LECTURE IN BAHRAIN

"The Transnational System of Commercial Justice and the Place of International Commercial Courts"

Tuesday, 9 May 2023

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Supreme Court of Singapore

Your Excellency Mr Ali bin Saleh Al Saleh, Chairman of the Shura Council
Your Excellency Shaikh Khaled bin Ali Al Khalifa, the Honourable Chief Justice of Bahrain
Your Excellency Dr Abdullatif bin Rashid Al Zayani, Minister of Foreign Affairs
Your Excellency Mr Youssef bin Abdulhussein Khalaf, Minister of Legal Affairs
Judges of the Bahrain Judiciary
Distinguished guests
Ladies and gentlemen

1. Good morning. It is a great honour for me to address this eminent audience, at the dawn of a historic collaboration between the judiciaries of the Kingdom of Bahrain and the Republic of Singapore. Let me express my heartfelt appreciation to Chief Justice Shaik Khaled bin Ali for inviting the Singapore delegation to visit Bahrain. We are delighted to be here, and are most grateful for the extremely warm hospitality that has been extended to us throughout our visit. We have truly been made to feel very

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much at home, and we thank you for going to such lengths. Let me also thank the Chief Justice for inviting me to address you, on "The Transnational System of Commercial Justice and the Place of International Commercial Courts". This is a subject that underlies a key plank of our emerging collaboration: namely, the project to establish the Bahrain International Commercial Court (or "BICC").

2. What then is the role and value of international commercial courts (or "ICCs")? I propose to address this issue by exploring the place and function of ICCs within a broader system of laws and institutions. My thesis is as follows. Over the last several decades, a transnational system of commercial justice, which I will call the "TSCJ" or the "Transnational System", has evolved organically to govern the efficient resolution of international commercial disputes. This has not happened as a result or consequence of a single, intentional act or a particular multilateral instrument. Rather, it is possible to see this in terms of a multitude of discrete developments that have been driven by the recognition that as the volume of transnational trade has grown, so too, inevitably, has the incidence of transnational commercial disputes. These feature some unique traits and call for an approach that is attuned to their needs, so that the incidence of such disputes does not clog the growth of cross-border commerce. This has underlain the organic development of the TSCJ to a point where, today, it plays a vital role in the rules-based international order. I suggest that ICCs and other commercial courts are central to the

TSCJ, because they serve as the *superintendents* of the system, and those that do this well have the potential to turn their jurisdictions into key nodes or centres of dispute resolution within the Transnational System. In short, ICCs play a *dual* role. They promote the TSCJ as a whole, and they also advance the legal infrastructure of their own jurisdictions. This, in a nutshell, is their unique and critical value proposition.

3. I propose to unpack this thesis in four main parts:

(a) First, I will provide an overview of the TSCJ and a brief account of its emergence, before examining its role and importance.

(b) Next, I will elaborate on the features of the TSCJ, with a focus on those aspects that justify our viewing it as a *system*.

(c) In the third part of my address, I will explain *how* commercial courts play a crucial role as *superintendents* of the TSCJ.

(d) And finally, I will explain *why* ICCs have the potential to help their jurisdictions become *nodal* jurisdictions within the Transnational System.

I. The TSCJ: its emergence and its significance

A. The rise of the TSCJ

4. Let me begin by defining the TSCJ. In gist, this is the entire legal framework for the resolution of international commercial disputes,

comprising *legal institutions* as well as the *laws and principles* that they create and apply. The *institutions* of the TSCJ include dispute resolution bodies such as commercial courts and arbitral and mediation institutions, which administer the legal processes, along with international organisations like UNCITRAL and UNIDROIT, which create and promote instruments of international commercial law. And the *laws and principles* of the TSCJ are those arising from the panoply of treaties and model laws, domestic legislation, judgments and awards, and soft law codes and principles relating to international commercial disputes.

5. The modern Transnational System is a descendant of earlier transnational systems of commercial law and dispute resolution, that had arisen across history in response to cross-border trade.[1] Its most prominent forebear was the medieval law merchant, which emerged in Europe during the Middle Ages. This comprised a mix of state and private rules, principles and customs relating to merchants, which was applied by a network of merchant and other courts and tribunals.[2] Notably, a central feature of this body of law was the development of special *procedural* rules for

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1 James Allsop and Samuel Walpole, "International Commercial Dispute Resolution as a System" in *Transnational Commercial Disputes in an Age of Anti-Globalism and Pandemic* (Sundaresh Menon and Anselmo Reyes (eds)) (Hart Publishing, 2023) ("*Transnational Commercial Disputes*") ch 2 at p 54.

2 Emily Kadens, "Order Within Law, Variety Within Custom: The Character of the Medieval Merchant Law" (2004) 5(1) Chicago Journal of International Law 39 ("Kadens") at 42; Ralf Michaels, "The True Lex Mercatoria" (2007) 14(2) Indiana Journal of Global Legal Studies 447 ("Michaels") at 454; John Linarelli, "Global Legal Pluralism and Commercial Law" in *The Oxford Handbook of Global Legal Pluralism* (Paul Schiff Berman ed) (Oxford University Press, 2020) ch 25 ("Linarelli") at p 690.

commercial disputes, which enabled commercial parties to avoid some of the formalities of proof and other technical procedures, and thereby secure a swift resolution of their disputes.[3]

6. From the 17th to the 19th centuries, the medieval law merchant gradually lost its international character, as it was assimilated into national legal systems.[4] But in the second half of the 19th century, the first shoots of the modern TSCJ appeared when a movement for the harmonisation of private law began in Europe.[5] This culminated in the establishment of the Hague Conference of Private International Law (or "HCCH"), which held its first session in 1893.[6]

7. Subsequently, after the First World War, the movement gained some strength.

   (a) In 1919, the desire of the global community to promote trade and thus secure peace led to the founding of the International Chamber

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3 Linarelli at pp 691–693; Kadens at 56–57.

4 For example, in France and Germany, it was incorporated into commercial codes; while in England, it was subsumed into the common law, most notably by Lord Mansfield: see Clive M Schmitthoff, "International Business Law: A New Merchant" (1961) 2 Current Law and Social Problems 129 at 136–139; Roy Goode, Herbert Kronke and Ewan McKendrick, *Transnational Commercial Law: Texts, Cases and Materials* (Oxford University Press, 2nd Ed, 2015) ("Goode, Kronke and McKendrick"), para 1.25.

5 Goode, Kronke and McKendrick, para 1.26; Vikki Rogers and Kaon Lai, "History of the CISG and Its Present Status" in *International Sales Law: A Global Challenge* (Larry A DiMatteo ed) (Cambridge University Press, 2014) ch 2 ("Rogers and Lai") at 9.

