

The Resurgence of Litigation in International Commercial Disputes

Richard Garnett

**Professor of Private International Law, the University of Melbourne
Consultant, Herbert Smith Freehills**

1. Introduction and Background

The enormous expansion in international commerce and communications in the past 40 years has led to a great increase in the volume of transnational disputes. Such disputes often involve applications for relief in a number of countries pursuant to a number of different laws. Two sets of rules are therefore very important in such cases: the rules for regulating the jurisdiction of national courts and those governing the recognition and enforcement of judgments of foreign courts.

The rules on jurisdiction and enforcement of foreign judgments have traditionally differed widely between countries which has led to great uncertainty and risk exposure for businesses in international trade and transactions and often significant expense in dispute resolution.

The increased use and popularity of international commercial arbitration since the 1980s has to some extent masked the problem of disparate and conflicting national jurisdiction and judgment rules. International commercial arbitration has emerged over the past 20-30 years as the principal and preferred method of dispute resolution for cross-border commercial transactions.

International arbitration operates according to a set of well-established internationally harmonised rules in the 1958 New York Convention, which provide for recognition and enforcement of both arbitration agreements and awards in over 150 countries. Consequently, parties can predict with some certainty that an arbitration agreement entered into or an award rendered by an arbitral tribunal will be recognised and enforced in most nations, absent exceptional circumstances.

Harmonisation of arbitral procedure is also noticeable on the international plane with the widespread adoption of the 1985 UNCITRAL Model Law on International Commercial Arbitration and the updating and refinement of arbitral institutional rules to match best practice. Other often cited advantages of arbitration are confidentiality of proceedings, neutrality and choice of adjudicators and finality of awards but, in practice, enforceability is the biggest drawback.

Litigation by contrast, at least in the area of civil or commercial disputes involving private parties, has never had a comparable international identity or profile. For example, there has never been an international commercial court exercising jurisdiction above the level of nation states. Litigation has therefore always been a product of domestic legal systems and is shaped by local political and social factors. Unlike international arbitration which in a sense has been 'custom built' for the international business environment, the primary role of litigation has been to resolve domestic disputes involving local parties, with less concern for cases with a foreign element.

It is not surprising therefore that when the practices and procedures of national courts are scrutinised by commercially sophisticated parties and their advisers seeking to choose a form of dispute resolution suitable for a cross-border transaction, that they can be seen as inappropriate. More tellingly still, the lack of an international legal infrastructure to guarantee recovery in a world where cross border disputes are increasing dramatically becomes a matter of particular concern.

So, arbitration has become the preeminent method of dispute resolution in international business transactions. Yet two qualifications should be noted. First, while arbitration advocates regularly spruik its attributes as proof of arbitration's superiority over litigation, the truth is that a strong system of arbitration requires the support of national courts. For example, arbitration would be unworkable without courts giving effect to enforcing arbitration agreements by staying conflicting court proceedings, issuing interim measures to protect parties' rights before the arbitral tribunal's hearing on the merits and then enforcing the ultimate award. So, it has always been a misnomer to regard international commercial arbitration and litigation as if they are hermetically sealed alternatives or competitors in the same space when in reality they are interconnected. Viewed in this light, litigation can be seen as having never really 'left the stage' in international commercial disputes.

Secondly, arbitration has its limitations in the resolution of commercial disputes: it is often very expensive since panels and administering institutions must be remunerated, it cannot easily deal with a range of disputes such as those involving a multiple parties or non-contractual causes of action, suffers from a lack of coercive power of the state and creates no public body of law or precedent.

The problem of multiple parties is particularly acute: either some persons, in relation to a dispute, are parties to an arbitration agreement and others are not or persons are parties to different arbitration clauses. Since non-parties cannot be joined to an arbitration without their consent and consolidation of parallel arbitrations is notoriously complex and uncertain, the result is usually fragmented proceedings. Either the matter is split between a court and an arbitral tribunal or between different arbitral tribunals, with serious risk of inconsistent results and confusion.¹

The lack of a publicly declared and accessible body of commercial law arising from arbitration has also become a topical issue, after the speech earlier this year given by the Lord Chief Justice of England and Wales, Lord Thomas. Lord Thomas notes that much of the strength, vitality and effectiveness of the common law in commercial cases has come through judicial decisions which create a body of rules that are open to scrutiny and debate and may be relied upon by business people in planning their affairs.

