Legal Week: Commercial Litigation and Arbitration Forum

3rd November 2016

Commercial Dispute Resolution – Current Developments in the Commercial Court

The Hon Mr Justice Blair

I begin by thanking Legal Week and the Commercial Litigators' Forum for the invitation to speak this morning at the 2016 Commercial Litigation & Arbitration Forum. This has become a well established event, as the list of speakers, sponsors and most of all the delegates shows.

It is also a very practical event, and in that spirit I am going to keep my remarks this morning on a practical level and concentrate on what is currently going on in the Commercial Court which may be of interest to you in the work you do.

I am going to speak under three broad headings. First, technology, second, procedure, and third, international strategy. These are not exact categories of course and we do not regard them as such.

But to begin by flagging up the third. We of course understand that commercial dispute resolution is now a global occupation. We welcome this, and the competition it brings. And since last year, we have had a strategy in place which I will come to later.

But we also have to remember that many commercial disputes are domestic. Some of the domestic players are on a global scale, but there are many SMEs, which are just as important.

The Mercantile Court in England and Wales plays a vital role in this regard, operating from six regional centres as well as London. Under the judicial leadership of the Midlands Circuit, there is currently a proposal to institute a Birmingham business court, in which the incoming Mercantile judge—whose position has just been advertised—will be expected to play a major role. This is consistent with Lord Justice

Briggs' view expressed in his July 2016 report that, as he put it, no case is too big to be resolved in the regions.

So I will start with technology. From the judges' perspective, undoubtedly the most important recent development has been the introduction of a completely new IT system for the judiciary, called (inevitably but appropriately) "e-judiciary".

It includes new hardware and dedicated software, and it is up to the best contemporary standards. Among other things, it has speeded up our access to the large electronic database which is available to all judges.

However, the main thing I want to mention relates to electronic filing in the Rolls Building. CE-file has been available for Commercial Court users since 2015, but take up has been slow.

Last month, the Chancery Division, Commercial Court and TCC introduced a Rule that where parties want to file documents electronically, they have to use the system to do so, rather than submit the documents as attachments to emails. Though we did not do it for this reason, it has had the effect that the number of electronic filings doubled.

There are many advantages to electronic filing, not least that an accessible electronic record in relation to the case is built up from its inception. We have moved forward carefully with this process, because there are inevitably glitches, and court users need to have systems in place that allow for electronic filing.

Though this has not been announced yet, it is anticipated that from some time probably in the first half of next year, the intention is that hard copy filing will cease to be an option, and that all documents required by the rules to be on the Court File will have to be filed electronically. The Rolls Building courts will of course consult on this, and give proper notice so that everyone has time to prepare.

However, let me add this. We want this to be an enabling development, and we want to increase, not lose, flexibility. We envisage that the documents that will be required

to be filed electronically are those which are required by the CPR or any Practice Direction to be filed on the Court File.

Normal day to day communications with the court, the sending of communications to the judge, including skeleton arguments, can continue to be done just as at present. The details are set out in a Practice Note issued on 14 October 2016, which is on the website.

One thing we will want to consult on, however, is whether skeleton arguments should be filed electronically as well as being sent out by email, etc. There may be issues with this, and we have no settled view at present, but it would seem to make sense. These and many other developments will be tackled under the leadership of the incoming Chancellor, Sir Geoffrey Vos.

Before leaving IT, let me say something about paperless trials. This is a step beyond the 'livenote' type transcript, which in my experience is now used as a matter of general practice in substantial hearings, and is useful if not actually indispensable.

The fully-paperless technology continues to improve, and all the Commercial Judges welcome it. Among other advantages, it enables us to access the documents, including any notes we have made on them, from wherever we happen to be working. Contrary to what some people who prepare paper bundles seem to think, we do not actually live in the Rolls Building.

But – and it is a big but – we appreciate that the technology remains expensive, and, of course, the parties pay for it. Commercial arbitration and litigation is already expensive enough without adding to it unnecessarily.

This, I think, we have to put back to you as the professions. The Commercial Judges had a meeting with the main provider earlier this year, and identified some of the drawbacks from the judges' perspective – we hope that the technology continues to develop. But ultimately, surely we should be looking to see in this field what has happened with most, if not all, other IT – that is, the technology becoming cheaper, as well as more efficient?

Let me move to my second heading which is procedure. It is important that we continue to adapt and innovate, and we have invaluable support from the professions in this respect.

I begin with the Commercial Court Guide which was first published in 1999, and has proved invaluable in succinctly stating the practice of the Court. It has been kept up to date since. Lord Justice Hamblen was responsible for it when he was a Commercial Court judge, which says something for its quality.

Under the leadership of Mr Justice Knowles, who played a leading role in the original draft when Sir Bernard Rix was Judge in Charge of the Court, we are in the course of producing a complete revision of the Guide. We invited comments from practitioners, and these have very much informed the draft. One of the speakers today, Sara Cockerill QC, is one of those who has been helping Sir Robin Knowles in the work.

Picking up on technology, one of the fields in which technology has posed a challenge is in respect of disclosure.

In April this year, on the initiative of the Master of the Rolls, the judiciary held a substantial seminar with the GC100 Group, which is the association of general counsel of the FTSE 100 companies, together with members of the professions.

