

The Fourth Jonathan Hirst Commercial Law Lecture

2 November 2021

“What is the point of commercial law?”

1. It means a lot to me to be able to give this lecture and, in doing so, pay tribute to a person whom I will always remember with the greatest affection and regard.

2. I first got to know Jonathan Hirst, and his wife Fiona, when I was his pupil at what is now Brick Court Chambers in 1984. The lessons that Jonathan taught me in professionalism, efficiency, client relations and the importance of focusing on the real issues in the case were not only valuable to me then but have been valuable ever since. I appreciated too, as his pupil and always afterwards, his conspicuous kindness, lack of any affectation and positive attitude to life – an attitude that he managed somehow to retain even when he was terminally ill. My pupillage with Jonathan was the start of a friendship that continued for over 30 years, until his untimely death in 2017. From first to last, I looked up to him as a model of integrity, positivity, robust decision-making and sound judgment tempered with humanity. I count myself fortunate indeed to have known him.

Lecture topic

3. This lecture in the series to honour his memory was originally planned some two years ago, before Covid put paid to live events. At that time, I had what I thought was an ideal subject to speak on. I was planning to discuss a dispute between two of the greatest English lawyers of modern times, both of them affiliated to Brick Court Chambers. The episode was touched on by Sir Christopher Clarke in the last of these lectures. You may recall it. It began when Lord Sumption gave a lecture at Oxford University about the interpretation of

contracts – a subject for long dominated by Lord Hoffmann’s famous judgments in the cases of *Investors Compensation Scheme* and *Chartbrook*.¹ In his lecture Lord Sumption described how (in his words) “the Supreme Court has begun to withdraw from some of the more advanced positions seized during the Hoffmann offensive, to what I see as a more defensible position.” There then followed a sustained attack on Lord Hoffmann’s views, expressed in characteristically outspoken terms.²

4. Lord Hoffmann responded with an equally vigorous defence of his position published in the *Law Quarterly Review*.³ I am sorry to say that the temperature rose rather high. He accused Lord Sumption of reviving intellectual heresies said to have been current in the nineteenth century and of wanting to go back to what he called “the dark ages of word magic”.

5. My idea – which I know would have appealed to Jonathan Hirst – was, rather presumptuously, to offer my services as an arbitrator in this dispute. I intended to suggest that both these great lawyers were partly right and partly wrong. The title for my lecture was: “A nice derangement of epitaphs”.

6. But the event was postponed, time has passed, and I have decided that my original topic is no longer topical. My sense is that, at least for the time being, the subject of contractual interpretation in English law is no longer generating the controversy that it did for many years and that we are now enjoying a period of relative quiet on this particular legal front. Lord Hodge did a magnificent job of reconciling the rival camps, when he said in what is now the leading case of *Wood v Capita Insurance Services*:⁴

¹ See *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896; and *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] 1 AC 1101.

² Lord Sumption, “A Question of Taste: The Supreme Court and the Interpretation of Contracts” (Harris Society Annual Lecture, Keble College, Oxford: 8 May 2017).

³ Hoffmann L, “Language and lawyers” (2018) 134 LQR 553.

⁴ [2017] UKSC 24; [2017] AC 1173, para 13.

“Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation.”

Translated, I think this means that it is time to call a truce and acknowledge that both text and context are important. Or, as Mr Justice Foxton put it in a recent lecture: “we are all purposive sheep now, just as we are all literalist goats,” with “the approach to construction now confirmed as one requiring a ‘unitary exercise’ which accommodates bovinds of both kinds.”⁵

7. Another reason for choosing a different topic is that the protagonists in the debate have themselves moved on. Lord Hoffmann is busy defending other parts of his legacy and, as you all know, Lord Sumption has found a new calling as a civil liberties campaigner.

8. So my services as an arbitrator are no longer apt and I have chosen a different subject for this lecture. It is also one that would, I hope, have met with Jonathan Hirst’s approval. It was part of his outlook that every case has its point, and one of his great skills as a barrister was to spot quickly the point on which a case turned. Being of a more philosophical turn of mind, I would like to take this approach to a more abstract level and pose the question: what is the point of commercial law?

