



# Doing Business: Enforcing Contracts

A PRELIMINARY REPORT AS TO CIVIL PROCEDURE REFORMS TO  
THE RULES APPLICABLE TO THE LAHORE DISTRICT COURTS

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**“A sense of confidence in the courts is essential to maintain the fabric of ordered liberty for a free people and three things could destroy that confidence and do incalculable damage to society: that people come to believe that inefficiency and delay will drain even a just judgment of its value; that people who have long been exploited in the smaller transactions of daily life come to believe that courts cannot vindicate their legal rights from fraud and over-reaching; that people come to believe the law – in the larger sense – cannot fulfill its primary function to protect them and their families in their homes, at their work, and on the public streets.”**

CJ Warren E. Burger, "What's Wrong with the Courts: The Chief Justice Speaks Out", *U.S. News & World Report* (vol. 69, No. 8, Aug. 24, 1970) 68, 71 (address to ABA meeting, Aug. 10, 1970).

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## Introduction

1. This report provides detailed observations as to the various matters referred to in my preliminary outline briefing paper<sup>1</sup>. The briefing paper highlighted the current position of the Lahore District Courts (“LDC”) by reference to the ‘enforcing contracts’ indicator of the *World Bank’s Doing Business report (2017)* (“DB Report 2017”)<sup>2</sup>.
2. As well as offering a commentary as to potential civil procedure reforms to the LDC by reference to the various indices which comprise the ‘enforcing contracts’ indicator, this report raises questions as to appropriate measures of procedural reform for the LDC. These questions are intended to facilitate discussion at the meetings to be convened with relevant stakeholders in coming weeks.
3. The stakeholder meetings and the input of interested parties will enable a final report and draft proposals to be crystallised and in turn put to the Honourable Chief Justice Mr. Justice Syed Mansoor Ali Shah for his consideration.
4. The Lahore High Court (“LHC”) is committed to the introduction and implementation of measures which reflect good practice for a modern civil court. It is the aim that the potential procedural reforms combined with

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<sup>1</sup> DOING BUSINESS (2018) – PAKISTAN - Preliminary briefing paper – Enforcing contracts (14/03/2017)

<sup>2</sup> See pp.152 to 156 of the DB Report 2017.

- the proposed measures already in place or shortly to be implemented will achieve the LHC's goal of an efficient and effective modern civil.
5. The defining theme of this report is that without a revision of the procedural framework then proposals to achieve court automation and introduce ADR which are already in motion will not achieve their full potential.
  6. The report therefore looks to those areas of the World Bank's data collation for the 'enforcing contracts' indicator and examines how gains may emerge from addressing deficiencies that have been identified.
  7. In approaching these issues, I have had firmly in mind the advances achieved by the English civil courts through the introduction of the Civil Procedure Rules 1998 ("CPR") following the Woolf Report and its recommendations. A description of the English civil procedure reforms is supplemented by good practice examples from Norway, Singapore, Russia and other jurisdictions to highlight various reform options.
  8. It is not contended in any way that these reforms should be the benchmark of what the LHC may aspire to for the LDC. But nonetheless, they offer an accessible form of comparison and one which persons who read this report may well be very familiar with in any event.
  9. A bibliography of the documentary sources, the legislation and regulations considered in preparing this report is appended to this report.

## The DB Report 2017 and the background to procedural reforms in the LDC

10. In the DB Report 2017, LDC attained 41.86%<sup>3</sup> by reference to the ‘enforcing contracts’ indicator. The data utilised in the DB Report 2017 solely tracked the performance of the LDC on its ability to resolve successfully a relatively low value commercial claim<sup>4</sup>.
11. The DB Report methodology measures the time and costs incurred in the life cycle of the notional claim relating to the commercial dispute. The methodology<sup>5</sup> was further adapted in 2015<sup>6</sup> to include a performance measure based upon a quality of judicial processes index (“QJPI”).
12. The QJPI examines <sup>7</sup>“...good practices that are internationally recognized as contributing to improved commercial court operations in support of fairer, timelier, and more transparent judicial proceedings. These 15 good practice areas address court structure and proceedings, case management, court automation, and alternative dispute resolution (ADR) (see figure 1.3) They aim to reflect the findings from numerous country studies that show that modern management approaches and advanced technologies provide new opportunities for courts and other justice sector agencies to modernize their operations to better reflect the

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<sup>3</sup> DB Report 2017

<sup>4</sup> The value of the claim is equal to 200% of the economy’s income per capita or \$5,000, whichever is greater. The claim refers to a dispute arising from the sale of custom-made furniture between a seller and the buyer of the furniture. The equivalent claim value was PKR 514,260.

<sup>5</sup> See Enforcing Contracts Methodology at <http://www.doingbusiness.org/Methodology/Enforcing-Contracts>

<sup>6</sup> First reported in the Doing Business Report 2016

<sup>7</sup> p.3 Good Practices for Courts – Gramckow and others

*changing needs of their communities as well as those of national and international markets.”*

13. The methodology of the DB Report 2017 therefore functions to measure three performance elements in relation to the “enforcing contracts” indicator; the time and the cost of resolving the notionally valued commercial dispute (each being a separate element) and whether or not the economy has adopted a series of good practices represented by the QPII. A relative weight of one third (33%) is given to each of time taken to resolve the dispute, the cost of resolving the dispute and the QPII.
14. Singapore is the jurisdiction with the speediest commercial dispute resolution. It takes on average 164 days (compared with 1,025 in the LDC) to dispose of a simple commercial dispute. Other jurisdictions with broadly comparable data for ‘enforcing a contract’ through the courts in less than 10 months include New Zealand, Norway, Korea and a number of post-Soviet countries – namely Azerbaijan, Belarus, Uzbekistan and Georgia.
15. Iceland is recorded as the least costly jurisdiction to litigate in. Here resolving the dispute costs 9% of the claim value (compared with 25% in LDC) to resolve the dispute; similarly the cost of disposal is less than 10% of the value of the claim in both Luxembourg and Norway.

16. The QJPI looks to four areas of the economy's court systems: court structure and proceedings, case management, court automation and alternative dispute resolution<sup>8</sup>.
17. The LHC has already embarked upon steps to improve case management and to introduce court automation systems both at the LHC and more widely across the LDC and District Judiciary in Punjab.
18. The LHC has placed a justifiably high premium on judicial training and capacity building for the judiciary and the ministerial staff. An ADR Centre has been launched in Lahore to provide alternative dispute resolution platforms for litigants. Legislative reforms will shortly introduce an ADR bill to the National Assembly.
19. Turning briefly to the analysis in this report, it is important to note at the outset the commentary is neither intended to supplant local expertise and experience nor to evaluate the reforms already in train; rather it is aimed at assisting those reforms by discussing routes to procedural reform and improving LDC's rating going forward.

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<sup>8</sup> See table 12.17 at p.154 of DB Report 2017 and related commentary for an explanation of what the component indicators of the QPJI measures.



## LDC and the DB Report 2017 in a nutshell

20. Pakistan is ranked overall 141/190 countries, as measured by the DB Report 2017 with a Distance to Frontier (“DTF”) of 51.77%<sup>9</sup>.
21. In relation to Enforcing Contracts, Pakistan is ranked 157/190 in DB Report 2017 with a DTF of 43.49%.
22. In the relation to the various elements of the QJPI, the LDC scores 5 out of a possible 18 points.
23. Economies with the highest score on QJPI average 15 out of 18 points. These are Australia, Croatia, Singapore, United Kingdom, United States (New York City).
24. The reasons for the comparative low scoring of LDC may be explained by the following factors:
  - Lengthy time to dispose of claims – data shows an average of 1,025 days to resolve a simple commercial matter;

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<sup>9</sup> The distance to frontier score captures the gap between an economy’s performance and 100 – a measure of best practice.

