

JOHN E.C. BRIERLEY MEMORIAL LECTURE

International Dispute Resolution Courts: Retreat or Advance?

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Professor Brierley was a world-renowned scholar of comparative law, with a lifelong interest in international arbitration. I unfortunately did not know him personally. This is my great loss.

I am honored to be invited to give this public lecture on international arbitration established in his name. I am also honored to join the ranks of Yves Fortier, the first Brierley lecturer, and the late Professor Andy Lowenfeld, and others.

I am also pleased to be here in Montreal. Canada deserves its reputation as a leader in international commercial and treaty arbitration, and as the torch-bearer for increased transparency.

Introduction

To be clear on terminology, by the phrase “international dispute resolution courts” in my Lecture title, I mean only international courts with jurisdiction to resolve *commercial* disputes – both investment and trade disputes. I am not tonight addressing “public international law courts” such as the International Court of Justice and human rights courts.

On the investment side, the call for new international investment courts – effectively, the judicialization of treaty arbitration by the new Free Trade Agreements (*FTA*) – has its origin in dissatisfaction with the (perceived) status quo. The dissatisfaction is wide and deep and loud: costs are too high, proceedings are too slow, arbitrator selection is too opaque, tribunals are too homogeneous, conflicts of interest and issue conflict are scandalous.

This bleeds over – on the trade side – into international commercial arbitration, fueled in part by the overlap in transnational players: parties, counsel, arbitrators, and even arbitral institutions. We have seen something of an increase in taking routine commercial/trade disputes to domestic courts instead of international arbitration.

The debates – still heated – are turning to the comparative advantages of *standing* courts over

¹ I wish to thank Pierre-Olivier Savoie, my former colleague at Freshfields and now practicing on his own, and my research assistant Rachel Tan for their invaluable help in researching and preparing this Lecture. The views expressed herein are strictly my own, as are any mistakes.

traditional *ad hoc* tribunals. We see this most clearly in the trajectory of the European Union initiative for first and second instance investment courts

The seemingly endless commentary at arbitration conferences and the growing stack of articles and blog posts have set me thinking. How much are the proponents of courts-over-arbitration looking *backwards*, by which I mean romanticizing the aspects of domestic court systems with which they are most familiar? How much are they willing to look *forward*, and explore new, and innovative, court structures for international commercial justice?

Hence the other part of my Lecture title: “Retreat or Advance”? I tell you now that I am in favor of advance.

Later in the lecture, I propose to illustrate such advance by highlighting another category of court, with the new hybrid Singapore International Commercial Court – known as the *SICC* (an unfortunate acronym). The *SICC* has not received much notice outside Asia, at least since its legislative launch in 2015. I am not here to market the Court to you – it has to market itself, on its merits – but to brief you on its nature and progress. Nor am I here to say that the *SICC* is the cure-all for international arbitration, but only an important new option for transnational actors dealing with Asia.

I see the *SICC* as something of a dark horse, which is worth knowing about because it may catch up to commercial arbitration tribunals and FTA investment courts.

My thesis is that international businesses expect and deserve a wide choice of first-class dispute resolution mechanisms. Where there are first-class domestic courts suitable for cross-border disputes, the parties are free to choose them. Where the local courts are not up to the standards of, say, Canada and United States, the parties will continue to use international commercial arbitration. For investment treaty disputes, it seems we have to be prepared to accept the new “Investment Court System” (*ICS* – another unfortunate acronym). And, also, we should be open to existing and new hybrids of domestic international commercial courts.

Arbitration vs Courts vs Investment Courts

As necessary background, I will start with what I call, for convenience, the Arbitration vs Courts vs Investment Courts debate.

And why not start with Professor Brierley? In 1992, he wrote the Preface to a special edition of the McGill Law Journal on international arbitration, which included studies stretching from classic international commercial arbitration to the new and more public arbitration under the Canada-US FTA and the United Nations Compensation Commission. He observed:

a further paradox (if the word is accepted as appropriate) implicit in the arbitration phenomenon, namely its use as a means for the “privatization” of dispute settlement for private persons and also as a mechanism adaptable to the resolution of disputes

*involving actors that are properly characterized as “public entities” or, at least, as implicating mixed public and private concerns”.*²

This resonates with me, having devoted my career to private and public international dispute resolution, crossing between the private and public sectors. Indeed, my Hague Lectures were rather grandly titled “Mixed Private and Public International Law Solutions to International Crises”.³

Today, Professor Brierley’s paradox is magnified. The private and public branches of international arbitration have ever more influence on each other. Treaty arbitration attracts the most attention – and worst whipping – because it is the most public. I will not, though, spend much time on the battleground of investor state dispute-resolution (*ISDS*), or on details of the new investment courts in the Canada-EU Trade Agreement (*CETA*) and EU-Vietnam FTA, or the prospects for a multilateral investment court.⁴ It is familiar territory, lectured upon by others.

I view a distinguished lecture like this as the opportunity – really, the responsibility – to learn something I do not know, or do not know well. Here, I assigned myself the task of exploring whether the Arbitration vs Courts vs Investment Courts debate could illuminate the prospects for *international commercial* courts. By this I mean international divisions of domestic courts, with jurisdiction of private international commercial disputes and, potentially, investment contract and even treaty disputes.

“Regular” Domestic Courts

Let me first address – and put aside – the threat of taking more international commercial disputes to “regular” domestic courts to escape the flaws of international commercial arbitration. This would be a *retreat* from international commercial justice. In my view, this is not a serious worry.

It is true that the EU (effectively) takes the position that intra-EU disputes could and should be resolved only by the (generally) excellent EU Member State courts. But there is an inconvenient fact: parties from different EU states have been free for decades to choose EU courts, and they have instead opted for arbitration

It is also true that we Westerners know and like and deservedly respect our independent and high-quality courts. Why would we not want to litigate disputes with foreigners in our familiar courthouses with our familiar procedures? Why would not our counter-parties from, say, west

² John E.C. Brierley, “Preface, McGill Law Journal, Volume 37:2 (1992).

³ Lucy F. Reed, “Mixed Private and Public International Law Solutions to International Crises”, 177 Hague Recueil 306 (2003).

