

Why international courts may be the way forward

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Michael Hwang SC and Sundaresh Menon SC sign memoranda in Dubai

The start of this year saw the launch of the Singapore International Commercial Court (SICC). **Alec Emmerson**, **Sapna Jhangiani** and **John Lewis** of Clyde & Co in Singapore and Dubai report on a subsequent signing of memoranda with the courts of the Dubai International Financial Centre and Singaporean Chief Justice Sundaresh Menon's insights into why international courts provide a good alternative to arbitration.

Two memoranda entered by the Singapore Supreme Court and the courts of the Dubai International Financial Centre on 19 January (one "of guidance" and one "of understanding") pave the way for the mutual recognition and enforcement of court judgments in these two jurisdictions as well of cross-referral of questions of law where needed.

The memoranda also stress the importance of "promoting and facilitating legal co-operation" and of the value of "close cooperation for mutual benefit in the field of administration of justice".

The signing of the memoranda was attended by the Chief Justice of Singapore **Sundaresh Menon SC** and Chief Justice of the DIFC courts, **Michael Hwang SC** (a Singaporean). It provided an opportunity for Chief Justice Menon to set out his reasons for creating the SICC and describe his vision for a global network of commercial courts to complement the role played by international arbitration.

Despite the success of international arbitration, there is a real need for alternatives, he argued.

The institutions behind the acronyms

The DIFC, described by Chief Justice Hwang as “a common law island in a civil law ocean”, is a financial freezone in Dubai governed by the common law (as opposed to the rest of the United Arab Emirates and its neighbour states, which are governed by the civil law).

The DIFC Courts have jurisdiction to hear disputes arising under agreements that have a connection to the DIFC (for example, claims to which an establishment licensed in the DIFC is a party); where the parties have specified the DIFC Courts as the dispute resolution forum under the contract; or where the provisions of DIFC law give the courts jurisdiction (as established in several recent cases in which arbitration award creditors sought recognition and enforcement of awards through the DIFC Courts against debtors in onshore Dubai).

The SICC was established as a division of the Singapore High Court under the Supreme Court of Judicature Act with a mandate to hear international commercial disputes arising out of cross-border agreements.

It will resolve cases arising from express SICC dispute resolution clauses, as well as cases transferred from the case list of the Singapore High Court upon the decision of the chief justice.

Crucially, both the DIFC Courts and SICC allow parties to “opt-in” to their jurisdiction to resolve disputes. Both therefore face the same challenge that all arbitration institutions face in needing to promote their services to users.

Both recognise that enforceability is a key concern of parties when considering the most appropriate dispute resolution forum and have, either themselves, or in the case of the SICC, through the Supreme Court of Singapore, taken pro-active and innovative steps to address enforceability.

Why international courts have a role to play

In a speech, Chief Justice Menon explained that he got the idea for the establishment of the SICC from a visit to the London Commercial Court. This made it clear to him that having a world-class commercial court alongside an international arbitration hub is not a “zero-sum game”.

Parties may prefer litigation for a number of reasons, he argued, including its transparency; the possibility of appealing judgments; and the court’s powers to order consolidation and joinder of disputes.

In addition, parties may be encouraged to look to alternatives to arbitration because of the lack of regulation of the arbitration industry (including in relation to ethics), the lack of accountability of arbitrators, and the “judicialisation” of arbitration, accompanied by rising costs.

While some of these shortcomings of arbitration can be addressed, some are inherent in the arbitral process, he argued. For example, there is no appellate jurisdiction

over arbitration awards, nor do such awards result in an open body of case law. An International Commercial Court therefore has a role to play.

In Menon's words, the SICC and DIFC courts are able to resolve cross-border disputes in a manner that ensures "public accountability and legitimacy". Advantages the courts offer that arbitration does not include:

- coercive powers (for example, to enforce interim awards);
- commitment to cost efficiency (Menon noted that, as litigation procedures have infiltrated arbitration, costs have escalated. In addition, the lack of appeal encourages parties to consider arbitration a "one-shot contest" and throw all their resources at it);
- the allocation of judges by the courts from a fixed panel, meaning that any perception that the tribunal is biased is avoided;
- the fact that counsel appearing in a case are bound by a code of conduct, unlike in arbitration;
- the open nature of proceedings, subject to exceptions; and
- the development of jurisprudence, with the appeal courts serving a two-fold purpose of correcting errors by the lower courts and developing precedents that can be relied on by parties in subsequent cases – giving them greater legal certainty.

Both the SICC and DIFC court offerings also incorporate certain features that are traditionally found in international arbitration, such as more limited disclosure processes (based on those in the IBA Rules on the Taking of Evidence in International Arbitration); the ability of parties to appoint foreign counsel; and panels made up of a mix of local and foreign judges.

Menon emphasised that he did not wish to suggest that the DIFC Courts and SICC were "superior" to international arbitration, just that they offer a choice of dispute resolution forum, depending on the relevant factors important to the parties.

But what about enforcement?

Chief Justice Menon acknowledged that a significant challenge for both courts is the enforceability of their judgments, but that this may not be as "insurmountable" as it first seems.

The more limited international enforcement prospects of judgments of the London Commercial Court, as compared with arbitration awards, do not appear to have affected the court's popularity as a dispute resolution forum for many parties outside the UK, he noted

The DIFC Courts have taken active steps to improve certainty for parties seeking to enforce their judgments abroad, and are already party to several memoranda

entered with, for example, the English Commercial Court; the Federal Court of Australia; the Supreme Court of New South Wales; and the High Court of Kenya.

These memoranda do not have the force of law, but set out the principles and processes for the enforcement of judgments between the jurisdictions, and the relevant criteria. If followed, these should mean that judgments are mutually enforceable.

Singapore is currently party to a limited number of treaties for the mutual recognition and enforcement of judgments (including with India), and its judgments are enforceable abroad in commonwealth countries such as the UK and the US, including by way of a common law action to enforce a foreign judgment.

At the signing event, Chief Justice Menon indicated that the Supreme Court of Singapore would be looking to enter into more memoranda with other courts, as the DIFC Courts have done, and that the Singapore government may also have more enforcement treaties in the pipeline.

What next?

In his speech, Menon outlined two further exciting prospects on the horizon.

The first, which could be a “game-changer”, is the 2005 Hague Convention on Choice of Court Agreements – described by Chief Justice Hwang at an event in Sydney in 2014 as “a sort of mini version of the New York Convention” for the enforcement of court judgments rather than arbitral awards.

So far only Mexico, the US and the EU have signed the convention, the chief justice said – and only Mexico has ratified it. Ratification by the EU is expected later this year. Once that happens, the convention will enter force and there will immediately be 27 more countries which are parties to it. This may encourage more states to sign up, he said.

The second exciting prospect Menon mentioned was the “experiment without parallel” initiated by the DIFC Courts to convert court judgments to arbitration awards to enhance their enforceability via the New York Convention.

A global network of commercial courts?

Menon concluded by describing his vision of a future global network of commercial courts that would coexist with international arbitration and support international commerce by enforcing bargains across boundaries.

Such courts would be low in cost, ethically regulated and “blind” to where parties are from, he said.