



LORD CHIEF JUSTICE
OF ENGLAND AND WALES

THE RIGHT HON. THE LORD THOMAS OF CWMGIEDD
LORD CHIEF JUSTICE OF ENGLAND AND WALES

COMMERCIAL JUSTICE IN THE GLOBAL VILLAGE:
THE ROLE OF COMMERCIAL COURTS

DIFC ACADEMY OF LAW LECTURE, DUBAI
1 FEBRUARY 2016

Introduction¹

1. I am very grateful to the Dubai International Financial Centre Courts and the DIFC Academy of Law for the both the pleasure and the privilege of delivering this lecture in the Dubai International Financial Centre. It provides a timely opportunity to canvass some proposals as to the way in which Commercial Courts can best meet the needs of the digital revolution in our Global Village and strengthen the rule of law.
2. It is over fifty years since the Canadian academic and theorist Marshall McLuhan developed the idea of the Global Village.² McLuhan's idea was developed in what some would describe today as the analogue age. His genius did not, however, stop there. An acute understanding of the prospects and potential of technology, and the, then, dawning electronic age led him to foreshadow the advent of the World Wide Web: what we could call the digital village. He predicted the idea that computers would become:
...research and communication instrument(s) (which) could enhance retrieval, obsolesce mass library organization, retrieve the individual's encyclopaedic function and flip into a private line to speedily tailored data of a saleable kind.³
He even suggested that people would "surf" this newly developing medium.⁴
3. The internet has not simply provided a means for buying almost anything, but it has facilitated rapid and fundamental changes in the way that business is done. The digital

¹ I wish to thank Dr John Sorabji, principal legal adviser to the Lord Chief Justice and Master of the Rolls for all his help in preparing this lecture.

² M. McLuhan, *The Gutenberg Galaxy: The Making of Typographic Man*, (1962); and, *Understanding Media*, (1964).

³ M. McLuhan, *The Gutenberg Galaxy*, (University of Toronto Press) (1962, 2002 edn) at 158.

⁴ M. McLuhan, *The Gutenberg Galaxy*, (University of Toronto Press) (1962, 2002 edn) at 144.

revolution has created new, digital, markets and digital products. It has altered the way in which businesses are structured, how they interact and trade with each other, and, of course, how financial markets operate. It has created a far more integrated world than the vast majority of people could have imagined forty or fifty years ago.

4. If we take the legal profession as an example. Digital technology has facilitated the growth of off-shoring and near-shoring work. It has facilitated the growth of law firms across many different jurisdictions across the world. Where once a law firm may have an office in one or two significant commercial centres outside their home jurisdiction and called themselves a global law firm, we now have truly global law firms with offices in cities throughout the world. As an article in *The Economist* described in 2010, and it is all the more pertinent today:

A talented graduate from any of the world's top law schools can expect a life of globe-trotting. A single month's work can include writing the small print on a Saudi investment in Africa, helping an Indonesian firm to market its shares in New York, and writing a contract under English law between two companies in Russia.⁵

Underpinning this is the obvious: as business, commerce, financial and other markets have become increasingly global, lawyers – and the law – must follow suit.

5. Technology-facilitated globalisation is not without its potential downsides. That became painfully clear with the global financial crash of the first decade of the 21st Century. Market integration across borders provided the backdrop to a global financial bubble, the effects of which are still being felt. On a more targeted level, the globalisation of business relations increases the potential scope of transnational business disputes. Both preventing and resolving such disputes calls upon the legal profession, requiring lawyers to be – in a term that seems to be increasingly popular – agile: able to move easily and quickly between many different jurisdictions, just as businesses do today.

The Rule of Law

6. Lawyers are only part of the story. Strong and effective markets, business and commerce which provide our prosperity and our economic development must be grounded on a firm commitment to law and the rule of law. This is as true of national markets and businesses as it is of transnational and international ones. Many reports of the World Bank make this clear. Judge Bufford, a U.S. Bankruptcy Judge in California, gave this long standing truism a digital age expression:

⁵ *Not Entirely Free, Your Honour*, *The Economist* (29 July 2010) <<http://www.economist.com/node/16693882>>.

The Rule of Law is part of the “software” of governmental regulation that is needed to operate the “hardware” of free markets.⁶

The importance is constantly reaffirmed. For example, in its General Assembly resolution 70/1 on Sustainable Development, the United Nations reiterated this last year: its article 9 highlights, amongst other things, the fundamental importance of good governance and the rule of law as the means to facilitate sustainable economic growth nationally and internationally.⁷ I make no apology for reaffirming it.