6 For the background, see Kurt Lipstein, "One Hundred Years of Hague Conferences on Private International Law" (1993) 42 International and Comparative Law Quarterly 553 at 554–557.

of Commerce,[7] which launched its International Court of Arbitration in 1923, and published the first editions of two important works – namely, the Uniform Customs and Practice for Documentary Credits (or the "UCP"), and the International Commercial Terms (or "INCOTERMS") – in 1933 and 1936 respectively.[8]

(b) Separately, in 1926, UNIDROIT was formed, and it then completed several projects in the interwar years. These included the first drafts of a uniform law on the international sale of goods, which laid the foundation for one of the central instruments of international commercial law: namely, the 1980 Vienna Convention on Contracts for the International Sale of Goods (or the "CISG").[9]

(c) Finally, two notable arbitration treaties – namely, the 1923 Geneva Protocol and the 1927 Geneva Convention – were also concluded during this period. These were the "first step[s] on the road" towards the international recognition and enforcement of arbitration agreements and awards.[10]

8. The development of the TSCJ was halted by the Second World War, but upon its end, the TSCJ expanded dramatically with the rise of globalisation

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7 Arthur Balfour, "The International Chamber of Commerce" (1927) 134 The Annals of the American Academy of Political and Social Science 124 at 124–125.

8 Jason Lin, "An Anatomy of the *Lex Mercatoria*" in *Transnational Commercial Disputes* ch 9 at p 258.

9 Rogers and Lai at 10.

10 Nigel Blackaby *et al*, *Redfern and Hunter on International Arbitration* (Oxford University Press, 5th Ed, 2009), at para 1.219.

and the broader rules-based international order.[11] Let me trace its development over the last eight decades, starting with the key *legal instruments*.

(a) First, in 1958, a central plank of the TSCJ was laid with the adoption of the New York Convention. This is the foundation of international arbitration today and, as Lord Mustill once observed, it can perhaps "lay claim to be the most effective instance of international legislation in the entire history of commercial law".[12]

(b) Next, in 1966, UNCITRAL was formed to promote and harmonise the law of international trade. Since then, it has developed many significant instruments, including the CISG, the Model Laws on International Commercial Arbitration and Cross-Border Insolvency and, most recently, the Singapore Convention on Mediation.

(c) And the HCCH and UNIDROIT have continued to develop several important works. Two examples are the Hague Choice of Court Convention ("Choice of Court Convention"), and the UNIDROIT Principles of International Commercial Contracts (or the "UPICC").

9. This explosion of legal instruments was accompanied by the proliferation of the *institutions* of the TSCJ, which fall into two main groups. The first

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11 This was part of a broader process of "juridification" (*ie*, the rise of legal rules and institutions in various domains of human life): see Georgios Dimitropoulos, "International Commercial Courts in the 'Modern Law of Nature': Adjudicatory Unilateralism in Special Economic Zones" (2021) 24 Journal of International Economic Law 361 ("Dimitropoulos") at 372.

12 Michael Mustill, "Arbitration: History and Background" (1989) 6(2) Journal of International Arbitration 43 at 49.

comprises *dispute-resolution bodies*. Let me first touch on the rise of arbitral and mediation institutions. The growth of global trade and investment sparked a boom in international arbitration, which fuelled a very substantial expansion in the number, size, and caseloads of arbitral institutions. For example, the annual caseload of the ICC International Court of Arbitration grew from 33 cases in 1955 to 946 cases in 2020,[13] while that of the Singapore International Arbitration Centre grew from 64 cases in 2003 to 469 cases in 2021.[14] Further, the recent upsurge in international commercial mediation has led to the creation of bodies like the ICC International Centre for ADR and the Singapore International Mediation Centre.

10. In addition, over the last two decades, there has been a marked increase in the number of International Commercial Courts.[15] These are domestic courts that cater to international commercial disputes. Examples include the Dubai International Financial Centre Court, which was launched in 2006, and the Singapore International Commercial Court (or "SICC") and

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13 David W Rivkin, "The Impact of International Arbitration on the Rule of Law", Arbitration International 327 at 337; ICC, "ICC Dispute Resolution Statistics: 2020": https://iccwbo.org/news-publications/arbitration-adr-rules-and-tools/icc-dispute-resolution-statistics-2020/.

14 Gary Born, *International Arbitration: Law and Practice* (Kluwer Law International, 3rd Ed, 2021), p 17; SIAC, "SIAC Commemorates 30th Anniversary in 2021 with High Caseload": https://siac.org.sg/siac-commemorates-30th-anniversary-in-2021-with-high-caseload.

15 Jianping Shi, "The Landscape of International Commercial Courts" in *Transnational Commercial Disputes* ch 3; Pamela K Bookman, "The Adjudication Business" (2020) 45 Yale Journal of International Law 227 ("Bookman") at 239–261; Weixia Gu and Jacky Tam, "The Global Rise of International Commercial Courts: Typology and Power Dynamics" (2022) 22(2) Chicago Journal of International Law 443.

the China International Commercial Court (or "CICC"), which were formed in 2015 and 2018 respectively. The rise of these ICCs contributed to the establishment of a global network of commercial courts – namely, the Standing International Forum of Commercial Courts (or "SIFoCC") – in 2017.

11. The second group of institutions of the TSCJ are bodies that promote convergence in its laws, principles, practices, and even certain professional standards. These, too, have proliferated and further contributed to the development of the TSCJ. Aside from UNCITRAL and the HCCH, which I have already mentioned, other examples include the International Mediation Institute, which was established in 2007 to develop principles, standards, and training for mediation,[16] and the Asian Business Law Institute (or "ABLI"), which was launched in 2016 to foster the harmonisation of Asian business laws.

B. The role of the TSCJ

12. In sum, over the last century, the TSCJ – a complex edifice of institutions and laws governing international commercial disputes – has clearly taken shape, and this is fundamentally important for three reasons.

13. First, it sustains cross-border commerce. The Transnational System encompasses the legal rules and principles that govern international

[16] International Mediation Institute: https://imimediation.org/about/.

commercial transactions, which are vital to cross-border trade because these rules and principles are the "currency of trust" that enables international commerce. Indeed, the TSCJ also provides the institutions through which commercial parties can seek to vindicate their legal rights, and so underlies and facilitates cross-border business.[17]

14. Second, by promoting cross-border trade, the TSCJ *has* supported the broader rules-based international order of which it is part. This multilateral order has been the bedrock of peace and the major advances in prosperity that were achieved after the end of the Second World War. Admittedly, over the last two decades, that system has come under increasing strain, as a series of crises and disruptions have fomented something of a retreat from globalisation.[18] The turn began with the 9/11 attacks, and accelerated with the global financial crisis, the United Kingdom's vote for Brexit, and the change of administration in the United States in 2017. This was followed by the COVID-19 pandemic, which led to the closing of borders and the fracturing of supply chains. Then came the war in Ukraine that broke out last year, which has become a massive humanitarian crisis, and

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[17] Sundaresh Menon CJ, "Introduction: Justice in a Globalised Age" in *Transnational Commercial Disputes* ("Justice in a Globalised Age"), pp 3–4; 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) ("The Law of Commerce in the 21st Century"), para 4.

