

**INTERNATIONAL COMMERCIAL COURTS:
TOWARDS A TRANSNATIONAL SYSTEM OF DISPUTE
RESOLUTION**

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I. Introduction

1. Many important principles relating to the sovereignty and legal equality of states can be traced to the Treaty of Westphalia of 1648 which brought an end to the Thirty Years' War.¹ The Westphalian doctrine of states as independent agents strengthened through the 19th Century, and was coupled with a rise in nationalism. Then came the dark moments in the 20th Century where two World Wars ripped the international order apart. In the wake of those wars, colonial empires disintegrated and the number of independent states and polities increased tremendously.² The right of nation states to self-determination, as enshrined in Article 1 of the Charter of the United Nations, re-affirmed the

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¹ See, eg, Simona Țuțuianu, *Towards Global Justice: Sovereignty in an Interdependent World* (Asser Press, 2013) at 44, and Stanford Encyclopedia of Philosophy, "Sovereignty", online: <http://plato.stanford.edu/entries/sovereignty/>.

² Sundaresh Menon, "The Transnational Protection of Private Rights: Issues, Challenges and Possible Solutions" (2014) *Asian Journal of International Law* 1 ("The Transnational Protection of Private Rights") at 1; and see Malcolm Shaw, *International Law* (6th Edition) (Cambridge: Cambridge University Press) at 38.

importance of national sovereignty in the post-war era.³ Legal systems and laws emerged, creating legal, economic and political boundaries between jurisdictions.

2. But despite these developments, the rise of connective technology has brought about a rapid increase in the interconnectedness of the world's economies and cultures.⁴ This is part of what we refer to as "globalisation". It has changed the way the world works, and in some respects, poses a major challenge to the traditional Westphalian concept of sovereignty.⁵
3. The global community is therefore faced with tidal movements in opposite directions. The fragmentation of empires, the right of self-determination and the re-affirmation of state sovereignty has generated a tidal wave towards erecting legal, economic and political barriers; while the cross-wave of globalisation has sought to transcend or break at least some if not many of those very boundaries.⁶
4. State-actors are key in the former wave, while the private commercial world features prominently in the latter. Today, multinational corporations, sometimes referred to as "stateless corporations",⁷ are establishing transnational

³ Chapter I, Article 1, Part 2 of the UN Charter states that the purposes of the United Nations are, *inter alia*, "[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace", see online: <http://www.un.org/en/documents/charter/chapter1.shtml>.

⁴ Thomas Friedman, *The World is Flat: A Brief History of the Twenty-First Century* (Farrar, Straus and Giroux, 2005).

⁵ A similar observation has been made in the context of international peacekeeping and human rights: see Alex Bellamy & Paul Williams, *Understanding Peacekeeping* (2nd Ed) (Polity Press, 2010) at 37.

⁶ *The Transnational Protection of Private Rights* at 2.

⁷ See, for instance, Roy Voorhees, Emerson Seim & John Coppett, "Global Logistics and Stateless Corporations" (1992) 15(2) *Transportation Practitioners Journal* 144.

businesses and trade links at a pace without parallel in history.⁸ 51 of the 100 largest economies in the world today are corporations, with the top 500 multinational corporations accounting for nearly 70% of worldwide trade.⁹

5. The exponential growth of international trade has given rise to a corresponding increase in the number of transnational commercial disputes.¹⁰ But the international legal order has struggled to evolve quickly enough to deal with the changing conditions. National legal systems were designed primarily to deal with intra-jurisdictional disputes rather than transnational ones.¹¹ There have also been understandable difficulties in achieving meaningful international consensus on a harmonised approach to resolving transnational commercial disputes.
6. Amidst the turbulence from these global cross-currents, a small but growing team of oarsmen have helped steady the vessel of international commerce and keep it afloat. I refer here to arbitration. In this lecture, I will briefly discuss how arbitration answered the need for an international commercial dispute resolution system, and the lessons we may learn from its experience. I will then discuss why, despite its success, there is a need for an alternative, and why international commercial courts are well placed to address this need. In this regard, I will focus on the model of two international commercial courts

⁸ Sundaresh Menon, "Transnational Commercial Law: Realities, Challenges and A Call for Meaningful Convergence" (26th LAWASIA Conference; 15th Biennial Conference of Chief Justices of Asia and the Pacific) (27-30 October 2013) ("*Transnational Commercial Law: Realities, Challenges and A Call for Meaningful Convergence*") at para 7.

⁹ World Trade Organisation, "Trade Liberation Statistics", online: http://www.gatt.org/trastat_e.html; see also <http://www.corporations.org/system/top100.html>.

¹⁰ Sundaresh Menon, "Origins and Aspirations: Developing an International Construction Court" (2014) *The International Construction Law Review* 341 ("*Developing an International Construction Court*") at 341.

¹¹ *Developing an International Construction Court* at 341.

represented by the Singapore International Commercial Court (“**SICC**”) and the Dubai International Financial Centre Courts (“**DIFCC**”). I will examine the similarities and differences between these two courts, and then consider how they compare with municipal courts on the one hand and international commercial arbitration on the other. I will end by considering some of the challenges that these courts might face, and share my views on what their vision and mission might be.

II. The arbitration experience – lessons in designing a transnational system of justice

7. As I briefly mentioned earlier, arbitration played a much-needed and timely role in stabilising the vessel of international commerce. It rose to prominence by providing a neutral forum for the resolution of transnational commercial disputes. In so doing, it minimised the concern that such disputes might fall to be determined in unfamiliar and possibly unreliable foreign legal systems.¹² It promised economy, simplicity, flexibility and confidentiality in the resolution of disputes.¹³ Arbitral awards were also clothed with international enforceability by virtue of the New York Convention¹⁴ and the widespread and still growing acceptance and adoption of the Model Law.¹⁵

¹² *The Transnational Protection of Private Rights* at 7.

¹³ Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration*, 2nd ed. (Sweet & Maxwell, 1991) at paras 1-42, 1-43, 1-44 and 1-53.

¹⁴ 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

¹⁵ 1985 UNCITRAL Model Law on International Commercial Arbitration.

8. But beyond providing a viable means of dispute resolution, the experience of international commercial arbitration has highlighted – at a meta level – five important lessons in designing a transnational system of justice.¹⁶
- (a) First, the importance of the harmonising rules on the recognition and enforcement of decisions. These secure the actual vindication of rights and therefore have perhaps the most direct practical impact for users.¹⁷ Without an agreed approach to recognition and enforcement, legal rights may remain territorially-bound, which can be a problem where transnational disputes are concerned.
- (b) Second, the importance of harmonising dispute resolution practices and processes.¹⁸ Arbitration has illustrated the positive impact that legal infrastructures can have on global commerce where the dispute resolution framework transcends national boundaries and enjoys a higher degree of harmonisation.¹⁹
- (c) Third, the importance of a common ethical framework to govern practitioners within a dispute resolution system. In its early days, arbitration consisted of a small and select group of practitioners.²⁰ This

¹⁶ In similar vein, I had, in previous lectures, conceived of a three-act script for harmonisation (see, eg, Sundaresh Menon, “The Somewhat Uncommon Law of Commerce” (Commercial Bar Association Annual Lecture 2013) (14 November 2013) (“*The Somewhat Uncommon Law of Commerce*”) at para 52; and see *The Transnational Protection of Private Rights* at 19).

¹⁷ See *The Somewhat Uncommon Law of Commerce* at para 53 and *Transnational Commercial Law: Realities, Challenges and A Call for Meaningful Convergence* at para 54.

¹⁸ *The Transnational Protection of Private Rights* at 21.

¹⁹ *Transnational Commercial Law: Realities, Challenges and A Call for Meaningful Convergence* at para 39.

²⁰ Sundaresh Menon, “Some Cautionary Notes For An Age Of Opportunity”, keynote address at the Chartered Institute of Arbitrators International Arbitration Conference (Penang, 22 August 2013) (“*Some Cautionary Notes For An Age Of Opportunity*”) at para 4, citing Doak Bishop & Margrete Stevens, *The Compelling Need for a Code of Ethics in International Arbitration: Transparency, Integrity and Legitimacy*, at 5.

group was effectively self-regulated by informal ethical understandings and cultural pre-suppositions, holding themselves to self-prescribed standards without the need for express rules.²¹ Their shared ethical framework and values helped to avoid numerous pitfalls and moral hazards in the industry at least in the early days of this industry.

- (d) Fourth, the importance of harmonising substantive commercial laws. The international commercial arbitration framework has initiated an informal and continuing process leading towards the formation of a free-standing body of law responsive to the needs of international commerce.²² As I shall contend, there are limits to what arbitration can do in this context but it is worth digressing here to elaborate on the need for harmonisation of substantive commercial laws. The existence of different legal systems and commercial laws increases the transaction costs of cross-border business because such differences create friction in transnational commerce.²³ Investors have to expend resources securing compliance with national regulations.²⁴ They also have to factor in the additional costs and risks of resolving legal disputes, enforcing cross-border contracts, as well as other unpredictable legal exposure.²⁵

²¹ *Some Cautionary Notes For An Age Of Opportunity* at para 4, citing Doak Bishop & Margrete Stevens, *The Compelling Need for a Code of Ethics in International Arbitration: Transparency, Integrity and Legitimacy*, at 5.

