

**THE SINGAPORE INTERNATIONAL COMMERCIAL COURT:
A NEW OPENING IN A FORKED PATH**

I. Introduction

1. I am deeply honoured by the invitation to address such a distinguished audience. It is particularly special to address an audience who speaks the same technical language. After all it was among this community of maritime practitioners that I was afforded many opportunities to develop my craft as a lawyer. Therefore, for better or for worse, in becoming the lawyer or perhaps more appropriately the judge I am today, I owe it to my roots or anchors in maritime law. However, this evening, it may not be entirely productive to speak on a subject of maritime law which each of you is not already *au fait* with. Instead, I am enthused to share with you a new entrant into the cross-border commercial dispute resolution terrain which originates from Singapore, namely, the Singapore International Commercial Court.

2. The SICC, as many of you may be aware, came into existence only very recently. It was launched just January of this year and, much like the new kid on the block, it has received its fair share of awkward stares and admiring glances. But, whatever one's initial take of the SICC may be, there is no doubting that it has generated a common sense of intrigue among all concerned and this curiosity can manifest itself in a laundry list of questions – What exactly is the SICC? Why was it established? What kind of cases will it hear? For that matter, has it heard its first case? Who sits as its judges? Who does it aim to attract? What does it have going for it and what potential challenges lie ahead? On that note, where is it projected to be in the next five, ten, or twenty years' time?

3. The questions come thick and fast, cover a broad spectrum, and so can leave one simultaneously daunted and disorientated, wondering where it may be best to start. At first glance, the task which I have set for myself seems to be made slightly more manageable by the fact that some of the questions posed, touching as they do on the mechanics of the SICC, are readily capable of short, sharp answers. But, on closer inspection, this brief respite is balanced out by other questions which are evidently much less amenable to a swift analysis because they either require more involved treatment or entail the typically treacherous exercise of crystal-ball gazing.

4. There is, however, nothing to be gained from slicing up the questions in this way. Regardless of whether they touch on the SICC's features, functions, founding or future, I consider that the best approach to addressing them is perhaps to trace the SICC's lineage within the wider dispute resolution landscape. Context is, after all, everything; hence we risk losing a crucial sense of perspective if we plunge too hastily to examine the SICC as a standalone entity divorced from the currents that are shaping it.

5. What I therefore propose to do in the first part of this address is to take a step back from the central focus that is the SICC. By expanding my lens both in terms of time and space, I hope to take in the broader dispute resolution picture and to chart its evolution in more contemporary times. In this respect, I am concerned, in particular, with the ebb and flow in popularity of the two most widely recognised forms of resolving commercial disputes, namely, litigation and arbitration. There is of course a host of other alternatives on offer such as mediation, expert determination,

adjudicatory boards and so forth,¹ but it is undeniable that litigation and, latterly, arbitration, have distinguished themselves as the two most subscribed pathways to commercial justice in the vast legal milieu. Unfortunately, commercial users have found the navigation of *both* paths increasingly tricky, not to mention frustrating, and it is against this backdrop of perceived discontent that the SICC hopes to position itself as a third path – a *tertium quid* as it were – at the service of users.

6. How exactly the SICC differentiates itself from litigation and arbitration as well as its prospects for success are, as mentioned, matters which I will come to in due course. For the moment, I turn to sketch how the pendulum has swung away from litigation towards arbitration in the resolution of commercial disputes.

II. The ballad of litigation and arbitration

Litigating transnational disputes in national courts: an unhappy affair

7. The most powerful driving force behind the migration of users from litigation to arbitration is something which is *external* to and envelops both these modes of dispute resolution; therefore do permit me to take one further step back into a third concentric circle as it were to set the stage for the more focused discussion that is to come.

8. The external stimuli that I refer to is none other than the defining feature of our modern, neo-liberalist era – *globalisation*. Globalisation is not, of course,

¹ See, for a similar observation, the *Patron's Address* delivered by Sundaresh Menon at the Chartered Institute of Arbitrators London Centenary Conference (2 July 2015) ("*Patron's Address*").

characterised by any one single factor; rather it is a compendious term referring to a set of processes which have wrought a dramatic transformation in the spatial organisation of socio-economic relations and transactions.² The explosion of information technology, advances in speed, range and capacity of our modes of transportation, and the ever-widening channels of communication – these, and more, are the interlinked forces which have combined centrifugally to create a more compressed, crowded, and frenzied world where, in the words of Thomas Friedman, we are able to “reach around ... farther, faster, deeper, and cheaper than ever before”.³

9. Commercial transactions are therefore no longer carried out in the traditional mode. Freed from the geographical constraints which once limited the ambition of their predecessors, commercial men are today able to seize the opportunities abound in this increasingly accessible and interconnected world. Nation states, too, have largely recognised and embraced this new reality in which their own fates and fortunes are ever more being bound up with those around them and further afield. This is clearly reflected in the widespread proliferation of free trade agreements and bilateral investment treaties across the globe. From 2008 to 2013, more than 80 FTAs were signed and 12 more announced to the WTO, representing a marked increase compared to the preceding five years periods which saw 63 FTAs signed between 2003 and 2007 and 43 FTAs signed between 1998 and 2002 respectively. This is an upward trend which is expected to continue.⁴ And while there were only

² David Held, Anthony McGrew, David Goldblatt and Jonathan Perraton, *Global Transformations: Politics, Economics and Culture* (Polity Press, Cambridge, 1999) at p 16.

³ Thomas L Friedman, *The Lexus and the Olive Tree: Understanding Globalization* (New York: Farrar, Straus and Giroux, 1999) at p 9.

⁴ Sundaresh Menon, “Transnational Commercial Law: Realities, Challenges, and a Call for Meaningful Convergence” [2013] *Singapore Journal of Legal Studies* 231 at p 233.

over 700 BITs in 1994, a “massive proliferation” thereafter saw this figure climb towards 2,600 by the end of the millennium.⁵ Today, there are more than 3,000 such treaties in force.⁶

10. Cross-border trade and investment has therefore firmly taken its place as the centrepiece of the new economic order.⁷ And this coming together of the commercial world has profound implications for the dispute resolution picture. Not only has the increase in economic activity driven up the volume of commercial disputes but, more significantly, the diversity in origin of its disputants has also resulted in its taking on of an unmistakably *transnational* complexion. It is, as Lord Kerr quite simply described some 30 years ago, a “*changed scene*”.⁸

11. With the growing *internationalisation* of commercial disputes today, litigation in *national* courts – as may be appreciated from this juxtaposition alone – has become increasingly less attractive as a means for resolving disputes in the eyes of commercial parties.

