Chief Justice Sundaresh Menon: Keynote Address delivered at the Standing International Forum of Commercial Courts (SIFoCC) Meeting 2022

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THE STANDING INTERNATIONAL FORUM OF COMMERCIAL COURTS: 4TH FULL MEETING, SYDNEY

"SIFoCC playing its part as a cornerstone of a transnational system of commercial justice"

Key Messages

1. In order to support a globalised, interconnected world, we should develop and sustain a transnational system of commercial justice. This involves pursuing meaningful convergence in the commercial laws of jurisdictions around the world, and regarding international commercial law and international commercial dispute resolution as parts of a system rather than mere compilations of rules.

2. International judicial dialogue is an important driver of meaningful convergence. This takes place not only through the publication of judgments which are considered by courts in other jurisdictions, but also through direct communication and collaboration between judges across jurisdictions. Examples of this include organisations like the Standing International Forum of Commercial Courts (SIFoCC), and the extremely successful use of court-to-court communication in cross-border insolvency cases.

3. There are a number of ways in which we can intentionally work to enhance the transnational system of commercial justice. One is by developing common approaches to the management of conflicts over where and how a transnational dispute should be resolved, and the standards that should apply to the conduct of arbitration and mediation. Another is by raising the capabilities of adjudicators to tackle challenges such as the growing complexity of disputes, and to address the new legal issues that will be raised by global problems such as climate change.

4. These are all areas in which SIFoCC is well-placed to contribute. Moving forward, SIFoCC should build formal relationships with leading arbitration and mediation institutions and bring the stakeholders in the transnational system of commercial justice together in an ongoing conversation, so as to ensure that dispute resolution providers around the world are equipped to support the delivery of justice nationally and internationally.

1. The Standing International Forum of Commercial Courts ("SIFoCC") was established at the initiative of Lord Thomas in 2017 when he was Lord Chief Justice of England and Wales. In the years since then, it has grown in its membership and also in the ambition of its projects and conferences. Today, it is the largest gathering of commercial courts and judges from around the world, all united in their mission to deliver justice to parties engaged in transnational commerce. I congratulate Lord Thomas, Mr Justice Robin Knowles and the Secretariat for all their efforts in bringing about the remarkable growth of the Forum within such a short period. This suggests that it does have a vital role to play: those who participate in SIFoCC's programmes are all busy people and they would not continue to make the effort unless they believed it was worth doing so.

2. I suggest today that having gotten this far, we should now look ahead to how we might conceptualise the next chapter of the SIFoCC journey. My principal suggestion this evening is this: transnational commerce remains a key driver of global efforts to sustain growth, alleviate poverty and improve lives. And given the extent to which trade today is truly transnational, the need of the moment is a commitment to develop and sustain a transnational system of commercial justice. I think SIFoCC is exceptionally well-placed to drive this effort, and later in my speech, I will seek to illustrate this with reference to the themes of this year's Meeting, which reflect some of the most important issues faced by those of us engaged in international commercial dispute resolution (or "ICDR") today.

3. I develop my thesis in three parts:

(a) First, I will explain what I mean by a transnational system of commercial justice and will argue that such a system is already in place, albeit as a work in progress.

(b) Next, I outline why and how we should work intentionally to enhance the development of this system.

(c) Finally, I will outline some ideas for how SIFoCC might evolve to play a central role in this effort.

I. Part 1: Globalisation and a transnational system of commercial justice

4. At the heart of transnational commerce lies the phenomenon of globalisation. While it is impossible to speak of globalisation today without acknowledging the many challenges it faces, I believe, as I have argued on a number of recent occasions, that globalisation is here to stay.[1] This is not least because the greatest challenges that confront us today are global challenges that demand transnational collaborative responses: geopolitical instability, global health security, the erosion of truth, stagflation, structural income and wealth inequality, and the climate crisis.[2] None of these can be addressed by our retreating into national siloes. And addressing them will be that much harder if we cannot maintain a healthy flow of transnational commerce to sustain economic growth, and offer the hope that we *can* alleviate poverty and optimise the returns on our limited resources for the benefit of all.

5. Much can be said for building a more sustainable vision of globalisation than what we have hitherto seen.[3] The precise vision we ought to embrace for the future will be a matter for discussion, contestation and experimentation for years to come. Nevertheless, it must be a vision of a globalised, interconnected world; and not a fragmented one made up of insular blocs standing apart. I outlined aspects of this vision at a lecture I delivered in Perth earlier this year,[4] and I will develop some of those points here.

