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International Commercial Courts within the domestic system – Enhancing commercial dispute resolution?

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Introduction

The brief for this session speaks of "the challenges of dealing with complex commercial disputes within a domestic framework and looks to the possibility of international commercial courts to fill gaps in expertise". I might be said to come to this with a perspective which sits ill with the brief for this session. That is because I am not just a judge – but the immediate past Judge in Charge of the Commercial Court of England and Wales; and The Commercial Court of England and Wales does not lack expertise in complex commercial disputes! It has built that expertise over the course of the last 127 years (the Court's birthday was just last week[1]) and built on even earlier roots in the C18.

The best way for me to address the issue is to start by telling you a bit about my home court, which naturally inspires my views on the issues.

Commercial Court of England and Wales

We are in one very real sense an international commercial court, we are a destination of choice for international litigants and we are to some extent an outlier within our own jurisdiction with rules focussed on transnational litigation and large disputes. For well over 20 years now the Court has seen about 75% of its business in cases where at least one party is from another jurisdiction with over 50% of disputes before the court being ones where neither party is a domestic one[2].

Judges

What we are not is an international commercial court in the sense of having an international roster of judges. We currently have some 14 specialist commercial judges all of whom were specialists in commercial law during their practice. At present all our judges are former barristers, but we did formerly have a former solicitor in the form of Dame Clare Moulder. We have some ability also to flex capacity by the use of deputies; Dame Clare for example sat with

[1] https://www.judiciary.uk/courts-and-tribunals/business-and-property-courts/commercial-court/about-the-commercial-court/the-history-of-the-commercial-court/

[2] https://www.judiciary.uk/courts-and-tribunals/business-and-property-courts/commercial-court/the-work-of-the-commercial-court/

us last week. This also allows the full time judges to have time to sit elsewhere to develop wider judicial skills; (e.g. sitting in our Criminal Court of Appeal or Administrative Court). It also allows a number of commercial practitioners sitting as deputies to consider the commercial bench and develop judicial skills.

Why the Commercial Court?

We are a venue of choice for sophisticated international parties, so much so that we have recently been described as a "black hole" for international commercial litigation[3]. . I am wildly proud of the Court's distinguished heritage and that continued attraction to foreign parties. Why do people come to us? We are aware (because surveys of litigants tell us) that those decisions rests largely in two things: i) the expertise of its judges and we are all conscious that we follow in the footsteps of judicial giants like Lord Atkin Lord Goff and Lord Bingham. Ii) the attraction of English Law which is seen as robust, comprehensible and because of that, sufficiently predictable to allow parties to explore settlement with confidence. Again that places a burden on us to maintain those standards in our decisionmaking. Another attraction which has been at the forefront of my mind as we've talked this week about problems of pendency, we maintain a speedy throughput, smaller cases up to 4 days within a year, larger cases pretty much as fast as parties can get ready. Permission is needed for all appeals and the court of appeal is largely supportive.

Advocate for the creation of international Commercial Courts

So it might be thought that as a representative of a major international commercial court I must be an advocate for the creation of international commercial courts. The answer is Yes and No. The development of commercial courts – a resounding yes, but I would like to caution against any approach which neglects the natural development of a country's own commercial courts and commercial judicial expertise. I'd like to think about that international aspect – because when I talk about international commercial courts I am not talking about the somewhat "Brexit-prompted" ICCs (France, Netherlands) but talking about of the majority of other ICCS – courts which are not just seeking to attract international commercial business but which are peopled by judges (or, in the case of China, advisers) from other jurisdictions. They are normally generally retired Commercial judges from established commercial courts.

Many people would say – if we can have Lord Mance, or Lord Collins, what's not to like? And similarly is it not an advantage to have the top international advocates as they can in arbitration? On one level yes, I do understand the argument that an international commercial court assists in giving pre-baked expertise, but my point is this: it should not be assumed that judicial – or indeed advocate - expertise cannot be grown at home – as we have done in England.

Nor should it be assumed that other jurisdictions – such as my own - come to this with perfect expertise. All of my court's judges were more expert in some aspects than others and have had to learn a lot. We have all also had to learn the different expertise which comes from being a commercial judge as opposed to a practitioner and we have to keep learning because litigation changes, just as life does – none of us dealt with crypto currency at the bar, for example. We have all had to learn on the job.

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[3] The Rise of the International Commercial Court: A Threat to the Rule of Law? Lucas Clover Alcolea Journal of International Dispute Settlement, Volume 13, Issue 3, September 2022, Pages 413–442, https://doi.org/10.1093/jnlids/idac022

And this is where SIFoCC comes in.

