

**SINGAPORE INTERNATIONAL COMMERCIAL COURT
SYMPOSIUM 2021**

**“INTERNATIONAL COMMERCIAL COURTS
IN THE POST-PANDEMIC ERA”**

Opening Remarks

10 March 2021, Wednesday

The Honourable the Chief Justice Sundaresh Menon

Supreme Court of Singapore

1. Let me begin with a greeting that has become customary in these times: A very good morning to all of you here in Singapore, and a good morning, good afternoon, and good evening to those of you joining us from elsewhere around the world. When we decided last year to postpone the Symposium, I had hoped that we would, by now, be able to host you in person, here in Singapore. While that has not come to pass, I am extremely heartened to see that so many of you have joined us for this virtual Symposium. My sincere thanks to all of you for making the time to join us today and I wish to mention especially those of you calling in from Europe, at what is, to put it quite mildly, a rather late hour.

2. Tomorrow marks exactly a year to the day the coronavirus outbreak was officially declared a pandemic by the World Health Organisation. In the space of just a year, the pandemic has exacted a terrible human and economic toll, and has completely upended economic and social life around the world.

3. In these difficult times, the study of history – and its reminder of the

trials that humanity has weathered in times past – can be both a comfort and an inspiration. Indeed, history informs us that while the pandemics of the past have largely been harbingers of destruction, they have also been agents of much-needed change. The Black Death, for example, swept through Europe in the 14th century and wiped out as much as a third of the world's population. Yet, out of the ashes of that tragedy came the emancipation of millions of indentured labourers from serfdom as the sudden and severe depopulation caused by the plague dramatically raised the demand and wages for labour.¹

4. The point is that some good *can*, and often *does* come out of the destruction and disruption wrought by crisis. And there is one crucial difference between the situation then and now. Unlike our forebears, who were the unwitting victims – or beneficiaries – of forces beyond their comprehension and control, we enjoy an unprecedented level of access to data, information, and technical know-how which affords us an unmatched ability to identify and seize the opportunities uncovered as the dust settles. Therefore, if international dispute resolution were likened to a sturdy tree, then the long winter which the pandemic has ushered in seems the perfect time for the work of pruning it – discarding the dead branches of outmoded processes and procedures, so that we might make way for the growth of new and more productive sprouts in the coming spring.

5. In these opening remarks, I hope to make a start in that direction by

briefly discussing *what* the pandemic has changed in dispute resolution, and *how* that change may be relevant to the work of international commercial courts or ICCs. The effects of the pandemic are undoubtedly far-reaching, and for our present purposes, I propose to focus on two areas: first, the types of *disputes* that might arise; and second, the ways in the which the *parties* can be expected to change how they manage those disputes.

I. Dispute hotspots in the post-pandemic landscape

6. First, it is important that we think about the likely dispute hotspots, and consider how we might equip ourselves to deal with them. I am pleased, therefore, that this Symposium features sessions dedicated to two sectors which seem poised for significant expansion in the light of the pandemic – infrastructure and insolvency.

7. Let me touch on the first area, which concerns infrastructure and construction. Asia, in particular, seems right on the cusp of an infrastructural golden age. The Asian Development Bank estimates that Asia will need some US\$26 trillion in infrastructure investment in the period up to 2030.² China's Belt and Road Initiative, which now involves more than 2,000 projects cumulatively valued at over US\$2.4 trillion, will certainly account for some of this.³ While we might reasonably expect a lull in enthusiasm for *new* projects in the immediate aftermath of the pandemic, the crisis seems certain to drive a spike in disputes arising from *existing* projects as construction programmes

are delayed, suspended, re-negotiated or even terminated.⁴ There is no doubt that this will drive demand for robust legal and dispute resolution infrastructure in the region.

