Law and the open economy

Securing the future of English law and civil justice system for 21st Century prosperity

Richard Hyde

SMF Social Market Foundation

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ABOUT THIS REPORT

The evidence presented in this report comes predominantly from two sources:

- The first is a 90-minute, high-level roundtable with politicians (including representatives from the Government), legal academics and practitioners and economists to discuss the importance of the legal system to the economy, convened in July 2021 by the SMF. The event was held under the Chatham House rule.
- The second is polling by Opinium of a sample of 1,000 businesses of all sizes (ranging from sole traders to large companies) and operating across all the main sectors of the economy. The sample included a mix of exporters, importers and solely domestically focused enterprises. Surveyed businesses were asked questions about their awareness and understanding of the enabling role the civil legal system plays in commerce.

The two key sources are complemented by desk research, which was undertaken across August 2021.

While the views and arguments of participants in the roundtable are reported in this paper, the conclusions and recommendations made in this paper are those of the author alone.

EXECUTIVE SUMMARY

Law and minimally effective legal institutions (e.g., a civil justice system that implements the law) are essential for establishing the rule of law and long-term prosperity. Furthermore, there is a growth premium that is linked to the quality of the law and those institutions. Higher quality legal institutions have a positive impact on the prosperity of a society.

The UK has a long history of adherence to the principle of the rule of law and has a well-developed corpus of (civil) law, that has a proven track record of supporting commercial activity and in-turn growth in the economy. This has been particularly true of English law and the English and Welsh civil justice system, which underpins English law.

The reasons why English law has traditionally been a respected facilitator of commercial activity include its numerous unique characteristics, such as: strong protection of property rights, an entrenched preference for upholding commercial freedom, evolving judge-made law based upon cases and the principle of precedent, among others. It is the particularities of English law that have contributed significantly to making it especially popular for governing international commerce of many kinds, such that English law itself has become an export. Its widespread use for governing cross-border trade and financial flows has seen it become - it has been suggested - into something akin to an "international public utility".

Similarly, the quality of the judges in the civil justice system and their incorruptibility has ensured the civil justice system is also globally respected and as a result, the English and Welsh jurisdiction is where many international firms want to resolve their disputes, whether through the courts or alternatives such as arbitration, where many judges, trained in the English and Welsh civil courts, also work and deliver arbitral services.

However, there is growing evidence that English law is, in some areas, in desperate need of modernisation, alongside the civil justice system that underpins it:

- The former falls short in some key areas important to the modern economy, whether they be the emergence of new technologies such as blockchain, AI and biotechnology, or the growth of new patterns in commerce like digital trade and changes in business practices including the rise of ESG issues, which are becoming more of a priority for firms, alongside traditional motivations such as shareholder value.
- The latter performs poorly in international comparisons and operates in a way that puts it far behind the best civil justice systems in the world. Specifically, going to law in England and Wales takes too long and costs too much. It is particularly difficult for smaller and medium-sized enterprises to utilise the civil justice system when needed. However, excessive time and cost are significant concerns for larger businesses involved in disputes, too. The slowness and "cost risk" associated with using the civil courts are key reasons why arbitration, for example, has become more popular among international businesses. Further, there is a persistent problem with the recruitment and retention of judges, which contributes to the slowness and cost of litigation.

Difficulties with judge recruitment and retention are particularly acute in common law systems like England and Wales, where competent judges are more central to the operation of the law than in in other systems.

These challenges have arisen, in-part at least, because of complacency among many of those who have positions of trusteeship over both the law and the legal institutions that implement the law, which has meant the efforts to modernise the law and to upgrade the civil justice system that have been made in the past have not been sufficiently extensive and consequently have failed to make a substantial difference to the problems.

The prospect of alternative jurisdictions, not least other common law jurisdictions, eclipsing England and Wales is a real risk. Places such as Singapore have made considerable strides in recent years to modernise their dispute resolution offerings to international businesses. Further, Singapore's civil courts are more efficient than those in this country, which helps contribute to the high domestic growth rates experienced by Singapore in recent decades. Among non-common law jurisdictions, international indices suggest that countries such as Norway and South Korea have more efficient civil justice systems than England and Wales, which help ensure their economic success.

The "good news" story of the international popularity of English law also comes with risks. As more jurisdictions vie for a "slice" of the international litigation and arbitration "pies" by offering to adjudicate disputes involving English law, for example. As a result, the prospect that the integrity of English law may be eroded over time, by its use in these "competitor jurisdictions" is a real one. This would see some of English law's usefulness for international commerce damaged. Therefore, there is a question as to whether measures to protect the integrity of English law might be needed.

To help tackle the numerous challenges to the ability of English law and the supporting civil justice system to continue to "deliver" economic advantages to the UK, action is needed to:

- Recognise more clearly the importance of English law and the civil justice system as an indispensable element of the "social infrastructure" and make the quality of English law and the functioning of the civil justice system a higher priority among policymakers, with a new long-term strategic approach towards policy in these two (closely connected) areas.
- Reduce the time and other cost problems that plague the civil justice system so that access to justice can be increased, in particular for businesses, and outcomes more easily and cheaply achieved.
- Modernise English law so that it is "fit" for the 21st century economy and therefore can, most effectively, support higher domestic growth as well as remain the best and most widely used law for governing international trade and financial flows.
- Protect English law from being undermined through its use by other jurisdictions, who are offering English law-based adjudicative services but do not have an interest in sustaining the integrity of English law over the long-term.

- Ensure legal services are a key topic in future trade discussions and that trade arrangements with developing countries in particular, are facilitated by efforts to help bolster the rule of law in those countries.
- Strengthen existing, and build new international institutions and networks that will enhance the reputation of, increase familiarity with and grow the levels of support for common law systems in general and English law in particular, around the world.
- Continue to try and accede to the Lugano Convention as well as pushing for swift implementation (by signatories) of the 2005 Hague Convention on Choice of Courts and widespread adoption of the 2019 Hague Convention on Recognition and Enforcement of Foreign Judgments.

CHAPTER ONE – INTRODUCTION

In July 2021, the SMF convened a high-level roundtable with politicians, legal academics, practitioners and economists to discuss the importance to the economy, of the English (civil) legal system and the institutions which administer that law, such a courts and tribunals.

Alongside the roundtable, SMF commissioned a poll of 1,000 businesses, which explored the same themes as those of the roundtable, with the business community. Testing their awareness and understanding of the enabling role of the (civil) law and associated legal institutions.

Box 1: Key concepts and terms

The rule of law emerges from and is sustained by:

- Having a clear set of laws that apply equally to all in society
- Ensuring breaches of the law (by individuals or public authorities) and disputes (between private parties) are dealt with peaceably and definitively through a transparent and independent process
- Entrenching principles such as private property rights in the law.

The presence of such conditions is essential for long-run prosperity,[1] as described by economic historian Douglass North, who pointed out that:[2]

> "...*long-run economic growth entails the development of the rule of law*"

The term "civil justice system" (CJS) is "shorthand" for the collection of legal institutions and people that deal with domestic (non-criminal) legal issues. The CJS includes the courts and tribunals, the staff that administer them and the judiciary. It also encompasses the enforcement officers and associated mechanisms,[i] that enforce the judgments of the courts. The term "jurisdiction" is also used to describe the same nexus of institutions and people. Although "jurisdiction" more explicitly recognises the territorial dimension.

English (civil) law (also known as English private law because it governs the behaviour of individuals and private entities, such as businesses) has been described as the "operating system", which works with the "hardware" of the CJS.[ii] English law (and common law systems more generally) has a number of distinct characteristics that differentiate it from alternative (e.g. Civil Law) systems.[iii] These qualities are popular among the international business community and are why, in-part, English law and jurisdiction have been a long running export successes for the UK. Some have suggested its international popularity makes it a "public utility" for global commerce, in addition to its core domestic functions.

[i] High Court Enforcement Officers and County Court Bailiffs.

[ii] This paper refers, mostly, to the "English legal system" or "English jurisdiction", "English civil justice system", or "civil justice system" etc, for ease. However, the shorthand refers to the law of England and Wales, or the civil justice system of England and Wales. Whilst devolution has created a distinctly Welsh legal jurisdiction in some areas, nevertheless, for most purposes the English and Welsh law and legal systems remain as one.

[iii] The Civil Law tradition is not homogenous. For example, the Napoleonic Code variant is used (and originated too) in France, Belgium and many of the Mediterranean countries such as Spain and Italy and much of Latin America. Whereas the Roman-Germanic variant is used in Germany, Switzerland, the Netherlands and Turkey among others. Source: Wood, P R. (2008). Maps of World Financial Law.

The importance of the rule of law and legal institutions for the domestic economy

An adequate system of civil (i.e. private) law alongside functioning civil legal institutions (that uphold the law) are indispensable to a successful society and economy. More particularly, the evidence presented in this paper contends that English (civil) law, the various legal institutions that underpin and implement English law - which together ensure the rule of law is securely in-place - are economically essential to the UK's past, present and future prosperity.

The fundamental importance of the civil law and more particularly the legal institutions that uphold and implement that body of law, has been summed up succinctly by legal scholar Dame Hazel Genn. The civil justice system is there to:[3]

> *"...support social order and economic activity; and...[serve a]... protective function... in relation to the rights of citizens and business vis-a-vis other citizens and businesses... the civil courts in a common law system provide much of the legal structure for the economy to operate effectively and for peaceful, authoritative and coercive termination of disputes between... companies..."*.

Also important to the functioning of the law, the courts and to maintaining the rule of law - and, in-turn, the economic activity they enable - is the wider legal eco-system. This includes the legal professionals and the wider legal services sector that they work in.[4] The latter includes the ADR (alternative dispute resolution) services that are often used to resolve disputes before any formal court process is instigated.

The global pre-eminence of English law

English (civil) law also plays a significant role internationally. It has been suggested that it operates in a role akin to that of an international "public utility"[5] because of its widespread use in international commerce and consequently its importance to the international economy.

The English courts, judiciary and the ADR services provided in the UK and by UK-trained judges and legal practitioners to international businesses, are similarly widely respected and popular among the international business community.

The success of English law is closely connected to the competence and incorruptibility of English courts and judges and the skills and competitiveness of the legal services sector. Each reinforces the strengths of the other, creating an economically powerful combination. Together, they generate considerable direct and indirect economic benefits for the UK economy from international sources.

Signs of decline

However, behind the historical success, there are growing challenges which cast doubt on the ability of English law and the civil justice system to underpin continued economic prosperity, whether domestically generated or through "English law and jurisdiction as an export", as successfully as they once did.

These challenges stem from a number of sources, including:

- A decline in the efficacy of the civil justice system, including problems with recruiting and retaining high quality judges
- Long standing deficiencies in some areas of English law and "gaps" where the law is not yet sufficiently "fit" to effectively govern some of the emerging technologies, commercial trends and business practices that will dominate the 21st century economy
- Risks to the integrity of English law from use by other jurisdictions that are less invested in ensuring English law is a high-quality corpus of rules.

Together, if these challenges are not recognised and taken seriously, the long-term consequences for the UK economy are likely to be significant. They will include slower growth and lower GDP-per-capita than otherwise would be the case, along with all the associated negative effects of that e.g., on employment, tax revenues and social capital.

Further, there is scant evidence that these growing challenges are being faced-up-to with the speed needed and that there are clear plans - accompanied by sufficient resourcing - to deal effectively with them, before the full set of negative consequences are felt.

A key reason, which emerged from the roundtable discussions, for the current lack of urgency is the degree of complacency among some of those who are entrusted with ensuring the maintenance of the utility of English private law and civil justice system. Acknowledging this, alongside recognising that previous efforts at improvement have fallen short, is essential if the problems are to be tackled.

Business, in particular, should have a strong interest in ensuring the country has a high-quality body of law and a robust set of legal institutions, because of the indispensable role of both in facilitating commerce. Yet, the polling evidence presented in this paper suggests many in the business community (as in other areas of society) take the civil justice system for granted, not seeing the importance of an effective set of legal institutions to their business and fail to see their enterprises benefiting from, what are considered, some of the traditional strengths of English law.

