



LORD CHIEF JUSTICE  
OF ENGLAND AND WALES

**THE RT HON. THE LORD THOMAS OF CWMGIEDD**

**THE NATIONAL JUDGES COLLEGE, BEIJING**

**COMMERCIAL DISPUTE RESOLUTION: COURTS AND ARBITRATION**

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1. It is a pleasure, and an honour, to have been invited to give this lecture at the National Judges College. I do so at a time when significant change is occurring at an ever-swifter pace. Businesses and markets are becoming ever more diverse. They are subject to rapid development as global trade and investment expands, as the potential of the digital and data era is being realised and as the benefits of artificial intelligence become available.
2. Courts and the legal profession are generally thought to be relatively stable institutions upholding the rule of law. If they evolve, they do so gradually over a long period of time. If courts are to fulfil their duties as a branch of the state in upholding the rule of law effectively they must, however, respond to the world around them and to the rapid pace of these fundamental changes. This is particularly important where a court is a Commercial Court, as such a court has a central role in underpinning economic prosperity and stability.
3. In three lectures I have given over the past year I have tried to set out the issues facing Commercial Courts in this changing world.
  - (1) In Dubai in the United Arab Emirates,<sup>1</sup> at the DIFC courts, I spoke of the importance of the Commercial Courts meeting the needs of the world of today, what I described as our global village, in its interconnected economies and the digital revolution; how this would strengthen the rule of law which underpins our prosperity and economic development. I made some tentative suggestions as to steps that could be taken to improve the legal framework for global business and markets through cooperation between Commercial Courts. I covered the need for judge led reform, the personnel and processes required to make courts successful, and the necessity to keep the law up to date.
  - (2) In Singapore,<sup>2</sup> I spoke of the way in which Commercial Courts should work together to reform court procedure and to use the opportunity of the digital revolution radically to recast procedure, to aim for a single generic code usable in

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<sup>1</sup> <https://www.judiciary.gov.uk/wp-content/uploads/2016/02/LCJ-commercial-justice-in-the-global-village-DIFC-Academy-of-Law-Lecture-February-2016.pdf>

<sup>2</sup> <https://www.judiciary.gov.uk/wp-content/uploads/2016/10/lcj-speech-singapore-academy-of-law.pdf>

all proceedings and to work together on a transnational basis towards convergence of a procedural system for all international civil disputes.

- (3) In the Grand Court of the Cayman Islands,<sup>3</sup> I spoke of international Commercial Courts owing a duty to work together to underpin the rule of law internationally, but yet competing against each other to offer the best law and the best dispute resolution centre. Both worked together to meet the needs of domestic and international business.
4. Today in Beijing, I want, in the context of the necessity to respond to change, to speak about how we ensure that Commercial Courts and arbitral centres work together to enhance expert, efficient and cost-effective commercial dispute resolution and to keep the law up to date. The importance of this goes far beyond the resolution of particular disputes. By bringing order to commerce and finance, a sound system of commercial dispute resolution helps to give the stability that is essential to the peace and prosperity of all our societies.
5. I will address this subject under five headings:
  - (1) The public interests of the state and needs of private users.
  - (2) The role and position of a Commercial Court in relation to court litigation.
  - (3) The complementary relationship between a Commercial Court and arbitration.
  - (4) The development of commercial law in the courts and arbitration.
  - (5) The role of the Standing International Forum of Commercial Courts.

**(1) The public interests of the state and the needs of private users**

6. It is often usual to look at the provision of dispute resolution from the viewpoint of the user – be they state corporations or private corporations. It is, however, at times important to look at the issue from the point of view of the state and its people. Perhaps unsurprisingly, when this approach is taken, the objectives are largely the same as they would be if they were to be approached from the interests of the user.
7. The public interest of the state is clear. It is essential to the prosperity of a state that it has an internal dispute resolution mechanism to resolve disputes quickly, cheaply, fairly and justly – whether in a court or in an arbitration. It must do so under a system of substantive law that meets the needs of business and commerce; the state also has a substantial interest in seeing that law developed and kept up to date.
8. A state has an additional interest that is significant - that other states must also have quick, cheap, fair and just internal dispute resolution mechanisms so that its citizens can do business and invest in those other states, in the certain knowledge there is a mechanism for the enforcement of their rights or for the enforcement of judgments or arbitration awards made there.
9. These interests of the state can never be underestimated. The rule of law is a fundamental component of commercial development and growth. Its importance is such that it was recently, and rightly, stressed by the United Nations in its General Assembly Resolution 70/1 on Sustainable Development. It highlighted, 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.<sup>4</sup> It has been a constant theme of World Bank Reports. Accessible high quality commercial courts and arbitral

