



LORD CHIEF JUSTICE  
OF ENGLAND AND WALES

THE RIGHT HON. THE LORD THOMAS OF CWMGIEDD  
LORD CHIEF JUSTICE OF ENGLAND AND WALES

THE JILL POOLE MEMORIAL LECTURE  
KEEPING COMMERCIAL LAW UP TO DATE

ASTON UNIVERSITY, 8 MARCH 2017

**Introduction**

1. It is both a pleasure and an honour to give the first in a series of lectures in memory of Jill Poole.<sup>1</sup> I knew her, what seems now a very long time ago, as a young law lecturer at Cardiff University when I went back to Wales to be a Presiding Judge in 1998. I followed her career through UWE, and then finally here, with great interest. She was very dynamic. She did a great deal for Cardiff and a huge amount for UWE; it has been a pleasure to know what she has done here. So it is, I think, fitting, that I should have this opportunity and privilege of saying something about a subject in which she was so interested, which was contract law, but seen through a commercial lens. I thought I would take as a topic not some interesting aspect of commercial law (such as bills of lading as I might lose you very, very quickly), but look at a much broader canvas - keeping commercial law up to date.
2. Although I am always reluctant about speaking of too many duties that judges carry, particularly when there are so many judges here this evening, one of the duties judges have, which is central to their role, is keeping the law up to date.

**The dynamic nature of the common law**

3. Our system of justice has been hugely privileged to have the common law which has always been a dynamic system of law, indeed one of the most dynamic systems in the world. As Lord (Robert) Goff of Chieveley said in *Kleinwort Benson*.

It is universally recognised that judicial development of the common law is inevitable. If it had never taken place, the common law would be the same now as it was in the reign of King Henry II. It is because of it, the common law is a living system of law, reacting

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<sup>1</sup> I am very grateful to Dr John Sorabji, Principal Legal Adviser to the Lord Chief Justice and Master of the Rolls, for his research and assistance.

to new events and new ideas, and so capable of providing the citizens of this country with a system of practical justice relevant to the times in which they live'.<sup>2</sup>

4. The need for judges, as Lord Nicholls noted in *National Westminster v Spectrum Plus* in 2005,<sup>3</sup> to discharge their 'responsibility of keeping the law abreast of current social conditions and expectations' is one that depends on the times. Periods of social and economic stability call for less and more limited development. Periods of significant social and economic change call for more and wider development. This latter point is however always subject to the cautious approach which the courts have always rightly demonstrated where the development of the common law was and is concerned.<sup>4</sup> It is, of course, also subject to Parliament's sovereign right to enact legislation amending, revising or overriding common law developments.
5. It is, I think, important to recall that, although in many aspects of law, judge-made law has been of critical importance, its modern importance worldwide is attributed to commercial law. I use the words "commercial law" not necessarily in the narrow sense of the law administered in the Commercial Court but the law that relates to business and to property, a concept we are anxious to develop in seeing commercial law through this wider spectrum. I will concentrate, however, on that aspect of commercial law which deals with business and shipping, banking, insurance, international finance, and the like. I have chosen to talk about this partly because Jill was very interested in how the law developed and partly because we are living in a time of very significant development.
6. We need also, in recalling the immense debt the English common law owes to Lord Mansfield, to appreciate the fundamental role the courts have played in developing commercial law. As one of his contemporaries put it shortly after his death, when Lord Mansfield became Lord Chief Justice the law in respect of mercantile cases – and the same point applies more widely to other commercial areas – there were no established principles. By the time he left office he had refashioned the law so that '*principles (were) stated, reasoned upon, enlarged, and explained. . .*'.<sup>5</sup> And the law's development has not stopped since then.
7. At the present time the court's ability to develop commercial law is of particular importance. First, we are living through a time of significant development in commercial and financial practice through the technological revolution. New areas are developing, and doing so

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<sup>2</sup> *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 at 377.

<sup>3</sup> *National Westminster v Spectrum Plus* [2005] 2 AC 680 at [32].

<sup>4</sup> For a discussion see, Lord Bingham, *The Business of Judging*, Vol. 1 (OUP) (2000) at 25ff.

<sup>5</sup> *Lickbarow v Mason* (1794) 1 Burr. 391.

rapidly. Bitcoins. Blockchains. Big Data. Financial markets' complexity and the complexity of the law underpinning them continues to grow apace. There are many other examples. The law needs to keep pace with such developments.