- Case management is lacking in tools to assist the Court and the parties efficiently handle claims (Pakistan scores 0.5/6)<sup>10</sup>:
  - Existing procedural standards enshrined to ensure disposal of claims are not complied with in more than 50% of issued proceedings.
  - This is accompanied by an absence of control over the frequency in which parties may seek to adjourn a stage in proceedings.
  - Efficient use of Court time is not maximised owing to an absence of using pre-trial conferences and electronic case management tools to assist Judges and Court staff.
  
- the absence of a dedicated commercial court division or bench – it is noteworthy that 99/190 economies covered by the DB report have a specialised commercial jurisdiction within its existing civil court or a dedicated body of specialised commercial judges;
  
- under-utilisation of mediation processes – there is a commitment to ADR on the part of the LHC but this is yet to be extended to LDC.

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<sup>10</sup> Comparison may be made here with the Shanghai People's Court in China which scores 5.5/6 in relation to Case Management and 14.518 on the Quality of Judicial Processes Index/(DB 2017 Enforcing Contracts: China). The Shanghai PC disposes of simple contract claims in an average of 406 days.

## Potential procedural reforms to the rules applicable to the LDC

25. Turning to the prospective procedural reforms, focus is now directed to the four good practice areas<sup>11</sup> covered by the QJPI.
26. By way of summary, it is submitted that consideration of the nil/low scoring elements of the 'enforcing contracts' indicator by reference to these good practices areas demonstrates the interconnectedness of the effective reforms needed to improve those scores.

### Good Practice Area 1 - Changes to the structure of the LDC in dealing with commercial disputes – establishing a specialised Commercial Court or a specialised Commercial Court bench

27. It is suggested that consideration of certain changes to the structure of the relevant courts of LDC seised in determining commercial disputes would complement both proposed existing reforms and any prospective procedural reforms.
28. The DB Report 2017 currently highlights that LDC has no specialised or dedicated commercial jurisdiction. The Doing Business methodology looks to the establishment of either a specialised commercial court division or a section dedicated solely to hearing commercial cases is in place at the

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<sup>11</sup> See the tabular summary at figure 1, page 6 of Good Practices for Courts, Gramckow.

court included in the study. It is stated in DB Report 2017 that 97/189 economies surveyed had a specialised commercial dispute jurisdiction.

29. International judicial studies point to:

- Increasing court specialisation throughout most jurisdictions globally, particularly in relation to business disputes;
- The common experience in such jurisdictions is that specialisation increases both efficiency and effectiveness of courts in dealing with not only complex but also less complex business disputes;
- This efficiency and effectiveness derives from judges developing a greater understanding and familiarity with parties and the business environments in which they operate;
- The aim here is that a judiciary of specialists leads to higher-quality decisions, especially in complex areas of the law thereby leading to better decisions as well as better outcomes for the litigants, and greater user satisfaction;
- The consequence of judicial specialisation is that there is greater efficiency because specialised procedures and judges/Court staff who are well versed in these cases lead to streamlined operations and more efficient processing;

- An added benefit may be that by diverting a class of cases to specialised courts, the burden of growing caseloads in the regular courts will be reduced;
- Finally, *the* creation of specialized courts with exclusive jurisdiction over particular areas of the law enhances uniformity of decisions in those areas, thereby contributing to greater predictability and confidence in the courts and possibly reduced appeal rates.

30. The key elements identified as being of importance in relation to a specialised commercial court entity include the existence of relevant enabling legislation and court rules, streamlined processes which are supported by appropriate facility and IT infrastructure together with a specialised judicial selection. These elements traverse the already proposed or potential areas for reform in consideration for the LDC.

31. It is to be noted that the World Bank reports that there is limited data available from internationally recognized centres of judicial excellence (e.g. Singapore or Hong Kong) to demonstrate exactly what elements rendered specialised commercial courts as being so effective. In this regard, it is suggested that the key lies in careful consideration and cultivation of factors peculiar and tailored to the relevant jurisdiction rather than a slavish adoption of 'best practice' models.

32. Looking at three contrasting examples<sup>12</sup> – the London and Greater England and Wales mercantile courts (UK) the Commercial Court of Abidjan (Cote d’Ivoire) and Russian Arbitrazh Courts, there are however clear illustrative factors which show actual evidence the benefits of a specialised forum for dealing with commercial disputes.

33. The Mercantile Courts in England and Wales (the “Mercantile Court”) are concentrated in 10 major population centres. They deal with disputes largely concerning SMEs, although the courts often also case-manage and hear more significant disputes. The Mercantile Courts have not historically supported by advanced IT<sup>13</sup> and they are subject to increased budgetary pressures.

34. The Mercantile Court is however acknowledged by the World Bank as an example of a specialised court demonstrating good practice features including:

- A willingness to innovate and work with relevant stakeholders in the litigation process;
- Recognised ease of procedure and relative speed of progressing claims;
- Specialised body of experienced commercial judges who are engaged with local commercial law practitioners;

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<sup>12</sup> pp.12 – 13, Good Practices for Courts – Gramckow and others

<sup>13</sup> Although an extensive IT modernisation programme is currently underway.

- Commitment to offering neutral early case evaluations;
- Active management of parties' legal costs and setting of costs' budgets as reflected in recent costs' amendments to the Civil Procedure Rules;
- Commitment to encouraging ADR and reinforcing commercial realities;
- Pilot trialling of shorter processing and trial options where case may be tried on the basis of limited disclosure and summary assessment of cost<sup>14</sup>

35. Gramckow comments that "...*The mercantile courts are working because they are staffed by very able judges, have very good staff, and apply good case management practice....There is also significant focus on the cost of litigation and its impact on access to justice and how this can best be addressed*"<sup>15</sup>.

36. The Commercial of Court of Abidjan shows graphically the effect in terms of the time taken to dispose of a claim that a dedicated commercial court may achieve. Since its foundation in 2012, the commercial court has cut from 770 days (2012) to 525 days (2016) the number of days to resolve the

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<sup>14</sup> Lord Woolf in his report on the civil justice system of England & Wales listed two of the key requirements of case management as "...*fixing timetables for the parties to take particular steps in the case; and limiting disclosure and expert evidence*". His report also concentrated on the need to control the cost of litigation, both in time and money, by focusing on key issues rather than every possible issue and limiting the amount of work that has to be done on the case.

<sup>15</sup> Good Practices for Courts – p.13

same notional commercial dispute. This has been achieved principally through the means of recruiting and utilising specialised commercial judges for trials.

37. Commercial dispute resolution in Russia falls within the jurisdiction of Arbitrazh courts<sup>16</sup>. These fora were established after the breakdown of the Soviet Union. The first (lower) tier consists of more than 80 arbitrazh courts; each covering a defined territory in the Russia's regions (constituent entity).
38. The first tier courts hear cases in the first instance and also consider appeals of a first instance decision (appeals are directed to the same court but must be considered by different judges).
39. The second tier of arbitrazh courts consists of 10 federal circuit arbitrazh court; each of which is responsible for a larger territory. These courts hear cassational appeals of the decisions of the lower courts.
40. The procedural principles of the arbitrazh courts are derived from those of continental European civil law jurisdictions. DB Report 2017 reported that Russia ranks 12/190 economies globally on ease of contract enforcement.
41. It takes an average 337 days and costs 16.5% of the value of the claim to resolve a commercial dispute in Moscow or St. Petersburg. The procedure is regulated by the 2002 *Code of Arbitrazh Procedure*. The code provides very

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<sup>16</sup> The name "arbitrazh court" originates from an old Soviet tradition, whereby disputes between state enterprises were heard before the so-called "state arbitrazh." The name should not be confused with an arbitration function.



short timelines for each stage of litigation envisaging that a case should be resolved within a 3 months' window.