¹ M Hwang, 'Commercial Courts and International Arbitration: Competitors or Partners?' (2015) 31 *Arbitration International* 193 at 195

Arbitration by contrast is hidden and ad hoc in its decision making with limited recourse to appellate correction, which has implications for both commercial certainty and democratic accountability. Lord Thomas concludes his discussion by making a plea for more litigation and less arbitration of commercial disputes so that the development of the common law is not stunted.

It was in response to these concerns, in particular the need to develop a global enforcement infrastructure for litigation similar to that existing for arbitration, which led member states of the Hague Conference on Private International Law to consider the development of a global treaty on jurisdiction and enforcement of foreign judgments. Parallel to this development has been the emergence of the Singapore International Commercial Court and recent proposals for the creation of a similar body in Australia.

These measures will be the focus of this lecture, with a view to assessing their contribution to a possible resurgence of litigation in international commercial disputes.

2. The Hague Conference Initiatives

The work on the Hague Conference 'Judgments Project' commenced in 1992 but after ten years the negotiations broke down with an impasse between the United States and European delegations. Essentially there was a conflict of goals and ambitions with respect to the Convention.

The US, on the one hand, saw the project as a means of providing a clear and binding structure for the recognition and enforcement of its judgments in other countries on the basis that the US already enforced those of others on a comparatively liberal basis, while the European delegations, on the other hand, wanted to develop new global rules of personal jurisdiction that would rein in the perceived excessively wide and extraterritorial US principles.

Out of the failure of the negotiations however there emerged a compromise proposal which would examine only one aspect of jurisdiction and judgments: choice of court agreements. Choice of court agreements were selected because this was a topic where some similarity of national law rules existed and so the prospect of achieving international consensus would be greater. Member states of the Hague Conference were also mindful of the great success of the New York Convention in the arbitration sphere and attracted to the idea of creating a litigation counterpart to that Convention, with choice of court agreements mirroring arbitration clauses.

Note that a choice of court agreement is a provision in a contract that stipulates a court for resolution of any disputes in relation to the contract. In common law countries a choice of court agreement is often referred to as a jurisdiction clause and the terms may be used interchangeably. A choice of court agreement performs an important role in international transaction planning by allowing parties to identify in advance where disputes will be litigated and so limit the scope for jurisdictional skirmishes after a dispute has arisen.

The driving rationale was that if parties could have the same certainty as they have with arbitration that their choices of forum would be respected and enforced then they may be encouraged to consider litigation on a more equal basis as a choice for dispute resolution.

The result of negotiations between 2002 and 2005 was the Hague Choice of Court Convention. In my presentation today I will outline the basic features of the Convention and at the same time consider its likely impact on Australian law if adopted here.

It is significant to note that as of September 2016 the Convention is in force and has been ratified by Mexico, the European Union and Singapore, with countries such as the United States, Canada and Australia giving close consideration to ratification.

Hague Choice of Court Convention: Scope

The key goal of the Convention is to protect choice of court agreements given by courts chosen roughly to the same extent as arbitral agreements and awards under the New York Convention.

The Convention applies to exclusive choice of court agreements in international cases with the default position being that a case is international unless the parties are resident in the same contracting state and all the other elements relevant to the dispute are connected only with that state.

The Convention does however have a number of excluded subject matters such as agreements between consumers and businesses and employment contracts.

'Consumer' is defined in the Convention as a 'natural person, acting primarily for person, family or household purposes'. Note that this definition is narrower than that provided in section 3 of the Australian Consumer Law which considers a consumer transaction to be one in which a business is engaged where the purchase is not for resupply or use in trade or commerce and the value is less than \$40,000. There will, therefore, be choice of court agreements that fall within the scope of the Convention despite being considered consumer transactions under the ACL. If Australia implements the Convention it will therefore be necessary to amend the ACL to give supremacy to the Convention, as was done when the Vienna Sale of Goods Convention was enacted in 1989.

