Punjab Commercial Courts Ordinance 2021: A New Frontier[1]

By

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1. Commercial Courts around the World

In 2017, The Lord Chief Justice of England and Wales, Lord Thomas addressing the National Judges College in Beijing, China said:

> "A Commercial Court must have as its objectives the ability to deliver justice quickly and relatively inexpensively. Its processes must be simple and flexible. The quality of its judgments must be high. It needs to apply the law in a way that is certain, fair, and predictable. It must ensure that the law keeps pace with market developments. It must maintain the strength and vitality of the legal framework."[2]

Lord Thomas made the statement at a time when commercial courts were mushrooming in many of the active trading countries. In a bid to establish themselves as commercial hubs for business and trade disputes and in response to international commercial arbitration which has been suffering from the malaise of conventional commercial litigation i.e. delays and costs, several countries set up new commercial courts promoting new perspectives on adjudication of commercial disputes. Cases range from minor disputes in monetary terms to major disputes with several billion USD at stake to disputes involving issues of geopolitical importance.[3]

The new millennium opened a whole new market for dispute resolution – modern commercial courts employing state-of-the-art technology. Dubai International Financial Centre Courts in 2004, Qatar International Court in 2009, Abu Dhabi Global Market Courts in 2015, Singapore International Commercial Court in 2015, Astana International Financial

[1] I am most grateful to the team at NBM Law Chambers, in particular Ashan Khalid, Nosheen Zain, Ateeb Ali, for their assistance in research, enthusiasm and for finding obscure references. All errors remain my own.
[2] 'Commercial Dispute Resolution: Courts and Arbitration,' Speech delivered at the National Judges College, Beijing China on 6 April, 2017. Speech by The Rt Hon. The Lord Thomas of Cwmgiedd: Commercial dispute resolution: courts and arbitration (judiciary.uk)
[3] The China International Commercial Court was established considering China's Belt and Road Initiative (BRI) and the Astana International Financial Centre (AIFC) in Kazakhstan is seen as strategic both as regards BRI and the development of commerce and business in Central Asia generally.

Centre Court in 2018, Chamber for International Commercial Disputes Frankfurt / Main in 2018, International Chamber, Paris Tribunal de Commerce / Cour d'appel in 2018, China International Commercial Court in 2018, and Netherlands Commercial Court in 2019, are some of the new commercial courts set up in just the last ten years. In addition, some jurisdictions have developed arrangements providing for specialised resolution of commercial cases in their civil courts e.g. the Luxembourg District Court.

The concept of dedicated commercial courts is not a new one. Le Tribunal de Commerce de Paris was the oldest commercial court in the West having been established in its present form in 1792. Its origin is traced back to an edict issued by Charles IX in 1563. Around the same time, in 1774 in America, the second-oldest court, the County Courthouse of New Jersey was hearing commercial disputes arising from the Boston Tea Party which then led to the American Revolutionary War of 1775. The first dedicated commercial court, though, was set up almost 200 years later, in 1995, as the Commercial Division of the New York State Supreme Court.

However, the prototype of the modern commercial court came from England in 1895 and in the most unlikely of ways. It all began with the dubious appointment of a certain Mr. Justice Lawrance – popularly known as Long Lawrance for his height.[4] Lawrance J was required, in the commercial case of *Rose v Bank of Australasia* [1894] A.C. 687, to rule on an Aberdeen shipowner's claim for general average contribution from cargo-owners based upon a complicated adjustment by adjusters in the City of London. According to a notable lawyer of the time, "Lawrance knew as much about the principles of general average as does a Hindoo about figure skating." A senior judge, Mackinnon L.J described him as:

> "a stupid man, a very ill-equipped lawyer and a bad judge. He was not the worst judge I have appeared before: that distinction I would assign to Mr. Justice Ridley; Ridley had much better brains than Lawrance but he had a perverse instinct for unfairness that Lawrance could never approach."

The statement of claim before Lawrance J was a mere 36 lines long and the reply and defence to counterclaim just over one page. He listened to the arguments with mild interest, reserved judgment and forgot all about the case till he was reminded and gave judgment almost a year later. This case turned out to be the last straw for merchants of the City of London who were already disillusioned by the delays, technicalities, and cost of commercial litigation in court. A revolt ensued giving birth to the London Commercial Court in 1895.

