

Max Planck Institute Luxembourg
for Procedural Law
The New Litigation Landscape
International Commercial Courts and Procedural Innovations
Sir William Blair¹
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It is a pleasure to speak at the Max Planck Institute Luxembourg this morning, and I thank MPI and Professor Burkhard Hess for the kind invitation.

The establishment of new “international commercial courts” over the past few years has been a major development which brings a new perspective to the adjudication of international commercial disputes. Some of these disputes are minor in monetary terms, but some are major, and even of geopolitical importance. A new player on the block is therefore a significant event – and depending on how you categorise them, nine have been created in the last decade and a half.

The growing literature contains descriptions of the courts and their operation, including the excellent research paper authored by Professor Marta Requejo Isidro published by MPI in January this year². These remarks do not duplicate this material, but rather concentrate on what appear to be the most important questions. The possibilities of these courts are discussed, and the contribution they can make, given the efficiency and relative ubiquity of arbitration in international commerce. In doing so, procedural innovations will be considered, including technology.

The discussion is not restricted to the new courts. Many jurisdictions have arrangements which provide for the specialist adjudication of commercial cases. The Luxembourg District Court for example has great experience in financial disputes.

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² Max Planck Institute Luxembourg for Procedural Law, Research Paper Series N° 2019 (2), *International Commercial Courts in the Litigation Market*, Prof. Dr. Marta Requejo Isidro, https://www.mpi.lu/fileadmin/mpi/medien/research/WPS/MPILux_Research_Paper_Series_2019_2_Requejo_International_Commercial_Courts.pdf

Throughout this paper, reference is made to “commercial courts” in this general sense. As discussed below, a mechanism was created in 2017 for bringing these courts together at the international level³.

The new courts have had an effect on the litigation landscape, though it would go too far to say that they have redrawn it. They have however undoubtedly widened the possible routes available to international parties to decide their disputes, and to a degree shifted some of the focus from international arbitration to the role of the courts in commercial cases, which is not new at all – it is an enduring role.

The names under which the courts go varies. Although there is (presumably) no “commercial court” which does not hear commercial cases, there are numerous courts not called “commercial courts” which do. A leading example is the Delaware Court of Chancery with a vast corporate docket.

What are the new international commercial courts?

A conventional list of the new courts with dates of commencement of operation would include the following:

- Dubai International Financial Centre Courts (2004)
- Qatar International Court⁴ (2009)
- Abu Dhabi Global Market Courts (2015)
- Singapore International Commercial Court (2015)
- Astana International Financial Centre Court (2018)
- Chamber for International Commercial Disputes, Landgericht Frankfurt/Main (2018)
- International Chamber, Paris Tribunal de Commerce/Cour d’appel (2018)
- China International Commercial Court (2018)
- Netherlands Commercial Court (2019)

This list shows that there is no single definition or model, and that while some courts are newly established, others are established as specialist courts within existing court systems.

³ The Standing International Forum of Commercial Courts (SIFoCC).

⁴ The Qatar International Court operates within the legal provisions of the Qatar Financial Centre.

It also shows that these courts are not a common law phenomenon. The only common law State in this list is Singapore⁵. The English common law has however also strongly influenced the legal principles and procedures applicable in the three Gulf courts and in the AIFC Court in Kazakhstan which operate within the institutional structures of financial centres. To a greater or lesser degree, common law procedure has had an influence on the procedures in the others. The reasons for this are largely practical, particularly in permitting the use of the English language, and because the common law is widely used in business.

What the new courts have in common is the intent to provide efficient and credible means of commercial dispute resolution, particularly in relation to international disputes, in support of a particular centre with some of the characteristics of a free trade zone, or in support of the court processes already provided by the State, with the aim of making it more attractive to inward investment.

Apart from the use of the English language to enable international accessibility which applies in all of them, a feature of five of these courts has been the appointment of judges from different jurisdictions, both common law and civil. This feature of international arbitration is an innovation in the case of commercial courts established under municipal law⁶. With or without such judges, all these courts can be said to have a resolutely outward-facing approach.

They take their place within the wider possibilities of commercial dispute resolution:

“Disputes are part of commerce. They are immanent within the activity. So how are they to be resolved? There are various possibilities: First, the stronger commercial party may insist on an outcome favourable to it. Secondly, the parties may abandon the arrangement at the point of breakdown, leaving the loss to lie where it falls. Thirdly, the parties may seek recourse to their national courts independently of each other. Fourthly, the parties may agree on one of their national courts. Fifthly, the parties may agree upon a neutral national court. Sixthly, the parties may agree upon arbitration. Seventhly, the parties may agree to mediate or conciliate the dispute. There may be other possibilities, including expert determination.”⁷

⁵ The Application of English Law Act (15th March 1994) declares the extent to which English law is applicable in Singapore.

⁶ In China, judges from other jurisdictions sit in the Hong Kong SAR (the Court of Final Appeal being a particular example). In connection with the foundation of the China International Commercial Court in 2018, the Supreme People’s Court of the People’s Republic of China set up an International Commercial Expert Committee which includes foreign judges. There are a number of other jurisdictions with foreign judges (Botswana and Fiji being examples) though not specifically in the commercial sphere.

⁷ Justice James Allsop, (FCA), *International Maritime Arbitration: Legal and Policy Issues*, [2007] FedJSchol 7, <http://www.austlii.edu.au/au/journals/FedJSchol/2007/7.html>

Of these possibilities, the promotion of mediation or conciliation should be a priority. This is not only because of the time and expense of formal dispute resolution proceedings, but perhaps even more important, the seeming ratcheting up of the interstate and political sensitivity of commercial disputes.

Commercial courts generally

As noted, there is no bright line between the new courts and the arrangements which are established in many jurisdictions to provide specialist adjudication of commercial cases. Specialist adjudication may be by allocation to a specialist “list”, as in the Hong Kong SAR, China, or in a separate court as in Paris, France.

