

# CONFERENCE ON THE RISE OF INTERNATIONAL COMMERCIAL COURTS

## International Commercial Courts: Unicorns on a Journey of a Thousand Miles

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### Introduction

Ladies and Gentlemen, good afternoon.

1. It is both a pleasure and an honour for me to address you this afternoon. We are gathered here today in part because we live in a period where the world is changing perceptibly before us. The world's largest media company, Facebook, was launched less than 15 years ago.<sup>1</sup> The world's largest taxi firm and accommodation provider, Uber and Airbnb respectively, did not exist 10 years ago.<sup>2</sup> Such technology companies have been called "unicorns" - some have described them as disrupters - because of their rarity and influence on the market; they have the power and influence to disrupt industry and affect national economies if not the global economy.<sup>3</sup>
2. This afternoon, I shall speak about a unicorn of a different variety. The unicorn I speak of is the international commercial court. Such courts carry the genealogy of two paradigms we are very familiar with. An eminent jurist has observed that they are "a careful marriage between litigation and arbitration".<sup>4</sup> This is a marriage ingrained with

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<sup>1</sup> Mark Zuckerberg launched "TheFacebook" on 4 February 2004.

<sup>2</sup> Uber was founded in 2009. Airbnb was officially launched on 11 August 2008.

<sup>3</sup> See Aileen Lee, "Welcome to the Unicorn Club: Learning from Billion-Dollar Startups", available at <https://perma.cc/9MZL-6MZG> (accessed 12 April 2018). See also Jennifer Fan, "Regulating Unicorns: Disclosure and the New Private Economy", (2016) 57 B.C.L. Rev. 583.

<sup>4</sup> Steven Chong, "The Singapore International Commercial Court: A New Opening in a Forked Path", speech delivered at British Maritime Association Lecture and Dinner (October 2015) at [52] ("*A New Opening in a Forked Path*"), available at

the attributes for success. The result is bespoke commercial courts characterised by stature, excellence and efficiency. Because such commercial courts are increasingly less rare, it is perhaps surprising that they are still not altogether familiar to international commercial actors. This may be down to the fact that many of these courts are of recent creation. The only unicorn of vintage is the London Commercial Court. The Singapore International Commercial Court (the “SICC”) is of more recent vintage. Indeed, new unicorns can or will soon be found here in Qatar, Abu Dhabi, Belgium, France, Germany, Dubai, India, Kazakhstan, the Netherlands, and elsewhere. It was also reported that China will set up not one but three international commercial courts to resolve disputes arising from its Belt and Road Initiative.<sup>5</sup> This speaks to the importance of such courts. So why exactly are they important?

3. Like technology companies, international commercial courts address a market failure. This afternoon, I propose to touch on how such courts are “particularly attuned to the needs and realities of international commerce”.<sup>6</sup> What value do such courts exactly provide? I will answer this question in two parts. First, I shall outline the advantages that they may bring for the international business community in the short, medium and long term. I will then consider the systemic advantages that disputants will enjoy from using them.

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[file:///C:/Users/issuser/Downloads/Steven%20Chong%20-%20The%20SICC%20-%20A%20New%20Opening%20in%20a%20Forked%20Parth%20-%20London%20\(21.10.15\).pdf](file:///C:/Users/issuser/Downloads/Steven%20Chong%20-%20The%20SICC%20-%20A%20New%20Opening%20in%20a%20Forked%20Parth%20-%20London%20(21.10.15).pdf) (accessed May 2018).

<sup>5</sup> Straits Times, “Businesses tapping Belt and Road ‘will have recourse’”, published 6 February 2018, available at <http://www.straitstimes.com/asia/east-asia/businesses-tapping-belt-and-road-will-have-recourse> (accessed May 2018).

<sup>6</sup> Sundaresh Menon, “International Commercial Courts: Towards a Transnational System of Dispute Resolution”, Opening lecture for the DIFC Courts Lecture Series 2015, at para [17, available at <https://www.supremecourt.gov.sg/docs/default-source/default-document-library/media-room/opening-lecture---difc-lecture-series-2015.pdf> (accessed May 2018).

## Advantages for the international business community

4. I begin first with a helicopter view. It cannot be gainsaid that international trade has grown exponentially since the conclusion of the Second World War. Much of this can be attributed to the success of the General Agreement on Tariffs and Trade (“GATT”) and its successor, the World Trade Organisation (“WTO”), in reducing tariffs and liberalising trade.<sup>7</sup> Indeed, President Emmanuel Macron made a passionate defence of free and fair trade and the WTO in his recent address to a joint session of the US Congress on 25 April 2018.<sup>8</sup> The advent of many bilateral and multi-lateral trade treaties like the recently inked Comprehensive and Progressive Agreement for Trans-Pacific Partnership or TPP 11 speaks to the importance of globalisation. Nevertheless, there remain significant inefficiencies in the global trading system.
5. In particular, the existence of different legal systems with different legal traditions across the world creates opportunities for jurisdictional arbitrage which in turn causes a general state of flux and uncertainty, a situation which is anathema to international commerce. This undoubtedly increases transaction costs for international businesses and does so in a number of ways.<sup>9</sup> The costs generated include costs of collating information about differing legal requirements, cost of compliance with such requirements, costs of a multiplicity of legal disputes, and costs of navigating different legal and regulatory minefields.<sup>10</sup> This is not at all a theoretical issue. In a 2018 survey

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<sup>7</sup> Judith Goldstein, Douglas River and Michael Tomz, “Institutions in International Relations: Understanding the Effects of the GATT and the WTO on World Trade” (2007) 61 *International Organization* 37.