A. The importance of a transnational system of commercial justice

6. Whatever shape the future of globalisation takes, the law will remain a critical part of the infrastructure of commerce. This can be traced back to early civilisations, but a more proximate starting point for understanding the law's role in transnational commerce is the law merchant, or *lex mercatoria*: a common body of rules and customs widely adopted by merchants in Europe around the Middle Ages.[5] This was a system of law where rules were applied throughout the trading region in a broadly consistent way by means of a network of courts and informal adjudication that prioritised speed and efficiency.[6] From the 17th to the 19th centuries, these rules were gradually assimilated into national legal systems and largely lost their transnational character. As a consequence, international commercial law is today often thought of less as part of a coherent system and more as a hodgepodge of rules from different sources.

7. I suggest that a renewed focus on a modern notion of a transnational *system* of commercial justice will be essential in a globalised world. To explain this, it will be necessary to outline what is meant by a transnational *system* of commercial justice. At its most rudimentary, a legal system is a public framework of laws accompanied by institutions which make and develop those laws, and which seek to interpret and apply them in a broadly consistent manner, thereby offering a basis upon which differences can be resolved fairly. At a domestic level, we know what this means. But since the nationalisation of the *lex mercatoria,* it has been less obvious what it means in a transnational commercial setting. Yet, while we do not seek a supranational legal system, we can effectively achieve many of the benefits of having such a system to facilitate transnational commerce by seeing the many discrete players and processes that do regulate aspects of commerce as though they were part of a

system, at least on a conceptual level.

8. But why should we do this, even assuming it were possible? At the most fundamental level, this is because legal differences and uncertainty increase transaction costs and hamper growth.[7] And these costs will only increase with new risks in emerging areas, such as artificial intelligence and data privacy, that inevitably will have a transnational impact while also necessitating new ways of regulating modern business. In addition, cross-border business activity inevitably leads to cross-border commercial disputes, and this adds another layer of increased costs. A focus on fostering a transnational system of justice would prioritise the convergence of commercial laws where possible, and the minimisation of the inefficiencies that inhere in transnational dispute resolution.

B. The components of a transnational system of commercial justice

9. Now, this seems a mammoth task to be sure, made even more difficult to navigate by the fact that different components of it have been worked on variously by different stakeholders over the course of the past few decades. Yet, somewhat ironically, it is because of this steady work on so many fronts that the transnational system of commercial justice is already in existence as a work in progress. Let me briefly illustrate this with reference to two of its facets: convergence in procedural law and in substantive law.

10. Beginning with procedural law, the exemplar for meaningful convergence is the set of rules of private international law governing arbitration agreements and awards. At its centre are the 1958 New York Convention,[8] which, with 170 parties and counting,[9] has created an almost universal regime for the enforcement of arbitral awards; and the UNCITRAL Model Law on International Commercial Arbitration, which is very widely adopted today.[10] These instruments create a robust and vitally important framework for managing the resolution of disputes by channelling them to the right venues and then avoiding the unnecessary re-litigation of issues by foreclosing the review of arbitral awards on their merits.[11] Such a perspective rests on a systematic rather than a court- or jurisdiction-centric approach to transnational commercial justice.[12]

11. There have also been long-standing efforts at achieving convergence in substantive law, such as through the Convention on Contracts for the International Sale of Goods (or “CISG”).[13] Today, however, we can expect to face an ever-growing set of legal issues that have an inherently transnational character – such as those arising from our responses to challenges like climate change and global public health. For example, disputes arising from projects under the Green Climate Fund of the UN Framework Convention on Climate Change (or “UNFCCC”) have already come before arbitral tribunals.[14] These and other disputes may turn on the commitments made under the Paris Agreement, national rules or policies made to implement those commitments, and the actions of individuals or businesses in response to these events. Another example is the Chancery Lane Project, which has contributors from 113 countries. It has published a set of template contractual clauses which can be inserted into a range of business contracts to mandate the pursuit of climate-related priorities.[15] If the project is successful, it will soon fall to

arbitral tribunals and commercial courts to interpret these clauses when contractual disputes arise. The legal norms arising from these decisions have the potential to become the transnational norms that will guide the greener conduct of global commerce. We will significantly handicap our ability to mount a coordinated response to such global challenges if we were to approach these disputes in an *ad hoc* fashion or in national siloes, instead of striving to achieve broad and thoughtful consistency in the approach we take to the interpretation, development and application of these norms, or at least to ensure that any divergences are principled.

