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"Constructing Collaboration: Remoulding the Resolution of Construction Disputes"

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I. Introduction

1. Good morning, and a very warm welcome especially to those among you who have travelled from abroad to join us in Singapore. Let me begin by thanking the organisers – in particular, Mr Oscar Aitken and Mr Thomas Wilson, Chair and Deputy Chair of this Conference – for putting this event together, and of course Mr Bruce Reynolds, President of the Academy, for inviting me to speak to you today. Two years ago, I had the privilege of speaking at the seventh edition of this Conference, which was conducted virtually. I am honoured to be addressing you once again and, as a fellow of the Academy, am delighted to be doing so in person, at a gathering in my home country.

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* I am deeply grateful to my law clerk, Ong Kye Jing, and my colleagues, Assistant Registrars Huang Jiahui and Tan Ee Kuan, for all their assistance in the research for and preparation of this address.

2. Today, I wish to speak to you about the value of *collaboration* in the prevention and resolution of construction disputes. My central thesis today is that enhancing and expanding collaboration – both between the *parties* to construction projects and disputes and between *dispute resolution bodies* that are typically tasked to resolve these disputes – will prove to be central to the efficient, holistic, and proportionate management of construction disputes. I will develop this thesis in four main parts:

(a) I will begin with an overview of existing collaborative processes in construction project delivery and dispute resolution.

(b) I will then discuss two pressing problems affecting construction dispute resolution. First, our adjudicative processes and procedures cannot realistically accommodate the ever-increasing complexity of construction disputes. This is a theme that I touched on when I spoke to you at the 7th edition of this Conference. Second, these processes and procedures are often ill-suited to the unique context and circumstances of such disputes. These are what I call the twin challenges of *complexification* and *contextuality* that confront us today.

(c) In the third part of my speech, I will explain why promoting collaboration will be vital if we are to address these two challenges. I will distil four strategies from perhaps a surprising quarter – I will speak about developments that we in Singapore have implemented in family justice, which might guide us in our project to reform construction law and practice. Admittedly, family justice is a very

different area of law and practice, but I suggest that it nonetheless offers us some invaluable insights.

(d) Finally, in the light of those strategies, I will unpack how we might promote collaboration both between the parties to construction projects and disputes and also between dispute resolution bodies.

II. Collaboration in construction law: an overview

3. Let me set the stage by outlining the state of collaboration in construction law. In recent decades, the construction industry and construction lawyers have developed various collaborative practices and procedures to address the unique demands of construction projects and the disputes that they spawn. In brief, construction projects typically have most or all of the following features:[1]

(a) First, a fairly long time horizon, spanning the life cycle of a project from initial design and planning, to pre-construction, construction, commissioning and finally, close-out. In other words, the parties to a typical construction project are usually locked into long-term business relationships, and the preservation of those relationships will often be critical to the successful completion of the project and the achievement of the parties' objectives.

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[1] Linda Grayson and Diana Harvey, "Resolution of Disputes" in David Jones *et al* (eds), *Partnering and Collaborative Working* (Informa Law, 1st Ed, 2003) ("**Jones**") ch 11; Queen Mary University of London & Pinsent Masons, "International Arbitration Survey – Driving Efficiency in International Construction Disputes" (November 2019) ("**QMUL 2019 Survey**") at 10.

(b) Second, construction projects involve numerous parties such as the owner, main contractor, subcontractors, engineers and other consultants, and these parties will often have divergent or sometimes even conflicting interests. As one practitioner has memorably observed, the parties to a project can seem "like a team of horses pulling in opposite directions: there may be lots of motion, but … little progress".[2]

(c) Third, construction projects require specialised engineering and other expertise, and thus present significant technical complexity.

(d) Finally, and flowing from the aforementioned three features, there is usually a high degree of uncertainty and variability in the progress of a project. This gives rise to a concomitant need for flexibility, to accommodate unforeseen changes, challenges and events.

4. In sum, construction projects are typically complex, long-term enterprises involving multiple parties acting under conditions of uncertainty. Associate Judge John Kern once observed that these projects can resemble "the middle of a battlefield … [as] nowhere [else] must men coordinate the movement of other men and all materials in the midst of such chaos and with such limited certainty of present facts and future occurrences …".[3] In this light, it is unsurprising that construction projects often spawn *disputes* that are complex and costly – both

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2 Howard W Ashcraft, "Integrated project delivery: a prescription for an ailing industry" (2014) 9(4) Construction Law International 21 ("**Ashcraft**") at 27.

3 *Blake Construction Co., Inc. v. C. J. Coakley Co., Inc*., 431 A 2d 569, 575 (DC Court of Appeals, 1981).

financially and also in terms of the damage that they inflict on the relationships between the parties.

5. It is in response to these realities that the construction industry has, over time, adopted a range of collaborative practices, which fall into two main categories. The first comprises *collaborative approaches to project delivery*, which are often coupled with *collaborative forms of contracting*. These arrangements were popularised by a process initiated by the United States Army Corps of Engineers in the late 1980s. Under this process, the owner and the contractor would meet, after the completion of the tender, to define goals and discuss potential issues, before signing an agreement or charter that captured their common goals and principles.[4] This marked the start of the concept of partnering, which was later adopted in the early 1990s by the North Sea oil industry. Then came the Latham Report in 1994,[5] which sparked the rise of partnering and alliancing in the construction industry in the UK and other countries, and which promoted standard form contracts like the New Engineering Contract ("**NEC**") that contain several elements to foster fair dealing and collaboration.[6]

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4 Chris Skeggs, "Project Partnering in the International Construction Industry" (2003) 4 International Project Partnering 456 ("**Skeggs**") at 457; Thomas J Stipanowich, "Managing Construction Conflict: Unfinished Revolution, Continuing Evolution" (2014) 34(4) Construction Lawyer 13 ("**Stipanowich**") at 14.

