'*The Contribution of the Common Law and the Courts to Economic Prosperity*'

Lord Hodge, Deputy President of the UK Supreme Court[1]

Supreme Court of Brunei Darussalam, 25 February 2025

Introduction

It is a great pleasure to be invited to speak to you today about the contribution that the common law and the courts bring to economic prosperity. In the time that I have to speak to you, I hope to explore the many ways that the continuous development of the common law has shaped and profited economies in the past, present and future.

I will sketch out the historical background to the way that commercial law developed in the United Kingdom and the common law principles which emerged from the jurisprudence of the courts. I will then discuss the present role of London as a global financial and legal centre, the economic impact of the legal profession, the courts and new methods of alternative dispute resolution. Finally, I will conclude by predicting the adaptability of the common law will help it to manage issues that may arise in the future, particularly in relation to the prodigious developments in technology that are readily apparent today.

The Past

It is often said that in order to understand the present, we must understand the past. That is my reason for giving the briefest of sketches of how commercial law has developed starting in the Middle Ages and early modern period, and the common law principles that we have derived from this period which still persist today.

The role of the medieval courts and lex mercatoria

Accounts place the Norman Conquest over 1000 years ago, resulting in the throne passing to William I, as the period which gave rise to an orderly system of law and government in England.[2] While the maturity of the common law remained in the distant future, the English

[1] I am very grateful to my judicial assistant, Poppy Mulligan, and fellow judicial assistants Raphaël Tulkens, Pete Kerr-Davis and Daniel Graham for their research and assistance in the preparation of this lecture.

[2] For a more detailed historical account see: Theodore FT Plucknett, *A Concise History of the Common Law* (5th edn, Butterworth 1956) 11; Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (Tony Weir tr, 3rd ed, Oxford University Press 1998) 182 in which the authors describe English legal history as beginning in 1066.

courts of the Middle Ages demonstrated a concern with what we would today call commercial law.[3] The 'lex mercatoria' or law merchant governed a great many early commercial and mercantile disputes in medieval England.[4] That somewhat elusive term is generally used to describe a set of distinct commercial customs and practices that could be used by the courts to resolve disputes.[5] By late medieval times many disputes among merchants were heard in the courts associated with fairs and markets and in the municipal courts of the principal commercial cities and towns.[6] The characteristics of these commercial courts were speed in adjudication (a particularly essential requirement for the foreign trader), a realistic attitude towards the proof of facts, and a relative freedom from technical rules of evidence and procedure.[7]

The evolution of the common law

From the 18th century, leading up to the Industrial Revolution, one sees the common law begin to develop its status as a tool for economic prosperity.[8] Much of the credit for developing English commercial law and facilitating the commercial revolution is due to the judge who was one of Britain's most influential jurists at this time, Lord Mansfield, Lord Chief Justice of the King's Bench between 1756 and 1788.[9] He would invite mercantile jury-members to dine with him so that he might develop a clearer understanding of commercial practice.[10] He was particularly interested in the practical consequences of the legal rule which he formulated.[11] Sir Ross Cranston provides a convincing account that demonstrates the way in which the common law developed: as adopting the practice of commercial parties into rules of

[3] Royston Miles Goode and Ewan McKendrick, *Goode and McKendrick on Commercial Law* (6th edn, LexisNexis 2020) para 1.02.
[4] ibid 1.05; Claus Dietmar Zimmermann, *A Contemporary Concept of Monetary Sovereignty* (Oxford University Press 2014) 81; Zweigert and Kötz (n 2) 194 in which the authors suggest that mercantile and maritime law in this period had stronger Roman influences, which may have led to the application of the continental civil law.
[5] There is a dispute as to the precise nature of the lex mercatoria (whether it was a discrete body of law, or was applied alongside the common law) for a modern treatment, see generally: Goode and McKendrick (n 3) ch 1.
[6] The view that the common law courts rarely dealt with commercial matters may now, however, be regarded as overstated: see generally, James Steven Rogers, *The Early History of the Law of Bills and Notes: A Study of the Origins of Anglo-American Commercial Law* (Cambridge University Press 1995) ch 1; Goode and McKendrick (n 3) para 1.05.
[7] Goode and McKendrick (n 3) para 1.02; See Rogers (n 6) 22 and the author's recitation of a 15th century case which saw the summons of the case to the enforcement of the judgment take place in a single day before 4pm.
[8] Plucknett (n 2) 67.
[9] Described varyingly by authors on legal history as an expert in civil law; the 'founder' of English commercial law, and an 'outstanding' commercial lawyer: (n 3) 196 & para 1.06. See also Norman S Poser, *Lord Mansfield, Justice in the Age of Reason* (McGill-Queens University Press 2013).
[10] Goode and McKendrick (n 3) para 1.04 at footnote 12.
[11] Poser (n 9) 219.

