

INNOVATIONS OF INTERNATIONAL COMMERCIAL COURTS IN PROVIDING LEGAL SERVICES

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ABSTRACT:

International commercial courts have been emerged recently and evolved rapidly around the world. The number of international commercial courts has increased from a few to sixteen institutions in fifteen jurisdictions in several years¹. This paper introduces the innovations of this kind of court in providing legal services.

Keywords: International Commercial Courts, Courts, Litigation, Arbitration, Mediation, Dispute Settlement, Dispute Resolution, Legal Services, Innovations.

Introduction:

A number of jurisdictions across the world have launched initiatives to position themselves as new hubs for the resolution of international commercial disputes by establishing specialized English-speaking courts with specific, more flexible procedural rules and technological facilities. In this paper, we will explore such innovative procedural rules and technological facilities through scrutiny of three international commercial courts, namely Singapore International Commercial Court (SICC),² the Courts of the Dubai International Financial Centre (DIFCC),³ and London Commercial Court (LCC).⁴ Some pieces of information will share the same sources to some extent with those in the author's papers somewhere but are updated to the time of writing this paper and grouped in a somewhat different structure on a summary basis

according to specific themes for the new purpose of highlighting the innovations of commercial courts' services.

1. Neutral International Judicial Bench and Foreign Lawyers

Having an international judicial bench is not a typical character of an international commercial court. However, it is regarded as an innovation at the most important authoritative part of the commercial courts. In SICC and DIFCC, judges come from various foreign jurisdictions. The SICC's judicial bench is comprised of 25 current local judges and 17 "international" judges (updated on 10 September 2020) drawn from both the common law and civil law jurisdictions (The USA: 1, India: 1, Australia: 4, Canada: 1, France: 1, the UK: 7, Hong Kong: 1, and Japan: 1).⁵ The DIFCC's bench comprises 10 judges⁶ from Malaysia: 1, the

UAE: 3, the UK: 2, Singapore: 1, and Australia: 3. This diversity is important to ensure that the judicial bench has enough expertise in both common law and civil law to earn trust from the international business community.

In addition, the general principle is that foreign lawyers do not have a right to represent their clients (or they must satisfy an extremely restricted requirement) in national courts of other jurisdictions. However, before the commercial courts, they can do that. For example, in Singapore, traditionally foreign lawyers who are Queen's Counsel or who hold an appointment of equivalent distinction may be admitted to practice in the Supreme Court of Singapore on an ad-hoc basis for a specific case. However, the court must be satisfied that the foreign lawyer has special qualifications or experience relevant to the case and that the services of a foreign counsel are a "necessity". By contrast, it is much easier for foreign lawyers to represent parties to proceedings commenced in SICC. Foreign lawyers must satisfy requirements to be granted registration, including being sufficiently proficient in the English language and agreeing to abide by a code of ethics. A lawyer must also have at least five years' experience⁷ in advocacy to be granted full registration.

These innovations eliminate the fear of parties for resolving disputes in a foreign land before local judges who may be perceived to favor local parties and also comfort parties with their familiar lawyers.

2. Courts' Users' Committee

DIFCC is so open through setting up a body by which they wish to listen to complaints and advice from users. The DIFCC's Users' Committee⁸ is an independent liaison body between DIFCC and court users, the purpose of the Committee is to assist the Court to provide an efficient, economical and professional service to all users. The Committee is chaired by a chairman and consists of voting members from the DIFC Authority, Dubai Financial Services Authority and representatives from law firms within the UAE.⁹ The Committee shall advise the Chief Justice of DIFCC about administrative issues related to the Court and any other appropriate

issues which will help increase the level of users' satisfaction. The Committee shall not have any authority over the implementation of the suggestions or the advice, judicial matters and the administrative work of the Court.¹⁰

3. Efficient Procedures

a. *Emergency proceeding*

For emergency situations where need a quick response to protect the interests of claimants, SICC has accepted urgent applications even via telephone or email, and hearings may be conducted through teleconference or video conference.¹¹

