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**Contemporary Trends in the Resolution of International Commercial and
Financial Disputes**

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Sir William Blair¹

It is a pleasure to give the 2016 ICCL lecture. The Institute has done excellent work in promoting the study of commercial law at Durham Law School, and it is a privilege to follow earlier annual ICCL lectures given by Lord Hodge and Sir Ross Cranston.

I spent a good part of my childhood, literally as well as metaphorically, in the shadow of Durham's great cathedral. The time of its completion in the 12th century was a period of strong economic growth. In dealing with the disputes that inevitably arise in trade, the merchants of the time had to cope with problems that are still with us. How do you develop portable rules that will work in different places? How do you input practical expertise so that disputes are resolved in accordance with commercial expectations? What are the underlying values which the system should reflect?

It is interesting to note that from a very different perspective, and in the context of a discussion on the future of arbitration law, Professor Shen Wei has recently analysed the medieval contribution in these respects in the form of the *lex mercatoria* and the merchant courts, and asked how they chime in our very different global environment.²

¹ Judge of the Queen's Bench Division, and Judge in Charge of the Commercial Court. The views expressed are those of the speaker.

² Of Shanghai Jiao Tong University Law School. See Shen Wei, *Rethinking the New York Convention*, Intersentia, Cambridge, 2013.

The answer is that there is much to learn from them, but that is a discussion that will have to wait for another day.

The subject of these remarks falls outside substantive commercial law. However, dispute resolution is at the heart of commercial law, and affects every aspect of it. There have been major changes in recent decades in the resolution of international commercial and financial disputes, and the pace of change continues. I will seek to describe some of these developments, including what is being done in the courts here in England and Wales—courts which have a long history of dealing with such disputes.

The commercial context

I will begin with some context. The 19th and 20th centuries saw a huge contribution by English lawyers and judges to the development of a coherent set of rules governing shipping, insurance and international trade. The case law the judges built is still largely the foundation of the law in these respects.

The London Commercial Court was part of this, set up in 1895 in response to a demand by business for judges with knowledge and experience of commercial disputes. The Admiralty Court has even deeper historical roots³. In modern times, the two courts work together, with a common procedural framework in the form of the Admiralty and Commercial Courts Guide.

A characteristic of our own time has been the closeness with which finance has become bound up with commerce. Let me give an example because it is topical. The recent downturn in manufacturing in China has fed through to the financial system. We see the financial authorities tasked with taking restorative action. At the beginning of January 2016, the China Securities Regulatory Commission introduced, and shortly afterwards suspended, a stock market circuit-breaker mechanism to seek to calm the markets.

³ <https://www.judiciary.gov.uk/you-and-the-judiciary/going-to-court/high-court/queens-bench-division/courts-of-the-queens-bench-division/admiralty-court/history/>

At the same time, a gap opened between the onshore market for China's currency, the yuan⁴, which is under the control of the People's Bank of China (the country's central bank), and the relatively new offshore market over which the central bank does not have the same degree of control. So there was currency instability added to the mix.

This problem may resolve during the course of the year, but some of the most intractable problems in recent years have featured finance. The global financial crisis peaking in September 2008 was followed by the European sovereign debt crisis, which was ultimately contained, culminating in Greece's narrow survival in the euro in 2015.

Some distinguished commentators, including the Chief Economist at the Bank of England, have noted the possibility of a new phase of the global financial crisis, around emerging markets⁵. The important caveat of course is that no one knows.

It is probably true to say that a coherent set of rules governing finance in the same way as applies to trade and shipping has yet to emerge. A significant difference between the sectors is relatively recent in the form of the growing amount of financial regulation. This tends to spill over into private law—anti-money laundering regulations are an example. But more coherence is both possible and necessary, and the courts have a part to play in this. I come back to this theme later.

The parties' choice

When it comes to the resolution of international commercial disputes, there is a feature which distinguishes them from, for example, public law disputes. International commercial disputes are mobile. What I mean by that is the parties have a choice.

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.

⁴Also called the renminbi.

⁵*How low can you go?* 18 September 2015. He was talking about interest rates.

If a court, they can choose which country the court is to be in. If by arbitration, they can choose the organisation under whose rules they will arbitrate. There are a number of leading arbitral institutions, some regional, others effectively global.

