



LORD CHIEF JUSTICE
OF ENGLAND AND WALES

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**Developing commercial law through the courts:
rebalancing the relationship between the courts and arbitration**

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Introduction¹

1. It is for me a great pleasure and privilege to deliver this the 4th BAILII lecture for a number of reasons. I will mention only two. First some 12 or so years ago, I worked very closely with Sir Henry Brooke, then a Lord Justice and chairman of the Trustees of BAILII, to ensure we had in place proper arrangements to provide judgments to BAILII. Second, I am delighted to see how successful that endeavour has been and how much is now available worldwide and for free. The benefit to the legal profession, to the UK and to the rule of law worldwide is immense.

The role of the courts in the development of the law underpinning commerce, finance and industry

2. It is to the rule of law in the context of the international financial markets and to international trade and commerce² that I wish to turn immediately. As is self-evident in this context, the function of the law is to provide the framework within which all societies operate all economic activities from financial markets to manufacturing.
3. Over the centuries, a framework of law that underpins these activities has been developed in various ways as I explained in a lecture in February at the Dubai International

¹ I wish to thank Dr John Sorabji for all his help in preparing this lecture.

² Sir Roy Goode in his magisterial treatment of commercial law explains the importance of trade: ‘One of the most powerful influences on human activity is the driving force of trade. Governments may be overthrown, wars may break out, large areas of a country may be devastated by natural disaster, but somehow traders find ways of establishing business relationships.’, in E. McKendrick, *Goode on Commercial Law*, (Penguin) (2010) at 3.

Financial Centre Academy of Law.³ The common law has played a very significant role in that development through its strength, vitality and agility in applying and adapting its principles to changes in trade, commerce and the markets. This great strength of the common law is exemplified in the judgments of the great judges, particularly those in the specialist and appellate courts in London.

4. To any trading nation – whether that is, as in the UK, through maritime commerce, the provision of insurance from the time of Lloyd’s coffee house to today, or financial or legal services – the importance of this development of the framework of law cannot be underestimated. Clarity and predictability in the law, as well as its ability to develop in a principled manner, is the bedrock upon which businesses, just as much as individuals, order their affairs and enter into binding agreements. It is a necessary pre-condition for understanding rights and obligations, something which is of crucial importance whether the person is an individual entering into an agreement to buy a washing machine, a house or a car, or whether the person is a business entering into a debt finance agreement, an international sales transaction or a reinsurance agreement. As Lord Salmon rightly noted in *The Laconia*, “Certainty is of primary importance in all commercial transactions.”⁴
5. As is well known, the development of the law in England and Wales was effected not only through cases where the claims were brought in the courts, but through claims that were brought in arbitrations. In 1979 (by statute) and 1981 (by Lords Denning and Diplock through an interpretation of that statute), the relationship between the courts and arbitration was changed on the perceived basis that it was damaging the attractiveness of London as a centre for dispute resolution through arbitration. The change has been hailed as a “pragmatic compromise”, but the clear consequence that can be seen today is that far fewer developments of the law are made in areas where the probability is that the case has had to begin in arbitration. As arbitration clauses are widespread in some sectors of economic activity, there has been a serious impediment to the development of the common law by the courts in the UK, particularly though the Commercial Courts in London (a term I also use in this lecture to encompass the TCC and specialist courts of the Chancery Division – all housed together today in the Rolls Building) and on appeal from them.

The development of Commercial Courts

6. I shall return in a moment to show how vital it is we draw the distinction between the attractiveness of London as a centre of dispute resolution, whether through the courts or arbitration, and the much more important issue – the development through the courts in London of the law that underpins trade, commerce and industry. I shall try and explain

³ I highlighted some of them in the DIFC Academy of Law Lecture I gave in Dubai on 1 February 2016 entitled *Commercial Justice in the Global Village: The role of Commercial Courts*.

⁴ *Mardorf Peach & Co Ltd v Attica Sea Carriers Corp of Liberia, The Laconia* [1977] A.C. 850 at 878.

how, with the benefit of hindsight, a wrong turning was taken in 1979 and 1981 and why what should concern us now is not the perceived need to protect dispute resolution in London but the necessity to ensure that there is in place the right dispute resolution methods to develop the law that underpins the markets, trade and commerce.

7. But it is necessary before turning to this to highlight some of the many changes that have taken place. First, technological change is taking place at an ever increasing pace and transforming the way in which business is done. Second, globalisation is a reality – the change in the legal profession is an excellent example of this. I have set these two changes out in greater detail in the lecture I gave in Dubai.⁵ Third, the past decade or so has seen the creation of a number of commercial courts with the aim of providing a means of international dispute resolution. By way of example, such courts now include in the Gulf courts in Dubai, Abu Dhabi and Qatar, in Asia in Singapore, India and Hong Kong, in Africa in South Africa and Nigeria, in North America in Delaware and New York and in the Caribbean, the Cayman Islands. These are all courts based on the common law, but Amsterdam is set to join this list, with its Commercial Court, one where proceedings can be carried out in English, expected to open in January 2017. The development has been such that at the turn of the year, I wrote to the Presidents or Chief Justices of these courts suggesting the formation of a forum of Commercial Courts. As the response has been uniformly positive (and continues to be so) I explained in Dubai the role I foresaw for these courts.
8. These courts have a common interest first in seeing that the rule of law is upheld in international markets. Second, they seek to promote the development of law to keep pace with the ever increasing pace of change in international markets, trade and commerce. These courts are, of course, competitors in seeking to provide the best dispute resolution mechanism to achieve these goals, but they are common goals. These Commercial Courts can work together to that end without in any way compromising their competitiveness or independence, in the same way as Central Bankers set about their duties to maintain international financial stability and growth. In my Dubai lecture I suggested that they should debate and work on common issues – and one of those I suggested was the relationship between courts and arbitrations with regard to the development of the law in the very rapidly changing world of international markets, trade and commerce in which we live.
9. An examination of what has happened here in London is central to understanding the relationship between the courts and arbitration in maintaining the strength, vitality and agility of the common law as the framework underpinning international commerce. Such an examination also points to the real need to re-appraise the “pragmatic compromise”