In LCC, the Court can provide an expedited trial in cases of sufficient urgency and importance.¹² A party seeking an expedited trial should apply to the judge in charge of the Commercial Court on notice to all parties at the earliest possible opportunity. Moreover, the ability of seeking relief on an "ex-parte" basis¹³ is considered support for the emergency proceeding.

b. *Agreed List of Issues*

In SICC's procedures, one crucial feature to reduce cost and delay is that the parties are obliged to prepare an Agreed List of Issues.¹⁴ This list promises to bring more efficiency to the litigation process: "The List of Issues is a document for use as a case management tool (e.g. to determine issues such as scope of documents to be produced, factual and expert evidence, and whether there are issues which may be summarily or preliminarily determined), and the List of Issues should identify the principal issues in a structured manner".

c. *Early Neutral Evaluation*

At the Business and Property Courts of England & Wales, they provide a new managerial mechanism, namely "Early Neutral Evaluation" (ENE).¹⁵ ENE is defined in provision G2.1 "is a without-prejudice, non-binding, evaluation of the merits of a dispute... given after time-limited consideration of core materials and having read or listened to concise argument. It is generally designed to take place at an early stage in a dispute, and in private", and is combined with a Case Management Conference according to provision

G2.2 “At a Case Management Conference the Court may explore with the parties, through their advocates, whether early neutral evaluation may assist the parties to resolve their dispute”.

ENE may be provided by appropriate third parties. However, in appropriate cases and with the agreement of all parties, the Court will itself provide an ENE. This is one of the Court’s powers for the purpose of managing the case and furthering the overriding objective.

d. Small Specialized Tribunal

DIFCC provides more efficient services with the Small Claims Tribunal (SCT), the SCT’s e-services, as well as the formation of a new division set up for the most complex construction and technology disputes.¹⁶ Firstly, the new “Technology and Construction Division” (TCD) is designed to handle only the most complex cases. Technology-related cases could include liability for cybercrime incidents, disputes over the ownership and use of data, and issues relating to emerging technologies such as artificial intelligence or connected cars. Secondly, the SCT can hear claims in situations where the value of a claim does not exceed AED 500.000, or where parties elect in writing that the claim will be heard by the SCT. The SCT was awarded a “Top 10 Court Technology Solution Award” by the National Association of Court Management (NACM) in Washington D.C.¹⁷ Lastly, the SCT’s e-services give claimants the option to use direct and instant messages to give defendants notice. This service will also benefit defendants by offering another channel to alert them that a claim has been filed against them.

e. Case management

Case management (in LCC and SICC) includes the following key requirements:¹⁸ A mandatory Case Management Conference will be held shortly after statements of case; Parties will be required to prepare a trial timetable for consideration by the Court; Throughout the case, there must be regular reviews of the estimated length of the trial, including how much pre-trial reading should be undertaken by the Judge.

f. Courts’ Openness to ADR

There is a rising trend in support and assistance of commercial courts to alternative dispute resolution (ADR). This trend makes a constructive relationship between commercial courts and ADR in the field of dispute resolution. It is apparent to see in Business and Property Courts of England & Wales: “G1.1 Rule - the Commercial Court encourages parties to consider the use of ADR as an alternative means of resolving disputes. G1.7 Rule - the Judge may adjourn the case for a specified period of time to encourage and enable the parties to use ADR”. By referring the matter to a mediator, parties could refine better their respective expectations, thereby leading to faster settlements. One reference is that the time to reach settlement decreases with the parties using mediation during the court proceeding (the finding based on the collection of the duration of commercial claims filed in Slovenian courts of first instance¹⁹).

