Standing International Forum of Commercial Courts

Report on the first meeting

London

4-5 May 2017

CONTENTS

Introduction	3
Actions	6
Summary of Programme	8
Attendees	10
Opening remarks	15
Discussion (1): Cooperation and Collaboration	18
Discussion (2): Enforcement	21
Discussion (3): Case Management, Technology and Best Practice	25
Discussion (4): The Relationship between the Courts and Arbitration and Mediation	28

Available separately:

(1) A booklet of short biographies of Attendees

(2) A booklet of outlines of each Commercial Court

INTRODUCTION

A unique gathering of commercial courts

On Friday, 5 May 2017, commercial courts from five continents gathered in London. This was the first time this has happened. Why now?

There were three reasons.

First, because users – that is, business and markets – will be better served if best practice is shared and courts work together to keep pace with rapid commercial change.

Second, because together courts can make a stronger contribution to the rule of law than they can separately, and through that contribute to stability and prosperity worldwide.

Third, because this is a means of supporting developing countries long encouraged by agencies such as the World Bank to enhance their attractiveness to investors by offering effective means for resolving commercial disputes.

The invitation, to meet and to form a Standing International Forum of Commercial Courts, came from the Lord Chief Justice of England & Wales, Lord Thomas, himself a former judge of the Commercial Court in London. It followed speeches he has delivered in Dubai, Singapore, Cayman Islands, London and (last month) Beijing.

His invitation was accepted by jurisdictions with a longer established commercial court offering and those with a relatively more recent offering. New York, Delaware, Australia, Singapore, Ireland, Hong Kong, and of course London, were among those accepting. And from the Gulf States, Dubai, Qatar, Abu Dhabi and Bahrain.

At a time of focus on "One Belt, One Road", China was represented, with Hong Kong, itself one of the world's great commercial centres, and so was Kazakhstan. Courts from Europe (Hamburg and the new English-language Netherlands Court) were around the table, as were offshore jurisdictions (e.g. Bermuda, Eastern Caribbean, Cayman Islands).

From Africa, Uganda, Sierra Leone and Rwanda were joined by Nigeria, which according to PWC projections could be 9th in the world league table of GDP by 2050. Through Scotland and Northern Ireland all parts of the UK were represented, and so too the major jurisdictions of Canada (Ontario) and New Zealand.

The representation was without exception at senior judicial level, including Heads of commercial court. 16 jurisdictions were represented by their Chief Justice.

The meeting was held at the Rolls Building, in the City of London and the centre for the courts (including the Commercial Court) which together comprise the Business & Property Courts of England & Wales. At other points of the programme, guests were warmly received

at the Locarno Suite in the Foreign & Commonwealth Office, at Middle Temple and at the Royal Courts of Justice.

The meeting affirmed the importance and feasibility of cooperation and collaboration between all jurisdictions. The shared willingness to provide help to developing countries was also affirmed. The discussion then extended to enforcement, case management, technology, best practice, and the relationship between commercial courts, arbitration and mediation.

A consensus was reached on the immediate next steps to include the following:

1. The Forum will now seek to produce a multilateral memorandum that explains how, under current rules, judgments of one commercial court may most efficiently be enforced in the country of another.

2. The Forum will use a working party to examine in further detail how best practice might be identified, and litigation made more efficient. This will be with a view to a further multilateral document, to be further discussed at a next meeting of the Forum.

3. A structure will be established for judges of the commercial court of one country to be able to spend short periods of time as observers in the commercial court of another.

4. The Forum will also consider issues such as practical arrangements for liaison with other bodies, including arbitral bodies, to identify and resolve areas of difficulty.

England & Wales have agreed to provide the Secretariat to the Standing International Forum. The Secretariat will be based at the Rolls Building. It will be able to support, coordinate and enable the activity above, and future meetings of the Forum.

New York has kindly volunteered to host the next meeting of the Forum, which will be in Autumn 2018.

Why should all these jurisdictions dedicate time to a commercial court? Is arbitration – which has come so far in the last few decades – not a sufficient means for commercial dispute resolution?

The answer is that arbitration whilst hugely successful can never carry the whole burden. It is courts that can produce decisions for business as a whole. And arbitration depends on parties agreeing to it. Parties do not always agree, and when they do, they do not always honour their agreement, including at the stage of enforcement. In short, whenever a mandatory intervention is required, recourse will be made to courts. As many arbitrators gladly acknowledge, experienced commercial courts help make arbitration work.

Business, nationally and internationally, thrives in a stable legal environment, and that includes a proven ability to decide commercial disputes if they arise. In fact, a stable legal environment can prevent disputes, because it provides relatively predictable outcomes and so enables early settlement.