5 Sir Michael Latham, "Constructing the Team", Final Report of the Government / Industry Review of Procurement and Contractual Arrangements in the UK Construction Industry (London: HMSO, 1994) ("**Latham Report**").

6 Latham Report at para 5.17; Skeggs at 457; Don Ward and Alan Crane CBE, "The Story So Far" in Jones ch 1.

6. Three decades on, other collaborative approaches such as integrated project delivery have developed. Common elements of these diverse approaches include early contractor involvement, tying profits to project outcomes, limiting the scope of change orders, the use of Building Information Modelling, and no-litigation clauses, along with other aspects promoting the sharing of resources and open communication.[7] These features align the parties' incentives, and link their interests to the successful completion of the project, thus incentivising efficient project delivery while working to reduce the incidence of disputes. Various collaborative models have been used in the United States, the United Kingdom,[8] and Australia; and in Singapore too, there has been a recent drive to promote collaborative contracting. For example, a suite of optional collaborative clauses has been developed for the Public Sector Standard Conditions of Contract ("**PSSCOC**"),[9] which is the standard form contract for public sector construction projects in Singapore, and these have been adopted in several infrastructure projects.[10]

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7 Ashcraft at 24–28; Skeggs at 460; David Mosey, *Early Contractor Involvement in Building Procurement* (Wiley-Blackwell, 2009) at 6–8; Australian Government Department of Infrastructure and Regional Development, *National Alliance Contracting Guidelines: Guide to Alliance Contracting* (September 2015); UK Government, *The Construction Playbook: Government Guidance on sourcing and contracting public works projects and programmes* (September 2022) at 55–56 and 72.

8 A 2015 UK study found that 62% of respondents had used collaborative techniques in at least some projects, with 65% of those respondents reporting that collaboration had reduced the frequency of disputes: see NBS, *National Construction Contracts and Law Survey 2015* ("**NBS 2015 Survey**") at 13–16.

9 PSSCOC, Option Module E (for Construction Works) and Option Module C (for Design and Build).

10 For example, the Punggol Digital District Project: see Singapore Academy of Law Law Reform Committee, *Guide on Collaborative Contracting in the Construction Industry* (January 2022) ("**Guide on Collaborative Contracting**") at 8.

7. The second group of collaborative processes that have been adopted by the construction industry are *collaborative dispute resolution procedures*. Let me mention two prominent examples: mediation and dispute boards.

(a) First, mediation has become a leading dispute resolution tool for construction disputes. Indeed, according to Professor Thomas Stipanowich, mediation is now "the dominant template for third-party intervention" in construction disputes in the United States.[11] In Singapore, around 40% of the disputes that are resolved by the Singapore Mediation Centre are construction disputes, and growing demand for mediation in the construction industry has led to the establishment of the Singapore Construction Mediation Centre in 2019.[12] The frequent use of mediation is partly due to the prevalence of multi-tiered dispute resolution clauses that mandate mediation as a preliminary step in the dispute resolution process.[13] I will return to this shortly.

(b) And, dispute boards too have become more common, whether these are boards with the power to issue non-binding recommendations or decisions with interim finality pending arbitration or litigation. These have been highly successful in

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11 Stipanowich at 17.

12 Singapore Mediation Centre, "About Us" (2022): https://mediation.com.sg/about-us/about-smc/; Shabana Begum, "New mediation centre to resolve disputes in construction sector launched", *The Straits Times* (12 March 2019).

13 Rebecca Shorter, "Trends in construction disputes", White & Case Insights (1 August 2018): https://whitecase.com/insight-our-thinking/trends-construction-disputes; Singapore International Dispute Resolution Academy, *SIDRA International Dispute Resolution Survey: 2022 Final Report*: https://sidra.smu.edu.sg/sites/sidra.smu.edu.sg/files/survey-2022/40/index.html at 29.

avoiding and containing disputes – some 85% or more of dispute board recommendations or decisions do not proceed further to arbitration or litigation.[14]

8. In these collaborative approaches to project delivery, and collaborative dispute resolution mechanisms, we can see that a collaborative ethos is already present to some degree in important aspects of construction law and practice. But I suggest that we will need to significantly enhance and expand this collaborative approach in new and innovative ways if we are to address two pressing challenges facing construction disputes: namely, *complexification* and *contextuality*. Let me elaborate on each of these.

III. The twin challenges of complexification and contextuality

A. Complexification

9. I begin with complexification, which refers to the growing complexity of disputes. I will focus on two aspects of this today: *technical* complexity and *evidential* complexity.[15]

10. *Technical* complexity refers to the increasingly technical nature of the evidence and the issues that arise in disputes. This trend derives from advances in science and technology, which are increasing the number and sophistication

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[14] Dispute Resolution Board Foundation, "Dispute Board FAQs" (2022): https://drb.org/db-faqs.

[15] Sundaresh Menon CJ, "The Complexification of Disputes in the Digital Age", Goff Lecture 2021 (9 November 2021) ("**Goff Lecture**") at paras 6–22.

of technical methods and tools in many fields. The result is what has come to be referred to as the "scientization of proof": that is, the increasing reliance on technical analyses and methods in factual inquiry.[16] This phenomenon will be familiar to any construction lawyer who has had to grapple with the intricacies of, for example, geotechnical engineering models or delay analysis methodologies.