SIFoCC

SIFoCC is the Standing International Forum of Commercial Courts[4]. It was founded in 2017.It now has membership from 45 jurisdictions from six continents – 70% of all the G20 jurisdictions. SIFoCC facilitates collaboration between the world's Commercial Courts and is not led by anyone – it is owned by its membership with a truly international steering group – including Australia Uganda Singapore. The UK is delighted to serve as the home base for its secretariat.

SIFoCC's aim is to promote and support best practice and the just and effective resolution of commercial disputes. The idea is that by working 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. It echoes of what was said yesterday at the rule of law breakfast. It also facilitates meaningful convergence in commercial laws around the world for example, I have spoken to participants here about the value of the SIFoCC Multilateral memorandum on enforcement. A SIFoCC working group has also produced a set of Presumptions of Best Practice in Case Management. So SIFoCC's raison d'etre is commercial courts internationally working together – and supporting each other. It is a forum for all judges in all jurisdictions, it is all about knowledge sharing and building.

There is a thriving judicial observation programme which is all about peer to peer knowledge sharing - with judges spending an intensive week in the courts of another jurisdiction, watching cases and discussing practices – whilst forging relationships with other judges. I have participated in a number of its events and while I know that less experienced commercial courts benefit from tapping into our expertise, it is most assuredly not a one way street.

The "International Commercial Court" model

This brings me back to the international commercial court model and the problem I had in mind has only been reinforced by what I have heard here in Goa. That is because in a sense, international commercial courts, bringing in outside judges because of their expertise, carries with it an assumption that there is a right way to do things and that way is the way that it has been done in the past in some other jurisdiction.

That is an assumption which resonates with a number of the things said in the "Hangover of Colonialism" session on Monday. India's Joanna Shireen Sarkar made a powerful point about colonialism conditioning people to defer to external forces. To similar effect, Raggles Ferguson from Grenada argued that one of the pieces of damages that colonialism has done is to train people to think that what is good comes from outside not from within. May I suggest that there is a danger that the international commercial court model does a similar thing?

And I'd suggest that caution is needed also because one of the things I have learned from discussing our cases with judges from around the world through SIFoCC is that the right solution in one place can be a very wrong solution in another, or that another solution will be

[4] https://sifocc.org/

much better given the types of cases that court sees, or the particular conditions on the ground. Another takeaway for me from such meetings has been that what we have done in the past and continued to assume is fine may suddenly seem open to question when discussing things with a judge from another jurisdiction, to whom the way we do things is not a given and who asks penetrating questions!

In 2019 Forbes said that "*if it ain't broke don't' fix it*" was one of the most dangerous sayings in business. That's because businesses that stay static fail, and the business of judging is no different. The smart money in business is about inspiring a culture of change and the courts need - in the modern world - to do likewise.

International arbitration and mediation

We also need to look at what international arbitration and mediation bring to the equation. This is something that SIFoCC, at its recent 4th Full meeting in Sydney, gave a lot of thought to – moving towards an integrated system of dispute resolution. Arbitration and mediation are a foil to commercial courts, but they are much more than that.

In London of course we have a very thriving international arbitration business. We act as the supervising court for that and 30% of my court's business stems from arbitration. We learn from what we see in the awards that we have to consider. We also learn from a thriving dialogue with the arbitration organisations which are headquartered in London. A great example was the discussions we had during covid where direct contact both short circuited a potential "lit to arb" movement and also helped give arbitrators confidence that moving to remote hearings was feasible in that the supervising court was doing this and was supportive.

I am not of course saying that the international judge model cannot be helpful; international commercial courts in that sense can bring an infusion of expertise. They can, as has been suggested, help to push harmonisation of law across jurisdictions by cross fertilisation of ideas. But I would suggest that this should be accompanied by caution as to suitability to the on the ground conditions and also seen as a bridge while strength is built organically.

Otherwise in creating an international commercial court there is a danger that you destroy judicial confidence and learning opportunities and that it is a backward looking build, not a build designed to prosper both in local conditions and in the future. International judicial expertise should, I would suggest, be seen as a starter, a facilitator of the growth of domestic judicial expertise and as only one contributor to that, working also with SIFoCC and CLA and with our friends in arbitration.

Conclusion

Ultimately the goal should be to build strong commercial courts across our jurisdictions so litigants – national and international – can rely on the work of experienced judges who are not only expert in the law but invested in the future of their courts, whose expertise can be recognised internationally and inform the development of commercial law generally.