8. This is of particular interest because international commercial courts, and the SICC in particular, offer features that make them uniquely suited to the resolution of infrastructure disputes. Infrastructure projects tend to involve multiple parties from different jurisdictions; the SICC appeals to the internationality of such disputes by offering the parties a neutral forum for the resolution of their dispute and the ability to engage counsel of their choice, while affording them a significant degree of procedural flexibility. Indeed, some have observed that ICCs offer at least three distinct advantages over international arbitration. First and foremost, international commercial *courts* offer the possibility of joining non-parties to a dispute resolution agreement without consent. This is a particular advantage in the context of disputes which tend to involve multiple contracts with different dispute resolution clauses. Second, ICCs boast specialised benches of internationally-renowned jurists, and therefore offer a middle path for those who want to avoid some of the potential concerns associated with party-appointed arbitrators,⁵ but at the same time are wary of subjecting themselves to the perceived 'lottery' of domestic courts where the commercial judges might not be internationally known. Third, some international commercial courts such as the SICC offer an excludable right of appeal. This offers the parties flexibility to tailor the

dispute resolution processes to their needs and preferences, and alleviates some of the pressures associated with arbitration being a 'one shot' remedy, which can be especially acute in the context of high stakes infrastructure disputes.

9. We should build on these advantages, and think about new ways in which the SICC can better address the needs of users in this sector. Would it, for example, be useful to develop a specialised infrastructure and construction list, with its own specialised procedural rules tailored to the specific needs of such disputes? There is ample and fruitful ground for further discussion here.

10. The Symposium will also feature a dedicated session for the second mentioned category of disputes on cross-border insolvency. The resolution of such disputes poses a unique problem which, in a word, may be described as that of fragmentation. In this context, it is essential that cross-border insolvencies be managed in a forum which enjoys the support of robust legislative and judicial frameworks that will facilitate a *unified, coordinated* approach to the restructuring process. The demand for such fora will become even more urgent in the light of the economic devastation of the pandemic, which is expected to cause insolvencies to surge by as much as 26%.⁶

11. Singapore and the SICC are well-positioned to meet this challenge. Singapore's Insolvency, Restructuring and Dissolution Act, which came into force last year, consolidates our restructuring and insolvency legislation under

a single omnibus Act. This includes the UNCITRAL Model Law on Cross Border Insolvency, which facilitates the coordination of cross-border insolvency proceedings across courts. It is therefore poised to be a game changer in combating the problem of fragmentation. Beside these legislative frameworks, the Singapore courts also engage actively with like-minded courts through platforms such as the Judicial Insolvency Network – a global network of insolvency judges formed with the objective of promoting judicial thought leadership and best practices in, amongst other things, facilitating court-to-court communication in cross-border insolvency and restructuring matters.

12. The SICC is particularly well-suited to handling restructurings involving debts governed by foreign laws. SICC Judges hail from a spectrum of jurisdictions and legal traditions, which is a particular advantage in ASEAN, which itself features a diverse range of legal cultures. Furthermore, foreign law need not be pleaded and proved before the SICC, because this can be dealt with by way of submissions. The combination of these two features makes the SICC a useful option for regional and global corporates in search of a reputable forum capable of delivering an efficient and effective restructuring process, and we should continue to consider what more can be done to enhance the value proposition that we offer to disputants in this category.

II. From dispute resolution to dispute management

13. I come to the second aspect of the pandemic's influence, which is its influence on the ways in which commercial parties can be expected to manage their disputes. The short point is that dispute resolution budgets will continue to shrink given the bleak economic outlook. This will further tighten the existing squeeze,⁷ and this carries several important implications for ICCs, of which I will mention just a few.

14. First, we might begin to see the centre of gravity of international dispute resolution shift towards non-adversarial processes.⁸ These processes, including mediation and conciliation, not only offer a potentially cheaper means of settling the dispute, but also promise greater control over the process and therefore more predictable outcomes.

15. Of course, arbitration or litigation will not be entirely displaced. Instead, the future, it seems, lies in the effective *integration* of the most successful aspects of adjudicative and non-adjudicative processes. Indeed, this trend pre-dates the pandemic; the Queen Mary University of London arbitration survey in 2018 found that roughly half of all arbitration users preferred arbitration in conjunction with alternative dispute resolution procedures, as opposed to arbitration as a standalone mechanism.⁹ It seems likely that this trend will continue to gain momentum as purse strings are tightened in the wake of the pandemic.