[18] Justice in a Globalised Age, pp 6–8; The Law of Commerce in the 21st Century, paras 5–6.

has raised the spectre of a world divided into hostile blocs with conflicting ideologies.[19]

15. The upshot is that multilateralism is under considerable strain. Yet there could be no worse time to abandon that ethos, because our world is facing a host of profound challenges that can only be adequately addressed through collective action.[20] The paradigm example is climate change, which calls for a coordinated response on multiple fronts to mitigate and adapt to its effects; and there are other issues like global health security and the peril of stagflation that demand global solutions. In this light, it seems to be more critical than ever that we strive to preserve and promote multilateralism. And I suggest that the TSCJ can significantly advance this goal, in three main ways.

    (a) First, by advancing trade and economic activity, the TSCJ shows that the rules-based international order is not a lofty abstraction. Rather, it has immense practical value, borne out in the quantifiable metrics of rising living standards, falling mortality and other objective indicators. Recognising the tangible benefits of the TSCJ can help foster fidelity to the broader multilateral system.

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19 Edward Wong and Ana Swanson, "Ukraine War and Pandemic Force Nations to Retreat From Globalization", *The New York Times* (22 March 2022): https://www.nytimes.com/2022/03/22/us/politics/russia-china-global-economy.html.

20 Justice in a Globalised Age, pp 11–13; The Law of Commerce in the 21st Century, paras 8 and 12–15.

(b) Second, as I will explain shortly, the TSCJ reflects many forms of collaboration and convergence. This demonstrates that despite our differences, we can work together to advance common goals and shared interests. In this light, the TSCJ can perhaps inspire broader cross-border efforts to tackle our global challenges.

16. That brings me to the third way in which the TSCJ is important. I suggest that the TSCJ will contribute to our responses to global challenges, by generating and helping to develop the relevant legal norms. Take climate change, for instance.[21] The Chancery Lane Project, a global collaboration between lawyers, has published template clauses that advance climate-related goals.[22] Examples include clauses that embed green obligations into the articles of association of a company, and contractual provisions that link the ultimate sum payable under a contract to the meeting of emissions targets.[23] Some such clauses have already been adopted by major businesses like NatWest and Vodafone;[24] and it will likely soon fall to arbitral tribunals and commercial courts to interpret them. Adjudicators have already decided climate-related disputes involving commercial parties. For example, in *Aven v Costa Rica*, an arbitral tribunal held that an investor could in principle be held liable for breaching international legal

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21 The Law of Commerce in the 21st Century, paras 18 and 42–44

22 The Chancery Lane Project, "About the Chancery Lane Project": https://chancerylaneproject.org/about/.

23 The Chancery Lane Project, "Green Company Articles" and "Climate-Linked Contractual Discretions": https://chancerylaneproject.org/climate-clauses/green-company-articles/; https://chancerylaneproject.org/climate-clauses/climate-linked-contractual-discretions/.

24 The Chancery Lane Project, "Case Studies": https://chancerylaneproject.org/case-studies/.

obligations relating to the environment.[25] Such decisions will generate and develop the legal norms that will guide business decisions, and thereby form part of the global response to climate change.

II. The systemic features of the TSCJ

17. You will notice that I have described the TSCJ as a *system* of laws and institutions. Yet unlike national legal systems, the TSCJ lacks centralised authorities; and this begs the question whether it is truly a *system*, or simply a loose collection of the discrete players and principles in the vast field of international commercial law. I suggest that the TSCJ can and should be seen as a system, for three main reasons.

A. Convergence in procedural and substantive law

18. First, the TSCJ reflects *convergence in its procedural and substantive law*. This is significant because such convergence promotes legal consistency, which is a core feature and value of all legal systems. In a domestic regime, legal consistency is attainable because the law emanates from a limited set of sources and there are various rules that avoid legal conflicts such as the hierarchy of norms and the doctrine of precedent. But in the TSCJ, there are no predominant law-making bodies, and few if any overarching rules to secure uniformity in the law. Yet despite these

[25] *David Aven v The Republic of Costa Rica*, Case No UNCT/15/3, Final Award at [738] and [742]. Ultimately, however, the tribunal dismissed the counterclaim on the basis of a lack of pleading and evidence: at [747].

realities, there has been substantial convergence in the laws of the TSCJ. This suggests an implicit adherence to the value of legal consistency, or at least a broad endeavour to realise this value, which in turn reflects a shared commitment to a *systemic* approach to transnational commercial law and dispute resolution.

19. Let me explain this first by reference to convergence in the *procedural norms* of the TSCJ. This is as central to the TSCJ today, as it was in the medieval law merchant,[26] because these procedural rules regulate the ability of commercial parties to access the remedies that vindicate their legal rights.[27] There are three main areas of procedural convergence.

20. The first is the law on *the allocation of jurisdiction*. Let me focus on a central part of this field: the law on jurisdiction and arbitration agreements. Today, it is almost universally recognised that such agreements should generally be enforced. This convergence has been driven by the rise and widespread acceptance of the principle of party autonomy,[28] which has led states to empower private parties to transnational contracts to choose where their disputes will be decided.[29] In relation to jurisdiction agreements, the consensus that such clauses should typically be upheld

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[26] See paragraph 5 above.

[27] Sundaresh Menon CJ, "Procedure, Practice and the Pursuit of Justice", Keynote Address at the Litigation Conference 2022 (5 May 2022), para 4.

[28] For a historical overview of the rise of party autonomy, see Alex Mills, *Party Autonomy in Private International Law* (Cambridge University Press, 2018) ch 2.

[29] Alex Mills, "The Privatisation of Private (and) International Law" (2023) 76 Current Legal Problems (forthcoming, 2023) ("Mills, Privatisation"), Section 3C.

is reflected in the Choice of Court Convention. This mandates the enforcement of exclusive jurisdiction clauses in international cases subject to narrow exceptions, regardless of whether the chosen court has links to the parties or the dispute.[30] Similarly, the wide reception of the New York Convention and the Model Law on International Commercial Arbitration embeds the principle in most national laws that arbitration agreements should generally be enforced.[31] Indeed, there has also been convergence in how commercial courts apply this principle in applications to stay court proceedings in favour of arbitration – and I will come back to this shortly.

21. The second area of procedural convergence relates to *the process of adjudication*. Consider arbitration, for example. The overarching principle of due process is well-established; the procedural framework in the Model Law has been adopted by many jurisdictions; and in relation to evidence, the IBA Rules on the Taking of Evidence ("IBA Rules") is widely used in numerous arbitrations. Indeed, the IBA Rules are an exemplar of convergence in two ways. First, they are the *product* of convergence, having been crafted to reflect both common law and civil law procedures, and then revised to incorporate the best practices of international arbitration.[32] Second, the Rules have been a *driver* of convergence. For

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30 Mills, Privatisation, Section 3D.

31 Richard Garnett, "International Arbitration Law: Progress Towards Harmonisation" (2002) 3(2) Melbourne Journal of International Law 400 at 403.