7. Fundamental to the rule of law is an effective justice system in each nation state. It is constituted of accessible courts, presided over by an independent and highly qualified judiciary, which delivers quality justice and commands public confidence. It is fundamental for a number of reasons. It underpins the operation of the markets and commerce. It enables contracts to be enforced and debts paid through a just and fair process. It provides a sound framework for just dispute resolution: enabling businesses to resolve their disputes, if necessary, on their substantive merits. It is, in short, essential to economic prosperity.
8. Effective courts thus give life – and where necessary give teeth – to the framework of law within which markets and businesses operate, and their lawyers advise. Such a framework enables entrepreneurs to be confident that they can develop their businesses, promote and market their products, and develop new products secure in the knowledge that their rights will be respected, vindicated and enforced.⁸
9. But all of that relates primarily to the nation state. How do we ensure that our laws and our courts properly underpin the interconnected economies and markets of the digital age and protect and foster international trade?
10. There is, of course, a long history of the way the law has adapted to the needs of international commerce by the evolution of law which is applied in the courts of the nation states. This evolution has taken many forms. One example is the *Lex Rhodia de iactu* – the law which provided a basis for compensation for those whose cargo was jettisoned to save the ship and the remainder of the cargo. As its name implies, its origins lie in the trade of the Mediterranean in pre-Roman times. As its Latin tag implies, it was adopted into Roman law and then in the European Middle Ages via a code named after the small island of Oleron off the coast of France, to the Admiralty

⁶ S. Bufford, *International Rule of Law and the Market Economy – An Outline*, (2006) Southwestern Journal of Law & Trade in the Americas [Vol. 12] 303, 303.

⁷ UN General Assembly Resolution 70/1, of 25 September 2015
<http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E>.

⁸ See, for instance, D. Acemoglu & J. Robinson, *Why Nations Fail*, (Profile Books) (2013) at 43.

Court of England and then by international rules to form the basis of the law of our modern law of general average. Numerous state sponsored international conventions have similarly, but not with quite the same ancient lineage, been developed from either commonly accepted laws of merchants or from the law of particular states, particularly common law case law; in the later part of the last century, the United Nations sponsored much of this development through UNCITRAL. Another method has been the adoption of standard terms either through the acceptance of the terms of a market that has won early domination (such as some of the commodity markets) or by agreement fostered by international bodies such as the International Chamber of Commerce (Uniform Customs and Practice for Documentary Credits) or the International Swaps and Derivatives Association, the ISDA standard terms. There can be no doubt that this development will be an ongoing process made more complicated by the necessity not only to address the needs of markets and commerce, but also the very different protective legal regime required by consumers who buy increasingly across transnational markets. An example of the latter is the publication on 9 December 2015 by the European Commission of a proposal for common terms applicable across the European Union to the supply of digital content.⁹

11. But although the provision of law adapted to the needs of international trade has a long history, the role of the courts and the legal framework for the enforcement of that law has a relatively shorter and more difficult history. Courts as state institutions have historically left it to the executive and legislature to make inter-state arrangements for enforcement. Some states courts have, however, developed their own case law to that end. One of the reasons that arbitration has such an attraction for international commerce is what is perceived as the much more robust regime provided by the New York Convention for enforcement.
12. However, with the advent of the global village in the digital age, and with the necessity of meeting the needs of the coming century, there is I think little doubt that we need to examine if what we have put in place is adequate. Such an examination is a vast topic. For example, it must include dealing with the substantive law and the means of enforcement for consumers. I have touched briefly on need for new substantive law; in England and Wales, as Lord Justice Briggs explains in his report published in January

⁹ Com (2015) 634 final; 2015/0287(COD).

2016,¹⁰ an online court is being developed specifically to provide a means by which these and other rights can be enforced.

13. I therefore must take one small bite-sized chunk this evening. I will look at Commercial Courts (a convenient term I use to encompass courts whose function is exclusively directed to dealing with dispute relating to markets, commerce and rights relating to them) and consider how they can be made fully fit to underpin global prosperity in the 21st Century. In outlining some tentative proposals, I will concentrate on the steps that could be taken to improve the legal framework for global businesses and markets and how Commercial Courts are best placed to achieve this. But first it is necessary to say a word about the real strengths of what we have.

