THE ROLE OF INTERNATIONAL COMMERCIAL COURTS IN CONSTRUCTION DISPUTES

VIDEO LECTURE BY SIR RUPERT JACKSON AT MELBOURNE UNIVERSITY LAW SCHOOL ON 8 DECEMBER 2023

1. INTRODUCTION

1.1 In this lecture I will discuss international commercial courts and their role in the resolution of construction disputes.

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.
"SIFoCC" means the Standing International Forum of Commercial Courts
"SICC" means the Singapore International Commercial Court.
"TCC" means the Technology and Construction Court in London.

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. During the twenty-first century many countries have set up international commercial courts, offering an English language service and applying the common law. They are usually linked to an international arbitration centre. 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 Unlike other courts which are characterised as 'international', these courts have not been established by an international legal instrument. Each is a domestic court seeking to attract international business. The London Commercial Court, upon which these new courts are to a greater or lesser extent modelled, handles many disputes between overseas parties but does not include the word 'international' in its name.

2.4 Two categories. The new international commercial courts fall, broadly, into two categories. Some sit within a special economic zone: the DIFC, QFC, ADGM and AIFC Courts fall into this category. Others do not, the SICC in Singapore being a classic example – it 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.

2.5 The China International Commercial Court. The CICC was established in 2018. 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 applies the law agreed between the parties, which will no doubt sometimes be the common law. The judges can hear cases in English or Chinese. The CICC dealt with its first case, *Guandong Bencao Medicine Group v Bruschettini SRL*, in 2019. There is a clear account in English of the court's structure and role on its website.[3]

2.6 European international commercial courts. International commercial courts have also emerged within the civil law jurisdictions of Europe: in particular, in France, Germany and the Netherlands. Space does not allow a discussion of each of those courts in this paper. Many have been waiting to see whether their caseloads will or will not significantly increase after Brexit.

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[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]. See also Brekoulakis and Dimitropoulos *International Commercial Courts,* Cambridge University Press 2022, chapter 1.

[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] Accessed on 29 October 2023, when preparing this draft.

2.7 SIFoCC. The Standing International Forum of Commercial Courts (SIFoCC) provides a forum in which judges of commercial courts and international commercial courts can meet and exchange ideas. The report of the SIFoCC's fourth full meeting, held in October 2022, is available on SIFoCC's website.

2.8 Recent academic study. Two US and Ontario scholars, Alyssa King and Pamela Bookman, have recently undertaken an in-depth study of international commercial courts and the judges who sit in them: see Alyssa S. King & Pamela K. Bookman, 'Traveling Judges', 116 *Am. J. Int'l L.* 477 (2022). After setting out much fascinating detail about the background history, the courts and the judges who sit in them, they reach the following conclusions:

"*Traveling judges embody the link between the idea of a global community of courts, colonial judiciaries, and modern international arbitration. Their identities demonstrate the continued influence of the United Kingdom and former dominions in commercial law, but they also demonstrate how today's judges differ markedly from the colonial judges of the past. They are far more elite and specialized. Hired, rather than sent, they trade on reputations built in their home jurisdictions' judiciaries. Who these traveling judges are reveal much about the hiring jurisdictions, their perceptions of the desires of the international community, and the landscape of post-colonial judicial power.*"

2.1 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 the purpose of this talk is not to produce a catalogue.

2.2 It may, however, be of some interest If I tell you more about the AIFC Court in Kazakhstan, where I am one of the judges.

3. THE ASTANA INTERNATIONAL FINANCIAL CENTRE COURT

3.1 Belt and Road. In September 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 and trade across more than 70 countries from the Baltic Sea to the Pacific Ocean.[4] 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. Views differ as to the benefits or harm which the BRI generates. However, the initiative may be seen as part of a wider phenomenon. Economic power and geopolitical influence are shifting from America to China and India.

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

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

Silk Road[5] 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.[6] This is a hub which switches 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.