⁴ CETA: EU and Canada agree on new approach on investment in trade agreement, 29 February 2016, http://europa.eu/rapid/press-release_IP-16-399_en.htm, last accessed on 9 October 2017.

Africa, also appreciate the proven benefits? Wait, they say, we are proud of our courts as well, and public proceedings in international cases will help develop the rule of law – why not come to us? To borrow from Lord Goff, there is a veritable “jungle of separate, broadly based, jurisdictions all over the world”⁵ – good, bad and mediocre – and they are not designed to resolve transnational commercial disputes fairly. As for investment disputes, we have to acknowledge the reality of injustice – including judicial injustice – in so much of the developing world, where so much foreign investment takes place.

I do not need to take this much further with this audience. International arbitration can and should trump “regular” domestic courts for most international commercial disputes.

But, before moving beyond judicial nationalism, it is worth asking why there is a stubborn contingent – the new Calvo-ists – who would *retreat* from international arbitration to domestic courts. What factors objectively might make domestic litigation better than international arbitration? This is not hard to answer. My core list is this (with the health warning that each item is complex):

- (1) The safety net of an appeal, when the decision-maker appears to be wrong;
- (2) The independence and accountability of sitting judges, answerable to the public, rather than *ad hoc* arbitrators answerable only to the disputing parties;
- (3) Transparency, for all but genuinely confidential commercial information;
- (4) Common codes of conduct and ethics for judges and counsel.

I am purposefully not including the factors of time, cost and efficiency, because we should recognize that they do not matter greatly in multi-hundred-million dollar international disputes. Enforceability of judgments, of course, does matter, and I will return to that.

The Investment Court System

I am indebted to Maître Fortier for a segue from domestic courts to international investment courts and appellate bodies. These have been on the treaty drawing boards for some years, and now promise to come to life – or try to come to life – under the CETA and EU-Vietnam FTA. Treaty draftsmen and women have now turned their attention to follow-on FTAs, and the gold ring of one multilateral investment court.

No doubt, much of the attraction of an international investment court lies in its similarity to a national court system, or at least the leading common law and civil law systems. Maître Fortier

⁵ *Airbus Industrie GIE v Patel and others* [1999] 1 AC 119 at 132.

highlighted this in his Preface to the Transnational Dispute Management special edition on CETA in March 2016:⁶

Resistance to the investor-state dispute settlement system embedded in CETA has essentially been pulling in two, opposite directions: toward a partial renationalization of available recourses on the one hand, and toward what is viewed as a 'greater' internationalization of dispute resolution, namely the institutionalization of dispute resolution based on a court model, on the other." [W]hat looks like a vote of confidence for internationalization may be closer to a vote for a certain kind of institutionalization, a kind modelled on domestic courts.

The intensity of the Treaty Arbitration vs Investment Courts debate is startling. You all know the sensational media stories about ISDS involving secret hearings, illegitimate law-making by illegitimate arbitrators, Fortune 500 dominance and so on.

Speaking with more perspective, but still with drama, Philippe Pinsolle has taken the view that defending investment arbitration is a "lost battle", because no "rational discussion is possible" where the criticisms are "largely ideological, if not emotional" and "[t]he perception is that private arbitration no longer passes the legitimacy threshold".⁷ The only answer, says Maître Pinsolle, is an investment court system.

Others disagree, with equally dramatic language.

Judge Stephen Schwebel has written that the investment court proposals "smack of appeasement of uninformed criticism of ISDS rather than sound judgment".⁸ His fundamental objection is that the EU investment court regime would replace "a system [arbitration] that on any objective analysis works reasonably well" with "a system that would face substantial problems of coherence, rationalization, negotiation, ratification, establishment, functioning and financing".⁹

The ICS – Investment Court System – does represent a radical change away from the decentralized ISDS regime of *ad hoc* party-appointed tribunals. Taking CETA as an example, the architecture includes:

- A standing court with stringent conflict of interest rules, similar to those applicable in domestic systems, which do not allow individuals to "double-hat" in counsel and arbitrator roles;

⁶ Yves Fortier, "Preface – Canada (TDM CETA Special)", Transnational Dispute Management, Vol 13, Issue 1, March 2016, at 1-2.

⁷ Global Arbitration Review, 'Defending investment arbitration "a lost battle", says Pinsolle', 11 October 2016. The remarks were made at a speech by Philippe Pinsolle at the Dutch Arbitration Day.

⁸ S.M. Schwebel, "The EU-Canada Free Trade Agreement (CETA) – Keynote remarks", Transnational Dispute Management, Vol. 13 Issue 1, March 2016.

⁹ Alison Ross, Global Arbitration Review, 'Schwebel criticizes EU act of "appeasement"', 24 May 2016.

- Court members appointed for five-year terms by the EU and Canada, with one-third coming from the EU, one-third from Canada, and one-third from other countries; and
- An appellate review mechanism.

In CETA, the court will have jurisdiction only in relation to the investment obligations of FET and compensation for expropriation. National treatment, MFN, and market access obligations at the establishment” stage, as well as performance requirements, will be left out in the cold, subject to state-to-state dispute resolution. Some may call this an *advance*; others of us, a *retreat*.

Whether friend or foe of the investment court concept, no one can ignore the magnitude of practical obstacles involved in setting up any bilateral international investment court, much less a multilateral court. How to manage civil and common law cases, both substantively and procedurally? How to write the rules? Who will write the rules? How to select, and entice to serve, a bench of judges that is suitably international, qualified, available and diverse?¹⁰ Anyone who followed the election of judges to the International Criminal Court will appreciate the challenges.

In this space, you might find interesting the scholarship of Professors Jeffrey Dunoff and Mark Pollack. In a panel on international judicial values at the 2017 Annual Meeting of the American Society of International Law, they propounded the “Judicial Trilemma”. An international court, they say, can maximize only two of this triangle of agreed values: judicial independence, judicial accountability, judicial transparency.¹¹ FTA drafters might want to ponder this.

In my view, the practical obstacles of establishing an international investment court are surmountable, with more or less happy results. Let me drop two footnotes:

- First, the early history of the Iran-US Claims Tribunal can provide a number of clues on how to launch an international investment court successfully, even in a political minefield;
- Second, I am surprised that the debate about how to find qualified “permanent” investment dispute judges – which debate can be rather self-interested – rarely if ever touches upon the obvious solution of *training* the judges who are selected in investment law and procedure. If we can teach this subject to scores of L.L.M students, why not to experienced commercial lawyers willing to serve on the new courts? The best national

¹⁰ See, for example, Investment Treaty Working Group of the International Arbitration Committee, ABA Section on International Law, Initial Task Force Discussion Paper 14 October 2016.

