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A comparative study on trials of commercial action with reference to India, EU and USA.

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The term commercial law has no fixed meaning in India. As a rule, there is no distinction between commercial and non-commercial contracts, government or non-government contracts. The concerned enactments are generally uniform in their application to these contracts. There are no commercial courts in this country. Broadly speaking, a discussion on commercial law may include within its ambit the Indian Contract Act, 1872; the Negotiable Instruments Act, 1882; the Transfer of Property Act, 1882; the Presidency Towns Insolvency Act, 1909; the Provincial Insolvency Act, 1920; the Sale of Goods Act, 1930; the Indian Partnership Act, 1932; the Arbitration and Conciliation Act, 1996; the Companies Act, 1956 and the specific Relief Act, 1963. If there is any type of inconsistency or doubt while regulating or performing according to the provisions of the act, the parties complaining for the same shall come up with commercial action.

The definition of "commercial action" is broad and has a wider range of arrangements. Generally, they include any transaction or dispute of a commercial or business nature. Examples are banking and insurance transactions, contracts for the sale or supply of goods or services (national or international) and commercial leases. The court also deals with disputes about building contracts, partnership agreements, professional negligence, and business property. The Court of Session has for many years had special provisions for dealing with commercial actions to enable specialist judges to handle commercial cases quickly and flexibly. Company and insolvency petitions, raised under the Acts found in Division I of Volume 4 of the Parliament House book, are also dealt with by the commercial judges.[1]

The preliminary stages

Shortly after a commercial action begins it is allocated to one of the four judges. In general, that judge will be responsible for overseeing the progress of the case and for deciding it at first instance. If a change has to

[1] **Commercial Dispute Resolution by Michael Waring**

be made, the case will be transferred to another commercial judge[2]. Very soon after its allocation to the particular judge, the action will be brought before him or her for a preliminary hearing. The purpose of that hearing is to take stock of the dispute and to choose what appears to be the best means of resolving it. As a result of pre-litigation discussion, the features of the dispute ought already to be well defined and, with only a little preliminary treatment, the case can be sent for judicial determination. Where the dispute is on a point of law, such as the interpretation of a contract, the court may be able to decide it without hearing evidence. When there is a dispute on the facts, the court may quickly order a hearing of evidence. More commonly, it will be necessary to hold a procedural hearing before the issues are sufficiently focused to allow the case to be sent for debate or the hearing of evidence.

At those preliminary stages the judge will take an active part in the discussions. His or her intervention may help parties to narrow the gap between them and lead to an early settlement. In other cases some important issue or issues may be singled out from the rest and dealt with separately in the hope that, by resolving that point, the court will help to resolve the whole dispute. The court may ask a suitable expert to decide, or express a view on, some technical aspect of a case. For example, the court might send a question of valuation in a building contract dispute to a quantity surveyor for that purpose. The preliminary stages are essentially informal and have the character more of a chaired discussion than of a formal court hearing. Consistent with that, neither the judge nor the parties' representatives wear formal court dress at those hearings. This informality has since been extended to all hearings with the exception of those where oral evidence is to be led.

Pleading the case

While written pleadings (summons and defense) remain the primary method by which parties set out their cases, the commercial judges encourage the use of alternative techniques. The keynote is flexibility. Where a case, or part of it, has been formulated in a pre-litigation document (such as a claim document in a building dispute) the judge may be content to use it, with only a minimal amount of written pleadings. Likewise, expert reports are commonly referred to without any requirement to translate them into "lawyer's language". Computer-generated spreadsheets (such as a Scott Schedule) are commonly used to set out complicated matters of detail, as in disputes between landlords and tenants over the state of repair of a building.[3]

The decision stages

The commercial judges insist on frank and early disclosure of relevant (but only relevant) documents. This helps to identify the strengths and weaknesses of the respective positions of the parties and facilitates settlements. An order will usually be made requiring parties and their representatives to meet to try to resolve the dispute or, at least, to narrow its scope. Where the case proceeds to a full hearing, that hearing is more formal. Detailed legal arguments will be presented or evidence heard from witnesses. The emphasis,

[2] **International Dispute Settlement by J.G. Meriills**

[3] International Dispute Settlement by J.G. Meriills

however, remains on efficient and expeditious disposal. Parties are encouraged to agree matters which are non-contentious and to deal with contentious matters without undue elaboration.

