**SUPREME PEOPLE'S COURT OF VIETNAM**
**WORKSHOP ON MEDIATION**

# THE SINGAPORE CONVENTION ON MEDIATION & THE COMING OF A NEW AGE

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Supreme Court of Singapore

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## I. Introduction: a watershed in international commercial mediation

1. Good morning and thank you all very much for inviting me to join you at this workshop. My address today concerns a method of dispute resolution that has grown steadily in prominence over the past few years, and was recently cast into the spotlight as a result of the United Nations Convention on International Settlement Agreements Resulting from Mediation. On 7 August 2019, delegations from 70 countries, involving some 1,600 government leaders and officials, business executives, judges, academics and practitioners, gathered in Singapore to attend the signing ceremony and conference for this Convention. A total of 46 countries signed the Convention, including the world's two largest economies (the US and China); 3 of Asia's 4 largest economies (China, India and South Korea); and 5 ASEAN countries (Brunei, Malaysia, Laos, the Philippines and Singapore). In adopting the

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Convention, the UN General Assembly also decided to name the Convention after Singapore, and it is now known as the "Singapore Convention on Mediation".[1]

2. I see the Singapore Convention on Mediation not only as a watershed in the development of international commercial mediation, but also as a milestone for multilateral cooperation and for international commerce. While international efforts on mediation have been robust and vibrant for many years, due largely to the work of such organisations and initiatives as the International Mediation Institute ("IMI"), UNCITRAL, and the Global Pound Conference, the Convention undoubtedly represents one of the peaks in the history of cooperative solutions on mediation. As our Prime Minister Mr Lee Hsien Loong remarked in his address at the signing ceremony, the Singapore Convention is also a "powerful statement in support of multilateralism", which has "brought the world growth and prosperity, and contributed to the peace and security and international order that we have enjoyed for decades". In the same spirit, the Singapore Convention "demonstrates that countries are capable of achieving consensus, with effort, creativity, and leadership". The signing of the Convention was equally a landmark for international commerce, since "[b]usinesses would benefit from greater flexibility, efficiency and lower costs" flowing from the Convention's support of mediated outcomes in international commercial disputes.[2]

3. My address today will have three parts. First, I will introduce Singapore's approach to mediation, briefly surveying the key institutions and actors that populate the mediation landscape in Singapore. Second, I will explore the development and workings of the Singapore Convention. Third, I will explain my belief that international commercial mediation will, in the near future, experience a surge in prominence and popularity that will allow it to take its place alongside international arbitration and court litigation as one of the leading modes of cross-border commercial dispute resolution and perhaps in time even come to surpass the other modes.

## II. A survey of mediation in Singapore

4. Let me begin with mediation in Singapore. Mediation, in some shape or form, has long had a place in our country. In the early years of Singapore's history, "indigenous forms of mediation"[3] were carried out in an informal and unstructured way, led by community leaders or other respected figures in the community. These individuals would intervene in disputes between members of the community, bringing the parties together to encourage dialogue and explore the possibility of an amicable settlement.[4] As Singapore underwent rapid urbanisation and villages made way for high-rise public housing, these simple forms of mediation declined and eventually disappeared altogether.[5]

5. Mediation in Singapore in the early 1990s was embryonic and largely ignored. A survey conducted in 1991 found that practitioners in the

construction industry had “no more than a rudimentary understanding” of mediation, and the rest of the private sector only made “occasional use” of mediation.[6] It has been observed that it was through exposure to court-annexed mediation that awareness of mediation as an alternative to litigation started to grow.[7] It was not until 1994 that a considered decision was made to promote the use of alternative dispute resolution (“ADR”) processes and, in particular, mediation. That decision was broadly motivated by four goals: first, to check the trend of Singaporeans becoming too litigious; second, to provide a less costly and adversarial method of dispute resolution; third, to ease the caseload in the courts; and fourth, to promote the harmonious settlement of disputes in a manner consistent with Asian culture and values.[8]

6. At the Opening of the Legal Year in 1996, my predecessor Chief Justice Chan Sek Keong, who was then Attorney-General, observed that mediation was a better and more harmonious form of dispute resolution than litigation.[9] These remarks evidenced a growing momentum in favour of mediation, leading eventually to the founding of the Singapore Mediation Centre (“SMC”) on 16 August 1997 by Chief Justice Yong Pung How.[10] The mandate of the SMC, as envisaged by the Chief Justice, was to be a “flagship mediation centre” that would “take the lead in promoting private, non-court-based mediation in Singapore and serve the public sector, professions and businesses”. The idea was to eventually extend its “services in dispute avoidance, dispute management and ADR mechanisms … abroad”.[11]

7. Over the two decades since then, Chief Justice Yong's vision for the SMC has undoubtedly been realised. Mediation today is a prominent feature in the landscape of civil justice in Singapore, and has become deeply integrated into dispute resolution processes both within and outside the courts. One of the fundamental tenets of our dispute resolution philosophy is that mediation, litigation, and arbitration each have their strengths and their limitations, and that they can and should be utilised creatively, complementing one another, in order to achieve optimal outcomes for the parties and for the community. We therefore place equal emphasis on both dispute *containment*,[12] through mediation; and dispute *resolution*, through litigation and arbitration, in our dispute resolution framework. I will provide some examples, beginning with court-annexed mediation.

