

**CROSS-BORDER DISPUTE RESOLUTION:
INNOVATIONS FROM SINGAPORE**

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*The Honourable Justice Steven Chong, Judge of Appeal, Supreme Court of
Singapore**

H.E. Mr Zhou Qiang, Chief Justice and President of the Supreme People's Court of
the People's Republic of China

Distinguished guests

Ladies and gentlemen

I. One Belt, One Road ... One Marketplace in an Internet Era

1. Today's conference takes place in the shadow of a towering endeavour by our hosts to propel transnational commerce forward: the "One Belt, One Road" project promises through overland and maritime corridors to connect 4.4 billion people across 65 countries in three different continents.¹ Indeed, complementing these hard infrastructural networks in forging a global marketplace is also the soft but transcendent power of connective technology. As aptly noted by the organisers of this year's Forum, this *is* the era of the Internet.

2. The Internet has transformed the nature of commerce by placing a global marketplace at the doorstep of businesses. Take Alibaba for example. It began life just before the turn of the century as a small start-up in Hangzhou. There were only

* I would like to record my appreciation to my colleague, Assistant Registrar, Bryan Fang for his assistance in the preparation of this speech.

¹ See <https://www.iesingapore.gov.sg/Venture-Overseas/Browse-By-Market/Asia-Pacific/China/About-OBOR>.

two million Internet users in China then.² Today, less than 20 years later, revolutionary leaps in technology enable Alibaba's well-known online platforms to connect around 450 million consumers of goods and services from more than 200 different countries.³

3. The Alibaba story speaks to two broad trends in the modern economy which pose their own unique challenges to our legal systems. First, as more businesses plug into the Internet, commercial life is steadily re-orientating away from parochial practices to embrace outward opportunities. This will inevitably lead to more disputes with an international dimension, the resolution of which does not play to the strengths of traditionally jurisdiction-bound systems of law. Second, the Internet—to borrow from Alibaba's corporate philosophy—"levels the playing field"⁴ by allowing small and medium-sized enterprises to scale up quickly and establish a global presence.⁵ Yet it is questionable whether our legal systems are sophisticated and collaborative enough to deal with the fallout when these international corporations collapse.

4. This forms the backdrop to my address today which is centred on two innovations from Singapore that seek to respond precisely to these challenges, namely, the Singapore International Commercial Court ("SICC") and the Judicial Insolvency Network, or "JIN" for short.

² See Porter Erisman, *Alibaba's World: How a Remarkable Chinese Company is changing the Face of Global Business* (Palgrave MacMillan, 2015) at p 3.

³ See "How Alibaba's Jack Ma is Building a Truly Global Retail Empire" (24 March 2017), at <http://fortune.com/2017/03/24/jack-ma-alibaba-china-ecommerce-world-greatest-leaders/>.

⁴ See <http://www.alibabagroup.com/en/about/history>.

⁵ See, for example, the 2011 report from McKinsey Global Institute, "Internet Matters: The Net's sweeping impact on jobs, growth and prosperity", which found that SMEs with a strong Web presence "grew more than twice as quickly as those that had minimal or no presence", accessible at [file:///C:/Users/issuser/Downloads/MGI_internet_matters_exec_summary%20\(1\).pdf](file:///C:/Users/issuser/Downloads/MGI_internet_matters_exec_summary%20(1).pdf).

II. The SICC: A specialised forum for resolving cross-border disputes

5. The SICC is a division of the Singapore High Court that is specially designed to deal with cross-border disputes. Singapore's Chief Justice, Sundaresh Menon, gave a short preview of the SICC at this Forum in 2014 before formally launching it at the start of 2015.⁶ Since then, the SICC has heard 12 cases, four of which have concluded while the rest are at various stages of the proceedings.

6. It is important first to recognise that fundamental to the success of any dispute resolution mechanism is a firm grasp of the needs of its users. As Lord Chief Justice Thomas of England and Wales rightly noted in the context of envisioning a commercial court, "[t]here is little point in a committee of judges designing reform according to some abstract principle and in isolation from ... modern day realities of dispute resolution".⁷ The architects of the SICC were acutely mindful of this, soliciting feedback from a range of key stakeholders during a long and considered gestation period. The result is a court whose procedures are carefully curated to suit the needs of transnational businessmen.

