parliamentary debate on Brexit. But it must be remembered that its purpose is narrow and the issues are subtle and complex. This is exemplified in the careful drafting of the Bill, the explanatory notes and the reports of the House of Lords Constitution Committee and the Bingham Centre for the Rule of law and other papers. Vital though these issues are I do not think visiting them here tonight is helpful to a discussion of the approach that should be taken to the position of the economic contribution of legal services to the UK economy. One issue is, however, relevant and I will come to it. What is of greater importance is how we should approach broader issues in relation to the future relationship that are still for decision.

(2) Although there was the initial agreement in December 2017 between the UK and the EU, there is at present little specific about the future, even after the Prime Ministers' speeches, including the one on Friday 2 March 2018 at the Mansion House. This means there is little to examine, as, without specific proposals, it is impossible to gauge the effect of any particular arrangement on the future of UK legal services and UK dispute resolution or the wider aspects of the work of the UK legal profession in strengthening the rule of law or the future relationship with European lawyers.

(3) The examination of the issues that arise, the narrow task of putting the statute into a workable form and the wider debate that has emerged in relation to issues such as participation in Euratom, the Erasmus programme, university research, quite apart from the effect of non-tariff barriers to trade, has demonstrated, if it had not been properly appreciated before, that the task of dealing with these issues is one where there can be only one approach – rigorous and, I add with emphasis, open analysis and debate.

6. It is therefore to that issue of open analysis and debate that I wish to devote this lecture - the need for decisions on the best approach to maintain the strength of the economic contribution of the legal services industry and the ability to strengthen access to justice and the rule of law internationally must be based on analysis arrived at by open discussion. That analysis will undoubtedly show that continued deep engagement with the other states of Europe will remain a central task of UK lawyers. The issues I am addressing are now accepted to be extremely difficult. It must follow that the best solution can only be arrived by open debate, identification of the options and a pragmatic evaluation of the pros and cons of each.

7. At first I had thought that as there was to be a negotiation, open discussion would be limited by the conventional approach to negotiation. However, I was mistaken, for the negotiation is not of the conventional kind as it is being in effect conducted in public. In these circumstances, given the complexities and importance of the issues, there is nothing to be lost and an enormous amount to be gained by open analysis and debate.

8. I will attempt to illustrate this by taking four subjects.

(1) Jurisdiction and enforcement

9. The first subject is jurisdiction, enforcement of judgments and extradition - one where agreement on the exact nature of the future trading relationship in goods and services does not matter. Whatever is agreed about the trading relationship, there has to be agreement on these issues and the options ought now to be clear, the subject of analysis and open discussion. Its importance to legal services and dispute resolution is obvious; I do not need to tell those present about the competition the UK faces. But it is important also as illustrative of the approach the government should take in relation to other issues and to the work necessary on the future development of the rule of law internationally – the role of the judiciary as the branch of the state in taking responsibility for aspects of interstate relations in relation to enforcement of judgments and extradition.

10. Although the EU has brought together the judiciaries of the Union in a way that is unprecedented outside federal states or states with more than one jurisdiction, there has recently been a tendency for judiciaries to work together internationally as independent branches of the state rather than leaving matters to the executive government. For example, in the field of family justice it became apparent that urgent problems relating to children taken to another jurisdiction could not be resolved without a creating a network of judges who could explain to their colleagues dealing with a particular case in two different jurisdictions the processes that needed to be gone through and who could act as a liaison between the judges; Thorpe LJ did much to create this. The creation of the Standing International Forum of Commercial Courts in May 2017 is another example of direct relationships between judges that will over time facilitate close co-operation that will undoubtedly be important in many areas such as the practicalities of enforcement of judgments and arbitration awards. Much can be achieved by direct co-operation between judges of different states.

Civil (including family)

11. Immediately after the Brexit referendum in 2016, it was apparent that one of the most important issues directly affecting dispute resolution in the UK was the recognition of jurisdiction clauses and the enforcement of judgments, as the Brussels Regulations would have to be reviewed. The judiciary working with the legal profession set up a committee under the chairmanship of Hamblen LJ to analyse the various options. It did precisely what was asked of it and produced a detailed paper and with a summary for public circulation. In the autumn of 2016 it was presented to the government. A separate report based on this was provided for family work.