8. Second, law is also going through a period of significant evolution. France, for instance, has recently revised its Civil Code relating to contractual obligations. This is the first such major revision since the time of Napoleon over 200 years ago. The revision is accompanied by an excellent English translation. Why was that done? It was done because it was feared that unless the law of France was brought up to date through a fundamental revision to the Civil Code, the law would fall behind and French lawyers and the French influence across the world (which is fairly profound in a number of countries) would become out of date and in time fall into disuse in international transactions. Another example is Germany. About eight years ago the German government first produced a booklet called *Made in Germany*. The current version starts,<sup>6</sup>

‘“Made in Germany” is not just a quality seal reserved for German cars or machinery, it is equally applicable to German law. Our laws protect private property and civil liberties, they guarantee harmony and economic success. In the age of economic globalism, law is an important competitive factor. German law forms part of the system of codified law that has evolved throughout continental Europe. It is predictable, affordable’.

So there is a real consciousness across the world for developing law and legal systems which can properly compete with those of other states.

9. In other common law jurisdictions, Singapore has been developing its contract law so that it provides the certainty that some argue English contract has to a degree lost. Again, we can see the intention is to establish a robust competitor to English law. If our laws are to retain their importance in the worldwide market place we cannot allow them to fall behind developments elsewhere. We cannot therefore, at the present, ignore the existence of an increasingly competitive market place between systems of substantive law and methods and places for dispute resolution.
10. The question for today then is how do we ensure that commercial law is kept ; that it moves with the times and remains as attractive a source of law to businesses both here and abroad?  
In considering this I want to focus on:

(1) Judicial expertise

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<sup>6</sup> [http://www.lawmadeingermany.de/Law-Made\\_in\\_Germany\\_EN.pdf](http://www.lawmadeingermany.de/Law-Made_in_Germany_EN.pdf)

(2) Assessors

(3) Procedural innovation

I know the last, to an English law school, will almost immediately find people fleeing for the exit. However, procedure is what you ought to be taught, as I was taught when I was at Chicago, as a first-year course, because it is central to the way in which any legal system operates and develops.

## (1) Judicial Expertise

### *The need for expertise*

11. Judicial expertise is of central importance to the vitality of a commercial court. The risk that a claim may be managed or tried by a judge who is not familiar with the practice area was one of the principal reasons that lay behind the creation of the Commercial Court in 1895. Scrutton LJ gave an account of a trial conducted in 1891 by Lawrance J which had such a baleful effect on the reputation of the English court's ability to deal with commercial cases that it led to the establishment of the Commercial Court.<sup>7</sup> He gave the account in a lecture he delivered to students at Cambridge in 1920.<sup>8</sup> I am not going to advise you to read the lecture because, although he was probably one of the most successful of all commercial barristers and outstanding as a commercial judge, a significant part of the lecture is devoted to explaining how few lectures he went to. I am sure the Dean would not appreciate your reading this as the necessary condition for a successful practice.

12. Lawrance J was not the best advert for the English courts at the time; he had practiced in an agricultural county,<sup>9</sup> and was appointed by the Earl of Halsbury who had a penchant for appointing those who had done service to his party, as Lawrance J had done as a Tory MP for 10 years.<sup>10</sup> His appointment was, unusually, greeted with public 'hoots of derision.'<sup>11</sup> As

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<sup>7</sup> He was known as "Long John Lawrance" because of his height. This was to distinguish him from AT Lawrence J who subsequently became Lord Chief Justice as Lord Trevethin. His appointment as Lord Chief Justice came about because the then Attorney General, Gordon Hewart, wanted to exercise the Attorney-General's right of reverter to the office of Lord Chief Justice, but it was not convenient. The then Prime Minister (Lloyd George) appointed him on terms that he signed an undated letter of resignation which in the following year was dated and submitted when it became convenient to appoint the Attorney General as Lord Chief Justice. Trevethin read of his own resignation in the Times. See Dictionary of National Biography entry for Lord Trevethin.

<sup>8</sup> *The Work of the Commercial Courts* (1923) 1 C.L.J. 6.

<sup>9</sup> V. Veeder, *Mr Justice Lawrance: the "true begetter" of the English Commercial Court*, LQR (1994) 292.

<sup>10</sup> See Heuston; *Lives of the Lord Chancellors (1885 – 1940)*, (Clarendon Press) (1964) at 44-5.