They may decide not to use formal dispute resolution mechanisms at all. Members of the International Swaps and Derivatives Association, ISDA, which is in effect a private global regulatory association for derivatives transactions, can settle disputes among themselves through the Credit Derivatives Determinations Committee and the Collateral Dispute Resolution Committee.

All this has tended to foster a competitive environment in which different states and systems and commercial actors seek to create optimal conditions to encourage use of their particular dispute resolution mechanisms. At times, some of the vast amount written on the subject seems more of a sales pitch than an attempt at analysis. On the plus side, it has encouraged new thinking and new institutions, some of which I will describe.

My remarks will be under three heads: first, as to the applicable law, second, as to dispute resolution mechanisms, third, as to the future.

Let me pose this question to begin with—what are international users looking for from international commercial dispute resolution? This is not a theoretical question, because it helps identify a kind of benchmark for deciding disputes where parties may come from very different cultures and political and economic systems.

I suggest that there at least eight components: (1) certainty, that is, the application of ascertainable legal principles to the underlying contractual or other dispute; (2) accessibility, being an absence of artificial barriers to bringing or defending claims; (3) predictability, in that the tribunal will apply known procedures; (4) transparency, so that the parties are aware of the whole process; (5) independence, underpinned by transparency, so that there is no suspicion that the tribunal is other than independent; (6) experience and expertise in the tribunal; (7) efficient case management, so that the proceedings are properly handled; and (8) effective outcome, including enforcement if necessary.

Many in the commercial dispute resolution community and certainly many users would add a ninth—that the process should be accomplished within a reasonable cost.

The applicable law

To start with the first component, that is, the application of ascertainable legal principles, in international arbitration the parties can agree to have their dispute arbitrated under the *lex mercatoria*, and such an agreement is perfectly valid in English law⁶. There are arguments in favour of developing an autonomous international approach, but the practical difficulty is that there is no authoritative statement of the *lex mercatoria*.

In the international context, most commercial and financial contracts have an express choice of law clause. In many cases, English law continues to provide a suitable vehicle. There are a number of reasons for this—its rules of commercial law are well developed, judge-made law provides the flexibility to develop along with changing commercial conditions, and of course there is the accessibility of the English language.

Because of its global use, it is important for the robust health of English commercial law that the judges, particularly at the appellate level, continue to expound the governing principles. Despite the fact that trial judgments in particular tend to be dominated by the need to make factual findings, this is important at first instance too.

In a speech given last November, Lord Thomas, the Lord Chief Justice, pointed to the difficulties that can arise where points of law are decided in arbitration awards which remain confidential. To help address the need for the law to continue to develop in an open way, he suggested the possibility of extending the test-case procedure which has recently been introduced in the case of the determination of high-value financial disputes into other city based markets, particularly the maritime, insurance and commodities markets.⁷

⁶ Section 46 Arbitration Act 1996 (UK); *Deutsche Schachtbau v Ras Al Khaimah National Oil Co* [1987] 3 WLR 1027; rev'd on other grounds [1990] 1 AC 295.

⁷ The Centrality of Justice: Its contribution to Society, and its Delivery, 10 November 2015. The same issue has been raised by arbitrators: David W. Rivkin, 11th Clayton Utz Sydney University International Arbitration Lecture, 13 November 2012.

Speaking here at a University, it is appropriate also for me to identify the part played by the writing of academic commentators. In the civil law, such “doctrine” has traditionally played an important role, but for many years judges in common law jurisdictions have paid it great heed too. The study of commercial, financial and corporate law should be closer to the top of the academic agenda, because in practice it can have a major influence.

Dispute resolution mechanisms

I turn next to mechanisms. Though the value can be large, in absolute terms, the number of international commercial disputes is relatively small. As between the various alternative dispute resolution methods, how do the numbers compare?

The statistics which I am about to mention, which are the most readily accessible, need a preliminary health warning. They focus on the number of cases begun, which does not take into account the differing size and complexity of disputes. Of claims which are begun, only a proportion result in a full hearing. Also, the numbers may not be calculated in precisely same way.

