

Commercial courts and international arbitration—competitors or partners?[†]

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ABSTRACT

Drawing on the author's extensive personal experience as an international arbitrator, Senior Counsel in Singapore, and the non-resident Chief Justice of the Dubai International Financial Centre (DIFC) Courts, this article examines the relationship between commercial courts and international arbitration in two jurisdictions, Singapore and Dubai. The author discusses the impact that the newly established Singapore International Commercial Court (SICC) will most likely have upon the Singapore International Arbitration Centre (SIAC) to conclude that these two dispute resolution forums will most likely complement one another. The article then moves on to discuss a novel, mutually beneficial interaction between the courts and arbitral institutions through the new Practice Direction of the DIFC which seeks to 'convert' court judgments into arbitration awards, thereby allowing successful parties to enforce their court judgments through either arbitration or litigation.

KEY REFERENCES

- United Arab Emirates Civil Procedure Code, Federal Law No. 11 (1992)
- (Hague) Convention on Choice of Court Agreements (2005)
- GCC (Gulf Cooperation Council) Convention for the Execution of Judgments, Delegations and Judicial Notifications (1996)
- Riyadh Arab Agreement for Judicial Cooperation (1983)
- Singapore Rules of Court, Order 110 (2015)
- DIFC (Dubai International Financial Centre) Arbitration Law No. 1 (2008)
- (New York) Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)
- *Tjong Very Sumito v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732.
- *Dalian Hualiang Enterprise Group Co Ltd v Louis Dreyfus Asia Pte Ltd* [2005] 4 SLR 646.
- *Halki Shipping Corporation v Sopex Oils Ltd* [1998] 1 LLR 465.
- *Hayter v Nelson Home Insurance Co* [1990] 2 LLR 265.
- *Ellerine Brothers (Pty) Ltd v Klinger* [1982] 1 WLR 1375.

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This is an emotional occasion for me. First, I have admired the Clayton Utz–Sydney University lecture series from afar for many years, and I consider it a great honour to follow in the footsteps of many distinguished arbitration practitioners who have preceded me in delivering this lecture. Therefore, I thank Doug Jones and his colleagues, as well as Chester Brown and his colleagues for this invitation to share my thoughts with you this evening. Secondly, I am returning to a place which has special meaning for me. In 1966 and 1967, I was a member of the Law Faculty at Sydney University at 167 Phillip Street, hence I know this street very well. My topic was Torts and I had to teach this subject under the guidance of Professor Bill Morison, who was one of the founding members of this Faculty, and was someone whom everyone held in awe (including his fellow teachers). But his lectures were so esoteric that Professor Ross Parsons (another icon of the Faculty) once suggested that he should deliver his lectures in the crypt of St Mary’s Cathedral as they were so cryptic. It was into this august law school that I came, fresh from Oxford, to start my career in the law. It, therefore, gives me enormous pleasure to return to Phillip Street to reprise my former experience as a lecturer. My class included some stars in the Sydney legal constellation, including former Chief Justice James Spigelman, Geoffrey Robertson QC, and Deputy Chancellor Alan Cameron (although they mainly distinguished themselves by their absence from my lectures). Hence, when I am asked about how many of my students became famous practitioners, I answer that my students succeeded in their careers in inverse ratio to the number of my lectures that they attended. I am also enormously grateful to Sydney Law School for honouring me with an Honorary Doctorate of Laws degree in May this year, conferred on me by my former student Alan Cameron, and this lecture is a small way of repaying my debt to the Law School.

I have been set this question as the topic of my lecture, ‘Commercial Courts and International Arbitration - Competitors or Partners?’ The answer to the question could possibly be answered in one word—both. Whether that is a good or bad thing is another story, which I will develop in the rest of this lecture.

The courts of most Model Law countries agree that curial courts should adopt an ‘arbitration-friendly’ policy, that is, to decline to set aside awards for error of law or fact, however gross; instead, courts should read awards generously and not look assiduously for defects in process, unless really serious violations of due process have occurred which have caused real prejudice.¹ Furthermore, courts should intervene quickly in support of arbitration by issuing court orders enforcing tribunal decisions where judicial assistance is needed. In short, courts should supervise with a light touch but assist with a strong hand.

Model Law standards of curial review are not yet in place in the United Arab Emirates (UAE) (including mainland Dubai) as the arbitration law is contained in a few provisions within the Federal Civil Procedure Code, which is quite different from the Model Law. However, in the Dubai International Financial Centre (DIFC), there is in force an Arbitration Law 2008, which is based firmly on the Model Law, and the DIFC Courts (which I head) will apply contemporary principles of Model

1 See *BLC and others v BLB and another* [2014] 4 SLR 79, [85] citing *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86.

Law jurisprudence in carrying out their role as curial court of arbitrations which are seated in the DIFC. It is interesting to note that, when the first cohort of overseas judges were appointed to the bench of the DIFC Courts, all of them were practising arbitrators, and hence were familiar with arbitration theory and practice.

Conceptually, we also need to be reminded of the doctrine of arbitrability. There are some issues which are simply beyond the capability of arbitral tribunals to resolve. Insolvency, real, and intellectual property issues involving registration, family law, criminal law, succession, and rights *in rem* are generally considered beyond the realm of arbitration. But even in these areas, where parties claim entitlement to certain rights against other parties and there is an arbitration agreement in place to resolve all disputes in connection with these rights, it may be possible for an arbitral tribunal to determine those rights as between the parties and then to make an order to compel the losing party to take such actions as are necessary to vest the rights adjudicated by the tribunal in the other party. Of course, the enforcement of such an order of specific performance will eventually have to be executed by a national court, but the point is that the dispute will essentially have been settled by arbitration, leaving the national court only an enforcement role.

