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The Emergence of Hybrid International Commercial Courts and the Future of Cross Border Commercial dispute Resolution in Asia

Firew Tiba*

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Abstract

The bulk of international commercial disputes are resolved by national courts. In Asia, regional international arbitration centres in places such as Shanghai, Hong Kong, Singapore, and Tokyo have also been partaking in these exercises albeit at varying levels of popularity. While commercial arbitrations remain popular, the influence of these bodies in driving convergence has been questioned. This has been in part due to the confidential nature of their awards and their *ad hoc* nature. The uptake of international commercial instruments in the region is growing, but the extent of harmonization of international commercial law remains weak. Even in countries such as Australia that have taken steps to adopt international commercial instruments, the efficacy of international law has been called into question. Application of these international rules have not been promising. In this regard, the lacklustre performance of the Convention for the International Sale of Goods (CISG) could be cited. There is no doubt that judicial institutions play a crucial role in achieving the lofty ideal of harmonisation. At

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the other end of the spectrum, the establishment of fully blown regional international courts for commercial disputes is further away. This has been hampered by the obvious sovereignty concerns and the relative success of international commercial arbitration.

It has been a little over a year since Singapore, a country that is already one of the most preferred arbitration destinations in the world, moved to establish an International Commercial Court, a unique institution that pushed the frontiers of cross border commercial dispute resolution. The Court heard its first case in May 2015 on a referral from the High Court. This case involved a dispute between Indonesian and Australian mining companies.[1] The court is unique in that it allows appointment of foreign judges and dispenses with the application of Singapore's Rules of Evidence. Naturally all Singapore regular courts are expected to apply the Singapore Rules of Evidence in disputes before them. However, an exception is made in regards to matters coming before the Singapore International Commercial Court (SICC), where on application of the parties the Singapore Rules of Evidence may be disapplied pursuant to Order 110, Rule 23.[2] As will be discussed later in this essay, this hybrid institution promises to combine the best of international commercial arbitration and that of judicial settlement of disputes. Elsewhere in Asia, we have had the Dubai International Financial Centre Courts of First Instance and Appeal, the Qatar International Court and Dispute Resolution Centre and, most recently, the Abu Dhabi Global Market Courts. The need for specialised commercial division has long been recognised in places like London, Delaware North, and Victoria in Australia. It is one thing to have a commercial division and yet another to make these divisions have an international orientation.

This paper seeks to put these developments in comparative perspectives and examine normative, procedural, institutional issues and practical challenges that such endeavours entail. It will also assess and critically examine the legal/legislative infrastructure required to accommodate the establishment of hybrid judicial organs for cross border commercial disputes.

I. Introduction

Asia is home to a population of over 4 billion. It consists of incredibly diverse group of countries whose legal systems are shaped by events spanning several centuries of their recorded history. Trade among Asian countries along the Silk Road, over land, and maritime route has been well documented. Major global economic hubs straddle the vast region. In West Asia, there exists the Middle East players with oil and emerging financial industries. In Central Asia, there are the vast expanse of ex-Soviet Republics with expanding resource economy. In South Asia, the Indian sub-continent is humming with activities with the emerging Indian economy acting as a driving force at its centre. In East Asia and South

[1] *BCBC Singapore Pte Ltd and another v PT Bayan Resources TBK and another* [2016] SGHC(I) 01, http://www.sicc.gov.sg/documents/judgments/2016_SGHC(I)_01.pdf.

[2] SICC User Guide Note 5 Disapplication of Singapore Evidence Law, http://www.sicc.gov.sg/documents/docs/SICC_User_Guides.pdf.

East Asia lie some of the world's biggest economies. While it is impossible to generalise about the continent, it would be fair to assume that doing business in any of these subregions calls for an effective legal framework and dispute resolution mechanisms.

Effective international legal framework and dispute resolution mechanisms do not operate in isolation from other factors such as the extent of regional integration and culture of independent national dispute resolution mechanisms. Asia lags behind for its lack of a pancontinental economic and political integration movements compared to its regional counterparts that have established the European Union and African Union.[3] However, there are promising efforts at the sub-regional levels as exemplified by the work of ASEAN in South East Asia and the Gulf Cooperation Council (GCC) in West Asia. There is potential for under-utilised sub-regional organisations to be activated. Also, there is growing participation of Asian countries in the activities of institutions such as UNICTRAL whose main objective is to harmonise rules of international commercial law. The establishment of UNCITRAL's regional centre for the Asia Pacific in 2012 is one of the steps taken to bring about "certainty in international commercial transactions through the dissemination of international trade norms and standards, in particular those elaborated by UNCITRAL."[4]

Individual member-states in these two sub-regions are also taking encouraging steps in facilitating harmonisation of applicable rules and cross-border commercial dispute resolution mechanisms. These initiatives will be discussed later in this paper.

Thus, when one speaks of Asia, one is inclined to look at its sub-regional economic and political integration movements to see if there are developments in these sub regions with broader regional or continental implications. These sub-regional initiatives have the potential to outgrow their subregions just as the European Coal and Steel Community grew in to the ever-expanding European Union. In this regard, however, there is little to be shown. Likewise, in regards to the immediate focus of this paper, international commercial dispute resolution, the role of sub regional integration movements in Asia has been limited. Based on experiences from Europe, it can be hypothesized that development of regional or sub-regional commercial dispute resolution mechanisms are directly related to the extent of economic and political integration. Thus, for less politically integrated regions, the immediate concerns remain peace and security matters along with laying framework for economic cooperation. Agreements for harmonization of commercial laws, much less, mechanisms for resolving commercial dispute between private parties rarely figure as their priorities.

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[3] Sub-regional bodies include: Gulf Cooperation Council (GCC); South Asian Association for Regional Cooperation (SAARC); Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation (BIMSTEC); Economic Cooperation Organization (ECO); Shanghai Cooperation Organisation (SCO); Association of Southeast Asian Nations (ASEAN); Mekong-Ganga Cooperation (MGC).

[4] United Nations Commission on International Trade Law [UNCITRAL], *UNCITRAL Reg'l Ctr. for Asia and the Pac.*, http://www.uncitral.org/uncitral/tac/rcap.html; UNCITRAL, *UNCITRAL Reg'l Ctr. for Asia and the Pac.: Launch Event*, http://www.uncitral.org/uncitral/en/tac/rcap/launch.html.

While there are a number of sub-regional organisations in Asia, ASEAN takes the lead for being at the centre of it all both geographically and in terms of acting as a catalyst for regional cooperation. It is also acting as a magnet for further regional cooperation agreements as manifested in ASEAN+3+ [India +Australia +New Zealand] and other configurations. Whatever prospect there is for regional, economic, and political integration in greater Asia, ASEAN is likely to play a leading role. Its recent transformation into an economic community is a good indicator that it is following the trajectory followed by the European Steel and Coal Community several decades ago. Therefore, if there is going to exist a regionally-sponsored commercial dispute resolution mechanism, ASEAN would be the prime candidate. With these background discussions in mind, let us explore the state of international commercial dispute resolution in general and in Asia in particular.

II. The State of International Commercial Law Dispute Resolution

The discussion of international commercial dispute resolution is directly linked to the existence of a body of law that can be identified as international commercial law. Commercial laws and courts have been variously defined. Lord Thomas, Lord Chief Justice of England and Wales, defined the word commercial courts in his DIFC Academy of Law lecture as one that encompasses, "courts whose function is exclusively directed to dealing with dispute relating to markets, commerce and rights relating to them."[5] Thus, without there being the need to be more specific, commercial laws can be defined as those laws that relate to markets, commerce and rights relating to them.