⁵ See footnote 3.

adopted in England and Wales in 1979 and 1981 and reaffirmed in the Arbitration Act 1996. As I shall explain there is a significant irony that has resulted from that policy. To promote the use of commercial law developed in London through the aim of making London a more attractive centre for dispute resolution, reform was effected, the consequence of which has been to undermine the means through which a significant part of its strength – its “excellence” was developed. But that undermining will, unless reversed, be to the detriment of the wider interests of the common law as developed in London and to the real interests of London as an international financial and trading centre. As one well known ship-owner explained in 2010 in the context of maritime law:

Consequently, although the quality of its dispute-resolution services is certainly a great attraction to this country, no one should underestimate the importance of English maritime law as a cornerstone underpinning the whole structure of maritime service industries in London. Of course, the body of precedent built up over centuries is not going to be overtaken by rival centres overnight. However there is no room for complacency.⁶

Developing commercial law

10. It is not necessary for me to set out in any detail the development of commercial law through the courts in London. It is as old as the common law. Its origins can be traced back to the Middle Ages, to the Law Merchant, and, for instance, the courts of pie powder. The real era of development however is the 18th Century, when the law’s development was guided by Lord Mansfield. His influence on the common law’s development was, and remains, unparalleled. Applying the common law method to contract law, commercial law and insurance law, he put vast areas of the law upon a sound and principled footing. He did so, however, not by way of drawing upon abstraction. His approach was both eminently practical as well as seeking its inspiration from the broadest range of sources. In terms of the latter, he drew from Justinian, as well as continental civil law, from the works of Puffendorf, Grotius and Huber.⁷ In terms of the latter, he adopted his (Huber’s) approach to the question of whether a contract could be avoided on grounds of illegality.⁸ In terms of the former, he ensured that the law was in step with commercial and market practices in a number of ways. He maintained a keen eye on commercial practice, was immersed in society, often dining with leading merchants and traders to ensure that he kept up to date with the latest developments in the markets. And he drew on expert

⁶ Epaminondas Embiricos: *Appeals from Arbitration Awards*.

<<http://www.lmaa.london/uploads/documents/C50AppealsfromArbitrationAwards.pdf>>.

⁷ N. Poser, *Lord Mansfield: Justice in the Age of Reason*, (McGill) (2013) at 228.

⁸ *Holman v Johnson* 1 Cowp. R. 341 at 344, “The doctrine Huberus lays down, is founded in good sense, and upon general principles of justice. I entirely agree with him. He puts the general case in question, thus : tit. De Conflictu Legum, vot 2, pag. 539. “In certo loco merces quisdam prohibita: sunt. Si vendantur ibi contractus est nullus. Verum, si merx eadem alibi sit vendita, ubi non erat interdicta, emptor condemnabitur, quia, contractus inde ab initio validus fuit.”

witnesses, and assessors in, for instance, maritime shipping matters,⁹ to assist the court in deciding commercial questions. As Mansfield put it in a related case, “*a great deal must be referred to the usage of merchants.*”¹⁰ Detail of that usage was the province of the expert witness. In some cases, such as that of *Goodwin v Robarts* where Sir Alexander Cockburn CJ dealt with the issue of whether a scrip certificate was a negotiable instrument, market usage led the way. As Cockburn CJ put it:

The usage of the money market has solved the question whether the (certificate) should be considered security . . .¹¹

11. The common law’s development under Mansfield and the courts during the 19th Century, and its articulation in texts such as *Chitty on Contracts*, which was first published in 1826, is only part of the story behind the development of commercial law. Its development owed a considerable amount, as you might expect, from the doctrine of precedent, particularly appellate decisions. We all know how decision making in the courts plays a vitally important role, in commercial law,¹² as in other spheres.
 - a. It enables the law to develop in the light of reasoned argument, which is itself refined and tested before a number of tiers of the judiciary.
 - b. It enables public scrutiny of the law as it develops. This may mean the wider public and it may equally mean those parts of society that have a direct interest in the decision and the principle it articulates. Scrutiny can lead to public debate, or debate in the commercial market place. It can bring the issue back to the courts or to parliaments if necessary.
 - c. It ensures, as a necessary underpinning to public scrutiny, that the law’s development is not hidden from view. Where markets are concerned publicity in this sense is of fundamental importance: publicly articulated laws, and precedents, are the basis from which markets and market actors can organise their affairs and business arrangements.

The role of appeals from arbitrations

12. The bringing of claims in arbitrations has played a central role in this development

⁹ *Folkes v. Chadd* 3 Dougl 157 at 159.