law.[12] Lord Mansfield's dedication to this practice – to what might in other contexts be described as treating the common law as a 'living instrument' – is perhaps most clearly demonstrated when he declared while sitting on a case as a judge of the Court of the King's Bench in 1784:

"[Q]uicquid agant homines [whatever people do] is the business of Courts, and as the usages of society alter, the law must adapt itself to the various situations of mankind."[13]

One would struggle to find a more succinct expression of the path that the common law has taken.

The common law had thus grown into a tool that could support economic prosperity. That was, however, by no means an inevitable conclusion. It required the assistance of the lex mercatoria and the foresight of judges in the Age of Reason. It has continued to require judicial effort and insight through the centuries to ensure that its basic building blocks remain suitable to support changing business practice.

The common law principles of commercial law

So, what is the nature of the commercial law which has emerged from this history?

Sir Ross Cranston identified the following philosophical underpinnings of English commercial law as it developed in and after the 19th century.[14]

The first is freedom of contract. Contract law developed rapidly in the nineteenth century in England to accommodate the changing economy. Broadly speaking, notions of fairness and equality of exchange coupled with liability based on reliance or receipt of benefit were replaced by notions of the expressed will of the parties, and liability grounded on promises. In English law, in the absence of statutory intervention to protect the weaker party such as the consumer, you tend to get what you bargained for, and parties are held to their bargains. Another dimension of freedom of contract is party autonomy. Commercial parties were empowered to make their own rules, institutions, standard form contracts and private arrangements for settling

[12] Ross Cranston, *Making Commercial Law Through Practice 1830–1970* (Cambridge University Press 2021) 200.
[13] *Barwell v Anne Brookes* [1784] 99 E.R. 702, 703.
[14] See speech by Sir Ross Cranston, '*The Rule of Law: Good for the Economy?'* (June 2018); Cranston, (n 12), 30-60.

disputes. They could design, in a largely unfettered manner, the arrangements they desired for their commercial transactions.[15]

The second is certainty. This is exemplified by Lord Mansfield's famous statement that "in all mercantile transactions the great object should be certainty".[16] As another judge put it, the strict application of rules is not to be whittled away "by introducing unnecessary exceptions… under the influence of sympathy-evoking stories… [H]ard cases can make bad law."[17] This is a corollary of party autonomy. Furthermore, legal rules should be expressed as bright line rules which parties can readily understand and, if necessary, contract out of. Assured predictability for commercial parties allows them to plan their affairs in the way they think best.

I would also add that the system of precedent, by which lower courts follow the decisions of higher courts, and apex courts only depart from their decisions in exceptional circumstances, generally ensures that the common law system is a stable and certain environment for commercial decision-making. The principle of stare decisis – or standing by what has been decided – is a fundamental principle of the common law. It makes the law stable and predictable.

A third principle is that the law should be flexible to accommodate commercial reality, and the reasonable expectations, needs and developments of market participants. As Lord Goff famously said in an extrajudicial writing: "[Judges] are there to give effect to [businessmen's] transactions, not frustrate them; we are there to oil the wheels of commerce, not to put a spanner in the works, or even grit in the oil."[18]

Fundamental features of the common law

As the common law has developed, it has become clear that one of the key features of this system is the provision of robust and reliable jurisdictions for the conduct of business. One aspect of the common law which has ensured this reliability and robustness is the historical commitment of its judges and practitioners to uphold the rule of law. That commitment is a

[15] ibid, 31.
[16] *Vallejo v Wheeler* (1774) 1 Cowp 143, at 153.
[17] *Cebora SNC v SIP (Industrial Products)* [1976] 1 Lloyd's Rep 271, at 279, per Sir Eric Sachs.
[18] Goff, *Commercial Contracts and the Commercial Court* [1984] LMCLQ 382.

necessary precursor to legal certainty, which is itself an essential feature in ensuring that a jurisdiction remains attractive to commercial businesses.