32 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), pp 2–3: https://www.ibanet.org/MediaHandler?id=4F797338-693E-47C7-A92A-1509790ECC9D.

example, beyond arbitration, the Rules inspired the document disclosure procedures in the SICC.[33] This illustrates how the procedural law of the TSCJ reflects convergence across different modes of dispute resolution.[34]

22. The third area of procedural convergence relates to the enforcement of the outcomes of dispute-resolution. In arbitration, the New York Convention, with more than 170 parties, has established an almost universal regime for the enforcement of arbitral awards. Its success inspired both the Choice of Court Convention and the Singapore Convention on Mediation, which were crafted to create similar regimes for judgments arising from exclusive jurisdiction agreements and international commercial mediated settlement agreements respectively.[35] In time, these two treaties will likely foster harmonisation in national rules on the enforcement of judgments and settlement agreements.

23. Turning to convergence in the *substantive* law of the TSCJ, there has admittedly been less progress on this front as compared to procedural law;

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[33] Teh Hwee Hwee, Justin Yeo and Colin Seow, "The Singapore International Commercial Court in Action: Illustrations from the First Case" (2016) 28 Singapore Academy of Law Journal 692, para 20. A new set of rules on document disclosure applies to SICC cases commenced after 1 April 2022: see O 12 of the SICC Rules 2021. These rules are similar to the IBA Rules in some respects. For instance, there are similarities in what a party requesting disclosure must state in its request (see O 12 r 2(3) of the SICC Rules and Art 3(3) of the IBA Rules), as well as the grounds on which a requested party may resist disclosure (see O 12 r 4(2) of the SICC Rules and Art 9(2) of the IBA Rules).

[34] See further Alyssa S King, "Global Civil Procedure" (2021) 62(1) Harvard International Law Journal 223.

[35] Trevor Hartley and Masato Dogauchi, "Convention of 30 June 2005 on Choice of Court Agreements – Explanatory Report" (2013), p 31: https://assets.hcch.net/docs/0de60e2f-e002-408e-98a7-5638e1ebac65.pdf; Eunice Chua, "The Singapore Convention on Mediation - A Brighter Future for Asian Dispute Resolution" (2019) 9(2) Asian Journal of International Law 195 at 195.

but this is unsurprising, because national commercial laws must account for legitimate differences in the cultures and values of domestic legal systems. Despite this, there have been areas of commercial law that reflect significant convergence.

(a) A prime example is the law of international sales. The CISG, which has 95 state parties representing more than two-thirds of the global economy,[36] has created a widely used regime for the international sale of goods. And it has driven convergence in national laws on *domestic* sales, by serving as a model for such laws in China, Eastern Europe, and many Scandinavian states.[37]

(b) Next, the prevalence of standard form contracts in certain areas of commercial law has also fostered legal harmonisation. For example, there has been significant convergence in international construction law due to the wide use of the standard form contracts of the International Federation of Consulting Engineers (or "FIDIC"), in cross-border construction projects. Indeed, it has been argued that the principles reflected in the FIDIC forms of contract should be seen as part of a construction *lex mercatoria*, which adjudicators can draw on in interpreting international construction contracts.[38]

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[36] UNCITRAL, "Status: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG): https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status; UNCITRAL, "CISG@40": https://uncitral.un.org/en/cisg40.

[37] Michael Joachim Bonell, "The CISG, European Contract Law and the Development of a World Contract Law" (2008) 56(1) The American Journal of Comparative Law 1 at 5–6 and 19 ("Bonell").

[38] Charles Molineaux, "Moving Toward a Construction *Lex Mercatoria* – A *Lex Constructionis*" (1997) 14(1) Journal of international Arbitration 55.

(c) More broadly, there has also been some convergence in general contract law. A key driver of such harmonisation is the UPICC. This is a non-binding code of contract law principles, which has inspired the reform of civil law codes and has also influenced the approach of common law courts to issues such as good faith.[39]

B. Mechanisms that foster coherence

24. I turn to the second reason why the TSCJ can be seen as a system. The TSCJ includes principles and procedures *that promote its coherence,* by striving to speak with one voice as far as possible and are unified in their pursuit of key values such as finality, efficiency, and fairness. These, after all, are some of the core values we associate with our domestic legal systems.

25. In line with this, the TSCJ has developed *principles* that reduce the fragmentation and relitigation of disputes. These fall into two categories.

(a) The first comprises rules that *reduce the incidence of concurrent proceedings*, such as the principles on forum agreements that I noted earlier and the law on parallel proceedings. These help secure the objective that transnational disputes are, as far as possible, allocated to a single forum, for their comprehensive and holistic resolution.

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[39] Bonell at 18–21.

(b) The second set of principles relates to *the effect and enforcement of adjudicative decisions*. These include the doctrine of transnational issue estoppel, which provides that final and conclusive judgments of a foreign court of competent jurisdiction have preclusive effect, so that the merits of a dispute cannot be reopened before the court of the enforcement forum.[40] Similarly, the principles governing the recognition and enforcement of judgments and arbitral awards generally prohibit the merits review of earlier decisions, and provide only for narrow grounds of challenge relating to jurisdiction, due process, and public policy. All these rules bar or limit the relitigation of matters, and thus promote finality within the TSCJ.

26. Further, in striving for efficiency and effectiveness, the TSCJ has innovated with *procedures* that facilitate communication and cooperation between dispute-resolution bodies, with a view to delivering outcomes across borders that are broadly consistent or at least compatible. An exemplar of this is the Judicial Insolvency Network (or "JIN") Guidelines. These set out a model for collaboration between insolvency courts presiding over cross-border insolvency proceedings. Further, mechanisms have been developed that provide for issues of foreign law to be referred to the courts of the relevant jurisdiction. Again, I will expand on these examples shortly.

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

C. Continuing cooperation and conversation

27. I turn to the third systemic feature of the TSCJ: namely, *the continuing cooperation and conversation* within the system that seeks to improve its operation. The ongoing commitment to reform and refinement is critical to the health of any justice system. In this context, let me outline two types of collaboration that can be seen in the context of the Transnational System. The first is collaboration through international legal organisations like UNCITRAL, the HCCH and ABLI, which strive to promote harmonisation in the laws of the TSCJ.[41] The second form of collaboration concerns international judicial dialogue in both judicial and extra-judicial settings, and I will again return to this later.

28. These, then, are three aspects of the TSCJ that unify its various parts and justify our seeing it as a *system*. The challenge is to achieve wider acceptance of this idea among key players in this system, and that brings me to the role of commercial courts in this edifice.

III. The role of commercial courts in the TSCJ

29. In gist, commercial courts in fact serve as *superintendents* of the TSCJ. They can and do play a central role in overseeing and steering its development, thereby enhancing the coherence and strength of the system. There are three main aspects to this: first, commercial courts

[41] The Law of Commerce in the 21st Century, paras 31–32.

develop and harmonise the laws of the TSCJ, especially its procedure; second, they facilitate the coordinated resolution of cross-border disputes; and third, they drive collaboration and dialogue within the TSCJ to enhance its operation. I take each of these in turn.