¹⁰ *Hibbert v Pigou* (1783) cited in J. Oldham (2004) at 134.

¹¹ (1874 -75) L.R. 10 Ex. 337 at 353.

¹² A survey of commercial law would encompass a wide range of legal areas. It might range from the principles of contract law, through banking and then company law, through insurance and reinsurance. It might require a consideration of the application of the postal rule to e-mail via the Court of Appeal’s decision in *Entores Ltd v Miles Far East Corp* [1955] 2 Q.B. 327 and the House of Lord’s in *Brinkibon Ltd v Stabag Stahl und Stahlwarenhandels GmbH* [1983] 2 A.C. 34. It might require an examination of swaps transactions, and the proper approach to local authorities’ *vires* to enter into them, and then whether they could recover money advanced in relation to them under the law of unjust enrichment - a point the House of Lords clarified in *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] A.C. 669. Casting the net more widely it might even call for some consideration of those passages in *Steele v M’Kinlay* (1880) 5 App. Cas. 754 where the House of Lords is taken to suggest that ‘that the Statute of Frauds does apply to claims against indorsers as guarantors of bills of exchange: Michael Brindle QC, *Law of Bank Payments*, (4th Ed) at 6-072.

because it provided a ready source of appellate decisions, which have helped shape commercial law. Let me take one example,¹³ as it will be useful to illustrate a second point - *L.Schuler A.G. v Wickman Machine Tools Ltd.*¹⁴ The appellants were a German manufacturing company. The respondents entered into a distribution agreement with them, whereby they were granted sole rights to market and sell the manufacturer's products within the U.K. The agreement was to last from 1963 until 1967. One of the terms of the agreement was that the distributors would send sales representatives on at least a weekly basis to a number of specified firms in order to seek sales orders. A dispute arose as to whether the distributors were acting in accordance with this obligation. In the result, the manufacturer terminated the contract on the basis that the distributors had failed to do so. It treated the failure as a repudiatory breach of contract. The question whether this was correct was, under the terms of the agreement, referred to arbitration. Peter Bristow (then a QC, but subsequently a High Court Judge) was appointed as the arbitrator. His decision was that the manufacturer was not entitled to terminate. At the request of the parties he had stated his arbitration award in the form of a special case so that the court could consider whether the manufacturer was entitled to terminate the contract. It went all the way to the House of Lords.

13. The House of Lords gave detailed guidance on the question of the meaning of contractual conditions and on their construction and re-affirmed the rule that subsequent conduct could not be used to construe a contract. In particular, Lord Reid explained that in considering differing possible constructions of a contractual condition, that a specific

¹³ A further example of development after the 1996 Act is *Transfield Shipping Inc v Mercator Shipping Inc (The Achilles)* [2009] 1 AC 61. A vessel was chartered by its owners from January 2003, with redelivery to take place on 2 May 2004. In April 2004 the market rate for hire had risen significantly, and the owners arranged a new charter of the vessel with a third party to follow from the redelivery. The new charterers, however, had to take delivery of the vessel by 8 May at the latest. The charterer's voyage was delayed. Redelivery did not take place until 11 May. The owners on 5 May in the knowledge that they would not be able to meet the 8 May deadline to deliver the vessel to the new charterers negotiated an extension of time to delivery. In order to do so they had to reduce the hire rate. They claimed damages for that loss under the subsequent charter from the original charterer. The dispute as to whether that loss was recoverable under the first limb in the rule in *Hadley v Baxendale* (1854) 9 Exch 341 was referred to arbitration before well-known maritime arbitrators. They decided by majority in favour of the Owners setting out their decision in the form of a reasoned award under s.69 of the Arbitration Act 1996. Leave to appeal was given as it was considered to raise a point of law of general public importance to the shipping industry. The decision was appealed to the Commercial Court and then to the Court of Appeal who reversed the decision. It again found its way to the House of Lords. As Lord Hoffmann put it, the dispute raised a 'fundamental point of principle in the law of contractual damages.' That was whether it was

“the rule that a party may recover losses which were foreseeable . . . an external rule of law, imposed upon the parties to every contract in default of express provisions to the contrary, or is it a prima facie assumption about that the parties may be taken to have intended, . . . but capable of rebuttal in cases in which the contest, surrounding circumstances or general understanding in the relevant market shows that a party would not reasonably have been regarded as assuming responsibility for such losses?”

Assumptions in past authorities and textbooks were noted. The question itself had however never been determined authoritatively. The answer, shortly put, was the second alternative. The decision was not greeted with unalloyed approbation. It was said to have introduced more than a degree of uncertainty into what had previously been the long-settled law on remoteness for loss. Clarification came in 2010 in *Sylvia Shipping Co Limited v Progress Bulk Carriers Limited* [2010] EWHC 542, another shipping case arising from an appeal from an arbitral decision. It explained, and limited the scope of application of the test articulated in *The Achilles*. Further clarification was then given in *John Grimes Partnership Ltd v Gubbins* [2013] EWCA Civ 37, albeit that decision did not arise from an arbitration.

¹⁴ [1974] A.C. 235.

construction

leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result the more unlikely it is that the parties can have intended it, and if they intend it the more necessary it is that they shall make the intention abundantly clear.¹⁵

Here we have concise, straightforward guidance on contractual construction. Such guidance is, of course, important for lawyers and courts. It is however far more important for businesses, for the market place. It gives a degree of certainty that was prior to the decision lacking. It thus plays an essential role in any developing market, as contract parties are in a better position to understand how they should draft their contracts.