From the practical point of view, there are also constraints on the reach of arbitration. Arbitration may not be the ideal method of dispute resolution where there is a web of connected contracts that could be upstream or downstream. Typical cases are those of employer/main contractor/subcontractor disputes. Similar problems arise in insurance/reinsurance/retrocession contracts and commodity contracts. Separate bilateral arbitrations with inconsistent decisions can be a nightmare. Despite the fact that most building contracts and subcontracts contain an arbitration clause, one may wonder why the Technology and Construction Court in England remains a much sought-after forum. One of the main reasons is that, where there is a web of contracts (sometimes called string contracts) upstream and downstream, it makes sense for the parties to resolve their disputes before one tribunal, and the only tribunal with power to consolidate or join third parties without the consent of all parties concerned will normally be a national court, since the issue of multiple party arbitrations remains an unsolved one, despite efforts to revise institutional rules to make consolidation and joinder easier.

Let me now move on to another topic of current interest.² What is the role of the forthcoming Singapore International Commercial Court (SICC) which will be launched in January 2015?³ I have no mandate to speak for the Singapore Government or the Singapore Judiciary, but what I tell you is based on public knowledge and private briefings for Senior Counsel of the Singapore Bar. In short, what will happen next year will be the establishment of a separate division of the High

2 I gratefully acknowledge that the remarks in this paragraph are taken from a speech delivered by Justice Quentin Loh of the Supreme Court of Singapore at the opening of the Regional Arbitral Institutional Forum (RAIF) Conference in Singapore on 1 August 2014, which is published in the Singapore Institute of Arbitrator's September 2014 newsletter <<http://www.siarb.org.sg/pdf/SIArb%20September%20Issue%20Newsletter%202014.pdf>> accessed 14 May 2015.

3 The SICC was in fact launched on 5 January 2015. For an explanation of the aims and broad structure of the Court, please refer to the report of the Singapore International Commercial Court Committee published in November 2013 by the Ministry of Law, '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>> accessed 14 May 2015.

Court of Singapore (equivalent to the New South Wales Supreme Court) to hear international, commercial, and offshore cases (which are all defined terms).⁴

The main aims of the SICC can be summarized as follows: (i) to establish the Singapore brand for dispute resolution in line with the country's increasingly sophisticated jurisprudence; (ii) to cater to the expected growth in cross-border, multi-jurisdictional dispute resolution services as Asia becomes an increasingly popular destination for foreign trade and investment; (iii) to harmonize the existing differences between legal systems in Asia, which have led to uncertainty and inconsistency, by developing a free-standing body of international commercial law; (iv) to provide a solution to some of the limits of arbitration such as the subject matter of dispute, joinder of non-parties to proceedings, and right of appeal; (v) to further Singapore's goal of being a centre of legal excellence and the legal hub of dispute resolution in Asia; and (vi) to leverage on Singapore's neutrality, legal expertise, integrity, and efficiency. Parties involved in cross-border disputes rely on the courts in London and New York if they do not want to arbitrate. Singapore wants to be the default court for such parties in Asia.

The source of jurisdiction of the SICC will be: (i) jurisdiction agreements between parties to refer their disputes to the SICC; and (ii) cases which are filed in the Singapore High Court, that the High Court determines come within the jurisdiction of the SICC without a jurisdiction agreement. In the latter case, the High Court may make an order transferring the case to the SICC, but only after consulting the parties. There are many interesting features of the SICC, but for purposes of this lecture, my only analysis will be this: what is the likely effect of the SICC on the work and reach of the Singapore International Arbitration Centre (SIAC)?

First, the SICC is not meant to cannibalize the caseload of the SIAC. The special appeal of having a court with certain attributes of arbitration procedure is that it can be attractive to certain parties who would not choose international arbitration as practised by arbitration institutions (let alone consider *ad hoc* arbitrations) but would also not be happy with national courts, particularly the national courts of one of the parties to the dispute. Hence, the target client pool of the SICC will be parties which have disputes (actual or potential) with their counterparties, and who do not

4 Under Order 110, r 1(2)(a) of the Rules of Court, a claim is 'international' in nature if: (i) the parties to the claim have, by a written jurisdiction agreement, agreed to submit the claim for resolution by the (SICC) and, at the time the agreement was concluded, the parties have their places of business in different States; (ii) none of the parties to the claim have their places of business in Singapore; (iii) one of the following places is situated outside any state in which any of the parties have their places of business—a place where a substantial part of the obligations of the commercial relationship between the parties is to be performed and/or the place with which the subject matter of the dispute is most closely connected; or (iv) the parties to the claim have expressly agreed that the subject matter of the claim relates to more than one state.

Under Order 110, r 1(2)(b) of the Rules of Court, a claim is 'commercial' in nature if the subject matter of the claim arises from a relationship of a commercial nature, whether contractual or not, including, but not limited to, any of the following transactions—(i) any trade transaction for the supply or exchange of goods or services; (ii) a distribution agreement; (iii) commercial representation or agency; (iv) factoring or leasing; (v) construction works; (vi) consulting, engineering, or licensing; (vii) investment, financing, banking, or insurance; (viii) an exploitation agreement or a concession; (ix) a joint venture or any other form of industrial or business cooperation; (x) a merger of companies or an acquisition of one or more companies; and (xi) the carriage of goods or passengers by air, sea, rail, or road.

immediately think of arbitration as an option. They do not wish to have their cases heard by national courts for various reasons, and yet have reservations about certain features of international arbitration. These reservations would include: (i) the right of parties to nominate party-appointed arbitrators who do not have to meet any pre-qualifications; (ii) the lack of an appellate process; and (iii) the restrictions on the scope of arbitration because of the doctrine of arbitrability. The best example of how international commercial courts exist side by side with international arbitration centres in complete harmony comes from London, which arguably has the most successful Commercial Court in the world, in addition to being one of the major centres for international arbitration, not simply through the London Court of International Arbitration (LCIA) but as the seat for many other institutional and *ad hoc* arbitrations as well as being home to the Centre for Effective Dispute Resolution (CEDR), one of the world's leading mediation institutions. Singapore shares many of the characteristics of the London scene, especially in the financial sector, and I expect that both the SICC and the SIAC will complement each other in providing dispute resolution options to commercial parties.