CHAPTER TWO – LEGAL INSITUTIONS AND THE ECONOMY

The centrality of legal institutions to long-run economic success

Recent scholarship has identified the central role that legal institutions, in particular, play in long-run development outcomes, above and beyond other factors that are associated with economic success.[6] The protection of private property, the preservation of incentives (e.g. through reducing the risks associated with commercial activity both domestically and across-borders) and the fostering of competition are linked with sustained wealth creation, over the long-term.[7] [8] [9]

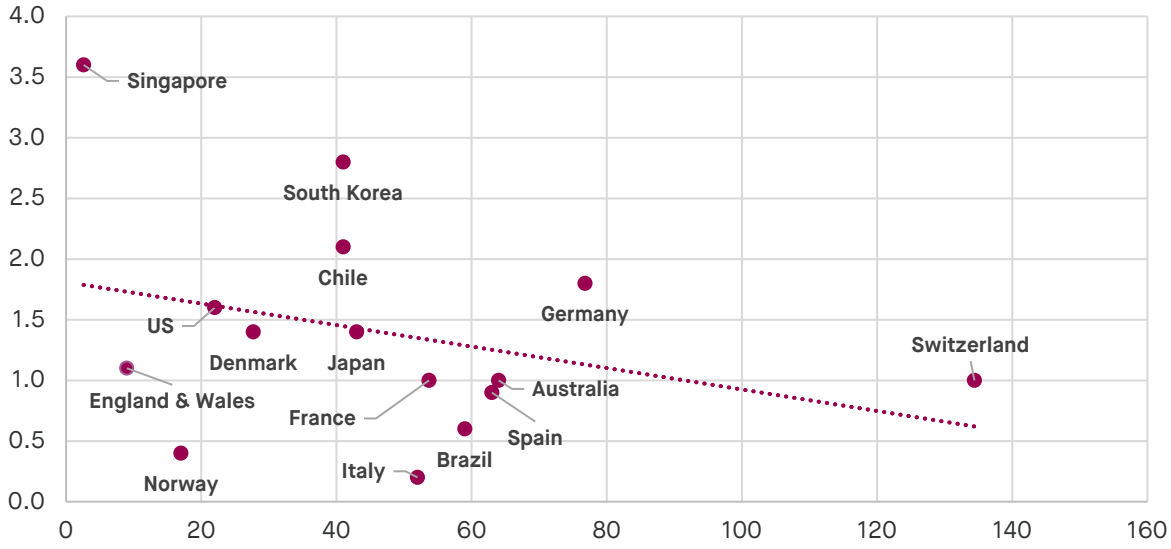
Good quality legal institutions are key to on-going prosperity

The quality of a country's legal institutions are an important determinant of investment levels and the rate of innovation in an economy[10] and therefore strongly linked to an economy's long-run level of per-capita GDP growth.[11] [12] [13] One attempt at quantifying the importance of improving the quality of legal institutions to economic prosperity found that a one percent shift in the efficacy of a country's legal institutions towards those of the best in the world - as measured by the World Bank's Cost of Doing Business Index - is linked to a 0.09% increase in annual GDP growth.[14] If such an improvement had been managed in the UK, in 1990 for example, and maintained over the subsequent 30 years, the country could have added (on average) approximately £2 billion extra to annual GDP, with additional improvements delivering further gains.

Figures 1 and 2 help illustrate the relationship between the quality of legal institutions and prosperity.[iv] In the charts, legal institutional quality is represented by the World Bank's ranking of countries across two key dimensions of their Doing Business Index, that are associated with the property rights and court efficacy. These are: "investor protection" and "contract enforcement".

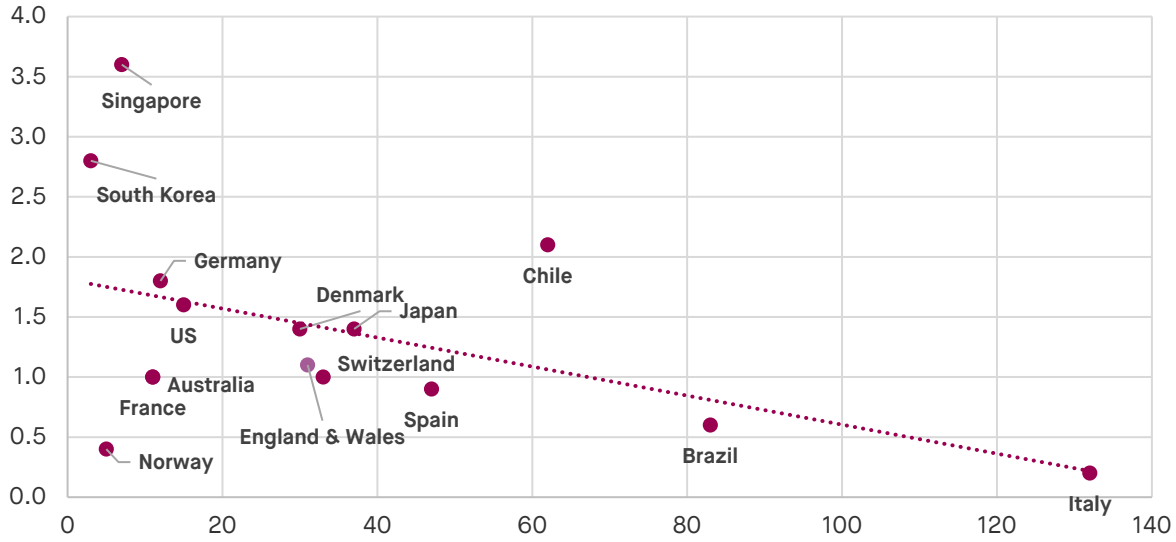
[iv] Data availability limitations mean that the period across which data for the selected countries is only the years: 2010 to 2019. It should also be noted that the World Bank made further changes to their methodology for compiling their Doing Business Index in 2015. The methodological changes and the short time frame over which the data (presented) in Figures 1 and 2 covers, means these charts should only be seen is complements to and confirmatory of the wider scholarship and not as evidence that stands alone.

Figure 1: Relationship between average country rankings: "investor protections" (Average Doing Business ranking) and average per-capita-GDP growth in selected countries (%), 2010-2019



Source: World Bank

Figure 2: Relationship between average country rankings: "enforcing contracts" (Average Doing Business ranking) and average per-capita-GDP growth in selected countries (%), 2010-2019



Source: World Bank

The two figures demonstrate that, even across a short period of time, there is a visible association between the quality of legal institutions and prosperity. Between 2010 and 2019, the lower in the World Bank rankings for “investor protection” and “contract enforcement” an economy was, the lower the average GDP-per-capita growth tended to be in that economy in that same decade. While a small sample only covering a decade, the evident relationship between the variables in Figures 1 and 2 is reflective of and consistent with the preponderance of evidence noted above, which covers longer periods of time, and which show that there is a clear link between law, legal institutions, and prosperity.

The economic importance of judicial competence and independence

A key contributing factor to the quality of a country's legal institutions is the independence and competence of the judiciary. Analysis has linked these specific dimensions with positive impacts on overall economic growth.[15] [16] This is the consequence of an association that has been identified between better performing courts and more developed credit markets[17] and a strong judiciary and greater dynamism among a country's small business community, as well as the larger firms in the same economy.[18]

The unique characteristics of the common law tradition and the English legal system

The UK prides itself on its reputation as a country governed by a stable body of law, administered by a competent judiciary, operating within an independent system of courts. This is the result of centuries of cumulative legal development.[19] [20] A central element of the evolution of the UK in general (and England and Wales in particular) into a modern society with the rule of law at its heart and an economy governed by a sophisticated legal system, has been the growth of the common law. Across centuries it has become an extensive and mature corpus of rules with its own distinct characteristics.[21] [v] [vi] Also important in that historical trajectory has been an independent legal profession that facilitates access to the law and use of the legal system.

Culturally distinct variants of the rule of law

The nature of the rule of law that has developed in common law countries, it has been argued, is a qualitatively different phenomenon to, for example, the variant that has tended to evolve in Civil Law countries, as was described by an attendee at the roundtable:

> *"...there is not just one concept of the rule of law in modern society, there are two... One is the rule of law, that is the traditional British conception that law is supreme... that governmental powers are limited, and law should be applied equally. Rule through law is a related concept... and the state rules and it rules through law. The state is supposed to follow its own law, but the state is the creator of the law, and the state is regarded as coming first. That's a very different cultural view. From that stem a lot of, you could say subtle, but very important differences... in the view of things..."*.

[v] It should be noted that common law systems are maintained by a number of countries around the world. One estimate suggested that 35% of the world's population live in common law jurisdictions. Source: Wood, P R. (2008). Maps of World Financial Law.

[vi] Developments such as UK membership of the EU (which has unavoidably influenced English law over the 46 years of formal UK membership) and the independence of the other common law jurisdictions from Britain (that have not been members of the EU) has seen each common law jurisdiction develop and diverge over time, in the detail of their respective laws.

The commercially advantageous characteristics of common law systems

A number of unique characteristics of English private law are seen as particularly important for facilitating commerce.[22] As was observed by a contributor (and echoed by others in attendance) at the roundtable:

> *"...first of all... English law is particularly flexible and responsive to business needs... that means it responds to innovation and emerging business needs and requirements quickly, it makes our legal system swift and agile and facilitates commerce and resolution of disputes...the second point is that English law is transparent, stable and predictable. A lot of that comes back to the common law. We have a foundation of precedent, stare decisis...[which]... means we're not reinventing the wheel every time a judge sits down to give a judgment. Businesses know that words mean not what people want to them to mean but what they actually do mean.... by and large we take an objective approach to contract... parties are masters of their own contractual fate...".*

One comparative analysis of the court systems in common law and Civil Law jurisdictions found that the legal institutions of common law countries - where there tended to be less procedural formalism – were typically swifter in their judicial proceedings relative to the Civil Law country average and more consistent, less corrupt, more honest and fairer, too.[23] Other analysis has suggested that factors such as property rights have been more securely guaranteed and the freedom to contract has been greater in common law regimes, compared to alternative systems.[24]

The importance of judges in English (civil) law and civil justice system

There was consensus among roundtable attendees that English law has, to a considerable degree, proven itself successful in promoting economic activity over a long period of time, because:

> *"Ultimately English law...evolves over time, its stronger because it is adaptable...".*

The delicate balance between stability, consistency, and flexibility over time, that English law has developed is – to a significant extent – because of the centrality of case-law to the system. Judges in response to specific cases brought before them, have had extensive influence over the development of the corpus of private law in England and Wales.[25] On the whole, this feature of the common law has delivered benefits,[26] not least in helping build a body of private law sensitive to the needs of commerce (domestic and international) of all kinds. The ongoing predominance of judge-made law across many areas of English private law (e.g. the law of obligations such as contract and tort, as well as property and succession, etc) and the importance of further judge-led development in the future,[vii] means that judges remain an indispensable ingredient in the success or decline, of English law and in determining the quality of this country's legal institutions.[viii] Consequently, it is important judges in

[vii] This is particularly the case now the UK has left the EU, as domestic judges are now back in the "driving seat" (subject to any Parliamentary constraints) of the development of swathes of areas of law that were previously subject to EU jurisdiction and thus determined, ultimately, by EU jurisprudence.

[viii] It is important to note that the development of the law that judges undertake from time-to-time is (generally) not "radical". (continued on next page)

the English system are high quality i.e. competent, independent[ix] and can be relied upon to ensure legal processes are fair and deliver rigorous judgments. As one contributor stated emphatically:

> *"These are the things that make us great…both the independence and the integrity of the judges…".*

The practical experience of judges is particularly important to the English system, as noted by another participant at the roundtable:

> *"One of the things we benefit from in this country is judges who have been practitioners…"*

This is in contrast to the position in Civil Law legal systems. Among the latter, the judiciary is a separate profession not populated by practitioners. Consequently, in such jurisdictions, judges tend not to have the commercial knowledge that comes from being a practitioner (i.e., a barrister or solicitor) prior to being "on the bench".

Estimates of the impact of having a common law system on a country's prosperity

The common law tradition has been linked, by some researchers, to better economic outcomes. For example, there is some suggestion that economies of common law countries tend to score higher in some economic freedom indexes.[27] Relative rankings in such indices are often considered by policymakers to be indicators of the underlying economic competitiveness of a county. Others have noted that common law countries are likely to be disproportionately represented at the top of comparative international rankings measuring factors such as entrepreneurship.[28] A key factor in driving economic success.[29] Research by academics has estimated a "growth premium" associated with being a common law country, compared to Civil Law jurisdictions.[30] One cross-country analysis suggested that common law countries grew by as much as 0.7% per annum faster than Civil Law countries between 1960 and 1992, in-part because of the differences in the legal systems.[31]

Rather, Lord Goff put it, in Kleinwort Benson Ltd v Lincoln City Council UKHL J1029-2: "*When a judge decides a case…he does so on the basis of what he understands the law to be….In the course of deciding the case before him he may, on occasion, develop the common law in the…interests of justice, though as a general rule he does this 'only interstitially'…This means not only that he must act within the confines of the doctrine of precedent, but that the change so made must be seen as a…very modest development, of existing principle and so can take its place as a congruent part of the common law as a whole*".

[ix] One analysis suggested judges in common law countries are more independent than those in Civil Law jurisdictions. Source; La Porta, R., Lopez-de-Silanes, F., Pop-Eleches, C and Shleifer, A. (2004). Judicial checks and balances. Journal of Political Economy. Vol 112. No 2.

The international success of English law and jurisdiction

At the international level, many businesses "vote with their feet" and choose English law to govern their commercial activities. The scale of the popularity of English law for international commerce has been highlighted recently in an analysis for Legal UK, which suggested that:[32]

- In 2020, English law governed around $11.6 trillion worth of global metals trading.
- The total value of global mergers and acquisitions (M&A) deals governed by English law in 2019, was approximately £250 billion.
- English law was the system of law that governed €661.5 trillion of global derivatives transactions in 2018.
- English law was the chosen law used for most of the £80 billion of gross written insurance premiums in the London Market.

