

*International Commerce:
Mapping the Law in a Borderless World*

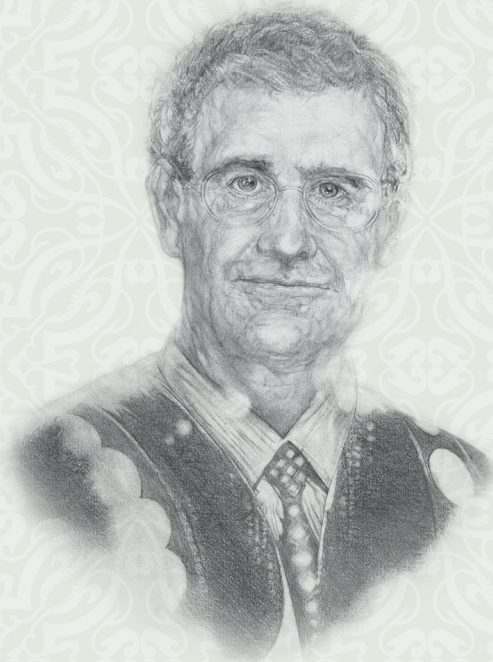
The Right Honourable
Lord Briggs of Westbourne
Justice of the Supreme Court of the United Kingdom

May I start by saying what a privilege and a delight
it is to be invited to your beautiful country to give the
latest in this long-standing series of lectures in honour
of His Royal Highness Sultan Azlan Shah.

Lord Briggs of Westbourne

The Right Honourable Lord Briggs of Westbourne

International Commerce: Mapping the Law in a Borderless World



Michael Townley Featherstone Briggs
(b. 23 December 1954)

Michael Townley Featherstone Briggs, Lord Briggs of Westbourne was appointed as a Justice of the Supreme Court on 2 October 2017.

As a judge, Lord Briggs has participated and delivered judgment in numerous landmark cases involving important issues of commercial law.

Lord Briggs was in charge of the extensive Lehman insolvency litigation from 2009 to 2013, following the global collapse of the international financial services firm Lehman Brothers in 2008.

Many years later, the effects of the seismic shock to the derivatives markets triggered by Lehman's collapse, and the complex legal problems arising therefrom in the context of a Cayman Islands master hedge investment fund, were dealt with by Lord Briggs in the Privy Council case of *DD Growth Premium 2X Fund (in liquidation) v RMF Market Neutral Strategies (Master) Ltd* [2017] UKPC 36.

More recently, Lord Briggs also delivered judgment in the UK Supreme Court case of *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] UKSC 24, an important decision on the formation and variation of commercial contracts, where Lord Briggs commended the "incremental development of the common law which accords more closely with the conceptual analysis adopted in most other common law jurisdictions".

Lord Briggs was educated at Charterhouse School and read law at Magdalen College, University of Oxford. He was admitted to the English Bar by the Honourable Society of Lincoln's Inn in 1978, and was the Junior Counsel to Crown Chancery from 1990 to 1994. He was appointed as Queen's Counsel in 1994, and was widely recognised as a leading commercial and chancery barrister.

Lord Briggs was made a Bencher of Lincoln's Inn in 2001. In the same year, he was appointed as the Attorney General of the Duchy of Lancaster, a post he held until his appointment to the High Court in 2006. From 2012 to 2013, Lord Briggs was Vice-Chancellor of the County Palatine of Lancaster.

In 2013, Lord Briggs was elevated to the Court of Appeal and was appointed to the Privy Council. In January 2016, he was appointed Deputy Head of Civil Justice of the Court of Appeal.

Lord Briggs was the judge in charge of the Chancery Modernisation Review in 2013 and led the Civil Courts Structure Review, culminating in the Briggs Report in 2016. The Report proposed, among others, a new online court promoting a more affordable dispute resolution procedure, prompting a description of Lord Briggs as the “architect of the future online court system”.

Lord Briggs is married to Lady Beverly-Ann Rogers, who is an accomplished and leading international mediator.

Outside of the law, Lord Briggs’s interests include sailing his 115-year old boat, driving his 60-year old car, and going on expeditions with Lady Briggs to remote places in the world (fair weather preferable!), “but is perhaps better known for his love of all things tech”.

In the last few years, specialist international commercial courts have sprung up in Singapore, Dubai, Qatar and Kazakhstan, as well as in France and Germany, perhaps in anticipation of Brexit.

They will all offer English as the (or at least a) language of the court, reflecting the growing pre-eminence of English as the language of international commerce.

International Commerce: Mapping the Law in a Borderless World

Lord Briggs of Westbourne

Justice of the Supreme Court of the United Kingdom

Your Royal Highnesses, distinguished guests, ladies and gentlemen, good evening and thank you for coming to listen to the ramblings of an elderly lawyer from a far-off land. May I start by saying what a privilege and a delight it is to be invited to your beautiful country to give the latest in this long-standing series of lectures in honour of His Royal Highness Sultan Azlan Shah.

My wife, who is also here this afternoon, has asked me to join her thanks with mine to your Royal Highnesses for the extraordinarily kind and generous hospitality which we have received. It is no exaggeration to say that we have been treated like royalty, and we will treasure this unique experience of warm Malaysian hospitality for the rest of our lives. Everyone has been so kind to us, from judges, to palace officials to the most junior hotel staff and we know that a great deal of quiet teamwork has been going on behind the scenes to make us welcome. Our special thanks go also to Tan Sri Dato' Seri Visu Sinnadurai for all the time

*Thirty-third
Sultan Azlan Shah
Law Lecture delivered
on 5 November 2019
in the presence of
His Royal Highness
Sultan Nazrin Shah
and Her Royal
Highness Tuanku
Zara Salim.*

and trouble to which he has gone in arranging this visit and in helping us to prepare for it.