42. An overview of the procedure for claims in the Arbitrazh Courts demonstrates the highly structured time events:

### ***Commencement of Proceedings***

*A court of first instance may start proceedings when a claim is filed. A claimant should deliver a copy of the statement of claim and all supporting documents to each party by registered mail. A statement of claim must set out the grounds for the claim and all the evidence and relevant documents supporting the claimant's case.*

*All these documents can be filed electronically via <https://my.arbitr.ru/>, an online service of the Supreme Arbitrazh Court of the Russian Federation for filing documents to arbitrazh (commercial) courts.*

### ***Defence***

*The respondent files its statement of defence setting out grounds for its full or partial rejection of the claims, as well as any evidence supporting its case. The period during which a defence is to be submitted is not specified. The law requires that a statement of defence should be filed early enough to enable the claimant to review it before the hearing.*

### ***Preparations for Hearing***

*The 2002 Code of Arbitrazh Procedure prescribes the steps to be taken by a judge in preparing for a hearing. These include, for example, prior interviews with the parties (pre-trial conference), offering the parties to present evidence in support of their respective claims and objections, explaining their right to refer at any stage of the proceedings to an intermediary or mediator and settle the dispute; decisions on whether to appoint an expert or to order provisional remedies, etc. The preparations also include a preliminary hearing to consider the parties' motions and to decide whether the evidence produced is sufficient.*

*If all parties to the case are present during the preliminary hearing, or they are not present but have been duly notified thereof and have filed no objections to considering the case in their absence, then the court may hear the case on the merits. This is not allowed when the case is to be resolved by a panel of judges.*

### ***Trial Period***

*Russian state arbitrazh courts tend to deal with cases very quickly. A court of first instance is generally required to resolve the case within three months (as per Article 152 of the RF*

CAP) from the date of filing a claim (inclusive of the period for the judge to prepare the case). The judge may request an extension of up to six months due to the complexity of the case or a considerable number of parties. In practice the period may be longer, but regular cases are reviewed within these deadlines. Periods when the case has been stayed or postponed are not included in the above term.

### **The Trial**

Trials are held in open court, and the public may attend. Once a trial has begun, the court will hear the full case and deliver judgment immediately upon its conclusion. In exceptional cases, the court may adjourn the hearing for no more than five days.

The court may suspend the proceedings on ordering an expert examination or, for example, where a foreign court is hearing another case the outcome of which may affect the Russian proceedings.

If the respondent was duly notified of the time and the place of the court hearing and fails to attend the court, the dispute may be decided in his absence.

Generally, a single judge conducts court hearings. A panel of three judges hears some cases (e.g., appeals against decisions of state authorities). A judge or a panel determines the procedure that will apply, hears the parties to the dispute, examines evidence, and interrogates the parties and the witnesses. A judge also examines motions filed by the parties and renders judgment on them.

All parties to the arbitrazh litigation are entitled to know each other's arguments prior to the commencement of the proceedings. Furthermore, each litigant is required to disclose all of the evidence underlying its case before the hearing.

In certain cases the court may postpone the hearing on merits when it considers that the case cannot be resolved during this hearing, for example due to the absence of a party, or upon a party's motion to enable it to submit additional evidence etc. As a rule, the court cannot postpone the case for over one month.

The judge is obliged to help the parties to settle a dispute amicably and the hearing may be postponed for that reason upon motion of the parties to the dispute. The court may also postpone the hearing for two months when the parties agreed on mediation procedure.

The court's decision is given at the end of the hearing. The text of the full judgment with the reasoning is delivered to the parties within five days from the date of the court hearing.

The judgment comes into force one month later. If an appeal is lodged against the judgment, the judgment comes into force when upheld by the appellate court.

## ***Interim Injunctions***

*The court may order provisional remedies at any phase in the proceedings if requested to do so by a party. The state arbitrazh court is required to consider a motion for an interim injunction not later than the day following the date of receipt of the application.*

### *Types of Interim Injunctions*

*Interim measures may include, amongst others:*

- Attachment of funds or other assets of the respondent and held by the respondent or another party*
- A prohibition on the respondent or another party committing certain acts relating to the subject matter of the action*
- An order that the respondent must commit certain acts to prevent the spoilage or other deterioration of an asset in dispute*
- An order for the transfer of assets in dispute to the claimant or other party for storage*
- A stay of execution under a writ of execution or other document challenged by the claimant that enables uncontested recovery*
- The suspension of the sale of assets in an action to have an attachment of assets lifted*

*The court may instruct the claimant to provide security for damages that may be incurred by the respondent (usually by bank deposit, bank guarantee or other security).*

## ***Recovery of Litigation Costs***

*Litigation costs are to be recovered from the losing party. However, the court may order a party abusing its procedural rights to cover the costs of the proceedings irrespective of the outcome.*

*Litigation costs include state duty and other costs associated with the proceedings, including witness and expert expenses, the costs of execution of the court judgment and legal fees. The court awards legal fees to the winning party within “reasonable limits”, which in practice means minimal amounts.*

*An application for compensation of legal costs may be filed within six months as of entry into force of the last court act issued on the merits of the case.*

## ***Compensation for Delay***

*A party is entitled to claim compensation for violation of its right to the resolution of a dispute within a reasonable time. The relevant application may be filed within six months of the entry into force of the last court act issued in the case. The party may also file the application before the end of the court proceedings if the case has been pending for over three years and the applicant has applied with a request to accelerate the pace of the court proceedings.*

*In addition, a party may claim compensation for violation of its right to a timely enforcement of a court act. The relevant application may be filed either before or after the termination of the enforcement proceedings in the case. In the first case, the party's application cannot be filed earlier than six months after the expiration of the term for enforcement of the court act established by the federal law. In the second case, it cannot be filed later than six months after the termination of the enforcement proceedings.*

### ***Appeal***

*A losing party may appeal a decision within one month. The appellate court is required to review the appeal within two months. This time period may be extended by the appellate court's president at a substantiated request of the judge up to six months due to the complexity of the case or a considerable number of the parties.*

### ***Cassation Appeal***

*Judgments of the court of first instance (normally, after passing the appellate court's review) and appellate court decisions may be contested in a so-called cassation appeal courts.*

*A cassation appeal must be filed within two months from the date that the relevant court judgment or appellate court decision has become effective, and must be heard within two months. This time period may be extended by the cassation appeal court president at a substantiated request of the judge up to six months due to the complexity of the case or a considerable number of the parties.*

### ***Supervision Appeal***

*The parties to proceedings and the public prosecutor in some cases may seek to challenge a judicial act before the Supreme Arbitrazh Court.*

*In contrast to the procedures in the lower courts, the supervisory review is a two-tier process. Before the appeal is actually heard on the merits, a panel of three judges of the Supreme Arbitrazh Court reviews the party's appeal and decides whether there are grounds for carrying out a supervisory review of the judgment that is appealed against. If the panel decides to refer the case for supervisory review, it would be the Presidium of the Russian Supreme Arbitrazh Court that proceeds to hear the appeal.*

*In practice, less than two percent of applications for hearing an appeal are accepted by the Supreme Arbitrazh Court.*

### **Summary Proceedings**

*Summary proceedings is an expedited procedure for resolving disputes on the basis of written evidence, which aims at reducing litigation costs and mitigating the caseload for judges. A list of disputes subject to summary proceedings is provided for in the law. Among those are various types of disputes with either unsubstantial or undisputed amount of claim. Corporate disputes, class actions and bankruptcy disputes cannot be resolved in summary proceedings.*

*The peculiar features of summary proceedings include:*

- *There is no preliminary or main hearing; the case is resolved based on written submissions and evidence only.*
- *The examination of the case file as well as all filings in the case are made electronically, with an individual access code sent to the parties together with a ruling on the initiation of summary proceedings.*
- *There is a fixed term for filing submissions and evidence established by the court, and the court returns unconsidered all filings made after this date, unless a party can prove it was unable to comply with the term for reasons beyond its control.*
- *There are no minutes kept.*
- *There is no adjournment of proceedings.*

*The judgment in summary proceedings is subject to immediate enforcement. It becomes effective within 10 days of its issuance unless an appeal has been lodged, in which case it becomes effective upon the resolution of a court of appeal. Cassation review of summary judgments is possible only if it has passed appellate review or the term for filing an appeal has been refused.*

## **The LDC and the incorporation of a specialised commercial court**

43. It is noted that the LDC already scores in the QJPI by reason of the existence of the LDC small claims' jurisdiction namely dealing with those disputes limited to *“small claim does not exceed one hundred thousand rupees (just under*

USD 1000) *in value for the purposes of jurisdiction: provided that the High Court may, by notification in the Official Gazette, vary such value from time to time*”.