The link between the rule of law and economic development is clear. Economic value is created when individuals, businesses and organisations transact with each other. Law provides predictability and confidence for commercial parties to transact, lowering transaction costs, increasing the volume of the transactions and enabling complex arrangements to be put in place. In this way, the law supports the creation of economic value. It is a critical platform on which other economic activity rests.[19]

The importance of good governance through a commitment to the rule of law is widely recognised as underpinning economic prosperity. Scholars have identified the central role that legal institutions play in enabling long-term development, above and beyond other factors that are associated with economic success. The quality of a country's legal institutions – in particular, the independence and competence of its judiciary - are important to investment levels, innovation, and an economy's GDP growth.[20] So too is the absence of corruption in its judiciary and legal institutions.

Commitment to the rule of law invariably encompasses a commitment to access to the courts. This was expressly recognised by the Supreme Court in *R (UNISON) v Lord Chancellor.*[21] This case concerned the level of Employment Tribunal fees imposed by the executive. Data demonstrated that the introduction of these fees, at such a level, led to a sharp and sustained drop in the number of claims brought. The Court emphasised the importance of access to the courts as a fundamental element of the rule of law. In its judgment, the Court stressed that:

"… the value to society of the right of access to the courts is not confined to cases in which the courts decide questions of general importance. People and businesses need to know, on the one hand, that they will be able to enforce their rights if they have to do so, and, on the other hand, that if they fail to meet their obligations, there is likely to be a remedy against them. It is that knowledge which underpins everyday economic and social relations."[22]

[19] Oxera (prepared for LegalUK), 'The Economic Value of English Law' (October 2021) <The-value-of-English-law-to-the-UK-economy.pdf> accessed 17 February 2025, p.5.
[20] Social Market Foundation, 'Law and the Open Economy' (October 2021) <Law-and-the-open-economy-Nov-2021.pdf> accessed on 17 February 2025, p 12-13.
[21] *R (UNISON) v Lord Chancellor* [2017] UKSC 51.
[22] ibid [71].

I turn now to the present impact that the common law legal system has on the economy and provide examples of how the courts, and in particular, the UK Supreme Court, supports economic activity.

The Present

Key statistics and figures

London's success as a financial centre and centre for international dispute resolution is in part the result of history, because many rules of international commerce, which continue to be of great utility, were formulated at a time when the United Kingdom was unrivalled in its influence on world trade. But London's reputation as an international centre depends in large measure on the success of judges and practitioners, whether lawyers, accountants or financiers, in maintaining the trust of those whom they serve.

Analysis by LegalUK highlighted that in 2018-2019, English law governed around £80 billion of gross written insurance premiums in the London market; £250 billion of global merger & acquisition deals; US$11.6 trillion of global metals trading; and €661.5 trillion of global derivatives transactions.[23] English law is the governing law of choice for maritime contracts, a sector that contributes over £17 billion annually to the UK economy.[24]

A recent report by TheCityUK showed that, in 2023, the legal industry contributed £37 billion to the UK economy.[25] The total revenue generated by legal industry activities was £47.1 billion – an increase of 7.7% on the previous year – and the trade surplus was £7.6 billion.[26] To place these figures into perspective, the UK is the largest legal market in Europe, and is second only to the US globally.

This economic activity is both generated by, and attractive to, a wide range of persons and organisations. The UK legal services sector employs 368,000, most of them in London. There are nearly 10,000 law firms in England and Wales alone, and over 200 foreign law firms have offices in the UK. Conversely, law firms headquartered in the UK increasingly employ lawyers

[23] Oxera (prepared for LegalUK) (n 19), p 1, 16-17.
[24] ibid.
[25] TheCityUK, 'UK Legal Services 2024' (December 2024) <https://www.thecityuk.com/media/ewkgespt/uk-legal-services-2024-legal-excellence-internationally-renowned.pdf> accessed on 17 February 2025, p4.
[26] ibid.

abroad, with the largest "Magic Circle" UK firms now having 42% of their lawyers based outside the UK.[27]

The same trend can be observed at the Bar. The number of barristers who act for clients located abroad has more than doubled over the past decade. In 2023, nearly 2,500 members of the Bar of England and Wales received instructions from abroad.[28]

Recent analysis also shows that the UK has become a hub for legal innovation. Since 2007, non-lawyers can own and manage legal services in the UK. Today, 12% of law firms follow that structure. The UK is also home to 350 Law Tech companies, which accounts for 44% of all Law Tech startups in Europe.[29]