[4] A national newspaper wrote "… was a bad appointment for although a popular man and thorough Englishman, Mr. Lawrance has no reputation as a lawyer, and has been rarely seen of recent years in the Royal Courts of Justice … The blight of politics falls everywhere, and nowhere more fatally than upon the judicial Bench." V.V. Veeder, 'Mr. Justice Lawrance: The "true begetter" of the English Commercial Court' (1994) LQR 110, pp.292-306.

2. Commercial Courts in Pakistan

It is difficult to say whether it has been Pakistan judiciary's good fortune not to have had a Long Lawrence necessitating the need for specialized commercial courts till now or whether it has been its misfortune. For had there been such an uninterested and ill-equipped judge as regards commercial cases, perhaps, commercial courts would have been established much sooner.

Pakistan has never had dedicated commercial courts till now. The closest it came to setting up commercial courts was under the Import and Export Control Act, 1950 which established a quasi-judicial criminal court in 1980 following amendments to the 1950 Act to deal specifically with cases coming from the Export Promotion Bureau. Although the forum was called a 'commercial court', it was more of a quasi-judicial tribunal rather than a judicial court of law in that the composition of judges of the commercial court was made up of a civil servant, a businessman / executive connected to the Federation of Pakistan Chambers of Commerce and Industry and a retired judge of the Sessions or High Court. Procedure was governed by the Code of Criminal Procedure 1898 rather than the Code of Civil Procedure, 1908. Two such courts were set up; in Karachi (servicing Sindh and Baluchistan) and Lahore (servicing Punjab and KPK). Tragically, even for a quasi-judicial tribunal, its performance has been less than laudatory managing a meagre 2 /3 cases a year at the cost of PKR 25,799,000 to the exchequer.[5]

Therefore, when the Lahore High Court in collaboration with the Punjab Government and the World Bank announced the setting up of commercial courts, it was hailed as a step in the right direction by the legal, business and overseas Pakistani community given the volume of commercial disputes which get thrown in with all other civil cases and begin their snail's crawl towards resolution. Motivation had already been building up spurred on by the growing number of overseas Pakistanis who contribute to the national economy through financial investments and active dealing in the ever-booming property market. The Lahore High Court Hon'ble Chief Justice Mr. Justice Qasim Khan aided by pro-active judges like Hon'ble Mr. Justice Jawad Hassan led an initiative designating independent judges in civil court to hear commercial disputes in the Overseas Pakistani cell which had been set up by the previous Hon'ble Chief Justice Mr. Justice Sardar Shamim Khan at the Lahore High Court and in various districts of the Punjab to address matters related to overseas Pakistanis.[6]

3. Lahore High Court Chief Justice authorizing Commercial Courts in the Punjab Districts

The success of the Overseas Pakistani Cell was followed by a notification[7] issued by the Chief Justice in April 2020 establishing Commercial Courts in districts of the Punjab and nominating judges to exclusively hear and adjudicate cases of a commercial nature as defined

[5] Annual Report 2012 and 2018, *Administrative Tribunals and Special Courts*, published by the Secretariat of Law and Justice Commission of Pakistan. http://ljcp.gov.pk/assets/dist/publication.
[6] Commercial & Overseas Pakistanis Cell - Lahore High Court | About (lhc.gov.pk)
[7] Notification No. 6032/DDJ/DR (PD&IT) dated 28.04.2020.

by the Lahore High Court Rules and Orders.[8] The notification kicked-off an intensive round of specialist training workshops on national and commercial law and practice. Simultaneously, a Working Group was formed headed by two High Court judges, Mr. Justice Shahid Karim and Mr. Justice Jawad Hassan comprising members of the legal fraternity, the Punjab Government and the World Bank. The result was the Punjab Commercial Courts Ordinance 2021 (the "Ordinance") signed, on 12 April 2021, by the Governor of the Punjab, Mr. Muhammad Sarwar, in the gardens of Governor House, Lahore at sunset, to the sound of the sonorous call to prayer and under the light of the new moon of Ramadan 1442 H. It was, indeed, an auspicious entry into a new frontier.

