



MASTER OF
THE ROLLS

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TAKING STOCK: INTERNATIONAL COMMERCIAL COURTS IN EUROPE AND ASIA BRITISH INSTITUTE OF INTERNATIONAL AND COMPARATIVE LAW

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Introduction

1. It was back in July 2018 that I addressed a similar gathering at a conference hosted by the University of Rotterdam entitled: “Innovating International Business Courts: A European Outlook”. My talk was under the heading: “A view from the Business and Property Courts in London”.
2. I well recall the stormy reaction that I managed unwittingly to generate. I am, therefore, particularly grateful to have the opportunity, 3 years later, after so much unexpected water has flowed under the bridge, to have an opportunity to revisit the subject at this timely conference on international commercial courts in Europe and Asia.
3. I am no longer in charge of the Business and Property Courts of England and Wales – that role is now ably undertaken by Sir Julian Flaux. Instead, as you have heard, I am the Master of the Rolls and Head of Civil Justice in England and Wales. As such, however, I work closely with my successor, Sir Julian, as Chancellor of the High Court, and keep closely in touch with developments in commercial courts across Europe and Asia – insofar as all that has been possible over the last 18 months since the appalling Covid pandemic struck in March 2020.
4. I looked back at what I said in July 2018, and tried to reconstruct what had caused such a lively debate. I spoke about the common law in the context of Brexit, then said something about the creation and intent of the Business and Property Courts here in England and Wales, before talking about the establishment of the new business dispute resolution courts in Europe. At that stage, if I recall, we were looking at new international

commercial courts in Paris, Frankfurt, the Netherlands, and Brussels, amongst others perhaps.

5. I did not think that what I said was actually all that controversial. I said that “legal systems are not, and should not be, in competition”, and that I had (and, by the way, I still have): “huge respect for my European judicial colleagues and have worked closely with them for many years”. I would also, had we been talking about Asian commercial courts (which we were not), have included my respect for the judges of those courts too. I suggested, and still believe today, that “it is extremely important [for] judges in different jurisdictions [to] collaborate and cooperate with each other, and exchange ideas and information about their justice systems. No justice system is superior. We are all trying to offer an excellent service to our domestic and international court users, whether they are businesses or individuals. And collaboration between our judges will assist in this process”.
6. I said back in July 2018, and still believe today, that the three most important ingredients for a successful business court in Europe and the world are: (a) the quality and integrity of the judges in the court and the lawyers who practice within it, (b) to introduce appropriate IT to make sure that the court’s processes are digital from end to end, and (c) to make sure that appeals are limited to those that are given permission, mostly on points of law, and that, as a result, delays in the initial dispute resolution process and in any appeals permitted are limited. One of the things that has blighted commercial dispute resolution in many countries over many years is a system that allows unlimited rights of appeal on essentially factual issues all the way to the highest court in the jurisdiction. Speed is of the essence.
7. I want to revisit today my second point, namely making sure that the court’s processes are digital from end to end. Covid-19 has forced all of our jurisdictions to move from face-to-face hearings to remote or zoom hearings. Here in the UK, we did so quickly and managed to continue to dispatch civil and commercial business without significant interruption. But what I was talking about in 2018 was not the use of “ordinary” technology within the justice system, but a new approach to delivering justice for the benefit of court users.
8. New commercial courts and old need to find methods of decision-making that are more stream-lined, less costly and far less time-consuming. The HMCTS reform programme in England and Wales will ultimately mean that

any civil or commercial case can be started and progressed online with integrated mediated interventions aimed at resolving the dispute applied within the online framework. I will come back to what more needs to be done in a moment.