A. Developing and harmonising the laws of the TSCJ

30. First, commercial courts help develop the laws of the TSCJ, especially its procedures. As I noted earlier, the TSCJ remains a decentralised structure without an overarching authority to establish its rules. Although legal instruments are an important part of the legal framework, they are limited in scope, and inevitably raise issues of interpretation and application, and these will usually be settled by commercial courts. We see this especially as commercial courts develop the principles governing *the practice of international commercial dispute resolution*, in the course of supervising the conduct of international commercial arbitration and litigation. And, with the passage of the Singapore Convention on Mediation, these courts will soon play a corresponding role in respect of international commercial mediation as well. This is an example of what has been termed "bottom-up judicial globalisation", where rules are generated by national courts for international use, rather than by global institutions for application in domestic legal systems.[42] Further, by promulgating common legal

[42] Dimitropoulos at 373–374.

standards, commercial courts promote the coherence and unity of the TSCJ.

31. Let me illustrate these points by demonstrating how commercial courts have developed two types of procedural rules: namely, those relating to the allocation of jurisdiction and the process of adjudication.

32. Regarding *the allocation of jurisdiction*, take, for example, the concept that arbitration agreements should generally be upheld. How should this principle be applied when the validity or viability of an arbitration agreement is challenged? In the case of *Tomolugen*,[43] the Singapore Court of Appeal decided that a relatively low *prima facie* standard of review should apply when considering an application to stay court proceedings in favour of arbitration. The court reasoned that this respected the *kompetenz-kompetenz* principle and would also deter the initiation of court proceedings in breach of an arbitration agreement.[44] This ruling promoted legal coherence in the TSCJ, by recognising that arbitration and litigation are each valid and legitimate players in the resolution of transnational disputes; and, at the same time, it advanced the value of consistency by

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43 *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2016] 1 SLR 373 ("*Tomolugen*").

44 *Tomolugen* at [67]–[68].

aligning the law in Singapore with that in jurisdictions such as Canada and Hong Kong.[45]

33. Notably, another issue arose in *Tomolugen*. Some of the litigants were not party to the arbitration agreement, and this gave rise to a risk of concurrent arbitral and court proceedings. To address this, the court imposed a case management stay on the proceedings that were not subject to the arbitration agreement, and issued directions to limit the risk of parallel proceedings.[46] This reflects what I call a *systemic* approach to dispute resolution, because the court did not simply concern itself with the narrow issue of whether to enforce the arbitration agreement. It considered the wider implications of its decision for the entire set of disputes, and strove to ensure that they would be resolved in a coherent and orderly way.

34. Next, commercial courts have developed standards for *the process of adjudication*. One example is the law on due process in international arbitration. This is a vexed and challenging subject which must accommodate two competing considerations. On the one hand, the law must secure the fairness of the arbitral process, which underlies the legitimacy of arbitration.[47] But on the other hand, in recent years, baseless

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45 *Tomolugen* at [50]–[56]. A different approach known as the "full merits" approach – under which the court determines the existence and scope of the arbitration agreement, generally on a balance of probabilities – applies in England: see *Tomolugen* at [46]–[49].

46 *Tomolugen* at [186]–[190].

47 *China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another* [2020] 1 SLR 695 ("*Jaguar Energy*") at [1]; James Allsop, "International Commercial Arbitration – the Courts and the Rule of Law in the Asia Pacific Region" (2015) 81(2) Arbitration 169 at 172.

due process arguments have been mounted to thwart the finality of arbitral awards,[48] and this has given rise to a trend in international arbitration known as "due process paranoia", where arbitrators may sometimes be unwilling to manage arbitrations robustly, for fear of provoking complaints of a denial of due process to challenge the eventual award.[49] Such a defensive approach is undesirable, because it encourages dilatory tactics, cheapens the value of due process, and, over time, erodes the legitimacy of arbitration.[50]

35. Commercial courts can help address this by developing standards that will secure procedural fairness while deterring cynical invocations of due process, and also preserving the arbitral tribunal's discretion to manage the case it is tasked to decide.[51] These factors shaped the thinking of the Singapore Court of Appeal in the *Jaguar Energy* case. We held that in assessing due process challenges to arbitral awards, the court should consider whether "what the tribunal did … falls within the range of what a reasonable and fair-minded tribunal in those circumstances might have done".[52] And in applying this test, the court should only account for what

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48 Lucy F Reed, "Ab(use) of due process: sword vs shield" (2017) 33 Arbitration International 361 ("Reed") at 364 and 374–376.

49 Sundaresh Menon CJ, "Dispelling due process paranoia: Fairness, efficiency and the rule of law", Chartered Institute of Arbitrators Australia Annual Lecture 2020 (13 October 2020) ("Dispelling due process paranoia"), paras 4–5; Reed at 376.

50 Dispelling due process paranoia, para 6; *Jaguar Energy* at [3].

51 *Jaguar Energy* at [4].

52 *Jaguar Energy* at [98] and [104(c)].

the tribunal was made aware of at the material time, and accord a margin of deference to the tribunal's exercise of its procedural discretion.[53]

36. I emphasise two points about the approach taken in that decision. First, it was fundamentally geared towards promoting international arbitration. This again illustrates a *systemic* attitude to dispute resolution: the courts do not see arbitral tribunals as rivals to be contained, but instead strive to support arbitration, so as to strengthen the TSCJ as a whole. Second, many other jurisdictions including the United Kingdom, the United States and China adopt a similar approach to due process challenges to arbitral awards and hence, the approach adopted in *Jaguar Energy* advanced consistency in the law.[54]

37. In the same vein, I anticipate that commercial courts will soon develop similar standards for international commercial mediation. This will likely be driven by cases regarding the Singapore Convention on Mediation. Notably, one ground for refusing enforcement of a mediated settlement agreement under this regime is a "serious breach" by a mediator of standards applicable to the mediator or the mediation.[55] This will likely be invoked by parties seeking to challenge settlement agreements, and it will then fall to commercial courts to explain and apply this ground of

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53 *Jaguar Energy* at [99], [103] and [104(d)].

54 "Dispelling due process paranoia", para 25.

55 United Nations Convention on International Settlement Agreements Resulting from Mediation (20 December 2018, entered into force on 12 September 2020), Art 5(1)(*e*).

challenge. Again, it is vital that a broadly consistent understanding of this principle is forged, to secure legal coherence.

B. Enabling the coordinated resolution of cross-border disputes

38. Let me turn to the second way in which commercial courts superintend the TSCJ. A particular feature of the type of cases that are dealt with in the Transnational System, is their transnational character. This can present enhanced complexity when the same issue is raised in more than one jurisdiction or before more than one forum. The question is whether it is possible, in such circumstances, to facilitate the coordinated resolution of cross-border cases. To illustrate this, I will focus on cross-border insolvency, where there is enormous potential for collaboration between commercial courts to deliver the holistic and synchronised resolution of complex transnational proceedings.

39. A striking example of such collaboration occurred in the insolvency of the Nortel Group, a corporate giant in the telecommunications business, which comprised more than 130 companies in over 100 countries.[56] In 2009, most of the Nortel entities filed for insolvency protection, including in Canada and the United States. The assets of the Group were sold, yielding some US$7.3 billion.[57] There then arose the issue of how the funds should be allocated between the Nortel entities. This issue arose before both the

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[56] *Re Nortel Networks Corp* [2015] OJ No 2440 ("*Re Nortel*") at [1].

[57] *Re Nortel* at [3].

Ontario Superior Court and the United States Bankruptcy Court for the District of Delaware.