Small businesses, including individual sole traders in standard form agreements and franchisees, are subject to the Convention much to the chagrin of some organisations who were observers at the negotiations, such as the International Librarians Association who feared being subjected to unconscionable licence provisions.

Other excluded matters are those concerning competition, insolvency, carriage of goods and persons, decisions of corporations relating to internal matters and family law questions.

Intellectual property licences are included within scope, provided that the defendant does not raise a counterclaim alleging that the primary IP right is invalid, at least where the right is a foreign registered right such as a patent or trademark. Such counterclaims are common in international patent litigation. The effect of such a counterclaim being raised is that any judgment that accrues is not subject to the recognition and enforcement rules of the Convention.

Another important exclusion is non-exclusive choice of court agreements. A non-exclusive agreement involves the parties nominating a court for resolution of any disputes but not precluding them from litigating elsewhere, unlike an exclusive agreement which imposes an obligation to litigate in the stipulated place. Non-exclusive clauses are common in international banking transactions where a lender will typically provide its own local court as a non-exclusive forum, which gives it the power to sue the borrower in the lender's jurisdiction but does not preclude it from suing the borrower in that party's place of business. They can therefore be a more flexible device than an exclusive choice of court agreement.

While it is perhaps unfortunate that non-exclusive agreements have been excluded, the position is tempered by the fact that first, article 3(b) of the Convention presumes an agreement to be exclusive unless the parties have expressly provided otherwise and secondly, contracting states may make a declaration under article 22 that they will recognise and enforce judgments given by courts of other contracting states designated in a non-exclusive choice of court agreement. Article 3(b) would represent a change to Australian law since no presumption of exclusivity currently exists.

The status of unilateral or asymmetric choice of court agreements under the Convention is not entirely clear. Such an agreement involves one party, A, being compelled to litigate claims against party B in one tribunal, for example the Victorian courts, but such tribunal is only non-exclusive as far as claims by B against A are concerned. If party A sues in Victoria and obtains a judgment, would that be enforceable under the Convention? What about if Party B obtains a judgment from the Victorian court? It is not clear whether the Convention allows a court to divide the choice of court agreement in this way or whether it has to be wholly exclusive to fall within scope.

An optional litigation or arbitration clause in a contract also raises difficult questions where party A for example sues in the country of the chosen court but the other party, B, seeks a stay of proceedings in favour of arbitration. Here there appears to be a direct conflict between the Hague Convention and the New York Convention on arbitration in terms of appropriate forum, with no clear answer.

Another exclusion from the Convention is interim measures of protection (see article 7). The availability of such measures is left to the national law of the court seized, that is, the court in which proceedings are brought. In Australia the main interim measure relevant to choice of court agreements is the antisuit injunction.

Australian courts have held, for example, that it is permissible to grant an antisuit injunction to restrain the commencement or continuation of foreign court proceedings where they have been brought in breach of an exclusive choice of court agreement that designates the forum's courts.

See *CSR v Cigna* (1997) 189 CLR 345. Article 7 of the Convention would allow Australian courts to continue to grant such relief under their own law, which may be important where, for example, the foreign court has a reputation for being unwilling to decline its jurisdiction when requested.

Jurisdiction under the HCC Convention

Assuming that there is an exclusive choice of court agreement that stipulates the court of a contracting state to the Convention and a dispute comes before the court of a contracting state then the jurisdiction provisions of articles 5 and 6 of the Convention are engaged.

Article 5 addresses the situation where an action is brought in the court of a contracting state that is designated in a choice of court agreement. Such a provision has a double effect both positive and negative: first it confers jurisdiction on the court to adjudicate the matter before it and secondly it precludes the court from declining its jurisdiction.

Article 5 makes little change to Australian law. First of all, a forum choice of court agreement is a basis for service of process outside the jurisdiction under all Australian rules of court and secondly, no Australian court has ever declined jurisdiction where it was the designated court in a choice of court agreement. A similar outcome would be reached under most countries' laws.

Perhaps the most important provision in the Convention is article 6, which provides that a court in a contracting state must decline jurisdiction when confronted by an exclusive choice of court agreement stipulating the courts of another contracting state. This provision is directed at the situation that most commonly arises-- where a party to an exclusive choice of court agreement seeks to evade its choice after a dispute has arisen and sue in another court, often in its own country of residence.