Having only had a small taste of Malaysia through the windows of a slow train from Singapore to Bangkok, five years ago, it is truly wonderful for us both to be able to make a proper visit at last. Our train did however make one stop, to enable us to visit the late Sultan's splendid gallery at Kuala Kangsar, where we were able to learn of his distinguished legal career, his important contribution to the rule of law and his membership of Lincoln's Inn, my and my wife's legal society in London. We felt an immediate affinity with his late Highness then, and it makes this occasion even more special for us. I am happy to be able to pass on Lincoln's Inn's best wishes to all its student and barrister members in Malaysia. Those of you who are here today, please convey those warm wishes to your colleagues.

International commerce and the rule of law

For the whole of my life, and I am just three years older than independent Malaysia, the world has witnessed a truly astonishing expansion in international commerce, in which our two countries, Malaysia and the UK, have each played a major part. Our citizens have (for the most part) been beneficiaries of this phenomenon. It has given us investment from overseas, jobs in raw materials, manufacturing and service industries, and access to world markets for goods and services that has transformed the lives of almost every

one of us. We take it for granted that the things we use in our daily lives (for example our mobile phones and the remarkable software which they contain) can be obtained from a competitive world market, in which international competition drives up quality and drives down price. Only last week we were, in our Supreme Court, marvelling at the way in which the world has come together as a community to develop and establish international standards in mobile phone technology, making the most modern and sophisticated devices available at reasonable cost to more than a billion users worldwide. Only recently my wife and I were using it to communicate with our family in London from the wildest parts of the Namibian desert.

This expansion of international commerce has been driven by numerous factors, under the general heading of globalisation. They include political conditions, such as the deep international peace which has developed between most nations since 1945; technical factors such as the Internet, which knows no national boundaries; the increased efficiency and reliability of international travel and transport; and legal factors which have led to an intensification of the rule of law as the essential underpinning of democratic society, mainly within but also across national boundaries. But the recent recurrence of nationalist political aspirations in many countries around the world, and the possibility that this may slow down or even reverse the onward march of globalisation, makes this a useful time to examine the rule of international law in the support and regulation of international commerce, so that

we may better understand the vital role which it plays in the underpinning of the benefits of the global village in which we all live.

We are all, I am sure, very familiar with the general concept of the rule of law. It provides an agreed framework within which fallible human beings may live together in freedom and harmony, honouring and respecting each other's beliefs, human rights and expectations, sure in the knowledge that our inevitable disputes will be determined by independent, skilled judges under public scrutiny in an open and transparent justice system to which everyone has access, and that their rulings will be enforceable by the state. It is a concept which, generally speaking, exists within rather than across national borders, both because systems of substantive and procedural law are overwhelmingly national in their content, and because enforcement of the law requires the authority and resources of national law-enforcement structures.

In the cross-border commercial context the rule of law works rather differently. There is no developed system of international commercial law which applies whether you like it or not, nor any trans-national courts or law enforcement authority. The rule of law depends heavily upon merchants choosing a mutually agreed system of law and jurisdiction for incorporation in their contracts. It depends upon the availability of sufficiently developed systems of law among which merchants may make that choice. It depends critically upon there being courts and tribunals with the skills and resources to resolve cross-border disputes with

speed and efficiency, and the independence sufficient to give comfort that neither the home player nor the richer party will be preferred. It also depends upon the existence of mechanisms for the enforcement of their decisions in a way, and at a place, where it will be effective, usually where the losing party has assets available for seizure. Finally, it depends upon there being in place systems for dealing with cross-border insolvency, under which reconstruction may be attempted and, if it fails, all the international creditors of the insolvent business receive equal treatment in the competition to share in any remaining assets.

“The rule of law provides an agreed framework within which fallible human beings may live together in freedom and harmony, honouring and respecting each other’s beliefs, human rights and expectations.”

The purpose of this lecture is to describe and explain, necessarily in outline only, some of the cross-border structures which contribute to the rule of law in international commerce, to look at the choices facing a merchant when venturing into cross-border legal relationships, and to highlight some of the pros and cons of the different legal and procedural systems on offer. Although I now sit in a UK court which is also that of Scotland and Northern Ireland, I claim no deep expertise in any law other than the law of England and Wales, and

I have a lifetime's experience trying to learn, understand, apply, fight with and (recently) reform English legal procedure. I have a deep and abiding love of the common law which, although largely of English origin, now flourishes in slightly different but complementary forms in numerous jurisdictions worldwide, including Malaysia. My last two years as a member of the Judicial Committee of the Privy Council, which hears appeals from 31 jurisdictions around the (mainly) common law world has given me a real chance to widen my legal horizons beyond the coastline of a small island on the other side of the world, as did my part as a judge in resolving the London litigation arising from the international Lehman crash in and after 2008.