12. First, municipal litigation is distinctly unable to offer a neutral forum for resolving cross-border commercial disputes. Parties hailing from different corners of the globe instinctively recoil at the notion of litigating in the local court of its counter-

⁵ M Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press, 3rd Ed, 2010) at p 172.

⁶ United Nations Conference on Trade and Development, “World Investment Report 2012: Overview” at p 19 accessible at <http://unctad.org/en/Pages/DIAE/World%20Investment%20Report/WIR2012_WebFlyer.aspx>.

⁷ See, generally for further empirical evidence, UK Department for International Development, “Global Context – How Has World Trade and Investment Developed, What’s Next?” (9 February 2011) accessible at <<https://www.gov.uk/government/publications/global-context-how-has-world-trade-and-investment-developed-whats-next-trade-and-investment-analytical-papers-topic-1-of-18>>.

⁸ The Rt Hon Lord Justice Kerr, “Commercial Dispute Resolution: The Changing Scene” in ch 9 of Dr Maarten Bos and Ian Brownlie (eds) *Liber Amicorum for The Rt Hon Lord Wilberforce* (Clarendon Press, Oxford, 1987) at p 115; see also, the useful discussion in Andrew Bell, *Forum Shopping and Venue in Transnational Litigation* (Oxford University Press, 2003) at paras 1.01–1.09.

party because of perceptions of “home-court bias”, unfounded or otherwise.⁹ Putting issues of bias aside, the lack of a neutral forum can also be felt in other ways. The foreign court can be “foreign” to the non-local party in almost every conceivable sense, from its rules and procedure to its lawyers, judges, and the language used – the non-local party may therefore have to be put through the considerable expense and inconvenience of retaining lawyers whom it is unaccustomed to and of engaging experts to translate reams of documentary evidence and correspondence into a language it does not understand.¹⁰

13. About two decades ago, Prof Yasuhei Taniguchi from Japan, whom I now have the privilege of being colleagues with on the SICC Bench, wrote that it might be possible to design a multinational convention to promote a worldwide uniform system of procedure for international litigation. However, he was also astute to recognise that this was perhaps “too idealistic” a vision and, indeed, nothing on the scale of what he had imagined has since materialised.¹¹ The reality today, therefore, is that litigating outside of familiar territory is seen as risky business and so it is “very often impossible” for either party to obtain agreement to resolve potential disputes in its local courts.¹²

14. This leads to the second conundrum of municipal litigation, which is that, in the absence of any prior agreement on the proper forum, attempting to resolve transnational commercial disputes by this mode can give rise to interminable

⁹ Gary Born, *International Commercial Arbitration* vol I (Kluwer Law International, 2nd Ed, 2014) at p 74.

¹⁰ Nigel Blackaby *et al*, *Redfern and Hunter on International Arbitration* (Oxford University Press, 2009) at para 1.90.

¹¹ Yasuhei Taniguchi, “Is There a Growing International Arbitration Culture? An Observation from Asia” in Albert Jan van den Berg (gen ed) *International Dispute Resolution: Towards an International Arbitration Culture* ICCA Congress Series vol 8 (Kluwer Law International, 1998) at p 34.

¹² Gary Born, *International Commercial Arbitration* vol I (Kluwer Law International, 2nd Ed, 2014) at p 75.

jurisdictional problems. The parties, the subject-matter of the dispute, the evidence and the relevant witnesses may all be spread across two or more states and, given the current state of our jurisdictional principles, this can result in disputes being resolved in different national courts.¹³ As Lord Goff once colourfully observed, there is “a jungle of separate, broadly based, jurisdictions all over the world”.¹⁴ What ensues, therefore, are the inevitable practices of forum shopping, the exchange of anti-suit injunctions, and a complex web of other tactical manoeuvres under which the substantive merits of the dispute finally come to be buried. The incurrence of greater costs and delay, too, are the further undesirable consequences of such satellite litigation.

15. The third problem with litigating transborder disputes has to do with its final phase, namely, the enforcement of foreign court judgments. This is a matter of utmost significance to parties because, having gone through the whole rigmarole of getting to this stage, they would certainly not want to be left holding onto what is essentially a paper judgment. However, the enforceability of court judgments across borders has, for a long time, not been entirely satisfactory as it is primarily facilitated by a patchwork of reciprocal enforcement arrangements between states.¹⁵ Nevertheless, there is strong reason to be optimistic that this aspect of cross-border litigation will change with the Hague Convention on Choice of Court Agreements having recently entered into force. Because the Convention is directly relevant to the SICCC, I will return to speak about it in greater detail later.

¹³ Gary Born, *International Commercial Arbitration* vol I (Kluwer Law International, 2nd Ed, 2014) at p 76.

¹⁴ *Airbus Industrie GIE v Patel and others* [1999]1 AC 119 at 132.

¹⁵ Gary Born, *International Commercial Arbitration* vol I (Kluwer Law International, 2nd Ed, 2014) at p 78.

16. Apart from these concerns over neutrality, jurisdiction, and enforcement, which have truly been exacerbated by the internationalisation of commercial disputes, litigation also suffers from an assortment of other well-rehearsed drawbacks which makes it ill-suited to the resolution of cross-border commercial disputes generally¹⁶ — its costs can be prohibitive; it can move too slowly through the court system; delays are compounded by the fact that decisions are subject to appeals; its proceedings are conducted in public; the adversarial system in common law jurisdictions is typically not conducive to the preservation of business relations; and generalist judges may not be able to adequately grasp the commercial realities of the dispute, much less the transnational dimension which surrounds it.¹⁷

17. It is evident, therefore, that litigating transnational commercial disputes in national courts is ultimately an unhappy affair for most commercial users. In the scathing description of a well-known author:¹⁸

“Transborder litigation is complex, difficult, and inefficient. It portrays the law at its theoretical best and its practical worst. The ethic of pragmatism succumbs to sectarianism. The utility of litigation is corroded by the antics of forum-shopping. ... [J]udgments are likely to conflict and to be rendered ineffective. The variability of national legal systems and the quest to find litigious advantage confound the functionality of the process. Further, the amounts of time and money expended to reach an inconclusive outcome is likely to have been enormous. An abysmal outcome is the result simply because parts or aspects of the transaction crossed national boundaries.”

¹⁶ See, generally, Lord Mustill, “Arbitration: History and Background” (1989) 6(2) *Journal of International Arbitration* 43 at p 43; see also Bernard Hanotiau, “International Arbitration in a Global Economy: The Challenges of the Future” (2011) 28(2) *Journal of International Arbitration* 89 at p 89.