8. The State Courts of Singapore is the "engine room" of our judicial system and it manages an annual caseload of around 350,000 cases.[13] Embedded within its Practice Directions is a "presumption of Alternative Dispute Resolution" for all civil disputes. The court will encourage the parties to consider ADR options as a "first stop" for resolving the dispute at the earliest possible stage, and it will also, "as a matter of course", refer appropriate matters to court dispute resolution or other forms of ADR.[14] The State Courts also applies mediation to less serious types of criminal matters which are initiated by a Magistrate's Complaint. The parties may be directed to attend a criminal mediation conducted by the Magistrate or a Justice of the

Peace,[15] and if the matter is then settled, the complaint will be withdrawn with no further action being taken. In October 2018, the State Courts also introduced conciliation to its repertoire of ADR tools. This is a process by which a Judge-conciliator guides and assists the parties to reach an out-of-court outcome by actively suggesting measures or proposals which the parties can consider.[16]

9. Mediation also plays a key role in the processes of the Supreme Court. Across the lifetime of a case, presiding judges or judicial officers conduct case management conferences during which parties are actively encouraged to explore mediation or other forms of ADR in order to settle their disputes. Appropriate cases are then referred to mediation at the SMC.**[17]** In exercising its discretion to award costs in a given case, the court may also consider the parties' conduct in relation to whether they had made a genuine attempt to mediate or otherwise resolve the dispute through other forms of ADR.[18] This incentivises the parties to pay serious consideration to mediation or other forms of ADR to settle their disputes.

10. Mediation is a central feature of our family justice system. When I took office as Chief Justice in November 2012, one of my first priorities was to enhance the role of mediation in family justice. The Committee of Family Justice, which was an interagency team established to study and recommend possible reforms to the family justice system to better serve the needs of

families in distress, conducted a comprehensive review over the course of the next one and a half years.[19] The Committee found that the adversarial court process did little, if anything, to preserve the relationships between the parties, which inevitably must persist beyond the life of court proceedings.[20] Recognising that a greater emphasis on mediation was needed, we reformed our family justice system to make mediation mandatory for divorcing couples with children under the age of 21, and to empower judges of the Family Justice Courts to order the parties to attend mediation and counselling in other cases.[21]

11. Apart from court-annexed mediation, Singapore also has a vibrant private mediation scene. I have already referred to the SMC, which has to date mediated more than 4,000 private commercial matters, with a settlement rate of about 70%, and with more than 90% of those disputes having been resolved within a single working day.[22] Alongside the SMC is the Singapore International Mediation Centre ("SIMC"), which was launched in 2014 as the first mediation institution in Asia focused on international commercial mediation services.[23] The SIMC has an outstanding track record, achieving an 85% settlement rate in 2017, compared to the global average of around 70%.[24] Perhaps the best-known of its many innovative projects is its collaboration with the Singapore International Arbitration Centre ("SIAC") to develop the "Arb-Med-Arb" protocol.[25] Under this protocol, arbitration proceedings are first instituted under the SIAC. Once the tribunal has been

constituted, the arbitration is stayed and the proceedings referred for mediation at the SIMC. If the dispute is then successfully mediated, the tribunal will issue a consent award reflecting the terms of the settlement. If it is not, the arbitration proceedings will resume.

12. On the community level, the Community Mediation Centres ("CMCs") were established in 1998 to provide a less confrontational method of resolving day-to-day disputes between neighbours, family members, and friends.[26] The CMCs mediate disputes brought to them by the parties themselves, as well as by the State Courts, the Singapore Police Force, and other community-based agencies.[27] Since their establishment, the CMCs have mediated more than 9,000 disputes, with a resolution rate in excess of 70%.[28]

13. Time does not permit me to provide a more detailed account of the mediation scene in Singapore, but I warmly welcome you to reach out to our courts and mediation institutions to find out more and explore opportunities for collaboration between mediation practitioners in Vietnam and Singapore. Dialogue and exchanges, which have always been the bedrock of international cooperation, will foster the cross-pollination of ideas and best practices and ultimately the betterment of our dispute resolution frameworks.

## III. Mediation in incubation

14. I come to the second part of my address, which concerns the Singapore Convention and the promise that this holds for the future of international commercial mediation.