The strength of the existing Commercial Courts structure

14. It is self-evident that a sound legal framework is constituted of clear, readily accessible and understandable substantive law, procedural law that facilitates consensual settlement of disputes and, where that is not possible, speedy and just decisions by accessible courts, whose judgments are readily enforceable. Although I have specifically referred to courts as that part of the legal framework primarily concerned with dispute resolution between the immediate parties to a dispute, I must emphasise that is but one function of the courts. Their judgments also provide the benchmark for others in the market, particularly at a time when change of the kind I have described is occurring. In common law jurisdictions they develop the law through precedent in response to market and business needs, to societal changes. Courts innovate in response to innovation. That they do so incrementally, and consistently with established principle, ensures that the law does not lose its predictability. The framework remains stable while meeting society's changing nature. It is a vital function of Commercial Courts.
15. Given the speed at which our digital village is developing and the effect such developments are having on society and business, this role taken by Commercial Courts based on common law, such as the several courts which sit in the Rolls Building in London and those of the Dubai International Financial Centre – which as Chief Justice Hwang noted is “a common law island in a civilian ocean”¹¹ – cannot be underestimated. They ensure that the law does not remain locked in an analogue world.

¹⁰ M. Briggs, *Civil Courts Structure Review: Interim Review*, <<https://www.judiciary.gov.uk/wp-content/uploads/2016/01/CCSR-interim-report-dec-15-final-31.pdf>>.

¹¹ M. Hwang SC, *Commercial courts and international arbitration—competitors or partners?*, *Arbitration International*, 2015, 31, 193 at 201.

Although it is right to recognise the dominant role of the common law courts, there are signs that the distinction between the common law world and the civilian world is in the process of erosion. This can be seen most clearly in the development of the case law by the Court of Justice of the European Union in Luxembourg and the European Court of Human Rights in Strasbourg influenced in part by the need to build a law through cases to interpret open textured treaties and more recently by the influence of those trained or educated in the common law world. In highlighting the role of the courts, I do not underestimate the proper role of governments and legislatures to develop the law. Courts, however, do provide the necessary blend of speed, flexibility and certainty required of the law generally, and particularly where the needs of business, commerce and the markets arise.

16. The development of the law by the courts has, however, historically, been reactive. To borrow an idea from a related context their role has typically been one of fire-fighting, with fire-prevention as a necessary consequence of how the fire-fighting exercise is carried out.¹² Like traditional fire fighters, they must wait for a dispute. One consequence of this has, in general, been the absence of any concerted, considered, strategic reform of court systems to enable them better to sharpen the legal framework. There are notable exceptions. The creation of the Commercial Court in London in 1895 is one of those. A problem was identified, at that time, in the delivery of high quality, timely and cost-effective, justice for commercial disputes. And targeted reform was enacted to rectify it and establish, if I can once more quote Chief Justice Hwang, what has become “arguably . . . the most successful Commercial Court in the world”.¹³ The importance of that success, and that of other Commercial Courts, cannot be underestimated. We start from a strong base with great potential, but we need a clear global strategy.

Utilising Commercial Courts to their full potential

17. Given the rapid changes to business and international markets resulting from the digital revolution, if Commercial Courts are to realise the potential I have described, they must build on their strengths and realise their full potential by a clear strategy. Their aim should be to ensure the legal framework is properly adapted to and responsive to the

¹² C. Gill, *The Evolving Role of the Ombudsman: a conceptual and constitutional analysis of the “Scottish solution” to administrative justice*, Public Law, (2014) (Oct) 662.

¹³ M. Hwang SC, *Commercial courts and international arbitration—competitors or partners?*, Arbitration International, 2015, 31, 193 at 197.

new market place and the new ways of doing business which has resulted in the global village. They cannot afford to be reactive. They must think and plan strategically, in order to ensure – as the Victorians did in the United Kingdom in the 1890s – that the courts will carry out their role in the rapidly developing digital world. It is in the public interest we do so; judges have the expertise and, as I outlined last year,¹⁴ the duty to carry out this role. If this is to be done properly, what approach should we take to realising the full potential of Commercial Courts to meet the needs of 21st century commerce?

18. I will try and answer this by considering four topics and putting forward some proposals:
- a. Market motivated, but judge led, reform
 - b. The personnel:
 - i. The judiciary
 - ii. The legal profession
 - iii. The court administration
 - c. The process
 - i. Rules
 - ii. Technology
 - d. The product
 - i. Keeping abreast of commercial change
 - ii. Determining unresolved market issues

Market-motivated, but judge led, reform

19. First, we must ensure that we develop our approach, and any reforms, in the light of what those engaged in the markets and commerce, including regulators, consider may assist the needs of the market and commerce in what is now the global village. There is little point in a committee of judges designing reform according to some abstract principle and in isolation from their perception of the need for development of the law and modern day realities of dispute resolution, particularly cost as perceived by the market user. And I should stress, I do not mean by market user, the lawyer or the professional litigant, but those in the market in its widest sense and those in

¹⁴ J. Thomas, *Judicial Leadership: Overhauling the Machinery of Justice*, (London, 22 June 2015) <<https://www.judiciary.gov.uk/wp-content/uploads/2015/06/ucl-judicial-independence-speech-june-2015.pdf>>; *Judicial Independence in a Changing Constitutional Landscape* (Wellington, New Zealand, September 2015) <<https://www.judiciary.gov.uk/wp-content/uploads/2015/09/speech-lcj-judicial-independence-in-a-changing-constitutional-landscape.pdf>>.

international commerce. Judges must ascertain those needs with the widest possible discussion and then lead the reform.