Trials of Commercial Action in India

Delays and pendency of economic cases are high and mounting in the Supreme Court, High Courts, Economic Tribunals, and Tax Department, which is taking a severe toll on the economy in terms of stalled projects, mounting legal costs, contested tax revenues, and reduced investment. In the last few years, much has been made of India's improved ranking in the World Bank's annual 'Ease of Doing Business' Report **("EODB Report").** The EODB Report 2020 has lauded India's achievement of being one of top 10 economies in the world that improved the most on the ease of doing business front. India witnessed a jump from a ranking of 142 to 63 in the last four years, after implementing regulatory reforms. These rankings serve as proof of then exceptional reforms implemented by the Government. The previous Economic Survey (2017-2018) highlighted India's "striking progress'' on taxation and insolvency reforms, protection of minority investors, ease of obtaining credit and the importance of an efficient, effective and expeditious contract enforcement regime for economic growth and development.3 However, the 2018-2019 Economic Survey bemoans India's inability to enforce contracts and resolve legal disputes as 'arguably the single biggest constraint to ease of doing business in India.[4] The establishment of commercial courts exclusively for the efficient resolution of complex business disputes was the key policy measure introduced by the Government to improve India's position on the enforcement of contracts indicator. It was touted as a major step towards reform of India's civil justice system to ensure quick enforcement of contracts, facilitate easy recovery of monetary claims and the award of just compensation for damages. This, it was argued, would encourage investors to establish and operate businesses in India and result in rapid economic growth.

The legislative history for the new law set out in the 188th and 253rd Reports of the Law Commission of India. Then, these recommendations were incorporated into the Commercial Courts Act, 2015 and implemented in that spirit. This detailed exploration of the legislative history uncovers how the current reform policy was chosen and shaped. In 2003, the 188th Report of the Law Commission of India ("Law Commission") first recommended setting up of fast track courts in the High Courts. In 2009, the Commercial Division of High Courts Bill was approved by the Lok Sabha ("2009 Bill").The Bill was then examined by a Select Committee of the Rajya Sabha ("Select Committee"), which presented its Report on July 29, 2010. A revised Commercial Division of the High Courts Bill, 2010 was presented before the Rajya Sabha. Owing to reservations expressed by several members of Parliament, the 2010 Bill was referred to the Law Commission for re-examination of its provisions. In particular, the Law Commission was tasked with scrutinizing the scope and definition of 'commercial dispute'.

The Law Commission, then engaged in several discussions with expert committees, and submitted a new report in 2015, namely, the 253rd Report. The 253rd Report recommended setting up commercial courts, and Commercial Divisions and Commercial Appellate Divisions in the High Courts.9 As a result, the

[4] Economic Survey India.

Commercial Division and Commercial Appellate Division of High Courts and Commercial Courts Act, 2015 (the "2015 Act") was enacted by both Houses of Parliament on Finally, the data from the Delhi High Court and qualitative research in the Bengaluru commercial court to ascertain whether these reforms have resulted in quicker case disposals. January 1, 2016 and made effective from October 23, 2015. In August 2018, the Act was amended through the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Act, 2018 (the "Amended Act") (the 2015 Act and the Amended Act together referred to as the "Act'') to reduce the pecuniary limits to jurisdiction for commercial disputes, thereby increasing the workload of these courts.[5]

Court Procedure and Trial in India

Commercial Divisions of High Courts were required to follow a fast track procedure, i.e. dispose cases and pronounce judgments within 30 days of the conclusion of arguments. When the Select Committee reviewed the 2009 Bill, some members of the Committee expressed reservations about "simply copying the concept of commercial courts from western countries without any analysis of the situation prevailing in India". They felt that the 188th Report failed to consider statistical data on actual pendency numbers for commercial matters in various courts, and were worried by the lack of specialist commercial training for judges of these Divisions.

This idea of fast track courts morphed in the 253rd Report, which moved beyond High Court Divisions to see commercial courts as a forum dedicated to resolving complex commercial matters. These forums were not limited only to high value commercial disputes but would extend to all disputes over time. The rationale was that commercial courts created a stable, certain and efficient dispute resolution mechanism, essential for India's economic development. Commercial courts would function as model courts, establishing new norms of practice in commercial litigation that could over time be scaled up and extended to all civil litigation in India. The procedure followed by these courts could form the basis of a larger reform of the country's Civil Procedure Code. Following a similar theme, the 2015 Act set up commercial courts as an independent mechanism for early resolution of 'high value' commercial disputes involving 'complex facts and question of law'. Early resolution of commercial disputes would 'create a positive image to the investor world about the independent and responsive Indian legal system', a measure towards improving ease of doing business in India. The objectives were to: "promote accelerated economic growth, improve the international image of India's justice delivery system and enhance investor communities' faith in our legal culture".[6]