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<sup>3</sup> <https://www.judiciary.gov.uk/wp-content/uploads/2017/03/grand-court-of-the-cayman-islands-guest-lecture-march-2017.pdf>

<sup>4</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)>.

centres underpinning the effective rule of law, promoting good governance and developing the law are a vital state interest.

10. The interests of the user who can choose a dispute resolution mechanism are also clear. Time and money are of importance. If a country's courts and arbitral centres provide slow, sclerotic processes, they are unlikely to be a forum of choice. If a court's judgment or an arbitral award cannot circulate easily across borders, be recognised and enforced, again business is likely to look to other jurisdictions. But there are two factors of greater importance from the perspective of the user:

- (1) The ability of a court or arbitral tribunal to decide the issue justly and fairly in accordance with the applicable or chosen law. Thus, if the law and practice underpinning both court procedure and arbitrations is unclear or uncertain, a jurisdiction is unlikely to be a forum of choice.
- (2) The strength of the legal framework within which disputes can be resolved and, as importantly for businesses, how they can be avoided. A secure, certain and predictable legal framework not only provides a sure basis for businesses to operate and to contract with each other, but it also provides a means to structure business relationships so that the possibility of a dispute is minimised. This is particularly important in present times. Where business practices are subject to rapid change, with, for instance, new financial products, new markets developing and rapidly doing so, law and practice may not keep up to date. The risk to businesses of a market outpacing the law is real and must be addressed.

11. The interests of both the state and the user therefore clearly coincide in what is needed. I therefore turn to addressing those needs. In London for example, London's Commercial Court and its arbitral centres have long strived to meet business and market needs and played a key role in the provision and development of a sound legal framework for business and commerce to thrive and the state's prosperity to be enhanced.

## **(2) The role and position of a Commercial Court in relation to court litigation**

12. Let me first summarise the role of courts in resolving disputes in litigation before them.

13. A Commercial Court must have as its objectives the ability to deliver justice quickly and relatively inexpensively. Its processes must be simple and flexible. The quality of its judgments must be high. It needs to apply the law in a way that is certain, fair and predictable. It must ensure that the law keeps pace with market developments. It must maintain the strength and vitality of the legal framework.

14. This was what the Commercial Court in London sought to achieve when it was established in 1895 and what it seeks to do today. London's Commercial Court is, with the other sister courts under the umbrella of Business and Property Courts, a centre of excellence. It continues to deliver timely, high quality and cost-effective dispute resolution. It is recognised as a centre of excellence. For example, in respect of its procedure, as Chief Justice Hwang of the DIFC Courts in Dubai noted recently,

‘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.’<sup>5</sup>

15. Judges of a Commercial Court also need to ensure they keep up to date with changes to market practice and are willing to introduce innovative procedures. Taking London as an example, the judges do this through the Commercial Court's Users Committee and through engagement with bodies such as the Financial Markets Law Committee and by drawing its judges from the most experienced and highly skilled commercial practitioners - lawyers who are not just experienced in English commercial law and

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<sup>5</sup> M. Hwang SC, *Commercial courts and international arbitration—competitors or partners?*, Arbitration International, 2015, 31 at 202.

practice, but have had international litigation and arbitration practices across many jurisdictions. It is constantly striving to innovate to meet market needs. It has, for instance, recently introduced a Market Test Case Procedure, which will enable parties to seek clarification of novel legal issues in advance of any dispute arising between them - not an advisory judgment, but a precedent, one that ensures certainty and clarity is brought to the law.

