



An International Commercial Court for Australia -Looking beyond the New York Convention

*Remarks by the Honourable Chief Justice Marilyn Warren AC¹ and the
Honourable Justice Clyde Croft² at the Commercial CPD Seminar Series,
Melbourne*

13 April 2016

Introduction

It is commonly thought that we are now living in a unique period of internationalisation or globalisation.³ Never before has there been such accessibility to international air travel and communications, but this is, in itself, deceptive. In many respects we are, at least from a legal perspective, only now moving again to a period of internationalism. Internationalism declined during the 20th century for a variety of reasons, the exploration of which time does not permit. Nevertheless, an important factor seems to have been the rise of the nation state at the expense of former world empires or other transnational organisations. Global trading empires, such as the British Empire, provided coherent and co-ordinated legal systems throughout the world, together

¹ Chief Justice of Victoria.

² Judge in Charge of a Commercial List, the Arbitration List and the Taxation List in the Commercial Court of the Supreme Court of Victoria.

³ Cf earlier great internationalisation or globalisation events brought about as a result of technology, such as the invention of the electrical telegraph: see Tom Standage, *The Victorian Internet: The Remarkable Story of the Telegraph and the Nineteenth Century's On-Line Pioneers* (Walker Publishing Company, 1998).

with some consistent legislative models, enforceability of judgments and court process available between different parts of the Empire and, of course, appeals to one court, the Privy Council.⁴

The development of coherent systems of transnational law continued into the 20th century in this context. There were, for example, a variety of proposals for the federation of the British Empire and, in that context, it was proposed that there be established a court akin to the US Supreme Court to resolve constitutional and other matters or, perhaps more broadly, a similarly reconstituted House of Lords.⁵ This transnational or international thinking had its origins in the 18th century, but it seems that as the commercial dominance and power of England rose throughout the 19th century, the readiness of the common law to accept settled rules of international law declined. So, in the latter part of the 18th century, “if English law was silent, it was the opinion of both Lord Mansfield and Blackstone that a settled rule of international law must be considered to be part of English law, and enforced as such”.⁶ By the latter part of the 19th century, however, a threshold question had been interposed—namely “whether the particular rule of international law has been received into, and so become a source of, English law”.⁷

As the power and significance of the nation state grew, so we moved into our legal silos—with apologies to more 21st century terminology—and away from the free flow of commerce and the law merchant with its transnational mercantile courts, which were so active in the middle ages. Consequently, it became necessary to explore new ways of providing support for world trade—

⁴ See Frank Safford and George Wheeler, *Privy Council Practice* (Sweet & Maxwell, 1901).

⁵ See, eg, Seymour Ching-Yuan Cheng, *Schemes for the Federation of the British Empire* (Columbia University Press, 1931) 72, 112.

⁶ Sir William S Holdsworth, “The Relation of English Law to International Law”, in AL Goodhart and HG Hanbury (eds) *Essays in Law and History* (Clarendon Press, 1946) 260, 261.

⁷ Sir William S Holdsworth, “The Relation of English Law to International Law”, in AL Goodhart and HG Hanbury (eds) *Essays in Law and History* (Clarendon Press, 1946) 267.

with transnational legislation and transnational dispute resolution.⁸ This process led to the development of one of the most important pieces of international “legislation”, namely, the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*—generally known in this context as the New York Convention—of 1958.

The ready enforcement of arbitral awards internationally had, by the 1950s, become critical as the then rapid rise of nation states, particularly given the post Second World War independence movements, posed significant problems for the enforcement of court judgments internationally—problems that were not solved by international conventions or domestic legislation.⁹ Neither could produce the universality of enforceability of determinative decisions, by way of court judgments, as was achieved by the New York Convention with respect to arbitral awards. Additionally, the enforceability of a court judgment obviously follows determination of the matter by a national court. As one party’s national court in an international dispute is not generally going to be neutral from the point of view of the other party, it is unlikely to be an attractive venue—no matter how good the quality of the particular national court. There are, however, some exceptions, such as the English Commercial Court, the reasons for which are explored further in this paper.

⁸ In the present context this includes the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959) (“the New York Convention”), the *UNCITRAL Model Law on International Commercial Arbitration* (As adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006) (“the Model Law”), and in terms of more substantive law, the *United Nations Convention on Contracts for the International Sale of Goods*, adopted 11 April 1980, 1489 UNTS 59 (entered into force 1 January 1988) (“the CISG”). The CISG is applied in Victoria by the *Sale of Goods (Vienna Convention) Act 1987*.

⁹ See, eg, the *Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters* (concluded 1 February 1971; entered into force 20 August 1979) (“the Hague Convention”); and, in terms of domestic legislation, see, eg, *Foreign Judgments Act 1991* (Cth).

Consequently, to date, international arbitration, with neutral arbitrators selected by the parties or an impartial international arbitral institution and seated in a neutral forum, has proved much more attractive than litigation in the courts.¹⁰ These issues would only have become more pressing but for the conclusion and success of the New York Convention as globalisation and privatisation produced a plethora of parties to international transactions and consequent disputes and litigation.¹¹

Without in any way denigrating or detracting from the process and success of international commercial arbitration, a variety of factors—to which we will turn shortly—indicate a desire by international commercial parties to have the option of access to, what may generally be described as, an international commercial court or courts. Moreover, the developing architecture of international “legislation” marks this as a propitious time for the development of international commercial courts. As will be discussed, this is also an ideal time for Australia to establish an international commercial court.

Existing International Legislative Architecture

Before considering existing international commercial court models, it is helpful to provide two brief examples of transnational legislation which form an important part of the international legislative architecture to which reference has been made. As will become apparent, the success of the New York Convention in particular serves to emphasise the need for simple “single tiered” structures which do not involve anything in the nature of double *exequatur* or “localisation”.

¹⁰ References to the “seat” of an arbitration are to “Juridical Seat”, which has consequences in terms of the *lex arbitri* and court “supervision”. See article 20 of the Model Law.

¹¹ See Robert Briner, “Philosophy and Objectives of the Convention” in *Enforcing Arbitration Awards under the New York Convention—Experience and Prospects* (United Nations, 1999) 9, 10.

Moreover, the recent coming into force of the Hague *Convention on Choice of Court Agreements* (“the Choice of Court Convention”)¹² has the potential to revolutionise international dispute resolution on a scale equivalent to the New York Convention.

a) *The New York Convention*

The New York Convention has been described as “the single most important pillar on which the edifice of international arbitration rests”¹³ and also as a Convention which “perhaps could lay claim to be the most effective instance of international legislation in the entire history of commercial law”.¹⁴ The outstanding success of the New York Convention is demonstrated very clearly by the fact that the network of convention countries has grown to 144 during the 58 years since its birth.¹⁵ The application of the New York Convention and its provisions for the enforcement of foreign arbitration agreements and the recognition and enforcement of foreign arbitral awards is regulated in Australia by Part II of the *International Arbitration Act 1974* (Cth).

The New York Convention greatly simplified and expedited the recognition and enforcement process established by the Geneva Convention because it eliminated the double *exequatur* problem that had existed since 1927.¹⁶ More particularly, this difficulty, which arose under the Geneva

¹² *Convention on Choice of Court Agreements* (concluded 30 June 2005, entered into force 1 October 2015).

¹³ J Gillis Wetter, “The Present Status of the International Court of Arbitration of the ICC: an Appraisal” (1990) 1 *American Review of International Arbitration* 91.

¹⁴ Lord Michael Mustill, “Arbitration: History and Background” (1989) 6(2) *Journal of International Arbitration* 43. See also Stephen Schwebel, “A celebration of the United Nations New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards” (1996) 12 *Arbitration International* 823; Redfern and Hunter, *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell, 4th ed, 2004) 441.

¹⁵ Information as to the extent of the application of the New York Convention is available from the UNCITRAL website at <www.uncitral.org>.

¹⁶ *The Convention on the Execution of Foreign Arbitral Awards* (concluded 26 September 1927, entered into force 25 July 1929) 92 UNTS 10 (“the Geneva Convention”), which followed on from the *Protocol on Arbitration Clauses* (concluded 24 September 1923, entered into force 28 July 1924).

Convention, arose because, in relation to recognition and enforcement, it was necessary, in effect, to demonstrate that an arbitral award which was sought to be enforced outside the country of its origin had become final in the country where it was made. This was known as the problem of double *exequatur*—because it meant that international arbitral awards, far from being rendered as something in the nature of international instruments, were fundamentally dependent upon the arbitration laws in the country of their origin, regardless of any international consensus or views in the country in which enforcement may have been sought. The need to “delocalise” these measures increased as a result of the expansion of international trade after the conclusion of the Second World War. The New York Convention, in eliminating this double *exequatur* problem, thereby “delocalised” and institutionalised international arbitral awards so that they became “international currency” to be considered and assessed in the courts of a country or countries of enforcement, rather than the instruments the validity and effectiveness of which was always to be determined in a critical respect by the laws and courts of the country of their origin, namely the seat of the arbitration.