11. Add to this, *evidential* complexity – reflected in the sheer quantity of evidence that is being presented to adjudicators – which too has been rising dramatically. This is a natural consequence of advances in digital technology, which account for the vastly expanding amount of data and documents that are generated, stored and then produced as evidence to adjudicators. Evidential overload is especially rife in construction cases, where adjudicators are often inundated with a mass of documents including contracts, correspondence, drawings and invoices. In his paper on the complexity problem, Professor Jörg Risse refers to three case studies illustrating evidential complexity. All three involved construction disputes.[17] In one case, the text of parties' written submissions alone, excluding exhibits, exceeded *10,000* pages. And in another case, more than *120,000* events were cited in support of a claim for disruption.

12. These might be somewhat extreme examples, but technical and evidential complexity are present in nearly all construction disputes that reach arbitration or litigation. Indeed, the 2019 International Arbitration Survey conducted by the

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16 Mirjan R Damaška, *Evidence Law Adrift* (Yale University Press, 1997) at 143–144 and 151.

17 Jörg Risse, "An inconvenient truth: the complexity problem and limits to justice" (2019) 35(3) Arbitration International 291 at 292–293.

Queen Mary University of London School of International Arbitration found that the top two *defining* features of international construction arbitration were factual and technical complexity and the large amounts of evidence involved.[18] This has troubling implications for the adjudication of construction disputes, because complexification undermines adjudicative processes at two levels.

(a) First, at the level of *the individual adjudicator*, complexification reduces the quality of decisions. To put it simply, we are human and there are finite limits to how much information we can process. Studies have found that information overload worsens decision-making significantly, by leaving decision-makers unable to understand the information, thus increasing the likelihood that they will overlook relevant points, and inducing them to use unreliable mental shortcuts or heuristics.[19]

(b) Second, at a *systemic* level, the financial cost and time required to dispose of complex cases, and the personal toll that such cases inflict on adjudicators, are considerable. Complex cases take up a disproportionate share of our limited adjudicative resources, and they place an increasingly unsustainable strain on entire adjudicative systems.[20] This will ultimately affect our collective efforts to secure access to justice for all our users.

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18 QMUL 2019 Survey at 10 (73% and 66% of respondents respectively identified factual and technical complexity, and the large amounts of evidence involved, as defining features of international construction arbitration).

19 Goff Lecture at paras 24–34.

20 Goff Lecture at paras 35–38.

13. In this light, complexification seriously threatens the just resolution of construction disputes through adjudication and also undermines the goals of our justice systems as a whole, and we must therefore enhance and reform our dispute resolution mechanisms to address this phenomenon. But beyond this, there is a second and deeper problem plaguing construction dispute resolution, to which I now turn.

B. Contextuality

14. To understand this problem, we should first take a step back to consider the *norms* that ought to govern our dispute resolution frameworks. What goals should we seek to realise by our procedures and processes, and what principles should we seek to incorporate within them? In another lecture that I delivered a couple of years ago, I outlined a set of procedural norms that should guide the design of our justice systems from a process point of view. The overarching lodestar must be *fairness*, which is foundational to all conceptions of procedural justice and the legitimacy of any justice system. And fairness should be supported by three second-order norms: namely, accessibility, proportionality and contextuality.[21] It is the last of these that I want to touch on today. In essence, contextuality calls for dispute resolution processes that are tailored to the nature and size of the dispute, and the circumstances and interests of the parties.[22]

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[21] Sundaresh Menon CJ, "Gateway to Justice: The Centrality of Procedure in the Pursuit of Justice", 36th Annual Lecture of the School of International Arbitration in Dispute Resolution (30 November 2021) ("**SIADR Lecture**") at para 17.

[22] SIADR Lecture at para 19.

15. I suggest that our dispute resolution tools for construction disputes do not adequately meet the demands of contextuality. There are at least three main problems. First, *an adversarial culture pervades our dispute resolution procedures*. This is especially acute in litigation and arbitration, but adversarialism has also seeped into other procedures. For example, Professor Stipanowich has observed that construction mediation in the United States often devolves "into a game of numbers, or positional bargaining" or, worse, a "mere whistle-stop on the litigation line".[23] Yet an adversarial approach is unsuitable for many construction disputes, because such mindsets can cause serious damage to the parties' relationships. This is particularly undesirable in the construction context because disputes will often arise in the middle of a long relationship during which the works are being carried out[24] and, as I noted earlier, the successful completion of a project depends on the preservation of the parties' relationships and the sustenance of goodwill between the parties.

16. The second, closely related problem is *the predominance of rights-based or fault-centric approaches to dispute resolution*. Such approaches may be apt for binary disputes where liability turns on fault, and a win-loss result is unavoidable. But most construction disputes are much more nuanced. Many construction disputes cannot be determined by applying a fault-based standard because they arise from unforeseen or exogenous events – for example, delay

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23 Stipanowich at 17.

24 A 2015 UK study found that 63% of construction disputes began during the currency of works: see NBS 2015 Survey at 26.

due to inclement weather or pandemic restrictions. And often, construction disputes are "non-absolute" matters where zero-sum outcomes are neither necessary nor desired by the parties.[25] As Bruce Reynolds has noted in a paper co-authored with Duncan Glaholt, many senior construction executives have "little interest in being proven "right" in a trial or arbitral hearing".[26] Hence, procedures that are tailored to produce zero-sum results based on the parties' legal entitlements will often not be ideal for many construction disputes. Instead, we should look for tools that focus on advancing the shared interests of the parties, to facilitate the holistic resolution of the underlying issues and to preserve the relationships that will continue after the dispute has been resolved.