<sup>8</sup> For a video of President Emmanuel Macro’s speech to the US Congress delivered on 25 April 2018, see [https://www.washingtonpost.com/video/world/emmanuel-macrons-full-speech-to-congress/2018/04/25/85924764-48be-11e8-8082-105a446d19b8\\_video.html?utm\\_term=.77c1abdd9fac](https://www.washingtonpost.com/video/world/emmanuel-macrons-full-speech-to-congress/2018/04/25/85924764-48be-11e8-8082-105a446d19b8_video.html?utm_term=.77c1abdd9fac) (accessed May 2018).

<sup>9</sup> Sundaresh Menon, “Transnational Commercial Law: Realities, Challenges and a Call for Meaningful Convergence”, [2013] Sing JLS 231 (“*Transnational Commercial Law*”) at 244.

<sup>10</sup> Helmut Wagner, “Costs of Legal Uncertainty: Is Harmonization of Law a Good Solution?”, in *Modern Law for Global Commerce: Proceedings of the Congress of the United Nations Commission on International Trade Law Held on the Occasion of the Fortieth Session of the Commission* (Vienna: UN, 2011) 53 at 55.

conducted by Pricewaterhouse Coopers (“PwC”), 13% of Chief Executive Officers (“CEO”) around the world reported that globalisation has not led at all to harmonisation of regulations while 57% was of the opinion that globalisation has only led to harmonisation “to some extent”.<sup>11</sup> More tellingly, 79% of CEOs felt that the world was moving towards multiple rules of law rather than legal convergence. This comes on the back of a 2013 report also by PwC where Asia Pacific business leaders flagged inconsistent regulations and standards as the single biggest barrier to their companies’ growth.<sup>12</sup> In short, the view is while international commerce is forging ahead, the law is lagging far behind.

6. This state of affairs has led naturally to a growing and concerted effort to harmonise international commercial law. In the field of arbitration, some academics have spoken of the development of a *lex mercatoria*<sup>13</sup> though I am not fully convinced of arbitration’s capacity to fully contribute to international commercial jurisprudence. Confidentiality of the arbitral process, the award and its reasons, a key hallmark of arbitration, presents an inherent shackle to arbitration’s ability to fully develop and contribute to global commercial jurisprudence. Moving away from arbitration, the United Nations Commission on International Trade Law has promulgated model laws like the Model Law on International Commercial Arbitration (the “Model Law”) and the United Nations Convention on Contracts for the International Sale of Goods (“CISG”). Interestingly, it has been opined that whether the individual provisions of

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<sup>11</sup> PwC, “21<sup>st</sup> CEO Survey: The Anxious Optimist in the Corner Office”, available at <https://www.pwc.com/gx/en/ceo-survey/2018/pwc-ceo-survey-report-2018.pdf> (accessed May 2018).

<sup>12</sup> PwC, “Towards Resilience and Growth: Asia Pacific Business in Transition”, available at <http://www.ncapec.org/ceosummit/PwC%202013%20CEO%20Survey%20Report.pdf> (accessed May 2018).

<sup>13</sup> Loukas Mistelis, “The UNIDROIT Principles Applied as ‘Most Appropriate Rules of Law’ in a Swedish Arbitral Award”, (2003) 3 Rev. dr. unif. 631 at 632.

these instruments are ideal is rather less important than the fact that they exist.<sup>14</sup> This simply underscores the remarkable value of legal certainty to international commerce.

7. Nevertheless, these efforts at harmonisation are insufficient simply because they are not adequate. For real legal convergence to take place, it is insufficient that parties have regard to the same statutory sources. Just as important is the fact that legal provisions are interpreted, and commercial law is applied and developed in a consistent and coherent manner. This is particularly so when international instruments such as the Model Law and the CISG are ultimately a product of diplomatic compromise, which lends to the deployment of less than clear terms thereby opening the door to multiple interpretations. It is said that “[h]armonization ‘on paper’ remains worthless unless it is transformed into or supplemented by ‘law in action’”.<sup>15</sup> In other words, harmonisation of the law must walk the talk. This is not something that arbitration, for all its virtues, can adequately provide for the reason I have mentioned earlier.
8. On the other hand, the development of a network or a grid of international commercial courts will provide significant ballast to this endeavour. While these courts are obviously independent, they need not and indeed should not operate as islands or in silos. Given that these courts deal in the main with the same subject matter, the same type of disputes and even, not infrequently, the same international corporations and commercial actors, there is a lot to be said for comparing notes, and engaging in

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<sup>14</sup> Gerhard Wagner, “Transaction Costs, Choice of Law and Uniform Contract Law”, in *Modern Law for Global Commerce: Proceedings of the Congress of the United Nations Commission on International Trade Law Held on the Occasion of the Fortieth Session of the Commission* (Vienna: UN, 2011) 39 (“*Transaction Costs, Choice of Law and Uniform Contract Law*”) at 41.