¹¹ Jeffrey L. Dunoff and Mark A. Pollack, “The Judicial Trilemma”, Temple University Beasley School of Law (Legal Studies Research Paper No. 2017-05), forthcoming in the American Journal of International Law (2017) at 14.

judiciaries do exactly this with their judges, both when they join the bench and throughout their tenures.

Footnotes done.

No doubt the impending Investment Court System will not be perfect. But it promises at least to provide certain of the objectively best aspects of domestic litigation: appellate rights, a stable and accountable bench, public jurisprudence, and integrated ethical codes. And also to provide certain of the best aspects of international arbitration: reasonable IBA-style evidentiary rules, and appropriate confidentiality protections. This mixed nature means that – if all goes well – the new investment courts should not be an abject *retreat* to traditional litigation, but a modest *advance* in international commercial justice.

I propose we be gracious this evening and assume that this new ICS world will go well. We should not lose sight, in the intensity of the Treaty Arbitration vs Investment Courts debate, that this is not a zero-sum game. We will still need international arbitration.

Johnny Veeder put it well in discussing the Transatlantic Trade and Investment Partnership initiative in his Alexander Lecture in 2016:

*There is some idea that investment arbitration, with an existing registry, can somehow be morphed with an international investment court, so as to produce the best of all possible worlds. This would, I suggest, be a grave mistake. Consensual arbitration and court proceedings are two very different creatures. Arbitration in the form of ISDS can co-exist separately with an international investment court, just as it does with state courts and other tribunals. If users want arbitration, arbitration will continue.*¹²

Investor-state arbitration will not only continue, it will continue improved, as a result of the ongoing debates. In his TDM Preface, Maître Fortier succinctly made the case:

*Though admittedly imperfect, the arbitration system is now embedded in sophisticated international practices that contribute significantly to international governance. To build upon those practices with a view to improving them would have seemed more reasonable than to throw them out altogether, in favour of an uncertain model apparently based on domestic judicial analogies whose relevance remains questionable.*¹³

International Commercial Courts

Now I am leaving the Arbitration-vs-Courts-vs-Investment Courts debate.

¹² V.V. Veeder, Alexander Lecture, “What Matters – About Arbitration”, 82 ARBITRATION: The International Journal of Arbitration, Mediation and Dispute Management 153 (May 2016) (Sweet & Maxwell), at 160.

¹³ Note 6, Fortier, at 2.

To borrow Yves Fortier's and Johnny Veeder's words – what if we could find something close to “the best of all possible worlds” that could “contribute significantly to international governance”?

I now turn to the *hybrid* of domestic international commercial courts – a hybrid species and, necessarily, a rare species.

To start with a definition, I borrow from V.K. Rajah, SC, immediate past Attorney General of Singapore, in his 2017 Arbitration International article entitled “W(h)ither adversarial commercial dispute resolution?”. International commercial courts are:

*domestic courts rooted in the legal system of their home jurisdictions, but specially created and tailored in terms of structure and personnel to meet the needs of transnational commercial disputes.*¹⁴

It bears emphasis that international commercial courts – unlike international investment courts in FTAs – are part of the relevant *municipal* legal order. Their *international* profile comes from their case load, bench, bar and/or rules.

An international commercial court must, in an appropriately judicial way, think and act commercially. The Lord Chief Justice of England and Wales, Lord Thomas of Cwmgiedd, captured this in a recent lecture at the National Judges College in Beijing, entitled “Commercial Dispute Resolution: Courts and Arbitration”. In summarizing the role, he said:

*A Commercial Court must have as its objectives the ability to **deliver justice** quickly and relatively inexpensively. Its processes must be simple and flexible. The quality of its judgments must be high. It needs to apply the law in a way that is certain, fair and predictable. It must ensure that the law keeps pace with **market developments**. It must maintain the strength and vitality of the legal framework.*¹⁵

¹⁴ V.K. Rajah, SC, “W(h)ither adversarial commercial dispute resolution?”, 33 Arbitration International 17, 26 (2017).

¹⁵ The Right Honourable The Lord Thomas of Cwmgiedd, “Commercial Dispute Resolution: Courts and Arbitration, Lecture given at the National Judges College, Beijing (6 April 2017), <https://www.judiciary.gov.uk/wp-content/uploads/2017/04/lcj-speech-national-judges-college-beijing-april2017.pdf>. See also Lord Thomas’ DIFC Academy of Law Lecture, Dubai (1 February 2016), “Commercial Justice in the Global Village: The Role of Commercial Courts”; <https://www.judiciary.gov.uk/wp-content/uploads/2016/02/LCJ-commerical-justice-in-the-global-village-DIFC-Academy-of-Law-Lecture-February-2016.pdf> and Grand Court of the Cayman Islands Guest Lecture 2017 (2 March 2017), “Giving Business What it Wants – a Well Run Court for Commercial and Business Disputes”; <https://www.judiciary.gov.uk/wp-content/uploads/2017/03/grand-court-of-the-cayman-islands-guest-lecture-march-2017.pdf>, last accessed on 9 October 2017.

Traits of an International Commercial Court

What are the desirable traits of an international commercial court? The list can be longer or shorter, and inevitably raises comparisons with international arbitration tribunals and “regular” domestic courts.

I am content with the medium-length list set out by Sir William Blair, Queen’s Bench Judge in Charge of the London Commercial Court, in his lecture entitled “Contemporary Trends in the Resolution of International Commercial and Financial Disputes” delivered at the Durham University Institute of Commercial and Corporate Law in January 2016.¹⁶

Judge Blair, who was not looking at courts *per se*, opens by asking “what are international users looking for from international commercial dispute resolution?”. He then lists eight components:¹⁷

- (1) Certainty – application of ascertainable legal principles to the underlying dispute;
- (2) Accessibility – absence of artificial barriers to bringing or defending claims;
- (3) Predictability – application of known procedures;
- (4) Transparency – party awareness of the process;
- (5) Independence – as underpinned by transparency, no suspicion of dependence;
- (6) Experience and expertise of the tribunal;
- (7) Efficient case management – cases are properly handled; and
- (8) Effective outcome – including enforcement if necessary.