<sup>11</sup> Stevens, *The English Judges: Their Role in the Changing Constitution*, (Hart) (2002) at 95.

Mackinnon LJ once put it, he ‘was a stupid man, a very ill-equipped lawyer, and a bad judge.’<sup>12</sup> He had, in the words of *The Law Times*

‘no reputation as a lawyer, and had been rarely seen of recent years in the Royal Courts of Justice.’<sup>13</sup>

13. Though he had been told that he would be all right as a judge, if he kept his ears open and his mouth shut, things did not improve when he was on the bench. It was his handling of the trial in the case of *Rose v Bank of Australasia* in 1891,<sup>14</sup> that precipitated calls for the creation of a specialist court in which commercial parties could properly place their confidence in the quality of the judge – as well as the confidence that justice would be delivered quickly, and in a cost-effective manner. *Rose* involved a ship that was sailing up the English Channel in fog with a large cargo of cotton. Through the fog, after a couple of days, the master saw a bright light and he thought it was Beachy Head. He ordered the ship, “Port, helm, hard”. Unfortunately, he had made a mistake. The light was that of the French coast and the ship ended up hard on the French coast. The cargo was retrieved and a dispute arose over a general average adjustment, a method of distributing the loss that occurs from a maritime adventure that goes back to pre-Roman times to the Lex Rhodia of about the 5<sup>th</sup> century BC. It was a subject on which Lawrance J knew next to nothing. Nor was he interested in it. He heard the case over 22 days with very distinguished counsel.<sup>15</sup> Then, as Mackinnon LJ has it, ‘he forgot all about the case.’ The parties waited and waited for judgment. None came. They waited again. They complained. Finally, prompted, he gave judgment, in favour of the plaintiff; a judgment that was lacking in detailed reasons.<sup>16</sup> At which point Counsel for the Plaintiff stood up and pointed out that the judge had simply failed to deal in his judgment with a key issue.

‘Not having the least idea what the point was, [Lawrance J] pulled himself together and said ‘Oh, yes; I meant to say that having considered that I think the adjusters took the right view, and in that respect also I think the claim as made out by them ought to succeed.’<sup>17</sup>

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<sup>12</sup> F. Mackinnon, *The Origin of the Commercial Court*, LQR (1944) 824.

<sup>13</sup> (1890) L.T. News 305, cited in Heuston, at 45.

<sup>14</sup> [1894] AC 687.

<sup>15</sup> Arthur Cohen QC and T.E. Scrutton (later Scutton LJ) for the Plaintiffs and Gorrell Barnes QC (subsequently President of the Probate Divorce and Admiralty Division) and J.A. Hamilton (later Hamilton LJ and as a Law Lord, Lord Sumner) for the defendants.

<sup>16</sup> The text of the judgment and the questions of counsel are set out in LQR (1994) 292 at 299

<sup>17</sup> F. Mackinnon, *ibid.*

14. Hardly a case of justice being done and being seen to be done. As an ironic coda, the plaintiffs appealed: the Court of Appeal reversed Lawrance J's decision. On a further appeal by the defendant to the House of Lords, his judgment was reinstated.
15. I have retold that story as it is the most striking illustration of why judicial expertise, just like the court's ability to deliver timely and cost-effective justice, is something that is essential. Today the quality of the judges of the Commercial Court and consequently the reputation of its decisions are both excellent. It is respected throughout the world. But it is not unrivalled. We cannot be complacent. There is and will no doubt continue to be intense competition from other commercial courts from across the world; an issue I considered recently in the Cayman Islands.<sup>18</sup> We must ensure that the Commercial Court remains a centre for dispute resolution and ensure that it can maintain its ability to develop commercial law, as it and our courts in general have since the time of Lord Mansfield. How is that to be secured by maintaining judicial expertise?

*The necessity of excellent appointments to the judiciary*

16. First, we must continue to draw our judges from the leading practitioners of commercial law - from those who have an excellent education in the law, know the law, are skilled in its application, and who understand the experience of practice. Our aim must be to ensure that we are in a position to draw expert practitioners onto the Bench to ensure that judicial expertise is not diminished. Of course, at the moment, it is not easy to recruit judges for various reasons. You all may have read about this and despair of the way in which the state has decided to remunerate judges. It is a matter, I think, for serious concern that over the period where the commercial market for lawyers has moved in one direction and the judiciary has been left far behind; but this is not a subject I want to go into more than saying that. The simple fact is that our commercial law will never stay up to date without the recruitment of excellent practitioners to the Commercial and Business Courts. We cannot afford to retreat to the pre-Commercial Court days of the early 1890s, where judicial expertise was, to borrow a phrase, a matter more of luck than judgment in terms of judicial appointments.