<sup>15</sup> *Transaction Costs, Choice of Law and Uniform Contract Law* at 44.

dialogue. The seed for this idea was planted by my Chief Justice, Mr Sundaresh Menon, as early as 2013 when he remarked:<sup>16</sup>

*... given the international nature of the disputes before each of our courts, the jurisprudence of each national court will have an impact on the collective jurisprudence of international commercial law... [T]he courts can no longer operate in jurisdictional silos. It is desirable that the international commercial courts, together with courts in the major commercial centres, continue to establish links with their counterparts with a view to collectively developing international commercial law in a consistent manner that is supportive of transnational business.*

9. There are at least three separate ways in which legal convergence can take place to support transnational business. As these have been elaborated upon elsewhere, I will but enumerate them briefly.<sup>17</sup> First, the rules relating to recognition and enforcement of foreign judgments may be harmonised. Efforts in this regard are already underway and this is a subject to which I will return. Second, there could be uniformity in the dispute resolution procedure adopted for international commercial disputes, perhaps even a transnational civil procedure code.<sup>18</sup> Finally, a consistent stream of re-affirming

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<sup>16</sup> *Transnational Commercial Law* at 250 – 251. See also the speech of Justice Quentin Loh at the Asia Pacific Insurance Conference 2017 where he predicted that “there will come a time when the commercial courts of the world will be referring to each other’s judgments to establish such [commercial law] principles and norms”: Quentin Loh, Untitled, speech delivered at Asia Pacific Insurance Conference 2017 (October 2017), available at [https://www.sicc.gov.sg/documents/docs/Asia\\_Pacific\\_Insurance\\_Conference\\_2017.pdf](https://www.sicc.gov.sg/documents/docs/Asia_Pacific_Insurance_Conference_2017.pdf) (accessed May 2018). Along the same lines, Chief Justice James Allsop contemplated the possibility of a “non-national and non-binding” commercial law: see James Allsop, “Commercial and Investor-State Arbitration: The Importance of Recognising their Differences”, speech delivered at ICCA Congress 2018 at [34] (“*Commercial and Investor-State Arbitration*”).

<sup>17</sup> See, for instance, Sundaresh Menon, “The Somewhat Uncommon Law of Commerce”, (2014) 26 SAclJ 23 at paras [52]-[64] (“*The Somewhat Uncommon Law of Commerce*”).

<sup>18</sup> In this regard, the Lord Chief Justice of England and Wales, Lord Thomas of Cwmgiedd, argued in favour of a transnational civil procedure code. See Lord Thomas of Cwmgiedd, “Cutting the Cloth to Fit the Dispute: Steps

jurisprudence from different international commercial courts may eventually lead to the holy grail - harmonisation of substantive commercial law.

10. Why has so much ink been spilt in the pursuit of legal convergence?<sup>19</sup> Far from merely allowing for the saving of transaction costs, legal convergence carries deeper, far-reaching implications for international commerce. I will suggest three, each building on the earlier, translating to a vision for the future.
11. First, as an objective, the harmonisation of law is valuable and desirable in and of itself. Imagine a commercial world where transnational businesses know with clarity what their legal standing, entitlements and responsibilities are for transactions they are undertaking, regardless of where they may transact or where they may eventually litigate disputes or restructure economic issues. Such certainty would be priceless for this would mean that businesses would be able to more fully factor in the cost of doing business before embarking on any venture. There would also be fewer commercial disputes, with a smaller proportion being taken to full blown litigation or arbitration.
12. Over time, and this leads to my second point, the stability of substantive law will result in norms-generation. The law is an edifice in whose shadow individuals act and negotiate.<sup>20</sup> So it is with businesses. It is in the shadow of substantive law that transnational businesses establish their policies, procedures and practices. Without a stable *lex mercatoria*, the shadow cast will be faint, difficult to discern. Indeed, this is

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Towards Better Procedures Across the Jurisdictions”, speech delivered at the Singapore Academy of Law Annual Lecture 2016 (September 2016) (“*Cutting the Cloth*”), available at <https://www.judiciary.gov.uk/wp-content/uploads/2016/10/lcj-speech-singapore-academy-of-law.pdf> (accessed May 2018).

<sup>19</sup> See, for instance, Martin Shapiro, “The Globalization of Law”, (1993-1994) 1 *Ind J Global Legal Stud* 37 and Roy Goode, “Contract and Commercial Law: the Logic and Limits of Harmonisation”, vol 7.4 *Electronic Journal of Comparative Law*, (November 2003), available at <https://www.ejcl.org/74/art74-1.html> (accessed May 2018).

<sup>20</sup> See, for instance, Robert Mnookin and Lewis Kornhauser, “Bargaining in the Shadow of the Law: The Case of Divorce” Vol. 88, No. 5, *Dispute Resolution* (Apr., 1979) 950.

one noted drawback of alternative dispute resolution.<sup>21</sup> It has been lyrically suggested that “the privatisation of justice tends to dry up the rich, behaviour-moulding stream that emanates from the common law courts.”<sup>22</sup> Similarly, the Lord Chief Justice of England and Wales, Lord Thomas of Cwmgiedd, described arbitration as a “serious impediment to the development of the common law...”.<sup>23</sup> While others have taken a somewhat less strident position, it is fair to say that the point has some traction.