12. On 22 August 2017, the government published its policy paper on this issue entitled *Providing a cross-border civil judicial cooperation framework*. This paper paid careful heed to the report of the Committee chaired by Hamblen LJ; it set out a clear analysis and came to a conclusion based on dispassionate and objective factors. Although I say nothing about the speed of the production of the paper, as Brexit involves an immensely complex number of issues and the civil service is stretched beyond its limit, I would like to pay tribute to the analysis. One example suffices; at paragraph 18 it states:

> existing international conventions can provide for rules in some areas but they would not generally provide the more sophisticated and effective interaction, based on mutual trust between legal systems, that currently benefits both the EU and UK businesses, families and individual litigants. The optimum outcome for both sides will be an agreement reflecting a close existing relationship…

13. This passage shows that it had clearly been understood that the regime between the states of the EU was different to traditional interstate enforcement regimes in that it was founded on mutual trust between judges which had been built up over the years and through the close relationships that had been developed. The publication of the policy paper gave confidence that the government understood the basis of the arrangements, that they had made the position open and public, that it was important to the position of the UK as a dispute resolution centre and there was an important issue for the development of judicial cooperation between the judiciaries of different states. Even though there were issues such as the role of a supervisory court which were not addressed, perhaps at that time understandable for political reasons, but nonetheless unfortunate, it is an example of the kind of work needed, but which urgently needs to be taken forward in respect of a supervisory court or other arrangement for resolving differences.

Criminal

14. Another important part of the judicial cooperation system that has been developed since 2002 is the European Arrest Warrant (EAW). Although it is a system for extradition (to use the UK term) or surrender (to use the European term), it operates in a way that is quite different to ordinary extradition arrangements. The EAW regime is under judicial control in its entirety rather than on an Inter-Governmental basis. The transfer of this function entirely to the judiciary was a deliberate change from the 1957 European Convention on extradition which was premised on the normal pattern of extradition treaties operated between governments of states.

15. The way in which extradition between the states of the EU has developed is, in my experience, much more akin to the operation between the states in the United States and between Scotland and Northern Ireland and England and Wales. It has been reinforced by extensive judicial cooperation through conferences, meetings and other arrangements where the judges work closely together to make the system operate smoothly wherever possible. For example, the judiciary of England and Wales helped lead a EU funded project to improve such cooperation, as the UK has such a significant interest in preventing the UK being used as a refuge for criminals; a significant amount of work was done directly with the Polish judiciary. The importance of extradition arrangements to national security are obvious; but it is also the importance to the integrity of markets that those who commit crimes can be expeditiously, inexpensively and above all, fairly dealt with. As the Prime Minister said in Munich on 17 February 2018:

> Extradition outside the European Arrest Warrant can cost four times as much and take three times as long.

16. In July 2017 the House of Lords European Union Committee which has produced a number of excellent reports produced a report on the EAW to which the government responded in December 2017. The response was far more general in analysis than the paper on civil jurisdiction and enforcement.

17. It is clear that what is needed is an analysis of the way in which the high volume of business under the current arrangements of judicial cooperation and judicial supervision can operate after Brexit, based on a firm appreciation that the arrangement operates under judicial control which is very different to the intergovernmental arrangements with states such as the USA, where in my experience real and substantial problems arise and are difficult to resolve. Tonight is not the occasion (for the reasons I have given) to make that analysis, but it is of critical importance that this is done so that the various options, including the role of the CJEU can be properly and dispassionately be considered. There are no easy answers but there are a range of potential solutions, including one that does not involve supervision by the CJEU, for it must be recalled that the EAW regime was developed and operated very successfully when the CJEU had no jurisdiction in respect of extradition to and from the UK until 2015.

18. By far the best way of achieving this is open debate and close and open consultation in the production of an analysis. Unlike other matters to which I will turn, extradition arrangements do not ultimately depend on the trading relations between states. It is therefore unclear why this issue has not been analysed and tackled in the same way and by the same process through which the issue has been tackled in civil and family matters, for experience of the practical

operation of these regimes shows that the issues are very similar. If an arrangement can be made that provides that extradition can be a matter which can be dealt with on an interstate basis directly by the judiciaries of each state, it has important implications for the rule of law internationally quite apart from our future relationship with Europe.