4. Overview of the Punjab Commercial Courts Ordinance 2021

The constitutional and procedural legal system in Pakistan is well-suited to accommodate specialized commercial courts with various constitutional safeguards and procedural provisions lending legitimacy to such a venture. This was reinforced ahead of the arrival of the Ordinance by the decision of the Lahore High Court in *Pizza Hut v Multan Development Authority and others (2021).* In this case which addressed the question of whether the writ jurisdiction of the High Court under Article 199 of the Constitution was maintainable in circumstances where proceedings were pending before a court of first instance which had jurisdiction, the learned judge, Mr. Justice Jawad Hassan, whilst dismissing the petition for failing to show that relief sought in the court of first instance i.e. the Commercial Court was not adequate and efficacious, stressed that:

> *"28. Undoubtedly freedom of trade, business and commerce is a fundamental right guaranteed under Article 18 of the Constitution which states that every citizen shall have the right to enter upon any lawful profession or occupation, and to conduct any lawful trade or business. One of the basic purposes behind provision of this fundamental right is certainly to advance culture of socio-economic progress and to protect and promote business and trade activities and, at the same time, to encourage simplification of the process of establishing and carrying out new business ventures throughout the country because activities of business and trade create opportunities for the masses around and provide job options, financial stability, and progress in the area.*
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> *29. Since the Pizza Hut is an international chain and entered into lease agreement with WASA, it is the duty of the Courts in Pakistan to see the rights of the parties and to protect their interest to build confidence of investors in Pakistan but at the same time the interest of government functionaries has also to be examined regarding financial interest of the Government. The learned Civil/Commercial Court is, therefore, directed to decide the case expeditiously but not later than 60 days from the receipt of copy of this judgment in accordance with law."*[9]

[8] Vol.1, Chapter 1, Part-K, Rules 10 & 11, Lahore High Court Rules and Orders.
[9] *Pizza Hut v Multan Development Authority and others (W.P. 2761/2021)*, pp.17-18.

The above decision set the stage for the arrival of the Ordinance as well as signalling a decisive nod of encouragement to the international investment and legal community as to the pro-commerce judicial climate. The Ordinance provides, for the whole of the Punjab province of Pakistan, "a legal regime for early resolution of commercial disputes and expeditious disposal of commercial litigation of specified value." A commercial dispute is defined as "any dispute, claim or counterclaim arising out of a contractual dispute where the value of the claim or counterclaim is five hundred thousand rupees or more, or such other value as the Government may notify, related to or connected with any transaction of trade, business or commerce excluding sale or purchase of immovable property:

i. between the domestic companies; or
ii. between a domestic company and a foreign company or a firm; or
iii. between the firms; or
iv. between a firm and domestic or foreign company; or
v. between a domestic company, foreign company or a firm and a private person."[10]

The distinguishing features of the Ordinance, which has 23 sections in all, are the:

(i) Setting up of dedicated commercial courts and appellate forums in the districts of the Punjab which will have exclusive jurisdiction to try commercial disputes and dispose of them within a period of 180 days from the date of filing of a suit;

(ii) Provision for e-filing of written and oral pleadings and recording of evidence. Commercial courts will be the first courts to formally allow arrangements to deal with crises like the current global Covid-19 pandemic without obstructing the judicial process;

(iii) Short shrift given to adjournments which plague the efficiency of courts in Pakistan as the most common dilatory tactic employed by obstructive advocates. Section 11 of the Ordinance allows two adjournments "for a specific purpose" and a third, final adjournment under exceptional circumstances and, that too, for only one week subject to payment of costs awarded at the discretion of the judge;

(iii) Apportioning of costs under Section 12. Section 12(1)(c) affords an opportunity to argue for wasted costs against a party resorting to dilatory tactics, not limited to unnecessary adjournments;

(iv) Disposal of appeals within 120 days from the date of filing of an appeal;

(v) Mandatory court-ordered alternate dispute resolution under the provisions of Order IX-B of the Code of Civil Procedure, 1908.

These are welcome developments not least because they are long overdue, and not least because they force the wider judicial law-making and law-interpreting process to step up and keep pace with the demands of a rapidly moving global commercial order, but because

[10] Section 2 of the Ordinance.

commercial courts by virtue of the subject-matter they deal with have a wider impact on society than, perhaps, other types of disputes do. Therefore, commercial court judges become even greater agents for social and economic change than one appreciates. This takes on greater significance when seen, as mentioned above, in commercial disputes that involve sensitive and complex geopolitical / geo-economic issues and questions of national concern.