Issues affecting the new commercial courts: procedural rules

9. The debate that followed my speech in 2018, I recall, raised some interesting questions as to which commercial courts were in fact the oldest and most experienced, and whether newly founded international commercial courts could or should utilise the common law and could or should utilise English rather than the lingua franca of their seat, and could or should abrogate the locally applicable civil procedural code. All of these questions, perhaps particularly the last, remain alive today.
10. Since then, however, in 2020, a joint project between the European Law Institute and UNIDROIT has resulted in the adoption of their Modern European Rules of Civil Procedure, for which I have a very high regard. The project demonstrated how much is shared between common law and civilian systems of civil justice, when so many commentators seek to emphasise and exacerbate the differences. These Rules hugely repay study, even though they run to 536 pages, the guts of them is actually in less than 50 pages. I shall say something more in a moment.
11. Since 2018, there has also been much international collaboration between commercial courts. The judges of England and Wales – led by Lord Thomas in particular – gave birth to the Standing International Forum of Commercial Courts or ‘SiFoCC’. That forum has been hugely successful and I am pleased to say that many of the new commercial courts are represented at its plenary meetings and on its working groups. I believe it provides an invaluable forum for co-operation and mutual understanding.
12. There has been bilateral collaboration between our courts. The Cour Commerciale de Paris and our Business and Property Courts have exchanged visits and online seminars. Whilst Covid has meant that many meetings have had to be held remotely, very valuable interactions continue. Many other bilateral and multilateral discussions have taken place.
13. Courts in Stuttgart (the Stuttgart Commercial Court) and Mannheim (the Mannheim Commercial Court) and Frankfurt are now in operation, as is the Netherlands Commercial Court and many in the Middle and Far East.

14. It is perhaps worth noting at this stage that municipal justice systems exist primarily to serve the citizens of their own state, whilst international commercial courts with rules that are separate from the courts of the country in which they are based are in a different position. They exist to serve their national and international business community, and can sometimes provide a very different kind of dispute resolution. But the ability to break away from a domestic civil procedure code is not always straightforward, as our discussion back in 2018 demonstrated.
15. The Business and Property Courts of England and Wales and those of the Southern District of New York, for example, are domestic courts, whose rules and practices have attracted non-domestic commercial litigants. But they remain municipal courts tied to the civil procedure of their national home. In contrast, the international commercial courts in many other countries in Asia, the Middle East and some in Europe use purpose built procedural rules and English as their working language. This allows for more flexibility, but can raise issues of status and enforcement of orders and judgments.
16. These procedural issues have been tackled in part by the ELI/UNIDROIT rules. But I would caution that what is needed is a procedural process for a technological age, not for an age of paper and bureaucratic procedural rules.
17. As the ELI/UNIDROIT rules have shown, it is possible to create some high-level principles to govern litigation, that are not hidebound in municipal systems that are centuries old. The principles include sensible rules on each party's duty to cooperate with the court, with the process and with each other, a duty to attempt to achieve compromise and settlement, and duties on the court to manage cases effectively, to treat parties equally and to deal with all cases proportionately. Even more forward looking are rules 9, 10 and 50, which seek to integrate ADR into the Rules themselves and into the dispute resolution process. In many jurisdictions, ADR is kept entirely separate from the court processes. It should not be like that, but it often is, because there is insufficient trust in the ADR providers to allow them to enter the mainstream court system. The rules also include, as I have said, an important duty to seek settlement. This is something that is often honoured only in the breach. The next step will be to ask how real effect can be given to that duty.
18. In England and Wales, the Government has just introduced legislation to create an online procedure rules committee to regulate the online

litigation process. This will allow for higher level procedural governance recognising that it is not possible to prescribe every specific step taken in the online space, particularly as artificial intelligence is increasingly used to streamline the case preparation stages. I expect that it will be possible in a relatively short period for every civil, family and tribunal cases started in England and Wales to be initiated online and progressed, at least in its procedural stages, through an online process.

19. In some ways, everything has changed since 2018 – Covid has added a new urgency to online dispute resolution. It has created a world full of remote hearings, from which many lawyers anyway are reluctant to retreat – because of the convenience for them of not having to travel to courts in different places. To be blunt, remote hearings can boost their earnings potential. Covid may ultimately lead to the introduction of procedural rules that are less cumbersome and steeped in municipal procedural codes. And, as I have said, the new commercial courts anyway have the opportunity to employ state of the art technology and appropriate rules to provide a process that more appropriately meets the needs of businesses in the 21st century, without affecting the quality of justice.

Cryptoassets and new technologies

20. I have said nothing thus far about cryptoassets, smart contracts and on-chain transactions and dispute resolution.
21. The UKJT (which I chair) has introduced digital dispute resolution rules, which aim to provide a kind of stream-lined arbitral or expert determination procedure to resolve disputes arising on-chain and in the digital space. This again is something that the new courts might wish to emulate, since the commercial disputes that will need to be resolved in the coming years will be quite different from those we are used to. These digital dispute resolution rules are revolutionary in some ways, because they allow for very speedy determination of digital disputes, and for the appointed arbitrator or expert to implement decisions directly on-chain using a private key, and for the optional anonymity of the parties.
22. In an era of smart contracts and digital commercial documentation used in financial services, banking, and transportation amongst many other sectors, where the facts will be recorded immutably on the blockchain, parties will not, I think, accept endless and costly analogue dispute resolution processes.