(2) **Interpretation of retained E U law**

19. I turn next to examine a subject which arises on the Withdrawal Bill and the provisions designed to retain the law made in consequence of membership of the EU as part of UK law – now referred to as "retained EU law". As I have said there are many complex issues to which great thought has been given in the drafting of the Bill and in the reports to which I have referred. Few issues are of essential relevance to the scope of what I wish to say, but the subject of the interpretation of retained EU law is of importance because it is vital to the standing of English law and the attractiveness of London as a dispute resolution centre. That is because the independence of the judiciary must not be undermined through ill-informed political attack on judicial decisions. We have had one such attack which received worldwide publicity. In an era of "fake news", it could be very damaging if Parliament did not act to ensure that to the greatest extent possible the judiciary is protected from attacks on its decisions when they relate to as divisive a subject as Brexit and the European Union on which passions run so high.

20. There are other reasons why a proper analysis through open discussion is essential. For example, we need to think through the implications for the UK legal system and its attraction to others as to the ambit in which English law should develop its own system of retained EU law in contradistinction to the EU system of EU law. There may be advantages; there may be disadvantages, but an informed choice needs to be made, putting to one side understandably passionate views about the CJEU as one of the institutions that has helped shape the European Union as an ever closer union.

21. It is envisaged in clause 6 of the Withdrawal Bill that after departure from the EU (save in one or possibly more special circumstances), the courts of the UK will no longer be subject to the jurisdiction of the CJEU. As courts of a sovereign state, the courts will be free to interpret the law of the EU made part of UK law as retained EU law. There are, I think two closely related problems that need consideration – the principles of interpretation of that retained law and the use of EU case law in its interpretation.

22. The first problem relates to the principles of interpretation to be applied by the UK courts to retained EU law as it is legislation which is very different to ordinary UK legislation. UK legislation is generally tightly drawn; Parliament generally does not like to duck decisions on legislation and leave an issue to the judges. In contrast, EU legislation is less tightly drafted, the text sometimes left without a clear intention so that the court can resolve a difficulty which could not be agreed at the drafting stage – I have been present at a meeting where precisely this approach was adopted. Furthermore some provisions will have been drafted in the context of ever closer union or the strengthening of the internal market or in the expectation that it would be interpreted by the CJEU to give effect to such a purpose or other purposes that may no longer be relevant to the UK in the context of departure from the Single Market or customs union.

23. Thus there must be clarity as to how general principles of interpretation set out before Brexit by the CJEU will be applicable after Brexit. Clause 6(3) provides that such principles will apply. It would appear to follow that such interpretive principles were to apply even where the principles were formulated by the CJEU having regard to the need for internal market freedoms (such as free movement of goods and people) or ever closer union which might no longer be applicable if the UK was not a member of the single market or did not enjoy a trading arrangement with similar effects. It would, however, be open to the Supreme Court under clause 6(5) to depart from such decisions and set out its own code of interpretation, a clause to which I shall return.

24. The second related problem is the use of CJEU case law. The Prime Minister summarised the government's position in her speech in the Mansion House on Friday 2 March 2018:

> That means cases will be determined in our courts. But, where appropriate, our courts will continue to look at the ECJ's judgments, as they do for the appropriate jurisprudence of other countries' courts. And if, as part of our future partnership, Parliament passes an identical law to an EU law, it may make sense for our courts to look at the appropriate ECJ judgments so that we both interpret those laws consistently.

25. This second problem needs a little further explanation in relation to the use of CJEU case law in interpreting retained EU legislation enacted before Brexit, though I will return later to the issue on the interpretation of new legislation passed after Brexit.

    (1) In the interests of legal certainty the Withdrawal Bill provides that the UK courts must follow the decisions of the CJEU made prior to Brexit, though the Supreme Court is given the power to depart from those decisions on the same basis as it is able to depart from its own decisions and those of the House of Lords – the practice statement of 1968 and

the case law on it. It is obviously right that existing case law is upheld as binding as there would be no certainty if issues could all be re-litigated.

