The Judicial Conference of the Supreme Courts of the G20

JUDICIAL REFORM: RESHAPING THE CIVIL JUSTICE SYSTEM IN SINGAPORE

*Justice Steven Chong**

I. Introduction

1. The theme of this paper is judicial reform. In exploring this theme, I will focus on reforms to the civil justice system in Singapore.

2. In his 1986 Hamlyn Lectures, Sir Jack Jacob QC observed that "the system of civil justice is of transcendent importance … for the people of every country".[1] I entirely agree. The civil justice system of any society serves two critical functions. First, it enables individuals and businesses to vindicate and enforce their civil law rights. The system "giv[es] life to the rule of law".[2] I will refer to this as the "Vindication Function". Second, the civil justice system provides mechanisms for the authoritative resolution of disputes. I will refer to this as the "Dispute-Resolution Function".

3. In this paper, I discuss two principal reforms to the Singapore civil justice system. Our Judiciary played a key role in driving both of these reforms. The first reform is the impending transformation of our civil procedure. Our overarching aim is to enhance access to justice, thereby enabling our civil justice system to better achieve the Vindication Function. The second reform is the creation of the Singapore International Commercial Court ("the SICC"). The SICC offers the business community an alternative to international arbitration and municipal litigation for the resolution of international commercial disputes. It augments the suite of dispute-resolution options under our civil justice system, and thereby furthers the Dispute-Resolution Function.

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1 Sir Jack I H Jacob QC, *The Fabric of English Civil Justice* (Stevens & Sons, 1987) at p 1.

2 John Sorabji, *English Civil Justice after the Woolf and Jackson Reforms: A Critical Analysis* (Cambridge University Press, 2014) at p 10.

II. Proposed reforms to civil procedure

4. I will begin by sketching the historical background to the proposed reforms.

Our historical inheritance

5. Singapore was a British colony. Consequently, much of our law derives from English law. Our civil procedure is no exception. The first statutory code on civil procedure in Singapore, the Civil Procedure Ordinance 1878 (SS Ord No 5 of 1878), was based on the English procedure in the Schedules to the Supreme Court of Judicature Act 1875 (c 77) (UK).[3] As English procedure evolved, we transposed the developing English rules into our law. Today, parts of our civil procedure are set out in primary legislation, case law, practice directions, notices and the court's inherent powers.[4] But much of our civil procedure is found in the Rules of Court (Cap 322, R 5, 2014 Rev Ed) (the "Rules of Court"), which largely derives from the English Rules of the Supreme Court 1965 (SI 1965 No 1776) (UK) ("the 1965 English Rules"). In England, the 1965 English Rules have been replaced by the Civil Procedure Rules 1998 (SI 1998 No 3132) (UK). This has been a model for the proposed reforms which I discuss below.

6. The system we inherited from England may be summarised as follows.

   (a) First, in terms of the *structure* and *spirit* of our system, we inherited an adversarial system under which the court had a passive, non-interventionist role. The parties were left to control the pace and progress of the proceedings.

   (b) Second, in terms of *content*, our civil procedure consisted of a suite of intricate and overlapping rules derived from English law.

   (c) Third, in terms of *language*, much of our procedure was formulated in archaic legalese such as "plaintiff", "writ of summons", *etc*.

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3 Jeffrey Pinsler, *Civil Justice in Singapore* (Butterworths Asia, 2000) at p 10.

4 Eunice Chua and Lionel Leo, "Civil Procedure: Autochthony for Efficiency and Justice" in *Singapore Law: 50 Years in the Making* (Academy Publishing, 2015) (Goh Yihan & Paul Tan gen eds) ch 6 ("*Chua & Leo*") at para 6.1.

The first wave of reforms

7. By the early 1990s, an unhealthy backlog of cases had built up in our courts.[5] Our High Court faced more than 2,000 pending cases for which trial dates were only available three or more years later. Almost half of all cases took between five to ten years to be disposed of. This state of affairs was highly unsatisfactory; justice delayed is justice denied. It was certainly not conducive to Singapore's ambition to be a leading financial centre. To remedy this situation, our Judiciary led a first wave of reforms to our civil procedure.

8. The delay in the progress of cases could be traced to our adversarial system and more specifically, the parties' ability to dictate the pace of proceedings. We therefore sought to refine our system by providing for the court to have a more active role in the proceedings. This was achieved in two main ways.[6]

    (a) First, we made incremental modifications to our procedural rules. For example, we introduced pre-trial conferences to enable case-management at an early stage, and an automatic discontinuance regime to incentivise plaintiffs to promptly pursue their claims.