The basic model of these courts has also shifted over time. While the 188th report focused on creating Commercial Divisions at the High Court level granting no jurisdiction to district courts, the Amended Act moves the entire burden of adjudication to commercial courts set up at the subordinate court level. In the next Section, we explore the choice of forum in greater detail. The Law Commission in its 188th report recommended that commercial disputes of high pecuniary value should go directly before a Commercial Division of the High Court, rather than to a District Court or a Single Judge Bench of the High Court.

[5] Commercial Courts Act 2015
[6] Commercial Dispute Resolution Michael Waring

Decrees of commercial matters in original suits and for transferred matters would be executed by the Commercial Division of High Courts and not by subordinate courts. This approach continued till the 2009 Bill. The Select Committee, which examined the 2009 Bill, felt that it would be necessary to create a Commercial Division in the Supreme Court in the future since the Bill provided for an appeal to lie to the Supreme Court against any decree, passed by the Commercial Divisions. It suggested that the issue of providing original jurisdiction to some High Courts, as the 2009 Bill envisaged, should be dealt with separately in a comprehensive law on judicial reforms, with a view to have uniformity in the judicial system.

The 253rd Report recommended that:-

(i) in High Courts with ordinary original civil jurisdiction, Commercial Divisions are set up in High Courts;

(ii) commercial courts are set up in High Courts even in regions where the original jurisdiction of High Courts does not extend (like Pune or Madurai) and

(iii) commercial courts are set up at the district court level in territories where the High Courts do not have ordinary original civil jurisdiction.

The 2015 Act followed the 253rd Report and mandated setting up of Commercial Divisions in those High Courts exercising ordinary original civil jurisdiction, i.e. at Bombay, Calcutta, Chennai, Delhi and Himachal Pradesh. In these territories, no commercial courts are constituted at the district level. Commercial Divisions adjudicate commercial disputes filed on the original side of these High Courts and transferred to High Courts under other laws. For all other States and Union Territories whose High Courts do not have ordinary original civil jurisdiction, commercial courts are set up at the district court level. However, under the Amended Act, 2018 even where High Courts enjoy ordinary original civil jurisdiction, commercial courts are to be set up at the district court level.

For other territories where High Courts do not exercise ordinary jurisdiction, commercial courts are to be established at a court below the level of a district judge. Hence, what began as a minor reform by the introduction of a new High Court Division has transformed into a structural reform of the subordinate court structure on the civil side. While the scale of reform was magnified, there was no corresponding budgetary allocation or programme for radical cultural transformation of these new lower courts. In the absence of these initiatives, it is unclear why the introduction of these new courts was assumed to be transformative. The 188th Report proposed a broad definition of 'commercial dispute cases' to include any transaction or dispute of a commercial or business nature. The envisaged disputes include banking and insurance transactions, contracts for the sale and supply of goods or services (national or international) and commercial cases, disputes of building contracts, partnership agreements and business property. A residuary clause was added to the definition, enabling High Courts to notify other disputes to be included in the definition. The Report also set out detailed explanations of matters which fall within the meaning of a commercial dispute. In the 2009 Bill that followed, an exhaustive definition of 'commercial disputes' was provided to mean "those disputes arising out of ordinary transactions between merchants, bankers and traders such as those relating to mercantile transactions, franchising, distribution

and licensing agreements, maintenance and consultancy agreements, and agreements relating to hardware and software technology and internet and intellectual property." Interestingly, the Bill suggested that the 'specified value' of a suit was the necessary determinant to vest jurisdiction over a matter in the Commercial Division.

The Select Committee reviewing the 2009 Bill observed that the exhaustive definition of commercial disputes needs to be made inclusive to provide as much clarity as possible. It recommended adding to the definition, 'joint venture, shareholder, subscription and investment agreements; agreements relating to the services industry including outsourcing services, and financial services". The Report warned that a very wide definition would lead to extensive litigation.