The process of “enlightenment” or the “Eureka moment” that occurred in the development of the New York Convention in this critical respect is described in a paper given by Pieter Sanders presented at “New York Convention Day” which was held at the United Nations Headquarters on 10 June 1998 to celebrate the fortieth anniversary of the New York Convention. It should be noted that Pieter Sanders was described as “the principal architect of the New York Convention” when delegates at the Eleventh IBA International Arbitration Day, held on 1 February 2008 at New York to commemorate the fiftieth anniversary of the New York Convention, viewed the premier

screening of “Pieter Sanders at 95—Reflections on the New York Convention”. In any event, Pieter Sanders recalled, in 1998:¹⁷

My review of the Convention’s history will deal in particular with what, during the Conference, was called the “Dutch proposal”. It was conceived during the first weekend of the Conference. I spent that week-end at the house of my father-in-law in a suburb of New York. I can still see myself sitting in the garden with my small portable type-writer on my knees. It was there, sitting in the sun, that the “Dutch proposal” was conceived. Upon return to New York on Monday, 26 May, this draft was presented to the Conference.

At the meeting of Tuesday, 27 May, this proposal was welcomed by many of the delegates. The meeting decided that the Dutch proposal would be the basis for further discussions. I will not go into details of these discussions and the amendments made. I will only mention that the Conference, initially, preferred not to deal in the Convention with the arbitration agreement, as the Dutch proposal did. Preference was first given to a separate Protocol, as we knew from the Geneva Protocol on Arbitration Clauses (Geneva, 1923) (the 1923 Geneva Protocol). Nevertheless, at a very late stage of the Conference, a provision on the arbitration agreement was inserted in the Convention, the present article II.

Was the Dutch proposal really, as Professor Matteucci called it, “a very bold innovation”? At the time, I regarded that as rather a logical follow-up of the Geneva

¹⁷ Pieter Sanders, “The Making of the Convention” in *Enforcing Arbitration Awards under the New York Convention: Experience and Prospects* (United Nations, 1999) 3, 3–4.

Convention on the Execution of Foreign Arbitral Awards (Geneva, 1927) (the 1927 Geneva Convention), taking into account the experience gained since then in the increased use of arbitration for solution of international business disputes.

The main elements of the “Dutch proposal” were, first of all, the elimination of the double *exequatur*, one in the country where the award was made and another one in the country of enforcement of the award. Under the 1927 Geneva Convention we always requested both. It is logical to require an *exequatur* only in the country where enforcement of the award is sought and not also in the country where the award was made, but no enforcement is sought. Another element of the proposal was to restrict the grounds for refusal of recognition and enforcement as much as possible and to switch the burden of proof of the existence of one or more of these grounds to the party against whom the enforcement was sought. This again stands to reason.

However, nothing is perfect in this world. After 40 years of practice with the Convention its text could certainly be improved. For example, one could consider the introduction of uniform rules for the procedure of enforcement. In this respect, the Convention only contains the requirement that the award and arbitration agreement shall be supplied to the court (article IV) and that no more onerous conditions or higher fees should be imposed than when enforcement of a domestic award is sought (article III).

The Convention provides for two possible reservations: the first that the Convention applies only on the basis of reciprocity and the second that it will apply only to disputes which are considered

to be commercial under the national law of the state relying upon this reservation.¹⁸ A significant proportion of states have relied upon the reciprocity reservation which has the effect of limiting the application of the New York Convention to arbitral awards within the jurisdiction of another convention state only, and not arbitral awards regardless of whether they are made within the jurisdiction of a convention state.¹⁹

b) *The Hague Choice of Court Convention*

The most recent addition to the international legislative architecture directed towards international commercial dispute resolution is the Hague the Choice of Court Convention. The Convention of 30 June 2005, which came into force on 1 October 2015, aims at ensuring the effectiveness of choice of court agreements—also known as “forum selection clauses” or “jurisdiction clauses”—between parties to international commercial transactions.

Parties to international commercial transactions often seek to agree in advance on how disputes arising out of the transaction between them will be resolved. Well advised parties realise that this is desirable, if not essential, in order to manage the risk associated with disputes that may arise in the future. For reasons already discussed, parties have tended to refer disputes which may arise to arbitration, thereby seeking to take advantage of the international enforcement mechanisms of the New York Convention. In some cases, parties will agree to litigate before a designated court but, as already discussed, this is less likely where the potential court is a national court of one of the parties.

¹⁸ See Article I(3).

¹⁹ Approximately 45% of ‘Convention’ states have applied the “reciprocity” reservation and approximately 30% the “commercial” reservation. Australia has not applied either reservation.

Moreover, choice of court agreements have not always been respected under divergent national rules, particularly when cases are brought before a court other than one designated by the parties. This is a position sought to be rectified by the Choice of Court Convention, with a view to promoting greater legal certainty for cross border business and creating a climate more favourable to international trade and investment. The Convention contains “three basic rules” to give effect to choice of court agreements:²⁰

- (1) The chosen court must in principle hear the case (art 5)
- (2) Any court not chosen must in principle decline to hear the case (art 6)
- (3) Any judgment rendered by the chosen court must be recognised and enforced in other Contracting States, except where a ground for refusal applies (arts 8 and 9).

The Convention applies in international cases to exclusive choice of court agreements “concluded in civil or commercial matters” (art 1). The Convention does not apply to exclusive choice of court agreements to consumer and employment contracts and to a number of other specified matters, including wills and succession, insolvency, composition and analogous matters and the carriage of passengers and goods (art 2). These exclusions generally reflect the existence of more specific international instruments and national, regional or international rules which provide for exclusive jurisdiction for some of these matters.

The Convention applies to “exclusive” choice of court agreements” (art 1). Article 3 provides that for the purposes of the Convention an “exclusive choice of court agreement” means an agreement concluded by two or more parties that meets the requirements specified in paragraph (c) of art 3

²⁰ Hague Conference on Private International Law, *The Hague Convention of 30 June 2005 on Choice of Court Agreements—Outline of the Convention* (HCCH, 2013).

and designates, for the purpose of deciding disputes which may have arisen or may arise in connection with a particular legal relationship, the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts. The formalities for such an agreement, as specified in art 3(c) are that the agreement must be concluded or documented in writing or by any other means of communication which renders information accessible so as to be useable for subsequent reference. In other words, the Convention well accommodates the digital age. Additionally, a Contracting State may declare that it will recognise and enforce judgments given by courts designated in a non-exclusive choice of court agreement (art 22).

Also of particular importance are arts 6 and 9. Article 6 makes provision for the obligations of a court which has not been chosen by the parties in their agreement:

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;

- 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.

Article 9 of the Convention makes provision for the refusal of recognition or enforcement, but in very limited terms, terms which are reminiscent of the limited grounds for refusal of enforcement of foreign arbitral awards under the New York Convention. It will be seen that one of the grounds for refusal of the recognition is manifest incompatibility with “public policy” of the State in which enforcement is sought. The “public policy” exception has been a vexed issue with respect to enforcement under the New York Convention.²¹ It would be expected that a similarly restrictive interpretation of the expression “public policy” under art 9 of the Choice of Court Convention would be adopted. The provisions of art 9 are as follows:

Article 9

Refusal of recognition or enforcement

Recognition or enforcement may be refused if—

- a)* the agreement was null and void under the law of the State of the chosen court, unless the chosen court has determined that the agreement is valid;
- b)* a party lacked the capacity to conclude the agreement under the law of the requested State;
- c)* the document which instituted the proceedings or an equivalent document, including the essential elements of the claim,

²¹ See *Indian Farmers Fertiliser Cooperative Ltd v Gutnick* [2015] VSC 770 and, on appeal, *Gutnick v Indian Farmers Fertiliser Cooperative Ltd* [2016] VSCA 5.

- i.* was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant entered an appearance and presented his case without contesting notification in the court of origin, provided that the law of the State of origin permitted notification to be contested; or
 - ii.* was notified to the defendant in the requested State in a manner that is incompatible with fundamental principles of the requested State concerning service of documents;
- d)* the judgment was obtained by fraud in connection with a matter of procedure;
- e)* recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State;
- f)* the judgment is inconsistent with a judgment given in the requested State in a dispute between the same parties; or
- g)* the judgment is inconsistent with an earlier judgment given in another State between the same parties on the same cause of action, provided that the earlier judgment fulfils the conditions necessary for its recognition in the requested State.