Lex mercatoria and the desiderata of merchants

Starting at the very beginning, there appears to be a rose-tinted memory among some commercial lawyers and academics of a supposed golden age in the distant past when merchants everywhere regulated their legal affairs in perfect harmony under the dictates of a customary law of merchants, the *lex mercatoria*.¹ Disputes were said to be settled by reference to a supposed custom among merchants rather than by fusty lawyers and judges burrowing in law books. The *lex mercatoria* knew no borders, answered to no sovereign power, and did not need to have recourse to the courts of any particular state for dispute resolution or enforcement. There is some evidence that merchants were first off the block into arbitration and mediation, driven

there by the lack of cross-border jurisdiction of the courts, the lack of commercial expertise of common law judges, and their inability to speak anything other than English. *Tout ça change ...*

But in my view, as someone who was a historian before becoming a lawyer, this “memory” of an international *lex mercatoria* is largely a romantic fantasy. In the real, tough world of international trade in the medieval and even early modern ages, traders were as likely to resolve their differences by the sword, the gun and, at sea, the ram, as by any concept of the rule of law, let alone its practical application. Private armies, highwaymen and bandits were rife on land, pirates and the warships of hostile nations at sea. Merchant ships were often so heavily armed as to be indistinguishable from warships, and such order as was occasionally imposed owed more to the temporary regional hegemony established by successive empires or treaty organisations (Chinese, Spanish, Portuguese, Dutch and latterly British) than to mutual respect for binding custom among merchants from different countries. But this myth that there was once an international *lex mercatoria* has played a significant part in very recent times by inspiring groups of well-meaning legal scholars to develop systems of truly cross-border business law as an available choice for merchants when making their contracts, and for business-minded governments when agreeing and then ratifying international law conventions.

Before describing recent and not so recent developments of this kind, it is worth asking, at the outset,

what do prudent merchants, doing business across borders in the modern global village, really want from the dispute resolution and enforcement systems which will regulate their dealings. What are their *desiderata*? First and foremost, they will, I suggest, want clarity and certainty in the legal rules by which they and their trading counterparties must abide. By certainty I do not merely mean after a dispute has arisen, so that they can get precise and reliable advice about who is going to win the looming litigation. Rather, I mean certainty about what the rules are, before dispute, so that they can conduct their business relations in a way that avoids disputes in the first place.

Secondly, I suggest that the merchant will want substantive justice and fairness. By this I mean not only a commercial law that is itself just and fair, but even more so, a tribunal, whether arbitral or a national court, which is and is seen to be fair, in particular as between merchants from different countries, especially not favouring the home player. They are likely to think that a tribunal with experience of their particular business, or the specialist law which regulates it, will be preferable to one which has no such specialisation. They would want to be sure that the tribunal is incorruptible, independent of the parties, affordable and accessible.

Thirdly, they will want reasonable speed, efficiency and finality. For the obtaining of those goals they may well be prepared to accept some compromises in the other *desiderata*, for example something less than perfect justice

in order to resolve a dispute quickly and move on. For this they may be prepared to forego rights of appeal. They may, depending upon the identity and integrity of their counterparty, want a ready means of enforcement of any favourable outcome.

Finally, they may want privacy. Merchants are unlikely to want even to risk the reputational damage of having been found in a public process to have acted unlawfully, let alone dishonestly, in dealings with counterparties, and even the winner after a long and expensive public fight may suffer reputational damage, either for having unwisely contracted with a rogue or from having been unacceptably tough in commercial litigation. The merchant may therefore be prepared to forego the typical openness and transparency of the justice process, provided that its absence does not detract from the quality of the justice delivered by the chosen tribunal.

These *desiderata* are not often complementary. They frequently pull in conflicting directions, and the differing emphasis which different commercial entities place on each of them may help to explain why there is at present so much choice among the systems of law, tribunal and procedure currently available and competing for international attention.

Returning to the history, the last of the empires to have left a continuing mark upon international business law and dispute resolution was of course the British empire, mainly

during the 19th century. It is probably true that English law and civil procedure was generally introduced at the point of a gun (or a gunboat), by settlement, colonisation and the dominance of the British merchant marine rather than by the free choice of local merchants based upon any perception of relative quality.² In some places, it replaced the Code Napoleon, following the wars named after the French emperor which ended just over two centuries ago.

But it has survived, partly under the Commonwealth umbrella, but also entirely outside it, as one of the prime competing systems, both of law and jurisdiction, long after any element of imperial compulsion has expired. English law probably remains the most frequently freely chosen system of national commercial law by parties contracting across borders, even where none of them have any connection with the UK.³ This is true as much for banking, finance and derivatives as it is for the sale and carriage of goods. The jurisdiction of the English courts, and in particular its Commercial Court, also remains a major player, although heavily attenuated in recent times by international arbitration, even where English law continues to be chosen. A number of countries have recently copied the English Commercial Court model, setting up English speaking commercial courts, resolving cross-border disputes by applying the law chosen by the litigants submitting to their jurisdiction.

Moving on from that background, it is necessary, at some cost to chronological order, to deal separately with

developments first in substantive law on the one hand, and then in jurisdiction, procedure and enforcement on the other. Later on, I will say something about how those developments interrelate.

Developments in substantive international commercial law

Commercial counterparties have since time immemorial had a wide degree of freedom of choice about how to identify the rules which are to govern their relationship. They can make a contract, for example of sale and purchase, in the very simplest of terms. Or they can laboriously negotiate all the detailed terms by which they want to be bound, writing them out in a long bespoke contract. Or they may contract on one or the other party's standard terms of business. Or they may agree to incorporate an internationally available set of widely used standard terms, such as the ISDA⁴ Master Agreement for derivatives, or the Lloyd's Open Form for salvage at sea.