How have Australian courts dealt with this situation? Historically Australian courts have had a mixed record in enforcing foreign exclusive choice of court agreements.

Courts have sometimes allowed plaintiffs to sue in Australia despite such a clause where the balance of convenience favours trial in this country, although this line of argument has probably now been closed off by the important NSW Court of Appeal decision in *GPF v Babcock and Brown* [2010] NSWCA 196. Similar to the reasoning in *Babcock* the Explanatory Report to the Convention emphasises that arguments based on convenience or appropriateness of a particular forum may not be raised as grounds to avoid enforcement of a choice of court agreement.

A more significant argument in Australian jurisprudence for avoiding a foreign choice of court agreement is where a plaintiff would suffer a disadvantage or injustice through application of a different choice of law by the foreign designated court.

In effect, if the claimant can show that it would 'lose' rights under an Australian statute such as the Australian Consumer Law by the matter being heard abroad, then the choice of court agreement will not be enforced.

The High Court in the case of *Akai v The People's Insurance Co* (1996) 188 CLR 418 allowed a New South Wales resident company to sue a Singaporean insurer in NSW despite an English exclusive choice of court agreement because the claimant would not have the benefit of the Commonwealth Insurance Contracts Act if the matter proceeded in England, as English law governed the contract.

Section 18 of the Australian Consumer Law is another statutory provision that courts have relied upon to allow claimants to avoid a foreign choice of court clause, again on the basis that the provision has few counterparts in foreign countries and so provides 'unique' relief under Australian law.

A critical question is whether such a 'choice of law' argument could still be raised as defence to enforcement of a foreign choice of court agreement under article 6 of the Convention.

There is a defence to enforcement in article 6(c) which provides that an agreement need not be enforced where it would lead to manifest injustice or would be manifestly contrary to the public policy of the state of the court seised.

The Explanatory Report mentions that manifest injustice would cover the exceptional case where one of the parties would not receive a fair trial in the foreign state's court, perhaps because of bias or corruption or where there were reasons specific to that party that would preclude him or her from bringing or defending proceedings in the chosen court.

While the standard for manifest injustice is intended to be high, an Australian court may well consider that a plaintiff's loss of rights under a beneficial Australian statute such as the ACL, where there is no equivalent under the law of the country of the designated court, to be a sufficiently compelling consideration to warrant avoiding the agreement.

Yet, weighed against this view is that a foreign choice of court agreement is a binding contractual obligation which the drafters of the Convention intended to be honoured in most cases, absent exceptional circumstances. Allowing opportunistic discretionary-type arguments to defeat enforcement would also weaken the Convention's value as an instrument of harmonisation by allowing excessive intrusion of national law. Many businesses will also more likely prefer the certainty in their transaction planning of having choice of court agreements respected, rather than undermined.

Also, since the Convention only applies to business to business agreements not disputes involving potentially disadvantaged parties such as consumers or employees, there is much to be said for taking a narrow view of the 'injustice' exception to enforcement.

Sending a commercial party off to a distant foreign country to litigate is normally different in terms of burden than ordering an individual consumer to do so.

Another 'injustice' argument that may be raised by a claimant to avoid enforcement of a foreign choice of court agreement is that the agreement is invalid by the operation of an overriding mandatory rule of the forum. Here the issue is not that a foreign court would not apply Australian law and so deprive the claimant of a legal advantage but rather that an Australian statute actually invalidates the dispute clause.

An example in the Australian context is section 11(2) of the Carriage of Goods by Sea Act (1991) (Cth) which renders null and void any foreign choice of court agreement in a bill of lading or other sea carriage contract. Another example is section 67 of the Australian Consumer Law which prevents parties contracting out of the warranties in the Law by inclusion of foreign choice of law or choice of court clauses.

The Explanatory Report is equivocal as to whether a forum court may apply its statutory rules to invalidate a foreign choice of court agreement. Article 6(a) of the Convention states clearly that the validity of a choice of court agreement will be governed by the law of the chosen state, which suggests that no other choice of law rule can apply. Once again the argument for avoidance would have to be based on local public policy or injustice under 6(c), with the Report stating that 'technical' violations of local law are not enough to preclude enforcement.