Starting with the English courts, in 2015, 924 cases were begun in the London Commercial Court, 166 in the Admiralty Court, and 209 in the London Mercantile Court⁸, totalling 1299. In terms of the international cases dealt with in the English courts as a whole, to these should be added cases commenced in the new Financial List discussed later, and cases of a commercial nature commenced in the Chancery Division and in the Technology and Construction Court, both of which play an important role in international disputes.

As to the experience of arbitration bodies, taking as a sample the most recently available figures I have been able to find for five of the major bodies:

- In 2014, 791 arbitrations were commenced in the Paris-based ICC (International Chamber of Commerce).
- In 2013, a total of 290 arbitrations were referred to the LCIA (London Court of International Arbitration).

⁸ The London Mercantile Court is established in the Commercial Court (CPR PD 59 1.2, and hears less complex business disputes.

- In 2014, 222 new cases were handled by SIAC (Singapore International Arbitration Centre).
- In 2014, 1052 arbitrations were commenced in the ICDR (International Centre for Dispute Resolution, the international arm of the American Arbitration Association).
- In 2014, a total of 1610 cases were accepted by CIETAC (this includes China domestic as well as foreign-related cases). CIETAC is the China International Economic and Trade Arbitration Commission, and the largest such body in China.

It is harder to find statistics as to the kind of disputes involved. So far as the London Commercial Court is concerned, of the cases commenced during 2015, 25.76% related to arbitration, 69.26% were claims particularly in the fields of banking, finance, commodities, shipping, maritime disputes and insurance and reinsurance, 3.68% were claims in the same subject areas but not involving factual disputes⁹, and 1.30% were pre-action applications.

Adapting procedure to changing conditions

In practice, there has been considerable homogeneity in the procedures which the courts and arbitration bodies adopt in resolving disputes. Commentators seem to agree that the days have gone when international arbitration was quicker and cheaper than litigation.

On the other hand, the amounts at stake can be very large. The 2014 award in the Yukos arbitration against Russia was over US\$50 billion. The costs of the arbitration, including all the attendant expenses, amounted to about €8.5 million. The successful claimants sought an order for legal costs in the amount of about US\$80 million. In the event, the arbitral tribunal ordered costs against Russia in the sum of US\$60 million.

This, of course, was an exceptional case. Nevertheless, high-cost commercial disputes, in the courts as well as in arbitration, with high stakes for the parties, appear to be a growing phenomenon.

⁹ CPR Part 8.

In the ordinary run of disputes, from the perspective of users, issues of concern relate to cost, and the time that the process takes to complete. Many trade disputes are straightforward, and mention should be made of the cost-effective procedures of the LMAA (London Maritime Arbitrators Association) and trade associations such as GAFTA (the Grain and Feed Trade Association).

As regards litigation, the English courts have sought to address the issues of expense and time in a number of ways.

The recently introduced costs budgeting rules introduced following Lord Justice Jackson's report require the court to approve the parties' budgets at an early stage in the proceedings, and are mandatory where the amount of the claim is below £10 million. Despite some teething problems, this seems to be settling down in Commercial Court practice.

The Shorter Trial scheme initiative introduced in October 2015 is aimed at making business litigation in the English courts¹⁰ quicker. Cases are to be dealt with by the same judge from beginning to end with the aim of reaching trial within approximately 10 months, with a maximum length of trial of four days.

The Flexible Trial scheme introduced at the same time is intended to allow for more flexible case management where both sides agree, resulting in a simplified and speedier trial than is currently provided for.

These are both pilot schemes, and express in formal terms the practice of the London Commercial Court which has always accommodated such flexibility. It is fully realised that these are for some types of case, and not for all. But their purpose is important—to help encourage a change in litigation culture, in that a full, oral trial on all issues may not be necessary for justice to be achieved.

This is different from the summary judgment procedure, where there is no oral evidence. This procedure is available in the courts where there is no defence, but

¹⁰ The courts covered are the Commercial Court, the Chancery Division and the Technology and Construction Court being the courts in the Rolls Building, a purpose-built complex opened in 2011.

traditionally there has been a doubt as to its availability in arbitration. This reflects the fact that arbitration is a solely consensual process. But summary judgment is entirely different from summary justice, with its negative connotations. In principle, there appears no reason why arbitrators should not deal with particular issues summarily, but ultimately this depends on the terms of the arbitration agreement¹¹.