Those figures are focused on the UK. However, they are underpinned by the international prestige of the common law, which forms the basis of the legal systems for some 27% of the world's 320 jurisdictions. The strength of the common law and the common law courts means that commercial parties are more likely to choose English law (or another common law legal system) to govern their contracts. They are also more likely to submit to the jurisdiction of common law courts. For example, the London Business and Property Courts attract high numbers of international users. In 2023, there was at least one international party in 75% of cases in the Patents Court, 64% in the Commercial Court, and 54% in Competition Court were international in nature (i.e. had at least one international party). All the parties were international in 40% of cases in the Commercial Court, 40% in Admiralty Court and 25% in Business Court.[30]

International Arbitration

Another essential component of the economic contribution of the common law and the courts is the support they lend to alternative means of dispute resolution. International arbitration in particular is, by a wide margin, the preferred method for commercial parties to resolve cross-border disputes.[31] To meet this demand, jurisdictions across the globe compete to become the most attractive seat for those arbitrations. London and Singapore are the most popular seats for

[27] ibid.
[28] ibid.
[29] ibid.
[30] ibid p8.
[31] Queen Mary University London and White & Case International Arbitration Survey 2021, p.2.

international commercial arbitration, with Hong Kong closely behind.[32] In certain more specialised areas, such as maritime disputes, it is estimated that more than 80% of the world's arbitrations are seated in London.[33]

So why are London, Singapore and Hong Kong so successful at attracting international arbitration? Studies show that the most important factor for international parties when choosing a seat is the degree of support for arbitration by the local courts and judiciary.[34] That support can take many forms, such as the certainty and predictability of the legal system, the availability of independent and impartial judges who decide cases on the basis of precedents designed to help rather than hinder the conduct of commerce. Judges can also support the reputation of international arbitration by intervening when an arbitration has been undermined by fraud.[35] A key example of the support which judges can provide is the availability in common law jurisdictions of powerful interim measures, often granted on an ex parte basis, such as worldwide freezing orders.

The reputation of a "safe seat" is something that is built over a long period of time. The common law is known as commercially friendly, flexible and reliable around the world. Our judges are widely respected internationally, for their expertise, knowledge of the markets, their incorruptibility and their independence. This is reflected by the fact that English judges are routinely appointed to international courts, for example the International Courts of Dubai, Qatar, Abu Dhabi, and Singapore.

The Commonwealth and more widely

So far, I have focused primarily on the impact that the common law has on the economic prosperity of the UK because that is the jurisdiction that I am most familiar with. However, studies show that the economic impact of the common law resonates throughout the Commonwealth. That contribution operates both directly in the form of monetary contribution to the economy, and indirectly by providing the necessary conditions for economic growth to take place.

[32] ibid p.6.
[33] TheCityUK Report (n 25), p.45.
[34] Queen Mary University London and White & Case International Arbitration Survey 2021, p.2.
[35] An example of policing arbitration as part of supporting the reputation of arbitration can be found in the High Court judgment of *The Federal Republic of Nigeria v Process & Industrial Developments Limited* [2023] EWHC 2638 (Comm).

In 2001, Professor Paul Mahoney demonstrated that countries with legal systems based on the common law not only have more developed financial markets, but also experienced faster economic growth in the second half of the 20th century compared to civil law countries.[36] Based on data from 102 countries, the analysis shows that between 1960 and 1992, the real per capita GDP growth for common law countries grew, on average, 0.71% faster than the civil law countries.[37] Although such economic analyses are difficult to verify for obvious reasons, I would suggest that there is force in Professor Mahoney's conclusion that the common law tradition of binding precedent and judicial independence tends to generate greater protection for property rights, which in turn supports economic growth.

The Supreme Court

I turn now to my work as a Justice of the UK Supreme Court. The Supreme Court decides approximately 50 cases per year which raise an arguable point of law of general public importance. We also decide about the same number of cases per year in our capacity as members of the Judicial Committee of the Privy Council. I would like briefly to mention two recent cases which are good examples of how the common law operates to support economic activity and a rules-based system of international finance and commerce.