Le Tribunal de Commerce de Paris is the world’s oldest commercial court, having been established in its present form in 1792 – its predecessor in the ancien régime goes back to an edict issued by Charles IX in 1563. It can almost certainly claim the grandest building of any of its peers.

The 2018 meeting in New York of the Standing International Forum of Commercial Courts included many of the existing courts, and all the new international commercial courts. Thirty two jurisdictions participated⁸, and more are expected to participate in the 2020 meeting in Singapore.

The mobility of international commercial disputes

There is a presupposition underlying all the new courts, which is that it is possible to attract legal business from one jurisdiction to another, or from one form (arbitration) to another. This might be viewed as a contemporary possibility arising from globalisation. However, it is not so new.

A study of legal institutions in late mediaeval to early modern Europe⁹ describes the approach foreign merchants took to disputes in the cities of Bruges, Antwerp, and Amsterdam. The experience seems remarkably familiar to that experienced today, which is perhaps not surprising, and says something about the nature of commercial disputes in the international context.

⁸ Including offshore financial centres such as the BVI, Cayman, and Bermuda where specialist adjudication is a significant part of the infrastructure.

⁹ Oscar Gelderblom, *Cities of Commerce, The Institutional Foundations of International Trade in the Low Countries, 1250-1650*, Princeton University Press, 2013.

In summary, foreign merchants preferred to avoid disputes, if necessary by writing off losses. If that was not practical, mediation or arbitration were the preferred routes. Where formal proceedings were unavoidable, local courts were used, leading to the eventual creation of specialised courts dealing with (for example) maritime or insolvency issues.

The central courts were on the whole avoided by merchants, because of the time and expense of proceedings. But the judgments of these courts had precedential value particularly in the development of the law of contract, and hence a lasting impact.

The study goes on to argue that the three cities (and there were others similar throughout Europe) existed in an environment where they needed to attract merchants who could relatively easily take their business elsewhere, and that their urban autonomy gave them the legal power to adapt institutional arrangements to make them more attractive. There are interesting analogies with contemporary free trade zones, city states, and semi-autonomous entities such as the Corporation of the City of London.

This point as to mobility remains valid today. When it comes to the resolution of international commercial disputes, it is a feature which distinguishes them from, for example, public law disputes. The parties have a choice. Within limits, they can choose to have their disputes decided by a court, or in arbitration. If a court, they can choose which country the court is to be in. If by arbitration, they can choose to arbitrate ad hoc, or under the rules of an organisation, and choose the seat.

A crucial point to recognise is that these choices are usually made when the parties contract, and so in advance, before a dispute has arisen. The choices can become standardised over time in standard terms or market practice. That is one reason why the investment in new commercial courts has to be an investment in the long term.

Time and expense is a recurring complaint in commercial dispute resolution¹⁰, and that includes international arbitration. It is a difficult problem to address where disputes are inherently complex, as many are, or are presented by the parties' lawyers to the court or tribunal with unnecessary complexity, as some are. But if it cannot be addressed, over time

¹⁰ See the respected 2018 International Arbitration Survey conducted by the School of International Arbitration, Queen Mary University of London, in partnership with White & Case.

business will find other solutions. In the long-term, it will be market choice that will ultimately determine the success of the new courts¹¹, just as with all previous models.

Making out the case for commercial courts

At a time of scarce judicial resources, the case for commercial courts needs to be made out. A strong case can be made out¹². Their value is in facilitating commerce by providing a means of settling the disputes that inevitably arise in commerce, to the benefit of the whole community. At their best, the courts work harmoniously with arbitration and mediation, and establish legal principles allowing commerce to develop while recognising the public good. They have played an important role for a long time, as the historical experience described above shows.

Their value is endorsed by international agencies such as the World Bank, and by national agencies as seen (for example) in the commercial courts established in Tanzania (1999), Uganda (1999) and Ghana (2005) with the assistance of the Danish International Development Agency¹³.

In setting out the justification for the establishment of commercial courts, the report of the Law Commission of India¹⁴ which led to the enactment of the Indian Commercial Courts Act, 2015, stated that:

“3.2.1 The importance of a stable, efficient and certain dispute resolution mechanism to the growth and development of trade and commerce is well established. Quick enforcement of contracts, easy recovery of monetary claims and award of just compensation for damages suffered are absolutely critical to encourage investment and economic activity, which necessarily involves the taking of financial and enforcement risks. A stable, certain and efficient dispute resolution mechanism is therefore essential to the economic development of any nation.”

The case for *international* commercial courts shares these objectives but is harder to make. What lies behind the establishment these courts? A 2018 study commissioned by the

¹¹ As to the components that international users are looking for from a court or arbitral tribunal, see Sir William Blair, Durham University Institute of Commercial and Corporate Law Annual Lecture 2016, *Contemporary Trends in the Resolution of International Commercial and Financial Disputes*.

¹² Lord Thomas of Cwmgiedd speaking in Beijing in 2017 (reference at footnote 70 below): “A Commercial Court must have as its objectives the ability to deliver justice quickly and relatively inexpensively. Its processes must be simple and flexible. The quality of its judgments must be high. It needs to apply the law in a way that is certain, fair and predictable. It must ensure that the law keeps pace with market developments. It must maintain the strength and vitality of the legal framework.”

¹³ Denmark's own Maritime and Commercial High Court was established in 1862.

¹⁴ Report no. 253, January 2015.

European Parliament's Committee on Legal Affairs advocates a "European Commercial Court", and gives this reason:

"... a European Commercial Court could also – and, again, probably better than any national court – take part in the global competition for international commercial disputes that has gained momentum over recent years and triggered the establishment of international commercial courts around the world. It could make the EU a globally attractive place for settling international disputes"¹⁵

The idea of courts being in competition with arbitration and with each other for international work would not be universally accepted, because courts are public goods, and their purpose is the administration of justice.