International commercial laws are laws of international origin but mostly of national application.[6] The laws themselves owe their origin to different sources: international conventions, model rules, soft laws and the like.[7] Resolving disputes involves interpreting, applying, and enforcing these laws. Various actors are involved in these activities.

Arbitration and litigation are the two key forms of international commercial dispute resolution, with the former commanding a significant acceptance among businesses and practitioners. A 2015 International Arbitration Survey by Queen Mary Arbitration Centre, University of London, provides a number of useful insights into the state of international commercial arbitration and factors motivating

[5] The Right Hon. The Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales, Dubai International Financial Centre [DIFC] Academy of Law Lecture, Dubai: Commercial Justice in the Global Village: The Role of Commercial Courts (Feb. 1, 2016) (transcript available at 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).

[6] A number of UNCITRAL and UNIDROIT international commercial conventions are generally interpreted and applied by national courts as there are no international commercial courts given these responsibilities.

[7] In general, see the international harmonization efforts of international institutions such as UNCITRAL, UNIDROIT and a number of regional economic communities.

businesses and legal practitioners in their dispute resolution activities.[8] The findings of such surveys are important indicators of things to do and not to do in designing international commercial courts.

The survey showed that 90% of respondents stated that international arbitration is their preferred dispute resolution mechanism; either as a stand-alone method (56%) or together with other forms of ADR (34%).[9] Enforceability of arbitral awards, avoiding specific legal systems, along with flexibility and selection of arbitrators were cited, in decreasing order, as the most valuable aspects of arbitration.[10] On the other hand, cost, lack of sanctions during the arbitral process, lack of insight into arbitrator's efficiency, and lack of speed are cited, in decreasing order, as some of the unfavourable features of arbitration.[11] Similar observations cannot be made about litigation since there are no equivalent international commercial courts. However, disputes with transnational commercial significance are being brought to national courts and hybrid international commercial courts. The latter is the subject matter of this paper.

In regards to national courts, it has been a long held belief that international parties are very reluctant to submit to the jurisdiction of the national courts of the other party to the dispute. F. Peter Phillips summarises the reasons as follows:

> Most companies doing business internationally are reluctant to enter their customers' courts. They fear corrupt or protective judges; they are unfamiliar with (and therefore sceptical of) local law; they seek to avoid inconsistent outcomes; they prefer private conflict resolution to public trial; they may be unfamiliar with local language and custom; they wish to pursue uniform agreements rather than modifying their contracts to comply with the sometimes obscure requirements of scores of jurisdictions.[12]

The contradiction between the global outlook of business and the introspective localised commercial dispute resolution is eloquently captured by W. Laurence Craig in the following words:

> While trade and investment were becoming increasingly transnational, and the multinational corporation was developing with an interest in promoting business and profits without regard to national boundaries, national courts, at least from the foreign trader's or investor's point of view, remained resolutely local in outlook. In many jurisdictions the judiciary

8 Paul Friedland & Professor Loukas Mistelis, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration* 2, Queen Mary Univ. of London School of Int'l Arb., http://www.arbitration.qmul.ac.uk/docs/164761.pdf (according to the researchers, the survey was conducted over a six-month period and comprised two phases: an online questionnaire completed by 763 respondents (quantitative phase) and, subsequently, 105 personal interviews (qualitative phase)).

9 *Id.*

10 *Id.*

11 *Id.*

12 F. Peter Phillips, *The Challenges of International Commercial Dispute Resolution*, CPR: The Int'l Inst. for Conflict Prevention and Resolution, http://www.businessconflictmanagement.com/pdf/BCMpress_01.pdf.

> was slow to change, ill-informed about modem commercial and financial practices, and hesitant to abandon local traditions and procedures that often seemed arcane or unbusinesslike to outsiders. Moreover, judicial procedures and formalities built on accepted national traditions have a very different impact on foreign persons and entities, to whom not only the procedure but frequently the language is foreign, than they do on their local contracting partners. Finally, there is always the possibility, or at least the perception, that local courts will be biased in favor of domestic parties and less protective of foreign interests"[13]

Such assessment of the shortcomings of judicial settlement of commercial disputes by local courts has helped international arbitration to grow in prominence. As W. Laurence Craig summarises:

> In short, while speed, informality, and economy have had some influence on the growth of international commercial arbitration, the essential driving force has been the desire of each party to avoid having its case determined in a foreign judicial forum. Parties seek to avoid these forums for fear that they will be at a disadvantage due to unfamiliarity with the jurisdictions language and procedures, preferences of the judge, and possibly even national bias.[14]

There is no denying the assumptions that such perceptions about domestic litigation may have led to the outcome that international arbitral bodies are the most preferred entities to deal with transnational commercial disputes. That is not to say that there are no domestic courts that have managed to overcome this perceived shortcoming and endeared themselves to international litigants. In this regard, one can mention the London Commercial Court. The Court was established in 1895.[15] This Court attracts significant proportion of litigants where one or both parties to the disputes do not have any real or significant connection to the United Kingdom.[16] It is suggested that 80% of work before the London Commercial Court has, at least, one party who is based outside the jurisdiction.[17]

There are a number of reasons why this type of national court is preferred to other national courts in resolving international commercial disputes. One of the significant advantages of the London Court is its ability to understand the busi-

[13] W. Laurence Craig, *Some Trends and Developments in the Laws and Practice of International Commercial Arbitration*, 50 Tex. Int'l. L. J. 699, 700 (2016).

[14] *Id.*

[15] Hon. L.J. Rupert M. Jackson, *Review of Civil Litigation Costs: Preliminary Report*, 1 Royal Cts. of Just. 277 (2009), http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-23/Amicus%20brief/AnnexOJacksonvolume1.pdf.

[16] Hon. C.J. Marilyn Warren AC & Hon. J. Clyde Croft, *An International Commercial Court for Australia: Looking Beyond the New York Convention*, Sup. Ct. of Vict., 17, https://www.monash.edu/__data/assets/pdf_file/0009/467658/Com-CPD-April-2016-Paper.pdf.

[17] Warren & Croft, *supra* note 16, at 18.

ness and commercial world.[18] London's link to the financial and business community dates back to the 18th century under Lord Mansfield.[19] Currently, the London Commercial Court's Financial List keeps abreast of developments through "the provision of market seminars by an independent body originally established by the Bank of England, the Financial Markets Law Committee."[20] It is said that this ensures that "senior members of the judiciary, and particularly the judges of the Commercial Court and the Financial List, are provided with regular and well-informed updates on changing market practices and the development of new financial products."[21] There are, of course, the well-known reasons of judicial independence, respect for rule of law and the commercial friendliness of the English Common Law. This cemented London's place as an attractive venue for international commercial dispute resolution, whether it is litigation or arbitration.

It is a well-known fact that states are less likely to cede sovereignty on matters of civil and commercial nature. This fact militates against the establishment of a truly international commercial court for the foreseeable future. Consequently, individuals and businesses engaged in cross-border commercial transactions are left to their own devices when it comes to dispute resolution. This is not to say states have not taken steps to mitigate the adverse impact of complex legal webs that businesses have to navigate in cross border transactions.