The first is an appeal brought by the Republic of Mozambique against a number of companies and banks in the context of the so-called "Tuna Bond" scandal.[38] It bears that name because the relevant loans were taken apparently to finance the purchase of equipment and services in connection with the development of Mozambique's exclusive economic zone, in particular through tuna fishing and exploitation of gas resources in its continental shelf. A preliminary issue arose as to whether the dispute fell within the scope of the relevant arbitration agreements, such that the defendant companies and banks were entitled to a stay pursuant to section 9 of the Arbitration Act 1996. The issue came down the meaning of the word "matter" in that section which so far as relevant stated:

> "*A party to an arbitration agreement against whom legal proceedings are brought … in respect of a matter which under the agreement is to be referred to arbitration*

[36] Paul G. Mahoney, 'The common law and economic growth: Hayek might be right' (June 2001) Journal of Legal Studies, Vol. 30, No. 2, p. 503-525.
[37] ibid p.516.
[38] *Republic of Mozambique v Privinvest Shipbuilding SAL (Holding) and others* [2023] UKSC 32.

may … apply to the court … to stay the proceedings so far as they concern that matter"

To support our interpretation of that provision, we relied on case law of course, but also on both policy and international considerations. We noted that English law, like many other legal systems, adopts a pro arbitration approach.[39] That may involve a liberal interpretation of an arbitration agreement in order to respect the autonomy of the parties in determining how their disputes are to be resolved.[40] We relied on what we saw as a general consensus among leading jurisdictions involved in international arbitration in the common law world which are signatories of the New York Convention on the determination of "matters" which must be referred to arbitration.[41] These considerations provided relevant context to support our conclusion that, on the particular facts before us, the substance of the dispute did not fall within the scope of the arbitration agreements.

The second case arises out of a contractual dispute between Ukraine and Russia.[42] In 2013, Ukraine issued Eurobonds, with a nominal value of $3 billion carrying interest at 5% per annum, to Russia. In substance, this amounted to a loan of $3 billion from Russia to Ukraine. The Law Debenture Trust Corporation (the 'Trustee') acted as trustee of the Eurobonds.

Ukraine failed to pay the Eurobonds by the date of maturity, leading to the trustee issuing proceedings against Ukraine for payment of the sums due to Russia. Ukraine filed a defence, which alleged (amongst other things) that Ukraine was entitled to avoid the Eurobonds because of duress arising from unlawful and illegitimate threats and pressure, including restrictive trade measures and threats to Ukraine's territorial integrity and independence. The Trustee applied for summary judgment. The Supreme Court held that Ukraine was entitled to defend the claim for sums due at trial in the High Court and therefore, the trustee was not entitled to summary judgment.

These two cases share two important things in common. First, they involved almost exclusively international parties who decided to resolve their disputes in the UK on the basis of English law. In the Tuna Bonds case, the parties were the Republic of Mozambique and a range of companies from various jurisdictions, including Swiss and Russian banks and Lebanese

[39] ibid [45].
[40] ibid [46].
[41] ibid [71].
[42] *Ukraine (represented by the Minister of Finance of Ukraine acting upon the instructions of the Cabinet of Ministers of Ukraine) v The Law Debenture Trust Corporation plc* [2023] UKSC 11.

shipbuilders.[43] In the contractual dispute case, the parties were Ukraine and Russia, and the trust agreement was governed by the law of England and Wales and specified that the courts of England and Wales had exclusive jurisdiction to hear disputes arising out of it.

Second, the cases involve the courts applying established principles of the common law designed to support commerce. The relevant principles include respect of party autonomy, due regard to international judicial consensus in relation to international arbitration, and a concern for certainty and predictability of the law.

The Future

As I have outlined, our legal system and the common law provide an exceptionally robust and reliable legal framework within which business can be transacted and prosperity enhanced. It is combined with a judiciary that is trusted to make impartial, informed and fair decisions by both domestic and international litigants. However, I would suggest that a further distinctive strength of the common law is that it combines stability with agility and predictability with flexibility. This is its ability to draw on principles of the law and to apply them in new circumstances. So, what about the future?