20. Design must also take account of technological developments to reduce enhance speed and reduce cost whilst maintaining the highest quality. It must also take account of the considerable evolution of differing approaches to dispute resolution across the globe. Where examples of beneficial developments are found in one court, we should learn from that and give serious consideration to their adoption. A recent instance of this approach being taken is the endorsement of Early Neutral Evaluation, ENE, as a formal part of civil process. ENE has a history which is long, but it is sensible to begin in London in the 1950s and 1960s when it was common in the relatively small communities that formed the ship chartering and insurance markets of London to take the opinion of the one of the two or three leading practitioners of the day and settle disputes on the basis of that opinion. ENE was then formalised as part of the judicial process, first, I think, in California in the 1980s,¹⁵ and then in the London Commercial Court and Technology and Construction Court during the 1990s. Unlike in the US, its uptake as a formal part of the process was until recently sporadic in England and Wales. Recognising its utility, and an increase in use in awareness of its utility in Chancery proceedings, it was confirmed to be within the general case management powers by way of amendment to the civil court rules of England and Wales.¹⁶ Given that I would anticipate that both parties and the court, which can now order ENE to take place, will make greater use of it.

21. Over the last forty years there has been a plethora of other procedural developments. The most recent of these is that which Chief Justice Hwang has pioneered here: taking a commercial court judgment and, if it is not paid, in effect transforming into an arbitral award resolving a dispute over payment.¹⁷ In some ways this is the opposite side of the coin to the approach developed in the UK where the parties can agree to appoint a judge as an arbitrator;¹⁸ the proceedings resulting in an arbitration award are much like court proceedings. Or in the US where, again in California, it is possible for parties to agree on the choice and appointment of an ad hoc judge to determine their dispute

¹⁵ W. Brazil, *Early Neutral Evaluation: An Experimental Effort to Expedite Dispute Resolution*, 69 *Judicature* 279 (1985-1986).

¹⁶ CPR r. 3.1(2)(m).

¹⁷ M. Hwang SC, *Commercial courts and international arbitration—competitors or partners?*, *Arbitration International*, 2015, 31, 193 at 203.

¹⁸ Arbitration Act 1996, s.93.

through what is in all other respects the normal civil court system. Parties obtain the perceived benefits of an arbitral award via an otherwise judicial process.¹⁹

22. I have posed these examples as courts must be bold in the way in which they devise reform, bold in practical application, and bold in addressing issues of principle that may arise. But they must heed the market in properly understanding the demand. As I hope I have made clear, such considerations should however not be limited to a discussion between judges or with government, or with the legislature or with the legal profession; its essential focus must be the commercial community as a whole. Its objective must be not only to improve the way the courts can better deliver justice in the particular dispute but also to make the courts work for the entire commercial community particularly through the wider task of developing the law to keep pace with change.
23. London can provide an example of such an approach which resulted in the introduction of the new Financial List,²⁰ which is uniquely both part of the London Commercial Court, using that term in its strict sense, and the Chancery Division. The judiciary is keeping its operation under scrutiny. Where necessary, its processes will be refined in the light of experience and court user feedback. This step was not taken because a judicial committee decided it was something to be pursued, but rather because from a range of possible reform options it was the one that the financial community in its entirety, from the regulators to the traders, strongly preferred.

Personnel

24. The second topic essential to realise the potential is personnel. We must ensure we have the right personnel to ensure success – judges, lawyers and court administrators.

Personnel: The judiciary

25. First of the personnel are the judges. It is essential that each Commercial Court is able, and continues to be able, to attract the highest quality of judges to Commercial Courts. The Commercial Court in London is well-known for the particularly high quality of its judiciary. Confidence and trust in the UK judiciary, their probity, judgment and expertise, is a matter of record. If we are to maintain the relevance of Commercial Courts in the 21st Century we must ensure that their judiciaries remain of such quality. It is of vital importance therefore that each Commercial Court continues to attract the very best. By widening the pool of appointment we are able to ensure that we

¹⁹ See, for instance, A. Kim, *Rent-a-Judge and the Cost of Selling Justice*, (1994) 44 Duke Law Journal 166.