Secondly, to some extent, the SICC will have to compete for new business in the same way as a fledgling international arbitration centre has to (and as the SIAC had to struggle for many years until achieving its present status in the last five years).⁵ It will have to learn to market its services, particularly to overseas parties, a task to which courts are not accustomed, and it may have to learn from SIAC how it will be a long slog before the numbers of new filings at the SICC start becoming significant. Even on the most optimistic scenario, a serious campaign of overseas marketing would take at least a year or two, after which SICC would hope that parties will start writing SICC jurisdiction clauses into their contracts. (It is not likely that there will be significant numbers of post-dispute submissions to jurisdiction if the experience of arbitration institutions is anything to go by.) SICC would then have to wait for disputes under those agreements to arise a year or two after the date of entry into those agreements, hence we are looking at a timeline of perhaps three to four years after marketing begins (or even longer) before any new cases are filed. But the SICC has one big advantage which may enable it to kick-start its marketing efforts in a way which would not be available to any new arbitration institution. I have earlier referred to one source of jurisdiction that the SICC will have. The High Court can transfer cases that meet the requirements of SICC jurisdiction (ie 'international' and 'commercial'⁶) to the SICC after consultation with the parties. Hence, assuming that the High Court can secure the consent of the parties (and possibly even if such consent is not forthcoming) there could be a steady pool of cases coming through the SICC

5 The SIAC caseload increased from two in 1991 (when it opened for business) to 51 in 1996 to 83 in 2000, with a plateau around that figure until 90 in 2006 (after which the increases became significantly greater), 190 in 2010, and 259 in 2013. Some of these figures are taken from the SIAC's website < www.siac.org.sg/2014-11-03-13-33-34/facts-figures/statistics > accessed 14 May 2015.

6 Under Order 110, r 12(4), read with r 7(1)(a) and (c) of the Rules of Court, the High Court can transfer cases to the SICC if: (i) the claims between the plaintiffs and the defendants named in the originating process are of an international and commercial nature; (ii) the parties do not seek relief in the form of, or connected with, a prerogative order; (iii) the SICC will assume jurisdiction in the case; and (iv) it is more appropriate for the case to be heard by the SICC.

quite soon after its launch. Actual numbers would not necessarily be critical at this stage, but the point is that the SICC would be working, and be seen as working, almost immediately after its launch, and the commercial world could then see how the new SICC (and its advertised advantages) will work. Publicity will be given to its cases in a way that cannot be done for arbitration (because of the need for confidentiality), hence public awareness of the SICC will be much higher than when the SIAC was launched.

Thirdly, to the extent that some of the features of SICC procedure prove popular, arbitration institutions can re-examine their own procedures and practices to see if these can be modified or even replaced by an equivalent SICC procedure. This will enable SIAC (and indeed other arbitration institutions) to remain alive to the preferences of their client pool and improve their services to meet client demands. Institutions are already sensitive to client preferences and responses to new initiatives because of the relatively closed nature of the arbitration market, where there are endless conferences and a plethora of publications on best practices in arbitration. The result is that every new initiative is broadcast and discussed, and starting a bandwagon would not be difficult. The best example of this is the way in which arbitration institutions over the last few years have, one after the other, introduced the Emergency Arbitrator procedure. There is every reason to believe that innovative procedures introduced by the SICC will be closely studied, not only by other commercial courts, but by arbitration institutions as well. The same could also be said of the DIFC Courts, which have a long history of introducing innovative dispute resolution solutions, such as the Small Claims Tribunal, which offers mediation services and fast track adjudication of small claims without legal representation, the *pro bono* programme, as well as the appointment of a female judge to our bench. All these innovations have subsequently been followed in one or more other Middle East jurisdictions. Therefore, the success of the DIFC Courts in introducing innovations which other legal systems can emulate may augur well for the success of the SICC in being the potential leader of legal change in Asia.

Fourthly, some may worry about the degree of international enforceability of SICC judgments as compared to the breadth of coverage of international arbitration awards (with more than 150 countries having acceded to the New York Convention (NYC)). It is true that people tend to think about extra-territorial enforceability in terms of treaty arrangements for reciprocal enforcement of judgments. In Commonwealth countries, there is usually a Reciprocal Enforcement of Commonwealth Judgments Act. The judgments of the SICC, as a division of the Supreme Court of Singapore, will qualify for recognition and enforcement in those Commonwealth countries with which Singapore has a treaty or similar arrangements. However, the range of Commonwealth countries with which such arrangements have been made is relatively few.⁷ The situation is even more parlous with non-Commonwealth countries. The only non-Commonwealth jurisdiction with which Singapore has mutual recognition and enforcement arrangements is Hong Kong. Hence, how does the SICC hope to make its judgments widely enforceable? The first

7 Singapore only has reciprocal enforcement of judgment arrangements with 11 out of 53 Commonwealth countries.

point to note is that SICC judgments will be enforceable in common law countries (including the USA) by a common law action to enforce a foreign judgment which would apply even without reciprocity and to judgments from civil law countries as well.

Enforcement of such judgments may even be faster under the common law than the NYC because of the availability of the summary judgment procedure for a fast-track judgment. Under the NYC the disputed enforcement application would require full arguments of fact and law with respect to any ground under Article V(1) of the Convention relied upon to support a denial of enforcement.

Forgive me for reminding such an august audience of the features of an action on a foreign judgment:

- i. The enforcing court will not re-examine the merits of a foreign judgment which may not be challenged on the grounds that it contains an error of fact or law; and
- ii. Common law judgments are only unenforceable where:
 - The defendant did not submit to the jurisdiction of the foreign court;
 - The judgment was obtained by fraud;
 - The judgment is contrary to the enforcing court's public policy; and
 - The proceedings were conducted in a manner that the enforcing court regards as contrary to the principles of natural justice.

