

MANAGING INTERNATIONAL COMMERCIAL LITIGATION IN AN INCREASINGLY GLOBALISED WORLD: THE ESTABLISHMENT OF SPECIALIST COMMERCIAL COURTS IN INTERNATIONAL FINANCIAL CENTRES

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“...[I]t is important that the court system in any country be set up in such a way that the public and litigants have the utmost confidence in it. This is particularly important where there may be a high degree of foreign participation in the lawsuits. Needless to say the court system must be blind as to the nationality or domicile of a litigant (except as to security for costs concerns.) Otherwise needed foreign investment will tend to dry up or become considerably more expensive, thereby depriving the domestic economy of the opportunity to fully develop its growth potential and deprive the society of the economic engine working to efficiency to fund social needs.” (Justice James Farley)²

Introduction

In ‘*Commercial Court: a Twenty First Century Necessity?*’³, Professor Alvin Stauber of the Florida State University Business School recently compared the experience of two commercial courts established in 2004 in the United States and Ireland. These were the Orlando, Florida Business Court, and the Irish Commercial Court. He reached the following conclusion:

“Is the Commercial Court a necessity for the 21st century? The answer in many states of the United States and in Ireland appears to be a resounding yes.”

Ireland may be considered to be an international or indeed offshore financial centre to the extent that it seeks to attract financial business from other countries. Professor Stauber in this regard made the following interesting observation:

“The substantial investment and commercial development in Ireland reinforce the notion that Commercial Courts play a critical role in attracting and retaining business.”

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² ‘*Efficient Court Administration: Effective Techniques for Real Time Litigation, Court Administration and Case Management. The Need for Effective, Efficient and Timely Delivery of Justice*’, Paper presented at World Bank Global Judges Forum, ‘Commercial Enforcement and Insolvency Systems’, Malibu, California, May 19-23, 2003: <http://www.iiiglobal.org/country/canada.html>., at page 25.

³ (2007) 1 Judicial Studies Institute Journal 154-177.

The present paper seeks to explore, with reference to Bermuda and other comparatively mature international financial centres (London-England and Wales, Sydney-New South Wales, Toronto-Ontario and Hong Kong) whether there may be an emerging consensus that international commercial litigation in an increasingly interconnected world can best be managed by specialist commercial courts. A brief review of the selected jurisdictions (and recent developments elsewhere) suggests that not only is such a consensus emerging in the common law realm, but that remarkably similar rules of practice are being adopted in diverse forums united by English law ties. In common law jurisdictions at least, there appears to be an intriguing ongoing process in which commercial judges and lawyers in disparate jurisdictions, linked by often invisible cross-border commercial transactional ties, are engaging in what is effectively an *ad hoc* legal harmonisation project while seeking to resolve international business disputes.

The way in which commercial court cases are managed by courts in the various common law international financial centres should be of equal interest in each jurisdiction, not just because of similar legal frameworks, but because the international business litigants will either be the same or possess similar commercial dispute resolution needs.

International financial centres-common commercial ground

International financial centres have been ranked by the City of London which has prepared a Global Financial Centres Index. Unsurprisingly, cynics might say, London has placed itself at the top of its own league table. Ranking arguments apart, judicial notice can surely be taken that most of the ranked centres ought to be included in the premier league. A striking omission until March 2008 was the British Virgin Islands (“BVI”). The most recent ranking however now lists BVI as a new entrant ranked at 27, one place ahead of Bermuda. The top 50 are set out in Table I below, with the various jurisdictions which will be considered in this paper highlighted.

TABLE I
The GFCI Financial Centre
Ratings⁴
March 2008

GFCI 2 Rank	Financial Centre
1	London
2	New York
3	Hong Kong
4	Singapore
5	Zurich
6	Frankfurt
7	Geneva
8	Chicago
9	Tokyo
10	Sydney
11	Boston
12	San Francisco
13	Dublin
14	Paris
15	Toronto
16	Jersey
17	Luxembourg
18	Edinburgh
19	Guernsey
20	Washington DC
21	Isle of Man
22	Glasgow
23	Amsterdam
24	Dubai
25	Cayman Islands
26	Gibraltar
27	British Virgin Islands
28	Bermuda
29	Melbourne
30	Montreal
31	Shanghai
32	Stockholm
33	Vancouver

⁴ 'Global Financial Centres Index 2', Table 2, page 12:
http://www.cityoflondon.gov.uk/Corporation/business_city/research_statistics/research_publications.htm.

34	Brussels
35	Munich
36	Bahamas
37	Monaco
38	Milan
39	Bahrain
40	Helsinki
41	Johannesburg
42	Madrid
43	Vienna
44	Copenhagen
45	Oslo
46	Beijing
47	Qatar
48	Mumbai
49	Rome
50	Osaka

If one looks at countries ranked on the basis of the somewhat controversial gross domestic product (“GDP”) criterion, small island international financial centres come clearly to the fore (see Table II below), but countries with specialist commercial court are also well represented.

TABLE II: Top 20 countries based on GDP per capita

(Source: CIA World Factbook, 2007:

<https://www.cia.gov/library/publications/the-world-factbook>)

Rank	Country	GDP- per capita (PPP)	Date of Information
1	Luxembourg	\$71,400	2006 est.
2	Bermuda	\$69,900	2004 est.
3	Jersey	\$57,000	2005 est.
4	Equatorial Guinea	\$50,200	2005 est.
5	United Arab Emirates	\$49,700	2006 est.
6	Norway	\$46,300	2006 est.
7	Guernsey	\$44,600	2005
8	Ireland	\$44,500	2006 est.
9	Cayman Islands	\$43,800	2004 est.

10	United States	\$43,800	2006 est.
11	Andorra	\$38,800	2005
12	British Virgin Islands	\$38,500	2004 est.
13	Iceland	\$38,000	2006 est.
14	Hong Kong	\$37,300	2006 est.
15	Denmark	\$37,100	2006 est.
16	Canada	\$35,700	2006 est.
17	Isle of Man	\$35,000	2005 est.
18	Austria	\$34,700	2006 est.
19	San Marino	\$34,100	2004 est.
20	Switzerland	\$34,000	2006 est.

While the small population size of the small island countries set out in Table II obviously inflates their GDP ranking, it is interesting to note international business is a mainstay of all of the relevant economies. The commercial ties which bind these various notionally competing jurisdictions are many and well known. For years, various categories of “offshore” professionals have flitted from one jurisdiction to the next, contributing to a coherent body of cross-border professional practice in areas such as accounting, asset management, captive insurance company management and legal practice. The cross-border flow of intellectual capital merely reflects the cross-border flow of commercial transactions. This in turn spawns cross-border international commercial litigation, in which the same or very similar international business litigants enter the judicial stage in different fora. Four illustrations help to make good this point.

Firstly, initially Bermuda -based law firms such as Appleby and Conyers Dill & Pearman now operate, sometimes as a result of mergers or other affiliations, in various international financial centres, including Anguilla, BVI, Cayman, Dubai, Hong Kong, Jersey and Singapore⁵. Secondly, case law illustrates that accounting and other business professionals in international firms based in different jurisdiction work collaboratively on the same client matters. In *Benjamin-v-KPMG Bermuda (a firm) and KPMG Barbados (a firm)* [2007] Bda LR 22, a Bermuda firm assisted a Barbadian firm to audit a Barbadian captive insurance company. Thirdly, litigation frequently occurs across borders.

One recent example is the dispute between, *inter alia*, a Bermuda company and a BVI company, which was litigated extensively in both forums⁶. Litigation has taken place in

⁵ <http://www.applebyglobal.com>; <http://www.cdp.bm/> . Appleby is believed to represent a merger of firms based in Bermuda, Cayman and Jersey. These are but two examples.

⁶ See e.g. *IPOC International Growth Fund Ltd-v- LV Finance Group Ltd.*, Eastern Caribbean Supreme Court, Civil Appeal No. 3 of 2006, judgment dated June 18, 2007 (Alleyne ACJ, Barrow JA and Rawlins JA) (BVI): <http://www.eccourts.org/decisions/new/IPOCvLVFinanceGroupLtddecsc1697.htm> . Also see *IPOC International Growth Fund Ltd -v- OA “CT Mobile” and LV Finance Group Ltd.* [2007] Bda LR 43, Court of Appeal for Bermuda

Bermuda in relation to funds held in a Bermudian bank for the account of a Bahamian corporate client of a St. Vincent & Grenadines bank. The bank was initially incorporated in Antigua and Barbuda is now in liquidation in both St. Vincent and Bermuda⁷. And fourthly, comparative law texts can now be found addressing common legal topics in relation to two or more international financial centres. Prominent examples include Rose-Marie B. Antoine (ed.), *Legal Issues in Offshore Financial Services*⁸, Christopher Bickley, *Bermuda, British Virgin Islands and Cayman Islands Company Law*, 2nd edition⁹ and Terry O'Neill and Jan Woloniecki, *The Law of Reinsurance in England and Bermuda*, 2nd edition¹⁰.

The value of looking at how international commercial litigation is managed in various international financial centres to those concerned with commercial dispute resolution cannot sensibly be doubted.

The English commercial court

Impact of the overriding objective

The Overriding Objective pioneered by Lord Woolf in the English Civil Procedure Rules 1998 (“CPR”) adopted in England and Wales in 1999 has since been adopted further afield. In the Caribbean region it is believed that it was first implemented in Rule 1 of the Trinidad and Tobago Civil Proceedings Rules 1998¹¹. On May 3, 2001 it was adopted by the Eastern Caribbean Supreme Court as part of the Eastern Caribbean Supreme Court’s Civil Procedure Rules 2000. These Rules are also substantially based on the English CPR. Elsewhere, the Overriding Objective itself has been adopted, as a guiding principle for the older English-derived Rules. This approach was taken in Cayman (with effect from September 8, 2003¹²) and in Bermuda (with effect from January 1, 2006¹³).

The most important element of the overriding objective which applies to commercial and non-commercial cases is the new almost inquisitorial powers of case management which it imposes on civil courts. Not only are courts under a positive duty to “actively manage” cases, but litigants (usually in reality their advisers) are also obliged to assist the court to achieve that goal. These new principles radically transform the traditionally passive role of the judge in relation to a party-driven civil litigation process. But how does the new CPR impact upon international commercial litigation?