An essential feature of commercial procedure is the ability to adapt and innovate. The London Commercial Court adapts its procedures in consultation with the Users Group. The views of the professional associations are also important in this regard. Here are some of the matters which are likely to be considered over the coming year.

IT can be expected to play a much bigger role than at present. In the English courts, the guiding principle which has been adopted going forward is ‘digital by design and default’¹².

In the Commercial Court, electronic filing was introduced in November 2015, and witness evidence has routinely been taken by way of video-link for a long time. Major trials now usually have a “live” transcript, the cost being borne by the parties. The court hears an increasing number of “paperless” trials, the cost again being borne by the parties. This enables the parties and the judge to have remote access to the documents including their own annotations. But there is room for both the technology to develop, and the cost to come down, to make it more accessible to all litigants.

In view of the amount which the exercise can cost, the scope of disclosure (or discovery) continues to receive attention. This is partly the consequence of the need to search electronic databases. Since 2013, “standard” disclosure has no longer been the “default option”¹³. The court has the power to, and will increasingly be expected to, choose between a “menu” of options, depending on the case, including disclosure by reference to individual issues. For some cases, it will continue to be necessary to have standard disclosure where (for example) the determination of significant issues needs to be seen in the light of what was said in emails at the time, but in other cases it incurs needless expense.

¹¹ *Travis Coal Restructured Holdings Llc v Essar Global Fund Ltd* [2014] EWHC 2510 (Comm).

¹² Civil Courts Structure Review: Interim Report by Lord Justice Briggs, December 2015, para 1.14.

¹³ CPR 31.5 (7)

It is common in commercial disputes for expert evidence to be required on one or more issues in the case. If the process is not managed, by the time of trial, this evidence can be very unwieldy. The court will look at ways of simplifying the process, including adopting in suitable cases the practice in the Technology and Construction Court, in which experts agree the issues before preparing their reports.

These points illustrate the fact that continuity in case management by docketing to an assigned judge can have significant advantages, and the court has gradually been taking that course in response to requests by the parties. At the same time, flexibility in listing means that hearings can be brought on earlier, so there is a trade-off. A pragmatic approach may work best, and we will be looking at ways to further formalise “pragmatic docketing”.

A key resource for both the court and its users is the Admiralty and Commercial Court Guide. This provides in succinct and accessible form a guide to how, in accordance with the procedural rules, cases are to be dealt with in the court through each of their stages. It is also a vehicle through which the court can convey its expectations of practitioners, e.g., of a high degree of cooperation. A priority for the court has been to keep the Guide updated, and the time is probably ripe for an overall review.

The courts and arbitration

I mentioned earlier that over a quarter of the cases begun in the Commercial Court in 2015 involved arbitration. The issues are various, including interim measures intended to preserve the status quo until the arbitration gets under way, challenges to awards on the limited grounds available under the Arbitration Act 1996, through to enforcement.

In a June 2013 lecture, Lord Goldsmith’s subject was, “The Privatisation of Law: Has a World Court finally been created by modern international arbitration?” Importantly, he pointed out that arbitration does not represent a rejection of or opposition to national legal systems.

He said that a “few key jurisdictions are most commonly identified as the seat of the arbitration. Favoured seats are London, New York, Washington D.C., Paris, Hong Kong, Singapore, Stockholm, Geneva and The Hague”. However, a true world court needs to embrace the developing world as well.

My belief is that dispute resolution procedures whether through the courts, arbitration, or mediation, work best when they work in harmony with each other. In the interests of the parties, some disputes are best arbitrated, some are best litigated—it is important to keep that perspective.

This is demonstrated by the example of Singapore, which already has an effective arbitration centre. To complete its structure, the Singapore International Commercial Court was launched in January 2015.

More generally, in the absence of a supra-national body, supervision by the courts of the seat, by judges with experience in commercial matters, providing a light-touch but nevertheless vital back-stop, may ultimately be the best guarantee of the continuing success of international arbitration.

The development of new commercial courts

From the viewpoint of governments, the importance of commercial justice is linked to economic development. Economists have long argued that a well-functioning legal system offering stable and predictable rights of property and contract is a precondition for significant growth. In particular, an effective judicial system with the court at its centre is considered one of the foundations of successful modern economies.¹⁴

This consideration lies behind the development of new commercial courts. The first three examples come from the Gulf.

