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**BENEFITS OF COURTS SUCH AS THE SINGAPORE INTERNATIONAL
COMMERCIAL COURT (SICC)**

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1. In 2010, speaking on the state of cross-border commercial dispute resolution, my predecessor, Jim Spigelman, sought to locate individuals and institutions on a spectrum from parochial to cosmopolitan.¹ If Gary here, the renowned world expert on international arbitration, represents the cosmopolitan, I feel that I, as the domestic judge speaking on behalf of a municipal court, must represent – much less flatteringly – the parochial. While not wanting to seem out of touch, I hope to show today that there are some benefits to the domestic court model that shouldn't be dismissed too easily when considering forums for international dispute resolution and that, subject always to constitutional constraints, a municipal court can be adapted to provide a valuable forum for the settlement of such disputes. In that way, courts can provide a service in the international sphere which, as I will explain, is complementary to arbitration and gives parties a real choice as to the best way they can resolve their disputes.
2. The Singapore International Commercial Court (SICC) is an example of how a domestic court can be adapted to provide such a service.
3. The SICC is, in fact, far from your typical municipal court. While technically constituted as a division of the Singapore High Court,² it possesses a jurisdiction that is uniquely international. Unlike municipal courts, which generally draw their jurisdiction from the substantial connection between the subject dispute and the court's home country,³

* I express thanks to my Judicial Clerk, Ms Bronte Lambourne, for her assistance in the preparation of this address.

¹ The Honourable JJ Spigelman AC, "Law and International Commerce: Between the Parochial and the Cosmopolitan" (Speech delivered to the New South Wales Bar Association, Sydney, 22 June 2010).

² *Supreme Court of Judicature Act* (Singapore, cap 322, 2007 rev ed) s 18A

³ See Sundaresh Menon, "International Commercial Courts: Towards a Transnational System of Dispute Resolution" (Speech delivered at the DIFC Courts Lecture Series, Dubai, January 22 2015), 21.

the SICC has jurisdiction over “international commercial matters”,⁴ where either: the parties have consented to the SICC’s jurisdiction after the dispute has arisen;⁵ the parties have included a dispute resolution clause in the contract out of which the dispute arises which confers jurisdiction on the SICC;⁶ or the Chief Justice of Singapore has transferred the case from the Singapore High Court.⁷ Furthermore, the SICC must not refuse jurisdiction solely on the ground that the dispute is connected to a jurisdiction other than Singapore.⁸ In other words, the SICC draws its jurisdiction in much the same way as an arbitral body does and, for this reason, can avoid the perception of “home-court bias” that often bedevils domestic courts.

4. The SICC further borrows from arbitration in its approach to foreign law. Judges of the SICC can take judicial notice of foreign laws with the assistance of oral and written submissions rather than requiring foreign laws to be pleaded and proved as a question of fact,⁹ avoiding the pitfalls and expense of expert evidence. This is assisted, first, by the international bench of the SICC which is comprised of judges of a variety of nationalities drawn from both civil and common law jurisdictions, and, second, by the “liberal rights of audience”¹⁰ for foreign counsel, who need only register with the SICC by application form and affidavit in order to appear before it.¹¹
5. But for all the SICC shares with international arbitration, I want to focus today on three key distinctions between the two models of international dispute resolution, which expose how the SICC “leverages on the strengths and traditions of its municipal foundations”.¹² The first is the distinction between the ad hoc approach of arbitration and the institutional nature of commercial courts. The second is the contrast between consensual and coercive approaches to determining the parties to, and decision-maker of, a dispute. And finally, the third contrast I want to draw is between the finality of an arbitral proceeding and the appellate mechanism available in the SICC.

⁴ *Supreme Court of Judicature Act* (Singapore, cap 322, 2007 rev ed) s 18D(a).

⁵ *Rules of Court* (Singapore, cap 322, R 5) O 110 r 7(1).

⁶ *Supreme Court of Judicature Act* (Singapore, cap 322, 2007 rev ed) s 18F.

⁷ *Rules of Court* (Singapore, cap 322, R 5) O 110 r 7(2)(a).

⁸ *Rules of Court* (Singapore, cap 322, R 5) O 110 r 8(2).