The historic position in England and Wales

14. The case is an illustration first of the historic relationship between arbitration and the court. Traditionally the courts were by and large prepared to leave procedure to the arbitrators, intervening only rarely. However the courts were ready to intervene to correct errors of law and hence foster the law's development.¹⁶
15. Although there existed the formal remedy of correcting an error on the face of an award, that type of intervention was readily avoided by making the award very formal and providing reasons separately. The mechanism through which the courts intervened was the special case out of which parties could not contract. Despite the growth in arbitration in the twentieth century, any party could generally get the court to resolve points of law by requiring the arbitrator to state a case on the question of law for the opinion of the court. By this means the court's diet of commercial cases was maintained notwithstanding the use of arbitration.

The problems that arose

16. In my early years at the bar I saw the huge strength of the system, but also circumstances where it could be open to abuse. Much was made of delay, the cost and expense and lack of finality because of the special case procedure. It was said to make London an uncompetitive venue for dispute resolution. *L. Schuler A.G. v Wickman Machine Tools Ltd* is an apt illustration. The hearing of the arbitration took seven days. The argument before Mocatta J. took a further seven days. The argument before the Court of Appeal presided over by Lord Denning MR took five days, despite his view that the whole dispute turned on the meaning of one word "condition".¹⁷ And before the House of Lords: seven more days of argument were required. This may seem incomprehensible today, but those

¹⁵ Ibid at 251.

¹⁶ See the excellent historical survey in the First Edition of Mustill and Boyd: Commercial Arbitration (1982) at 381 to 401.

¹⁷ [1972] 1 W.L.R. 840 at 846.

were the days when the judge came to a case without knowing much about it and even the pleadings had to be laboriously read aloud to the judge.

17. The focus of those who wished for change was very much on the importance of the business of dispute resolution through arbitration. They were assisted by a number matters: the special case procedure could, as I have explained, be used for delay; at a time of very high interest rates and inflation this was a significant consideration. Second, the large number of disputes that arose out of a single event (the soya bean embargo of 1973 being probably the best example) resulted in a vast number of arbitrations and many special cases. Third, there had been a growth in very large international arbitrations which did not arise out of the traditional London markets. These gave rise to concern that the special case procedure caused unnecessary expense and was no longer suitable particularly for cases where foreign state enterprises were involved.
18. It was argued that the well-established approach of allowing courts to intervene to correct and develop the law was out of step with other arbitration centres. It was making London a less attractive prospect for dispute resolution. London had an excellent commercial law, but there was a need to make London an equally excellent forum for dispute resolution via arbitration.¹⁸ To achieve this London, it was argued, would have to change the approach so that there was greater finality and certainty in arbitral awards. Lord Diplock in his Alexander lecture in 1978¹⁹ set out the case for change in the perceived interests of London, but only in the interests of London as a centre for arbitration.

The 1979 Arbitration Act, the Nema Guidelines and section 69 of the 1996 Act

19. The argument prevailed in two stages - first the Arbitration Act 1979 and then the interpretation placed on it by Lords Denning and Diplock. The Act replaced the special case by a right of appeal with leave to the court and with the right to contract out of the right of appeal save in restricted categories of case. The Act was, however, open to two interpretations: (1) that the court would give leave where there was a real and substantially arguable point of law or (2) it was much more restrictive. The issue arose in *The Nema* where the issue was whether a charterparty had been frustrated on which an urgent decision was needed. It therefore provided the right occasion for the second view to prevail both in the Court of Appeal and in the House of Lords; that was because the issue of frustration is sometimes treated as a mixed question of law and fact and an urgent decision was needed. In the Court of Appeal Lord Denning went so far as expressing the view that a commercial arbitrator was more likely to be better placed to interpret the contract in a commercial sense than a judge and in a one off case probably

¹⁸ Sir Anthony Colman, *Arbitrations and judges – how much interference should we tolerate?* Arbitration 2006, 72(3), 217 at 217-218.

¹⁹ Lord Diplock, *The Alexander Lecture*, Arbitration 1978, 44(3), 107-116.

more likely to be right than a judge.²⁰ Before the case reached the House of Lords, a very great commercial judge, Robert Goff J (later Lord Goff) pointed out in unanswerably correct terms the fallacies in the approach of Lord Denning,²¹ It was to no avail. In the House of Lords Lord Diplock set out guidelines for the very strict approach by what was clear judicial legislation implementing the ideas which he had foreshadowed in his Alexander lecture.²²

20. When the law of arbitration was examined by the Departmental Committee successively chaired by Lords Mustill, Steyn and Saville, the issue was again considered. In the result the effective codification of *The Nema* Guidelines was recommended partly for the reasons that had been used to justify the 1979 Act and partly because of the more philosophic point (with which I disagree) that, as the parties had freely chosen arbitration, the court should not interfere.²³ This recommendation was implemented in section 69 of the Arbitration Act 1996, which also abolished the special categories where contracting out was not permitted.
21. The consequence has been that under the section 69 test, far fewer appeals from arbitral awards come before the courts, as only a small number satisfy the test for the grant of permission to appeal.²⁴ Even in the case of a decision on a standard form contract or matter of general public importance, the court is only permitted under section 69 to give permission to appeal if the arbitrator's decision is open to serious doubt. In 2009, statistics were published²⁵ which showed the average number of applications was about 50 a year.²⁶ In the years before 1979, the number of special cases had been 300. Last year there were 58 applications for leave to appeal from an arbitration award made in the Commercial Court; 19 permissions were granted – that is to say roughly one third. Unfortunately, the analysis is presently manual and very time consuming. The figures produced in 2009 took 150 hours to produce and analyse. We need better figures, and the new computer systems in the Rolls Building will, I hope, be able to assist. Whatever the precise figures, the effect in reducing cases coming to the court has been dramatic.