13. Finally, and this is my third point, the confluence of the two previous points will ultimately lead to the development of a global business culture. Legal culture is an elusive animal to sketch. It has been proffered that “legal culture is about who we are not just what we do”.<sup>24</sup> Whatever may be its shape, it is clear that culture affects all of us. It informs our behaviour, habits and mind-set. In the context of international commerce, a homogenised commercial culture will allow transnational businesses to know how to act and what to expect even in novel, unfamiliar situations where no legal rule or norms readily apply. At the same time, it will inform regulatory behaviour. Essentially, international commerce would have cultivated a self-sustaining ecosystem.
14. All of the above is no mere pipe dream. These possibilities are not Utopian, nor should they be described as such. We should strive for the realisation of these goals as doing so will inform the manner in which we develop the architecture for international

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<sup>21</sup> See Craig Loveless, “The Dangers of Privatising Civil Justice through Mandatory ADR”, (2003) UCL Jurisprudence Rev 368 and Jack Weinstein, “Some Benefits and Risks of Privatization of Justice through ADR”(1996) 11 Ohio State Journal on Dispute Resolution 241.

<sup>22</sup> Sundaresh Menon, “The Future is Now: Legal Trends in the Global Village”, speech delivered at Symposium at Keio Law School, Keio University (27 April 2016) at para [22], available at [https://www.sicc.gov.sg/documents/docs/The\\_Future\\_is\\_Now\\_Legal\\_Trends\\_in\\_the\\_Global\\_Village.pdf](https://www.sicc.gov.sg/documents/docs/The_Future_is_Now_Legal_Trends_in_the_Global_Village.pdf) (accessed May 2018).

<sup>23</sup> Lord Thomas of Cwmgiedd, “Developing Commercial Law through the Courts: Rebalancing the Relationship between the Courts and Arbitration”, speech delivered at the Bailii Lecture 2016, at para [5], available at <https://www.judiciary.gov.uk/wp-content/uploads/2016/03/lcj-speech-bailii-lecture-20160309.pdf> (accessed May 2018).

<sup>24</sup> David Nelken, “Using the Concept of Legal Culture”, (2004) 29 Austl. J. Leg. Phil. 1 at 1.



commercial dispute resolution. It is a journey of a thousand miles which has to begin with a single step. That step has indeed been taken. In May 2017, senior judges from 25 jurisdictions convened in London for the inaugural Standing International Forum of Commercial Courts. This forum aims to increase the quality of dispute resolution services provided to the international business community through the fostering and sharing of best practices and experiences. In that landmark meeting, not only were ties between international commercial courts forged and strengthened, practical goals were set. The forum agreed to work on several things. First, to commence work on a multilateral memorandum for enforcement of each other's judgments. Second, to establish a working party to improve efficiency in litigation. And third, to establish a structure for exchange of judges so that they could spend time in each other's courts and better understand each other's practices. Most significantly, the forum signalled a clear intention by commercial courts that they were eager and willing to collaborate to support transnational business. Singapore is a firm supporter of this development. At least on two separate occasions in 2013, Chief Justice Sundaresh Menon advanced the desirability of forming a network of commercial courts.<sup>25</sup>

15. Such a move is not without precedent. As a segue, some of you may be aware that a similar trend towards judicial and juridical connectivity, communication and collaboration is also taking root in the context of cross-border insolvency. The manner in which corporations organise themselves has evolved with globalisation but until recently, insolvency courts have mostly acted in jurisdictional silos. This ignores the reality that many companies have branches and assets all over the world which, in turn, leads to inefficient restructuring outcomes or suboptimal realisation of economic value

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<sup>25</sup> See the speeches of Chief Justice Sundaresh Menon in *Transnational Commercial Law and The Somewhat Uncommon Law of Commerce*.

in the event of an uncoordinated restructuring effort to address economic malaise. In an effort to address this, and promote the value of universalism, the Judicial Insolvency Network, or JIN for short, was formed in 2016. The JIN is a network of judges from key commercial jurisdictions focused on developing best practices and providing thought leadership in cross-border insolvency matters.<sup>26</sup> The inaugural meeting of the network in Singapore saw the development of a set of guidelines - the JIN Guidelines as they have come to be popularly known - which provide a roadmap for inter-court communications and cooperation, even to the extent, in appropriate instances, of holding joint hearings and the issuance of joint decisions. To date, the network has judges from the United States of America (“USA”), Singapore, England and Wales, Canada, Australia, Japan, South Korea, Hong Kong, Brazil, Argentina, Bermuda, the British Virgin Islands and the Cayman Islands. The JIN and the JIN Guidelines were recognised by the Global Restructuring Review as the Most Important Development of 2016.

16. Returning to the topic of international commercial courts, there is of course still some distance to go before the vision I had outlined earlier – the harmonisation of commercial law, the generation of business norms and the development of a global business culture – is realised. This does not mean that the utility of international commercial courts may only be unlocked in the distant future. Such courts do offer immediate and tangible value to transnational businesses in the present. It is to this topic that I now turn.

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<sup>26</sup> See the Supreme Court of Singapore, “Paving the Way for Improved Coordination of Cross-Border Insolvency Proceedings: Adoption of the Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters”, available at <https://www.supremecourt.gov.sg/news/media-releases/paving-the-way-for-improved-coordination-of-cross-border-insolvency-proceedings--adoption-of-the-guidelines-for-communication-and-cooperation-between-courts-in-cross-border-insolvency-matters> (accessed May 2018).