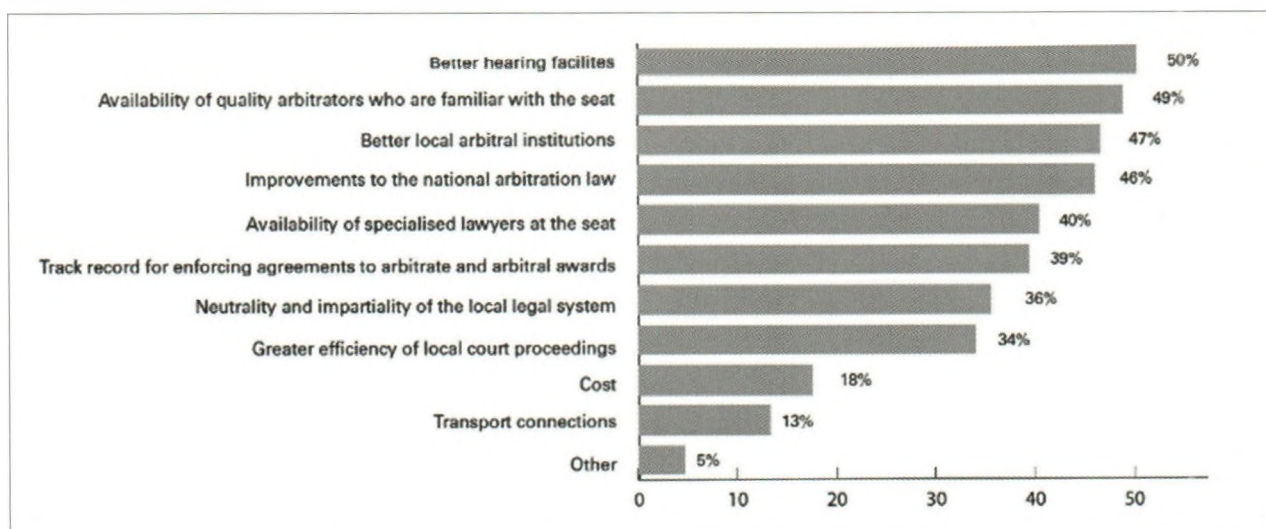
Besides, one of the reasons that parties choose arbitration as their dispute resolution mechanism when they make their agreement is the support and assistance of a court. A court has a power to enforce an arbitral award and support parties during the arbitration proceeding once they ask for that support. In England, the Arbitration Act 1996 established a general principle of non-intervention in arbitral proceedings (“the court should not intervene”),²⁰ but it also sets out the power of the court to support arbitration in relation to securing the attendance of witnesses in arbitral proceedings. The most important things are listed in Section 43 of the Act - “A party to arbitral proceedings may use the same court procedures as are available in relation to legal proceedings to secure the attendance before the tribunal of a witness in order to give oral testimony or to produce documents or other material evidence”. On the other hand, when a party to an arbitration agreement finds fault with the decision of the arbitral tribunal, the proper place to challenge it is before a court of the seat of the arbitration.²¹ Where an arbitration application involves recognition and enforcement of an agreement to arbitrate and that application is challenged on the

grounds that the parties to the application were not bound by such agreement, it will usually be necessary for the court to resolve that issue in order to determine the application.²² Also, in SICC, the Court offers its openness to ADR, they encourage parties to settle their disputes by using ADR: “During the case management conference, the Court may: (1) assist the parties in considering and determining whether any ADR process can be used to resolve the dispute between the parties; (2) The Court may make an order directing that a case be referred for resolution by an ADR process if the parties consent to the case being referred for resolution by the ADR process”.

4. Technology Facilities

Though the surveys below are on arbitration, the results also reflect the litigants’ common longing and the necessity of better hearing facilities in increasing the attractiveness of commercial courts, because arbitration which is mostly used in dispute resolution precedes traditional litigation in providing technologies-based services. We can use these results as a reference for knowing the demand for technology facilities in proceedings. In the 2015 Survey Improvements and Innovations in International Arbitration conducted by Queen Mary University of London (QMUL)²³, “better hearing facilities” was listed as the most reason which had improved the quality of the arbitration seat.

QMUL 2015 Survey



Even for the future evolution, in the 2018 International Arbitration Survey named “The Evolution of International Arbitration”,²⁴ technology once again is one of the factors that will have the most significant impact on the future evolution of international arbitration.

Technology facilities, therefore, are worth writing about, especially in commercial courts which were newly established (except for LCC) and intended to compete internationally with arbitration.