    (b) Second, there was a sea change in judicial attitudes towards the monitoring of cases, with an emphasis on statistics in relation to clearance rates, case lifespans and waiting periods, and the adoption of a firm approach towards procedural non-compliance.

9. The reforms succeeded. The backlog of cases was cleared, and our courts continue to efficiently dispose of cases today. Yet deeper issues with our civil procedure endured. The first wave of reforms tempered the adversarial nature of our system. But it did not substantially change the content and language of our civil procedure, which remained complex and cast in outdated wording. Moreover, significant time and expense is still spent on procedural matters instead of the merits of a dispute.

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5 *Chua & Leo* at para 6.18.

6 *Chua & Leo* at paras 6.23–6.41.

The impending reforms

10. The time for more sweeping change has come. In January 2015, our Chief Justice constituted a Civil Justice Commission ("the CJC") with a view to studying and proposing radical change to our civil procedure. The Terms of Reference of the CJC stated that its overall objective was "to *transform, not merely reform,* the litigation process by modernizing it, enhancing efficiency and speed of adjudication and maintaining costs at reasonable levels".

11. The CJC included members of the Judiciary (I was the Co-Chairman), the Bar and academia. In late 2017, after three years of study, we submitted a report proposing bold reforms to our civil procedure. A public consultation is imminent. I will briefly set out the main themes of the proposed reforms.

12. First, in terms of the *structure and spirit* of our system, the proposed reforms would further enhance judicial control of the litigation process. For example, our present system of case-management would be overhauled through the introduction of Case Conferences, held soon after an action is commenced, to enable the court to take control of proceedings at an early stage. Our judges and judicial officers would also be given more discretion to tailor, modify or disapply procedural rules to advance the interests of justice in any given case. In short, the reforms would take the changes to our adversarial system effected by the first wave of reforms one step further, by providing for the court to play an even more active role in proceedings. It is our hope that this would further reduce delay in and costs of proceedings.

13. Second, regarding the *content* of our civil procedure, the proposed reforms would retain the core concepts of our law. But they would simplify and restructure our rules for better understanding and coherence. For example, our rules on the commencement of proceedings and service both in and out of Singapore would be substantially simplified and consolidated.

14. Third, as for the *language* of our civil procedure, the reforms would strip away outdated terminology and reformulate our law in plain English. For example, references to "plaintiff" would be substituted with references to "claimant". And instead of referring to a "writ" or an "originating summons", we would refer to Originating Claims and Originating Applications.

15. The CJC also proposed two more significant changes to our civil procedure which I will briefly allude to. The first reform is to our law on the production of documents (also known as discovery). The reforms would create a new regime based on the principle that a claimant should sue on the strength of its case, not on the weakness of the defendant's case. The proposed regime would hopefully be less expensive, time-consuming and intrusive than our current regime, under which a party must generally disclose documents that may adversely affect its case or support its opponent's case.

16. The second proposed reform is to our costs regime. In this regard, one key aim of the proposed reforms is to signal to litigants that there is, in general, a fixed cost for bringing a dispute in court. The parties can then decide whether to litigate in that light. And in the light of this fixed cost, solicitors should not have an incentive to prolong or complicate the proceedings.

17. Civil procedure constitutes the process by which parties may vindicate their substantive rights under the civil law. This process must be simple, swift and reasonably affordable, to enable the civil justice system to better achieve the Vindication Function. This vision of our civil procedure has guided the proposed reforms discussed above.

III. **The creation of the SICC**

18. The SICC was officially launched on 5 January 2015. Before I describe the main features of the SICC, I will briefly explain its raison d'être.

The raison d'être of the SICC

19. Globalisation has led to a proliferation of cross-border trade, especially in Asia, and thus, the number and value of cross-border commercial disputes has risen exponentially. What is the appropriate forum for resolving these disputes? Municipal civil courts have not been the preferred choice of the international business community for three main reasons. First, there are perennial concerns about the perceived competence and neutrality of national courts. Second, in the absence of an agreed forum, municipal litigation carries the risk of the fragmentation of disputes across jurisdictions and the corollary expense and delay associated with resolving such disputes. Third, there are often difficulties with enforcing the judgments of national courts abroad.

20. For these reasons, international commercial parties have typically turned to international arbitration to resolve their cross-border disputes. International arbitration promises a flexible, relatively inexpensive and speedy mode of dispute-resolution. Disputes are decided by specialists, whose decisions are not subject to appeal, and the enforceability of awards is not a concern due to the widespread adoption of the New York Convention.

