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"Dispute Resolution at the Intersection of Domestic and Transnational Justice Systems: The Case for International Commercial Courts"

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I. Introduction

1. A very good morning, and to those of you who have travelled from abroad to join us today, let me extend to you a very warm welcome to Singapore.

2. I am delighted that Singapore is hosting the Biennial Conference of the International Bar Association Asia Pacific Regional Forum this year. The success of the Conference over its past six iterations and the breadth and depth of the discussions that are promised at this, its seventh iteration, are emblematic of the immense growth of legal practice within our region and the vast opportunities that avail us today. Although we now take this for granted, it is worth noting that up until perhaps the turn of the century, all legal roads

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

tended to go west – primarily to London, and perhaps also to New York or to Western Europe. I recall visiting a major international client in India just two decades ago to discuss a legal issue that he was facing. When I suggested arbitration in Singapore as a possible option, he looked at me rather oddly. As far as he was concerned, arbitration could only take place in London. This was not remarkable at the time: not only because it reflected the ways of thinking of our colonial past, but also because of the widely acknowledged sophistication of the English legal system and the reputation of its lawyers and judges.

3. But this was not a tenable view of dispute resolution in the long run, given the changing tides of trade and commerce. To put it bluntly, it is not natural, much less is it inevitable, to think that major commercial disputes rooted in Asia *must* be resolved in London or New York. Instead, as I have argued on a number of recent occasions,[1] today we have something approaching a truly transnational system of commercial justice which offers a suite of dispute resolution options catering to the needs of international commerce across the world, including litigation, arbitration and mediation

[1] See Sundaresh Menon, "SIFoCC playing its part as a cornerstone of a transnational system of commercial justice" (Keynote Address at the 4th Full Meeting of the Standing International Forum of Commercial Courts, 20 October 2022) at https://www.judiciary.gov.sg/news-and-resources/news/news-details/chief-justice-sundaresh-menon-keynote-address-delivered-at-the-standing-international-forum-of-commercial-courts-2022 ("SIFoCC playing its part"); and 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 ("The Law of Commerce in the 21st Century").

taking place in any of a number of suitable venues. Much has been said about the relative merits of these three modes of dispute resolution, and, increasingly, we have also recognised the potential of *integrated* dispute resolution mechanisms which make use of these modes in tandem.

4. But today, I want to shine a light on a specific dimension of modern international commercial dispute resolution: the establishment of specialist international commercial courts (or "ICCs"), of which the Singapore International Commercial Court (or "SICC") is a good example. International commercial courts have their share of detractors. Some have suggested that ICCs are superfluous, or even detrimental to access to justice. In my remarks today, I will argue that these criticisms miss the mark, and I will use the SICC as a case study. I will argue that ICCs offer unique advantages, and can in fact strengthen access to justice and the international rule of law. These qualities make them invaluable contributors to the transnational system of commercial justice, and for that reason ICCs ought to capture the attention not just of those of us who are in the field of dispute resolution, but of legal practitioners at large, and even businesspeople engaged in transnational commerce.

II. The rise of ICCs

5. Let me set the stage for the discussion by saying a few words about the rise of the SICC as well as of ICCs in general. It was ten years ago that I announced the formation of a committee to study the viability of establishing the SICC.[2] This took place against the backdrop of predictions that Asia's explosive economic growth placed it on track to account for more than half of global GDP by 2050,[3] and the recognition that this would inevitably lead to an increase in commercial disputes involving Asia. That, in turn, would give rise to a growing demand for dispute resolution institutions in the region with a reputation for efficiency, commercial awareness and impartiality.[4] The Singapore International Arbitration Centre had long demonstrated that there was a strong appetite for such services within Asia. With the launch of the Singapore International Mediation Centre in 2014, and the launch of the SICC on 5 January 2015, Singapore was in a position to offer the entire suite of dispute resolution options. The rapid and continuing growth of all three institutions is testament to the synergies that can be gained from the integration of these services within a legal hub.

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2 Sundaresh Menon, "Response by Chief Justice Sundaresh Menon: Opening of the Legal Year 2013 and Welcome Reference for the Chief Justice" (4 January 2013) at https://www.sal.org.sg/sites/default/files/PDF%20Files/Speeches/CJ%20OLY%20Welcome%20Reference.pdf at para 33.