17. The third problem is *the generic design of many dispute resolution tools*. One key source of this problem is the use of boilerplate dispute resolution clauses which apply to *all* disputes that arise from a particular contract. These clauses do not accommodate the reality that there are many types of construction disputes, which call for different procedures. This point was made by Justice Vivian Ramsey, my colleague in the Singapore International Commercial Court (or "**SICC**"), in a paper on multi-tier dispute resolution clauses.[27] Such clauses generally require a dispute to pass through collaborative procedures, before it

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25 Cyril Chern, *The Law of Construction Disputes* (Informa Law, 3rd Ed, 2021) at 374.

26 Duncan W Glaholt and R Bruce Reynolds, "The collaborative settlement of construction disputes" (2017) 1(2) American Journal of Construction Arbitration & ADR 189 ("**Glaholt and Reynolds**") at 197.

27 Sir Vivian Ramsey IJ, "Multi-tier dispute resolution clauses in construction contracts" in Renato Nazzini (ed), *Transnational Construction Arbitration: Key Themes in the Resolution of Construction Disputes* (Informa Law, 2018) ch 3 ("**Ramsey**").

can be referred to arbitration or litigation. But as Justice Ramsey observed, such procedures are less suitable for simple disputes like those arising from a bare failure to pay, which may benefit from a shorter route to an award or a judgment.[28] Similarly, Professor Stipanowich has noted that the usual linear sequencing of procedures in multi-tier dispute resolution clauses may not be useful for certain disputes, where a negotiated settlement may only be feasible after a formal claim has been filed.[29]

18. In sum, I suggest that our dispute resolution tools for construction disputes often do not satisfy the requirements of contextuality because of their intrinsically adversarial nature, their prevalent focus on legal rights, and their generic designs.

19. Hence, both the spectre of complexification and the ideal of contextuality drive us towards the thoughtful reform of construction law and practice. How can we accomplish this mission? I suggest that the answer lies in an idea that is not new to construction law – namely, collaboration. We must build on the efforts already made over the past few decades to enhance and expand collaboration, both between the parties to construction projects and disputes, and also between the dispute resolution bodies that handle such disputes. Let me explain why this is critical, identify some strategies to achieve this, and then unpack this vision in greater detail.

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[28] Ramsey at para 3.5.

[29] Stipanowich at 19.

IV. The imperative of collaboration and lessons from family justice

A. The need for collaboration

20. First, it *is* vital to promote collaboration between the *parties* to construction projects and disputes. This is essential if we are going to address complexification and contextuality. Beginning with complexification, as I explained in my address at this Conference two years ago, two key strategies for tackling complexification are *containing* disputes before they escalate and *downsizing* disputes once they have crystallised.[30] These strategies can only be effectively realised through consensus and cooperation between the parties. Consider, for example, collaborative project delivery models and dispute boards, which can prevent many disputes from erupting or escalating. Such mechanisms can only be established by agreement between the parties, and work best when approached in a spirit of collaboration. And once a dispute arises, procedures for downsizing a dispute such as summary determination processes, which I will return to shortly, can typically only apply if the parties agree to and collaborate in their implementation. In these and other ways, cooperation between the parties will be crucial to addressing the challenge of complexification.

21. Party collaboration will also be fundamental to advancing contextuality. As I noted earlier, in the context of construction disputes, contextuality calls for less adversarialism, a focus on advancing the parties' interests rather than a fixation

[30] Sundaresh Menon CJ, "The Role of Commercial Courts in the Management of Complex Disputes", Address at the 7th Annual Conference of the International Academy of Construction Lawyers (9 April 2021) at paras 11–20; Goff Lecture at paras 53–62.

on vindicating their perceived rights, and developing bespoke dispute resolution methods. Again, these goals can only be attained through cooperation between parties. Conflict and acrimony will only be minimised if the parties jointly pursue the sensible and peaceable resolution of their disputes. Collaborative tools that seek to promote the parties' longer-term interests will only work if those parties commit to the process, and strive for a mutually acceptable outcome. And although dispute resolution bodies can and should create specialised processes for different types of disputes, the parties to a particular project or dispute are often best placed to devise creative processes that best suit their circumstances and preferences.

22. Let me touch on collaboration between *dispute resolution bodies*, and how this can help tackle complexification and contextuality. I suggest that these challenges can only be effectively addressed by applying a *mix* of dispute resolution tools to construction disputes. We should increasingly rely on collaborative procedures like dispute boards and mediation to contain and downsize disputes as far as possible, before taking what is left through adjudicative processes like arbitration and litigation.[31] Hence, we should strive to use *all* of these processes sensibly and in an integrated way, in order to resolve each facet of a dispute in the most appropriate way. But this multi-pronged approach can only succeed if dispute resolution institutions work in sync as parts

[31] Sundaresh Menon CJ, "SIFoCC playing its part as a cornerstone of a transnational system of commercial justice", Address at the 4th Full Meeting of the Standing International Forum of Commercial Courts (20 October 2022) ("**2022 SIFoCC Address**") at para 18.

of a unified *system* of international commercial dispute resolution (or "**ICDR**").[32] Hence, we should foster collaboration between dispute resolution bodies to ensure the coherence and efficiency of the ICDR system that resolves many of the construction disputes that we face.