40. The two courts made the ground-breaking decision to hold a joint trial to decide how to allocate the funds, under an agreed cross-border protocol. Under this process, the same evidence was placed before each court. The courts then held joint video hearings over 24 days, with witnesses testifying in and counsel making submissions to both courts.[58] The two judges also communicated with each other outside of the hearings, in line with the agreed protocol.[59] Ultimately, the courts found that they were able to reach consistent rulings on the appropriate approach for the distribution of the funds, and issued separate judgments on the same day. This was a stunning example of judicial collaboration to secure the coordinated and holistic resolution of complex cross-border disputes.

41. A model for such collaboration can now be found in the JIN Guidelines. These set out a framework for courts presiding over cross-border insolvency cases to cooperate in areas like the sharing of documents and the convening of joint hearings.[60] The JIN Guidelines have been adopted as a basis for protocols used by the Singapore courts and the United States Bankruptcy Court for the Southern District of New York in three

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58 *Re Nortel* at [8].

59 *Re Nortel* at [10].

60 JIN Guidelines: https://jin-global.org/jin-guidelines.html.

cases, including the recent Garuda Indonesia case – the first cross-border insolvency proceedings to be dealt with in the SICC.[61]

42. Apart from communication and cooperation, a broadly consistent judicial approach is vital to ensure the coordinated resolution of insolvency cases. In this regard, there have been two competing views in cross-border insolvency. The first approach, *universalism*, calls for cross-border insolvencies to be dealt with by one forum applying one set of laws. The second approach of *territorialism* envisions multiple courts dealing independently with the assets of the insolvent entity in their respective jurisdictions, under their separate laws.[62] I have argued elsewhere that insolvency courts should eschew these polar alternatives for a pragmatic and principled middle path, namely, "modified universalism". Under this approach, separate proceedings are filed in each jurisdiction where the insolvent entity has assets. But the courts presiding over *ancillary* proceedings should, as far as is consistent with justice and public policy, cooperate with the court managing the *main* insolvency proceedings, to ensure that the entity's assets are distributed to all its creditors under a broadly coherent scheme.[63]

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61 The other two matters involved Ezra Holdings Ltd and Three Arrows Capital Ltd respectively.

62 Sundaresh Menon CJ, "The Future of Cross-Border Insolvency: Some Thoughts on a Framework Fit for a Flattening World", Keynote Address at the 18th Annual Conference of the International Insolvency Institute 2018 (25 September 2018) ("The Future of Cross-Border Insolvency"), para 18.

63 The Future of Cross-Border Insolvency, para 18, citing *In re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852 at [30] (*per* Lord Hoffmann).

43. This is essentially the framework in the UNCITRAL Model Law on Cross Border Insolvency, which requires courts to recognise a foreign insolvency proceeding as either a "foreign main" or a "foreign non-main" proceeding, depending on whether it unfolds at the debtor's centre of main interests.[64] At the same time, the Model Law includes safeguards for national interests. These include: first, a public policy exception;[65] second, a proviso that protects the interests of local creditors;[66] and third, a provision which secures the pre-eminence of local proceedings where there are concurrent proceedings.[67] In this light, the Model Law sets out a compelling blueprint that should be adopted to secure the coherent and orderly resolution of cross-border insolvencies.

C. Driving collaboration and dialogue within the TSCJ

44. I turn to the third way in which commercial courts superintend the TSCJ, and that is by *driving collaboration and dialogue within the system*, in both judicial and extra-judicial settings, which enhances its overall operation.

45. Collaboration and dialogue occur in judicial settings at several levels.

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64 UNCITRAL Model Law on Cross Border Insolvency, Art 17(2).

65 UNCITRAL Model Law on Cross Border Insolvency, Art 6.

66 UNCITRAL Model Law on Cross Border Insolvency, Art 22(1).

67 UNCITRAL Model Law on Cross Border Insolvency, Art 29.

(a) The first is the cross-citation of authorities.[68] This enables courts to harness the wisdom of their counterparts, and to develop their laws consistently with the laws of other jurisdictions as far as possible, thus advancing coherence in the TSCJ. This is especially useful in relation to novel areas of law. For example, in the *Quoine* case,[69] the Singapore Court of Appeal considered whether cryptocurrency was property capable of being held on trust. After reviewing cases from England and Canada, we expressed a tentative view that it could be.[70] Less than two months after we issued that decision, the New Zealand High Court cited it in deciding that cryptocurrency was property.[71] This illustrates how the cross-citation of cases can advance the development of commercial law in a broadly consistent way.

(b) And there are other mechanisms that facilitate judicial cooperation. Besides the JIN Guidelines, the Supreme Court of Singapore has concluded memoranda of understanding on references of questions of law with several courts.[72] In gist, these instruments provide for issues concerning the law of the counterpart foreign court to be referred to that court for determination or a non-binding

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68 The Law of Commerce in the 21st Century, paras 34–36.

69 *Quoine Pte Ltd v B2C2 Ltd* [2020] 2 SLR 20 ("*Quoine*").

70 *Quoine* at [139]–[140] and [144].

71 *Ruscoe v Cryptopia Ltd (In Liq)* [2020] 2 NZLR 809 at [77]–[84].

72 SG Courts, "References of questions of law between Singapore and foreign courts": https://judiciary.gov.sg/who-we-are/references-questions-of-law-singapore-foreign-courts.

opinion.[73] This can simplify the process of deciding complex issues of foreign law, and reduce the risk of conflicting rulings.

46. In all these ways, we can see that despite the lack of an overarching authority to impose rules, the various players in the TSCJ strive to operate as parts of a system. Of course, some might lack awareness of this, while others might sometimes lose sight of the value of a systemic approach. This can lead to mishaps where a forum or jurisdiction seems to act to preserve its own turf, to the detriment of the overall system. It is therefore vital that we raise awareness of the emergence, benefits and operation of the TSCJ, so that all its players might be more inclined to act intentionally to advance the system.

47. Commercial courts play a critical role in this endeavour, especially through the forum of the SIFoCC. At its Full Meeting last year, the SIFoCC examined how commercial courts, arbitrators and mediators could work together to advance the integrated system of commercial dispute resolution, and also considered pressing issues facing the TSCJ such as the "complexification" of disputes.[74] Significantly, the SIFoCC invited leading arbitrators and mediators to attend and join the discussion.[75] In

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73 Such instruments have a long history in the common law, tracing back to the 16th century: see J H Baker, "Ascertainment of Foreign Law: Certification to and by English Courts prior to 1861" (1979) 28 International and Comparative Law Quarterly 141 at 146–148.

74 SIFoCC, "Report of the fourth full meeting", pp 30–36.

75 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), paras 34–35.

this way, SIFoCC is working to promote the integration and systemisation of the TSCJ.