7. To begin with, given the *international* profile of those it hopes to attract, the SICC deliberately steers clear from dictating to parties how their cases must be conducted. Certainly, a one-size-fits-all approach cannot endear itself to an international community of users who are accustomed to different procedural norms that prevail in their national courts or, indeed, in international arbitration. The SICC

⁶ See Sundaresh Menon, "Judicial Reform and Improvement of the Investment Environment", speech delivered on 25 September 2014 at the 1st China-ASEAN Justice Forum.

⁷ See Lord Thomas of Cwmgiedd, "Commercial Justice in the Global Village: The Role of Commercial Courts", speech delivered on 1 February 2016 at the DIFC Academy of Law Lecture, Dubai.

therefore affords parties a generous berth for tailoring the procedures to suit their expectations.⁸ For example:

(a) Parties can choose to present their cases in a memorial-style brief which is common in international arbitration but not so in a common law court.

(b) Parties may also agree to disapply any rule of evidence under the Singapore Evidence Act which is rooted in the common law.

(c) Parties can also apply to have questions of foreign law determined on the basis of submissions rather than proof through foreign law experts. This is possible because, first, the SICC bench comprises a mix of common and civil law judges and, secondly, the SICC maintains a register of foreign lawyers who have liberal rights of audience before the court.

8. The SICC's target audience also has distinctly *commercial* interests which impact on its design in several ways. Two examples will suffice:

(a) First, given that large sums are often at stake in commercial disputes, the SICC recognises that parties may prioritise safeguards against an erroneous decision over speed and finality.⁹ Parties in the SICC therefore have a right of appeal unlike in international arbitration.¹⁰ A pair of pending cross-appeals

⁸ In this regard, para 76(2) of the SICC Practice Directions sets out a laundry list of procedural matters that the parties are encouraged to confer and, where possible, agree on for the proper conduct of their case.

⁹ See, for example, The Honourable T F Bathurst, "Benefits of courts such as the Singapore International Commercial Court" (at para 26), speech delivered on 21 November 2016 during the Sydney Arbitration Week.

¹⁰ This is subject to any prior agreement to exclude or limit the scope of an appeal: see para 139 of the SICC Practice Directions.

arising from the SICC's second judgment is perhaps early vindication of the choice to provide for appellate review.¹¹

(b) Second, commercial disputes also tend to involve multiple parties strung out along a series of interlocking contracts, not all of which may contain the same dispute resolution clause. This is a perennial problem in international arbitration because tribunals assume jurisdiction on the basis of a consensual agreement and are therefore powerless to bring a relevant non-party into the proceedings. The SICC, however, is able to cut through this conundrum as it has been vested with the coercive power to join third parties even without their consent.¹²

9. There is, of course, no point crafting the best procedures for the SICC if, at the end of the day, a successful claimant emerges from the court with only a paper judgment. This brings me to a perceived shortcoming that is commonly associated with the SICC, namely, the enforceability of its judgments.

10. In my view, this concern is often exaggerated. For a start, we have not received or noted any reports that SICC judgments are actually facing any real difficulty in enforcement. In other words, there is no indication that the losing party in any of the concluded cases is refusing to honour the judgment. It is also useful to note that Singapore has reciprocal enforcement arrangements with leading jurisdictions such as the United Kingdom, Australia, India and Hong Kong.¹³ In March this year, we

¹¹ These appeals arise from the judgment in SIC/S 2/2016 (*Telemidia Pacific Group Limited & Anor v Yuanta Asset Management International Limited & Anor*) and are presently scheduled to be heard in July 2017.

¹² See O 110 r 9 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed).