²² *Transnational Commercial Law: Realities, Challenges and A Call for Meaningful Convergence* at para 32.

²³ *The Somewhat Uncommon Law of Commerce* at paras 5 and 49.

²⁴ *Transnational Commercial Law: Realities, Challenges and A Call for Meaningful Convergence* at para 41.

²⁵ *Transnational Commercial Law: Realities, Challenges and A Call for Meaningful Convergence* at para 23.

A recent survey of Asia-Pacific business leaders revealed that inconsistent regulations and standards constituted the “single biggest barrier” to a company’s growth in the Asia-Pacific region.²⁶ The same survey suggested that investment is likely to increase if regulations or standards are harmonised across the region. Consistent with this, the experience of the member states of the Organisation of Business Law in Africa (“**OHADA**”) has demonstrated how legal uncertainty borne out of the heterogeneity of laws in a particular region can lead to a reduction in trade and investment.²⁷ The subsequent introduction of common commercial courts lent clarity and uniformity in domestic and regional legal infrastructure. This, in turn, promoted greater foreign investment and cross-border trade.²⁸

The harmonisation of substantive commercial laws may therefore be seen as the metaphorical global trade wind that blows towards the harbour of global prosperity. I should say that this wind is not actually something new. Indeed, there is “ample historical precedent” for it, for it is an ancient wind that has been blowing at least since the Middle Ages where transnational practices governed trade and carriage by sea.²⁹

- (e) The fifth and final lesson is that a successful system will have to deal with, rather than ignore, the twin tidal forces of state sovereignty and

²⁶ This is a reference to survey results as reported in the PricewaterhouseCoopers 2013 Asia-Pacific Economic Cooperation (“APEC”) CEO Survey.

²⁷ *Transnational Commercial Law: Realities, Challenges and A Call for Meaningful Convergence* at para 43.

²⁸ *Transnational Commercial Law: Realities, Challenges and A Call for Meaningful Convergence* at para 42.

²⁹ Jan H Dalhuisen, “The Case For An International Commercial Court” (*The Case For An International Commercial Court*), online: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2433513 at 9.

globalisation. The legitimacy of international commercial arbitration stemmed from the fact that it was chosen by the international commercial community.³⁰ However, despite its roots in the choices made by private actors, it became the pre-eminent mode of cross-border civil dispute resolution due to institutional structures such as the New York Convention and the Model Law. These instruments espouse party autonomy at the user level but, crucially, national courts remain the final guarantors of the legal fitness of arbitral awards and processes.³¹ Respect for state sovereignty and the sanctity of a national court's jurisdiction is therefore part of the very philosophy of the New York Convention and the Model Law.³² It is evident then that the success of international commercial arbitration is owed, in part, to its ability to navigate the twin tidal forces.

III. The need for an alternative to international commercial arbitration

9. We are well advised to keep these five lessons in mind when considering the design of a transnational system of justice. But there is a question that is anterior to this, namely: why do we need to embark on such a venture as designing a transnational system of justice when international commercial arbitration has already been playing an important role in resolving transnational commercial disputes?

³⁰ *Transnational Commercial Law: Realities, Challenges and A Call for Meaningful Convergence* at para 32.

³¹ Professor Jan Paulsson notes that “[t]he great paradox of arbitration is that it seeks the cooperation of the very public authorities from which it wants to free itself. See Jan Paulsson, *The Idea of Arbitration* (Oxford University Press, 2013) at 30.

³² See *PT First Media Tbk v Astro Nusantara International BV and others* [2013] SGCA 57; and see *The Somewhat Uncommon Law of Commerce* at para 58.

10. In September 2012, I visited the London Commercial Court and observed that its caseload was burgeoning alongside a vibrant arbitration market. The London experience suggests that arbitration and commercial courts are not competing players in a zero-sum game.³³ Rather, there is room for co-existence and development of these two systems of dispute resolution.
11. While arbitration certainly provides an attractive option for the resolution of transnational commercial disputes, some disputants prefer to have their disputes resolved by litigation. This may perhaps be attributed to a combination of push and pull factors.
12. The main pull factors are that certain cases are better suited for a process that is relatively open and transparent, equipped with appellate mechanisms, the options of consolidation and joinder, and the assurance of a court judgment.
13. The main push factors relate to the actual or perceived problems with arbitration. There are some well-rehearsed (if not universally accepted) issues relating to the lack of regulation in the arbitration industry.³⁴ Among other things, there is said to be a lack of ethical consensus to guide the increasingly amorphous and diverse body of practitioners, resulting in various ethical issues;³⁵ a lack of visibility and public accountability in decision making;³⁶ increasing judicialisation and laboriousness in process resulting in delay

³³ *Developing an International Construction Court* at 347.

³⁴ Sundaresh Menon, "International Arbitration: The Coming of a New Age for Asia (and Elsewhere)", Opening Plenary Session at ICCA Congress 2012 ("*International Arbitration: The Coming of a New Age for Asia (and Elsewhere)*") online: http://www.arbitration-icca.org/media/0/13398435632250/ags_opening_speech_icca_congress_2012.pdf, at paras 43–46.

³⁵ See, eg, Catherine A. Rogers, "Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration" 23 Mich. J. Int'l. L. 341 (2002). And see *Some Cautionary Notes For An Age Of Opportunity* at paras 3–7.

³⁶ *International Arbitration: The Coming of a New Age for Asia (and Elsewhere)*, at paras 47–50.

accompanied by rising costs;³⁷ some unpredictability in the enforcement of arbitral awards due to the *ad hoc* nature of courts' oversight of the enforcement process;³⁸ and some lack of consistency in arbitral decisions due to the lack of corrective appellate mechanisms or an open body of jurisprudence.³⁹ Metaphorically, the oarsmen have multiplied in numbers, but they have come on board from different cultures and backgrounds, each with different paddling techniques, different equipment, and even different destinations in mind. They do not always pull in unison, and oftentimes, perhaps not even in the same direction.

14. Of course, some of these shortcomings may be mitigated or resolved by the talent within the industry. But, at least in the context of transnational commercial dispute resolution, I think it will not be enough to simply repair the oars and train the oarsmen. This is because arbitration, by its very nature, cannot provide a complete solution to propel the vessel of global commerce forward. Arbitration was conceived as an *ad hoc*, consensual, convenient and confidential method of resolving disputes. It was not designed to provide an *authoritative* and *legitimate* superstructure to facilitate global commerce. It cannot, on its own, adequately address such things as the harmonisation of substantive commercial laws, practices and ethics.
15. This is where I believe that international commercial courts have a potentially important role to play. Such courts can be instrumental in facilitating the harmonisation of commercial laws and practices. They also represent an

³⁷ *The Transnational Protection of Private Rights* at 9.

³⁸ *The Transnational Protection of Private Rights* at 10–11.

³⁹ *The Transnational Protection of Private Rights* at 11.

avenue for the advancement of the rule of law as a normative ideal in global commerce. This is because there will be greater external scrutiny of their decisions and processes, with increased pressure to justify decisions against international norms.

16. There are, of course, numerous and fundamentally varied conceptions of international commercial courts. For instance, one conception is that of a court with exclusive international jurisdiction in certain areas of law and that bases its decisions on international principles and practices, somewhat akin to the International Court of Justice (“**ICJ**”).⁴⁰ Another conception is that of an international court that supervises international commercial arbitrations.⁴¹ Today, I will focus on the model typified by two recent entrants to this space, namely, the SICC and the DIFCC.

IV. Whither international commercial courts?

A. The SICC and the DIFCC: Similarities and Differences

1. *Similarities between the SICC and the DIFCC*

17. The SICC and the DIFCC share three very fundamental similarities.

(a) First, they are fully constituted *municipal courts* that have an international dimension, with the jurisdiction to hear international cases founded on the consent of the parties.⁴² They remain firmly part of the municipal legal

⁴⁰ See, for instance, *The Case For An International Commercial Court* at 12.

⁴¹ *The Case For An International Commercial Court* at 13.

⁴² As observed by Chief Justice of the DIFCC, Mr Michael Hwang SC, the opt-in jurisdiction to hear cases which are the subject of a written jurisdiction agreement puts the DIFCC “in the same position

systems from which they derive their powers. Their authority stems from legal norms established by their respective jurisdictions for the judicial resolution of disputes.⁴³ When viewed through the lenses of the accepted legal taxonomy, they might not be regarded as international courts at all.⁴⁴ They do not purport to exercise true international jurisdiction in the way the ICJ does. They do not unilaterally extend their reach across national boundaries.

- (b) Second, they deal with *international commercial* matters where either one or both parties are international parties. They therefore cater to transnational and cross-border commercial disputes that may have little connection to the actual physical jurisdictions within which they are situated.⁴⁵
- (c) Third, they are particularly attuned to the needs and realities of international commerce, and are in a position to set international standards for resolving commercial disputes. For instance, their rules and procedures build upon the best practices in reputable commercial courts and international commercial arbitration. Their panels comprise eminent international jurists who are experienced in commercial matters and

as the SICC will be". See Michael Hwang SC, "Commercial Courts and International Arbitration – Competitors or partners?" (2014 Clayton Utz Lecture, Sydney, 11 Nov 2014), online: http://www.claytonutz.com/ialecture/2014/speech_2014.html ("Clayton Utz Lecture 2014").