(2) But where there is no decision of the CJEU prior to Brexit, then no UK court nor tribunal is bound after Brexit by any principles laid down by or decisions made by the CJEU. Clause 6(2) further provides that a court "need not have regard to" a decision after Brexit", "but may do so if it considers it appropriate to do so".

(3) It is suggested that there are two analogies that might guide a court on the approach to this provision. First that the courts from time to time look at the decisions of other jurisdictions to help them decide cases. For the most part courts do this for the development of general principles or when considering the scope of conventions conferring human rights. In the present context that is not an entirely apposite analogy, as the courts would be looking for the most part at CJEU decisions for its views on the interpretation of specific legislation made by the EU.

(4) Second, although there is significant case law which stresses the need for uniform interpretation of international conventions and therefore the desirability of UK courts taking very much into account decisions of overseas courts on international conventions to reach a uniform interpretation, that also does not provide a real analogy which will help the courts. That is because EU law is not an international convention universally applicable and for which uniform interpretation is necessary and desirable, but a law of a union of states from which the UK has departed because it does not want to have uniformity in every circumstance, though uniformity of interpretation may be desirable in some cases. For example, if it was set out in any agreement setting out the terms of Brexit that there should continue to be complete alignment between UK and EU policy as had been expressed in an identical pre-Brexit text, the courts would help no one if the same text were to bear two different meanings or there be potential for the same text to have two different meanings.

(5) As neither of these suggested analogies is really apt, and the position may be more akin to the position arising on state succession (such as occurs when a colony gains independence), the courts will be put in the position of having a wide discretion emphasised by the use of the term "appropriate", with the only apparent steer that they need not have regard to CJEU case law, but they can if they want.

(6) In my view this provision has rightly been regarded as placing the judges in the position where the only indication given to the judges is a clause that appears to create a presumption against following decisions of the CJEU. Judges therefore would have to

make decisions which may well be perceived as political, for example aligning the UK with the CJEU interpretation or departing from it in the particular circumstances of each case. Alignment is, however, a political not a judicial decision.

26. In respect of both of these related problems, it is in the end the legislative policy that is to be pursued post Brexit in relation to specific issues which should be determinative of any change to post Brexit interpretation of legislation made by the EU prior to Brexit and kept unamended as retained EU law. Prior to Brexit, the decisions of the CJEU were determinative of interpretation; it is difficult to see why post Brexit where the retained legislation has not been changed, such decisions made by the CJEU which has such experience of interpretation of such legislation should not be of great persuasive weight. But it should be for Parliament to say this, if it is what Parliament intends. However, it is not in my view right to leave to a court the making of the decision. The court would most probably be the Supreme Court as it is the court that can depart from CJEU decisions which determine the approach to interpretation. In my view it is not right, in cases where no change is made to retained EU law, to leave to it the decision whether new principles of interpretation should apply because principles laid down by the CJEU premised on the objective of ever closer union or single market freedoms are no longer relevant interpretative considerations in the UK.

27. In my view the judiciary should not be placed in the position of deciding for itself what interpretative approach to follow on a given issue where the decision may well be political. For example, there are those who may take a view that there should be close alignment on a particular issue and others who take a view that the UK should strike out on its own. The choice is a political one, not one for judges. The dangers in leaving the choice to the judges is that their position might be undermined if they are perceived to be making political decisions in circumstances where the disputes in relation to Brexit have raised such passions and where there is no sign of such passions diminishing.

28. There are various suggested solutions that need much more open debate and analysis, as this issue is so important to the future position of the judiciary. May I mention some:
    (1) The choice of interpretative approach could be made by reference to the policy decision made in respect of particular matters as set out either in (1) the amendments to be made to EU legislation under powers granted in the Withdrawal Bill or (2) expressed in the final agreement reached with the EU and given a format of Parliamentary approval to give it the force of law. It could be provided that if a change was not made, then the retained EU law

was to be interpreted without any departure from existing principles of interpretation. If this were not an acceptable solution, then the courts could be given assistance as to how they are to determine how legislation is to be interpreted, for example where the issue related to alignment, whether to continue alignment or not.