In all those cases the law applicable to the contract as a whole will still have a real part to play. All the many gaps in the simple contract will be filled (in an English law case) by terms implied from the common law and from the Sale of Goods Acts. The long, bespoke detailed terms will have to be interpreted by reference to the rules for interpretation in the applicable law, where (as very often in bespoke contracts) there is a dispute about what it means. Where each side has

attempted to provide for the use of its own standard terms (as often happens) the applicable law may have to decide which party's terms are to prevail (sometimes called the "Battle of the Forms").⁵ Internationally used standard terms such as the ISDA Master Agreement are a notorious battleground for disputes about what they mean (from several of which as a judge I have emerged bloodied but unbowed), and the outcome may depend upon whether English or New York law (the two main ISDA contenders) was chosen by the parties to govern their derivative contract.

There has during the last 40 years been a remarkable surge in the development of systems of international commercial law which are independent of the law of any nation state. They have been the product of the lengthy and skilled work of international teams of legal scholars, usually working under the auspices of an international body such as the United Nations. They are of two main types. The first is that of an international legal convention, setting out an attempted comprehensive statement of the law about a particular subject. When ratified by a particular state, it then becomes the law of that state on that subject. I will mention two important but very different examples. The first is the UN Convention on Contracts for the International Sale of Goods promulgated by the UN Commission on International Trade Law (UNCITRAL) in Vienna in 1980, sometimes called the Vienna Sales Convention. This seeks to do just what it says on the tin, namely specify the whole of the law applicable to international (ie cross-border) contracts

for the sale of goods. The second is the Convention on International Interests in Mobile Equipment, promulgated by the International Institute for the Unification of Private Law (UNIDROIT). It was adopted in Cape Town in 2001 and is generally known as the Cape Town Convention. This seeks to deal comprehensively with a narrow but important subject matter, namely intangible interests (for example, security interests) in mobile equipment, such as aeroplanes, railway trains and satellites.

The second type consists of forms of model law or principles, available not to nation states as a convention by ratification, but to private parties by way of choice of the law applicable to their contracts. The example to which I will refer is the Principles of International Commercial Contracts promulgated in and after 1984 by UNIDROIT. I will call them the UNIDROIT Principles. These can be incorporated in contracts by the use of model clauses published for that purpose. The Principles can be incorporated either as a complete choice of law to regulate the contracting parties' relationship, or as terms in the contract which remains otherwise governed by a particular national law. Parties can even agree for arbitrators to take the UNIDROIT Principles into account in determining a dispute, where the relevant contract is silent about them.

The law of most developed nations recognises the right of contracting parties to choose the system of law to be applied to their relationship, subject to some public

policy restrictions. For example, in the European Union, the Rome I⁶ and Rome II⁷ Regulations (and formerly the Rome Convention⁸) lay down a mainly choice-based code for the identification of the law applicable to a dispute before the courts of any member state. But unfortunately they assume that the law chosen will be that of a particular nation state, not a model law independent of any state like the UNIDROIT Principles.

“The law of most developed nations recognises the right of contracting parties to choose the system of law to be applied to their relationship, subject to some public policy restrictions.”

Reciprocal cross-border enforcement arrangements

Side by side with these developments, and beginning rather earlier in time, have been a range of measures designed to ensure the cross-border enforcement of judgments and arbitration awards, for example in states where the losing party has its assets, even if that is different from the state where the judgment or award was given. The earliest examples, dating back to the 1920s but still in widespread force and effect, are the mutual arrangements around the British Commonwealth for the reciprocal recognition and

enforcement of judgments. Like the UK, Malaysia and Singapore are both parties to those arrangements.⁹

A much more thoroughgoing regime for the reciprocal recognition and enforcement of judgments in civil (including commercial) matters has been put in place throughout the EU, and the EFTA¹⁰ countries, by what used to be called the Brussels and Lugano Conventions, but these have no effect in this part of the world, and it is possible that they will cease to affect the UK if and when Brexit takes place. So I will say no more about them today.

Of much greater import in relation to international commerce is the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, published in New York in 1958 and since ratified by no less than 160 states. It is usually called the New York Convention. As Sir Roy Goode described it in 2001 in a published essay,¹¹ it has been “astonishingly successful”. Many of those states (including Malaysia) have also enacted a law of arbitration based in the UNCITRAL Model Law on International Commercial Arbitration. The Malaysian Federal Court has adopted an encouragingly purposeful approach to the enforcement of foreign arbitral awards under the New York Convention, for example in *Lombard Commodities Ltd v Alami Vegetable Oil Products Sdn Bhd*.¹² Provided only that the relevant arbitration award has been given in a contracting state, it may readily be enforced under the New York Convention in any of the others. This makes an arbitration award

into a form of international legal currency far more easily negotiable than the judgment of any national court, however eminent and respected. The effect of the New York Convention and Model Law in placing arbitration at the pinnacle of alternative dispute resolution mechanisms for international commerce simply cannot be overstated.

Coming onto the scene only this year, having been promulgated in July, is the brand new 2019 Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, or Hague Judgments Convention for short. It is not yet in force; it has only been signed thus far by Uruguay and has yet to be ratified by any state. So its effect remains unpredictable and lies in the future. But if it is ratified by the main body of the states which ratified the New York Convention, it will go a long way to redress the junior partner status to which national judgments have been reduced, compared with arbitration awards, when it comes to enforcement abroad. It does however have some exclusions from its scope, including carriage by sea and intellectual property, which will restrict its effect in the business and commercial sphere.