⁴³ Denise Wong, "The Rise of the International Commercial Court: What is it and will it work?" (2014) 33(2) *Civil Justice Quarterly* 207 ("The Rise of the International Commercial Court: What is it and will it work?") at 214.

⁴⁴ The SICC and the DIFCC may only fulfil four of the seven criteria for international judicial bodies; the remaining three, which they fail to satisfy, are: (a) Establishment by an international legal instrument; (b) the dispute must involve at least one sovereign state; and (c) having resort to international law (in international commercial courts, the laws to which the court will refer are ultimately still rooted in national jurisdictions, and the applicability of the rules of private international law will determine the most appropriate law). See *The Rise of the International Commercial Court: What is it and will it work?* at 217.

⁴⁵ *The Rise of the International Commercial Court: What is it and will it work?* at 217.

foreign lawyers are granted relatively liberal rights of audience; this enhances the international flavour of both courts.

2. Differences between the SICC and the DIFCC

18. While the SICC and the DIFCC have fundamental similarities, they also have important differences which arise from the different circumstances that they find themselves in. I do not intend to go into the minutiae about divergences in operational matters and processes. Instead, I want to focus on the different underlying motivations and ideologies of the two courts.

19. The DIFCC was created to support the economic activities within the Dubai International Financial Centre (“**DIFC**”), a purpose-built financial centre strategically located between the East and West.⁴⁶ It seeks to provide a “platform for business and financial institutions to reach into and out of the emerging markets of the region”.⁴⁷ It is conceived of as an independent zone specially created for the specific purpose of supporting a financial market for multi-national companies.⁴⁸ The idea is that a capital market could be created in order to provide global businesses with a familiar environment governed by financial regulations and legal rules that are substantially similar to those found in leading common law jurisdictions.⁴⁹ To this end, the DIFCC is a common law

⁴⁶ See <http://difccourts.ae/about-the-courts/faqs/>, which states “The Dubai International Financial Centre is an onshore financial centre in the UAE. The DIFC’s strategic location, between the markets of the east and west, provides a secure and efficient platform for business and financial institutions to reach into and out of the emerging markets of the region. The Centre offers independent regulation, supportive infrastructure and a tax-efficient regime, as well as a common law system”.

⁴⁷ See <http://www.difc.ae/discover-difc>.

⁴⁸ *The Rise of the International Commercial Court: What is it and will it work?* at 208.

⁴⁹ *The Rise of the International Commercial Court: What is it and will it work?* at 209.

court that applies either the law governing the contract in question,⁵⁰ or the DIFC's common law system, which is "based substantially on English law in codified form but with civil law influence".⁵¹

20. When the DIFCC was launched about a decade ago,⁵² it focused on dealing with matters that arose within the DIFC. The "internationalisation" of the DIFCC came about in 2011, when its jurisdiction was expanded to include consent jurisdiction.⁵³ This allowed the DIFCC to hear disputes that were not connected to its physical jurisdiction. With this expansion of its jurisdiction, the DIFCC plays an even more important role in making the DIFC a legal hub for the Middle East and North Africa.⁵⁴
21. This is to be contrasted with the SICC, which is located in South-East Asia, and therefore will likely serve a different demographic. From its inception, the SICC was envisaged as a forum dedicated to handling only international commercial disputes.⁵⁵ As such, unlike the DIFCC, the SICC's jurisdiction does not have a significant domestic component, if at all.
22. The genesis of this dedicated international commercial court was driven by the massive growth of transnational trade in Asia and the corresponding need for a

⁵⁰ See <http://difccourts.ae/about-the-courts/faqs/>.

⁵¹ See <http://www.difc.ae/discover-difc>. See also *Clayton Utz Lecture 2014*.

⁵² The DIFCC was established in 2004 under two laws enacted by His Highness the late Vice President of the UAE and Ruler of Dubai, Sheikh Maktoum bin Rashid Al Maktoum: see DIFC Courts, "Courts' Activities and Business Plan 2013-2015" (on file with author) at 9.

⁵³ See <http://difccourts.ae/about-the-courts/faqs/>, which states that "Originally the DIFC Courts were established to hear cases relating to the DIFC only. In light of their success and far-reaching reputation for swift and efficient justice, the DIFC Courts' jurisdiction was extended in October 2011. Decree no.16/2011 opened the Courts' remit to hear: [a]ny civil or commercial case in which both parties select the DIFC Courts' jurisdiction, either in their original contracts/agreements or post-dispute as well as [a]ny civil or commercial case related to the DIFC".

⁵⁴ *Clayton Utz Lecture 2014*.

⁵⁵ *The Rise of the International Commercial Court: What is it and will it work?* at 211.

centre to resolve transnational disputes that may arise.⁵⁶ According to the Boston Consulting Group, Asia accounted for more than 30% of world trade in 2010 and is expected to account for 35% of world trade by 2020.⁵⁷ The Asian Development Bank has suggested that by 2050, Asia could account for half of global GDP, trade and investment.⁵⁸ The sheer volume of disputes that accompany the growth in trade and investment fuels the need for a neutral and well-regarded transnational dispute resolution centre in Asia.⁵⁹

23. Singapore is strategically located to be a leading international dispute resolution hub in Asia. In the context of arbitration, Singapore is already one of the most preferred seats of arbitration in the world.⁶⁰ The SICC will leverage on Singapore's strength in the resolution of commercial disputes, and provide another world-class option in Singapore's suite of transnational dispute resolution services.
24. These differences in the drivers and origins of both courts influence their respective emphases and institutional design.
25. For instance, the DIFCC was effectively established from a blank slate, with all the attendant pioneering benefits. While some of the laws in the DIFC involve

⁵⁶ *Developing an International Construction Court* at 344.

⁵⁷ This was a study by the Boston Consulting Group. See https://www.bcgperspectives.com/content/articles/financial_institutions_globalization_profiting_from_a_sias_rise_new_global_trade_flows/.

⁵⁸ Asian Development Bank, "Realizing the Asian Century" (Executive Summary), online: <http://www.adb.org/sites/default/files/publication/28608/asia2050-executive-summary.pdf>, at 5.

⁵⁹ *Developing an International Construction Court* at 345.

⁶⁰ *Report of the Singapore International Commercial Court Committee* (November 2013) at para 6, online: <https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Annex%20A%20-%20SICC%20Committee%20Report.pdf>. See also the White and Case 2010 International Arbitration Survey: Choices of International Arbitration, online: http://www.whitecase.com/files/upload/fileRepository/2010International_Arbitration_Survey_Choices_in_International_Arbitration.pdf.

fusion between the civil law and the common law,⁶¹ the DIFCC was primarily designed as a common law court operating within a purpose-built English-language common law jurisdiction.⁶² The opening page of the DIFCC website proclaims that “[t]he DIFC Courts are an *independent common law judiciary* based in the Dubai International Financial Centre (DIFC) with jurisdiction governing civil and commercial disputes” (emphasis added).⁶³ In similar vein, Chief Justice Michael Hwang has described the DIFC as “a common law island in a civil law ocean”.⁶⁴ The DIFC’s common law system was specifically intended to be “independent from, but complementary to, the UAE’s Arabic-language civil law system, thus offering a choice that strengthens both processes while ensuring public access to world-class justice”.⁶⁵ While a French-heritage Arabic language civil law system is available in the Dubai national courts, parties opting for English common law processes go to the DIFCC instead.⁶⁶ Consonant with these objectives, the DIFCC’s international judges are experienced common law legal professionals from Australia, Malaysia, Singapore and the UK.⁶⁷

⁶¹ Michael Hwang, “The Courts of the Dubai International Finance Centre – A Common Law island in a Civil Law ocean” (1 Nov 2008), online: <http://difccourts.ae/the-courts-of-the-dubai-international-finance-centre-a-common-law-island-in-a-civil-law-ocean/>.

⁶² See <http://difccourts.ae/about-the-courts/fags/>, which states “The UAE’s DIFC Courts administer a unique English-language common law system – offering swift, independent justice to settle local and international commercial or civil disputes.”

⁶³ See <http://difccourts.ae/>.

⁶⁴ *Clayton Utz Lecture 2014*.

⁶⁵ DIFC Courts, “Courts’ Activities and Business Plan 2013-2015” (on file with author) at p 9.

⁶⁶ This is an observation made by the UAE Minister of Justice HE Dr Hadeef Al Dhaheri, who said “The importance of Dubai offering two judicial systems, one Arabic language civil and one English language common law, should not be underestimated”: see *DIFC Courts Annual Review 2013* (on file with author) at 18.