The focus on 5 May 2017 was on things we think can make a difference to users. And that will always include efficiency, speed and cost. As judges, we know that commercial dispute resolution whether in courts or arbitration is regarded by users as both too slow and much too expensive. We have a duty to address these concerns, and that is best done together.

Across such a wide range of jurisdictions there are different views, and different priorities. For some, domestic capacity-building is most important. Others have their eyes firmly fixed on the international market. There were, of course, some important jurisdictions absent. Our hope is that they will be present for the second and subsequent meetings. Enhancing, through collaboration, the just and effective resolution of commercial disputes is a prize worth having.

ACTIONS

A Standing Forum

- The Forum will continue as a standing arrangement.
- Invitations may be extended to other jurisdictions in due course.

Secretariat

- England & Wales agreed to provide the Secretariat to the Standing International Forum.
- The Secretariat will be based at the Rolls Building. It will support, coordinate and enable continuing activity as set out below, and also future meetings of the Forum.
- The Secretariat will be responsible to the Forum, not England & Wales.

Immediate next steps

(1) A multilateral memorandum on enforcing judgments

The Forum will now seek to produce a multilateral memorandum that explains how, under current rules, judgments of one commercial court may most efficiently be enforced in the country of another.

(2) A working party on making litigation more efficient

The Forum will use a working party to examine in further detail how best practice might be identified, and litigation made more efficient. This will be with a view to a further multilateral document, to be further discussed at a next meeting of the Forum. The remit of the working party would include but not be limited to setting out: best practice in particular types of case, how we use technology to make litigation more efficient and cost effective, and how we manage cases to keep costs under control.

(3) Structured arrangements for cross-jurisdiction judicial observation

A structure will be established for judges of the commercial court of one country to be able to spend short periods of time as observers in the commercial court of another. This would be useful for courts of all types, but in the case of emerging courts it might be part of a capacity building programme.

(4) Liaison with arbitral bodies to resolve areas of difficulty

The Forum will also consider practical arrangements for liaison with other bodies, starting with arbitral bodies, to identify and resolve areas of difficulty including developing the law.

Further suggested issues

Further issues suggested for memoranda include: the taking of evidence.

Further issues suggested for working groups include: how courts engage with governments over resources; the service of process.

Further issues suggested for liaison include: a guide to what courts can consider doing in connection with mediation

Future meetings of the Forum

- New York agreed to host a next meeting of the Forum in Autumn 2018, with organisational help and support from the Secretariat

SUMMARY OF PROGRAMME

On the eve of the meeting, attendees were welcomed to a reception and dinner at the Locarno Suite in the Foreign & Commonwealth Office, Whitehall, London[1].

The dinner was addressed by:

- The Rt. Hon Lord Thomas, Lord Chief Justice of England & Wales
- Mr Richard Heaton CB, Permanent Secretary, Ministry of Justice
- Dame Sian Elias, Chief Justice of New Zealand.

The next day, the meeting itself centred on round table discussions, to which each attendee contributed. The discussions were chaired by:

- Sir William Blair, Judge in Charge of the Commercial Court of England & Wales
- The Hon Sundaresh Menon, Chief Justice of Singapore
- The Hon James Allsop AO, Chief Justice, Federal Court of Australia.

The subjects discussed were:

- Cooperation and Collaboration
- Enforcement of Judgments
- Case Management, Technology and Best Practice
- The Relationship between the Courts and Arbitration and Mediation.

In addition, at intervals between the round table discussions, short remarks were made by:

- The Hon Bart M. Katureebe, Chief Justice of Uganda: ("Challenges and opportunities for Commercial Courts in developing countries")
- The Hon Justice Liu Guixiang, Chief Judge of the No.1 Circuit Court, Permanent Member of the Adjudication Committee, the Supreme People's Court of China

---

[1] Also attending the dinner were senior members of the UK Judiciary, members of the Judicial Office, and the following: Ms Sonya Branch, General Counsel, The Bank of England; Mr Robert Chatterton-Dixon, Director of Foreign Policy, National Security Secretariat, The Cabinet Office; Sir Iain Macleod, Legal Adviser, The Foreign & Commonwealth Office; Mrs Sheridan Greenland, Executive Director, The Judicial College of England & Wales; Mr Robert Bourns, President, The Law Society of England & Wales; Mr Andrew Key, Chief Executive, The Judicial Office; Mr Alisdair Walker, Head of China Desk, The Foreign & Commonwealth Office; Mr Bob Neil MP, Chairman, The Justice Select Committee.

- The Hon Loretta Preska, Senior Judge, Southern District of New York Courts, formerly Chief Judge (2009-2016)
- Dame Janice Pereira DBE, Chief Justice, Eastern Caribbean Supreme Court.