12. None of this means that the entire corpus of commercial law must be the same everywhere. Not only would that be unachievable, the laws of each jurisdiction reflect a compromise between the competing political, social and economic realities within that jurisdiction. But even so, in some select areas, we can attain uniformity; in others, we can pursue meaningful convergence; and in the remaining areas, we can at least aim to acquire an understanding of our principled differences. And for the reasons I have just explained, these are worthy goals for us to pursue. To achieve them, we should see the body of laws that govern international commerce and ICDR as well as the institutions involved in applying them from the perspective of a system rather than as a mere compilation of rules administered by discrete and disconnected entities: in short, we should seek to develop a modern-day *lex mercatoria*.

C. International judicial dialogue as a driver of convergence

13. The examples I have just discussed also illustrate the importance of what I call the *drivers* of meaningful convergence. In domestic law, we take it for granted that the law is made and refined by legislatures and courts. On the international plane, there is no single authority that has responsibility for the development of the law. Instead, convergence is driven by a multitude of stakeholders with varying degrees of coordination. Prime amongst these are international organisations, such as UNCITRAL, which promulgate international instruments such the Model Law and the CISG.

14. But another key driver of convergence is international judicial dialogue. This takes place on at least two levels: First, through the means that is especially well-known to the common law – the publication of judgments which are then read by practitioners and by courts in other jurisdictions. The cross-citation of authorities across different jurisdictions is an important way in which we ensure that the law develops in a manner that is cognisant of other pertinent positions and considerations.

15. Second, and less frequently appreciated, is direct communication and collaboration between judges across jurisdictions. I suggest that the transnational system of commercial justice benefits tremendously from such exchanges, which are an often-overlooked source of strength for a court system: it helps judges keep abreast of legal developments emanating from their colleagues across the world and provides them with a sounding board for their own thoughts and ideas.

16. This is where we see the genius that lies behind the establishment of SIFoCC as an international community of commercial judges. In the five years since its establishment, SIFoCC has already accomplished a number of notable

feats, of which I highlight just these:

(a) SIFoCC has developed and published a Multilateral Memorandum on Enforcement of Commercial Judgments for Money, with each contributing judiciary explaining the legal position in their own jurisdiction.[16] While the Memorandum is not legally binding, it provides clear and reliable information that can give judges much greater confidence in understanding the implications of their rulings in transnational cases and afford litigants the comfort of knowing how they can monetise their judgments. With such a tool, we take a significant step towards achieving meaningful convergence in an area of law of central importance to commercial users.

(b) SIFoCC has also published a set of guidelines summarising international best practices in case management, incorporating the input of judges from more than a dozen jurisdictions.[17] This document provides an excellent starting point for courts to develop their own principles on effective case management, a vital capability for effective commercial dispute resolution.

(c) And at the height of the COVID-19 pandemic, SIFoCC issued two COVID-19 memoranda, in which member courts pooled their experiences and lessons learnt from how they used technology to sustain the delivery of justice during the pandemic.[18]

17. The remarkable work SIFoCC has already done should, I suggest, be seen as a precursor to a more ambitious goal: Imagine an international community of leading commercial judges, international adjudicators and third party neutrals, engaging in direct dialogue in the endeavour to develop and refine solutions and responses to the challenges that face all of us in the world of ICDR. Happily, we have just taken the first step in this direction with this year's SIFoCC Meeting. I would like to situate the discussions we have had today and which we will have tomorrow within this broader context of developing a transnational system of commercial justice. Our topics of discussion will make a direct contribution towards two important facets of this undertaking: first, improving ICDR by having it function more as a system; and second, raising the effectiveness and the capabilities of adjudicators and indeed, of the system as a whole.

II. Part 2: Intentionally working to enhance the system

A. Improving the function of international commercial dispute resolution

18. I begin by suggesting that we should first acknowledge the reality that the ICDR system encompasses not only litigation, but also arbitration, and increasingly, mediation and other forms of dispute resolution. A commercial dispute today will frequently flow across these different mechanisms. To take one example, most complex infrastructure projects benefit immensely from the work of dispute boards, which can dramatically reduce what remains in dispute at the end of the project, to be resolved by further mediation, arbitration, or litigation.[19] More commonly, the enforcement of an arbitral award or a mediated settlement agreement will typically lie in a commercial court, sometimes in a different jurisdiction from that of the law governing the arbitration or mediation. And multiple proceedings on the same or similar matters may arise in different jurisdictions or fora, raising the question how

each should regard the related proceedings in the others, especially where a judgment or award has already been rendered.