⁶⁷ As at 5 February 2015, the international judges are: Chief Justice Michael Hwang, SC (Singapore), Deputy Chief Justice Sir John Murray Chadwick (UK), Justice Sir David Steel (UK), Justice Roger Giles (Australia), Justice Tun Zaki Azmi (Malaysia) and Justice Sir Anthony David Colman (UK): see <http://difccourts.ae/about-the-courts/courts-structure/judges/>.

26. In contrast, the SICC is built on Singapore's extant legal system. It is an international commercial court that leverages on the strengths and traditions of its municipal foundations and is an extension of a commercially-savvy legal and judicial system that has been highly regarded and favourably ranked.⁶⁸ It begins from existing practices and jurisprudence that are increasingly autochthonous in nature⁶⁹ and seeks to build on Singapore's tradition of efficiency and excellence in court processes and case management.
27. As a branch of the Singapore High Court, the SICC will develop jurisprudence that is consanguine with Singapore's domestic jurisprudence. SICC judgments and the principles espoused therein might be highly persuasive, if not binding, on prospective litigants in Singapore especially where Singapore law, rather than a foreign law, is the chosen law of the dispute. This means that beyond being concerned with the undoubtedly important element of efficiency in dispute resolution, the SICC has the additional important responsibility of developing sound jurisprudence that is suitable for the purposes of commerce. Recognising this, decisions of the SICC will generally be published,⁷⁰ although for confidential cases the necessary redaction and confidentiality safeguards will be taken.⁷¹

⁶⁸ For instance, Singapore has consistently scored well in international surveys conducted by the International Institute for Management Development ("IMD") and the Political and Economic Risk Consultancy ("PERC"). The Supreme Court of Singapore has also consistently met rigorous key performance indicators, such as clearing 85% of all writ actions within 18 months of commencement.

⁶⁹ See, for instance, Andrew Phang, "Recent Developments in Singapore Contract Law — the Search for Principle" (2011) 28 JCL 3 and Goh Yihan & Paul Tan, "An Empirical Study on the Development of Singapore Law" (2011) 23 Singapore Academy of Law Journal 176 at 214 and 216.

⁷⁰ See O 110 r 31(1) of the Rules of Court, which provides that, subject to certain confidentiality safeguards, "the Court must direct that a judgment made by the Court may be published in law reports and professional publications if the Court considers the judgment to be of major legal interest".

⁷¹ The Court may give directions for the concealment of certain information in the reports, or where it is not practicable for reports to be published without revealing such information, direct that reports not be published until up to 10 years after the date of judgment. See O 110 rr 31(2) and 31(3) of the

28. The SICC also possesses a good mix of eminent international jurists from both common and civil law traditions.⁷² All of these jurists will play an active role both in hearing substantive cases as well as in case management. This diversity is specifically intended to enhance the international character of the SICC and strengthen its ability to handle matters that originate from civil law systems. Such diversity is particularly useful in Singapore's circumstances, given the diversity of legal systems within the ASEAN region. It bears noting that the Singapore International Arbitration Centre ("**SIAC**") has reported that 36% of its cases involve parties with a civil law background.⁷³ A similar trend may extend to the cases coming before the SICC.
29. Beyond competence to accommodate aspects of civil law, the SICC aims to provide a platform for the cross-pollination of ideas, procedures and jurisprudence from both common and civil law jurisdictions. To borrow an analogy recently used in the context of international commercial arbitration, civil law jurists with civil law "chords" at their fingertips could contribute greatly towards creating a new and unique "jazz" blend of commercial laws and practices.⁷⁴ Coupled with the flexibility accorded to judges and parties in

Rules of Court. This is the approach taken in Australia as well: the Australian courts have attempted to balance the competing interests of open justice and the need for protecting commercially sensitive information through permitting only limited disclosure of the information: see Justice Susan Glazebrook, "Judging In An International World", online: http://www.courtsofnz.govt.nz/speechpapers/IPBA%20Judging%20in%20an%20International%20World.pdf/at_download/file, ("*Judging In An International World*") at 8.

⁷² As at 5 February 2015, the international judges are: Justice Carolyn Berger (United States), Justice Patricia Bergin (Australia), Justice Roger Giles (Australia), Justice Irmgard Griss (Austria), Justice Dominique Hascher (France), Justice Dyson Heydon (Australia), Justice Vivian Ramsey (UK), Justice Anselmo Reyes (Hong Kong), Justice Bernard Rix (UK), Justice Yasuhei Taniguchi (Japan), and Justice Simon Thorley (UK): see <http://www.sicc.gov.sg/Judges.aspx?id=30>.

⁷³ Patrick Dahm, Andreas Respondek & Kevin O'Shea, "A Grain of Civil Law – Some (Not So) New Chords for the International Arbitration Jazz" *Singapore Law Gazette* (October 2014) 19 ("*A Grain of Civil Law – Some (Not So) New Chords for the International Arbitration Jazz*") at 30.

⁷⁴ See, generally, *A Grain of Civil Law – Some (Not So) New Chords for the International Arbitration Jazz*.

designing their own dispute resolution processes, the SICC provides a platform for the emergence of unique processes based on the best practices in both common and civil law jurisdictions. It will be a forum in which, on the one hand, eminent international jurists will develop commercial jurisprudence bringing their experiences and practices to bear, while on the other, the jurisprudence and best practices of the Singapore courts will be shared with the world. The co-mingling of SICC decisions and Singapore jurisprudence positions the SICC to actively serve as a platform for the development and harmonisation of substantive commercial laws, practices and ethics. Over time, the SICC aspires to contribute towards laying in place the foundations for an international *lex mercatoria*.

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30. In summary, the SICC and the DIFCC share many similarities, although there might be institutional and ideological differences between them. This is not to say that one court is better than another; all that can be said is that their differences are explicable by reference to the circumstances and policy objectives peculiar to each court.

B. The SICC / DIFCC and municipal courts: Similarities and Differences

31. I turn now to compare the SICC and the DIFCC with their municipal counterparts.

1. *Similarities between SICC / DIFCC and municipal courts*

32. The SICC and the DIFCC are similar to municipal commercial courts by virtue of their municipal roots. They share particular similarities with commercial courts situated within major financial centres such as London, New York, Hong Kong, Mumbai and New South Wales.⁷⁵ Indeed, given the increasing internationalisation of commerce, these municipal courts invariably also deal with cross-border disputes.⁷⁶

33. Like municipal commercial courts, the SICC and the DIFCC are designed to deal with commercial disputes in a manner that ensures public accountability and legitimacy in their processes. One of the clearest indications of this is that, in the interest of “open justice”, proceedings in the courts and court records are generally publicly accessible. Judges often publish reasons for their decisions and endeavour to lay down the law or their interpretations of the law. There are procedural rules that must be complied with, and breaches of court directions or orders are subject to peremptory orders, the law of contempt, and other

⁷⁵ Many of these specialist commercial courts have existed for “over 100 years”: see Justice Ian Kawaley, “The Role of Specialist Commercial Courts” (2010) 18 *Journal of the Commonwealth Magistrates’ and Judges’ Association* 16 (“*The Role of Specialist Commercial Courts*”) at 16.

⁷⁶ It has been observed that courts all over the world “are dealing more and more with disputes with a cross-border flavour and even societal expectations are influenced by the increasingly global world our citizens inhabit. For courts to try to serve their societies without regard for the world outside their particular jurisdiction would be to ignore the environment that those using the courts inhabit”: see *Judging In An International World* at 2.

relevant sanctions. There are also formal safeguards to minimise ethical issues or conflicts of interest. For instance, judges and counsel are drawn from different pools of professionals and parties are not generally permitted to select their tribunal, and so on.

2. Differences between SICC / DIFCC and municipal courts

34. However, there are major differences between international commercial courts and their municipal counterparts. I will touch on three such differences.

(a) The first relates to the important issue of jurisdiction. While there are exceptions,⁷⁷ municipal courts often find jurisdiction on the principle that a dispute should be heard by the court with which the dispute has its most substantial links.⁷⁸ In contrast, the jurisdiction to hear international matters in the SICC and the DIFCC will be invoked very largely on the basis of party consent, and in the case of the SICC at least, it will not have jurisdiction by reason of the usual connecting factors.

(b) The second difference relates to foreign representation. Generally, foreign counsel are not permitted to practice within a jurisdiction or represent parties in court, unless certain (often restrictive) criteria are met. This has the effect of ensuring that only those qualified to practice locally are able to represent parties in court, to make submissions and to influence the development of domestic law. It might also have the effect of protecting

⁷⁷ One of the most notable exceptions is the London Commercial Court, where aside from its usual municipal jurisdiction, a significant proportion of its case load derives from the consent of the parties.