As well as exploring the practical problems that arise, the judges were able to emphasise the importance that the courts attach to disclosure in particular cases.

It is part of the DNA of our system of civil justice, and for a good practical reason. The contemporaneous documents may provide the best way of testing whether assertions made by parties are in fact correct. They can also anchor the chronology where it is important to the court, and to all parties, to know the precise course of events in reliable detail.

Having said that, the scope of disclosure is ultimately an exercise which has to balance these considerations against the cost.

As you will know, since April 2013, standard disclosure has ceased to be the default position.

Under the CPR, the court may dispense with disclosure altogether. I made just such an order by consent in a case in the Financial List a few weeks ago.

Another option is an order in the form of the IBA Rules on the Taking of Evidence in International Arbitration.

There are, in fact, five options listed in the Rules.

The criticism has been made that too often the parties simply assume that standard disclosure should take place, and I think that there is force in that criticism. The judges will expect parties to be more proactive in this respect.

Ultimately, however, I doubt very much that experienced litigation lawyers of the kind gathered in this room will cease to appreciate the importance of disclosure. The real challenge is to find ways of bringing down the disruption and cost.

One of the things to emerge from the GC100 meeting is a working group chaired by Lady Justice Gloster. Among other things, she will be looking at the contribution that techniques such as predictive coding may play. As you will know, use of this was approved in principle in a decision handed down by Master Matthews, an expert in this field, in the Chancery Division earlier this year.

I mentioned a moment ago the importance of continuing to innovate.

One such innovation is the Financial List. I spoke about this in September at a well received Commercial Litigators' Forum event in New York. 16 cases have been filed in or transferred into the List so far this year, which is good going for a new list.

The next Users' Committee meeting will be held probably in January of next year. This, by the way, is not in any sense a closed meeting. We will put the date on the website when it is fixed, and users and potential users of the List will be welcome.

The Financial List, is, of course, a joint initiative between the Chancery Division and the Commercial Court. I want to say something about a different initiative, which applies to each of the Rolls Building's courts.

There is an excellent description of the Shorter Trials Scheme in the judgment of Mr Justice Birss in the *Family Mosaic Home Ownership* case decided earlier this year.

This initiative was also introduced in 2015, and the purpose, as the name suggests, is to get trials which will take no more than four days on more quickly, where that is appropriate.

So far, this year, we have had eight such cases in the Commercial Court and London Mercantile Court. Whilst this is obviously a small fraction of the total, it is, in my view, a promising start.

To give a concrete example, next Monday 7 November a trial will take place in a case in the Commercial Court in which proceedings were issued in March.

So under this second heading, the point I want to emphasise is that the court is committed to continue to adapt its procedures where it is of use to our users.

My third heading is as to the position internationally.

Our courts have traditionally made a strong contribution in this respect, as exemplified by the Head of International Judicial Relations, Lady Justice Arden, herself a leading corporate and commercial lawyer.

Let me begin with international arbitration, and with a statistic. In 2015, 25.7% of cases commenced in the Commercial Court were arbitration claims, and this is a rising trend.

They include a wide range of issues such as injunctions, interim measures, the appointment of arbitrators, registration of awards and enforcement, as well as the court's supervisory jurisdiction. As regards the latter, there were four successful appeals on points of law, and one successful challenge on the grounds of serious irregularity.

So this gives some perspective on the scope of the court's work in support of arbitration, and this provides a sure foundation for international arbitration with a seat in England to proceed with confidence. This point was underlined by Lord Thomas, the Lord Chief Justice, in a speech given in October.

By the way, we do not think it is accurate or sensible to see arbitration and litigation as in some kind of arms race. Both should be seen as mutually supportive parts of what is a developing system of international commercial dispute resolution.

There are, of course, many excellent commercial courts in various parts of the world. The Unites States, Europe, the Gulf States, Singapore, Hong Kong, Australia and many more. India enacted a Commercial Courts Act at the end of last year, and in the developing world, a number of African states have set up such courts. I would like to pay tribute to these courts, and the work that they do.

This global picture raises a question. How are these courts to interrelate? The Lord Chief Justice posed this question in a speech given in Dubai in February.

With the support of other Chief Justices and judicial leaders, he announced the setting up of a Standing International Forum of Commercial Courts.

Among the subjects in which there is a common interest, he identified procedure and enforcement. In the latter regard, special mention may be made of the 2005 Hague Convention on Choice of Court Agreements which, following the requisite number of ratifications, entered into force on 1 October 2015.

The Forum will convene here in London on 5 May 2017. We will not be meeting in a spirit of competition, but in a spirit of cooperation. We have much from our own

experience to share, but equally we have much to learn from the experience of our colleagues in other jurisdictions.

Let me end on a personal note. I handed down judgment in a case last week in which one of the issues was the timing of a notice. Shortly before trial, the solicitors for the defendants discovered that an email believed to have been sent at 6.30 was in fact sent an hour later. It was disadvantageous to their case. It might never have been noticed. But they did the right thing, notified the other side, and took the hit.

This underlines in a very practical way the debt that the justice system owes to the professions and to you as professionals. Quite simply, without your high standards, justice would be much the poorer.

Thank you for your attention.