The 253rd Report however failed to pay heed to this warning and further expanded the scope of "commercial disputes". The broadened definition covers all categories of disputes which arise out of ordinary transactions of merchants, bankers, financiers and traders relating to 22 categories of documents including mercantile documents, agreements relating to immoveable property, construction and infrastructure contracts, and transactions relating to intellectual property rights, insurance, air crafts and carriage of goods and export and import of goods and services among others. This legislative debate on the definition of a commercial dispute is anticipated by the academic debate on the scope of commercial law. Goode (2015), in his treatise on commercial law, examined whether commercial law should be distinguished from general civil law. He observed that "in those legal systems that treat commercial law separately from civil law, the character of the transaction may be determined subjectively by the status of the parties as carrying on a business or objectively by reference to the type of transaction or activity or by a combination of the two.

Whatever the legal system involved, it is clear that commercial law and commercial transactions cannot be isolated as self-contained compartments of contract or of commercial law". Goode observed that historically, it has been very difficult if not impossible, to draft a code that applies exclusively to a civil or commercial transaction, and hence, the hair splitting is best avoided. A similar problem is encountered in the 2015 Act and the Amended Act. Following the recommendations of the 253rd Report, 'commercial disputes' has been defined very widely. 'Commercial disputes' includes disputes arising out of ordinary transactions of merchants, bankers, financiers and traders, which we categorise under three broad headings: (i) trade/mercantile disputes - those relating to mercantile usage, agency, partnerships, sale, export or import of merchandise or services, (ii) infrastructure and construction disputes – including carriage of goods, construction and infrastructure contracts including tenders, agreements relating to immovable property used exclusively in trade or commerce, relating to aircrafts, oil and natural gas, (iii) business and financial disputes – arrangements including franchising, distribution and licensing, management and consultancy agreements, joint ventures, investment agreements, information technology, financial services, insurance, intellectual property rights etc.

Such a broad definition is superfluous since it negates subject matter assessment while determining whether a dispute is a 'commercial dispute'. In practice, commercial disputes are essentially civil

disputes of higher pecuniary value. As we discussed earlier, the legislative history of the Act also seems to support this view, even though it effectively converts specialist commercial courts to ordinary civil courts. The 2009 Bill set out the procedure that the Commercial Divisions would follow, suggesting minor improvements to the Code of Civil Procedure, 1908 ("CPC") as it applied to commercial disputes. The single judge of the Commercial Division was empowered to hold case management conferences to fix time schedules for filing evidence and written submissions. Some members of the Select Committee pointed out that adopting the CPC into to, as the 2009 Bill recommended, was likely to lead to extensive delays "both at the time of trial and later at the time of execution". The 253rd Report dealt with this subject in greater detail. It recommended the introduction of targeted and specific modifications to civil procedural rules to ensure that commercial disputes moved easily through the court system, and judges are given power to ensure that trials are conducted fairly and efficiently.35 For streamlined conduct of litigation, civil revision applications or petitions against interlocutory orders of the commercial court were barred. It suggested that frequent filings of revision applications and petitions against interim orders of the court should be discouraged, and that removing such unnecessary and cumbersome litigative processes would prevent derailing of timelines set out in a case.

High courts were required to issue rules or practice directions for managing conduct of trial, such as fixing timelines starting from pre-trial hearings for the first hearing, framing of issues, submission of documents, gathering evidence, summoning witnesses and up until completion of trial. Judges were encouraged to use internationally recognized litigation practices like case management hearings with tools such as pre-trial conferences and electronic filing of documents to ensure that litigation is conducted within the time frames scheduled at such hearings. In the event of non-compliance with orders, commercial courts could foreclose the non-compliant party's right to carry on the trial or in extreme cases, dismiss their complaint.

The 2015 Act expanded the existing powers of the court to order summary relief under Order 37, CPC. Commercial courts could order summary judgment without regard to nature of relief claimed, and at any stage in the litigation process prior to framing of issues. Summary judgement could be given against a party if the court was convinced that the claim has no substance and there is no compelling reason for not disposing the matter before recording evidence. These were aimed at cutting down the time spent on, and expenses of conducting a regular trial. The Act provides that commercial courts and Commercial Divisions should undertake case management hearings for speedy and expeditious disposal of pending matters which are transferred to them from other courts.66 As we note in the Section above, High Courts are required to issue rules or practice directions for managing conduct of trial.67 The Act also imposes strict time limits for expeditious disposal of matters on appeal – appeals should be made within 60 days of judgment or order and should be disposed by the Commercial Appellate Courts/Divisions within 6 months from the filing of the appeal. A commercial litigator with about 7 years of experience, mentioned that the "use of case management techniques for efficient conduct of trials is neglected. The case management [practiced in the commercial court] is similar to ordinary civil matters". In the few courts where case management practice directions are applied to commercial disputes, like in the Delhi High