¹⁷ Justice Malcolm Wilkey, “Transnational Adjudication: A View from the Bench” (1984) 18(3) *International Lawyer* 541 at p 543.

¹⁸ Thomas E Carbonneau, “Arbitral Law-Making” (2004) 25 *Michigan Journal of International Law* 1183 at p 1188.

The rise and retreat of arbitration

18. The tale just told about municipal litigation could not be more different from the experiences of arbitration in the last 50 years. Arbitration has truly thrived in the changed dispute resolution scene such that it has “eclipsed” litigation as the leading mode of transnational dispute resolution.¹⁹ And this, no doubt, is borne out by the statistics which show that the caseload across the leading arbitral institutions has continually been on the rise over the last few decades.²⁰

19. We are all familiar with the main reasons behind the remarkable growth of arbitration in recent times so I shall be brief in stating them.²¹

(a) First, the “bellwether” of arbitration’s success has been none other than the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.²² By introducing a uniform legal framework for the mandatory recognition and enforcement of arbitral awards, subject only to very narrow exceptions, the Convention had, in one swoop, addressed the very practical difficulties of enforcement which have long confounded municipal litigation.

¹⁹ A Claire Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (Cambridge University Press, 2003) at p 225

²⁰ Gary Born, *International Commercial Arbitration* vol I (Kluwer Law International, 2nd Ed, 2014) at p 94.

²¹ For a more detailed discussion, see, for example, Lord Mustill, “The History of International Commercial Arbitration: A Sketch” in ch 1 of Lawrence W Newman and Richard D Hill (eds) *The Leading Arbitrators’ Guide to International Arbitration* (Juris Publishing Inc, 2nd Ed, 2008); Julian Lew QC, “Achieving the Dream: Autonomous Arbitration?” in ch 20 of Julian Lew QC and Loukas A Mistelis (eds) *Arbitration Insights: Twenty Years of the Annual Lecture of the School of International Arbitration* (Kluwer Law International, 2007); and Walter Mattli, “Private Justice in a Global Economy: From Litigation to Arbitration” (2001) 55(4) *International Organization* 919.

²² David J McLean, “Toward a New International Dispute Resolution Paradigm: Assessing the Congruent Evolution of Globalization and International Arbitration” (2009) 30(4) *University of Pennsylvania Journal of International Law* 1087 at p 1090.

(b) No less significant has been the UNCITRAL Model Law, which was adopted some 30 years later in 1985.²³ The Model Law brought together in one instrument a collection of widely-accepted arbitration principles covering all stages of the arbitration process that could be easily adopted by states and, indeed, its uptake by close to 70 countries (including many of the major economies of the world) has been most impressive.²⁴ I am certainly aware, though, that the UK has chosen not to follow the mainstream. I recall that Lord Kerr once wrote that the Model Law was perhaps better suited to “countries without any settled and explicit law of arbitration”; hence he thought it would be a “retrograde step” for the UK to go down this path simply to achieve uniformity based on “the lowest common denominator”!²⁵ That being said though, there can be no doubt that the Model Law has been remarkably successful in harmonising the laws of arbitration where they were once contained in fragmented pieces of domestic legislation. And so, what Prof Taniguchi had considered too idealistic in the context of transnational litigation has in fact been the practical reality for arbitration in the last 30 years.

(c) The New York Convention and the Model Law together provided the architecture for international arbitration. That was crucial, but not enough; because norms, as we know, can be aspirational only and not have the desired impact of effecting a real change in practice. Fortunately, international

²³ Indeed, so foundational is the Model Law as an instrument of arbitration that it has been hailed as “*the Magna Carta of Arbitration*”: see, in this regard, the Keynote Speech delivered by Lord Neuberger at the Chartered Institute of Arbitrators Centenary Celebration, Hong Kong (20 March 2015), titled “Arbitration and the Rule of Law” at para 29 accessible at < http://www.ciarbasia.org/Centenary_Celebration/#videos>.

²⁴ See, “Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006” accessible at <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html>; see also Mark Beznat *et al*, “Trends in International Arbitration in the New World Order” in *Global Arbitration Review’s European, Middle Eastern and African Arbitration Review 2015*.

²⁵ Michael Kerr, “Arbitration and the Courts: The UNCITRAL Model Law” (1985) 34 *International and Comparative Law Quarterly* 1 at p 16.

arbitration has flourished because the courts, for their part, played a significant role in breathing life into those norms. Where courts once looked disdainfully on the private, informal justice dispensed by arbitration and took a somewhat patronising “Big Brother” approach towards it, there has been “an enormous change in attitude” over the last fifty years.²⁶ The posture of judicial suspicion and supervision has given way to one of judicial support and, as a consequence, arbitration has been allowed to flourish.²⁷

(d) Finally, arbitration’s success has also been made possible because of the efforts of an ever-growing corps of skilled arbitrators. The Chartered Institute of Arbitrators, of which many here today are members, is a testament to this. The Institute celebrates its centenary this year and, from having just 2,200 members in the early 1970s (most of whom were from England), its membership today stands at approximately 13,000 spread across 125 countries.²⁸ With so many capable hands on deck forming a strong network across the globe, it is little wonder that arbitration has sailed into its current position as “the natural judge”²⁹ of international commerce.

20. Apart from these noteworthy factors, it also bears mention that the draw of arbitration rests in some of its intrinsic features which are, in many respects, the

²⁶ See the Keynote Speech delivered by Lord Neuberger at the Chartered Institute of Arbitrators Centenary Conference in London (2 July 2015) accessible at <<https://www.ciarb.org/centenary/conference-lon/papers-and-presentations>>; see also the Herbert Smith Freehills–SMU Asian Arbitration Lecture delivered by Prof David Williams QC, titled “Defining the Role of the Court in Modern International Commercial Arbitration” (October 2012).

²⁷ Sundaresh Menon, “International Arbitration: The Coming of a New Age for Asia (and Elsewhere)” in Albert Jan van den Berg (ed) *International Arbitration: The Coming of a New Age?* ICCA Congress Series vol 17 (Kluwer Law International, 2013) at p 7.

²⁸ Nigel Watson, *A History of the Chartered Institute of Arbitrators* (James & James (Publishers) Limited, 2015) at p 12.

²⁹ Bernard Hanotiau, “International Arbitration in a Global Economy: The Challenges of the Future” (2011) 28(2) *Journal of International Arbitration* 89 at p 102.

converse of litigation³⁰ — arbitration's less formal and more flexible proceedings give rise to the perception that it is less costly and more speedy; parties are ensured of the finality of awards because of the lack of an appeal mechanism; parties may appoint the tribunal who will generally be subject-matter specialists; and arbitral proceedings are confidential, which is generally favoured by commercial parties.