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. English is the official language of the AIFC.

3.4 The Court. The Court[7] 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 deals 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 Burnett (former Lord Chief Justice of England and Wales) 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.

[5] The name 'Silk Road' was first given to that ancient trade route in the nineteenth century. This has now acquired a new significance: see Peter Frankopan, *The Silk Roads: A New History of the World*, Bloomsbury, 2015; *The New Silk Roads*, Bloomsbury, 2018.
[6] Described in the Sunday Times, 17th December 2017.
[7] For further information about the AIFC Court, see the Court's website.

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 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 <u>The AIFC Court Regulations.</u> The AIFC Court Regulations[8] 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;

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

(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;
(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 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 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 become a party to the Convention by accession and that is what it has done. These countries are not lesser parties to the Convention on that account. Legislation in both Hong Kong, Singapore and elsewhere specifically designates Kazakhstan as a New York Convention state.

3.10 And how is the 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. The statistics as at 18 October 2023 were as follows. The court had issued 82 judgments, which compares favourably with other international courts in their sixth year of operation. The associated Astana International Arbitration Centre had dealt with 457 arbitrations and 1,768 mediations. More importantly the Court and the IAC have been designated in the dispute resolution clauses of many thousand contracts. During the pandemic, the Court and the IAC operated entirely online.

4. WHAT IS THE PURPOSE OF INTERNATIONAL COMMERCIAL COURTS?

4.1 International arbitration buttressed by the New York Convention 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. The

consent of the new party is required.[9] In construction disputes, where multiple contractors and consultants are involved, this can be particularly problematic.[10]

4.3 Consolidation. The court rules of international commercial courts generally permit related proceedings to be consolidated. Absent consent to consolidation, this can be more difficult to achieve in arbitration. Institutional rules may provide for consolidation. Rule 6.10 of the AIFC IAC rules provides:
'At the request of a party the Tribunal may decide to consolidate a newly commenced arbitration with a pending arbitration, if: (1) the parties agree to consolidate; (2) all the claims are made under the same arbitration agreement; or (3) where the claims are made under more than one arbitration agreement, the relief sought arises out of the same transaction or series of transactions and the Registrar considers the arbitration agreements to be compatible.'
This rule will be effective if the parties (a) agree to consolidation or (b) have submitted to the AIFC IAC Rules. But if the pending arbitration is *ad hoc* (as many are) or is proceeding under different institutional rules, it is difficult to see how the first tribunal can insist upon consolidation.

4.4 Appeals. Appeals from arbitral awards (as opposed to challenges) are rare. Some jurisdictions provide for appeals: for example, s. 69 of the English Arbitration Act 1996, but that is often excluded by agreement. When there are appeals, 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.[11] 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 Cost and administrative effort. Litigating before an international commercial court is substantially cheaper than bringing the same dispute before an arbitral tribunal. It is also simpler. The structure and the rules are there. There is no need to draw up terms of appointment for the tribunal or terms of reference for the dispute. The pleadings suffice for defining the dispute and the issues. International commercial courts usually have splendid premises, as well of course as the facility for online hearings.

4.6 Arbitration applications. The new international commercial 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.[12] 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.

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[9] For example, rule 6.2 of the AIFC IAC Rules provides 'A party to an arbitration may apply to join one or more additional parties to the arbitration as a Claimant or as a Respondent, if all parties, including the additional party, consent to the joinder of the additional party.'

[10] See Brekoulakis and El Far, 'Subcontracts and multiparty arbitrations in construction disputes' in Brekoulakis and Thomas (eds) *The Guide to Construction Arbitration* (2017).

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

[12] Part 27 of the AIFC Court Rules deals with arbitration claims.

4.7 Publicly available judgments. Subject to limited exceptions (such as ICSID awards), arbitral awards generally 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,[13] the judgments of international commercial courts are publicly available and can usually be found on the courts' websites. This means that the different international commercial courts can learn from one another and, hopefully, develop international commercial law in a more coherent way.