Now is the time to scrutinize the Ordinance to see if it lives up to the promises it makes in the preamble that "commerce, trade and business matters require special expertise for their expeditious disposal" and that "commercial courts shall facilitate investment in the country and provide speedy justice."

The configuration of the Ordinance, not the concept of Commercial Courts, comes with some caveats which should be corrected before the Ordinance acquires the status of a statute. First and foremost, the "specified value" of commercial cases mentioned in the preamble and again in section 18 of the Ordinance (in relation to the power of the High Court to issue directions) has not been defined. The term "specified value" has also been used in the 2015 Indian Commercial Courts Act as well as in its 2018 Amendment. Section 2(1)(i) of the Indian Commercial Courts Act 2015 defines specified value in relation to a commercial dispute as "the value of the subject-matter in respect of a suit as determined in accordance with section 12 (which shall not be less than three lakh rupees)[11] or such higher value, as may be notified by the Central Government. Section 12 of the 2015 Act elaborates on the various methods of quantification of "specified value" depending on whether recovery is of money, movable property, immovable property, or any other intangible right. This crucial computation to determine what constitutes "specified value" is missing in the Ordinance and will be easy fodder for an advocate looking for deleterious and time-wasting tactics.

A bigger concern is the appellate forum envisaged by the Ordinance. This is dealt with in section 15, Commercial Appellate Tribunals. This is a cumbersome procedure which falls neither at the District Court level nor at the High Court level. It is a tribunal hanging somewhere in between and could pose similar handicaps to the tribunal set up years ago under the Import Export Act 1950 rendering it largely ineffective. Section 15(2) of the Ordinance states that the "Tribunal shall consist of a Chairperson and two members who are, or have been, or are qualified for appointment as, a Judge of the High Court, to be appointed in consultation with the Chief Justice." This would allow for a district judge who has not yet been elevated to the High Court as well as a retired judge to form the panel of members of the Tribunal. It is doubtful that it will sit comfortably with sitting judges to be by-passed for an appointment in favour of a retired judge. Furthermore, such a tribunal would by-pass the High Court altogether and decisions rendered by it would be challenged directly in the Supreme Court which goes against the civil procedure code and practice.

Another concern is the definition of a commercial dispute which is somewhat opaque in its ambit by "excluding sale or purchase of immovable property." This definition needs refinement since much of the discourse on rule of law and economic development revolves

[11] This has been substituted in the 2018 amendment of the 2015 Act by section 4 for "which shall not be less than one crore rupees".

around two critical factors: (i) enjoyment of property rights; and (ii) enforcement of contracts.[12] Indeed, there are social philosophers and economists who argue that rule of law in a country can precede or operate independently of democracy if two elements in their legal system are strong:

(i) Effective courts; and
(ii) Tight commercial law.

A legal system in a developing country dominated by legislative action will neither inspire the confidence nor establish the stability that modern governance and investment require. If courts are efficient and commercial codes are effective to secure property rights and enforce contracts, then rule of law and economic development have a chance to develop. Commercial law draws for its sustenance on all the great streams of law that together make up the corpus of English jurisprudence, with the law of contract as its core, while equity acts now as its handmaiden, now as the keeper of its conscience.[13] Contract law is so foundational to commercial law simply because contracts are essential to commerce. Without the certainty or, at least, the security provided by a contract, modern day commerce would not be possible.[14]

5. Punjab Commercial Courts at Cross-roads of Legal Cultures

The Lahore High Court has seized what is a chance of a legal lifetime in setting up specialized, state-of-the-art courts underpinned by an internationally respected commercial code. A feature that puts the Ordinance and commercial courts in Pakistan in good international stead is the fact that whilst the prominent new international commercial courts do not follow a single definition or model, many of them are strongly influenced by the common law tradition.[15] The Pakistan legal system also evolved out of the English common law tradition which could be a competitive advantage amongst international commercial dispute resolution fora. Common law, both in terms of substance and procedure, is widely recognised in international business, in part perhaps because the common denominator for international trade from South-East Asia to Latin America (one end of the globe to the other) is the English language. It is a tried and trusted system, known for its adaptability to the needs of modern commerce. Further, there is always a need for a common denominator, since conducting trade across different legal systems increases the transaction costs of business. Resources are spent on understanding compliance with national laws from the start to the end (i.e., enforcement of judgments), differences between systems need to be bridged, and unfamiliarity with local legal process increases commercial risk.