¹³ See the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264) and the Reciprocal Enforcement of Foreign Judgments Act (Cap 265).

also entered into a Memorandum of Guidance with the Abu Dhabi Global Market Courts and signed an Exchange of Letters with the Supreme Court of Victoria (Commercial Court) on the cross-border enforcement of money judgments.¹⁴ I should add that, even in the absence of such reciprocal legislation and court-to-court protocols, a Singapore High Court judgment was enforced by the Nanjing Intermediate People's Court last year.¹⁵ This was done on the basis of reciprocity as our High Court had previously enforced a judgment of the Suzhou Intermediate People's Court.¹⁶ In my view, this is most encouraging and fully in accord with the spirit of mutuality that should inform our joint endeavour to construct a transnational legal order. Finally, Singapore also enacted legislation last year which implements the 2005 Hague Convention on Choice of Court Agreements.¹⁷ The Convention is in force in Mexico and the European Union,¹⁸ and can count the United States as a key signatory. With more countries to follow suit, the Convention certainly looks to be a "game changer" for the enforceability of court judgments.¹⁹

11. The SICC is therefore, in my view, well-poised to become a leading dispute resolution forum for international commercial users. But beyond that lies the hope that it can inspire the creation of similar specialist commercial courts in other

¹⁴ See SICC News (April 2017), accessible at

www.sicc.gov.sg/documents/doc/SICC_News_Issue_5.pdf.

¹⁵ This is the Civil Ruling in Special Proceedings between Kolmar Group AG and Jiangsu Textile Industry (Group) Import & Export Co Ltd in respect of Application for Recognition and Enforcement of Civil Judgment and/or Ruling of Foreign Court (27 December 2016).

¹⁶ See *Giant Light Metal Technology (Kunshan) co Ltd v Aksa Far East Pte Ltd* [2014] SGHC 16.

¹⁷ This refers to the Choice of Courts Agreements Act 2016 (Act 14 of 2016).

¹⁸ This is with the exception of Denmark.

¹⁹ See Sundaresh Menon, "International Commercial Courts: Towards a Transnational System of Dispute Resolution" (at para 58(c)), speech delivered on 19 January 2015 at the DIFC Courts Lecture Series 2015.

jurisdictions. Indeed, this is already the subject of ongoing discussion in Australia.²⁰ The vision of a constellation of commercial courts working and learning from one another is truly an ideal worth aspiring to because what they can together create over time is a freestanding body of transnational commercial jurisprudence that businessmen can confidently conduct themselves by. This would allow us to move away from the present-day fragmentation of laws in this region which can only stifle the enthusiasm for doing business across borders.²¹

III. JIN: Facilitating communication in cross-border insolvency

12. Moving on to Singapore's second innovation, the JIN is essentially a grouping of like-minded judges from different insolvency courts who are acutely aware that an insular approach is unsuited to the administration of cross-border insolvencies. Such an approach tends to see a "parochial rush to assets" leading to suboptimal distribution amongst creditors as well as inconsistent rulings.²² The JIN therefore provides a timely platform for sustained discussion on deepening judicial co-operation and developing best practices.

13. The idea of the JIN was first floated by Chief Justice Menon at the start of 2016.²³ Since then, insolvency judges from Singapore have reached out to their counterparts in several other jurisdictions. These efforts culminated in October last

²⁰ See The Hon Chief Justice Marilyn Warren AC and The Hon Justice Clyde Croft, "An International Commercial Court for Australia: Looking beyond the New York Convention", paper presented on 13 April 2016 at the Commercial CPD Seminar Series, Melbourne.

²¹ See Sundaresh Menon, "Doing Business Across Asia: Legal Convergence in an Asian Century" (at para 7), keynote address delivered on 21 January 2016 at the launch of the Asian Business Legal Institute, Singapore.

²² See Kannan Ramesh, "The cross-border project – a 'dual track' approach" (at para 7), speech delivered on 30 November 2015 at the INSOL International Group of 36 in Singapore.

²³ See the 1 February 2017 media release on the Supreme Court of Singapore's website, accessible at <http://www.supremecourt.gov.sg/news/media-releases>.

year when insolvency judges from 10 jurisdictions gathered in Singapore for the JIN's inaugural conference. These included judges from Australia (Federal Court and New South Wales), the British Virgin Islands, Canada (Ontario), the Cayman Islands, England and Wales, Hong Kong (as an observer), Singapore and the United States (Delaware and Southern District of New York). A set of draft guidelines to promote cross-court communication was discussed at the conference which the judges then took back for further consideration. Notably, in February this year, the Supreme Court of Singapore and the Bankruptcy Court for the District of Delaware became the first to formally announce the adoption of these guidelines. Very soon thereafter, the courts in four other jurisdictions would do the same. These were the United States Bankruptcy Court for the Southern District of New York, the Supreme Court of Bermuda, the Chancery Division of the High Court of England and Wales, and the British Virgin Islands.²⁴