IV. Nodal jurisdictions and the promise of ICCs

48. Let me turn to the final part of my address. I wish to focus on ICCs, and explain their benefits. Two main reasons have been canvassed for the formation of an ICC.[76] The first relates to how such a court can attract foreign investment in local or regional economic initiatives or zones. This has been said to be the main rationale for the ICCs in Qatar, Dubai, and Abu Dhabi, as well as the CICC.[77] The second reason concerns how ICCs can foster their jurisdictions to become dispute resolution hubs – and this will be my focus today. In essence, I suggest that ICCs have the potential to help turn their jurisdictions into *nodal jurisdictions* within the TSCJ, by enhancing the legal framework and standing of their jurisdictions. Let me first explain the concept of a nodal jurisdiction.

A. The concept and legal nature of a nodal jurisdiction

49. Dispute resolution activity in the TSCJ is not evenly distributed. Instead, it centres around certain key nodes. In the past, there were a few significant

[76] Dimitropoulos at 371–372; Bookman at 239–261 and 265.

[77] Bookman at 240–241, 257 and 265.

hubs of commercial dispute resolution, such as London and New York.[78] Other jurisdictions like Singapore and Hong Kong have since emerged as key players. But it remains the case that a relatively small number of jurisdictions attract a major share of the dispute resolution market. These are what I call the *nodal* jurisdictions of the TSCJ.

50. What are the key features of a nodal jurisdiction, aside from the foundational requirement of quality? I will highlight four important aspects.[79]

51. First, a nodal jurisdiction will typically have *a matrix of laws that support international commercial dispute resolution*. Central among these are laws promoting the international enforceability of judgments, arbitral awards and international commercial settlement agreements arising from mediation. These laws are crucial because without them, the outcomes of dispute resolution in a jurisdiction may have little if any teeth, and commercial parties will have scant incentive to take their disputes to that forum. Aspiring nodal jurisdictions should therefore be exploring the ratification and implementation of the New York Convention, the Choice of Court Convention, and the Singapore Convention on Mediation. Next, the leading procedural rules of the TSCJ, such as those in the UNCITRAL

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78 Sundaresh Menon CJ, "Dispute Resolution at the Intersection of Domestic and Transnational Justice Systems: The Case for International Commercial Courts", Keynote Address at the 7th International Bar Association Asia Pacific Regional Forum Biennial Conference (23 February 2023 ("The Case for International Commercial Courts"), paras 2–3.

79 The Future of Cross-Border Insolvency, paras 41–46.

Model Laws on International Commercial Arbitration and Cross-Border Insolvency, along with best practices and procedures on issues like costs and evidence, should be incorporated into domestic law. Then there are ancillary legal arrangements that have significant practical importance, including rules that permit third-party funding and conditional fee agreements for international commercial disputes.[80] And this body of laws should be kept under review and reformed as needed, to ensure that it keeps pace with emerging practices and trends in the Transnational System.

52. The second key feature of a nodal jurisdiction is an independent judiciary that is well-versed in international commercial law. This is vital because the most sophisticated laws will have little worth if they are not applied by judges in a sound and efficient way. Experienced commercial judges are central not just to litigation, but also to arbitration and mediation because, as I explained earlier, commercial courts supervise and set the standards for these other forms of dispute resolution. Hence, an aspiring nodal jurisdiction must have judges with the expertise and the nous to apply and develop the law of the TSCJ effectively.

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[80] In Singapore, legislative amendments were introduced in 2017 and 2021 to permit third-party funding for (a) arbitration proceedings and related court and mediation proceedings and (b) proceedings in the SICC and related mediation proceedings: see s 5B of the Civil Law Act 1909 and reg 3 of the Civil Law (Third-Party Funding) Regulations 2017. Further, in 2022, legislative amendments were introduced to enable lawyers to enter into conditional fee agreements with clients in the same types of proceedings: see s 115B of the Legal Profession Act 1966 and reg 3 of the Legal Profession (Conditional Fee Agreement) Regulations 2022.

53. The third feature of a nodal jurisdiction is a strong corps of commercially savvy and competent lawyers. Complex transnational disputes call for legal practitioners with a wealth of experience in different facets of commercial law and cross-border business. This may suggest the need to permit foreign legal talent to offer their services in at least some areas of international commercial legal practice, given the limited pool of domestic lawyers in any given jurisdiction.

54. The fourth feature of a nodal jurisdiction is that it should actively strive to be a thought leader in the TSCJ, because the health of the Transnational System, at a time of rapid change, will depend significantly on new ideas and innovations to meet the new and emerging challenges of international commercial dispute resolution. In a sense, because these jurisdictions deal with a large part of the overall caseload of the TSCJ, they have a particular responsibility for safeguarding its health. This is often reflected in active participation in the foremost platforms of the TSCJ, such as the SIFoCC and the JIN.

B. The features of an ICC and how these can promote the essential traits of a nodal jurisdiction

55. Let me explain how an ICC can advance these four traits of a nodal jurisdiction, by reference to the SICC. I will discuss three aspects of the

SICC: its international bench; its specialised procedures; and its provision for international legal representation.[81]

i. International Judges

56. First, the SICC's bench includes International Judges.[82] These are a group of eminent jurists from both common and civil law jurisdictions, with deep and diverse expertise in the whole spectrum of commercial disputes. For example, the SICC's ranks include leading experts in construction adjudication like Justice Douglas Jones, a well-respected construction adjudicator, and Sir Vivian Ramsey, who served as judge in charge of the Technology and Construction Court in England. And the ongoing proceedings involving Garuda Indonesia that I noted earlier, is being heard by a panel that includes Justice Christopher Sontchi, the former Chief Judge of the United States Bankruptcy Court for the District of Delaware, and Justice Anselmo Reyes, an esteemed commercial jurist.

57. An international bench advances several qualities of a nodal jurisdiction. It augments the commercial acumen and expertise of the judiciary, enhances the domestic legal framework and its thought leadership, and promotes an exchange of views. Let me explain how this occurs both inside and outside the courtroom.

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81 The Case for International Commercial Courts, paras 13–27.

82 There is a long history of "travelling judges" in both the common and civil law traditions: see Alyssa S King and Pamela K Bookman, "Traveling Judges" (2022) 116(3) The American Journal of International Law 477 at 482–485.

58. By hearing and determining SICC cases, International Judges play a key part in enriching our commercial jurisprudence, and thereby enhance the value of our case law as a source of ideas and inspiration for other jurisdictions. A good example of this is the *Quoine* case that I mentioned earlier. There, we convened a 5-Judge panel to hear the appeal, including 2 International Judges: Justice Mance, former Deputy President of the UK Supreme Court, and Justice French, the former Chief Justice of Australia. A difference of views arose within the court regarding how the doctrine of unilateral mistake should apply in the context of algorithmic trading. These differing views were set out in the majority judgment that I authored and the minority judgment that was issued by Justice Mance. Such jurisprudential dialogue not only enhances our domestic law, but also augments its ability to inspire legal developments abroad. Indeed, as I noted earlier, the *Quoine* decision was cited just two months after its release in New Zealand, and has also been hailed as a "prime example" of how ICCs can develop international commercial law.[83]

59. Judicial exchanges also take place off the bench. For example, the SICC holds an annual closed-door Conference, which brings together our Singapore and International Judges, as well as selected external speakers. This has proved to be an invaluable fount of ideas on how to improve not just the procedures and practices of the SICC, but also the

[83] Pamela K Bookman, "Arbitral Courts" (2021) 61 Virginia Journal of international Law 161 at 218.

broader legislative framework for international commercial dispute resolution in Singapore. The SICC Conference has also been a useful platform for discussing pressing issues facing the TSCJ, such as the interface between different dispute resolution tools and climate change litigation.

ii. Specialised procedural rules

60. I turn to the second feature of ICCs that I wish to highlight. This relates to the *specialised procedural rules* that ICCs can create, drawing on international best practices. Let me illustrate this by discussing some aspects of the SICC Rules 2021 ("SICC Rules"), and a novel procedure in the SICC for complex technology and construction cases.