²⁰ CPR Pt 63A.

continually improve its quality and we draw to the bench the broadest range of skills and knowledge. In doing so we ensure that judgments remain of the highest quality, that claims are managed efficiently and economically and that alternatives to formal adjudication are properly considered. We maintain and develop the law and the rule of law. Complacency in this area is something out of our contemplation. The aim should be not simply to maintain high appointment standards but to strive to improve them.

Personnel: The legal profession

26. This leads me to the legal profession itself, the second group of personnel. Experience indicates that the full potential of Commercial Courts cannot be realised without a legal profession that is innovative and excellent.
27. Can the profession be innovative? Of course. May I take the legal profession in England and Wales as an example, though the same can be said of the legal professions of some other jurisdictions. The profession is usually seen as naturally conservative, resistant to change and protective of its own interests. In some instances, that is the case, and in some cases rightly so. It is not, however, a universal truth. Indeed, despite appearances to the contrary, the profession has always innovated. A truly conservative profession would have remained resolutely focused on work within its own jurisdiction. But the overseas offices, both for law firms and barristers' chambers in England and Wales, give the lie to that. And the expertise gained from such a breadth of practice, both in terms of practice area and in terms of dispute resolution fora, provides the strongest basis for a lawyer's ability to provide effective, practical advice and representation. It makes them a real asset for any business, and does so not simply in terms of fire-fighting, but equally in terms of fire-prevention, whether that be through ensuring that contract terms are framed to their client's commercial advantage and so as to minimise the risk of litigation, or advising on the most appropriate corporate structure.
28. Innovation comes in other ways. One way in which law firms are leading the way is through changes they are introducing to their training schemes for young lawyers. An example from England and Wales was given by Lord Neuberger, the President of the UK Supreme Court, when he highlighted how one London-based international law firm had introduced in 2009 an option for its trainees to undertake an MBA as part of their

vocational training.²¹ In 2012 this was to become a mandatory part of their training. Further training was to be given after they qualified. It was a 19th Century idea that a solicitor should be a “man of business”. Here we have the modern solicitor as a man or woman of business and the law: bringing to bear expertise in both to provide effective legal and commercial solutions for their clients, ones based in a thorough understanding of today’s changing business environment.

29. This links necessarily to excellence. Improving knowledge and skills is a prerequisite of maintaining excellence. The key skill where Commercial Courts are concerned however is that of integrity and advocacy. Integrity speaks for itself. The ability to present complex cases skilfully, to assist the court in reaching the right decision within a clear legal structure and understanding of markets and commerce, is imperative. High oral and written advocacy standards must be maintained and improved. This is particularly important where advocates are able to obtain rights of audience across different jurisdictions and before a variety of different courts and tribunals. Just as court-reforms need to be based in a dialogue between court and user, the development and maintenance of the highest standards in advocacy ought to be based on a dialogue between the profession, professional regulators and representative bodies, and the courts or through Academies such as this in Dubai. Areas of weakness need to be identified, and rectified. Areas of strength highlighted and built upon. For example, the Bar of England and Wales has a long tradition of ensuring that its members have access to and take advantage of professional training to enhance advocacy skills. Any long-term strategy for securing excellence, across all our courts national and international, commercial and otherwise, must incorporate this as an aspect of it.

Personnel: Court administration

30. The final category of personnel is that of the court administration. It is all very well buying a top of the range sports car but you cannot skimp on the engine. A Ferrari needs a Ferrari’s engine. A truly effective court requires excellence to run through it. It cannot make do with first class judges, and a first class legal profession. It needs a first class administration. In this regard developments in the DIFC Courts in Dubai and in the International Commercial Court in Singapore, where the Commercial Courts are led by highly skilled and experienced Registrars and supported by an excellent staff, have set a benchmark. In the London Commercial Court, using that term in its strict sense,

²¹ D. Neuberger, *Reforming Legal Education*, (15 November 2012) at [45]
<<https://www.supremecourt.uk/docs/lord-neuberger-121115-speech.pdf>>.

leadership is provided by the judiciary, and particularly by the judge in charge of the Commercial Court, who this year is Mr Justice Blair. It is a judicial leadership which works with an extremely dedicated and knowledgeable complement of administrative staff who provide the court and court users with a very high level of service.