*The necessity of being at the forefront of change*

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<sup>18</sup> J. Thomas, *Giving business what it wants – a well-run court for commercial and business disputes*, (2 March 2017), (Grand Court of the Cayman Islands – Guest Lecture 2017). <https://www.judiciary.gov.uk/wp-content/uploads/2017/03/grand-court-of-the-cayman-islands-guest-lecture-march-2017.pdf>

17. Second, there is a need to ensure that its judges are at the forefront of knowing and understanding the changes that are occurring in commerce and the markets at an ever increasing pace. When I started practice in commercial law in 1972, much commercial practice had not materially changed for many years. What has happened in the last 15 or so years is that commercial practice has changed significantly and at an ever-increasing pace. We must therefore be clear on what we can do to keep judges . Securing this has many facets.

*Ways of being at the forefront of change*

18. It must begin at law school. It requires that law students, as I am sure the Dean will appreciate, be given the best possible legal education so that they enter the profession with a sound grounding in the law and its practical application, as well as the ethical responsibilities of lawyers. I do not think, particularly with Jill Poole in mind, I can emphasise enough the importance of a very sound grounding in law. Despite what I said about Scrutton LJ not attending lectures, it is not feasible to start learning the law as a young lawyer writing textbooks and watching cases (as Scrutton LJ did), while earning nothing; the start must be at law school. Teaching excellence is something that we all have a stake in seeing maintained and improved. And at a time when the professions are, once again, reviewing the approach to be taken to legal education and training, it is absolutely essential that nothing is done to dilute the quality of a very broadly based legal education and law schools as the centres of excellence, not mere training grounds for the profession, a point on which Jill always insisted. Quality should be increased both in terms of teaching of law as an academic subject and as a practical subject. As I have already said, we live in a highly competitive world; our law students have to be among the best educated in the world with a broad understanding of law and its place in our society. For commercial lawyers, this means a grounding in the principles that underpin our law and an understanding of the modern commercial practices in which they must be applied. I would hope that one way in which new lawyers can gain such early exposure is through the development of greater and closer links between universities, law firms and commercial businesses.

19. Next, it must be continued in practice. When a student becomes a professional, as a professional every good commercial lawyer must immerse himself or herself in understanding commerce and markets. No one can be a good commercial lawyer without such an immersion and a consequent understanding. The great thing about the way in which we practice law in this country is that there is no way a successful practice can be

achieved other than by understanding the way commerce and markets actually work. Moreover, as commerce, finance and business become ever more global, it is essential that lawyers continue to develop international practices. Whether this is through building on their current links in established commercial areas, or in building new links in countries that are developing their international commercial presence and expertise, we cannot but be an international profession, if we are to maintain our nation as a centre of legal excellence.

20. Finally, it must be continued on the Bench so that our long tradition of maintaining judicial expertise in developing the law to accommodate change in markets and commerce. We must do this in a number of ways.

*Our practice*

21. First, we are, I think, very fortunate in this country in having the ability to educate judges as they continue to work. Part of this is done through the work of the Judicial College, but in areas which are critical to the development of commercial law we do a great deal, particularly through the Financial Markets Law Committee, and through other specialist associations in London. They try and make sure that innovation in the markets and innovation in forms of product that are on offer, are properly understood. They provide amongst others, briefing papers and seminars detailing developing practices and issues.<sup>19</sup> An illustration of what we seek to do is provided by our most recent innovation – the establishment of a financial list in London with new procedures. Its launch was accompanied by intense tuition from financial markets to try and ensure that the judges in a very dynamic area of practice were up to date and able to decide legal principles with that knowledge as has been the tradition since the time of Lord Mansfield.
22. Second, we are revisiting the rather neglected use of judges as arbitrators. The Commercial Court had flourished after its establishment. In its second year it had 198 cases but, by the mid-1950s, the number of cases had fallen to below 50, and continued to fall. The then judge in charge of the Commercial Court, probably one of the great judges of the last century, Devlin J (subsequently Lord Devlin) became extraordinarily concerned and told the Lord Chancellor that the Commercial Court was dying. As a result, a Committee, chaired by a judge of the Commercial Court and a leading practitioner, came up with various