3 "Asia 2050: Realizing the Asian Century" (Asian Development Bank, August 2011).

4 See Sundaresh Menon, "Response by the Chief Justice Sundaresh Menon at the Opening of the Legal Year 2015" (5 January 2015) at https://www.supremecourt.gov.sg/docs/default-source/default-document-library/sjc/response-by-cj---opening-of-the-legal-year-2015-on-5-january-2015-(final).pdf at para 20.

6. We in Singapore were not alone in seeing the potential benefits of ICCs. They have grown in popularity across Asia: over the past 15 years or so, we have seen the establishment of ICCs in Dubai, Qatar, Abu Dhabi, Astana, and more recently China.[5] Many of these ICCs have also contributed to the modern-day phenomenon of "travelling judges" – jurists who travel from their home jurisdictions to serve on a court in a different jurisdiction.[6] This trend reflects the willingness of many jurisdictions to strengthen their bench with foreign appointments in order to meet the unique demands of international commercial dispute resolution.

A. Criticisms of ICCs

7. As ICCs grew in prominence, other financial and commercial hubs began to take notice. In recent years, international commercial courts or chambers have also been set up in Paris, the Netherlands, Frankfurt, and other cities in Germany.[7] But two countries in which the idea of an ICC was debated at length and ultimately not adopted were Australia and Belgium.

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5 These are the Dubai International Financial Centre Courts, the Qatar International Court, the Abu Dhabi Global Market Courts, the Astana International Financial Centre Court, and the China International Commercial Court. See generally Alyssa S King and Pamela K Bookman, "Traveling Judges" (2022) 116(3) The American Journal of International Law 477 ("Travelling Judges") at 530.

6 See "Traveling Judges" at 478.

7 See Olga Sendetska and Martin Bär, "Checking In With Competition In Europe: Where Do International Commercial Courts Stand?" (Kluwer Arbitration Blog, 26 April 2021) at http://arbitrationblog.kluwerarbitration.com/2021/04/26/checking-in-with-competition-in-europe-where-do-international-commercial-courts-stand-2 ("Where Do International Commercial Courts Stand?").

8. Between 2016 and 2017, the Chief Justices of the Federal Court of Australia and of the state of Victoria both spoke in favour of the establishment of an Australian ICC, and the idea was reported to be under consideration by the Australian government.[8] However, not everyone was in favour. One commentator from Hong Kong, who was then the chair of the Hong Kong International Arbitration Centre, weighed in on the debate in Australia and was dismissive of the value of ICCs, suggesting that they were only really needed in jurisdictions that lacked confidence in their judicial system, and were otherwise merely a form of "marketing".[9] Chief Justice Andrew Bell of New South Wales, while he was President of the Court of Appeal, also announced himself a "sceptic" of ICCs, partly on the basis that most if not all of their benefits could be secured in Australia's existing courts.[10] To date, no plans have been announced for the introduction of an ICC in Australia.

9. Proposals for an ICC went further in Belgium, with a bill to establish the Brussels International Business Court (or "BIBC") having been submitted to

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8 See A S Bell, "An Australian International Commercial Court – Not A Bad Idea Or What A Bad Idea?" (Speech delivered at the ABA Biennial International Conference, 12 July 2019) ("An Australian International Commercial Court") at para 10, citing comments by Chief Justice James Allsop, Chief Justice Marilyn Warren, Justice Clyde Croft, and a spokesperson for the Attorney-General of Australia.

9 These comments were made by Teresa Cheng SC: see Lara Bullock, "Debate Over Need for International Commercial Court in Aus" (Lawyers Weekly, 28 October 2016) at https://www.lawyersweekly.com.au/news/19850-debate-over-need-for-international-commercial-court-in-australia.