⁹ *Supreme Court of Judicature Act* (Singapore, cap 322, 2007 rev ed) s 18L.

¹⁰ Justice Steven Chong, “The Singapore International Commercial Court: A New Opening in a Forked Path” (Speech delivered at the British Maritime Law Association Lecture and Dinner, London, 21 October 2015), [37]; The Honourable the Chief Justice Sundaresh Menon, “Shaping the Future of Dispute Resolution & Improving Access to Justice” (Speech delivered at the Global Pound Conference Series 2016, Singapore, 17 March 2016), [43].

¹¹ *Supreme Court of Judicature Act* (Singapore, cap 322, 2007 rev ed) s 18M.

¹² Menon, above n 3, [26].

6. It has often been observed that the SICC is a companion rather than a competitor of international arbitration.¹³ Indeed, the two models form a type of “symbiotic legal order”¹⁴ in which the shortcomings of one model are the strengths of the other. In this way, I aim to show that some of the most desirable aspects of international arbitration are also its flaws and thus there is a need for both arbitration and commercial courts in the international legal architecture. As Chief Justice Sundaresh Menon of Singapore has stated, “International commercial courts can play their role best if they capitalise on their differences from international commercial arbitration.”¹⁵

AD HOC VERSUS INSTITUTIONAL

7. Turning to the first distinction, one of the major drawcards of arbitration is its highly personalised approach to justice. Many commercial parties are attracted to arbitration because of its ad hoc nature and its promise of confidentiality. This should remain a viable curial option for parties. The flip side of ad hoc, confidential proceedings, however, is a failure to produce a harmonised body of international jurisprudence.
8. There are a number of reasons why arbitral bodies are unable to fulfil this role. First, in the common law world at least, legal decision-making relies on precedent. Arbitral awards have no precedential value in the strict sense, and in my own experience of arbitration, I have witnessed only one occasion where the reasons for a previous arbitral award were cited as an aid to determining the question at hand. That is notwithstanding the fact that many arbitrators are distinguished retired judges or eminent scholars.
9. Second, and no doubt the reason why a doctrine of precedent does not exist in arbitration, arbitral awards and the reasons for those awards are generally private. As I mentioned, the confidentiality of arbitral awards is, for many, a desirable aspect of arbitration, but it can act as a counterweight to legal convergence in the development of transnational commercial law.

¹³ Michael Hwang, “Commercial courts and international arbitration – competitors or partners?” (2015) 31 *Arbitration International* 193, 196-7; The Hon Chief Justice Marilyn Warren AC and the Hon Chief Justice Clyde Croft, “An International Commercial Court for Australia – Looking beyond the New York Convention” (Speech delivered at the Commercial CPD Seminar Series, Melbourne, 13 April 2016), 16; Menon, above n 3, [10].

¹⁴ Chief Justice Allsop AO, “International Commercial Arbitration – the Courts and the Rule of Law in the Asia Pacific Region” (Speech delivered at the 2nd Annual Global Arbitration Review, Sydney, 11 November 2014), 7.

¹⁵ Menon, above n 3, [67].

10. Third, even if arbitral awards were published, there remains a distinction between the kind of precedence developed by arbitrators and that developed by institutional courts. As Chief Justice French has pointed out:

*“That is because judicial adjudication serves larger purposes than the efficiencies and economic benefits and party autonomy served by the arbitral process. True it is focussed on the determination of particular disputes between particular parties. But it necessarily involves the public interpretation and application of laws, be they statutory or the judge-made common law which can affect a whole polity. The courts are not just one item on a list of dispute resolution service providers. They have an institutional responsibility to maintain the public face of the rule of law”.*¹⁶