Further, the English jurisdiction is where many international firms resolve any problems that arise. The position was summed up succinctly in one comment from a roundtable contributor:

> *"English law has achieved near universal adoption as the go-to legal system".*

Another added that:

> *"...English law is globally renowned and trusted...that's why, whether you're in India or China or Germany or the UK you've got businesses who are using English law in their contracts, and they know, not only the system of law is predictable, but our courts are trusted and fair".*

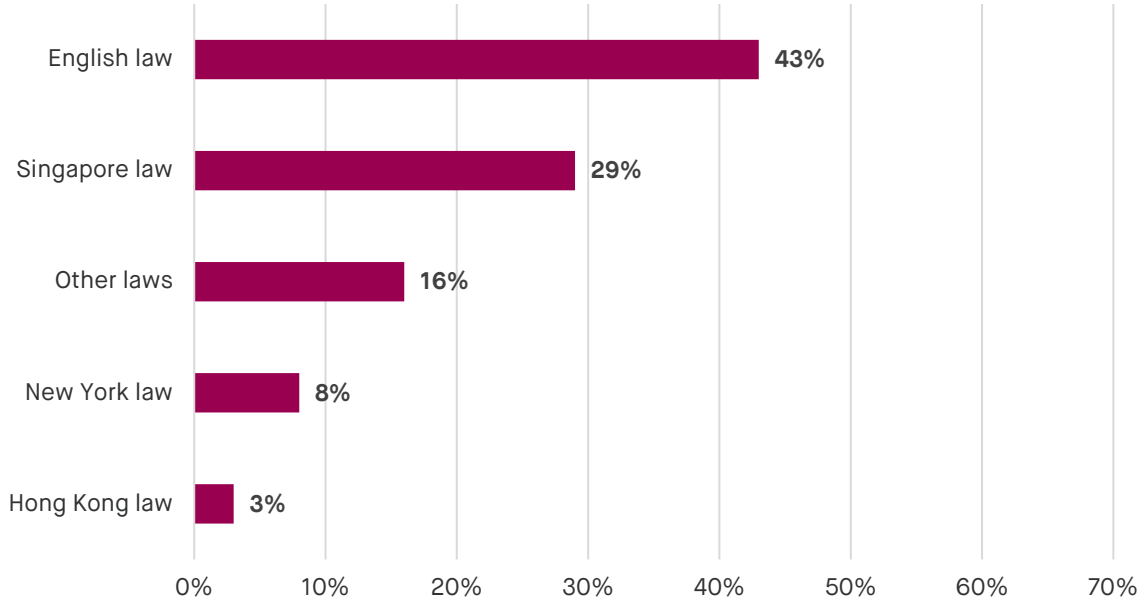
As another participant highlighted:

> *"If you're an Egyptian cotton producer selling cotton to India, you're likely to choose English law and you're pretty likely to choose London as your jurisdiction".*

Research by the Singapore Academy of Law (see Figure 3) reflects the points made by many of the roundtable participants about the pre-eminence of English law in international commerce. The former found that, in 2019, among businesses in south and east Asia that were engaging in cross-border transactions,[x] the most popular law for governing such commercial activities was English law.[33]

[x] Countries covered by the research included: India, China, Vietnam, Singapore, Malaysia, Myanmar, Indonesia, the Philippines, Hong Kong and Japan.

Figure 3: most frequently used governing law among south and east Asian businesses engaging in cross-border transactions, 2019

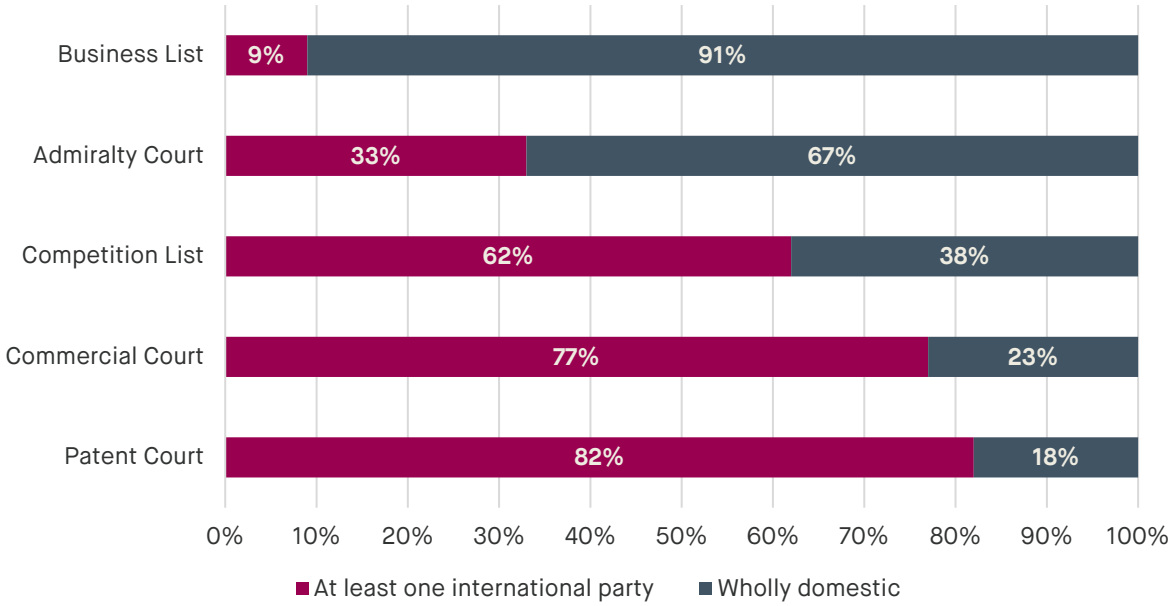


Source: Singapore Academy of Law and Ipsos-Mori

The international popularity of English law and jurisdiction is also observable in the proportion of cases before the Business and Property Court[xi] that involve international parties (see Figure 4).

[xi] The Business and Property Court brings together the work of the Chancery Division and specialist courts of the Queen's Bench Division of the High Court. The Court deals with cases that fall into the following: the Commercial Court (e.g. shipping, sale of goods, insurance and reinsurance); the Business List; the Admiralty Court; the Circuit Commercial Court; the Technology and Construction Court; the Financial List; the Insolvency List; the Companies List; the Competition List; the Intellectual Property List (e.g. the Patents Court and Intellectual Property and Enterprise Court); the Property, Trusts and Probate List and the Revenue List. Source: The Business and Property Courts - GOV.UK (www.gov.uk)

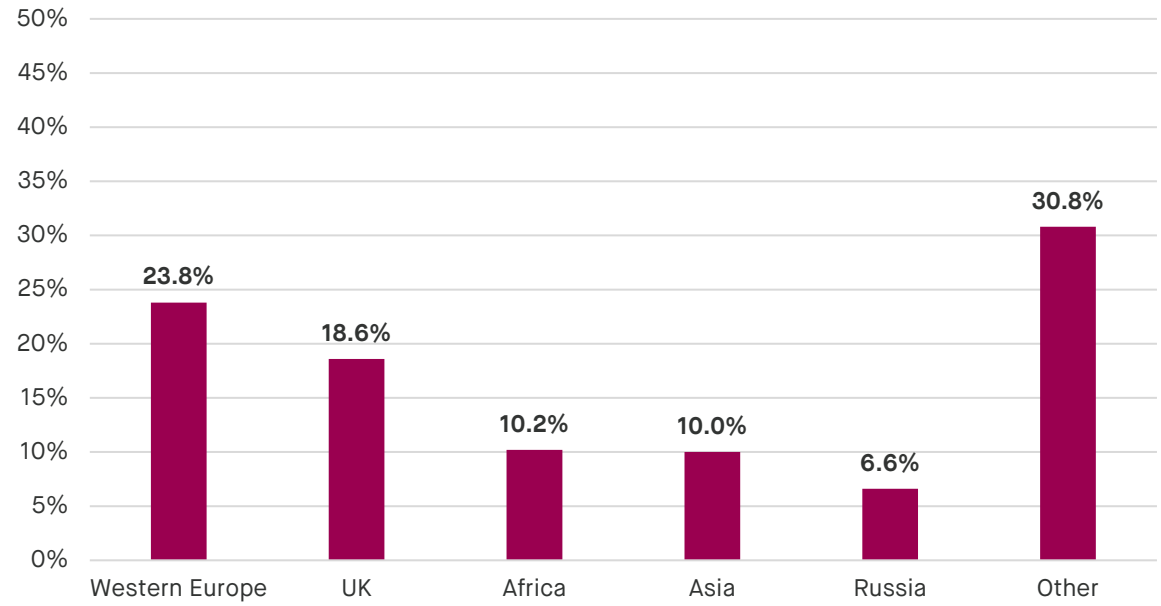
Figure 4: proportion of cases before the Business and Property Court with at least one international party involved, 2019



Source: Ministry of Justice

Arbitration is the way most international businesses that are engaged in cross-border activity prefer to resolve problems.[34] In recent years, the UK has been a world leader in hosting and conducting commercial arbitration. One estimate suggested that English law governs around 40% of all law in corporate arbitrations globally.[35] The importance of the English jurisdiction to international arbitration is also visible in the data presented in Figure 5, which shows the origins of the parties to arbitrations at the London Court of International Arbitration (LCIA) in 2019.[36]

Figure 5: geographic origins of parties involved in arbitration cases at the LCIA, 2019



Source: LCIA

The success in arbitration is inextricably intertwined with the more formal legal structures of the courts and the judiciary in this country.[37] [38] The position was put succinctly by Lord Justice Gross, in a lecture in 2017, where he outlined that there is:[39]

> *"...[a]...mutually supportive relationship between the English court and London arbitration... they enjoy a complementary relationship, to the benefit of both. The strength of one supports the strength of the other and vice versa..."*.

The contribution of the legal services sector

An important element in the overall attractiveness of the English jurisdiction across the globe is the UK's legal services sector. The latter is important because of:

- The training and knowledge of English law (used in much cross-border commerce) among UK legal professionals.
- The international focus of a significant proportion of the UK's legal services providers.
- The openness of the UK to international law firms.
- The cluster of expertise around finance, insurance and other internationally focused industries that has developed over a long period, particularly in London.[40]

As far back as 2012, it was estimated by the Ministry of Justice that 90% of the commercial cases handled by London law firms involved at least one international party.[41] While, more recent analysis by The City UK suggested that the UK's legal services market is the largest in Europe and the second largest in the world, with UK-based law firms accounting for a third of all the legal services provided in western Europe and generating around 5% of the world's legal services fee revenues.[42]

This international success has helped the legal services sector to generate significant annual value added for the UK, as shown in Table 1.

Table 1: contribution of the legal services sector to the UK economy, various years

Direct GVA (2018)	Indirect GVA (2018)	Induced GVA (2018)	Direct employment (2018)	Supply chain employment (2018)	Productivity (2018)	Earnings from international legal services trade (2017)
£39.79 bn	£11.87bn	£8.27bn	358,000	150,000	£100,500 per employee	£5bn

Source: KPMG for the Law Society of England and Wales

In aggregate, the legal services sector contributes more than £59 billion to the UK economy annually, and saw cumulative growth of around 20%, between 2013 and 2018.[43]

However, the importance of the legal services sector goes beyond the economic contribution described in Table 1. Lawyers play a significant role in sustaining the rule of law, as noted in one analysis of their role:[44]

> *"...lawyers also play a significant role...through their actions and conduct...[they]... contribute both to the shape of a legal system and how it functions...".*

Particularly important for enabling legal professionals to contribute to this wider "societal function" is the skill and capability levels of lawyers and the degree of independence of the legal profession from influences such as politics.[45]

The role of lawyers is especially crucial in common law systems. They facilitate access to and use of the courts for many and, as such, their role in advocating for disputing parties is vital in helping case law evolve over time which – as noted earlier – is one of the key strengths of English law. Further, it is from this pool of practitioners that the all-important judges that will adjudicate in disputes in the English courts, are usually selected.

CHAPTER THREE – COMPLACENCY AND DECLINE

Taking previous success for granted

Despite the historic domestic and international economic success of English law and legal institutions, there are several reasons to believe that past success is on the wane and consequently, without corrective action, the UK could suffer from less growth and lower levels of prosperity.

A number of roundtable participants argued that many of those who have a trusteeship role over English law and the civil justice system – such as policymakers – take the historic success of the former and the long-standing attributes of the latter, somewhat for granted. As a result, this has led to complacency and a failure to:

- Ensure English law is of the highest quality across all domains by sorting out longstanding deficiencies and updating it in the face of changes in technology, commercial patterns and business practices
- Nurture the legal institutions that underpin and implement the law and make sure they're as efficacious as possible.