An Australian court may however consider that a statute that directly invalidates a foreign choice of court agreement to be more than a mere 'technical' violation.

Three final issues on jurisdiction should be noted. The question of the scope or construction of a choice of court agreement is not covered by the Convention and so would be governed by the law stipulated by the agreement.

The same rule would apply to determine whether the doctrine of separability would apply to the agreement, which provides that a choice of court agreement is legally separate from the contract in which it is contained and cannot be invalidated merely by a pleading that the main contract is void.

Finally, the operation of articles 5 and 6 above does not entirely prevent the occurrence of parallel and conflicting proceedings. For example, it is not clear how to resolve the situation where two courts are seised with the same issue and there is the risk that the court chosen would give a judgment upholding the validity of the choice of court agreement but the non-chosen court would invalidate the very same agreement. There is no *lis pendens* or *forum non conveniens* rule in the Convention for resolving such a conflict; query whether again national law principles could be relied upon.

Recognition and Enforcement under the HCCC

The two other major provisions in the Convention to consider are articles 8 and 9, dealing with recognition and enforcement of foreign judgments. The effect of those provisions is that a judgment of a court stipulated in an exclusive choice of court agreement must be recognised in other contracting states, with limited exceptions.

There is nothing controversial about these provisions from an Australian law perspective since under current law, for a foreign judgment to be recognised, the defendant must have either been present for service in the territory of the foreign court or submitted to its jurisdiction. Since being a party to a foreign choice of court agreement would amount to a submission to that country's courts, there is consistency with the current position.

Australian parties will also have the security of knowing that any judgment in their favour under the Convention given by a chosen court against a business resident in another contracting state will be very likely enforced in other contracting states. This conclusion follows from the mandatory command in article 8 that a foreign judgment shall be recognised and that no review of the merits shall be undertaken by the enforcing court.

Another issue that is implicit in the Convention's provisions on judgments is that where a judgment is given in country A for breach of contract based on a choice of court agreement in favour of country A, any additional claim such as for tort or breach of statute that forms part of the judgment must also be enforced.

So, for example, if the Supreme Court of Victoria, as the court chosen, were to award damages for breach of contract and also for infringement of the Australian Consumer Law, then the entire judgment would be enforceable in other member states.

The defences to enforcement under the Convention are also admirably restricted, for example that the defendant did not receive adequate notice of the proceedings, that the judgment was obtained by fraud or enforcement would be manifestly incompatible with the public policy of the enforcing country.

Article 11 of the Convention further provides that a court of a contracting state is only required to enforce judgments for monetary damages that may be considered to be compensatory rather than for punitive or exemplary damages. Such defences largely replicate those under Australian law.

While the scope of judgments available for recognition may seem limited, confined as they are to judgments from exclusively chosen courts, article 22 may however be helpful in expanding the Convention's scope by allowing a contracting state to declare that it will recognise and enforce judgments based on non-exclusive choice of court agreements. Note however that this provision will only apply where both the state of origin and the enforcing court have made such a declaration.

Another benefit to Australian stakeholders under the Convention will be that it provides for enforcement of non-monetary judgments such as injunctions, whereas current Australian practice requires the judgment to be for a monetary sum. The monetary sum rule is arguably outdated and inflexible in an increasingly interconnected world, as the Supreme Court of Canada has recently said.

Another possible restriction in the Convention comes from article 21 which enables a contracting state with a strong interest in not applying the Convention to a specific matter to declare that it will not apply the Convention to that matter. As the Explanatory Report says, article 21 allows contracting states an unlimited power to contract out of the Convention.

It is unfortunate that article 21 was included in what is already a reasonably limited instrument. Obviously all nation states have areas of particular sensitivity but if article 21 declarations were issued by contracting states on a widespread basis then the Convention would not only become very complex and unharmonised but its scope would be further reduced.

We can only hope that this does not happen—fortunately no state has done so in the ratifications to date, although in the negotiations, China did flag IP rights and Canada asbestos as possible bases for declarations. Some American commentators have suggested franchises as another possible area.