11. Justice Stephen Chong, a judge of the Supreme Court of Singapore, notes that this is an area in which the SICC seeks to distinguish itself from arbitration. As a court, the SICC’s “objective is somewhat broader in that it seeks not only to retrospectively resolve the particular dispute at hand, but also to signal in a more general and prospective manner how it will decide similar cases in the future”.¹⁷
12. There have been numerous calls over the years for greater legal convergence in the Asia-Pacific region,¹⁸ including by myself.¹⁹ Whether this be greater convergence between domestic bodies of law or a harmonised body of international law striving for the status of a *lex mercatoria*, the advantages are self-evident. First, the existence of a patchwork of conflicting commercial laws increases transaction costs and deters investment in certain regions. A harmonised body of law that applies consistently to international commercial disputes will increase commercial certainty. Furthermore, consistency in decision making helps to secure legitimacy and confidence in the decision making body.
13. Second, a published body of judgments is necessary in order for international commercial law to keep pace with the business world that it seeks to regulate. As Lord Neuberger warned in a speech on “Arbitration and the Rule of Law”, “One of the disadvantages of an increase in

¹⁶ Chief Justice Robert French AC, “Convergence of Commercial Laws – Fence Lines and Fields” (Speech delivered at the Doing Business Across Asia – Legal Convergence in an Asian Century Conference, Singapore, 22 January 2016), 17.

¹⁷ Chong, above n 10, [44].

¹⁸ See, eg, French, above n 16; Sundaresh Menon, “Transnational Commercial Law: Realities, Challenges and a Call for Meaningful Convergence” [2013] *Singapore Journal of Legal Studies* 231.

¹⁹ The Hon T F Bathurst, “The Importance of Developing Convergent Commercial Law Systems, Procedurally and Substantively” (Speech delivered at the 15th Conference of Chief Justices of Asia and the Pacific, Singapore, 28-30 October 2013).

awards and a concomitant decrease in judgments, particularly in the common law world, is that the law does not develop, that it becomes ossified". To the extent that that leads to a lack of coherent development of the law, parties inevitably suffer, whether they choose to have their disputes resolved by arbitration or through the courts.

14. So aside from the fact that its judgments are generally published,²⁰ how will the SICC contribute to a harmonised body of international commercial jurisprudence? The SICC is particularly well-positioned, as a body constituted for the purpose of resolving international disputes and with a distinctly international bench, to increase dialogue between judges and jurisdictions, "facilitate the flow of information"²¹ and develop authoritative jurisprudence on both procedural and substantive laws. For instance, the SICC has the capacity to "develop streamlined rules of procedure and harmonised rules for the taking of evidence".²² It is also able to clarify and promote the enhanced use of international conventions and standards such as the UN Convention on Contracts for the International Sale of Goods or the UNCITRAL Model Law on Cross-Border Insolvency.²³
15. There is certainly space in the international legal infrastructure for private, efficient and personalised justice represented by international arbitration, but the type of clarity and rationalised development that an institutional body brings to international commercial law is a crucial counterbalance to ad hoc justice. Professor Jan Dalhuisen of King's College London makes the case for international courts by arguing that the development of a modern transnational law requires greater focus on the currently underdeveloped "spokesman function".²⁴ She writes:

*"If we may accept that the new transnational law is informally formed in a continuing dynamic process based on the practical needs of the international business community supplemented by the exigencies of modern international arbitrations ... it is for its formulation still dependent on this spokesman function to articulate this law more clearly as it emerges."*²⁵

²⁰ But see *Rules of Court* (Singapore, cap 322, R 5) O 110 r 30, which allows parties to apply for orders that the case be heard in camera, that there be no publication of information and documents relating to the case or that the Court file be sealed.

²¹ French, above n 16, 17.

²² Menon, above n 18, 249.

²³ French, above n 16, 9.

²⁴ Jan H Dalhuisen, "The Case For An International Commercial Court" (2014) online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2433513, 13.

²⁵ Ibid 11.

16. International arbitration was never intended to provide an “authoritative and legitimate superstructure”²⁶ for the development of international commercial law. International courts like the SICC can take up the mantle of such development while continuing to exist side by side with arbitration in that symbiotic legal order.