Finally, it is also important to observe that the provisions of art 3(b) provide that a choice of court agreement which designates the courts of one Contracting State or one or more specific courts of one Contracting State are deemed to be exclusive unless the parties have expressly provided otherwise.

To date, the European Union, the United States, and Singapore have signed the Convention. Australia is yet to become a signatory; however, just last month, the Convention was tabled in the Federal Parliament along with a detailed National Interest Analysis.²² The National Interest Analysis states:²³

Accession to the Convention is in Australia's national interest. Implementing the Convention will provide greater clarity and certainty for Australian businesses in the resolution of disputes arising from international transactions. Furthermore, accession to the Convention by Australia will facilitate party autonomy in civil and commercial contracts, making the process of determining jurisdiction more transparent and predictable.

The National Interest Analysis goes on to set out the proposed implementation of the Convention in Australia and states:²⁴

[21] It is proposed that the Convention will be implemented domestically through a new International Civil Law Act. This Act will also implement the *Hague Principles on Choice of Law in International Commercial Contracts* approved by the Hague Conference on Private International Law on 19 March 2015 ("Principles"). The Principles consist of 12 articles designed to clarify the operation of contracts with cross-border elements in international commercial

²² National Interest Analysis on Australia's Accession to the Convention on Choice of Court Agreements [2016] ATNIA 7

²³ National Interest Analysis on Australia's Accession to the Convention on Choice of Court Agreements [2016] ATNIA 7 [6]

²⁴ National Interest Analysis on Australia's Accession to the Convention on Choice of Court Agreements [2016] ATNIA 7 [21]–[24].

law. They establish the basic rule that international commercial contracts are to be governed by the law chosen by the parties, subject to certain limitations. The Principles are a guide to best practice with respect to the recognition of party autonomy in choice of law in international commercial contracts. They are neither binding in international law, nor a model law, but are designed to be incorporated into State law in the manner most appropriate to each State, so as to develop and harmonise State laws.

- [22] The Convention and the Principles are well suited to implementation via a single Act, which will provide clear, consistent and accessible Australian private international law rules and principles to litigants in Australia and abroad.
- [23] For international proceedings, the treatment of exclusive choice of court agreements is currently governed by the common law, and the Trans-Tasman Proceedings Act for Trans-Tasman litigation. Exclusive choice of court agreements are generally regarded as enforceable in Australia, subject to certain limitations relating to the validity of the agreement and public policy considerations.
- [24] The proposed International Civil Law Act will codify the common law relating to choice of court agreements, clarify areas of uncertainty, and broaden the range of situations in which choice of court agreements will be given effect by Australian courts, consistent with Convention obligations. It

will also set out the circumstances in which the recognition and enforcement of foreign judgments can occur in Australia. In accordance with the provisions of the Convention, the new Act will limit the possible grounds for refusing to give effect to an exclusive choice of court agreement.

It is, of course, early days for the development of the Choice of Court Convention, and it remains to be seen whether it will replicate the success of the New York Convention in providing a global web of enforceability for the judgments of courts of Contracting States the same way as the New York Convention has achieved for arbitral awards. There are, however, reasons for thinking that commercial parties will see the need for such global coverage and that States, including Australia, will respond accordingly. Of particular note in the present context, the Choice of Court Convention also has the potential to help further facilitate the effectiveness and attractiveness of international commercial courts, as well as helping drive the establishment of such courts.

International Commercial Courts

There are presently five prime examples of courts which have been described as “international commercial courts”. They are the relatively newly established Singapore International Commercial Court (“SICC”),²⁵ the London Commercial Court,²⁶ the Qatar International Court (“QIC”),²⁷ and the courts of the Dubai International Financial Centre (“DIFC”)²⁸ and the Abu Dhabi Global

²⁵ See <www.sicc.gov.sg>.

²⁶ See <www.judiciary.gov.uk/you-and-the-judiciary/going-to-court/high-court/queens-bench-division/courts-of-the-queens-bench-division/commercial-court/>.

²⁷ See <www.qicdrc.com.qa>. The QIC was formerly known as the Civil and Commercial Court of the Qatar Financial Centre.

²⁸ See <<http://difccourts.ae/>>.

Market (“ADGM”).²⁹ The London Commercial Court has a long lineage which is readily traceable to the work of Lord Mansfield who, as Chief Justice of the Court of Kings Bench, drew on the expertise of special commercial juries for the purpose of informing the Court in deciding commercial cases.³⁰ When one looks at these courts, it is readily seen that, beyond the common feature that they hear disputes involving international parties, they provide examples of the variety of international commercial court models.

Each of these courts are municipal courts in that they are established under the legislation of the States in which they are situated, with jurisdiction to hear international cases. They commonly deal with international commercial matters, sometimes including matters where more than one party is foreign to the State within which the court is based. It is therefore imperative that these courts are attuned to the needs and realities of international commerce and in the course of their work set standards for resolving international disputes. Before considering these existing international commercial court models further though, it is necessary to say something about the developing need for an alternative to international commercial arbitration.

a) *An Alternative to International Commercial Arbitration*

Despite the undeniable success of international commercial arbitration—success which is attributable in no small part to the widespread adoption and implementation of the New York Convention and the Model Law—there is a growing recognition of a need for an alternative to arbitration for international disputing parties. In the Opening Lecture for the DIFC Courts Lecture Series 2015, the Chief Justice of Singapore, Chief Justice Sundaresh Menon, attributed the

²⁹ See <<http://adgm.com/doing-business/adgm-courts/about-us/>>.

³⁰ See Lord Chief Justice John Thomas, “Commercial Justice in the Global Village: the Role of Commercial Courts” (Paper delivered for the DIFC Academy of Law Lecture, Dubai, 1 February 2016) [41]–[43].

preference of some commercial parties for litigation over arbitration to a variety of push and pull factors. As Menon CJ put it:³¹

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. 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; a lack of visibility and public accountability in decision making; increasing judicialisation and laboriousness in process resulting in delay accompanied by rising costs; some unpredictability in the enforcement of arbitral awards due to the ad hoc nature of courts' oversight of the enforcement process; and some lack of consistency in arbitral decisions due to the lack of corrective appellate mechanisms or an open body of jurisprudence. ...

The Chief Justice went on to address what, in our view, forms the crux of the need for an alternative to arbitration, observing that—³²

14. ... 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,

³¹ Chief Justice Sundaresh Menon, “International Commercial Courts: Towards a Transnational System of Dispute Resolution” (Opening Lecture for the DIFC Courts Lecture Series 2015, Dubai, 2015) [12]–[13] (citations omitted).

³² Chief Justice Sundaresh Menon, “International Commercial Courts: Towards a Transnational System of Dispute Resolution” (Opening Lecture for the DIFC Courts Lecture Series 2015, Dubai, 2015) [14]–[15].

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 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.

Similar sentiments have been expressed by the Chief Justice of the High Court of Australia, Chief Justice Robert French, who has questioned the capacity for arbitration to contribute to the “development and international convergence of commercial law.”³³

Recognition of the inherently different conceptual bases of arbitration and litigation also helps demonstrate why the establishment of international commercial courts does not pose an existential threat to the practice of international commercial arbitration. This is because international commercial courts are not a replacement for arbitration, but rather they add to the range of options available to parties involved in international commerce. Indeed, Menon CJ gives the example of the London Commercial Court, which has operated “alongside a vibrant arbitration market” for

³³ Chief Justice Robert French AC, “Transnational Dispute Resolution” (Supreme and Federal Court Judges’ Conference, Brisbane 2016) [14]–[15].

many years.³⁴ Space does not permit a more comprehensive consideration of the differences between arbitration and litigation, but it is clear that commercial parties will welcome the greater choice.³⁵

b) *The London Commercial Court—Building on a History of Innovation*

The London Commercial Court is a division of the Queen’s Bench and has a long history dating back to its establishment in 1895. Although the Court is, in essence, a municipal court and not a court newly and specially established to deal with international disputes—unlike the SICC and the DIFC courts for example—it does attract an enormous amount of international commercial litigation, including in circumstances where neither the parties nor the subject matter of the disputes have any real or significant connection with the United Kingdom. As indicated previously, international dispute resolution in municipal courts, particularly the courts of the country of nationality of one of the international transactional parties, is generally thought to be unattractive, both for the reasons of lack of a “neutral” forum and difficulties in enforceability of judgments. Nevertheless, the London Commercial Court, based as it is in one of the world’s preeminent financial centres, has through its long history of excellence in its work in the hands of judges of impeccable ability and impartiality, attracted this international position.

