

# GIVING BUSINESS WHAT IT WANTS – A WELL RUN COURT FOR COMMERCIAL AND BUSINESS DISPUTES

GRAND COURT OF THE CAYMAN ISLANDS GUEST LECTURE 2017

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

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## Introduction<sup>1</sup>

1. It is a pleasure and privilege to have been invited to give a lecture in this distinguished series and to have this opportunity to consider how we can ensure that the courts that serve the business community build on their reputations, their expertise, and remain centres of excellence. There are perhaps two contrasting reasons for doing this. The first is what may be seen as becoming an increasingly competitive market place between jurisdictions and types of dispute resolution. The second is the discharge of the duty of commercial courts<sup>2</sup> to work together to uphold the rule of law and so underpin international economic cooperation and prosperity. Both reasons require these courts to ensure they meet the needs of the business community. Let me turn first to the market in justice.

### *The market in justice*

2. It is perhaps strange to think of a market in justice, but it is readily apparent that there is one. As Blair J rightly noted recently,  

‘International commercial disputes are mobile ... Parties to an international commercial relationship can, within limits, choose their governing law. 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 ...’<sup>3</sup>
3. These observations make clear, that there are two basic considerations that ought to be taken into account:
  - a. The governing law.
  - b. The choice of venue both as to location and as to type of tribunal.

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<sup>1</sup> 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.

<sup>2</sup> A term I will use to courts which specialise exclusively in resolving disputes between businesses

<sup>3</sup> Sir W. Blair, *Contemporary Trends in the Resolution of International Commercial and Financial Disputes*, (21 January 2016, Institute of Commercial and Corporate Law Annual Lecture 2016, Durham University) at 1 – 2 <<https://www.judiciary.gov.uk/wp-content/uploads/2016/01/blair-durham-iccl-lecture-2016.pdf>>.

4. In making that choice on both basic matters, businesses should take account of many factors: familiarity with the governing law; their lawyers' advice; their preference for a court or arbitration and their perceptions of the advantages of these alternatives; the quality of justice within the court; the enforceability of a judgment.
5. From discussions with lawyers in the UK and in particular General Counsel, it is clear that the choice on these matters is likely to be a subsidiary matter in the negotiations between businesses, as most businesses proceed on the justifiable assumption that a dispute is highly unlikely. A few businesses are, however, sometimes conducted on the basis that if the deal is not quite as advantageous as hoped for, or the price obtained too high or too low, the matter can be remedied in litigation; then the choice becomes critical.
6. However, whatever the position of the business, lawyers advising on the deal should carefully examine the choices.<sup>4</sup> In due course when AI is used in a more sophisticated manner to assemble and evaluate contract clauses, the input of the data which is used to evaluate the different options will be important; AI should then help to make an analysis more rigorous.

#### *The duty of the courts*

7. In contrast to what can be described as market reasons, the courts (as one of the three branches within the state) have a duty to provide not only within each state what the business community needs to underpin domestic prosperity, but they have to look at what is needed from a transnational perspective. Although in a sense courts and other forms of dispute resolution may be in competition in a global market place for dispute resolution, if the courts are to discharge their duties in a way that upholds the rule of law on the international plane and sustains international prosperity, they have to ensure that they learn from each other and strive to achieve the same quality of justice.

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<sup>4</sup> Simon Bushell, chair of Latham & Watkins' Litigation and Trial Department, concluded in an article for *London's Financial List – A choice of forum crossroads*, PLC Magazine (April 2016) that "Financial institutions are, it seems, at a crossroads when it comes to their dispute resolution options. More than ever, real care and consideration needs to be taken over this decision." He noted with the growth of more and more options, whether the traditional ones, such as commercial courts, arbitration, or new options, whether they be new courts and arbitral tribunals or new bodies such as P.R.I.M.E or JAMS Financial Markets Group, that considered choice calls for more care to be taken by businesses.

### *The choice of law*

8. The essential choice of governing law is between a civilian code system (likely to be based either on the French or German codes) and a common law system.
9. The civilian code systems make much of the certain status of their law. About 10 years ago the German Government made a powerful case in a small booklet in support of this proposition called “Made in Germany”. Last year, France revised for the first time since the time of Napoleon that part of their civil code relating to contractual obligations and also published it with an excellent English translation. Their purpose was to try and ensure that French law was seen as up to date and therefore seen as a viable competitor to the common law systems. Common law lawyers cannot be complacent.
10. The common law systems in a sense pride themselves in having an aversion to codification of the law relating to business. After the great national codifications of the nineteenth century and the international conventions relating to carriage, apart from “minor fixes”, the systems have looked to judicial development, fostered by an increasingly influential academic contribution, made accessible through textbooks and restatements
11. Factors influencing the choice between these two basic systems is a complex one. It is not easy for a common law lawyer to suggest a choice other than the common law, but, as judge-made development of the law is so important, I will return to this briefly when examining whether courts in a common law system are giving the business community what it needs in balancing certainty and development of the law

### *The choice between court and arbitration*

12. Not without generating some controversy, I spoke on this topic in London last year.<sup>5</sup> I will only return to it in the context of privacy and confidentiality in arbitration.