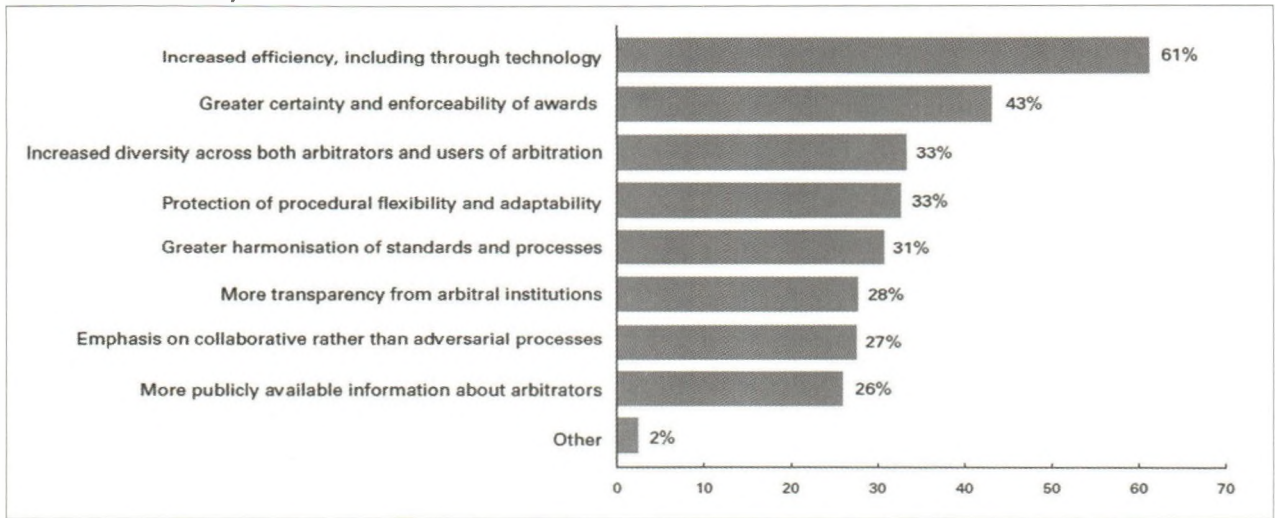
We now investigate what kind of technologies should be used more often. According to the same 2018 International Arbitration Survey named “The Evolution of International Arbitration”, the following forms of information technology seem to be used more often in international arbitration.

We would check how they have been used in the commercial courts.