(2) In the various proposed amendments to the Withdrawal Bill (which may be debated in Committee in the House of Lords this evening), it has been suggested that decisions of CJEU after Brexit should be regarded as "persuasive" or that UK courts "must have regard to" them if "relevant"; and in determining relevance, the court should have regard to any agreement between the EU and the UK which the court considered relevant.

(3) Clause 6(2) could be omitted altogether. On at least one view clause 6(2) is worse than nothing as it is means that a judge is more open to criticism if the judge follows a CJEU judgment than if there was no clause 6(2). That is because the present clause appears to create a presumption against following CJEU decisions, whereas the absence of any clause 6(2) would at least mean that it was an open question whether to follow CJEU judgments.

(4) Clearer interpretative guidance could be given because of the particular circumstances of Brexit and the particular way in which EU legislation is crafted, so that the leaving of what is in effect a policy decision on differing political issues is not a decision for the judges. It would form no precedent for ordinary Parliamentary legislation, if Parliament did, as this is a unique circumstance.

(5) Moreover it would be an important demonstration for the international rule of law that policy decisions of a political nature should not be left to judges; it would also provide clarity for the UK's relationship with the other states of Europe.

29. As the theme of this lecture is what is needed is detailed analysis and open discussion, I hope that these issues and the choices they reflect will be subject to open analysis and discussion. It is essential that Parliament arrives at the right solution as that will not only protect the independence of the judiciary, but also be an important demonstration for the international rule of law that policy decisions of a political nature should not be left to judges and of a determination to achieve that clarity which is so important to the future of trading and other relationships with the EU.

(3) Amending retained EU law to make it operable after exit.

30. The next subject I take is the way in which retained EU law is to be amended to make it operable after Brexit.

31. Much has been written about the number of legislative provisions which need to be changed to make the retained law operable after Brexit and whether this should be done by traditional subordinate legislation or by primary legislation or by some new method. It is, in my view, quite apparent that it is impracticable to make all the changes by primary legislation, but equally wrong to make a considerable number of the changes without detailed parliamentary scrutiny either through primary legislation or through properly scrutinised secondary legislation. In the *Scarman* lecture I gave last summer, I urged the need to consider some new format for legislation, particularly secondary legislation so it can be amended by Parliament as it is scrutinised and the use of the Law Commission and the Parliamentary procedures in respect of its work. There are a number of reasons for this; may I mention four.

    (1) There are a number of important changes to make Brexit operable which it would be inappropriate to make without proper Parliamentary scrutiny. Although this may be a temporary phenomenon, the pace of technical, scientific and market change is such that it is likely that we will have a need for major change on a regular basis. A very large amount of legislation which has been enacted over recent years has been legislation originating in Brussels. That may have masked the task facing our domestic legislatures as the debate and the scrutiny has occurred elsewhere during its passage as EU legislation.

    (2) A legislative process which is much simpler than our traditional process for Bills is the only way a legislature can cope with the volume to be anticipated. This is a subject that needs urgent consideration.

    (3) If important changes are to be made, then scrutiny is essential not simply to make government accountable, but to ensure that in an increasingly complicated environment, errors or unintended consequences are spotted and eliminated.

    (4) If there is no proper parliamentary scrutiny, then it is inevitable that there will be recourse to the courts for judicial review; this is not an effective way of making good legislation.

32. The importance of this issue to the underlying theme of this talk needs no explanation; the UK should be setting an example of how the different branches of the constitution should interrelate.

(4) Developing and making the law after Brexit

33. Closely related and my next subject is the issue of keeping our laws, both retained EU law and other law, up-to-date in the light of technical and scientific change, globalisation and

amendments the EU will make to its own laws, as is illustrated by the current proposed changes to the Brussels Conventions on jurisdiction and enforcement of judgments.

The method of developing the law

34. As I have mentioned, I have for some time shared the views expressed most recently by Sir Geoffrey Vos and Lord Briggs that the non-statute or common law of the United Kingdom provides us with the basis to develop the law in a way that other states cannot.

35. However, we must cater for the fact that judicial development of the law is not apposite in many areas. There will be the need to formulate legal principles and develop legislation to enable new technical and scientific developments to have a foundation that is certain in law in order for them to flourish.