9. It is a question to which it seems to me that anyone who earns a living as a commercial lawyer ought to be able to give an answer. My own principal motivation at the Bar and now on the Bench has always been the superficial one of wanting to do the work that presents itself as well as I can, for the satisfaction which that gives. But it would be a shame to have spent as long as I have

⁵ See Foxton D, “The Status of the Special Rules of Construction of Exemption Clauses in Commercial Contracts” [2021] JBL 205. The reference to sheep and goats is, in addition to Matthew 25:31-46, to the judgment of Lloyd LJ in *Summit Investment Inc v British Steel Corp (The Sounion)* [1987] 1 Lloyd’s Rep 230, 235.

practising commercial law without any clear conception of whether or why it is a worthwhile activity to engage in. After all, to invert a familiar saying: if something isn't worth doing, it isn't worth doing well.

10. I therefore thought it would be worthwhile - for me and I hope for you - to identify what I see the point of commercial law as being.

What is “commercial law”?

11. Before I do, I should first indicate what I mean by “commercial law”. Unlike in those legal systems which have a commercial code, in English law the term “commercial law” is not a term of art. It is a matter of choice what parts of the law to include within this description. I am using it to denote the law which governs commercial transactions. I am in good company here, if you will excuse the pun, as this is also how commercial law has been defined by Professor Roy Goode, the doyen of academic scholars of the subject.⁶ It is a definition that broadly corresponds to the kind of claim that can be brought in the Commercial Court: rule 58.1(2) of the Civil Procedure Rules defines a “commercial claim” as “any claim arising out of the transaction of trade and commerce”. The focus on transactions means that I do not include in my definition most of competition law, which I take to be concerned with regulating markets and controlling market power rather than with particular transactions. I also exclude fields such as company law, insolvency law and partnership law, which are concerned with structures through which commerce may be conducted rather than with commercial transactions themselves. And by “commercial” transactions, I intend to refer to transactions between “commercial parties” - meaning parties who are each acting in the course of a business. I am therefore leaving aside transactions involving consumers, who are increasingly treated differently in modern law and given legal protections not afforded to commercial parties.

⁶ See Goode R, “The Codification of Commercial Law” (1988) 14 Monash LR 135, 141.

Facilitating commerce

12. So what is the point of commercial law, defined in this way to mean the law which governs commercial transactions? At a general level, I think that my question is very easily answered. The point of commercial law is to facilitate commerce. That great commercial lawyer, Robert Goff, expressed the point eloquently when he said of the judges of the Commercial Court:⁷

“We are there to help businessmen, not to hinder them: we are there to give effect to their transaction, not to frustrate them: we are there to oil the wheels of commerce, not to put a spanner in the works, or even grit in the oil.”

13. That answer may seem to you disappointingly obvious, perhaps even banal. No one, you may say, would suggest that commercial law should be trying to obstruct or hinder commerce. The hard question is: how can and should the law facilitate it? I will come to that soon. But before I do, I would like you to note the assumption implicit in my answer. To say that the point of commercial law is to facilitate commerce assumes that commerce is a morally valuable activity, so that oiling the wheels of commerce is a good thing for the law to do. We may normally take that for granted. But why is commerce morally valuable?

The value of commerce

14. I would suggest that there are at least four reasons.

15. First, commerce creates material wealth. Second, commerce not only creates wealth in material goods and amenities; it also creates diversity of occupations and pursuits for both work and leisure. Every human occupation other than being a hunter-gatherer or subsistence farmer is made possible only as a result of commerce. And the same is true of all but the most basic leisure activities. There would, for example, be no professional artists, writers, actors,

⁷ Goff R, “Commercial Contracts and the Commercial Court” [1984] LMCLQ 382, 391.

sports players or musicians, let alone doctors, scientists, teachers, entrepreneurs, architects, engineers, coders, aid workers - or any other occupation you care to name, including of course commercial lawyers - without commerce.

16. In a society like ours which has enjoyed the benefits of being a leading centre of international commerce for several hundred years we tend to take the ways in which commerce vastly enriches our lives for granted. But I think it is worth taking a moment to recall the basic economics of how commerce creates wealth and opportunity. It does so through two related mechanisms: voluntary exchange and the division of labour.

17. Unlike, say, war or theft or most lawsuits, commerce is not what in game theory is called a “zero-sum game”. In other words, it is not an activity in which one person’s win is another person’s loss. It has the beneficent effect of making both parties to a transaction better off. I grow apples and would like sometimes to eat oranges. You have only oranges but would like some apples. If I can freely exchange some of my apples for some of your oranges, we both gain. The same is true if, instead of apples, I have money and pay you for your oranges. Again, the transaction benefits us both. And the acceptance of money as a token of value enormously enhances the opportunities for mutually beneficial exchange which increases the total sum of human wealth.