### *The need to change: resting on laurels*

13. Established commercial courts cannot rest on their laurels and simply assume that as they have been the forum of choice for businesses they will continue to be so. Longer established specialist commercial courts, such as Delaware’s Court of Chancery, the

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<sup>5</sup> *Developing commercial law through the courts: rebalancing the relationship between the courts and arbitration*, <<https://www.judiciary.gov.uk/wp-content/uploads/2016/03/lcj-speech-bailli-lecture-20160309.pdf>>

Commercial Division of the New York State Courts, the International Division of the Paris Commercial Court, and the Financial Services Division of your Grand Court, have always provided businesses with a choice of venue.

14. New commercial courts present businesses with further options, such as the Singapore International Commercial Court or the proposed Netherlands Commercial Court, which will conduct proceedings and issue judgments in English where one of the parties is based outside the Netherlands.<sup>6</sup> And then, of course, there are comparable developments in Dubai, Qatar, Abu Dhabi, and India.<sup>7</sup>
  
15. The time when Lord Denning MR could comment on the attraction of England and Wales and the courts of England and Wales as the forum of choice for many commercial and business disputes – because, simply put, London was a good place or forum to shop in – is now long gone. The advantages Lord Denning MR noted of England and Wales – ‘*the quality of the goods and the speed of service*’ remain in place.<sup>8</sup> They are not however unique; I doubt they ever were. Quality, timeliness and containment of cost are the hallmark today of many jurisdictions across the world. Increased choice of increasing quality across jurisdictions produces and will continue to produce increasing competition, at the same time serving to increase the quality of justice in each jurisdiction and thus strengthening the rule of law internationally. If commercial courts, wherever situated, are to continue to be centres of excellence, forums of choice, we must ensure that they are to deliver justice in ways that best suit court users.
  
16. It is, however, an unpalatable truth that courts and justice systems have not always been designed or operated with the needs of business foremost. Procedures may not have been designed for the convenience of lawyers and judges; that is not to say, however, that they have been designed for the convenience of litigants. And it is not to say that they have not operated in ways that have inconvenienced litigants. At one time they clearly did, when

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<sup>6</sup> P. Ernste & F. Vermeulen, *The Netherlands Commercial Court – an attractive venue for international commercial disputes*, TCR 2016 (Issue 4) 127 at 132 – 134.

<sup>7</sup> For an outline of these developments see, W. Blair, *Contemporary Trends in the Resolution of International Commercial and Financial Disputes*, (Durham, 21 January 2016) at 11-12 <<https://www.judiciary.gov.uk/wp-content/uploads/2016/01/blair-durham-iccl-lecture-2016.pdf>>.

<sup>8</sup> Lord Denning MR in *The Atlantic Star* [1973] QB 364 at 381 – 382, ‘*No one who comes to these courts asking for justice should come in vain. ... This right to come here is not confined to Englishmen. It extends to any friendly foreigner. He can seek the aid of our courts if he desires to do so. You may call this 'forum shopping' if you please, but if the forum is England, it is a good place to shop in, both for the quality of the goods and the speed of service.*’

the '*luxurious march towards the House of Lords*' for commercial disputes meant businesses having to succumb to unknown costs and unknown delay before final judgment.<sup>9</sup>

17. Thankfully, those days are now long gone. That they are is no cause for complacency, even were it not the case that new commercial courts were developing their presence in the market for justice. The question I wish to explore is how we can ensure that we continue to provide well run courts that can properly resolve commercial and business disputes. In other words, how do we ensure that our courts remain forums in which businesses want to shop? In considering this I want to focus on the following:

- ascertaining the business perspective;
- getting procedure right;
- getting the law right;
- ensuring proper enforcement;
- business disputes in the wider context of the rule of law.

#### **(1) Ascertaining the perspective of businesses**

18. My starting point must be the perspective of the businesses. What is it that businesses wants from commercial courts?

#### *The needs of business changes*

19. In 1892, at a time when the serious dissatisfaction with the way in which the courts in London dealt with business cases was coming to a head, the business community made its view clear. According to an unnamed High Court judge the answer was simple. He put it this way,

“Two considerations are important to men of business when contemplating the possibilities of litigation. The first is – money. ‘How much is it likely at most to cost?’ The second is – time. ‘How soon at latest will the thing be over?’ They want to close their books at the end of the current year, to write off bad and hopeless debts, to know upon what lines next year to deal with similar questions should they arise.”<sup>10</sup>

20. Certainty of cost. Certainty of time. And, implicitly in these points was a third: certainty in the law. They were the three key features identified in the 1890s. There were also other

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<sup>9</sup> The Times, (10 August 1892).