36. Again we have a significant record in developing legislative solutions, but I do not think we have come to terms with the sheer scale of doing this on our own. It might be wise to recall what happened to civil procedure when small jurisdictions were given independence. On independence their procedural regime continued to be that in the Rules of the Supreme Court as set out in the White Book for the year in which independence was granted; they had so much other legislation to pass or amend that 20 or 30 years later, they still had not got round to bringing it up to date.

37. We have enjoyed huge benefits from working collaboratively across the European Union in keeping legislative provisions up to date. That could be lost unless by open debate and analysis, we work out how this is to be done for the future.

Implementing agreed common legislation

38. As is clear from the extract from the Prime Minister's speech to which I have referred, it is anticipated that there may be new UK legislation that it is intended will seek to achieve an identical result to new legislation passed by the EU, in some cases no doubt as a result of legislative collaboration.

39. As it seems highly likely that the UK and the EU will have to work together on many developments, we need to begin consideration with the EU of the design and the mechanics of joint work on policy, on consultation and the like to achieve a common legislative proposal. We also need to consider how Parliamentary scrutiny is to be achieved – a topic to which I have just

referred - for there will *ex hypothesi* be no scrutiny of the kind which currently occurs when the proposal goes through the EU Parliament in which the UK is presently represented. I need say no more on this save to emphasise the need to include this further issue in relation with the work that is needed, but I do want to add a word on drafting and recourse to EU case law.

40. Let us assume that the EU has a draft regulation which the UK wishes to apply domestically to ensure frictionless trade or the provision of services. Is it envisaged that the UK will legislate as if it were a piece of new British legislation in traditional UK style? Or will the UK enact the EU regulation in identical language to that used in the EU, or if the UK does not, will the legislation enacted make it clear it is intended to give effect to the same regulation as the EU has enacted. For the reasons I have already expressed, the issues in respect to the use of EU case law will arise. If parallel legislation intended to produce the same result is enacted in the UK and the EU, it is difficult to see why the CJEU and the courts of the UK would not seek to give the legislation the same meaning. I would hope that the expectation would be that each should therefore follow the case law of the court that made the first decision, but we need to lay the groundwork for this through continued deep judicial engagement.

The desirability of global standardisation or equivalence

41. There is much talk of the freedom that could be obtained on departure from the EU to set the UK's own standards. The opportunity will be created to implement new ideas (where other states cannot be persuaded to agree). Politicians will be able to show that they are achieving progress as a result of what they individually have done; they will be accountable much more directly to the electorate. Both can be seen as clear benefits but these need weighing against other considerations.

42. There are considerations the other way. For example. standards are of great importance as non-tariff barriers to trade in goods and services. We therefore have to consider the extent of the freedom the UK has in fact got to set its own standards in relation to the product of the fourth industrial or digital revolution. At present much work is being done in relation to developing the law on distributed ledger technology, access by fiduciaries to digital assets, rights in respect of data and intermediary platforms. Can we develop our own approach or should we be deeply engaged in working with others in the expectation that we will be participating on a cross-jurisdictional basis?

43. One answer sometimes suggested is that the UK can develop its own, because the standards the UK can achieve, although they may be different, will be a better way of doing things, but nonetheless equivalent to or in alignment with other standards. There are two possible difficulties that need to be brought into account:

    (1) when different language in a legal document is used, it is the usual argument of a lawyer that some different intention must have been meant;

    (2) there are additional costs and time in determining whether standards are equivalent; a mechanism will be needed to make the determination binding and not simply advisory.

44. These considerations must inevitably point to the need for a proper analytical consideration of the issues I have raised under this third and fourth subject. Each of the issues is far too important for deficiencies to be identified once the process of implementation of Brexit has begun. It surely must be possible now to examine the process of legislation, to consider how the law is developed in conjunction with other states and the areas where it is realistic, given the fourth industrial revolution, to set about developing the U.K.'s own standards.