31. Maintaining high standards will increasingly require court staff to have the most up to date training, not least in responding to the rapidly changing technological environment. This necessarily implies that our courts must ensure that their digital systems are kept up to date. Training and ensuring technology is up to date is something that can, and perhaps all too often does in some jurisdictions, tend to be forgotten, to be treated as something that is not a priority. It is an absolute priority for the court user, however, who needs to have their claim dealt with the highest quality of justice but at a speed and cost appropriate to modern standards. Putting in place systems, such as the state-of-the-art system that is in place for the Commercial Courts in the Rolls Building in London, has been a starting point in London; the key is to ensure that the system is kept to the state of the art to ensure that the court administration's skill-set is kept in sync with it. Should Commercial Courts fail in this, they will find that work will increasingly move to tribunals, to dispute resolution fora, that offer different solutions but do so in ways and through media that meet the needs of the market and commerce.

Process

32. This leads me to the third topic essential to success – process. I want to focus on two aspects: court rules and technology.

Process: Rules

33. If I can once again quote Chief Justice Hwang:

The rules of the English Commercial Court . . . are generally accepted as being the most suitable set of rules to determine the trying of complex commercial cases.²²

34. You would not expect me to disagree. I do not, though equally I am not at all complacent. There is the ever present need for improvement. Again, this leads me back to innovation. In October 2015, in addition to the Financial List, two two-year long pilot schemes that are now operative in a number of courts, including the Commercial Court, were introduced: the shorter trial procedure and the flexible trial procedure.²³

²² M. Hwang SC, *Commercial courts and international arbitration—competitors or partners?*, Arbitration International, 2015, 31, 193 at 202.

²³ CPR PD51N.

The aim of both procedures is to provide the highest quality justice in commercial disputes more proportionately and cost effectively, thus being entirely reflective of the needs of court users, the commercial community and markets, and most importantly of justice.

35. The first thing to note is that both schemes are optional. They are available if parties agree to take advantage of them.
- a. The Shorter Trial Procedure provides for a fixed length trial of a maximum of four days, with the trial to be held within ten months of issue of proceedings. Claims are docketed and subject to limits on time to comply with procedural obligations and on disclosure and evidence.
 - b. The Flexible Trial Procedure enables the normal process to be adapted to the parties' needs. It aims at facilitating agreement on modifications, and limits, to disclosure, expert and other evidence and submissions.

Both are intended to provide parties and their lawyers the opportunity to adopt a form of process that best serves their needs in the pursuit of judgment. Looked at in a broader context they are an innovation which seeks to bring the procedural flexibility of various forms of alternative dispute resolution within the formal court setting. As such they are intended to enable parties to ensure that procedural rules that are already well-adapted to their needs, can be individually tailored to an even greater extent.

36. I would be surprised if these pilots were not successful. I say this because past experience has shown that where courts provide the means for parties to have early decisions on the merits, there is an appetite to take up the offer. In England and Wales in the period before 1974, interim applications became a form of truncated trial process to get an early view of the merits before the House of Lords put a stop to it in *American Cyanamid*,²⁴ without unfortunately the courts responding with a more innovative procedure. Thus experience suggests that where there is a demand for a truncated court based procedure it should be made available more broadly, and made available in a way that it does not result in a specific form of process being misused.

Process: Technology

37. Today it is impossible to provide a procedural code without basing it on technology and future proofing it as far as possible. It seems a very short time ago when the idea of holding a hearing via the telephone was viewed as a radical step forward. Hearings by

²⁴ *American Cyanamid v Ethicon* [1975] AC 396.

video-conference are well-established. Only a matter of years ago both Justice Barrett of the New South Wales Supreme Court and Lord Neuberger, then Master of the Rolls, suggested that video-conferences – via some form of Internet medium – could see proceedings take place simultaneously in two courts in a virtual courtroom.²⁵ We have seen the development of Memoranda of Guidance between Commercial Courts across the world. Technology suggests that those could be developed further to provide for the development of such joint hearings.

38. Why stop there? May I pose an idea that some years hence may seem feasible, if all goes well between Commercial Courts? If technology enables such hearings to take place might it equally facilitate something more? Might we be able to devise joinder of proceedings across jurisdictions: applying the same substantive law, with the parties and court determining which of the jurisdictions' procedure and law of evidence to apply, with the tribunal made up of a judge from each jurisdiction – with perhaps a third judge chosen from a roster of international commercial judges, and parallel judgments being rendered. Too far-fetched now? Yes. But should not our thinking be that ambitious? Yes, we must think what is unthinkable in our current process.
39. If the digital revolution has brought business and markets together, might it do the same for Commercial Courts? Such an approach, and I stress that this is simply something I raise to highlight the breadth of development technology could facilitate, may well be one possible means to cure the problem of effective cross-border enforcement. If a judgment is a judgment in both States, it is difficult to see what problems would arise were the parties to seek enforcement in either of them. There is thus no need to rely on reciprocal enforcement agreements between States, or the possibility that the Hague Convention on Choice of Court Agreements will enter into force and mirror the New York Convention. This, however, is a possible thinking point as to where the judiciary of the Commercial Courts might go in the future.