16. Innovation in a Commercial Court does not stop with a new procedure. It involves taking advantage of technological innovation. Many courts and arbitral centres are doing so.<sup>6</sup> It is also necessary for a Commercial Court to examine its practices and processes to ensure that they remain up to date and meets the interests of the state and the user.<sup>7</sup>
17. A Commercial Court must also be prepared for political change. In London we are having to deal with such a change, given the decision of the UK to leave the European Union, known as Brexit. This decision might be seen, by some, as raising a question of the strength of London as a centre for commercial dispute resolution. In some quarters it has even been suggested that Brexit makes the law of the UK uncertain. This is all quite wrong. Brexit will have no effect on London's key strengths. Let me take English contract law as an example.<sup>8</sup> Brexit has no effect, unsurprisingly, both because the common law is used by nearly 30% of the world's legal jurisdictions and because English contract law has at its centrepiece respect for parties' intentions, as has the Commercial Court in London.<sup>9</sup> That English contract law is well-established, well-understood and freely circulates contributes to its being a law of choice; and in terms of arbitration, the law of choice for 40% of all global corporate arbitrations.<sup>10</sup> English contract and commercial law remains as the UK's 'national treasure'.<sup>11</sup> The British Government has made clear that measures will be put in place to ensure the recognition of jurisdiction

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<sup>6</sup> For example, the Commercial Court in London is now a technology-based court, with state of the art information technology. From the end of April this year its filing and court processing will move entirely online, bringing further cost-savings and efficiencies

<sup>7</sup> For example, disclosure, a widely-viewed source of litigation expense, is now subject to three developments in London: first, there is now very much a culture of control, with parties and the court exercising options to limit disclosure, including limiting it to that provided for under the IBA Rules on the Taking of Evidence in International Arbitration. Secondly, through the use of technology – such as TAR (Technology Assisted Review) and predictive coding – to reduce the cost and time it takes to effect disclosure while making it a more effective means of identifying relevant evidence; see W. Blair, *Commercial Dispute Resolution – Current Developments in the Commercial Court*, (3 November 2016) (Legal Week: Commercial Litigation and Arbitration Forum). And thirdly, proposals being produced by a Working Party of court users and litigation and arbitration professionals, established by Sir Terence Etherton, the Master of the Rolls, following a Disclosure seminar in April 2016, to recommend methods of reducing disclosure costs.

<sup>8</sup> Another example is arbitration. Far from having any adverse effect on arbitration, there is a strong case that it will have a beneficial effect; see the discussion by Professor N. Andrews who concluded: “. . . ‘Brexit’ has no impact on the New York Convention (1958) system of arbitral enforcement”. N. Andrews, *London Arbitration and Brexit*, at 10, <<http://www.ciarb.org/docs/default-source/ciarbdocuments/events/2016/november/arbitration-and-brexit-2016.pdf?sfvrsn=0>>. Professor Adrian Briggs, Professor of International Private Law at Oxford University, has argued in his lecture *Secession from the European Union and private international law: The cloud with a silver lining*, that Brexit will have a beneficial effect on London as an arbitral centre. It will because, as he puts it at page 21:

‘. . . the relationship between judicial jurisdiction and arbitration will be freed from the hamstringing complications of the [Brussels] Regulation and from the taint – to put it no higher – that the Regulation is less respectful of the rights and duties of those who promised to arbitrate than English law would naturally be.

It is clear that the Commercial Court in London will continue to provide the expertise it has honed over very many years of practical experience and familiarity with arbitral culture to assist arbitral tribunals, supervise where asked to do so, and enforce arbitral awards. As a centre for international dispute resolution, it will remain at the fore

<sup>9</sup> W. Rowley, *London Arbitration Under Attack*, (16 March 2016) <[http://www.idrc.co.uk/media/26078/rowley\\_-\\_london\\_arbitration\\_under\\_attack.pdf](http://www.idrc.co.uk/media/26078/rowley_-_london_arbitration_under_attack.pdf)>.

<sup>10</sup> Cited in J. Makin (Freshfields Bruckhaus Deringer), *Brexit – Jurisdiction, Enforcement and Conflict of Laws*, at 5 <<http://www.brickcourt.co.uk/application-forms/Brexit17.10.16papersfinal.pdf>>.

<sup>11</sup> N. Andrews, *ibid* at 3.

clauses and the enforcement of judgments. London's Commercial Court is and will remain the ideal commercial court for litigation. It is both 'international in outlook' and 'commercial in skill'.<sup>12</sup> London remains and will remain to the fore as a centre of international dispute resolution.