21. Arbitration has therefore come very far to establish itself as the primary mode for resolving international commercial disputes. However, any even-handed account of arbitration must also acknowledge that it has, in recent times, lost some of its lustre. Indeed, the general feeling about arbitration today seems to be that it has reached that curious moment in its history where, to borrow from Dickens, it is caught in both the best of times and yet also the worst of times. Evidence of this is everywhere. From the most current journals to the latest conference speeches, today's arbitration discourse has taken on a more sobering tenor. Authors and speakers alike have gone to great lengths to caution of the various problems that have been bubbling away for some time and which seem, finally, to have cracked arbitration's erstwhile resplendent surface. And so, if arbitration were likened to a mansion, it would appear gleaming from the outside; but step inside, take a closer look around, and you may not like what you find.

³⁰ See, generally, Gary Born, *International Commercial Arbitration* vol I (Kluwer Law International, 2nd Ed, 2014) at pp 80–90.

22. The arbitration mansion has many a room in it. We begin with the one which it is least proud of – the room of high cost and inordinate delay.³¹ There are various strands which contribute to this undesirable aspect of arbitration.

(a) First, arbitration does not provide for appeals. The finality of awards has always been one of arbitration's great attractions but, increasingly, that is also proving to be one of its more prominent shortcomings. This is largely because disputes today involve enormous claim amounts. As the late Lord Mustill once noted, the value of claims today can be "breathtaking"; "[s]ix consecutive zeroes scarcely raise an eyebrow".³² With such high stakes coupled with the risky "one shot" nature of arbitration,³³ commercial users feel compelled to pour in disproportionate amounts of resources to get the decision they want at the first and, of course, only time of asking.

(b) Secondly, arbitration's processes have also increasingly begun to resemble those ordinarily associated with litigation in what has been described as the process of "judicialisation".³⁴ Again, this is because one of arbitration's erstwhile advantages, namely, the flexibility and informality of its processes, have allowed arbitration practitioners to turn proceedings into

³¹ It has been said that the rising costs of international commercial arbitration is today the "*primary bane*" of international commercial arbitration: see Sundaresh Menon, "Some Cautionary Notes for an Age of Opportunity" (2013) 79(4) *Arbitration* 393 at p 397 [emphasis in original].

³² Lord Mustill, "The History of International Commercial Arbitration: A Sketch" in ch 1 of Lawrence W Newman and Richard D Hill (eds) *The Leading Arbitrators' Guide to International Arbitration* (Juris Publishing Inc, 2nd Ed, 2008) at p 27.

³³ See, for example, the opening lecture delivered by Sundaresh Menon, "International Commercial Courts: Towards a Transnational System of Dispute Resolution" at the Dubai International Financial Centre Courts Lecture Series 2015 at para 48.

³⁴ See, for example, Thomas J Stipanowich, "Arbitration: The 'New Litigation'" (2010) *University of Illinois Law Review* 1.

highly legalistic, litigious, and, ultimately, costly affairs.³⁵ Indeed, as a recent study has shown, it is not uncommon for arbitration practitioners to employ what has been described as “guerrilla tactics” to derail the arbitration proceedings.³⁶ These include the systematic use of arbitrator challenges, multiple requests for extension of time, and the submission of excessive amounts of documents to hinder proceedings.

(c) Thirdly, some blame for the rising costs and delay must also go to the arbitrators who have a tendency to “bullet-proof” their awards against a subsequent setting aside application. This can manifest itself in a kind of leave-no-stone-unturned approach whereby the arbitrator may decide to admit evidence more liberally, allow for more extensive discovery, and grant extensions of the hearing time.³⁷

23. We switch focus to a second weak spot of arbitration – ethics. One of the reasons why this has become more of a pressing issue in recent times is because, as the pool of participants in the arbitration industry widens, so too has it become more diverse; and lost among this increasing heterogeneity was a once shared and unspoken sense of what constituted ethically acceptable conduct.³⁸ The practice of arbitration today can therefore be rather chaotic and unpredictable in the sense that,

³⁵ See, for example, Sundaresh Menon, “The Transnational Protection of Private Rights: Issues, Challenges, and Possible Solutions” (2014) 108 *American Society of International Law Proceedings* 219 at pp 225–226.

³⁶ See Gunther J Horvath and Stephan Wilske (eds), *Guerrilla Tactics in International Arbitration* (Wolters Kluwer Law & Business, 2013) where the authors state at p 3 that, in a survey of this topic, 55 out of 81 international arbitration practitioners had witnessed the use of guerrilla tactics in cases in which they were involved.

³⁷ See, for example, Sundaresh Menon, “The Transnational Protection of Private Rights: Issues, Challenges, and Possible Solutions” (2014) 108 *American Society of International Law Proceedings* 219 at p 227.

³⁸ See, for example, Sundaresh Menon, “Some Cautionary Notes for an Age of Opportunity” (2013) 79(4) *Arbitration* 393 at p 394; see also, generally, Susan D Franck *et al*, “The Diversity Challenge: Exploring the ‘Invisible College’ of International Arbitration” (2015) 53 *Columbia Journal of Transnational Law* 429.

without a common standard to guide conduct, almost anything may be said to be fair game in this “ethical no-man’s land”.³⁹

24. Besides this, there are also other ethical problems which are more commonly attributable to the traditional aspects of arbitration. For example, the fact that the appointment of arbitrators lies with the parties themselves means that some arbitrators, behaving as “rational economic actors”, may be incentivised by the prospect of re-appointment to decide in a certain way.⁴⁰ Indeed, with arbitration becoming “more expressly entrepreneurial”,⁴¹ this seems a very real danger. It is thus not uncommon to hear of arbitrators “splitting the baby”. Although some commentators have preferred to call this a myth,⁴² it is clear that such a moral hazard does exist and the fact that it continues to be whispered within arbitration corridors is enough to call into question arbitration’s legitimacy in the minds of some commercial users.

25. Another traditional strength of arbitration is the cloak of confidentiality which it provides to parties. Recently, however, there have been growing calls for more transparency in arbitration. As Lord Neuberger recently cautioned in his keynote address at the CI Arb’s Centenary Celebration in Hong Kong, “too much openness will kill off arbitration, but unnecessary privacy is a real concern”; this is because there is a real risk that, without transparency, many arbitrators might feel relatively

³⁹ Catherine A Rogers, *Ethics in International Arbitration* (Oxford University Press, 2014) at para 1.04.

⁴⁰ Christophe Seraglini, “Who are the Arbitrators? Myths, Reality and Challenges” in Albert Jan van den Berg (ed) *Legitimacy: Myths, Realities, Challenges* ICCA Congress Series vol 18 (Kluwer Law International, 2015) 589 at pp 596–597.