44. It is recommended that the LHC review the existing threshold and evaluate merits for increasing the jurisdiction of the small claims’ court up to five hundred thousand rupees as a means of decongesting the LDC. Such a measure would require an evaluation of the efficiency of the smalls claims’ court in disposing of claims and total pendency of cases to determine the availability of actual capacity to hear the additional cases which would result from an increase in the threshold of the small claims’ court.
45. It is further recommended that LHC now considers the suitability of a limited number of LDC centres being earmarked for specialised commercial court status either by formal recognition as specialised commercial courts or by deployment of specialist commercial judicial resources.
46. An alternative to the creation of a specialist commercial court within LDC would be the possibility of deploying a cadre of trained and qualified commercial judges to selected LDC centres.
47. This alternative option would entail the creation of a separate court bench within the LDC. A specialised court bench would have the advantage of most probably being created with less formality than by legislation possibly only by administrative direction or by rules adopted by the LHC.

48. A bench of this kind would hypothetically have several judges, a dedicated staff and courtrooms assigned to it and it may also have a separate building. Judges may be allocated either indefinitely or as needed to workloads from time to time.
49. A dedicated bench could be a highly flexible way of pursuing specialisation without significantly greater administrative effort or other costs. Their use is often found in common law countries resulting from the inherent nature of such jurisdictions to adjust court rules without referring to a central ministry or the state legislature.
50. The hidden benefit of introducing this specialist facility of a commercial court or in the alternative a dedicated bench of commercial judges would be to cement other prospective procedural reforms alongside the potential court automation project spearheaded by PITB as well as the development of the ADR centre in Lahore.
51. This proposal therefore complements not only the other good practice reforms but more importantly offers a significantly increased likelihood of reducing the time taken to dispose of the notional claim from the current 1025 days. Whilst LDC sits below the average number of days taken (1098) for the disposal of a commercial dispute in South Asia; it is considerably higher than averages for jurisdictions in East Asia/Pacific (560 days), Middle East/North Africa (653 days) and Europe & Central Asia (485 days). The OECD high income countries average 553 days.

### Questions for discussion

52. It is submitted that the following issues may facilitate further discussion:

- *Can the jurisdiction of the 'commercial court' be defined adequately for the purposes of creating a specialised dedicated court?*
- *Are current judicial/court staffing levels sufficient to enable a specialised court to be created?*
- *Are there enough judges and other staff with the knowledge and expertise available to be assigned to a specialised court?*
- *How many judges would be required and what level of threshold experience would be mandatory?*
- *Does current caseload within LDC justify specialisation in certain locations only?*
- *If the specialised court is introduced in a limited number of locations, will litigants from other parts of Punjab have adequate access?*
- *Are there sufficient numbers of practising advocates in the potential court locations to support the effective functioning of a specialised court?*



- *Are there sufficient resources to fund and maintain the court, including administrative staff, equipment, and organisational services?*
- *How long will it likely take to train staff and assign the needed resources?*
- *What are the potential costs of creating the specialised court and are those costs justified by the advantages?*
- *To what extent does the creation of the specialised court require different procedures (such as discovery of evidence, stricter time limits or fewer options for appeals)?*

## Good Practice area 2 – case management and its relation to prospective procedural reforms

53. The second measure of assessment of QJPI relates to case management. This measure of assessment consists of five distinct case management practice areas:

- regulations setting time standards for key court events;
- regulations on adjournments and continuances;
- availability of performance measurement mechanisms;

- use of pretrial conferences;
- availability of an electronic case management system (“CMS”).

54. LDC scores only 0.5/6 in relation to the case management index. It is trite that the key to the successful standing of any court rests upon it having a clear and effective legal framework. Equally that standing is enhanced by effective case management.

55. It is fundamental to the review and submissions contained in this report that a revised set of civil procedure rules applicable to the LDC are adopted in time by LHC. The aim is that this will spearhead not only a marked improvement in the case management of claims before the LDC but also improve the standing of the LDC in the QJPI Index.

56. My observations are made with both respectful regard to my standing as a non-Pakistani legal practitioner and equal respect for the existing civil procedural system and its day to day operation by Punjabi judges and practitioners.

57. However, it is apparent from reviewing the relevant statutes and court rules that the applicable provisions and guidance for case management are not readily accessible from within those relevant documentary sources.

58. This inaccessibility derives from the relevant provisions being located variously in Civil Procedure Code 1908 (“CPC”), other applicable procedural laws, the various volumes of the LHC Rules and Orders, relevant judgements of the Supreme Court and the High Courts, and administrative Directions, Notifications and Instructions of the LHC.
59. The LHC Rules and Orders do not thematically identify matters relating to case management and again identification of relevant rules and orders takes considerable time.
60. It is therefore suggested that there is considerable merit in the LHC considering issuing a compendium guide to civil court practice which incorporates those procedural reforms and existing (non-amended provisions) in an accessible form.
61. The following categories from the QJPI seek to illustrate how procedural changes might both take shape and how they might be best configured.<sup>17</sup>

## Setting time standards for key court events

62. Time standards are a critical element of case management. This is because:
- By establishing ‘time goals’ the Court is able to manage and process a case effectively towards completion in a timely fashion;

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<sup>17</sup> It is not suggested that procedural reform should be limited to the areas falling within the QJPI nor that the suggested reforms are themselves exhaustive. These are areas for further discussion at stakeholder meetings and input from judges and practitioners.

- By fixing expectations as to when various stages are to be undertaken, the Court can retain control of a case and use various mechanisms to avoid a bottleneck occurring;
- Time standards can facilitate the effective operation of ADR and therefore avoid unnecessary wastage of costs and Court time;
- They have been shown to improve Court efficiency and create a mechanism for assessing Court performance.

63. From my reading of the relevant provisions of the existing civil procedure rules in the Punjab, there are statutory time standards for certain stages of the progression of case and not for other stages. It appears that in terms of caseload management<sup>18</sup> following the provision of a written reply, there appears to be no laid-down time standards between subsequent events.

64. This is an area where the LHC may wish to consider whether or not to exercise its rule making powers under articles 202 and 203 of the Constitution<sup>19</sup> to introduce specific time standards for the purposes of caseload.