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<sup>19</sup> See <<http://www.fmlc.org>>.

recommendations. One was the proposal that judges could be appointed as arbitrators.<sup>20</sup> It is a power that has been little used. Probably, its most famous application was in the case relating to the ships that were trapped in the Shatt al-Arab as a result of the Iran/Iraq war in 1980 and the then judge of the Commercial Court, Sir Christopher Staughton, sat as an arbitrator to determine issues relating to the frustration of the charter parties and also to the affect on war risks insurance.<sup>21</sup> We are now encouraging this under-used power for judges to be appointed as arbitrators; thus exposing them to a further range of disputes and practices. Helping to both build on their expertise, but also provide a means through which there can be greater cross-fertilisation of practices, exposure to different ways of working can itself also be a source of innovation. In this regard, it is helpful that the power to appoint judge-arbitrators is to be liberalised under the Prison and Courts Bill 2017.<sup>22</sup> At the present time only Commercial Court judges and TCC judges can be appointed as judge-arbitrators. The Bill proposes widening this to enable all High Court judges to be appointed to conduct arbitrations. This is particularly important at the present time due to the increasing expansion of arbitration into new areas of trust and intellectual property law; ones which while they are commercial in the broadest sense, would if litigated here fall within the ambit of the Chancery Division. I very much hope that over a period of time, commercial parties will respond to the encouragement to seek to have judges appointed as arbitrators.

23. Third, and linked to the preceding point, we are ensuring, as far as possible, that serving judges gain the widest exposure to commercial and business disputes. One way that we do so is by enabling judges to sit across the courts and the Competition Appeals Tribunal, so that if a claim starts in one, a single judge can manage and try the claim even if it is transferred from one to the other. Equally, we are doing so through the Financial List, which is drawing together the experience of Commercial and Chancery judges. And more practically, we are doing so as a consequence of the physical transfer of the Commercial Court, the Technology and Construction Court, and the Chancery Division into the Rolls Building in London. Shared accommodation is a remarkable, if not obvious, way to facilitate cross-fertilisation, the sharing and building of expertise.
24. Fourth, we can also learn something from private judging – the practice developed in the United States from the late 1980s through which the court at the request of the parties

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<sup>20</sup> Report of the Commercial Court Users Conference (Cmnd. 1616 of 1962)

<sup>21</sup> *The Bamburi* [1982] 1 Lloyd's Rep 312

<sup>22</sup> This Bill failed to complete its passage through Parliament before the dissolution of Parliament in April 2017.

appoint retired judges to determine their disputes through a form of flexible court procedure with hearings suiting the convenience of the parties.<sup>23</sup>

25. Fifth, we must learn from other commercial courts. We have invited approximately 23 different states that have commercial courts to a meeting in London in May 2017. We have taken the view that, although the courts to which I have referred in other countries are in one sense competitors, they must work together as they have a duty to uphold and develop the rule of law internationally; in addition we can learn from each other. It is particularly important in areas such as enforcement.
26. So, looking at these areas, it does seem to me that, to maintain the judiciary's ability to develop the law, we must use these and other ways to ensure that our judiciary is kept up to date in this world of changing commercial practices.

## **(2) Assessors**

### *The use of assessors*

27. A strategy to ensure the courts can keep commercial law up to date should also draw a lesson from history – the use of assessors, though this is more controversial. Assessors have been used in the Admiralty jurisdiction for a very, very long time. That jurisdiction developed as a system of law apart from the common law as part of the civilian tradition. Whereas the common law judges used to have special jurors who would help them in relation to the practice of the markets of the City, the judges of the Admiralty Court have had and continue to have assessors.
28. The Committee, to which I have referred in connection with the fall in the work of the Commercial Court in the 1950s also proposed that Commercial Judges might sit with assessors.<sup>24</sup> One striking piece of evidence was:

‘Complaints are made in the City and elsewhere in commerce that very often, when somewhat complex and obscure contracts are produced, although we in our trade know exactly what we mean, the Judge does not, and he may come to the wrong conclusion. However well the parties may say they know the industry; it always surprises me how violently they differ in a dispute as to the meaning of the words in use everyday in their contracts and I should have thought that if the Judge had an assessor sitting with him, it must be of assistance.’<sup>25</sup>

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<sup>23</sup> Christensen, *Private Justice: California's general Reference Procedure*, 1982 Am. B. Found. Res. Journal 79.