Court, A1 mentioned that the "timelines imposed on disputing parties are not strictly implemented. Case management is left in the hands of lawyers, who will most likely adapt this to suit their client's convenience." He recommended that, "disputing parties cannot be allowed to control the pace and intensity of litigation and all measures should be taken to prevent loss of precious court time through delay tactics used by them" and that "judges have to be instructed to order that case management techniques are used to ensure smooth conduct of trials and bring about certainty in timelines. Since the court's directions issued in case management hearings are binding, they need to strictly punish all instances of default by any party."[7]

Court's Procedure and Trial in USA

The English courts take the view that litigation should be a last resort. For some disputes, a specific pre-action protocol will apply – for example, in respect of professional negligence and defamation claims. If a specific pre-action protocol applies, then save in exceptional circumstances such as for matters of great urgency, you will need to comply with the detailed requirements of that protocol. This will involve, among other things, the early exchange of information and documents.[8] Even if one of the specific pre-action protocols does not apply, as soon as litigation is contemplated, parties are under a duty to preserve relevant documents under their control. You will also still be expected to make serious attempts to resolve your dispute without recourse to the courts. In all disputes, therefore, the courts expect you to exchange information and documents and to behave reasonably to try to avoid litigation. This will normally mean that the claimant should write a detailed letter of claim to the defendant setting out the basis of the claim and giving the defendant a reasonable time to ask for more information and to respond in detail to the claim. The parties should if possible conduct genuine and reasonable negotiations with a view to settling the claim. The parties should also consider alternative dispute resolution. If a party is found not to have acted reasonably in attempting to settle the dispute before proceedings are started, then the courts can take this into account at a later stage when deciding which party should pay costs, and the level of those costs.[9]

Alternative Dispute Resolution

Parties to a dispute are encouraged by the courts to consider whether some form of alternative dispute resolution (or ADR) would be more suitable than litigation. Whilst the parties can choose whatever form of ADR they consider to be appropriate, the more conventional options include:-

a) Arbitration – a form of dispute resolution (normally confidential) pursuant to which one or more arbitrators decide a case rather than a court appointed judge.

b) Mediation – this is a facilitated negotiation assisted by an independent third party mediator appointed by the parties.

[7] Employment and commercial dispute
[8] The business man's commercial law and business forms combined
[9] International Dispute Settlement by J.G. Meriills

c) Early neutral evaluation by an independent third party, who advises in a non binding way on the merits of each party's position.

d) Expert determination – in which an independent expert is appointed to resolve the matter by producing a legally binding decision.

e) Other forms of discussion and negotiation.

It might be that one or more of the above procedures is provided for in a contract which forms the basis of the dispute. If the contract does provide for some sort of ADR then the parties should, save in exceptional circumstances, follow the procedure provided for. Consideration should also be given to other ways of settling a dispute – for example, by referring a complaint to an ombudsman. Whilst it might be possible to settle the case before proceedings start, if this is not possible you can still agree a settlement with the other parties at any time during the court proceedings – even after the trial. However, most cases do settle before trial.

Once litigation is reasonably in contemplation, the parties are under an obligation to preserve all documents (paper and electronic, including recordings of telephone calls). Automatic document destruction policies should be suspended. In certain circumstances, it might be appropriate to apply to the court for copies of documents from an intended defendant before proceedings have started. You do not have to provide legally privileged documents to other parties as part of the disclosure process in English litigation. Care should therefore be taken to ensure that harmful, non-privileged documents are not created. See Section 3 for an explanation of privilege. Does the defendant have any assets? If you are bringing a claim, it is important to find out if the defendant has any assets or whether the claim is covered by insurance. Otherwise, there is a danger that a successful claim is unenforceable (see enforcement overleaf).