(Zacca P, Nazareth JA and Murray-Smith JA). The case was also litigated in numerous other forums including The Bahamas, Russia and the USA.

⁷ *Walsh and Taal-v- Horizon Bank Ltd. (in provisional liquidation)* [2006] Bda LR 42.

⁸ (The Caribbean Law Publishing Company: Kingston, Jamaica, 2004).

⁹ (Sweet & Maxwell Asia: Hong Kong, Singapore, Malaysia, 2007).

¹⁰ (Sweet & Maxwell: London, 2004).

¹¹ http://www.tlawcourts.org/ord_rules.htm.

¹² Order 1, Cayman Islands Grand Court Rules 1995 (Revised Edition) Vol. 1 as amended.

¹³ Order 1A, Rules of the Supreme Court 1985 as amended.

It is well known that one of the main goals of the Woolf Reforms was “*to improve access to justice for individuals and small businesses*”¹⁴. How, then, do these modern principles impact (if at all) on commercial litigation? It seems obvious, as a matter of first impression, that those factors which will be important in small money cases, or cases where a weaker litigant is suing or being sued by a stronger opponent (saving expense, ensuring the parties are on an equal footing) will have little or no significance in cases involving parties with ample resources. Such an impression is probably misleading. The same principles undoubtedly apply, but must be given a distinctive emphasis.

One factor, in large complex litigation, will have added significance: the need to ensure that one case does not swallow up a disproportionate extent of the court’s resources. In such cases, the main judicial case management challenge is to ensure that all litigants’ fair trial rights, which are in many jurisdictions constitutionally protected in terms similar to Article 6 of the European Convention on Human Rights, are equally protected. There is a very thin line to be drawn between allowing a plaintiff to have his case fully heard and ensuring that considerable time and costs will not be wasted by allowing unmeritorious claims to be fully aired. Discovery, unless appropriately defined, may impose intolerable administrative burdens on one or more parties. Plaintiffs suing “deep-pocket” defendants may skilfully use the litigation process with a view to pressurizing the defendant to settle an unmeritorious claim which is not so hopeless as to be liable to be struck-out.

In an international financial centre, most significant commercial cases will likely have an international element to them. Jurisdictional issues will frequently arise. The need to assist or seek assistance from foreign courts will perhaps be common place concerns. The need to be sensitive to the cultural diversity of witnesses, the potential impact of judicial decisions on overseas individuals and parallel proceedings will often have to be borne in mind. In the year 2000, there was at least one foreign litigant in over 80% of the cases heard by the Commercial Court in London¹⁵.

These are the sorts of challenges which arise for courts seeking to ensure that cases are tried “justly” in the commercial context. And how does the offshore context impact on these principles differently than in other jurisdictions? In jurisdictions where offshore financial services are a major economic pillar, the credibility of the legal system in terms of its ability to effectively adjudicate commercial disputes is a major feature in the jurisdiction’s economic infrastructure. The ability of the courts to effectively handle international commercial disputes is, for established or emerging offshore jurisdictions, a matter of considerable economic importance. Since the leading offshore jurisdictions are now recognised as global financial centres in their own right, alongside major metropolitan centres, the very concept of distinguishing “offshore” from “onshore” jurisdictions is arguably losing its meaning. However, the concept of an “offshore” legal context may best be utilized to describe non-metropolitan jurisdictions whose national economies substantially

¹⁴ Access to Justice, Final report, paragraph 5.

¹⁵ Anthony Colman, Victor Lyon and Philippa Hopkins, ‘*The Practice and Procedure of the Commercial Court*.’^{5th} edition, (LLP: London/Hong Kong: 2000), page 12.

depend on international financial business. And in jurisdictions which are seeking to promote themselves as established or emerging international financial centres, it seems to be of obvious importance that both judges and practitioners are able to conduct commercial cases in a way which conforms to international business needs. However, to the extent that local legal conditions will differ from legal conditions elsewhere, offshore lawyers must view commercial case management through an appropriately focussed jurisdictional lens.

Any lawyer who has practised in more than one British Commonwealth jurisdiction cannot fail to be impressed by the great similarities which exist in terms of fundamental practice and procedure. But, in substantial commercial disputes, even minor differences of procedural and substantial law across different jurisdictions can have potentially huge consequences in terms of litigation strategy and available relief. In the absence of legal texts highlighting the idiosyncrasies of local law, the offshore practitioner asked for off-the-cuff advice at the beginning of a retainer will often be tempted to assume, along with their onshore colleagues, that local law is the same as it is in England. The offshore forum will often have less capacity to manage large-scale commercial litigation than large metropolitan centres such as London and New York where huge law firms have sizeable standing litigation armies at their disposal.

The establishment of the English commercial court

But before providing an overview of the English Commercial Court approach, it may be instructive to consider how it was initially established. First proposed in June 1892 as a “Commercial Court for London”, its establishment was opposed by then Chief Justice Lord Coleridge. After his death, a Commercial List was established in 1895, and a single judge assigned to it. It has been suggested that the idea of a Commercial Court was first raised in 1892 as a result of the poor judicial handling of a major commercial case tried in 1891¹⁶. According to V.V. Veeder Q.C., writing on the eve of the centenary of the Commercial Court’s establishment in London:

*“As Scrutton L.J. noted, the trial in *Rose v. Bank of Australasia* in May 1891 was positively the last straw of merchants of the City of London, who had already become dismayed with the unnecessary delays, technicalities and cost of commercial litigation in the Queen’s Bench Division (despite or even because of the recent reforms under the Judicature Acts 1873-1875). These merchants has (sic) begun increasingly to vote with their feet away from hostile adversarial litigation in the High Court towards new forms of commercial arbitration in the City of London. These included the foundation in November 1982 of the London Chamber of Arbitration under the auspices of the corporation of the City of London and the London Chamber of Commerce (now the London Court of International Arbitration); and for many years, the City of London had advanced successive proposals for the English equivalent of tribunaux de*

¹⁶ V.V. Veeder, ‘Mr. Justice Lawrence: the “true begetter” of the English Commercial Court’ (1994) LQR 292.

*commerce, the form of judicial arbitration by commercial men that existed in France, Belgium and Germany. From 1895 the establishment and extraordinary success of the Commercial Court more than met these and other demands of the commercial community; and for that, we must thank Lawrence J. as the “true begetter” of the English Commercial Court.”*¹⁷

Interestingly, the connections between the English case which inspired the creation of the English Commercial Court and Sydney would be recalled at a Centenary Dinner celebrating the creation of the New South Wales Commercial Court in 1903¹⁸.

Over 100 years before the Woolf Reforms adopted a civil procedural code based on the premise that the function of the courts was to provide a cost-effective, efficient and fair service to all civil litigants, the idea of a Commercial Court to meet the needs of the commercial community was institutionalised. Initially, the Commercial Court was established as a Division of the High Court through rules of court. Its first statutory recognition came in 1970¹⁹.

But the number of judges assigned to the Commercial Court has risen from one in 1895 to some 14 in 2008 “*nominated to be judges of the Commercial Court and of the Admiralty Court*”, almost all appointed to the High Court in their late 40’s to early 50’s²⁰.

Judges assigned to the Commercial Court have invariably been former leading counsel who have specialised in commercial matters. It is doubtful whether many other jurisdictions have a sufficiently large highly specialised talent-pool to draw from to enable the recruitment of an elite cadre of judges to handle commercial cases along current English lines. And, as will be discussed briefly in relation to Bermuda below, it is far from clear that extensive practising experience of commercial law is, objectively speaking, a necessary prerequisite for efficient judicial handling of commercial cases. Indeed, as Sir Gordon Langley recently observed on retiring from the Commercial Court:

*“Essentially the task of a judge is to decide the dispute that is before the court, not to use it as a peg upon which to hang great intellectual legal analysis. That can usually be safely left to the House of Lords.”*²¹

One English institution which can be and has been replicated elsewhere is the Commercial Court Users Committee. First established in London in 1967²², this Committee (now simply the Commercial Court Committee) is a vehicle for the Commercial Court’s main “clients” to

¹⁷ Ibid, at 298-299.

¹⁸ http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_spigelman.

¹⁹ See section 3 of the Administration of Justice Act 1970.

²⁰ http://www.judiciary.gov.uk/keyfacts/list_judiciary/senior_judiciary_list.htm.

²¹ ‘How to be...a Judge’, The Times Online, February 11, 2008.

²² ‘Commercial Court Practice’, page 19.

provide input on how the Court and litigants can best achieve their shared goals of expeditious and just commercial dispute resolution. The ‘*Commercial and Admiralty Court Guide*’ 7th edition provides:

“A3.1 The success of the Court's ability to meet the special problems and continually changing needs of the commercial community depends in part upon a steady flow of information and constructive suggestions between the Court, litigants and professional advisers.

A3.2 The Commercial Court Committee has assisted in this process for many years. It is expected to play an important part in helping to ensure that the procedures of the Court enable the achievement of the "overriding objective". All concerned with the Court are encouraged to make the fullest use of this important channel of communication.”

Distinctive case management approach

The need for a distinctive approach to judicial case management in the commercial context has long been recognised by the Commercial Court in London, located in what is arguably still today the leading international commercial dispute resolution centre in the world. The story of how this Court married the new CPR philosophy with commercial case management is eloquently told in the fifth edition of Anthony Colman, Victor Lyon and Philippa Hopkins, ‘*The Practice and Procedure of the Commercial Court*’.²³ Lead author Mr. Justice Anthony Colman is a senior member of the Commercial Court. In August 1999, by way of modification of the new CPR, a new Commercial Court Guide was published “*in order that the special demands of the work of the court can be met.*”²⁴ The current Commercial Court Guide is the ‘*Admiralty and Commercial Court Guide*’, 7th edition, 2006.