These points have all been noted by the DIFC Courts, which have utilized the common law action on a foreign judgment to highlight the wide enforceability of our own judgments, and we have done so by signing Memoranda of Guidance (MOG) with different common law jurisdictions,⁸ starting with the English Commercial Court, followed by the Supreme Court of New South Wales and the Federal Court of Australia, soon to be joined by Kenya later this month, Singapore in January next year and the Judicial Court of the Southern District of New York in March. We call them MOG rather than Memoranda of Understanding, because the latter usually import some positive undertakings by each party; in our MOGs neither party undertakes anything. The MOG is a common declaration of the broad principles which guide common law courts in recognizing and enforcing foreign judgments; each party states the law and practice in its own courts, and the statements by the two jurisdictions are, for all practical purposes, the same as far as the legal principles governing enforcement are concerned (any differences in legal principles or procedural practices are identified in the MOGs). I know that Singapore is banking its hopes to some degree on the Hague Convention on Choice of Court Agreements which is a sort of mini version of the NYC for the enforcement of court judgments. Until April this year, only Mexico, the USA, and the European Union (EU) (with the exception of Denmark) had signed the Convention with Mexico as the only country ratifying it. However, once the EU ratifies the Convention, there will be an immediate addition of 26 more countries (Denmark being excluded for the time being) which will

8 A list of these countries can be found on the DIFC website <<http://difccourts.ae/category/protocols-and-mous/>> accessed 14 May 2015.

recognize and enforce judgments of any court which has been expressly chosen as the dispute resolution forum of the disputing parties. Now that the EU has signed the Convention, Singapore is hoping that there will be a bandwagon effect with other countries, particularly in the Asia-Pacific Region, signing and ratifying it as well.⁹

The points I make are neatly summarized in a recent speech given by Justice Quentin Loh, when he said the following:

Arbitrators should not think of the SICC cannibalizing their work. Instead they should look upon it as an integral part of a vibrant dispute resolution hub. Just as mediation or adjudication or other forms of ADR complement arbitration, the SICC will do likewise for disputes that do not sit well with the private consensual dispute resolution process. If Singapore succeeds in becoming the premier dispute resolution hub of Asia, the pie will grow, hopefully enormously, your [i.e. arbitration practitioner's] share will also grow, hopefully enormously too, even though it forms a smaller percentage of the whole.¹⁰

What Justice Loh was saying is that the concept of Singapore as a dispute resolution hub is likely to persuade those law firms which have the task of advising their international clients (particularly those with business or investments in Asia) to look seriously at Singapore as a dispute resolution centre to resolve their disputes with their international counterparties. This is because Singapore will be offering a variety of dispute resolution solutions, one of which should fit the particular client's needs and preferences. In passing, I would add that the same could be said of Dubai in relation to the Middle East, as I will explain later.

Hence, the conclusion is that the SICC and SIAC will to some degree be competitors because there will be parties who, when faced with a choice of the Singapore High Court and the SIAC, might have chosen SIAC, and would now be attracted by some features of SICC. However, the greater likelihood is that SICC will attract a breed of disputants who essentially prefer (or need) the dispute to be resolved by litigation before a national court rather than arbitration by an institutional or *ad hoc* arbitration, and would have chosen the most suitable neutral national court outside the courts of either disputant (typically London). Those disputants will now have an additional choice of a national court specifically designed to cater to the needs of international parties with little or no connection to Singapore and which also recognizes their special needs. Procedures which may prove attractive to international dispute resolution practitioners are:

9 On 10 October 2014 the EU Council of Justice Ministers representing the Member States ratified the Convention. The EU Parliament subsequently ratified the Convention on 25 November 2014. As a consequence, the EU Council adopted the relevant legislation on 4 December 2014, published on 10 December 2014, which provides for deposit of the instrument of approval to take place within one month of 5 June 2015 (art 2 of the Council Decision of 4 December 2014). Following art 31(1) of the Convention, the Convention will then enter into force on either 1 October 2015 or 1 November 2015 (depending on whether the instrument of approval is deposited before or after 1 July 2015).

10 See above n 3.

- More limited discovery and interrogatories than traditional common law rules (the SICC will follow the DIFC Courts' example in adopting document disclosure rules based on the IBA Rules on the Taking of Evidence in International Arbitration 2010).
- Confidentiality in terms of private hearings and restrictions on release of information concerning the case to the public.
- Special provisions relating to joinder and consolidation.
- Exclusion of normal rules of evidence and substitution of foreign rules of evidence where appropriate.
- Proof of foreign law may be made by submissions from qualified foreign law experts rather than by affidavit evidence subject to cross examination.
- Allowing parties the right to appoint foreign counsel to appear for them in cases where there is no substantial connection with Singapore, save for the choice of the SICC and Singapore law.¹¹

In this respect, the SICC is like a hybrid; while it is emulating some of the distinctive features of international arbitration, it is clearly intended to remain a national court, but one possessing certain features peculiar to arbitration tribunals.

Let me complete the picture of the dispute resolution landscape in Singapore. On 5 November 2014, the Singapore International Mediation Centre (SIMC) was launched. Chaired by Edwin Glasgow, a distinguished English QC, and having a panel of experienced international mediators, SIMC is poised to attract mediation for international disputes to be held under the auspices of a dedicated mediation centre catering for the needs of international clients. The SIMC will, therefore, complete the suite of dispute resolution options available in Singapore, and which are also available to non-Singaporean disputants by opt-in jurisdiction.

I now turn to another international commercial court, the DIFC Courts, with a very brief word on the essential features of these courts. I have described them as 'a common law island in a civil law ocean' because UAE laws are based on the civil law, while the governing law in the DIFC are laws enacted specifically for the DIFC and based on common law. The DIFC is an area of approximately 110 acres situated in the heart of Dubai City, which is well publicized internationally by its iconic symbol, the Gate. It is a free trade zone (of which there are many in Dubai), but what distinguishes this zone is that it has its own civil and financial administration, its own legal

11 This is particularly significant with respect to the regime's introduction of the concept of an 'offshore case'.

Under Order 110, r 1(2)(f) of the Rules of Court, an 'offshore case' means an action which has no substantial connection to Singapore. An action which has no substantial connection to Singapore is one in which—(i) Singapore law is not the law applicable to the dispute and the subject matter of the dispute is not regulated by or otherwise subject to Singapore law; or (ii) the only connections between the dispute and Singapore are the parties' choice of Singapore law as the law applicable to the dispute and the parties' submission to the jurisdiction of the Court. An action will not be considered an offshore case if it is an action *in rem* against a ship or other property under the High Court (Admiralty Jurisdiction) Act (Cap123) (See Order 110, r 1).