What do all these developments mean for the world's new commercial courts?

23. So what does all this mean for the world's commercial courts, new and old? I think there are some key features on which we can all agree. Hopefully we will all be able to collaborate to work towards achieving them.
24. First, we all need to focus on the changing nature of the disputes that business people require to be resolved. It is no use building court systems to resolve the disputes of yesteryear, arising from piles of analogue documentation, when disputes now arise online, from entirely digital communications and often on-chain transactions.
25. Secondly, as I have been saying, the focus on domestic procedural codes will only serve to hold back the success of modern commercial courts. In the new digital environment, all procedural codes need a thorough overhaul. That is happening in England and Wales in the online space; and the new commercial courts have an even better opportunity to re-write the rulebook – perhaps drawing on the excellent work of ELI/UNCITRAL.
26. Thirdly, our commercial courts need to embrace technological advances – not just remote hearings and electronic disclosure processes, but the blockchain, smart contracts and the use of artificial intelligence to cut legal costs and streamline dispute resolution. I predict that, as always, the most efficient will succeed and the most cumbersome and procedurally complex will not.
27. There is a point also that can be made about artificial intelligence. Lawyers tend to be very cautious about its use in the legal context. One often hears lawyers and judges saying that artificial intelligence is dangerous, prone to bias, and should not be used to facilitate court proceedings or legal advice. The truth, of course, is that artificial intelligence is already used in almost every aspect of business and domestic life, including the law. Every Google search you make is facilitated by artificial intelligence. Legal research is assisted and made quicker and more efficient by artificial intelligence. Online dispute resolution systems inevitably use artificial intelligence to ensure that the cases are progressed effectively and to suggest resolutions where appropriate.
28. In ordinary domestic life, artificial intelligence assists your online shopping and the location and selection of goods and services across the entirety of

consumer demand, and the production of data about subjects as diverse as Covid and banking.

29. It is true, of course, that artificial intelligence can, if not properly used, introduce and perpetuate bias and inequalities. It can provide solutions that are unreliable as has been pointed out when it is used, for example, in relation to sentencing or predicting litigation outcomes. But these problems do not lead to the conclusion that we should pretend that artificial intelligence is not here to stay. It very much is. It means instead that we must understand it better and learn to set out the value and uses of human interventions, perhaps to sense check outcomes that are derived from AI programmes.
30. I will leave the question of robot judges for another day. As I always say, some 60 million disputes on eBay are resolved without human intervention every year. But when it comes to the kind of commercial disputes we are discussing today, I think robot judges are a long way off. That is not because they could not, in some types of case, provide perfectly reasonable outcomes, but because dispute resolution is about justice, and no justice system is sustainable unless those it serves have confidence in its practices, processes and outcomes. I cannot see that commercial organisations are likely in the near term to repose confidence in a justice system driven entirely by AI. That is perhaps even more the case in relation, say, to a family dispute as to, for example, which of a father or mother should have custody of a child. The extent to which human emotion feeds into a justice system, even a commercial justice system is an interesting question, but perhaps another one for another day.
31. Forgive me. I was diverted from drawing the threads together as to what the new technologies mean for the world's old and new commercial courts.
32. A fourth important factor is to ensure that commercial courts provide court services that complement and support commercial arbitration. You have a session on that subject this afternoon. The Business and Property Courts in London and the Arbitration Act in the UK are friendly to the commercial parties that decide to arbitrate in London. The Commercial Court, in particular, has supervisory jurisdiction over London arbitration under the Arbitration Act 1996. The links with the arbitration community are very strong and beneficial. This is something that is not always replicated in other jurisdictions. Strong court support for an arbitral seat is hugely beneficial to the international parties using it.

Conclusions

33. I welcome the new commercial courts in Europe and in Asia. I hope they will all play a full part in SiFoCC. There is more than enough room for a wide diversity of dispute resolution processes available to the international business community. In the commercial world, parties to commercial contracts can choose their applicable law and forum and their preferred mode of dispute resolution. They will continue to do so.

34. As I have said, the most successful commercial courts will have judges of the highest quality and integrity, digital processes and limited rights of appeal. The key is to ensure that users have absolute confidence in the integrity of the system. But there is no competition. Different parties, whether individuals, businesses or states require different kinds of dispute resolution services. Diversity is everything.