i. Jurisdictional conflicts

19. In these situations, commercial courts will typically be the ultimate arbiters of where disputes are to be adjudicated and whether recognition should be accorded to the outcomes of other proceedings. In this way, they are akin to the *control centres* of the ICDR system. There is no single pre-determined court that will serve as *the* control centre of any given dispute. Instead, each court has the prerogative to rule on jurisdictional disputes that pertain to the proceedings before it. It follows from this that we should strive to develop broadly common approaches to manage and reduce jurisdictional conflicts. The central guiding principle should be to minimise costs and uncertainty arising from the possibility of jurisdictional arbitrage and the re-litigation of decided issues, within the overarching aim of doing what is just in the circumstances. The rules that courts have developed in areas such as the enforcement of arbitration agreements, the effect of exclusive jurisdiction clauses, rules for managing *lis alibi pendens*, and the doctrine of *res judicata*, should be understood in this light, and it might be surprising how much common ground there is on these points among different jurisdictions. Such commonality would be less surprising if we thought of these rules not as a strategy to dominate a contest for turf, but as part of an effort to introduce order and predictability within the ICDR system.

20. In the commentary that opens the SIFoCC Multilateral Memorandum on Enforcement of Commercial Judgments for Money, the learned authors observe that there is a "gradual drawing together of the approaches of the civil and common law jurisdictions",[20] but they also recognise that the rules in this area are complex and not always capable of generalisation.[21] I think the same can be said for much of the law of jurisdictional conflict. SIFoCC offers the ideal platform for meaningful engagement over such issues, and we have the opportunity to begin doing so under Theme 4 tomorrow. Perhaps, through such a forum, it might be possible to aspire to reach a common understanding of what the principles are, and to produce another Multilateral Memorandum, which would be a tremendous service to the international business community.

ii. Standards for the conduct of arbitration and mediation

21. Adopting a systematic perspective would likewise enable us to see commercial courts as playing a vital role in maintaining quality standards for the conduct of arbitration and mediation. In the context of arbitration, courts will have to rule on contests as to the fairness of the process and on allegations of breach of natural justice. In doing so, they must strike a balance between safeguarding the integrity of the arbitral process, and not permitting disgruntled parties to contrive such allegations just to set aside the award – a phenomenon that has led to the coining of the term "due process paranoia".[22] Divergence in the jurisprudence of different courts on these standards can cause confusion and compromise the conduct of effective arbitration.

22. With the increasing adoption of the Singapore Convention on Mediation, commercial courts will soon be faced with similar challenges arising from

mediated settlement agreements. One ground for the refusal of enforcement under the Singapore Convention is a “serious breach” by a mediator of standards applicable to the mediation.[23] It will fall upon commercial courts to consider and articulate what amounts to such a “serious” breach, and broad consistency across jurisdictions will be equally important here.

23. SIFoCC provides the ideal setting for judges to understand diverse views on how these standards should be calibrated, but to do this, they will also need a real understanding of the realities of arbitration and mediation practice. In Theme 1 of this Meeting, we saw judges and representatives from the other disciplines in ICDR exchanging their perspectives. Imagine the benefits of SIFoCC institutionalising a regular dialogue on these matters among judges, arbitrators and mediators to raise awareness and understanding among the key players on all sides, with a view to working towards a set of shared perspectives on these issues. I note that this was precisely what Judge Dominique Hascher, representing the International Council for Commercial Arbitration, suggested in the Theme 1 discussion this morning.

B. Enhancing the efficacy of adjudication

24. A second facet of ICDR in which SIFoCC can lead the way is in raising the effectiveness of adjudication and the capabilities of adjudicators. I have in mind new types of issues or challenges that all of us involved in international dispute resolution are likely to face. Let me illustrate this with some examples.

i. Complexification

25. I begin with the challenge of complexification. This is the phenomenon of disputes becoming so factually rich and technically complex that they threaten to become virtually impossible to adjudicate in the traditional ways, because they surpass the ability of any single adjudicator to fully comprehend and analyse. Solutions that aim to increase the efficiency of adjudication are important but can only take us so far.[24] When faced with a truly complex dispute, an adjudicator will have to find more drastic approaches to downsize it to a manageable scale. These may include relatively radical ideas that might challenge our traditional assumptions, such as representative sampling, bellwether trials,[25] and the use of summary procedures to dispose of lower-value claims in large trials.[26] There is immense value to be had if these ideas were studied, discussed and shared across as wide a community of dispute resolvers as possible. Not only would this promote their acceptability, it would also shine a light on mistakes and best practices alike for our collective benefit.

