

A COMPARATIVE PERSPECTIVE TO HYBRID DISPUTE RESOLUTION FORA: JURISDICTION, APPLICABLE LAW AND ENFORCEMENT OF JUDGMENTS

LECTURE BY SIR RUPERT JACKSON FOR THE QATAR CONFERENCE ON 'THE PROMISE OF HYBRID DISPUTE RESOLUTION FORA' ON 18th NOVEMBER 2018

1. INTRODUCTION

1.1 This lecture. The title set by the conference organisers for this contribution is a daunting one – especially for a speaker who was not at the recent New York conference discussing these very matters. Nevertheless, I will do my best from the perspective of a judge at the newly established Astana International Financial Centre Court.

1.2 Definitions. I use the following definitions:

“ADGM” means Abu Dhabi Global Market.

“AIFC” means the Astana International Financial Centre.

“BRI” means Belt and Road Initiative.

“CICC” means China International Commercial Court.

“DIFC” means Dubai International Financial Centre.

“CIS” means Commonwealth of Independent States (i.e. former Soviet republics).

“IAC” means international arbitration centre.

“LCIA” means London Court of International Arbitration.

“QFC” means Qatar Financial Centre.

“SICC” means the Singapore International Commercial Court.

“SIFoCC” means the Standing International Forum of Commercial Courts.

“TCC” means the Technology and Construction Court in London.

1.3 Hybrid dispute resolution fora. Hybrid dispute resolution fora are domestic courts which (a) are specifically set up to provide an international service in commercial matters and (b) have overseas judges. I shall refer to them as international commercial courts

2. INTERNATIONAL COMMERCIAL COURTS

2.1 Traditional domestic courts. There are many common law courts around the world which commercial organisations have used for the resolution of their disputes, including international disputes. Obvious examples are the Commercial Court in London, the High Court in Singapore, the Federal Court and state Supreme Courts in Australia, the High Court in Hong Kong and the Commercial Division of the New York Supreme Court. Most of the London Commercial Court’s work involves the resolution of disputes between foreign parties who have chosen to litigate their disputes in England.

2.2 The new breed of international commercial courts. Over the last dozen years many countries have set up international commercial courts, offering an English language service and applying the common law. Obvious examples are the ADGM Courts, the AIFC Court, the DIFC Courts, the QFC Courts and the SICC. Judges from England and other jurisdictions serve on all of these

courts. I hope it is not impertinent to say that the London Commercial Court and the LCIA appear to have been the model which has inspired many of these developments.¹ These new courts seem to have been set up with two objectives: first, to provide a judicial system in the background, which will inspire confidence in overseas investors coming to that jurisdiction; secondly, to catch as much international dispute resolution work as possible. In relation to the first (but not the second) objective the size of the caseload is unimportant. What matters is that the court is there.

- 2.3 Two categories. The new international commercial courts fall, broadly, into two categories. Some such as the DIFC Courts sit within a special economic zone. Others do not, the SICC in Singapore being a classic example. That is part of the Singapore High Court. If the court sits within a special economic zone, that fact usually plays a key role in determining the jurisdiction of the court.
- 2.4 The China International Commercial Court. The CICC was established earlier this year. It is somewhat different from the models described above. It is specifically designed to support the BRI. There are two branches, one in Xian and one in Shenzhen.² The court is a branch of the Supreme People's Court of China. It will apply the law agreed between the parties, which will no doubt often be the common law. The judges will be able to hear cases in English or Chinese.
- 2.5 Similarities and differences. It would be possible to write a voluminous thesis on the details of each individual court; which features are shared with other courts; which are unique; which courts have lots of work; which courts are rather less busy and so forth. But you have not invited me to this prestigious conference to produce a catalogue.
- 2.6 It may, however, be of some interest if I tell you about the newly established AIFC Court in Kazakhstan. That came into existence this year and people at this conference may not be familiar with it.