One of such steps is to work towards harmonisation of substantive rules applicable to commercial transactions. Intergovernmental bodies such as United Nations Commission on International Trade Law (UNCITRAL) and the Hague Conference on Private International Law have spearheaded the harmonisation efforts. Others, such as, the International Chamber of Commerce have also been making contributions towards harmonisation. In the dispute resolution realm, UNCITRAL's New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards remains one of the stellar contributions to cross-border commercial dispute resolution. This Convention has been ratified by almost all Asian countries except North Korea, Iraq, Yemen and Turkmenistan.

Similar success achieved in the arbitration sphere has not been replicated in the realm of judicial settlement of cross border commercial disputes. To date, only four countries have ratified the 1971 Convention on the Recognition and Enforcement of Foreign Judgment.[22] The 2005 Choice of Courts Agreement Convention seems to have escaped similar fate as a result of its ratification by the

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[18] *See* The Right Hon. The Lord Thomas of Cwmgiedd, *supra* note 5, at 15. ("[A] court must understand the markets and the commercial world. The London Commercial Court has developed and adapted its links with the financial and business community.").

[19] *Id.* ("In the 18th Century Lord Mansfield, the creator of the basis of modern English commercial and insurance law, often used special juries drawn from experts in the field: being, for instance, commercial merchants, insurance brokers, traders and so on.").

[20] The Right Hon. The Lord Thomas of Cwmgiedd, *supra* note 5, at 15-16.

[21] *Id.*

[22] *See* Hague Conference on Private International Law, *Principles on Choice of Law in International Commercial Contracts* (March 19, 2015) https://assets.hcch.net/docs/5da3ed47-f54d-4c43-aaef-5eafc7c1f2a1.pdf [hereinafter *Principles on Choice of Law*]; *see also* Hague Conference on Private International Law, *16: Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*, https://www.hcch.net/en/instruments/conventions/sta

US and the European Union.[23] From Asia, Singapore is the first and only country to accede to the Convention at the time of this writing.[24] It is to be seen whether the ratification process will be accelerated by these developments. But commentators are already asserting that the 2005 Choice of Courts Agreement Convention is set to do for litigation, what the 1958 New York Convention did for arbitration.[25]

At this stage, harmonisation of most aspects of international private laws as applied to commerce is a remote prospect. Harmonisation of substantive laws is a product of a number of factors one of which is political integration. Since, South East Asian economies are more integrated, should there be an economic crisis in one country, it is inevitable that the other East Asian markets will be effected.[26] It needs to be noted that even in regions that achieved the highest degree of regional integration, such as Europe, cross-border dispute resolution is not as developed as one would like to see.

At the same time, existence of uniform substantive law does not guarantee uniform interpretation and application of these laws. But businesses across Asia would benefit from clarity on issues of conflict of jurisdiction, choice of law and recognition and enforcement of foreign judgements. With this background discussion in mind, let us have a look at some of the approaches to cross-border commercial dispute resolution with specific reference to judicial settlement of disputes.

III. Overview of Approaches to Cross-Border Commercial Dispute Resolutions

A. The Private International Law Model (The Default Model)

National courts remain the most important forum for resolution of cross border commercial disputes. These courts rely on rules of private international law (conflict of law rules) to address transnational/foreign elements of disputes before them. Rules of private international law are essentially national laws.

tus-table/?cid=78 [hereinafter *Recognition and Enforcement of Foreign Judgments*] (discussing Albania, Cyprus, Netherlands, and Portugal).

[23] *See* Hague Conference on Private International Law, *§ 14: Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* (June 30, 2005) https://assets.hcch.net/docs/f4520725-8cbd-4c71-b402-5aae1994d14c.pdf [hereinafter *Convention on the Service Abroad of Judicial and Extrajudicial Documents*]; *see also* Hague Conference on Private International Law, *§ 37: Convention of 30 June 2005 on Choice of Court Agreements*, https://www.hcch.net/en/instruments/conventions/status-table/?cid=98 [*Convention on Choice of Court Agreements*] (Status Table defines the countries established in the 2005 Choice of Courts Agreement Convention).

[24] For the ratification status table for Convention of 30 June 2005 on Choice of Court Agreements see https://www.hcch.net/en/instruments/conventions/status-table/?cid=98.

[25] *See* Michael Hwang, *Commercial Courts and International Arbitration-Competitors or Partners?*, 31 Arb. Int'l 193, 207 (2015) (discussing the meaning of the word dispute in an arbitration clause and highlighting the word differences in the 1958 New York Convention. "Article II(1) mandates recognition of 'an agreement . . . to submit to arbitration all or any differences . . . . ").

[26] The 1997 Asian financial crisis is a prime example.

These rules, among others, determine questions of jurisdiction, applicable laws, recognition, and enforcement of foreign judgements. This is the default regime for resolution of cross border disputes including commercial disputes. In the absence of international rules laying down common principles, there is bound to exist divergent positions among countries in any of these key areas of private international law. Let alone between two or more countries, the applicable rules may even vary between jurisdictions in the same country, such as Australia or United States that have a federal state structure.[27] In the following paragraphs, we will briefly consider the participation of countries in South East Asia in private international law initiatives aimed at harmonising rules applicable in the areas of jurisdiction, applicable laws and recognition and enforcement of foreign judgements.

As noted, only four countries, none of which are from Asia, are parties to the Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. Israel is the only country that signed Convention of 25 November 1965 on the Choice of Court. On the other hand, the Convention of 30 June 2005 on Choice of Court Agreement, has steadily acquired a number of significant signatories, including Mexico, the European Union, the United States of America, and Singapore.

Singapore's ratification is likely accelerated by its increasing prominence in cross-border commercial dispute resolution and its recent establishment of a hybrid Singapore International Commercial Court as a division of its high court. In an era of choice, where litigants have the option and, in most cases, preference for international arbitral bodies, the ratification of this Convention has significant ramifications for the reassertion of the role of national courts in cross-border commercial disputes. It is a commonly-held belief, as stated by the International Chamber of Commerce, that the Convention has "the potential to achieve for litigation what the New York Convention has achieved for arbitration."[28]

The three basic rules of the convention as summarized by the Hague Conference on Private International Law are: 1) the chosen court must in principle hear the case (Article 5); 2) Any court not so chosen must decline to hear the case (Article 6); 3) Any judgment rendered by the chosen court must be recognised and enforced in other Contracting States, except where a ground for refusal applies (Articles 8 and 9).[29]

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[27] Hon. James Allsop & Daniel Ward, *Incoherence in Australian Private International Laws*, FED. CT. OF AUSTRL., (Apr. 11, 2013), http://www.fedcourt.gov.au/publications/judges-speeches/chief-justice-allsop/allsop-cj-20130410 (discussing whether the principle surrounding jurisdiction where relevantly cases ought to be treated similarly actually occurs. The article eludes to the lack of unity in upholding certain provisions ultimately makes a foreign party's "answerability before Australian courts appear arbitrary.").

[28] INTERNATIONAL CHAMBER OF COMMERCE, ICC calls on governments to facilitate cross-border litigation, (Nov. 29, 2012), http://www.iccwbo.org/News/Articles/2012/ICC-calls-on-governments-to-facilitate-cross-border-litigation/ ("[T]his Convention is a necessary tool towards effective cross-border dispute resolution. It has the potential to achieve for litigation what the New York Convention has achieved for arbitration.").