26. The value of seeing other disciplines, such as mediation, as part of an integrated ICDR system becomes especially evident in this context. Litigation and arbitration tend to be rights-based approaches to dispute resolution, whereas mediation is generally more interest-based. But these are not binary options. Sometimes, our interests may lie in moderating our insistence upon our rights and we can do this by incorporating techniques such as mediation or early neutral evaluation within the adjudication process itself.[27] This has been used to great success in complex insolvencies. A good example of this was in the collapse of Lehman Brothers, where the mediation protocol adopted

by the US Bankruptcy Court resulted in the settlement of hundreds of cases yielding billions of dollars for creditors.[28] Even where the whole dispute cannot be settled, the incorporation of such techniques can reduce the number and scope of procedural and substantive disputes that the court must rule on. Is it not time for us to engage in these dialogues with our fellow dispute resolvers? Theme 2 of this Meeting started precisely such a dialogue, and SIFoCC affords a platform for us to continue that conversation – perhaps with the aim of finding ways to combine our diverse crafts in a shared commitment to better serve those engaged in transnational commerce.

ii. Transnational issues

27. Looking further ahead, the global issues that I referred to at the start of my address will be another emerging source of complexification which we cannot afford to leave to be addressed within jurisdictional siloes. The law's response to climate change is a central example. This can come at a number of levels. First, tremendous investment will be needed as part of the global response to climate change,[29] and many of these will inevitably give rise to disputes that will need to be adjudicated. Second, through the Chancery Lane Project I mentioned earlier, and other avenues such as counterclaims in investor-state arbitration for damage caused by the investor to the environment,[30] we may have to reconsider our understanding of the usual patterns of legal rights and obligations in transnational commerce. Third, and most significantly, citizens may seek to hold governments, and perhaps also businesses, directly accountable for their contributions to climate change or their failure to mitigate it.[31]

28. The discussion we will be having under Theme 3 tomorrow, on how corporate legal responsibility and governance can respond to climate change, will be an important start. But I believe it will only be a preface to what will need to be a much wider-ranging discussion within the transnational system of commercial justice of the issues that we should be thinking about and the developments that are already afoot as the law responds to climate change. And again, I suggest that SIFoCC is especially well-placed to be at the vanguard of this global effort.

C. The ICDR system in action

29. Let me pull these threads together with an example of how systematic thinking has informed remarkable advances in the approach to managing complex international disputes in the field of cross-border insolvency. The Nortel Group comprised more than 130 companies located in more than 100 countries.[32] Following its insolvency, some US$7.3 billion was raised from the sale of the Group's intangible assets. The problem was that it was impossible to view these assets as being located in any one jurisdiction or owned by any one subsidiary.[33] As the Ontario Superior Court of Justice described it, the Nortel Group was a "highly integrated multinational enterprise with a matrix structure that transcended geographic boundaries and legal entities".[34] This could be said of any number of large companies today. The Ontario Superior Court and the US Bankruptcy Court for the District of Delaware decided to hold a joint trial to determine how to allocate the sale proceeds.[35] Under an agreed cross-border insolvency protocol, joint hearings took place before both courts with the judge, the lawyers and the witnesses in each courtroom connected to each other electronically.[36] Outside of the hearings,

the two presiding judges communicated directly with each other in accordance with the protocol, and were able to determine that they could reach consistent rulings to distribute all the money. This is a stunning example of courts, the parties and their lawyers taking a systems-based approach to the resolution of a hyper-complex transnational dispute. If the Ontario and US courts had chosen to act within their own jurisdictional siloes, it would have been much more difficult, assuming it were possible at all, for the Group to be wound up in an orderly manner that preserved value for its creditors.

30. Because of cases such as this, many insolvency judges have come to recognise the tremendous value of being able to communicate with one another when handling discrete parts of a cross-border insolvency. In 2016, a transnational group of like-minded insolvency judges came together in Singapore to form the Judicial Insolvency Network (or "JIN"), and developed a set of guidelines for court-to-court communications that could readily be adopted by courts across the world.[37] These guidelines have been incorporated into the Rules or Practice Directions of a number of courts around the world, and have already been invoked in some cases.[38]

31. Taking an even broader systemic perspective, those in the world of cross-border insolvency have recognised that such matters depend on a consistent overarching framework being available for their management. UNCITRAL first developed a Model Law on Cross-Border Insolvency to this end and then, seeing that the insolvency of *groups* of companies posed unique issues of coordination and the need for particular cross-jurisdictional solutions, it published a Model Law on Enterprise Group Insolvency in 2019 to promote a common and systematic approach to such cases.