[12] Thomas Carothers, *The Rule of Law Revival*, Foreign Affairs (1998); Brian Tamanaha, *The History and Elements of the Rule of Law*, Singapore Journal of Legal Studies (2012).
[13] RM Goode, *Commercial Law in the Next Millennium* (Sweet & Maxwell, 1998) pp 8 – 9.
[14] Sundaresh Menon, 'International Courts: Towards a Transnational System of Dispute Resolution', DIFC Courts Annual Lecture Series 2015.
[15] The three Gulf courts (Abu Dhabi, Dubai, and Qatar) and the AIFC court in Kazakhstan are heavily influenced by English common law procedures and principles. All these courts operate within institutional structures of financial centres.

This is not to diminish the contribution of the civil law (i.e. inquisitorial) court system, and the civil law itself, in international commerce. The Punjab commercial court judges should take note of this in developing commercial jurisprudence. Indeed, this is one of the unique features of international commercial law that it allows for harmonization, and the picking and choosing of the best features of all systems, in a way other areas of law may not. A 2018 study commissioned by the European Parliament's Committee on Legal Affairs introduced the idea of a "European Commercial Court" which would create a centre for international commercial disputes in the way that the Singapore International Commercial Court is doing. In mainland Europe, Brexit has been seen as an opportunity to attract legal business either away from London or as an alternate complement to London. In each case, there is a focus on building a truly international system of dispute resolution that strives for convergence.

It is universally acknowledged that the purpose of the modern commercial court is to provide an efficient and credible means of commercial dispute resolution, particularly in relation to international disputes, with the aim of attracting inward investment. For Pakistan, this extends to providing an efficient and transparent adjudication environment for overseas Pakistanis to invest in their motherland despite the many challenges and blockages in the system. The Pakistani diaspora around the world amounts to over 11 million people. That is 3 times the populations of Singapore, Denmark, Finland and equals all of Belgium and Tunisia. This diaspora is a national asset that should be recognised, appreciated, and catered for in the development of commercial courts, rule of law and economic development. As the Singapore Chief Justice Mr. Sundaresh Menon has noted:

> "… it is also in the sphere of commerce that the dualism between an international outlook and a domestic rootedness is perhaps at its most visceral. How we choose to structure and propagate our laws of commerce can have an impact on the calculus of economic actors and, consequently, on the behaviour of the markets they transact in."[16]

Many countries world-wide have recognised the importance of the role of commercial courts in laying strong foundations for a stable economy. France is an example of a country that has changed its law with a view to competitive advantage – the section of the French Civil Code on the law of contract was comprehensively amended in 2016 with the stated aim of rendering French contract law more accessible, predictable, and influential abroad and commercially attractive. The purpose of setting up these new courts – which are expensive to establish and maintain – goes beyond competition for international commercial disputes work. They are seen as essential building blocks in the ecosystem of a global commercial and financial centre as observed by the Singapore Chief Justice Sundaresh Menon:

> "Arbitration, by its very nature, cannot provide a complete solution to propel the vessel of global commerce forward. Arbitration was conceived as an ad hoc, consensual, convenient, and confidential method of resolving disputes. It was not designed to provide an authoritative and legitimate superstructure to facilitate global

[16] Sundaresh Menon, Annual COMBAR Lecture delivered in November 2013 at Lincoln's Inn Old Hall, England.

commerce. It cannot, on its own, adequately address such things as the harmonisation of substantive commercial laws, practices and ethics."[17]