4.8 The Nigeria case. The recent decision of Mr Justice Robin Knowles in *Federal Republic of Nigeria v Process & Industrial Developments Ltd* [2023] EWHC 2638 (Comm) may lead to a re-evaluation of the respective merits of arbitration and litigation in the resolution of international commercial disputes. In that case the Commercial Court in London set aside a massive arbitration award against the Nigerian government on the grounds that it had been obtained by fraud.

4.9 In the last part of his judgment at [581]-[591], the judge set out some general observations about international arbitration in the light of what had occurred in that case. See in particular:

"*581. Policy, worldwide, properly limits challenges to arbitration awards. In the present case a challenge has been available and, in my judgment, has prevailed. But I end the case acutely conscious of how readily the outcome could have been different, and of the enormous resources ultimately required from Nigeria as the successful party to make good its challenge. …*

582. Regardless of my decision, I hope the facts and circumstances of this case may provoke debate and reflection among the arbitration community, and also among state users of arbitration, and among other courts with responsibility to supervise or oversee arbitration. The facts and circumstances of this case, which are remarkable but very real, provide an opportunity to consider whether the arbitration process, which is of outstanding importance and value in the world, needs further attention where the value involved is so large and where a state is involved.

583. The risk is that arbitration as a process becomes less reliable, less able to find difficult but important new legal ground, and more vulnerable to fraud. The present case shows that having (as here) a tribunal of the greatest experience and expertise is not enough. Without reflection, then a case such as the present could happen again, and not reach the court.

584. With diffidence and respect, I draw attention to 4 points, which are to some degree interconnected. …

(2) Disclosure or discovery of documents

[13] I have only once ordered that a hearing should proceed in private in the Astana International Financial Centre Court. That was an arbitration claim involving issues of no wide public interest. Even in that case, an anonymised version of the judgment subsequently went onto the court's website.

586. It has been disclosure or discovery of documents that has enabled the truth to be reached in this case. I highlight the disclosure orders made by courts in this and other jurisdictions. The disclosure secured from P&ID and third parties through court processes has been remarkable and crucial. And but for disclosure orders the Sunrise episode would not have been revealed from Nigeria. In all the recent debates about where[14] disclosure or discovery matters, this case stands a strong example for the answer that it does.

(3) Participation and representation in arbitrations over major disputes involving a state
587. Notwithstanding Nigeria's allegations, I have not found Nigeria's lawyers in the Arbitration to be corrupt. But the case has shown examples where legal representatives did not do their work to the standard needed, where experts failed to do their work, and where politicians and civil servants failed to ensure that Nigeria as a state participated properly in the Arbitration. The result was that the Tribunal did not have the assistance that it was entitled to expect, and which makes the arbitration process work. And Nigeria did not in the event properly consider, select and attempt admittedly difficult legal and factual arguments that the circumstances likely required. Even without the dishonest behaviour of P&ID, Nigeria was compromised.

588. But what is an arbitral tribunal to do? The Tribunal in the present case allowed time where it felt it could and applied pressure where it felt it should. Perhaps some encouragement to better engagement can be seen as well. Yet there was not a fair fight. And the Tribunal took a very traditional approach. But was the Tribunal stuck with what parties did or did not appear to bring forward? Could and should the Tribunal have been more direct and interventionist when it was so clear throughout the Arbitration that Nigeria's lawyers were not getting instructions, or when at the quantum hearing Nigeria's then Leading Counsel, Chief Ayorinde, was failing to put necessary points to experts to test their opinion and Nigeria's own experts (for whatever reason) had not done the work required? Should the Tribunal have taken the initiative to encourage exploration of new bounds of contract law and the law of damages that may today be required where major long term contracts are involved?

