Launch of Litigation-Mediation-Litigation Protocol & SICC Model Jurisdiction Clause for International Arbitration Matters
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ADDRESS ON APPROPRIATE DISPUTE RESOLUTION

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I. Introduction

1 The launch of the Litigation-Mediation-Litigation Protocol (or "LML Protocol") between the Singapore International Commercial Court (or "SICC") and the Singapore International Mediation Centre (or "SIMC"), together with the launch of the SICC Model Clause for International Arbitration matters, reflects the importance of offering business users of dispute resolution services clear and flexible pathways between the three principal modes of dispute resolution, namely mediation, arbitration and litigation. Disputes come in all shapes and sizes, and for this reason alone 'one size does not fit all'. The LML Protocol provides for a party commencing proceedings in the SICC to have them stayed for a few weeks in order to refer the dispute for mediation at SIMC. Any resulting settlement agreement may then be recorded as an order of court. The SICC Model Clause is simple and straight-forward. It makes sense for parties to combine it with the Singapore International Arbitration Centre (or "SIAC") Model Clause, and this combined choice of arbitral institution and supervisory court will be put up on the SIAC website. I'd like to thank the members of the SICC Working Group comprising nine lawyers drawn from Singapore and foreign law practices that worked with us to develop the clause. Input from the profession has helped make sure that it is useful and relevant for lawyers and their clients.

2 Our theme today is "appropriate dispute resolution". The adjective "appropriate" avoids the oppositional adjective of "alternative". It is true that litigation in court is the natural avenue for redress in a developed society, because access to justice forms part of the social contract between citizens inter se and with their elected government. Moreover, court litigation is conducted openly and transparently and results in reasoned decisions that are publicly available, and thus may help guide future conduct. For these among other reasons, the courts

anchor the legal system. Nonetheless, other modes of dispute resolution may be more appropriate in specific circumstances. Consequently, it may be helpful to think in terms of "appropriate dispute resolution" rather than "alternative dispute resolution".

3 In my address, I will make three points:

(a) Mediation is useful even if it does not resolve the entire dispute, because it may save time and costs by settling some parts of a larger dispute.

(b) Arbitrators must have the confidence to exercise their procedural discretion so that they can achieve substantial justice.

(c) Lawyers, regardless of whether the mode of dispute resolution adopted is in court or outside court, must keep top of mind their role in the administration of justice.

4 It is worth keeping in mind that any discussion of systems of justice requires consideration of at least two perspectives. One is society's interest in an objectively fair and efficient process. The other is the individual litigant's subjective interest not only in fairness but also in winning. There is a tension between the two perspectives, because litigants and their lawyers will inevitably seek advantage, and processes must be designed to minimise how they might be gamed or manipulated. On this last concern, it is important that the legal profession inculcate from generation to generation the culture that lawyers are an integral part of the administration of justice and therefore share responsibility for a fair and efficient process. This appreciation is part of what gives purpose to a legal career.

II. Mediation as a way of managing and simplifying complex disputes

5 Courts and other tribunals find their origin in the human desire that injustices be remedied. We speak of doing justice but what we really mean is remedying injustice: stopping one person from infringing the rights of another or compensating the victim for the infringement. Mediation in and of itself has only an indirect relationship to justice, because it focuses not purely on the rights of parties but also on their interests regardless of their strict legal rights. On one hand, this makes mediation attractive, with the potential to rescue parties from the zero-sum game of a formal adjudication where one party must lose for the other to win. On the other, however, if mediation is unmoored from the legal system and the possibility

of redress in court is cut off, it may favour the party with greater bargaining power and so advantage the strong over the weak. Where seeking legal remedies takes too long or is too costly, then mediated outcomes that involve compromise become more attractive, but not for the right reason. Hence, it is necessary to anchor mediation within the broader context of a fair and efficient court system. Parties who know that the legal case can in principle be fully litigated will be better placed to reach just mediated outcomes, accommodating both parties' interests and not overriding either party's desire for justice.

