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PRESENTATION ON THE COMMERCIAL COURT

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The foundations of English mercantile law were laid in the latter half of the 18th Century, when trials of commercial actions involving banking, insurance and shipping took place at the Guildhall in the City of London.

However, I am going to take you back to the 17th Century where the story begins – in 1663. What happened in 1663?

In America, the province of Carolina was established. Charles II was King of England, having been crowned in 1661 following his father's execution, the Civil War and Cromwell is protectorate. The Theatre Royal opened in Drury Lane. It was 25 years before the Lloyd's market emerged, but England was a trading nation, shipping was big business and with it insurance was growing, thereby creating the conditions for the Lloyd's market. We know a lot about life during this period thanks to this well known diarist –

Samuel Pepys, who on 1 December 1663 visited the Court of King's Bench to watch a marine insurance case being tried. His diary entry includes the following comment:

> "*To hear how the Counsel and Judge would speak as to the terms necessary in the matter would make one laugh*."

The merchantmen of the City at that time were not happy that the Courts really serviced their needs or understood their business. Trade grew and disenchantment grew but it was not until a century later that the then Lord Chief Justice, Lord Mansfield, took a direct interest in the efficient resolution of mercantile disputes. He adopted the practice of sitting at the Guildhall regularly during his 32 years as Lord Chancellor

between 1756 and 1788. Under his influence consistent principles of mercantile law, especially in relation to bills of exchange, insurance and shipping, were developed. Incorporation of mercantile usages into English law was achieved by his practice of empaneling a body of jurors, who were experienced merchants from the City, to hear cases with him. He would incorporate their verdicts on questions of mercantile usage into his Judgment. The same jurymen sat over a number of years and merchants came to feel that their disputes would be decided by a tribunal broadly conversant with trade practices.

However these procedures were not enshrined in the law or in rules of Court and with the passing of Lord Mansfield the practice gradually fell away to be replaced by the more rigid rules of Court. The Guildhall fell into disuse as a place for commercial disputes to be heard. Litigation became slow and expensive. Judges and jurors became out of touch with the world of international commerce.

In 1869 the Judicature Commission was set up to look into the Court system generally. The City made great efforts to persuade it to recommend the establishment of tribunals of commerce, or judicial arbitration. Here are two snippets from witnesses who gave evidence to the Commission:

> "*To guard myself against the possibility of litigation, this is the clause which I have inserted in my form of charter parties:*
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> > *'Should any difference arise between the owners and the charterers as to the meaning and intention of the charter party, the same shall be referred to three parties in London, one to be appointed by each of the parties hereto and the third by the two so chosen, and their decision, or any two of them, shall be final and binding …'"*

This may have a familiar ring to a number of you.

> "*The number of arbitrations that take place daily in London is extremely numerous, and there is both in the Baltic Coffee House and in other large centres of trade, a regular system of arbitration. At Mark Lane there is a system of the kind"*

These areas remain the centres of business in the City. The Baltic Coffee House became the Baltic Exchange and is now right next to the Gherkin – the Swiss Re building. The London Underwriting Centre is now in Mark Lane.

What was happening was something with which we are familiar. Disenchantment with the law was causing business to take its dispute resolution into its own hands by way of arbitration. The report of the Judicature Commission noted that the judiciary lacked technical knowledge of commerce. It recommended that commercial actions be tried by a Judge assisted by two business assessors – thereby borrowing concepts from arbitration. This interaction between commercial arbitration and the development of the Commercial Court was to become a theme over the years.

It must be recalled that it was during this time that the first Lloyd's Act was passed in 1871. This could be seen as a barometer of the increases in commerce and the resultant need for and growth of insurance. Business and the British Empire were booming. Disraeli was Prime Minister. Victoria was Queen. In 1874 Fiji became a British province and New York annexed the Bronx! Levy Strauss in the same year patented blue jeans with copper rivets. It was a period of exceptional commercial and trading activity.