<sup>10</sup> The Times, (10 August 1892).

factors such the introduction of interrogatories and discovery and the prolixity of pleadings. The court's failure to deliver justice in a manner businesses wanted at the time underpinned the search for alternatives, particularly arbitration which secured two of the three: low cost and speed. The judicial response at the time was to create the Commercial Court in London on 8 February 1895. Its process was simple and flexible. It was quick and relatively inexpensive. It delivered high quality judgments providing businesses with the legal certainty and predictability they needed, both in terms of resolving specific disputes and, more broadly, in enabling them to order their future commercial deals on a sure footing. It met each of the three objectives. It did so because of the close working relationship between the businesses of the City of London and the judges of the court.

21. However, business perspectives do change over time. Furthermore it is an uncomfortable truth that, over time, court procedures and practices have a regrettable tendency to become complex, lengthy and, accordingly, expensive; in short, they ossify – it is an endemic disease to which all legal systems are prone.
22. The most famous illustration was the Chancery Court of the nineteenth century as described in *Bleak House*. However, it can be seen at several times in the history of the Commercial Court in London. By 1956 it was a court in decline; in that year it had only 29 cases that occupied 56 days of court time, in contrast to the 169 cases that had been tried in 1898, three years after the court's creation. In 1956 only 15 commercial trials took place.<sup>11</sup> Devlin J (as he then was) was even more pessimistic. He told the Lord Chancellor in March 1957 that it was dying and suggested the appointment of a Committee under Cyril Miller of Thos. R Miller, the managers of the major P and I Club, which played such a prominent role in litigation when so many of the disputes related to shipping, given London's prominence at the time in the maritime industry.
23. The Lord Chancellor came to the view that only radical reform would enable the Commercial Court in London to survive. He therefore established a conference under the leadership of Cyril Miller and Pearson J (as he then was), Pearson J chairing the legal sub-committee.<sup>12</sup> It sought the views of the commercial community as to why the court was in decline. A number of answers were given in its report in November 1961. Two

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<sup>11</sup> Sir A. Colman *The Practice and Procedure of the Commercial Court* (1<sup>st</sup> edition, 1983) at 10.

<sup>12</sup> The Report of the Commercial Court Users' Conference, (1962 Cmnd. 1616).

will not surprise you. The court that started with not just the promise, but the reality, of quick and inexpensive processes had become sclerotic and expensive – lengthy pleadings and the insistence on lengthy oral evidence. Arbitration once again was viewed as offering a cheaper and speedier forum.

24. It is worth noting, in passing though, that such problems are not the unique province of the courts. The present problems associated with arbitration show that it is not immune to the problems of cost and delay; its promise of expeditious and less expensive processes has too been lost over time. As Professor Jones put it in last year's Roebuck lecture, the 'cost and time advantages (of arbitration) have grown elusive of late ...'<sup>13</sup>

25. Cost and delay were not the only issues raised though. The court had a number of other problems. It had been in part a victim of its own, earlier, success and in part had forgotten its earlier processes. This was the point forcibly made by Megaw J in a practice direction issued at the beginning of the legal year in 1962 that implemented some of the suggestions.<sup>14</sup> It started:

The purpose of the commercial court, as it is commonly called, is to provide a service to the commercial community by enabling commercial disputes to be decided as quickly and as cheaply as circumstances allow.

26. The Practice Direction suggested that parties come to the court at the outset, explain the real issues to the judge and the judge would make an order for directions; if that were done pleadings might in many cases not be necessary. The hearing for this purpose could, if desirable, be heard in the judge's private room.

27. This last suggestion no doubt arose from what the conference had reported about the preference of business - privacy and confidentiality. Arbitration provided this. Litigation did not. The main suggested answer was to allow commercial court judges to sit as arbitrators, in private. Businesses were also noted as having an 'inherent dislike of . . . the system of oral examination and cross-examination.'<sup>15</sup> The suggested answer was that powers to permit the court to order informal proof of facts, unsworn witness statements and trials on agreed facts be extended. And finally, criticism was made about the

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<sup>13</sup> See, for instance, D. Jones, *Using Costs Orders to Control the Expense of International Commercial Arbitration*, (Roebuck lecture 2016),

<sup>14</sup> [1962] 1 WLR 1216

<sup>15</sup> For a summary of the points raised see, A. Colman *ibid* at 10-11.

enforceability of judgments; it was – as it still is today – easier to enforce arbitral awards in foreign jurisdictions. Again, the answer was to permit judges to sit as arbitrators.

28. There is a common thread in these points that had arisen since the court was originally created. The business community identified as weaknesses in the court the advantages it perceived arbitration as having. Reform was effected. Judicial arbitration was introduced in 1970, although surprisingly it has never been used widely. It is not clear why this has been so. On one or two occasions, such an arbitration has proved most valuable, such as the decision of Staughton J in relation to the ships trapped in the *Shatt al Arab* at the commencement of the Iran/Iraq War in 1980, reported as the *Bamburi*.<sup>16</sup> I have indicated my willingness to be much more favourably inclined to appoint judges as arbitrators. I therefore hope that there will be more requests in suitable cases.
29. The practice of the Commercial Court in London was therefore reformed to ensure that its procedure was more flexible; and importantly, in terms of managing cost and delay, what we would now describe as active case management by the court became the norm. As reform had done in the 1890s, the 1960s to 70s saw the court change in order to meet business needs.
30. Responding to business needs is not however unique to England and Wales. To give another example: commercial dispute resolution in New York suffered similar problems to those that have periodically been apparent in England. As former Justice Cahn, of the Commercial Division of the New York state courts, put it:

“In the early 1990s, the business community complained that New York state courts were not handling commercial matters in an expeditious manner.”<sup>17</sup>

The answer: to create a specialist commercial division with dedicated specialist judges, and with the possibility of adapting court rules and practices flexibly; this would then be applied with rigour through active case management. The response was to seek to meet these needs of business.