⁴¹ Catherine A Rogers, *Ethics in International Arbitration* (Oxford University Press, 2014) at para 1.39.

⁴² Ana Carolina Weber *et al*, “Challenging the ‘Splitting the Baby’ Myth in International Arbitration” (2014) 31(6) *Journal of International Arbitration* 719.

free to do what they want rather than give effect to the law.⁴³ In other words, a lack of transparency serves only to compound the current thinking that arbitration is perhaps already too *laissez-faire* in terms of the standard of ethics which it maintains. If sunlight truly is the best disinfectant,⁴⁴ then perhaps the arbitration mansion could do with a few more windows.

26. A third major drawback of arbitration is one that is closely connected to the last-mentioned point about the confidentiality of arbitration proceedings. This concerns the fact that arbitral awards are rarely published. The problem which this creates is obvious – it can perpetuate a state of “lawlessness”⁴⁵ in the sense that there is a dearth of jurisprudence to guide commercial practice. As another new colleague of mine on the SICC Bench, Sir Bernard Rix, observed:⁴⁶

“The more that arbitration awards are final and supplant and avoid any visit to the courts, the more commercial parties have ... a real and justifiable interest in being able to discover for themselves how arbitral tribunals in general, and individual arbitrators or boards of arbitrators in particular, decide and perform. They should not be simply in the hands of their legal advisers, who give them anecdotal information. Moreover, the legal advisers themselves should be in a position where they can advise their clients on an informed basis about the principles applied by and the performance of arbitrators.”

27. The fourth and final point which I make about international arbitration is the fact that the joinder of parties is generally not permissible without the consent of non-

⁴³ Keynote Speech delivered by Lord Neuberger at the Chartered Institute of Arbitrators Centenary Celebration, Hong Kong (20 March 2015), titled “Arbitration and the Rule of Law” at paras 22–23 accessible at <http://www.ciabasia.org/Centenary_Celebration/#videos>; More recently, Lord Neuberger repeated this concern concerning a lack of transparency in arbitration when he said at the CI Arb’s Centenary Celebration in London that “it is by no means so clear that arbitration can always properly be a confidential process”, accessible at <<https://www.ciarb.org/centenary/conference-lon/papers-and-presentations>>.

⁴⁴ See, for example, Laurie Kratky Doré, “Public Courts Versus Private Justice: It’s Time to Let Some Sunshine in on Alternative Dispute Resolution” (2006) 81 *Chicago-Kent Law Review* 463.

⁴⁵ Philip J McConaughay, “The Risks and Virtues of Lawlessness: A ‘Second Look’ at International Commercial Arbitration” (1999) 93 *Northwestern University Law Review* 453.

⁴⁶ Bernard Rix, “International Arbitration: Yesterday, Today and Tomorrow” (2006) 72(3) *Arbitration* 224 at p 227.

parties. As the Singapore Court of Appeal described in one of its recent landmark arbitration decisions, the notion of a *forced* joinder is simply “utter anathema to the internal logic of consensual arbitration”.⁴⁷ However, the primacy that is accorded to the parties’ consent in arbitration can be quite a significant constraint in today’s commercial world where because of the greater sophistication and complexity of transactions, the disputes which arise thereto frequently go beyond more than just the traditional “one claimant-one respondent” dynamic.⁴⁸ In this increasingly “multi-polar” environment, not all of the relevant parties whose interests are implicated in a particular dispute will mirror all of the parties who are signatories to the arbitration agreement; and so arbitration is gradually finding it harder to provide parties with a complete resolution to their multi-faceted disputes. The result is inefficiency and unnecessary costs as duplicitous proceedings are then instituted in different fora to resolve essentially common issues arising out of the same factual substratum.⁴⁹ This, in turn, introduces the risk of inconsistent and conflicting decisions which, ultimately, do little to instil confidence in the parties that a just and fair result has been reached.

Users at the crossroads

28. Arbitration, it may be said, is not in the ruddiest of health. Today, anyone with his or her finger on the pulse can easily detect a palpable sense of disenchantment with it. The mansion is thus in need of repair if it hopes to keep users returning to its

⁴⁷ *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372 at [197].

⁴⁸ See, in this regard, Quentin Loh, “The Limits of Arbitration” (2014) 1(1) *McGill Journal of Dispute Resolution* 66 at pp 74–75.

⁴⁹ See, for example, Nathalie Voser, “Multi-Party Disputes and Joinder of Third Parties” in Albert Jan van den Berg (ed) *50 Years of the New York Convention ICCA Congress Series vol 14* (Kluwer Law International, 2009) at p 345.

door. But there is no quick fix available, nor should the arbitration community seek one out – papering over the cracks one day only allows the fissures to grow deeper the next. Instead, what is called for is a commitment to long-term restoration works from its very foundation. International arbitration, after all, is not just any structure; it is a superstructure, and so meaningful change and consolidation will necessarily take time. As the Chief Justice of Singapore, Sundaresh Menon, had recently observed, “arbitration is perhaps better suited to evolution rather than revolution”.⁵⁰

29. But where does this leave the users in the meantime? The reality is that a good number of them are increasingly becoming disillusioned with arbitration *today*. Yet they turn to it because conventional municipal litigation may not offer a better alternative. In other words, when viewed from the perspective of this group of users, the commercial dispute resolution landscape currently confronts them with a Morton’s fork characterised by two unpalatable modes of resolving their disputes. In this calculus, arbitration is only selected as the primary mode of dispute resolution by *default* rather than by *desire*. It is an unenviable situation to be in, especially when it is considered that these users have so much in commercial terms at stake.

III. The Singapore International Commercial Court

A brief prelude

30. It is apposite at precisely this juncture to introduce the SICC into the picture.

⁵⁰ Sundaresh Menon, “Where We Have Been, Where We Should Go” in Albert Jan van den Berg (ed) *Legitimacy: Myths, Realities, Challenge* ICCA Congress Series vol 18 (Kluwer Law International, 2015) at p 1033.