## **Systemic advantages of international commercial court**

17. In a speech delivered in 2017, Lord Thomas set out what he expected of a commercial court. He said:<sup>27</sup>

*A Commercial Court must have as its objective the ability to deliver justice quickly and relatively inexpensively. Its processes must be simple and flexible. The quality of its judgments must be high. It needs to apply the law in a way that is certain, fair and predictable. It must ensure that the law keeps pace with market developments. It must maintain the strength and vitality of the legal framework.*

It may be that many commercial courts meet these expectations. As I am most familiar with the SICC, I will now explain how the SICC does so.

18. It must first be said that the SICC, established in 2015, was intended to complement, not replace, the role played by arbitration. Singapore was and remains very much supportive of arbitration as a dispute resolution forum. Arbitration, generally speaking, possesses extant features that many disputants find attractive – neutrality, flexibility, confidentiality, finality in terms of a one-shot process, and wide-spread enforceability through the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”). The Singapore International Arbitration Centre (“the SIAC”) was founded in 1991 to help develop a vibrant arbitration scene. In 2010, Maxwell Chambers was launched as a premier venue for

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<sup>27</sup> Lord Thomas of Cwmgiedd, “Commercial Dispute Resolution: Courts and Arbitration”, speech delivered at the National Judges College, Beijing (April 2017) at para [13], available at <https://www.judiciary.gov.uk/wp-content/uploads/2017/04/lcj-speech-national-judges-college-beijing-april2017.pdf> (accessed May 2018).

arbitration. Today, I think it can be fairly said that Singapore is a prominent and leading participant in the international arbitration landscape. In 2017, the SIAC received 452 new cases, a record number.<sup>28</sup> The aggregate sum in dispute amounted to USD 4.07 billion. In a recent survey by Queen Mary University London released only a few days ago, Singapore was cited as the 3<sup>rd</sup> most preferred seat for arbitration worldwide and the most preferred seat in Asia.<sup>29</sup>

19. As important as arbitration is, however, it does not alone fully meet all the dispute resolution needs of global commercial actors. The SICC was launched to meet this demand gap. As Chief Justice Sundaresh Menon explained, the formation of the SICC has very much to do with the desire to provide “an entire suite of options for the resolution of commercial disputes.”<sup>30</sup> The reality is that commercial disputes exist across a wide spectrum – different businesses, different transactions and different disputes. This diversity naturally generates different needs and requirements. It would therefore be unwise and unnecessary to limit disputing parties to a binary choice between arbitration and traditional litigation. An international commercial court such as the SICC was viewed as plugging a significant gap in the international dispute resolution architecture.

20. As established, the SICC has three jurisdictional requirements.<sup>31</sup> First, the claim must be both international and commercial in nature. These terms are defined in Singapore’s

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<sup>28</sup> Singapore International Arbitration Centre, “Annual Report 2017”, available at [http://siac.org.sg/images/stories/articles/annual\\_report/SIAC\\_Annual\\_Report\\_2017.pdf](http://siac.org.sg/images/stories/articles/annual_report/SIAC_Annual_Report_2017.pdf) (accessed May 2018).

<sup>29</sup> Queen Mary University of London, “2018 International Arbitration Survey: The Evolution of International Arbitration”, available at <https://www.whitecase.com/sites/whitecase/files/files/download/publications/2018-international-arbitration-survey.pdf> (accessed May 2018).

<sup>30</sup> Sundaresh Menon, “Response by the Chief Justice Sundaresh Menon at the Opening of the Legal Year 2015” at para [20], available at [https://www.supremecourt.gov.sg/docs/default-source/default-document-library/sic/response-by-cj---opening-of-the-legal-year-2015-on-5-january-2015-\(final\).pdf](https://www.supremecourt.gov.sg/docs/default-source/default-document-library/sic/response-by-cj---opening-of-the-legal-year-2015-on-5-january-2015-(final).pdf) (accessed May 2018).

<sup>31</sup> See Rules of Court (Cap 322, R 5, 2014 Rev Ed), O. 110, r. 7 (“*Rules of Court*”).

Rules of Court.<sup>32</sup> Secondly, the parties must submit to jurisdiction under a written jurisdiction agreement. This submission may be *ex ante* or *ex post facto* the dispute. Finally, parties should not seek any relief in the form of prerogative orders.

21. The international nature of the SICC is one of its pillars of strength. This internationality is reflected not just in the type of matters the SICC hears, but also in the composition of both its Bench and its Bar. The Bench is empanelled with both Singapore judges and eminent international jurists from leading common and civil law jurisdictions. These international jurists are presently from Australia, Canada, France, Hong Kong, Japan, the United Kingdom and the USA.
22. Insofar as the Bar is concerned, litigants may, in offshore cases, which by definition have no substantial connection to Singapore, choose to be represented by any counsel of their choice, including foreign counsel.<sup>33</sup> In the SICC, foreign lawyers are granted rights of audience. They need only satisfy the registration requirements and be registered, which is a relatively straightforward process. This feature of the SICC is of considerable benefit to multinational companies as they can then engage the services of their usual or preferred lawyers. As of May 2018, 77 foreign lawyers, from jurisdictions all over the world, have registered with the SICC. Hence, litigants can be assured that there will be an SICC Judge who has the relevant expertise to appreciate the context and decide the dispute, and a lawyer best suited to represent their interests.
23. Another feature characteristic of the SICC is how it balances between flexibility and predictability. It does this by providing a clear and definite process and procedure for litigation which may be modified by the court in consultation with the parties. On the

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<sup>32</sup> *Rules of Court*, O. 110, r. 1(2).