6 Given this context, mediation of disputes that have already been brought before a court, done with the encouragement and ultimately the supervision of that court, carries the benefit that parties knowing and understanding their rights may nonetheless find it in their interests to resolve their dispute without pursuing the fight to the bitter end. Commercial relationships may be preserved, time and costs may be saved.

7 Mediating in the context of an ongoing litigation at the suggestion or direction of the court has several additional benefits. One is that because mediation is suggested or directed by the court, the problem that neither party wants to be the first to suggest it (in case this is perceived as weakness) is sidestepped. A second benefit is that filing proceedings helps parties shape and define the contours of their case, so that the issues for mediation are properly established. A common difficulty with mediating in the early stages of a dispute is that parties do not have enough information, not just about their own case, but also about that of the opposing party.

8 I would make three additional observations. First, it is important to stress that mediation must be something that takes place separately from the proceedings happening in front of those mandated to adjudicate on the dispute. Successful mediation requires the mediator to be let in to the confidence of each side in turn *in the absence of the other*. This is antithetical to the general principles of fair hearing on which adjudicative processes are based.

9 Secondly, while in principle courts may be given the power to direct unwilling parties to mediate, a fact which is no more objectionable than enforcing a prior agreement to mediate contained in a contract, in practical terms ordering a mediation where one of the parties is adamant that it will not settle and wants to litigate its rights, is likely to be a waste of time, and thus merely delays that adamant party's access to justice without any countervailing benefit.

10 Thirdly, while it can be said that there is a time in any dispute where parties are more likely to settle successfully, a sweet spot if you like, occurring after they know enough about their respective cases and before they have descended into an unbridgeable hostility, exactly when this sweet spot occurs is likely to differ from case to case and from party to party. This means that pre-determining whether by contract or by rules of court when mediation should occur may not be the best approach. Instead, there should be procedural flexibility of two kinds: first, in the processes of the adjudicative body to consider with counsel the desirability of mediation at different stages, and secondly in the processes of the mediating body, to carry out mediation quickly and efficiently regardless of the stage of the dispute. I am happy to report that the SICC and the SIMC have the requisite respective procedural flexibility.

11 I turn now to the main point I wanted to make in this section. There are disputes that are of such complexity that they are difficult to resolve fairly and efficiently by one mode alone. For such disputes, the possibility of mediating certain aspects of a dispute while leaving others to be fully litigated is truly beneficial. A good example would be technically complex construction disputes where there are contractual aspects, defects aspects and delay aspects. It can be difficult to the point of impossibility (or at least inefficiently costly) for all aspects of such a dispute to be determined by the same adjudicator in one big set-piece battle. In these circumstances, parts of the dispute can be hived off for other modes of dispute resolution. While neutral evaluation can help to resolve certain kinds of disputes (such as defects claims or even accounting issues), mediation is also an appropriate method to resolve such discrete chunks of disputes. Parties may be reluctant to lose the option of agreeing or disagreeing to the outcome that happens when binding neutral evaluation is selected. But a non-binding evaluation (because it comes all at once as a singular outcome) may not be accepted by the party who feels it has not had its way. Mediation offers a potentially more nuanced approach, in which parties feel they have control. It can be very effective.

III. Arbitrators' procedural discretion

12 A key positive feature of arbitration is that arbitrators have the procedural discretion to establish a fair and efficient procedure that fits the circumstances of the case and the needs and means of the parties. It is through the exercise of this discretion that many helpful innovations were developed which have since spread beyond the world of arbitration. Two simple examples of this suffice. One is witness conferencing, where the expert witnesses of all parties in one

discipline testify together, rather than sequentially during presentation of the party's cases. The traditional practice meant that expert witnesses might testify days or weeks apart. Witness conferencing was developed in arbitration and is now commonplace in courts around the world. It is very helpful in getting to the right answers because it eliminates the risk of experts simply talking past each other. It also fosters candour and realism on the part of the experts. Add to this the point that experts asking direct questions of each other rather than through lawyers can, when properly handled by the adjudicator, really elucidate the technical issues in the matter.