⁷⁸ *The Rise of the International Commercial Court: What is it and will it work?* at 216.

the local bar. However, these restrictions ought to apply with much less force, if at all, when a court hears disputes that are not connected to it save for the consent of the parties to refer disputes to the court. As such, in both the SICC and the DIFCC, parties may be represented by foreign lawyers who are registered with the respective courts.⁷⁹ The criteria for registration are generally much less stringent than the application for *ad hoc* admission in municipal courts. I pause here to note, on a related point, that in the SICC, questions of foreign law may be determined on the basis of submissions instead of proof.⁸⁰ Before permitting such an arrangement, the court must be satisfied that all parties are or will be represented by counsel who are competent to submit on the relevant questions of foreign law.⁸¹ This is similar to the model adopted in international arbitration, and might be justified, in part, by the fact that foreign judges and/or counsel are involved in the litigation.⁸²

- (c) The third difference is that in the SICC and the DIFCC, court processes are simplified and parties have increased autonomy in designing court procedures. For instance, there are simplified discovery rules based on the International Bar Association (“**IBA**”) rules. In the SICC, there is no process of “general discovery”. Instead, parties are to provide documents on which they rely within the time and in the manner ordered by the court. A party may also serve a request to produce on any person. This allows parties to avoid problems associated with discovery in modern litigation,

⁷⁹ For the SICC, see s 36P of the Legal Profession Act and para 26 of the SICC Practice Directions. For the DIFCC, see <http://difccourts.ae/registration-of-practitioners/>.

⁸⁰ O 110 r 25 of the Rules of Court.

⁸¹ O 110 r 25(2) of the Rules of Court.

⁸² *The Rise of the International Commercial Court: What is it and will it work?* at 216.

which – in and of itself – has made litigation unattractive for some commercial disputes.⁸³ Another example of flexibility in the SICC is the fact that parties may by consent agree that evidential rules other than those in Singapore’s Evidence Act shall be applicable.⁸⁴

3. *Brief Conclusions*

35. Therefore, while the SICC and the DIFCC are similar to municipal commercial courts, they do feature some important differences that are designed to enhance their abilities to handle international commercial disputes. However, municipal commercial courts can and should continue their important contributions to the international dispute resolution process. The fact that one of the parties is from the home jurisdiction of a municipal commercial court might not always be an impediment. During my visit to the London Commercial Courts in 2012, I realised that most of the cases there involved an international party and it seemingly did not matter that one of the parties shared the same nationality as the court.⁸⁵ This suggests that a trustworthy and competent commercial court, even if situated within the national judicial structure of one country, could remain highly attractive to foreign nationals.

⁸³ G T Pagone, “The Role of the Modern Commercial Court” (Supreme Court Commercial Law Conference) (12 November 2009) (“*The Role of the Modern Commercial Court*”) at 1.

⁸⁴ O 110 r 23(1) of the Rules of Court.

⁸⁵ *Developing an International Construction Court* at 347.

C. Comparing the SICC / DIFCC with arbitration: Similarities and Differences

36. I turn finally to compare the SICC and the DIFCC with international commercial arbitration.

1. Similarities between SICC / DIFCC and arbitration

37. Recognising the strengths of international commercial arbitration, both the SICC and the DIFCC were designed to incorporate some of its features. It is therefore not surprising that there are some broad similarities between the SICC, the DIFCC and arbitration. I have alluded to some of these earlier, for instance, jurisdiction founded on party consent, the availability of foreign representation, foreign law being received by submissions, the flexibility of procedures, and so on.

38. One characteristic of arbitration that bears special mention here is the relative neutrality of forum. As mentioned earlier, this is an important reason for the growth of international commercial arbitration.⁸⁶ Arbitrators are often from jurisdictions that are, or are perceived to be, neutral to the dispute at hand. The relative neutrality of forum avoided the need for parties to resolve disputes in a foreign land before judges who may be perceived to favour local parties. It also avoided the need to account for differences in laws and languages.⁸⁷

39. Where the SICC and the DIFCC hear cases that do not involve parties from Singapore and Dubai respectively, they offer the same virtue of neutrality that

⁸⁶ *The Rise of the International Commercial Court: What is it and will it work?* at 207.

⁸⁷ *The Rise of the International Commercial Court: What is it and will it work?* at 220.

international commercial arbitration does. Having said that, I reiterate the observation that over time this may not be a concern for a strong and well-regarded commercial court as the Commercial Court of London undoubtedly is and as its experience demonstrates.

2. Differences between SICC / DIFCC and arbitration

40. However, there are major differences between international commercial courts and arbitration. I will discuss four major categories of differences.

(i) Differences in coercive power and enforceability of outcomes

41. The first category of differences relates to the differences in coercive power and the enforceability of outcomes.

42. The SICC and the DIFCC hear international cases *qua* municipal courts exercising jurisdiction by the consent of parties. However, once the jurisdiction of the courts is attracted, they have the coercive power to join third parties to proceedings even if the third parties have not consented or submitted to the Court's jurisdiction.⁸⁸ The availability of joinder can overcome many of the problems that arise in arbitration because the jurisdiction of an arbitral tribunal is limited only to the parties to the arbitration agreement.⁸⁹ The difficulties caused by the absence of joinder are particularly evident where the "real"

⁸⁸ For the SICC, see O 110 r 9 of the Rules of Court. As noted in the Singapore International Commercial Court User Guides, "SICC User Guides Note 1 – Jurisdiction" at paras 6–10, online: http://www.sicc.gov.sg/documents/docs/SICC_User_Guide_1.pdf, this is a form of "compulsory jurisdiction". For DIFCC, see rule 20.7 of the Rules of the DIFC Courts.

⁸⁹ *Developing an International Construction Court*.

parties to the dispute might not be signatories to the arbitration agreement,⁹⁰ or where there are numerous strings of connected contracts as is often the case in construction disputes. The issue of multiple party arbitrations remains unresolved, despite efforts to revise institutional rules to make consolidation and joinder easier.⁹¹ As Chief Justice Michael Hwang noted in a recent speech, despite almost every construction contract or subcontract containing an arbitration clause, the UK Technology and Construction Court remains a sought-after forum because only a court has the power to consolidate or joint third parties without the consent of all parties concerned.⁹²

43. The courts' coercive power extends of course to the enforcement of judgments within Singapore and Dubai respectively, as well as in foreign jurisdictions where there are reciprocal enforcement arrangements⁹³ or where common law enforcement of judgment debts is possible. As judgments of the SICC and the DIFCC are equivalent to judgments of a national court, they can, in these scenarios, be enforced relatively easily, or even directly. Such enforcement could conceivably be even faster than the enforcement of arbitral awards under the New York Convention.⁹⁴

⁹⁰ Rajah & Tann LLP, "The Development of The Singapore International Commercial Court" (December 2013) at 3.

⁹¹ *Clayton Utz Lecture 2014*.

⁹² *Clayton Utz Lecture 2014*.

⁹³ In Singapore, there is the Reciprocal Enforcement of Commonwealth Judgments Act ("RECJA") and the Reciprocal Enforcement of Foreign Judgments Act ("REFJA"). The RECJA covers the UK, as well as several major jurisdictions in the region: Australia (New South Wales, Queensland, Victoria, etc), New Zealand, Malaysia, Brunei and India (except the states of Jammu and Kashmir). The REFJA covers Hong Kong SAR.

⁹⁴ *Clayton Utz Lecture 2014*.

44. Having said that, there can be little doubt that, at present, the international enforceability of arbitral awards outstrips that of court judgments. This is an issue to which I will return in greater detail later.

(ii) *Differences in approach towards achieving cost-efficiency in dispute resolution*

45. The second category of differences relates to differences in approach towards achieving cost-efficiency in dispute resolution.

46. Arbitration began as the economical and informal alternative to litigation. The process was attractive due in large part to its flexibility. Article 19 of the Model Law states that parties are free to agree on the procedure to be applied by the arbitral tribunal, and in the absence of such agreement the tribunal may conduct the proceedings in such manner as it considers appropriate. Even though the SICC and the DIFCC have more flexible procedures than their municipal counterparts, international commercial arbitration still has the potential to offer an even more flexible approach. The absence of appellate mechanisms in arbitration was also attractive as it promised to keep costs down and help parties to achieve finality more promptly.

47. However, while flexibility and the absence of appeal might have once been thought to be self-evidently desirable features, experience has shown that they do not always ensure a cost-efficient process. Today, courts in many jurisdictions provide dispute resolution services that are cheaper than that available in arbitration. Study after study has shown that the amount of time taken and the costs involved have come to be seen today as major

disadvantages of international arbitration.⁹⁵ How did this come to pass? One reason is that litigation practices might have infiltrated the arbitration industry, and the flexibility of arbitration has been used, somewhat ironically, to fashion highly litigious and legalistic proceedings.⁹⁶

48. Another reason is that over the years, the absence of appellate mechanisms in arbitration has paradoxically led to rising costs. On one hand, it has encouraged parties to approach the arbitral process as a “one shot” contest in which the winner takes it all. Parties pour extensive resources into the battle, exercising utmost effort and rigour because there is no second chance for a favourable outcome.⁹⁷ On the other hand, arbitrators may be anxious to avoid challenges on grounds, among others, of natural justice.⁹⁸ They might therefore countenance protracted proceedings giving rise to expenditure of time and costs that substantially exceed those incurred in litigation. There is certainly room to question the efficiency of such a process as compared to the traditional court mechanism where issues are crystallised and fine-tuned as the case passes through the interlocutory, trial and then appellate processes. It may also be noted that the arbitration industry is not subject to supra-national oversight

⁹⁵ See, for instance, Queen Mary, University of London and PricewaterhouseCoopers, “International Arbitration: Corporate Attitudes and Practices 2008”, (*International Arbitration: Corporate Attitudes and Practices 2008*) online: <http://www.pwc.co.uk/assets/pdf/pwc-international-arbitration-2008.pdf>; and 2013 International Arbitration Survey conducted by the School of International Arbitration at Queen Mary, University of London, “Corporate Choices in International Arbitration: Industry Perspectives” (2013) 7, online: <http://www.pwc.com/gx/en/arbitration-dispute-resolution/assets/pwc-international-arbitration-study.pdf>.