Even more recently arrived is the Singapore Mediation Convention (UN Convention on International Settlement Agreements Resulting from Mediation), signed in August this year by 46 countries including Malaysia but not yet, alas, the UK. This seeks to make a settlement of a cross-border dispute by mediation as good a piece of international

legal currency as a judgment or an arbitration award, so that, once signed by the mediator, the settlement agreement can be speedily enforced in any of the countries which ratify the Convention, regardless where the mediation took place, the law under which it was conducted, or the nationality of any of the parties. It is too early to tell by how many countries it will be ratified, but the encouraging number of early signatories suggests that it will greatly reinforce the status of mediation as a strong competitor with arbitration and as a foundation of the rule of law for international commerce. It is therefore greatly to be welcomed.

I mentioned among the legal underpinnings of international commerce the need for an effective system of cross-border insolvency, for use when a commercial counterparty goes bust without paying its debts. This is a constantly changing and enormously complex subject (with which I have wrestled as a judge for many years) but it is, alas, fit only for a full lecture of its own. So I will reluctantly have to pass it by.

Specialist dispute resolution forums

None of these international structures (even when backed by national ratification and legislation) will deliver anything of practicable use unless there are readily available courts or tribunals qualified to adjudicate with appropriate speed, efficiency, independence, fairness and reliability on

international commercial disputes (which may be both urgent and complex) and legal and forensic teams able to provide a cost-effective service to the commercial world. Generally speaking, the main business of national courts is to apply their national law to cases (both criminal, family and civil) arising within their own borders. Exercising jurisdiction in relation to matters arising on or over the seas has always been regarded as exceptional, sometimes exorbitant, and usually calls both for legal specialisation and a certain minimum size, in terms of courts, judges, lawyers and resources. We have in the Supreme Court in London just been dealing with the question how far (if at all) the UK courts can and should exercise a form of quasi international jurisdiction in relation to patents essential for the mobile phone industry worldwide.¹³

I would not have been let free to do this lecture unless I promised to include just a little bit of advertising, but it is I think generally acknowledged that the English Commercial Court is both the oldest and still the largest specialist court in the world for adjudicating upon disputes arising out of international commerce. The new Rolls Building in Central London in which it operates alongside the other branches of the Business and Property Courts is certainly the largest specialist business court centre of its type in the world. It is the natural forum for the many commercial parties who still choose English law and jurisdiction for the regulation of their relationship and the resolution of their disputes, even when none of them has any other connection with England or the UK.¹⁴

But this long pre-eminence among commercial courts is now coming under challenge as never before. In the last few years, specialist international commercial courts have sprung up in Singapore, Dubai, Qatar and Kazakhstan, as well as in France and Germany, perhaps in anticipation of Brexit. They will all offer English as the (or at least a) language of the court, reflecting the growing pre-eminence of English as the language of international commerce. Many are trained, even staffed, by retired English judges and English lawyers. Who would have thought, 10 years ago, that the chief justice of the Kazakh Commercial Court would be Lord Woolf, a former Lord Chief Justice of England and Wales, and a predecessor¹⁵ of mine in this series of lectures? Malaysia has its own long-established Commercial Court, which also uses English as one of its working languages. I am sure that it will not be long before it develops its own international clientele.

All this, however high profile, is statistically dwarfed by the ever-increasing growth of arbitration to an undoubted first place as a form of tribunal for dispute resolution in the international commercial sphere. Commercial mediation is following close behind. Arbitrations and mediations can be held almost anywhere where there is a hotel and an airport, in a location convenient to the parties, or even by video link between parties almost anywhere in the world. It requires little or no infrastructure or taxpayer-funded investment. Arbitrators and mediators can be chosen from around the world for their expertise so as to be best suited to the system of law chosen by the parties, so as to speak the language

(if any) common to the parties, and for their experience of the particular form of international business which has generated the dispute, whether it be shipping, commodities, derivatives or even high-tech IT or intellectual property. Many countries, including Malaysia, have invested in commercial arbitration and mediation centres in order to bolster their offering to international business. As already noted, most have signed up to the New York Convention, and legislated to create a bespoke law of arbitration.

“Arbitrations and mediations can be held almost anywhere where there is a hotel and an airport, in a location convenient to the parties, or even by video link between parties almost anywhere in the world.”

These are all powerful advantages, and might be thought to turn the current pre-eminence of arbitration into something approaching an international business dispute resolution monopoly, together with the unconstrained use of systems of model law which are not shackled to any particular state. But all is not as one-sided as it seems. It is time to take a more cautious look at the pros and cons, and to consider how comfortably or otherwise all these relatively new legal sinews of the rule of law in international commerce work together to deliver the *desiderata* of their

business customers, and of society in general. I will begin with choice of law.

Choice of law

It is an obvious drawback of any particular system of national law that it was not designed (or even evolved) specifically for the purpose of regulating international commerce. For example, that field is regulated in English law overwhelmingly by the general common law, with minimal (and some would say now outdated) statutory intervention. As long ago as 1765 in *Pillans v Van Mierop*,¹⁶ Lord Mansfield, who is regarded by many as the father of English commercial law, said: “The law of the merchants, and the law of the land, is the same”. Thus the selection of a particular national law to govern an international commercial relationship will be to choose something which has been adapted rather than designed for the purpose. By contrast, the newer international models, such as the Vienna Sales Convention, the Cape Town Convention and the UNIDROIT Principles are all designed and built specifically for the purpose. If all states and international traders were to adopt them, then the ambitious dream of the scholars to recreate a real *lex mercatoria*, applicable all round the world, might come to fruition.