16. I suggest that this is part of a broader philosophical shift in the approach towards dispute resolution – one which moves beyond the rather narrow view of resolution as necessarily entailing an adjudicated *outcome*, and towards a more holistic view that conceives of resolution as an open-ended *process* which embraces non-adjudicated outcomes such as settlement.¹⁰

17. An obvious indicium of this shift is the proliferation of multi-tier dispute resolution clauses. Under a multi-tier clause, disputes pass through a cascade of dispute management mechanisms, beginning with non-adjudicative mechanisms aimed at *avoiding* or *containing* the dispute, and, should those options fail, ending with mechanisms which *resolve* the dispute by means of a final adjudicative outcome. Many standard forms of contract, including the NEC4, FIDIC and World Bank standard forms, now contain such multi-tier clauses.¹¹

18. A further variation on this trend is the rising popularity of Dispute Boards. While the precise structures may vary, these generally involve the establishment of a standing panel of neutrals that follows the project throughout its lifespan. The organising principle undergirding this concept is that the proper management of disputes requires a proactive approach to identifying and containing potential problems before they escalate into serious disputes. To that end, a Dispute Board might, for example, ask to conduct site

visits or inspect key contractual documents even before disputes have arisen or crystallised.¹² Problems which do arise are then swiftly and informally addressed by the same panel of neutrals who would, over time, have acquired an ever more nuanced appreciation of the parties' relationships, objectives, and needs.

19. Such arrangements are quickly gaining traction. Law practices around the globe are urging their clients to consider the use of Dispute Boards following the COVID-19 crisis.¹³ Industry watchers report a growing willingness to use Dispute Boards.¹⁴ And closer to home, the Ministry of Law, the Singapore Mediation Centre ("SMC"), and the Singapore International Mediation Centre ("SIMC") have also come together to jointly develop a dispute management framework called the Singapore Infrastructure and Dispute Management Protocol, which promotes the use of Dispute Boards in infrastructure and construction projects.¹⁵

20. Given these trends, the question before us is this: If indeed we are moving towards a new paradigm of holistic dispute *management*, should ICCs continue to be positioning themselves as offering a solely adjudicative process of dispute resolution? And if the answer to that is 'no', what does this mean for the ways in which ICCs might engage with their users so as to better meet their needs in their search for justice?

21. We, in Singapore, are blessed to share the dispute resolution

landscape with respected mediation institutions like the SMC and SIMC. How might ICCs partner with other alternative dispute resolution providers to offer their users a holistic, one-stop forum for the management and resolution of their disputes?

22. These are strategic questions that relate to the value proposition that ICCs offer, as well as the challenges to their long-term success in the post-pandemic era, and I am glad that we will have the opportunity to hear from a sterling line up of speakers on these and other difficult questions in the sessions that will follow.

III. Concluding thoughts

23. This Symposium provides us with a timely opportunity to take stock of what has changed, and of how we, in turn, must change if we are to meet the challenges and seize the opportunities that lie ahead of us in the post-pandemic world of dispute resolution. To be sure, the crisis is still unfolding and the future is far from certain, but forums like these, which bring us together in the search for a better vision of the future, can help light the way. I thank you for your participation and wish you an excellent Symposium.

¹ Brown University, Decameron Web, “Social and Economic Effects of the Plague” (12 March 2010): <https://www.brown.edu/Departments/Italian_Studies/dweb/plague/effects/social.php>.

² Organisation for Economic Co-operation and Development, “China’s Belt and Road Initiative in the Global Trade, Investment and Finance Landscape” (2018): <<https://www.oecd.org/finance/Chinas-Belt-and-Road-Initiative-in-the-global-trade-investment-and-finance-landscape.pdf>> at p 3.

³ Amanda Lee, South China Morning Post, “Belt and Road Initiative debt: how big is it and what’s next” (19 July 2020): <<https://www.scmp.com/economy/china-economy/article/3093218/belt-and-road-initiative-debt-how-big-it-and-whats-next>>.

⁴ Arcadis, “2020 Global Construction Disputes Report: Collaborating to achieve project excellence” (“Arcadis Survey 2020”) at pp 6-7; Martin Hicks, Blackrock Expert Services Group, “COVID-19: A pandemic of construction disputes?” (6 May 2020): <<https://www.blackrockx.com/news-insights/covid-19-a-pandemic-of-construction-disputes/>>.