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<sup>18</sup> A subject studied and commented upon in depth by Dr. Siddique in his *Caseload Management in Courts in the Punjab: Frameworks, Practices and Reform Measures*

<sup>19</sup> Part VII, Ch.3, The Constitution of the Islamic Republic of Pakistan

65. This may also be an opportune moment to consider the beneficial effects of time standards in the context of the powers of the Court to adopt alternate methods of dispute resolution under s89A of the CPC.
66. I am also mindful in making these observations as to the practices of the LDC, its district judges and practitioners appearing in the Court. The recommended approach is plainly one of seeking to reach consensus as to the appropriate time standards amongst these stakeholders as well as adopting pilot schemes to test and monitor as to whether or not there is enforcement of relevant standards.
67. The model of the Admiralty and Commercial Court in England and Wales serves as a solid example of a court having introduced effective time standards for intermediate events between the end of pleadings and trial. These time standards are recorded in the Court's own guide<sup>20</sup> which supplements the Civil Procedure Rules applicable to the proceedings in the English Courts. The guide also sets out a pre-trial timetable with due dates for each key event.
68. The Guide is therefore supplemental to the civil procedure rules and offers a more informal structure in setting out applicable rules.
69. The Admiralty and Commercial Courts Guide is a 'living' document in so much as it has been amended frequently to include the changes that have been implemented, e.g. electronic filing and use of email to lodge

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<sup>20</sup> The Admiralty and Commercial Courts Guide (2014) at <https://www.gov.uk/government/publications/admiralty-and-commercial-courts-guide>

- documents at the Court. It has also been developed as a useful guide for litigants and practitioners providing details as to how to process cases and avoid commonplace errors (including obviating those risks which may advertently or inadvertently diminish compliance with time standards).
70. It is submitted that any revision of the civil procedure rules applicable to the LDC would benefit greatly from the creation of a standalone guide to accompany and provide guidance to civil procedure reforms.
71. Central to the approach of the Admiralty and Commercial Court in maintaining compliance with time standards is active case management by the Court and the mandatory case management conference.
72. It is helpful to instructive to illustrate how the Guide records the intermediate case events (key sections relating to time management and time standards underlined) following the exchange of pleadings:

### ***D.2 Key features of case management in the Commercial Court***

*D2.1 Case management is governed by rule 58.13 and PD58 § 10. In a normal commercial case commenced by a Part 7 claim form, case management will include the following 12 key features:*

*(1) statements of case will be exchanged within fixed or monitored time periods;*

*(2) a case memorandum, a list of issues and a case management bundle will be produced at an early point in the case;*

*(3) the case memorandum, list of issues and case management bundle will be amended and updated or revised on a running basis throughout the life of the case and will be used by the court at every stage of the case. In particular the list of*

*issues will be used as a tool to define what factual and expert evidence is necessary and the scope of disclosure;*

*(4) the court itself will approve or settle the list of issues and may require the further assistance of the parties and their legal representatives in order to do so;*

*(5) a mandatory case management conference will be held shortly after statements of case have been served, if not before (and preceded by the parties lodging case management information sheets identifying their views on the requirements of the case);*

*(6) at the case management conference the court will (as necessary) discuss the issues in the case and the requirements of the case with the advocates retained in the case. The court will set a pre-trial timetable and give any other directions as may be appropriate;*

*(7) after statements of case have been served, each of the parties may serve a disclosure schedule (see further E2.3 below). At the first case management conference, the court will discuss with the advocates retained in the case by reference to the list of issues the strategy for disclosure with a view to ensuring that disclosure and searches for documents are proportionate to the importance of the issues in the case to which the disclosure relates and avoiding subsequent applications for specific disclosure;*

*(8) before the progress monitoring date the parties will report to the court, using a progress monitoring information sheet, the extent of their compliance with the pre-trial timetable;*

*(9) on or shortly after the progress monitoring date a judge will (without a hearing) consider progress and give such further directions as he thinks appropriate;*

*(10) if at the progress monitoring date all parties have indicated that they will be ready for trial, all parties will complete a pre-trial checklist;*

*(11) in many cases there will be a pre-trial review; in such cases the parties will be required to prepare a trial timetable for consideration by the court;*

*(12) throughout the case there will be regular reviews of the estimated length of trial, including how much pre-trial reading should be undertaken by the judge.*

*D2.2 The Costs Management section of CPR Part 3 and PD3E applies to all Admiralty and Commercial Court claims commenced on or after 22 April 2014*

except where the claim is stated or valued at £10 million or more or where the court otherwise orders. Save in such cases the parties will be required to file and exchange costs budgets in accordance with rules 3.12 and 3.13.

(a) Unless an earlier costs management conference has been convened the issue of costs budgeting and whether a costs management order should be made will be considered at the first case management conference.

(b) The Court encourages input from users as to the best ways of implementing costs budgeting in the wide variety of cases heard by the Court.

(c) Parties should consider the need for a costs budget to reflect the directions imposed at the CMC. Where costs budgets cannot be determined in advance of directions a separate Costs Management Conference may be scheduled if the parties cannot agree a budget in the light of the Court's directions.

### D.3 Fixing a case management conference

D3.1 A mandatory case management conference will normally take place on the first available date 6 weeks after all defendants who intend to serve a defence have done so. This will normally allow time for the preparation and service of any reply (see section C4). The case management conference will be conducted by telephone, unless the court orders otherwise. The Claimant must make the relevant arrangements in accordance with Practice Direction 23A Civil Procedure Rules<sup>21</sup>.

D3.2 (a) If proceedings have been started by service of a Part 7 claim form, the claimant must take steps to fix the date for the case management conference with the Listing Office in co-operation with the other parties within 14 days of the date when all defendants who intend to file and serve a defence have done so: PD58 § 10.2(a). The parties should bear in mind the need to allow time for the preparation and service of any reply.

(b) If proceedings have been begun by service of a Part 8 claim form, the claimant must take steps to fix a date for the case management conference with the Listing Office in co-operation with the other parties within 14 days of the date when all defendants who wish to serve evidence have done so: PD58 § 10.2(b).

D3.3 (a) In accordance with section C3 the Registry will expect a defence to be served and filed by the latest of:

(i) 28 days after service of particulars of claim (as certified by the certificate of service); or

(ii) any extended date for serving and filing a defence as notified to the court in writing following agreement between the parties; or

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<sup>21</sup> Judges in the English civil courts are increasingly conducting case management conferences by telephone, though less often when parties are legally unrepresented. The Practice Direction sets out what the party told to make the arrangements for the telephone conference call should do. Unrepresented parties are rarely expected to do this.



*(iii) any extended date for serving and filing a defence as ordered by the court on an application.*

*(b) If within 28 days after the latest of these dates has passed for each defendant, the parties have not taken steps to fix the date for the case management conference, the Listing Office will inform the Judge in Charge of the List, and at his direction will take steps to fix a date for the case management conference without further reference to the parties.*

*D3.4 If the proceedings have been transferred to the Commercial List, the claimant must apply for a case management conference within 14 days of the date of the order transferring them, unless the judge held, or gave directions for, a case management conference when he made the order transferring the proceedings: PD58 § 10.3.*

*D3.5 If the claimant fails to make an application as required by the rules, any other party may apply for a case management conference: PD58 § 10.5.*

*D3.6 (a) In some cases it may be appropriate for a case management conference to take place at an earlier date.*

*(b) Any party may apply to the court in writing at an earlier time for a case management conference: PD58 § 10.4. A request by any party for an early case management conference should be made in writing to the Judge in Charge of the List, on notice to all other parties, at the earliest possible opportunity.*

*D3.7 If before the date on which the case management conference would be held in accordance with section D3 there is a hearing in the case at which the parties are represented, the business of the case management conference will normally be transacted at that hearing and there will be no separate case management conference.*

*D3.8 The court may fix a case management conference at any time on its own initiative. If it does so, the court will normally give at least 7 days notice to the parties: PD58 § 10.6.*

*D3.9 A case management conference may not be postponed or adjourned without an order of the court.*

73. As can be seen above, the approach of case management is carefully aligned to:

- Time standards against which events associated with the prosecution and defence of the claim must happen;
- Initial case management conference is often done by phone to minimise cost and travel time. Teledensity in Pakistan is high; if the option is taken to consider the establishment of a limited number of specialised court centres then telephone case management conferences are well-worth consideration;<sup>22</sup>
- An obligation on the Claimant in the majority of cases to take steps within 14 days of service of the defence to contact the Court to fix a case management conference;
- Restrictions upon seeking an adjournment of the case management conference.

74. The advantage of clearly defined steps and the co-existence with the case management conference places more control in the hands of the Court to ensure that the parties progress the litigation pragmatically and in a cost/time effective process.