6. Parallel Global Developments

Internationally, the London Commercial Court is heralded as the model for new international commercial courts. Justice Long Lawrence, albeit infamous, became immortalized by being in the right place at the right time. He was the goose, but he did not lay the golden eggs, only happened to be sitting on them. England already had centuries of established commercial jurisprudence; the setting up of dedicated commercial courts consolidated the vast body of jurisprudence under one roof. That is not to say that England has, by any means, been at the forefront of commercial courts. The London Commercial Court went through its own dry spell after World War II and had a slow recovery in the ensuing decades showing that a commercial court is as good as the market it seeks to preserve. And even in doing that, it needs to be complemented by a strong commercial law and an active arbitration mechanism allowing for speedy alternatives to litigation. It was only with the civil procedure reforms of Lord Woolf in 1996 that fresh life was breathed into a cluttered and slow system. Several other developments alongside also directed the course of commercial courts' efficacy. A few are of note:

(i) SIFoCC

This is an international forum for commercial courts which was set up in 2016. Judges of dedicated commercial courts or courts dealing with commercial matters can become members e.g. China, Korea, Japan, Singapore, Philippines, Astana, Malaysia, Sri Lanka – to mention a few in Asia. All the countries that are important for Pakistan in terms of investment are members of SIFoCC. Pakistani judges could play an important role given that CPEC is the flagship of China's BRI project and the BRI was a huge motivation for starting this forum. SIFoCC facilitates collaboration between members' courts to promote and share best practices for the just and efficient resolution of commercial disputes.

(ii) Users Committee of the London Commercial Court

This was set up by the Lord Chancellor in 1977 as a Standing Committee, not a decision-making body. Its purpose is to provide a direct link between the commercial users of the court and the court itself, in order to improve the service that the court can offer. It does not have a constitution or statement of objectives but meets a few times a year to review the working of the Commercial Court from the perspective of judges, advocates, and users. It is also an organized forum for maintaining statistics e.g. number of new cases commenced, or information as to the outcome of arbitration applications under ss.67, 68 or s.69 of the English Arbitration Act 1996 (setting aside applications and appeals).

(iii) Case Management

[17] Sundaresh Menon, "International Commercial Courts: Towards a Transnational System of Dispute Resolution", Opening Lecture at the DIFC Courts 2015.

Case management procedures adopted by commercial courts are judicially driven, and critical. Case management is not a process for its own sake. It is an essential 'judicial grip' on proceedings at all stages, whether pre-trial, trial, appellate or enforcement. It is an integral part of the judicial role in commercial disputes. The key to effective case management is early identification of what is common ground, what are the real issues in dispute, and what is really required for an efficient and effective resolution. This streamlines proceedings, whether pre-trial, mediation, other ADR, or trial proceedings themselves. Successful case management requires the active cooperation of parties' counsel, in close collaboration with the court. Elements of case management include timelines, extent and approach to disclosure / discovery, framing of issues, the handling of interlocutory applications, adopting ADR procedures with timelines, and the use of technology (specially during the Covid-19 pandemic but in the future also), the approach to witness testimony and expert evidence, and the active management of costs. The Ordinance in its earlier drafts had provisions for case management which, unfortunately, were removed from the final draft.

(iv) Importance of Pre-Trial Mediation / Negotiation

Compulsory or semi-compulsory mediation has been successful in several jurisdictions. In the Frankfurt Chamber for International Commercial Disputes, in general, the proceedings start with a conciliation hearing in which the possibilities for an amicable settlement are discussed with the parties. Similarly, in the China International Commercial Court, mediation is discussed early in the proceedings. Timing is key for mediation and requires strong discretion on behalf of the judge. The start of litigation may not be the best time to encourage mediation; it may be more appropriate to factor it into the case management timetable at a later stage, when the issues in dispute have been clearly defined, but before the case reaches trial. Here, the ability of a judge to act inquisitorially can be critical.

(v) Procedure

If it can be achieved, early listing of cases is an incentive for early settlement, obviating the need for an expensive and potentially destructive trial. In other words, efficient procedures are themselves a significant aid to settlement – which is generally by far the best commercial outcome. But this requires confidence on the part of users that the court will indeed stick to schedules and is ready and able to dispose of the case on the allotted timetable. A common complaint in both litigation and arbitration are the volumes of documents, unfeasibly long submissions, and inclusion of all arguments – whether viable or not. Some courts impose page limits e.g. the Hong Kong Commercial Courts. The London Commercial Court also now has page limits on written submissions.