CONSENSUAL VERSUS COERCIVE

17. Turning now to the second distinction, that being the distinction between the consent-based jurisdiction of arbitration and the coercive powers of the SICC. Consent is often thought to be the foundation of arbitration. Commercial parties may choose arbitration because they consider it important that they remain in control of the resolution of their own dispute²⁷ and have the ability to tailor features of the dispute resolution to their specific needs. This manifests itself in two key ways. First, parties submit to the jurisdiction of the arbitral body because they have consented to it; it is their consent that gives the arbitral body legitimacy. Second, parties have a significant degree of autonomy in selecting the tribunal or decision-maker who will hear the dispute.
18. While these are both viewed as advantages for many commercial parties, the centrality of consent can also throw up challenges that highlight the benefits of the independent, coercive power of a court. First, difficulties can arise where there is a string of connected contracts and it becomes necessary to join parties to the dispute who are not necessarily signatories of the arbitration agreement. This was identified by the Singapore Court of Appeal in *PT First Media TBK v Astro Nusantara International BV* as “a raging controversy” in arbitration.²⁸ The Court observed that
- “the power of the tribunal to join non-parties to an arbitration at any stage without the consent of the existing parties and at the expense of the confidentiality of proceedings is such utter anathema to the internal logic of consensual arbitration”.*²⁹
19. String contracts often arise in situations where, for instance, there is an employer-main contractor-subcontractor dispute or an insurance-

²⁶ Menon, above n 3, [14].

²⁷ The Hon Justice John Middleton, “Some Reflections of a ‘Statutory Decision-maker’ on Consensual International Commercial Arbitration” (Speech delivered at the Inaugural annual Chartered Institute of Arbitrators (Australia) & Grossi Florentino business lunch, Melbourne, 28 July 2016).

²⁸ [2014] 1 SLR 372, [196].

²⁹ *Ibid* [197].

reinsurance-retrocession dispute.³⁰ In those instances, inconsistency, inefficiency and unnecessary costs can arise “as duplicitous proceedings are then instituted in different fora to resolve essentially common issues arising out of the same factual substratum”.³¹ Michael Hwang, Chief Justice of the Dubai International Financial Centre Courts, notes that the reason the Technology and Construction Court in England remains a much sought after forum – despite the regular inclusion of arbitration clauses in building contracts – is because it is national courts who have the “power to consolidate or join third parties without the consent of all parties”.³²

20. The SICC Rules ensure that the SICC retains this important power of domestic courts. Joinder of a third party can be prompted by an application from one or more of the disputants. Under Order 110 rule 9, the Court has the power to allow a third party to be joined irrespective of whether that third party is a party to the SICC agreement. If the third party does not consent to the joinder, they can be served a writ in Singapore or can be served out of jurisdiction.³³
21. The second complication that can arise from consent-based dispute resolution centers around the independence of the decision-maker. Arbitrators and counsel are generally drawn from the same pool of professionals, and as the profession expands and diversifies, so do the standards of ethical conduct.³⁴ While it is generally considered that conflicts of interest are dealt with by the fact that the parties to arbitration have mutually consented to the choice of decision-maker, this choice can in itself give rise to ethical issues, or at least the perception of ethical issues.³⁵ For instance, it has been suggested that an arbitrator’s prospect of reappointment might incentivise them to “split the baby”. While this has invariably been attacked as a myth by those experienced in the field, Chong argues that it is clear such a moral hazard does exist, particularly as the profession expands and becomes more entrepreneurial.³⁶

³⁰ Hwang, above n 13, 195; Quentin Loh, “Opening Address” (Speech delivered at the Regional Arbitral Institutes Forum (RAIF) Conference 2014, Singapore, 1 August 2014).

³¹ Chong, above n 10, 17.

³² Hwang, above n 13, 195.

³³ Singapore International Commercial Court Committee, *Report of the Singapore International Commercial Court Committee* (29 November 2013), [22]-[25].

³⁴ The Honourable the Chief Justice Sundaresh Menon, “Some Cautionary Notes for an Age of Opportunity” (Speech delivered at the Chartered Institute of Arbitrators International Arbitration Conference, Penang, 22 August 2013), [5].

³⁵ See Menon, above n 3, [51].

³⁶ Chong, above n 10, [24].