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<sup>16</sup> [1982] 1 Lloyd’s Rep 312

<sup>17</sup> H. Cahn, *Advantages and Pitfalls of the Commercial Division*, New York Law Journal (Vol. 242. No. 28) (10 August 2009)



31. Although we can learn from the history on which I have touched, of the need for vigilance and awareness of the endemic disease of all litigation, procedural complexity, of how many of the questions have been raised in the past and of the answers given, each era has its own problems. Today apart from the old favourites of cost, complexity and delay, the major new issues include disclosure/discovery and realising the potential of IT. Paramount, however, is the need to obtain the perspective of business.

*Ascertaining those needs*

32. The first question then is how to we ensure that our courts are aware of the business perspective. A conference similar to that led by Cyril Miller and Pearson J is one answer. It is a less than ideal one. Such enquiries are inevitably periodic. They arise when problems have become acute and when muddling through is no longer an option. The 1961 conference exemplifies this. By the time Cyril Miller and Pearson J were appointed in 1960 the court was, in effect, in the moribund state I have described. Steps ought properly to have been taken much earlier. Problems need to be tackled at source, when they arise not when they become unbearable.

33. Another and better approach is the one that has since 1961 been taken by the Commercial Court in London and, in an apparently less formal way, by the New York state courts. It is to listen to and respond to complaints when they arise. It is to provide a forum for discussion between the court and its users. Such a forum, the Users' Liaison Committee, was recommended by the 1961 conference, and established shortly thereafter. It is now the Commercial Court Users' Committee. Similar users' committees exist in other areas. There is one for our Court of Appeal, and the recently established Financial List (to which I will return) has also established its own users' committee.

34. Each such committee is an indispensable means of communication between the commercial judges, court administration, commercial lawyers and business leaders, both domestic and international. It tries to ensure that the court's work and its practices are kept under review. It makes recommendations for reform in the light of user experience, and 'the changing needs of the commercial community'.<sup>18</sup> It has meant that a far-ranging inquiry has not been necessary since the 1960s. Improvement and reform has been a

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<sup>18</sup> Admiralty and Commercial Courts Guide (2014) at A3.1.

continuous process since its creation; and one that has most recently produced our new Shorter Trial and Flexible Trial procedures<sup>19</sup> and, via a wider consultation process carried out in 2014-2015, our Financial List and Financial Markets Test case procedure.<sup>20</sup> In particular, the Financial List was arrived at as a result of consultation on a number of different reform options.<sup>21</sup> It was strongly preferred by the financial and business community; and was demand-led rather than top-down reform.

35. Although court user or liaison committees are a very effective means to ensure a continuous dialogue between the courts and the commercial and business community, they are not on their own sufficient. The judiciary needs to have the greatest possible contact with the business community. I am not advocating a return to Lord Mansfield's dinners with his special jurors, but a wide ranging dialogue to check that the views of all, particularly those who are averse to committees (or do not have the time), are properly communicated. Three recent examples have demonstrated the need to ensure the widest possible contact. The Commercial Court Users' Committee was broadly against the proposals for costs budgeting; when in-house counsel were consulted, the view was not so clear, but you will be glad to know I do not intend to venture into a subject that remains highly contentious in England and Wales. The second has been disclosure, to which I will return. The third is an area where committees sometimes find difficulty in expressing an unambiguous view – a case where the courts have got the law wrong. It is essential that the last is communicated fearlessly.

36. For this reason, those responsible for the courts that serve the business community must be in a regular dialogue with all interested in the work of the court, including of course regulators, central banks, the executive government and the legislature.

37. Though there is the inevitable danger of complacency, I think the ways I have described are the best ways of ascertaining the needs of the business community. It is to two of those main needs I now turn.

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<sup>19</sup> CPR PD51N.

<sup>20</sup> CPR Pt 63A, PD51M

<sup>21</sup> See <<http://www.chba.org.uk/for-members/library/consultations/financial-list-initiative-consultation-document>; <http://www.chba.org.uk/for-members/library/consultations/financial-list-initiative-consultation-appendices>>

## **(2) Getting procedure right**

### *The aim*

38. What I have already said makes clear that obtaining a cost effective, timely and, above all, just procedure is almost as hard as the search for lost treasure. The difficult issue is how to ensure that procedure facilitates the achievement of cost effectiveness, timeliness and justice. Procedural flexibility and simplicity, as I have said, was, from its inception, at the heart of the London Commercial Court's approach; with parties able to adapt the process to fit the needs of the case and the court able to provide a certain time frame to trial and judgment. This remains reflected today in its procedure. More than that, it has provided the basis for an extension of the London Commercial Court's approach through the formal introduction of a specific Shorter Trial procedure, which ensures that a single judge is responsible for the management of a claim from issue to trial – which should take no more than ten months with a maximum four day trial period – and of the Flexible Trial procedure, which allows parties to modify the process by consent so that, again, the proceedings are as speedy and simple as the case merits.