18. Voluntary exchange in turn makes possible and promotes the division of labour. To illustrate how this creates wealth, Adam Smith, at the start of his great book, *An Inquiry into the Nature and Causes of the Wealth of Nations*, gave the example of a pin-maker.⁸ He said that he had seen a pin factory in which the task of making pins was broken down into different operations and divided among 10 people, who between them could manufacture 48,000 pins a day - equivalent therefore to 4,800 pins per person. By contrast, a single individual might not even

⁸ *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776), Book I, ch 1.

be able to make one pin, and certainly no more than 20, in a day. The reasons for this vast difference in productivity, Adam Smith observed, lie in three key advantages of the division of labour. First, by specialising in pin-making, the pin-maker develops expertise through practice and experience. Second, time is saved that would otherwise be spent switching between tasks. And third, it pays the pin-maker to buy or invent machines which save labour and, in Adam Smith's words, "enable one man to do the work of many".

19. Increasing productivity by these means enables goods and services of better quality to be supplied at lower cost and hence makes them more affordable to more people. The benefits are exponential. A contemporary version of Adam Smith's parable of the pin-maker is described in a book you may have come across called *The Toaster Project*. It turns out that even a cheap toaster of a kind you can buy for a few pounds from Argos contains over 400 parts. The author of the book, Thomas Thwaites, set out to build a toaster by himself from scratch. It took him 9 months, cost him over £1,000 to make and, when he plugged it in, it immediately caught fire.

20. When Adam Smith was writing in the eighteenth century, the growth of British commerce over the previous hundred years meant that goods formerly regarded as luxuries available only to a few very wealthy people had begun to be enjoyed by the middle classes. That revolution was beautifully described by Joseph Addison in an essay in *The Spectator* in 1711.⁹ He wrote:

"If we consider our own Country in its natural Prospect, without any of the Benefits and Advantages of Commerce, what a barren uncomfortable Spot of Earth falls to our Share!"

After expanding on what a poor place to live in this country would be if we had to be self-sufficient, Addison said:

⁹ Spectator No 69, 19 May 1711.

“Traffick [meaning trade] has improved the whole Face of Nature among us. Our Ships are laden with the Harvest of every Climate: Our Tables are stored with Spices, and Oils, and Wines: Our Rooms are filled with Pyramids of China, and adorned with the Workmanship of Japan: Our Morning's Draught comes to us from the remotest Corners of the Earth: We repair our Bodies by the Drugs of America, and repose ourselves under Indian Canopies. ... the Vineyards of France [are] our Gardens; the Spice-Islands our Hot-beds; the Persians our Silk-Weavers, and the Chinese our Potters. Nature indeed furnishes us with the bare Necessaries of Life, but Traffick gives us greater Variety of what is Useful, and at the same time supplies us with every thing that is Convenient and Ornamental. ...”

“For these Reasons,” Addison went on, “there are no more useful Members in a Commonwealth than Merchants. They knit Mankind together in a mutual Intercourse of good Offices ...” Addison was also clear that the benefits of commerce flow in both directions. As he put it:

“The Mahometans are clothed in our British Manufacture, and the Inhabitants of the frozen Zone warmed with the Fleeces of our Sheep.”

21. The knitting of mankind together through commerce to which Addison referred has a further benefit which came to be appreciated in the eighteenth century. As Montesquieu wrote in *Of the Spirit of the Laws*: “The natural effect of commerce is to bring peace”.¹⁰ Or to quote Adam Smith again:¹¹

“... commerce and manufactures gradually introduced order and good government, and with them, the liberty and security of individuals, among the inhabitants of the country, who had before lived almost in a continual state of war with their neighbours and of servile dependency upon their superiors. This,

¹⁰ Book 20, ch 2: “L'effet naturel du commerce est de porter à la paix.”

¹¹ *An Inquiry into the Nature and Causes of the Wealth of Nations*, Book III, ch 4.

though it has been the least observed, is by far the most important of all their effects.”

22. Commerce promotes peace by making people - and nations - who trade with each other interdependent and, through interaction, less tribal and more tolerant. It requires each party to have regard to the needs and interests of the other and to satisfy others in order to gratify themselves. By doing so - and this is a fourth reason why commerce is morally valuable - commerce fosters moral virtues of prudence, honesty, reliability and reciprocity.