The parties will give the court a written outline of their case before the trial. This is called a skeleton argument. The length of the trial will depend on matters such as the complexity of the case and the number of witnesses giving evidence There is one judge, who listens to all the evidence. It is for the parties to present the evidence. The judge does not investigate the case, but listens to the evidence and usually also asks questions. Hearings are generally held in public and there is no restriction (aside from physical space) on who attends, whether they are connected to the proceedings or not. In English proceedings in the High Court, the case is usually presented orally at trial by a barrister (although some solicitors have the right to present cases in the High Court). In larger and more complex cases, a barrister is actually likely to be instructed at the beginning of a case, and will be fully involved in drafting the court documents such as the particulars of claim. The barrister will also often represent a party at any other court hearings before the trial. The claimant's advocate usually starts by presenting their case. The defendant's advocate then presents their case. This is called 'opening submissions'. In civil cases in England and Wales, there is no jury, save in some defamation cases. The general rule is that, at trial, witnesses of fact give oral evidence and are cross-examined. Expert witnesses may also be cross-

examined. Cross-examination takes place after opening submissions. The parties then summarise their cases (called 'closing submissions'). Following trial of the action, the judge usually takes a period of time to write the judgment. It is then typically delivered (known as being 'handed down') in court, sometimes read out by the judge and, more often, copies are made available to the parties and the public by the judge's clerk. Once handed down, the judgment is public. Only in very exceptional circumstances do parts of or even whole judgments remain confidential (at the request of the parties and where the court agrees this). Frequently, the draft judgment is provided to the parties' legal teams in advance of the delivery of the decision to allow typographical errors or (more controversially) obvious errors to be pointed out. Sometimes the legal teams can communicate the decision to their clients at this stage and sometimes they cannot – this depends on the wording of the embargo placed on the front of the judgment by the judge. There can even be challenges to the decision during this period and before the decision is formally handed down. Following handing down of the judgment, there is often a further hearing where the judge hears argument as to appropriate remedies based on the judgment and makes the final order.[10]

An unsuccessful party (the 'appellant') can appeal from a County Court to the High Court or from the High Court to the Court of Appeal, subject to permission from the lower court or appeal court. The court only grants permission if it considers that the appeal has a real prospect of success or there is some other compelling reason for the appeal to be heard. It is possible to appeal in relation to findings of both law and fact. However, the appeal courts are generally reluctant to overturn a trial judge's findings of fact, particularly where these depend on the judge's view of the credibility of the witnesses. The appellant must file an 'appellant's notice' (a request for permission to appeal made to the appeal court) within 21 days of the date of the decision appealed against, unless the lower court has directed a different period. If a claimant wins, they will get judgment in their favour. If the defendant does not pay, the claimant can take steps to enforce the judgment. The main enforcement means are:

a) The High Court can give a sheriff authority to seize and sell the debtor's (defendant's) property.

b) Third party debt orders, which redirect to the creditor (i.e. the claimant) funds owed to the debtor by a third party – for example, funds in the debtor's (defendant's) bank account.

c) Charging orders over land or securities – this gives the claimant a charge over the defendant's property.

d) Insolvency proceedings – i.e. steps taken to put a non-paying defendant company into liquidation, or bankruptcy in the case of individuals.

Alternative or appropriate dispute resolution (ADR) is an umbrella term for a wide variety of conflict management techniques and processes used in lieu of traditional judicial and administrative methods such as litigation and administrative adjudication. Many ADR processes use a third party neutral, such as a facilitator, mediator, or arbitrator. Professor Robert Kagan has documented the dramatic growth in adversarial legalism as an approach to governance from the 1960s to 1980s. ADR use was relatively sparse

[10] International Dispute Settlement by J.G. Meriills.

in the federal government until the 1990s, when it began to grow in earnest through a combination of congressional legislation, presidential proclamations, and Attorney General guidance as a response to a perceived explosion in litigation or the threat of litigation. Although Congress passed a series of legislative acts incorporating ADR into all three branches of the federal government, the greatest impacts have been experienced in administrative agencies and federal courts.

Alternative Dispute Resolution Act provide little specific discussion about the role of ADR in the court system and leave district courts "tremendous discretion" in designing and implementing ADR processes. The result is that programs vary widely along a number of dimensions. A recent study by Professor Lande suggests that court administrators view the administration of justice broadly and do not see it as encompassed by a traditional trial to a judge or jury.[11]