¹⁴ Cheryl Xiaoning Long, *Does the rights hypothesis apply to China?* The Journal of Law & Economics, Vol 3, No 4 (November 2010), p.629.

The Dubai International Financial Centre (DIFC) Courts opened in 2008. Speaking on 28 August 2015, Chief Justice Michael Hwang SC gave as one of the reasons for the success of the court its priorities of “efficiency and concern for users modelled on the English Commercial Court, the most famous commercial court in the world...”¹⁵.

The Qatar International Court and Dispute Resolution Centre was established in 2009, as part of a strategy to attract international business and financial services into Qatar. The procedures of the Court are similar to those seen in common law jurisdictions. I was privileged to play a role in the setting up of the court.

In October 2015, Abu Dhabi Global Market (ADGM) opened for business as a broad-based international financial centre. The ADGM Courts are established as an integral part of the structure of the centre, and regulations make provision for the application of English common law and equity. This should help to promote certainty.

The fourth example comes from India, another key emerging markets economy. In December, Parliament enacted the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act 2015, and the Arbitration and Conciliation Act (Amendment) Act 2015. By creating specialist commercial courts with commensurate appeal routes, the purpose is to improve commercial dispute resolution with the twin goals identified above—establishing the country’s status as a dispute resolution centre (the comparison with Singapore and London has been cited), but more important, to improve the legal climate for inward investment.

There are of course quite a number of dedicated Commercial Courts in various countries, and these are examples cited to show that the number is growing. This is a positive development, and there is the scope to develop links between them, a cooperation which accords with the international nature of commercial dispute resolution.

Financial markets disputes

¹⁵ <http://difccourts.ae/presentation-made-by-cj-michael-hwang-at-the-conference-devoted-to-the-20th-anniversary-of-the-constitution-of-the-republic-of-kazakhstan-on-28-august-2015-at-astana-kazakhstan/>

I return to the subject of financial law, mentioned earlier in these remarks. The complexity of financial law and particularly financial regulation has come to mirror the complexity of the financial markets themselves. P.R.I.M.E. Finance, a new body based in The Hague, has made a good contribution since 2012, among other things providing dispute resolution services in disputes concerning complex financial transactions, and the provision of independent expert evidence and reports.

Until recently, within the English courts financial cases have been dealt with by both the Commercial Court and the Chancery Division. In July 2014 the Lord Chief Justice announced that the judiciary would examine what more it could do to meet the needs of court users in financial cases. This was important, because along with New York law, English law is very commonly used in international financial contracts, as is English jurisdiction.

Following a consultation process, a proposal was made for a “Financial List”. Following a further consultation, the list came into effect in October 2015.

The list deals with cases which involve claims of over £50 million (or equivalent) or which require particular expertise in financial markets, or which raise issues of general importance to the financial markets. The judges are drawn from both the Commercial Court and the Chancery Division.

A wide range of transactions are within the list, including those in the fixed income, equity, derivatives, loan, FX and commodities markets, as well as complex banking transactions and sovereign debt. So far, the list appears to be operating well, and by the end of 2015, as well as two existing cases which were transferred in, eight new claims had been commenced in the list.

Additionally, a pilot market test case procedure has been introduced to facilitate the resolution of market issues to which immediately relevant authoritative English law guidance is needed without the need for a present cause of action between the parties to the proceedings. This is a facility which may be of most use in cases of urgency, where legal risk may be an unacceptable addition to systemic risk. But it is ultimately a matter for users how to take it up.

The future

Finally, as to the future. Globalisation may be a cliché, but it forms the essential backdrop to any credible method of international commercial dispute resolution. I have sought to give some indication of how the English courts are meeting the challenge, and some of the other key developments as well.

I would not wish to end purely on a practical note. There is the wider issue of values—why we do it, as well as how we do it. Many of the kind of disputes under discussion are commercial in a traditional sense. There are others which manifestly have ramifications for society as a whole. The mechanisms used to resolve all disputes have to be sensitive to the wider societal implications of the decisions taken. Commercial dispute resolution must not become marooned on an island of its own making. It takes its place as part of a wider commitment to justice and the rule of law, and the values which this entails.

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