32. In these examples, we see the tremendous value of approaching our work from the perspective that we are each components of a larger ICDR system. I began by suggesting how we could conceptualise this system. While I acknowledge the scale of this vision, I also suggest that many of the foundational elements are already in place. The need of the moment is to dare to go further and reframe the various moving parts not as discrete elements pointing in vaguely the same direction, but instead as components of a transnational system of justice that regulates cross-border commercial activity. This will surely facilitate the development of coherent and consistent transnational legal norms in many of these diverse areas of procedural and substantive law. That would better serve the needs of international commerce by promoting what Chief Justice James Allsop has called "a culture of problem solving" that goes beyond black letter law and discrete processes, and instead focuses on the sensible and effective resolution of disputes as part of a system.[39] Finally, by sustaining a reputable ICDR system, we also strengthen the global rule of law.[40]

III. Part 3: The future of SIFoCC

33. All of this also shows why it is so important to have a platform such as SIFoCC. Besides building up an international community of commercial judges, SIFoCC can bring together the leading experts and institutions in the ICDR system as a whole. I congratulate the organisers of this year's Meeting for including representatives from arbitral and mediation institutions, and I look

forward to continued exchanges with them and other players in this space under the SIFoCC umbrella.

34. I suggest that we now look into establishing formal partnerships between SIFoCC and some of the leading arbitration and mediation institutions so as to formalise our working relationships with them. This would recognise and underscore the importance of a systematic approach to ICDR and to the development of transnational commercial law. I suggest that we further consider including representatives from the world of arbitration and mediation in the SIFoCC working groups, so as to ensure that SIFoCC's endeavours are developed from the perspective of an integrated ICDR system. In the more distant future, we might envisage the establishment of a research unit and the publication of materials that promote the systemisation of ICDR. This might even see us collaborating with organisations such as the Asian Business Law Institute, the European Law Institute and the American Law Institute on the development of international commercial law, or perhaps engaging in dialogue with other bodies actively pursuing the project of convergence.

35. As SIFoCC's membership and partnerships grow, this will further enrich the ongoing conversation among the stakeholders in the transnational system of commercial justice. This will help ensure that commercial courts and other dispute resolution providers around the world are equipped with the knowledge, tools and practices to support the delivery of justice nationally and internationally. Justice David Barniville spoke for all of us this morning when he highlighted how much we have learnt from the conversations we have had today. We will need all the help we can get if we are to address the global challenges to which the flourishing of the world economy, and indeed our collective fates, are tied, and SIFoCC promises to be a vital ally in that endeavour.

36. The vision I have outlined might seem like a moon-shot, but it is a worthwhile goal because there will be many gains to be had from securing such a system, built on a shared vision and a mutual understanding among judges and dispute resolvers around the world. That such a system might help our world meet challenges as important as poverty and climate change underlines the responsibility on us, together, to keep this work going. And it is made more exciting by the fact that we have actually already commenced our journey. It has been my privilege to present it to you this evening. Thank you.

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[1] Sundaresh Menon, "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 Australian Law School and the Supreme Court of Western Australia, 27 July 2022) at https://www.judiciary.gov.sg/docs/default-source/news-docs/chief-justice-sundaresh-menon's-address-on-transnational-justice.pdf ("Law of Commerce in the 21st Century"); and Sundaresh Menon, "Justice in a Globalised Age" (3rd Judicial Roundtable on Commercial Law: Keynote Lecture, 29 September 2021) at https://www.judiciary.gov.sg/docs/default-source/news-docs/3rd-judicial-roundtable-on-commercial-law.pdf ("Justice in a Globalised Age").

[2] See “Law of Commerce in the 21st Century” at para 12.

[3] See “Justice in a Globalised Age” at paras 23–24.

[4] “Law of Commerce in the 21st Century” (n 1 above).

[5] See Sundaresh Menon, “Roadmaps for the Transnational Convergence of Commercial law: Lessons Learnt from the CISG” (speech at the 35th Anniversary of the CISG, 23 April 2015) (“Lessons Learnt from the CISG”) at paras 7–8.

[6] See James Allsop and Samuel Walpole, “International Commercial Dispute Resolution as a System” in Sundaresh Menon and Anselmo Reyes (eds), *Transnational Commercial Disputes in an Age of Anti-Globalism and Pandemic* (Hart Publishing, forthcoming 2022) (“International Commercial Dispute Resolution as a System”) at pp 50–51.

[7] See Sundaresh Menon, “Doing Business Across Asia: Legal Convergence in an Asian Century” (Opening Address, 21 January 2016) at https://www.judiciary.gov.sg/docs/default-source/news-docs/doing-business-across-asia---legal-convergence-in-an-asian-century-final-version-after-delivery--260116.pdf (“Legal Convergence in an Asian Century”) at para 6.