In such 'offshore cases', a party may be represented by registered foreign counsel without involving local Singaporean counsel—a novel development considering the fact that foreign lawyers could not freely represent parties in arbitrations seated in Singapore before 2004.

system, and its own courts. Our legal system is based substantially on English law in codified form, but with civil law influences. We have an Arbitration Law 2008 which is based closely on the Model Law and applies to all arbitrations seated in the DIFC. The DIFC is a separate seat from the Emirate of Dubai itself, and therefore the DIFC Courts will be the curial court for all DIFC seated arbitrations. Contractual references to ‘arbitration in Dubai’ will be interpreted as meaning seated in mainland Dubai, subject to the UAE Federal Laws on Arbitration and supervised by the Dubai National Courts as the curial court.¹² If an analogy is needed for this remarkable experiment, one may find it in China with Hong Kong living under ‘one country, two systems’.

The DIFC Courts can be characterized as an international court in two ways. First, nearly all of our cases involve at least one party that is not from Dubai or the UAE, which is to be expected, since our primary jurisdiction is over cases relating to parties incorporated or registered in the DIFC or cases which relate to something happening within the DIFC. Additionally, most of the occupiers of the DIFC are international persons or companies. Secondly, we have, since the end of 2011, had opt-in jurisdiction from parties around the globe whereby we have jurisdiction to hear cases which are the subject of a written jurisdiction agreement. That puts us in the same position that the SICC will be, except that we do not have a separate court with special rules. Arguably, we do not need such special rules like the SICC since our practices and procedures are largely based on the English Civil Procedure Rules (CPR), particularly the Rules of the English Commercial Court, which are generally accepted as being the most effective set of rules to apply in trying complex commercial cases.

We addressed the issue of Courts versus Arbitration when the DIFC was first established in 2006. The original concept was that the DIFC Courts would have a partnership with the proposed DIFC–LCIA Arbitration Centre (‘the Arbitration Centre’), we handling litigation, and the Arbitration Centre handling arbitration and mediation. When the Courthouse was built, the DIFC Courts shared our premises with the Arbitration Centre for some years until our expansion made it necessary for the Arbitration Centre to move out and seek alternative premises. However, we have turned full circle and, as from this year (2014), the Courts and the Arbitration Centre are now legally housed under an over-arching authority known as the Dispute Resolution Authority (DRA), which comprises two arms: (i) the DIFC Courts, with myself as the Chief Justice, and (ii) the DIFC Arbitration Institute (DAI) (the operator of the Arbitration Centre), with myself as the Head of this Institute. Hence, we have an unusual situation of a Chief Justice who not only heads the Courts, but also acts as the nominal head of the Arbitration Centre. I should point out that this is not unique because Singapore had such a situation a decade and a half ago, when the SIAC was housed in the Supreme Court Building and was managed under the supervision of the Academy of Law, whose President was the Chief Justice.

Under our Arbitration Law, all arbitrations seated in the DIFC (which is an independent seat within the Emirate of Dubai) are supervised by the DIFC Courts,

12 *DHIR v Waterfront Property Investment Ltd and Linarus Fze* [2006–09] DIFC CLR 12, [79]–[92].

which will, therefore, act as the curial or supervisory court of the Arbitration Centre as well as other arbitrations seated there. To prevent conflicts of interest under the new legal structure I have just described, I have appointed a Board of Trustees of the DAI who will effectively manage the business and caseload of the Arbitration Centre, and who will not report to me. The Arbitration Centre will, therefore, be fully independent of the DIFC Courts. Despite this separation of powers and responsibilities, this new DRA fulfills a dream that the DIFC authorities and my predecessor, former Chief Justice Sir Anthony Evans, had of making our Courthouse a ‘house of justice’ in its different forms.

The DIFC Courts have one significant advantage concerning the enforceability of our judgments over the SICC. DIFC Courts judgments are, under Dubai Law, registrable in the state courts of mainland Dubai without any challenge posed to the substance of the judgment. When registered, those judgments (translated into Arabic) will become judgments of the mainland Dubai courts and will be treated as such in the UAE. By virtue of the Gulf Cooperation Council (GCC) Convention, which provides for mutual recognition and enforcement of all court judgments between GCC countries (Jordan, Bahrain, Qatar, Kuwait, Oman, and UAE), DIFC Courts judgments are fully enforceable throughout the Gulf region. There is also the possibility of our judgments being enforceable in the wider Middle East North Africa Region (MENA) under the Riyadh Convention, but the provisions on enforcement in that latter Convention are not as precise as those under the GCC Convention.

The significance of this arrangement is that neither the DIFC Courts nor the Arbitration Centre consider such co-operation to be against its own interests and, like Singapore, the imperative is to make the DIFC the legal hub of MENA by offering a suite of legal options for dispute resolution through litigation, arbitration, and mediation, in addition to making sure that each option is satisfactorily delivered in accordance with parties’ expectations. Like Singapore, Dubai has been inspired by London’s example in maintaining a number of vibrant legal forms of dispute resolution, thereby enlarging the pool of disputes being resolved in our legal hub, and interlinking them to each other as necessary (eg between arbitration and mediation).

We are now about to launch in the DIFC an experiment without parallel in arbitration history. We have recently circulated for public consultation a draft Practice Direction setting out an initiative in the form of a guidance note that will have the effect of ‘converting’ court judgments into arbitration awards. (As I will explain later, I use the term ‘convert’ as shorthand for a more complex process.) In brief, the protocol (as set out in the draft released for public consultation) was as follows:

- i. When parties submit to the jurisdiction of the DIFC Courts by a jurisdiction agreement, they may include within their submission agreement an arbitration clause in the following terms:

Any dispute arising out of or in connection with the enforcement of any judgment given by the Courts of the Dubai International Financial Centre, including any dispute as to the validity or enforceability of the said judgment, and satisfying all of the Referral Criteria . . . shall be referred to and finally resolved by

arbitration under the Arbitration Rules of the DIFC-LCIA Arbitration Centre, which Rules are deemed to be incorporated by reference into this clause. The number of arbitrators shall be [one/three]. The seat, or legal place of the arbitration, shall be the Dubai International Financial Centre. The language to be used in the arbitration shall be English.