As one attendee stated:

> *"There is some complacency, because it is built upon a system which is taken for granted".*

A second contributor agreed, and noted:

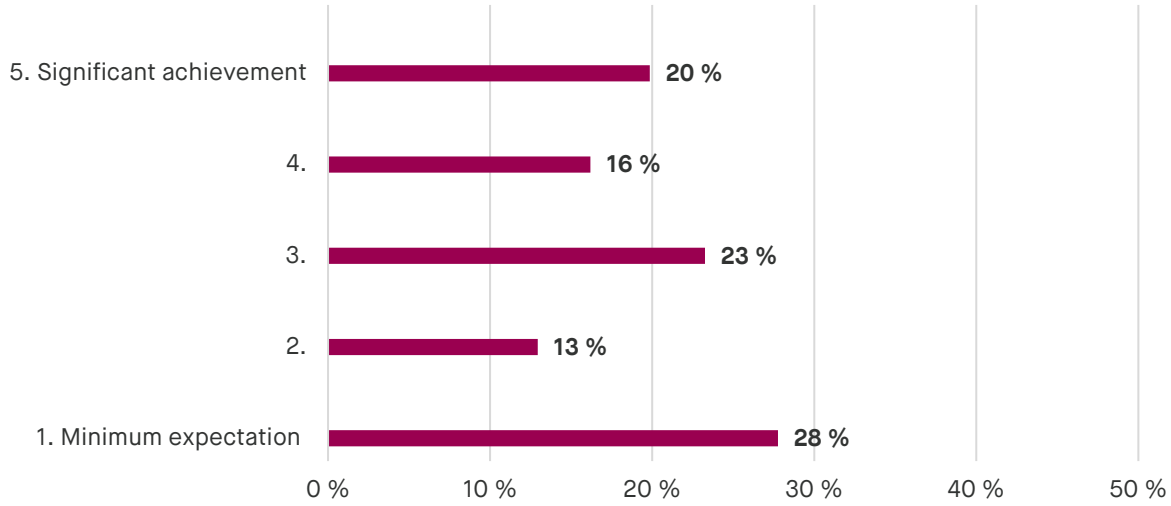
> *"There is…complacency…and that comes from a number of sources…".*

While a third described how:

> *"It's the hidden wiring of our successful economic system and we've taken it for granted for too long".*

Polling conducted with businesses suggests that they are among the groups taking the legal system for granted and failing to acknowledge its centrality to a prosperous economy. Figure 6 shows that, on an attitudinal spectrum, just over a third (36%) of businesses agree that having securely placed rule of law is a "significant achievement".

Figure 6: the perspective of the business community on the rule of law



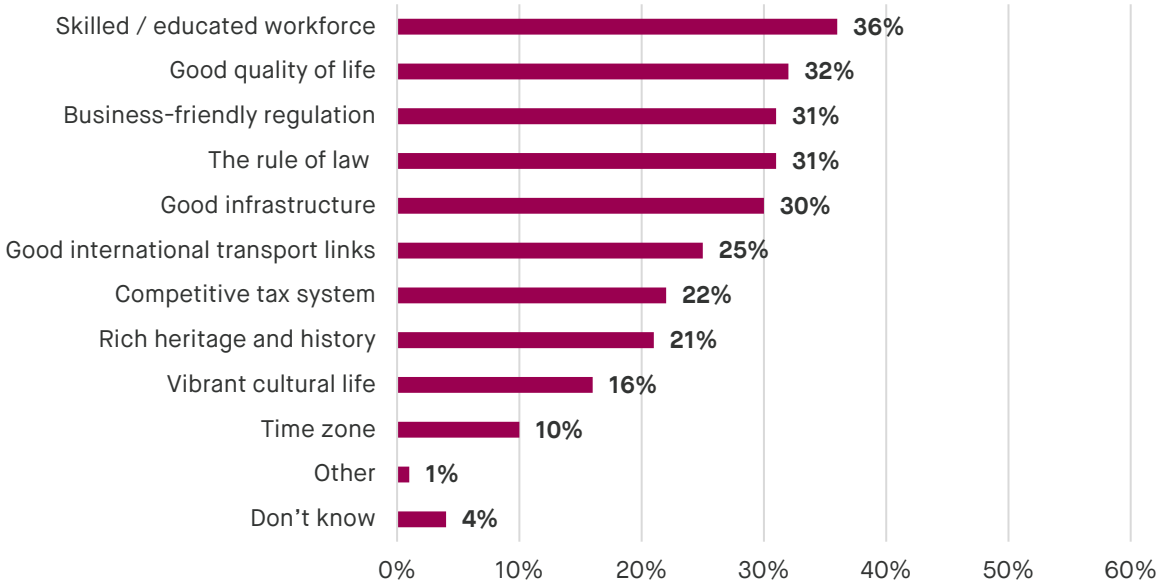
Source: SMF Opinium polling of businesses

In contrast, 64% of business respondents were indifferent or selected positions on the spectrum which suggested the rule of law and its importance to business is taken for granted, agreeing that it is "the minimum expectation".

The distribution of attitudes among the business community suggests that the majority of entrepreneurs and firms are failing to recognise how historically rare a society with a stable rule of law in-place is[46] [47] and what an important condition the rule of law is for any successful business environment, over the long-term.

Echoing the indifference and complacency of many in the business community is the data presented in Figure 7. It shows the factors (external to firms) that businesses consider important for making the UK a "good place to do business". It reveals that only 31% of the business community believe the rule of law is important for doing business in the UK.

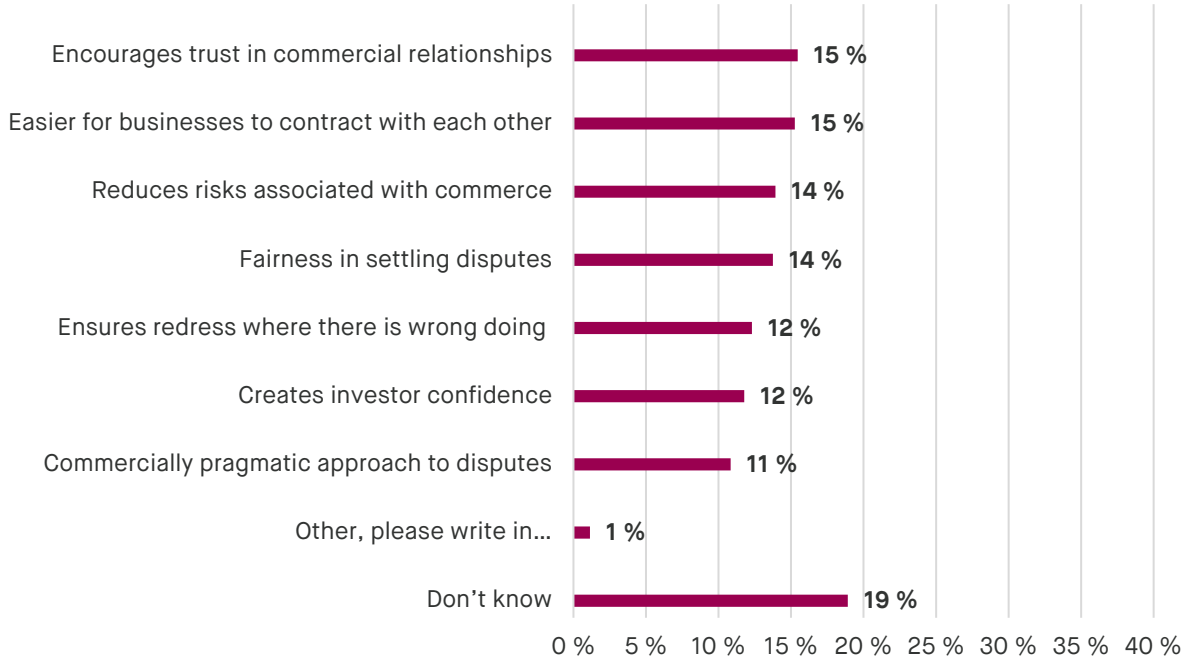
Figure 7: factors that businesses consider important for the UK as a place to do business



Source: SMF Opinium polling of businesses

The seeming lack of engagement with, or perhaps understanding of, among the importance of the rule of law (and the corpus of laws and the courts and tribunals and judiciary that underpin the rule of law) to commerce is further reinforced by the survey results of the business community presented in Figure 8. Participants in the research were presented with a series of statements about the benefits that the rule of law, English law and good quality legal institutions create for businesses. While, overall, eight in ten businesses recognised at least one benefit, only small percentages of respondents identified each individual benefit as "important" to their business activities.

Figure 8: the importance - to individual businesses - of several key benefits associated with the rule of law and good quality laws and legal institutions



Source: SMF Opinium polling of businesses

The low proportions of businesses, as illustrated in Figure 8, recognizing the benefits that a mature and stable corpus of law and civil justice system generates for those engaged in commercial activity, reinforces the picture already painted by the results presented in Figures 6 and 7.

In the search for explanations as to why businesses (and others) take the rule of law - based upon an enduring body of laws, underpinned by a functional set of legal institutions - for granted, one contributor to the roundtable suggested it was because:

> *"...we don't know anything else" adding that "The system works therefore people don't think about it. It's only when it stops working that you have to worry about it".*

The failings of English (civil) legal institutions

While the legal institutions of this country have not stopped working, there are clear signs that they are working less effectively than they should be. Further, there are not just signs of stagnation but also indications of decline.

The key problems with the civil justice system

Lord Justice Briggs, in his report on structural reform of the English and Welsh civil justice system, identified five deficiencies that were undermining its efficacy:[48]

> *"...The first is the lack of adequate access to justice for ordinary individuals and small businesses due to the combination of the excessive costs and cost risk of civil litigation about moderate sums, and the lawyer-ish culture and procedure of the civil courts, which makes litigation without lawyers impracticable. The second consists of the inefficiencies arising from the continuing tyranny of paper, coupled with the use of obsolete and inadequate*

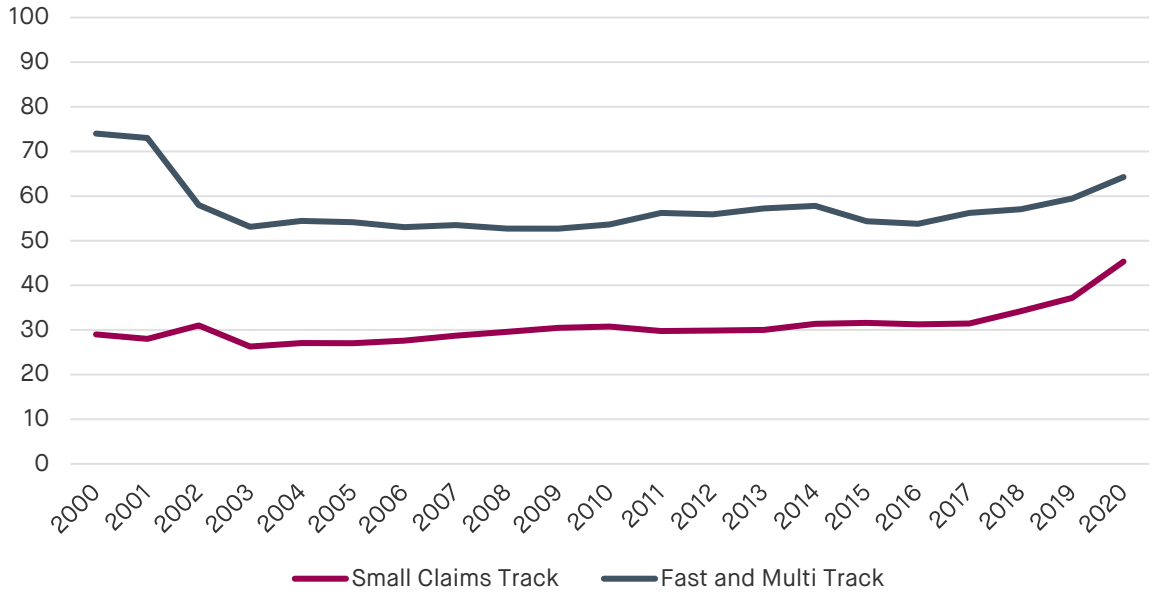
> *IT facilities in most of the civil courts. The third consists of the unacceptable delays in the Court of Appeal, caused by its excessive workload. The fourth lies in the serious under-investment in provision for civil justice outside London. The fifth consists of the widespread weaknesses in the processes for the enforcement of judgments and orders".*

The expert discussion at the roundtable concurred with the findings of Lord Justice Briggs. One attendee summed up the state of affairs bluntly, highlighting that:

> *"...we've got a problem with the cost and the speed of litigation. People say we have this Rolls Royce service, it's certainly a Rolls Royce charge for the service as well".*

The "speed problem" is visible in the Ministry of Justice's own data, as illustrated in Figure 9. It shows the average time (in weeks) it takes for a dispute (e.g., over debts) to reach the trial stage, in the Small, Fast and Multi-Tracks Claims of the civil justice system.

Figure 9: average number of weeks between issuing a claim and the trial in the for Small, Fast and Multi-Track Claims, 2000 - 2020



Source: Ministry of Justice

The data suggests that, for example, in 2020 a small business owner-manager bringing a claim in the Small Claims Track, could expect it to take around 45 weeks before a trial is held. After the trial and a judgment, World Bank analysis has suggested that it can take, typically, eight weeks to enforce a judgment on a contract dispute in England and Wales[49] which adds more time to the process, prolonging the disruption and costs for those involved.