‘*The Practice and Procedure of the Commercial Court*’ is not simply the leading text on English Commercial Practice; it is also, potentially, an invaluable guide to practitioners in any jurisdiction with English legal antecedents. The extent of the value of English Commercial Court practice in other Commonwealth jurisdictions will largely turn on the extent to which such other jurisdictions can adapt the letter and or spirit of the English regime to their distinctive substantive and procedural law regimes. The history of the English Commercial Court has been one of uneven evolution, however. Difficulties have recently arisen, prompting an investigation into the need for special case management rules for long commercial cases²⁵. But this evolution has essentially represented a refinement of mediaeval notions of international commercial disputes being resolved by merchants themselves, a tradition still seen in arbitration today. The primary mission of the specialist commercial court or commercial judge is to resolve business disputes in a business-like

²³ *Op. cit.*

²⁴ *Op. cit.*, page 36.

²⁵ Judiciary of England and Wales, ‘*Report and Recommendations of the Commercial Court Long Trials Working Party*’ (London: December, 2007).

manner which commercial individuals and entities consider to be commercially credible. As the process of globalisation evolves and the volume of international commercial litigation with cross-border elements in offshore financial centres increases, the need to consider a distinctive commercial litigation case management approach would appear to be more important than in the past.

The experience of arguably the leading commercial dispute resolution forums in the world must be instructive for any jurisdiction desirous of attracting international business to its shores. But each jurisdiction, despite broad areas of legal common ground, is likely to have local idiosyncrasies which influence the particular shape judicial case management can realistically take. The concept of judicial case management in relation to international commercial litigation may broadly be defined as encompassing both (a) what capacity does a court possess to handle commercial cases generally, and (b) what techniques should be deployed by judges and/or litigants to effectively manage individual cases? How far the practice of the London Commercial Court (and other specialist commercial courts) is a useful guide for Commonwealth Caribbean offshore financial centres and similar smaller jurisdictions with no long tradition of specialized commercial courts will be considered below. In addition, an attempt will be made to both (a) outline existing commercial case management practice, and (b) suggest appropriate case management techniques for the smaller international financial centre context.

In the Introduction to the current *‘English Commercial and Admiralty Court Guide’*, Steel J. made the following important observations:

“As before, the Guide is not intended to provide a blueprint for litigation to which practitioners and the court must unthinkingly conform. The interests of efficiency and justice are paramount and the Guide must be treated as a flexible instrument so as to enable the Court to continue to provide a service to the international business community of the highest quality.”

The English Commercial Court, then, very much as one would expect the case to be for its international financial centre counterpart jurisdictions elsewhere, has as its primary goal *“to provide a service to the international business community of the highest quality.”* Managing international commercial litigation is not seen as requiring a mechanical application of rigid procedural rules; rather flexibility should be the watchword, because the *“interests of efficiency and justice are paramount”*. The Guide describes the types of matters which qualify for hearing before the Court as follows:

- “BI.1 Rule 58.1(2) describes a ‘commercial claim’ as follows:**
‘any claim arising out of the transaction of trade and commerce and includes any claim relating to -
- (a) a business document or contract;*
 - (b) the export or import of goods;*
 - (c) the carriage of goods by land, sea, air or pipeline;*

- (d) *the exploitation of oil and gas reserves or other natural resources;*
- (e) *insurance and re-insurance;*
- (f) *banking and financial services;*
- (g) *the operation of markets and exchanges;*
- (h) *the purchase and sale of commodities;*
- (i) *the construction of ships;*
- (j) *business agency; and*
- (k) *arbitration.’”*

There is no value-based filter to eliminate small commercial claims under the English regime. In Ireland, by way of contrast, only claims worth at least one million euros and intellectual property cases automatically qualify. The Irish Court retains a discretion to include (a) applications to challenge regulatory decisions, and (b) any other cases which do not automatically qualify for entry in the Commercial List²⁶. After dealing with various procedural matters of limited relevance to case management, the Guide then provides as follows:

“D2 Key features of case management in the Commercial Court

D2 Case management is governed by rule 58.13 and PD58 §10. In a normal commercial case commenced by a Part 7 claim form, case management will include the following 10 key features:

- (1) statements of case will be exchanged within fixed or monitored time periods;*
- (2) a case memorandum, a list of issues and a case management bundle will be produced at an early point in the case;*
- (3) the case memorandum, list of issues and case management bundle will be amended and updated or revised on a running basis throughout the life of the case and will be used by the court at every stage of the case;*
- (4) a mandatory case management conference will be held shortly after statements of case have been served, if not before (and preceded by the parties lodging case management information sheets identifying their views on the requirements of the case);*
- (5) at the case management conference the court will (as necessary) discuss the issues in the case and the requirements of the case with the advocates retained in the case. The court will set a pre-trial timetable and give any other directions as may be appropriate;*
- (6) before the progress monitoring date the parties will report to the court, using a progress monitoring information sheet, the extent of their compliance with the pre-trial timetable;*
- (7) on or shortly after the progress monitoring date a judge will (without a hearing) consider progress and give such further directions as he thinks appropriate;*

²⁶ ‘Commercial Courts: A Twenty-first Century Necessity?’ [2007] 1 Judicial Studies Institute Journal 154 at 166-167.

- (8) *if at the progress monitoring date all parties have indicated that they will be ready for trial, all parties will complete a pre-trial checklist;*
- (9) *in many cases there will be a pre-trial review; in such cases the parties will be required to prepare a trial timetable for consideration by the court;*
- (10) *throughout the case there will be regular reviews of the estimated length of trial.”*

This case management regime must be read in conjunction with the CPR’s pre-action protocols which are designed to encourage clarification of issues before an action is even commenced. These commercial rules, however, displace the application Parts 26-29 of the English CPR and constitute a case management code which is designed to ensure that the progress of the litigation is more efficient and orderly because the parties and the court are required to (a) prepare more thoroughly, (b) proceed more swiftly, and (c) define the issues in advance of trial more clearly than would otherwise be the case. The practical effect of these provisions is described in Colman et al, ‘*Commercial Court Practice*’ as follows:

“There can be no question but that the new case management procedures, involving as they do the preparation of new documents and an early, compulsory hearing, increase the costs of the early stages of litigation-this has been described as a ‘front-loading’ of costs. Rightly or wrongly, those responsible for the preparation of the CPRs and the Commercial Court Guide have taken the view that such ‘front-loading’ is justified by the greater degree of control which the court will be able to exercise over such a case and that such control will (or may) ultimately result in costs savings, not least because it is likely to result in more cases being settled at an early stage.”

The Commercial Court Guide implicitly seeks to create a framework within which the court can play a more proactive role in mediating the parties’ conflicting fair trial rights in an arena in which the parties’ resources often make it easy for substantial time to be expended upon unmeritorious points of marginal importance to the principal issues in controversy. Article 6 of the European Convention on Human Rights (“ECHR”), like its counterpart provisions in Commonwealth Caribbean constitutions, protects the plaintiff’s right to a fair hearing of an arguable claim and the defendant’s right not to be subjected to unarguable claims. Balancing these opposing yet complementary rights, particularly in large complex cases with substantial sums in dispute, is arguably as much an art as a science and not susceptible to any foolproof procedural code. Thus criticisms about the adequacy of these case management rules in two large claims resulted in the January 2007 established ‘*Commercial Court Working Party on Long Trials Report*’ being published on December 6, 2007. The Commercial Court Users Committee adopted the Report of the Working Party (chaired by Aikens J.) in November 2007. The following month, Steel J as judge in charge of the Commercial List announced in the Foreword to the Report as published on the Judiciary of England and Wales website that the recommendations of the Report would be implemented on a trial basis between February 1, 2008 and July 31, 2008. Thereafter, any necessary changes would be made to the Commercial Court Guide²⁷.

²⁷ Report, page 5.

An overview of the main recommendations will now be given. One common thread which runs through almost all the recommendations is the need for greater brevity and clarity in various documents at various stages, be it pre-action notification of claim and response, witness statements, and expert reports. Similarly, it is recommended that discovery be linked to issues to avoid a disproportionate amount of time being expended on peripheral issues. The Report also emphasises that many fundamental principles, such as the approach to striking out, summary judgment and no case submissions must be the same in all commercial cases, large or small. It is suggested that costs orders should be applied flexibly in respect of such unsuccessful applications to encourage their greater use, and that the court should use the List of Issues to identify points which are appropriate for early resolution. Trial management should become more detailed, and no trial ordinarily listed for more than three months, with common ground and a provisional timetable identified at the pre-trial conference. In addition, the Report makes client accountability recommendations designed to ensure that senior executives are accountable for the way litigation is conducted. It is recommended, for instance, that senior client representatives should verify the statements of case for a second time before trial.²⁸ Daily court fees were considered but rejected, because the Working Party “*felt strongly that the introduction of daily Court fees would put the court, and thus the use and development of English commercial law, at a significant disadvantage*”, potentially deterring use of the court in favour of arbitration or overseas litigation.²⁹

Lessons from the English Commercial Court experience

The English experience offers two important lessons. Firstly, judicial case management of international commercial litigation in practice will always raise challenges, even in the world’s leading dispute resolution forum, which cannot all be met by “quick-fix” solutions applicable to commercial cases generally. But secondly, if the courts wish to provide an effective service to international commercial litigants, they must be willing to work with commercial litigants and their legal advisers to face problems which do arise head on, and seek to arrive at user-friendly solutions. The following observations of Steel J. in the Foreword to the ‘*Commercial Court Working Party on Long Trials Report*’ should arguably reflect the aspirations of the civil courts in any international financial centre:

*“The Commercial Court was founded to deal with the disputes of the international commercial community as effectively as possible. Large scale commercial litigation is increasing and I am confident that this Report and its recommendations will ensure that the Commercial Court, together with the specialist barristers and solicitors who practise in it, will be able to meet the challenge of such litigation in the twenty-first century...”*³⁰

²⁸ Report, pages 6-12.

²⁹ Paragraphs 14, 124.

³⁰ Page 5.