(4) Confidentiality in significant arbitrations involving a state
589. The privacy of arbitration meant that there was no public or press scrutiny of what was going on and what was not being done. When courts are concerned it is often said that the "open court principle" helps keep judges up to the mark. But it also allows scrutiny of the process as a whole, and what the lawyers and other professionals are doing, and (where a state is involved) what the state is doing to address a dispute on behalf of its people. An open process allows the chance for the public and press to call out what is not right. …"

4.10 I hold no brief to argue in favour of either litigation or arbitration. Like many others, I have a foot in both camps serving as both an arbitrator in international arbitrations and as a judge in an international commercial court. I merely draw to your attention the competing considerations which arise.

5. THE APPLICABLE LAW

[14] Possibly 'whether' rather than 'where' was intended.

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".

5.3 Will a general *Lex Mercatoria* emerge? A form of *lex mercatoria* existed in Europe in the medieval period, but this did not survive the rise of nation states. Whether such a body of law exists now is a matter of debate.[15] It may plausibly be said that the UNIDROIT principles already constitute a basic *Lex Mercatoria*. They enshrine basic principles of contract law which are common to civil law jurisdictions and common law jurisdictions. For example, *pacta sunt servanda* and freedom of contract. CJ Menon of Singapore has speculated that a common *Lex Mercatoria* may emerge from the growing band of international commercial courts. Those courts, with a growing number of reported judgments, are the ideal fora to develop such body of law.

5.4 There is a thoughtful discussion of this issue in *Transnational Commercial Disputes in an Age of Anti-Globalism and Pandemic*.[16] Then authors state that there are different views about whether a modern *lex mercatoria* exists and, if so, what it is. One view is that it consists of general principles like good faith, reasonableness and so forth. Another view is that it can be inferred from contracts drawn up by commercial parties, such as FIDIC conditions which are used across the world. A third view is that *lex mercatoria* can be inferred from soft law instruments, such as the UNIDROIT principles or the UNCITRAL Model Law on International Commercial Arbitration.

5.5 A related issue is whether national courts recognise any form of *lex mercatoria*. Some French, German and Austrian courts have done so. For example, in *Société Fougerolle v Banque de Proche Orient* [1983] Rev Arb 183 the French Court de Cassation upheld an award in which the tribunal had applied 'general principles of obligation generally applicable in international trade'. Some commentators maintain that the content of *lex mercatoria* is not certain enough to be of practical utility in international trade or projects. The problem is that there is no system of courts or authoritative body that can rule on the content of *lex mercatoria*. There is no consensus on these issues.

[15] See the discussion in Brekoulakis and Dimitropoulos 2022, chapter 8.
[16] Menon and Reyes (editors), Hart Publishing, 2022

5.6 In *Freedom Finance v Romanyuk* (AIFC Court, 4 September 2023), the court made these observations when dismissing an application for security for costs in respect of the counterclaim:
"*There are certain general principles, which are emerging as part of the lex mercatoria, which tribunals and courts have regard to across the world in both common law and civil law jurisdictions. One principle is that when a defendant faces a claim, the defendant must have a proper opportunity to defend himself or itself against that claim, and orders for security for costs should not inhibit the defendant from advancing its defence.*"

5.7 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 *Construction Law*[17] by Julian Bailey, 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 many countries).

5.8 Need for as new set of law reports. 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.

5.9 Judicial comment on the global reach of FIDIC. *JSC Insaat Sanayi ve Ticaret A.S. v The Committee for Roads of the Ministry of Industry and Infrastructure Development of the Republic of Kazakhstan* (AIFC Court, 16 November 2021) arose from a construction contract between a Turkish company and a Kazakhstan government body. It related to the construction of the motorway referred to in paragraph 3.2 above. The contract incorporated the FIDIC conditions (red book). In paragraph 3.16 of the judgment the judge observed:
"*In addressing these issues, I must apply the law of the Republic of Kazakhstan. This is contained in (amongst much other material) four codes (Civil Code, Civil Procedure Code, Criminal Code, Criminal Procedure Code) and other legislation. For present purposes, the most important legislation is the Enforcement Law. I also bear in mind that the FIDIC Conditions contained in the present contract are widely used on engineering projects around the world. Although there are certain well-known differences of approach between civil and common law jurisdictions, the construction industry operates in the expectation*

[17] Third edition, 2020

that the FIDIC conditions will be applied in a broadly consistent manner in international construction disputes."