### **(3) The complementary relationship between a Commercial Court and arbitration**

18. However, the role of a Commercial Court cannot simply be seen as a forum for court based litigation. It has an essential role in relation to arbitration, provided that a Commercial Court and arbitrators and arbitral institutions work together and respect the complementary nature of their respective roles.
19. When parties enter into an agreement in which they opt for arbitration as their dispute resolution mechanism, they do so in the knowledge that it may on occasions be necessary to have not only the power of a court to enforce an award, but also the support of a court during the arbitration when the other party seeks to frustrate the arbitration agreement.<sup>13</sup> A successful arbitral centre therefore needs a Commercial Court that can provide what is required, but it must do so on the basis that the parties right to opt for arbitration is a right that must be respected and upheld by a Commercial Court. It is not always appreciated that arbitral centres need strong Commercial Courts to ensure that arbitration can function effectively.
20. Commercial Courts therefore must approach an arbitration agreement, and a dispute in relation to the agreement, or to the arbitration under the agreement to ensure that the choice of arbitration and party autonomy are fully respected and not nullified.
21. Again can I take London as an example of a Commercial Court which shows this respect for arbitration? This respect derives in part from hard law; the Arbitration Act 1996 established a general principle of non-intervention in arbitral proceedings.<sup>14</sup> As importantly, it is reflected in the Commercial Court's processes, mirroring the requirements in the Arbitration Act 1996, which are applied to secure speedy, efficient, and cost-effective decision-making.<sup>15</sup>
22. But as in many aspects of a legal system, culture is of the greatest importance. It is culture that is a powerful force in enhancing respect for arbitration. Again, taking London as an example, the judges of the Commercial Court are appointed from the legal profession where they will have sat as arbitrators or appeared as lawyers in arbitrations. Throughout their careers in practice, the judges have learnt by experience the ways of arbitrator and arbitration, the importance of party autonomy, the relationship with the court and the court's proper role in respect of it. They carry those lessons into their role as judges: respect for arbitration and for parties' right to choose it over litigation are an inherent aspect of culture, law and practice. Judicial experience of arbitral culture and practice does not stop however when they take up appointment as a judge. Experience is maintained through the court's supervisory and supportive role undertaken as and when called upon by arbitral parties. This important support and supervision can, for example, include: the restraint or stay of domestic or foreign court proceedings brought in breach of the arbitration agreement; the resolution of jurisdiction disputes; the grant of freezing or search and seize orders to protect assets to meet an award; the appointment or

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<sup>12</sup> J. Allsop, *National Courts and Arbitration: Collaboration or Competition?*, at 3 <[http://www.ciarb.org/docs/default-source/ciarbdocuments/london/the-hon-chief-justice-james-allsop-ao-\(australia\).pdf?sfvrsn=0](http://www.ciarb.org/docs/default-source/ciarbdocuments/london/the-hon-chief-justice-james-allsop-ao-(australia).pdf?sfvrsn=0)>.

<sup>13</sup> This will usually be the court of the seat of the arbitration: see Lord Mance's Freshfields Arbitration Lecture 2015. <https://www.supremecourt.uk/docs/speech-151104.pdf>

<sup>14</sup> Arbitration Act 1996, s.1(c).

<sup>15</sup> Compare the requirement set out in Arbitration Act 1996, s.1(a) and the overriding objective set out in rule 1 of the Civil Procedure Rules. They demonstrate a clear complementarity of approach.

removal of arbitrators; and (but only where appropriate) appeals on points of law or the setting aside of an award, on the grounds of procedural irregularity. In addition, vital support is provided by the court's enforcement of arbitral awards – often a fiercely contested process, where the quality of judicial assistance may be critical. All these roles contribute to the maintenance of the Commercial Court judges' expertise and experience of the arbitral process, as does the practice of judges acting as judge-arbitrators.<sup>16</sup>