⁵ See Chief Justice Sundaresh Menon, Herbert Smith Freehills-SMU Asian arbitration Lecture (11 October 2016), “Adjudicator, advocate, or something in between? Coming to terms with the role of the party-appointed arbitrator”: <[https://www.supremecourt.gov.sg/Data/Editor/Documents/CJ speech at CI Arb Presidential Lecture 2016.pdf](https://www.supremecourt.gov.sg/Data/Editor/Documents/CJ%20speech%20at%20CIArb%20Presidential%20Lecture%202016.pdf)>.

⁶ Atradius, “2020 insolvencies forecast to jump due to Covid-19” (1 September 2020): <<https://altradius.sg/reports-and-services/economic-research-2020-insolvencies-forecast-to-jump-due-to-covid-19.html>>.

⁷ Richard Susskind, Harvard Law School Center on the Legal Profession, The Practice, “A Response to the More for Less Dilemma” (2014): <<https://thepractice.law.harvard.edu/article/speakers-corner-richard-susskind>>. Writing in 2014, Susskind recounted, anecdotally, that CEOs frequently invite their general counsel to slash 30 to 50% off their legal budgets over the next three to five years, giving rise to a problem of ‘more for less’; *ie*, where legal departments are expected to complete more legal and compliance work with less headcount and budget.

⁸ Norton Rose Fulbright, “Global overview of disputes trends in infrastructure and construction” (May 2019): <<https://www.nortonrosefulbright.com/en/knowledge/publications/bab8ffbe/global-overview-of-disputes-trends-in-infrastructure-and-construction>>.

⁹ White & Case and Queen Mary University of London, “2018 International Arbitration Survey: The Evolution of International Arbitration” at p 2.

¹⁰ Royal Institute of Chartered Surveyors, “Is COVID 19 a catalyst for change in resolving construction disputes?” (10 September 2020): <<https://www.rics.org/mena/news-insight/latest-news/news-opinion/is-covid-19-a-catalyst-for-change-in-resolving-construction-disputes/>>: “The pandemic, besides adding economic pressure on the industry that may result in a flood of disputes, has also highlighted some of the best ways to overcome the prevailing issues in the construction sector. Collaboration and early preventive mechanisms that were just being promoted before, are now becoming more widely used to help project participants avoid, mitigate and resolve disputes.”

¹¹ Michael O’Connor, Charles Russell Speechlys, “Multi-tiered Dispute Resolution Clauses” (31 January 2018): <<https://www.charlesrussellspeechlys.com/en/news-and-insights/insights/construction-engineering-and-projects/2018/multi-tiered-dispute-resolution-clauses/>>.

¹² Dechert LLP, “Dispute Boards: Another Potential Means of Resolving COVID-19 Disputes” (24 April 2020): <<https://www.dechert.com/knowledge/onpoint/2020/4/dispute-boards--another-potential-means-of-resolving-covid-19-di.html>>.

¹³ Dechert LLP, “Dispute Boards: Another Potential Means of Resolving COVID-19 Disputes” (24 April 2020): <<https://www.dechert.com/knowledge/onpoint/2020/4/dispute-boards--another-potential-means-of-resolving-covid-19-di.html>>; Lindy Patterson QC, 39 Essex Chambers, “Dispute Boards, Conducting the Process in the New Normal After COVID-19” (18 January 2021): <<https://www.39essex.com/dispute-boards-conducting-the-process-in-the-new-normal-after-covid-19/>>; Dechert LLP, ICLG.com, “Dispute Boards: A Novel Dispute-Resolution Technique for Life Sciences Companies Fighting COVID-19” (3 June 2020): <<https://iclg.com/briefing/13024-dispute-boards-a-novel-dispute-resolution-technique-for-life-sciences-companies-fighting-covid-19>>.

¹⁴ Arcadis Survey 2020 at pp 18, 20 & 23, indicating that this is a growing trend in the United Kingdom and Continental Europe.

¹⁵ Ministry of Law, “New Singapore Dispute Protocol Launched to Minimise Time and Cost Overruns in Infrastructure Projects” (23 October 2018): <<https://www.mlaw.gov.sg/news/press-releases/launch-of-sidp-reduces-time-and-cost-overruns-in-infrastructure-projects>>.