<sup>33</sup> See section 36O of the Legal Profession Act (Cap 161, 2009 Rev Ed) read with section 3 of the Legal Profession (Foreign Representation in Singapore International Commercial Court) Rules 2014.

application of any party, the SICC may order that certain rules not be applied. For instance, parties may prefer not to apply Singapore rules of evidence. If so, they may agree on applying rules that may be found in foreign law or, indeed, in arbitration for example the International Bar Association's Rules on the Taking of Evidence in International Arbitration, and the court is empowered to give effect to the parties' agreement.<sup>34</sup> A question of foreign law too may be determined on the basis of submissions only instead of proof.<sup>35</sup> In the interest of justice, parties generally enjoy a right of appeal against any decision of the SICC to the Court of Appeal. However, if a quick, certain resolution is more important, parties may agree to waive, limit or vary their right of appeal.<sup>36</sup> In some disputes, confidentiality may be vital. To this end, the SICC may make the necessary orders to preserve the confidentiality of the proceedings.<sup>37</sup> By allowing parties to "cut the cloth to fit the dispute"<sup>38</sup>, the SICC provides both a highly predictable yet customised platform for international commercial actors to resolve their disputes.

24. Allied to this combination of certainty and flexibility are the elements of efficiency and ethics. Each case is presided over by a judge or a coram that manages the case from its inception until its final resolution. This personal oversight ensures that there will be no undue delay and inefficiencies in the resolution of the dispute. Further, judges are assigned to cases by the Registry. This ensures some of the ethical conundrums that

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<sup>34</sup> *Rules of Court*, O. 110, r. 23.

<sup>35</sup> *Rules of Court*, O. 110, rr 25 and 29.

<sup>36</sup> Paragraph 139 of the Singapore International Commercial Court Practice Directions, available at [https://www.supremecourt.gov.sg/docs/default-source/default-document-library/sicc-practice-directions---amended-version-\(final\)77b73133f22f6eceb9b0ff0000fcc945.pdf](https://www.supremecourt.gov.sg/docs/default-source/default-document-library/sicc-practice-directions---amended-version-(final)77b73133f22f6eceb9b0ff0000fcc945.pdf) (accessed 12 April 2018).

<sup>37</sup> *Rules of Court*, O. 110, r. 30.

<sup>38</sup> This phrase is borrowed from the speech of the Lord Chief Justice of England and Wales, Lord Thomas of Cwmgiedd, in *Cutting the Cloth*.

have been asserted as plaguing arbitration will not be an issue.<sup>39</sup> For instance, the fact that arbitral parties are generally entitled to appoint their own arbitrators may cause the apprehension that arbitrators may be incentivised by the prospect of re-appointment to decide in a certain manner. This naturally is not a concern with a court. The expectation of ethical behaviour in the SICC also extends to lawyers, both local and foreign, who are required to abide by a code of conduct.<sup>40</sup> Open court hearings, which apply by default, and the publication of reasoned judgments adds to the tapestry of transparency.

25. It is worth mentioning one final point in relation to the SICC. One problem that has occurred in arbitration is the fact that there are often many parallel proceedings arising out of what is essentially a single dispute. This is often the case in multi-polar disputes such as those involving string contracts or back-to-back agreements and is a result of the fact that third parties cannot be joined to the arbitral proceedings without their consent. The SICC does not face this issue as it has, being a court, the coercive power to join third parties.<sup>41</sup> This perhaps explains why the SICC has been described as a “one-stop dispute resolution centre”.<sup>42</sup>

26. As of May 2018, within 3 years of operation, the number of cases that have been filed or transferred to the SICC stands at 20. Of these cases, 10 matters have concluded while 10 are still pending. Arising from these cases, 24 written judgments have been issued, not a few of which deal with significant legal issues. Late last year, Professor Lucy Reed, whom you heard this morning, expressed that she would “put [her] money on the

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<sup>39</sup> For the ethical issues facing arbitration, see generally Catherine Rogers, *Ethics in International Arbitration*, (Oxford University Press, 2014).

<sup>40</sup> Local counsel has to comply with the Legal Profession (Professional Conduct) Rules 2015. For foreign counsel, the applicable code of ethics may be found in the First Schedule of the Legal Profession (Foreign Representation in Singapore International Commercial Court) Rules 2014.

<sup>41</sup> *Rules of Court*, O. 110, r. 9.

<sup>42</sup> *A New Opening in a Forked Path* at [45].

[chances of success for the] Singapore International Commercial Court” and predicted that there would be “a slow-but-steady stream of cases for the SICC”.<sup>43</sup>

## Enforcement

27. It would be remiss of me not to address the elephant in the room before I conclude. How would the judgments or decisions of the SICC or, indeed, any commercial court be enforced? By its very nature, international disputes will require decisions to be enforced internationally. However, some have commented that judgments from such courts do not enjoy the scope of enforceability allowed under the New York Convention. Are international commercial courts therefore tigers without teeth, with a roar but no bite?
28. In my view, the answer to this question is a layered one, starting with correcting the incorrect assumption that all judgments and decisions require coercive enforcement. The experience of arbitration has been primarily that awards are typically honoured voluntarily.<sup>44</sup> Perhaps this has got to do with the fact that arbitration is a consensual dispute resolution process with the parties by agreement accepting that they will be bound by the outcome of the arbitral process. The SICC too requires parties’ consent to jurisdiction. Given that consent underpins jurisdiction, as in arbitration, I see no reason

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<sup>43</sup> Lucy Reed, “International Dispute Resolution Courts: Retreat or Advance?”, speech delivered at John E.C. Brierley Memorial Lecture (September 2017), available at [https://www.sicc.gov.sg/documents/docs/John\\_EC\\_Brierley\\_Memorial\\_Lecture-International\\_Dispute\\_Resolution\\_Courts-Retreat\\_or\\_Advance\\_by\\_Professor\\_Lucy\\_Reed.pdf](https://www.sicc.gov.sg/documents/docs/John_EC_Brierley_Memorial_Lecture-International_Dispute_Resolution_Courts-Retreat_or_Advance_by_Professor_Lucy_Reed.pdf) (accessed May 2018).