23. I will consider in more detail shortly how commerce does this, but let me give two illustrations, which I like, from the large literature on this subject. The first involves a change in the meaning of a word: the word “honest”. The shift in its meaning is illustrative of the social change that accompanied the growth of commerce in Britain and other European nations in the eighteenth and nineteenth centuries whereby “bourgeois” virtues, as they have been called,¹² supplanted as the dominant value system aristocratic virtues of honour, courage, dignity and the like. When Charles I on the scaffold in 1649 described himself as “an honest man and a good king, and a good Christian”, he did not mean that he always told the truth and kept his word, which notoriously he did not. He meant that he was a person worthy of honour. By the end of the eighteenth century that meaning had become obsolete and the word “honest” had acquired its modern “bourgeois” meaning of telling the truth and not cheating. Nor was this shift in meaning limited to English. A similar thing happened in other European languages, for example with the French word “honête”.¹³

24. My second illustration involves the “ultimatum game”. As you may know, this is a game much loved by economists where one player is given some money - say, £100 - and asked to divide it between himself and the other player. If the

¹² See McCloskey D, *The Bourgeois Virtues* (2006).

¹³ See McCloskey D and Carden A, *Leave Me Alone and I'll Make You Rich* (2020)p.150.

other player accepts the amount offered, each gets to keep their share. But if she rejects the offer, neither player gets anything.

25. At first sight you might suppose that the first player would offer just a very small sum to the other player - say, £5 - and that the other player would accept this, on the basis that £5 is better than nothing at all. But that is not what happens in practice. If you ask yourself what you would offer the other party, you will probably choose 50% of the total or just under. That is what people typically offer. They anticipate - correctly - that, if they offer too little, the other player will reject the offer, even at the expense of their pure self-interest, because they regard it as unfair.

26. Experiments have been done, however, in which people in small-scale tribal societies were enticed to play the ultimatum game; and the results were very different. The less experience people have of engaging in commerce, the smaller the offers they tend to make and the more likely it is that very small offers will be accepted.¹⁴ The lesson of such studies is not that commerce teaches people to be kind. It is that societies that use markets extensively develop (out of enlightened self-interest) a culture of cooperation and fairness.

Disclaimers

27. In case you think I am getting too carried away with the blessings of commerce, I must make a couple of disclaimers. The first is that I am not suggesting that all commerce is good. It goes without saying that some forms of commerce are morally deplorable - for example, trading in hard drugs or rare animal species or - to take the most extreme instance - slaves. In arguing that it is good to facilitate commerce, I naturally exclude commerce in things which should not be bought and sold. So generally does our law by making such forms

¹⁴ See Ridley M, *The Rational Optimist: How Prosperity Evolves* (2010) pp. 86-87; Oman N, *The Dignity of Commerce* (2016) p. 45.

of commerce illegal. Exactly where the limits lie of what trade the law should prohibit is a question for another day. But - for the avoidance of doubt, as we lawyers say - I am talking only about legitimate trade.

28. Second, it is plain that some people benefit from commerce more than others. In a wealthy society like ours, even those who are relatively poor enjoy fruits of commerce - including not only material goods but amenities such as education, health care and so forth - better by orders of magnitude than those who live in a subsistence economy. But, by the same token, disparities in wealth are also far greater. Nothing that I say bears on the question of how or how far law should be used to redistribute within society the wealth derived from commerce. That is not a matter in which commercial law has any role to play. I am making only the straightforward - and I hope uncontroversial - point that, without commerce, there would be no wealth to redistribute.

Creating trust

29. If you are with me so far that commerce in general is morally valuable for some or all of the reasons I have given, why do we need law to facilitate it? If we grant that voluntary exchange makes both parties better off, why doesn't commerce function by itself, without any need for law?

30. Well, to a large extent it can and does. Clearly, human beings traded with each other long before they established legal systems, let alone sophisticated systems of commercial law. But the structural problem which needs to be overcome in order for commerce to flourish, and to which law provides a potential solution, is the risk that the other party will not carry out its side of a reciprocal transaction and, in particular, the risk posed by the temptation to cheat. It is a problem which becomes much more acute when exchange is not simultaneous.

31. To go back to my simple example, if I buy a bag of oranges from you and pay you an agreed price of, say, £10, we are indeed both better off. But clearly I am better off still if I receive the oranges but then don't pay you for them; just as you will be better off if you take my money and don't deliver the oranges.