3. THE ASTANA INTERNATIONAL FINANCIAL CENTRE COURT

- 3.1 Belt and Road. In 2013 Xi Jinping announced China's Belt and Road Initiative ('BRI') in a lecture at Nazarbayev University in Kazakhstan. The BRI aims to promote infrastructure development, trade and comity across more than 70 countries from the Baltic Sea to the Pacific Ocean.³ The 'belt' is the Central Asian land mass through which China has historically traded with the West. The 'road' is the sea road along which China trades with the wider world. China has already invested tens of billions of US\$ in the BRI. Estimates differ as to the actual sums invested to date and as to likely future investments. This initiative may be seen as part of a wider phenomenon. Economic power and geopolitical influence are shifting from America to China.
- 3.2 Kazakhstan. Because of its location, stretching from Mongolia to the Caspian Sea, Kazakhstan is at the heart of the BRI. China's new Silk Road, like the Silk Road⁴ of the Han and later dynasties, runs across the steppes of Kazakhstan. A new 'port' has been built at Korgos on the border of China and Kazakhstan for 'dry' handling of goods shipped by land.⁵ This is a hub which switches

¹ Chief Justice Sundaresh Menon acknowledged this in his thoughtful and extremely well researched Opening Lecture for the DIFC Courts Lecture Series 2015, entitled *International Commercial Courts*: see [10].

² Although I have not heard anyone say this, I would have thought that the Shenzhen court is also linked to the 'Greater Bay Project': this is an attempt to create an innovative economic area (modelled on California's Silicon Valley) comprising Hong Kong, Macau and Shenzhen.

³ See 'Xi v Marshall', *The Economist*, 10th March 2018, p 77.

⁴ The name 'Silk Road' was first given to that ancient trade route in the nineteenth century: see Peter Frankopan, *The Silk Roads: A New History of the World*, Bloomsbury, 2015.

⁵ Described in the Sunday Times, 17th December 2017.

containers carried by train from the narrow gauge of China's railways to the standard gauge. From there goods are transported across Kazakhstan to Russia and Europe. A new four-lane motorway running from China to St Petersburg was opened in October 2018. Almost half of this motorway is in Kazakhstan.

Kazakhstan has benefited not only from participating in the BRI, but also from substantial oil and gas exports. The mammoth Kashagan oilfield is one of the biggest discoveries in recent years. Oil and gas accounted for 58% of exports in 2016. Even *The Economist*, which is sparing in its praise at the best of times, acknowledges that "reasonably competent government has also played a part".⁶ The government has re-invested much of the country's oil wealth in the creation of a new capital city, Astana. At the same time, it is making determined efforts to become a main player in global finance and trade. According to the same *Economist* article, between 2015 and 2017 Kazakhstan moved up from 51st to 35th place in the World Bank 'ease of doing business' rankings. Continuing that same policy, the government is switching from the Cyrillic to the Latin alphabet. It has also created the Astana International Financial Centre ('AIFC') to serve as a trading and financial hub for the Eurasia region. English is the official language of the AIFC.

3.3 The Astana International Financial Centre. The AIFC has five main pillars. These are capital market development; asset management; private banking; Islamic finance; and 'FinTech' (i.e. promoting start-ups, especially those developing new technologies or protecting the environment). The AIFC is also expanding to focus on insurance and green/sustainable finance.

3.4 The Court. The Court⁷ comprises a Court of First Instance ('CFI') and a Court of Appeal. Within the CFI there is a separate Small Claims Court. The Small Claims Court will deal with claims up to US\$150,000 or (where both parties agree) up to US\$300,000. Appeals from the Small Claims Court go to the CFI. Appeals from the CFI go to the Court of Appeal, which comprises up to three of the justices, excluding (obviously) the judge under appeal from the CFI. Lord Woolf is Chief Justice of the AIFC Court. The justices of that court comprise retired English judges and senior English counsel.

3.5 The Constitutional Statute. Constitutional Statute no.438-V ZRK of 22nd December 2017 governs the AIFC. Article 13 provides:

"Article 13. AIFC Court

1. The judicial settlement of disputes specified by paragraph 4 of this article is to be undertaken exclusively by the AIFC Court. The purpose of the Court is to protect the rights, freedoms and legal interests of the parties and to ensure that the Acting Law of the AIFC is implemented.

2. The AIFC Court is independent in its activities and is not a part of the judicial system of the Republic of Kazakhstan.