15. I would like to preface this discussion by considering why it is that mediation – despite its obvious potential and its long history in various parts of the world, including Asia – has not yet achieved ascendance in the realm of international commercial dispute resolution. Indeed, it has been observed that despite market predictions to this effect and despite support from governments and institutions, mediation in Asia has failed to flourish to the same degree as international arbitration.[29] I want to begin by first outlining mediation's potential, before considering the reasons for its underdevelopment.

### *A. The potential of mediation*

16. The benefits of mediation are well-known. It will therefore be enough for me to identify what I suggest are its four primary advantages.

(a) First, mediation has proven itself to be a more cost-efficient method of dispute resolution.[30] Unlike arbitration or litigation, mediation is not confined by the strictures of procedural formalities

which can protract the dispute resolution process and thereby increase the costs involved.

(b) Second, by focusing on agreement, mediation generally promotes the quicker resolution of disputes. In contrast, parties engaged in litigation or arbitration can often find themselves embroiled in complex and time-consuming procedural battles before even engaging with the merits.

(c) Third, the mediation process is particularly suited for laypersons because it is relatively simple to understand and participate in, certainly when compared to arbitration or litigation, and in that way, it promotes access to justice.[31]

(d) Fourth and finally – and perhaps most importantly – mediation tends to promote harmony and the preservation of relationships between the parties, who are encouraged to adopt a long-term view of their dealings with each other and recognise the damage that continued conflict can cause to their broader interests.

17. These are all reasons why I have on other occasions suggested that we should turn away from our conventional understanding of mediation as a form of "*alternative*" dispute resolution.[32] We often think of court litigation as the primary method of dispute resolution, with ADR – as its name suggests – as a secondary or inferior option, or at most as an adjunct to court litigation.

I suggest this could not be further from the truth. The time has come for us to recognise mediation as an essential component of our dispute resolution toolkit, with unique strengths and advantages that can justify its selection as a first option in relation to many kinds of disputes.

18. I want to briefly address a critique that has sometimes been made about mediation and other forms of ADR. This is the argument that the "privatisation and informalisation of dispute resolution" brought about by ADR is antithetical to the Rule of Law. It is said that ADR removes dispute resolution from the public sphere, leading to a loss of precedents and the erosion of public norm-setting,[33] and increases the vulnerability of less powerful members of society by removing them from the protection of the courts.[34] All of this stands in contrast to conventional adjudicative processes in the courts, where laws are publicly discussed, promulgated and administered.

19. Not all of these concerns are invalid, but I suggest that they can largely be addressed by strengthening ADR frameworks and maintaining sufficient judicial and regulatory oversight over those processes. And I firmly believe that none of them warrant the wholesale abandonment of the enterprise of ADR, which has the potential to enhance – and not to diminish – the Rule of Law. I have explained on another occasion[35] why the argument that mediation and the Rule of Law are inconsistent is premised on an unduly

restricted conception of the Rule of Law – specifically, one that places insufficient attention to access to justice. It ignores the various challenges facing courts and litigants today: limited judicial resources, shrinking amounts of available court time, the growing complexity and technicality of court procedures which has led to the domination of the system by professionals, and the rising cost of litigation. All of this means that it is increasingly difficult for those who are less well-off or well-educated to participate meaningfully in conventional court processes. Set against this reality, the choice for vulnerable litigants is often not between the courts and ADR, but between ADR and the non-resolution of their grievances. We must constantly remind ourselves that justice cannot be done without *access* to justice as an essential precondition. That is why access to justice has always been central to the Rule of Law.

20. Let me take a moment to explore the point a little further. The realities that I have just described also mean that the method by which justice is delivered must be *proportionate* to the needs and interests of the parties and, indeed, to the dispute. A dispute resolution process that drains parties' resources, exacerbates their differences, and facilitates rather than prevents the breakdown of the overall relationship in the single-minded pursuit of a result will often lead to a victory only in form, but not in substance. Such an outcome erodes, rather than promotes, confidence in the ability of the process to better the lives of its participants. As against this, mediation is not

only likely to be more affordable and expeditious and to result in an outcome more likely to be honoured, but also better able to preserve the underlying relationships which may persist long after the dispute has been settled and forgotten. On the whole, these benefits are likely to be considerably more valuable than a one-off award of damages or compensation, or a declaration of right and wrong at the end of a long, arduous and expensive process that might seem alien and inaccessible to the parties themselves. In short, mediation and other forms of ADR can be more effective in promoting the delivery of proportionate justice.

21. I suggest that what we fundamentally require is not only a broader conception of the Rule of Law, but a broader vision of what *justice* requires. The great American jurist Roscoe Pound once observed that justice is not the law, but the end of the law.[36] In other words, while law must serve justice, justice is broader than law.[37] Law and its processes are a modality by which justice may be achieved, but should not be allowed to define what justice *is* or what it *requires* – and often what the parties really want is not only the accurate adjudication of rights and obligations but also the preservation of "harmony, reconciliation, balance, and equality".[38] Justice is the purpose of the law, and the purpose of justice is the achievement and advancement of peace. It is through this lens that we should view critiques about "loss of law" as a consequence of ADR, and avoid mistaking means with ends.