23. If these or similar factors coincide, the result should be that a Commercial Court deals with challenges to arbitral proceedings and awards in a way that is both speedy and supports arbitration.<sup>17</sup> This general rule must be a rule of practical application, not theoretical aspiration. The exceptions to it should be used infrequently. For example in London, the average number of challenges and successful challenges over a three year period from 2012-2014: to substantive jurisdiction was six per year, with only two per year succeeding; to serious irregularity was seven, with only one per year succeeding; to appeals on points of law 11 per year, with only six per year succeeding either in whole or in part.<sup>18</sup> In 2015, there were four successful appeals on points of law and one successful challenge on the grounds of procedural irregularity.
24. But numbers do not tell the entire story. More importantly, such disputes must be dealt with by a Commercial Court very quickly, for delay during an arbitration is the commonest weapon used to frustrate an arbitration and prevent an award being made. Experience of arbitration and its culture thus should work together to ensure a Commercial Court respects and supports arbitration in these ways.
25. In the same way, a Commercial Court must provide a speedy and effective enforcement mechanism for arbitral awards. A summary procedure should permit prompt enforcement at minimal time and expense.<sup>19</sup> The position of every Commercial Court towards arbitration can be summarised as “Maximum support. Minimum interference”.
26. There is a second benefit from such a complementary approach. In many states, the same lawyers will act both in disputes before the court and in disputes before an arbitral tribunal. In some states (including England and Wales) judges can sit as arbitrators and retired judges sometimes become arbitrators. As procedure is always evolving, there is therefore a real exchange of practice between courts and arbitration, as they learn from each other. Procedure is improved and the relationship between the different forms of dispute resolution strengthened.

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<sup>16</sup> Administration of Justice Act 1970, s.4 and then Arbitration Act 1996, s.93. And see, for instance, *The Bamburi* [1982] 1 Lloyd's Rep 312, where Staughton J sat as a judge-arbitrator. A recent 2017 example is Flaax J sitting as a judge-arbitrator to resolve reinsurance disputes arising out of Mesothelioma claims. Legislative reforms are currently being promoted to enable a wider range of judges to act as judge-arbitrators, which should facilitate both the growth in areas of arbitration, such as Intellectual Property, company or competition law arbitration, but also ensure that a wider range of judges maintain and gain experience of the culture and practice of arbitration: Prison and Courts Bill 2017, cl.57(4).

<sup>17</sup> As Mr Justice Teare put it in a case before the Commercial Court in London, *Emmott v Michael Wilson & Partners* in 2009, Commercial Courts must support arbitration and keep interference to a minimum ‘. . . judicial interference with the arbitral process should be kept to a minimum, . . . the proper role of the court is to support the arbitral process rather than review it . . . the circumstances in which the court can properly interfere with or review the arbitral process are limited to those within sections 67-69 of the Arbitration Act 1996 (challenges to the substantive jurisdiction of the arbitral tribunal, challenges based on serious irregularity and appeals on points of law.’ [2009] EWHC 1 (Comm), [2009] 2 ALL ER (Comm) 856 at [58].

<sup>18</sup> Challenges to Arbitral Awards at the Seat (December 2014), published on the Commercial Court website 16 October 2015.

<sup>19</sup> This interest was expressed in a London case by Gross J in *Norsk Hydro ASA v State Property Fund of Ukraine* in 2002 [2002] EWHC 2120 (Comm) at 17, of ensuring the ‘effective and speedy enforcement of . . . international arbitral awards [through ensuring that the court's task] should be as ‘mechanistic’ as possible.’

27. An example of the benefits of the collaborative relationship can be seen in London, where the strength of arbitral centres is a reflection of, and underpinned by, the strength of its Commercial Court and its expert legal profession. Parties wishing to arbitrate have immediate access to some of the most experienced international commercial arbitrators in the world, not only from the legal professions but also from specialist professional arbitrators practising in a variety of different fields. In 2015, 25.7% of all claims commenced in the Commercial Court were arbitration claims; this rose to 26.6% in 2016. There is a rising trend in support and assistance, but I must emphasise again support and assistance is dealt with great respect for the parties' choice of arbitration and indeed far more speedily than many other centres for arbitration.<sup>20</sup>

#### **(4) The development of commercial law in the courts and arbitration**

28. Developing the law and making it more accessible is a fundamental part of a Commercial Court's purpose. This is a major issue for the future as we see the development of the digital and data revolution in relation to innovations such as blockchain contracts and the commercial exploitation of bulk data. In London, to ensure that the common law can be more readily invigorated, with clarification of novel legal principles, the Market Test Case Procedure was introduced in London for the financial markets, as I have mentioned.