5.10 Donald Charrett gave an excellent lecture entitled '*Lex Constructionis* – or my Country's Rules' through Maxwell Chambers on 10 September 2020. Understandably, the lecture focused on international arbitration and how arbitral tribunals apply, or should apply, *lex constructionis*. The suggestion which I put before you today is that international commercial courts (if parties are willing to use that forum) may be better placed than arbitral tribunals to develop a coherent body of law under the rubric *lex constructionis*.

5.11 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.

5.12 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 bring their disputes to the AIFC Court. This is often achieved by specifying the AIFC Court in the dispute resolution clause of the parties' contract, drawn up when they embark upon their trading relationship or project.

5.13 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.[18] I understand that domestic legislation does not always give this power to international commercial courts. Instead, in some jurisdictions, 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.

5.14 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 UK 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

[18] 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.

available under Article 47. The Article 47 defences mirror those available under the New York Convention, Article V.

6. ENFORCEMENT

6.1 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.

6.2 Singapore. Since the SICC is part of the Singapore High Court, they are subject to the same reciprocal enforcement regime as other High Court judgments. Overseas judgments, if gazetted, are enforceable in Singapore under the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed).

6.3 Regional treaties. Most, possibly all, states benefit from regional treaties for the reciprocal enforcement of judgments.

6.4 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 numerous bi-lateral treaties. Judgments of the AIFC Court should be readily enforceable under those arrangements.

6.5 The Multilateral Memorandum on Enforcement. SIFoCC has produced and published of a Multilateral Memorandum on Enforcement.[19] This details the mechanism for enforcing foreign court judgments in each of the major jurisdictions. This is an authoritative guide, written by judges in each of the jurisdictions under discussion.[20] The position in Australia is set out on pages 7-14.

[19] Available at https://sifocc.org/app/uploads/2019/11/Multilateral-Memorandum-on-Enforcement-Nov-2019.pdf.

[20] Brekoulakis and Dimitropoulos 2022, chapter 1

6.6 The 2005 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. The Convention came into force in 2015, when the EU states ratified it. Also, 31 other parties have now signed the Convention, but not all have ratified it.[21] The UK has made arrangements for its membership of the Convention to continue after Brexit. The US and China are signatories to the Convention, but have not yet ratified it.[22]

6.7 The 2019 Hague Convention. The 2019 Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters provides for judgments in one participating state to be enforced in the courts of another participating state, if the requirements of article 5 are satisfied. Essentially, these require a sufficient connection between the judgment debtor and the jurisdiction in which the original judgment was given. There is some concern that national courts of individual states may construe article 5 differently.[23] The EU and Ukraine became parties to the 2019 Hague Convention on 1 September 2023. The UK has been consulting about joining.

6.8 The long term goal of the 2019 Hague Convention is to create a framework for the mutual enforcement of judgments which will rival the corresponding framework for the enforcement of arbitration awards under the New York Convention. But there is a long way to go. The New York Convention has 172 state parties.[24]

Rupert Jackson
Arbitrator, mediator and a judge of the AIFC Court

4 New Square
Lincoln's Inn
London WC2A 3RJ
r.jackson@4newsquare.com

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[21] Menon & Reyes 2022, p. 202.
[22] Brekoulakis and Dimitropoulos (2022) p. 149
[23] Menon & Reyes 2022, p. 239.
[24] See M. McIntosh, 'The Hague 2019 Judgments Convention: Will it fill the Post-Brexit enforcement gap?', *Civil Justice Quarterly* [2023] 420-438 at 423.