Consequently, the position of the London Commercial Court might be regarded in this context as unique. So, apart from the clear message with respect to the establishment of any international

³⁴ Chief Justice Sundaresh Menon, “International Commercial Courts: Towards a Transnational System of Dispute Resolution” (Opening Lecture for the DIFC Courts Lecture Series 2015, Dubai, 2015) [10].

³⁵ For a comprehensive discussion of the differences between international commercial arbitration and litigation in an international commercial court, see especially Chief Justice Sundaresh Menon, “International Commercial Courts: Towards a Transnational System of Dispute Resolution” (Opening Lecture for the DIFC Courts Lecture Series 2015, Dubai, 2015) [37]–[56].

commercial court—that is, the requirement of judges of impeccability and impartiality—the more immediate issues which need to be addressed in Australia are better illustrated by looking to other international commercial court models. Nevertheless, the English experience does highlight the importance of, and the capacity for, international commercial courts to keep abreast with innovation in the world of commerce. This was particularly well illustrated by Lord Chief Justice Thomas in his Lordship’s lecture to the DIFC Academy of Law in Dubai in February 2016:³⁶

41. ... [A] court must understand the markets and the commercial world. The London Commercial Court has developed and adapted its links with the financial and business community. The aim of those links is to ensure that the judiciary remained abreast of changes in the market. London has a historic advantage. In the 18th Century Lord Mansfield, the creator of the basis of modern English commercial and insurance law, often used special juries drawn from experts in the field: being, for instance, commercial merchants, insurance brokers, traders and so on. Their expertise would be practical expertise. In *Lewis v Rucker* from 1794, for instance, Lord Mansfield drew on the expertise of a special jury to enable him to fashion principles of insurance law. As he explained it, the jury:³⁷

understood the question very well, and knew more about the subject of it than any body else present; and formed their judgment from their own notions and experience, without much assistance from anything that passed.

³⁶ See Lord Chief Justice John Thomas, “Commercial Justice in the Global Village: the Role of Commercial Courts” (Paper delivered for the DIFC Academy of Law Lecture, Dubai, 1 February 2016) [41]–[44].

³⁷ (1761) 2 Burrow 1167.

42. That experience helped form the principles which he then went on to articulate in his judgments. In these, and other ways, Lord Mansfield ensured that the courts, and their search for principle, were not divorced from practice and thus the law was moulded to underpin the rapid growth of the UK as a trading state. It was also his common practice to invite his “jurymen” to dinner, in order to discuss mercantile principles and customs so that he was as up to date as possible. I am afraid to say that even if it were still thought appropriate for judges to invite jurors to dinner, the idea that a modern Chief Justice would be able to invest the same amount of time as Lord Mansfield did in this way is one that bears little scrutiny.
43. The courts in London may no longer have special juries or leisurely dinners, but the London Commercial Court and the Financial List must keep properly abreast with rapidly changing market developments. This is now done through the provision of market seminars by an independent body originally established by the Bank of England, the Financial Markets Law Committee.³⁸ It ensures that senior members of the judiciary, and particularly the judges of the Commercial Court and the Financial List, are provided with regular and well-informed updates on changing market practices and the development of new financial products. In addition, to ensure that the Financial List remains relevant to court users and that change is demand-motivated, but judge led, a Financial List Users Committee has been established. Akin to the Commercial Court Users Committee, it is intended to have a broad membership drawn from

³⁸ See <<http://www.fmlc.org/>>.

representatives of legal and market associations, as well as Financial List judges.

44. The creation of the Financial List User Committee is a demonstration of a commitment to court users in the widest sense. In an interconnected world it has long seemed to me that London needed to develop a similar forum for debate at the international level. The London Commercial Court and the Financial List are international in their focus. 80% of work before the London Commercial Court has, at least, one party who is based outside the jurisdiction. Singapore and the DIFC Courts of Dubai, amongst others, are equally outward looking. Business and markets require us to be so. In truth all our Commercial Courts are international dispute resolution centres underneath their individual differences.

The message then, is clear—successful international commercial courts must be inherently outwards looking, and adapt their processes to the changing needs and expectations of the international market. In furtherance of this goal, Chief Justice Menon and Lord Chief Justice Thomas have separately indicated their support for the creation of a network or forum of commercial courts which would encourage collaboration between courts and aid the development of best dispute resolution practice.³⁹ As Lord Chief Justice Thomas puts it—expressing sentiments with which we wholeheartedly agree:⁴⁰

³⁹ Chief Justice Sundaresh Menon, “International Commercial Courts: Towards a Transnational System of Dispute Resolution” (Opening Lecture for the DIFC Courts Lecture Series 2015, Dubai, 2015) [67(d)]; Lord Chief Justice John Thomas, “Commercial Justice in the Global Village: the Role of Commercial Courts” (Paper delivered for the DIFC Academy of Law Lecture, Dubai, 1 February 2016) [47]–[51].

⁴⁰ Lord Chief Justice John Thomas, “Commercial Justice in the Global Village: the Role of Commercial Courts” (Paper delivered for the DIFC Academy of Law Lecture, Dubai, 1 February 2016) [47].

In our interconnected world, our global village, the judges of the Commercial Courts have a ... role in ensuring our global prosperity continues to be underpinned by an effective legal framework and by law which develops in harmony with the rapidly changing markets and commerce brought about by the digital revolution. The Commercial Courts of the world are not unconnected islands, but have a common duty working together to innovate and to lead.

c) Other International Models

Returning to Menon CJ's illuminating paper delivered at the DIFC Courts Lecture Series 2015, the Chief Justice observed that the SICC and the DIFC Courts share some fundamental similarities, many of which have already been mentioned. The Chief Justice then turned to focus on the different underlying motivations and ideologies of the two courts:⁴¹

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.⁴² It seeks to provide a “platform for business and financial institutions to reach into and out of the emerging markets of the region”. It is conceived of as an independent zone specially created for the specific purpose of supporting a financial market for multi-national companies.⁴³ The idea is that a capital market could be created

⁴¹ Chief Justice Sundaresh Menon, “International Commercial Courts: Towards a Transnational System of Dispute Resolution” (Opening Lecture for the DIFC Courts Lecture Series 2015, Dubai, 2015) [19]–[21] (citations omitted).

⁴² 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.”

⁴³ Denise Huiwen Wong, “The Rise of the International Commercial Court: What is it and will it Work?” (2014) 33 *Civil Justice Quarterly* 205, 208.

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.⁴⁴ To this end, the DIFCC is a common law court that applies either the law governing the contract in question, or the DIFC's common law system, which is "based substantially on English law in codified form but with civil law influence".

20. When the DIFCC was launched about a decade ago, 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. 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.
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.⁴⁵ As such, unlike the DIFCC, the SICC's jurisdiction does not have a significant domestic component, if at all.

Moreover, the drivers for the establishment of the SICC and the DIFC courts were different. As Chief Justice Menon emphasises in his lecture, the massive growth of transnational trade in Asia

⁴⁴ Denise Huiwen Wong, "The Rise of the International Commercial Court: What is it and will it Work?" (2014) 33 *Civil Justice Quarterly* 205, 209.

⁴⁵ Denise Huiwen Wong, "The Rise of the International Commercial Court: What is it and will it Work?" (2014) 33 *Civil Justice Quarterly* 205, 211.

and the need for a centre to resolve transnational disputes was the genesis of the SICC.⁴⁶ The driver for establishing the DIFC courts was, however, somewhat different, as Chief Justice Menon explains:⁴⁷

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 fusion between the civil law and the common law, the DIFCC was primarily designed as a common law court operating within a purpose-built English-language common law jurisdiction. 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”. In similar vein, Chief Justice Michael Hwang has described the DIFC as “a common law island in a civil law ocean”. 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”. 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. Consonant with these objectives, the DIFCC’s international judges are experienced

⁴⁶ Chief Justice Sundaresh Menon, “International Commercial Courts: Towards a Transnational System of Dispute Resolution” (Opening Lecture for the DIFC Courts Lecture Series 2015, Dubai, 2015) [22]–[23].