However, the Lord Chief Justice of the day, Lord Coleridge, was set against any such reform, unwilling to sacrifice the certainty of the law for any uncertainty of trade usage. As a result, the Judicature Acts of 1873 and 1875 hindered rather than helped the efficient, speedy and informed resolution of commercial disputes. The only concession made was to restore Court hearings in the City at the Guildhall. However a

mere change of venue was not going to be enough for the City gentlemen, who wanted a new tribunal that would freely depart from the excessively formal procedures of the High Court.

In 1892 the Bar and the Law Society reported that if the High Court were to regain the confidence of the commercial community, it was essential to establish a separate list for commercial actions to be operated separately from all other Court actions. Lord Coleridge remained implacably opposed.

On 17 June 1882 a meeting of High Court Judges passed a resolution by a majority of 20:5 "*that there shall be a Commercial Court for London cases*". Lord Coleridge was one of the five, so nothing happened.

Litigation continued to decline and arbitration to increase, such that on 10 August 1892 a Judge felt moved to write in the Times:

> "*Two considerations are important to men of business when contemplating the possibilities of litigation. The first is – money. ' How much is it likely at most to cost?' The second is – time. 'How soon at latest will the thing be over?' They want to close their books at the end of the current year, to write off bad and hopeless debts, to know upon what lines next year to deal with similar questions should they arise. For such and other reasons of their own the mercantile public is not fond of law, if law can be avoided.*
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> *They prefer even the hazardous and mysterious chances of arbitration, in which some arbitrator, who knows about as much of law as he does of theology, by the application of a rough and ready moral consciousness, or upon the affable principle of dividing the victory equally between both sides, decides intricate questions of law and fact with equal ease."*

Still Coleridge would not budge. However two years later an event occurred which was to change all this and open the door to reform – Lord Coleridge died.

He was replaced by Lord Russell of Killowen. Lord Russell was keenly interested in commerce and in arbitration. He had written on the subjects. He represented Britain in the first international arbitration between States – the Bering Strait arbitration.

1n 1894 a Judicial Commission was therefore formed which resulted in February 1895 in the "*Notice as to Commercial Cases*". This is generally taken as the date on which the Commercial Court was formed – but in fact, it was not a Court but a "*list*". Cases would still be issued in the High Court but, on application by a party, would then be transferred, to the Commercial Court list where it would be heard by a Judge to be specialised in commercial matters, using more flexible procedures. This was indeed what tended to happen in the initial burst of enthusiasm, but there were those who still veered towards Lord Coleridge's view. Lindley LJ observed:

> *"The Commercial Court has no more power to dispense with strict evidence, or depart from the administration of the law in the ordinary way, than any other Judge or Court … It is a mere piece of convenience in the arrangement of business."*

Formality slowly crept back in and a whole new area of dispute emerged to slow things down – the contested application for transfer to the Commercial List! Technical matters prolonged litigation together, I suspect, with a disinclination by certain High Court and Chancery Judges to hand over their more interesting cases to a commercial judge. In 1958, only 21 actions were tried in the Commercial List.

As a result, there was a Commercial Court users conference in 1960, recommendations of which included procedural reforms, simplification of pleadings, using written witness statements (again borrowing from

successful international arbitration procedures). Perhaps most importantly, the ability to issue in the Commercial List without applying to transfer at a stroke removed a major source of contention and delay. In 1970, the Administration of Justice Act changed the Commercial List into the Commercial Court. It took off slowly at first, but as commerce came to trust it momentum was gathered. There were 130 trials in 1974 and 431 trials in 1982. In 2006, 1,721 Judge days were available for hearings and all were used. In 1999 over 2000 applications were issued. There has been a slight decline in recent years in the number of cases that have come to trial due to the successful promotion of ADR processes, primarily mediation, by the Commercial Court. However the Commercial Court remains widely used and confidence in it has become international. It was recently quoted that in over 50% of cases heard none of the parties were in fact British – this means that large numbers of foreign companies are conferring jurisdiction on the Commercial Court by contractual agreement, to resolve their disputes. In 80% of cases they are international disputes in the sense that at least one of the parties is not British. The Commercial Court has become a significant invisible export!