Nevertheless, the reality is that in commercial work there is an element of competition to become what has aptly been described as the preferred dispute resolution hub¹⁶. In mainland Europe, Brexit has been seen as an opportunity to attract legal business from London.

There has not so far been a commitment to maintain the current application of the rules for the mutual enforcement and recognition of civil and commercial judgments throughout Europe which is seen as the main disadvantage of Brexit¹⁷ in this context¹⁸. However, commercial (and common) sense suggests that this will be restored whatever the outcome, since it is in the interest of Paris, Frankfurt, Amsterdam and others, just as much as London¹⁹ which in any case has adopted an open platform approach²⁰. In most commercial cases, enforcement is not an issue. Further remarks on the enforcement issue are made later in this paper.

¹⁵ Building Competence in Commercial Law in the Member States, September 2018, para 2.2.4. The proposal is to provide commercial parties with an alternative to both the courts of the Member States and international commercial arbitration. There is no sign yet of the proposal being taken up.

¹⁶ Georgios Dimitropoulos and Stavros Brekoulakis, *International Commercial Courts and Bottom-Up Judicial Globalization*, draft paper in course of publication kindly provided by the authors.

¹⁷ See Burkhard Hess, *The Unsuitability of the Lugano Convention (2007) to Serve as a Bridge between the UK and the EU after Brexit*, Max Planck Institute Luxembourg for Procedural Law, Research Paper Series N° 2018(2).

¹⁸ This longstanding regime dates back to the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, dated 27 September 1968.

¹⁹ Sir Geoffrey Vos, Chancellor of the High Court, *The effect of Brexit on Financial Services Disputes in London*, 7 May 2019.

²⁰ Sir Geoffrey Vos, op. cit., "we are working closely with several of the newly established commercial courts in Europe and beyond to exchange ideas and improve our systems for the benefit of international businesses generally. In June and October this year, we have three judges from the new Paris Commercial Court visiting London for two weeks each to sit with our judges."

The element of competition goes beyond the courts. France is an example of a country that has changed its law with a view to competitive advantage – the section of the French Civil Code on the law of contract was comprehensively amended in 2016 with the stated aim of rendering French contract law more accessible, predictable, and influential abroad and commercially attractive²¹.

But the purpose of setting up these new courts – which are expensive to establish and maintain – goes beyond competition for international commercial disputes work, lucrative though that can often be. They are seen as essential building blocks in the ecosystem of a global commercial and financial centre.

Until recently, the Brussels International Business Court would have been included in the list with an expected start date in 2020. However, the Bill establishing the court was withdrawn in 2019, and it is instructive to consider the reasons as put on a well-known blog:

“ … it became clear that there is insufficient political backing for the proposal after one of the big parties withdrew its support. Other – mostly left-wing parties – had expressed their concerns earlier and the proposed court has been referred to as a ‘caviar court’ and a ‘court for the super rich’. But probably the most fierce opponent is the judiciary itself. Arguments range from principled two-tiered justice fears (including for instance by the First President of the Court of Cassation) to concerns about the feasibility to attract litigation in the Brussels courts and the costs involved in establishing this new ‘VIP court’.”²²

The Conseil supérieur de la Justice (CSJ) had earlier proposed instead the establishment of specialised chambers within the ordinary national courts using the English language in the same way as has been done elsewhere as in Germany and the Netherlands²³.

In Australia, the need for a new international commercial court has also been questioned, not on the basis of any objection to supposed preferential treatment in a “VIP court”, but simply because that international role is already fulfilled by specialist commercial lists in the domestic courts²⁴.

²¹ Solène Rowan, *The New French Law of Contract*, LSE Research Online. This pre-dated Brexit. http://eprints.lse.ac.uk/75815/1/Rowan_New%20French%20law_2017.pdf

²² Conflict of Laws.net: <http://conflictflaws.net/2019/the-international-business-courts-saga-continued-ncc-first-judgment-bibc-proposal-unplugged/>

²³ March 2018, Avis d’office Avant-projet de loi instaurant la Brussels International Business Court.

²⁴ See for example The Hon Justice AS Bell, "An Australian international commercial court – not a bad idea or what a bad idea?", 2019 ABA Biennial International Conference, (http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2019%20Speeches/Bell_20190712.pdf).

There is a further point to take into account. International commercial arbitration has become very successful in recent years, has developed sophisticated institutional support in the form of arbitration bodies, and is international in the sense which the municipal courts, even those with a strong international profile, are not. The leading arbitrators have justifiably worldwide reputations. It is true that much arbitration is slow and expensive, but the same can be said for litigation in the courts. Why not therefore focus exclusively on the development of arbitration, and, so the argument would go, accept that domestic courts have at best a subordinate role to play?

Addressing this question, Chief Justice Sundaresh Menon has said:

“... arbitration, by its very nature, cannot provide a complete solution to propel the vessel of global commerce forward. Arbitration was conceived as an ad hoc, consensual, convenient and confidential method of resolving disputes. It was not designed to provide an *authoritative* and *legitimate* superstructure to facilitate global commerce. It cannot, on its own, adequately address such things as the harmonisation of substantive commercial laws, practices and ethics.”²⁵

There are a number of other reasons why arbitration cannot provide a complete solution. First, the dispute may not be subject to an arbitration agreement. Many disputes over intellectual property are an example in point. Even where there is an agreement, since arbitration is by definition consensual, there is no power to join non-parties. Second, arbitration is subject to the supervision of the courts of the seat, which for that reason alone play an essential part. Third, domestic courts must develop their own expertise in commercial dispute resolution if only to deal with domestic disputes – arbitration cannot be expected to take the place of the courts. Fourth, it is unlikely in the long-term that States will be prepared to contract out decision-making in areas of key public policy. This very consideration has had the effect of weakening investment arbitration recently, despite the fact that the process of investment arbitration is generally highly respected for its professionalism.