⁴⁷ Chief Justice Sundaresh Menon, “International Commercial Courts: Towards a Transnational System of Dispute Resolution” (Opening Lecture for the DIFC Courts Lecture Series 2015, Dubai, 2015) [25] (citations omitted and emphasis in original).

common law legal professionals from Australia, Malaysia, Singapore and the UK.⁴⁸

The models for the ADGM Courts in Abu Dhabi, and the QIC in Qatar, are more like that of the DIFC Courts. The ADGM Courts are due to commence operation in the first half of 2016 and, like the DIFC Courts in Dubai, the ADGM Courts service a specially created economic zone within the United Arab Emirates. The ADGM Courts are modelled on the English judicial system and will administer legislation based on English, Scots and Australian statutes. The *Application of English Law Regulations 2015*⁴⁹ also make the English common law directly applicable in the ADGM—an approach which the ADGM Courts’ website proclaims as unique in the Middle East.⁵⁰ Pursuant to the *ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015*, the Court of First Instance has jurisdiction to hear commercial matters which are connected with the ADGM,⁵¹ as well as “jurisdiction as is conferred on it by any request, in writing, by the parties to have the Court of First Instance determine the claim or dispute.”⁵²

Singapore International Commercial Court—A Case Study

⁴⁸ 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).

⁴⁹ See <http://adgm.complinet.com/en/display/display_viewall.html?rbid=4503&element_id=2>.

⁵⁰ See Abu Dhabi Global Market, “Frequently Asked Questions—What are ADGM Courts” (2016) <<http://adgm.com/doing-business/adgm-courts/frequently-asked-questions/>>.

⁵¹ See *ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015*, s 16(2)(a)–(d); *Law No 4 of 2013 Concerning the Abu Dhabi Global Market*, art 13(6). For legislation affecting the Abu Dhabi Global Market, see <http://adgm.complinet.com/en/display/display_main.html?rbid=4503&element_id=3271>.

⁵² *ADGM Courts, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015*, s 16(2)(e).

Returning to our region, the SICC has been established as a curial forum which accommodates parties foreign to its sovereign jurisdiction, where neither the parties nor the subject matter of the dispute have or has any connection with Singapore. Moreover, the SICC will not decline to assume jurisdiction solely on the ground that the dispute is connected to a jurisdiction other than Singapore.⁵³ As a result, the SICC provides useful a case study with respect to issues to be considered in establishing an Australian international commercial court.

a) Composition of the Court

The SICC is a division of the Singapore High Court and thus part of the Supreme Court of Singapore. The panel of SICC judges is constituted by the existing Supreme Court Judges, as well as international judges appointed for a fixed period and assigned to cases on an ad hoc basis.

These Associate International Judges have been appointed from a variety of countries, both within and beyond the region, and are preeminent and experienced commercial judges. As the SICC is part of the Supreme Court of Singapore, provision is made for appeals from the SICC to the Court of Appeal of Singapore, with the appellate Bench drawn from the SICC panel of judges—which, for this purpose, also includes the Associate International Judges.

The composition of the SICC generally reflects the position for Singapore High Court proceedings in that proceedings may be disposed of by a single judge, who may be a Singapore Supreme Court Judge or an Associate International Judge. The Chief Justice may, on the application of a party, designate three judges to hear a case. In this respect, regard would be had to the nature of the

⁵³ Supreme Court of Singapore, *Singapore International Commercial Court User Guides* (9 December 2015) <http://www.singaporelawwatch.sg/slw/files/User_Guide.pdf>, Note 1 [4].

dispute, its subject matter and, no doubt, the nationality of parties in designating a particular judge or judges to hear the case.

b) Governing Legislation

Provision has been made for the SICC in amendments to the Singapore *Supreme Court of Judicature Act*, particularly in new ss 18D, 18E and 18F, which provide for the jurisdiction of the Court, certification as to the nature of the intended action and the effect of the parties' jurisdiction agreement.⁵⁴ These provisions are as follows:

Jurisdiction of Singapore International Commercial Court

18D. The Singapore International Commercial Court shall have jurisdiction to hear and try any action that satisfies all of the following conditions:

- (a) the action is international and commercial in nature;
- (b) the action is one that the High Court may hear and try in its original civil jurisdiction;
- (c) the action satisfies such other conditions as the Rules of Court may prescribe.

Pre-action certificate

18E.—(1) A party intending to bring an action in the Singapore International Commercial Court may apply for a certificate stating all or any of the following matters:

⁵⁴ (Singapore, cap 322, 1969 rev ed) (“the *Supreme Court of Judicature Act*”).

- (a) that the intended action is international and commercial in nature for the purposes of section 18D(a);
 - (b) such other matters as the Rules of Court may prescribe.
- (2) An application under subsection (1)—
 - (a) shall be made by an originating process or such other process as the Rules of Court may prescribe;
 - (b) shall be determined by a Judge or the Registrar; and
 - (c) may be determined summarily or otherwise in accordance with such procedure as the Rules of Court may prescribe.
- (3) A certificate issued under this section is conclusive as to the matters certified in such circumstances as the Rules of Court may prescribe.

Effect of jurisdiction agreement

18F.—(1) Subject to subsection (2), the parties to an agreement to submit to the jurisdiction of the Singapore International Commercial Court shall be considered to have agreed—

- (a) to submit to the exclusive jurisdiction of the Singapore International Commercial Court;
- (b) to carry out any judgment or order of the Singapore International Commercial Court without undue delay; and
- (c) to waive any recourse to any court or tribunal outside Singapore against any judgment or order of the Singapore International Commercial Court, and against the enforcement of such judgment or order, insofar as such recourse can be validly waived.

- (2) Subsection (1)(a), (b) and (c) applies only if there is no express provision to the contrary in the agreement.

There are other provisions added to this legislation providing for the composition of the SICCC, its powers, the transfer of cases from the SICCC to the High Court of Singapore and, significantly, provisions with respect to the rules of evidence, determination of foreign law on submissions rather than as a factual matter to be proved, and for representation by foreign lawyers. These provisions are contained in ss 18K, 18L and 18M, and are as follows:

Rules of evidence in certain cases

18K.—(1) The Singapore International Commercial Court—

- (a) shall not be bound to apply any rule of evidence under Singapore law in such cases and to such extent as the Rules of Court may provide; and
- (b) may, in those cases, apply other rules of evidence (whether such rules are found under any foreign law or otherwise) in accordance with the Rules of Court.

- (2) In subsection (1), “rule of evidence” includes any rule of law relating to privilege, or to the taking of evidence.

Determination of foreign law on submissions

18L.—(1) The Singapore International Commercial Court may, in such cases as the Rules of Court may prescribe, order that any question of foreign law be determined on the basis of submissions instead of proof.

- (2) In determining any question of foreign law on the basis of submissions, the Singapore International Commercial Court may have regard to such matters as the Rules of Court may prescribe.

Representation by foreign lawyers

18M. A party to a case in the Singapore International Commercial Court, or to an appeal from that Court, may in accordance with the Rules of Court be represented by a foreign lawyer who is registered in accordance with Part IVB of the Legal Profession Act (Cap. 161).

These legislative provisions are also supported by Court Rules and,⁵⁵ perhaps more significantly, from the perspective of an intending international party, comprehensive and helpful *Singapore International Commercial Court User Guides*⁵⁶ and a very detailed and comprehensive *Singapore International Commercial Court Practice Direction*.⁵⁷

c) Approach to Procedure

The approach to procedure generally is encapsulated in the *Report of the Singapore International Commercial Court Committee* in the opening of the discussion on procedure in the then proposed SICC:⁵⁸

⁵⁵ *Supreme Court of Judicature Act* (Singapore, cap 322, 1969 rev ed) s 80.

⁵⁶ Supreme Court of Singapore, *Singapore International Commercial Court User Guides* (9 December 2015).

⁵⁷ Supreme Court of Singapore, *Singapore International Commercial Court Practice Direction* (1 January 2015, as amended by Amendment No 1 of 2016) <<http://www.supremecourt.gov.sg/rules/practice-directions/singapore-international-commercial-court-practice-directions>>.

⁵⁸ SICC Committee, *Report of the Singapore International Commercial Court Committee* (November 2013) <<https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Annex%20A%20-%20SICC%20Committee%20Report.pdf>> 16 [29] (citations omitted).

The SICC Rules and practice directions will govern proceedings before the SICC. It is envisaged that these provisions would follow international best practices for commercial dispute resolution. In particular, reference will be taken from the procedure of institutions such as the English Commercial Court. The provisions adopted must be sensitive to the unique needs of commercial users and the commercial Bar. In addition, a model similar to the English Commercial Court Guide which, through consultation with the Users' Committee, may be considered to allow for a flexible and efficient mode of amending the SICC Rules.