3. The AIFC Court consists of two instances: the court of first instance and the court of appeal.

3-1. The Chief Justice and other judges of the AIFC Court are appointed and removed by the President of the Republic of Kazakhstan on the recommendation of the Governor of the AIFC.

4. The AIFC Court has exclusive jurisdiction in relation to the hearing and adjudication of the following disputes, but does not have jurisdiction in criminal and administrative proceedings: 1) disputes between AIFC Participants, AIFC Participants and AIFC Bodies and an AIFC Participant or AIFC Body and its

⁶ See Steppe Change, *The Economist*, 1st July 2017, pp 51-52.

⁷ For further information about the AIFC Court, see <http://aifc-court.kz/>.

expatriate Employees; 2) disputes relating to activities conducted in the AIFC and governed by the Acting Law of the AIFC; 3) disputes transferred to the AIFC Court by agreement of the parties.

5. The activities of the AIFC Court are governed by the resolution of the Council *On the Court of Astana International Financial Centre*, which is based on the principles and legislation of the law of England and Wales and the standards of leading global financial centres. The Resolution of the Council *On the Court of Astana International Financial Centre* determines the composition of the AIFC Court, the procedure for the appointment and removal of court officials, qualification requirements for judges and court officials, and other matters related to the functioning of the AIFC Court.

6. In adjudicating disputes, the AIFC Court is bound by the Acting Law of the AIFC and may also take into account final judgments of the AIFC Court in related matters and final judgments of the courts of other common law jurisdictions.

7. Decisions of AIFC Court of Appeal are final and not subject to appeal, and are binding on all natural and legal persons.

8. Decisions of the AIFC Court are to be enforced in the Republic of Kazakhstan in the same way, and on the same terms, as decisions of the courts of the Republic of Kazakhstan. To enforce a decision of the AIFC Court, a translation of the decision into the Kazakh or Russian language, in accordance with the procedure determined by AIFC Acts, is required.

9. Decisions of the courts of the Republic of Kazakhstan are to be enforced in the AIFC in accordance with legislation of the Republic of Kazakhstan.

10. The AIFC Court has exclusive jurisdiction to interpret AIFC Acts.”

3.6 The AIFC Court Regulations. The AIFC Court Regulations⁸ supplement article 13 of the Constitutional Statute. Regulation 26 (1) to (5) provide:

“26. Jurisdiction of the Court

(1) The Court has exclusive jurisdiction, as provided by Article 13 of the AIFC Constitutional Statute, in relation to:

- (a) any disputes arising between the AIFC’s Participants, Bodies, and/or their foreign employees;
- (b) any disputes relating to operations carried out in the AIFC and regulated by the law of the AIFC;
- (c) any disputes transferred to the Court by agreement of the parties; and
- (d) the interpretation of AIFC Acts.

(2) The reference to “disputes” between the parties mentioned in this Article applies to civil or commercial disputes arising from transactions, contracts, arrangements or incidences.

(3) The reference to “transferred to the Court by agreement of the parties” in this Article applies to all parties, including parties not registered in the AIFC, such that all parties may “opt in” to the jurisdiction of the Court by agreeing to give the Court jurisdiction pre or post-dispute.

(4) The Court does not have jurisdiction in relation to any disputes that are of a criminal or administrative nature.

(5) The Court of First Instance has jurisdiction to hear and determine an appeal from the decision of an AIFC Body, Organisation, or Participant, as provided for in the AIFC Constitutional Statute, AIFC Regulations, AIFC Court Rules, or other AIFC Rules where the appeal relates to:

- (a) a question of law;
- (b) an allegation of a miscarriage of justice;

⁸ Resolution of the AIFC Management Council dated 5th December 2017

- (c) an issue of procedural fairness; or
- (d) a matter provided for in or under AIFC law. Decisions of the Court of First Instance referred to in this Article 26(5) are final and shall not be subject to further appeal.”