And, possibly, as a ninth component, reasonable cost.

The list has to grow when we look at international commercial courts.

Existing International Commercial Courts

It is reasonable to start with existing international commercial courts.

¹⁶ Sir William Blair, “Contemporary Trends in the Resolution of International Commercial and Financial Disputes”, Durham University, Institute of Commercial and Corporate Law Annual Lecture 2016 (21 January 2016), <https://www.judiciary.gov.uk/wp-content/uploads/2016/01/blair-durham-iccl-lecture-2016.pdf>, last accessed on 9 October 2017.

¹⁷ Id at 4.

The main ones are the London Commercial Court, the Dubai International Financial Centre Court, and the Singapore International Commercial Court. The *Economist* mentioned these three in the 2 September 2017 edition, in an article on international court competition.¹⁸

First and foremost is the London Commercial Court, technically the Commercial Court of the High Court of England and Wales, established in 1895. It has always had international jurisdiction and focus. Since 2010, over 50% of its cases have involved only foreign parties, and more than 80% have involved at least one non-UK party.¹⁹ The caseload is high, exceeding 900 new cases in 2015 (with 25% related to arbitration issues).²⁰

V.K. Rajah, SC, among many, attributes the London Commercial Court's success to "*the global standing of English commercial law, the fairness and consistency of English judges, and the ready access to quality representation in London*".²¹

Who can disagree? But is it an *international* court, as we know the world post-1895, post-1945, post-2008? With due respect, I think not.

Despite its welcome international outlook, this is meant to be and is an English court, with English judges, with English procedure, requiring English counsel, in London. I hasten to add that there is nothing wrong with that – for certain purposes. Without accepting the easy charge that the London Commercial Court is something of "a relic of Commonwealth traditions",²² I submit it is not the best option or model for all, and not for Asia.

Second, there is a suite of international commercial courts in the **Gulf**. The Dubai International Financial Centre Courts (*DIFCC*) opened in 2008; the Qatar International Court and Dispute Resolution Centre (*QIC*), in 2009; and the Abu Dhabi Global Market (*ADGM*) Courts in 2015. The DIFCC, which is the most developed and successful of the three, originally dealt only with matters arising in the DIFC (as a special legal jurisdiction) and internationalized with consent jurisdiction only in 2011.

V.K. Rajah, SC, gives the Gulf courts credit for their "youthful flexibility", being (like the SICC) "unafraid to take bold procedural innovations" and thereby offering "reasons for litigants to be drawn back to the courts".²³

I agree that, with their innovations, the Gulf international commercial courts are *advances* in international litigation. But, given that all three are (1) driven by their host governments' national business attraction strategies, and (2) very much English common law-based, are they really *international* commercial courts? Again, I think not.

¹⁸ "Courtly competition; International litigation", *The Economist*, 2 September 2017, at 63.

¹⁹ Note 14, Rajah, at 26.

²⁰ Note 16, Blair, at 6-7.

²¹ Note 14, Rajah, at 26.

²² Jan Paulsson, "International Arbitration is not Arbitration", 28 May 2008, John E.C. Brierley Memorial Lecture, at 3.

²³ Note 14, Rajah, at 26-27.

For the sake of completeness, let me add other recent initiatives. First, the Dutch are establishing a chamber of the Commercial Court in Amsterdam in 2018, with authority to render judgments in English on complex international trade disputes involving the Netherlands.²⁴ Second, India has adopted international commercial court legislation in parallel to arbitration legislation.²⁵ Third, turning to the francophone African world, there is the Cour Commune de Justice et d'Arbitrage of the Organisation pour l'harmonisation du droit des affaires en Afrique (*OHADA*). *OHADA*, which now has 17 member states, seeks to harmonize business law by adopting Uniform Acts on subjects such as companies law. The *Cour Commune* acts as both an arbitral institution and a court of last instance with respect to Uniform Act matters, with final judgments automatically enforceable in the 17 member states.

Further, there is now a "Standing International Forum of Commercial Courts", which met for the first time in May 2017. This is an initiative of Lord Thomas, and the meeting was in London. Courts from five continents were represented: North America (including Canada, through Ontario), Europe, Asia, Australia and Africa.²⁶

Will a rash of new international commercial courts be *advances* or *retreats*, perhaps retreats to familiar "regular" domestic court procedures? It is too soon to tell. Indeed, it is too soon to tell if they will ever have any cases.

It is not too soon to tell that the competition for cases is fearsome. Judge Blair observes that we are seeing "a competitive environment in which different states and systems and commercial actors seek to create optimal conditions to encourage use of their particular dispute resolution mechanisms" and "[a]t times, some of the vast amount written on the subject seems more of a sales pitch than an attempt at analysis."²⁷ To be fair, Judge Blair also acknowledges that the competition has "encouraged new thinking and new institutions".²⁸ So, this is perhaps a start towards an advance.

²⁴OGEMID 12 August 2017. The full analysis is at <http://www.loc.gov/law/foreign-news/article/netherlands-draft-law-on-new-international-commercial-court/?locl= eaglm>, last accessed 9 October 2017.

²⁵ The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act. See Note 16, Blair, at 12.

²⁶ A Unique Gathering of Commercial Courts, 15 May 2017, <https://www.judiciary.gov.uk/announcement-court/high-court/>, last accessed 9 October 2017. The venues represented included New York, Delaware, Australia, Singapore, Ireland, Hong Kong, Dubai, Qatar, Abu Dhabi, Bahrain, China, Kazakhstan, Hamburg, Netherlands, Bermuda, Eastern Caribbean, Cayman Islands, Uganda, Sierra Leone, Rwanda, Nigeria, Scotland, Northern Ireland and Canada.

²⁷ Note 16, Blair, at 4.

²⁸ *Id.* Judge Blair also recognizes the need for options, stating (p. 11): "*My belief is that dispute resolution procedures whether through the courts, arbitration, or mediation, work best when they work in harmony with each other. In the interests of the parties, some disputes are best arbitrated, some are best litigated – it is important to keep that perspective*".