The speed and cost problems have been exacerbated in recent years by the increase in Litigants in Person (LiP) in a system – as Lord Justice Briggs noted – that is not designed for those who are not represented by a lawyer. One roundtable attendee noted how the high costs associated with litigation[xii] are simultaneously a driver of the number of LiPs in the courts and a cause of additional costs, as LiPs often mean, a slower legal process:

> *"...costs...[can be]...particularly acute if you're up against a litigant in person and one of the reasons for the dramatic increase in litigants in person is the cost issues".*

The comparative evidence for decline

The speed and cost problems are visible in the regular comparative analyses carried out by the World Bank (published in their annual Doing Business Index) into the efficacy of the civil justice systems, of different countries, for businesses. Table 2

[xii] These include court or tribunal fees, lawyers' fees, the potential liabilities associated with paying the costs of the winning side and any damages the loser might have to pay. For businesses and individuals there are also time and "disruption" (covering factors such as stress) costs, which can also be substantial, which figure into the calculations of possible claimants and defendants but are not easily represented in monetary terms.

shows the relative effectiveness ranking of Singapore's civil justice system compared to that of England and Wales, when confronted with the same type of contract problem.

Table 2: comparing Singapore and England and Wales - enforcing a contract, 2020

	Singapore	England and Wales
Overall ranking	1st	34th
Overall score	84.5	64.7
Time (days)	164	437
Cost (% of claim)	25.8	45.7
Quality of processes (rating out of 18)	15.5	15

Source: World Bank

Singapore is at the "global frontier" (i.e., is ranked 1st) in the Doing Business rankings for contract enforcement. England and Wales languishes 33 places behind Singapore, at 34th. As Table 2 illustrates, the differences between Singapore and England and Wales, in the speed it takes to enforce a contract and the costs incurred when trying to do so, are stark.[xiii]

The business perspective

While the court process is only one part of the total cost of legal problems experienced by businesses – of all sizes, across all sectors - the disruption caused by an inefficient civil justice system is not trivial to those trying to utilise it to resolve a problem,[xiv] As highlighted by Sir Geoffrey Vos, who is now Master of the Rolls:[50]

> *"Delays in payment, and delays in the recovery of monies owed through the civil justice system can create a massive drag on the economy… Dysfunctional…justice systems deter investment… [and have]… a negative economic effect[s]".*

[xiii] Further exploration of the Doing Business Index, reveals that two of the key contributors to the higher costs of enforcing a contract in England and Wales, compared to Singapore, are court and lawyers' fees:

- In England and Wales, according to the World Bank, to enforce a contract in a dispute with a value of approximately £60,000, court fees as high as approximately 9.5% of the claim value are likely to be incurred, while the associated lawyers' fees are estimated to be the equivalent to 35% of the value of the claim.
- In Singapore, to enforce a contract in a dispute worth around SGD153,000, the court fees charged are the equivalent to 2.1% of the value of the claim, while lawyers' fees are estimated to be the equivalent to 20.9% of the value of the claim. Sources: Doing Business in United Kingdom - World Bank Group and Doing Business in Singapore - World Bank Group

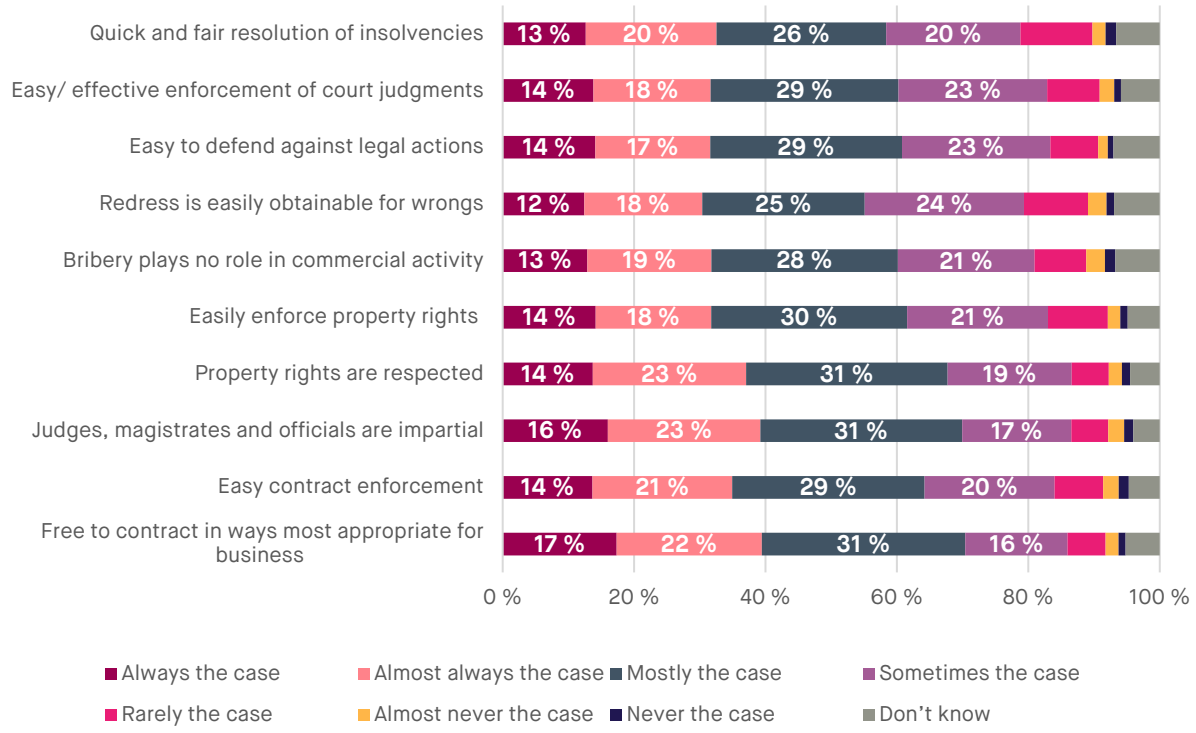
[xiv] See Annex for more detail on this topic.

A poorly performing civil justice system can be particularly disruptive to small and medium-sized businesses, an impact also noted by Sir Geoffrey Vos:[51]

> *"Small disputes are as important as big ones in economic terms. Big businesses can generally survive if the resolution of their litigation is delayed by the court process. Small businesses often cannot…[ensuring]…individuals and SMEs are paid what they are owed and can continue to trade…will reduce unnecessary personal and corporate insolvencies and enhance access to justice".*

There is evidence (see Figure 10) that the comparative decline in the efficacy of the civil justice system is now being noticed by businesses. Alongside the many businesses reporting that on some occasions their commercial experiences suggest the civil justice system is not delivering the benefits it should be for them, many entrepreneurs also report that they fail to see some aspects of English private law (that have long been considered particular strengths by many who work in and around the law) delivering benefits to their commercial activities.

Figure 10: the extent to which features of a good quality civil justice system and some of the key characteristics of English law, are reflected in the experiences of individual businesses



Source: SMF Opinium polling of businesses

Figure 10 shows that, when presented with a number of ways in which a good quality civil justice system (in the common law tradition) supports commercial activity, only a minority of respondents agree that their business has benefited either "always" or "almost always" from them.

For example:

- An effective legal system must be able to enforce court judgments. A significant minority of business respondents (34%) said that they experienced "easy/ effective enforcement" only "sometimes", "rarely", "almost never" or "never". This suggests there could be as many as two million businesses whose experiences of the civil justice system enforcing court judgments fall short of what should be expected from any courts or tribunals that aim to be world-leading.
- One long-standing benefit of the English law has been the freedom to contract in ways most appropriate to the needs of the parties involved. However, only 39% of businesses surveyed felt able to say that the law had supported their "freedom to contract in the most commercially appropriate ways", either "always" or "nearly always". Meanwhile 25% of businesses said that the law had facilitated their freedom to contract only "sometimes", "rarely", "almost never" or "never". This indicates that English law is failing to consistently facilitate commerce - in some of the ways it is supposed to - for more than one and a half million businesses.

On its own, the findings in Figure 10 might be considered suggestive of issues that policymakers should take note of. However, in conjunction with the evidence from Lord Justice Briggs, the World Bank, the Ministry of Justice data and the expert perspectives provided to the SMF roundtable, the preponderance of evidence points towards a poorly performing civil justice system and its specific failings.

Problems with enforcement

Lord Justice Briggs identified the enforcement of judgments as a key current failing of the civil justice system.[52] Comparative analysis by the World Bank for its annual Doing Business Index, for example, shows that the enforcement of a judgment by a judge in England and Wales in a contract dispute (with a value of just over £60,000) can take more than 60 days.[53] By contrast, in Singapore, a similar dispute would see the judgment enforcement typically take 40 days.[54] Difficulty in enforcement is a substantial problem for domestic firms who are involved in court proceedings, especially SMEs, because it can be an additional (and costly) hurdle to jump before the eventual end of the process can be arrived at.[55]

For those engaged in international commerce (including those using English law to govern such transactions and/or looking to utilise the English courts to settle any disputes) the enforcement of outcomes that involve cross-border problems is inherently more difficult than in wholly domestic cases.

The use of ADR services, such as arbitration, reduces some of the difficulties of cross-border enforcement. However, arbitration is not a "silver bullet" solution for cross-border problems. It has its own difficulties. Nevertheless, overall, it tends to be less costly than traditional litigation. Other types of ADR, such as international commercial mediation, are much less developed. Mediation has a long way to go to catch-up with

arbitration and the advanced international legal framework and decades of practice underpinning the latter.[xv]

There are, however, international instruments that help negate some of the inherent difficulties of enforcing legal judgments in commercial cross-border situations.[56] [57] One such tool is the Lugano Convention.[58] [xvi] Recently, the EU has blocked the UK from acceding to the Convention.[59] That action by the EU means the UK will have to rely on alternative arrangements (including the 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters)[60] [61] to make cross-border judgment enforcement a little easier with the member states of the EU, the EEA countries and Switzerland. However, the new Hague Convention is expected to take a number of years to come into effect and will only make a significant difference if a large number of states implement it.[62]

Deficiencies in the corpus of English (civil) law

Some parts of English (civil) law have not been as high quality as they can be. In some areas, deficiencies have been a decades-long problem. At the same time, there has been little impetus for making improvements in long-lingering problems because overall, English (civil) law has managed to maintain its commercial utility. Internationally, additional factors such as a period of global dominance in the 19th and early 20th Century, the English language, the English jurisdiction (including the incorruptibility of its judges), its respected ADR services and legal sector have, in a mutually reinforcing way, helped sustain English law's pre-eminence.

However, developments in technology (including blockchain, additive manufacturing, AI and biotechnology), changing commercial patterns (e.g., the growth of digital trade) and the emergence of new business practices (such as concerns for ESG issues, in addition to traditional objectives towards maximising shareholder value) put at risk English law's:

- Capacity for supporting a prosperous domestic economy where these technologies and trends will be central to economic operation
- Popularity as governing law for intentional commercial activity over the coming decades

Consequently, the body of English (civil) law, needs updating across a range of areas, if it is to play a full role in maximising national prosperity.

Long-standing deficiencies in English law

Over many years, practitioners and scholars have identified a number of deficiencies in the accumulated stock of English laws.[63] The contributors to the SMF roundtable were no exception.

[xv] A recent attempt to give mediation to an international legal underpinning, like arbitration has, is the 2018 Singapore Mediation Convention. Source: United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018) (the "Singapore Convention on Mediation") | United Nations Commission On International Trade Law

[xvi] The signatories to the Convention are the EU member states (through the EU, except Denmark which acceded separately), the EEA countries and Switzerland.

One participant's ire was focused upon areas where English law is often considered world-leading but argued that it was actually inadequate:

> *"...Our statutes on insurance are a disgrace, our statute on sale of goods...will make your mouth drop. We really do have to bring up a certain amount of our legislation to date...We've also shown a certain amount of indolence...thirty years ago, we introduced a provision for introducing digital shipping documents by statutory instrument ... we then sat, twiddled our thumbs, and did absolutely nothing".*

Not only is there out-of-date law, "gaps" and "indolence", but legislation that has been passed is often poorly considered and drafted, it was argued by another attendee, who suggested that:

> *"There are serious issues about the clarity of law the judges have to apply...laws...are very difficult... [to understand]... for those at the front line who are actually having to apply those laws...".*

One participant implored legislators in the UK:

> *"...to get what codifications we have properly drafted and up-to-date".*

Areas where the law is behind developments in the modern economy

In addition to the existing inadequacies in longstanding areas of English law, a number of roundtable attendees were exercised about the risks to the future utility and pre-eminence of English law because, in some areas, the law lags behind technological advances, changing patterns of commerce and modern business practices.

The concern from several participants was that, ultimately, failure to make sure the law reflected developments in the modern economy would be a threat to the future success of the economy as a whole and English law as the preeminent choice of governing law for international commerce, specifically.