[29] HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, *Outline of the Convention 30 Jun. 2005 on Choice of Court Agreements*, 1 (May 2013), https://assets.hcch.net/docs/89be0bce-36c7-4701-af9a-1f27be046125.pdf.

In regards to choice of law, there are no conventions in force. However, Principles on the Choice of Law in International Contracts that were approved on 19 March 2015 could someday gain widespread acceptance.[30] The overriding aim of these principles is to entrench the notion of party autonomy in choice of law.

B. The OHADA Model (Intergovernmental Approach)

Common Court of Justice and Arbitration (CCJA) is the court of the Organization for the Harmonization in Africa of Business Laws (OHADA).[31] OHADA is the French acronym for Organisation pour l'Harmonisation en Afrique du Droit des Affaires.[32] This organisation was established in 1993 with the purpose of harmonising business laws.[33] This means it has been in existence for over two decades. OHADA currently has 17 member states, mainly from West and Central Africa.[34] Uniform acts adopted by its Council of Ministers become an integral part of the legal system of its member states. The uniform acts adopted so far include a commercial code, company law, law of secured transactions, arbitration, simplified recovery procedures and measures of execution, bankruptcy and collective discharge procedures, accounting, carriage of goods by road, and cooperatives.[35]

CCJA is given three key roles. The first role is certifying consistency of draft Uniform Acts with OHADA treaties.[36] This has a gate keeping impact which ensures that future Acts do not conflict with OHADA's constitutive documents. The second role is the supervision of arbitration conducted under its auspices.[37] Its supervision role is limited to naming and confirming the arbitrators, to be informed of the progress of the proceedings, and examine decisions, in accordance with Article 24.[38] According to Article 24 of the Treaty, before signing a partial or final award, the arbitrator shall submit the proposed decision to the CCJA, which may suggest any formal amendments to such a decision. The third and very significant role from dispute resolution perspective is ensuring the consistent interpretation of the treaty.[39] In this capacity it can give advisory opinions and hear appeals from the highest courts of the member states. Its decisions are final and conclusive, and the execution and enforcement shall be ensured by the

[30] *Principles on Choice of Law*, *supra* note 22, at 17 (stating it was created on 17 October 1993 in Port Louis, Mauritius).

[31] *See* Organization for the Harmonization of Business Law [Ohada], *CCJA* at a Glance, http://www.ohada.org/index.php/en/court-of-justice-and-arbitration/ccja-at-a-glance.

[32] *See* Ohada, *General Overview,* http://www.ohada.org/index.php/en/ohada-in-a-nutshell/general-overview.

[33] *See generally Treaty on Harmonisation of Business Law in Africa*, OHADALegis.com (Oct. 17, 1993) http://www.ohadalegis.com/anglais/traiteharmonisationgb.htm.

[34] *See id.* arts. 13-26.

[35] *See* OHADA, *Achievements*, http://www.ohada.org/index.php/en/ohada-in-a-nutshell/achievements.

[36] *Treaty for Harmonisation of Business Law in Africa*, *supra* note 33, arts. 6, 7.

[37] *Id.* art 21.

[38] *Treaty for Harmonisation of Business Law in Africa*, *supra* note 33, arts 21.

[39] *See id.* art. 7.

Contracting States on their respective territories.[40] There are thirteen judges appointed for one non-renewable term of seven years.[41] The court does not have an appellate body and its decisions have a force of *res judicata* in a territory of member states.[42]

It is worth noting that the membership of OHADA consists of both Civil Law and Common Law legal systems as in South East Asia, although the balance overwhelmingly tilts in favour of the French speaking civil law countries.[43] There have been suggestions that CCJA had played a role in narrowing a gap between both systems in the region.[44] CCJA has jurisdiction over disputes between parties in the same country so long as the dispute involves the interpretation of OHADA Acts.

The OHADA system not only attempts to bring about harmonisation of substantive business law, but also seeks to bring about uniform interpretation of cases that end up with its CCJA. It is worth noting that its decisions have precedential value.[45] However, exhaustion of local remedies rule does not apply.[46] Parties may bypass their appellate court and directly appeal to CCJA.[47]

Given that OHADA operates mechanism for lawmaking and its interpretation, it is possible to argue that laws once made will continue to evolve both through legislative amendments and judicial interpretations. CCJA also runs a regional training centre for legal officers.[48]

Obviously, OHADA model is not without its limitations. Charles Manga Fombad outlines the following limitations: legitimacy problem of the process being driven from outside by France and its legal experts although the Acts have to be adopted by national legislatures; focus on big business issues; the inaccessibility of the court.[49] Regardless, the framework with all its limitations stands out as one good example of international commercial dispute resolution with the added benefit of harmonisation of applicable commercial rules.

[40] *Treaty for Harmonisation of Business Law in Africa*, *supra* note 33, art. 20.

[41] See OHADA, CCJA at a Glance, http://www.ohada.org/index.php/en/court-of-justice-and-arbitration/ccja-at-a-glance

[42] Charles Manga Fombad, *Some Reflections on the Prospect for the Harmonisation of Business Law in Africa*, 59(3) Africa Today 51, 65 (Spring 2013).

[43] The following seventeen states, mostly former French colonies, that follow continental system are members of OHADA: Benin, Burkina Faso, Cameroon, Central African Republic, Côte d'Ivoire, Congo, Comoros, Gabon, Guinea, Guinea Bissau, Equatorial Guinea, Mali, Niger, the Democratic Republic of Congo (DRC), Senegal, Chad and Togo.

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.* at 68.

[48] Fombad, *supra* note 42, at 66.

[49] *Id.*

C. The Caribbean Model (Intergovernmental Approach)

The Caribbean model is established under the auspices of the Caribbean Community and Common Market (CARICOM).[50] CARICOM has its origins in the 1973 agreement between four Caribbean countries to foster regional integration.[51] The establishment of the Caribbean Court of Justice was heralded in 2001 with the signing of agreement establishing it by twelve member states.[52] It became operational on 16 April 2005.[53] It has both original and appellate jurisdictions.[54] Original jurisdiction is in regards to treaty matters while appeal to the court could be made on civil and criminal matters.[55] Countries need to specifically adopt legislation for CCJ to permit this appellate jurisdiction.

The court also replaces the Privy Council for some former British colonies. However, the Privy Council replacement concerning appeal against national law decisions has only been accepted by the four countries of Barbados, Dominica, Guyana and Belize out of twelve countries that agreed to make the Caribbean Court of Justice their final court of Appeal replacing the Privy Council.[56] On 21 June 2016 Grenadian parliament voted to replace Privy Council by Caribbean Court of Justice. This vote put the matter to a referendum. However, Grenadians voted on 24 November 2016 in a referendum to reject CCJ as their final court of appeal.[57]

While the Court has a long way to go before it gains the backing of all its members in regards to its appellate jurisdiction, its very existence provides avenues for harmonisation of the civil laws of these jurisdictions of which commercial laws are one. It can be seen that CCJ did not appear from the vacuum. Instead it responded to the need to hasten regional integration and move away from the colonial institutional legacy.

D. The Gulf Region Models (Hybrid Approach)

The experiences from the financial districts of the Gulf emirates are another approach to commercial dispute resolution. The Emirates of Dubai and Abu Dhabi in the United Arab Emirates and the State of Qatar are the three jurisdictions that demonstrate that international commercial disputes within geographi-

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50 For Caribbean Community Institutions, see http://caricom.org/community/institutions.