Sometimes, geopolitical considerations are also involved. The China International Commercial Court was set up with a view to China’s Belt and Road Initiative, and the AIFC Court in Kazakhstan is seen as strategic both as regards BRI and the development of commerce and finance in Central Asia generally.

²⁵ Sundaresh Menon, *International Courts: Towards a Transnational System of Dispute Resolution* (DIFC Courts Lecture Series 2015).

The point to take away from this discussion is that there is no one solution – the case for specialist determination of commercial disputes is clearly made out. But whether this is done by way of existing mechanisms within the domestic legal system, or (less commonly) by the setting up of new international courts, depends entirely on the needs and objectives of the particular jurisdiction.

What is an “international commercial case”?

Following on from that point, there is no precise usage of the term “commercial case”, and the type of dispute dealt with by “commercial courts” differs from jurisdiction to jurisdiction.

A comprehensive definition is found in the definition of "commercial dispute" in section 2 of the Indian Commercial Courts Act, 2015²⁶, which includes disputes relating to trade, finance, import/export, admiralty and maritime, carriage of goods, construction and infrastructure, franchising, consultancy, joint venture and shareholders agreements, investment agreements, technology development, intellectual property rights, oil and gas, insurance and re-insurance and agency.

In other countries, one or more of these subjects are dealt with by other specialist courts, an important example being intellectual property, a subject increasingly at the centre of disputes between States.

This is the position in England and Wales. In a 2017 reform, the Business and Property Courts was introduced as an umbrella for a number of previously unconnected specialist jurisdictions²⁷. This has kept the courts including the Commercial Court and their rules intact – it but makes connections between judges whose work is mainly in the business field, presents a complete picture of the business offering internationally, and has enhanced the status of commercial dispute resolution at the regional level.

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https://indiocode.nic.in/handle/123456789/2156?view_type=browse&sam_handle=123456789/1362#targetText=Long%20Title%3A,connect%20therewith%20or%20incidental%20thereto.

²⁷ Including the London Commercial Court (both the LCC, and the regional Mercantile Courts, renamed Circuit Commercial Courts) and Admiralty Court (which in practice works as a single unit with the LCC), the Technology & Construction Court, the Financial List, the Business List (Chancery Division), the Insolvency and Companies List, the Intellectual Property List, the Competition List, and the Revenue List. See [https://uk.practicallaw.thomsonreuters.com/w-010-4588?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/w-010-4588?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1)

What is meant by an “*international*” commercial case? It is not a particularly easy concept to define.

For statistical purposes, a simple yardstick has been used in London by reference to the domicile of the parties. However, this is not necessarily a good measure, since a dispute between UK parties may be international in nature, and conversely, a dispute between one or more non-UK parties may be purely domestic. Other factors include the location of the dispute, where the effects are felt, and the nature of the markets in which the dispute arises²⁸.

As it is put by the new Netherlands Commercial Court²⁹, the “international” test is broad in scope. It is met not only where one or more of the parties have their domicile in a foreign jurisdiction, but also where the dispute otherwise involves a relevant cross-border interest, such as shareholders, employees or revenue located in or linked to a foreign jurisdiction.

The point is only of consequence if it goes to jurisdiction. The rule in the Singapore International Commercial Court is that the claims should be of an international and commercial nature, which is a wide and flexible test.

The London Commercial Court

The London Commercial Court (LCC) has been described as the paradigm³⁰ for the new international commercial courts, which are said to have been inspired in part by its success³¹. When it was established in 1895³², the circumstances were favourable in that English commercial law was already developed³³, and the structure of the courts had recently been reformed³⁴ with a modern procedural code³⁵. However, this did not forestall complaints about delay and expense³⁶. The immediate reason for setting up the Court was practical,

²⁸ C.f. *Banco Santander Totta S.A. v Compania Carris* [2016] 4 WLR 49 at [404], [2017] 1 WLR 1323 at [46] in relation to "mandatory rules" applied irrespective of choice of law.

²⁹ <https://www.rechtspraak.nl/SiteCollectionDocuments/brochure-netherlands-commercial-court.pdf>

³⁰ Marta Requejo Isidro, op. cit.

³¹ Stephan Wilske, *International Commercial Courts and Arbitration — Alternatives, Substitutes or Trojan Horse?*, Contemporary Asia Arbitration Journal, Vol. 11, No. 2, pp. 153-192, November 2018. Chief Justice Sundaresh Menon observed it during a visit in September 2012, and decided to help create a similar court in Singapore: *International Courts: Towards a Transnational System of Dispute Resolution*, op. cit.

³² As the “Commercial List” in the Queen’s Bench Division of the High Court.

³³ Both through the body of common law precedent, and statutory codes such as the Bills of Exchange Act 1882.

³⁴ Through the Judicature Acts of 1873 and 1875 (applying in England and Wales).

³⁵ Rules of the Supreme Court (RSC), 1883.

³⁶ Sir Anthony Colman, Victor Lyon and Philippa Hopkins, *The Practice and Procedure of the Commercial Court* (informa, 6th ed, 2008) p.1.

namely to address this by facilitating the allocation of commercial cases to specialist judges³⁷, appointed from among experienced commercial practitioners³⁸.

Case management is not dealt with by Masters³⁹, but by the judges of the Court themselves. Within the Civil Procedure Rules, the Court maintains considerable procedural informality, periodically issuing a Guide dealing with the practical aspects of bringing a claim in the Court⁴⁰. An historically close connection with arbitration has tended to foster a relatively informal and decidedly commercial approach by the judges.

Although the LCC is a domestic court with exclusively domestic judges, the prime reason that it has influenced the models for international commercial courts is the international nature of much of its caseload⁴¹ which is what the new courts aspire to as well.

Only the New York courts surpass this, reflecting New York's position not just as a global centre but as the financial capital of the world's largest economy. The United States District Court for the Southern District of New York (SDNY) is a Federal Court established in 1789, and the Commercial Division of the New York State Supreme Court is a State court established in 1995.