13 The second example is time limits for evidence taking. In arbitration this is usually done by the so-called chess-clock method. The equal allocation of time is considered by arbitrators to be the simplest demonstration of fairness to both parties. Courts increasingly adopt time banking where the use of time during trials is planned and allocated in advance in consultation with parties. In my view, in arbitrations as in court, equality of time is not an essential feature. One side may have more witnesses than the other. More witnesses may require more time for cross-examination. So what is truly essential is fair and due consideration, in consultation with counsel, of what the appropriate allocation of time is. This can be readily demonstrated at the time of making the allocation.

14 Given that arbitrators' procedural discretion has delivered so many innovations that have been of great value to fair and efficient dispute resolution, it is concerning to hear talk of "defensive arbitration" – a phrase that evokes "defensive medicine" where doctors said to be worried about being sued for negligence order unnecessary tests, increasing costs for patients. In defensive arbitration, an arbitrator worried about a natural justice challenge may also fall into bad practices, of which I give three examples:

(a) permitting excessive rounds of evidence and submissions at the expense of time and costs;

(b) allowing timelines to slip as a recalcitrant party delays proceedings;

(c) not asking questions or raising concerns to counsel, or refraining from inviting additional submissions when these are necessary to get to the heart of the matter, a quest that is certainly in the interests of justice.

15 Practising defensive arbitration is in fact unwarranted. The courts only set aside arbitration awards where this is mandated by the law, and the grounds for challenge are narrow. In truth, courts are acting to protect the integrity of the arbitration process when they set aside awards on the basis of proven due process failures. There is nothing in the law and practice surrounding the natural justice ground that should hinder or impede arbitrators from acting fairly and efficiently. It may be that sometimes unhappy parties find a way to shoehorn their unhappiness into a natural justice challenge, but such unmerited applications do not succeed.

16 Reference to SIAC Rules 2016 Rule 19.1 is salutary:

> The Tribunal shall conduct the arbitration in such manner as it considers appropriate, after consulting with the parties, to ensure the fair, expeditious, economical and final resolution of the dispute

17 Fulfilling this rule is a core duty of the tribunal and it is completely consistent with the demands of natural justice.

IV. Lawyers' responsibility for a fair and efficient process

18 My third point concerns the role of lawyers and their shared responsibility for a fair and efficient process. Under the Legal Profession (Professional Conduct) Rules 2015, counsel owe a duty to assist in the administration of justice in proceedings before the Court and any Tribunal. For example, Rule 9(1)(*e*) states as a general principle that "A legal practitioner must, in any proceedings before a court or tribunal, conduct the legal practitioner's case in a manner which maintains the fairness, integrity and efficiency of those proceedings and which is consistent with due process." This is a core duty of counsel.

19 It is worth elaborating on what this means in practice within proceedings, whether before a court or a tribunal. I would note three points:

(a) In relation to timelines for filing documents, counsel must not seek excessive time;

(b) In relation to fixing of hearings, counsel must make themselves reasonably available, and where this is not possible they should be open to arrangements for other counsel to handle the hearing in their place;

(c) In relation to requests or requirements that counsel agree procedural documents, such as lists of issues or statements of agreed facts, counsel must approach the task in a spirit of good faith and genuine cooperation.

20 But there is a further overarching point that is relevant to our topic today, which is appropriate dispute resolution. Appropriate dispute resolution involves helping parties in dispute move towards the fair and efficient resolution of that dispute by the pathway most appropriate to the circumstances, including the nature of the case and the situation of the parties. Lawyers are guides and have a responsibility to their clients to find the shortest, smoothest path to achieving a fair and just outcome. Thus, lawyers must advise clients on the possible modes of dispute resolution, and do so at appropriate junctures, so that time and costs may be saved.

V. Conclusion

21 In conclusion, today marks a milestone of coordination among institutions that offer parties different pathways to the resolution of their disputes, providing linkages and crossover points that make it easier for parties to navigate.

22 I thank SIAC and SIMC for their partnership in our shared aspiration that international commercial disputes find a natural and safe harbour in Singapore for their fair and efficient resolution. And I thank all of you for being here.