10 See "An Australian International Commercial Court" at paras 15–16. Chief Justice Bell also made a number of points as to why the unique constitutional and legal landscape in Australia would not be conducive to ICCs, which I do not comment on here.

the Belgian Parliament in May 2018.[11] However, the bill was criticised in various quarters, with some calling the proposed BIBC a "caviar court".[12] The advocate general of the Belgian Court of Cassation expressed the worry that the BIBC would lead to "two-speed justice", with litigants who chose the BIBC receiving speedy decisions, while other citizens would be left with slow justice rendered in obsolete premises.[13] The bill was eventually withdrawn.[14]

10. The experiences of Australia and Belgium raise two prominent criticisms which proponents of ICCs must contend with: first, that ICCs are merely a form of packaging or marketing, and second, that ICCs can create a two-track justice system and therefore ultimately undermine access to justice.

11. At the most basic level, the answers to these criticisms may be easily stated. First, we can all agree that an ICC which has no distinctive value proposition compared to the existing courts within a jurisdiction is simply an ill-conceived project. But that is far from all that an ICC could be. The SICC, like many other ICCs, has the benefit of a panel of eminent commercial judges from around the world. They come from a range of countries, legal traditions and life experiences, and they all share a background of extensive experience

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11 See Erik Peetermans and Philippe Lambrecht, "The Brussels International Business Court: Initial Overview and Analysis" (2019) 12 Erasmus Law Review 42 at 42.

12 See Xandra Kramer and John Sorabji, "International Business Courts in Europe and Beyond: A Global Competition for Justice?" (2019) 12 Erasmus Law Review 1 at 1–2.

13 See Alexandre Biard, "International Commercial Courts in France: Innovation without Revolution?" (2019) 1 Erasmus Law Review

14 See "Where Do International Commercial Courts Stand?"

in commercial legal work with acknowledged excellence as dispute resolvers. It would be unthinkable for Singapore, or for that matter, perhaps any other jurisdiction in the world, to claim such expertise within its domestic judicial line-up, and it is the establishment of a standalone ICC that makes it possible for us to draw on this body of considerable expertise within our Judiciary.[15] There are at least two other facets of the SICC that distinguish it from other parts of our Judiciary: the possibility of foreign representation, and a set of cutting-edge procedures tailored for international commercial disputes. I will elaborate on each of these shortly.

12. As for access to justice, again we can all agree that the establishment of an ICC must not come at the expense of the rest of the justice system. But the SICC was an aspiration we pursued only after we were amply satisfied that ordinary court users were very well-served by our domestic courts. Once the fundamentals of a well-functioning justice system have been secured, however, I suggest that the addition of an ICC can have the benefit of further enhancing access to justice even for those who do not engage in international commercial litigation. This is a point that I will come to in the final segment of my speech: namely, that ICCs have the potential to advance the cause of

[15] In Singapore, the right of appeal to the Judicial Committee of the Privy Council was fully abolished in 1994. This marked the end of a constitutional arrangement which permitted a foreign court to decide domestic disputes before the Singapore courts. This might be contrasted against the constitutional arrangement in Hong Kong, where the Court of Final Appeal has Non-Permanent Judges who are typically sitting judges from the apex courts of selected Commonwealth jurisdictions.

justice both domestically as well as internationally, as part of a transnational system of commercial justice.

III. The case for a standalone ICC

13. In that light, let me turn first to the case for establishing a standalone ICC such as the SICC. In short, an ICC can provide a mode of dispute resolution that is thoroughly international in its outlook, beyond what may be possible within the domestic court system. Let me explain this with reference to the three important features of the SICC that I have just outlined.

A. An international bench

14. The first is the appointment of International Judges – a group of eminent jurists hailing from other financial and commercial hubs across the world. Amongst the International Judges of the SICC are experts in complex infrastructure and construction disputes, jurists from leading civil law jurisdictions, and a particularly deep bench of experts in international commercial arbitration. As the SICC begins to hear cases under its jurisdiction to deal with corporate restructuring and insolvency proceedings that are international and commercial in nature,[16] we will also be able to count on the

[16] See "New rules introduced for Singapore International Commercial Court to deal with cross-border corporate insolvency, restructuring and dissolution matters" (Supreme Court of Singapore, 5 October 2022) at https://www.judiciary.gov.sg/news-and-resources/news/news-details/media-release-new-rules-introduced-for-singapore-international-commercial-court-to-

expertise of Justice Christopher Sontchi, one of the world's leading insolvency judges, alongside one of our own champions in the field, Justice Kannan Ramesh.