<sup>44</sup> See Anselmo Reyes, “Recognition and Enforcement of Interlocutory and Final Judgments of the Singapore International Commercial Court” (2015) 2 J. Int’l & Comp. L. 337 at p 341. The article cites a 2008 survey of major corporations which use arbitration services conducted by the School of International Arbitration of Queen Mary College of London. This survey found that “high levels of compliance” were reported, with 84% of respondents indicating that the opposing party had honoured the award in full in more than 76% of cases. The “principal reason” given for compliance with the arbitral award was to preserve a business relationship. See also Gary B Born, *International Commercial Arbitration* vol III (2nd Ed, Wolters Kluwer) at para 26-03, where the learned commentator notes that “the overwhelming majority of international awards are complied with voluntarily”.



why decisions of commercial courts should carry a different outcome. Indeed, I would expect judgments of international commercial courts to be even more respected and therefore more readily honoured.

29. Equally significant is the fact that enforceability may not be as difficult or limited as one imagines, even as things presently stand. Let me elaborate. Insofar as the SICCC is concerned, there are four possible modes of enforcement. First, Singapore is a party to the Hague Convention on the Choice of Courts Agreement (the “Hague Convention”). Under the Hague Convention, members are required to recognise and enforce each other’s judgments to which the Convention applies<sup>45</sup>, subject only to very narrow exceptions such as where the judgment was obtained by fraud or where enforcement would be against public policy<sup>46</sup>. The reach of the Hague Convention is growing. As of May 2018, 29 states comprising the European Union (save for Denmark), Singapore and Mexico are bound by the Hague Convention. In addition, China, Montenegro, Ukraine and the USA have signed the Hague Convention and it is pending their ratification.<sup>47</sup>
30. Second, the next possible mode of enforcement is by way of registration. To this end, Singapore has reciprocal agreements with the following countries to recognise each other’s judgments by registration: Australia, Brunei Darussalam, India<sup>48</sup>, Malaysia, New Zealand, Pakistan, Papua New Guinea, Sri Lanka, the United Kingdom and

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<sup>45</sup> The Hague Convention applies in international cases to exclusive choice of court agreements concluded in civil or commercial matters: see Article 1 of the Convention available at <https://assets.hcch.net/docs/510bc238-7318-47ed-9ed5-e0972510d98b.pdf> (accessed May 2018). It does not cover matters of personal law (e.g. family, consumer or insolvency matters): see Article 2 of the Convention for a full list of excluded categories.

<sup>46</sup> See Article 9 of the Hague Convention.

<sup>47</sup> See Hague Convention on Private International Law, “Convention of 30 June 2005 on Choice of Court Agreements”, available at <https://www.hcch.net/en/instruments/conventions/status-table/?cid=98> (accessed May 2018).

<sup>48</sup> Except the State of Jammu and Kashmir.

Windward Islands.<sup>49</sup> In addition, Singapore also has a similar reciprocal arrangement with Hong Kong.<sup>50</sup> In respect of these jurisdictions, enforcement of SICC judgments is simple; SICC judgments need only be registered in these jurisdictions and they would be treated as if the judgments were issued by the courts of these jurisdictions themselves.

31. Third, even if no formal state-to-state agreement is in place, an SICC judgment creates a debt which can be sued upon under common law. Hence, enforcement of SICC judgments in all common law jurisdictions is straightforward as there is unlikely to be re-litigation on the merits of the original action. In fact, such proceedings are likely to be abbreviated because of the strong possibility of summary judgment without trial. As one jurist remarked, “[i]t is hard to see how there could be a defence to such action. Accordingly, it should be possible to obtain summary judgment and enforce the summary judgment against the debtor as a matter of course.”<sup>51</sup>

32. Fourth and finally, some civil law jurisdictions also have in place legislation and procedures that allow for enforcement of foreign judgments. Let me cite just one example. In China, judgments from foreign countries may be enforced in accordance with the principle of reciprocity established in the Chinese Civil Procedure Law.<sup>52</sup> In 2014, the Singapore High Court enforced a judgment issued by the Suzhou Intermediate Court.<sup>53</sup> As a result, when the Nanjing Intermediate People’s Court had to consider whether a Singapore High Court judgment should be recognised and enforced in 2016,

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<sup>49</sup> See the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264).

<sup>50</sup> See the Reciprocal Enforcement of Foreign Judgments Act (Cap 265).

<sup>51</sup> Anselmo Reyes, “Recognition and Enforcement of Interlocutory and Final Judgments of the Singapore International Commercial Court” (2015) 2 J. Int’l & Comp. L. 337 at p 342.