<sup>24</sup> Report of Commercial Court Users Conference at 42. Devlin J had also made the suggestion that assessors should be used more widely by comments in 2 cases: *Waddle v Wallsend Shipping* [1952] 2 Lloyd's Rep 105 at 131; *Southport Corpn v Esso Petroleum* [1956] AC 218 at 222.

<sup>25</sup> PRO/LC02/8038.

29. Adopting the practice of assessors sitting with the judge was seen as a means to educate the judge, to keep the judge up to date, and explain the nature of industry practice. The recommendation was made, but the practice did not develop. Assessors remained a well-known feature of the Admiralty Court. And that was that. Forty years after the Commercial Court Users Conference report made its recommendation, Lord Woolf in his Access to Justice report echoed it. As he put it,

‘. . . where there are complex technical issues the assessor's function would be to ‘educate’ the judge to enable him to reach a properly informed decision. In the most complex cases this function could be performed by two assessors, one instructed by each party.’<sup>26</sup>

30. More recently still, the Civil Justice Council has suggested that expert witnesses should, through what it described as a ‘teach-in’ help to educate judges regarding complex issues that arise in cases.<sup>27</sup> While there are problems with its idea – mainly as it mistakenly conflates what an expert witness can properly do with what an assessor can do – the Civil Justice Council is essentially making the same point as was made in the 1950s and the 1990s: there needs to be greater and wider use of assessors.

#### *The failure to adopt the use of assessors*

31. Lord Woolf and the Council came back to using assessors because the system was never taken on outside this very narrow steer of Admiralty law. Why is that so? It is not because it is not a sound proposal. The benefit that an assessor may bring to proceedings, and to a judge’s understanding of commercial and financial practice, remains clear. With commercial practice constantly developing, financial markets and new financial instruments constantly developing, the presence of an assessor – or two assessors – to clarify issues, to educate, and enable judges to get to grips with expert evidence, will be all the more of a benefit than it was understood to be in the past.

32. There are two answers to the question as to the failure to take up the use of assessors. First, we live in a system conditioned by an adversarial system and, therefore, we are used to adversarial work; it is very difficult to make any inroads into that culture. Second, the use of

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<sup>26</sup> H. Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO) (1996) at chapter 13, para. 59.

<sup>27</sup> Civil Justice Council, *Concurrent expert evidence and ‘hot-tubbing’ in English litigation since the ‘Jackson reforms’*, (2016) at 24 <<https://www.judiciary.gov.uk/wp-content/uploads/2011/03/cjc-civil-litigation-review-hot-tubbing-report-20160801.pdf>>

an assessor is perceived as somehow enabling the judge to take greater control over the evidence that comes before the court, and therefore the parties having less.

*A way forward*

33. But times are changing. Our court processes are less adversarial today than they were historically. Courts actively manage claims and the costs of claims. Parties and courts must work together to further the overriding objective. Single joint experts are now an established feature of civil process. Concurrent evidence processes are taking their own place in trials.
34. The time surely has therefore come when we ought either to look at using assessors in certain types of cases or to progress an alternative which produces a similar result - that is providing some neutral input to the judge in cases where he needs the commercial or scientific background. I make the second suggestion because the conservatism and culture of the legal profession has so far successfully defeated the first.
35. Can I take two illustrations of the alternative? I take one from a field in which one of the judges here in Birmingham has played a leading role - developing expert evidence in forensic science that is neutral, as regards the basic science in the case. We have made great progress in relation to trying to ensure that forensic science, in particular, and by way of illustration, DNA, is presented to a court in a completely neutral and intelligible way.<sup>28</sup> A similar illustration is the provision of intense tuition to judges of the new financial list to which I have already referred.
36. The objection, however, appears to remain that whether assessors are used or whether neutral material is made available to the judge in the way I have described, you are taking the control of what the judge is to be told away from the parties. This is however unreal. In almost any kind of litigation, most experts, unless they are dishonest (and I regret to say a tiny handful are) will approach the case in a way which shows there is agreement probably on 95% or more of what is before the court. In my view, therefore, the time has come when we either proceed by way of assessor (which has the disadvantage of the parties not knowing in essence everything that passes from the assessor to the judge) or alternatively we proceed by providing judges with much more accessible and neutral material about science or commerce in cases they are to decide.