15. Beyond the obvious immediate benefits of having these International Judges adjudicate disputes before the SICC, our foreign and local judges alike benefit from their interactions working alongside each other and applying their unique sets of experience and knowledge to the legal issues that arise in international commercial disputes. The kind of judicial exchange that takes place in this context promotes the cross-pollination of ideas and perspectives between judges, and even between jurisdictions, both on matters of substantive law, as well as in best practices in case management.

16. These judicial exchanges occur in the SICC both on and off the bench. On the bench, Singapore and International Judges sit together to hear SICC cases. This occurs in every appeal from the SICC to the Court of Appeal. An excellent example of this is the case of *Quoine v B2C2*,[17] which concerned the erroneous operation of a cryptocurrency trading algorithm. We convened a 5-Judge panel which included 2 International Judges, Justice French and Lord Mance, to hear the appeal. A difference of views arose between the members of the court on the question of how the traditional principles on unilateral

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deal-with-cross-border-corporate-insolvency-restructuring-and-dissolution-matters, on the introduction of the new Order 23A of the Singapore International Commercial Court Rules 2021 ("SICC Rules").

17 *Quoine Pte Ltd v B2C2 Ltd* [2020] 2 SLR 20.

mistake should be applied to the actions of an algorithm. This difference resulted in what I hope was an illuminating discussion between us, recorded in a majority judgment that I authored and a minority judgment which was issued by Lord Mance. This kind of exchange surely works to the benefit of lawyers and jurists around the world who can draw upon these judgments in coming to their own conclusions. In the same vein, we do appoint 3-Judge panels to hear some of the more complex SICC cases, bringing the experience of both Singapore and International Judges to bear on the management and resolution of these challenging cases.[18] We do this because we recognise that in a world that brings legal issues of ever-growing complexity to the fore, there is tremendous benefit in harnessing a range of talents to resolve them. We do this not because we lack confidence in our own judges, but because we see immense value in collaboration.

17. Judicial exchanges also occur outside the courtroom at formal and informal levels. We host an annual SICC Conference, a closed-door event which brings together all our Singapore and International Judges, as well as selected external speakers from practice and academia, in what I believe to be one of the strongest international fora for comparative judicial perspectives.

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[18] See, for instance, SIC/S 1/2015 (*BCBC Singapore Pte Ltd and another v PT Bayan Resources TBK and another*, which is the subject of the commentary in Teh Hwee Hwee, Justin Yeo and Colin Seow, "The Singapore International Commercial Court in Action: Illustrations from the First Case" (2016) 28 SAcLJ 692); SIC/S 3/2017 and SIC/S 4/2017 (*Kiri Industries Ltd v Senda International Capital Ltd and another*); and SIC/OS 5/2020 and SIC/OS 6/2020 (*Lao Holdings NV v Government of the Lao People's Democratic Republic and another matter*).

At this year's SICC Conference, we discussed such topical issues as environmental, social and governance litigation, multi-tiered dispute resolution, and cross-border insolvency. These gatherings encourage frank, open and deep discussions between commercial judges on common trends and shared challenges.

18. Any justice system that is willing to embrace this kind of international judicial dialogue will be strengthened, and that can only be to the benefit of litigants and the legal system as a whole.

B. International representation

19. The second important feature of the SICC is the provision for foreign representation. By fulfilling a relatively simple set of criteria,[19] foreign lawyers can obtain registration before the SICC, which allows them to act as counsel in "offshore" cases that have no substantial connection to Singapore.[20] This is a marked departure from litigation before the domestic courts, where in general, only Singapore-qualified lawyers are permitted to appear, so as to ensure that only those who have met stringent requirements in their

[19] See r 4(1) of the Legal Profession (Representation in Singapore International Commercial Court) Rules 2014.

[20] 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.

understanding of Singapore law and practice are able to make submissions before our courts.[21]

20. Because these concerns are attenuated in "offshore" cases which invariably entail issues of transnational law and practice, the SICC is able to adopt a much more open approach to foreign representation, thus allowing commercial parties in such cases to instruct counsel of their choice. This is particularly useful in cases where foreign law is to be applied, and it complements the rules that allow questions of foreign law in the SICC to be determined by way of submissions rather than having to be proved by way of evidence.[22]

C. Specialised procedures

21. And third, as a standalone court, the SICC has its own set of specialised procedural rules tailored to the resolution of international commercial disputes. The SICC Rules 2021 are the product of the careful study of international best practices and innovations, and the collective experience of the SICC bench gained from presiding over our cases.