22. By contrast, judges are independently assigned to cases in the SICC, avoiding any potential conflicts or ethical vacuums. Furthermore, the SICC has introduced a code of conduct to which foreign lawyers registering to appear before the SICC must agree. So, to contrast the regulation of ethical conduct: in the SICC, cl 7 of the code of conduct prohibits *ex parte* communications with the Court;³⁷ in arbitration, practice differs depending on the customs of the particular arbitrator, while *ex parte* communications are generally prohibited, in China for instance they are not necessarily objectionable.³⁸
23. Now it is at this stage I feel I should reinforce that I am a proponent of international arbitration, I do not intend to detract from the arbitration model but rather to highlight some of the inevitable weaknesses on which commercial courts such as the SICC are well-positioned to capitalise. As Justice Middleton of the Federal Court has stated:

*“The statutory decision-maker (a judge) and the consensual decision-maker (an arbitrator) must work in tandem, to facilitate and promote international trade and commerce through an efficient, fair and cost-effective dispute resolution process. Competent and careful arbitrators, and judges conscious of their proper role, will ensure this happens.”*³⁹

FINALITY VERSUS APPEALABILITY

24. Moving finally to our third distinction between the principle of finality in arbitration and the availability of merits appeal in the SICC. In arbitration, the principle of finality prevents national courts from interfering with an arbitral award by relitigating the merits of the case. For commercial parties who want to avoid years of protracted litigation as a case winds its way through the tiers of the courts, the principle of finality can have much appeal. Indeed, in a 2006 survey of in-house counsel at major international corporations, only 9% of corporations indicated that they would welcome a merits appeal mechanism in international arbitration.⁴⁰ Depending on the seat of arbitration, interference with an arbitral award is only allowed on limited grounds relating to jurisdictional or procedural irregularities.
25. By contrast, the SICC is structured to allow merits appeals to the Singapore Court of Appeal. The appeal bench may be composed of

³⁷ *Legal Profession (Foreign Representation in Singapore International Commercial Court) Rules 2014* (Singapore, cap 161, 2014) Sch 1 cl 7.

³⁸ See Menon, above n 34

³⁹ Middleton, above n 27.

⁴⁰ Queen Mary School of International Arbitration, University of London and PricewaterhouseCoopers, *International Arbitration: Corporate Attitudes and Practices – Survey* (2006), 15.

international jurists from the SICC panel, Singapore Court of Appeal judges or a mixture of the two. Importantly, there is flexibility built in to the SICC model as the right of appeal is subject to the parties' prior agreement which may exclude appeals all together or limit their scope.

26. The choice between these two models is often conceived of as “a tension between the rival goals of finality and fairness”.⁴¹ One situation in which the scales may be tipped towards fairness is where the stakes are particularly high. For instance, in the 2011 US Supreme Court decision of *AT&T Mobility v Concepcion*,⁴² the majority found that the principle of finality rendered arbitration unsuitable for classwide disputes. Justice Scalia wrote: “Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration ... We find it hard to believe that defendants would bet the company with no effective means of review”.⁴³ This sentiment can motivate commercial parties to favour a court such as the SICC over international arbitration, as Rowan Platt observes, “where stakes are particularly high, the need to protect against the risk of an aberrant award by permitting court review outweighs the desire for speed and finality”.⁴⁴
27. But in some ways this is also an artificial distinction, because where the stakes are high it is often the case that finality is not synonymous with speed and efficiency. Parties are more likely to pour extensive resources into a process that they conceive of as a “one shot contest”, dilating both the time and costs of the proceedings.⁴⁵ Conversely, another reason why it has been argued that the lack of an appellate mechanism has led to rising costs and inefficiency is because of a tendency for arbitrators “to ‘bullet-proof’ their awards ... in a kind of leave-no-stone-unturned approach”.⁴⁶ The result may be that a greater amount of evidence is admitted, hearing times are protracted or discovery is more extensive than it would be under court rules.⁴⁷
28. While the appeal process in the SICC obviously involves a second bout of litigation, the appeal mechanism also allows issues to be “crystallised and fine-tuned as the case passes through the interlocutory, trial and then appellate processes”.⁴⁸ This is assisted by the SICC’s “cutting-edge

⁴¹ Rowan Platt, “The Appeal of Appeal Mechanisms in International Arbitration: Fairness over Finality?” (2013) 30(5) *Journal of International Arbitration* 531, 534 citing W W Park, “Why Courts Review Arbitral Awards” (2001) 16 *International Arbitration Report* 596.

⁴² 563 US 333 (2011).

⁴³ *Ibid* 344, 350.

⁴⁴ Platt, above n 41, 534.