⁹⁶ *The Transnational Protection of Private Rights* at 9

⁹⁷ *Arbitration: The ‘New Litigation’*, citing an interview with David McLean, Managing Partner, New Jersey Office, Latham &Watkins LLP (7 October 2008).

⁹⁸ *Arbitration: The ‘New Litigation’*, citing an interview with David McLean, Managing Partner, New Jersey Office, Latham &Watkins LLP (7 October 2008).

or regulation, and practitioners may not readily be incentivised or driven to minimise costs or enhance the efficiency of the system.⁹⁹

49. In contrast, the SICC and the DIFCC seek to enhance the cost-efficiency of dispute resolution through court-based processes. Both courts are well-equipped specialist courts with access to the infrastructure of cutting-edge case management systems. Each case could be docketed, judicially managed and decided by specialists in the relevant areas of law. It is thus not unlikely that such courts could provide swifter and less expensive access to justice than arbitration. The availability of a single tier of appeal in both the SICC and the DIFCC also reduces the difficulties caused by the “one shot” nature of arbitration.¹⁰⁰

(iii) *Differences in approach towards ethical issues*

50. The third category of differences concerns differences in approach towards ethical issues.

51. It is a feature of arbitration that arbitrators and counsel are not infrequently drawn from the same pool of professionals, with minimal restrictions on practitioners switching between adjudicatory and advocacy roles. Any potential conflicts of interest are thought to be taken care of by the fact that parties generally have a significant degree of autonomy in selecting the tribunal.

⁹⁹ *The Rise of the International Commercial Court: What is it and will it work?* at 219.

¹⁰⁰ In the SICC, first instance decisions will generally be appealable to an appellate court, although the right to and scope of appeal can be excluded, limited, or varied by prior agreement of the parties. See para 139(3) of the SICC Practice Directions. In the DIFCC, appeals are governed by Part 44 of the Rules of the DIFC Courts 2014.

Arbitration is also usually conducted behind closed doors, affording parties an avenue for resolving their disputes privately. These features of arbitration can present some potential ethical pitfalls. Where it once worked well because the small group of practitioners was effectively self-regulated, that group has grown tremendously and the lack of consistency in practices and in understandings may take its toll on the legitimacy of international commercial arbitration.

52. Recognising these problems, the SICC and the DIFCC adopt a different approach towards ethical issues. I will touch on four aspects.

(a) First, there is a relatively constant panel of judges within the SICC and the DIFCC. The tribunal for each case is assigned by the respective courts as neutral parties.

(b) Second, the existence of such a panel of judges also helps to avoid the problems that arise from arbitrators and counsel being drawn from the same pool.

(c) Third, both the SICC and the DIFCC have introduced codes of conduct that will help to ensure a certain standard of ethical practice by lawyers who are registered with the respective courts.¹⁰¹ In Singapore, a foreign lawyer may only register to appear in SICC proceedings upon confirmation that he has read, understood and agrees to abide by the

¹⁰¹ In the SICC, foreign lawyers must abide by a code of ethics set out in the First Schedule of the Legal Profession (Foreign Representation in Singapore International Commercial Court) Rules 2014. In the DIFCC, there is a code of professional conduct that sets minimum ethical standards to which lawyers must adhere: see <http://difccourts.ae/code-of-conduct/>.

prescribed code of ethics.¹⁰² This will help to address the concerns relating to the lack of ethical consensus in arbitration.¹⁰³

(d) Fourth, both the SICC and the DIFCC envisage open court hearings and public judgments. While there has been a call for increased transparency in arbitration,¹⁰⁴ it seems likely that the ethos of conducting open court hearings and releasing public judgments will remain an important difference between international commercial courts and international commercial arbitration.

(iv) *Differences in development of jurisprudence*

53. I move to the final category of differences which relates to the development of jurisprudence.

54. International commercial arbitration has initiated the formation of a growing body of substantive rules and principles which arbitrators can draw upon in deciding disputes.¹⁰⁵ However, the quest for coherence in arbitral jurisprudence remains constrained by the confidential nature of arbitral proceedings as well as the absence of appeal and error-correction mechanisms. It has also been observed that the task of articulating a transnational law of commerce is

¹⁰² Legal Profession (Foreign Representation in Singapore International Commercial Court) Rules 2014, rr 5(2)(e) (full registration) and 6(2)(e) (restricted registration).

¹⁰³ *Some Cautionary Notes For An Age Of Opportunity* at paras 3–7.

¹⁰⁴ This is so particularly in the context of investor-State arbitration.

¹⁰⁵ *Transnational Commercial Law: Realities, Challenges and A Call for Meaningful Convergence* at para 29, citing Loukas MISTELIS, *Unidroit Principles Applied as “Most Appropriate Rules of Law” in a Swedish Arbitral Award*, *Uniform Law Review / Revue de droit uniforme*, vol. VIII (2003-3) 631. Indeed, international commercial arbitral tribunals increasingly refer to and rely on other awards as precedents in their decision-making processes. See Emmanuel Gaillard and John Savage, eds., *Fouchard, Gaillard, Goldman on International Commercial Arbitration*, (Kluwer Law International, 1999) at p 802.

currently “diversified”,¹⁰⁶ and that international commercial arbitrators often feel compelled to articulate legal principles in an indirect manner.¹⁰⁷ This seems inevitable because arbitrators do not decide cases within a unified structure designed to enable the development of the law as is the case with the courts. In these circumstances, if major and complex commercial cases are heard by arbitral tribunals rather than courts,¹⁰⁸ judicial precedents might become outdated,¹⁰⁹ and this might be an impediment to the development of a *lex mercatoria*.¹¹⁰

55. In contrast, international commercial courts are well placed to develop jurisprudence. I spoke about this earlier in the context of the SICCC, but the point applies equally to the DIFCC and other commercial courts as well. The availability of an appeal process will serve both error-correction and precedent-creation functions, thereby enhancing the legitimacy of the decisions rendered and ultimately the quality of justice.¹¹¹ Increased transparency may also facilitate the development of a body of jurisprudence.¹¹² A network of international commercial courts helmed by a community of renowned international commercial judges can emerge as a very significant platform for the development of a body of consistent jurisprudence.

¹⁰⁶ In *The Case For An International Commercial Court* at 11–12, the author notes that in the absence of a transnational legislator, the task of articulating transnational law is diversified in that it is sometimes taken up by the International Chamber of Commerce, or by states, or by international commercial arbitrators.

¹⁰⁷ *The Case For An International Commercial Court* at 12.

¹⁰⁸ Richard Mosk, “Trends in International Arbitration” (2011) 18 *Southwestern Journal of International Law* 103 at 107.

¹⁰⁹ *Judging In An International World* at 5.

¹¹⁰ It has been suggested that increased reliance by commercial parties on arbitration “could hinder the development of the law if court systems are routinely bypassed”. See *Judging In An International World* at 5.

¹¹¹ *The Rise of the International Commercial Court: What is it and will it work?* at 221.

¹¹² *Report of the Singapore International Commercial Court Committee* (November 2013) at para. 31.

3. *Brief Conclusions*

56. It is evident from the foregoing analysis that there are many differences between the SICC, the DIFCC and international commercial arbitration. Many of the differences were intentionally introduced in the SICC and the DIFCC to avoid some of the issues in international commercial arbitration. But this does not mean that international commercial courts are “superior” to international commercial arbitration. Ultimately, the preferred mode of dispute resolution depends very much on the needs of the parties. Some may prefer to have the option of joinder, while others may not have need for this. Some may seek judgments that are directly enforceable in particular jurisdictions, while others may prefer to have internationally enforceable awards. Some may prefer to have increased autonomy in appointing decision-makers and designing dispute resolution processes, while others may prefer to leave these to a neutral third party. Some may prefer to have their disputes ventilated behind closed doors, while others may prefer to do so in open court with public judgments to follow. Ultimately, I believe that the SICC, the DIFCC and international commercial arbitration constitute different but complementary tools in the dispute resolution toolbox. The availability of increased options in resolving disputes can only be beneficial to the international commercial community.

V. Challenges faced by international commercial courts

57. I have analysed the case for international commercial courts and how they weigh in against other dispute resolution mechanisms. There is certainly a strong case for these courts, but they will face several challenges as well. I briefly touch on three.

A. Challenges in international enforceability of judgments

58. The first and perhaps most pressing challenge relates to the international enforceability of court judgments. Court judgments at this time do not enjoy the same wide-ranging international enforceability as arbitral awards do. However, I think that this challenge may not be as insurmountable as it may appear at first blush, for three reasons.