51 *See* CARICOM, *Who we are*, http://caricom.org/about-caricom/who-we-are.

52 *See* CARICOM, *Agreement establishing Caribbean Court of Justice*, http://caricom.org/about-caricom/who-we-are/our-governance/about-the-secretariat/offices/office-of-the-general-council/treaties-and-agreements/agreement-establishing-the-caribbean-court-of-justice-ccj (last visited Dec. 30, 2016).

53 *Id.*

54 *Id.* See Articles XI-XXV for original and appellate jurisdiction of the Court.

55 *Id.*; *see also* Salvatore Caserta & Mikael Rask Madsen, *Between Community Law and Common Law: The Rise of the Caribbean Court of Justice At the Intersection of Regional Integration and Post-Colonial Legacies*, 79 LAW & CONTEMP. PROBS. 89, 90 (2016).

56 *See Grenada Parliament votes for CCJ*, JAMAICA OBSERVER (June 22, 2016) http://www.jamaicaobserver.com/NEWS/Grenada-Parliament-votes-for-CCJ_64626. However, voters rejected the proposal, see *Why the Grenadians Rejected the CCJ*, JAMAICA OBSERVER (Nov. 29, 2016) http://www.jamaicaobserver.com/editorial/Why-Grenadians-rejected-the-CCJ_81970.

57 *Why the Grenadians rejected the CCJ*, *supra* note 56.

cally defined financial centres could be resolved by specialized hybrid international tribunals without the involvement of regular courts.

i. Dubai International Financial Centre Courts (DIFC)

Dubai is the pioneer in starting such a scheme within its Dubai International Financial Centre (DIFC) in 2006 located in Financial Free Zone. The law establishing the Court to administer justice within the DIFC was enacted in 2004.[58] The DIFC has a Court of First Instance and a Court of Appeal.[59] Court proceedings are to be conducted in public in English while Arabic is the official language for court proceedings in the regular courts.[60]

A person is qualified to be appointed as a judge if the appointee has been the holder of high judicial office in any jurisdiction recognised by the Government of the United Arab Emirates and has significant experience as a qualified lawyer or judge in the common law system.[61] This means that an international judge could be appointed to the bench and that the appointees need to be qualified in a common law system despite Dubai being a predominantly civil law jurisdiction. A judge of the Court could be removed by the decree of the ruler of Dubai for "inability, incapacity or misbehaviour that is found to have taken place by an independent inquiry established by the Ruler, and whose findings have been published."[62] The judges enjoy immunity for things done or omitted to be done in performance or purported performance of their duties unless those actions or omissions were result of bad faith.[63]

The Court of First Instance has original jurisdiction over civil and commercial disputes involving any of the centre's bodies or any of the centre's establishments.[64] Centre's bodies are those established by the centre, while centre establishments are "entities or businesses established, licensed, registered or authorised to carry on business or activities in the Centre."[65] Originally the jurisdiction of the DIFC Courts was geographically limited to parties within the DIFC, but the law was amended to allow parties outside DIFC to institute cases before DIFC Courts by agreement.[66]

The governing laws in the DIFC Courts are the judicial authority law, DIFC Law or any legislation made under it, rules of the court and such law as agreed

58 DIFC Law No. 10 of 2004 (U.A.E.), https://www.difc.ae/files/1914/5448/9176/Court_Law_DIFC_Law_No.10_of_2004.pdf.

59 *Id.* art. 7.

60 *Id.* art. 13.

61 *Id.* art. 9(3).

62 *Id.* art. 10.

63 *Id.* art. 61.

64 DIFC Law No. 10 of 2004, *supra* note 58, art. 19.

65 DIFC Law No. (9) of 2011 Amending Certain Provisions of Law No. (7) of 2004 art. 2 (U.A.E.).

66 DIFC Law No. (16) of 2011 Amending Certain Provisions of Law No. (12) of 2004 art. 5(A)(3) (U.A.E.).

by the parties.[67] Here it is worth noting the fact that the courts will recognise any choice of applicable law made by the parties.[68] There is a large body of substantive law enacted to be applied by DIFC Court, which include, among others, contract law, company law, employment law, insolvency law, law of damage and remedies, law of obligations, real property law, personal property law.[69] The massive scale of codification of substantive rules done in this area is equivalent to transplanting the whole body of common law in commercial and civil matters in a systematic manner in to another jurisdiction whose legal system is based on the continental civil law.

The rules of evidence used by the Court are those prescribed in DIFC Law, that the DIFC Court finds appropriate, and rules of evidence of England and Wales.[70] For the purpose of any matter before the DIFC Court, a judge may appoint an independent assessor or expert in their field, to assist the DIFC Court in the determination of any of the issues arising in a proceeding before the DIFC Court.[71] Another feature of the system is that, the DIFC Court, on application by the parties to a proceeding before the DIFC Court, may refer any matter relating to the proceedings to an arbitrator.[72]

ii. Qatar Financial Centre Courts

The Civil and Commercial Court in the Qatar International Dispute Resolution Centre was established in 2009, following the footsteps of its neighbour, Dubai. It became operational on 14 December 2010. It was established pursuant to Article 8(3) of the Qatar Financial Centre Law (Law No. 7 of 2005), as amended by Law No. 2 of 2009.[73] Unlike Dubai, where English is the official language, proceedings before the Qatar Court are held both in English and Arabic. The Civil and Commercial Court contains first instance and appellate levels.

The Court has the jurisdiction over civil and commercial disputes involving parties both within and outside the financial centre.[74] Jurisdiction could also be established with the agreement of the parties. There is similarity with the DIFC Court in these regards. The Courts apply QFC Law and regulations issued under it as well as laws agreed between the parties so long as such laws are not inconsistent with the public order of the State of Qatar.[75]

67 DIFC Law No. 10 of 2004, *supra* note 58, art. 30(1).

68 *Id.* art. 50.

69 See DIFC, *Legal Database*, https://www.difc.ae/laws-regulations/legal-database, for remaining applicable laws.

70 DIFC Law No 10 of 2004, *supra* note 58, art. 50.

71 *Id.* art. 18(1).

72 *Id.* art. 54.

73 Qatar Financial Centre Version No. 4 [QFC] Law No. (7) of 2005 art. 8, http://www.qfc.qa/en/Documents/ResourcesDocuments/QfcLaw/Rebranded%20QFC%20Law%20Brochure.pdf.

74 QFC Law No. 7 of 2005, *supra* note 73, art. 8.

75 *Id.* sched. 6, art. 8.

Just like its Dubai counterpart, the Qatar International Court is staffed by very high profile judges from the Common Law world, notably England.[76] In addition to judicial settlement of disputes, the Centre also provides arbitration and mediation services.[77]

iii. Abu Dhabi International Court

Abu Dhabi, one of the emirates of the United Arab Emirates of which Dubai is also a member, has also established a similar international commercial court within its Abu Dhabi Global Market known as the Global Market Court.[78] The Court is expected to be fully operational after mid-2016 and its proceedings are to be conducted in English.[79]

Parties in the Global Market can agree to exclude the jurisdiction of the Global Market Court or refer the matter to arbitration.[80] Unlike the DIFC Court, Global Market Courts do not have jurisdiction over matters from outside its boundaries. The Court is modelled on the English judicial system in that it applies common law rules, and the judges are high profile judges from the Common Law world, notably England. Perhaps, what sets the Global Market Court apart from its neighbouring DIFC Court is that the former did not codify common law rules but just made some English law applicable by virtue of the Application English Law Regulation 2015.[81] The regulation makes the English Common Law and Equity directly applicable thereby making Abu Dhabi the only post-colonial middle eastern country to voluntarily receive English laws for a specific purpose of promoting commercial dispute resolution.