31. The SICC was created with the intention of providing commercial users at the crossroads with a new dispute resolution alternative. As we shall see, this is an alternative that houses some aspects of international arbitration within the courtroom setting while opting to do without those others which have alienated users in more recent times. This is not to say, however, that the SICC is in any way a *superior* mode of dispute resolution to arbitration such that it will “cannibalise” the business of the latter.⁵¹ That is not what it purports to be or to do. The reality is that any commercial dispute resolution mechanism is ultimately placed at the service of users. And users, as we know, can have an infinite permutation of needs and priorities.⁵²

32. Therefore, in the eyes of some users, arbitration always has, and still does, hold that perfect blend of features which they consider to be ideal for the resolution of their disputes. They would not trade, for example, the finality of an award for a right of appeal, nor would they happily forgo the right to appoint an arbitrator and leave the composition of the tribunal to chance. Yet, what are regarded as *fundamental* aspects of arbitration to some are in fact *fungible* to others. And the same applies to how disputants view litigation. Some greatly value the transparency, certainty, and predictability that litigation offers while others may be less enamoured by these very features.

⁵¹ See the Opening Address of the Regional Arbitral Institutes Forum Conference 2014 by Justice Quentin Loh, accessible at <<http://www.siarb.org.sg/pdf/SIArb%20September%20Issue%20Newsletter%202014.pdf>>.

⁵² As Gary Born has written in *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (Kluwer Law International, 3rd Ed, 2010) at p 5, “It would be imprudent to prescribe a single dispute resolution mechanism for all transactions or parties. There are too many variables, which counsel in different directions in different transactions for different parties.”

33. Ultimately, what the SICC hopes to do is to bridge the gap between litigation and arbitration by providing commercial users with a dispute resolution mechanism that combines certain features of both but which, in the end, approximates neither and stands as something quite unique on its own. It would be a mistake to think, however, that the SICC is the result of some random, uninformed experimentation; or a casual exercise of mix-and-match between litigation and arbitration. The SICC is by no means a shot in the dark. Instead, it has emerged from a long and considered gestation period during which the trends and shifts in user sentiment have been closely monitored. In short, its make-up is no accident.

34. With that in mind, I turn to briefly set out the SICC's basic structure, in particular, those aspects which give it its *international* flavour. I will then go on to flesh out some of its finer features which, it is hoped, will together present the SICC as an attractive and perhaps more favourable path to the disaffected users of arbitration.

The basic structure

35. To begin, I should remove any doubts by stating that despite the SICC's emphasis on internationality, it is strictly a municipal court created by local legislation. The SICC has been specifically constituted as a branch of the Singapore High Court⁵³ and is not a true international court in the mould of the International Court of Justice or of the International Criminal Court. The way in which the SICC hopes to attract cases is therefore not based on some unilateral, exorbitant reach of

⁵³ Section 18A of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed).

extra-territorial jurisdiction. Instead, the SICC's jurisdiction to hear cases will primarily be based, much like in arbitration, on the consent of the parties who can choose to "opt-in" to the SICC at different stages. They can do so prior to any dispute having arisen in their written contracts or thereafter. But the SICC is not designed to hear any kind of dispute regardless of its subject-matter or the parties involved. And it is here that the "international", not to mention "commercial", dimension of the SICC comes in because these are the twin aspects of a claim which must be present before the SICC can assume jurisdiction.⁵⁴ Most maritime disputes, though, will typically tick both these boxes and, in that sense, they are naturally amenable to be heard in the SICC. For completeness, I should also mention that the SICC has a further source of jurisdiction, which is that the Chief Justice of Singapore is empowered to transfer cases commenced in the Singapore High Court to the SICC for determination.

36. Seeing as the SICC is international in its jurisdiction, its architects recognised the importance of ensuring that it is international in its outlook as well. Therefore, the SICC has been structured such that the composition of its Bench features not only local judges of the Singapore High Court but also eminent jurists from across the leading Commonwealth and civil law jurisdictions. I have, in this address, already named two of these International Judges, namely, Sir Bernard Rix and Prof Taniguchi. But there are others whom many of you here will also find familiar and, no doubt, hold in equally high esteem. They are — (a) from the UK: Justice Bernard Eder, Justice Vivian Ramsey, and Justice Simon Thorley; (b) from Australia: Justice Dyson Heydon, Justice Patricia Bergin, and Justice Roger Giles; (c) from Hong

⁵⁴ See, for the statutory definitions of "international" and "commercial", Order 110 r 1(2) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed).

Kong: Justice Anselmo Reyes; (d) from the United States of America: Justice Carolyn Berger; (e) from Austria: Dr Imgrad Griss; and (f) from France: Justice Dominique Hascher.

37. With such a stellar assembly of renowned jurists well versed in both the common and civil law traditions, commercial parties, I daresay, can have every confidence that the resolution of their disputes will be in good hands. And this, I should add, rings true in a further respect – because foreign lawyers are granted relatively liberal rights of audience before the SICC, parties choosing to resolve their disputes in this way can look to retain their preferred set of foreign counsel to advance their cases before the court. Foreign lawyers need only submit an application form supported by an affidavit to be registered with the SICC and, indeed, many have already done so. We are receiving fresh applications every week and, to-date, there are close to 50 foreign lawyers who are registered with the SICC, with more applications pending. And it is noteworthy that those who have registered include some of the leading lights in international arbitration such as Lucy Reed, Stephen Moriarty QC, Roderick Cordara QC, John Savage, Alastair Henderson, and Tim Eicke QC, to name just a handful. I should also add that, in terms of the make-up of foreign lawyers who have registered thus far, 12 different nationalities are represented. Therefore, as with the diversity on the SICC Bench, the early signs are very positive that the SICC Bar is also gathering a good mix of common and civil law talent which will provide users with a competitive market to choose from.

38. Having set out some of the SICC's basic features which gives it its international dimension, let me now turn to consider some of the more notable features that distinguish it from international arbitration.

Notable features of the SICC

39. First, unlike arbitration, the SICC provides parties with a right of appeal. It is hoped that this will keep costs down because, with the assurance of a further tier of review, parties might feel less constrained to pull out all the stops to obtain a favourable decision. There are of course some who might question whether the converse is in fact true, in that providing parties with yet another opportunity to ventilate their dispute may serve only to drive costs up. However, to that concern, I would point to the fact that the traditional strength of court proceedings lies in how contested issues of fact and law typically go through a rigorous process of distillation as a case makes its way through the interlocutory and trial stages before finally being crystallised before the appellate court.⁵⁵ That being the case, parties can be assured that arguments on appeal will ordinarily be confined within a narrow compass.