The effect on the development of the law

22. The effect of the diminishing number of appeals compounds the problem that arises from

²⁰ *BTP Tioxide Ltd v Pioneer Shipping, The Nema* [1980] QB 547 at 564-5.

²¹ *Schiffabrtsgesellschaft Hamburg Middle East Line GmbH v Virtue Shipping Corp'n (The Oinoussian Virtue)* [1981] 2 All E.R. 887; [1981] 1 Lloyd's Rep. 533.

²² *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema) (No.2)* [1982] A.C. 724.

²³ See, for example, the 1995 Denning Lecture given by Saville LJ.

²⁴ See, for instance, A Tweeddale & K. Tweeddale, *Section 69: of Chablis, smoked salmon and trifles*, *Arbitration* 2013, 79(3), 265.

²⁵ Lord Mance's Advisory Committee on section 69 of the Arbitration Act 1969: V. Veeder & A. Sander, *First Interim Report on the Workings of s.69 of the 1996 Act in regard to Maritime Arbitrations in London* (2009) <<http://www.lmaa.london/uploads/documents/First%20Interim%20Report%20Mance%2024%2005%202009.pdf>>.

²⁶ The article by Sir Anthony Colman cited in footnote 18 sets out analysis for the year 2005-6.

the diversion of more claims from the courts to arbitration. It reduces the potential for the courts to develop and explain the law. This consequence provides fertile ground for transforming the common law from a living instrument into, as Lord Toulson put it in a different context, “an ossuary”.²⁷ Here lies the irony. As I have explained reform was effected to promote the use of London as a centre for dispute resolution largely based on contracts based on the common law as developed in the Commercial Courts of London. However, the consequence has been the undermining of the means through which much of the common law’s strength – its “excellence” was developed – a danger not merely to those engaged in dispute resolution in London, but more importantly to the development of the common law as the framework to underpin the international markets, trade and commerce.

23. Quite apart from this major issue, there are other issues which arise from the resolution of disputes firmly behind closed doors - retarding public understanding of the law, and public debate over its application. A series of decisions in the courts may expose issues that call for Parliamentary scrutiny and legislative revision. A series of similar decisions in arbitral proceedings will not do so, and those issues may then carry on being taken account of in future arbitrations. As has been put:

Arbitration confidentiality perpetuates public ignorance of continuing hazards, systemic problems, or public needs . . .²⁸

Such lack of openness equally denudes the ability of individuals, and lawyers apart from the few who are instructed in arbitrations, to access the law, to understand how it has been interpreted and applied. It reduces the degree of certainty in the law that comes through the provision of authoritative decisions of the court. As such it reduces individuals’ ability to fully understand their rights and obligations, and to properly plan their affairs accordingly.

The UK has not reached the stark example which appears to be taking place in the United States, where mandatory arbitration clauses in contracts are removing whole classes of claim from the jurisdiction of the courts and undermining aspects of the law’s development.²⁹ This development has arisen due to support in the United States from the courts for the mandatory diversion of such classes of claim to arbitration. The support stems from, on the one hand, the view that arbitration is a quicker and cheaper form of dispute resolution than litigation, and the need to reduce the perceived burden on the courts by reducing the amount of litigation, on the other.³⁰ That is emphatically not the view of the courts of England and Wales. However, across many sectors of law traditionally developed in London, particularly

²⁷ *Kennedy v The Charity Commission* [2014] 2 W.L.R. 808 at [133].

²⁸ L. K. Doré, *Public courts versus private justice: it’s time to let some sun shine in on alternative dispute resolution*, 81 Chi-Kent L. Rev 463 (2006) at 487.

²⁹ J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 Yale L.J. 3052-3092 (2015) at 3059.

³⁰ A series of article in *New York Times* of 31 October 2015 and subsequent days was drawn to my attention when delivering this lecture. It sets out a powerful case as to the damaging effects this can have on ordinary citizens.

relating to the construction industry, engineering, shipping, insurance and commodities, there is a real concern which has been expressed to me at the lack of case law on standard form contracts and on changes in commercial practice.

Restoring an essential part of the development of the common law

24. In my view, therefore, we must address what has happened and restore an essential part of the way in which courts are able to continue the development of the law that underpins our trade, financial system and our prosperity. Let me speak first of what the courts can now do, not merely to demonstrate their capacity for agility and innovation, but as a model of a way forward.

The example of the financial markets

25. A striking development of the last two years has been the design and launch of the Financial List in London. Its significance is two-fold. It demonstrates that London, as a major international centre for finance, wanted to create a court where the law could be developed and that the courts could provide not only the forum for development but do so by revising their procedures to make the court proceedings a cost effective means of doing so.