39. The intention of these two new, formal, procedures is to extend the London Commercial Court's original approach to all claims brought in the Technology and Construction Court and the courts of the Chancery Division. Their incorporation however emphasises a specific point: innovation. The London Commercial Court has long been a source of procedural innovation because of its focus on the needs of business. It has matched process to the claim; a principle that the Civil Procedure Rules after the Woolf reforms has, with mixed success, tried, to achieve. I will take two examples.

### *Technology*

40. First, the use of technology. In England and Wales we are currently developing an online court/tribunal. This must be and is radical in its approach. It is well known that it is far from ideal to try to digitalise an existing process; the use of IT and in due course AI enables courts radically to rethink procedure. To that end we have very recently completed a systems analysis across civil and family law and the law administered by our tribunals (determining disputes between the citizen and the state on matters such as tax, disability benefit, social security entitlement, special educational needs and immigration). It has demonstrated that every type of procedure shares a common path, despite the differences we currently have in relation to nomenclature and the like. That common path

has six stages. There is of course a need to provide for additional processes which might be necessary in some cases. The analogy used is a simple corridor for all claims, with rooms off the corridor (or an atrium with several doors spaced around it). The rooms off (or the doors in the atrium) provide for additional procedures in some cases – such a pre-trial relief and disclosure.

41. In the Prisons and Courts Bill presented to the UK Parliament at the end of February 2017 to give effect to this and other reforms, provision is made for a rule committee to support the online court/tribunal with a common set of rules/practice directions. The aim is absolute simplicity with much of the procedure, such as time limits, embedded in the digital process.
42. I mention this as the initial intention is to use this for simpler and lower value claims. Similar approaches have been taken in other countries; from March 2017, litigation in the Netherlands must be conducted electronically.<sup>22</sup> However, depending on experience in practice, it may well be possible to extend the new online court/tribunal across much, if not all, of the system. After all the Commercial Court was founded on principles of simplicity. As we proceed we will of course engage fully with businesses, but we feel certain that a return to greater simplicity by harnessing IT properly will be greatly welcomed.
43. In the meantime the London Commercial Court, the Technology and Construction Court and the courts of the Chancery Division have also embraced technology, through the traditional approach: digitalising existing process. In June 2015, following early pilots, these courts introduced an electronic filing and case management system. The system enables court documents and fees to be submitted online, and it facilitates the management of claims by the courts online, rather than via the historic – labour and cost intensive – paper processes. The pilot was successful. And from April 2017, all claims, applications and documents will have to be filed online: paper processes will be no more. E-filing and management increase efficiency and reduce cost. As do paper-free trials. Judges will lead the way in dispensing with the use of paper as is now happening in the Crown Court of England and Wales. These changes also facilitate ease of filing, and

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<sup>22</sup> P. Ernste & F. Vermeulen, *ibid.* at 137.

video-link submissions and even witness evidence, from across the world, making courts more accessible to litigants and their legal advisers from across many jurisdictions.

#### *Disclosure/discovery*

44. My second example is disclosure. Probably the biggest issue facing common law systems is the issue of discovery. In his recent Neil Lecture on 10 February 2017, “*20 years as a Judge: Reflections and Refractions*”, Lord Neuberger expressed his view based on his experience as a trial judge that the value of the expensive and well-established practices of disclosure of documents and of cross-examination of witnesses was highly questionable. We all will have our own views. My experience, both as counsel in commercial cases and as a trial and appellate judge in commercial and criminal cases, would lead me to a different conclusion on disclosure, at least in some types of case. But whatever personal views one might hold, there can be no doubt about the need for radical reform of disclosure. It is now the biggest concern of businesses; more than 25 years ago, a very large reinsurance dispute I was involved in settled when the Chief Executives of the main parties were given the estimated cost of disclosure; and that was before the days of email.

45. The problem may not be as acute in England and Wales as it is, for instance, in the United States, due to the different roles that discovery plays in those two jurisdictions, but it is acute nevertheless. The one message which businesses, and particularly Group General Counsel, consistently make is that disclosure is too burdensome; and with the growth of e-disclosure it becomes ever more so. The refrain is “Something must be done”. But what? The abolition of the process? Disclosure of what each party volunteers? Specific disclosure only? We have over the last twenty years made a number of attempts to remedy this concern. The Woolf reforms attempted to do so on a general level. Sir Richard Aikens examination of the issue in 2007 made a further, commercial-court-focused attempt.<sup>23</sup> None have so far succeeded. At present Gloster LJ is leading on a detailed examination of the issue.