29. However, it is necessary in each state to see that the law is also developed in relation to areas of law where parties prefer to resolve their disputes through the use of arbitration. One solution is publication of awards.<sup>21</sup> Another is the symbiotic relationship between the courts and arbitration. I spoke in London last year of the need to reconsider the court's ability to play a role in the development of the law due to the limited number of appeals that come from arbitration. I raised the question whether there needs to be a re-balancing in respect of this aspect of their collaborative competition.<sup>22</sup> But, as I then said, the key point is the balance between respect for party choice and the wider state and public interest in ensuring the law is developed and keeps pace with change.

30. I have emphasised earlier in this talk the need to respect the choice of the parties for the resolution of their dispute by arbitration; this respect is at the centre of the relationship between court and arbitration. The UNICTRAL model rules, and laws based on it, do not provide for any appeal mechanism on issues of law so that the law can be developed by the courts. The Arbitration Act 1996 for England and Wales, however, provides the basis for appeals on points of law.<sup>23</sup> It also provides the means for parties to opt-out of the appeal regime which parties do in a number of areas. The shipping industry and some commodities organisations have, traditionally, chosen not to opt-out. They have valued the ability to appeal on points of law, in order to clarify points that have a wider importance to them than the immediate arbitration. In 2012-2015, the bulk of appeals from arbitration were shipping appeals. The benefits to the development and clarification of English maritime law have been considerable.

31. I consider that a commitment to flexibility and innovation is essential in any Commercial Court if the ways in which the law can be developed are to be enhanced. This is a subject that needs a great deal of further discussion; it is an essential part of the collaborative

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<sup>20</sup> When the nature of the claims commenced in the Commercial Court generally – 70% of all such claims being international in nature – is factored in, the attraction of, and strength of London for both litigation and arbitration is clear. See The CityUK, *UK Legal Services Report*, (2016).

<sup>21</sup> I touched on this in the Jill Poole Memorial Lecture I gave at Aston University on 8 March 2017, which will be reproduced in due course

<sup>22</sup> <https://www.judiciary.gov.uk/wp-content/uploads/2016/03/lcj-speech-bailli-lecture-20160309.pdf>

<sup>23</sup> Also see, for instance, Arbitration Act 2001(Singapore) s.49.

competition not only between the different methods of dispute resolution but also between states.

**(5) Developing a global dialogue through the Standing International Forum of Commercial Courts**

32. May I now therefore return to the transnational context and collaborative competition between each state and the Commercial Courts of each state to which I have referred? I cannot stress enough the importance of states working together, innovating more effectively and ensuring they work together to keep the law uniform and in pace with commercial and market change. Doing so ensures that the global legal framework for the rule of law is upheld and strengthened. The exchange of ideas from each ensures the law keeps pace with changing market practice and technical innovation – as well as enabling it to guide market practice through providing timely, clear and readily enforceable judgments.
33. It was for these reasons that we proposed the establishment of the Standing International Forum of Commercial Courts. Its objective is to build on and develop a more systematic and common approach to the provision of dispute resolution, to keep commercial dispute resolution up to date and to see that the law and legal framework is developed in a way that supports international trade, international commerce and the international financial markets. All will benefit.
34. The Standing International Forum's first conference takes place in London in May this year. It promises to provide a firm basis for developing more structured links between Commercial Courts, while providing a means to consider problematic areas and innovative solutions to them. We are glad that judges of the People's Republic of China will join this conference.
35. Amongst the topics for future meetings of the Forum will, I hope, be the development of a constructive relationship between courts and arbitration; and that this will be done through broader engagement with practitioners, arbitrators, and academics. Innovation is built on engagement. And engagement must deliver concrete benefits for court users and for each state and the people of each state. It should ensure that in the field of commercial dispute resolution the delivery of justice and the legal framework do not stand still. I am sure the Standing Forum will achieve this aim, and enable Commercial Courts to evolve at the right pace for the market, for their users, and to continue to secure a sound legal framework for stability and the delivery of global prosperity for each state and the people of each state.
36. Thank you.

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