In terms of case management generally, interlocutory proceedings are heard by judges in a docket system. The SICC places emphasis on case management, including encouragement of ADR, and the use of technology, such as electronic filing and the like.⁵⁹

It is worthwhile reflecting on the way in which the SICC has developed in a very short period. Chief Justice Menon described the administrative and operational issues with the establishment of the SICC in the following terms⁶⁰:

[it was necessary] to consider a number of administrative and operational issues with the establishment of the SICC. This included such matters as the possible need for a special website; promotional and marketing work to raise awareness; IT and infrastructure needs and the manpower needs of this new division of the court. Underlying all of that was the need for funds. We submitted a bid to the Reinvestment Fund (a government innovation

⁵⁹ Supreme Court of Singapore, *Singapore International Commercial Court Practice Direction* (1 January 2015, as amended by Amendment No 1 of 2016) [73]–[86] (Case Management), [42]–[60] (Electronic Filing and Technology).

fund) and our bid was successful, as a result of which we were given funds over and above our baseline budget for the specific purpose of financing the SICC.

d) Confidentiality

As a general rule, SICC proceedings take place in open court. The *Report of the Singapore International Commercial Court Committee* observed that:⁶¹

Transparency is attractive to some parties and is important for the branding of the SICC. The Committee agreed that confidentiality militates against the development of a body of jurisprudence which will be necessary to enable prospective users of SICC dispute resolution to model their future commercial relations.

The Committee continued, observing that the position may be different where the dispute is one which has no connection with Singapore:⁶²

Nevertheless, it is intended that special rules apply for cases which have no substantial connection to Singapore. What constitutes the absence of substantial connection will be further refined in consultation with stakeholders, but will include cases where parties confirm that either (i) Singapore law is not the governing law; or (ii) the choice of Singapore law is the sole connection to Singapore, and agree that it is desirable to maintain confidentiality, the hearing will be conducted *in camera*, with other appropriate measures, such as the redaction of judgments. Confidentiality will immediately attach on filing unless the position is shown to be misstated later. On the

⁶¹ SICC Committee, *Report of the Singapore International Commercial Court Committee* (November 2013) 17 [32].

⁶² SICC Committee, *Report of the Singapore International Commercial Court Committee* (November 2013) 17 [33].

other hand, if one party wishes to have confidentiality but the other does not, the SICC Rules will allow the party requesting for confidentiality to apply to the court, which will consider all the circumstances of the case, including the private interest of the contesting parties and any public interest considerations. In such cases, confidentiality will be extended until the court has disposed of the application.

Provision is made in the Singapore Court Rules for the granting of a certificate of confidentiality in a pre-action procedure.⁶³ The effect of such certification is that the proceedings will be heard *in camera*, disclosure of any information or document relating to the case is prohibited and the court file will be sealed. This option is reflective of the position available in international arbitral proceedings.⁶⁴

e) Rules of Evidence, Determining Foreign Law, and Joinder

As will be seen from the provisions of ss 18K and 18L of the Singapore *Supreme Court of Judicature Act*, considerable flexibility is accorded to the SICC with respect to the application of the rules of evidence and also in relation to the determination of foreign law.⁶⁵ The considerable flexibility provided to the SICC by these provisions mirrors the flexibility enjoyed by arbitral tribunals but with the Court having many other advantages flowing from its position and from its sovereign rather than consensual source of power and authority. One particular advantage in this

⁶³ See *Supreme Court of Judicature Act* (Singapore, cap 322, 1969 rev ed) s 18E; Supreme Court of Singapore, *Singapore International Commercial Court User Guides* (9 December 2015) Note 4 [9]–[11].

⁶⁴ See, eg, *International Arbitration Act 1974* (Cth) ss 23C–23G; *Arbitration Act 1996* (NZ) ss 14–14I. See, eg, *ACICA Arbitration Rules* (2016) r 22; *AMINZ Arbitration Appeal Rules* (2009) r 8; *Arbitration Rules of the Singapore International Arbitration Centre* (5th ed, 2013) r 35. See also Supreme Court of Singapore, *Singapore International Commercial Court Practice Direction* (1 January 2015, as amended by Amendment No 1 of 2016) [97].

⁶⁵ See Supreme Court of Singapore, *Singapore International Commercial Court User Guides* (9 December 2015) Note 5 (Disapplication of Singapore Evidence Law).

respect is the power to join additional parties under Order 110 of the Singapore Court Rules.⁶⁶ The intent of those powers is summarised in the *SICC User Guides*:⁶⁷

6. Once an action is in the Court (i.e. the Court has and has assumed jurisdiction), a person may be joined as a party, including as an additional plaintiff, defendant or as a third or subsequent party, to the action. This is provided that:
 - (a) the requirements in the Rules of Court for joining the person are met (the relevant provisions include Orders 15 and 16);
 - (b) the claims by or against the person:
 - (i) do not include a claim for any relief in the form of, or connected with, a prerogative order (including a mandatory order, a prohibiting order, a quashing order or an order for review of detention); and
 - (ii) are appropriate to be heard in the Court.
7. Unlike the claims between the plaintiffs and the defendants named in the originating process when it was first filed, there is no requirement that the claims by or against a person sought to be joined to the action must be of an international and commercial nature. However, the Court, in exercising its discretion on whether to join that person, would have to decide whether the claims by or against that person are appropriate to be heard in the Court. In exercising that discretion, the Court would have

⁶⁶ *Supreme Court of Judicature Act* (Singapore, cap 322, 1969 rev ed) s 80.

⁶⁷ Supreme Court of Singapore, *Singapore International Commercial Court User Guides* (9 December 2015) Note 1 [6]–[10].

regard to its international and commercial nature: see Order 110, Rule 9(3).

8. There is also no requirement that a person sought to be joined to the action must have submitted to the Court's jurisdiction under a written jurisdiction agreement. There is one exception. A State or the sovereign of a State may not be made a party to an action in the Court (whether by joinder or otherwise) unless the State or the sovereign has submitted to the jurisdiction of the Court under a written jurisdiction agreement: see Order 110, r 9(2).
9. Where the person sought to be joined has not agreed in writing to submit to the jurisdiction of the Court, the Court may examine the connecting factors to Singapore in deciding whether to exercise its compulsory jurisdiction and join that person to the action. There is therefore no equivalent of Order 110, Rule 8(2) for joinder cases.
10. However, this does not mean that the Court is bound to consider and give weight to arguments based on connecting factors made by persons sought to be joined. Where the person sought to be joined has submitted to the Court's jurisdiction under a written jurisdiction agreement, for example, the Court may decide to disregard such arguments in deciding whether to join that person. This would be in the discretion of the Court.

These are very extensive powers and avoid the problems encountered in arbitral proceedings in attempting to "join" other parties to the proceedings. Given the consensual basis of arbitral proceedings, absent cooperation and agreement of the parties to the arbitration agreement and

parties to be joined, there are limits to the extent that arbitration legislation and rules can assist to, in effect, achieve joinder.⁶⁸ Powers of joinder such as this also complement and are complemented by the extensive powers of the SICC with respect to Mareva injunctions and associated remedies.⁶⁹

In relation to foreign law, s 18L of the Singapore *Supreme Court of Judicature Act* represents a significant departure from the usual position at common law, which is that foreign law is a matter to be proved as a question of fact. However, the recommendation of the Singapore International Commercial Court Committee was that greater flexibility should be allowed in this respect and the same practice adopted with respect to questions of foreign law as is adopted by international arbitral tribunals. Thus, the Committee reported:⁷⁰

Questions of Foreign Law. In line with the international character of the SICC, foreign law need not be pleaded and proved as a fact in proceedings before the SICC, as the Judges can take judicial notice of foreign law with the assistance of oral and written legal submissions, supported by relevant authorities. The SICC would then apply foreign law⁷¹ to determine the issues in dispute. This would facilitate buy-in from foreign counsel to bring their disputes to the SICC and, at the same time, aligns SICC procedure with the practice in international arbitration. Notwithstanding the position on the applicable conflict of laws rules, consideration should be given to the extent to

⁶⁸ See Clyde Croft, Christopher Kee and Jeff Waincymer, *A Guide to the UNCITRAL Arbitration Rules* (Cambridge University Press, 2013) 185–92 (in relation to Article 17(5) of the *UNCITRAL Arbitration Rules*).

⁶⁹ Supreme Court of Singapore, *Singapore International Commercial Court User Guides* (9 December 2015) Note 6 (Injunctions Prohibiting Disposal of Assets).

⁷⁰ SICC Committee, *Report of the Singapore International Commercial Court Committee* (November 2013) 17–18 [34].