There is not space in this paper to describe the immense contribution of the United States both to commercial dispute resolution through the courts and arbitration, and to the development of commercial law through projects such as the Uniform Commercial Code (UCC), which dates back to 1952.

Four main factors account for the LCC's position: (1) choice of English law and jurisdiction in commercial and financial⁴² contracts internationally, (2) choice in arbitration agreements of a London seat, the Commercial Court being the assigned court for such

³⁷ Colman, Lyon and Hopkins, *ibid*. On the pressure from the commercial establishment that led to the establishment of the London Commercial Court see VV Veeder, *Mr Justice Lawrence: the “true begetter” of the English Commercial Court*, (1994) 110 LQR 292; David Foxton, *The Life of Thomas E. Scrutton*, Cambridge University Press (2013), p.100 et seq.

³⁸ An issue for all jurisdictions in respect of specialist courts is that of judicial expertise, and different approaches are possible between the common law and civil law models.

³⁹ Intermediate judges.

⁴⁰ 10th edition, 2017. Sir Robin Knowles CBE was largely responsible for this revision: see https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/672422/The%20Commercial%20Court%20Guide%20new%2010th%20Edition%2007.09.17.pdf

⁴¹ Estimates vary, but a conventional figure is that about 70% of the claims brought in the London Commercial Court do not involve domestic UK disputes.

⁴² In financial contracts the dominant systems to date have been New York law and English law. The International Swaps and Derivatives Association's (ISDA) master agreements are written according to English, New York and Japanese laws, with Irish and French law governed versions published in 2018.

arbitrations, (3) the Court’s long-standing rules as to “long-arm” jurisdiction⁴³, and (4) and most important, London as a commercial and financial hub with an ecosystem in which commercial dispute resolution is an integral part.

The Court has been successful over time, but there have been periods in which the caseload was very light. During the 1950s, there was barely enough work to keep one judge occupied⁴⁴ (presently, eight Commercial Judges sit at any one time). Recovery began in the 1960s with the re-emergence of London as a global financial centre which began with the growth in the booking of US dollar deposits in the city which were then recycled in the global financial system.

This experience shows that however well organised a commercial court may be, with able and independent judges, functioning within a strong ecosystem⁴⁵, the court is ultimately dependent on the markets it serves. Markets can come and go quite abruptly, and in no field is this more true than in contemporary finance. Political risk is also a major imponderable, now, as it always has been in the past.

The importance of procedure

An early feature of the LCC was the speed with which cases were brought on⁴⁶.

There is an important point here. If it can be achieved, early *listing* of cases was then, as now, an incentive for early settlement obviating the need for an expensive and potentially destructive trial. In other words, efficient procedures are themselves a significant aid to settlement – which is generally by far the best commercial outcome – *provided* users are confident that the court will indeed stick to schedules, and is ready and able to dispose of the case on the allotted date. A sense that the court will readily accede to adjournment applications has the precise opposite effect. So it is not court procedures themselves which matter so much as how they are applied in practice.

Similar considerations apply to mediation, which is increasingly important, and compulsory or semi-compulsory in a number of jurisdictions (Switzerland being an example).

⁴³ These may involve long-standing economic links, a current example being those with the Russian Federation dating back to 1553 during the reign of Ivan IV (Ivan the Terrible) (Christopher Andrew, *The Secret World*, Penguin, 2018, p.147 et seq), and Central Asia.

⁴⁴ British Journal of Law and Society, Vol 7, No 2, Winter 1980, p.141, R.B. Ferguson, *Adjudication of Commercial Disputes*. Professor Sir Ross Cranston FBA kindly provided this reference.

⁴⁵ Consisting of among others the legal profession, accountancy profession, consultancies of various kinds, and academic support.

⁴⁶ Foxton, *ibid*, p.103.

In the Frankfurt Chamber for International Commercial Disputes, in general the proceedings start with a conciliation hearing (*Güteverhandlung*) in which the possibilities for an amicable settlement are discussed with the parties. In the China International Commercial Court, mediation is discussed early in the proceedings⁴⁷.

In commercial cases in jurisdictions where mediation is voluntary, encouragement by the court may be appropriate, but timing is of the essence. A careful judgment is sometimes needed to encourage mediation not at the beginning of litigation (when it may simply fail) but at a particular stage in the case management timetable. It may be too late to encourage mediation when the case gets to trial, by which time the issues have all been identified, the parties (it can be assumed) have considered the possibility of mediation in the course of the litigation and may have done so without success, and much of the expense has already been incurred. But in some instances, it may be a case of better late than never.

A significant aspect of the administration of the LCC remains its published “lead times”, which give parties an indication of how long it will take to fix a hearing, and a strong predisposition on the part of the judges against allowing adjournment of hearings without good reason. However, very speedy listing of the kind possible when the court was set up has been hard to maintain, except in cases of real urgency.

The importance of procedure is emphasised by the Netherlands Commercial Court, which began operations in 2019, stating that “Dutch procedural law is recognised for being efficient, pragmatic and cost-effective”⁴⁸, as is speed – “the Dutch courts are in the top 5 of the fastest courts in the European Union with an average of 130 days from a notice to appear to a final judgment (EU Justice Scoreboard)”⁴⁹.

It can be said with confidence that commercial judges and arbitrators fully understand the desirability of expedition, and do their best to achieve it. Generally, however, it is also necessary to accept that complex commercial cases cannot be decided over short periods of time, and that any commercial case, just like other cases, require sufficient time to satisfy due process. Precisely the same applies to arbitration.

⁴⁷ Procedural Rules for the China International Commercial Court of the Supreme People’s Court (For Trial Implementation), Chapter 4.

⁴⁸ <https://netherlands-commercial-court.com/>

⁴⁹ <https://www.rechtspraak.nl/English/NCC/Pages/key-features-NCC.aspx>

Straightforward cases in which there is in reality no defence can be dealt with under “summary judgment” procedures, but these are not suitable in cases where serious issues are raised.