32. It is not just failure to honour agreements which stymies trade: it is the fear or anticipation of it. That is much reduced where the parties deal with each other face to face and the exchange is simultaneous. There is little risk of default on either side when I can see the oranges I am buying and you hand them over to me in exchange for a £10 note. But in all but the simplest transactions, one party has to perform part or all of its side of the bargain before - and sometimes long before - the other. The party who performs first - for example, by providing finance for a complex, long-term venture - needs to be able to trust the other to do what it has agreed to do.¹⁵ If that trust is lacking, the bargain will not be struck in the first place and no transaction will take place - even though, if it did take place, the transaction would benefit both parties.

33. The risk of default can take many forms other than a straightforward refusal or failure to do what has expressly been agreed. Unless I can feel confident, for example, that the goods that I am buying from you will correspond with their description, be of satisfactory quality and be your property to sell, I will not want to buy them. Trade takes place within a system of norms and expectations of honesty, reliability and fair dealing. For commerce to function effectively, people need to be able to trust each other to comply with those norms.

¹⁵ See on this point McBride NJ, *Key Ideas in Contract Law* (2017) p. 4.

Non-legal incentives and sanctions

34. Law is one means of creating such trust. It is not the only nor even the principal means of doing so. There are other ways in which the trust on which commerce depends can be created. Three of these seem particularly important.¹⁶

35. First, there is the prospect of repeat dealing. Where two parties have established - or hope to establish - a continuing business relationship which is mutually beneficial, each has a self-interest in dealing honestly, reliably and fairly with the other. If in an individual transaction one party cheats or otherwise breaks its commitment to the other, that party may make an immediate gain; but it stands to lose the profits it could otherwise make from future dealing. Those future profits will likely be much more valuable than the short-term advantage of defaulting on one transaction. The same is also true for the other party. And each party knows that the other has such an interest in cooperating and maintaining the relationship.

36. That is a powerful reason why a long-term commercial relationship can enable parties to develop a high level of mutual trust. It also explains why, in a long-term relationship, parties generally expect more from each other than in the case of a one-off transaction between strangers. I have been your customer for 10 years. If I discover that you are selling the same product to someone else for less than you are charging me, I will be upset and may well stop dealing with you. You have been a reliable supplier, but on this occasion you have a problem meeting your promised delivery date. You can expect me to be understanding. But if next month, I have a problem paying you on time, I will reasonably expect you to be similarly accommodating towards me. This is one way in which

¹⁶ See generally Charny D, "Nonlegal Sanctions in Commercial Relationships" (1990) 104 Harv LR 373.

commerce tends, as I mentioned earlier, to foster virtues of integrity, reliability and reciprocity.

37. A second mechanism is reputation. If I cheat you, not only will I likely lose your future custom, but word may get around that I am not someone who can be trusted. And that will cause me much wider economic harm. Nobody wants to deal with a trader who has a reputation for cheating. Conversely, a reputation for honesty, reliability and fair dealing is a valuable commercial asset and one which, once acquired, a trader will be loath to lose and which people who deal with that person will know that he or she will not want to lose.

38. A third basis for building trust is social ties and pressures. Most of us wish to be thought of by others (and to think of ourselves) as good and not as rogues. Moral conscience and social stigma can be powerful forces for inducing honesty, reliability and fair dealing in commercial transactions, particularly within a close-knit community. And generally speaking, the better you know someone, the more you care about what they think of you and the worse you will feel if you let them down. That is surely one reason why business is typically conducted in a highly social manner and trading partners so often devote so much time and effort to socialising with each other and developing personal relationships.

Self-regulating markets

39. There are examples of sophisticated markets which have developed high levels of mutual trust entirely or almost entirely through these non-legal means without relying on the state legal system.

40. In a book just published called *Making Commercial Law Through Practice: 1830-1970*, Sir Ross Cranston describes how international commodity markets in London and Liverpool, as they grew in the nineteenth century, organised themselves. What began as informal gatherings of merchants evolved into formal

associations, which then created an institutional framework for trading in particular commodities.

41. An example is the Baltic Exchange, which began life in a London coffee house. In 1823 formal rules were adopted to establish its membership. By controlling membership of the association and, with it, the right of entry to the venue where trading took place, standards of conduct were enforced. Insolvency was an automatic ground for expulsion; and in 1837 a rule was added providing for expulsion of a member for conduct considered “derogatory of his character as a man of business”. Many other markets organised themselves in similar fashion. Notable examples were the Liverpool Cotton Brokers’ Association and the London Corn Trade Association. Both later became international associations and still exist today as the International Cotton Association and the Grain and Feed Trade Association (GAFTA).