Court's Procedure and Trial in EU

This European added value assessment (EAVA) analyses the benefits for the EU economy that can be generated by adopting new EU procedural rules for the settlement of high-value commercial disputes. The policy debate on the competitiveness of EU procedural rules for the settlement of commercial disputes is necessary both because of the changing structure of the global legal services market and the economic value of this economic sector for the EU economy, businesses and Member States. There are three main trends affecting the global market for the settlement of commercial disputes. First, increasing competition among jurisdictions. There has been a gradual shift from a polycentric global market structure where London and New York City are the main jurisdictions for the litigation of high value commercial disputes to a more diverse jurisdictional landscape. This traditional set up was conditioned by the structure and dynamics of international business. The current drivers of change are the globalization of international business, including competitive pressure from other global regions such as Asia, and competitive pressure within the legal services industry itself. In the European context, jurisdictional competition is being fuelled by the possible UK exit from the EU. Second, there has been a shift from the judicial settlement of commercial disputes to alternative dispute resolution. The main driver of this change is efficiency. Parties prefer the more efficient and less lengthy procedures that alternative dispute resolution (ADR) promises to deliver. The third trend is the digitalization of the legal services industry. Digitalization impacts both the delivery of services and the 'exportability' of legal services abroad.

The litigation process has also been simplified as a result of digitalization which makes it easier and more costefficient to litigate under foreign jurisdictions. Litigation is the largest sector in the global legal services market, with a 31 % of market share. Commercial litigation and connected legal services for B2B is increasingly globalised. This reflects the general trend in international business where commercial counterparties increasingly come from diverse and multiple jurisdictions. Parties in business transactions increasingly select foreign courts and foreign law to govern their obligations and settle disputes. In the

[11] International Dispute Resolution J.G. Merills

global context, London and New York have established themselves as the two main centres of international commercial litigation. This practice emerged as a result of multiple factors including for example;

a) model agreements with a standard choice of law and choice of forum clauses (e.g. International Swaps and Derivatives Association master agreements) as well as established 'standard' practices in a specific industries (e.g. financial services);

b) the legal infrastructure and specialisation of specific courts supported by regulatory action;

c) the preferences and advice of lawyers for specific jurisdictions.

d) English, as a business lingua franca, further supports choice of law and choice of forum jurisdictions where English is the main language of commercial transactions and commercial litigation.

This dynamic is however changing, reflecting the globalization and diversification of the market. For example, in the financial services sector the long-standing practice of using International Swaps and Derivatives Association (ISDA) master agreements has recently been reviewed. In July 2018, the ISDA introduced two additional law choices, Irish and French, to standard master agreements. Previously, the ISDA master agreements choice of law included only English, State of New York and Japanese (court and jurisdiction). The ISDA's General Counsel, commenting on the introduction of two additional EU choices of law in the master agreements explained: 'There will be good reasons for EU/EEA counterparties to continue using the English law master agreement, and there will be good reasons for them to start using the French and Irish law versions. This is all about providing choice to the market and allowing counterparties to choose the option that best suits their needs'. Similarly, in 2017 and 2018, Belgium, France, Germany and the Netherlands have announced their plans to establish specialized courts to further enhance resolution of international commercial disputes in those jurisdictions. To attract foreign litigants those initiatives aim to offer among other benefits dispute resolution in the English language. This trend arguably signifies a push factor for the emergence of the European market for high value commercial disputes. A market that is currently highly dominated by litigation in the London courts. In that sense the statistical data of English commercial courts is revealing. The data for 2016 to 2017 suggest that 72 % of litigants in the commercial courts came from outside the UK. In addition to Member States' efforts the European Union has taken a number of successful legislative initiatives to facilitate the resolution and enforcement of civil and commercial disputes across the EU. The European Union has taken legislative action in four broad categories: first, the rules on applicable substantive law: contractual and non-contractual obligations; second, the rules on jurisdiction, recognition and enforcement of Member State court judgements; third, judicial cooperation proceedings; and finally, other legislation, including rules on legal aid, mediation and judicial networks. The EU's harmonized rules in relation to jurisdiction and the enforcement of Member State court judgements in civil and commercial matters are very successful and are 'widely considered to have been one of the most successful EU initiatives over the last 30 years. According to the expert survey by Allen & Overy 'The choice of court is of critical importance in commercial disputes. Where a party fights its battles can impact not only the length and cost of any proceedings but, more substantively, the reliability and

enforceability of any resulting judgment'. Similarly, the 2008 survey of European businesses revealed that for 97 % of respondents the possibility for choice of forum was important or very important.