- (a) First, whenever queried on the problem of enforcement, my instinctive response is that our issues on enforcement are not dissimilar to those faced by the London Commercial Court but this has not stopped users taking their disputes there. The point here is that it is not unlikely that parties will comply with judgments of an esteemed commercial court. In this regard, while the analogy is not perfect, it should be recognised that there is a high degree of party compliance with arbitral awards.¹¹³ According to a report by PricewaterhouseCoopers and the Queen Mary University of London, “[m]ost corporations are able to enforce arbitral

¹¹³ A survey conducted in 2008 by PricewaterhouseCoopers and the Queen Mary University of London found a “high degree” of party compliance with arbitral awards: see *International Arbitration: Corporate Attitudes and Practices 2008* at 2, 8 and 13.

awards within one year and usually recover more than 75% of the value”,¹¹⁴ and “[o]nce an award has been rendered, corporations reported high levels of compliance”.¹¹⁵ This high level of compliance is motivated, in many cases, by the need to preserve business relationships.¹¹⁶ Of course, the high level of compliance may well be due to the fact that parties are aware that arbitral awards will in all likelihood be enforced under the New York Convention in any case. But the London experience suggests that there is reason to believe that many commercial parties will voluntarily comply with the judgments of a reputable international commercial court.

(b) Second, there are several existing methods of enforcement that can be highly effective. Judgments can be enforced in jurisdictions where there are reciprocal enforcement provisions.¹¹⁷ Enforcement can also be achieved by commencing an action on the judgment against the losing party in any common law country.¹¹⁸ The merits of the original action will not be re-litigated. Instead, the action will be highly simplified, with limited defences, and summary judgment may be available as well.

(c) Third, on the horizon, there are two exciting prospects that promise to enhance the enforceability of court judgments.

(i) The first is the Hague Convention on Choice of Court Agreements (“**the Hague Convention**”), which aims to do for court judgments

¹¹⁴ *International Arbitration: Corporate Attitudes and Practices 2008* at 3.

¹¹⁵ *International Arbitration: Corporate Attitudes and Practices 2008* at 8.

¹¹⁶ *International Arbitration: Corporate Attitudes and Practices 2008* at 8.

¹¹⁷ See footnote 93 above.

¹¹⁸ This action is based on the common law cause of action of debt, with the judgment as evidence of that debt.

what the New York Convention has done for arbitral awards.¹¹⁹ It will be applicable in business-to-business contracts that contain choice of court clauses. Thus far, the European Union (“EU”), the United States and Mexico are signatories to the Hague Convention.¹²⁰ While only Mexico has ratified the Hague Convention to date, the Hague Convention will enter into force with the ratification of just one more state.¹²¹ On 4 and 5 December 2014, the Council of the EU adopted the decision on the approval of the Hague Convention. It is reported that “[w]ith this final step, the EU has completed the internal approval process for this Convention and is now in a position to deposit its instrument of approval with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, the depository of the Convention.”¹²² The Hague Convention is expected to enter into force three months after the EU’s deposit of the instrument of approval.¹²³ The EU’s ratification could lead to even more non-EU states becoming a party to the Hague Convention as well. The Hague Convention therefore holds the promise to be a game-changer in the international enforceability of court judgments. It is a development to be closely watched.

¹¹⁹ See “The Hague Convention of 30 June 2005 on Choice of Court Agreements – Outline of the Convention” (May 2013), online: <http://www.hcch.net/upload/outline37e.pdf>.

¹²⁰ Online: http://www.hcch.net/index_en.php?act=conventions.status&cid=98.

¹²¹ See Article 31(1) of the Convention, online: http://www.hcch.net/index_en.php?act=conventions.text&cid=98.

¹²² Online: http://www.hcch.net/index_en.php?act=events.details&year=2014&varevent=389.

¹²³ Online: http://www.hcch.net/index_en.php?act=events.details&year=2014&varevent=389.

(ii) The second is what Chief Justice Michael Hwang has called “an experiment without parallel in arbitration history”.¹²⁴ This is the DIFCC’s novel process of “converting” court judgments into arbitral awards. The mechanism functions as follows: parties who have elected to submit to the jurisdiction of the DIFCC will have the option to refer any dispute about the enforcement of a decision of the DIFCC to arbitration in the DIFCC-LCIA Arbitration Centre.¹²⁵ The DIFCC-LCIA tribunal will render an award which the winning party can seek to enforce under the New York Convention. We might have to wait for a “test case” to see how the mechanism might work, but it is certainly an interesting development and promises to enhance the international enforceability of judgments.

59. I am cautiously optimistic that once the world sees how legitimately and effectively international commercial courts are able to play a role in transnational justice, the obstacles to enforcement will be significantly diminished.

¹²⁴ *Clayton Utz Lecture 2014*.

¹²⁵ Michael Hwang, “The DIFC Courts Judgment-Arbitration Protocol – Referral of Judgment Payment Disputes to Arbitration” (19 November 2014), online: <http://difccourts.ae/wp-content/uploads/2014/12/DIFC-Courts-CJ-Lecture-Notes2.docx>; and see Julia-Djdon Cayre, “Converting DIFC Court judgments into DIFC-LCIA arbitration awards: A look at the DIFC Courts’ recent proposal for public consultation” (4 August 2014), online: <http://www.blplaw.com/expert-legal-insights/articles/converting-difc-court-judgments-difc-lcia-arbitration-awards-look-difc-courts-recent-proposal-public-consultation/>.

B. Challenges to coercive power of international commercial courts

60. The second challenge relates to the ability of an international commercial court to enforce its jurisdiction or orders against a party. A party may choose to breach an exclusive jurisdiction clause in favour of the court, and pursue matters in another forum. Even if the court has the power to issue an anti-suit injunction, such an injunction may not be effective in restraining the defaulting party. This is because the court will often hear matters that are unconnected from the physical jurisdiction within which it is sited. If the defaulting party disobeys the anti-suit injunction, there appears to be little in practice that the court can do if that party does not have assets within the jurisdiction.¹²⁶ Even if the court were to hold the defaulting party in contempt, this may be of little practical consequence.¹²⁷
61. Many of these difficulties would be overcome with the widespread adoption of the Hague Convention, given that Article 6 of the Hague Convention provides that a court of a Contracting State that is not chosen as the court to decide a particular dispute “shall suspend or dismiss proceedings” except under certain circumstances.¹²⁸ Until then, there is perhaps no easy solution to these

¹²⁶ *The Rise of the International Commercial Court: What is it and will it work?* at 227.

¹²⁷ *The Rise of the International Commercial Court: What is it and will it work?* at 227.

¹²⁸ Article 6 of the Hague Convention provides as follows:

Article 6
Obligations of a court not chosen

A court of a Contracting State other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies unless –

- a) the agreement is null and void under the law of the State of the chosen court;
- b) a party lacked the capacity to conclude the agreement under the law of the State of the court seised;
- c) giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised;

difficulties. However, I suspect that these difficulties will have less impact on courts situated within international financial centres or transportation hubs. If a party wishes to continue operating within or through these hubs, it would be practically inconvenient or even impossible for that party to avoid the contempt jurisdiction of these courts. The defaulting party would probably also suffer severe reputational damage from such a default. A strategically developed network of international commercial courts will further enhance the practical coercive power of these courts.

C. Challenges in dealing with questions of foreign law

62. The third challenge concerns the international commercial court's competence to deal with questions of foreign law by way of submissions instead of proof. There are two concerns here.
63. The first concern is that the members of the court might not actually be familiar with the law applicable to the dispute in question. While this concern is valid:
- (a) First, it must be remembered that parties have a choice of whether to submit their disputes to a particular international commercial court. In doing so, they would no doubt have been aware of the expertise of the judges in that court.
 - (b) Second, any concerns can be mitigated if safeguards are put in place to ensure that the question of foreign law is competently handled. For
-
- d) for exceptional reasons beyond the control of the parties, the agreement cannot reasonably be performed; or
 - e) the chosen court has decided not to hear the case.

instance, in the SICC, foreign law may only be received by submissions if the court is satisfied that all counsel are competent to submit on it.¹²⁹ The diversity of the adjudicatory panel that may be called on to decide such cases will also serve as a further safeguard.

- (c) Third, the fact that such courts deal specifically with commercial matters should lessen concerns about their competence to decide on issues of foreign law. While there are differences in commercial laws across jurisdictions, the principles undergirding such laws are often relatively similar. For instance, we see an increasing number of uniform standards in international commerce, such as Incoterms,¹³⁰ FIDIC forms,¹³¹ and the United Nations Convention on Contracts for the International Sale of Goods (“**CISG**”).¹³²
- (d) Fourth, parties in international businesses often enter into contracts governed by foreign law, and willingly submit their disputes to arbitrators who might not be experts in those laws.

All of these suggest that we should not be overly concerned about whether international commercial courts are competent to resolve commercial disputes that involve questions of foreign law.

¹²⁹ O 110 r 25(2) of the Rules of Court.

¹³⁰ “Incoterms” is short for “International Commercial Terms”. See International Chamber of Commerce, “The New Incoterms 2010 Rules”, online: <http://www.iccwbo.org>.