The primary language of the meeting was English, but with simultaneous translation into Chinese and Arabic. The "Chatham House" rule applied, so that remarks in discussion are not attributed.

Lunch was taken in the hall of the Hon Society of the Middle Temple. The meeting was followed by a reception in the Painted Room of the Royal Courts of Justice.

The occasion of the meeting additionally provided an opportunity for discussion between judiciaries of areas other than commercial dispute resolution. In particular, a breakfast discussion was held on the subject of judicial training and the development of judicial skills and expertise.

ATTENDEES

List of Attendees: 4-5 May 2017

Africa

Nigeria

Federal High Court of Nigeria
Justice Ibrahim N. Buba
Justice Nnamdi O. Dimgba

Rwanda

Supreme Court of Rwanda
Justice Kamere Emmanuel, President of the Commercial High Court

Sierra Leone

Supreme Court of Sierra Leone
Chief Justice Abdulai Hamid Charm
Justice Amy Wright, Judge of the Fast Track Commercial Court
Justice Miatta Samba, Judge of the Fast Track Commercial Court

Uganda

Supreme Court of Uganda
Chief Justice Bart M. Katureebe
Justice David Wangutusi, Head of the Commercial Division of the High Court
Mr Boniface Wamala, Deputy Registrar

Asia

People's Republic of China

Supreme People's Court of the People's Republic of China
The Hon. Justice Liu Guixiang, Chief Judge of the No.1 Circuit Court; Permanent Member of the Adjudication Committee, the Supreme People's Court of the PRC
Mr. Huo Min, Senior Judge, Executive Vice-President of the High People's Court of Guangdong Province
Ms. Li Wei, Senior Judge, Vice-President of Qingdao Maritime Court

Hong Kong Judiciary
Chief Justice Geoffrey Ma

Chief Judge Andrew Cheung, Chief Judge of the High Court
Ms Patricia So, Deputy Judiciary Administrator

Republic of Kazakhstan

Astana International Financial Centre

Lord Harry Woolf, Adviser to the Astana International Financial Centre

Singapore

Supreme Court of Singapore

Chief Justice Sundaresh Menon
Justice Quentin Loh

Deputy Registrar Ms Teh Hwee

Australasia

Australia

Federal Court of Australia

Chief Justice James Allsop
Justice Lindsay Foster
Justice John Middleton

Supreme Court of Victoria

Chief Justice Marilyn Warren
Justice Michael Sifris
Julian Hetyey, Judicial Registrar of the Commercial Court

Supreme Court of New South Wales

Chief Justice Tom Bathurst
Justice David Hammerschlag, Head of the Commercial List
Justice Julie Ward, Chief Judge in Equity

New Zealand

High Court of New Zealand

Chief Justice Sian Elias

Justice Geoffrey Venning, Chief Judge of the High Court

Europe

Germany

Hamburg Landgericht

Dr Jan Tolkmitt, Presiding Judge

Netherlands

Netherlands Commercial Court
(To be established in 2017)
Judge Areane Dorsman

Judge Lincoln Frakes, Judge of the Court of Appeal of 's-Hertogenbosch

Republic of Ireland

High Court of the Republic of Ireland
Mr Justice Peter Kelly, President of the High Court
Mr Justice Brian McGovern, Judge in Charge of the Commercial List

United Kingdom

High Court of England and Wales
Lord John Thomas, Lord Chief Justice of England & Wales
Sir Geoffrey Vos, Chancellor of the High Court, Lord Justice of Appeal
Mr Justice William Blair, Judge in Charge of the Commercial Court
Mr Justice Robin Knowles, Judge of the Commercial Court

High Court of Northern Ireland
Lord Chief Justice Declan Morgan
Mr Justice Donnell Deeny

Court of Session, Scotland
Lord Carloway, Lord President of the Court of Session, Lord Justice General
Lord Colin Tyre

Middle East

Bahrain

Higher Commercial Court
Judge Khaled Almedfae, Head of the Commercial Court
Dr Aseel Zimmo, Legal Adviser to the Chief Justice of Bahrain

Qatar

Qatar International Court and Dispute Resolution Centre
Lord Phillips, President
Mr Chris Grout, Registrar

United Arab Emirates

Abu Dhabi Global Market Courts
Chief Justice Lord David Hope

Dubai International Financial Centre Courts

Justice David Steel
Justice Richard Field

North America and Caribbean

Bermuda

Commercial Court of Bermuda

Chief Justice Ian Kawaley

Canada

Ontario Superior Court of Justice

Justice Geoffrey Morawetz, Regional Senior Judge for Toronto Region

Cayman Islands

Grand Court of the Cayman Islands (Financial Services Division)