I personally would not put my money on the chances of success for so many courts, even if their goals are modestly regional. This audience knows how many international arbitration centers there are with nothing to do, except market and pitch.

The Singapore International Commercial Court

I *would* put my money on the Singapore International Commercial Court, if only because Singapore has succeeded so brilliantly with Maxwell Chambers, with the Singapore International Arbitration Center, and the Singapore International Mediation Center. Singapore has invested substantial funds and talent towards becoming the leading international dispute resolution center in Asia, and one of the best globally.

While many of us have been caught up in the Arbitration-vs-Courts-vs-Investment Courts debate, the SICC has quietly been going about its business. And it has been starting to fulfill ambitions far broader than the London Commercial Court or Dubai DIFCC.

Origin and Aims

Singapore established the SICC in January 2015, as a separate division of the High Court under [s18A of] the Supreme Court of Judicature Act, to hear cases that are both “international” and “commercial”, including the category of “offshore cases” – all defined. At the time, Chief Justice Menon emphasized the Court’s substantive reach:

*From its inception, the SICC was envisaged as a forum dedicated to handling **only** international commercial disputes. As such, unlike the DIFCC, the SICC’s jurisdiction does **not** have a significant domestic component at all.*²⁹

As for procedure, Judge Stephen Chong has described the Court as “a careful marriage between litigation and arbitration, which allows it to strike a middle ground between the two”.³⁰

With the SICC, Singapore unabashedly aims:³¹

- To be the default court for international commercial parties who do not want to arbitrate, and for whom London and New York do not make sense;

²⁹ Sundaresh Menon, “International Commercial Courts: Towards a Transnational System of Dispute Resolution”, Opening Lecture for the DIFC Courts Lecture Series 2015; <https://www.supremecourt.gov.sg/docs/default-source/default-document-library/media-room/opening-lecture---difc-lecture-series-2015.pdf>, last accessed 9 October 2017.

³⁰ Justice Steven Chong, British Maritime Law Association Lecture and Dinner in London, “The Singapore International Commercial Court: A New Opening in a Forked Path”, (21 October 2015), at 31.

³¹ See Report of the Singapore International Commercial Court Committee, published by Ministry of Law in November 2013, <http://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Annex%20A20-%20SICC%20Committee20Report.pdf>, last accessed 9 October 2017.

- To further Singapore’s status as the center of dispute resolution in Asia, complementing the Singapore International Arbitration Centre and the Singapore International Mediation Centre;
- To be responsive to the growing need for dispute resolution services, as cross-border trade and investment increase in Asia;
- To harmonize the differences between Asian legal systems, by developing a dedicated body of international commercial law in the region;
- To address certain inherent limits to arbitration, such as right of appeal and joinder of non-parties; and
- To leverage on Singapore’s legal expertise and efficiency, and neutrality.

This picture represents an *advance*, rather than a retreat to regular “Singaporean Singapore litigation”, at least on paper.

Jurisdiction, Bench and Main Features

As for what is on paper, the implementing legislation is not necessarily easy to parse. I will describe the main definitions and working parts.

Singapore is an UNCITRAL Model Law jurisdiction, and the definition of “international” is similar to that found in the Model Law. A case is *international* if: (1) the parties to the claim have their places of business in different states; or (2) none of the parties has its place of business in Singapore; or (3) at least one of the parties has its place of business in a state different from, in effect, the locus of the parties’ commercial venture; or (4) the parties have expressly agreed that the subject-matter of the claim relates to more than one state.³²

The subject matter must arise from a relationship of a “commercial” nature, whether contractual or not. A case is *commercial* if it falls into the usual categories, including: a trade transaction for the supply of goods or services; a distribution agreement; commercial representation or agency; construction works; investment, financing, banking or insurance; an exploitation agreement or a concession; a joint venture; a merger or acquisition; or carriage of goods or passengers by air, sea, rail or road.³³

An “*offshore case*” – which matters for non-Singaporean counsel – is an commercial action that has “no substantial connection to Singapore”, meaning that: (1) Singapore law is not the law applicable to the dispute and the subject matter is not regulated by [or otherwise subject to] Singapore law; or (2) the only connections between the dispute and Singapore are the parties’ choice of Singapore law as the applicable law and the parties’ submission to SICC jurisdiction.³⁴

³² Order 110, r 1(2)(a) of the Rules of Court.

³³ Order 110, r 1(2)(b) of the Rules of Court.

³⁴ Order 110, r 1(2)(f) of the Rules of Court.

The SICC has jurisdiction over suitable cases – those falling within the definitions – that are either (1) transferred from the docket of the Singapore High Court by the Chief Justice, upon consultation with the parties; or, eventually (2) based on express SICC clauses in international commercial contracts.

The bench consists of 22 Singapore High Court and Court of Appeal judges and 12 international judges from civil as well as common law jurisdictions, including the Honorable Justices Patricia Bergin from Australia, Dominique Hascher from France, Sir Bernard Rix from the UK, and Professor Yasuhei Taniguchi from Japan.

This civil-common law makeup is more than window-dressing. As Chief Justice Menon reported in a 2015 lecture:

*Such diversity is particularly useful in Singapore's circumstances, given the diversity of legal systems within the ASEAN region. It bears noting that the Singapore International Arbitration Centre ("SIAC") has reported that 36% of its cases involve parties with a civil law background.*³⁵

This distinguishes the SICC from the London Commercial Court and the DIFCC. This should make the SICC credible to potential litigants from civil law jurisdictions, for example, South Korea and Indonesia. This is an *advance*.

The default is for first instance proceedings to be heard by one judge, but the Chief Justice may direct that a case be heard by a three judge panel or the parties may agree to a three judge panel (subject to the Chief Justice's approval).³⁶ Any first instance judgment may be appealed to the Singapore Court of Appeal under the general rules of appeal,³⁷ with the possibility that the parties agree to limit or vary the scope of appeal. The international judges may be appointed to appellate panels.

Judge Stephen Chong has emphasized the value of this experienced SICC bench in controlling costs. In his words:³⁸

As Lord Mustill had once memorably remarked, arbitration appears to have "all the elephantine laboriousness of an action in court, without the saving grace of the exasperated judge's power to bang together the heads of recalcitrant parties". The SICC avoids this problem. It has a judge at the helm of the proceedings and he or she has the power to knock heads together. Indeed, the judges in the SICC stable are both knowledgeable in the fields of commerce and skilled in the art of litigation, hence one can

³⁵ Note 29, Menon, at 18.