3.7 The applicable law. Regulation 29 of the AIFC Court Regulations provides:

“29. Applicable law in the Court

(1) The law to be applied by the Court is as set out in Article 4 and Article 13(6) of the AIFC Constitutional Statute. Accordingly, in exercising its powers and functions, the Court shall apply:

- (a) the AIFC Constitutional Statute, AIFC Regulations including the AIFC Court Regulations, and AIFC Court Rules;
- (b) such law as is agreed by the parties, although it will not do so if such law is inconsistent with the public order or public policy of the Republic of Kazakhstan; or
- (c) such law as appears to the Court to be the most appropriate in the facts and circumstances of the dispute.

(2) The Court, as provided by Article 13(6) of the AIFC Constitutional Statute, in determining a matter or proceeding, shall be guided by decisions of the Court and decisions made in other common law jurisdictions.”

3.7 Procedure. The Rules of the AIFC Court are based upon the Civil Procedure Rules of England and Wales, but in much abbreviated form. They are 94 pages, when printed on A4 sheets.

3.8 Linked arbitration centre. The AIFC International Arbitration Centre stands in the same building complex as the court. The two institutions are linked. They have the same registrar, Mr Christopher Campbell-Holt. The AIFC Arbitration Regulations are based on the UNCITRAL Model Law. The court will support AIFC IAC arbitrations by making orders in support of arbitration, hearing arbitration applications and challenges etc in a way which will be familiar to most international arbitration practitioners.

3.9 Has Kazakhstan ratified the New York Convention? A very eminent international arbitration practitioner recently challenged me at a meeting, saying that Kazakhstan had acceded to the NY Convention, but not ratified it. The short answer to this concern is that only countries which signed the Convention before 31st December 1958 were entitled to ‘ratify’ it. Kazakhstan did not come into existence as a separate state until 1991. Therefore, Kazakhstan like many other countries could only, and did, become a party to the Convention by accession. These countries are not lesser parties to the Convention on that account. Legislation in both Hong Kong and Singapore specifically designates Kazakhstan as a New York Convention state.

3.10 And how is the new AIFC Court getting on? The AIFC Court is the first common law court to be set up in Central Asia or in a former Soviet state. The establishment of this court is an important step in the promotion of the rule of law world-wide. It is fair to say that this project is arousing considerable interest. Many parties are now writing into their contracts clauses referring future disputes to the AIFC Court and/or the AIFC IAC. Standard form provisions for this purpose are publicly available.

4. WHAT IS THE PURPOSE OF THESE NEW COURTS?

4.1 International arbitration buttressed by the New York Convention (now celebrating its 60th anniversary) has provided an indispensable service to the business community and will continue to do so. But there are many reasons why some parties may prefer litigation in court to arbitration.

4.2 Joinder. The court rules of international commercial courts generally permit joinder of other relevant parties in a single action. For example, rule 12.5 of the AIFC Rules provides:
“The Court may order a person to be added, removed or substituted as a party if it is desirable to do so.”

Such a general power of joinder is not readily available in international arbitration. In construction disputes, where multiple contractors and consultants are involved, this can be particularly problematic.⁹

4.3 Consolidation. The court rules of international courts generally permit related proceedings to be consolidated. Absent consent to consolidation, this can be more difficult to achieve in arbitration.

4.4 Appeals. Appeals from arbitrators are difficult to pursue. When they arise, they go to the local courts, which may not be the forum of choice of the parties. By contrast, most international commercial courts provide one tier of appeal. There are two ways of doing this. There can be a ‘full court’ system. This means that an appeal from one judge goes to three of his/her colleagues. Such an arrangement avoids the need to create a separate Court of Appeal.¹⁰ Alternatively, there can be a separate Court of Appeal. The SICC is a division of the High Court of Singapore. Accordingly, appeals from the SICC lie to the Court of Appeal of Singapore.

4.5 Arbitration applications. The new international courts provide a forum in which arbitration challenges or applications to set aside awards can be heard. Thus, applications to set aside arbitration awards made in arbitrations administered by the AIFC IAC go to the AIFC Court.¹¹ Many users of international arbitration are more comfortable with this arrangement than with a system under which arbitration challenges or applications go to the local courts.