46. In the meantime, at least some small progress is being made – two innovations illustrate this. First technology. The High Court, in *Pyrrho Investments Ltd v MWB Property Ltd &*

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<sup>23</sup> Sir R. Aikens, *Report and Recommendations of the Commercial Court Long Trials Working Party* (Judiciary of England and Wales) (2007).

*Ors* [2016],<sup>24</sup> endorsed the use of predictive coding as a means by which the disclosure process could be carried out. In doing so it endorsed an approach taken by the District Court of New York in *Moore v Publicis Groupe* (2012),<sup>25</sup> and then by the Irish High Court's commercial court in *Irish Bank Resolution Corporation Ltd v Quinn* (2015).<sup>26</sup> In that particular case it was noted that an automated search was both a quicker and cheaper way of carrying out the disclosure process than having a number of junior lawyers or paralegals review over three million documents, but that as a search method it was more reliable. Thus, efficiency and economy arose from a more accurate system.

47. The second innovation is the introduction of a more flexible, tailored approach to disclosure. There is no default disclosure option, no presumptive option. There are many options, including no disclosure, issue-by-issue disclosure, all the way to trial of inquiry disclosure. Parties are expected to consider how to approach the process, and ought to agree on the approach to take. As such there is no reason why, in the commercial context, parties cannot agree to an approach.. Again, process can be adapted to meet the needs of the case and the court user to promote accessibility through procedural flexibility. However, as I have indicated, the work on this is far from complete and, although a solution has so far been elusive, I am optimistic Gloster LJ will take us a long way forward.

### **(3) Getting the law right**

#### *The balance between development and certainty*

48. But the needs of business extend not only to cost and procedure. Far, far more important, as the birth of the Commercial Court in London demonstrated, is getting the law decided correctly. Apart from cost and procedural issues, the problem identified in the 1890s was the failure to guarantee that a case would be tried by a judge who understood business and its needs; that was not simply the provision of a judge who would be able to try the case quickly, but who would be able to get it right.

49. Getting it right entails achieving a proper balance between legal certainty and the development of the law to meet changes in the way business is conducted. The balance is

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<sup>24</sup> [2016] EWHC 256 (Ch).

<sup>25</sup> 11 Civ 1279 (ALC)( AJP), (S.D.N.Y. Feb. 24, 2012).

<sup>26</sup> [2015] IEHC 175, [2015] 3 J.I.C. 0306, Irish High Court (Comm.)

clear where there are no precedents such as in some of the cases in the new Financial List. It is important to note in this context that the procedure of the List provides the parties with some input in the choice of judge. Although judge shopping is not allowed, the parties can indicate the specific expertise they believe their dispute requires.

50. As regards the development of the law, it provides through a novel test case procedure – the Market Test Case Procedure – the means by which parties can bring a claim where there is no present cause of action between them, but there is the need for the resolution of market issues on which there is no relevant authoritative precedent. Agreed facts will be put before the court by the parties. In appropriate cases third parties, such as market associations, may be joined as parties or allowed to make submissions as intervenors. The issue of law will be tested and a precedential judgment given, which if necessary can then be considered on appeal. No use has yet been made of this, but at a meeting of the Financial List users committee, all agreed it was a valuable procedure.

51. The wider benefits of this new List are already being seen both for parties and market actors generally. 18 cases came into the list during 2016, of which 10 were begun in the List (6 in the Commercial Court and 4 in the Chancery Division) and 8 cases were transferred into the List (2 in the Commercial Court and 6 in the Chancery Division). The subject matter of the cases has varied widely — it includes swaps and other derivatives, re-financings, Eurobonds, securitisation, calculation of default interest, carbon credits, trust certificates, breach of warranty, bond issues, settlement agreements, payments, and SPAs. 5 cases have been determined in the list. I will refer to one only: a swaps case that has been tried and determined on appeal. *Banco Santander Totta SA v Companhia Carris de Ferro de Lisboa SA and others*. The trial ended on 10 December 2015 with the judgment by Blair J on 4 March 2016;<sup>27</sup> it was heard by the Court of Appeal in early November 2016 and judgment was given on 13 December 2016.<sup>28</sup>

52. However, outside this area where it is easier to see where the balance lies between certainty and development, the balance is more difficult to strike. For example, it is said by some that the courts of the UK have gone too far in allowing evidence of the surrounding circumstances to be used and have adopted too loose an approach to

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<sup>27</sup> [2016] EWHC 465 (Comm); [2016] 4 W.L.R. 49

<sup>28</sup> [2016] EWCA Civ 1267

ascertaining contractual intention; the consequence, it is said, has been to pay less weight to the wording of the agreement and thus to reduce certainty. Time does not permit me to go further into the detail of this; or into other criticisms, such as the habit of judges in sometimes going further than necessary in deciding a case by making observations that prove to be costly to the business community and take time to put right.

53. But that balance is the more easily struck, first, if courts, as I have said, pay the closest attention to the views of businesses in the reaction to the law as decided by judges and, second, if there is a strong judiciary and legal profession. I have said enough about the importance of ascertaining the views of businesses. I have so far said nothing of the latter.