E. The Singapore Model

Singapore is the latest country to establish a hybrid international commercial court. The idea for the establishment of Singapore's International Commercial Court was conceived in 2013 when Chief Justice Sundaresh Menon proposed this court at the opening of the 2013 Legal Year.[82] The objective was "to grow the legal services sector and to expand the scope for the internationalisation and ex-

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[76] *See List of Qatar International Court Judges*, QATAR INT'L CT. AND DISPUTE RES. CENTRE, http://qicdrc.com.qa/the-courts/overview.

[77] *See generally ADR Centre*, QATAR INT'L CT. AND DISPUTE RES. CENTRE, http://qicdrc.com/qa/adr-centre.

[78] KHALIFA BIN ZAYED AL NAHYAN, RULER OF ABU DHABI LAW NO. (4) OF 2013 art. 13, http://adgm.complinet.com/net_file_store/new_rulebooks/a/b/Abu_Dhabi_Law_No_4_of_2013.pdf.

[79] ABU DHABI GLOBAL MARKET COURTS, *Frequently asked questions about ADGM*, http://www.adgm.com/doing-business/adgm-courts/frequently-asked-questions.

[80] KHALIFA BIN ZAYED AL NAHYAN, *supra* note 78, art. 13(7).

[81] BOARD OF DIRECTORS OF THE ABU DHABI GLOBAL MARKET, *Application of English Law Regulations 2015*, (Mar. 3, 2015) http://www.adgm.com/media/37261/applicationofenglishlawregulations2015_adgm.pdf.

[82] Ms Indranee Rajah et al., SINGAPORE INTERNATIONAL COMMERCIAL COURT COMMITTEE, *Report of the Singapore International Court Committee*, (Nov. 2013), https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Annex%20A%20-%20SICC%20Committee%20Report.pdf.

port of Singapore law.[83] A Committee was soon established to study, among others, (a) the establishment of a SICC specialising in international commercial cases; (b) the constitution, jurisdiction, powers, procedure and other features of the SICC; and (c) the appointment of specialist commercial Judges to the SICC.[84] The Committee recommended the establishment of the Court in its report, 29 November 2013. The report was followed by a public consultation and legislative processes which culminated in the launch of the Court on 5 January 2015. There are a number of features of this Court that stand out and deserve further discussion.

Needless to say that Singapore is a global, commercial, and financial hub that is uniquely positioned to serve as dispute resolution venue for international commercial disputes. It is slated to become the second largest offshore financial centre in the world by 2020 overtaking London.[85] It already hosts one of the most preferred arbitration centres in Asia and an initiative such as the establishment of the SICC is going to complement the work already being done in that regard. In fact, it is being asserted that the establishment of the Court will assist parties in avoiding the following problems associated with arbitration:[86]

a. over-formalisation of, delay in, and rising costs of arbitration;
b. concerns about the legitimacy of and ethical issues in arbitration;
c. the lack of consistency of decisions and absence of developed jurisprudence;
d. the absence of appeals; and
e. the inability to join third parties to the arbitration

The above list, found on the Court's website, are good indicators of perceived shortcomings of international arbitration which SICC is set out to remedy.[87] Another way of looking at this is how SICC intends to overcome the shortcomings of arbitration and present itself as a form of dispute resolution for transnational litigants.

In his opening Lecture for the DIFC Lecture Series 2015, Singapore's Chief Justice, His Honour Sundaresh Menon highlighted some of the ethical dilemma facing international arbitration. He states:

> There are some well-rehearsed (if not universally accepted) issues relating to the lack of regulation in the arbitration industry. Among other things, there is said to be a lack of ethical consensus to guide the increasingly amorphous and diverse body of practitioners, resulting in various ethical issues; a lack of visibility and public accountability in decision making; increasing judicialisation and laboriousness in process resulting

[83] Rajah, *supra* note 82.

[84] These were the Committee's three terms of reference.

[85] Hugo Greenhalgh, *Singapore to overtake UK as offshore financial centre*, FINANCIAL TIMES (June 7, 2016) https://www.ft.com/content/cf0c64e4-2cb2-11e6-bf8d-26294ad519fc.

[86] *See* SINGAPORE INTERNATIONAL COMMERCIAL COURT [SICC], *Establishment of the SICC*, (Jan. 5, 2015) http://www.sicc.gov.sg/About.aspx?id=21.

[87] *Establishment of the SICC*, *supra* note 86.

> in delay accompanied by rising costs; some unpredictability in the enforcement of arbitral awards due to the *ad hoc* nature of courts' oversight of the enforcement process; and some lack of consistency in arbitral decisions due to the lack of corrective appellate mechanisms or an open body of jurisprudence.[88]

While his honour cites these as some of the push factors away from arbitration, there are also pull factors that prompt parties to choose litigation over arbitration. These pull factors are that, "certain cases are better suited for a process that is relatively open and transparent, equipped with appellate mechanisms, the options of consolidation and joinder, and the assurance of a court judgment."[89] In the paragraphs that follow, we will look at how these push and pull factors are accommodated at the SICC and its additional features that need highlighting.

i. Jurisdiction

SICC is a division of the Singapore High Court and part of the Singapore Supreme Court.[90] In that sense it is similar to commercial court divisions that have been in existence in many places such as London, Delaware, Victoria in Australia and many others. These are essentially domestic courts attuned to the needs of commercial litigants. What qualifies the SICC as a hybrid international court is the mere fact that some of its judges are from overseas jurisdictions. However, using foreign judges is hardly a unique development. Jurisdictions from the larger common law world have been appointing judges from other common law jurisdictions. SICC judges are handpicked and appointed at the discretion of Singapore, and countries of which they are nationals have no say or input in to their appointment.

The international designation of the court has more to do with the subject matter of the dispute and the national origin of a dispute that can come before SICC. Under the rules of the Court, a claim is considered international if: i) the parties to the claim have their places of business in different States; (ii) none of the parties to the claim have their places of business in Singapore; (iii) at least one of the parties to the claim has its place of business in a different State from (A) the State in which a substantial part of the obligations of the commercial relationship between the parties is to be performed; or (B) the State with which the subject matter of the dispute is most closely connected; or finally, (iv) the parties to the claim have expressly agreed that the subject-matter of the claim relates to more than one State.[91]

Commercial court divisions have long been favoured for their specialist knowledge and expertise that they provide. SICC will provide such service.

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[88] Chief Justice Sundaresh Menon, International Commercial Courts: Towards a Transnational System of Dispute Resolution, Opening Lecture for the DIFC Courts Lecture Series 2015, at 9-10, http://www.supremecourt.gov.sg/docs/default-source/default-document-library/media-room/opening-lecture—difc-lecture-series-2015.pdf.

[89] Chief Justice Sundaresh Menon DIFC 2015 Opening Lecture, *supra* note 88, at 9.

[90] SICC, *Overview of the SICC*, http://www.sicc.gov.sg/About.aspx?id=22 (June 1, 2016).

[91] Singapore International Commercial Court [SICC], Order 110, r. 1(3) (2014).