But there are powerful reasons why this apparent disadvantage of national law has not in fact, yet at least,

led to the adoption of international legal models in place of national (and in particular English) law as the law of choice for international commerce. The first reason may be summarised as a question of richness. The international models tend to be focussed only upon specific areas of law, and they are just a bare code. There is yet to build up around them either the carapace of learned commentary and interpretation which encases most civil law codes, still less the extraordinary wealth of decided cases that build and continually update the common law under the system of precedent which prevails in England and indeed most common law countries. The new international models have serious gaps in them, in the sense that they do not come near to dealing with every occurrence likely to lead to a dispute. More seriously, their precise meaning and application to particular circumstances remains seriously uncertain, in the absence either of academic learning or binding precedent. Thus businessmen seeking a legal regime with a high level of predictability, within which they may navigate to avoid dispute, and litigate with a reasonable expectation as to the outcome, will not find it by choosing the UNIDROIT Principles or similar models to regulate their commercial relationships.

Secondly, the achievement of richness and predictability by reference to decided cases is not going to happen for the new international model laws any time soon, if ever. This is for two reasons. The first is that typical national systems for identifying the applicable law, like

the Rome Conventions, limit the court's choice of law to national legal systems, and do not include international model laws like the UNIDROIT Principles. Thus the international model laws do not get analysed by national courts sitting usually (and in England almost always) in public, and publishing their judgments and reasoning. The second is that the main forum for the use of such international model laws is arbitration, which typically takes place in private, and where reasoned awards are hardly ever published.

This may be less of a problem for the legal rules in the two international law conventions which I have described. This is because they do become part of the national law of every state which adheres to them by ratification. But ratification is not to be taken for granted, as following quickly, or sometimes at all, from their promulgation. As a striking example, the UK has yet to ratify the Vienna Sales Convention, despite 40 years having passed since it was promulgated. But even when the provisions of those conventions do become part of a national law, and then become the subject of public judgments, they frequently give rise to uncertainty and disagreement about their meaning, not to be found to the same extent in purely national law, which usually has a history that may resolve uncertainty, and at least binding precedent once determined. Even the decision of the UK Supreme Court on the meaning of a provision, for example in the Cape Town Convention has no binding force outside the UK. The courts of another country

which has ratified that convention may interpret the same provision in a different way. By contrast, a decision of the Supreme Court about a provision of purely English law does have binding force, with worldwide effect wherever English law is chosen as the governing law.

Court or arbitration?

Turning to the choice between court and arbitration for dispute resolution, arbitration has powerful advantages in terms of finality and (usually) swiftness of outcome, because there is typically only very restricted scope for an appeal. It also has the powerful attractions for many businessmen of privacy, choice of venue and an element of choice of tribunal members. There is no shortage of the very best lawyers available to act as arbitrators, including many very eminent retired judges. Arbitration has historically been more nimble than the courts in modernising its procedure, although this may soon change. Enforcement of foreign arbitral awards is often easier than enforcement of foreign judgments, because of the wide international adherence to the New York Convention. It remains to be seen whether the 2019 Hague Judgments Convention wins sufficient adherents to enable it to redress the imbalance.

But these apparent advantages (apart perhaps from ease of enforcement) come at a price. Limited scope for appeal means that those who arbitrate choose to risk getting

the wrong (even unjust) result, about which nothing can usually be done. The proceedings do not enjoy the healthy stimulus of openness or transparency which underpins all good court systems. Choice of tribunal members comes literally at a price since, generally speaking, arbitration fees are significantly higher than court fees.

There is also a real risk that the rise to pre-eminence of arbitration over court proceedings may involve a substantial price to be paid by the international commercial community generally. I have mentioned how the privacy of arbitration prevents the reasoning of the often-distinguished tribunals from adding richness to the international legal models which are used mainly there, rather than in court. But if arbitration approaches a monopoly of international commercial dispute resolution generally, the same problem will also detract from the richness and development of the common law in its application to the same field. This is a concern powerfully emphasised and backed up by statistics by Lord Thomas,¹⁷ former Lord Chief Justice of England and Wales and a distinguished commercial lawyer, in a recent lecture.¹⁸ Similar concerns are frequently expressed about mediation, which is equally private. While there has been some academic challenge to Lord Thomas's use of the statistics, the general thrust of his concern must surely be well-placed, looking in the long term.¹⁹

Finally, arbitration has a continuing difficulty in dealing with the sheer messiness of many commercial

disputes. It is well designed for a discrete dispute between two parties, arising simply from a two-party contract, containing an arbitration clause. But what if the dispute spills over into arguments about security or other proprietary rights to the goods or other assets in question, not just between the parties but between their finance houses or other claimants, none of whom have signed up to the arbitration clause? Thus far, arbitration has struggled to deal with the problem of multi-party disputes of this kind, and no satisfactory resolution is in sight.²⁰

“Some quite difficult choices face business entities when going about their international commercial dealings, and those choices need to be made early, when contracts are being negotiated. It will be much too late once a dispute has arisen.”