40. In this connection, it should be noted that one of the unique features of the SICC lies in the flexibility that it affords to parties. As mentioned earlier, it is simply a fact of commercial life that parties will vary in what they prefer and prioritise in a dispute resolution mechanism. Therefore, so far as it is possible to do without

⁵⁵ See, for a similar observation, the opening lecture delivered by Sundaresh Menon, "International Commercial Courts: Towards a Transnational System of Dispute Resolution" at the Dubai International Financial Centre Courts Lecture Series 2015 at para 48.

compromising the legitimacy of the system, the SICC allows parties to opt out of certain features which it offers by default. The right of appeal is one such feature. It is subject to any prior agreement by the parties to limit or vary the scope of appeal. Parties may therefore decide on a wholesale exclusion of the right of appeal or to limit it only to specific grounds modelled after the international arbitration regime.⁵⁶

41. A second way in which the SICC hopes to keep the cost and length of proceedings in check is through none other than the judges who preside over any particular matter. One of the main reasons why arbitration has become “judicialised” is because it lacks any degree of supra-national oversight or regulation; and so arbitrators and arbitration practitioners alike may not readily be incentivised to minimise costs or enhance the efficiency of arbitration proceedings.⁵⁷ As Lord Mustill had once memorably remarked, arbitration appears to have “all the elephantine laboriousness of an action in court, without the saving grace of the exasperated judge’s power to bang together the heads of recalcitrant parties”.⁵⁸ The SICC avoids this problem; it has a judge at the helm of proceedings and he or she has the power to knock heads together. Indeed, the judges in the SICC stable are both knowledgeable in the fields of commerce and skilled in the art of litigation; hence one can naturally expect a tight control to be kept over proceedings such that costs do not spiral out of control.

42. It is interesting to note, though, that in attempting to fashion a procedure which is as time and cost efficient as possible, the SICC has not sought to distance

⁵⁶ Report of the Singapore International Commercial Court Committee (November 2013) at para 35.

⁵⁷ See the opening lecture delivered by Sundaresh Menon, “International Commercial Courts: Towards a Transnational System of Dispute Resolution” at the Dubai International Financial Centre Courts Lecture Series 2015 at para 48.

⁵⁸ Lord Mustill, “Arbitration: History and Background” (1989) 6(2) *Journal of International Arbitration* 43 at p 55.

itself entirely from arbitration. The architects of the SICC recognised that conventional litigation may itself sometimes conduce towards protracted proceedings and to combat this, they chose, interestingly, to take a leaf out of arbitration's book in two significant respects. First, foreign law need not be pleaded and proven as a fact in proceedings before the SICC; instead, SICC Judges can take judicial notice of foreign law with the assistance of oral and written legal submissions supported by relevant authorities.⁵⁹ This, of course, is made possible because of the international make-up of the SICC's Bench.⁶⁰ And, secondly, SICC proceedings will also involve less extensive discovery and interrogatories unlike in conventional court litigation. The SICC's discovery rules are modelled after the IBA Rules on the Taking of Evidence in International Arbitration 2010 and so parties are required to disclose only documents on which they rely within the time and in the manner ordered by the court; there is no process of "general discovery".⁶¹

43. I move next to list out some aspects of the SICC which enable it to steer clear of some of the ethical pitfalls that have dogged arbitration in recent times. First, the SICC has sought to avoid the problem of a lack of an ethical consensus through the introduction of a common code of conduct which all foreign lawyers must agree to abide to before being registered to appear in SICC proceedings.⁶² Secondly, the panel of judges who will hear cases in the SICC will not be chosen by the parties. Instead, they will be assigned and that will surely lend to the neutrality and transparency of SICC proceedings. And, thirdly, it is also notable that hearings in the

⁵⁹ Report of the Singapore International Commercial Court Committee (November 2013) at para 34.

⁶⁰ See, for a similar observation, Denise H Wong, "The Rise of the International Commercial Court: What is It and Will It Work?" (2014) 33(2) *Civil Justice Quarterly* 205 at p 214.

⁶¹ See the opening lecture delivered by Sundaresh Menon, "International Commercial Courts: Towards a Transnational System of Dispute Resolution" at the Dubai International Financial Centre Courts Lecture Series 2015 at para 34(c).

⁶² This code of ethics may be found in the First Schedule of the Legal Profession (Foreign Representation in Singapore International Commercial Court) Rules 2014 (S 851/2014).

SICC will be conducted in open court by default. There are exceptions, however, in that parties whose cases have no “substantial connection” to Singapore can apply to have their cases heard *in camera*.⁶³

44. A corollary of open court hearings is, of course, the publication of judgments. This is yet another area where the SICC looks to set itself apart from arbitration which, as just mentioned, often prizes confidentiality above all else. The SICC, however, is a court and, as a court, its 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 future.⁶⁴ This forward-looking perspective towards influencing behaviour outside of the courtroom is what some have called the “shadow”⁶⁵ or “radiating”⁶⁶ effect of the courts. By making its decisions publicly available, the SICC hopes to fulfil precisely this broader role by stimulating a gradual accretion of judgments which, in the longer term, will coalesce into a coherent body of case law that has an educative effect on the legal and business communities alike. Commercial behaviour can then take reference from the norms so established in the case law and, ultimately, predictability and efficiency in business is enhanced.

45. Finally, the SICC stands apart from arbitration in that it has the coercive power to join third parties to proceedings even though such parties may not have

⁶³ Order 110 r 1(2)(f) read with O 110 rr 30(1) and (2) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed).

⁶⁴ Alec Stone Sweet and Thomas L Brunell, “Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community” (1998) 92 *American Political Science Review* 63 at p 64.

⁶⁵ Christopher A Whytock, “Litigation, Arbitration, and the Transnational Shadow of the Law” (2008) 18 *Duke Journal of Comparative & International Law* 449 at p 454.

⁶⁶ Marc Galanter, “The Radiating Effect of Courts” in (Keith O Boyum and Lynn Mater eds) *Empirical Theories about Courts* (Longman, 1983) at p 121.

consented or submitted to the court's jurisdiction.⁶⁷ This arms the SICC with a potent procedural power which enables it to overcome many of the drawbacks encountered by arbitration in the face of multi-polar disputes, which is something that can be "extremely common" in the maritime context where, for instance, back-to-back charterparties or a string of sale contracts forms the genesis of the dispute.⁶⁸ As mentioned earlier, resolving such disputes through arbitration has the potential of spawning parallel proceedings elsewhere. Parties who have shunned arbitration for this reason may therefore find the SICC attractive as providing a one-stop dispute resolution centre. On top of that, because the SICC also positions itself as a *neutral* one-stop centre, it is similarly hoped that the users of conventional court litigation might choose to resolve their disputes in the SICC and thus do away with the costly distractions such as forum shopping which have frustrated them in the past.

The challenges ahead

46. All of these attributes certainly position the SICC well to appeal to the growing body of commercial users who might currently feel lukewarm or somewhat disenchanted towards arbitration. But that is not to say that the SICC is without its challenges. At the time of its conception, the most pressing concern for the SICC no doubt centred on the international recognition and enforceability of its judgments. In this respect, arbitration was streets ahead because of the New York Convention. Court judgments, on the other hand, could not call on such a multilateral convention of comparable scale to facilitate their enforceability.