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<sup>22</sup> <https://www.pakistantoday.com.pk/2014/02/10/cellular-subscribers-reach-132-33m-with-73-5pc-record-penetration/>

## Regulations on adjournments and continuances

75. The effectiveness of maintaining time standards of course can be dramatically undermined where there is an absence of controls on the limitations of parties to seek adjournments.
76. LDC has no specific regulations governing adjournments. It consequently has scored no attainable points under the reference to such provisions within QPJI.
77. The World Bank identifies clear adjournment provisions as being critical to ensure that a fair process is maintained and cases are progressed/completed in a timely manner.
78. The existence of effective regulations in this regard (and also to avoid undue trial continuances) is heavily dependent on the pre-existence of effective timetabling which limits any adjournments to evidence based grounds.
79. The question of avoiding undue adjournments is also significantly affected by the ability of the court to manage its own proceedings and to have effective control on the unfolding litigation. In this regard, the existence within the key events timetable of a case management conference pre-trial serves as a central part of an overall strategy to achieve effective case management.

80. The key features of structuring and achieving clear guidance on adjournments include:

- Introduction of clear requirements which necessitate evidence backed grounds for permitting timetabled events to be deferred;
- Structured and realistic timelines for events to fall – thereby reducing the risk of tight deadlines defeating parties' best intentions to comply with time standards;
- Early and effective case management to ensure that parties are clear as to time line for disposing of the issues;
- Interaction with any ADR requirements to create sufficient time-cushions to increase the possibility of resolution without recourse to a trial.

81. A good example of such a process in action (and one commended as a good practice) is that of the Norwegian District Court which will schedule a pre-trial conference for the judge and legal representatives shortly after the case is registered with the Court. The Court will then use that preparatory hearing to agree the issues and put in place a timetable to agree the case including the imposition of deadlines to achieve a hearing for low value claims (<€15,0000) within three months and six months for ordinary civil claims.

82. A structured approach to adjournment requests plainly offers considerable benefits. It is submitted that to the extent such a structure is not enshrined in civil procedure rules then guidance might be helpfully produced for district judges and practitioners in any guide to the LDC's procedures. The *Good Practices* Report refers the factors taken into account in the Ontario Superior Court of Justice in Canada in determining whether or not to grant an adjournment. The countervailing factors are reproduced below. Whilst they are essentially obvious in nature from a judicial perspective and I anticipate form part of judicial reasoning in most common law jurisdictions, when combined with other case management techniques discussed herein this report, they present a succinct structure for viewing the introduction of rules as to adjournments:

*Factors supporting the denial of an adjournment:*

- *a lack of compliance with prior orders;*
  - *previous adjournments that have been granted to the requester;*
  - *previous peremptory hearing dates;*
  - *the desirability of having the matter decided;*
- and*
- *a finding that the requester is seeking to “manipulate the system by orchestrating delay.”*

*Factors supporting the granting of an adjournment:*

- *the consequences of the hearing are serious;*
- *the requester would be prejudiced if the request were not granted; and*
- *the requester was making honest efforts to avoid an adjournment (for example, honestly seeking to exercise a right to counsel).*

*Other factors to consider:*

- *the timeliness of the request;*

- *the reasons for being unable to proceed on the scheduled date; and*
- *the length of the requested adjournment.*<sup>23</sup>

83. I have noted the proposal that the scheduling function of the forthcoming CFMS system which has been developed by PITB includes a means of a party's legal representative making an online application for an adjournment. Whilst the same may constitute an effective way of the LHC's resources being utilised, it is submitted that clear bases on the part of the judge considering the application would be beneficial to allow effective management of court resources and to ensure fairness to the opposing party.

## Availability of Performance Measurement Systems

84. The QJPI measures whether the court is able to generate and publish any performance measurement reports that monitor the progress of cases through the court and also provide related information about compliance with established time standards.

85. The scoring works by assigned a single point if at least two of the following four reports are made publicly available:

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<sup>23</sup> Law Society of Upper Canada v. Igbinosun, 2009 ONCA 484, at paragraph 37, <http://www.canlii.org/en/on/onca/doc/2009/2009onca484/2009onca484.html>.

- (i) time to disposition;
- (ii) clearance rate;
- (iii) age of pending cases; and
- (iv) single case progress.

A score of 0 is assigned if none or only one of these reports is available.

86. Data collected for DB Report 2017 on the availability of four of the performance management reports show that at least two of these reports are publicly available in 70 economies.

87. Although measurement of the four performance reports (or specific measures of performance) is not explicitly referred to in the PITB Report, the same report refers to the Project as engaging with various functions which are taken to include the four subject areas which are assessed for the purposes of the QJPI.

88. The DB Report 2017 highlights how the performance reports have been finessed within certain jurisdictions to demonstrate sophisticated reviews of particular quality standards:

- The impartiality and integrity of the judicial system;
- Treatment of litigants and defendants;

- Expertise of advocates<sup>24</sup>.

## Use of Pre-Trial Conferences

89. Data collated for the DB Report 2017 show that having a pretrial conference is a common case management tool, used in 89 economies.

90. Prior commentary in this report to the singular importance of early exposure of the claim to a judge demonstrate the important role that the pre-trial conferences have to play in effective case management procedures. Reference is made to prior examples of the English and Norwegian courts referred to herein.

91. The shape of and purpose of a pre-trial conference include:

- Determining the issues in the case and striking out misconceived elements of a claim;
- Encourage and discuss the possibility of settlement or utilisation of ADR;
- Developing a timetable for disposal of the case and setting time standards for case events;

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<sup>24</sup> Adopted by Courts in the Netherlands as part of a commitment to strengthen the process and performance of the judiciary.



- Determining the width of relevant and necessary disclosure and evidence;
- Obtain any admissions of facts;
- Resolve evidentiary matters and disputes; and
- Setting trial dates.

92. Adopting the model of the Admiralty and Commercial Courts Guide, the LDC may wish to include specific commentary as to the extent and purpose of the pre-trial conference together with examples of documents which the parties would be expected to provide. This is dealt with extensively in the Guide, an extract is provided for illustration purposes:

#### *D.5*

##### *Case memorandum*

##### *D5.1*

*In order that the judge conducting the case management conference may be informed of the general nature of the case and the issues which are expected to arise, after service of the defence and any reply the solicitors and counsel for each party shall draft an agreed case memorandum.*

##### *D5.2*

*The case memorandum should contain:*

- (i) a short and uncontroversial description of what the case is about; and*
- (ii) a very short and uncontroversial summary of the material procedural history of the case.*

##### *D5.3*

*Unless otherwise ordered, the solicitors for the claimant are to be responsible for producing and filing the case memorandum, and where appropriate for revising it.*

#### *D5.4*

*The case memorandum should not refer to any application for an interim payment, to any order for an interim payment, to any voluntary interim payment, or to any payment or offer under CPR Part 36 or Part 37.*

#### *D5.5*

*(a) It should be clearly understood that the only purpose of the case memorandum is to help the judge understand broadly what the case is about. The case memorandum does not play any part in the trial. It is unnecessary, therefore, for parties to be unduly concerned about the precise terms in which it is drafted, provided it contains a reasonably fair and balanced description of the case. Above all the parties must do their best to spend as little time as practicable in drafting and negotiating the wording of the memorandum and keep clearly in mind the need to limit costs.*

*(b) Accordingly, in all but the most exceptional cases it should be possible for the parties to draft an agreed case memorandum. However, if it proves impossible to do so, the claimant must draft the case memorandum and send a copy to the defendant. The defendant may provide its comments to the court (with a copy to the claimant) separately.*

*(c) The failure of the parties to agree a case memorandum is a matter which the court may wish to take into account when dealing with the costs of the case management conference.*