We live in a time of rapid technological change. Recent decades have seen four important developments: (i) there has been a huge increase in the computational and data processing power of IT systems; (ii) data has become available on an unprecedented scale; (iii) the cost of storing data has fallen precipitously; and (iv) we have seen the development of increasingly sophisticated software services. From the dawn of civilisation until 2003, humans created a total of five exabytes of information.[44] According to the latest projections, we will soon be creating 16 exabytes of information every hour.[45]

As a result, the economy is changing fast, both nationally and internationally. The tech boom is driving the growth of entirely new industries at an exponential speed. The development of generative AI technologies and their application in new fields are recent examples of the many developments that the law is racing to keep up with. The McKinsey Global Institute concluded

[43] Following the UK Supreme Court judgment, the case was remitted to the High Court (see *The Republic of Mozambique v Credit Suisse International and others* [2024] EWHC 1957 (Comm)). Prior to the High Court judgment hand down, the Republic of Mozambique settled its claims against Credit Suisse and a number of other banks having acknowledged the corrupt practices of its employees.
[44] An exabyte is 1000 to the power of six (or a quintillion) bytes.
[45] Fabio Duarte, 'Amount of Data Created Daily (2024)' <https://explodingtopics.com/blog/data-generated-per-day> accessed on 18 February 2025.

that AI and big data are not only contributing to the transformation of society but, compared to the Industrial Revolution, the revolution is "happening ten times faster and at 300 times the scale, or roughly 3000 times the impact".[46]

The law has an extremely important dual role to play in relation to supporting our rapidly evolving economy in this area. It must both provide a steady framework to support the growth of these industries, but also address the demands for the regulation of these innovations to protect our societies from harm. Legislation, however, is a slow process. Statute law is developed, scrutinised and refined over the course of many months, if not years. Many bills are the culmination of years of careful research and consultation even before they are introduced to Parliament.

The common law, by contrast, is nimble. It is capable of contributing, in combination with state regulation, to fill the gap between fast-moving commercial realities and legislative action. At its best, the common law can also help distil and clarify the key issues that require the most urgent attention of the legislature. These features of our common law are illustrated by the way it has engaged with a deceptively simple question: are digital assets capable of attracting property rights?

Capturing Digital Assets

The potential of digital assets to boost our economy is great. There is a pressing need to facilitate the development of digital assets and to protect the billions of pounds that are being invested in the development of such assets, not least in the field of financial technology.

The question of whether digital assets are to be treated as property requires a brief return to some fundamental common law principles.

The English common law has long recognised two basic classes of property that command legal rights. First, real property, or interests in land. Second, personal property. Historically, personal property has been split into two further categories. As Lord Justice Fry explained in his judgment in the 1885 case of *Colonial Bank v Whinney*:[47] "All personal things are either in possession or in action. The law knows no *tertium quid* between the two." Things "in

[46] Richard Dobbs, James Manyika, and Jonathan Woetzel, *The Four Global Forces Breaking all the Trends* (Public Affairs 2015).
[47] [1885] 30 Ch. D. 261.

possession" are tangible, physical moveable assets. Whereas things "in action" are property rights that can be enforced or claimed by a court action, such as a debt or a right to sue under a contract.

Traditionally, the common law has followed Fry LJ's principled view of these two categories of personal property rights as being both comprehensive and mutually exclusive. However, digital assets sit uncomfortably with the *Colonial Bank* binary.

For example, cryptoassets are intangible stores of value, which therefore seem incapable of belonging to the category of things in possession. Yet they also resist the traditional meaning of a thing in action, as being rights primarily enforceable against another parties. Participants in Bitcoin, for example, neither take nor give legal obligations to one another, they simply engage in the same decentralised system of value which is governed by consensus rules.

So, are cryptoassets capable of being personal property? As is so often the case in our legal system, it was not Parliament or a regulator, but our first instance courts that first tackled this novel question. In a series of cases, litigants sought injunctions and asset freezing orders in respect of cryptoasset holdings by other parties in litigation. As these orders attach to property, the courts had to decide whether cryptoassets could constitute property. With varying degrees of difficulty, first instance courts began to grant such orders. [48]

For example, in *Robertson v Persons Unknown*,[49] Mrs Justice Moulder granted an asset preservation order over cryptocurrency holdings worth around £1 million. In so doing, she drew on a decision of Singapore International Commercial Court which found that cryptocurrency could constitute property and therefore form the subject of a trust.[50]

Early cases like *Robertson* crystalised the issue as to the proprietary status of cryptoassets and set the terms of the conceptual debate. In November 2019, LawTechUK's UK Jurisdiction Taskforce ("UKJT") issued its "Legal statement on cryptoassets and smart contracts".[51] The UKJT statement supported the view taken in early cases like *Robertson* that cryptoassets were capable of being personal property, notwithstanding that they might not be capable of being