On balance, the implementation of the Hague Choice of Court Convention by Australia would provide greater certainty to Australian parties that their choices of forum would be respected internationally.

Obviously, however, for the Hague Convention to be a serious vehicle in the revitalisation of litigation relative to arbitration, there will need to be very significant and widespread adoption of the instrument by nation states.

2016 Provisional Draft Convention

As noted above, however, the Choice of Court Convention does not address all international transactions. For example, contracts involving consumers and employees are excluded as well as commercial contracts where no choice of court agreement exists and purely non-contractual claims such as tort, unjust enrichment and intellectual property.

Most recently, however, member states to the Hague Conference have concluded that to further enhance the status of litigation relative to arbitration, further instruments were required that captured a much wider field of disputes. Instead, however, of seeking to address jurisdiction and judgments in one convention, which failed earlier, it was thought better strategically to proceed in stages.

The first stage was to prepare an instrument on the recognition and enforcement of foreign judgments which would go beyond and supplement the Choice of Court Convention, after which work could then commence on a text addressing adjudicatory jurisdiction.

The Special Commission of the Hague Conference which I attended as expert member of the Australian government delegation, agreed the text of a draft convention in June with further negotiations to take place in February 2017.

The significant feature of the instrument is that rules have been created for the recognition and enforcement of judgments in matters going well beyond the scope of the Choice of Court Convention. For example, articles 5 and 6 provide that judgments arising from the following situations will be eligible for recognition: where the defendant was habitually resident in the state of origin, where the defendant maintains a branch in the state of origin, where the defendant consented to the jurisdiction, where the judgment involved a contractual obligation the performance of which occurred in the state of origin, where the judgment rules on a non-contractual obligation causing harm and the act causing harm occurs in the state of origin, where the judgment gives relief for infringement of a patent or trademark or infringement, ownership, subsistence or validity of copyright and such rights arise under the law of the state of origin and where the judgment rules on an express trust with one of a number of connections to the state of origin.

Significantly also, for the first time outside the European Union, judgments arising from consumer or employment contracts are now made expressly capable of enforcement.

Article 7 then provides a number of defences to recognition and enforcement that closely model those in The Hague Choice of Court Convention such as fraud, lack of notification to the defendant and manifest incompatibility with public policy.

Article 7(2) also includes an innovative *lis pendens* provision that allows a court to refuse recognition if parallel proceedings between the same parties and concerning the subject matter are pending before the courts of the enforcing state.

If this new instrument were to be widely adopted by nation states, then the mobility and recognition of court judgments across borders would increase dramatically.

From an Australian perspective adoption of the draft convention would represent a change to existing law in the sense that the grounds for recognition and enforcement of foreign judgments would be significantly expanded beyond the cases where a defendant was resident in or submitted to the jurisdiction of the foreign court. The addition of new jurisdictional filters would mean that more foreign judgments would be enforceable in Australia against local defendants. While this change may concern some practitioners, the safeguards in the draft convention in terms of public policy, fraud etc will operate to allow Australian courts to avoid enforcing judgments obtained in unconscionable circumstances.

Secondly, the wider scope for enforcement of judgments under the draft convention will assist in opening up countries with poor enforcement records and so allow Australian claimants greater scope for recognition of Australian judgments abroad.

If the draft convention were widely adopted international arbitration would arguably face a more serious challenge with its weaknesses relative to litigation more fully exposed: in particular, the problems of accommodating third party claims, of determining matters that fall outside the scope of the arbitration agreement and the lack of coercive powers. At the moment such issues often cannot be resolved by arbitration and parties are forced to bring court proceedings in conjunction with arbitration.

The effect of this new instrument, however, would provide scope for parties to consolidate all claims in a single judicial forum (assuming the requirements of jurisdiction are satisfied) and then seek enforcement of the judgment in another member state's courts. Contrast this result with the spectre of multiple forums and fragmented proceedings which would arise from parallel arbitration and court proceedings with not only the obvious cost inefficiencies but also the risks of inconsistent results between tribunals.

In short, therefore, the much heralded 'enforcement advantage' which currently rests with international arbitration would be nullified and parties would be able to make a much more balanced and informed choice between arbitration and litigation as dispute resolution alternatives in cross border transactions.