21. But the drawbacks of international arbitration have become increasingly apparent. First, arbitration proceedings are very costly and are increasingly protracted. A key reason for this is, ironically, what is often seen as an attraction of arbitration – the finality of arbitral awards. The "one-shot" nature of arbitration has incentivised parties to expend a tremendous amount of resources in advancing their cases in arbitration with the aim of obtaining a favourable award. Second, because arbitration is premised on the parties' consent, arbitral tribunals do not have the power to join related parties to a dispute unless they consent. Such parties typically have little incentive to do so. The consequence has been the fragmentation of disputes across multiple fora, leading to the duplication of resources. Third, ethical concerns about arbitration, many of which stem from the fact that arbitrators are appointed by the parties, have grown. Finally, as Lord Thomas of Cwmgiedd ("Lord Thomas"), the former Lord Chief Justice of England and Wales, noted in 2015, commercial arbitration has arguably stunted the development of a *lex mercatoria*, a body of jurisprudence governing commercial disputes.[7]

22. There is therefore space for a mode of dispute-resolution that marries the advantages of arbitration and litigation, and seeks to avoid their drawbacks.

The main features of the SICC

23. The SICC is a branch of our High Court, established by local legislation, with jurisdiction to decide international commercial disputes. The jurisdiction of the SICC is based on the parties' consent, albeit cases commenced in the (non-SICC branch of the) High Court may also be transferred to the SICC.

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[7] The Rt Hon the Lord Thomas of Cwmgiedd, "The Centrality of Justice: Its Contribution to Society, and its Delivery" (10 November 2015) <https://www.judiciary.uk/wp-content/uploads/2015/11/lord-williams-of-mostyn-lecture-nov-2015.pdf> at para 23.

24. The distinctiveness of the SICC lies in the fact that it is (1) an international commercial court, (2) with the traditional advantages of litigation, (3) yet with modified evidential, procedural and professional rules, all of which are (4) underpinned by a core theme of flexibility to meet the needs of litigants. I will now elaborate on these four points in turn.

25. First, the SICC is an international commercial court. This is reflected in both the jurisdiction and the composition of the court. In terms of jurisdiction, the SICC's jurisdiction extends only to international and commercial actions. With regard to the composition of the court, the bench of the SICC includes International Judges from both common law and civil law jurisdictions, all of whom are eminent jurists in commercial law. They are – (a) from England: Justice Sir Jeremy Cooke, Justice Sir Henry Bernard Eder, Justice Lord Neuberger of Abbotsbury, Justice Sir Vivian Ramsey, Justice Sir Bernard Rix and Justice Simon Thorley; (b) from Australia: Justice Patricia Bergin, Justice Robert French, Justice Roger Giles and Justice Dyson Heydon AC; (c) from the USA: Justice Carolyn Berger; (d) from Canada: Justice Beverley McLachlin PC; (e) from France: Justice Dominique Hascher; (f) from Japan: Justice Yasuhei Taniguchi; (f) from Hong Kong: Justice Anselmo Reyes.

26. Second, the SICC possesses many traditional advantages of litigation that arbitration does not enjoy. I will simply list three such advantages:[8]

    (a) *The power to join third-parties*: First, unlike arbitral tribunals, the SICC has the power to join third parties to a dispute even if they do not consent to its jurisdiction. The SICC can thus ensure that related disputes involving multiple parties that raise similar factual and legal issues are resolved by one tribunal, thus eliminating the risk of inconsistent findings. This is particularly important in construction, shipping and insurance disputes, which often arise out of chain contracts and involve multiple parties, not all of whom may be party to an arbitration or jurisdiction clause.

    (b) *A default right of appeal*: Second, there is by default a right of appeal. This may encourage parties to eschew an over-inclusive

[8] The Hon the Chief Justice Sundaresh Menon, "The Rule of Law and the SICC" (10 January 2018) <https://www.sicc.gov.sg/docs/default-source/modules-document/news-and-article/b_58692c78-fc83-48e0-8da9-258928974ffc.pdf> at para 28.

approach towards evidence and submissions. I would add that there is provision for expedited appeals and that the first appeal to the Court of Appeal, which was an expedited appeal, was decided barely a month after the notice of appeal was filed, with the written judgment released less than a week later.[9]

(c) *Public proceedings and published judgments*: Third, by default, the SICC's proceedings are in open court, which lends transparency to them. Further, the SICC's judgments are published. They will hopefully contribute to the development of a body of jurisprudence that will give guidance to the international business community.