One contributor pointed out that while English law may remain dominant in some "traditional" areas of law, it has no track record in others:

> *"Where I see, in practice, the dominance of English law tends to be in long-established areas of practice e.g., maritime law, insurance law, capital markets... And when you look at new areas, where we would like to be predominant or influential, such as ESG, green finance, crypto-currencies, it seems to me we don't have the natural advantages that we used to have in establishing that dominance and we have to do it in other ways, through...ingenuity and...policymakers...".*

Another participant concurred, stating:

> *"The main challenge is to look at the current law and the current legislation that we've got and understand how that has to be adjusted to enable conducive business environment in these...ESG, digital technology and green finance...spaces".*

The importance of being an "early mover" on the law relevant to new technologies was emphasised by an attendee, who argued:

> *"...those who do things first will have an advantage in terms of the digital economy and the economies of the future, this is where the UK has to keep an open an eye and...[be]...as timely as possible".*

One roundtable participant suggested that the best way to meet the challenge of these new areas was to build upon some of the existing strengths of English law which, if utilised, could enable the country to get ahead of emerging trends:

> *"Business is obsessed with ESG...We need to go to institutions and say there is no credible ESG unless you create underlying conditions to underpin it...Business doesn't understand that, boardrooms don't get it...We can lead business thinking and we can do that from the perspective of English law, and the flexibility it has towards things like corporate purpose".*

Risks to the reputation of English law from widespread use by other jurisdictions

While the "internationalisation" of English law has many upsides, it does also bring with it several risks. One emerging problem, raised by more than one roundtable attendee, is the risk that the "internationalisation" of English law poses to the integrity of English law and, over time, its current preeminent position in the international business community. As was noted by one expert at the event:

> *"The proliferation of English law and the number of dispute resolution centres around the world...does raise risks to standards. There are some jurisdictions that are applying English law that are not applying it well because the judges are not very good. Also, there is the consistency. You can have judgments using English law turned out by courts around the world, and you look at them and you think 'that's just wrong'".*

A judicial deficit in the civil justice system

In addition to the deficiencies in the law itself, one of the other key causes of the weaknesses in the civil justice system and consequently of the risks to the ongoing utility and future pre-eminence of English law, is the challenge of recruiting and retaining sufficient numbers of high-quality judges.

A shortage of judges in the civil courts

The problem of insufficient competent judges in the civil courts and its consequences for the system was noted in the roundtable discussion by many of the attendees. One of the participants argued:

> *"...we need rules that are fit for markets and that move with the times...that means we need experienced judges who have some exposure to how the commercial world works so we get the right rules as they're developing slowly because the common law has that terrific advantage. On that front we've got increasing problems in attracting people to become judges".*

In 2019, for example, more than 10% of High Court judicial positions were unfilled. In the Chancery Division, where much commercial litigation takes place, the situation was worse – it was 20% below its full complement of judges.[64]

Reasons for the judicial deficit

A second roundtable participant concurred that judge recruitment and retention was a significant problem and suggested some reasons as to why it had become so:

> *"...there is a problem about recruiting judges at the moment...[its]...partly about pay but it's partly about the attacks...[in the mainstream media and on social media]...that some of the judges had experienced".*[xvii]

Box 2 sets out some of the most salient reasons why recruitment of new judges and retention of existing ones has been a challenge in the civil justice system.

Box 2: reasons for the shortage of judges in the English and Welsh civil justice system

Pay and increased concerns about the personal security of judges[65] have been widely publicised as reasons behind the difficulties in recruitment and retention. However, other issues also play a role. These include:[66]

- Limited specialisation among the judiciary, compared to the wider legal profession, where specialisation is the norm
- Increasing workloads, not least because of the trend for more LiPs
- Less autonomy over working hours and practices, compared to the flexibility typically available to those working in a law firm or at the Bar
- Sub-par working conditions, including poor quality IT facilities that make collegiate working difficult and leave insufficient time for case preparation and consideration of judgments.
- A mandatory retirement age that means experienced judges retire at 65, often taking their skills and experience elsewhere, rather than remaining at the disposal of the civil justice system.

Sources: Turenne, S and Bell, J. (2018). The attractiveness of judicial appointments in the United Kingdom and Financial Times

The consequences of a judicial deficit for common law systems

A deficit of judges has implications for the efficiency and efficacy of the civil courts. In the longer-term, it also likely to have negative effects on the quality of English private law. There are three reasons why:

- Good quality judges are indispensable in ensuring that legal processes are impartial, and the law is rigorously applied, ensuring adherence to the principle of precedent - one of the frequently cited beneficial characteristics of English law.
- Judges play a central role in incrementally developing the corpus of English law. Judge-made law, emanating from the cases they adjudicate on is one of the key advantages of common law systems in general and English law in particular. That means its utility to the economy and its attractiveness for international

[xvii] Lord Burnett of Maldon, the current Lord Chief Justice, highlighted that "*...Abuse and vitriol on social media is...making the profession more difficult for judges, who find themselves targeted because they sit in sensitive cases...*". Source: Judicial shortages pose threat to court system, top judge warns | Judiciary | The Guardian

use, is dependent on that judge-made law being good quality law. This requires competent judges to be adjudicating on the disputes, the outcomes of which set the precedents.

- Fewer judges mean a slower through-put of cases. This in-turn not only means a smaller "pool" of cases from which to develop the law when necessary, but will also result in greater financial, time and other disruption costs for those involved in litigation. Ultimately, inefficient higher cost-risk systems lead to more economic detriment for domestic businesses using the civil justice system and reduces the comparative attractiveness of the English jurisdiction to international companies.

Periodic attempts at improvement

It needs to be acknowledged that, while policymakers and others may not be addressing the challenges described in this paper with sufficient ambition, urgency or thoroughness – due, in-part, to a degree of complacency – there have been attempts at improving the civil justice system and further, there are reforms currently underway.

Structural and procedural reform

Previous attempts at reform of the civil justice system have included the Woolf reforms[67], the Jackson changes to civil litigation funding[68] [69] [xviii] - and more recently the proposals from Lord Justice for structural reform of the civil courts[70] followed by further suggestions from Lord Justice Jackson to regulate more stringently cost-recovery by litigants.[71]

Investment

In 2015, the then coalition government outlined plans for the first significant investment programme in the (civil and criminal) court system in England and Wales over many years.[72] Around £1 billion of spending was promised, for modernising the civil (and criminal) courts and tribunals.[73] The objectives that the expenditure intended to achieve were set out in a 2016 "vision" document, jointly authored by the then Lord Chancellor, Lord Chief Justice and Senior President of Tribunals.[74]

Failing to make a sustained difference

The broad consensus among roundtable participants was that policymakers and others (who have a trusteeship role over the law and civil justice system) have been complacent about the quality of English private law and the efficacy of the civil justice system and, as a result, have allowed them to deteriorate.[xix] The decline has put at risk the pre-eminence of both among the international business community, as well as being a drag on the domestic economy.

These attempts at reform have – at best – slowed the decline. Further, some of the changes meant to deliver improvements to the civil justice system in particular, remain

[xviii] Many of which were introduced in the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012

[xix] England and Wales fell from 23rd in 2010, in the World Bank's Doing Business index, for efficacy of contract enforcement, to 34th a decade later.

a long way from being fully implemented. For example, the court modernisation programme is behind schedule,[xx] while many of the pieces needed to implement some of the key proposals made by Lord Justice Briggs are only just beginning to progress.[xxi] The Government has only recently said that it will take forward Lord Justice Jackson's suggestions to expand the use of fixed-recoverable costs, despite the proposals being brought forward in 2017.[75]

Modernising the corpus of law has been, largely, left to the Law Commission to make proposals, on a piecemeal basis. Many proposals have not been taken forward.[xxii] Most importantly, law reform has not been undertaken in the context of a clear and determined strategy to make sure the relevant areas of English civil law are not only optimised for the economy in general but also that it is able to better reflect new technological developments in commercial patterns and business practices.

[xx] A recent NAO report noting that "…it is behind where it expected to be and has had to scale back its ambitions. While HMCTS has kept within budget, this has come at the cost of a reduced scope and lower savings". Source: NAO. (2019). Transforming courts and tribunals – a progress update.

[xxi] Around seven years after Lord Justice Briggs report into structural reform of the civil courts, where he proposed the establishment of an online civil court, the current Judicial review and Courts Bill is taking some of the necessary steps for creating such an entity by proposing to establish a procedure committee to govern the workings of the online court. Source: Judicial Review and Courts Bill - GOV.UK (www.gov.uk)

[xxii] The Law Commission have estimated that around two-thirds of their recommendations are ultimately implemented in part or in-whole. Source: Implementation Table | Law Commission

CHAPTER FOUR – THE CHALLENGES FOR POLICYMAKERS, THE JUDICIARY AND LEGAL SERVICES SECTOR

If left to ossify, as a result of complacency, the problems with the civil justice system and the challenges facing English law - identified by many of the roundtable participants - will only get worse. The consequences of a deteriorating position will be a poorer domestic environment for commerce than it needs to be and a decline in the attractiveness and consequent use of English law and jurisdiction, by international businesses.

Improvements are most likely to come through a strategic approach

Attendees at the roundtable discussed ways of bringing about significant improvements in the civil justice system, reforming English law and protecting the latter from international threats to its integrity.

One participant argued that improvement can only begin if policymakers and others, with an interest in an effective civil justice system and a body of private law "fit" for the 21st century, understand the fundamental characteristics of both and deploy policy measures which will maximise their combined strengths. This needed to begin, it was suggested, by recognising that:

> *"English law is a platform…businesses don't understand that and…[Finance and Business]…Ministries don't understand the significance of English law as a platform. There's a whole science about how you create platforms and sustain them, network effects, tipping points, etc…we need to invest in that…".*

Another contributor argued that policymakers need to take a "systems approach" to ensure the civil law and the civil justice system are brought up to "world-leading" standards and that efforts towards improving the latter in particular are aligned with other ambitions of the Government:

> *"…[the]…Government lacks joined up thinking…There is no coherent plan for…justice, what's the levelling-up plan for justice…? There isn't a total systems approach which includes law reform, modernisation and also investment in the system itself i.e. the machinery of justice and access to the law".*

Choices about the best approach to improving English law

A variety of tools available to modernise the law

Any attempt to "modernise" the corpus of English law will require policymakers to make choices about how that should be done. One expert contributor highlighted that:

> *"There are a number of issues coming up, such as AI, green tech, bio-tech, where we're going to have quite new ways of treating them under the law. In that we need to make some choices about whether we act early at the risk of U-turns or locking in errors versus waiting until later when we might have a better idea of what to do is. And our legal system gives a slightly different suite of options, a balance of one what might favour the one over the other, versus*

> *other legal systems…some of these options include deciding whether to act via regulatory bodies, act via codified legislation or…[judge-made case law]…".*

The case for case-law

Another argued explicitly for allowing judge-made case-law to predominate, because of what they saw as its advantages over statute law:

> *"In order to be competitive, the UK is going to have to deal with crypto-currency, green finance, etc, and sometimes the courts are a better way of doing this because they will analogise to pre-existing law rather than put…[it]…in the hands of legislators and legislative communities that come up with compromises that very often make little or no sense…".*

The same participant added:

> *"…the shortcomings of legislation…are clear…especially when you're talking about newcomers to an industry or new industries…".*

They finished off by pointing out:

> *"When you're in the courts, very often judges and juries can weigh those things in a way that a legislature cannot. A legislature is looking at theoretical possibilities, they hear a lot of things. They usually write laws that are either too broad and cover and stifle the problem, or too narrow and don't resolve the problem. It's a very tricky thing to pass effective legislation. It's difficult to come to these compromises that often end up a disaster".*

Another participant built on the above points, by adding that they:

> *"…fear[ed]…that in some of these areas people may be tempted to leap too quickly to…legislation as the solution. A little bit of understanding the strengths that our system allows, might place us better in that regard".*

The conditions for relying on case law to update English law

Relying on judges to be in the vanguard of adapting English law to better reflect the emergence of new technologies, changing commercial trends and developments in business practices, could have been an effective option if:

- The courts were more efficient than they currently are
- The cost-risks associated with litigation were lower
- If there were sufficient competent judges to hear the cases and develop the law where necessary.

It is only when more cases are brought to the courts, they are able to pass through the system quickly, the judgments are high quality and that the latter are enforced, that reliance on judge-made law will have a good chance of helping English law keep up with the rapidly evolving economy of the 21st Century.