Product: High Quality Justice

40. Now to the fourth topic. Effective judges, lawyers and court administrations, court rules and technology are all simply building blocks: a means to an end. The end is high quality justice which develops the law in tandem with change and which thus underpins

²⁵ Barrett, *Thoughts on Court-to-Court Communications in Insolvency Cases*, Closing address to the Current Issues in Insolvency Conference (31 July 2009) University of Sydney; D. Neuberger, *A Judicial Perspective on the Conduct of Claims in the Current Climate*, (23 October 2009) at [23]
<<http://webarchive.nationalarchives.gov.uk/20131202164909/http://judiciary.gov.uk/Resources/JCO/Documents/Speeches/mor-financial-inst-conf-23102009.pdf>>.

the prosperity of our global village. In this respect I cannot stress enough that Commercial Courts must be practical courts, not courts of abstract principle, committed to enhancing the prosperity of our global village through the delivery of justice and the development of law. Let me then turn to practical steps to achieve this.

Product: Keeping abreast with commercial change

41. First, a court must understand the markets and the commercial world. The London Commercial Court has developed and adapted its links with the financial and business community. The aim of those links is to ensure that the judiciary remained abreast of changes in the market. London has a historic advantage. In the 18th Century Lord Mansfield, the creator of the basis of modern English commercial and insurance law, often used special juries drawn from experts in the field: being, for instance, commercial merchants, insurance brokers, traders and so on. Their expertise would be practical expertise. In *Lewis v Rucker* from 1794, for instance, Lord Mansfield drew on the expertise of a special jury to enable him to fashion principles of insurance law. As he explained it, the jury:

...understood the question very well, and knew more about the subject of it than anyone else present and formed their judgment from their own notions and experience, without much assistance from anything that passed.²⁶

42. That experience helped form the principles which he then went on to articulate in his judgments. In these, and other ways, Lord Mansfield ensured that the courts, and their search for principle, were not divorced from practice and thus the law was moulded to underpin the rapid growth of the UK as a trading state. It was also his common practice to invite his “jurymen” to dinner, in order to discuss mercantile principles and customs so that he was as up to date as possible. I am afraid to say that even if it were still thought appropriate for judges to invite jurors to dinner, the idea that a modern Chief Justice would be able to invest the same amount of time as Lord Mansfield did in this way is one that bears little scrutiny.

43. The courts in London may no longer have special juries or leisurely dinners, but the London Commercial Court and the Financial List must keep properly abreast with rapidly changing market developments. This is now done through the provision of market seminars by an independent body originally established by the Bank of England,

²⁶ (1794) 1 Burr. 391.

the Financial Markets Law Committee.²⁷ It ensures that senior members of the judiciary, and particularly the judges of the Commercial Court and the Financial List, are provided with regular and well-informed updates on changing market practices and the development of new financial products. In addition, to ensure that the Financial List remains relevant to court users and that change is demand-motivated, but judge led, a Financial List Users Committee has been established. Akin to the Commercial Court Users Committee, it is intended to have a broad membership drawn from representatives of legal and market associations, as well as Financial List judges.

44. The creation of the Financial List User Committee is a demonstration of a commitment to court users in the widest sense. In an interconnected world it has long seemed to me that London needed to develop a similar forum for debate at the international level. The London Commercial Court and the Financial List are international in their focus. 80% of work before the London Commercial Court has, at least, one party who is based outside the jurisdiction. Singapore and the DIFC Courts of Dubai, amongst others, are equally outward looking. Business and markets require us to be so. In truth all our Commercial Courts are international dispute resolution centres underneath their individual differences.

Product: Determining unresolved market issues

45. Second, a Commercial Court must put itself in a position where it can develop the law. Let me take as an example another innovative aspect of the Financial List, a pilot Market Test Case Scheme.²⁸ Its aim is to provide a procedure through a transparent court process for the resolution of market issues in which there is no immediately relevant authoritative English law guidance, but where such guidance is urgently needed. This enables parties to bring proceedings, where there is no present cause of action, before the court to seek declaratory relief. It is, to return to an earlier innovation, fire-prevention rather than fire-fighting. It enables parties to resolve a market uncertainty before it has reached the stage where damage is accruing as a consequence of that uncertainty. It does so through enabling all the arguments, on as far as possible agreed facts, to be put before the court by the opposing interests in relation to the issue, albeit at a time when they are not yet in dispute. As part of this innovative process and to achieve authoritative certainty, in matters of particular urgency or importance, the court may sit as a two judge court, with one judge a judge of the Financial List and one

²⁷ <<http://www.fmlc.org/>>.