4.6 Publicly available judgments. Subject to limited exceptions, arbitral awards are and remain confidential. That has been the subject of much criticism. It inhibits the development of general principles, despite the galaxy of eminent legal jurists who are at work resolving broadly similar disputes around the globe. The position is different in international commercial courts. Unless the court makes an order for confidentiality, the judgments of international commercial courts are publicly available and can usually be found on the courts’ websites. This means that the different international courts can learn from one another and, perhaps, develop international commercial law in a more coherent way.

5. THE APPLICABLE LAW

5.1 Common law. It is a feature of the new international commercial courts that they offer a common law service, although the court will apply other systems of law when that is what the parties have agreed. One of the qualities of the common law is its flexibility. Judges of the new international commercial courts can look around the common law world and follow those authorities which seem most appropriate. The DIFC courts, which have built up a substantial caseload, look for guidance to the decisions of courts in England, Australia, Singapore, Hong Kong and elsewhere in the common law world.

5.2 Law applied by the AIFC Court. As noted above, the regulation governing the AIFC Court is “based on the principles and legislation of the law of England and Wales” (Constitutional Statute article 13.5). The AIFC Court may take into account “final judgments of the courts of other common law jurisdictions” (Constitutional Statute article 13.6). Subject to the overriding provisions of Kazakhstan law, the AIFC Court may apply “(b) such law as is agreed by the parties ...or (c) such law as appears to the court to be the most appropriate in the facts and circumstances of the dispute” (regulation 29 (1) of the AIFC Court Regulations). Regulation 29 (2) requires the Court to be guided by “decisions of the Court and decisions made in other common law jurisdictions”.

⁹ See Brekoulakis and El Far, ‘Subcontracts and multiparty arbitrations in construction disputes’ in Brekoulakis and Thomas (eds) *The Guide to Construction Arbitration* (2017).

¹⁰ Some Australian states use the full court system, others have a separate Court of Appeal.

¹¹ Part 27 of the AIFC Court Rules deals with arbitration claims.

- 5.3 Will a general *Lex Mercatoria* emerge? CJ Menon of Singapore has speculated that a common *Lex Mercatoria* may emerge from the growing band of international commercial courts. In my view this may occur over time, but that time period is likely to be lengthy. Each of the new courts takes time to establish itself and to build up a caseload.
- 5.4 What about a general *lex constructionis*? Building projects around the world generate high value disputes of great complexity, which generally go to arbitration. The new international commercial courts provide an alternative – and perhaps attractive – forum for such cases. Sir Vivian Ramsey sits in the SICC and is available to hear such cases. Sir Vivian is a former head of the TCC in London. He is also a qualified engineer. The AIFC Court can also offer construction expertise. There are many common features in construction dispute resolution across all continents. See for example excellent textbook written by Julian Bailey (who will be speaking tomorrow) which synthesises the construction law of England and Wales, Australia, Hong Kong and Singapore. The FIDIC conditions are widely used in both civil and common law jurisdictions. So is the *Delay and Disruption Protocol* published by the Society of Construction Law (an influential organisation with branches in almost every country). It would be helpful to the construction industry if a body of case law on construction issues emerges from the international commercial courts. At the moment, arbitrators around the world are grappling with recurrent issues arising from the FIDIC conditions etc, largely in ignorance of what their colleagues are deciding. Of course, we have the national law reports from many jurisdictions – the Building Law Reports edited by Atkin Chambers in London are a good example. But reports of construction cases which (a) arise out of international projects and joint ventures and (b) are decided in the new international commercial courts would be a valuable addition.

6. JURISDICTION

- 6.1 Domestic legislation. The jurisdiction of an international commercial court is determined by the legislation under which the court is established. Inevitably, that is domestic legislation of the state in which the court is situated.
- 6.2 Jurisdiction of the AIFC Court. As noted above, the AIFC Court has jurisdiction over disputes arising within the AIFC and over other disputes referred to that court by the agreement of the parties. The second category may, over time, generate a substantial amount of business. Under local Kazakh law all civil disputes must be resolved within three months. This is of great value to many litigants. Indeed, it is not unlike the UK adjudication regime which operates successfully in the construction sector. Nevertheless, some parties with commercial disputes wish to have their factual and legal issues explored in greater depth than is feasible under the Kazakh rules of civil procedure. Such parties may well wish to bring their disputes to the AIFC Court.
- 6.3 Enforcement of arbitration awards under the New York Convention. It would make sense for international commercial courts to have jurisdiction to enforce overseas arbitration awards under the New York Convention – without the need for any further agreement on the part of the parties.¹² I understand that domestic legislation does not always give this power to international commercial courts. Instead that power is reserved to the local courts. This seems strange. The judges who staff the international commercial courts around the world have the necessary expertise to deal with applications under the New York Convention. Not all local judges have relevant experience for that task.