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[21] 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 would be well-versed in: see *Singapore Parliamentary Debates, Official Report* (9 January 2018) vol 94 (Ms Indranee Rajah, Senior Minister of State for Law).

[22] See O 16 r 8(1) of the SICC Rules.

22. The SICC Rules allow claims to be channelled into one of three adjudication tracks: the pleadings track, the statements track, and the memorials track.[23] In particular, the memorials adjudication track resembles the procedure followed in civil law systems and in many international arbitrations. Many international parties will also find the rules on document disclosure in the SICC familiar: these are based in part on the IBA Rules on the Taking of Evidence in International Arbitration,[24] and are designed to simplify and curtail the process of discovery in the context of complex commercial disputes, which frequently feature expensive and long-drawn discovery.[25]

23. While the default procedures in the SICC are designed to meet the needs of most international commercial disputes, there is a high degree of flexibility to adjust the procedures to suit the needs of the particular case. The SICC has the discretion to modify the default procedures that apply to the chosen adjudication track,[26] as well as to modify the document disclosure regime, including by changing the timing and manner of disclosure or even

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23 O 4 r 6 of the SICC Rules.

24 See O 12 of the SICC Rules, and the *IBA Rules on the Taking of Evidence in International Arbitration* (adopted on 17 December 2020) ("IBA Rules"). 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).

25 See, *eg*, Gaetano Tony Pagone, "The Role of the Modern Commercial Court" (Speech at the Supreme Court Commercial Law Conference, 12 November 2009) at p 1.

26 O 4 r 6(3) of the SICC Rules.

dispensing with disclosure altogether.[27] Where the parties agree, the SICC also has the power to disapply the rules of evidence in Singapore law, and to apply other rules of evidence proposed by the parties.[28]

24. In terms of practice, the SICC has developed its own tools for handling Technology, Infrastructure and Construction (or "TIC") disputes, which often pose unique challenges, with the recent launch of the TIC List. When an SICC case is placed on the TIC List, it will benefit from several procedural innovations designed to downsize or contain complex disputes. One area of focus is the active management of expert evidence, which is often voluminous, conflicting, and difficult to understand in these technically complex cases. In the TIC List, the court may convene a case management conference to speak directly with the experts,[29] and may require the experts to produce a joint report in respect of the areas in which they agree, and individual reports only on the areas in which they disagree.[30]

25. Another feature of the TIC List is the optional Simplified Adjudication Process Protocol, which provides a means to downsize disputes comprising many dozens or even hundreds of related claims, as is common in TIC cases. The Protocol recognises the reality that adjudicating each claim individually

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27 O 12 r 5 of the SICC Rules.

28 O 13 r 15 of the SICC Rules.

29 O 28 r 7 of the SICC Rules.

30 O 28 r 6(2) of the SICC Rules.

may consume an inordinate and disproportionate amount of resources, and allows the parties to agree to have certain lower value claims decided according to a simplified process, or even to have them resolved based on the outcome of other, more complex claims.[31]

26. These procedures are tailor-made for complex international commercial disputes, and may not always be suitable for other kinds of disputes. This reflects our adherence to the notion of *contextuality*, which is an essential feature of a well-designed system of procedure.[32] But that might raise the question: why not have just one court, able to choose what procedural rules it will apply? Procedural flexibility is, of course, an important feature. But there is also good reason to carve out a set of specialised rules specifically for cases before the SICC. This is because procedural flexibility is not costless: every fork in the procedural roadmap invites potential disputation over which way to go, giving rise to the possibility of satellite litigation over procedure, which diverts the parties' energies away from resolving the underlying dispute.[33] For

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[31] O 28 r 10(6) and Appendix E of the SICC Rules. 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 to be awarded without any adjudication, according to an agreed formula based on the proportion of recovery of Main Claims by each party.