A commercial silk has described this Report as “*the most important post CPR consideration of procedure and practice before the Commercial Court.*”³¹ The same writer also reflected on the problem cases which prompted the Report, acknowledging that various jurisdictions are promoting themselves as commercial dispute resolution fora:

*“Whatever the reasons for the decline in civil litigation, there was a strong perception among many that the collapse of the Equitable Life and BCCI cases in 2006 after lengthy, expensive and protracted litigation would act as an even stronger disincentive to parties locating their disputes before the Commercial Court. It was plain from these cases that “active case management” and “proportionality” were concepts which had yet to find real root in the approach of the judiciary as well as the legal profession. For the judiciary, the desire to allow the adversarial process to take its course coupled with the lack of resources to engage in “hands-on” case management is seen as a powerful explanation in this regard. For the legal profession, the perceived need to “leave no stone unturned” and “out-gun the opposition, as well as the imperative to bill fees is perceived by some as having led to “churning” and colossal billing. The net result is that parties who would otherwise have seen London and the English Commercial Court as the obvious and only choice for commercial dispute resolution are now considering a wider range of options, including venues such as Singapore, Hong Kong and Dubai.”*³²

Attention will now be given to how other British common law international financial centres deal with international commercial litigation, with a more cursory discussion of those jurisdictions with no commercial court.

New South Wales Commercial List

Establishment of Commercial Court

Sydney, ranked by the Global Financial Centres index as one of the top ten financial centres in the world, has had a commercial court for over 100 years. It was established in 1903 under the Commercial Causes Act (repealed in 1973) as a division of the state Supreme Court. The story of its establishment was told by Bergin J in a welcome address presented at a 2003 Centenary dinner³³:

³¹ Khawar Quereshi QC, ‘*Is the Commercial Court Striking Back?*’ (2008) New Law Journal 204 at 205.

³² Khawar Quereshi Q.C., ‘*Is the Commercial Court Striking Back?*’ (2008) New Law Journal 204.

³³ Commercial Causes Centenary Dinner, November 6, 2003:

http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_bergin_061103.

“The Commercial Causes Act 1903 was the idea of Bernard Ringrose Wise, the Attorney General for NSW in 1903, consequent upon representations from the commercial community and the legal profession and after discussions with Chief Justice Darley. It was his aim, as he put it, to have commercial causes dealt with “under special provisions directed to securing rapidity of decision and cheapness.”

Judges hearing commercial causes were given the statutory discretion to give directions “expedient for the speedy determination of the questions in the action really at issue between the parties”. A list of commercial causes was established at that time and the judges were given power, amongst other things, to: (a) dispense with pleadings; (b) dispense with the technical rules of evidence in certain instances; (c) require either party to make admissions with respect to any question of fact involved in the cause; and (d) settle the issues for trial.”

Distinctive approach to case management

The Court operates as a list within the Equity Division, which also has a Corporations List. The Commercial List has its own Practice Note, SC Eq 3, which came into operation on July 30, 2007. The Practice Note mandates summary and informal pleadings and a flexible approach to discovery and other interlocutory issues with a view to expedition and saving costs. Justice P.A Bergin, in a paper presented in 2005³⁴, made insightful observations about the case management approach which was required to actually realise the goals underlying the Practice Note and case management generally. Two points are particularly instructive.

Firstly, although the Court could impose its own timetable, an agreed timetable was more desirable:

“In any event it seems to me that it is preferable to have the parties communicating and agreeing to a timetable that the parties believe to be reasonable than to have the court imposing a regime in the directions hearing after sometimes heated argument involving very minor differences in dates for completion of interlocutory steps. There are some exceptions to this approach, particularly those cases in which it is apparent that the parties are not prosecuting the case diligently. There is also the capacity for the parties to request that there be no directions for a particular period so that they can pursue settlement discussions. Experience suggests that the process of consensual timetabling is more cost efficient in the long term.”

³⁴ ‘Presentation of Commercial Cases in the Supreme Court of New South Wales’, Commercial Litigation 2005, Lexis Nexis Conference, October 26, 2005:
http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_bergin261005.

Secondly, writing in 2005, he identified an important generic cause of delay in terms broadly consistent with the conclusions arrived at two years later in the 2007 English Commercial Court Long Trials Working Group Report:

*“Case management in the Commercial List is intended to assist the parties to achieve the final resolution of their disputes as quickly and fairly as possible in all the circumstances of the particular case. **There are a number of causes of delay that seem to stem from the failure to identify or appreciate the real issues between the parties at an early stage of the proceedings. It is imperative to focus on the issues that are “real” and to see if some agreement on those issues is able to be reached at an early stage of the proceedings.** When that is done the interlocutory steps are completed far more quickly than if agreement is not reached. It seems to me that cases in which such agreement is reached are those in which counsel are briefed at an early stage. When counsel (and if possible trial counsel) are briefed early there are less amendments sought on the eve of the trial. Experience shows that when counsel are not briefed until the matter is close to trial late applications for amendments to the pleadings are sometimes sought with consequential adjournments and delay.”*
[emphasis added]

Austin J in a February 9, 2004 speech, ‘*Some Reflections on Managing Corporate and commercial Cases*’³⁵ outlines the functioning of the Corporations List (to which three judges are assigned) and the Commercial List (to which three judges are assigned). The New South Wales approach helps to highlight the different character between applications relating to companies which are not essentially contentious litigation in the general sense and commercial litigation designed to resolve commercial disputes which do not involve internal corporate governance, insolvency or corporate restructuring issues. This mirrors the English approach of a separate “companies’ court”. All of these principles, it might be contended, have no demonstrable link with Sydney’s status as an international financial centre. It is clear, however, that the New South Wales Supreme Court is playing an active role in ensuring that it is in a position to efficiently cope with the international dimension of commercial litigation.

The New South Wales Chief Justice, giving the Keynote Address at the June 2007 LAWASIA Conference made a number of interesting observations about the importance of judicial cooperation to deal with cross-border commercial litigation issues. Having pointed out the commercial cost of litigation delays, not just to individual litigants, but also whole economies, he observed:

“There is, in my opinion, considerable scope for judges in the region, either separately or together with commercial practitioners, to exchange information about their practices with respect to commercial litigation generally and, particularly, about

³⁵ Law Council of Australia, Business Law Section Workshop:
“http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_austin_090204”.

international commercial litigation. Some element of harmonisation using the ALI/UNIDROIT Model Principles as a standard should not be beyond the realms of achievement with respect to procedural matters. Interaction amongst judges, perhaps in a Conference devoted to these issues, would enhance the understanding of the judiciary of one nation about the practices of other nations and enable judges to make decisions on cases involving cross-border disputes with a higher level of understanding of what is likely to happen if the court declines jurisdiction in favour of another.

The Model Principles are not, of course, a treaty or convention. They may be adopted in whole or in part in any jurisdiction by statute or by rules of court. However, some degree of harmonisation, by reference to an agreed model such as this, could significantly increase the degree of confidence that judges and lawyers have about jurisdictions with which they are not familiar. Such confidence is essential if we are to achieve the level of cooperation between courts now required by the extent of commercial interaction across borders. It is also desirable to ensure that an appropriate level of judicial comity is adopted in the course of making decisions to accept or decline jurisdiction, under the relevant domestic rule in cases of venue disputation.”³⁶

Chief Justice Spiegelman identified forum disputes and cross-border insolvencies as particularly important topics in the international commercial dispute resolution context. He also observed:

“The expansion of international commercial litigation makes the established mechanisms for the provision of judicial assistance by the courts of one jurisdiction to those of another jurisdiction of even greater significance. Furthermore, there is a need for the development of new modes of assistance.”³⁷

Lessons from the New South Wales Commercial List experience

It seems clear from the New South Wales experience that the task of judicially managing commercial litigation gives rise to similar broad challenges to those experienced in London. The need for a Commercial List was acknowledged over a century ago, yet (as in the case of London) no “magic bullet” has been found to obviate the need to grapple with practical case management issues which vary from case to case while seeking to develop appropriately flexible umbrella procedural guidelines. The most important goal appears to be to avoid the usually negative economic cost of unnecessary delays in commercial litigation. This jurisdiction has also acknowledged the importance of seeking to develop new forms of judicial cooperation to deal with cross-border commercial dispute resolution issues, which appear likely to increasingly come to the fore.

The Ontario Commercial List

³⁶ Op. cit. supra, note 2, pages 15-16.

³⁷ Ibid, at page 40.

The Commercial List in Ontario in 1991 effectively created a commercial court within the Ontario Superior Court of Justice based in Toronto, one of the leading financial centres in the world. The most recent Commercial List Practice Direction operative as of April 1, 2002 states³⁸:

“The Commercial List was established in 1991 for the hearing of certain actions, applications and motions in the Toronto Region involving issues of commercial law. The special procedures adopted for the hearing of matters on the Commercial List expedite the hearing and determination of these matters and they have met with considerable approval...”

...The Commercial List remains, in the first instance, voluntary, except for bankruptcy matters. Applicants and plaintiffs may continue to set other matters that qualify for the Commercial List down for hearing either on the Commercial List or elsewhere. There is, however, provision for any party to have a matter transferred to, or removed from, the Commercial List.

A continuous re-evaluation process by the Court and the Commercial List Users' Committee determines whether (i) other matters should be added to those matters which may be listed on the Commercial List or (ii) its procedures should be further modified or continued. This Practice Direction is to govern the conduct of matters on the Commercial List after April 1, 2002, subject to further amendments as required.”

So the explicit rationale for the establishment of the commercial court was to “*expedite the hearing and determination of these matters*”. As in London, there is a “*Commercial List Users' Committee*” tasked with constantly reviewing the procedural regime governing how commercial disputes are adjudicated. Paragraph 53 of the Practice Direction provides in this regard as follows:

“A Commercial List Users' Committee has been established. It is comprised of members of the judiciary who sit on the Commercial List from time to time, of practitioners who are familiar with the operation of the Commercial List and who are nominated by relevant Bar organizations, and of a representative of Courts Administration from the Commercial List Office. The names of the members of the Users' Committee may be obtained from the Commercial List Office. The Users' Committee meets regularly to consider improvements to the organization and operation of the Commercial List and to make recommendations to the Regional Senior Justice and the Chief Justice in that regard. The Users' Committee welcomes suggestions, compliments and complaints from other practitioners who have had cases on the Commercial List. Communications may

³⁸ <http://www.ontariocourts.on.ca/scj/en/notices/regional/commercial.htm>.

be sent to the Commercial List Office, which will direct them to the office of the Regional Senior Justice.”