42. Disputes between members of these associations were (and generally still are) resolved through arbitration. Typically, each party appointed another member of the association, with no interest in the matter, as an arbitrator; and if the two disagreed, a third arbitrator was brought in. The process was designed to be cheap and speedy and conducted by people with practical knowledge of the trade. Lawyers were generally excluded, both as arbitrators and representatives.

43. Another market which was (at least until recently) almost entirely self-regulating is the international diamond trade. In a much-cited study,¹⁷ Lisa Bernstein described how the diamond trade operated outside the formal legal system and managed to maintain very high levels of trust between dealers, who would do business on a handshake, leave stones with another dealer for inspection and, as one observer put it, “trust each other not to walk away with

¹⁷ Bernstein L, “Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry” (1992) 21 J Legal Stud 115-157.

the world's most valuable, easily concealed commodity".¹⁸ Traditionally, the diamond trade was dominated by Orthodox Jews, who formed a tight-knit community linked by ethnic, religious and social ties. A reputation for trustworthiness was a vital commercial asset, which took a long time to build and could also be passed on within what was almost always a family business. Diamond dealers' clubs or bourses in the major trading centres such as New York performed an important function because membership of the bourse conferred prestige and economic advantages and was a badge of trustworthiness. The trading floor of the bourse was a place where information about prices and also about dealers' reputations was transmitted very rapidly and efficiently. Members of a bourse were required to submit any dispute to industry arbitration. Although arbitrations were secret, if an award was not complied with promptly, details of the default and a picture of the defaulting member would be posted publicly in the bourse - which worked as a very effective sanction.

44. Already when Bernstein was writing in 1992, this system of trust-based exchange was coming under strain. Since then, others have described how the diamond trade has increasingly come to resemble other markets,¹⁹ with changes in the structure and demographics of the industry, erosion of mutual trust and more frequent resort to litigation - something which I saw directly when I heard the case of *W Nagel v Pluczenik Diamond Co NV* in the Court of Appeal in 2018.²⁰

Enforcing contracts through the legal system

45. What is remarkable about the diamond trade is not that its extra-legal mechanisms for sustaining cooperative trust eventually broke down. It is that they proved so effective for as long as they did in the modern world. That can be

¹⁸ New York Times, 26 March 1984, quoted in Richman B, "An Autopsy of Cooperation: Diamond Dealers and the Limits of Trust-Based Exchange" (2017).

¹⁹ See eg Richman B, "An Autopsy of Cooperation: Diamond Dealers and the Limits of Trust-Based Exchange" (2017).

²⁰ [2018]EWCA Civ 2640; [2019]Bus LR 692.

seen in hindsight to have been dependent on an unusual combination of institutional and historical circumstances.

46. Trust-based exchange without the support of law is difficult to achieve and sustain in modern commerce. There is a good deal of empirical research which confirms that informal enforcement mechanisms can work well within a small, geographically concentrated and ethnically and socially homogeneous group, where repeat transactions among members of the group are frequent, information about reputation is transmitted easily and rapidly and social sanctions are potent. However, such mechanisms become increasingly inadequate as commerce becomes more complex, markets more global, and market participants more numerous, geographically spread and ethnically and culturally diverse.²¹ In developed economies most commercial exchange does not involve repeated face-to-face interactions between members of a tight-knit social group. In such economies the legal system provides a vital basis for the creation of mutual trust. It is not that commercial parties want or expect to go to court to recover money owed to them (or money as a substitute for the performance that was owed). That is usually the very last resort. But the ultimate possibility of legal enforcement - and the knowledge that it would, if it became necessary, be available - gives both parties an incentive not to cheat and to perform their agreement, as well as the knowledge that the other party has such an incentive. That creates a background against which commercial parties can much more easily and efficiently establish the cooperative trust needed for successful dealing to take place.

47. To see what happens when you don't have the legal system to fall back on, you need only look at how commerce operates in our own society in markets where contracts are not legally enforceable - for example, in the market for illegal

²¹ See eg Trebilcock M and Leng J, "The Role of Formal Contract Law and Enforcement in Economic Development" (2006)92 Virginia Law Review 1517.

drugs, where dealers frequently resort to violence to enforce debts and gangs and vendettas are common. Similar patterns of behaviour tend to be more widespread in societies which lack well-functioning legal systems.