One of the consequences of ineffective courts and shortages of competent judges is the increased incentive to use ADR mechanisms such as arbitration. The risks to the future development of English law as a result of the growth of such substitutes has been recognised by some of the leading judges in the country, such as Lord Thomas of

Cwmgiedd - who was Lord Chief Justice when he raised his concerns.[76] It was a point that was reiterated by one of the experts participating in the roundtable, as those in attendance discussed the extent to which case-law could be relied upon to develop English law sufficiently to be the chief engine of legal modernisation. The participant noted approvingly that:

> *"...Lord Thomas...[made]...the point that more cases that go to arbitration...if too many cases are resolved in private...that might deprive English law of sufficient cases to keep English law sharp and keep the doctrine of precedent alive and vigorous".*

Improving the operation of the civil justice system

Among roundtable attendees, there was a widely supported call for:

> *"...think[ing] more flexibly and imaginatively about how we can do these things more efficiently [in the courts]. And some of that will be AI...but some of it's going to have to come from...[better]...management...and that kind of thing".*

Greater differentiation between types of cases and specialisation

One reason why the courts suffer from a speed and cost problem was highlighted by another of the roundtable contributors, who pointed out that:

> *"What we do in the County Court for a £35,000 case, we do the same for a £350 million case in the Commercial Court. Same procedures, done very slightly differently".*

The suggested solution was to have processes better tailored to different kinds of cases. This might be done by introducing greater differentiation in the treatment of cases of significantly different value and complexity. The participant summed up their point by suggesting:

> *"It's got to be radically different for the County Court and the Commercial Court".*

Other changes could include expanding the use of current practices that have proven to be efficiency enhancing, such as:

> *"...specialised lists, which have been very useful, so for example we have the financial list which has been put there to reinforce our pre-eminence in City cases" and "Judges...[that]...are much more ready to be proactive and answer prospective questions...[the] market test cases procedure in the 'financial list'..[has been a]...really good innovation that...should [be] roll[ed] out more".*

Box 3: OECD findings on the factors common to the most effective civil justice systems

Many of the suggestions from the roundtable participants about how to improve the functioning of the civil justice system in England and Wales are in line with the findings from international comparative research conducted by the OECD.[77] Looking at examples from many countries, it identified several common factors that are associated with the best performing civil justice systems. These include ensuring of adequate spending on the civil justice system. However, within the expenditure envelope, the balance of resourcing is also a crucial determinant of efficacy. The OECD pinpointed a number of specific factors, additional to sufficient money, that make a significant difference to the effectiveness of a civil justice system. These factors included:

- The right governance structures, including clarity on overall responsibility for the running of the courts, preferably by placing it in the hands of one person, such as the chief judge
- The computerisation of court processes to automate (particularly routine) activities where possible, eliminate paperwork, speed up communication, accelerate the production and processing of evidence, document preparation and exchange.
- Active case management of disputes by the courts, to make sure cases are timetabled promptly, move swiftly through their various stages and that the parties to the litigation are supervised sufficiently strictly.
- Close monitoring of the progress of disputes and the collection and public production of detailed data on case-flow and outcomes. Not only will better data enable more effective management of the courts and the cases going through but will better enable early advice to litigants about options such as early settlement and support automation efforts e.g., through generating data for digital systems to work more effectively.
- Greater specialisation of tasks across the court system, so that, for example, the judges adjudicating on cases are experts in the issues under dispute and have an understanding of the background and interests of the litigating parties. For business disputes, this might involve more extensive use of specialist commercial courts.

Improving procedure

Several participants noted that procedural changes could make a difference to the costs associated with going to court. One suggested that helpful procedural reforms, might include:

> *"…[tackling]…'sacred cows' like…disclosure. It's vastly expensive, in 99 cases out of 100 it's an absolute waste of time. We should adopt IBA Rule[s]…you produce the documents you want to rely on, the other side produce the documents they want to rely on, each side asks focused questions for specific documents and then you get on with it".*

Box 4: IBA Rules on the Taking of Evidence in International Arbitration

The International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration were first published in 1999. The rules were most recently updated in 2020.[78] There are nine articles in total. They outline a set of "good practices" for the taking of evidence, primarily in commercial, investment and finance arbitrations. They combine both common law and Civil Law elements.

IBA Article 3 is the third of the nine. It focuses on the production of documents by parties to the arbitration, for evidential purposes. The rules try to avoid the "expansive" nature of the "discovery" process in English and American litigation and instead take a more concentrated approach to document disclosure where only the most salient to the issues under arbitration are "disclosed".

Parties who want documents from the other side are required to submit a "Request to Produce", accompanied by an explanation about how the documents or categories of documents are relevant. The other party can submit an objection in writing and the arbitrators decide upon the validity of the objection(s). Where there is non-cooperation, the uncooperative party can be subject to cost sanctions and the arbitrators on the arbitration tribunal are entitled to draw adverse inferences about the behaviour of the non-disclosing party and their case.

Sources: International Bar Association (IBA)

Another attendee pointed out that, in order to improve the administration of justice and reduce the overall costs of going to court, action would be needed across several areas. These included:

> *"...[improved]...case management and restricting the number of things that can be brought before a court, and the amount of discovery and the scope of witness statements..."*.

"Smart" ways of enhancing the reputation of English law and jurisdiction

Utilising networks and institutions to bolster the reputation of English law and jurisdiction

One participant suggested that a series of more subtle measures should complement the legal and organisational reforms other roundtable attendees were proposing. In particular, they argued that efforts should be made to construct a wider network of common law supporting institutions at home and, equally important, internationally too. Specific measures proposed by the participant, included:

> *"...[using the]...the Judicial College...as a proxy and educate all the judges of the world...Fund the Law Commission to lead the world in thinking. There are very few global institutions dedicated to the rule of law. There's an opportunity to lead the world..."*.

Defensive measures

In addition to pro-active efforts to amplify the reputation of English law and jurisdiction at home and abroad and enhance the influence of both, another contributor argued that explicit defensive measures were likely to be required to help stave off threats to the integrity of English law, such as those that emerge from other jurisdictions that adjudicate disputes interpreting English law. They pointed out that the countries that offer such services do not have the same level of interest in ensuring the quality of English law not only endures but is enhanced. That contributor stated:

> *"We need to get used to saying which bits of English law apply to contracts not only governed by English law by choice of parties, but which apply to courts…abroad which have been set up to apply English law. It would be…helpful if we started saying that certain bits of English law are only properly applicable in England and didn't apply there".*

CHAPTER FIVE – RECOMMENDATIONS FOR REFORM

Though historically successful, in many areas English (civil) law and the civil justice system that underpins and implements the law together face a number of growing challenges, that pose a significant threat to the reputation, popularity and utility of both. However, there is little sign at the moment that policymakers are going to make serious headway in tackling them.

Tackling these challenges requires a better approach than has been taken, to date. There are a number of mutually reinforcing directions for action that policymakers should consider which, taken as a package would put English (civil) law and the civil justice system on a stronger and more secure footing for the future.

Recommendation 1: a longer-term and more coherent approach - at the highest policymaking levels - towards the civil justice system and English (civil) law

Policymakers need to more explicitly recognise that the civil justice system and English (civil) law are vital "social infrastructure" that need to be nurtured and sustained. That means understanding more explicitly their contribution to the economy and a peaceable society, specifically:

- The quality of both civil justice system and English (civil) law needs to become a cross-government concern. The Prime Minister, the Ministry of Justice, HM Courts and Tribunals Service and other interested departments such as BEIS - with input from relevant external parties like the legal profession, consumer, and business groups, etc – should collaborate to develop a more strategic "systems" approach to this policy area followed by proposals for effectively embedding continuous improvement into the civil justice system and the law.
- Government should commission work to establish a clearer picture of the importance of the civil legal system to society and the economy, which should include efforts to identify more precisely the broad range of "societal benefits" that accrue from it, to bolster the evidential basis for prioritising the civil justice system and English (civil) law in policymaking.
- Investment in the civil justice system should be recognised by government as "social investment" that generates a "societal return". Estimates of the latter should be used as the basis for decisions about spending on and planning for the reform of the civil justice system and the body of civil law that it upholds.

Recommendation 2: reform of the structure and functioning of the civil justice system to improve its quality

To be a more effective system, that can resolve disputes swiftly and justly, the civil justice system needs structural reform supported by operational changes. The first step in reform should be the Government setting-out the aim of moving the civil justice system to the "global frontier" by 2030 i.e., it is at least as effective as the best systems in the world, such as Singapore, South Korea and Norway, on key metrics such as enforcing contracts.

A clear plan setting out how to achieve this overall aim should be set out. That plan should revolve around the "success factors" that the OECD has identified as essential to any high-quality civil justice system (see Box 3).

A key element of the plan must be to get the current court modernisation programme back on track.[79] Digitisation offers the prospect of making accessing the system much simpler. However, reform needs to go further than those already in the pipeline, if the civil justice system is to become and then remain "world class". In addition, further reform needs to deliver:

- Greater clarity on leadership across the court system accompanied by enhanced accountability mechanisms for the performance of the system.
- The collection of better-quality data about the operation of the civil justice system (including the cases going through it and the outcomes it delivers) along with effective utilisation of the data to improve the management of the system.
- Improved case management from the start to the end of the process i.e., from the point a claim is filed to the enforcement of its outcome.
- More specialisation within the courts and among judges. While this has been developing at the higher end of the system, it is notably absent at the lower end for most users. The benefits of specialisation should be available to all those accessing the courts.

Speedier cases will increase access to justice, not least by reducing the financial and time costs and other disruptions associated with going to court. In conjunction with efforts to constrain some of the other factors which also contribute to the cost risks associated with using the civil justice system, the costs of using the civil justice could be dramatically reduced. To this end, roundtable participants outlined a number of reforms that could be made to the ways in which the civil courts operate. Particular proposals that the Government should take forward, included:

- Changing the way lower value and simple cases are treated in the courts, through a much simpler process for such disputes. One way this could be done would be to bring more cases into an expanded and improved Small Claims Track. Another might be to extend the principle of specialisms

throughout the civil court system, with judges presiding over cases in which they are particularly expert.[xxiii]

- Alterations to procedure, such as scaling back the obligations around "discovery" and adopting IBA Rule 3.

Cost risks can and should be reduced further by revisiting the issue of court fees as well as wider use of "fixed recoverable costs", as proposed by Lord Justice Jackson.[80]

In addition, there is a particular problem in England and Wales with judicial recruitment. This needs to be tackled urgently with a package of amendments to the terms and conditions under which judges serve, that will ensure a pipeline of high-quality judges for the long-term and that experienced judges are retained.

Recommendation 3: modernisation of English law

The roundtable identified a decline in the quality of English law as a significant risk to its utility, both to the domestic economy and as the preeminent "choice of law" for international commerce. Consequently, substantial modernisation is needed to make English law suitable for the 21st century economy.

In broad terms, the corpus of English law needs to be modernised in two ways:

- Firstly, modernisation is needed in areas where the current law – which has served the economy adequately - has become outmoded or long-standing inadequacies (while insufficient to detract from the overall utility of the law in an area) still cause problems. As a result, the usefulness of some aspects of English law to business in particular, has been declining for a-while, and in others future decline seems likely. These deficiencies are additionally urgent because other jurisdictions are taking steps to "catch-up" and overtake English law. The example of insurance law was raised in the roundtable, as one such area ripe for improvement.
- Secondly, gaps in the law - where technologies (e.g., AI, blockchain and biotech), patterns of commerce (e.g., digital trade) and business models and practices (e.g., ESG) have evolved – need to be filled if English law is to provide the best possible framework for commercial activity in the 21st century economy and underpin a prosperous society.

Efforts at modernisation must avoid being dis-jointed and contradictory. Efforts must be coherent and coordinated and reduce complexity in the law. Therefore, any modernisation programme must be joined-up. To that end, the

[xxiii] A specialist list for lower value business disputes was proposed by the Federation of Small Businesses in a report published in 2016. Source: FSB. (2016). Tied up; unravelling the dispute resolution process for small firms.

government should establish a time-limited, adequately resourced expert legal modernisation Commission, which can analyse the scale of the problems and identify proposals for reform, with the explicit aim of updating the corpus of English law to make it "world leading".

The commission will be required to develop recommendations that build upon the existing principles and practices of the common law wherever possible. Identifying and adopting lessons from other common law jurisdictions where relevant, should also be encouraged. Further, the Commission should be required to consider whether, in some instances, the law could be left to develop through judicial decision-making rather than ex-ante legislation.

Alternatively, the same outcome could be achieved through a temporary expansion of the Law Commission of England and Wales, endowed with an additional (time-limited) mission along the same lines as outlined above, for this specific task.[xxiv]

To ensure coherence, the modernisation programme will need to be coordinated with the efforts - that were recently announced by the Government[81] [82] as part of their response to the proposals from the Taskforce for Innovation, Growth and Regulatory Reform (TIGRR)[83] - to revise (and in some cases repeal) the legacy-EU law currently on the statue book, and to reform the UK's Better Regulation framework.[84]

Recommendation 4: step-up internationally focused efforts to protect and promote the English legal system and legal services sector

To counter the manifest risks to the integrity of English law through its improper use by other jurisdictions, the Government should undertake a review with the aim of it making recommendations as to whether legislative action might be needed to protect the quality of English law from misuse by other countries.

In addition to actions to establish a degree of "quality control" over the use of English law by other jurisdictions, efforts to increase the international visibility and reinforce the reputation of English law and jurisdiction should be increased. In particular:

- The government should make funds available to enable the judiciary and other relevant parties to train (e.g., through the Judicial College) more foreign judges who might be interpreting English law, as a way of helping ensure more consistency and quality in the application of English law around the world and therefore helping uphold its reputation.

[xxiv] It should be noted that the Law Commission is already undertaking work into the law around smart contracts. Source: Smart contracts | Law Commission

- The government should look to fund international networks of judges, academics, and practitioners from common law countries, to help strengthen the connections between and opportunities for knowledge exchange and learning between common law jurisdictions.
- Large law firms in the UK should be encouraged by the government to contribute additional resources to such initiatives.

Legal services should be a priority area for inclusion in future trade deals pursued by the UK government. To help encourage other countries to open up their legal services markets, measures such as judicial exchanges, enhanced access to legal education opportunities in England and Wales for students, practitioner and judges in counterpart countries and direct support for strengthening the rule of law (especially in developing countries), should all come as part of the UK "offer" in trade negotiations. Attaching such measures to trade negotiations would "dovetail" with the broader set of actions for bolstering the international visibility and reputation of English law, that are described above.