SICC's rule states that a claim is considered commercial if the subject matter of the claim arises from a relationship of a commercial nature, whether contractual or not and provides an illustrative list of claims that can be considered commercial.[92] Claims relating to an *in personam* intellectual property dispute as well as claims to which the parties to the claim have expressly agreed that the subject matter of the claim is commercial in nature will be considered as such.[93] For parties that are not sure if the Court has jurisdiction, there is a procedure for obtaining pre-action certificate.[94] A pre-action certificate certifies that the intended claim is international and commercial in nature and the intended action is an offshore case.[95] However, the Court is not necessarily bound by its pre-action certificate as it can set the certificate aside if it determines that it lacks jurisdiction.[96] Pre-action certificates may also be used for the following reasons: to seek an order that the intended action be heard in camera, an order that no person must reveal or publish any information or document relating to the case, and an order that the Court file for the intended action be sealed.[97] This procedure serves a very useful purpose of saving time by allowing parties to get a swift decision on whether or not the court has jurisdiction. It also allows parties to secure the confidential commercial information from getting into the public domain.

One of the advantages of arbitration has been that the hearings take place in camera and the fact that SICC procedure allows for pre-trial decision to protect confidentiality during trial and thereafter addresses the concerns of some parties in regards to confidentiality. At the same time, it is important to note that despite the order not to publish judgments, the Court can direct that a judgment made by the Court be "published in law reports and professional publications if the Court considers the judgment to be of major legal interest."[98] If a court determines that the judgment could not be published without compromising confidentiality, it can order the judgment not to be published for ten years or such shorter period it deems necessary.[99]

Courts in the Gulf Models we saw above started their life as courts intended to serve businesses within specified economic zones, some have now relaxed their rules to allow businesses outside the economic zones to opt to have their disputes resolved by the hybrid commercial courts based in the economic zones. The

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92 SICC Order 110, *supra* note 91, at r.1(1)(2)(b). The illustrative list includes: any trade transaction for the supply or exchange of goods or services; a distribution agreement; commercial representation or agency; factoring or leasing; construction works; consulting, engineering or licensing; investment, financing, banking or insurance; an exploitation agreement or a concession; a joint venture or any other form of industrial or business cooperation; a merger of companies or an acquisition of one or more companies; the carriage of goods or passengers by air, sea, rail or road.

93 Singapore International Commercial Court [SICC], Order 110, r. 1(3) 2014.

94 *Id.* at r. 40.

95 *Id.* at r. 39.

96 Singapore International Commercial Court [SICC], Order 110 at r. 10(2).

97 *Id.*

98 SICC Order 110, *supra* note 91, at r. 31(1).

99 *Id.* at 3(b).

SICC from the outset was established without such geographical restriction provided parties have consented to its jurisdiction.

ii. Judges

The commercial court divisions in places like London are exclusively staffed by domestic judges and they follow the same rules of procedure and evidence as the other divisions of the court. At the SICC, on the other hand, the judges constitute of both domestic and international judges appointed from diverse overseas legal traditions.[100] Currently, the international judges appointed to the bench are from the US, England and Wales, Australia, France, Austria, Hong Kong, and Japan.[101] There is a glaring absence of judges from China, India and other regional players such as Indonesia or Malaysia.

iii. Applicable Laws

There is also a significant difference between the basic law applied by the Gulf Courts, on the one hand, and the SICC, on the other. As noted above, Gulf courts opted for either codifying common law rules or receiving English statutes in bulk, while the prevailing legal tradition in their regular courts is that of continental civil law. In establishing SICC, Singapore did not need to do this as it is a common law jurisdiction, except to acknowledge parties' right to choose their applicable law. In connection to applicable law, it can be observed that most of the national and regional efforts outside the EU and the OHADA model tend to coalesce around common law rules.

One of the most significant relaxations of Singapore's existing rules around applicable rules involving foreign laws is provision allowing foreign laws determination on the basis of submission instead of proof.[102] Proof would have necessitated the use of expert witnesses. Submission, on the other hand, is to be made by a lawyer representing the party. In making an order on this matter, the Court must be satisfied that "all parties are or will be represented by counsel who are competent to submit on the relevant questions of foreign law."[103] If the person making the submission does not have a right of audience before the Court, the person needs to have a practicing certificate as a solicitor or advocate, admitted to practice or is registered under s. 36P of the Legal Profession Act (Cap. 161).

iv. Rules of Procedure and Evidence

However, at the SICC, rules of evidence are relaxed to exclude the application of Singapore's rules of evidence. Accordingly, the Court may, on the application of the parties, rule that any rule of evidence found in Singapore law shall not

100 SICC, *Judges*, (Aug. 16, 2016), http://www.sicc.gov.sg/Judges.aspx?id=30 (showing a current list of SICC local and international judges).

101 *Judges*, *supra* note 100.

102 SICC Order 110, *supra* note 91, at r. 25.

103 *Id.*

apply and instead, such other rules of evidence, whether foreign or not, apply.[104] Under these rules, a rule of evidence includes any rule of law relating to privilege or taking of evidence.[105]

v. Legal Representation

At the SICC, representation by a foreign lawyer is allowed where a case is treated as an offshore case pursuant to Order 110, Rule 34 of the Rules of Court or when the court allows.[106] An offshore case is an action that has no substantial connection with Singapore, but does not include an action in rem (against a ship or any other property).[107] A case is considered not to have substantial connection with Singapore if 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 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.[108] A foreign lawyer representing a party to proceedings commenced in the Court, and in appeals from such proceedings, shall be registered under Section 36P of the Legal Profession Act (Cap. 161).[109]

vi. Appeal

Unlike arbitral awards which are final, the decision of the SICC can be appealed to the Court of Appeal. However, it is interesting to note that parties may agree in writing to waive, limit, or restrict the right to appeal and the Court must enforce this agreement.[110]

vii. Joining Third Parties

Once the Court has assumed jurisdiction, a person may be joined as a party, including as an additional plaintiff, defendant or as a third or subsequent party, to the action.[111] This ability of courts to join third parties makes courts more favourable than arbitral bodies that lack such powers.[112]

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104 SICC Order 110, *supra* note 91, at r. 23.

105 *Id.*

106 SICC, *Singapore International Commercial Court Practice Directions*, § 26(b)-(c), (Jan. 1, 2016), http://www.supremecourt.gov.sg/docs/default-source/default-document-library/sicc-practice-directions-(with-effect-from-1-jan-2016)f7782f33f22f6eceb9b0ff0000fcc945.pdf.

107 *Id.* § 29.

108 SICC Order 110, *supra* note 91, at r. 2(f).

109 SICC Order 110, *supra* note 91, at r. 26. *See also Court Practice Directions, supra* note 106 (stating that the qualifications, requirements, conditions and procedure for registration are prescribed in the Legal Profession Act (Cap. 161) and the Legal Profession Act (Foreign Representation for the Singapore International Commercial Court) Rules 2014).

110 *Court Practice Directions, supra* note 106, § 139.

111 SICC Order 110, *supra* note 91, at r. 9; *see also, Court Practice Directions, supra* note 106, at § 29.

112 Chief Justice Sundaresh Menon, *supra* note 88, at 26.

viii. Enforcement of Judgments

Where the judgment or order of the Court is to be enforced in Singapore, such enforcement proceeding is to be commenced in a High Court.[113] Enforcement of Singapore Court judgments overseas is dependent upon reciprocal international foreign judgement recognition and enforcement agreements. Currently, Singapore does not have many of such agreements. It relies heavily on framework for recognition and enforcement of foreign judgements within the Commonwealth. In this regard, there is an optimism that the 2005 Convention on the Choice of Law Agreements may assist.