26. The Financial List³¹ draws on the wealth of expertise of the judges in the Rolls Building. Its judges are expected to keep up to date with the changes in practice in the financial markets and to resolve disputes on the basis of their specialist knowledge and understanding of the markets – the route employed by Lord Mansfield as adapted for modern times and not the type of judge spoken of by Lord Denning in *The Nema* when he said that a commercial arbitrator was more likely to be right than a judge:

Because he, with his expertise, will interpret the clause in its commercial sense; whereas, the judge with no knowledge of the trade, may interpret it in its literal sense.

That mischaracterisation has never been the position of a judge of the Commercial Courts in London.

27. A further innovative feature is the Market Test Case Scheme.³² Its aim is to provide a procedure for the resolution of market issues in which there is no immediately relevant authoritative English law guidance. It enables parties to bring proceedings, where there is no present cause of action, before the court to seek declaratory relief. It thus enables parties to resolve a market uncertainty before it has reached the stage where damage is accruing as a consequence of that uncertainty. It does so through enabling all the arguments, on as far as possible agreed facts, to be put before the court by the opposing interests in relation to the issue, albeit at a time when they are not yet in dispute.

³¹ CPR Pt 63A.

³² CPR PD51M.

28. As to procedural innovation, there was also introduced – by way of a two-year pilot, the shorter trial procedure and the flexible trial procedure.³³ The aim of both procedures is straightforward. It is to increase procedural efficiency, economy and proportionality in commercial disputes. They seek to make the process available in the Commercial Courts even more reflective of the needs of court users, the business community, and most importantly of justice. Both schemes are optional. They are available if parties agree to take advantage of them. The shorter trial procedure provides for a fixed length trial of a maximum of four days, with the trial to be held within ten months of issue of proceedings. Claims are docketed and subject to limits on time to comply with procedural obligations and on disclosure and evidence. The flexible trial procedure enables the normal process to be adapted to the needs of the parties. It aims at facilitating agreement on modifications, and limits, to disclosure, expert and other evidence and submissions. Both forms of process are intended to allow parties and their lawyers to adopt a form of process that best serves their needs in the pursuit of a judgment. Looked at in a broader context they are an innovation that seeks to bring the procedural flexibility of various forms of alternative dispute resolution within the formal court setting. As such they are intended to enable parties to ensure that procedural rules that are already well-adapted to their needs can be individually tailored to an even greater extent.
29. In these ways concrete steps have been undertaken to make litigation more attractive in terms of cost, efficiency and the ability to provide high quality judgments in good time; and crucially, to provide the means by which a proper diet of commercial cases, and consequently the potential for commercial appeals, come before the courts to secure the proper development of commercial law.
30. Thus in the financial markets there are now established the means by which, through a transparent court-based procedure which can respond quickly to market developments, disputes can be resolved and the law developed properly. Disputes are commencing under them and being transferred to them.³⁴ Indications are that the new procedures are proving popular, that they are proving attractive as a means of securing quality justice in a manner that benefits both the parties, in terms of cost and time; and, in so doing, they are providing the means to facilitate the better development of the law.
31. With this model derived from this international market in which London has a pre-eminent position, let me return to the development of the law in areas where parties are presently wont to resort to arbitration. I will put questions that need to be answered in a much changed world where the development of international commerce in a rapidly changing world needs a parallel development of the legal framework that underpins it:
- a. Revision of the criteria for appeals

³³ CPR PD51N.

³⁴ See, for instance, *Family Mosaic Home Ownership Ltd v Peer Real Estate Ltd* [2016] EWHC 257 (Ch); *Property Alliance Group Limited v Royal Bank of Scotland Plc* 2016 EWHC 207 (Ch).

- b. Use of section 45 of the 1996 Act
- c. Greater recourse to the court instead of arbitration

(a) Should we revise the criteria for appeals?

32. One answer might be to suggest that we go back to a more flexible test for permission to appeal before Lords Denning and Diplock restricted the ability to appeal by the interpretation he gave to the 1979 Act and before this was codified in the 1996 Act. That would enable the courts more readily to develop the law whilst leaving arbitration as an important means of dispute resolution.
33. That has been the approach that a number have suggested. For example, Sir Robert Finch, when Lord Mayor, set out in 2004 in the sixth Cedric Barclay Memorial Lecture his concerns that the 1996 Act had adversely inhibited the necessary and “regular throughflow of commercial cases . . . that arise in arbitrations in order to continue to develop and refine English commercial law in a way that is most relevant to the market”.³⁵ He recommended reforms to section 69 of the 1996 Act to enable more appeals to be brought and a more flexible test for the grant of permission to appeal. In 2006, a Committee under the chairmanship of the well-known maritime arbitrator, Bruce Harris, produced a Report on the 1996 Act. Another Committee was set up under the chairmanship of Lord Mance.
34. So far there has been no change, but I have no doubt that change to the section 69 test is one of the options that must be considered. The restriction in relation to appeals where the question is one of general public importance is, I have little doubt, a serious impediment to the growth of the common law. The benefits to the development of the common law is therefore obvious as it would increase the potential for greater numbers of appeals which would provide the means to maintain a healthy diet of appellate decisions, capable of developing the law particularly on issues of general public importance.