To maximise the international attractiveness of English law as the governing law for cross-border commerce, the Government should pursue a policy of including the UK in high quality international instruments that help reduce the barriers to English law being used to facilitate those commercial activities. Therefore, the Government should continue to pursue acceding to the Lugano Convention and ensure it signs-up-to and ratifies the 2019 Hague Convention on like it has the 2005 Hague Convention on Choice of Courts.[85] This process should begin with a review, conducted jointly by the Ministry of Justice, Foreign Commonwealth and Development Office, BEIS and the Treasury to systematically identify potential options.

ANNEX – SMALL BUSINESSES AND LEGAL PROBLEMS

The cost of inadequate access to legal services and the legal system to smaller businesses

The vast majority (99%) of the UK's six million businesses are small businesses.[86] Further, small enterprises account for 60% of private sector employment and 40% of private sector turnover in the economy.[87] Despite their importance, small firms are often forgotten in the debate (such as it is) over legal problems, their impacts, access to and use of the courts and dispute resolution. This is despite analysis for the Legal Services Board suggesting more than one in four (29%) small firms in England and Wales experience at least one legal problem every year.[88] For more than a third of firms that experience a legal problem (35%), the main legal problem persists for over a year in duration.[89]

Legal problems can generate several negative consequences for businesses who experience them, including financial costs, loss of market share, damage to reputation, distraction from the core business and detrimental impacts on the health of the owner-manager(s)/ senior leaders.[90]

Professor Pascoe Pleasance and Dr Nigel Balmer estimated that, in 2013, the total cost to small businesses of all the legal problems they experienced in the preceding 12 months was around £100 billion.[91]

Although a small proportion of the "main" legal problems experienced by smaller enterprises in any single year end up in court or before a tribunal – 3.4% according to one estimate[92] - the length of time such a problem is in "the court or tribunal system"[93] is a key determinant of the disruption the problem creates for the individuals and businesses involved. In addition to the personal and commercial disruption, using the court often comes with significant financial costs courtesy of court and lawyers' fees as well as possible liabilities for costs (although generally not in the Small Claims Track) and any damages deemed to be owed. The Federation of Small Businesses (FSB) published research in 2016, which estimated the aggregate annual cost to smaller businesses, of business-to-business or internal to the business (non-employment related disputes)[xxv] disputes. The research suggested that these types of legal problems cost the small business community in England and Wales around the £11 billion a year.[94]

For smaller businesses, making use of the courts (whether as a claimant or – reluctantly - as a respondent/ defendant) is a significant business risk and often undesirable, even in circumstances where it might be the best forum for sorting out the problem. The risks associated with getting caught up in lengthy and complex proceedings where the one who is found in favour of still might struggle to obtain the damages they're owed for example, means that some problems which might best be resolved through a court process never get into the court system.[95] While others that

[xxv] FSB defined "disputes" as breaches of price/ payment and other contractual terms as well as intellectual property infringements, instances of negligence, breaches of commercial confidentiality and corporate legal obligations, that led to a disagreement/ conflict between entrepreneurs/ firms relevant to the issue.

do enter the “system”, find the process so disruptive and costly that the ultimate outcome proves to be poor value for time and money expended.

ENDNOTES

[1] Kaufmann, D., Kraay, A. and Zoido-Lobaton, P. (1999), Governance Matters. World Bank Policy Research Working Paper Series 2196.

[2] North, D C. (1993). The New Institutional Economics and Development. Accessible here: NewInstE.North.pdf (iastate.edu)

[3] Genn, H (2010). Judging Civil Justice.

[4] Yarrow, G and Decker, C. (2012). Assessing the economic significance of the professional legal services sector in the European Union.

[5] Microsoft Word - BK-_47299764-v1-Why_English_Law (1) (primefinancedisputes.org)

[6] Rodrik, D et al (2004). Institutions rule: the primacy of institutions over geography and integration in economic development.

[7] World Bank. (2008). Role of Institutions in Growth and Development.

[8] North, D. (1990). Institutions, institutional change and economic performance.

[9] Vitola, A and Senfelde, M. (2015). The role of institutions in economic performance.

[10] Vitola, A and Senfelde, M. (2015). Evaluation of institutions in innovation-driven economies.

[11] Hall, R E and Jones, C I. (1999). Why Do Some Countries Produce So Much More Output Per Worker Than Others?. The Quarterly Journal of Economics. Vol. 114. No. 1

[12] Acemoglu, D., Johnson, S and Robinson, J. (2004). Institutions as the fundamental cause of long-run growth. NBER Working Paper 10481.

[13] Wiggins, S and Junior Davis, J. (2006). Economic Institutions. IPPG Briefing Paper No 3.

[14] Divanbeigi, R. and Ramalho, R., (2015). Business Regulations and Growth. Policy Research Working Paper 7299

[15] Feld, L P., and Voigt, S. (2004). Making Judges Independent—Some Proposals Regarding the Judiciary.

[16] Hayo, B. and Voigt, S. (2007). Explaining de facto judicial independence. International Review of Law and Economics. Vol 27. No 3.

[17] Dam, K W. (2006). The Judiciary and Economic Development.

[18] Dam, K W. (2006). The Judiciary and Economic Development.

[19] Baker, J H. (2007). An Introduction to English Legal History.

[20] Hogue, A R. (1986). Origins of the Common Law.

[21] Potter, H. (2015). Law, Liberty and the Constitution; a Brief History of the Common Law.

[22] Microsoft Word - BK-_47299764-v1-Why_English_Law (1) (primefinancedisputes.org)

[23] Djankov, S., La Porta, R., Lopez-de-Silanes F and Shleifer, A. (2002). Courts: the Lex Mundi Project. NBER Working Paper No 8890.

[24] La Porta, R, Lopez-de-Silanes, F and Shleifer, A. (2008). The Economic Consequences of Legal Origins. Journal of Economic Literature. Vol 46. No 2.

[25] speech-191028.pdf (supremecourt.uk)

[26] A number of studies suggest that judge-based legal evolution is, over time and on-average, beneficial for societal welfare. Source: Gennaioli, N and Shleifer, A. (2007). The Evolution of Common Law. Journal of Political Economy. Vol 115. No 1.

[27] Pejovich, S. (2008). Law, Informal Rules and Economic Performance: The Case for Common Law.

[28] Nedzel, N E. (2020). The Rule of Law, Economic Development and Corporate Governance.

[29] Porter, M E. (1990). The Competitive Advantage of Nations.

[30] La Porta, R, Lopez-de-Silanes, F and Shleifer, A. (2008). The Economic Consequences of Legal Origins. Journal of Economic Literature. Vol 46. No 2.

[31] Mahony, P G. (2001). The Common Law and Economic Growth; Hayek Might be Right.

[32] The-value-of-English-law-to-the-UK-economy.pdf (legaluk.org)

[33] Trends in choice of governing law & jurisdiction in cross-border transactions in Asia: Singapore Academy of Law publishes study – Singapore International Mediation Centre (SIMC) and PowerPoint Presentation (sal.org.sg)

[34] Around 56% of such businesses said that arbitration was their preferred method of dispute resolution and a further 34% said arbitration combined with other alternative dispute resolution (ADR) mechanisms (e.g., Med-Arb) was their preference. While 4% said litigation was their preference and further, half of the those who said litigation was their preferred option wanted litigation combined with ADR. Source: thisoneqmul_international_arbitration_survey_2015_report_final_69115_1532.pdf (cloudinary.com)

[35] Legal-excellence-internationally-renowned-UK-Legal-Services-2020.pdf (thecityuk.com)

[36] The London Court of International Arbitration. (2019). 2019 Annual Casework Report.

[37] Speech by Lord Justice Gross: Courts and Arbitration - The Jonathan Hirst QC Commercial Law Lecture (judiciary.uk)

[38] Speech by The Rt Hon. The Lord Thomas of Cwmgiedd: Commercial dispute resolution: courts and arbitration (judiciary.uk)

[39] Lord Justice Gross A Good Forum to Shop In: London and English Law post-Brexit 35th Annual Donald O'May Maritime Law Lecture London 1 November 2017 (judiciary.uk)

[40] European Foundation for the Improvement of Living and Working Conditions. (2006). The legal services cluster in the City of London.

[41] Plan for Growth: Promoting the UK's Legal Services Sector (justice.gov.uk)

[42] Legal-excellence-internationally-renowned-UK-Legal-Services-2020.pdf (thecityuk.com)

[43] Global Business Speaks English (hbr.org)

[44] Yarrow, G and Decker, C. (2012). Assessing the economic significance of the professional legal services sector in the European Union.

[45] Yarrow, G and Decker, C. (2012). Assessing the economic significance of the professional legal services sector in the European Union.

[46] Ferguson, N. (2012). Civilisation: the west and the rest.

[47] World Justice Project. (No date given). History and Importance of the Rule of Law.

[48] Briggs L J. (2016). Civil Courts Structure Review: Final Report

[49] Doing Business in United Kingdom - World Bank Group

[50] Sir Geoffrey Vos' speech at the launch of TheCityUK's Legal Services Report 2020 | The Law Society

[51] Sir Geoffrey Vos' speech at the launch of TheCityUK's Legal Services Report 2020 | The Law Society

[52] civil-courts-structure-review-final-report-jul-16-final-1.pdf (judiciary.uk)

[53] Doing Business in United Kingdom - World Bank Group

[54] Doing Business in Singapore - World Bank Group

[55] FSB. (2016). Tied Up: unravelling the dispute resolution process for small firms.

[56] enforcement-of-foreign-judgments-2021 (lw.com)

[57] HCCH | #37 - Full text

[58] Enforcing consumer rights threatened unless UK can join Lugano Convention | The Law Society

[59] 1_en_act_en.pdf (europa.eu)

[60] HCCH | #41 - Full text

[61] Simmons & Simmons | Cross-border disputes: no Lugano Convention, so what next? (simmons-simmons.com)

[62] Hague Convention on enforcement of foreign judgments - Allen & Overy (allenovery.com)

[63] LCJ Speech: Law Reform Now' in 21st Century Britain - Brexit and Beyond (judiciary.uk)

[64] Government acts urgently to protect judicial recruitment - GOV.UK (www.gov.uk)

[65] Shortage of judges sums up role's lack of appeal | Financial Times (ft.com)

[66] SSRB_Report_Attractiveness_Turenne-Bell_Revised_14_March_FINAL_-_temp_pdf.pdf (publishing.service.gov.uk)

[67] [ARCHIVED CONTENT] Department for Constitutional Affairs Website (nationalarchives.gov.uk)

[68] 860_00_Cover_35mm.indd (judiciary.uk)

[69] Legal Aid, Sentencing and Punishment of Offenders Act 2012 (legislation.gov.uk)

[70] Briggs, LJ. (2016). Civil Courts Structure Review: Final Report.

[71] fixed-recoverable-costs-supplemental-report-online-2-1.pdf (judiciary.uk)

[72] Spending review and autumn statement 2015 - GOV.UK (www.gov.uk)

[73] HMCTS reform programme projects explained - GOV.UK (www.gov.uk)

[74] Transforming Our Justice System By the Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals (publishing.service.gov.uk)

[75] Extending Fixed Recoverable Costs in Civil Cases: The Government Response (publishing.service.gov.uk)

[76] Lord Chief Justice speech: The Bailii Lecture 2016 (judiciary.uk)

Speech by The Rt Hon. The Lord Thomas of Cwmgiedd: Commercial dispute resolution: courts and arbitration (judiciary.uk)

[77] Palumbo, G., Giupponi, G., Nunziata, L and Mora Sanguinetti, J S. (2013). The Economics of Civil Justice: New Cross-country Data and Empirics.

[78] IBA. (2021). Commentary on the revised text of the 2020 IBA Rules on the Taking of Evidence in International Arbitration.

[79] NAO. (2019). Transforming courts and tribunals – a progress update.

[80] fixed-recoverable-costs-supplemental-report-online-2-1.pdf (judiciary.uk)

[81] Lord Frost statement to the House of Lords: 16 September 2021 - GOV.UK (www.gov.uk)

[82] Brexit_opportunities-_regulatory_reforms.pdf (publishing.service.gov.uk)

[83] FINAL_TIGRR_REPORT__1_.pdf (publishing.service.gov.uk)

[84] Reforming the Framework for Better Regulation: a consultation (publishing.service.gov.uk)

[85] Microsoft Word - Explanatory memoranda - Hague 2005 SI - Final.docx (publishing.service.gov.uk)

[86] Business population estimates for the UK and regions 2020: statistical release (HTML) - GOV.UK (www.gov.uk)

[87] Business population estimates for the UK and regions 2020: statistical release (HTML) - GOV.UK (www.gov.uk)

[88] The legal needs of small businesses - Final - 12 October 2015 (legalservicesboard.org.uk)

[89] The legal needs of small businesses - Final - 12 October 2015 (legalservicesboard.org.uk)

[90] The legal needs of small businesses - Final - 12 October 2015 (legalservicesboard.org.uk)

[91] In-Need-of-Advice-report.pdf (legalservicesboard.org.uk)

[92] The legal needs of small businesses - Final - 12 October 2015 (legalservicesboard.org.uk)

[93] The legal needs of small businesses - Final - 12 October 2015 (legalservicesboard.org.uk)

[94] FSB. (2016). Tied Up: unravelling the dispute resolution process for small firms.

[95] In-Need-of-Advice-report.pdf (legalservicesboard.org.uk)