For example, key issues such as cost, lack of appeal rights and guiding precedent in international arbitration have been often obscured by the overarching question of enforceability.

In effect the consolidated litigation model that I describe above would enable a 'one stop shop' for parties' cross border dispute resolution needs, unlike the situation of split proceedings between arbitration and litigation. What may be achieved, therefore, is what the Chief Justice of Singapore, Sundaresh Menon has described as courts operating as globally networked institutions.

But it is very early days yet-- this new instrument needs to be signed and accepted at a diplomatic conference and widely adopted among member states.

Also, ideally, a parallel convention on jurisdiction will need to be prepared which is likely to be difficult given the very different approaches in Europe and the United States. Such differences were a major factor in the collapse of the first Hague Judgments project.

3. The SICC

The final evidence of a possible resurgence of litigation in international commercial disputes has come through the creation of the Singapore International Commercial Court in 2015, when coupled with the proposals for establishment of a similar tribunal in Australia. The SICC is a division of the High Court of Singapore with special responsibility for determining international commercial disputes.

The SICC has jurisdiction to adjudicate a matter if the claim is of an international and commercial in nature, the parties to the action have submitted to the SICC's jurisdiction under a written jurisdiction agreement and the parties to the action do not seek any relief in the form of a mandatory order such as an injunction. The SICC may also hear cases which are transferred from the Singapore High Court, where it considers the SICC to be a 'more appropriate forum'. Jurisdiction established on the basis of transfer avoids the need for party consent.

Importantly the SICC will not decline to assume jurisdiction in an action solely on the ground that the dispute between the parties is connected to a country other than Singapore where there is a choice of court agreement that stipulates jurisdiction in the SICC.

An interesting procedural innovation is that the Court may determine questions of foreign (that is, non-Singaporean) law without the need for the parties to plead and prove such law by expert evidence, which is normally required in common law courts. Other innovations are that a party to proceedings before the court may be represented by a foreign lawyer, at least where the matter is considered an 'offshore case', that is, one with no substantial connection to Singapore and that the SICC has a panel of international judges with great experience in commercial disputes. Also, the procedural rules of the SICC allow for the Singapore laws of evidence to be excluded, for proceedings to be determined confidentially and for rights of appeal to be limited or excluded by party agreement. Such procedural measures are designed to replicate arbitration in certain respects and so make the SICC attractive to commercial parties.

Also, since the SICC is a division of the Singapore High Court its judgments will be enforceable in other member states under the Hague Choice of Court Convention now that Singapore is a party. This feature will also likely encourage parties to use the SICC in future cases, although until the Convention is widely adopted, international arbitration will retain an advantage, given that enforcement will be subject to the vagaries of national law referred to above.

Since the court's creation it has heard seven cases, at least two of which interestingly, had an Australian connection. The first was a dispute between Australian and Indonesian companies over a joint venture agreement involving the production and sale of coal in Indonesia: this case was *BCBC Singapore Pte Ltd v PT Bayan Resources* [2016] SGHC (I) 01. Another recent case involved natural gas projects in Australia with contracts governed by Singapore law: this was *Teras Offshore Pte Ltd v Teras Cargo Transport* [2016] SGHC (I) 02, which includes a detailed discussion of what amounts to an 'offshore' case.

As a final word on international commercial courts, it is noteworthy that leading Australian judges, including two members of the Supreme Court of Victoria, have recently suggested the creation of such a tribunal in this country. Time however prevents me from exploring this proposal in detail.

4. Conclusion

The aim of this lecture has been to consider possible signs of a resurgence of litigation in the resolution of international commercial disputes. Such a movement can be detected in the increasing concerns expressed regarding arbitration in terms of spiralling costs, the inability to determine disputes involving third parties and the lack of a publicly accessible and declared body of law. Such concerns have however been obscured by the significant enforcement advantages that arbitration continues to enjoy relative to litigation, principally through the New York Convention. If, however, such benefits can be neutralised by the development of conventions through the Hague Conference, which go on to achieve wide international acceptance, perhaps it will be then that the dominance of international arbitration will be truly challenged.