IV. Discussion

The above overview of some of the existing mechanisms for the resolution of commercial disputes provides important insight into various approaches and design of such bodies and the prospect of similar organs being set up in Asia's other sub-regions. The European mechanism which is more developed owing to its advanced economic and political integration is not addressed in this brief study. Asia's developments, particularly, that in Singapore is already inspiring a similar proposal in countries like Australia.[114]

However, a Pan-Asian commercial dispute resolution mechanism is a remote prospect. Given the immense diversity of the region and the under-developed political and economic cooperation mechanisms, it is not even feasible to suggest one. Experience in Asia and elsewhere shows that such initiatives originate in sub-regions and grow in popularity to embrace the greater region or be emulated elsewhere. Replication of such efforts requires understanding of the challenges and opportunities available. It is hoped that experiences from the Gulf region and Singapore will have a cascading effect.

Our overview of the above initiatives reveals that regions that established commercial dispute mechanisms predominately built on foundations that were already in place. Some relied on colonial era relationships and infrastructures and built upon them. Others leveraged their status as legal and financial hub in their sub-region. The Caribbean and OHADA models exemplify the first, while the initiatives from the Gulf and Singapore that of the second.

It is also clear that there is no one single model for advancing the causes of international commercial dispute resolution. There are a number of tools that can be utilised. These tools could, for convenience sake, be grouped as normative, institutional, and procedural.

In normative terms, it has long been the focus of attention of those working in the sphere of harmonisation to propose treaties, model rules, model contracts and practices to ensure substantive harmonisation of applicable rules without establishing supranational dispute settlement bodies. The assumption is that the more harmonised the substantive rules are, the lesser the cost of operating cross border

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[113] *Court Practice Directions*, *supra* note 106, § 138.

[114] See Hon. Chief Justice Marilyn Warren AC & The Hon. Justice Clyde Croft, *supra* note 16, for a discussion of this feasibility.

businesses, given the predictability and certainty of applicable legal rules. A lot of energy has been expended on this endeavour with mixed results. Most of the harmonisation efforts are spearheaded by global public entities such as UNCITRAL and UNIDROIT as well as private entities like the ICC, ILA. While there have been regional and sub-regional efforts in the harmonisation sphere, there is little to be shown in the realm of harmonisation of private law. OHADA's experience in this regard could be cited as unique. Under OHADA, several commercial law legislations have been enacted. Whether it is legitimate to replicate similar approaches in Asia's sub regions is an important question to ask. A key factor that unified participants of the OHADA system was that almost all its members were former French colonies or those whose laws had strong affinity with the French legal system. Therefore, it is fair to surmise that having a similar legal tradition is an important consideration for the harmonisation of substantive rules. The same cannot be said of Asia's various sub-regions.

Nevertheless, some key players in the region such as China have gone on to heavily rely on UNIDROIT's Principles of International Commercial Contracts in their reform of their contract laws. Such principles could serve as a basis for reform of substantive commercial rules in the region.

On the other hand, as highlighted earlier, experience from the Gulf seems to suggest that common law's substantive rules are preferred over civil law rules as a basis for the legal engineering attempted. This seems to be inspired by the success of the London Commercial Court and the global significance of the common law in international commerce. A recent study by the Singapore Academy of Law on governing law and jurisdictional choices in cross-border commercial transaction found that 48 percent of the 500 commercial practitioners and in-house counsel who deal with cross-border transactions in Singapore and the region favoured English Law as a preferred governing law.[115] Several reasons for English laws popularity are given. Perhaps the following specialist brief from Allen and Overy would sum up the reasons. These reasons include: certainty, stability, predictability, independence and expertise of the judiciary, the commerciality and reliability of the court decision and for the willingness of judges to endorse contractual bargain struck between commercial parties.[116]

Harmonisation of substantive law alone is not enough in terms of increasing certainty, stability, predictability and reliability of outcomes for commercial litigants. Substantive harmonisation needs to be complemented by harmonisation in the procedural law realm. It is important that courts and arbitral bodies have commercial friendly dispute settlement procedures. Recognising party autonomy in cross border commercial dispute resolution is important. That is generally reflected in recognising parties' choice of law and choice of forum. Some juris-

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[115] SINGAPORE ACADEMY OF LAW, *Study on Governing Law and Jurisdictional Choices in Cross-Border Transactions*, (Jan. 11, 2016) http://www.sal.org.sg/Documents/SAL_Singapore_Law_Survey.pdf.

[116] ALLEN & OVERY, *Brexit – Legal Consequences for Commercial P arties: English Governing Law Clauses – Should Commercial Parties Change Their Approach?*, (Feb. 2016), http://www.allenovery.com/SiteCollectionDocuments/Brexit%20Governing%20Law%20Article%20specialist%20paper%20no%201.pdf.

dictions may do so as part of their domestic private international law, while others may ratify relevant treaties. Accordingly, recognition to parties' choice of applicable law and forum is an indicator of their commitment to openness, that in turn makes reciprocity possible.

Once choice of applicable law is recognised, the next logical step would be the mechanism of proving such laws. This is especially critical where the chosen applicable law is not the forum law. The widespread practice has been to rely on expert witnesses.[117] In some jurisdictions, courts can take judicial notice of foreign law. The process of proving foreign law has been described as expensive and these requirements prolong trials.[118] There is the possibility of referring cases to foreign courts for declaration. However, this by itself is time-consuming and in some cases requires the agreement of all parties.[119] In light of this, Singapore's SICC rule, that allows proof of foreign law through submission by the legal counsel instead of expert evidence, can be said to be more permissive.

Issues of judicial cooperation are matters that require attention. Once judgements are handed down, the question of recognition and enforcement of such judgements is bound to arise. The recognition and enforcement of international arbitral awards has so far been favoured by the widespread ratification of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The New York Convention has the finest distinction of being ratified by almost all Asian countries except North Korea, Iraq, Yemen and Turkmenistan. Similar treaties in the realm of foreign judgement have not been widely ratified. In the absence of such global agreements, recognition and enforcement of foreign judgements will have to rely on bilateral agreements. Network of bilateral treaties is less likely to achieve the desired outcome. Regional/sub-regional multilateral treaties are probably the better hope.

In regards to institutional matters, our survey reveals a number of choices available. These choices range from supranational institutions such as the Caribbean Court of Justice or OHADA Common Court of Justice and Arbitration; hybrid courts in defined economic zones; hybrid courts integrated into the regular courts. There is also a room for courts within economic integration unions. This shows there is no single institutional model universally preferred for international commercial dispute resolution and each sub region will have to pick its preferred institutional design based on what can work in their sub region. In summary, the above normative, procedural and institutional considerations require attention in this exercise.

[117] Hon. Justice P.L.G. Brereton, AM, RFD, *Proof of Foreign Law - Problems and Initiatives: The Future of Private International Law in Australia*, SYDNEY L. SCH. – U. OF SYDNEY (May 16, 2011) http://sydney.edu.au/law/events/2011/May/Justice_Brereton.pdf.

[118] *Id.*

[119] Brereton, *supra* note 117; *see also* New South Wales [NSW], Uniform Civil Procedure Rules 2005, Part 6, Division 9, r. 6.44(1).