Chief Justice Anthony Smellie

Justice Nick Segal

Eastern Caribbean

Eastern Caribbean Supreme Court

Chief Justice Janice Pereira, President of the Court of Appeal

Justice Paul Webster, Justice of Appeal

United States of America

United States District Courts - Southern District of New York

Hon. Loretta A. Preska, United States District Judge

New York Supreme Court – Commercial Division

Chief Administrative Judge Lawrence K. Marks

Senior Justice Charles E. Ramos

Supreme Court of Delaware

Chief Justice Leo E. Strine Jr

Standing International Forum of Commercial Courts

CAYMAN ISLANDS
- JUSTICE NICK SEGAL
- CHIEF JUSTICE ANTHONY SMELLIE

REPUBLIC OF IRELAND
- MR JUSTICE DONNELL DEENY
- LORD CHIEF JUSTICE DECLAN MORGAN

SINGAPORE
- JUSTICE QUENTIN LOH
- CHIEF JUSTICE SUNDARESH MENON
- DEP REG MS TEH HWEE

GERMANY
- DR JAN TOLKMITT

AUSTRALIA
- JUSTICE LINDSAY FOSTER
- CHIEF JUSTICE JAMES ALLSOP

ABU DHABI
- CHIEF JUSTICE LORD HOPE

USA
- CHIEF ADMINISTRATIVE JUDGE LAWRENCE MARKS
- SENIOR JUSTICE CHARLES RAMOS

CANADA
- JUSTICE GEOFFREY MORAWETZ

AUSTRALIA
- JUSTICE JULIE WARD
- CHIEF JUSTICE TOM BATHURST
- JUSTICE DAVID HAMMERSCHLAG

BAHRAIN
- DR AZEEL ZIMMO
- JUDGE KHALED ALMEDFAE

RWANDA
- JUSTICE KAMERE EMMANUEL

ENGLAND & WALES
- MR JUSTICE KNOWLES
- MR JUSTICE BLAIR

AUSTRALIA
- CHIEF JUSTICE MARILYN WARREN
- JUSTICE MICHAEL SIFRIS
- JUDICIAL REGISTRAR JULIAN HETYEY

EASTERN CARIBBEAN
- CHIEF JUSTICE JANICE PEREIRA
- JUSTICE PAUL WEBSTER

NETHERLANDS
- JUDGE AREANE DORSMAN
- JUDGE LINCOLN FRAKES

SCOTLAND
- LORD COLIN TYRE
- LORD CARLOWAY

NIGERIA
- JUSTICE IBRAHIM BUBA
- JUSTICE NNAMDI DIMGBA

THE PEOPLE'S REPUBLIC OF CHINA
- MS LI WEI, SENIOR JUDGE
- HON JUSTICE LIU GUIXANG
- MR HUO MIN, SENIOR JUDGE

ENGLAND & WALES
- SIR GEOFFREY VOS

USA
- CHIEF JUSTICE LEO STRINE

QATAR
- LORD PHILLIPS, PRESIDENT
- REGISTRAR CHRIS GROUT

SIERRA LEONE
- JUSTICE MIATTA SAMBA
- CHIEF JUSTICE ABDULAI CHARM
- JUSTICE AMY WRIGHT

DUBAI
- JUSTICE RICHARD FIELD
- JUSTICE DAVID STEEL

BERMUDA
- CHIEF JUSTICE IAN KAWALEY

REPUBLIC OF IRELAND
- JUSTICE BRIAN MCGOVERN
- JUSTICE PETER KELLY

NEW ZEALAND
- JUSTICE GEOFFREY VENNING
- CHIEF JUSTICE SIAN ELIAS

USA
- HON. LORETTA A PRESKA

ENGLAND & WALES
- LORD THOMAS, LORD CHIEF JUSTICE

UGANDA
- CHIEF JUSTICE BART KATUREEBE
- MR BONIFACE WAMALA
- JUSTICE DAVID WANGUTUSI

KAZAKHSTAN
- LORD HARRY WOOLF

HONG KONG
- CHIEF JUSTICE GEOFFREY MA
- CHIEF JUDGE ANDREW CHEUNG
- MS PATRICIA SO

LORD CHIEF JUSTICE
OF ENGLAND AND WALES

THE RT HON. THE LORD THOMAS OF CWMGIEDD

Opening Remarks

STANDING INTERNATIONAL FORUM OF COMMERCIAL COURTS

ROLLS BUILDING, LONDON

5 May 2017

---

1. I hope you all had a very convivial evening last night and I, again, would express on all our behalves, our gratitude to the government for organising the evening.