<sup>52</sup> Adeline Chong (Ed), Recognition and Enforcement of Foreign Judgments in Asia, (Asian Business Law Institute, 2017) (“ABLI Publication”) at p. 55, accessible at

<http://abli.asia/LinkClick.aspx?fileticket=10rTeJ0yljw%3d&portalid=0> (accessed May 2018).

<sup>53</sup> *Giant Light Metal Technology (Kunshan) Co Ltd v Aksa Far East Pte Ltd* [2014] 2 SLR 545.

the Chinese court found that reciprocal relations with Singapore had been established.<sup>54</sup>

This authority will assist in the future enforcement of Singapore High Court judgments, including judgments of the SICC, in China. Similar procedures for the enforcement of foreign judgments are also found in codes of other civil law jurisdictions.

33. As a result of the four modes of enforcement cited above, SICC judgments are likely to be enforceable in all common law jurisdictions, the European Union (save for Denmark) and Mexico pursuant to the Hague Convention, and many jurisdictions in Asia, including China and Japan.<sup>55</sup> Once the Hague Convention is ratified by China and the USA, the reach and force of the judgments will be even greater. It is worth pointing out that this list encapsulates most of the major global financial centres and sea and air hubs, and several of the biggest economies in the world. This is of immense relevance to any international business as these centres, hubs and economies impact significantly on money, trade and investment flows. When it comes to enforceability, this is perhaps more relevant than the absolute number of countries a judgment may be enforced in.
34. Of course, more work can and is being done in this area. I will mention three brief points. First, the Asian Business Law Institute has embarked on a project to work towards harmonisation of enforcement law in Asia. As the first step in this important and exciting endeavour, the institute has published a comparative survey of the relevant rules on enforcement of judgments in 15 Asian jurisdictions. The project lead, Associate Professor Adeline Chong from Singapore Management University, concluded at the end of this first phase as follows:<sup>56</sup>

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<sup>54</sup> (2016) Su 01 Xie Wai Ren No. 3 ((2016) 苏 01 协外认 3 号).

<sup>55</sup> See the Singapore International Commercial Court, "Note on Enforcement of SICC Judgments", available at [https://www.sicc.gov.sg/documents/docs/SICC\\_Enforcement\\_Guide.pdf](https://www.sicc.gov.sg/documents/docs/SICC_Enforcement_Guide.pdf) (accessed May 2018). For more information on the enforcement of SICC judgments in Asian jurisdictions, please refer to the ABLI Publication.

<sup>56</sup> See the ABLI publication at pp [4]-[5].

*Of the 15 countries that are covered in this compendium, 13 of them accept that foreign judgments are entitled to recognition and enforcement. Even in the two countries where a litigant has to sue afresh on the same cause of action despite a prior foreign judgment in his favour, a foreign judgment may have effect in the local proceedings as it can be introduced as evidence. This state of affairs, coupled with the presence of shared criteria for the recognition and enforcement of foreign judgments, is promising for convergence purposes. Of course, one cannot overlook the fact that significant differences do exist, but there is cause to believe that harmonisation of the recognition and enforcement of foreign judgment rules in Asia is no pipe dream.*

If harmonisation of enforcement law is possible within a continent as diverse as Asia, it certainly bodes well for convergence on a global scale.

35. Second, the enforcement of foreign judgments is an area where international commercial courts can and should work together for the benefit of international commerce. One of the best ways to do so is by acceding to the Hague Convention, which has been described as the “litigation counterpart” to the New York Convention.<sup>57</sup> Chief Justice James Allsop of the Federal Court of Australia observed recently that “[o]ver the coming years, as the adherence to the Hague Convention on Choice of Courts increases, national commercial courts will begin to have the same regime of

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<sup>57</sup> Ronald Brand and Paul Herrup, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents* (Cambridge University Press, 2008) at p 3.

enforcement as does arbitration for its awards.”<sup>58</sup> In that spirit, I urge those who have not joined the Hague Convention to do so.

36. Finally, if a commercial court is looking for a low-hanging fruit in this area, it should consider signing bilateral or multilateral memoranda with other courts to set out how their judgments may be enforced in each other jurisdictions. Indeed, the Qatar International Court and Dispute Resolution Centre has signed one such agreement with the Supreme Court of Singapore, as have courts in Abu Dhabi, Bermuda, Dubai and Victoria.<sup>59</sup> Such memoranda will be of great assistance to parties and lawyers in providing certainty if enforcement does become necessary.

## **Conclusion**

37. In conclusion, I wish to echo the call for all international commercial courts to work together for the benefit of international commerce. Doing so will provide a surer platform from which transnational trade can take flight. In my vision, close collaboration and ties between international commercial courts will allow for the harmonisation of commercial law, the generation of business norms and the development of a global business culture. Even if not, international commercial courts have the ability to design their architecture in a way that will answer the dispute resolution needs of transnational business. They are ideally placed to collectively develop a nuanced and principled body of substantive commercial law for the benefit of the international commercial community. Like a blessing of unicorns embarking

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<sup>58</sup> *Commercial and Investor-State Arbitration* at [48].

<sup>59</sup> See the Supreme Court of Singapore, “Enforcement of Money Judgments”, available at <https://www.supremecourt.gov.sg/publications/enforcement-of-money-judgments> (accessed May 2018).

together on a journey of a thousand miles, I wish all who will join the SICC in this endeavour every success. Thank you.

Kannan Ramesh \*

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\*Judge, Supreme Court of Singapore