B. Lessons from family justice

23. So *how* can we pursue this endeavour? What strategies should we adopt? In the context of dispute resolution processes, I suggest that we can draw some lessons from what I mentioned earlier might be a surprising quarter: family justice. Let me acknowledge at the outset that there are important differences between construction and family disputes. Family disputes arise from and involve the fracturing of personal ties, and can cause immense and lasting trauma to families that can span generations. In this context, we have found that justice requires a *therapeutic* response that aims to heal the parties and protect the children who are often caught in the cross-fire. It will typically be inappropriate in this context to adopt a rights-based approach when deciding family disputes.[33] By contrast, construction disputes usually spring from commercial factors, against the backdrop of contractual arrangements freely chosen by parties. A fundamental principle in this context is party autonomy, which requires that we uphold and

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[32] Sundaresh Menon CJ, "The Law of Commerce in the 21st Century: Transnational commercial justice amidst the wax and wane of globalisation", Lecture hosted by the University of Western Australia Law School and the Supreme Court of Western Australia (27 July 2022) ("**UWA Law School Address**") at paras 16–40; 2022 SIFoCC Address at paras 6–28.

[33] Sundaresh Menon CJ, "The Future of Family Justice: International and Multi-Disciplinary Pathways", International Family Law Conference 2016 (29 September 2016) at para 9.

enforce the parties' contractual rights in cases where they fail to settle their disputes amicably or wish to vindicate those rights.

24. But that said, if we looked past these differences, we might see some important similarities between the types of issues that we face in the construction space and family disputes. Among other features, both these types of disputes occur frequently and tend to corrode relationships that will extend beyond the duration of a specific dispute. Critically, family justice has evolved in recent years to address many of the same problems that plague construction disputes. Indeed, the very critiques from contextuality that I mentioned earlier – namely, excessive adversarialism, an undue focus on legal rights and inflexible procedures – have also been levelled against family justice. Further, although complexification has not affected family disputes as much as construction disputes, family disputes, too, have benefitted from being *contained* and *downsized*, which are two main methods for addressing complexification. In this light, I suggest that, as we strive to foster collaboration in the construction context, we can glean some insights from recent developments in family justice. Let me briefly refer to the development of the Singapore family justice system, before drawing out four lessons or insights that might be relevant to construction disputes.

25. Until around 30 years ago, family justice in Singapore was viewed as just another species of civil justice. Family disputes were heard by the same courts that heard personal injury or commercial disputes, and under largely the same procedural rules. Further, family proceedings were conducted in the adversarial

tradition and consequently, many family cases were clouded with acrimony and rancour of the sort that most of us have seen in the movies.

26. Over the course of the last 25 years or so, the Singapore courts have introduced structural and procedural reforms to transform family justice. First, specialised procedures such as mandatory counselling and mediation were implemented. Then we established the dedicated Family Justice Courts, and adopted a new set of procedural rules for family disputes. And in 2020, we adopted therapeutic justice as the guiding philosophy for family justice in Singapore, and we have since introduced a range of initiatives to embed this ethos into our family justice system.[34]

27. Let me highlight four broad lessons from our reforms to family justice, which I suggest might also inform our thinking in the construction context:

(a) First, we have found that *early intervention* is vital to containing disputes and reducing conflict. To this end, we introduced a range of upstream procedures for contested divorce proceedings. All parties with at least one child under the age of 21 are required to attend a Mandatory Parenting Programme before filing for divorce, unless the divorce and all ancillary issues have been agreed.[35] And once divorce proceedings commence, the court will generally order parties with minor children to attend mandatory counselling and

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34 SIADR Lecture at para 23.

35 Section 94A of the Women's Charter 1961; Singapore Courts, "Divorce in Singapore: The Essentials": https://www.judiciary.gov.sg/docs/default-source/family-docs/divorce_guide_english.pdf ("**Divorce in Singapore**") at 3.

mediation at the earliest opportunity.[36] Such upstream intervention has been crucial to preventing disputes from escalating and thus inflicting further harm to the ties between the parties.

(b) The second lesson that we have learnt is that we should *triage cases to direct each dispute to the most appropriate procedure*. For example, in 2020, we introduced a pilot under which high-needs or high-conflict family disputes were channelled to multi-disciplinary teams of judges, mediators, counsellors, and social workers, who could closely manage the many challenging facets of these disputes and help the parties reduce their conflict. At the other end of the spectrum, uncontested divorce cases where all issues are agreed between the parties are placed on a simplified track, which spares parties the time, costs, and turmoil of lengthy proceedings.[37] Today, almost 60% of divorce cases are resolved through the simplified process.

(c) The third idea is that *harnessing the multidisciplinary expertise of a range of professionals* can play a key role in managing complexity and promoting contextuality. I have just alluded to our pilot where we referred complex and high-conflict family disputes to multi-disciplinary teams. We have found that by bringing together various professionals with diverse expertise, our family courts were better

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36 Section 139I of the Women's Charter 1961; Divorce in Singapore at 11.

37 A divorce case on the simplified track typically concludes within four months: see Singapore Courts, "File a divorce application (simplified track)": https://www.judiciary.gov.sg/family/file-divorce-application-simplified-track. See also SIADR Lecture at para 26, and Sundaresh Menon CJ, "Through the Eyes of a Child", Address at the 8th Family Law & Children's Rights Conference: World Congress 2021 (12 July 2021) at paras 13–15.

able to manage complex issues and deliver tailored responses to the specific dispute at hand, for example by referring the parties involved to social service agencies for targeted intervention.[38]

(d) The fourth insight is that besides transforming the "hardware" of procedures and processes, *it is vital to reform the "software" by raising the level of awareness of new mechanisms among our users and inculcating appropriate mindsets regarding these tools*.[39] To this end, we have introduced training programmes and guides to raise awareness of therapeutic justice processes and to inculcate the ethos of therapeutic justice in lawyers and parties involved in family disputes.[40] Ultimately, our mechanisms will only succeed if our users are aware of them and turn to them in the right spirit.