2. I thought last night we gathered together in a spirit of conviviality and as Dame Sian Elias, Chief Justice of New Zealand, said so eloquently, the contribution that this forum could make is potentially huge and very significant. I hope in the morning light you will forgive me for being a little forthright and that is if I say that I would suspect none of you would come to a meeting of this forum again unless we were able to achieve something today.

3. We could be a most agreeable talking shop and I think we found the very first evidence of that last night and the cities of our respective countries have wonderful places to visit and much else to do and friends to meet but, to be blunt, I really do think that what we have to do by the end of the day is to ensure we have a clear perspective of what the forum is to do and what we intend to deliver.

4. I think many of those who use our courts - people of commerce, financiers and others - often talk in terms of what is being delivered and here in an election at the moment,

for the time being at least, so do politicians, but I think we can only achieve a positive outcome if we can show that, by the end of the day, we have formulated a programme that will benefit, I think, all of us in different ways. First, in improving our own commercial courts at home for the benefit of our respective states; and secondly, as Dame Sian said last night, internationally for the benefit of global prosperity.

5. I think it's fair to recognise that what I have set is a pretty tough goal, but I wouldn't think of setting it unless I thought we could succeed and, to that end, I think I would like to say, I think on all our behalves, what an immense debt of gratitude we owe to Mr Justice William Blair and Mr Justice Robin Knowles, assisted by the staff of our Judicial Office, for careful construction of the programme in hand. I think it can be said for all the commercial courts, and I don't intend to define that term because the booklets that we have set out a huge range of different work that is done in each of the courts.

6. In fact, we all have, I think a number of issues reflected in our programme.

   a. First, I think we need to ensure that our practices and procedures reflect not only what is best suited to our own state but also what represents best international practice, utilising modern technology to the greatest extent possible.
   b. I think the second thing, and this is very important to all of us, is that we must see what we can do to strengthen enforcement because that is ultimately what a person using a court wants.
   c. Third, I think we need to see how we can best support other forms of dispute resolution, which our users may choose in preference to the court, such as arbitration or mediation.
   d. And last, and I think this is maybe a topic we ought to look at not necessarily today but in the future, is how do we work together in rapidly emerging new forms of commerce? I think our users need law which can be developed by reference to principle, that is certain and - I think this is the real challenge - which is uniform as globally as is possible.

7. I think we must try and work out what we can do today and I am sure we will, by working together, be able to develop a common approach to the resolution of these various problems which are effective in the four topics we are going to discuss today, sharing best practice, looking at problematic areas and analysing novel developments in commerce, particularly those recorded by technology, and new forms of commercial transactions.

8. I think, though, what is the most important, and I think we are making huge headway already in this, is establishing mutual confidence between ourselves and I am sure that, during today, we will find that the spirit in which we started last night will be translated into real practical outcomes by the discussions. I, for my part, have no idea

what the outcome will be. All I know is that there will be an outcome and it would be wrong I think for any of us here in England and Wales to try and set that out because that would be an outcome we had not collaboratively agreed together. Let us see what emerges during the course of the day.

9. Trying therefore to stick to a timetable, in fact to try and improve on it, I am going to ask Mr Justice Blair in a moment to chair the first roundtable discussion. You will have seen from the delegate packs that we have been presumptuous enough, and I worried about doing that for judges, to put out some ground rules, but they are simply intended to facilitate discussion and participation.

10. It is difficult to conceive of a more distinguished group of judges than we have here present today and what I think we must try and do is to give everyone an opportunity to say what they wish to say in the time that we have available. I will therefore ask Mr Justice Blair to start. But let me end by saying, thank you to him and to Robin Knowles for all that they have done, the huge work that has gone into this and I look forward to seeing where we have reached by the end of the day, but I know we will have reached something concrete.

DISCUSSION: (1) COOPERATION AND COLLABORATION

Please note: the views summarised below were among those raised; it is not suggested that they represented a consensus; rather, they were expressed to help identify and inform the actions resulting of the Forum.

The discussion (facilitated by Mr Justice William Blair) raised the following views among others:

General

- The question is not whether to collaborate or cooperate further but how we go about it. All can develop through the sharing of experience and knowledge.
- How a court informs itself about systems other than its own is a good question.
- There is existing experience of "picking up the phone between courts" but care is needed if this is in the context of a particular case.
- Collaboration is not easy to achieve. But it is in these difficult situations that cooperation becomes all the more important.
- Collaboration breeds mutual respect and an increase in our ability to place trust in each other.
- There is an abundant number of channels of communication available. But we all know that before people use those channels they've got to value each other as colleagues.
- Collaboration in cross border situations can be a challenge. Some have no settled position. However there are good examples where courts already work across borders.
- There has been less cooperation between common law and civil law systems.
- A lot of natural areas for cooperation will come from shared principles.
- The gains from collaboration will be very important going forward. Cooperation is a realistic objective.
- Comity should be mentioned.