This contract, including any provisions relating to the choice of forum, shall be governed by and construed in accordance with the laws of the Dubai International Finance Centre.

[or]

This contract shall be governed by and construed in accordance with the laws of [INSERT PLACE], save that the laws of the Dubai International Finance Centre shall apply to any provisions relating to the choice of forum.

- ii. The Referral Criteria referred to in this model clause were defined in the draft Practice Direction as follows:

1. *The judgment has taken effect in accordance with Rule 36.29;*¹³
2. *The judgment is a judgment for the payment of money (whether or not the judgment also provides for remedies other than the payment of money);*
3. *There is an enforcement dispute in relation to the judgment;*
4. *The judgment is not subject to any appeal and the time permitted for a party to the judgment to apply for permission to appeal has expired; and*
5. *The judgment creditor and judgment debtor have agreed in writing that any enforcement dispute between them shall be referred to arbitration pursuant to this Practice Direction.*

- iii. The most important criterion was ‘enforcement dispute’, which was defined as:

a dispute between a judgment creditor and judgment debtor with respect to money (including costs) claimed as due under a judgment, including a failure to pay on demand a sum of money due under the judgment on or after the date on which that sum becomes due under Rule 36.33.

- iv. Rule 36.33 of the Rules of the DIFC Courts (RDC) (now renumbered 36.34 in the 2014 Edition) provides that judgments for the payment of money (including costs) must be made within 14 days of the judgment unless:

- a. *the judgment specifies a different date for compliance (including specifying payment by instalments);*
- b. *any of the other Rules of Court specifies a different date for compliance;*
or
- c. *the Court has stayed the proceedings or judgment.*

13 r 36.29 provides that a judgment takes immediate effect from the time on the day when it is given or made, or such later time or date as the Court may specify.

The net effect of this initiative is that, following a money judgment of the DIFC Courts, the judgment creditor would be able to demand payment of the judgment sum and, if payment were not made pursuant to that demand for any reason, the judgment creditor would be able to consider that an enforcement dispute has arisen and could refer the dispute to arbitration at the DIFC–LCIA Arbitration Centre, or indeed any other arbitration centre (The latter might not be the most sensible course for the parties, but they would be entitled to make that choice). The Arbitration Centre in turn would progress the arbitration and appoint one or three arbitrators as the parties had chosen in their arbitration agreement, and the dispute would then be referred to the tribunal for its decision in the usual way in accordance with the Arbitration Rules of the chosen Arbitration Centre.

This process is what I meant to encapsulate by the term ‘conversion’ of a judgment into an arbitration award. But it is not a ‘conversion’ in the strict sense of that word; the process enables a judgment creditor to have an additional option for enforcement of its judgment without losing its rights under the judgment in any way.

After our public consultation, we received a fair number of comments from several law firms within the DIFC. The principal worries emerging from the public consultation version of the draft Practice Direction, and my responses to them were as follows:

- i. Whether our definition of ‘enforcement dispute’ would work in creating a dispute based on a judgment sum which could not be disputed, and whether a subsequent national court which had to enforce the award would consider that it was a mere ‘rubber-stamping’ exercise.
 - There is a long line of common law jurisprudence which clearly establishes that, for purposes of arbitration, a ‘dispute’ exists where one party makes a claim for payment of a sum allegedly due from another party, and the respondent (a) refuses to pay or (b) keeps silent but, in any event, does not make payment. This is so even if the issue of whether the debt is owing is beyond dispute—only a clear and unequivocal admission of liability or actual payment will mean that there is no dispute.
 - In particular, there has been extensive English jurisprudence on the subject because of the legislative development of section 4 of the English Arbitration Act 1950, which originally provided that:

If any party to an arbitration agreement or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to those legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay proceedings, and that court or a judge thereof . . . **unless satisfied that the agreement or arbitration has become inoperative or cannot proceed or that there is not in fact any dispute between the**

parties with regard to the matter agreed to be referred, shall make an order staying the proceedings. (emphasis added)

This provision was later repeated in section 1 of the English Arbitration Act 1975, but was significantly modified by section 9(4) of the English Arbitration Act 1996, which omitted the words ‘unless satisfied that . . . there is not in fact any dispute between the parties with regard to the matter agreed to be referred’. Both before and after 1996, a body of case law has developed to ascertain what a ‘dispute’ means as well as its significance for future cases. Even before 1996, Courts have referred to pre-1996 cases for guidance on the meaning and scope of the word whenever it appears in an arbitration agreement.

- In one of the earliest English cases on the subject, Lord Justice Templeman held in the 1982 case of *Ellerine Brothers (Pty.) Ltd v Klinger*¹⁴ that there is a dispute until the defendant admits that the sum is due and payable. Eight years later, his opinion was referred to in *Hayter v Nelson Home Insurance Co*¹⁵ by Justice Saville, who expressed the view that, if the parties had agreed to arbitrate their disputes, the Court should not ignore that bargain merely because the parties are seeking a quicker remedy by pursuing the case in Court. Justice Saville gave the following example in his judgment to illustrate his point,

Two men have an argument over who won the University Boat Race in a particular year. In ordinary language they have a dispute over whether it was Oxford or Cambridge. The fact that it can be easily and immediately be demonstrated beyond any doubt that one is right and the other wrong does not and cannot mean that the dispute did not in fact exist. Because one man can be said to be indisputably wrong does not, in my view, entail that there was never any dispute between them.

- In a post-1996 case, *Halki Shipping Corporation v Sopex Oils Ltd*,¹⁶ the English Court of Appeal had to determine the meaning of the word ‘dispute’ in an arbitration clause, and the effect of the amended section 9 of the English Arbitration Act 1996 on the circumstances in which a stay of proceedings would be granted by the Court. Two competing meanings of ‘dispute’ were taken into consideration by the Court: whether it meant that a ‘real’ or ‘genuine’ dispute on the parties’ rights and obligations under the contract had to exist, or whether the term simply encompassed any disputed claim not admitted as due and payable, regardless of its merits. The Court held that the effect of the

14 [1982] 1 WLR 1375, 1383.