As initially in London but unlike in New South Wales, it appears that the Ontario Commercial List was not established by statute. Order 77.01 (2)(c) of the Rules of Civil Procedure provides that this order’s case management rules do not apply to “*actions or applications placed on the Commercial List established by Practice Direction in the Toronto Region.*”³⁹

Distinctive approach to case management

The Ontario approach, somewhat like New South Wales, has not followed the English Commercial Court technique of enacting a comprehensive procedural code for commercial cases. However, the Commercial List is exempted from the standard civil case management rules, and a remarkably concise Practice Direction distils the rules which do apply.

The dominant principle appears to be the following: “5) *Co-operation, communication and common sense shall continue to be the principles of operation of the Commercial List*”. This is reflected in the provisions made in relation to the assignment of judges to specific cases and the central task of case management itself. Thus the Practice Direction makes the following provision in the former regard:

“34) It is anticipated that a judge who determines a substantive proceeding in a matter will continue to hear all subsequent substantive proceedings in that matter. Arrangements for these subsequent proceedings may be made directly with the Commercial List Office. The continuing judge should be contacted in writing about the nature of the matter to be heard and a list of times which are convenient to all counsel, so that the judge can conveniently schedule the matter or can refer it back to the Commercial List Office for re-assignment. For matters of sufficient complexity or duration, in the event that the original judge is not sitting on the Commercial List at the time or has not then been assigned to a future Commercial List team, a request may be made for the appointment of new continuing judge.”

The governing case management principles appear to be encapsulated in the immediately following provision:

“35) It is expected that most matters of substance and of an ongoing nature on the Commercial List shall be subject to a form of case management by a Commercial List judge. Paragraph 34) already provides for significant informal case management for each case on the Commercial List. When a matter is transferred to the Commercial List, when the trial of an issue is directed or in any other matter where a party moves

³⁹ R.R.O. 1990, Regulation 174, as at January 21, 2008: <http://www.e-laws.gov.on.ca/navigation?file=currencyDates&lang=en>.

for case management and a Commercial List judge so directs, a specific case management judge may be appointed.”

36) Where a Commercial List matter is subject to specific case management, a Scheduling Conference (if not already held at the time of transfer or otherwise) shall be held with the case management judge not later than 1 month after the close of pleadings or the date of the order referred in paragraph 35), to determine a plan to process the case in a timely and reasonable fashion and to deal with any matters of a procedural nature which should be addressed at an early stage of the proceedings. The prospects for settlement should also be addressed. The results of a Scheduling Conference will be recorded in a Case Timetable.”

The central aim of the Scheduling Conference is “to determine a plan to process the case in a timely and reasonable fashion and to deal with any matters of a procedural nature which should be addressed at an early stage of the proceedings.” These objectives are, however, not left to chance. These core principles are in practice supplemented by Request and Case Timetable Forms (Practice Direction, paragraph 55). A week before the Scheduling Conference, the parties may also be required to complete a Trial Requirements Hearing Memorandum, which lists the issues in the case and the “cast of characters”⁴⁰.

The first twelve years’ experience of the Ontario Commercial List is explored in more depth in an illuminating paper presented in 2003 by now retired commercial judge James Farley ‘*Efficient Court Administration: Effective Techniques for Real Time Litigation, Court Administration and Case Management. The Need for Effective, Efficient and Timely Delivery of Justice*’. Justice Farley makes the vivid distinction between cases which require urgent resolution (“*real time cases*”), and those which do not (“*autopsy*” litigation). He suggests the ideal completion time for autopsy litigation as between 1 and 1½ years with an outside limit of 3 years⁴¹. In a practice which may have resonance for the circumstances of smaller jurisdictions, it appears that where Commercial List judges are not fully engaged with list matters, they are assigned urgent or other matters in the ordinary List⁴².

Lessons from the Ontario Commercial List experience

The Ontario Commercial List, based in Toronto, a prominent international financial centre, appears to support the notion that attracting international business requires the courts, as well as other branches of government and private service providers, to provide an efficient service for international commercial litigation. Judicial case management appears to be flexible but clearly focussed on efficiency and expedition, while the procedural framework is monitored

⁴⁰ Justice James Farley, ‘*Efficient Court Administration: Effective Techniques for Real Time Litigation, Court Administration and Case Management. The Need for Effective, Efficient and Timely Delivery of Justice*’, Paper presented at World Bank Global Judges Forum, ‘Commercial Enforcement and Insolvency Systems’, Malibu, California, May 19-23, 2003: <http://www.iiiglobal.org/country/canada.html>.

⁴¹ Page 2.

⁴² Page 6.

not just by the commercial court itself, but also by those who use the court. Justice Farley, concluding his above-mentioned paper, emphasised the important economic role that appropriately-run courts can play in their respective jurisdictions:

*“Lastly, it is important that the court system in any country be set up in such a way that the public and litigants have the utmost confidence in it. This is particularly important where there may be a high degree of foreign participation in the lawsuits. Needless to say the court system must be blind as to the nationality or domicile of a litigant (except as to security for costs concerns.) Otherwise needed foreign investment will tend to dry up or become considerably more expensive, thereby depriving the domestic economy of the opportunity to fully develop its growth potential and deprive the society of the economic engine working to efficiency to fund social needs.”*⁴³

Hong Kong Special Administrative Region Commercial List

Establishment of Commercial Court

The Hong Kong Commercial List appears to have been established administratively as a division of the High Court under Order 72 of the Rules of the High Court while Hong Kong was still under British control. As a Special Administrative Region of the People’s Republic of China, this judicial structure seems to have been preserved.

Precisely when the Commercial List was first established is unclear but the High Court’s online judgments in respect of the Commercial List start with a judgment delivered in 1979 in respect of a matter commenced in 1977⁴⁴. Although little heralded thus far, it appears to have been in existence for over 30 years. Its significance may be somewhat muted because the High Court has other special lists which deal with matters which may broadly be described as “commercial”. There are Companies Winding-Up and Construction and Arbitration Lists, for instance⁴⁵. Order 72 provides in salient part as follows:

“SPECIAL PROVISIONS AS TO PARTICULAR PROCEEDINGS

1. Application and interpretation (O. 72, r. 1)

(1) This Order applies to particular proceedings, and the other provisions of these rules apply to those actions subject to the provisions of this Order.

(2) In this Order "particular proceedings" (特定法律程序) means a type of

⁴³ Page 25.

⁴⁴ *Manchu Gems Ltd.-v- Pan American Airways*, HCCL000141-1977, Judgment dated February 19, 1979, Cons J (later Sir Derek Cons JA of the Hong Kong and Bermuda appeal courts).

⁴⁵ See: <http://legalref.judiciary.gov.hk/lrs/common/ju/judgment>.

proceedings for which provision has been made by the Chief Justice for separate listing.

2. The Various Lists (O. 72, r. 2)

(1) There may be lists, in which actions and other proceedings may be entered in accordance with the provisions of this Order, and a judge shall be in charge of each list. (L.N. 307 of 1998)

(2) In this Order references to the judge shall be construed as references to the judge for the time being in charge of a particular list.

(3) The judge shall have control of the proceedings in his particular list and, subject to the provisions of this Order and to any directions of the judge, the powers of a judge in chambers (including those exercisable by the Registrar) shall, in relation to any proceedings in such an action (including any appeal from any judgment, order or decision of the Registrar, given or made prior to the transfer of the action or proceedings to the relevant list) be exercisable by the judge.

(4) Paragraph (3) shall not be construed as preventing the powers of the judge being exercised by some other judge.

4. Entry of action in particular list when action begun

(O. 72, r. 4)

(1) Before a writ or originating summons by which particular proceedings are to be begun is issued out of the Registry, it may be marked in the top left hand corner with words identifying the relevant list, and on the issue of a writ or summons so marked the action begun thereby shall be entered in that list.

(2) If the plaintiff intends to issue the writ or originating summons by which particular proceedings are to be begun out of the Registry and to mark it in accordance with paragraph (1), and the writ or the originating summons, as the case may be, is to be served out of the jurisdiction, an application for leave to issue the writ or summons and to serve the writ or the summons out of the jurisdiction may be made to the judge.

(3) The affidavit in support of an application made to the judge by virtue of paragraph (2) must, in addition to the matters required by Order 11, rule 4(1), to be stated, state that the plaintiff intends to mark the writ or originating summons in accordance with paragraph (1) of this rule.

(4) If the judge hearing an application made to him by virtue of paragraph (2) is of opinion that the action in question should not be entered in the list in question, he may adjourn the application to be heard by the Registrar.

5. Transfer of action to particular list after action begun (O. 72, r. 5)

(1) At any stage of the proceedings in any action any party thereto may apply by summons to the judge to transfer the action to a particular list.

(3) If, at any stage of the proceedings in any action, it appears to the Court that the action may be one suitable for trial in a particular list and any party wishes the action to be transferred to that list, then the Court may adjourn any hearing so that it can proceed before the judge and be treated by him as a summons to transfer the action to that list.

6. Removal of action from particular list (O. 72, r. 6)

(1) The judge may, of his own motion or on the application of any party, order an action in a particular list to be removed from that list. (L.N. 126 of 1995)

(2) Where an action is in a particular list by virtue of rule 4, an application by a defendant or third party for an order under this rule must be made within 7 days after giving notice of intention to defend.

7. Pleadings in particular proceedings (O. 72, r. 7)

(1) The pleadings in an action in a particular list may be in the form of points of claim, or of defence, counterclaim, defence to counterclaim or reply, as the case may be, and must be as brief as possible.

(2) Without prejudice to Order 18, rule 12(1), no particulars shall be applied for or ordered in an action in the particular list designated the commercial list except such particulars as are necessary to enable the party applying to be informed of the case he has to meet or as are for some other reason necessary to secure the just, expeditious and economical disposal of any question at issue in the proceedings.

(3) The foregoing provisions are without prejudice to the power of the judge to order that an action in a particular list shall be tried without pleadings or further pleadings, as the case may be.

8. Directions in particular proceedings (O. 72, r. 8)

(1) Notwithstanding anything in Order 25, rule 1(1), any party to particular proceedings may take out a summons for directions before the pleadings are deemed to be closed.

(2) Where an application is made to transfer an action to a particular list, Order 25, rules 2 to 7, shall, with the omission of so much of rule 7(1) as requires the parties to serve a notice specifying the orders and directions which they desire and with any other necessary modifications, apply as if the application were a summons for directions...