28. These, then, are four useful strategies from family justice: *pursuing early intervention; triaging cases to direct each dispute to the most suitable procedure; harnessing multidisciplinary expertise; and raising awareness of new tools and inculcating appropriate mindsets*. Let me now elaborate on how we might enhance collaboration in the construction context, in the light of these strategies.

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38 Debbie Ong J, "Practising TJ", Address at the Family Conference 2021 (29 September 2021) ("**Practising TJ**") at paras 26–32.

39 Practising TJ at para 35.

40 For example, in 2021, the Family Justice Courts collaborated with the Singapore Academy of Law and the Law Society of Singapore to launch a Family Therapeutic Justice Certification Programme: see Practising TJ at paras 38–40.

V. Promoting collaboration: unpacking the vision

A. Collaboration between parties

29. I turn first to collaboration between the parties to construction projects and disputes.

i. Collaborative project delivery

30. Party collaboration in project delivery is essential. As I have explained, an important lesson from family justice is that early intervention is critical to containing disputes and reducing conflict. Fostering collaborative project delivery must therefore be one of our key priorities. Let me suggest three strategies that we could adopt to pursue this goal.

31. First, we should *develop and refine collaborative forms of contracting that support collaborative project delivery*. In Singapore, as I noted earlier, an optional suite of collaborative clauses has been developed for the PSSCOC, the standard form contract for public sector projects. And the International Federation of Consulting Engineers (FIDIC) is preparing a collaborative form of contract that is expected to be issued later this year.[41] We should consider revising or supplementing other standard forms in wide use to include more collaborative features and structures.

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[41] FIDIC, "Collaborative Contracting – Survey": https://fidic.org/node/34921.

32. Second, we should *promote the use of such collaborative contracts*. This is vital because collaborative contracting is fundamentally different from traditional modes of contracting: it requires the parties to apply open-textured concepts such as good faith, to share in uncertain risks and rewards, to act jointly, and to communicate openly. In this light, implementing collaborative models will require some fundamental changes in organisational culture and practices for many players in the industry.[42] Construction lawyers can play a key role in driving these changes by raising awareness of collaborative contracts, tailoring such models to the needs of specific clients and projects, and inculcating appropriate mindsets for collaborative project delivery. There have been recent efforts on this front in Singapore – for example, last year, the Singapore Academy of Law published a guide on collaborative contracting to explain and promote its use.[43] This, in essence, is the fourth strategy from family justice – of raising awareness of new tools and inculcating appropriate mindsets – and we should apply it to ensure that this idea of a collaborative approach takes root more widely in our jurisdictions.

33. Third, we should *consider developing the concept of a "project lawyer"*, an idea suggested by Justice Douglas Jones, another of my colleagues on the SICC bench. In a recent paper, Justice Jones proposed that we envision a lawyer

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[42] Indeed, organisational inertia has been identified as the biggest obstacle to collaborative contracting: see Na Zhang *et al*, "Collaborative contracting in the Singapore construction industry: current status, major barriers and best solutions" (2020) 27(10) Engineering, Construction and Architectural Management 3115 at 3124.

[43] Guide on Collaborative Contracting.

whose role is to serve the interests of the project, rather than any of its individual participants.[44] The project lawyer would adopt a "best-for-project-outcome approach", and would coordinate and manage the various parts of a construction project.[45] The role of a project lawyer might include preparing a multi-party collaborative contract, monitoring the progress of the project, operating informal dispute avoidance and resolution mechanisms and facilitating a smooth close-out process to avoid end-of-project disputes.[46] The project lawyer would in effect directly support and sustain collaborative project delivery.

ii. Collaborative dispute resolution

34. I turn to party collaboration in *dispute resolution*. Let me outline three ways in which we might promote such collaboration.

35. First, we can both *expand our use of existing collaborative dispute resolution mechanisms* such as dispute boards, and also *develop new modes of collaborative dispute resolution.* Let me mention two innovative procedures, one for dispute avoidance and the other for dispute resolution.

(a) In relation to *dispute avoidance*, the UK government recently issued model conflict avoidance clauses for the NEC and Joint Contracts

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44 Douglas Jones IJ, Keynote Speech at the III International Congress on Construction Law in Chile (25 October 2022) (to be published in a revised version as Douglas Jones IJ, "Collaborative Solutions in Construction: Rising to the Challenges Facing International Construction", *Journal of the Canadian College of Construction Lawyers* (forthcoming) ("**Collaborative Solutions in Construction**")).

45 Collaborative Solutions in Construction.

46 See also David Jones and Alan Crane CBE, "The Role of Lawyers" in Jones ch 5.

Tribunal standard forms.[47] Under these clauses, parties may adopt a Conflict Avoidance Process operated by the Royal Institution of Chartered Surveyors (or "**RICS**"). This involves referring emerging disputes to a panel of construction professionals constituted by the RICS for the specific issues that have arisen. The panel will then issue a recommendation that is non-binding until it is implemented. This procedure resembles a dispute board in some ways. But it may be cheaper than maintaining a standing dispute board, and can enable expertise relevant to the specific disputes at hand to be brought to bear on those disputes.[48]

(b) In relation to *dispute resolution*, we should explore collaborative law procedures, which involve "mediation without the mediator", as one commentator has put it.[49] The process starts with the parties and their lawyers signing a "participation agreement", under which the parties agree to conduct confidential negotiations in good faith, and not to file court proceedings during the process. The agreement also typically contains a disqualification clause that bars the parties' lawyers from acting further for them if the dispute is not settled through the process, which then focuses the minds and energies of those involved on achieving settlement. The parties and their

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47 UK Government, "HMG Model Clause – Conflict Avoidance" (5 September 2022): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1102392/220901-HMG-Model-Clause-Conflict-Avoidance.odt.