27. Third, the SICC applies modified evidential, procedural and professional rules with the aim of providing a dispute-resolution mechanism that meets the need of commercial parties. I will give three examples:

(a) First, foreign law may be decided based on submissions. This will eliminate the cost and time of laboriously proving foreign law through foreign law experts.

(b) Second, discovery in the SICC is based on the "reliance discovery" process in arbitration: there is no "general discovery". This will reduce the expense and delay due to the production of documents.

(c) Third, foreign lawyers have liberal rights of audience before the SICC. Parties who regularly instruct certain preferred lawyers will thus be able to retain their counsel of choice to represent them.

28. Finally, a core theme of flexibility runs through the SICC's procedure. The SICC allows parties to tailor its procedure to their dispute. Again, I will give three examples which illustrate this theme of flexibility:

(a) First, although there is a right of appeal by default, the parties may exclude this by agreement.

(b) Second, the parties can agree that rules of evidence other than the evidential rules under Singapore law will apply to their dispute.

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[9] *Jacob Agam and another v BNP Paribas SA* [2017] 2 SLR 1, discussed in Justin Yeo, "On Appeal from Singapore International Commercial Court" (2017) 29 SAcLJ 574.

(c) Third, in certain cases, parties can apply to have their cases heard *in camera*, and for orders to be made to preserve the confidentiality of the proceedings.

The progress of the SICC

29. As noted above, the SICC was launched on 5 January 2015. Since then, in a span of less than 3 years, 30 judgments have been issued, including 6 appellate judgments, most within 3 months after submissions, and at least one judgment has been reported in overseas law reports.[10] Significantly, in February this year, the first writ of summons (based on a jurisdiction clause conferring jurisdiction on the SICC) was filed with the SICC.[11] (The earlier SICC cases had all been transferred from the High Court.)

30. Three years after its inception, the SICC's Bench has expanded to include, as noted above, Lord Neuberger of Abbotsbury IJ, ex-President of the UK Supreme Court, and Beverly McLachlin PC IJ, ex-Chief Justice of Canada, among other eminent jurists. Both of these towering figures of the common law sat with our Chief Justice in an appeal earlier this year.[12]

31. The SICC is also an active member of the Standing International Forum of Commercial Courts ("the SIFoCC"), a forum that brings together commercial courts from all around the world to facilitate collaboration and pursue best practices. The first meeting of the SIFoCC was held in London on 4–5 May 2017. A second meeting was held less than two weeks ago in New York, on 27–28 September 2018. The SIFoCC has worked on, among other things, a multilateral memorandum on the enforcement of judgments of commercial courts, creating a working party to identify best practices to make litigation more efficient and introducing a structure to enable commercial court judges to spend time as observers in other commercial courts.[13]

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10 *BCBC Singapore Pte Ltd and another v PT Bayan Resources TBK and another* [2016] 5 LRC 186; (2016) 167 ConLR 93.

11 *SICC News – Issue No 11* (April 2018) <https://www.sicc.gov.sg/docs/default-source/modules-document/media-resources/sicc-newsletter-issue-no-11_8239f5c5-8e7f-42bf-81b0-cb581c33a349.pdf> at p 1.

12 *Bumi Armada Offshore Holdings Ltd and another v Tozzi Srl (formerly known as Tozzi Industries SpA)* [2018] SGCA(I) 05.

13 *SiFoCC: Report on the first meeting; London; 4–5 May 2017* <https://www.sifocc.org/wp-content/uploads/2018/03/First_SIFOCC_Report_-_FINAL.pdf> at p 4.

32. In sum, the SICC is a significant addition to the dispute-resolution options available to litigants in our jurisdiction. It advances the Dispute-Resolution Function of our civil justice system.

IV. Conclusion

33. In conclusion, I will draw together two common themes that underlie the two reforms to Singapore's civil justice system discussed above.

34. First, both reforms reflect a desire to boldly reshape the civil justice system. The proposed reforms to our civil procedure are the product of a root-and-branch rethinking of our existing law. If they come into effect, they will substantially change our civil justice system. The establishment of the SICC was no less revolutionary. It required significant and unprecedented changes to our Constitution and other primary legislation – for example, to provide for International Judges to become members of our High Court. Transformative changes of this nature will be necessary to ensure that our civil justice systems meet the needs and expectations of our users.

35. Second, although our Judiciary was a key leader of both sets of reforms, both were a product of collaboration between the Judiciary, practitioners and the Ministry of Law. The Judiciary bears primary responsibility for the judicial system. However, other stakeholders also have an interest in the judicial system and have a role to play in reforming it.