³⁶ Rules of Court Order 011, r 53(1).

³⁷ Supreme Court of Judicature Act (Chp 322), s 29A; Rules of Court Order 110, r 29.

³⁸ Note 30, Chong at 24, citing Lord Mustill, "Arbitration: History and Background" (1989) 6(2) *Journal of International Arbitration* 43 at 55.

naturally expect a tight control to be kept over proceedings such that costs do not spiral out of control.

The SICC infrastructure has several additional attractive features for potential parties. As the SICC was opening in 2015, Michael Hwang, SC, listed these to include:

- Limited discovery, based on the IBA Rules on the Taking of Evidence in International Arbitration;
- Confidentiality options, for private hearings and restrictions on public release of information;
- Substitution of foreign rules of evidence, where appropriate;
- Special provisions for joinder and consolidation;
- Foreign lawyers may be appointed in offshore cases;
- Foreign lawyers may give submissions to prove foreign law.³⁹

The fee regime is also different between the High Court and SICC. High Court fees are generally chargeable per document filed. SICC fees are chargeable by milestone events, basically based on the type of hearing, length of hearing, and number of judges assigned.

These features suggest the SICC “marriage” between international arbitration and litigation. It is worth highlighting evidence and rights of appearance.

First, it is extraordinary that the legislation allows the SICC judges to use foreign rules of evidence, in cases that, one must recall, are being heard in the Singapore High Court.⁴⁰ This flexibility, combined with the profiles of the international judges, underscore the accessibility of the court to civil as well as common law litigants. This is novel, and an *advance*.

Second, parties are able to use foreign counsel of their choice, within the relatively liberal rights of audience before the SICC. Foreign lawyers may register (annually) to appear alone in offshore SICC cases – cases with no substantial connection to Singapore.

The registration process is straightforward. To be eligible, a lawyer must be authorized to practice law in a foreign jurisdiction; have five years’ experience in advocacy; be sufficiently proficient in English to conduct proceedings; and not have been subject to disbarment or

³⁹ Michael Hwang, “Commercial courts and international arbitration – competitors or partners?”, 31 *Arbitration International* 193, at 201 (2015). For another assessment of the SICC’s profile and potential, see Johannes Landbrecht, “The Singapore International Commercial Court (SICC) – an Alternative to International Arbitration?”, 34 *ASA Bulletin* 1/2016 (March).

⁴⁰ Supreme Court of Judicature Act (Chp 322), s 18K; Rules of Court Order 110, r23.

suspension or similar discipline.⁴¹ Foreign lawyers must also agree to abide by Singapore's rigorous code of legal ethics.⁴² As of May 2017, there were approximately 75 foreign lawyers registered, of over a dozen nationalities.⁴³

A foreign lawyer may also apply for and obtain a limited registration to appear in a specific SICC case to make submissions on specific questions of foreign law – not as a foreign law expert, but as an advocate.

These rights of appearance may not seem enough to some. They actually are liberal when viewed against two factors: first, it was not until 2004 that Singapore allowed foreign lawyers to practice in Singapore; and, second, High Court audience is limited to members of the Singapore bar, with the exception of foreign lawyers of “eminent distinction” admitted on an *ad hoc* basis – in practice, only senior English QCs, and that very rarely.⁴⁴

Most important for the prospects of foreign lawyers, the regulatory framework defines “offshore cases” broadly. There is no “substantial connection to Singapore” just because, for example: a witness or relevant document is found in Singapore; or funds have passed through Singapore or are in Singapore bank accounts; or one of the parties has property or assets in Singapore, which are not the subject matter of the dispute; or one of the parties is a Singapore party or, if not, has Singapore shareholders.

Nonetheless, in their comments on the legislation, foreign lawyers voiced concerns that the SICC would interpret the concept of “offshore case” narrowly, to protect the Singapore High Court bar. This has not happened.

Overall, the relatively open access of foreign lawyers to SICC cases is an *advance* for international litigation.

The SICC in Operation

Now that the SICC has received its first cases – obviously, all by transfer from the High Court docket so far – how does the SICC in operation compare to the SICC on paper? When the SICC was launched in 2015, Judge Stephen Chong memorably said “much like the new kid on the block, it has received its fair share of awkward stares and admiring glances”.⁴⁵ What are the neighborhood kids thinking now?

⁴¹ Legal Profession (Foreign Representation in Singapore International Commercial Court) Rules 2014 (S 851/2014), s4.

⁴² The ethics code can be found in the First Schedule of the Legal Profession (Foreign Representation in Singapore International Commercial Court) Rules 2014 (S 851/2014). There is a separate disciplinary framework to deal with complaints about foreign lawyers registered with the SICC.

⁴³ As of September 2017, there were 75 foreign lawyers registered with the SICC.

⁴⁴ Legal Profession Act (Ch 161), s29(1) and s15(1)(a)(i).

⁴⁵ Note 30, Chong at 1.

The SICC received its first case in 2015, and there was much publicity when the first judgment came down in May 2016. By May 2017 – as I said, somewhat to my surprise, as I was preparing this Lecture – the Court had rendered 10 judgments and the Singapore Court of Appeal had decided its first appeal. Now, the tally is 13 and 1, with certain cases involving multiple judgments.

BCBC Singapore. The first judgment, which came after the first tranche of a trial, arose from a cross-border joint venture energy dispute between *BCBC Singapore* and *Bayan Resources TBK* of Indonesia.⁴⁶ The Chief Justice named a three judge panel: Singaporean Judge Quentin Loh, and International Judges Sir Vivian Ramsey and Anselmo Reyes. The judgment was in favor of the Indonesian defendant. The judges resolved issues dealing with Singaporean law on implied terms and Singapore’s approach to contractual interpretation.

Most important for present purposes, the case offered insights into how the Court would determine questions of foreign law, permit foreign lawyers to appear, and manage confidentiality – all issues of interest to us as international arbitration practitioners.