⁴⁵ Menon, above n 3, [48]; Chong, above n 10, [22].

⁴⁶ Chong, above n 10, [22].

⁴⁷ *Ibid*; Menon, above n 3, [48].

⁴⁸ Menon, above n 3, [48].

case management system” in which cases are “docketed, judicially managed and decided by specialists in the relevant areas of law”.⁴⁹ As an example of the efficiency of this process, the SICC’s maiden case made its way through the courts with celebrated speed and quality with judgment on the complex matter being handed down four months after the end of the hearing.⁵⁰

29. Now I would be remiss if I failed to mention one present weakness of the SICC which pertains to the enforceability of its judgments. Unlike the New York Convention which ensures the near-universal enforceability of arbitral awards, a judgment of the SICC takes effect as a judgment of the High Court of Singapore. Its enforceability thus depends on a patchwork of reciprocal enforcement agreements with specific countries. That being said, SICC judgments will also be enforceable with relative ease in common law countries via an action for enforcement of a judgment debt.
30. Looking to the future, one exciting prospect for the SICC is the hoped-for expansion of the Hague Convention on Choice of Court Agreements which at present has been ratified by Mexico and the EU with the exception of Denmark. This convention would see countries give effect to three basic rules: that the court chosen by the parties must hear the case; that any court not chosen by the parties must decline to hear the case; and that any judgment rendered by the chosen court must be recognised and enforced in other contracting states, subject to limited grounds of refusal.⁵¹

CONCLUSION

31. In 2013, I mooted the idea of an international commercial tribunal in our region as a “radical possibility”⁵² and a “lofty goal”.⁵³ While I was, at the time, referring to a transnational body upon which multiple countries conferred jurisdiction, the creation of the SICC and its potential for evolution I hope illustrates that my cynicism was unwarranted. The unique balance struck by the SICC between its municipal court structure and distinctly global jurisdiction and bench shows that from domestic soil

⁴⁹ Ibid [49].

⁵⁰ Alastair Henderson and Emmanuel Chua, *Singapore International Commercial Court issues its first judgment in cross-border dispute* (3 June 2016) Herbert Smith Freehills Arbitration Notes <<http://hsfnotes.com/arbitration/2016/06/03/singapore-international-commercial-court-issues-its-first-judgment-in-cross-border-dispute/>>.

⁵¹ Hague Conference on Private International Law, *The Hague Convention of 30 June 2005 on Choice of Court Agreements – Outline of the Convention* (May 2013) <<https://assets.hcch.net/docs/89be0bce-36c7-4701-af9a-1f27be046125.pdf>>.

⁵² Bathurst, above n 19, [49].

⁵³ Ibid [51].

something international can grow. While we must not remain trapped in a parochial view of the law, nor must we ignore our domestic institutions as an important resource in the crafting of international dispute resolution models. Not, I emphasise, to compete with arbitration, but rather to provide the parties with a choice between the two models as to which best serves their commercial needs.

32. If an alternative such as the SICC is desirable as a mechanism for the settlement of international disputes, should this country be going the same way? There doubtless are difficulties in a federal system such as ours. However, it does seem to me that it is worthwhile exploring whether a similar, albeit modified, system could be established in one or other of the municipal courts in Australia.
33. The concept of a separately constituted court sitting within or alongside a State supreme court is not novel. An example is the Court of Criminal Appeal in this State. Further, there is no constitutional restraint on bringing judges from the Federal Court or other courts of the State to act as judges of the Supreme Court in a particular case. Section 37 of the *Supreme Court Act 1970* (NSW) already enables the appointment of judges of federal courts and courts of other states as acting judges of the Supreme Court. Whether judges or retired judges of other jurisdictions could be appointed would, of course, require legislative intervention and may raise constitutional issues in light of the decision in *Forge v ASIC*.⁵⁴ However, it does seem to me a matter worth investigating. Further, the courts' rule-making powers are flexible and, to the extent necessary, can be adapted to accommodate any particular procedural difficulties.
34. These are matters I think are worth pursuing if Australia is to have a legal system that provides the best options for international litigants who wish to either arbitrate or litigate their disputes in this country.

⁵⁴ (2006) 228 CLR 45.