¹² Any party resisting enforcement is most unlikely to agree to confer jurisdiction. I understand that that is the experience of international commercial courts where such agreement is required.

6.4 The position in Kazakhstan. The AIFC has enacted the [AIFC Arbitration Regulations 2017](#). These are ultimately based on the UNCITRAL Model Law (2006 version). The effect has therefore been to implement the terms of the New York Convention into AIFC law. Article 16 is the equivalent of the [Arbitration Act 1996, section 9](#) and implements Article II of the [Convention](#). It provides that the Court will stay (or dismiss) proceedings in favour of arbitration, where the dispute is governed by an arbitration agreement. Articles 45 to 47 implement Articles III to VI of the [Convention](#). Article 45 requires the Court to recognise and enforce any arbitral award “irrespective of the State or jurisdiction in which it was made”, subject only to the limited defences available under Article 47. The Article 47 defences mirror those available under the [New York Convention](#), Article V.

7. ENFORCEMENT

7.1 No universal convention available. Commentators often, and rightly, point out that international commercial courts do not have available the enforcement mechanisms of the New York Convention. Nevertheless, these are all properly constituted courts, staffed by highly respected judges. It is possible to bring an action based on the judgment of such a court in many jurisdictions. The parties’ agreement to the claim being heard in the issuing court will often be sufficient to establish that court’s jurisdiction. I am told, anecdotally, that the success rate for such actions is high. I do not have the figures, but this would be a worthwhile subject for any university to study.

7.2 Regional treaties. Most, possibly all, states benefit from regional treaties for the reciprocal enforcement of judgments. The SIFoCC is currently preparing a Multilateral Memorandum of Guidance, setting out the various arrangements for enforcement around the world. This will be an enormously useful document when it emerges.

7.3 Taking Kazakhstan as an example. Article 501(1) of the Civil Procedure Code of the Republic of Kazakhstan provides that judicial orders of foreign courts are recognised and enforced by the courts of the Republic of Kazakhstan if recognition and enforcement is provided by legislation and/or an international treaty that has been ratified by the Republic of Kazakhstan, or on the basis of reciprocity. Judgments of the courts in CIS countries are enforceable in the Republic of Kazakhstan in accordance with the Minsk Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (22 January 1993 as amended 28 March 1997), and the Kiev Agreement between the CIS Countries on the Procedure for Settlement of Disputes Associated with Commercial Activities (20 March 1992). Judgments of the courts of non-CIS countries are enforceable in the Republic of Kazakhstan in accordance with bi-lateral treaties. The Republic of Kazakhstan has ratified twelve bi-lateral treaties but none with West European or North American countries. Judgments of the AIFC Court should be readily enforceable under those arrangements.

7.4 The Hague Convention. The 2005 Hague Convention on Choice of Court Agreements is limited to exclusive choice of court agreements concluded in civil or commercial matters. The Convention (a) requires the courts of a country chosen by contract to accept jurisdiction in a dispute; (b) requires the courts of other countries to decline jurisdiction; and (c) provides for enforcement by all countries of the judgments of the courts chosen in the contract. Certain categories of dispute are excluded from the scope of the Convention, including carriage of goods, insolvency and anti-trust.

7.5 Recognition of foreign judgments. A recent article in the Law Quarterly Review¹³ has lamented the difference between the UK and Canada in their approach to recognising foreign judgments. This is an area where, hopefully, international commercial courts could develop a more uniform approach.

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¹³ A. Dickinson, '*Schibsby v Westenholz* and the recognition and enforcement of judgments in England' 134 LQR (2018) 426-449