On application of the parties, the Court decided certain questions of applicable Indonesian law on the basis of submissions, and certain other questions, under the more traditional common law practice, by way of proof and pleading. As we know from arbitration, submissions on foreign law can save substantial time and costs.

Also on application from the parties, the Court granted confidentiality orders: (1) for certain documents to be sealed; (2) for witness examination of the sealed documents to be heard *in camera*; (3) to allow the option of clearing the courtroom when confidential evidence was to be addressed; and (4) for the sealed documents not to be given to non-parties reviewing the public case file. The parties also could have asked the Court to redact any part of the judgment dealing with confidential matters, or even postpone publication of the judgment for up to 10 years, although they did not do so in the *BCBC* case.

Teras Offshore. A case of *Teras Offshore Pte Ltd v Teras Cargo Transport (America) LLC*, concerned Bechtel-related supply and service contracts for LNG projects in and around Queensland Australia. The Singaporean plaintiff exercised the option to apply for a preliminary decision that the action was an “offshore case”. International Judge Sir Bernard Eder, sitting alone, construed the test broadly, finding that the dispute did not have a substantial connection with Singapore.⁴⁷

Telemedia Pacific. A later case, leading to three decisions, involved a failed joint venture between the *Telemedia Pacific Group* and the *Yuanta Asset Management International Group*. In brief, the plaintiffs pledged \$50 million worth of shares in a Singapore listed company to the defendants as collateral for loans, and the defendants proceeded to sell all the pledged shares in the market.

⁴⁶ *BCBC Singapore Pte Ltd v PT Bayan Resources TBK* [2016] SGHC (I) 01.

⁴⁷ *Teras Offshore Pte Ltd v Teras Cargo Transport (America) LLC* [2016] SGHC (1) 02.

In the first full judgment on liability issued by the Court, with International Judge Patricia Bergin sitting, the plaintiffs prevailed.⁴⁸ The Court issued a second judgment on costs and damages.⁴⁹ The Hong Kong defendants then applied for a stay of execution of parts of both judgments, on grounds that execution would pose a genuine risk of non-recovery if they should prevail on appeal – because the plaintiffs were not Singapore residents and one plaintiff was implicated in past questionable transactions.

Judge Bergin dismissed the defendants' stay application, with this pointed finding:

*the parties consented to their case being heard in this Court (the SICC). Having done so, they are taken to have understood that they must comply with the orders of this Court. It seems to me that if parties embrace the jurisdiction of an International Court to determine their dispute, there should be little force in a claim that seeks to rely upon the international status of one or other of the parties to claim that the orders of the Court should not be enforced.*⁵⁰ (Emphasis added)

Judge Bergin added that the defendants could seek recovery of funds, if necessary, via the reciprocal enforcement regime between Singapore and Hong Kong.

The *Telemedia* group judgments should help dispel any fear that the non-Singaporean status of a party will itself impede execution of an SICC judgment.

BNP Paribas. The last group of cases warranting mention is *BNP Paribas*, comprised of two High Court judgments and the first appellate decision.

BNP Paribas Wealth Management filed suit in Singapore in 2015 against Israeli siblings, Jacob and Ruth Agam, after the defendants allegedly failed to repay loans of some € 61 million to their companies, secured by their personal guarantees.⁵¹ Six months later, the Agams counter-filed in a Paris court seeking a declaration that their facility agreements and personal guarantees were invalid under French law. The Agams then applied to the SICC to stay proceedings pending the Paris court's determination of their counter-action.

The SICC – a panel of Singaporean Judge Steven Chong and International Judges Roger Giles and Dominique Hascher – the latter from France – dismissed the application, on grounds that the defendants had filed in France not only after the SICC case had been commenced, but also after they had filed a counterclaim. The Agams, said the Court, were not in fact applying for a limited stay but rather seeking to have the very issue that was before the SICC – the validity and enforceability of their personal guarantees – decided in France, and thereby interfere with the Singapore action.

⁴⁸ *Telemedia Pacific Group and Another v Yuanta Asset Management International Limited and Another* [2016] SGHC (1) 03.

⁴⁹ *Telemedia Pacific Group and Another v Yuanta Asset Management International Limited and Another* [2016] SGHC (1) 06.

⁵⁰ *Telemedia Pacific Group and Another v Yuanta Asset Management International Limited and Another* [2017] SGHC (1) 03 at [32].

⁵¹ *BNP Paribas Wealth Management v Jacob Agam and Another* [2016] SGHC (1) 5.

There was also a related action, namely an application by BNP Paribas Wealth Management to substitute a related entity as plaintiff. The SICC granted the application.⁵² The defendants appealed. The Singapore Court of Appeal – a SICC bench of Chief Justice Menon, Singaporean Judge Judith Prakash, and International Judge Dyson Heydon – dismissed the appeal in a short 14-page judgment.⁵³ The Court did not hesitate to criticize the conduct of the appellants' counsel, who were Singaporean not foreign, for certain surprise tactics:

*The appellants' written submissions raised various issues which were outside the Notice of Appeal. Those issues arise out of the Appellants' contentions that they were entitled to appeal as of right ...in passing though, it should be said that the Appellants ought to have given the Respondent more notice of their proposed tactics on appeal in order to avoid surprise. The Respondent only had a little over a week's notice given that the Appellants' filed and served their skeleton arguments on 4 May 2017 for the appeal listed for hearing on 12 May 2017. Since the skeletal arguments were served contemporaneously and not consecutively, the Respondent had no chance to deal with the subrogation point before the oral hearing.*⁵⁴

These comments reflect the serious weight the SICC puts on due process. This should serve as both warning and comfort to potential future parties. And – like national court judgments and unlike commercial arbitration awards – this judgment gives future parties the benefit of knowing the Court's stance as they consider forum selection.

Encore: Traits of an International Commercial Court

This quick review of the early progress of the SICC prompts additions to Judge Blair's list of legitimacy factors for international commercial dispute resolution. Not necessarily in order of importance, these include:

- (1) Public interest in public justice;
- (2) The safety net of appellate review of legal issues;
- (3) Accountability of full-time judges;
- (4) Independence of full-time judges;
- (5) Coercive power;
- (6) Joinder and consolidation power;
- (7) Freedom of choice of party representation;

⁵² *BNP Paribas Wealth Management v Jacob Agam and Another* [2017] SGHC (I) 5.