Procedural innovations

The setting up of new courts in the 21st century has given an excellent opportunity to make procedural innovations, and on the whole the challenge has been taken up, not least in the area of technology. There is the potential for much more, and one of the most important areas of study for the Standing International Forum for Commercial Courts is case management⁵⁰.

(i) A common complaint among judges (and arbitrators) is that a proliferation of documents, over-lengthy submissions and memorials, and a tendency to include arguments which are not truly arguable, have slowed down the process unnecessarily. These concerns are often well justified.

Efforts are made from time to time to address this by procedural means. In the LCC, page limits are now put on written submissions – however, it is in practice difficult for a judge to refuse what appears to be a bona fide request to extend the limits.

(ii) Document production in the electronic era has proved even harder to control. The traditional distinction between the common law, and its insistence on the discovery of all documents including those unfavourable to a party’s case, and the civil law with its emphasis on the selection of documents by the parties themselves, has tended to become blurred.

There has been a noticeable push back by commercial users in relation to the costs of common law document production. In the Singapore International Commercial Court, the Rules of Court set out a simplified regime applicable to SICC cases, which is limited to documents relied upon and requested. This document production process is largely based on the International Bar Association’s IBA Rules on Taking of Evidence in International Arbitration 2010.⁵¹

It should be appreciated that under the SICC Rules, as under the IBA Rules, parties have the right to request the production of further documents, and in a case of any size, this

⁵⁰ Report of the Second SIFoCC Meeting – New York 2018, <https://www.sifocc.org/wp-content/uploads/2019/02/Report-of-the-Second-SIFoCC-Meeting-New-York-2018.pdf>, p.27.

⁵¹ Godwin, Ramsay, Webster, *International Commercial Courts: The Singapore Experience* [2017] MelbJlIntLaw 13; (2017) 18(2) Melbourne Journal of International Law 219.

right is likely to be pursued. In courts and arbitration generally, arguments over orders for the production of further documents, and whether such orders have been properly complied with, account for an appreciable part of the cost of commercial disputes. Efforts continue in a number of jurisdictions to address this problem, including the 2019 pilot scheme for disclosure in the Business and Property Courts of England and Wales⁵², and in the field of arbitration in the Prague Rules 2018⁵³.

These efforts are praiseworthy and should be encouraged. It also needs to be recognised however that there is a conceptual difference which cannot be resolved procedurally between a process which requires parties to produce adverse documents, and a process which does not. In commercial cases, there are arguments both ways, depending partly on the type of dispute. In time, and perhaps the relatively near future, commercial parties may be content to accept the choice of a machine working on AI techniques on grounds that it is simpler and cheaper, even if not perfect.

(iii) A difficult problem for judges and arbitrators is the assessment of expert evidence on factual issues. This can have a wide range depending on the issues in the case, and is sometimes voluminous, and often difficult for non-experts to understand. In some areas of arbitration, for example construction and marine arbitration, some leading arbitrators have specialist experience and/or qualifications.

For courts, there is no easy shortcut available, since a proper understanding may be essential for the resolution of the dispute. Some courts favour court-appointed experts, and parties may sometimes be ordered to agree a single expert. But understandably, this is not necessarily welcome for commercial litigants which wish to place before the tribunal their own case on factual issues particularly if the sums at stake are large.

The most recent edition of the London Commercial Court Guide⁵⁴ contains a provision intended to make complex expert evidence more manageable. At the Case Management Conference, consideration may be given to a direction that the trial reading list for the judge identifies the issues, briefly states each party's case, and identifies the pages of the expert evidence that need to be read.

⁵² Including the LCC.

⁵³ Under the Prague Rules, the parties are "encouraged to avoid any form of document production, including e-discovery", though the structure is in substance similar to that under the IBA Rules.

⁵⁴ 10th edition, 2017, op. cit., at para H2.31.

(iv) Issues of foreign law are common in commercial cases. The procedure in any court is governed by the *lex fori*, but in a contractual claim the governing law is usually expressed in the choice of law clause in the contract, or if the issue is tortious or delictual, identified according to conflict of law rules such as where the damage occurred.

The question often arises as to how to ascertain the content of the governing law as it applies to the issues in the case. Sometimes, this is unproblematic either because the law is not in dispute, or, if there is a dispute, the answer is obvious. The difficulties arise where the point of law is a difficult one, and there is no clear answer identified from the legal system in question. So, to take an example, if an English judge is seeking to apply French law as the governing law of the contract, or a French judge is seeking to apply English law, the question is how the court decides the issue.

Traditionally, English procedural law treats disputed issues of foreign law as questions of fact to be established by expert evidence as any other expert evidence. However, this principle can be cumbersome, and is not necessarily applied in international arbitration, nor in those international commercial courts with judges from different jurisdictions.

In a more flexible approach, it has been held that the Dubai International Financial Centre (DIFC) Courts are not bound to treat foreign law as a fact to be proved as such, as they possess a discretion to apply such rules of evidence they may consider appropriate in the circumstances. They adopt the approach of accepting all submissions on foreign law as part of legal submissions, as is usually done in international arbitration with regard to issues of any national law⁵⁵.

The Singapore International Commercial Court (SICC) similarly has the option of adopting the international approach in certain situations. It may make an order allowing any question of law to be determined on the basis of submissions instead of proof provided that the court is satisfied that all parties are or will be represented by counsel who are competent to submit on the relevant questions of foreign law. On an appeal to the Singapore Court of Appeal, similar rules apply⁵⁶.

⁵⁵ See the valuable analysis of the issues by Hwang CJ in *Fidel v (1) Felecia (2) Faraz* [2015] DIFC CA 002.

⁵⁶ O 110 rr 25-29 of the Singapore Rules of Court (Cap 322, R 5, 2014 Rev Ed).