(Enacted 1988)"

This specialist list system, mirroring to some extent the way in which the English Commercial Court was apparently initially established by rules of court, is concisely

described in Colman, Bryan and Foxton (eds.), *‘Encyclopedia of International Commercial Litigation’*⁴⁶ as follows:

“Under the Rules of the High Court the Chief Justice has power to make special provision for particular types of proceedings... Thus certain business before the Court of first Instance is dealt with by specialist judges in charges of lists, e.g. admiralty, companies, bankruptcy, commercial, arbitration... matters.”

However, the most authoritative commentary on the Hong Kong Rules and seemingly the leading practitioner’s text is edited by Court of Final Appeal Justice Kwan, *‘Hong Kong Civil Procedure 2008’*⁴⁷. The commentary set out in paragraphs 72/2/8-72/2/9 illuminatingly provides as follows:

“It has already been pointed out that the pre-1988 version of O.72 was restricted to commercial actions. While it is not clear exactly when the Commercial List was set up in Hong Kong, it seems to have been introduced in the late 1960s although it did not become active until 1976: see Idmiston Ltd v. Asian Master Enterprises Ltd & Another, unreported, Civ. App. Nos 1, 2, 3 of 1989, March 17, 1989, [1989] H.K.L.Y. 863, CA. A point was taken in K Master & Co. Ltd v. Eagle Star Insurance Co. Ltd [1968] H.K.L.R. 215 (Blair-Kerr J.⁴⁸) that there was in fact no Commercial List in Hong Kong (and thus, so ran the argument in that case, O.72, r.10 had no application). This was rejected. It was held that there clearly was a Commercial List in Hong Kong. Reference was made in the judgment to a Practice Direction dated September 1, 1967, which referred to the Commercial List.

For a useful discussion on the history and practice of the Commercial List, see Ma J., "Litigating in the Commercial List" (Law Lectures for Practitioners, 2002).

There is no exhaustive list of matters that are considered appropriate to be heard in the Commercial List. In Idmiston Ltd v. Asian Master Enterprises Ltd & Another (above) the following statement of the type of causes appropriate to be dealt with by the English Commercial Court, was said to be a useful guide as to what was a commercial cause: ‘causes arising out of the ordinary transactions of merchants and traders; amongst others, those relating to the construction of mercantile documents, export or import of merchandise, affreightment, insurance, banking and mercantile agency and mercantile usages’.

Distinctive approach to case management

⁴⁶ (Kluwer Law International: Alphen aan den Rijn, 2001), ‘Hong Kong’, paragraph A1.5.

⁴⁷ Kwan and Rogers (eds), Sixth Edition (Sweet & Maxwell Asia: Hong Kong, 2007).

⁴⁸ Sir Alastair Blair-Kerr was later a judge of both the Hong Kong and Bermuda Courts of Appeal.

The present rule permits a distinctive approach to case management of cases in the Commercial List. Ordinarily, under Order 25 rule 1, a summons for directions must be taken out after the pleadings have closed. Order 72 rule 8 provides as follows:

“(1) Notwithstanding anything in Order 25, rule 1(1), any party to particular proceedings may take out a summons for directions before the pleadings are deemed to be closed.”

This permits earlier case management to take place with respect to cases in the Commercial List than in ordinary civil litigation. The Hong Kong rules are based on a pre-CPR version of the English rules, but nevertheless it appears that the Hong Kong courts in practice have regard to CPR notions of case management. This is supported by the following extracts from the judgment of Madam Justice Kwan dealing with an application to stay pending appeal eight consolidated actions, including an action commenced in the Commercial List. In the Court of First Instance, Miscellaneous Proceedings No. 4146 of 2001, *In the Matter of Chime Corporation Limited, et al*⁴⁹, she stated as follows:

“14. The correct approach, as submitted by Mr. Potts and Mr. Ng, in an application for a temporary stay of proceedings is “to consider the balance of convenience and fairness as between the parties” (Alfred McAlpine Construction Ltd. v. Unex Corporation Ltd. (1994) 70 BLR 26 at 45C to D, per Glidewell LJ; applied in Clinton Engineering Ltd. v. B-Tech (Holdings) Ltd. [2001] HKCU 1002 at para. 9 and SWE Ltd. v. Chong Lai Fun, HCA No. 1064 of 2004, 28 October 2004, Reyes J, pages 5 and 6; see also Halsbury’s Laws of Hong Kong, Vol. 5(2), footnote 7 to para. [90.0938]) and the court should exercise its discretion in such a manner “to ensure that its procedures are used in a logical, fair and cost-efficient manner” (SWE Ltd., page 5). The question at hand is not a question of deprivation of the right of a litigant to proceed altogether, but a question of case management...

24. It was accepted by all that the observations of Lord Scott are obiter dicta. It was also not disputed that they were made in the context of the Chime B Petition. That said, it is pertinent to note that his observations had the full agreement of all the other members of the court. As statements on case management go, it is difficult to see how they could form part of the ratio decidendi of a judgment of the Court of Final Appeal, as one would expect case management issues rarely to reach our final court. I agree with Mr. Potts the proper inference is that the Court of Final Appeal had seized on the opportunity to voice its serious concerns, unanimously and firmly, about the way litigation had been proceeded with. Although the court had heard no argument as to whether the Chime B Petition or any other action brought by the administrators should be stayed, the court nevertheless decided, of its own motion, to declare in paragraph 66 of the CFA Judgment that the Chime B Petition ‘cries out for firm and effective case

⁴⁹ Judgment dated March 11, 2005.

management'. The emphatic statements on case management were not made in a vacuum, as the court was apprised of the procedural history of the Chime B Petition, it was also aware of the Chime A Action and its purport. The court also expressed its concerns from the point of view of the judiciary in paragraph 55, that if the Probate Appeal were to be determined in Mrs. Wang's favour, the Chime B Petition "will be pointless and an inexcusable waste of money, time and judicial resources of Hong Kong", and in paragraph 67, that prosecution of the complaint relating to the loan to CAL would 'make demands on the judicial resources of Hong Kong that it would be unreasonable for any litigant to expect to be met unless it were plainly necessary in the interests of justice for that to be done'. It can hardly be inappropriate for the court to express its concerns on a serious matter troubling it even though the parties did not seek its views. The criticisms levied on behalf of the administrators are unjustified."

In fact, 'Hong Kong Civil Procedure 2008' provides further support for the view that a distinctive case management approach, similar to that adopted by the English Commercial Court and its other Commonwealth progenitors. According to paragraph 72/2/10:

"It is clear that the Commercial List is modelled on the Commercial Court in England. 'The English Commercial Court celebrated its centenary in March 1995. Our Commercial Court has only a recent history but is expected to be run on the same format': per Liu J.A. in Wu v. Tsoi Kay & Another, unreported, Civ. App. No. 3 of 1998, July 23, 1998, [1998] H.K.L.R.D. (Yrbk) 551, CA. There is much literature on the origin and development of the English Commercial Court: see for example The Practice and Procedure of the Commercial Court: Colman & Lyon (4th ed.). The Commercial Court was instituted in England "so that it might solve the disputes of commercial men in a way which they understood and appreciated, and it is a particular misfortune for it if it has to deny that service to any except those who are clearly undeserving of it": per Devlin J. in St. John Shipping Corp. v. Joseph Rank Ltd [1957] Q.B. 267, at 289 (cited by Fuad J.A. in the Court of Appeal in Whitehall Finance Ltd v. Win and Fair Securities Co. Ltd [1985] 1 H.K.C. 68, at 76-77). From time to time, much assistance has been derived from the practice of the English Commercial Court, e.g. in Mareva injunctions (see Chow Chor Leung v. Rafaella Sportswear Inc. & Another [1990] 1 H.K.L.R. 449, at 451 (Bokhary J.)) or in arriving at the appropriate interest rate for damages in commercial actions (see Komala Deccof & Co. SA & Others v. Perusahaan Minyak dan Gas Bumi Negara (Pertamina) [1984] H.K.L.R. 219 at 223, CA.

In the Commercial List, judges will take a more active role in case management. Any application before the court will be seen against the overall case management of the action: see PCCW-HKT International Ltd v. New World Telephone Ltd [2001] 2 H.K.L.R.D. 141 at 149-150 per May V.-P. (these dicta were approved in HBZ Finance Ltd v. Nippon Yusen Kaisha, unreported, Civ. App. 3185 of 2001, June 12, 2002, [2002] H.K.E.C. 723).

The approach of judges in Commercial List actions has often been robust. Delays are often not tolerated. "In a Commercial Court, disputes are or are intended to be expeditiously and efficiently resolved without necessary formality. ... In explaining the way in which the English Commercial Court did its work to the University Law Society on November 18, 1920, Lord Justice Scrutton observed, 'The founders of the Commercial Court said: "Our object shall be this: Get the parties before us the moment the writ is issued".' ... The parties seemed to have paid no heed to this advice.' : per Liu J.A. in Wu v. Tsoi Kay. While obviously in the present day, it is not possible to get before the court soon after the writ is issued, nevertheless parties should not expect leisurely timetables in the Commercial List..."

This illustrates that common law civil courts have considerable flexibility under their inherent jurisdiction to manage commercial cases in an efficient manner without being explicitly empowered to do so by modern case management rules. Nevertheless, a recent Civil Justice Reform Interim Report has recommended amendments to the current High Court Rules which would (as has been done in Bermuda, Cayman and New South Wales) introduce a new Order 1A entitled “*Underlying Objectives*”, and amend Order 25 rule 8(1) to replace the term “*summons for directions*” with “*case management summons*”⁵⁰. In the meantime, it appears that the spirit underlying the proposed amendments is already being adhered to by the courts.

Lessons from Hong Kong experience

The Hong Kong Commercial List experience provides further ammunition for the argument that leading international financial centres appear to benefit from providing a commercially-oriented dispute resolution service to the commercial litigants whose business transactions involve the host forum. The English Commercial Court model is clearly flexible enough to be adapted to similar commercial environments in distant corners of the world.

Most significant, perhaps, is the evidence that judicial approach, attitude and practice, rather than elaborate procedural rules, may hold the key to effectively managing international commercial disputes. This may explain why other leading international financial centres, such as Singapore and Cayman, have thus far managed to thrive without apparently establishing specialist commercial courts or lists⁵¹.