What has happened is that barristers who have spent their careers in commercial law in areas such as insurance, reinsurance, shipping, banking, trade and technology transfer have been appointed Judges to the Commercial Court. Over the years they have been promoted and replaced by Judges of like experience, so that commercial expertise now runs through the whole Court system to the Supreme Court, formerly the House of Lords, as the final Appeal Court. My firm actually acted in the last case to be decided in the House of Lords in 2009 – it was an international reinsurance dispute involving parties from the UK, the USA and Sweden. The leading judgments in the House of Lords were given by two very experienced commercial judges, Lords Collins and Mance – the latter of whom comes from a City commercial family, his father having been Chairman of Lloyd's.

Now, I have been speaking for the last 15 minutes about the Commercial Court and the commercial cases that it hears. However what I have not yet considered is what is a commercial claim? And how are commercial cases now being dealt with in the Commercial Court?

There is now a Rule of Court which sets out a non-exclusive list of commercial cases. Hence they include:

> Cases relating to business contracts, export and import, carriage of goods, oil and gas, insurance and reinsurance, banking and financial services, markets and exchanges, commodities, shipbuilding, business agency and arbitration – in the latter of which the Commercial Court is the Court that oversees all international arbitrations that take place in the United Kingdom. London is a major world centre for international arbitration, another significant invisible export.

It is a non-exclusive list. Indeed many would say that the main rule is that a commercial lawyer and a commercial judge know a commercial case when they see one.

Finally, without wishing to send the audience to sleep before the next speaker, I will briefly run through the process of a Commercial Court case highlighting areas of major difference from the procedures that you may be used to.

First of all the Courts have issued pre-action protocols aimed at ensuring that the nature of the claim and the responses are dealt with properly in correspondence, supplying key documents, before the matter goes to litigation. Claim Forms are issued and served, with leave to serve out of the jurisdiction if needed and jurisdictional challenges are of course dealt with before substantive issues are heard. Jurisdiction must be challenged before a step in the action is taken by the defendant. Once the pleadings have been dealt with a list of issues is agreed between the parties and approved by the Court. This list of issues becomes an important document in the case management of the Judge.

Disclosure takes place but is more limited than the US disclosure. There are no fishing expeditions to try and find documents that may lead to a line of enquiry that may lead to an allegation. Documents disclosed are essentially those which may assist or harm a party's case, and it is the solicitor's duty to the Court to ensure that a proper search is carried out.

Witness evidence is given in chief by the exchange of written witness statements of fact. Hearsay evidence is allowed subject to notices stating why it is necessary. These witness statements stand as evidence in chief at the main hearing, following which there may be some additional questions which arise from other witnesses' statements but essentially the witnesses' oral evidence consists of cross-examination and re-examination.

Depositions are virtually unknown. Where they happen it is generally for de bene esse evidence in circumstances where the witness cannot appear in Court. They are never used in relation to documentary discovery.

Expert witness evidence is exchanged, as you will be familiar with, but one major difference is that the parties' expert witnesses then meet generally without the parties or their lawyers present. They are charged with producing a list of the issues on which they agree and disagree, setting out the areas of disagreement. There may be short supplemental reports dealing with these.

The Court will expect an attempt to settle using ADR at an appropriate point during the process and will require an explanation if it does not happen. There are potential cost penalties for failure to do so – bearing in mind that the system is that the loser pays normally. Throughout the case is managed by the Judge and there are case management conferences, questionnaires as to progress etc, a few copies of which appear to be in the final few slides that you have but which I will not go through now. Generally the intention is that procedures are flexible, but there will be variations on the above themes. Although in practice arbitration has had a tendency to utilise these core processes, which to some extent have in themselves been borrowed from arbitration anyway, in theory at least arbitration remains a more flexible tool that can be moulded to the requirements of the case. However, the differences between the two are far less than they have been historically.

Finally, in an attempt to prevent the sort of cycles that we have seen whereby commercial cases are heard in a commercial atmosphere and this veers back towards an out of touch rigidity, a Commercial Court Users Committee has been formed and sits every year. This comprises solicitors, barrister and corporations who are major users of the Commercial Court – both in industry and in commerce. In this way it is hoped that the Commercial Court will remain at the forefront of commercial dispute resolution and continue to work harmoniously with London's international arbitration industry.

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