What determines the choice of a specific law and forum in the EU context is less clear. Few empirical studies have attempted to understand the main factors influencing the choice of law and the choice of forum in litigation. The two main EU comparative, empirical contributions on parties' choice of law and choice of forum preferences in commercial matters are the 200562 and 200863 Oxford European and Comparative Law / Clifford Chance studies. The two studies were based on expert surveys. The 2005 study surveyed 175 businesses from eight EU Member States. The 2008 study surveyed 100 businesses from eight EU Member States. More recent, comparative empirical studies, focused on arbitration. According to the 2008 survey the most important factors are: quality of the chosen contract law, the fairness of outcomes, absence of corruption and predictability. Other important factors included quality of judges and courts, speed of dispute resolution, costs of proceedings and quality of lawyers.

The quality of the legal system and the rule of law are general underlying factors that impact the decision of litigants to bring a case to a specific jurisdiction. Legal system quality has been indicated as an important factor in all available empirical studies. The most comprehensive global dataset on the rule of law is the World Justice Project Rule of Law Index (WJP Index). This index collects primary data from 113 world jurisdictions. The index includes 44 indicators. It is based on household and expert surveys and measures how the rule of law is experienced and perceived worldwide. This index covers 20 EU Member States, including the UK, Germany, France, Italy and Spain. The higher the score, the better the country's overall performance. In the EU-wide context, Denmark is the leader (0.89 index score), followed by Finland (0.87) and Sweden (0.86). Denmark is also the global leader with best overall global rank. Among the 20 EU Member States for which data is available, Germany is ranked fifth and the UK is ranked seventh. In the global ranking Germany comes sixth and the UK eleventh out of 113 countries.

The second central factor influencing litigant’s choice is speed. The economic literature suggests that 'lengthy trials undermine certainty of transactions and investment returns, and impose heavy costs on firms'. The differences in the time needed to resolve a civil or commercial case in the EU are striking. Lithuania is the leader with an average disposition time of 88 days for litigious cases of the first instance. Among the five EU Member States with the largest share of the EU legal services market, Germany has an average of 196 days necessary to resolve litigious civil and commercial cases. There is no directly comparable data for the UK. The information available from the UK Ministry of Justice however suggests that on average 392 days are needed to resolve civil and commercial cases in the UK courts. Fairness and predictability of outcomes are factors that scored very high in the 2008 survey. The qualitative studies on the litigation choices of the parties likewise refer to predictability and certainty as key factors. The 2015 Legal Certainty Index provides a valuable, comparative, in depth analysis of legal certainty. The index adopts a complex methodology to measure legal certainty. The essential elements of the adopted measurement tool are 'accessibility of the applicable law', 'predictability', 'reasonable stability over time' and 'balance of interests'. In providing a scoring method for different elements of certainty the index attempts to adopt a 'practitioner / economic

operator' perceptive. The note on the rational of the index explains: 'legal certainty is one factor of economic appeal. Companies' needs for stability and predictability are greater at a time when the globalization of trade is accompanied by greater competition. 'Know and predict' have become major imperatives, and risk evaluation – particularly of disputes – is a factor in any financial decision. Considering market changes in the global and EU legal services market and legal uncertainty relating to the application of EU harmonized rules in the UK courts, it may be reasonable to expect a certain re-distribution of commercial litigation in the EU to take place. The exact pattern of this re-distribution would depend on a number of factors that are not yet known. The next chapter discusses possible trends and their economic impacts.[12]

The EAVA quantifies the size of the litigation market based on 2017 Global Legal Services Survey data. The EAVA uses the global survey because it provides a comparative estimate of Europe visà-vis the other global regions as well as the most recent data. This global survey values the EU legal services market at US$191 billion / €164 billion, with the UK share, 6.5 % globally. This global survey also estimates that the current size of the litigation market globally represents 31 % of the legal services market. B2B litigation accounts for 48 % of the litigation market. There is no available estimate of the share represented by cross-border cases in the total EU B2B litigation market. The Member States' estimates diverge widely. The UK Commercial Court reports that 72 % of all cases settled by the UK Commercial Courts involve at least one non-UK party.

The 2018 Deloitte financial study supporting the European Commission impact assessment on the service of documents in civil and commercial matters assumes a 4-15 % range of cross-border cases. This range includes all areas of law where service of documents in cross-border situations might potentially be necessary. Therefore, it does not reflect the state of play in commercial B2B litigation and probably may be considered to underestimate B2B commercial litigation. Considering the maximum as reported in the UK and a minimum as reported by the Deloitte study as well as secondary sources, the EAVA makes an assumption of 33 %. This is the medium-range estimate that the EAVA applies for the overall EU B2B litigation market.[13]

[12] International Commercial Dispute Resolution

[13] International Dispute Settlement by J.G. Meriills