#### *D.6*

##### *List of issues*

#### *D6.1*

*After service of the defence (and any reply), the solicitors and counsel for each party shall produce a list of the key issues in the case. The list should include the main issues of both fact and law. The list should identify the principal issues in a structured manner, such as by reference to headings or chapters. Long lists of detailed issues should be avoided, and sub-issues should be identified only when there is a specific purpose in doing so. A separate section of the document should*

*list what is common ground between the parties (or any of them, specifying which). The common ground section should include features of the factual matrix which are agreed to be relevant. Any disagreements as to the relevant features of the factual matrix should be addressed in the List of Issues.*

#### *D6.2*

*(a) The list of issues is intended to be a neutral document for use as a case management tool at all stages of the case by the parties and the court. Neither party should attempt to draft the list in terms which advance one party's case over that of another.*

*(b) It is unnecessary, therefore, for parties to be unduly concerned about the precise terms in which the list of issues is drafted, provided it presents the structure of the case in a reasonably fair and balanced way. Above all the parties must do their best to spend as little time as practicable in drafting and negotiating the wording of the list of issues and keep clearly in mind the need to limit costs.*

*(c) Accordingly, in most cases it should be possible for the parties to draft an agreed list of issues. However, if it proves impossible to do so, the claimant must draft the list and send a copy to the defendant. The defendant may provide its comments or alternative suggested list to the court (with a copy to the claimant) separately.*

#### *D6.3*

*(a) A draft (or drafts) of the list of issues is to be available to the court prior to the first case management conference. It is intended that at that stage the draft list should be in a general form, identifying the key issues and the structure of the parties' contentions, rather than setting out all detailed sub-issues.*

*(b) At the first case management conference and any subsequent case management conferences which take place, the court will review and settle the draft list of issues with a view to refining it and identifying important sub-issues as appropriate and as required in order to manage the case. Accordingly the list of issues may be developed, by expansion or reduction as the case progresses.*

#### *D6.4*

*The list of issues will be used by the court and the parties as a case management tool as the case progresses to determine such matters as the scope of disclosure and of factual and expert evidence and to consider whether issues should be determined summarily or preliminary issues should be determined.*

## D6.5

*The list of issues is a tool for case management purposes and is not intended to supersede the pleadings which remain the primary source for each party's case. If at any stage of the proceedings, any question arises as to the accuracy of the list of issues, it will be necessary to consult the pleadings, in order to determine what issues arise.*

## D.7

### *Case management bundle*

#### *Preparation*

### D7.1

*Before the case management conference (see sections D3 and D8), a case management bundle should be prepared by the solicitors for the claimant: PD58 § 10.8.*

#### *Contents*

### D7.2

*The case management bundle should contain the documents listed below (where the documents have been created by the relevant time):*

- (i) the claim form;*
- (ii) all statements of case (excluding schedules), except that, if a summary has been prepared, the bundle should contain the summary, not the full statement of case;*
- (iii) the case memorandum (see section D5);*
- (iv) the list of issues (see section D6);*
- (v) the case management information sheets and the pre-trial timetable if one has already been established (see sections D8.5 and D8.9);*
- (vi) the principal orders in the case;*
- (vii) any agreement in writing made by the parties to disclose documents without making a list or any agreement in writing that disclosure (or inspection or both) shall take place in stages.*

*See generally PD58 § 10.8.*

*D7.3*

*It is also useful for the case management bundle to include all disclosure schedules stating what search each party intends to make pursuant to Rule 31.7 when giving standard disclosure of electronic and other documents and what search he expects of the other party (or parties).*

*D7.4*

*The case management bundle should not include a copy of any order for an interim payment.*

93. It will be seen that the ‘case management conference’ as it is known in the Commercial Court is a highly structured exercise aimed at the presence of lawyers alone without the need for the presence of lay parties.

## The availability of an electronic case management system

94. According to the situational analysis document<sup>25</sup>, the following functions/areas at the LDC are already automated: cause list generation, performance monitoring system, court management analysis: delay reasons, bottlenecks, time taken at different stages, intelligent statistics.
95. The effectiveness of any electronic case management system relies heavily on the internal capacity of any court system to ensure ‘automation uptake’.

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<sup>25</sup> <http://ljcp.gov.pk/nljcp/assets/dist/Publication/aaab5-automation-report-final-remove-tag.pdf>

This requires not only adequate to good levels of equipment functionality, training and ‘institutional buy-in’.

96. Some examples of case management systems in high performing jurisdiction provide useful illustrations of how such systems function but also importantly how they are complemented by interaction with their users.

97. Singapore introduced a new electronic litigation system<sup>26</sup> in 2014: *“eLitigation leverages on content management systems and e-form technology to offer law firms; and court users a single access point for commencement and active management of case files throughout the litigation process. The system also provides functionalities and related services that streamline the litigation process, thereby helping to improve efficiency and enhance access to justice.”* The system allows litigants to file cases online—and it enables courts to keep litigants and lawyers informed about their cases through e-mail, text alerts and text messages; to manage hearing dates; and even to hold certain hearings by videoconference.

98. Korea launched an electronic case filing system<sup>27</sup> in 2010 that allows electronic document submission, registration, service notification and access to court documents. The Electronic Case Filing System (ECFS, <http://ecfs.scourt.go.kr>) is the Korean Judiciary’s electronic litigation system. It is a comprehensive system that allows litigants and their lawyers

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<sup>26</sup> <https://www.elitigation.sg/home.aspx>

<sup>27</sup> <https://eng.scourt.go.kr/eng/judiciary/eCourt/eTrials.jsp>

to file and manage cases as well as to access court information and procedures electronically. Parties can file all court documents, documentary evidence and digital evidence over the Internet without physically visiting the courts.

99. After filing a case via ECFS, the plaintiffs/petitioners receive e-mail and text message notifications when the other parties submit documents to the court. If the defendants/respondents consent to e-filing, they may also receive electronic notices of the other parties' filings. Such notice, in conjunction with access to case records and procedures electronically, allows all parties using ECFS to promptly check the current status of the proceedings. In addition to litigant access, the computerised case management program of ECFS also allows judges and court officials to manage cases much more efficiently by viewing electronic case records and checking case statuses in a speedy manner. Judges are able to conduct paperless hearings because all the electronic case files, including documents, are retrieved from central databases and viewed on monitors and larger screens in courtrooms. Due to privacy and security reasons, access to electronic case files is available to parties and their legal representatives but not to the public. However, the online judgment search service for the decisions of the Supreme Court as well as the lower courts' opinions is accessible to the public. The system enables some judges to adjudicate up to 3,000 cases a year, manage up to 400 cases per month and hear up to 100 pleas a month.

100. Russia has made available a range of e-services in the court system since 2011. One of the components of the e-justice system is a group of portals of the High Arbitrazh Court on the Internet providing access to up-to-date information of the work of the courts. Access to all the portals is free of charge<sup>28</sup> through the main portal of the court's system. Any person with access to the Internet, including mobile browsing, can study the catalogue of cases (<http://kad.arbitr.ru>), the bank of court decisions (<http://ras.arbitr.ru>) and find all the cases involving certain parties resolved in the courts of all instances, determine the procedural status thereof and gain immediate access to all judicial acts passed in respect thereto, as all the judicial acts of the *arbitrazh* courts, with the exception of closed-door hearings, are subject to mandatory publication on the Internet.

101. The cases' database currently has over 19 million entries. Federal Law No. 220-FZ dated June 23, 2016 "*On Introducing Amendments to Certain Legislative Acts of the Russian Federation in Relation to Electronic Documents being Applied in the Activities of the Judicial Authorities*" (Federal Law No. 220-FZ) has updated the rules on the electronic document management system used by the courts in a number of ways.