48. Particularly in international commerce, parties often prefer arbitration to litigation to resolve disputes. But commercial arbitration very rarely takes place entirely outside the court system. Generally, it relies on the court system being available, if necessary, to enforce the arbitration agreement, exercise powers of compulsion in support of arbitration proceedings and enforce arbitral awards.

49. So, to return to the question posed by the title of this lecture, I suggest that the first and most fundamental way in which commercial law facilitates commerce is by providing effective procedures for enforcing agreements between commercial parties. That includes not only substantive agreements to enter into commercial transactions but agreements to refer disputes arising out of such transactions to arbitration or to the courts of a chosen jurisdiction. Effective procedures are also needed to enforce the orders made by arbitrators and courts. Given the reach and interconnectedness of modern international commerce, that is not confined to domestic judgments and arbitral awards but also includes foreign judgments and awards.

50. Nor is it enough, today, for such procedures to be available after a judgment or award has been issued. To ensure that a judgment or award will provide an effective remedy, legal machinery needs to be available before there has been an adjudication, and indeed before proceedings have even been commenced. Sometimes in fact even before proceedings could be commenced because the right to bring them has not yet arisen.

51. When money and financial assets can be moved around the world almost instantaneously, a key instrument in the toolbox of English commercial law today is an injunction to freeze assets. The principles underpinning freezing injunctions,

and other forms of interim injunction, were recently considered by the Privy Council on an appeal from the BVI in *Broad Idea International Ltd v Convoy Collateral Ltd*,²² in which I gave the judgment of the majority of Board. The Board emphasised that the essential purpose of such injunctions is to facilitate the enforcement of a judgment or other order to pay a sum of money, which usually does not yet exist when the application is made but which will potentially be frustrated unless the court acts now to lend its assistance. Amongst other things, the Privy Council disapproved a line of cases, such as *The Veracruz I*,²³ which decided that a freezing injunction cannot be granted before a right to payment of a debt or damages has accrued. We said that this approach is “unsound in principle, unfit for modern commerce and should no longer be adopted”.²⁴

Other ways for law to facilitate commerce

52. So far I have been considering how the law can and should facilitate commerce by providing effective procedures for enforcing agreements (and judgments and arbitral awards based on such agreements). But what about the substantive rules of commercial law? What function can or should they play as an aid to commerce? In the short time remaining, I would like to highlight what I see as being two primary functions of substantive commercial law.

Deciding which agreements to enforce

53. The first is to provide a basis for deciding which agreements or alleged agreements should be enforceable through the legal system. There can be factual disputes about whether an agreement was made or about what was agreed. But even where the facts are clear or are proved, questions can arise as to whether

²² [2021]UKPC 21.

²³ [1992]1 Lloyd's Rep 353.

²⁴ [2021]UKPC 21, para 100.

an agreement should be recognised as legally enforceable. Rules of law are needed to resolve this question.

54. Sometimes, for example, commercial parties reach informal agreements or understandings which they do not intend should create rights and obligations enforceable through legal process. The law should respect that choice. Sometimes parties make what they intend should be a legally enforceable contract but there are good reasons why it should not be enforced. A classic example is a contract which a party was induced to make by fraud. It plainly would not assist the smooth functioning of commerce if the law were to enforce a contract of this kind at the suit of the party who made the fraudulent statement. Contracts procured by duress are another example.

The incompleteness of contracts

55. The other role of substantive commercial law that I want to highlight derives from the fundamental fact that contracts are always incomplete. They are incomplete for two reasons. First, even the most elaborate and comprehensive written contract cannot anticipate in advance every possible event that might arise in relation to a transaction and stipulate what is to happen if the event occurs. That is not humanly possible. Contracts are for this reason necessarily incomplete. Second, attempting to negotiate a contract which anticipates and provides in advance for as many contingencies as possible is time-consuming, costly and can be counterproductive - for example, because the very process of demanding certain legal protections can impair trust. It is often entirely rational for parties not to expend time and money on such negotiations. The point was well put in a nineteenth century case, *Humfrey v Dale*, where Lord Campbell LCJ said:²⁵

²⁵ (1857) 7 E & B 266, 278-9; 119 ER 1246, 1250.

“... merchants and traders, with a multiplicity of transactions pressing on them, and moving in a narrow circle, and meeting each other daily, desire to write little, and leave unwritten what they take for granted in every contract. In spite of the lamentations of Judges, they will continue to do so; and in a vast majority of cases, of which Courts of law hear nothing, they do so without loss or inconvenience; and, upon the whole, they find this mode of dealing advantageous even at the risk of occasional litigation.”