[32] See Sundaresh Menon, "Procedure, Practice and the Pursuit of Justice" (Keynote Address at the Litigation Conference 2022, 5 May 2022) at https://www.judiciary.gov.sg/docs/default-source/news-docs/litigation-conference-2022-keynote-2022-04-26-(final).pdf ("Procedure, Practice and the Pursuit of Justice") at para 9.

[33] See, in this regard, "Procedure, Practice and the Pursuit of Justice" at para 8.

that reason, we judged that some procedural tools, such as those I have just outlined, were better reserved for the SICC, at least for the time being, given the likely scale and complexity of its cases.

27. This leads me to a further benefit of having a standalone ICC with its own procedural regime, which is the opportunity it affords us to develop innovative procedures and case management tools that are responsive to the needs of the particular types of cases that are typically dealt with in these courts. I have observed elsewhere that we live in a time of the complexification of disputes,[34] which is the phenomenon of disputes becoming so factually rich and technically complex that they threaten to exceed the ability of a human adjudicator to even comprehend the material. Many of the procedures that we have adopted in the SICC are intended to address this phenomenon. These may well turn out to be the tools that we will need in the near future to manage cases even in other parts of our Judiciary.

IV. ICCs and access to justice in a changing world

28. Thus, I suggest that far from being a mere marketing ploy, a court such as the SICC can benefit not just its immediate users, but also the justice system as a whole, through its salutary effects on judges, lawyers and the

[34] Sundaresh Menon, "The Complexification of Disputes in the Digital Age" (Goff Lecture 2021, 9 November 2021) at paras 8–22.

court system as a whole. In the final segment of my speech, I would like to focus the discussion through the lens of promoting and ensuring access to justice. I will look at this from two perspectives: first, the impact of ICCs on court users and the wider community; and second, the interactions between ICCs and the transnational system of commercial justice.

A. ICCs, court users and the wider community

29. In discussing the impact of ICCs, members of the community can be divided into two categories: first, those who engage in commercial activities that may potentially bring them before an ICC, and second, those who are unlikely to ever be involved in an international commercial dispute.

30. For the former category, the benefits of having access to an ICC are well-documented, and I have recounted many of them. Much has been said about comparative advantages and disadvantages of commercial courts as compared to international arbitration,[35] and I do not intend to rehearse those points. It suffices to say that arbitration and litigation each have their place in international commercial disputes, and it is to the benefit of commercial parties to have a choice between them.

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[35] See Sundaresh Menon, "The Future of Commercial Litigation: How Not to Fall off the Edge of Flat World" at paras 11–15. See also Sundaresh Menon, "Dispelling due process paranoia: Fairness, efficiency and the rule of law" (Chartered Institute of Arbitrators Australia Annual Lecture 2020, 13 October 2020) at https://www.judiciary.gov.sg/docs/default-source/news-docs/ciarb-annual-lecture-speech-by-chief-justice-sundaresh-menon.pdf at paras 4–5.

31. But what of the vast majority of people who have no need for, and will never see the inside of, an ICC? I suggest that they, too, can and will benefit, perhaps indirectly, from having a strong ICC operating alongside the domestic courts. Thus, looking beyond the broader economic benefits of attracting high-quality legal work to Singapore, the adjudication of cases in the SICC has had a bearing on access to justice in our jurisdiction. For one thing, the judgments of the SICC – which are pronounced publicly, unlike most arbitral decisions – do not just resolve the dispute between the parties, but also clarify the law for the public at large[36]: just take, as an example, the questions of the legal status of cryptocurrency and the legal effect of mistakes made by an algorithm, which were clarified in *Quoine v B2C2*.[37] In doing so, the court laid down and reinforced rules and norms governing commercial life and dealings and thus would have helped avert at least some potential disputes altogether. So, the SICC too plays its part in reducing what I refer to as the "justice gap" – meaning the legal needs in the community which are unmet, for any of a variety of reasons.[38]

32. These benefits of ICCs can only be properly appreciated, however, if the existing justice system already performs adequately; otherwise, they will

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36 See "Procedure, Practice and the Pursuit of Justice" at para 6.