⁵³ *Jacob Agam and Another v BNP Paribas SA* [2017] SGCA (I) 01.

⁵⁴ *Id* at [23-24].

- (8) Known ethics standards for counsel and judges; and
- (9) A flexible approach to procedure, evidence, and case management.

Judge Blair's potential extra factor – cost and efficiency – deserves special mention, in conjunction with appeal rights. Just as Judge Stephen Chong connected the profile of the SICC bench to cost efficiency, so, too, can we – counterintuitively – connect the availability of appellate review to efficiency. For arbitration devotees, how can a non-final decision be more efficient than a final decision not subject to further review? Chief Justice Menon has captured the paradox well:

*[O]ver the years, the absence of appellate mechanisms in arbitration has paradoxically led to rising costs. On one hand, it has encouraged parties to approach the arbitral process as a “one shot” contest in which the winner takes it all. Parties pour extensive resources into the battle, exercising utmost effort and rigour because there is no second chance for a favourable outcome. On the other hand, arbitrators may be anxious to avoid challenges on grounds, among others, of natural justice. They might therefore countenance protracting proceedings*⁵⁵

Chief Justice Menon also mentions – and this is often overlooked as a costs measure – that international commercial courts have “access to the infrastructure of cutting-edge case management systems”, including electronic filing, of modern municipal courts.⁵⁶

Yes, the SICC is a different creature than international arbitration. It is also a different creature than “regular” Singapore court litigation. It is a hybrid, representing an *advance* – in the form of a serious new choice for international commercial justice.

But, speaking of creatures, what about the elephant in the room – enforcement of SICC judgments?⁵⁷ I do not find this as problematic as others do. Leaving rogue states and claimants aside, the reality is that business-to-business parties generally comply with judgments and awards alike, and get back to business. As for the rogue outliers, we know from hard experience that they can and will run and hide from enforcement, despite the New York Convention.

Actually – and again counterintuitively – the availability of appeal rights in an international commercial court (as well as in the FTA investment courts) could itself improve enforcement. It is the appellate avenue that either annuls a judgment or award wrong on the law, or legitimizes an outcome the loser thought wrong.

⁵⁵ Note 29, Menon at 28 (footnotes omitted). See also Note 30, Chong, at 13-14.

⁵⁶ Note 20, Menon at 29.

⁵⁷ For a discussion of the challenges of enforcing international commercial court judgments, and proposed solutions, see Dalma Demeter and Kayleigh Smith, “The implications of international commercial courts on arbitration”, 33 *Journal of International Arbitration*, Issue 5, 441 (October 2016).

Having said all this, the 2015 Hague Convention on Choice of Court Clauses is already a game-changer. In brief, the Convention aims to create a system like the New York Convention, for enforcement of judgments of the courts of any country provided the parties have agreed to submit disputes to a court of their choice. There are so far 30 States Parties: the 27 Member States of the EU, Mexico, and Singapore.

The more inclusive the Convention, the more attractive the SICC may be to transnational actors. This may send those parties that simply tolerate international arbitration, because of the protection offered by the New York Convention, to an international commercial court. Because this increases choice, it will be an *advance* for international dispute resolution.

The path forward? I predict a slow-but-steady stream of cases for the SICC. The jurisprudence will grow. We will learn just how problematic enforcement of judgments proves to be. Perhaps the Court will set up Users' Committee, such as those at the London Commercial Court and DIFC. Depending on such developments – and business growth in Asia – parties will begin to put SICC clauses in contracts. Interesting, although not yet significantly, Pakistan has included the SICC as a dispute resolution option for trade disputes in its draft Trade Resolution Act 2016.⁵⁸

Conclusion

To begin my conclusion, I suggest the following (mostly) shared views of the world in which we practice and teach international commercial law:

- (1) global commerce will increase;
- (2) disputes are inevitable in commerce, and are particularly challenging in international commerce;
- (3) commerce depends upon effective and fair dispute resolution mechanism;
- (4) “regular” domestic courts are rarely an acceptable venue for transnational dispute resolution;
- (5) investor-state treaty arbitration is self-correcting, but not fast enough to keep the Investment Court System at bay;
- (6) even international business-to-business actors are demanding more effective and fair commercial arbitration; and
- (7) those actors deserve a *choice* of first-class dispute resolution options.

⁵⁸ Part X of the draft Pakistan Trade Dispute Resolution Act 2016.

Therefore, there is room for first-class international commercial courts, as an increasing *option* – and an *advance* – for international commercial justice.

The courts' mission, as articulated succinctly by Chief Judge Menon, will be “to build a trustworthy, competent and commercially sensible system to resolve transnational commercial disputes ... [and] function alongside arbitration and fill a gap in the suite of transnational dispute resolution mechanisms”, and “be responsive to the needs of the international commercial community”⁵⁹

The courts' constituency will be the sub-group of transnational parties that requires or prefers: appellate rights; permanent rather than *ad hoc* judges; general transparency, and the related development of commercial jurisprudence that generally public proceedings allow; and, representation by ethical counsel of their choice.

As a result of researching for this Lecture, I now appreciate that the Singapore International Commercial Court is uniquely genuinely international among the existing offerings. With its marriage of valuable attributes of litigation and arbitration, it is looking *forward* rather than backward. It no doubt will be joined by others.

Having said that, the SICC seems to be an *advance* in international dispute resolution in the right place at the right time. The Asian Development Bank suggests that by 2050, Asia may account for one-half of global GDP, trade and investment.⁶⁰ China's One-Belt-One-Road initiative envisions \$4 to 6 trillion of infrastructure construction across Asia, the Middle East, Africa and Europe. Imagine the number and complexity of disputes that will arise, and that will need resolution – first-rate and consistent resolution.

This is another story for another evening. For now, I will just say that SICC is not likely to stay a dark horse for long. I like to think that Professor Brierley would agree.

My spell-checker brought up the word “briefly” for “Brierley”. I have not been brief, and it is time I sit down.

⁵⁹ Note 29, Menon at 42.

⁶⁰ Note 29, Menon at 15. Also see Asian Development Bank, “Realizing the Asian Century” (Executive Summary), online: <http://www.adb.org/sites/default/files/publication/28608/asia2050-executive-summary.pdf>, at 5, last accessed 9 October 2017.