Even today there are still many cases in which parties are content to deal with each other on the basis of a rudimentary written contract or even no written contract at all.

Default rules

56. There are two, overlapping ways in which commercial law can perform a useful and important function which compensates for the incompleteness of contracts. The first is by providing a ready-made framework of rights and obligations which will govern any transaction, or any transaction of a particular type, unless the parties agree something different. An example is the Sale of Goods Act. The Act sets out obligations - for example, obligations which a seller will impliedly owe, such as those I mentioned earlier that the goods will correspond with their description, be of satisfactory quality and belong to the seller. The parties may not think to agree what the consequences will be if one of these terms is broken, or if there is delay or other failure in performance. The Act provides a scheme dealing with such matters. It is open to commercial parties, if they choose, to exclude or vary the default rules provided by the Act and agree something else. But the Act saves them the trouble of doing so. It also establishes a benchmark for what is widely regarded as a reasonable set of mutual rights and obligations that strikes a fair balance between buyers and sellers. In part the law operates as what behavioural economists call a “nudge”,

to assist parties to achieve optimal results by providing a good default option.²⁶ It serves a similar function to, for example, an arrangement where employees are automatically enrolled in a pension scheme and contributions deducted from their wages unless they positively opt out.

57. If they are to serve their purpose, the default rules established by commercial law need to produce outcomes which commercial parties would generally regard as fair. It is also desirable that they should, so far as possible, produce outcomes which are reasonably predictable: hence the importance of certainty in commercial law. One of the great advantages of the common law is that it has been developed from the ground up, from the experience of actual cases, so that it generally reflects norms and usages of commerce. It also has the capacity to adapt as such norms and usages evolve.

Contract construction

58. Other techniques by which commercial law compensates for the incompleteness of contracts operate at a more particular level. Frequently, even quite detailed written contracts do not spell out usages or matters of assumed obligation which the parties take for granted. A valuable technique which English commercial law uses to enforce tacit obligations which may be presumed to have gone without saying is the implication of a term in the contract of the kind often referred to as a term implied in fact – or what Lord Steyn called an “ad hoc gap filler”.²⁷

59. Even where there is an express term (or terms) of a contract in point, contractual wording has to be applied to situations which the parties never specifically thought about and sometimes which they could never reasonably have contemplated. In any case language is never completely determinate and

²⁶ See Thaler R and Sunstein C, *Nudge: The Final Edition* (2021).

²⁷ See *Equitable Life Assurance Society v Hyman* [2000] UKHL 39; [2002] 1 AC 408, 459.

often, as we all know, it is reasonably capable of bearing more than one meaning. A further important function of commercial law is to provide fair and efficient means for resolving disputes about the meaning and effect of contractual documents.

60. Mention of contract interpretation brings me full circle. I have reached the subject on which Lord Hoffmann and Lord Sumption disagreed that was my original topic for this lecture. But you will be relieved to know that I am not going to embark at this stage on a nice derangement of epitaphs.

Conclusion

61. Except in passing, I have not said anything this evening about current issues in English commercial law - which may be prudent. Instead, my aim has been to stand back from the daily practice of commercial law and reflect on what the point of it is. The answer I have put forward starts from a recognition of the central importance of commerce in human life and of its moral value. It is not an understatement, I believe, to say that on the foundations of commerce are built all the achievements of human civilisation. I have then sought to explain why, in today's complex global markets, commerce cannot function effectively on the basis of informal means of creating and sustaining trust alone, important as those are; and why an effective legal system for enforcing contracts is necessary to create conditions in which commerce can thrive. Lastly, I have sought to indicate, in very general terms, ways in which substantive rules of commercial law are also needed to facilitate commerce.

62. The practice of commercial law as a barrister or solicitor, or for that matter as an arbitrator or mediator, is itself a form of commercial activity. Like all forms of commerce, it depends - if it is to function effectively - on trustworthiness and on adherence to standards of honesty (in the modern sense) and fair dealing by those engaged in it. If, as commercial lawyers, you demonstrate those virtues and

employ your knowledge and skills to help resolve disputes or to use the law in other ways to oil the wheels of commerce, then I submit that that is something to be proud of. Jonathan Hirst was a paragon of those skills and moral virtues. He was and is a shining example to us all.