61. An innovative feature of the SICC Rules is its provision for claims to be placed on one of three adjudication tracks: the pleadings track, the statements track, and the memorials track.[84] The last of these is a recent addition to our toolkit, and resembles the procedure used in many international arbitrations and civil law systems. Further, the SICC Rules confer the SICC with the discretion to modify the procedures of each track to suit the needs of a particular case.[85] The result is a highly flexible framework that can be used to chart the best procedural path for any given dispute. This advances what I think is a fundamental norm for dispute

[84] O 4 r 6 of the SICC Rules.

[85] O 4 r 6(3) of the SICC Rules.

resolution systems: namely, *contextuality*, which calls for processes that are tailored to the nature of the dispute and the circumstances of the parties.[86]

62. With technology, infrastructure, and construction (or "TIC") disputes, the demands of contextuality are coupled with the challenge of complexification.[87] This refers to the increasing complexity of disputes, which is especially apparent in construction cases, which often involve significant technical complexity and voluminous amounts of evidence.[88] To address this reality, the SICC has created customised tools for TIC disputes under a specialised TIC List. A prime example is the Simplified Adjudication Process Protocol. This is a voluntary protocol which offers the option of streamlined processes. For example, the parties can agree that they will not present any evidence for certain lower value claims, but will simply recover a percentage of such claims pegged to the percentage of recovery for their main claims.[89] Such innovative processes can

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86 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), para 19.

87 Sundaresh Menon CJ, "The Complexification of Disputes in the Digital Age", Goff Lecture 2021 (9 November 2021).

88 Sundaresh Menon CJ, "Constructing Collaboration: Remoulding the Resolution of Construction Disputes", Keynote Address at the 9th Annual Conference of the International Academy of Construction Lawyers (14 April 2023), paras 9–13.

89 SICC Rules 2021, Appendix E (Simplified Adjudication Process Protocol). The Protocol divides claims into three categories: (1) Main Claims, (2) Higher Value Excluded Claims, and (3) Lower Value Excluded Claims. Main Claims are tried in the usual manner. Higher Value Excluded Claims are tried under a simplified process based solely on agreed documents and written submissions in tabular form (*ie*, a Scott Schedule), supported by tightly circumscribed expert evidence, with no other factual evidence permitted. Lower Value Excluded Claims are

significantly mitigate the problem of complexification, while advancing the ideal of contextuality.

63. The specialised rules that I have just described reflect novel innovations developed to cope with the needs of the cutting-edge in international commercial dispute resolution. They thereby also reinforce the work of the jurisdiction in promoting the overall health and well-being of the TSCJ.

iii. International legal representation

64. That brings me to the third important feature of ICCs, which relates to international legal representation. Generally, in domestic cases, only Singapore-qualified lawyers may appear in court proceedings. This ensures that only those who have demonstrated substantial understanding of Singapore law and practice can represent parties in our courts.[90] But these concerns are attenuated in "offshore" cases that have no substantial connection to Singapore. Hence, the SICC Rules provide that foreign lawyers who meet a simple set of criteria can obtain registration to appear

to be awarded without any adjudication, according to an agreed formula based on the proportion of recovery of Main Claims by each party.

90 For instance, Parliament was careful to provide that registered foreign lawyers would not be permitted to appear in arbitration-related matters before the SICC. The government explained that the International Arbitration Act was part of Singapore law, with features tailored for the Singapore arbitration landscape, and there was a developed body of local jurisprudence which Singapore lawyers are well-versed in: see *Singapore Parliamentary Debates, Official Report* (9 January 2018) vol 94 (Ms Indranee Rajah, Senior Minister of State for Law).

in such "offshore" cases.[91] Currently, more than 90 foreign legal practitioners have registered with the SICC.[92]

65. I suggest that ICCs provide an opportunity for jurisdictions to scope out a category of cases relating to transnational commercial disputes, in which more liberal rules on foreign representation can be adopted. This enables a jurisdiction to expand the pool of commercial legal talent that can access that forum in a calibrated way, thus advancing the third trait of a nodal jurisdiction that I outlined earlier. One lesson from Singapore's growth as an arbitration hub is that a more open approach to foreign legal representation is critical.[93] Commercial parties will more readily consider bringing their disputes to a forum if they can instruct their counsel of choice to represent them there.

C. The need for strong physical infrastructure and a conducive business environment

66. And then there are two other practical features that must be considered in the effort to enhance the success of an ICC.

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91 See r 3(2)(b) of the Legal Profession (Representation in Singapore International Commercial Court) Rules 2014 read with O 3 r 3 of the SICC Rules.

92 SICC, "Register of Foreign Lawyers": https://sicc.gov.sg/registration-of-foreign-lawyers/foreign-lawyers.

93 Sundaresh Menon CJ, Patron's Address at the Chartered Institute of Arbitrators London Centenary Conference (2 July 2015), paras 8–15.

67. The first relates to *the physical infrastructure* and *staffing support*. An ICC must be equipped with modern and cost-competitive facilities and services. These include technology-enabled hearing and meeting rooms with remote hearing capabilities, and efficient administrative, IT and translation services. An ICC also requires a dedicated registry of competent judicial officers to assist the bench in managing the docket, and to oversee the other operations of the court.

68. Second, the ICC must be situated in a *conducive business environment*. One key factor is air connectivity, especially to major legal and business hubs around the world, because this will ease the flow of commercial parties and their lawyers to and from the forum. Further, to meet the needs of those involved in these types of disputes, there will need to be an ecosystem of financial, corporate, and other professional service providers.

69. In short, the success of an ICC depends on a holistic effort on the part of the legislature, the executive, and the courts to establish a conducive environment in which it can flourish.

V. Conclusion

70. The project to establish a successful ICC is therefore a formidable task. But as I have sought to explain this morning, it can be a worthwhile undertaking for several reasons. An ICC has the potential to transform its

jurisdiction into a key node of international commercial dispute resolution, and to play a vital role in promoting the TSCJ, by contributing to the superintendence of the system. In these ways, an ICC can help sustain cross-border commerce and more broadly, the rules-based international order. That is why the endeavour to establish the BICC is such a meaningful enterprise.

71. We in Singapore are deeply committed to the international rules-based order. We established the SICC just 8 years ago as part of our commitment to uphold and strengthen the values of the TSCJ. We are delighted that Bahrain shares this commitment, and we welcome the opportunity to work with you to realise the vision of the BICC.

72. Thank you very much.