15 [1990] 2 LLR 265.

16 [1998] 1 LLR 465.

omission in the 1996 Act was that, in deciding on whether a stay should be granted, it no longer had to consider whether there was in fact any genuine dispute between the parties. Previous cases which turned on this distinction were no longer relevant. In summary, given this new wording, English Courts now have no discretion but to grant the stay (unless the arbitration agreement is null and void, inoperative or incapable of being performed), even in cases where it is satisfied that there is not in fact any ‘genuine dispute’ between the parties.

- In *Dalian Hualiang Enterprise Group Co Ltd v Louis Dreyfus Asia Pte Ltd*,¹⁷ Justice Woo Bih Li of the Singapore High Court referred to the judicial decision in *Halki Shipping Corporation v Sopex Oils Ltd*. He affirmed that the court is not to consider if there is in fact a dispute or whether there is a genuine dispute, and that a dispute exists as long as the defendant at least makes a positive assertion that he is disputing the claim.
 - All these cases were examined in the 2009 Singapore Court of Appeal case of *Tjong Very Sumito v Antig Investments Pte Ltd* and cited with approval. The Court of Appeal emphasized that it will not assess the merits or genuineness of a ‘dispute’, and will readily find that a dispute exists unless the defendant has clearly and unequivocally admitted that the claim is due and payable. Mere silence in the face of a demand may not be sufficient to constitute such clear and unequivocal admission necessary to exclude the existence of a dispute amounting to an admission of that demand. As the Court pithily put it: ‘. . . an open-and-shut case must be distinguished from an admission’.¹⁸
- ii. What about the enforceability of awards made under this protocol under the NYC?
- The word ‘dispute’ does not appear in the NYC. It chooses to use the word ‘differences’ (which, however, may be considered to be synonymous with ‘disputes’). Article II(1) mandates recognition of ‘an agreement . . . to submit to arbitration all or any differences The term ‘differences’ is not defined in the NYC and I have not discovered any helpful authority elucidating the meaning of this term. However, the leading authority on the NYC, Dr Albert Jan van den Berg, says unequivocally: ‘It should not be readily assumed that a dispute does not fall under the arbitration agreement, having regard to the “pro-enforcement bias of the Convention”’.¹⁹

17 [2005] 4 SLR 646.

18 [2009] 4 SLR(R) 732, [62]. *Tjong Very Sumito v Antig Investments Pte Ltd* was itself approved by *Larkden v Lloyd Energy Systems* [2011] NSWSC 268 and *Cape Lambert Resources v MCC Australia* [2013] WASCA 66.

19 *The New York Convention of 1958* (1981) 150.

- iii. Is ‘enforcement dispute’ an appropriate term when the protocol does not directly deal with enforcement of a judgment? Would ‘payment dispute’ be more accurate?
- This is a useful observation and the term has been changed to ‘Judgment Payment Dispute’.
- iv. What would be the governing law of the payment dispute?
- Since the enforcement dispute is separate from the underlying dispute which the judgment would already have decided, we have added extra words to the governing law provision to make it clear that any matter to be decided in relation to the enforcement dispute (now renamed as ‘Judgment Payment Dispute’) will have one governing law, that is, the laws of the DIFC.
- v. The model arbitration agreement should only specify one arbitrator to ensure speedy processing of the arbitration.
- This seems a sensible comment, and we have changed the model arbitration agreement accordingly.
- vi. Would the arbitral tribunal have power to rehear the dispute or entertain challenges to the DIFC Courts judgment on any ground that could have been raised in an appeal?
- That is certainly not the intention, but again, ‘belt and braces’ have persuaded us to make express provision for clarification. The tribunal would in all probability have to apply the doctrine of *res judicata* or issue estoppel.
- vii. Would the protocol apply to summary and default judgments?
- It is certainly intended to do so, and we have amended the wording of the Practice Direction to remove any ambiguity.
- viii. Would the referral to arbitration affect the rights of the judgment creditor to enforce the judgment as such during the pendency of the arbitration? Would enforcement of the judgment be stayed, either automatically or upon application?
- We intend that the judgment will remain in full force and effect whatever the progress or outcome of the arbitration. As mentioned earlier, the term ‘conversion’ is a misnomer because the judgment creditor is not supposed to lose any of its rights under the judgment. Appropriate amendments have been made to the Practice Direction for clarity. A judgment creditor will have control of when it wishes to exercise its alternative options for realizing the fruits of its judgment—to levy execution on the judgment, in which case it might wish to defer commencing the arbitration, or, if it sees no assets of the judgment debtor within the DIFC or elsewhere in the GCC (which it could seize through use of the GCC Convention), it might then proceed to take the arbitration route.

- ix. Should we provide for potential third-party challenges, such as applications under the renumbered RDC 36.33, by non-parties who are directly affected by judgments to apply for setting aside?
- My thought is that these applications will simply take their course in the usual way. Because our renumbered RDC 36.33 provides for third parties to intervene and apply for setting aside in certain limited circumstances, no judgment can be said to be beyond challenge, even if treated as final. If such applications are filed before judgment is given, they will be dealt with by the Court and the outcome will be reflected in the judgment. In the unlikely event that such applications are filed after the referral to the Arbitration Centre has been filed, there may be cause for an application being made to the tribunal for a stay, which may or may not be granted depending on the circumstances. In my provisional view, if a judgment is set aside, the basis of the demand for payment of the judgment sum will have disappeared.
- x. Should the model arbitration agreement be amended to refer to a ‘judgment (or any part thereof)’ to address the possibility that some parts of the judgment may not relate to money (assuming that the intent is to permit the enforcement of the ‘money (including costs)’ part of any judgment)?
- In the revised version of this Practice Direction, we have consolidated the definition of ‘judgment’ in Referral Criteria 2 within the main definition, which has been amended to clarify the point about partial payment.
- xi. If there are multiple judgment creditors and/or debtors, will all of them need to be made parties to the arbitration?
- That will ultimately be a matter for the tribunal to decide. However, if the matter is governed by DIFC law, then that decision will probably depend on whether (in the case of multiple debtors) the judgment debtors are jointly or severally liable. If the judgment debtors are jointly liable, the tribunal is likely to rule that all of them need to be made parties, following the common law rule that all joint debtors need be joined for an enforcement of a joint liability. The interesting question will be if a demand for satisfaction of a judgment against joint judgment debtors is only made against one of them, can the judgment creditor then commence an arbitration only against the one debtor on whom he/she has made a demand? This may have to be decided under English common law as there seems to be no provision in the DIFC Contract Law expressly dealing with this issue.
- xii. Is the reference in the model arbitration clause providing for referral of any dispute to the DIFC–LCIA Arbitration Centre intended to be fixed?
- No. Parties may choose to refer their disputes to arbitration to any institution or any seat of their choice. But common sense would inform