⁷¹ This can extend to civil law, and the relevant rules can allow for the appointment of judges from civil law jurisdictions.

which Singapore's public policy would be applicable in each case, and if so, the relevant implications it might have on the resolution of SICC disputes.⁷²

Furthermore, the provisions of s 18M with respect to representation by foreign lawyers are clearly significant and important. Apart from reflecting the flexibility enjoyed in this respect in most jurisdictions in the arbitration field, it is important in the present context in two particular respects. First, if foreign law is to be established by submission rather than proof as a fact, considerable advantage may flow from involvement of foreign practitioners from relevant foreign jurisdictions. Secondly, to close off representation against foreign lawyers engaged by parties would put an international court at considerable disadvantage as compared to international arbitral proceedings. Provision is also made for foreign representation in the Singapore Court Rules, and Practice Directions, as summarised in the SICC User Guides.⁷³ For present purposes, it is sufficient to note that the main category of cases in which foreign lawyers may represent parties in the SICC is offshore cases—that is, cases which have no substantial connection to Singapore.

f) Appeals

Decisions of the SICC are appealable, in the same way as other Singapore High Court decisions, to the Singapore Court of Appeal. The difference with respect to SICC appeals is that the Court of Appeal may be composed of Associate International Judges from the SICC panel and, or

⁷² An example raised in the SICC Committee meeting would be the consideration of the SICC's position towards disputes based on gaming contracts, or otherwise claims which are pre-supposed upon contracts which ordinarily be considered illegal in many jurisdictions.

⁷³ Supreme Court of Singapore, *Singapore International Commercial Court User Guides* (9 December 2015); Note 3 [3]–[9]. See also Supreme Court of Singapore, *Singapore International Commercial Court Practice Direction* (1 January 2015, as amended by Amendment No 1 of 2016) [26]–[28].

alternatively, comprised of judges from the Singapore Court of Appeal—or a mixture of both.⁷⁴ Significantly, the right of appeal is subject to any prior agreement between the parties to limit or vary the scope of an appeal. Apart from wholesale exclusion of the right to appeal, parties may agree to a limited scope of appeal or review on specific grounds modelled after the international arbitration regime, such as breaches of natural justice or defects in the validity and scope of the agreement to submit matters to the SICC.⁷⁵

g) *Enforceability of Judgments*

In relation to enforceability, the approach of the SICC is to rely upon existing mechanisms for the enforcement of Singapore judgments, which may be complemented by the provision of model SICC dispute resolution clauses. Additionally, the Singapore International Commercial Court Committee suggested that the Singapore government may wish to consider negotiating multilateral judgment enforcement agreements, especially within the Association of Southeast Asian Nations (“ASEAN”) community, bilateral government agreements and the possibility of court to court arrangements. Moreover, it was suggested that an aspect of multilateral government agreements would be for Singapore to consider signing the Choice of Court Convention.

The Committee recommendations with respect to the international enforceability of SICC judgments generally and court to court arrangements are applicable to any jurisdiction and are,

⁷⁴ See Supreme Court of Singapore, *Singapore International Commercial Court Practice Direction* (1 January 2015, as amended by Amendment No 1 of 2016) [23]–[25] (noting that in varying circumstances the Court of Appeal may be constituted by two, three or five judges).

⁷⁵ See Supreme Court of Singapore, *Singapore International Commercial Court Practice Direction* (1 January 2015, as amended by Amendment No 1 of 2016) [139].

consequently, of particular interest and importance in the present context. The Committee's commentary and recommendations in this respect are as follows:⁷⁶

42. As with the judgments of the Supreme Court of Singapore, judgments of the SICC may be enforced in other jurisdictions through reciprocal enforcement provisions, such as the Reciprocal Enforcement of Commonwealth Judgments Act⁷⁷ and the Reciprocal Enforcement of Foreign Judgments Act,⁷⁸ is a key factor to be emphasised in marketing and promotion.
43. The existing position may be complemented by the provision of model SICC dispute resolution clauses. A party who has submitted or who has agreed to submit to the SICC's jurisdiction may be deemed to have waived its right to defend against an action based on a SICC judgment in all jurisdictions. This may be expressly agreed upon or incorporated by reference to the SICC Rules in the SICC model dispute resolution clauses. The written consent of parties should be required so as to create issue estoppels which will bind parties to the decision of the referred jurisdiction.
- ...
48. **Court to Court Arrangements.** A unique method to market the internationality of SICC judgments would be to have a tie up with a friendly

⁷⁶ SICC Committee, *Report of the Singapore International Commercial Court Committee* (November 2013) 20 [42]–[43], 21–2 [48]–[51] (emphasis in original).

⁷⁷ In addition to the UK, the RECJA covers 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).

⁷⁸ In particular, the domestic legislation of India recognises Singapore as a “reciprocating territory” and provides a regime which facilitates the enforcement of a judgment given by a Singapore court. See ss 13, 37 and 44A of the Code of Civil Procedure 1908. To maximise the enforceability of a Singapore judgment in India, sufficient regard may have to be accorded to the public policy of India where applicable, and the laws of India would have to be applied where it is expressed to be the governing law of a contract; see Rishi Agrawala, *Executability and Enforceability of Foreign Judgments and Decrees in India: Judicial Trends* (Agarwal Law Associates, New Delhi).

foreign international court, to refer appropriate proceedings to each other's jurisdiction. For example, Order 101 of the Rules of Court reflects the procedure of the Memorandum for Understanding signed between Singapore and New South Wales. The order prescribes that if, in any proceeding before the Singapore High Court or Court of Appeal, a question of foreign law relating to the New South Wales jurisdiction arises, our courts have the power to, on its own motion or upon a party's application, order that an action be commenced in New South Wales for that question of foreign law to be determined.

49. The SICC could have similar arrangements with a friendly and prominent jurisdiction, for example, the English Commercial Court, such that:

- (a) Where parties have commenced proceedings in the SICC, and a party to the dispute brings an independent but related set of proceedings in the English Commercial Court to determine a question of English law, the English Commercial Court could refuse the continuation of the proceedings and refer the matter back to the SICC. This would be an express recognition of the SICC's competence to deal with questions involving foreign law, in view of the SICC Panel's international make up.
- (b) If a party to an agreement to resolve commercial disputes in the SICC commences proceedings in the English Commercial Court, the latter would refer parties to bring their dispute to the SICC as a matter of course. A low threshold is needed: so long as there is the *prima facie*

existence of a written SICC dispute resolution agreement, the referral will be made, any dispute on whether the commercial dispute falls within the agreement, or the validity of the agreement, would essentially be a dispute over the SICC's jurisdiction, which can and should be decided by the SICC itself. This obviates the existing position in the English common law, which permits the party to continue with the proceedings in the English Commercial Court notwithstanding an *exclusive* SICC dispute resolution clause if it can show strong cause to do so.

50. Singapore would likely need to offer to reciprocate on both (a) and (b).
51. A Memorandum of Guidance with jurisdictions which do not have any reciprocal enforcement treaty with Singapore may also enhance the international enforceability of SICC judgments. The Memorandum would set out the understanding of the court procedures required for the enforcement of each jurisdiction's judgment in the other court, and would promote a positive perception of SICC judgments. A written example would be the Memorandum of Guidance signed between the English Commercial Court and the DIFCC in January 2013.

Finally, it should not be forgotten that judgments for a definite sum of money can also be enforced at common law in a variety of circumstances.⁷⁹

⁷⁹ See Supreme Court of Victoria, *Practice Note 1 of 2014 Enforcement of Foreign Judgments at Common Law*.

An Australian International Commercial Court

As has been discussed, the manner in which other international commercial courts have been established and developed provides useful guidance and issues for consideration in the establishment of an Australian international commercial court. This does not mean, however, that in establishing an Australian international commercial court, we should slavishly follow any particular model. Moreover, the Australian legal landscape is, unsurprisingly, different from that in which the international commercial courts that have been considered have been established and developed. An obvious difference in Australia is its federal system of government and courts. On one level, it might be thought that this is an inhibition to national action, but thoughtful consideration of possible models indicates, rather, that the Federation has the strength of bringing together diverse thought and experience and the legal and economic environments and experience from throughout a diverse continent. Moreover, the establishment of an international commercial court provides the opportunity for the nation as a whole to present an integrated commercial court to the region and to the world.

a) Sovereign Base and Composition of the Court

Clearly, the Australian International Commercial Court (“the AICC”) would require a sovereign base if it is to be established as a court, rather than something in the nature of an arbitral tribunal. This sovereign base is readily provided by a State or Territory Supreme Court which, with enabling State or Territory legislation, would be empowered to establish a panel of national and international judges along the same lines as the model adopted in Singapore by the SICC. Constitutional difficulties arising from the judicial appointment requirements of Chapter III of the

Australian *Constitution* would appear to prevent the use of any federal court as a sovereign, as it would not be possible to establish the necessary national and international judicial panel with less than full term judicial appointments. These constitutional inhibitions would also appear to prevent the inclusion of any judges holding a federal commission from being appointed to the national and international judicial panel.