21st century recent developments

Establishment of Bermuda Commercial Court

The Bermuda Commercial Court was established under Order 72 of the Rules of the Supreme Court as amended with effect from January 1, 2006 by The Rules of the Supreme Court Amendment Rules 2005. The changes were enacted by Chief Justice Richard Ground under section 62 of the Supreme Court Act 1905. The initial stimulus for the creation of a specialist court undoubtedly came when a large trust case had to be aborted in 2001 because the trial judge’s contract expired in the midst of the trial and was not renewed. The case management of the trial judge and Bermuda’s capacity for handling large commercial cases was criticised in the press, to the merriment (no doubt) of commercial lawyers in Bermuda’s competitor jurisdictions. The conduct of the judge and leading counsel was the subject of further uncomplimentary public comment in David RL Litchfield, ‘*The Thyssen Art Macabre: the History of the Thyssens*’.⁵² The case settled not long after the first trial was aborted.

⁵⁰ See: <http://www.civiljustice.gov.hk>, and October 18, 2007 revised draft Rules of the High Court (Amendment Rules 2007).

⁵¹ The ‘Encyclopedia of International Commercial

⁵² (Quartet Books: London, 2006), Chapter XI.

But in fairness to the trial judge (who had an impressive record himself as a commercial litigator), the problems he faced were not wholly different to those faced by his London counterparts in the cases which more recently provoked the *'Report and Recommendations of the Commercial Court Long trials Working Party'* published in London in December, 2007 (discussed above). How to balance the fair hearing rights of a plaintiff, advancing a substantial and complex claim in a case presented by eminent leading counsel, with the wider interests of economy and efficiency will always be a challenging task. Moreover, modern notions of active judicial case management had hardly become familiar in London, let alone thought of in Bermuda when the *Thyssen* litigation began in the late 1990's. Nevertheless, by early 2003 Bermudian commercial litigators were calling for a commercial court.⁵³

In February 2004, then Attorney General and Minister for Justice Senator the Honourable Larry Mussenden appointed a Justice Review Committee which, chaired by Justice Norma Wade-Miller, reported by the end of the following month. The Bermuda Bar Council in their submission to the Committee pointed out the need to "[c]reate a commercial court or designate a full-time dedicated Commercial Judge"⁵⁴. One of Bermuda's most prominent commercial advocates made an even more explicit recommendation⁵⁵:

"The establishment of a Commercial Court, as a division of the Supreme Court, with the suitable allocation of a particular judge or judges with a strong commercial background would assist in raising this jurisdiction's profile as a highly developed offshore jurisdiction with the capability and dedicated resources available to deal with complex commercial litigation."

The Justice Review Committee Report made the following recommendation in paragraph 7.4.4:

*"The Chief Justice amends as soon as practicable the existing Rules of the Supreme Court to create a Commercial Division of Supreme Court similar to that established under Part 71 of the Jamaican CPR..."*⁵⁶

This recommendation was substantially implemented in Order 72 of the Rules of the Supreme Court which came into effect on January 1, 2006, save that the provisions enacted follow more closely the English Supreme Court Practice 1999 version of the rule. Order 72 created both a Commercial Court as a division of the Supreme Court and a Commercial List:

⁵³ *'Lawyers argue the case for a commercial court'*, The Royal Gazette, January 16, 2003: <http://www.royalgazette.com> .

⁵⁴ March 12, 2004, paragraph 2.

⁵⁵ Narinder K. Hargun, Partner, Conyers Dill & Pearman, Submission to Justice Review Committee dated March 10, 2004, page 1.

⁵⁶ Report dated March 31, 2004.

“72/1 Application and Interpretation

1 (1) *This Order applies to commercial actions in the Supreme Court, and the other provisions of these Rules apply to those actions subject to the provisions of this Order.*

(2) *In this Order "commercial action" means any claim or counterclaim arising out of the transaction of trade and commerce and —*

(a) *includes any claim or counterclaim relating to —*

(i) *a business document or contract;*

(ii) *the export or import of goods;*

(iii) *the carriage of goods by land, sea, air or pipeline;*

(iv) *the exploitation of oil and gas reserves or other natural resources;*

(v) *insurance and re-insurance;*

(vi) *banking and financial services;*

(vii) *the operation of markets and exchanges;*

(viii) *the purchase and sale of commodities;*

(ix) *the construction of ships;*

(x) *business agency; and*

(xi) *arbitration.*

(b) *includes any application under the Companies Act 1981.*

(3) *There is hereby established, as part of the Supreme Court, a Commercial Division (to be known as the Commercial Court) to take such causes and matters as may in accordance with this Order be entered in the commercial list.*

(4) *The judges of the Commercial Court shall be known as Commercial Judges and shall be such of the judges of the Supreme Court as the Chief Justice may from time to time designate to be Commercial Judges.*

72/2 The Commercial List

2 (1) *There shall be a list, which shall be called "the commercial list", in which commercial actions in the Supreme Court may be entered in accordance with the provisions of this Order, for trial in the Commercial Court, and the Chief Justice or one of the Commercial Judges nominated by the Chief Justice shall be in charge of that list.*

(2) *All proceedings in the commercial list will be heard or determined by a Commercial Judge, except that —*

(a) another judge of the Supreme Court may hear urgent applications if no Commercial Judge is available; and

(b) unless a Commercial Judge otherwise orders, any application relating to the enforcement of a Commercial Court judgment or order for the payment of money may be dealt with by any judge of the Supreme Court...”

The institutional arrangements for Bermuda’s Commercial Court are more formal than those in Hong Kong, New South Wales and Ontario where only a “list” is established and judges are assigned to it. The Bermuda version formally creates a separate division of the Supreme Court, and provides for judges to be designated as “*Commercial Judges*”. The Chief Justice and two other puisne judges were designated as such in January, 2006. However, as appears to be the case elsewhere, cases can be initially filed in the Commercial List or transferred into or out of it. The number and international profile of cases filed in or transferred into the Commercial List in Bermuda during the first two years of the List’s establishment is believed to be as follows⁵⁷:

	2006	2007	Total	No. of Cases Involving Overseas Parties	No. of Cases Involving Exempt Companies⁵⁸
No. of Cases	52	64	116	32	73

The above figures suggest that nearly two-thirds of Commercial List cases are international business-related as exempt companies under Bermuda company law are based in Bermuda, majority foreign-owned, and only permitted to carry on business outside of Bermuda.

Distinctive case management approach

The following provisions of Order 72 reflect the time-saving and early case management aspirations of the new civil procedure regime:

“72/7 Pleadings in commercial list actions

7 (1) *The pleadings in an action in the commercial list must be in the form of points of claim, or of defence, counterclaim, defence to counterclaim or reply, as the case may be and must be as brief as possible.*

⁵⁷ The author is indebted to the researches of Sarina V. Bean, Law Researcher, Supreme Court of Bermuda.

⁵⁸ Including exempted partnerships.

(2) *Without prejudice to Order 18, rule 12 (1) no particulars shall be applied for or ordered in an action in the commercial list except such particulars as are necessary to enable the party applying to be informed of the case he has to meet or as are for some other reason necessary to secure the just, expeditious and economical disposal of any question at issue in the action.*

(3) *The foregoing provisions are without prejudice to the power of a Commercial Judge to order that an action in the commercial list shall be tried without pleadings or further pleadings, as the case may be.*

72/8 Directions in commercial list actions

8 (1) *Notwithstanding anything in Order 25, rule 1 (1) any party to an action in the commercial list may take out a summons for directions in the action before the pleadings in the action are deemed to be closed.”*

Order 1A embodies the English CPR overriding objective, without the embellishments of re-naming it as occurred in New South Wales (“*overriding purpose*”) and Hong Kong (“*underlying objective*”). Later the same year, the Chief Justice issued the following complementary Practice Direction:

“Commercial Court

1. *Practitioners are reminded that Ord. 72 is now in effect, and encouraged, in appropriate cases, to issue new proceedings in accordance with Ord. 72, r. 4, or apply for transfer in accordance with Ord. 72, r. 5.*

Case Management

2. (i) *Ord. 1A (‘the Overriding Objective’) is now in effect and will be applied. Pursuant to Ord. 1A, r. 4, the court is obliged to further the overriding objective by actively managing cases.*

(ii) *The court will accordingly exercise its discretion to limit (a) discovery; (b) the length of oral submissions; (c) the time allowed for the examination and cross-examination of witnesses; (d) the issues on which it wishes to be addressed; (e) reading aloud from documents and authorities.*

(iii) *Unless otherwise ordered, every witness statement shall stand as the evidence in chief of the witness concerned.*

(iv) *R.S.C., Ord. 18, r. 7 (facts, not evidence, to be pleaded) will be strictly enforced. In advance of trial parties should use their best endeavours to agree which are the issues or the main issues, and it is their duty so far as possible to reduce or eliminate the expert issues.*

(v) *R.S.C., Ord. 34, r. 10(2)(a) to (c) (the court bundle) will be strictly enforced. Documents for use in court should be on letter size paper where possible, contained in suitably secured bundles, and lodged with the court at least two clear days before the hearing of an application or a trial. Each bundle should be paginated, indexed, wholly legible, and arranged chronologically and contained in a ring binder or a lever-arch file. Where documents are copied unnecessarily or bundled incompetently the cost will be disallowed.*

(vi) *In cases estimated to last for more than 5 days a pre-trial review must be applied for or in default will be directed by the court. In any other case the court may direct a pre-trial review, either of its own motion or on the application of any party, if considered appropriate. A pre-trial review should when practicable be conducted by the trial judge between eight and four weeks before the date of trial and should be attended by the advocates who are to represent the parties at trial.*

(vii) *At trial, the opening speech should be succinct. At its conclusion other parties may be invited briefly to amplify their skeleton arguments. In a heavy case the court may in conjunction with final speeches require written submissions, including the findings of fact for which each party contends.*

Summonses for Directions

3. (i) *The court's primary opportunity for case management is the summons for directions. In order to permit the court to use that opportunity to comply with its obligations, in future trial directions will not be given by consent, and counsel having conduct of the case must attend on the hearing of the summons for directions. For the avoidance of doubt this does not apply to the giving of directions for the hearing of contested summonses, which can continue to be dealt with by consent.*