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<sup>28</sup> <https://royalsociety.org/news/2016/04/national-academies-and-the-law-collaborate-to-provide-better-understanding-of-science-to-the-courts/>

37. Given the ever-increasing rapidity of change in science and commercial practice, we can no longer afford to think of reasons for objecting to the provision of neutral assistance to a judge by those at the forefront of our changing commercial and scientific worlds. If we fail to change and remain mired in the culture of the past, then the development of our law in keeping up with such change is put seriously at risk.

### **(3) Procedural Innovation**

#### *The importance of procedure*

38. The final topic to which I wish to turn is a very difficult subject - procedural innovation. One of the real problems of English law schools is they do not teach procedure. Unless this University is an exception, virtually no-one teaches procedure. It is a fundamental problem in the development of legal education and quite a lot of the development of our law is that people do not understand the significance of procedure. They are not therefore prepared to be innovative.
39. One or two judges here this evening will know of the very substantial progress that we have made in criminal justice in providing a body of procedural rules over the past 12 or so years. It has made an enormous difference to the development of criminal justice and making it fairer and enabling cases to move more quickly. We also need to think about procedural innovation in civil justice. I am not going to talk about the way of resolving disputes online, but I want to turn to another way of looking at procedural innovation, directly relevant to the development of commercial law – making sure that there are sufficient cases before the courts to keep the law up to date.
40. Part of the answer to ensuring the courts have sufficient cases is making the procedure of the Commercial Court more attractive, such as introducing over the last year or so various forms of trial and trying to make certain parts of a trial stick to a fixed time limit; one illustration is fixed times for submissions – proper time limits produce generally better submissions than those that are not time limited. We are also addressing one of the most serious problems of the common law systems – disclosure of documents. When I was a law student, there was no such a thing as instantaneous communication in writing. There was then the telex machine, which probably most of you have never heard of, and then there was the fax machine which still exists for some forms of communication. There certainly was no email and there certainly was no *WhatsApp*. The problem is that the ease of

simultaneous communication has swamped the performance of the procedural obligation under our system of discovery to provide all documentation relevant to a case. Courts have to grapple with these and similar issues so that they make courts the most attractive places to resolve disputes. History has shown that if the courts are not responsive to the needs of litigants, then they move to arbitration. This is something that happened before the Commercial Court was established. If you were going to get a judge of the court such as Lawrance J for a commercial dispute, you certainly did not want to go anywhere near a court.

*The need for public decisions developing the law*

41. I have mentioned the need to make the Commercial Court the most attractive place to resolve disputes, first because resolution of disputes involving legal issues before the court is the best way not only of determining the dispute but of developing the law. Second, it is because I want to say a little bit about arbitration and its relevance to the development of commercial law. I gave a lecture in London in 2016 where I looked at the question of appeals from arbitrators to the courts and suggested the statutory provisions be looked at again so that appeals ought to be more readily available.<sup>29 30</sup> The reason I did that was because, unless the Commercial Court has a good diet of cases, it cannot develop the law. Arbitrators were not too keen on my ideas, but it is something on which I firmly believe I was right and time will tell.
  
42. There is not the time to look at the relative attractions of courts and arbitration for dispute resolution. Two points will suffice. At the present time, there is a view that one of the advantages of arbitration is that awards are easier to enforce internationally than judgments given by a court; a disadvantage of going to court is that the dispute is aired publicly. Arbitrations in contrast are heard in private and English law certainly has developed a very strong doctrine of confidentiality.<sup>31</sup> Thus, without more appeals to the court, as I suggested, the law does not have the means of development.

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<sup>29</sup> S.69 of the Arbitration Act 1996

<sup>30</sup> *Developing commercial law through the courts: rebalancing the relationship between the courts and arbitration*, <<https://www.judiciary.gov.uk/wp-content/uploads/2016/03/lcj-speech-bailli-lecture-20160309.pdf>>

<sup>31</sup> Some national jurisdictions, such as Chile (see <<http://www.camsantiago.cl/english/publications1.html>>) and some arbitral the ICC or LMAA, publish arbitral awards to differing degrees. The ICC, for instance, publishes some awards in anonymised and truncated form. Other jurisdictions, such as the State of Delaware in the US, do not operate a presumption in favour of confidentiality in the arbitral process – see the lecture referred to in the next footnote