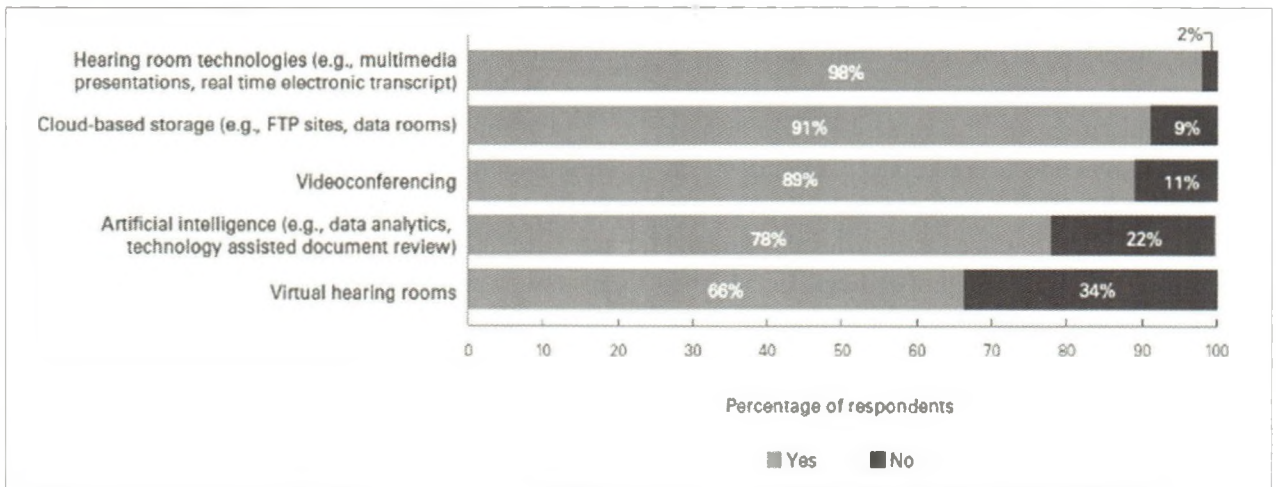
a. E-filing

In terms of technical utilization, the uses of information technology, including paperless working at trials, are strongly encouraged where they are likely to save time and cost or to increase accuracy: in LCC, “If any party considers that it would be advantageous to make use of IT in preparation for, or at, trial, the matter should be raised at the first Case Management Conference... the parties must expect the Court to consider its use, including its use at trial”.²⁵ Paperless trials, in

QMUL 2018 Survey



QMUL 2018 Survey



particular, are strongly encouraged, except where the cost would be too great for a party. The Court will have regard to the financial resources of the parties in deciding for the use.

They also permit taking evidence from a video link on the Internet: “The party seeking permission to call evidence by video link should prepare, serve on all parties, provide to the Court a memorandum, and set out precisely what arrangements are proposed. An application for permission to call evidence by video link should be made, if possible, at the Case Management Conference, or, at the latest, at any pre-trial review...Particular attention should be given to the taking of evidence by video link whenever a proposed witness will have to

travel from a substantial distance abroad and evidence is likely to last no more than half a day”.

In addition, parties can provide or file electronically (e-filing) under the Electronic Working arrangements, which apply to LCC. Electronic Working enables parties to issue proceedings and file documents online 24 hours a day, every day all year round. Submission of any document using Electronic Working will generate an automated notification acknowledging that the document has been submitted and is being reviewed by the Court prior to being accepted.

b. E-hearings

SICC makes the most of technologies in deploying their works at many stages of the

hearings process. Technology facilities for use during trials or hearings have been described:²⁶ “Teleconference, video conference and audio-visual facilities (including the Mobile InfoComm Technology Facilities) may, at the discretion of the Registrar and subject to the payment of the appropriate fees, be used at any trial or hearing conducted in the Court”. In which, the Mobile Infocomm Technology Facilities (MIT facilities) are “video conferencing and audio-visual equipment located on a mobile cart and which may be moved from location-to-location within the Court”. In LCC, video conferencing is also available.

c. Court Tech Lab

In 2019, DIFCC signed a cooperation agreement with the Dubai Future Foundation (DFF) to launch the world’s first Court Tech Lab (CTL).²⁷ The CTL hosts a yearly competition to raise support and capital for companies demonstrating promising technical breakthroughs in the arena of court tech. The competition will invite start-ups and innovative participants to submit and present new court tech solutions. The final chosen idea will receive financial investment, as well as a right to access to DIFCC for researching, testing, and adapting the technology solution. This is expected to reinforce the collaboration between the government, foundations, and start-ups to create an ecosystem that drives innovation. On the aspect of investing in technology, DIFCC deserves to be called a court pioneer. Technology is the critical priority of DIFCC in its development.

5. Confidential Order

International commercial courts have power to make confidential orders on the application of a party. Court proceedings also may be confidential. Such procedural flexibility provides parties with greater autonomy and allows them to shape the court rules to the needs of their particular case. At SICC, for an offshore case, which has no substantial connection to Singapore, and on the application of parties who desire to maintain confidentiality, these special rules will be applied. These confidentiality orders include: “(a) that the case be heard in camera; and (b) that no person must reveal or publish any information or document relating to the case”. On the other hand, if one party wishes to have confidentiality, but the other does not, confidentiality will be extended until the court has disposed of the application. In such cases, the necessary redaction and safeguards will be taken. For example, SICC may give directions for the judgment not to be published for up to 10 years after the date of the judgment. Disclosure of any information or document relating to the case is prohibited, and the court file will be sealed. This option is reflective of the position available in international arbitral proceedings. In the same fashion, DIFCC also allows all or part of a hearing to be in private, if: Publicity would defeat the object of the hearing; It involves matters relating to national security; It involves confidential information and publicity would damage that confidentiality; A private hearing is necessary to protect the interests of any child or patient...or the Court considers this to be necessary, in the interests of justice ■

QUOTATIONS:

¹Singapore, Dubai, Qatar, Abu Dhabi, France, The Netherlands, Ireland, China, USA, Lesotho, England, Belgium, Germany, India, Kazakhstan.