(b) Section 45 of the 1996 Act

35. Another approach is to encourage greater use of the power under section 45 of the Arbitration Act to enable the court to give decisions on points of law which arise after the commencement of an arbitration but before the decision. The purpose of this section was to retain the mechanism that had existed under the consultative case procedure³⁶ so that if an important point of law of general application arose applicable to many arbitrations (as had happened with the closure of the Suez Canal or the US soya bean export embargo), the court could be used to rule definitively. Unfortunately, as Coulson J

³⁵ R. Finch, *London: still the cornerstone of international commercial arbitration and commercial law?* Arbitration, 2004, 7094) 256 at 264-265.

³⁶ 1996 Report on the Arbitration Bill at paragraphs 217-221.

pointed out last year, it has been little used, despite its obvious utility.³⁷

Considerations relating to a revision of the guidelines and greater use of section 45

36. However, although there is obvious merit in both revising the guidelines and making greater use of section 45, the question arises as to whether this can be achieved without raising, despite the transformation of court procedure, the spectre of reintroducing what was perceived to damage London's attractiveness as a centre for arbitration? Can a change be made in a way which ensures that the law which is applied within the legal framework within which arbitrations operate, is maintained, and where necessary clarified and developed? If so, commercial arbitration will benefit, yet the imperative of the law's development will be met.

(c) Should greater use be made of the courts?

37. Let me then turn to the third solution - one that does not impinge upon the increased finality that section 69 embedded. Rather than looking at increases in appeals from arbitral decisions, the solution looks at the more general issue – the direct development of the law by the courts in place of arbitrations in the right cases. But can litigation be sufficiently attractive from the parties' perspective, a better option than arbitration? The objection to this is that in commercial cases arbitration has characteristics that litigation cannot have such as party autonomy, confidentiality, enforcement, speed and low cost.

Party autonomy and confidentiality

38. The principle of party autonomy is expressed in s.34 (1) of the 1996 Act – the right of the parties ultimately to decide on all procedural and evidential matters. In the light of the developments in the courts in London of which I have spoken, there is, I think, little difference now in practice, though there may be in theory. As to confidentiality, this is often cited as one of the most valued components of international commercial arbitration.³⁸ The strength of this perceived benefit is not, however, as clear cut as it might seem. Arbitral confidentiality is, as the Lord Mayor had it, "overrated". Why? Because the market tends to know which parties are involved in which arbitrations and what the arbitration is about. I recall in one of the market conferences on the Arbitration Bill in July 1995, a very well-known member of the insurance community pointed out how easy it was to acquire any award in the insurance market. This shocked the purists, but reflected reality then, and I suspect now. And then even when confidentiality and privacy are maintained during the arbitration, it does not stay so for long, as information leaks and private markets in the trade of arbitral decisions develop. If the arbitral award

³⁷ *Secretary of State for Defence v Turner Estate Solutions Limited* [2015] EWHC 1150 (TCC).

³⁸ E. Zlatanska, *To publish, or not to publish arbitral awards: that is the question...*, *Arbitration* 2015, 81(1), 25 at 26.

requires recognition and enforcement, the inevitable entry into the public arena occurs.³⁹ Even if confidentiality can be maintained, even then the perceived advantage is more apparent than real, for most commercial disputes, although of interest to lawyers, are not newsworthy.

39. Some have suggested that courts could anonymise judgments or details within judgments. This would not be a course I would favour, for as is clear from what I have said elsewhere, open justice is a hallmark of democratic society. There are, however, cases where it is recognised that confidentiality of parts of a dispute is necessary in the interests of justice; in such cases the power to appoint a judge of the Commercial Court (in the strict sense) as an arbitrator has been used.⁴⁰ I am much more favourably inclined than my predecessors as Chief Justice to make judges available in cases where there is a need to determine the matter by arbitration in such circumstances. There is also much to be said for extending the power to all judges of the Rolls Building's courts to which I have referred to as Commercial Courts in the wider sense.

Enforcement

40. Another perceived advantage of arbitration is the greater ease of enforcement through the New York Convention. As with confidentiality, it can be queried whether things are as clear cut as they might seem. The Convention, quite properly, permits challenges to recognition and enforcement of arbitral awards. A national court may accede to such challenges. Most obviously such discretion provides an arbitral party one more opportunity to stave off what might have thought to have been the inevitable when the arbitral award was made, or any challenges to that award in the seat of arbitration have finally been disposed of. They provide another opportunity for additional delay and expense, and like the Italian Torpedo, provide an incentive for pressure to be brought on the party in whose favour the award was made to settle for less than the award was worth.

41. Other problems arise.⁴¹ An award that has not been challenged in the courts of the seat of arbitration can be challenged successfully in the country of enforcement.⁴² As has been noted this is clearly not the role of courts under the Convention. What it highlights though, is the scope for differential approaches to recognition and enforcement across the Convention States, and where there is such a difference there is the scope for challenge,

³⁹ See E. Zlatanska, *ibid.*

⁴⁰ S.93 of the 1996 Act

⁴¹ More recently, the temptation seems to have arisen for awards to be challenged on grounds which call upon the enforcing court to 'judge' the relative merits of a foreign judicial system: M. Holmes, *Enforcement of annulled arbitral awards: logical fallacies and fictional systems*, *Arbitration* 2013, 79(3) 244 at 253.