Among the ways the China International Commercial Court (CICC) has identified to ascertain foreign law, is included opinions provided by a member of the International Commercial Expert Committee⁵⁷. Overall, the approach is an inclusive one and seems to be intended for adaptation depending on the case.

(v) There have been sensitivities as regards the enforcement of the judgments of the new international commercial courts in the countries in which they are established⁵⁸. This does not arise where the courts are integrated into the domestic jurisdiction.

The more general question is as to the enforceability of the judgments of commercial courts outside their home jurisdiction.

Numerous bilateral instruments exist between individual States for the enforcement of judgments (for example, between Australia and New Zealand), and some multilateral instruments – examples of the latter include the Brussels Regulation⁵⁹ operative between member states of the European Union, and a similar instrument in the Gulf Cooperation Council⁶⁰. There is, however, no equivalent of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, or the ICSID Convention in the field of investment arbitration.

This is a major issue, because although the judgments of commercial courts, like arbitration awards, are normally complied with, in the absence of compliance, the party holding the judgment needs to be able to enforce it.

In 2019, the Hague Conference on Private International Law finalised a Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters which will come into force once two signatories ratify it. Whereas the 2005 Hague Choice of Court Convention applies in cases where the parties have agreed to a particular jurisdiction, the 2019 Convention applies independently of party agreement.

Although these Conventions are important steps giving emphasis at the international level to the desirability of enforcing commercial judgments, they lack for the time being the

⁵⁷ <http://cicc.court.gov.cn/html/1/219/206/207/index.html>

⁵⁸ Decree 19 of 2016 in Dubai established a Joint Judicial Committee whose primary task is to resolve conflicts of jurisdiction between the DIFC and Dubai Courts. It is chaired by the President of the Dubai Court of Cassation.

⁵⁹ The (recast) Brussels I Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters applies (Regulation (EU) No 1215/2012).

⁶⁰ GCC Convention for the Execution of Judgments.

universality of the New York Convention, which is remarkable for the extent of its adoption since 1958.

So in practice enforceability will often depend on the domestic rules of the country in which enforcement is sought. A growing number of commercial courts have entered into a Memorandum of Guidance on a bilateral basis which explains these rules.

In 2019, the Standing International Forum on Commercial Courts published the 1st edition of a Multilateral Memorandum on Enforcement of Commercial Judgments for Money⁶¹ setting out a description by the courts of the member jurisdictions of the procedures they apply for the enforcement of judgments of courts of another State.

This has no binding effect, but it does have the authority of the contributing court behind it. There is a traditional difference between the civil law which, which depends on reciprocity, and the common law approach which treats the foreign judgment as itself giving rise to a cause of action – in other words, there is no need to sue on the underlying debt. A common law, the judgment will be enforced subject to certain conditions which are very similar to those contained in the New York Convention. The contributions to the Multilateral Memorandum suggest that internationally the civil and common law are drawing closer together in their approach.

Technology

Technology in the sphere of commercial dispute resolution has so far generally aspired to making existing systems work more efficiently rather than produce fundamental change. Online courts of the kind being established in various countries presently work best in the commercial context for consumer disputes.

The new commercial courts have been established at a time when technology offers further opportunities, and as new courts, they are in a good position to embrace those opportunities. Broadly, the impact of technology on the work of commercial courts consists of (1) practitioner driven innovation, (2) innovation in court practice, and (3) potential assistance in decision-making through “predictive justice” and otherwise.

In commercial practice, examples of techniques in use are document review (so-called predictive coding in the document production process), legal research in which start-ups seek

⁶¹ <https://www.sifocc.org/2019/06/24/multilateral-memorandum-on-enforcement/>

to apply data analytics to traditional search engines, and AI techniques applied to due diligence to use probability statistics and machine learning to search documents for information far more rapidly than a human could.

As to court practice, paperless litigation been available for some years, giving parties and the court access to the documents on line, the judge’s annotations and comments being accessible only to the judge. Documents are produced in court on screens, and more sophisticated systems use “doc cams” enabling counsel to highlight and zoom in on documents.

An example of how technology is being used in practice is in the Qatar International Court⁶². Its “*eCourt*” is a free to use an online case management system developed by a Singapore company and tailored to meet the requirements of the QIC’s procedural rules. *eCourt* is accessible through the court website and functions across a variety of devices, including iPads/tablets and phones. It is available in both Arabic and English, and accessible by litigants, lawyers, judges and court staff, its interface being customised depending upon the type of user. It accommodates the uploading of court pleadings, files and communications between the Court and parties, and is integrated with QIC’s audio-visual facilities accommodating video and audio link appearances.

The Abu Dhabi Global Market Courts (ADGM Courts) established a fully digital courtroom in 2018.

Other innovations on the near horizon relevant to both courts and arbitration include speech recognition techniques which can provide a real-time transcript up to the standards of accuracy required in a courtroom – these have already been trialled in a court in Shanghai. A witness in a Beijing court has given evidence using virtual reality technology.⁶³ A cheap and reliable system of transcription open to all to see would be a significant contribution to the Rule of Law.

Also potentially very significant in international commercial cases, there is the possibility of AI augmented translation of evidence and documents for use in court or arbitration.

⁶² Information kindly provided by Mr Christopher Grout, Registrar of the Qatar International Court and Dispute Resolution Centre.

⁶³ <https://www.sixthtone.com/news/1001846/vr-technology-called-to-the-stand-in-beijing-court> the trial was a criminal case.

The core idea of “predictive justice” is that AI techniques can be used to predict the outcome of particular cases. Whilst this should not be considered as a substitute for a judicial determination, it could be a useful aid for judges, and if sufficiently credible, could help parties reach early settlement.

It is premised on the availability of a mass of data now available in relation to decided cases in many jurisdictions. However, outcomes are difficult to achieve in cases of factual or legal complexity. As the report attached to the 2018 European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems⁶⁴ states—

The current state of development of machine learning techniques does not allow us to reach reliable results regarding the “prediction” of judicial decisions. This is because of the impossibility of mechanically identifying all the causative factors of a decision and the risks of confusing correlation and causality.