²Singapore International Commercial Court, <<https://www.sicc.gov.sg/forms-and-services/use-of-technology-at-the-sicc>>, assessed 10 September 2020.

³Courts of the Dubai International Financial Centre, <<https://www.difccourts.ae/>>, accessed 10 September 2020.

⁴London Commercial Court, <<http://www.judiciary.gov.uk/you-and-the-judiciary/going-to-court/high-court/queens-bench-division/courts-of-the-queens-bench-division/commercial-court/>>, accessed 10 September 2020.

⁵SICC Brochure August 2020, p2.

⁶DIFCC Annual Review 2019, p26.

⁷Legal Profession Act (Chapter 161) Legal Profession (Representation in Singapore International Commercial Court) Rules 2014, part 2, art 4(1,b).

⁸Ibid n6, p31.

⁹Ibid.

¹⁰DIFCC Charter 2013.

¹¹Singapore International Commercial Court Practice Directions, 2020, ¶14,15.

¹²The Business and Property Courts of England & Wales, 2017, the Commercial Court Guide, Tenth Edition, J.1 (Expedited trial).

¹³An ex parte decision is one decided by a judge without requiring all parties to the controversy to be present. In Australian, Canadian, the UK, South African, Indian, and the US legal doctrines; Ex parte means a legal proceeding brought by one person in the absence of and without representation or notification of other parties.

¹⁴Ibid n11, ¶80.

¹⁵ Ibid n12, G2, p63.

¹⁶Commercial claims on the rise at DIFCC, available at <<https://www.difc.ae/newsroom/news/commercial-claims-rise-difc-courts/>>, accessed 10 September 2020.

¹⁷DIFCC Annual Review 2017, p43; The NACM monitors and supports new initiatives which help courts worldwide to operate more efficiently and fairly.

¹⁸ Ibid n12, D.2 (Key features of case management in the Commercial Court).

¹⁹Grajzl, P., Zajc, K. (2015). Litigation and the timing of settlement: evidence from commercial disputes. CESIFO Working Paper No. 5520, p25.

²⁰Arbitration Act 1996, Part 1, Section 1 (c).

²¹Briggs, A. (2014). Private International Law in English Courts, Oxford: OUP Oxford, p1025.

²² Ibid, n12, p91, O6.6.

²³International Arbitration Survey: Improvements and Innovations in International Arbitration, QMUL (Queen Mary University of London) 2015 Survey, [pdf], p16.

²⁴2018 International Arbitration Survey, The Evolution of International Arbitration, QMUL (Queen Mary University of London), [pdf], p38.

²⁵ Ibid, n12, J.3 Information technology at trial, including paperless trials.

²⁶Ibid, n11, ¶57.

²⁷Ibid, n6, p43.

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CÁC ĐỔI MỚI, SÁNG TẠO CỦA TÒA ÁN THƯƠNG MẠI QUỐC TẾ TRONG CUNG CẤP DỊCH VỤ PHÁP LÝ

● TS. ĐẶNG VĂN QUÂN

Giảng viên, Khoa Luật, Đại học Quốc gia Hà Nội

TÓM TẮT:

Các tòa án Thương mại Quốc tế gần đây đã xuất hiện và phát triển nhanh chóng trên thế giới. Số lượng tòa án Thương mại Quốc tế đã tăng từ một vài tòa đến 16 tòa trong vòng vài năm tại 15 khu vực tài phán khác nhau. Bài báo này trình bày về những đổi mới, sáng tạo của kiểu tòa án này trong cung cấp các dịch vụ pháp lý.

Từ khóa: Tòa án Thương mại Quốc tế, tòa án, trọng tài, hòa giải, giải quyết tranh chấp, dịch vụ pháp lý, đổi mới, sáng tạo.