[8] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958, entered into force on 7 June 1959).

[9] Following the deposition by Turkmenistan of its instrument of accession on 4 May 2022.

[10] With the 2005 Hague Convention on Choice of Court Agreements (the Convention of 30 June 2005 on Choice of Court Agreements (entered into force on 1 October 2015))and the Singapore Convention on Mediation (the United Nations Convention on International Settlement Agreements Resulting from Mediation (20 December 2018, entered into force on 12 September 2020)), the international dispute resolution community has been working to replicate the success of the New York Convention in litigation and mediation respectively.

[11] And there is a further possible dimension to preventing relitigation by holding that in at least some circumstances, an application to resist enforcement of an arbitral award should be determined with reference to the outcome of a similar earlier application, whether before a different enforcement court, or to set aside the arbitral award in the seat court. There are differing views on this, but I have argued elsewhere that the best approach would be to apply the doctrine of issue estoppel transnationally, so that if the criteria for issue estoppel are satisfied, a party should not be allowed to relitigate the same ground for resisting enforcement after the issue has already been decided by another court: see Sundaresh Menon, “The Role of the National Courts of the Seat in International Arbitration” (Keynote address at the 10th Annual International Conference of the Nani Palkhivala Arbitration Centre, 17 February 2018) at https://www.judiciary.gov.sg/news-and-resources/news/news-details/chief-justice-sundaresh-menon-keynote-address-delivered-at-the-10th-annual-international-conference-of-the-nani-palkhivala-arbitration-centre-2018-the-role-of-the-national-courts-of-the-seat-in-international-arbitration at para 32.

On the other hand, it should be noted that issue estoppel will typically not apply where the ground for setting aside is public policy, since the issue before each court is whether the award is consistent with the public policy of the jurisdiction where the court is located, and there is therefore no identity of subject matter in relation to this issue when it is decided in different jurisdictions (see *ibid* at para 34).

[12] Similarly, in relation to the *process* of international dispute resolution, it is unsurprising that international commercial arbitration has led the way in promoting convergence in the *conduct* of dispute resolution, since it tends to involve parties hailing from different legal traditions. The International Bar Association's Rules on the Taking of Evidence in International Arbitration, first adopted in 1999, sought to harmonise this process by borrowing from practices developed in common law and civil law jurisdictions, as well as those indigenous to international arbitration. See IBA Rules of Evidence Review Task Force, *Commentary on the revised text of the 2020 IBA Rules on the Taking of Evidence in International Arbitration* (2021) at https://www.ibanet.org/MediaHandler?id=4F797338-693E-47C7-A92A-1509790ECC9D, at p 3.

[13] United Nations Convention on Contracts for the International Sale of Goods (11 April 1980, entered into force on 1 January 1988). See "Lessons Learnt from the CISG" (n 5 above).

[14] See *ICC Commission Report: Resolving Climate Change Related Disputes through Arbitration and ADR* (ICC, 2019) at https://iccwbo.org/climate-change-disputes-report, at para 2.4 and 4.1.

[15] "About the Chancery Lane Climate Project" at https://chancerylaneproject.org/about/ (accessed on 15 July 2022).

[16] "SIFoCC Multilateral Memorandum on Enforcement of Commercial Judgments for Money" (SIFoCC, revised 2nd edn, 2021) at https://sifocc.org/2021/04/21/sifocc-multilateral-memorandum-on-enforcement-now-with-international-working-group-commentary/ ("SIFoCC Multilateral Memorandum").

[17] "First SIFoCC International Working Group: International Best Practice in Case Management" (27 May 2020) at https://sifocc.org/app/uploads/2020/05/SIFoCC-Presumptions-of-Best-Practice-in-Case-Management-May-2020.pdf.

[18] "Delivering justice during the Covid-19 pandemic and the future use of technology – Memorandum" (SIFoCC, May 2020) at https://sifocc.org/app/uploads/2020/05/SIFoCC-Covid-19-memorandum-29-May-2020.pdf; "Second SIFoCC COVID-19 Memorandum" (SIFoCC, March 2021) at https://s3-eu-west-2.amazonaws.com/sifocc-prod-storage-7f6qtyoj7wir/uploads/2021/03/6.7119_JO_Second_SIFoCC_COVID-19_memorandum_WEB.pdf.

[19] See Sundaresh Menon, "The Complexification of Disputes in the Digital Age" (Goff Lecture 2021, 9 November 2021) at https://www.judiciary.gov.sg/docs/default-source/news-docs/goff-lecture-2021.pdf ("The Complexification of Disputes") at para 54(a).