²⁸ CPR PD51M.

from the Court of Appeal. It thus provides a further way in which the courts can properly develop the law in the commercial and financial arena with absolute and transparent authority.

46. This is an example of the way in which a Commercial Court can answer to the needs of the markets and the commercial community. It may also produce a reversal of the tendency born of the use of arbitration whereby the development of the law is retarded by a reduction in authoritative court judgments.

A forum of Commercial Courts

47. In these four topics (market motivated, but judge led reform, personnel, process and product) I have tried to identify some matters which I think Commercial Courts need to consider. I have drawn heavily on the experience of London. As in England and Wales, so in each state, the judges of the Commercial Courts have to discharge their duties and lead change in such a way that the Commercial Courts fulfil their indispensable role in maintaining the economic prosperity of their state. But that is no longer enough. In our interconnected world, our global village, the judges of the Commercial Courts have a similar role in ensuring our global prosperity continues to be underpinned by an effective legal framework and by law which develops in harmony with the rapidly changing markets and commerce brought about by the digital revolution. No Commercial Court can do this on its own. The Commercial Courts of the world are not unconnected islands, but have a common duty working together to innovate and to lead.
48. There is, of course, an element of competition between Commercial Courts; it is occasionally suggested that a particular court may have advantages over others. But although in a sense competitive, judges have the wider duties I have outlined. It follows that the judges of the Commercial Courts must do what they can to see that the rule of law is upheld in international markets and the law developed to keep pace. That means for example ensuring that each must learn from the others in the use of the best dispute resolution techniques, that judgments of other Commercial Courts are readily enforceable and that the law is developed to take into account the decisions of each of the other Commercial Courts. I believe this can be done without compromising in any way our competitiveness or our independence, in the same way that Central Bankers set about their duties to maintain international financial stability and growth.

49. This is of course a vast task, but as a small first step in that direction, over the New Year vacation I proposed, with the full support of the senior judiciary of England and Wales, to colleagues responsible for other Commercial Courts that we establish a forum of Commercial Courts. The objective should be to build on and develop a more systematic approach to providing a common approach to the resolution of disputes and, as important, to developing the law to keep pace with the way our global village is developing. If we are able to start to develop more structured links, share best practices, consider problematic areas and novel developments, build that mutual confidence so important to the recognition of judgments of other courts and engage constructively with our court users, our courts will realise better their potential to ensure the prosperity and good order of the digital village. I have had a very enthusiastic response.
50. In this regard I hope to see a first symposia organised over the course of the next eighteen months. There will be many topics to choose from: by way of example, cross-border enforcement,²⁹ best use of IT, the response of Commercial Courts to topical issues in arbitration (such as those that are currently arising in respect of “string contracts”), how to enhance international co-ordination and, in the light of recent experience, how we can best respond to international financial crises and their aftermath. I have recently raised this with a number of Chief Justices and, again, the response has been very positive. Given his immediate expertise and position as judge in charge of the London Commercial Court I have asked Mr Justice Blair to set about the organisation with his customary vigour. This will be no talking shop. It must deliver concrete benefits. I have no doubt we shall see these before too long.
51. Some of these issues need developing before the first symposium. I hope to encourage this by addressing one of these in a lecture in London in March 2016: the relationship of Commercial Courts and arbitration in dispute resolution and development of the law.

Conclusion

52. As our world has come together and our financial and commercial markets are changing ever more rapidly as a consequence of the digital revolution, it is imperative that our Commercial Courts adopt a clear strategic approach to how they meet that change. The basis of that strategic objective must be strengthening the rule of law in our global village. Implementation requires us to ensure that our Commercial Courts continue to

²⁹ The recognition and enforcement of foreign judgments is also anticipated to be one of the first topics considered by the recently formed Asian Law Business Institute as explained by Chief Justice Sundaresh Menon in his lecture, *Doing Business in Asia: Legal Convergence in an Asian Century* (21 January 2016).

be able to provide authoritative interpretations of the law, to resolve individual disputes in a timely, cost-effective and just manner, and to guide wider market behaviour. If we focus on four broad areas – market motivated, but judge led, reform, personnel, process, and product – and take account of and learn from each other, and make best use of the possibilities that digital technology is providing, I am convinced that we can achieve our strategic objective. And, as we work together to overcome problems, such as those concerning enforcement, and listen to the market, I am equally sure that we will be best able to enhance the rule of law in our global village and underpin its continuing prosperity and economic development.

53. Thank you.