*The judiciary and the legal profession*

54. There can be no doubt that what a commercial court needs are judges of the highest calibre who understand the needs of business. That need can be acquired either by practice in the profession continuously reinforced through close contact with the changing needs of business or by experience as a judge with progressive close contact with the business community in the way to which I have referred. Without such a judiciary, a court cannot meet the needs of business and cannot get the balance right between certainty and development of the law.
55. Keeping the judges abreast of the market is a topic in itself and I cannot go into it in this lecture. It is, for example, dependent on high quality judicial education and seminars through which the business community brings the judiciary up to date; in London we are fortunate to have the Financial Markets Law Committee to help us on this.
56. It is clear, however, that I must say a word about another problem that has arisen in the UK and in some other jurisdictions. That is the relative decline in judicial remuneration in comparison to the private sector and the increasingly demanding nature of the work. This is now at least understood in the UK and I am very grateful that an initial step was taken to remedy the problem of remuneration at the end of February 2017. The whole issue is under consideration by the Senior Salaries Review Board which is expected to report in the summer of 2018.
57. Other steps, however, can be taken to ameliorate the position. One is the provision of state-of-the-art IT. The second is the recognition that judges do need their own legal



assistants in certain types of work or case. The longest trial I undertook as a judge of the Commercial Court lasted over 110 days, largely because the main parties were litigants in person as they could not afford lawyers. Without a legal assistant to check the references to the transcripts and to draw the diagrams of the contractual relations in each of the 25 or so different transactions involved, the task of delivering a judgment would have taken far longer. Last October we massively extended the use of judicial assistants in the Court of Appeal. The value to both the judge and the assistant has been very high indeed. It is extremely cost effective and beneficial to the overall legal system.

58. To a business, the employment of the best advocate is a self-evident necessity. It is not always appreciated, however, that such an advocate for each party is equally needed by the judge, if the law is to be developed (quite apart from the huge extra cost bad advocacy can entail in terms of wasted time and the failure to agree on the essential issues in a case and confine a trial to them). The promotion of the highest standards in the legal profession that practises before the court is a pre-requisite to meeting the needs of businesses. The judiciary has therefore the greatest interest in ensuring the highest professional and ethical standards.

#### *The proper functioning of an appellate system*

59. One final matter I must mention is the proper functioning of appeal courts. The problem identified in the 1890s in London was the time it took a claim to pass from trial court, to appeal court, to the House of Lords. Appeals were no doubt in many cases tactical, to postpone the effect of judgment or to try to force a favourable settlement.

60. One issue of concern at the moment is the inter-relationship between the Commercial Court, the Financial List and the Court of Appeal.<sup>29</sup> Speedy first instance proceedings need to be matched by speedy appeal processes if the benefits of the former are not to be frustrated. So far, as I have said, we have managed as regards the Financial List, but others have not been so fortunate. One possible avenue for innovation may then be the development of a dedicated Commercial and Financial List in our appeal courts, to ensure that a consistent procedural approach is taken at all stages of the life of a commercial claim.

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<sup>29</sup> See, for instance, <<http://www.inhouselawyer.co.uk/index.php/legal-briefing/financial-list-reflections-one-year-on/>>.

#### **(4) Ensuring enforcement**

61. All too often though, the system is taken to mean access to the process up to and including judgment. It is more than that. The sixth of the six stages which are common to all disputes is enforcement. A speedy judgment is of little use if it cannot be enforced. Equally a justice system whose judgments cannot be enforced either at home or in other jurisdictions is one that carries little attraction to court users; except perhaps those who wish to cynically use, or rather abuse it, as a form of latter day “*Italian torpedo*”.
62. Effective enforcement is something that we still need to work on. The New York Convention provides a signal advantage, in terms of the recognition and enforcement of arbitral awards across jurisdictions, over judgments. There remains no comparable multinational instrument with the same scope and effect in respect of judgments; and that is despite the existence since the early 1970s of the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.<sup>30</sup>
63. The development of an effective, widely respected, recognition and enforcement mechanism for commercial disputes is long overdue, and will form a central part of the discussions in the forthcoming conference of the Standing Forum of International Commercial Courts in London. An accessible commercial court requires confident access to a cost-effective recognition and enforcement regime. There are some new ideas such as the memorandum of guidance on enforcement pioneered by the court of the Dubai International Financial Centre and, although first implemented in the memorandum between that court and the Commercial Court in London, it has been used more extensively. I hope that commercial courts working together can devise more solutions and seek their implementation.

#### **(5) Business disputes in the wider context of the rule of law**

64. Although it is better to have a commercial court that impartially delivers good justice for the business community than none at all, there is a huge advantage for businesses if commercial courts operate within a system which recognises the commitment of the entire state to judicial independence, judicial impartiality and the rule of law in all types of case. The importance of the last, the vitality of which is a function of, amongst other

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<sup>30</sup> <<https://www.hcch.net/en/instruments/conventions/full-text/?cid=78>>.

things, the first, is essential to the development and health of strong and effective commercial and financial markets, nationally and internationally - a point that the United Nations General Assembly reiterated rightly in 2015. Its Resolution 70/1 on Sustainable Development highlighted the fundamental importance of the rule of law and good governance to the world economic growth.<sup>31</sup> In the context of commercial and business disputes it is important to stress two of its features.