[20] "SIFoCC Multilateral Memorandum" at p 15, para 21. The commentary is authored by Sir William Blair and Judge François Ancel.

[21] "SIFoCC Multilateral Memorandum" at p 7, para 5.

[22] See Sundaresh Menon CJ, "Dispelling due process paranoia: Fairness, efficiency and the rule of law", speech at the Chartered Institute of Arbitrators Australia Annual Lecture 2020 (13 October 2020) ("Dispelling due process paranoia") at paras 4–5.

[23] See Art 5(1)(e) of the United Nations Convention on International Settlement Agreements Resulting from Mediation (20 December 2018, entered into force on 12 September 2020) ("the Singapore Convention").

[24] See "The Complexification of Disputes" at paras 42, 56.

[25] Which has seen widespread use in the United States: see Alexandra D Lahav, "Bellwether Trials" (2008) 76(3) George Washington Law Review 576.

[26] See Appendix E of the Singapore International Commercial Court Rules 2021, setting out a voluntary simplified adjudication process protocol for cases under the Technology, Infrastructure and Construction List.

[27] See para 10.17 of the *Business and Property Courts of England & Wales Chancery Guide 2022*; and see generally Sundaresh Menon, "The JDRN: Remoulding the Justice System" (Opening address at the Inaugural Meeting of the International Judicial Dispute Resolution Network, 18 May 2022) at https://www.judiciary.gov.sg/docs/default-source/news-and-resources-docs/chief-justice-sundaresh-menon's-opening-address-at-the-inaugural-jdrn-meeting.pdf.

[28] See James M Peck, "Plan Mediation as an Effective Restructuring Tool" (Speech at the Singapore Academy of Law, 1 April 2019). For more on different forms of mediation that can be applied in insolvency proceedings, see "Report of the Committee to Strengthen Singapore as an International Centre for Debt Restructuring" (Ministry of Law, 20 April 2016) at para 3.54.

[29] An estimated US$600 billion per year is needed in capital spending on clean energy in emerging and developing economies alone in order to limit the global temperature rise to 1.65°C: "Financing Clean Energy Transitions in Emerging and Developing Economies" (International Energy Agency, 2021) at https://www.iea.org/reports/financing-clean-energy-transitions-in-emerging-and-developing-economies, at p 26. Much of these investments will need to be transnational in nature: *ibid*, at p 58.

[30] See, for instance, the counterclaim in *David Aven v The Republic of Costa Rica*, Case No UNCT/15/3.

[31] Examples of recent cases in the Federal Court of Australia are *Minister for the Environment v Sharma* [2022] FCAFC 35 and *Pabai Pabai & anor v Commonwealth of Australia* VID622/2021; see also "Landmark class action lawsuit sees frontline communities sue Australian Government for climate crisis" (Grata Fund, 26 October 2021) at https://www.gratafund.org.au/climate_case_release. There has also been successful litigation against the Dutch government for failure to set adequate

emissions targets: see *The State of the Netherlands v Urgenda Foundation*, ECLI:NL:HR:2019:2007 (20 December 2019, Supreme Court of the Netherlands).

[32] *Re Nortel Networks Corp* [2015] OJ No 2440 (Ontario Superior Court of Justice) ("*Re Nortel*") at [1].

[33] *Re Nortel* at [195]–[203].

[34] *Re Nortel* at [16].

[35] See *Re Nortel Networks Corp* [2013] OJ No 1579 (Ontario Superior Court of Justice).

[36] *Re Nortel* at [6]–[10].

[37] The JIN Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters: see "Paving the way for improved coordination of cross-border insolvency proceedings: Adoption of the guidelines for communication and cooperation between courts in cross-border insolvency matters" (Supreme Court of Singapore, 1 February 2017) at https://www.judiciary.gov.sg/news-and-resources/news/news-details/paving-the-way-for-improved-coordination-of-cross-border-insolvency-proceedings-adoption-of-the-guidelines-for-communication-and-cooperation-between-courts-in-cross-border-insolvency-matters.

[38] See K Shanmugam, Speech at the launch of the INSOL Asia Hub (5 August 2019) at para 15 (referring to the case of Aralez Pharmaceuticals in the Ontario Superior Court of Justice).

[39] "International Commercial Dispute Resolution as a System" at pp 55–56; see also James Allsop, "Commercial and investor-state arbitration: The importance of recognising their differences" (ICCA Congress 2018 Opening Keynote Address, 16 April 2018).

[40] "International Commercial Dispute Resolution as a System" at p 72.

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