¹³¹ FIDIC is short for “*Fédération Internationale Des Ingénieurs-Conseils*”. FIDIC forms are published by the International Federation of Consulting Engineers, and are used in the construction industry. See “About FIDIC”, online: <http://fidic.org/node/13>.

¹³² The CISG attempts to bridge the gap between civil and common law systems, by creating a uniform law for the international sale of goods (preamble of the CISG). See, for instance, <http://www.singaporelaw.sg/sglaw/laws-of-singapore/commercial-law/chapter-10>.

64. The second concern is that the international commercial court's position on a particular point of law may be contradicted subsequently by the relevant municipal court. I suggest that this is not a major concern at all. Under the *status quo*, municipal courts are already called upon to make decisions on foreign law. The only difference is that they approach the question by way of evidence, rather than by submissions. The risk of any contradiction is therefore unavoidable even under prevailing practices. The *Dallah* cases provide a good example of this point, albeit in a different setting. The courts of England and France were separately called upon to decide whether the Pakistan government should be considered a party to an arbitration agreement.¹³³ The Supreme Court of England applied the *lex loci arbitri*, ie French law, and answered the question in the negative.¹³⁴ The *Cour d'Appel's* decision followed subsequently, applying French law to the same question, and reached the opposite conclusion.¹³⁵ As such, regardless of the precise methodology by which a court receives information on an issue of foreign law, there will always be a risk of its decision on that issue being contradicted subsequently by the relevant municipal court.

¹³³ See, eg, Jacopo Crivellaro, "Conflicting Contrasts in *Dallah v Government of Pakistan*" (2011) 17 Columbia Journal of European Law 51; and see Jacob Grierson & Mireille Taok, "*Dallah*: Conflicting Judgments from the U.K. Supreme Court and the Paris Cour d'Appel" (2011) 28(4) Journal of International Arbitration 407.

¹³⁴ *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763.

¹³⁵ *Gouvernement du Pakistan Ministere des Affaires Religieuses v Sociere Dallah Real Estate and Tourism Holding Company*, Cour d'Appel, Paris, 17 Feb 2011.

VI. Vision and mission for international commercial courts

65. Having explored the strengths and limitations of international commercial courts, I venture to propose some normative propositions on what the vision and mission of these courts might be.
66. I suggest that their *vision* should be to facilitate international commerce in a flattened world marked by an extremely high degree of economic interconnectedness. They should support international commerce by enforcing bargains and resolving disputes across national boundaries.¹³⁶
67. In order to achieve that vision, I suggest that these courts could consider four points as part of their *mission*:
- (a) First, they should aim to build a trustworthy, competent and commercially sensible system to resolve transnational commercial disputes. Amongst other things, international commercial courts ought to select their judges carefully. These judges should be patently independent of biases, and in particular, “blind to the nationality or domicile of a litigant”.¹³⁷ International commercial courts will also have to provide effective ethical regulation for all who practice under their auspices, so as to develop and promote an honourable profession to support the dispute resolution framework.
 - (b) Second, they should aim to function alongside arbitration and fill in a gap in the suite of transnational dispute resolution mechanisms. In this regard, both the SICC and the DIFCC are inspired, to some extent, by London’s

¹³⁶ A similar role was suggested for municipal commercial courts in *The Role of the Modern Commercial Court* at 3.

¹³⁷ *The Role of Specialist Commercial Courts* at 16, citing an observation by Canadian Justice James Farley at a World Bank sponsored Judicial Forum.

example of having room for both litigation and arbitration within a single legal hub.¹³⁸ International commercial courts can play their role best if they capitalise on their differences from international commercial arbitration. For instance, they might seek to be the faster and more economical alternative to arbitration, to promote publicly available and settled jurisprudence, and to focus on developing a coherent corpus of case law which might one day be looked upon as a source of *lex mercatoria*.¹³⁹

- (c) Third, they should aim to be responsive to the needs of the international commercial community.¹⁴⁰ They have a responsibility to support commerce in a timely fashion.¹⁴¹ As such, they should leverage on efficient and technologically advanced court processes to facilitate efficacious case disposal. They should also constantly explore and introduce cutting edge practices to optimise the economic and efficient resolution of transnational commercial disputes. After all, it has been said that the “efficiency or inefficiency of the courts has a bearing on the health or sickness of commerce”.¹⁴² They must continually and courageously push frontiers in managing international commercial disputes. They should also frequently consult with the community that they serve.

¹³⁸ Clayton Utz Lecture 2014.

¹³⁹ See *The Somewhat Uncommon Law of Commerce* at para 64 and *The Rise of the International Commercial Court: What is it and will it work?* at 220 and 221.

¹⁴⁰ *Developing an International Construction Court* at 347.

¹⁴¹ A similar responsibility was suggested in the context of municipal commercial courts in *The Role of the Modern Commercial Court* at 3.

¹⁴² This was a statement by Justice Dyson Heydon in the context of municipal commercial courts: see *AON Risk Services v ANU* (2009) 83 AJLR 951 at 981.

(d) Fourth, they should aim to develop deeper connections amongst commercial courts, and eventually develop a network of such courts. In this regard, collaborative and consultative approaches have proven to be very useful, even for municipal courts. For example, collaboration between national judges has taken place in the context of cross-border insolvency matters,¹⁴³ international family law,¹⁴⁴ and even in the territorially-bound area of intellectual property law.¹⁴⁵ It is also very useful to conduct regular knowledge-sharing sessions amongst commercial courts. One example of this is the judicial seminar on commercial litigation which involves the courts of New South Wales, Hong Kong, Singapore, Mumbai and Shanghai.¹⁴⁶ A collaborative approach amongst international commercial courts will enhance knowledge-sharing, the consistency of decisions, and possibly even the practical coercive powers of the courts. It will also provide a greater impetus to pursue the harmonisation of substantive commercial laws, practices and ethics.¹⁴⁷ It is therefore encouraging to see that courts are taking the lead in collaboration by

¹⁴³ In a 1994 insolvency matter taking place in both US and UK, the judges of each court established an informal protocol to appoint a respected international practitioner to report to both courts on what was happening in each jurisdiction: see *The Transnational Protection of Private Rights* at 25. See also *Judging In An International World* at 4, where the learned author notes that cross-border insolvency is “[a]n example of a field where there has been extensive dialogue (and no doubt more to come)”. There is, today, the UNCITRAL Model Law on Cross-Border Insolvency and the ALI Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases: see *The Transnational Protection of Private Rights* at 26.

¹⁴⁴ In the context of international family law, regular communications take place through an established judicial network. See *The Transnational Protection of Private Rights* at 26.

¹⁴⁵ In the context of intellectual property law, there has been occasion for judges of courts in different jurisdictions to discuss various aspects of a patent dispute with a view to reaching a common result, subject to the limitations of their national laws. See *The Transnational Protection of Private Rights* at 25.

¹⁴⁶ *The Transnational Protection of Private Rights* at 22.

¹⁴⁷ *The Somewhat Uncommon Law of Commerce* at paras 62 and 64.

entering into various memoranda of understanding and guidance.¹⁴⁸

These are all useful examples of inter-curial collaboration that can help to facilitate the conduct of transnational litigation.¹⁴⁹ With a network of commercial courts working together to develop an international *lex mercatoria*, law might eventually become part of the modern superstructure of global commerce.¹⁵⁰

VII. Conclusion

68. Amidst the cross waves of state sovereignty and globalisation, international commerce cannot remain bound by a mishmash of domestic and international law,¹⁵¹ practiced by a variety of oarsmen without a helmsman to steer and coordinate their efforts. This is a pressing problem, and while repairing the oars and training the oarsmen might help to some extent, we need to dream bigger and harness the global trade wind of harmonisation. International commercial courts such as the SICC and the DIFCC may serve as the sails that catch the trade wind and propel the vessel of global commerce forward.

¹⁴⁸ Some examples include memoranda of understanding on references of question of law and memoranda of guidance on the enforcement of judgments. Very recently, both memoranda were entered into between the Singapore Supreme Court and the DIFC Courts. The memoranda of understanding will help to assure commercial parties of the correct application of foreign law regardless of the jurisdiction in which they choose to resolve their dispute. The memoranda of guidance will help commercial parties to understand the enforcement of judgments in foreign jurisdictions. While these arrangements do not have legal force, they serve to clarify the process for enforcement and encourage mutual enforcement by clearly laying out procedures and requirements. Other similar arrangements have been made between the Singapore Supreme Court and the New South Wales Supreme Court, the Chief Justice of New South Wales and the Chief Judge of the State of New York, the DIFC Courts and the Commercial Court, Queen's Bench Division, England and Wales, the DIFC Courts and the Federal Court of Australia, the DIFC Courts and the New South Wales Supreme Court, the DIFC Courts and the High Court of Kenya (Commercial & Admiralty Division), etc.

¹⁴⁹ *The Somewhat Uncommon Law of Commerce* at para 62.

¹⁵⁰ *The Somewhat Uncommon Law of Commerce* at para 64.

¹⁵¹ *The Case For An International Commercial Court* at 8.

69. I look forward very much to riding the crest of the next wave with you. Thank you.

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