65. The first feature is the provision of a sound, generally applicable and open legal framework for all cases. Market confidence depends upon ready access to a sound system to resolve disputes via judgment, and their enforcement, to enable contracts to be enforced and debts and damages paid where justice requires it. A sound framework of law and accessible commercial courts provides a sure basis for the prevention of disputes: as the law clarifies obligations making contracts and business relations surer so that the prospect of a dispute arising is diminished, just as access to the court gives potential contract breakers pause for thought before they take such a step. In other words, a sound commercial court as part of a sound legal framework provides the basis for economic prosperity through providing a sure basis for the development of commercial and business transactions. As David Hume might have put it, a commercial court is always a hidden hand guiding the economy; however, where claims are brought it is one that comes out into the open.

66. If our commercial courts are to play this role properly their processes must be carried out in an open and transparent way. Justice cannot be done, unless our courts and judges are themselves on trial whenever they are hearing cases: on trial in the sense that they are subject to public scrutiny. Justice delivered behind closed doors can tend to become arbitrary; it becomes open to possible interference; to a lack of impartiality or at worst of independence from the parties. As Robert Nicholson, a former judge of the Federal Court of Australia put it:

“The exercise of ... judicial power... requires that judicial decisions be made 'according to law'. If the power is exercised on some other basis, and particularly as

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<sup>31</sup> 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](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E)>.

the consequence of influences whether of power, policy, private thoughts or money, it follows that an essential requirement of the judicial power is negated.”<sup>32</sup>

A commercial court that was believed to be subject to such interference, or to be liable to arbitrary decision-making, would soon cease to be viable. It would no longer be sought out by reputable businesses. Its judgments would be treated, at best, with caution by other jurisdictions.

67. There is a qualification I should add. There is a live and important question as to whether there are circumstances in which a court can deal with business disputes in a way that accords some privacy and confidentiality to the parties without infringing the fundamental principle of open justice. I have referred to the practice direction issued by Megaw J in 1962. Some have raised with me affording anonymity to parties or only partially reporting the facts in the judgment which is made public. I mention this, as it is not an issue on which a court should have a closed mind. However it is a difficult issue which I cannot go further into in this lecture. Many will say that, in an era of populism and suspicion of elites, the principle of open justice should not be set aside for the benefit of some in the business community.

68. The second of the two features to which I wish to refer is that commercial courts must be accountable. Independence does not mean unaccountability. Courts are and must be publicly accountable through their decisions. They must also be accountable through the appellate process, so that individual error can be reviewed and rectified. Accountability is also a prophylactic: the appeal court over your shoulder ensures that as a trial judge you discharge your office properly. It is the best means to ensure that the possibility of judicial independence or impartiality being suborned remains no better than remote. It is the best means to demonstrate a commitment to the rule of law, both to businesses and to other courts and States.

## **Conclusion**

69. Why other courts and States? It is obvious why businesses need to know that they will receive a fair and proper hearing, but why other commercial courts in other jurisdictions? The answer takes me back to the second of the points with which I began – the duty of

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<sup>32</sup> R. D. Nicholson cited in D. Malcolm, *The Independence of the Judiciary as the Base of Business and Economic Development*, (Tokyo, 2003) at 11  
<[http://researchonline.nd.edu.au/cgi/viewcontent.cgi?article=1004&context=law\\_conference](http://researchonline.nd.edu.au/cgi/viewcontent.cgi?article=1004&context=law_conference)>.

courts to look transnationally. Economic development depends on more than the rule of law in one or a number of states. It depends upon its development and adherence to it across the world. Businesses depend upon it as a means to ensure that they can invest and trade confidently knowing that assets are not likely to suffer State appropriation; that they are not to be subject to corrupt practices. It is a basis for sound investment.

70. States committed to the rule of law, and their courts, also need to have confidence when it comes to enforcement of foreign judgments that that judgment was reached by way of a fair process, one carried out by a judiciary that was institutionally independent of other branches of government, whose processes were not corrupted by interference by one of the parties to the claim, and which was ultimately committed to acting according to the rule of law. A commercial court, like that in London and here in the Cayman Islands, which can demonstrate its adherence to such standards is one whose judgments are capable of enforcement across frontiers. It is a court which has real utility to the international business community.

71. Improving practices across all countries and commercial courts in this way should therefore strengthen not only the way in which each commercial court operates, the way it serves the needs of business and the greater ease of enforcement, but also strengthen international trade and commerce. That is why, although each court is in a market place and in a sense a competitor, each court has the wider duty I have outlined. The performance of the wider duty and the competitive spirit work together to give business what it needs.

72. Thus commercial courts must ensure that they work together to remain aware of changing business needs and market practices, that they innovate and continue to provide accessible, flexible, economical, efficient justice. It is not a case of saying that the needs of business are king. It is more a case of saying that the quality of justice is king; and that is what each commercial court should aim to guarantee businesses.

73. Thank you.