Procedures generally

- Standardisation of procedure is one idea.

- A degree of harmonised procedure is important to litigants as it leads to a lower sense of risk and lower cost. A company may be trading in ten jurisdictions.

- Best practice on stating a case should be discussed. In many countries judges are locked down with pleadings.

- Judges are in a unique position and we have an opportunity and duty to pick up these points and to build procedures.

- Work has been done recently by the American Law Institute to create trans-national procedures. An issue for us is how to build on that kind of work.

Particular considerations

- There can be different languages and different legal systems even within a state.

- It is important to work sensitively to respect each other and understand the boundaries.

- We each need a minimum state of IT development to communicate successfully across borders.

- Much can be done by judges working together without legislation by understanding other systems better.

- In cases where a foreign law has to be applied SIFOCC might provide a platform to give access to that foreign law. It would be helpful to have more cooperation to understand what other courts have said.

- On informing an arbitration tribunal on another jurisdiction's law, counsel can address the court and it doesn't need to be moderated.

- There are memoranda whereby issues of law can be put to a foreign judge to answer and litigants will then be bound by it.

Means

- The building of relationships face to face will allow us to make the most of the other channels between meetings.

- A working group methodology provides an opportunity for individual jurisdictions to opt into individual exercises. We can make progress without requiring each jurisdiction to engage in the same way.

- An increase in the ad hoc appointments of judges to sit in other courts has been observed, and this can be a very valuable form of cooperation.

- There may be scope to take it further (eg a regional Court of Appeal).

- Arbitration has had a success in making connections that has not been matched by commercial courts; we should explore this.

- Practising lawyers can give us great insight.

For <u>Actions</u> please see separate section.

DISCUSSION (2): ENFORCEMENT

Please note: the views summarised below were among those raised; it is not suggested that they represented a consensus; rather, they were expressed to help identify and inform the actions resulting of the Forum.

The discussion (facilitated by Mr Justice William Blair) raised the following views among others:

A problem?

- Is there a problem with enforcement and if so what is it?
- There are serious problems with enforcement in some parts of the world.
- Yet often enforcement is not a problem at all.
- Enforcement is not a big problem practically in many cases. What is a problem is the perception of being unenforceable.
- There are examples of very swift enforcement.
- Within Europe most cases concern the recognition of European member states where there is already mutual trust.
- It is a problem that the cost of enforcement has become disproportionate for litigants.
- Newly established courts can face unique difficulties with enforcement not least because it is not always clear on what basis the court has been established and has been operating.
- It sometimes takes longer than expected to register a judgment.
- The simple problem to overcome is if there is a judgment to be enforced which violates international principles or a judgment on a matter that relates to an offence in another country; there will be difficulty enforcing them.
- If people thought that the approach of a number of courts would be to do everything to respect the judgment of the other court then that would go a long way to giving commercial parties the confidence they need.
- There is an inconsistency with mutual recognition, eg there are not enough countries that have commitments to cross border insolvency etc.

- A fight over jurisdiction is unnecessary.

Particular considerations

- Comity is a difficult but practical concept.

- There is inconsistency in levels of judicial expertise in dealing with these issues when they arise. It is desirable to increase standards of judicial knowledge and judicial education, and knowledge and awareness through the legal profession.

- The best experiences of getting an understanding of a foreign system can be through sitting as an observer with judges of different jurisdictions, and the relationship that can result.

- The challenges and opportunities all depend on why Commercial Courts were set up in the first place.

- Here as elsewhere countries are not moving at the same pace. Some are emerging as has been described. Many are learning. Not all are in the same place. Standardisation of procedures may help in this regard.

Appeals

- Appeal is an important issue.

- If there is a judgment in one country but appeals in other countries we need to consider these problems.

- How we deal with enforcement in another country could be solved by forcing an appeal in the same country.

Civil law and common law

- It may be easier to establish relations in common law. The problem is moving into it with civil law systems.

- There is experience of a civil law court enforcing a common law judgment without re-litigating as long as the plaintiff makes a showing that the process was fundamentally fair.

- On the enforcement of judgments a civil law jurisdiction may adopt more of a common law approach than a civil one.

Conventions: New York and Hague

- We do not have an international convention for the reciprocal enforcement of judgments, in contrast to arbitration awards.

- The New York Convention was meant not to elevate judgments, but to rehabilitate arbitration awards as a way of resolving issues across borders. The NY Convention is about enabling cross border arbitration.