As has rightly been said, ethics will be imperative to the proper development of law and AI:

“AI is going to go deeper into people’s lives than many things have before, and it is imperative that we take the opportunity for law and ethics to travel with it. We have as a society developed law and ethics over thousands of years. That means they are ready and available for us in this journey.”⁶⁵

Appeals

Appeals raise two particular issues in commercial cases. First, they inevitably give rise to a delay, though in some jurisdictions⁶⁶ permission is needed. Second, since it is generally impractical to provide a purely specialist panel for the appeal, some of the benefits of specialist adjudication may be lost. Each of the new courts appears to have given careful consideration to the appeals issue.

Le Tribunal de Commerce de Paris has had an International Chamber since 1995. The 2018 reform was to introduce an International Chamber in the Paris Cour d’appel, and harmonise the applicable procedures.

⁶⁴ Published under the auspices of the Council of Europe, the host body for the European Court of Human Rights.

⁶⁵ Sir Robin Knowles CBE speaking at the Law Society’s technology and law policy commission, November 2018, <https://www.legalfutures.co.uk/latest-news-/high-court-judge-ethical-and-legal-framework-for-AI-imperative>

⁶⁶ As in England and Wales.

The DIFC Courts, the QIC, the ADGM Courts, the AIFC Courts and the NCC have each set up an appeal court as part of their structure. Because of the limited jurisdiction of these courts, this should enable the appeal process to be considerably speeded up.

Decisions of the SICC are generally appealable to the Singapore Court of Appeal, although in a significant innovation, the right and scope of appeal may be excluded, limited, or varied by the prior agreement of the parties. International Judges of the SICC may be assigned to sit in the Court of Appeal.

A decision of the CICC is effectively a decision of the Supreme People's Court, and so in principle final with no appeal, although parties can apply for a retrial in the SPC's No. 4 Civil Division⁶⁷.

It is believed that no particular arrangements have been made for appeals from the Frankfurt Chamber for International Commercial Disputes.

From the users' perspective, the relative finality of arbitration may be very attractive. The absence of any general right of review can, however, lead to dissatisfaction on the part of the losing party. There are advantages in both models from that point of view, particularly if the appeal process is speedy.

Finally, appellate courts have a particularly important role in developing the substantive commercial law. So far as the common law is concerned, "In the area of commercial law, the features of consistency, certainty and predictability (the polar opposites of arbitrariness) are promoted by reason of the doctrine of precedent".⁶⁸

Standing International Forum of Commercial Courts (SIFoCC)

SIFoCC is an initiative led by Lord Thomas of Cwmgiedd⁶⁹ in the course of an influential series of speeches setting out the changing issues facing commercial dispute resolution. He proposed that commercial courts owe a duty to work together to underpin the rule of law:

⁶⁷ Matthew Erie, <https://opiniojuris.org/2019/05/13/update-on-the-china-international-commercial-court%EF%BB%BF/>

⁶⁸ Chief Justice Geoffrey Ma of the Hong Kong SAR, China, *The Dependency of Business and Finance on the Common Law in Hong Kong : A Paradigm Jurisdiction*, Oxford, November 2018, [https://www.hkcfahk/filemanager/engagement/en/upload/76/2018.11.07%20-%20Bapsybanoo%20Marchioness%20of%20Winchester%20Lecture%202018%20\(Oxford\) for%20upload.pdf](https://www.hkcfahk/filemanager/engagement/en/upload/76/2018.11.07%20-%20Bapsybanoo%20Marchioness%20of%20Winchester%20Lecture%202018%20(Oxford) for%20upload.pdf)

⁶⁹ Former Lord Chief Justice of England & Wales, and a former judge of the London Commercial Court.

“By bringing order to commerce and finance, a sound system of commercial dispute resolution helps to give the stability that is essential to the peace and prosperity of all our societies.”⁷⁰

SIFoCC was set up in 2017 to share knowledge and expertise. Courts are represented often at the Chief Justice level. It offers the opportunity of peer-to-peer judicial relationships, the development of best practice, and assistance in capacity building.

Membership is not restricted to the new international commercial courts, or the existing courts established in the major commercial jurisdictions. It is open to jurisdictions with an identifiable commercial court or court handling commercial disputes, and a substantial part of its membership comes from the developing world.

This is the first such initiative in the case of commercial courts. Its work in relation to enforcement has been referenced above. Its philosophy is that together courts can make a stronger contribution to the rule of law than they can separately.⁷¹

Concluding remarks

Commercial courts, by whatever name, are the essential bedrock of international commercial dispute resolution. The future of the new international commercial courts depends on market take up. If they can prove that they fulfil a useful role, they will survive and thrive. Together, commercial courts provide:

Authoritative development of the content of commercial law

The essential basis upon which international arbitration functions

A specialised forum of choice for businesses that prefer courts to arbitration

A specialised forum for commercial disputes which cannot be arbitrated

A route to capacity building amongst the judiciary

Procedure that can be/has been developed first in a commercial court for later wider use across a legal system

An ability both to optimise the potential of technology, and to develop it under high ethical standards

Where methods of dispute resolution currently fall below best standards, the potential to raise standards across the whole system.

⁷⁰ <https://www.judiciary.uk/wp-content/uploads/2017/04/lcj-speech-national-judges-college-beijing-april2017.pdf>, the last of the speeches in May 2017, which sums up those given earlier.

⁷¹ See the Second Report at <https://www.sifocc.org/wp-content/uploads/2019/02/Report-of-the-Second-SIFoCC-Meeting-New-York-2018.pdf>

These are long-term projects. Neither the courts nor arbitration can solve the looming disputes between States particularly in the technology field – these must be settled at the political level. However, sound commercial dispute resolution can provide a degree of stability and certainty, particularly where the courts, arbitration, and mediation work harmoniously together.

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