37 See para 16 above.

38 See Sundaresh Menon, "Technology and the Changing Face of Justice" (Speech at the Negotiation and Conflict Management Group (NCMG) ADR Conference 2019, 14 November 2019) at https://www.judiciary.gov.sg/docs/default-source/news-docs/ncmg---keynote-lecture.pdf at para 11.

be overshadowed by other, much more serious justice gaps. As I have already stressed, it is a mistake to think that the establishment of an ICC will make up for existing shortcomings in the justice system. Instead, an ICC should be seen as the feather in the cap of a well-functioning, forward-looking court system: *that* was and remains our vision for the SICC.

B. ICCs and the transnational system of commercial justice

33. The second perspective I would like to develop is that of a transnational system of commercial justice. Let me briefly explain what I mean by this.[39] This notion is based on the observation that so much commercial and business activity today – and no doubt an even greater proportion in the future – crosses national borders, which means that it will be touched by multiple legal systems. The differences between these legal systems and the resultant uncertainty this creates tends to increase transaction costs and hamper growth. Cross-border commercial disputes, in particular, can entail significant additional layers of costs. I therefore suggest that we need to work towards a coherent system to facilitate transnational commerce, and we can do this by seeing the many discrete players and processes that regulate such activity as though they were part of a *system*, at least on a conceptual level. This can be achieved through a conscious effort to promote the convergence of

[39] See "SIFoCC playing its part" at paras 7–9; see also "The Law of Commerce in the 21st Century".

commercial laws where possible, and by working to minimise the inefficiencies that often arise in transnational dispute resolution.

34. At a recent gathering of the world's leading commercial courts in Sydney under the umbrella of the SIFoCC – the Standing International Forum of Commercial Courts – I argued that commercial courts are an indispensable part of the transnational system of commercial justice. I said then that we should build an international community of leading commercial judges, arbitrators and mediators, who can play an outsize role in driving meaningful convergence.[40] In my view, ICCs, such as the SICC, are uniquely positioned to lead this charge on a number of fronts:

(a) In the area of procedural law, ICCs are poised to serve as the *control centres* of the system of international commercial dispute resolution. They do this by ruling on jurisdictional conflicts between courts and also amongst courts and arbitral tribunals.[41] They also have the expertise to set the standards for the conduct of arbitration and mediation in their supervisory and enforcement roles.[42]

(b) Next, the challenge of the complexification of disputes is one that disproportionately affects ICCs, but also one which ICCs are especially well-equipped to tackle through both procedural and

40 See "SIFoCC playing its part" at para 18.

41 See "SIFoCC playing its part" at paras 20–21.

42 See "SIFoCC playing its part" at paras 22–24.

substantive innovations designed to downsize disputes. Since this is a phenomenon rooted in the same causes around the world, the global community of ICCs is well-placed to promulgate best practices through their collective experience.[43] And this will be enhanced through greater dialogue with the other major constituency that deals with the same challenge, international arbitrators.

(c) As for substantive commercial law, ICCs can also issue authoritative or at least highly persuasive pronouncements on novel and complex legal issues that have a global reach. I have already mentioned *Quoine v B2C2* in this connection.[44] But beyond this, I believe we are likely to see the emergence of a host of new transnational legal issues arising from such areas as the global response to climate change. This will likely involve the contestation and reimagination of legal norms governing such areas as corporate governance and responsibility for harm to the environment.[45] Such norms will be more effective if, like the underlying issues they seek to address, they are transnational in scope, development and influence. In many cases, an ICC will be an ideal forum in which to address such matters.

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43 See "SIFoCC playing its part" at para 26.

44 *Quoine v B2C2* raised the question of whether cryptocurrency was property capable of being held on trust. After considering authorities from England and Canada, the Singapore Court of Appeal expressed a tentative view that it could be: at [139]–[140], [144].

45 See "SIFoCC playing its part" at para 28; "The Law of Commerce in the 21st Century" at paras 18, 42–44.

35. By developing, promoting and enforcing legal norms as part of the transnational system of commercial justice, ICCs can help to strengthen the rule of law internationally. This is a priority we should pursue in conjunction with ensuring access to justice on the domestic plane, because these transnational challenges also threaten to open up justice gaps. We see this happen when parties find themselves unable to enforce an arbitral award, or when a victim of a novel kind of damage is unable to secure any remedy from those responsible for the harm. But more simply put, the irreversible effects of globalisation mean that we are all participants on the transnational plane. Those of us involved in the delivery of justice and the practice of law cannot afford to treat transnational justice as a matter of subsidiary importance or a passing curiosity.