- The importance of the Hague Convention should not be underestimated. The Hague convention gives, in effect, NY Convention enforcement to the choice of the parties, which solves problems through party autonomy. This is a game changer if enough courts take it up. Since 2005 the exclusive choice of court agreements has been ratified only by Mexico, Singapore and the EU.

- On the face of it there seems very little difference between the rationale for party autonomy on arbitration and courts.

- One practical point is what is an exclusive jurisdiction agreement?

- The Hague Conference has done a lot in terms of taking evidence through to the creation of handbooks. We must avoid the danger of reinventing wheels.

- This is an area where we could make collective recommendations to our respective governments.

Memoranda of Guidance

- It would be excellent to have everyone sign up to the Hague Convention but if that is not practical then a Memorandum of Guidance might well go a long way to giving parties confidence.

- The development of Memoranda of Guidance describing existing procedures in place for enforcement is very helpful, and not dependent on governments putting treaties into place.

- Before new courts start on Memoranda of Guidance in relation to the enforcement of foreign judgments and awards it is important that procedures domestically are secure first, otherwise they will not work on an international level.

- Some jurisdictions have a Memorandum of Guidance between a new court and local courts.

- Memoranda of Guidance are not enforceable agreements; they are about understanding each other’s systems, without being bound by agreements which would need the authority of government.

- The advantage is that they bring together the legislative basis and the case law which referred to that legislation and helped understanding.

- Multilateral Memoranda of Guidance or of Understanding could have some assistance as a model.

For Actions please see separate section.

Discussion (3): Case Management, Technology and Best Practice

Please note: the views summarised below were among those raised; it is not suggested that they represented a consensus; rather, they were expressed to help identify and inform the actions resulting of the Forum.

The discussion (facilitated by Chief Justice Sundaresh Menon) raised the following views among others:

Case management

- The Woolf Report marked a new age in litigation. It caused us to re-imagine the roles of judges and affects the way we think even today.
- We no longer see parties as entirely autonomous.
- Judicial resources are limited.
- A court that is efficient in dealing with commercial disputes then leads to the question about who can come and use the court. A small claims procedure with a financial limit to limit what comes to the commercial court is one approach.
- The cost of litigation and delays affecting the resolution of cases are real concerns.
- Docketing, balance, expertise and transparency can be important.
- Discovery/ disclosure is not always manageable for smaller firms and takes judicial time.
- Limits on the amount of legal submissions are in use.
- Case management has to be learnt.
- Those who appear before courts have to know that there are consequences if they don't follow through.
- The legal profession can be informed through judicial seminars. The profession can come to understand that the court relies on them. They come on board.
- We still need to case manage individually, case by case.
- Flexibility is critical in case management.
- One jurisdiction starts with lists of issues rather than pleadings.

- Some courts set time limits for the conclusion of commercial cases, and appeals.

- Parties must be encouraged to cooperate and only come back if there is a problem.

- Some courts have a document setting out the duty on practitioners.

- Codification has been useful and provides proportionality.

- On discovery, some courts are brutal; they set categories and make it clear to parties that there is no general discovery.

- Having developed the concept of case management we have the opportunity to try to select the approach to disclosure that the particular case needs, whether wide or narrow, but always proportionate. It does mean a 'hands on' approach from the judge.

- A party shouldn't be compelled to settle until a list of documents had been filed, with a statement of truth from the other side that relevant documents have been disclosed.

- It is important to be sure the clients understand why a particular course has been taken. One needs an open and transparent dialogue to ensure the client understands.

- We need to avoid frontloading costs so ADR can be used at an appropriate point. We need to find appropriate technological solutions.

- There is a conflict of interest between the client and lawyer on costs. The client is not always in a position to know what is proportionate so case management by judges is important.

Technology

- Technology has been the dominant force in our lives for some years and has reached the law.

- Technology is an enabler.

- It must be embraced and harnessed rather than pretending it won't affect us. It makes physical distances much less important.

- To what extent are we thinking about the next level of technology as in AI and predictive technologies?

- Online dispute resolution platforms might be of greatest assistance in less contentious cases.

- To what extent are we ready to use technology to get courts to work together across borders?

- There is experience of analysing cases to determine typical types and using big data to predict what case might be coming up.

- It is valuable to explore electronic trials which avoid the need to bring in third party providers of technology.

- Some countries have moved to mandatory electronic filing.

- Web design consultants can make things as easy as buying a book on Amazon.

- It is time for some judges to turn into advocates with governments and others. We know that if we have an increase in clerks or technology then we can do more than we are now. The difficulty we have is that often our resources are inadequate and judges need to persuade funding authorities to invest.