them that there could be a greater likelihood of a tribunal seated in the DIFC accepting the validity of this clause than in any other seat, and, unless there is an overwhelming desire to use the Dubai International Arbitration Centre (DIAC) as the institution of choice (with a DIFC seat), our Arbitration Centre would seem an obvious choice.

- xiii. Will the restrictions on the use of arbitration in employment and consumer matters (as provided for in Article 12(2) of the DIFC Arbitration Law 2008) apply to matters covered by the draft Practice Direction? What is intended where only part of a judgment (or only some but not all of the parties to it) have employment/consumer related content?
- As provided in the DIFC Arbitration Law 2008, disputes covering employment and consumer matters may not be enforced against the employee or consumer except under specific situations. It is, therefore, unlikely that judgments encompassing such matters will be enforced. This is simply a matter of arbitrability. The draft Practice Direction has been amended in the revised version to reflect this point.
- xiv. Should the suggested arbitration clauses include reference to Referral Criterion 5—that is, referral pursuant to this Practice Direction?
- Since the model arbitration agreement expressly refers to the satisfaction of all the Referral Criteria, it will not be necessary to make any further amendment.
- xv. Would not the effectiveness of this initiative be dependent on the number of parties who are willing to sign up for it since it is an optional submission? Why should Party A agree in advance to help Party B to enforce a judgment against Party A?
- That is a fair observation, and this protocol would probably be most likely to be adopted where:
 - a. both parties believe that they have a fighting chance of winning, especially if a counterclaim is added; or
 - b. one party is in a stronger bargaining position than the other so as to be able to insist on this protocol being adopted.
- xvi. This is a query which I myself raised. What if a clever judgment debtor responds to the demand for payment by saying: ‘*I acknowledge my liability for the judgment debt, but I simply have no liquid assets to satisfy the judgment and I seek time for payment.*’ Will there still remain a ‘dispute’ for purposes of a valid arbitration?
- This problem is now pre-empted by our amendment to the definition of ‘*enforcement dispute*’ (now renamed a ‘*Judgment Payment Dispute*’) to add the words ‘*including any dispute about the ability or willingness of judgment debtor to pay the outstanding portion of the judgment sum*’.

xvii. Finally, the question of a possible contradiction between the intention of the protocol to give the judgment creditor (whether that be the claimant or the respondent) greater powers of enforcement of its judgment and the wording of the model arbitration agreement, which allows the right of arbitration to be exercised by either party.

- This problem has now been addressed by amending the wording of the model arbitration clause so that it reads, '*Any Judgment Payment Dispute...may be referred to arbitration by the judgment creditor, and such dispute shall be finally resolved by arbitration under the Arbitration Rules of the DIFC-LCIA Arbitration Centre*'.

We have also realized that the model arbitration clause can work as a stand-alone arbitration agreement, not inextricably linked to parties' voluntary submission to the jurisdiction of the DIFC Courts. In particular, the model clause can be used by parties who are already compulsorily subject to the jurisdiction of the DIFC Courts under Article 5 of Law No 12 of 2004. We have accordingly separated the original version of the model clause whereby parties submit to the jurisdiction of the DIFC Courts.

Accordingly, we have made appropriate amendments to meet the concerns of our users, and the final version of the model arbitration clause now reads as follows.

Any Judgment Payment Dispute (as defined in the DIFC Courts Practice Direction No 2 of 2015) that satisfies all of the Referral Criteria set out in the Practice Direction may be referred to arbitration by the judgment creditor, and such dispute shall be finally resolved by arbitration under the Arbitration Rules of the DIFC-LCIA Arbitration Centre, which Rules are deemed to be incorporated by reference into this clause. There shall be a single arbitrator to be appointed by the LCIA Court pursuant to Article 5.4 of the DIFC-LCIA Arbitration Rules. The seat, or legal place of arbitration, shall be the Dubai International Financial Centre. The language to be used in the arbitration shall be English.

This agreement for submission to arbitration shall in all respects including (but not limited to) its existence, validity, interpretation, performance, discharge and applicable remedies be governed by and construed in accordance with the laws of the Dubai International Finance Centre.

The judgment creditor may, before or after exercising its option to refer a Judgment Payment Dispute to arbitration as provided above, exercise all rights of enforcement of the judgment in a national court by way of execution on the assets of the judgment debtor, and the judgment debtor shall not be entitled to resist execution before any such national court on the grounds of this arbitration agreement, which is intended to provide a judgment creditor with additional, and not alternative, remedies for enforcement of its judgment.

We, therefore, intend to launch the actual initiative early in 2015. The overall reactions from our legal community in the DIFC have been largely encouraging of our intention to give DIFC judgments more global reach. If our experiment subsequently proves successful, we will have developed an important tool to synthesize litigation

and arbitration by giving concurrent remedies for enforcement and thereby resolved one of the great problems of international litigation which other jurisdictions can follow. This is because there is nothing in our protocol that changes the existing common law; indeed, our protocol builds on it. If we can develop a model for the rest of the common law world, civil law countries may also be able to adopt it because ultimately it is a question of persuading courts to interpret, not the national laws of any country, but the meaning of an 'award' under the NYC, which is a matter of international, rather than domestic law. If our bold step proves successful, this would be the ultimate partnership between commercial courts and arbitration, hence I hope that all of you will wish us good luck in this venture.