⁴² In an interesting consideration of the issue, Nazzini gives a personal example. He was Counsel in an arbitration in Switzerland. The arbitration was valid according to Swiss law, and no challenge to its validity was brought there. Enforcement was sought in Germany. Its validity was challenged there, and the German courts held it to be unenforceable there because the arbitration agreement was 'inoperative between the parties'. R. Nazzini, *Consistency and divergence in international arbitration: evolutionary reflections on res judicata and abuse of process under the New York Convention*, *Arbitration* 2014, 80(3), 273 at 273.

cost and delay.

42. This can be contrasted with the improvements that are being made in cross-border enforcement of judgments. One of particular note is the development of Memoranda of Understanding or Guidance between Commercial Courts which is also helping to foster greater comity in this area. And, as I outlined earlier this year, greater use of technology may well facilitate new means to secure effective cross-border enforcement; ones that go beyond the prospect of quicker and less expensive enforcement proceedings where those are necessary.

Procedure, time and the cost

43. It may then be said that the arbitration provides a more efficient and cheaper option than long, protracted litigation, that it has procedural advantages, such as narrower rules on disclosure than the courts. Such claims would not, I think, stand up against detailed scrutiny today. The answer though is one that has recently been taken in London: it is to provide a more flexible, a quicker, and hence less resource intensive form of procedure as I have explained in relation to the Financial List and other reforms to the courts of England and Wales that are in progress.

Are these alternatives or can they be complementary?

44. The historic trend has been one that has pitted the courts and arbitration, and for that matter the courts and all forms of ADR, against each other. Philosophers would no doubt describe this as a form of procedural dualism: the dialectic of dispute resolution. Some like the Qing Emperor Kangxi, who ruled China during the late 17th and early 18th Centuries, would take the view that arbitration was preferable to litigation. As he put it:

. . . the good citizens who may have difficulties among themselves will settle them like brothers by referring to the arbitration of some old man or the mayor of the commune. As for those who are troublesome, obstinate and quarrelsome, let them be ruined in the law courts; that is the justice that is due to them.⁴³

Others would take the opposite view, and favour litigation over arbitration. That debate will undoubtedly continue for many years to come, although I think that few would take the view now that any dispute resolution process should be designed or operated with the intention of deliberately ruining its users.

45. The debate is a false one. Whether to litigate, arbitrate, or for that matter mediate, a dispute will rest on many factors. What is good for one dispute may not be for another. Many now see the advantage of court proceedings for some types of dispute, particularly those where the issue at stake is of wide application. The courts have shown that they can lead the way in innovation and in short form dispute resolution. The development of

⁴³ Cited in N. Bunni, *What has history taught us in ADR? Avoidance of dispute!* Arbitration 2015, 81(2), 176 at 176-177.

commercial courts worldwide and their wish to co-operate is another factor for change. There is an increasing realisation, as that perspicacious ship-owner noted six years ago, that what matters more to the centrality of the common law, particularly as developed in London, is its use as a basis for doing business. That is, in my opinion, a far more important consideration than the business of dispute resolution in London. The decision of HSBC on 14 February 2016 to retain its headquarters in London was, as it made clear, influenced significantly by the UK's respected regulatory framework and legal system.

46. However, achieving flexibility in the choice of dispute resolution is difficult to achieve quickly because across many areas of commerce and international trade, arbitration clauses which were apposite to a time when the attitudes of the 1970s, 1980s and 1990s were formed have become a commonplace in standard forms of contract and are often inserted as a matter of routine in individually negotiated contracts. My own personal experience reflects this. More than 20 years ago when at the Bar, I played a role in devising an arbitration scheme for the reinsurance industry and over a period of years a clause incorporating that scheme was gradually embedded into contracts as part of the ordinary working of the market. The clause took time to embed, but once embedded, it will be there for many years.
47. These embedded clauses therefore make the task of change more difficult. Although therefore it will take time to change attitudes which have embedded arbitration in the way I have described, and even longer for that change to take effect, the factors to which I have pointed mean that it is necessary now to address in a constructive way the issues that I have canvassed.
48. My view is clear. In retrospect the UK went too far in 1979 and again in 1996 in favouring the perceived advantages for arbitration as a means of dispute resolution in London over the development of the common law; the time is right to look again at the balance. There is also a need to examine whether other markets would be prepared to follow the financial markets, to waive arbitration in cases where there were significant points of general interest and to appreciate that not only would their own dispute, in the right case involving legal issues, be better determined in a court but, more importantly, the wider interests of their industry and of the common law in general would be much better served by more issues being resolved in court and the law thus developed and clarified.
49. Although it must always be remembered that:
 - a. It is the courts that develop the law. Arbitration does not.
 - b. Courts articulate and explain rights, including definitive rulings on the scope and interpretation of contractual clauses, financial instruments and so on. Arbitration does not.
 - c. As has been very rightly noted, 'open court proceedings enable people to watch, debate, develop, contest, and materialize the exercise of both public and private

power'.⁴⁴ Arbitration does not.

Arbitration and the courts can work well together. As Lord Parker CJ said in 1959 of the position before the 1979 Arbitration Act:

The two systems (arbitration and litigation) ought indeed to be properly regarded as co-ordinate rather than rival.⁴⁵

50. Thank you.

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⁴⁴ J. Resnik, *Courts: In and Out of Sight, Site, and Cite*, 53 Vill. L. Rev. 771 (2008) at 804.

⁴⁵ Lord Parker CJ cited in R. Finch, *London: still the cornerstone of international commercial arbitration and commercial law?*, *Arbitration* 2004, 70(4) 256 at 269.