<u>Best practice</u>

- The challenge is now sustaining expertise in a commercial court. In some countries a lot of training is required. Having judges from other courts sit with us allows us to borrow best practice from each other.

- On case management and best practice, sitting with others and learning practically from each other is beneficial. This needs us to allow judges to go off for a week at a time. Judicial exchanges could be very valuable.

- In areas where the judiciary does not have the power to amend procedural rules but the legislature is not responsive to the judiciary there is a problem.

- There is a commercialisation and industrialisation of litigation (and arbitration) which has got be dealt with.

- Can we put the various ideas together and find some generic best practices without dictating practice? It could be useful, especially for some who are feeling their way. We are talking about best practice and writing it down into something we can share, as we all try to get best outcomes for parties using our courts.

- We need to persuade our treasuries to invest back in the courts.

For <u>Actions</u> please see separate section.

DISCUSSION (4): THE RELATIONSHIP BETWEEN THE COURTS AND ARBITRATION AND MEDIATION

Please note: the views summarised below were among those raised; it is not suggested that they represented a consensus; rather, they were expressed to help identify and inform the actions resulting of the Forum.

The discussion (facilitated by Chief Justice James Allsop) raised the following views among others:

Context

- The relationship between commercial courts and 'non-court resolvers' is hugely important.
- With the globalisation of world trade there are not enough courts to do all the work now and certainly not enough to do all the work there will be in 20 years' time.
- Non-court resolvers are working in an unorganised and sometimes chaotic international justice system.
- How the parts of that international justice system fit together is crucial; the topic throws up a number of aspects of sovereignty, comity and relationships with different courts.
- In some countries litigation is of low cost and quicker; it is preferred over arbitration.

General

- As far as possible we must ensure judicial engagement with arbitration issues is from a position of judicial expertise. It is easy to see what arguments will be attempted unless there is a specialist judge.
- There is a need for communication between the arbitral community and the judiciary that is being helped by retiring judges serving as arbitrators.

Judicial intervention and appeals

- It is not always the case now that the arbitrator’s decision is final.

- If you have finality there may be no chance of building up a corpus of law.

- It is a point of view that so long as courts do not reopen factual issues the ability to examine the use of the law is valuable. There is a concern within the legal community that the disappearance of a reasonable opportunity to appeal is damaging the development of law.

- People need to realise judges will not let courts revisit everything that has been agreed. It is about developing the law. Arbitration tends to focus on facts not on law.

- There is an importance attached to being able to appeal on a question of law to keep a degree of certainty.

- Another view is that the practice of many would be reluctant to see an enlargement of the right to appeal.

- In practice the number of cases where permission to appeal is given in a jurisdiction may quite small. A very limited number every year and an even smaller number where the court disagrees with arbitrator.

- One jurisdiction recently passed new legislation in an effort to accommodate the needs of domestic and international communities so as to say to parties you can choose which court will be responsible for supervising the administration of the arbitration in accordance with this new law. They hope that giving parties those choices will overcome some of the concerns about different interpretations.

<u>International enforcement of arbitral awards</u>

- If one has multiple international enforcement hearings, when should one court follow another; when should courts critically examine the conduct of other courts?

- Courts have a duty to apply the NY Convention or an equivalent. It should not be a subconscious pro-enforcement stance. This has a significant effect on the role the court should play.

- In some countries it is only the Supreme Court that has the right to decide whether a local court should accept a foreign award.

- Sometimes the delays in challenge before the court of the seat are so long that the enforcing court has to take a view whether to be bold enough to exercise its discretion in favour of enforcement. There are difficult decisions to be made.

- At the process level courts are showing they will not tolerate anything other than fair process.

- Greater definition is needed of the meaning of public policy.

- There is a tendency in the Middle East to look at public policy narrowly.

Mediation

- In some countries in regard to mediation the practice is that when you file a case the parties must all submit to mediation first. Lawyers didn't like it initially but lately it has been found to be useful and more people are using it. But what is best practice?

- Many courts have skilled registrars and tend not to use judges at all stages. One view is that registrars can speak to parties in a way that judges cannot; they can whittle away a case over time; if not settled as a whole they can at least bring rationality to the case with time and money saved.

For Actions please see separate section.

With thanks to:

The Foreign and Commonwealth Office
Government Hospitality
The Royal Courts of Justice, its Clerks and Staff
The Rolls Building, its Clerks and Staff
The Judicial Office and its International Department
The Hon Society of the Middle Temple

Matthew Gaunt
Nicola Massally
Grace Karrass
Ben Yallop

Secretariat contact details:
Email: Matthew.Gaunt@judiciary.gsi.gov.uk
Telephone: +44 (0)20 7071 5673