45. These issues are particularly important for the UK's legal services and dispute resolution work. Both historically and more recently, our legal system has achieved its international position because the UK's way of doing business has been a standard setter, because of the dominance in many areas of the UK's markets and trade and because of the ability of UK lawyers to develop pragmatic law around that way of doing business, those markets and that trade. It is in the UK's interests to see that everything is done to ensure that the legal system continues to evolve on similar commercial foundations. Therefore to the extent (which I believe to be overwhelming for the future) that standards will be global, the UK has to ensure it remains at the forefront of developing those global standards by active participation in global work on them.

What should the lawyers do?

46. My underlying message is clear. There should be open discussion of the very complex issues that arise (and I have touched on 4 simply by way of illustration) and an open and dispassionate analysis of the options that not only will serve the UK best, but which can also form a realistic basis for negotiation and agreement with the EU. A further benefit that will accrue is that it will address the perception I have heard expressed by many that the government is not listening to what is said and needs to be done. You may say that this is all very well, but what should we do in practical terms?

(1) We need to continue to stress the importance of the UK legal services industry and dispute resolution to the UK economy, quite apart from the importance of legal certainty and fundamental rights to the good governance of our own society. It is easy, given the many issues that arise in Brexit, for the importance of the economic contribution of legal services and dispute resolution to be overlooked or take a place well down the list.

(2) It is vitally important to make clear worldwide and as often as is possible that our legal system will maintain its strength and vitality whatever course is taken in relation to Brexit.

(3) There is the strongest need for help in the proper and dispassionate analysis as to what needs to be done in so far as it affects the legal services and dispute resolution work. There have been many calls for clear analysis, but the more the complexities of Brexit are understood, the greater is the need. There are many excellent papers and analyses that are in existence; these need to be put into the public domain. These are issues that need much more open and transparent engagement with the Executive and Parliament, as the experience of the past year makes clear.

(4) We must use the tools that we have in our legal system to try and resolve uncertainties that we can presently identify. You will know that one of the issues that have to a greater or lesser extent troubled those in the banking and insurance industries are issues arising out of contractual continuity. The recent development of the law in relation to illegality may need to be clarified in so far as it affects performance of contracts governed by English law which may be contrary to regulations in the place of performance. One solution might be legislation, though there probably is not the Parliamentary time. The other is to take up a suggestion made at a recent Financial Markets Law Committee Seminar by utilising the test case procedure developed for the Financial List of the Business and Property Courts of England and Wales. I would regard the use of this new procedure to solve anticipated issues as useful not only in itself in resolving such problems, but also in demonstrating the vitality and ingenuity of the legal system here.

(5) We must ensure that we continue to reform and invest in our legal system so that it remains at the forefront. Where legislation is needed, as it is for certain of the reforms, then that must be brought forward and passed as expeditiously as possible. We cannot afford to be seen as lacking in any respect in reforming our legal system. It is the hallmark of its vitality.

(6) We must be vigorous in support of the work exemplified by the Slynn Foundation and what is being done to help other countries. It is in the greatest national interest this continue, quite apart from the humanitarian and human rights benefit it brings.

(7) We must continue to engage with Europe – both judges and lawyers. There are many ways of doing this – though networks, through the European Law Institute and other bodies. It is in the interests of all that the UK Government facilitate engagement by the judiciary with the judiciaries of the EU and the CJEU, as judges should never be put in a position where they can be criticised for engagement. It is now accepted that judicial cooperation must continue, but it can only do so if it can be done without risk to the independence of the judiciary from political criticism of such engagement.

(8) We must continue to engage internationally. When digital products are developed, the marketplace is global. The problems which need legal solutions will also be global problems. We have to ensure that we find ways of developing our common law and in participating in the development of law internationally so that English law remains in this new age the law of choice and the law on which the standards are built.

(9) Although the judiciary and the legal profession will play a strong and leading role, I do not think we can do without a carefully thought through strategy worked out with government and regulators. Although we have some of the most skilled law firms in the world and a judiciary second to none, we need to ensure that developments for which government and regulators are responsible are aligned so that the contribution made to the economy by legal services and dispute resolution is maintained and increased; so that we continue to set an example of excellence and of the importance of a modern legal system; and so that we make a real and effective contribution to the maintenance of relations with Europe in alignment with the agreements that will be made between the EU and the UK

47. Thank you.