It will be clear from what I have already said that some quite difficult choices face business entities when going about their international commercial dealings, and that those choices need to be made early, when contracts are being negotiated. It will be much too late once a dispute has arisen. The choices fall to be made at the outset, when hopes are high for a successful and harmonious business relationship, the prospect of dispute no larger than a small cloud on the horizon, when time may be tight, and when it

may appear to be as unattractive to argue about choice of law and forum for dispute resolution as it is to negotiate divorce terms when proposing marriage. The choice will usually be impossible to make without excellent legal advice.

Nothing which I have said thus far is designed to suggest that there is some clear answer to these issues, or a clear choice to be made, which will serve every, or even most, situations. But if I have done something to illuminate the playing field, and to start processes of thought for the future, this lecture will not have been in vain.

Future developments – IT and AI

What of the future? I have noted how the deep international peace which has developed between most nations since 1945 has been a key factor in the expansion of international commerce. Plainly peace between nations is a prerequisite for any kind of rule of law across their borders. It is noteworthy that a major promoter of the international conventions and model laws which I have described has been the UN. There can be few in this room who do not worry, at least just a little, as they follow the news, about whether this long tide of deepening peace may be about to turn. International trade has always been a major buttress to international peace, but I fear that the developing web of cross-border legal structures which I have described would not withstand renewed warfare between nations. They would just be swept away or ignored, as the *lex mercatoria*

would have been by the armies, navies, pirates, highwaymen and bandits of the Middle Ages.

To end on a more cheerful note about the future, thus far I have said almost nothing about the relatively recent arrival of modern information technology (IT) on the legal scene, and nothing at all about the imminent arrival of artificial intelligence, or AI. IT offers splendid opportunities for streamlining the conduct of cross-border disputes, opportunities which are only slowly being realised. Most modern law firms have almost completely replaced paper document handling, management and storage with a digital equivalent, and yet most court processes (and probably most arbitral processes) remain almost completely subject to the tyranny of paper. The oral process is almost always conducted face to face, by participants sitting, or standing, in the same room.

And yet it is in the international, cross-border sphere that IT offers the best advantages from being released from these constraints. Getting on a train, or onto a motorway (with piles of paper documents) to meet in a courtroom or arbitration venue is one thing, but travelling by plane around the world to do so is quite another, leaving aside the effect upon climate change. An example from my work may show that the logic of this is sinking in. Our cases in the Supreme Court are always conducted face to face in London, although we occasionally travel to other parts of the UK, such as Edinburgh, Cardiff and Belfast to hear cases. But an increasing amount of our work as the Judicial Committee

of the Privy Council, which hears appeals from all around the Commonwealth, and is therefore in that sense always cross-border, is conducted by video conference, saving the time and cost of the overseas parties and their legal teams in flying to London. Since all our hearings are streamed live on the Internet world-wide, and we use digital files alongside paper equivalents, we do now offer international users of the Privy Council a completely digitised service, which will I am sure soon become the norm. As a second example, although the work of our civil courts in the UK remains almost entirely paper-based, it is the Business and Property Courts in the Rolls Building, with their predominantly international clientele, that have led the way within the UK in the digital issue, filing and management of court documents, which is now compulsory.

And yet, and yet, many advocates and even some judges still appear to prefer to go on using paper, in preference to computer files, where the court in question permits, or requires, that both be available as we do in the Supreme Court and Privy Council. Why is this? I think it is largely a generational thing. Time after time, in my two years in the Supreme Court, I have seen the senior (of course older) advocates in the front row using bulky paper files when making their submissions, while their supporting (mainly younger) legal teams do it all from their laptops. Since I (and some of my colleagues) have now entirely given up using paper files in court, it is sometimes the juniors who have to help their leaders give us the electronic page numbers. Alas, one of the early teething troubles of the introduction

of electronic files was that the paper and electronic page numbers did not match. Those of you who watched our recent Prorogation case online will have seen that this is a problem which has still not entirely gone away.

“Imagine being able to read the document which the advocate is asking the judges to read, on a screen on your desk on the opposite side of the world, in real time, while watching the proceedings live on a second screen.”

IT holds out unique opportunities to improve the openness and transparency of justice generally, and international justice in particular. As I have said, all our Supreme Court and Privy Council hearings are streamed live around the world on the Internet, and the Court of Appeal in England is starting down the same road. We are now considering whether we can make the hearing bundles similarly available online (or at least those parts of them which merit no confidentiality). Imagine being able to read the document which the advocate is asking the judges to read, on a screen on your desk on the opposite side of the world, in real time, while watching the proceedings live on a second screen. But it may be that the frequent desire of business people to conduct their disputes in private may mean that this potential revolution in open justice is of less force internationally than it is at home.

Finally, AI. This amazing new technology offers the prospect of doing away altogether with judges and arbitrators, and replacing them with a form of robot. It is sometimes called the “dis-intermediation of judges”. Provided that the robot has access to a sufficient database (usually of past cases) which it can scan (literally) at the speed of lightning, it is said to offer big improvements in the reliability and predictability of dispute resolution, and to remove all forms of judicial bias, unconscious or otherwise. In fact, if both parties to the dispute have a copy of the same robot, they will both have the same advice about the likely outcome, and need not go to court (or to arbitration) at all.

This is not mere science fiction. The People’s Republic of China is well on the way to building the required legal database, with a parallel, astonishingly comprehensive and speedy law reporting service covering all judicial decisions in that vast country, and rumour has it that AI is already available as a template against which their justice ministry can monitor the performance of their judges. But it is something much more easily constructed within a single, let’s say, centrally directed national structure with no real separation of powers, than across the international borders of a large number of separate states which merely trade together, each with their own different cultures, political and legal systems.