43. One of my former colleagues, Sir Bernard Rix, who retired from the Court of Appeal in 2013 and is now a leading arbitrator, pointed out the consequences, in a lecture he gave in Singapore in 2015:

‘Once however we come to awards which are concerned with standard forms of contracts, or jurisdictional issues, or principles of law, or important forms of interim relief, the lack of publication, the lack of transparency, the difficulty or impossibility of getting such awards into the public domain, a fortiori in the light of institutional rules which bar any challenge or appeal to the courts whatsoever, mean that our commercial law is going *underground*. As more and more international commercial cases go to arbitration rather than the courts, we are more and more losing sight of the basic feedstock of our commercial law.’<sup>32</sup>

44. His solution was different to mine. His view was that we should begin to look at publishing awards on a much more systematic basis and, where necessary, try and disguise or anonymise them so that the benefit of privacy was not lost. A similar problem is raised in some commercial courts, such as those in an offshore jurisdiction where the parties do not want a dispute to come too much into the public domain. Such courts are also beginning to look at expounding principles of the law in terms that leave the facts of the case confidential - you shave it of what might be of interest to the public, but expound the principle. I am not sure how appealing that would be to certain newspapers in this country who dislike anything done behind closed doors. I think it might be a highly regressive suggestion.
45. Thus one of the issues under this topic which should receive detailed consideration is how are we going to make certain, to use Sir Bernard's phrase, that we keep the feedstock of the law alive? This is of the greatest possible importance. We are not like France in that we can develop a code, though I do not think codes really work in commercial cases for a number of reasons. We therefore have to look at trying to make certain we have sufficient disputes before the courts to keep the law dynamic.
46. One other alternative that has been suggested is to try and improve the appeal process. Rather than go to a commercial judge, it has been suggested by Professor Neil Andrews of Cambridge University that maybe we should look at creating a direct right to go to the

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<sup>32</sup> Jones Day Professorship in Commercial Law Lecture, SMU, Singapore 12 March 2015

Court of Appeal for arbitrations where the arbitrator was a person such as a retired judge.<sup>33</sup>  
That is one possibility.

47. Whatever the particular solution, we need to find an answer to two really difficult questions. One is modernising our procedure to cope with issues such as disclosure of discovery; the other is trying to stop, as Sir Bernard puts it, the law going underground in arbitrations. Because, unless we can keep law dynamic and in a state where places involving modern forms of commerce come to the court, we will not make the progress that I think that we should make.

#### *Soft Codes*

48. There are other areas which I could explore, such as one which no doubt might appeal to some students: should we develop something like the restatements that have been developed in America? Professor Andrew Burrows', *A Restatement of English Law of Contract*,<sup>34</sup> is an example of what may be possible by providing a distillation of principles. It is a very interesting subject. But time does not permit more than a mention.

#### **Conclusion**

49. I must conclude by again emphasising that we do face in our commercial law the major problems in the various aspects I have tried to outline, of keeping it up to date and of developing it on principled grounds through cases. This has been done since the time of Lord Mansfield and we must ensure that we can continue to do this in today's rapidly changing world. In 2007, Lord Bingham in the *Golden Straight Corporation v Nippon YKK (The "Golden Victory")* stated that

‘the quality of certainty [is] a traditional strength and major selling point of English commercial law.’<sup>35</sup>

50. It is an important task for Universities to play their part, with academics having Jill's dynamism being interested in the development of commercial law and facing up to the issues of judicial expertise, assessors and procedural innovation which I have outlined. As you all know, it is now probably more important than ever that our legal system, which faces the further difficulties that it will undoubtedly encounter through Brexit and which is

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<sup>33</sup> N. Andrews, *London Arbitration and Brexit*, at 23-24 <<http://www.ciarb.org/docs/default-source/ciarbdocuments/events/2016/november/arbitration-and-brexite-2016.pdf?sfvrsn=0>>; see the power under Access to Justice Act 1999, s.54.

<sup>34</sup> Oxford University Press, 2016.

<sup>35</sup> [2007] UKHL 12 at [1].

already facing international competition, retains its position which it undoubtedly has at the moment of being the most accessible and useable commercial law system in the world.

51. We must not be complacent. That, particularly for the young in this audience, would be a disaster. There is much work to be done, and my only regret is that Jill is not here to do it.
52. Thank you, very much.