(ii) *Counsel are reminded of their duties under Ord. 25, r. 7 to make all interlocutory applications on or under the summons for directions, and respondents to the summons are reminded of their duty to consider what directions they want and give notice thereof not less than seven days before the hearing of the summons for directions.*

(iii) *Counsel's attention is also drawn to Ord. 25, r. 3 and the particular matters for consideration listed therein.*

(iv) *In heavy or complex cases counsel should always apply for an appropriate direction under Ord. 25, r. 3(2) that a summary of the issues involved; a summary of the propositions of law to be advanced together with a lists of authorities to be cited; and a chronology should be included in the court bundle to be prepared under Ord. 34, r. 10.*

Skeleton Arguments

4. (i) *Not less than three clear days before a hearing to which this direction applies each party should exchange and lodge with the court skeleton arguments or written submissions, summarizing that party's submissions in relation to each of the issues, and citing the main authorities relied upon (which may be attached).*

(ii) *The copy lodged with the court should be marked for the attention of the Judge to whom the hearing is assigned, or, if the Judge is not then known, for the attention of the Registrar.*

(iii) *This direction applies to the trial of any action and to any interlocutory application which has been given a special appointment by the Registrar for hearing.*

Unnecessary Copying

5. *This direction applies to the copying of authorities and other material for the use of the Court on any hearing, whether interlocutory or final. Counsel should do their best to minimize unnecessary copying, and in particular counsel should:*

(a) *only supply cases which it is intended to cite in argument;*

(b) *where the reference is to a short statement of principle, and not the facts or argument in the case, copy only the head-note and the relevant page;*

(c) *assume that the Judge has access to the Revised Laws of Bermuda, and never copy whole statutes.”⁵⁹*

Lessons from Bermuda experience

The Bermuda experience does also illustrate that commercial judges need not be commercial litigation “thoroughbreds”. The Commercial Court was established by a Chief Justice who developed an impressive track record as a specialist commercial judge after a legal career mostly devoted to the non-commercial public legal service. However, it is too early to assess how the Commercial Court has changed the approach to judicial management of commercial cases in Bermuda, which is probably the first small island offshore forum to establish such a court. However, it does suggest a widening consensus that common approaches to international commercial dispute resolution are indispensable tools in an increasingly interconnected world.

Other common law commercial courts

Brief mention must be made of two other recent developments in the common law world. Firstly, the Dubai International Financial Centre Court and the BVI Commercial Division.

⁵⁹ Ref A/50, Circular No. 8 of 2006, May 25, 2006; [2006] Bda LR 35.

Dubai

The Emirate of Dubai is now ranked in the top 25% of global financial centres. Although neither a British Overseas Territory nor a member of the Commonwealth, it has established a Commercial Court which is empowered to apply the law of England and Wales. The 2004 Law of the Judicial Authority of the International Financial Authority⁶⁰ applies to what seems to be a special tax-free economic zone within the Emirate⁶¹. Article 5 creates a Court of First Instance and a Court of Appeal. The jurisdiction of the Court of First Instance is defined as follows:

“(1) Without prejudice to paragraph 2 of this Article, the Court of First Instance shall have the exclusive jurisdiction over:

- (a) civil or commercial cases and disputes involving the Centre or any of the Centre’s Bodies or any of the Centre’s Establishments.*
- (b) civil or commercial cases and disputes arising from or related to a contract that has been executed or a transaction that has been concluded, in whole or in part, in the Centre or an incident that has occurred in the Centre.*
- (c) objections filed against decisions made by the Centre’s Bodies, which are subject to objection in accordance with the Centre’s Laws and Regulations.*
- (d) any application over which the Courts have jurisdiction in accordance with the Centre’s Laws and Regulations;*

(2) Parties may agree to submit to the jurisdiction of any other court in respect of the matters listed under paragraphs (a), (b) and (d) of this Article.”

The Law on the Application of Civil and Commercial Laws in the DIFC⁶² provides as follows:

“8. Application

(1) Since by virtue of Article 3 of Federal Law No.8 of 2004, DIFC Law is able to apply in the DIFC notwithstanding any Federal Law on civil or commercial matters, the rights and liabilities between persons in any civil or commercial matter are to be determined according to the laws for the time being in force in the Jurisdiction chosen in accordance with paragraph (2).

⁶⁰ Law No. 12 of 2004: http://www.difc.ae/laws_regulations/laws/enacted_laws.html.

⁶¹ Law to Establish a Financial Free Zone in Dubai, Law No.35 of 2004.

⁶² Law No. 3 of 2004.

(2) *The relevant jurisdiction is to be the one first ascertained under the following paragraphs:*

- (a) so far as there is a regulatory content, the DIFC Law or any other law in force in the DIFC; failing which,*
- (b) the law of any Jurisdiction other than that of the DIFC expressly chosen by any DIFC Law; failing which,*
- (c) the laws of a Jurisdiction as agreed between all the relevant persons concerned in the matter; failing which,*
- (d) the laws of any Jurisdiction which appears to the Court or Arbitrator to be the one most closely related to the facts of and the persons concerned in the matter; failing which,*
- (e) the laws of England and Wales.” [emphasis added]**

The above article appears to provide that apart from regulatory or other matters where another DFIC law applies, English law shall apply to commercial matters before the DFIC courts. In fact there are specific DFIC laws governing various topics, which are based on English commercial law, and where such laws are silent English laws applies. DFIC laws cover topics such as company law, partnership law and the law of contract and obligations (the latter two seemingly codify the main elements of the English law of contract and tort)⁶³. The Judicial Authority’s Chief Justice is Sir Anthony Evans, formerly head of the English Commercial Court⁶⁴. Sir Anthony is also currently on Bermuda’s Court of Appeal. A February 2, 2006 London Telegraph article reported:

“The judicial authority, which also reports direct to the Ruler, has drafted 20 of its own statutes based largely on English commercial law. But where DIFC law is silent, for example in the field of intellectual property, the law of England and Wales applies.

Why has DIFC chosen English common law in preference to the codified system of "civil" law, derived from Roman law and used throughout Europe, the Middle East and beyond? Dean Ferris, the DIFC's chief legal officer, says it allows the judges more discretion. Mr Ferris, Lebanese-born but brought up in the United States, refers me to the principles of fairness and equity introduced by the Court of Chancery 500 years ago to mitigate the rigours of the common law.

‘The judge has discretion to fashion remedies where precedents do not exist or existing remedies are not adequate to right the wrongs,’ he says.

Sir Anthony Evans is the chief justice of the newly-established DIFC court. He was the senior commercial judge in London before serving on the Court of Appeal from 1992 to

⁶³ See generally: http://www.difc.ae/laws_regulations/laws/enacted_laws.html.

⁶⁴ ‘British law is oasis of reassurance in Dubai’:

<http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2006/02/02/nlaw02.xml&sSheet=/news/2006/02/02/ixhome.html>.

2000. He now practises as an arbitrator and will make regular visits to Dubai. Sir Anthony's deputy is Michael Hwang, a leading Singaporean lawyer, arbitrator and former judge."

So Dubai affords another emerging example of an international financial centre creating a specialist commercial court designed to meet the needs of the international business community applying internationally accepted legal standards. It is also, for the international comparative lawyer, a fascinating example of a marriage between the civil law codification approach stylistically (the law of tort and contract have been reduced to statutory form) with common law content and (it seems) procedural approach.

BVI

At the time of writing it is understood that the Eastern Caribbean Supreme Court is in the process of creating a Commercial Division within the Supreme Court sitting in BVI. This no doubt reflects BVI's growing status as the leading international financial centre in the Eastern Caribbean region.

It is too early to ascertain precisely what institutional framework will be adopted and how the Commercial Division will work in practice, but the Division will have many precedents to follow and will join a growing family of specialist courts dedicated to resolving international commercial disputes in an efficient and user-friendly manner.

Conclusion

There appears to be a growing consensus in some of the world's leading common law international financial centres that dedicated commercial courts are an important part of the business infrastructure. This trend is spreading from major metropolitan centres such as London, Hong Kong and Sydney to "offshore" financial centres such as Bermuda, BVI and Hong Kong. While attention has focussed primarily on established British Commonwealth financial centres in this paper, it is important to appreciate that business courts are in use in the US and Ireland⁶⁵, as well as in a number of other established emerging jurisdictions in Africa and Asia as well (e.g. Kenya, Lesotho, Malaysia, Philippines, Tokyo and Uganda)⁶⁶. They also appear to be the norm in major European financial centres, where the civil law reigns, as well.

The Commonwealth approach appears to consistently reflect adaptations of the English Commercial Court model, with the deployment of case management techniques designed to achieve expeditious yet just results. The importance of commercial courts to economic success must not, however, be exaggerated. Singapore is ranked in the top 5 and Cayman in the top 25 global financial centres according to the Global Financial Centres Index reproduced in part

⁶⁵ Stauber J, 'Commercial Courts: a Twenty-First Century Necessity?' (2007) *Judicial Studies Journal* 1.

⁶⁶ The Asian position is discussed in Spiegelman CJ's 'Commercial Litigation: an Asian Perspective' : http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_spiegelman070607. The African commercial courts all maintain helpful websites.

above. Neither jurisdiction appears to have any formal specialised mechanism for dealing with commercial disputes. It seems clear from the jurisdictions reviewed above that formal structures and even procedural rules cannot guarantee effective judicial case management. What probably is most important in reality is an appropriately business-oriented judicial attitude, and an appreciation that active judicial case management in large commercial cases conducted by lawyers with substantial financial and intellectual resources is far from a mechanical task. On the contrary, managing large-scale international commercial cases may well often feel like trying to ride an archetypal “bucking bronco”. As a recently retired English Commercial Court Judge sagely reflected:

“One of the problems in the commercial court is that the quality of advocates is such that you could read one side’s argument and think that it was clearly right, then read the other’s and think it was clearly right too. In those situations all you can do is explain that the decision was a difficult one to make and be very clear in your justifications.”⁶⁷

⁶⁷ ‘How to be... a Judge’, The Times Online, February 11, 2008.