102. The amendments introduced by this law have the following effects:

- Widening the scope for filing documents electronically;
- Increasing the scope for parties being informed of judicial directions electronically;

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<sup>28</sup> <http://www.arbitr.ru>



- Permitting notification of the parties about court hearings via the Internet and place the burden of tracking the progress of cases heard by the courts of general jurisdiction on the parties. One of the most important amendments, is that documents which a party could previously file in the original only (such as applications for interim relief or to suspend the enforcement of a judicial act), can now be submitted electronically.
- Enabling payments of court-related fees could be done online through any e-banking service or mobile banking application.

### *Questions for discussion*

103. It is perhaps inevitable that Good Practice area 2 will require considerable discussion and consideration. It is where the focus of procedural lies and more importantly where potential areas of procedural reform inter-connect and cross-fertilise each other. Evolution of any one aspect requires a degree of consideration of all others.

104. The following questions are intended to feed that discussion only; they are by means likely to be exhaustive:

- *Is it now time to introduce a root and branch reform of the civil procedure rules to create a comprehensive set of rules?*

- *How are the rules best presented for users – is a single ‘codified’ structure solely sufficient or does accessibility demand additional forms of guidance?*
- *Is the time now right for the establishment of specialised commercial court centres or a dedicated commercial court bench?*
- *How do these reforms best achieve the advances offered by the proposed court automation project?*
- *Does the proposed court automation project by PITB facilitate the introduction of procedural reforms across the board or does it require a ‘gradualist’ approach?*
- *How does the introduction of revised case management procedures (time-event driven rules/timetabling/restriction on adjournments) fit with developing an ‘ADR’ culture in the form of mediation?*
- *Does mediation require piloting or is there likely to be adequate capacity to promote its wider introduction?*

### **Good Practice Area 3 - Court Automation**

105. I have discussed above and provided illustrations as to the importance of increasing Court automation in many economies.

106. In view of the project undertaken by the PITB, I make no evaluation for the purposes of this report beyond reiterating the importance of ensuring that there is a careful correlation between the work already undertaken and the future work as to how to shape the revised procedural reforms going forward.

#### **Good Practice Area 4 - ADR**

107. The arguments advanced in a modern business context for methods of ADR are multifarious. The advantages of ADR are argued to be all embracing in the sense that it is said to:

- (a) Assist parties in effectively resolving disputes in circumstances that business and other relationships may better survive than if exposed to adversarial proceedings;
- (b) Promote the prospect of certainty where court systems are open to criticism for delay and unpredictability;
- (c) Relieve an overburdened court system where complex claims may be disposed of swiftly.

108. It is perhaps instructive to view how the *Doing Business* methodology examines the existence of sources of ADR:

*The alternative dispute resolution index has six components:*

- *Whether domestic commercial arbitration is governed by a consolidated law or consolidated chapter or section of the applicable code of civil procedure encompassing substantially all its aspects. A score of 0.5 is assigned if yes; 0 if no.*
- *Whether commercial disputes of all kinds—aside from those dealing with public order, public policy, bankruptcy, consumer rights, employment issues or intellectual property—can be submitted to arbitration. A score of 0.5 is assigned if yes; 0 if no.*
- *Whether valid arbitration clauses or agreements are enforced by local courts in more than 50% of cases. A score of 0.5 is assigned if yes; 0 if no.*
- *Whether voluntary mediation, conciliation or both are a recognized way of resolving commercial disputes. A score of 0.5 is assigned if yes; 0 if no.*
- *Whether voluntary mediation, conciliation or both are governed by a consolidated law or consolidated chapter or section of the applicable code of civil procedure encompassing substantially all their aspects. A score of 0.5 is assigned if yes; 0 if no.*
- *Whether there are any financial incentives for parties to attempt mediation or conciliation (for example, if mediation or conciliation is successful, a refund of court filing fees, an income tax credit or the like). A score of 0.5 is assigned if yes; 0 if no.*

*The index ranges from 0 to 3, with higher values associated with greater availability of alternative dispute resolution mechanisms. In Israel, for example, arbitration is regulated through a dedicated statute (a score of 0.5), all relevant commercial disputes can be submitted to arbitration (a score of 0.5), and valid arbitration clauses are usually enforced by the courts (a score of 0.5). Voluntary mediation is a recognized way of resolving commercial disputes (a score of 0.5), it is regulated through a dedicated statute (a score of 0.5), and part of the filing fees is reimbursed if the process is successful (a score of 0.5). Adding these numbers gives Israel a score of 3 on the alternative dispute resolution index.*

Source: DB Report 2017

109. Focus goes beyond the statutory overlay for methods of ADR looks further to the practical incentivisation of adopting, for example, mediation.

In DB Report 2017, LDC scores 0.5 in relation to the recognition of mediation and/or conciliation in the context of a simple commercial dispute. From my reading of the current situation, that scoring appears somewhat precipitative in that it anticipates the likely developments which have arisen since the data was collated for DB Report 2017.

110. I note that the National Assembly of Pakistan website records the Alternative Dispute Resolution Act 2017 as having been passed on 18 May 2017. This plainly lays the foundation for the further development and promotion of methods of ADR alongside the practical steps of training judges in mediation, the opening of the LHC ADR Centre and the increasing number of practitioners who have received training and accreditation.

111. For current purposes, the question as to how procedural reforms to the civil procedure rules may assist promotion is probably best answered by careful assimilation of prevailing local approaches to dispute resolution.

112. The willingness of English judges and practitioners to 'buy-in' to mediation was a slow process. It was outpaced by the desire of the business community to achieve speed and certainty in resolving their commercial disputes. Its cultural absorption into English legal practice consequently owed more to non-lawyers than lawyers.

113. How LDC best considers the adoption of mediation into its day to day resolution of disputes will benefit considerably in my observational opinion from what has already been achieved. The key from the

perspective of civil procedure reform will be perhaps to measure the appetite of all involved carefully and reflect that in clear terms (be it in revised rules or associated guidance to the courts, lawyers and litigants).

## A Footnote as to the CPR

114. Rule 1.1 of the CPR states that *“These Rules are a new procedural code with the overriding objective of enabling the Court to deal with cases justly.”*
115. By producing an accessible and coherent set of procedural rules, the CPR has enabled judges and court officials to exercise a degree of effective management power to set timetables, order relevant disclosure necessary to dispose of the issues in a claim and to determine procedures would be followed. This is combined with comprehensive powers at the disposal of the courts to enforce compliance with the applicable rules of procedure and where necessary to rectify procedural mistakes.
116. The courts are equipped to proceed with the power to dismiss case on the understanding that this does not bar a new action within the limitation period but also to deploy sanctions short of the draconian sanction of striking out a case which serve to discourage delays.
117. Prior to the introduction of the CPR, the Woolf Report identified significant problems with the conduct of litigation in England:

- lax enforcement of procedural obligations by courts (e.g. failure to submit written replies/statements) because the superior courts interpreted the procedural provisions in the light of a ‘justice on merits’ approach;
- While the courts possessed some powers to control the conduct of the proceedings they were not always willing to exercise those powers;
- The parties rather than the courts controlled the pace of litigation
- The courts lacked adequate management powers; and
- effective enforcement powers (such as sanctions like those of striking out a claim for non-compliance).

118. These problems have been identified by academic commentators as playing to a smaller or larger degree their part in the civil justice system in the Punjab<sup>29</sup>.

## Summary conclusion

119. The commitment of the LHC to reform of its civil justice system is manifest. The LDC, its judges, legal practitioners, court staff and users of

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<sup>29</sup> See the general observations of Dr. Osama Siddique in *Caseflow Management in the Courts of the Punjab*.

the court face what from an observer's perspective is a challenging number of sources for the procedures to be followed in a civil suit.

120. The advantage of consolidating the applicable rules into digestible form promotes a real impetus behind the positive benefits of making the Punjab's civil justice system speedier and demonstrably accessible to its users.

**MARTIN PALMER**

**20<sup>TH</sup> MAY 2017**



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