The London Commercial Court publishes "lead times" giving parties an indication of how long it will take to fix a hearing, and a strong predisposition on the part of the judges against allowing adjournment of hearings without good reason. The importance of procedure is emphasised by the Netherlands Commercial Court, which began operation in 2019, stating that "Dutch procedural law is recognised for being efficient, pragmatic and cost-effective as

to speed. Dutch courts are amongst the fastest courts in the European Union with an average of 130 days from a notice to appear to a final judgment (EU Justice Scoreboard)."[18]

(vi) Technology

The setting up of new courts in the 21st century has made procedural innovations in technology possible to meet market demands. In England, electronic filing was made mandatory for all professional users since 2017. Electronic bundles are frequently used in courts and there is a plethora of commercial providers of software to support annotation, hyperlinks and searching. The advantage of technology was best exhibited in 2020 when the Covid-19 pandemic brought the world to a standstill. Because of technology, lawyers and courts were able to adapt within a matter of weeks from the time lockdowns were imposed. Hearings went online in England, Singapore, Thailand and many other countries. Zoom / MS Teams and other competitive software flooded the market to cater to a multitude of professional needs. A common sight in many courts / lawyers' offices was the cockpit-style array of IT with four screens running simultaneously showing judges, opposing counsel, counsel making submissions, and live transcript. On the side of counsel would be the fifth screen – the omnipresent WhatsApp to receive continuous instructions from clients.[19]

(vii) Foreign law in commercial cases

Whereas the procedure in any court will be governed by the law of the place where the court is located (the *lex fori*), cross-border commercial activity invariably results in disputes that are governed by multiple laws. This, in turn, raises complexities as to how foreign law is to be determined and applied. Different courts adopt different approaches on whether issues of foreign are questions of fact (England) or may be presented by way of legal submissions (DIFC Dubai). China International Commercial Court decides issues of foreign law by way of opinions provided by a member of their international commercial expert committee. The SICC in Singapore provides different options for the presentation of foreign law, including the admission of foreign counsel to present this. This is an important issue, on which clear directions are required.

(viii) Enforcement

Where commercial courts are part of the domestic legal landscape, there are no issues as to enforcement but issues have arisen in some of the new 'international' commercial courts outside their home jurisdiction. Commercial litigation has no equivalent of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (for commercial arbitration) or the 1965 ICSID Convention (for investment arbitration). In 2019, the Hague Conference on Private International Law finalised a Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters which

[18] 2020 EU Justice Scoreboard. See www.justice_scoreboard_2020_en.pdf (europa.eu)
[19] History was made in Lahore in July 2020 when Mr. Toby T. Landau QC – an international arbitration and commercial law specialist – argued before the UK Supreme Court from the offices of NBM Law Chambers in the case of *Enka v Chubb* [2020] UKSC 38. It was the first time in the history of the English House of Lords / Supreme Court that counsel addressed the court from Pakistan.

will come into force once two signatories ratify it. Whereas the 2005 Hague Choice of Court Convention applies in cases where the parties have agreed to a particular jurisdiction, the 2019 Convention applies independently of party agreement. It will take time to test how successful the 2019 Hague Conference will be. Till then, enforceability will depend on the domestic legislation of the country in which enforcement is sought.[20]

7. Conclusion

Whatever their shape and structure, commercial courts are now an indispensable feature of commercial dispute resolution. They have the ability, by virtue of public jurisprudence and precedent, to direct the content and evolution of commercial law. They are an effective route for capacity-building for a legal fraternity and they have an ability to utilise and optimise modern technology as seen in the development of artificial intelligence applications in international arbitration.

A journey of a thousand miles begins with a single step. This single step taken by the Punjab Commercial Courts Ordinance 2021 is, undoubtedly, a leap and a leap in the right direction. And now having made this leap under the stewardship of Chief Justice Mr. Justice Qasim Khan and the likes of the indefatigable Mr. Justice Jawad Hassan, one must not allow cultural myopia from making us pause to rest. Now is the time to take stock of what is happening in the world around Pakistan and adapt. Summary judgment, case management, court-sponsored pre-trial mediation and ADR are no longer revolutionary innovations – they are the universally-recognised components needed for the super-structure of a commercial court, and essential for full participation in global commerce.

[20] Here again, the differences in common law and civil law approaches become apparent. Common law treats a foreign judgment as in itself giving rise to a cause of action while civil law makes it a matter of reciprocity.