14. The Guidelines for Communication and Co-operation between Courts in Insolvency Matters (“the Guidelines”) represent the first time that a common set of principles have been formulated to facilitate judicial communication in cross-border insolvencies. Previously, courts would only communicate on insolvency matters, if at all, on an *ad hoc* basis. Now, with the Guidelines, participating courts can work

²⁴ See Supreme Court Media Release, “England and Wales – the latest to adopt the Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters” (11 May 2017), accessible at <http://www.supremecourt.gov.sg/news/media-releases/england-and-wales---the-latest-to-adopt-the-guidelines-for-communication-and-cooperation-between-courts-in-cross-border-insolvency-matters>; see also the Global Restructuring Review article, “British Virgin Islands adopt JIN guidelines” (15 May 2017), accessible at <http://globalrestructuringreview.com/article/1141625/british-virgin-islands-adopt-jin-guidelines>.

safely and consistently within an overarching institutional framework to customise specific protocols to govern their communication in specific cases.

15. To illustrate the clear benefits of judicial communication in cross-border insolvencies, let me turn briefly to discuss the insolvency of Nortel Networks.²⁵ This was a Canadian telecommunications conglomerate that had subsidiaries in more than 100 countries. After running into financial troubles and selling its assets, the administrators of its various entities agreed that the allocation of the proceeds was to be decided by the courts in the United States and Canada.²⁶ A protocol for communication was approved by both courts which provided for, among other things, a joint trial to be conducted. This was noted to be “a pioneering international precedent” which reaped time and costs savings for the parties while minimising the risk of conflicting decisions for the courts.²⁷ Indeed, as one commentator has sensibly observed, “[p]resenting the same arguments and evidence to two courts on a single schedule increases the chance that international courts or parties will end on the same page”.²⁸

16. Significantly, the Guidelines make specific provision for the conduct of such joint hearings.²⁹ With its obvious benefits, I keenly await its implementation in an appropriate case which should serve as a catalyst for greater co-operation between

²⁵ See, for a more detailed discussion, Zeslene Mao, “Heralding Protocols for Court-to-Court Communication and Cooperation in Cross-Border Insolvency Matters in Singapore” (20 November 2016), accessible at <http://www.singaporelawblog.sg/blog/article/173>.

²⁶ Specifically, the Ontario Superior Court of Justice (Commercial List) and the US Bankruptcy Court for the District of Delaware.

²⁷ See Lauren L Peacock, “A Tale of Two Courts: The Novel Cross-Border Bankruptcy Trial” (2015) 23 American Bankruptcy Institute Law Review 543 at p 569.

²⁸ See *Ibid.*

²⁹ See Annex A of the Guidelines.

courts. In the meantime, I am confident that the JIN will continue to devise creative but practical solutions befitting a borderless world.

IV. Concluding remarks

17. The SICC and the JIN demonstrate Singapore's desire to adapt its legal system to the new commercial environment. But these are only two examples in a closely-knitted patchwork of projects. Indeed, I would be remiss not to mention the Singapore International Arbitration Centre and the Singapore International Mediation Centre which, together with the SICC, aim to provide international businessmen with a suite of dispute resolution options. The Asian Business Law Institute was also launched by Chief Justice Menon early last year with the stated aim of informing and instigating the convergence of substantive business laws in the region through practical scholarship.³⁰ That was followed closely by the establishment of the Singapore International Dispute Resolution Academy which hopes to cultivate in the next generation of lawyers an instinct to think beyond boundaries in the search for optimal dispute resolution solutions.³¹

18. How these initiatives pan out remains to be seen. But it is clear from the lively discussion at this Forum that Singapore is not alone at the vanguard of shaping a truly transnational legal order. On that note, I thank you for your attention and look forward to engaging with you as we strive to keep our legal systems relevant.

³⁰ See Sundaresh Menon, "Doing Business Across Asia: Legal Convergence in an Asian Century", speech delivered on 21 January 2016 at the launch of the Asian Business Legal Institute in Singapore.

³¹ See Sundaresh Menon, "Shaping the Future of Dispute Resolution and Improving Access to Justice" (at para 50), speech delivered on 17 March 2016 at the Global Pound Conference Series 2016 in Singapore.