That does not mean that AI has no place in international business dispute resolution. I am told that it is only first-generation AI that needs a comprehensive

database, and that the second generation of legal robots will be able to puzzle out the answers using inexorable logic rather than speedy reference to past cases. And my belief that it will be a long time before robots learn how to do equity (that is tempering strict law by the application of conscience) and mercy as well as judges may fall on deaf ears among business people who, for understandable reasons, may prefer speedy predictable outcomes to perfect justice. There are many who say (although I profoundly disagree) that equity has no place in the world of commerce. Nor does the fact that legal robots may not (yet at least) be much good at developing the law to meet social and economic change, as common law judges do, have much traction with a commercial desire just to get a quick result and move on.

Please do not think that I face the approach of AI and the possible dis-intermediation of judges with anything approaching equanimity, even though, with only five years left to serve, I may feel reasonably confident that the grim robot reaper, or *disintermediator*, may not reach me quite in time. I do not. I continue to believe, with a passion, that the resolution of disputes between human beings by a process involving face to face meetings with a human judge, arbitrator or mediator is a fundamental and beneficial part of what being human and living under the rule of law is all about. But you, the people, have the right to choose, not we the judges. Perhaps you might start, as you go home, by asking: would this event have been better, or even as good, or worse, if I had addressed you on a big screen from

London, or if the lecture had been delivered by a robot called Briggs 2, rather than by this rambling old foreigner from the other side of the world, face to face. It has been a complete delight for me to do it in the old-fashioned way. I do hope you all feel the same.

Terima kasih. 🌿



Endnotes

- 1 See, for example, Roy Goode, *The Development of Transnational Commercial Law: Policies and Problems*, OUP, 2018, chapters 19, 21; Roy Goode, “Usage and its reception in transnational commercial law” (1997) 46(1) ICLQ 1–36; Horia Ciurtin, “A quest for deterritorialisation: the “new” lex mercatoria in international arbitration” (2019) 85(2) Arbitration 123–137.
- 2 For a short summary on the introduction of English law in Malaysia see Andrew Harding, *The Constitution of Malaysia*, Hart, 2012, especially pages 15–23.
- 3 For a recent account see Lord Burnett (Lord Chief Justice of England and Wales), “English Law on the World Stage” (London International Disputes Week, 8 May 2019), paragraph 2, available at <https://www.judiciary.uk/wp-content/uploads/2019/05/20190508-LIDW-English-Law-on-the-World-Stage-For-publication.pdf> (accessed on 12 November 2019).
- 4 International Swaps and Derivatives Association.
- 5 The classic English authority is *Butler Machine Tool Co Ltd v Ex-Cell-O Corp (England) Ltd* [1979] 1 WLR 401 (CA). See more recently *RTS Flexible Systems Ltd v Molkerei Alois Muller* [2010] UKSC 14; [2010] 1 WLR 753.
- 6 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).
- 7 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).
- 8 The Convention on the Law Applicable to Contractual Obligations 1980.
- 9 In the UK, see the Administration of Justice Act 1920. In Malaysia, see the Reciprocal Enforcement of Judgments Act 1958, which also covers jurisdictions like Hong Kong, Singapore, New Zealand, Sri Lanka and India.
- 10 European Free Trade Association.

- 11 Roy Goode, “The Role of the Lex Loci Arbitri in International Commercial Arbitration” (2001) 17(1) *Arbitration International* 19–39, available at <https://eclass.uoa.gr/modules/document/file.php/LAW161/goode2001.pdf> (accessed on 12 November 2019).
- 12 [2010] 2 MLJ 23.
- 13 **Editor’s note:** See the recent consolidated judgment of the UK Supreme Court dated 26 August 2020: *Unwired Planet International Ltd and another v Huawei Technologies (UK) Co Ltd and another; Huawei Technologies Co Ltd and another v Conversant Wireless Licensing SÀRL; ZTE Corporation and another v Conversant Wireless Licensing SÀRL* [2020] UKSC 37].
- 14 For a summary of recent reforms see Lord Burnett, “English Law on the World Stage”, note 3 above, paragraphs 17–22.
- 15 Lord Woolf delivered the Twelfth Sultan Azlan Shah Law Lecture in 1997 entitled *Judicial Review of Financial Institutions*; see Visu Sinnadurai (ed), *The Sultan Azlan Shah Law Lectures: Judges on the Common Law*, Professional Law Books and Sweet & Maxwell Asia, 2004, pages 281–297.
- 16 (1765) 3 Burr 1663.
- 17 Lord Thomas delivered the Thirty-first Sultan Azlan Shah Law Lecture in 2017 entitled *The Rule of Law, the Executive and the Judiciary*, pages 345–389 above.
- 18 See Lord Thomas, “Developing commercial law through the courts: rebalancing the relationship between the courts and arbitration” (Bailii Lecture, 9 March 2016), available at <https://www.bailii.org/bailii/lecture/04.pdf> (accessed on 12 November 2019).
- 19 For a summary of the main academic responses see Dame Elizabeth Gloster, “Symbiosis or Sadoomasochism? The relationship between the courts and arbitration” (2018) 34(3) *Arbitration International* 321–339.
- 20 See generally *Russell on Arbitration*, 24th edition, 2016, [3-049]–[3-059]; Gary B Born, *International Arbitration: Law and Practice*, 2nd edition, 2016, chapter 12.