48 RICS, "RICS Conflict Avoidance Process": https://www.rics.org/content/dam/ricsglobal/documents/dispute-resolution-service/CAP_User Guide.pdf at 5.

49 Bobette Wolski, "Collaborative Law: an (un)ethical process for lawyers?" (2017) 20(2) Legal Ethics 224 ("**Wolski**") at 225.

lawyers then hold four-way meetings to negotiate a settlement.[50] This is a promising model that we should study, to see how we might adapt it for construction cases. For instance, Bruce Reynolds and Duncan Glaholt have proposed a modified collaborative law model for construction disputes.[51] Under their approach, the parties engage in limited disclosure of documents before negotiating a solution. External counsel typically exit once negotiations begin, to enable parties to regain full control over their disputes.

36. The second way in which we could promote collaborative dispute resolution is *by enforcing agreed collaborative mechanisms.* Historically, some common law courts have declined to enforce provisions for the parties to negotiate in good faith or to engage in other cooperative procedures, on the basis that such clauses are too uncertain.[52] But I suggest that if dispute resolution clauses reflect the parties' clear intent to use certain collaborative mechanisms, adjudicative bodies should strive to enforce these processes unless they cannot be performed.[53] This would both advance party autonomy in giving effect to the

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50 Wolski at 226–229.

51 Glaholt and Reynolds at 191–192.

52 See Ramsey at paras 3.9 and 3.12–3.20, citing *Walford v Miles* [1992] 2 AC 128, *Sulamérica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2013] 1 WLR 102 and *Wah v Grant Thornton International Ltd* [2012] EWHC 3198 (Ch).

53 This approach has been adopted by courts in Singapore, England and Australia: see Ramsey at paras 3.21–3.25; *HSBC Institutional Trust Services (Singapore) Ltd (trustee of Starhill Global Real Estate Investment Trust) v Toshin Development Singapore Pte Ltd* [2012] 4 SLR 378 at [45] (Singapore); *Emirates Trading Agency LLC v Prime Mineral Exports Pte Ltd* [2015] 1 WLR 1145 (England); *United Group Rail Services Ltd v Rail Corpn New South Wales* (2009) 127 Con LR 202 (New South Wales).

parties' intentions, and also promote collaboration in dispute resolution which will be vital to addressing complexification and contextuality.

37. Third, we should strive to *create procedures to foster party collaboration in arbitration and litigation aimed at downsizing and narrowing their disputes*. Let me touch on some recent steps taken by the SICC in this context. In 2021, the SICC created a specialised Technology, Infrastructure and Construction List ("**TIC List**") for complex construction and technology disputes, and introduced two voluntary protocols for the resolution of cases that are placed on this List.

(a) The first is a Pre-Action Protocol, that facilitates the frank and early exchange of information between the parties about their dispute. Under the protocol, the parties exchange summaries of their claims and responses, and then attend a pre-action meeting. At the meeting, they discuss whether they can resolve their disputes without litigation. If litigation must proceed, they are then to consider how they can narrow their dispute, for example by appointing a common expert or by limiting the disclosure of documents.[54]

(b) The second is a Simplified Adjudication Process Protocol, which establishes a summary adjudication procedure for certain lower-value claims. For some of these claims, the parties will not present any evidence at all, but will simply recover a percentage of such claims pegged to the percentage of recovery for its main claims. This can easily be adapted by parties to reflect different formulae

[54] SICC Rules 2021, Appendix D (Pre-Action Protocol for Dispute Involving TIC Claim).

for recovery.[55] These types of mechanisms can provide practical and flexible ways for parties to collaborate in streamlining their disputes.

B. Collaboration between dispute resolution bodies

38. I turn finally to how we might foster collaboration between dispute resolution bodies. As I have explained, such collaboration will be vital to ensure the coherence and efficiency of the ICDR system as a whole. I suggest that this system should have three key features, and we should promote collaboration between dispute resolution bodies to advance these features.

39. First, the ICDR system should *channel disputes or aspects of disputes to the most suitable dispute resolution mechanism*. This is the *triaging* strategy that I outlined from family justice. To realise this, dispute resolution bodies should *develop triaging schemes that can funnel disputes or parts thereof to other dispute resolution bodies* in appropriate cases.

(a) One example is the Pre-Action Protocol for cases on the SICC TIC List that I mentioned earlier, under which parties hold a pre-action meeting to discuss, among other things, whether they can resolve their disputes or parts thereof without going through litigation.[56]

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55 SICC Rules 2021, Appendix E (Simplified Adjudication Process Protocol).

56 Similarly, the UK Pre-Action Protocol for Construction and Engineering Disputes provides for the parties to exchange information before filing proceedings, to enable them to consider using alternative dispute resolution methods to resolve their dispute: see UK Ministry of Justice, "Pre-Action Protocol for Construction and Engineering Disputes 2nd edition": https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_ced.