⁶⁷ Order 110 r 9 Rules of Court (Cap 322, R 5, 2014 Rev Ed).

⁶⁸ Clare Ambrose, Karen Maxwell and Angharad Parry, *London Maritime Arbitration* (Taylor & Francis, 3rd Ed, 2009) at ch 15.

47. Today, however, that view has to undergo some revision. This is because not more than three weeks ago, on the 1st of October, the Hague Convention on the Choice of Court Agreements came into force. This was after the European Union became the second signatory to ratify it in June of this year, following Mexico's lead in 2007.⁶⁹ As for Singapore, we became a signatory in March this year and it will not be long before we too ratify the Convention.

48. The Hague Convention is essentially “the litigation counterpart”⁷⁰ to the New York Convention and has been described as a “game changer”⁷¹ in the cross-border dispute resolution scene. No doubt this is because it has the potential, when unleashed, to enable court judgments to be enforced as widely and as seamlessly across all of its member states in the same way that arbitral awards now are. It is small wonder, then, that in a survey of practitioners conducted by the American Bar Association before the Hague Convention was adopted, an overwhelming 98% of respondents indicated that such a convention would be useful for their practice; further, more than 70% also indicated that, if such a convention did come into existence, they would be “more willing to designate litigation instead of arbitration” in their contracts.⁷²

⁶⁹ See, for the respective dates of ratification of the European Union and Mexico, the “Status Table” for the Hague Convention accessible at <http://www.hcch.net/index_en.php?act=conventions.status2&cid=98>.

⁷⁰ Ronald A Brand and Paul Herrup, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents* (Cambridge University Press, 2008) at p 3.

⁷¹ See the opening lecture delivered by Sundaresh Menon, “International Commercial Courts: Towards a Transnational System of Dispute Resolution” at the Dubai International Financial Centre Courts Lecture Series 2015 at para 58(c).

⁷² Louise E Teitz, “Both Sides of the Coin: A Decade of Parallel Proceedings and Enforcement of Foreign Judgments in Transnational Litigation” (2004) 10(1) *Roger Williams University Law Review* 1 at p 63.

49. It is therefore only natural to get excited about the Hague Convention's recent entry into force. It truly is a watershed moment for cross-border litigation but, at the same time, we must be patient. It is unrealistic to expect the Hague Convention to immediately rival the New York Convention in terms of membership and, therefore, its reach. That will take time. But that being said, I think we can afford to be optimistic that the process of getting more states on board will not take too long. If one looks to the New York Convention as a rough proxy for the time it might require for the Hague Convention to achieve the same level of universal currency, then, as some commentators have observed, "[t]hat could indicate a very long time" before the latter gives the former "a run for its money".⁷³ However, that is surely an imperfect comparison because the geopolitical and economic realities of the world we live in today are so different from those that prevailed in the second half of last century. The interdependence of national economies in today's globalised world marked by the emergence of free trade zones and trading blocs⁷⁴ are powerful factors which will all pull towards the harmonisation of laws in the realm of commerce. Indeed, with the recent ratification of the European Union, it means that the Hague Convention has already taken effect in a significant economic bloc of 27 states. With there already being such a critical mass of members, it is envisaged that more states will be encouraged to follow suit.

50. A further challenge for the SICC is the very practical one of attracting the buy-in of commercial users. This is because as attractive as the SICC may appear in theory, I do acknowledge that until we see a constant stream of cases emerging from

⁷³ Guy S Lipe and Timothy J Tyler, "The Hague Convention on Choice of Court Agreements: Creating Room for Choice in International Cases" 33 *Houston Journal of International Law* 1 at p 38.

⁷⁴ Guy S Lipe and Timothy J Tyler, "The Hague Convention on Choice of Court Agreements: Creating Room for Choice in International Cases" 33 *Houston Journal of International Law* 1 at p 38.

the court, it will remain an unknown entity to many parties and their advisers. It may therefore take quite some time before parties warm up to the idea of the SICC and make provision for it in their contracts. Indeed, if the experience of the Singapore International Arbitration Centre is anything to go by, it can be quite a “long slog” before the number of new filings at the SICC becomes significant.⁷⁵

51. But it has been observed that there is “one big advantage” which the SICC has over fledgling arbitral institutes in terms of enhancing its visibility to the commercial world straight off the bat.⁷⁶ As mentioned earlier, one of the SICC’s sources of jurisdiction lies in the transfer of suitable cases from the Singapore High Court by the Chief Justice. With this mechanism available, there should be a fairly steady flow of cases to the SICC to help raise its profile and this effort will further be bolstered by the fact that publicity can be given to the SICC’s judgments unlike in the case of arbitral awards. Indeed, as I speak, two maiden cases are already making their way through the interlocutory stages of the SICC, one of which has been fixed for hearing next month while the other is due to be heard early next year. It will therefore not be long before we see the SICC handing down its first judgment.

IV. Conclusion

52. I hope that I have, in the course of this address, managed to adequately answer all of the questions that were listed right at the outset. But even if I have done so, I acknowledge that I may have succeeded only in inviting yet more

⁷⁵ Michael Hwang, “Commercial Courts and International Arbitration – Competitors or Partners” (2015) 31 *Arbitration International* 193 at p 197.

⁷⁶ Michael Hwang, “Commercial Courts and International Arbitration – Competitors or Partners” (2015) 31 *Arbitration International* 193 at p 197.

questions about the SICC. Indeed, it is but inevitable that, as time passes and the SICC sinks its roots deeper into the dispute resolution landscape, more searching questions will be asked of it. When that happens, though, I am confident that the SICC will not be caught floundering. As I have sought to outline this evening, the SICC's entry into the dispute resolution services market has been cannily timed, its design is based on a careful marriage between litigation and arbitration which allows it to strike a middle ground between the two, and though there are some immediate challenges in the way, there is good reason to believe they can be surmounted.

53. In closing, I wish to make the point that the SICC has been bold in its aspiration to carve out a new opening for commercial parties. And it is in that same spirit that I urge users and arbitration practitioners such as yourselves to take, in the famous words of Robert Frost, the path less travelled by; for that, as you may find, will have made all the difference. Thank you.

Steven Chong
Judge
Supreme Court of Singapore
21 October 2015

Speech delivered by Justice Steven Chong⁷⁷ at the British Maritime Law Association Lecture and Dinner in London

⁷⁷ I would like to record my appreciation to Mr Bryan Fang for his assistance in the preparation of this address.