[48] See, for example: *Vorotyntseva v Money-4 Ltd (t/a Nebeus.Com) and others*, [2018] EWHC 2596 (Ch) (asset freezing order granted over cryptocurrency); *Robertson v Persons Unknown*, CL-2019-000444, unreported (Engl. Comm. Ct. July 15, 2019) (asset preservation order granted over cryptocurrency).
[49] CL-2019-000444, unreported (Engl. Comm. Ct. July 15, 2019).
[50] *B2C2 Ltd v Quoine Pte Ltd* [2019] SGHC(I) 03 (affirmed in part and reversed in part on other grounds).
[51] The LawTech Delivery Panel, 'Legal statement on cryptoassets and smart contracts' (November 2019) <Legal statement on cryptoassets and smart contracts> accessed on 18 February 2025, p. 4.

things in action. It concluded that the *Colonial Bank* binary was established in a very different historical context and should not be construed to exclude cryptoassets from attracting property rights.

Fittingly, the introduction to the UKJT's statement pays particular tribute to the common law as the forum for the determination of these questions: "The great advantage of the English common law system is its inherent flexibility. […] Time and again over the years the common law has accommodated technological and business innovations, including many which, although now commonplace, were at the time no less novel and disruptive than those with which we are now concerned. In no circumstances therefore are there simply no legal rules which apply."

The UKJT statement was not legally binding guidance. But it was swiftly followed by the case of *AA v Persons Unknown*.[52] The claimant had been the victim of a ransomware attack and had made a Bitcoin payment to unknown defendants. The claimant sought to recover that payment and made an application for a freezing injunction over the Bitcoin it had transferred to them. In determining whether Bitcoin was "property at all", Mr Justice Bryan noted the difficulty posed by the traditional common law position in *Colonial Bank*, but adopted the UKJT's analysis and conclusion as to the proper approach to this question.

The decision in *AA* has itself been followed subsequently in the High Court,[53] and was expressly approved and adopted in the Court of Appeal in the 2023 case of *Tulip Trading Ltd. v Bitcoin Association for BSV*.[54] This is the common law at work. From the bud of a single case grows a whole new branch of case law through which the courts can identify the proper place for a novel economic concept in the common law order, all the while guided by historic principles and precedent.

There remain voices who argue against this recognition of digital assets. To put the matter beyond doubt, in November 2024, the UK Government introduced the Property (Digital Assets etc) Bill to Parliament. As introduced, the Bill has a single substantive clause, confirming that:

[52] [2019] EWHC 3556 (Comm).
[53] For example, in *Toma & True v Murray* [2020] EWHC 2295 (Ch).
[54] [2023] EWCA Civ 83.

"*A thing (including a thing that is digital or electronic in nature) is not prevented from being the object of personal property rights merely because it is neither—*

(a) a thing in possession, nor

(b) a thing in action."

The Bill responds directly to the question that was asked of and answered by the common law. Indeed, the Minister who moved the Bill in the House of Lords specifically referred to this recognition in recent case law.[55]

Final remarks

The role of the common law can be seen against a wider perspective.

The 2024 Nobel Prize-winning economists, Daron Acemoglu and James Robinson, respectively professors at MIT and Harvard University, produced a ground-breaking book in 2012 called "Why Nations Fail".[56] Their thesis is that it is not geography, culture or climate that determines whether a country succeeds but the quality of its political and economic institutions. A central state authority is needed as it imposes order, secures property rights and provides essential public services. Securing property rights gives businesspeople the incentive to invest, innovate and work hard. Inclusive political and economic institutions, which are open to technological change and innovation and allow economic pluralism, achieve long term prosperity; nations that do not fail.

A robust and resilient legal system is not of itself sufficient to create long term prosperity; but it is a necessary component of a state which aspires to such prosperity. The common law has developed through the centuries, providing guiding principles that help shape the direction it takes, and providing confidence when it is stretched to accommodate novel developments. This exemplifies just how important the common law system is to our continued economic prosperity.

[55] HL Deb 6 November 2024, vol 840, col 264GC (<Property (Digital Assets etc) Bill - Hansard - UK Parliament>).
[56] D. Acemoglu and J. A. Robinson, *Why Nations Fail: The Origins of Power, Prosperity and Poverty* (Profile Books 2012).

The jurist Sir John Laws once aptly described our common law as, "endlessly creative … a living law, built on what has gone before, but open to constant renewal".[57] Now, at the conclusion of this lecture, I hope that this message rings true.

Thank you.

[57] Sir John Laws, The Common Law Constitution, Hamlyn Lectures (Cambridge University Press 2014) p.10.