(b) We should also create similar triaging schemes that would allow us to place disputes that would *not* benefit from collaborative processes like mediation on a swift path to judgment or award. A possible model can be found in the Singapore Infrastructure Dispute-Management Protocol, which the parties can choose to incorporate into the PSSCOC form of contract.[57] Under this Protocol, a party who refers a dispute to the dispute board established under the Protocol may propose how the dispute should best be resolved – for instance, by mediation or through a formal determination by the dispute board. If the other party objects to the proposed method, the dispute board decides the appropriate mode of dispute resolution, having regard to the nature of the dispute and what would facilitate the contract's performance or reduce the risk of disruption.[58]

(c) In a similar vein, my colleague Justice Philip Jeyaretnam, President of the SICC, has proposed that collaborative contracts could provide for a third party neutral to be appointed, at the time of contracting, to assess disputes as they arise, and channel them to the most appropriate mode of dispute resolution.[59]

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57 PSSCOC, Option Module E (for Construction Works), E4.0, and Option Module C (for Design and Build), C4.0.

58 Singapore Infrastructure Dispute-Management Protocol 2018: https://www.mediation.com.sg/wp-content/uploads/2019/06/Guide-to-Singapore-Infracture-Disputre-Management-Protocol-Booklet.pdf at para 6.

59 Philip Jeyaretnam J, Keynote Address at the LEAD Milestone Programme – SMU-BCA AMP Programme (2 February 2023) at para 14.

40. The second need of the ICDR system calls for *the dispute resolution bodies that constitute the system to enhance and reinforce each other's operations*. This can occur at two levels.

41. At the first level, dispute resolution bodies can and should sustain each other by *supporting the use of each other's mechanisms, and by recognising and giving effect to each other's decisions*.[60] Commercial courts in particular play a key role in this endeavour because they are generally the ultimate arbiters of where a dispute is to be decided and whether the outcomes of other dispute resolution tools and processes will be recognised and upheld.[61] A familiar example of this is how the courts support international arbitration by staying court proceedings which are in breach of an arbitration agreement, and by enforcing arbitral awards. Looking ahead, commercial courts will likely see similar interest in the enforcement of foreign judgments and international commercial settlement agreements, under the Hague Convention on Choice of Court Agreements and the Singapore Convention on Mediation respectively. Another area worth exploring is the development of the doctrine of transnational issue estoppel, to bar the re-litigation of issues. In the 2021 decision of *Merck Sharp & Dohme*, for instance, the Singapore Court of Appeal held that that doctrine applies to foreign judgments, and set out its views on the scope and the elements of the doctrine.[62]

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60 UWA Law School Address at paras 22–24.

61 2022 SIFoCC Address at para 19.

62 *Merck Sharp & Dohme Corp (formerly known as Merck & Co, Inc) v Merck KGaA (formerly known as E Merck)* [2021] 1 SLR 1102.

42. At the second level, dispute resolution bodies can deepen collaboration *by integrating each other into their own processes or by co-developing composite procedures*. Let me offer two examples.

(a) Adjudicators of construction disputes can introduce or expand the use of expert referees or assessors. Such experts can play an invaluable role in addressing complexity, by helping adjudicators to understand and assess complex technical evidence. Integrating technical experts into these processes reflects the third strategy from family justice – namely, harnessing multidisciplinary expertise to manage complexity. And referees can also play various useful roles at other stages of the dispute resolution process. The UK Pre-Action Protocol for Construction and Engineering Disputes includes an optional Protocol Referee Procedure, under which a senior construction lawyer can be appointed to resolve pre-action disputes about compliance with the Protocol, which cannot be decided by the courts which lack jurisdiction until an action has been filed.[63]

(b) Dispute resolution bodies can also develop composite dispute resolution models. For example, the SICC recently collaborated with the Singapore International Mediation Centre (or "**SIMC**") to develop a Litigation-Mediation-Litigation Protocol. Under this protocol, proceedings initiated in the SICC may be referred to mediation at the SIMC. The SICC will support such mediation by

[63] Tom Green and Louis Foscolo, "The Pre-Action Protocol for Construction and Engineering Disputes: the Protocol Referee Procedure (Part 3)" (13 June 2019): https://kennedyslaw.com/thought-leadership/article/the-pre-action-protocol-for-construction-and-engineering-disputes-the-protocol-referee-procedure-part-3/.

granting a case management stay. If the mediation succeeds, the SICC can record the terms of the settlement as an order of court to facilitate its enforcement.

43. That brings me to the third need of the ICDR system, which is to *pursue its own reform and refinement to enhance its delivery of transnational commercial justice*. To this end, dispute resolution bodies should *engage in continuing dialogue* to exchange ideas on and develop solutions to common challenges such as complexification and contextuality. For example, the Standing International Forum of Commercial Courts (or "**SIFoCC**") invited leading arbitrators and mediators to attend and contribute to its meeting in October last year, and I have suggested that SIFoCC should establish linkages and avenues for dialogue with leading arbitration and mediation bodies to facilitate further discussions and exchanges.[64]

VI. Conclusion

44. My principal thesis today has been that the need of the moment when considering how best to prevent and resolve construction disputes is a renewed commitment to collaborative approaches at several levels. Collaboration is far from foreign to the construction industry and construction dispute resolution. But it is time to intentionally enhance and entrench our collaborative efforts, to meet the challenges of complexification and contextuality. I have offered you some

[64] 2022 SIFoCC Address at paras 34–35.

ideas to start what I hope will be a meaningful and ultimately productive conversation. I am delighted that collaboration and cooperation are two of the main themes of this Conference, and I am certain that there will be many enriching and insightful discussions over the next two days. Thank you very much for your attention; and I wish you a highly successful Conference.