36. A good illustration of some aspects of this can be found in *Lao Holdings v Government of the Lao PDR*, which concerned an application brought before the SICC to set aside two investor-state arbitral awards.[46] The parties in those arbitrations had reached an agreement not to admit any further evidence after a certain point in time. However, the arbitral tribunals read into this agreement an exception for what they termed "compelling circumstances", and by way of example this would include cases where there was an attempt to introduce

[46] *Lao Holdings NV v Government of the Lao People's Democratic Republic and another matter* [2021] 5 SLR 228 ("*Lao Holdings (SICC)*"); upheld on appeal in *Lao Holdings NV and another v Government of the Lao People's Democratic Republic* [2022] SGCA(I) 9 ("*Lao Holdings (CA)*").

evidence of corruption.[47] The tribunals admitted the further evidence that one of the parties wished to adduce and concluded that the applicants' conduct disentitled them from relief. The applicants argued that in doing so, the tribunals had failed to follow the parties' agreed procedure. The SICC dismissed this ground of challenge and held that the tribunals' interpretation of the parties' agreement could not be reviewed *de novo* by the court.[48] But the SICC went further and held, *obiter*, that the tribunals had reached the correct conclusion in any event: it recognised that arbitrators had a public duty to consider evidence of corruption, and this could not be precluded by an agreement between the parties.[49] This is a dramatic illustration of the international justice system weighing in on norms of governance and commercial behaviour. On appeal, the decision of the SICC was affirmed by the Court of Appeal.[50] The decisions of the SICC and the Court of Appeal reinforced two important sets of transnational norms, amongst others: first, the principle of limited curial intervention in arbitration, and second, the law's strong and universal condemnation of corruption.

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47 See *Lao Holdings (SICC)* at [29].

48 *Lao Holdings (SICC)* at [130] and [142].

49 *Lao Holdings (SICC)* at [153]–[154].

50 *Lao Holdings (CA)* at [102] and [138] (holding that a tribunal's construction of an agreed procedure between the parties would not be revisited by a court so long as the construction is open on the text of the agreement), and [139] (commenting, *obiter*, that the arbitral tribunals had correctly interpreted the agreement in the present case).

37. Quite apart, therefore, from what ICCs can do for the domestic legal regimes in which they are set up, we should also recognise their contributions to the development of the transnational system of commercial justice. As participants in and beneficiaries of this transnational system, we all have an independent interest in seeing it flourish, and ICCs provide an important avenue for enabling that.

V. Conclusion

38. Let me conclude where I started: Asia in the 21st century has seen a new dawn for transnational dispute resolution services, set against the backdrop of an increasing stream of international commercial disputes in Asia arising from steady economic growth, including from engines of growth such as the Belt and Road Initiative. Few litigants in such cases will set out with the goal of resolving their disputes in London or New York. Instead, their goal will typically be to litigate in a familiar environment under a predictable and well-tailored set of procedural and substantive laws. ICCs, such as the SICC, fill this need by enabling parties to litigate with confidence in a location near the centre of gravity of their dispute.

39. This allows such courts to provide a viable alternative to arbitration, but as I have sought to explain today, they also offer a distinctive value proposition compared to domestic commercial courts. ICCs such as the SICC offer a

package of advantageous features such as an international bench, foreign representation, and specialised procedures. They nurture a cadre of counsel and adjudicators – both local and foreign – with a truly international outlook and who can seamlessly conduct the kind of multi-jurisdictional and transnational litigation that is an increasingly common feature of our operating environment. They also offer us a vision of a network of courts that work as a coherent and cohesive system to better serve the needs both of domestic society and international trade and commerce. Standing at the intersection of domestic and transnational justice systems, ICCs offer many of the features that will be most needed for us to meet the legal challenges of today and tomorrow – such as the ones that you will be discussing and reflecting upon at the conference sessions over the next two days.

40. Thank you very much, and I wish all of you a fruitful and fulfilling conference.