On the other hand, with the cooperation of State and Territory Supreme Courts, together with State and Territory governments, there would appear to be no inhibition in appointing to the judicial panel the finest commercial judges from the various State and Territory Supreme Courts across the nation. The benefit to Australia, both domestically and internationally, in being able to bring this commercial judicial expertise together needs no further explanation. It should, however, be emphasised that though the AICC would have an analogous international focus to that of the other international commercial courts considered above, there is no reason why the AICC could not also have a national domestic jurisdiction enabling commercial parties from anywhere in Australia to litigate in a forum populated by the best commercial judicial minds in the country.

The panel of judges appointed for the purposes of the AICC would not, of course, be limited to Australian judges or judges within this region. Similarly to the approach taken to populating the panel of international judges adopted by the SICC, the AICC panel would consist of leading commercial judges from jurisdictions across the world, including, for example, Singapore, Hong Kong, New Zealand, the United Kingdom, and other jurisdictions where it might be expected or it is found that disputes arise, or in which disputing parties conduct their business. Additionally, consideration should be given to the appointment of international judges from beyond the common law world.

As has been observed, the environment in which the DIFC courts exist has been described as something in the nature of a civil law sea in which the DIFC courts are a common law “island”. As is clear from experience with international arbitral tribunals, it is often the case and helpful where parties come from common law and civil law jurisdictions to include within the arbitral tribunal panel of three, arbitrators from both the common law and civil law tradition. This mix of judicial backgrounds may also be very beneficial if, as is contemplated, the AICC is empowered to determine foreign law on the basis of submissions without the need for formal proof as a factual matter.

b) Appeals

As is clear from the Singapore model, attention also needs to be given to the appellate arrangements, particularly the constitution of the Court of Appeal from judgements at first instance in the AICC. As with the SICC, it is desirable that flexible appellate arrangements be provided for and, particularly, that the Court of Appeal Bench, whether it be composed of two, three or five judges, is able to be selected from the AICC panel of Australian and international judges.

It goes without saying that the appellate procedures from an international commercial court must be flexible and expeditious. In this respect, legislation empowering the Court of Appeal to dispose of matters on the papers and for the filtering of appeals through a leave to appeal mechanism is highly desirable. Our Victorian experience with expedited appeals and leave to appeal requirements has proved very successful in expediting civil appeals. In light of this experience, there could be no objection to these type of appeal “constraints” with respect to Australian commercial litigation conducted in the AICC and, internationally, such “constraints” would likely

be very attractive as they more closely replicate the international arbitral regime where, under the Model Law and the New York Convention, appeals and challenges to international arbitral awards are severely constrained, with merits appeals simply not permitted.

Finally, with respect to appeals, it is desirable that the SICC model be adopted, which would allow parties to agree to constrain appeal rights—subject to any constitutional limitations in Australia with respect to appeals to the High Court of Australia. In this respect, there is, of course, the issue of the constitutional right, ultimately, to seek to appeal to the High Court of Australia. However, as this is not a right unregulated, in the sense that there is a requirement to seek special leave from the High Court, this right might be expected to be “constrained” to the same extent now evident in the disposition of special leave applications by the High Court.

Having regard to the nature of disputes and the sophistication of parties as expected litigants in the AICC, there would seem no good reason to prevent agreement between parties limiting or ousting appeal rights with respect to purely Australian litigation.

c) Scope of Jurisdiction, Procedure, and the Enforceability of Judgments

In terms of substantive jurisdiction, there seems every reason to adopt the approach of the SICC and to accommodate and encourage disputes which are “disconnected” from Australia—an approach which is, similarly, adopted by the other courts discussed above. Moving from substance to procedure, it is clear from the nature of an international commercial court and the experience in Singapore and London, particularly, that procedures must be flexible, be provided for clearly in readily accessible court rules, practice notes and user guides, and be supported by administrative structures and court technology which will accommodate the hearing of disputes from across the globe. With respect to technology, clearly basic things like electronic filing, video conferencing

and, as technology develops, e-dispute resolution fora are essential, in order to ensure that the court keeps pace with developments in international commerce.⁸⁰

In relation to enforceability of judgments of the AICC, the same issues arise as with respect to the SICC, at least internationally. Singapore, as a member of the Commonwealth of Nations, is in much the same position as Australia and the Australian States and Territories in relation to international enforcement of judgments, and so the Singapore experience and position adopted in this respect is readily applicable to the AICC. A matter which does, however, require particular attention from an Australian perspective is the question of accession to the Choice of Court Convention. As momentum develops internationally in this respect, national accessions to this Convention will become more and more important if countries are to be connected to the international commercial litigation network.

Conclusion

When the significant trade agreements negotiated by the Federal government are considered with respect to Asia, especially China, and the Pacific, the opportunities offered by an Australian international court are almost boundless. Indeed, there is a symmetry in the establishment of an Australian court which would complement the trade agreements.

The proposal for an international commercial court for Australia cannot be left to the Courts themselves or the legal profession to develop and agitate. The experiences of Singapore, Dubai,

⁸⁰ See, eg, Lord Chief Justice John Thomas, “Commercial Justice in the Global Village: the Role of Commercial Courts” (Paper delivered for the DIFC Academy of Law Lecture, Dubai, 1 February 2016) [37]–[39].

Abu Dhabi, and indeed, London demonstrate that it is vital for there to be government interest and support for such a proposal.

It is also important to be reminded that a proposal for an Australian court occurs within an international context. I have already cited the International Trade Agreements. Recently, an important legal institute was established in the Asian region in which Australia is an active participant.

The Asian Business Law Institute (“ABLI”) was launched on 21 February 2016 in conjunction with the International Conference on *Doing Business Across Asian – Legal Convergence in an Asian Century*. The purpose or ‘mission’ of ABLI is to⁸¹:

Undertake and facilitate research into transnational business law possibility for the region, publish in the area of Asian business laws, provide guidance in the field of Asian legal development and to promote the convergence of Asian business laws. The specific ‘mission’ statement of ABLI states that it is to:

- Evaluate and stimulate the development of Asian law, legal policy, and practice and in particular make proposals for the further convergence of business law among Asian countries and regions;
- Study Asian approaches regarding business laws and practice in drafting legal instruments, restatement law or model rules;

⁸¹ <<http://abli.asia/ABOUT-US/Introduction>>

- Conduct and facilitate Pan-Asian research, in particular to draft, evaluate or improve principles and rules which are common to Asian legal systems; and
- Provide a forum, for discussion and cooperation, between the business community and the legal fraternity including, inter alia judges, lawyers, academics and other legal professionals, who take an active interest in business law development.

ABLI has a board of governors. The Australian representatives on the board are Chief Justice French, Chief Justice Warren and the Honourable Kevin Lindgren.

In his keynote address to launch ABLI, the Singaporean Chief Justice Sundaresh Menon said:

Business today is conducted in an environment that is dramatically different from what we have, until recently, been accustomed to. Once upon a time, the market place referred to riotous fairs and bazaars in which merchants gathered to barter and trade. Today, we think of the market place as a metaphysical global interface for the exchange of goods and services, unbounded by both in its reach and its potential.

Indeed, there is considerable international interest in sharing information or, in the words of Chief Justice French, engaging in “convergence”. For example, this year the Supreme Court of Victoria received an invitation for the Commercial Court to join an international forum or college of commercial courts across the world. In his invitation, the Lord Chief Justice, the Lord Thomas, said:

Such a forum might allow the commercial court judiciary worldwide to share experiences and hold discussions on subjects of mutual interest. It could promote the possibility of common practices. It could even consider developing common or at least converging rules and procedures.

Needless to say the Court has accepted the invitation. We gather that our enthusiasm is shared by the judicial leadership in the other jurisdictions from all parts of the world who have responded to the Lord Chief Justice's invitation.

Finally, it is important that the Bar and the profession supported by the Academy raise awareness of this significant opportunity. Discussions, advocacy and articles to raise awareness and appreciation is vital and it is hoped that this paper contributes to this end.

An abridged version of this Paper was presented at the Commercial CPD Seminar Series—a joint initiative between the Supreme Court of Victoria, Monash University, the Law Institute of Victoria, the Victorian Bar, the Commercial Bar Association of Victoria, the Judicial College of Victoria, and the Centre for Commercial Law and Regulatory Studies.

Melbourne, 13 April 2016