### *B. The surprising unpopularity of mediation*

22. Why then, despite its attributes and advantages, has mediation not enjoyed greater international prominence as a mode of dispute resolution? In 2016, the Singapore Academy of Law conducted a survey of 500 commercial law practitioners and in-house counsel dealing with cross-border commercial transactions in Singapore and in the region.[39] 71% of the respondents indicated that their preferred method of dispute resolution was arbitration, while 24% cited litigation, and only *5%* favoured mediation.[40] That trend was not limited to Asia. In a 2014 survey of 816 experts across the European Union, the EU Directorate-General for Internal Policies found that despite high success and satisfaction rates when used, as well as the amount of potential savings relative to other alternatives, mediation in civil and commercial matters in Europe was attempted in *less than 1% of all cases*. The problem was so inexplicable that the EU study even thought it worthy of a name: the "EU Civil and Commercial Mediation Paradox".[41]

23. The EU study also found that the use of mediation varied greatly depending on jurisdiction. For instance, Italy reported that over 200,000 cross-border commercial mediations were conducted in the country annually. On the other hand, Germany, the Netherlands, and the UK reported that only about 10,000 mediations took place each year. What is perhaps even more surprising is that 46% of the surveyed EU member states – including Greece, Portugal, Croatia, the Czech Republic, and Sweden – reported having less

than 500 cross-border commercial mediations each year.[42]

24. These statistics are noteworthy and they call for explanation. What was giving rise to the “mediation paradox”? In the 2016 SAL survey that I mentioned earlier, respondents were asked to identify the factors that influenced their preferences regarding methods of cross-border commercial dispute resolution. The factor that was identified as being far and away the most important was that of *enforceability* – it was selected by 46% and 43% of the respondents as the primary reason for their preference for arbitration and litigation respectively.[43] This tends to suggest that the relative disinclination towards mediation arose from a profound lack of confidence in the enforceability of mediated outcomes.

25. This hypothesis is strongly supported by a number of other authoritative studies. In the 2016 Global Pound Survey of more than 4,000 delegates, respondents were asked to consider measures that would most improve commercial dispute resolution. The top choice, garnering 64% of the votes, was the use of legislation or conventions that would promote the recognition and enforcement of settlements, including those reached in mediation.[44] In a 2014 survey of in-house counsel and senior corporate managers conducted by the IMI, 93% of respondents indicated that they would be more likely to mediate a dispute if they knew that the settlement could be enforced by way of a binding ratified international convention; while

88% said that the existence of a widely-ratified enforcement convention would make it easier for commercial parties to agree to mediation.[45] In the survey of EU member states I mentioned earlier, many respondents similarly expressed concerns over the enforcement of settlement agreements and suggested that mediation would be more attractive if enforcement was uniform and assured.[46]

26. I conclude therefore that the lack of confidence in cross-border commercial mediation is due substantially – if not primarily – to the absence of a coherent international regime for the effective enforcement of mediated settlements. This brings me neatly to the Singapore Convention on Mediation.

## IV. Mediation unlocked: the Singapore Convention on Mediation

### *A. From uncertainty to consensus*

27. The idea for a multilateral convention to promote the enforceability of international commercial settlement agreements reached through mediation was proposed in 2014, at the 47th session of UNCITRAL.[47] This was not the first time that a similar idea had been raised. 12 years prior to that, during the preparation of the UNCITRAL Model Law on International Commercial Conciliation, the question of enforcement was considered but the discussions ran into an impasse as a result of which the attempt was abandoned.[48]

28. This large and difficult task was then given over to the UNCITRAL Working Group on Arbitration, Conciliation and Dispute Settlement ("Working Group"). Its beginnings were shrouded in a cloud of doubts, misgivings, and uncertainties. The echoes of UNCITRAL's failed attempt 12 years earlier continued to linger in the discussions of delegates, some of whom pointed out that the circumstances had not changed since the adoption of the Model Law.[49] One of the concerns raised was the overall feasibility of the endeavour. It was observed that the procedures for enforcing settlement agreements varied greatly between legal systems and were heavily dependent on domestic law, which in turn did not lend itself easily to harmonisation.[50] Some states had no special provisions on the enforceability of settlement agreements, with the result that the general contract law applied; while others provided for the enforcement of settlement agreements as court judgments. As a result, the grounds for refusing enforcement were also extremely varied. The Working Group was forced to concede that national legislation on enforceability was so diverse that "no dominant trend [could] be identified".[51]

29. Doubts were also raised over whether an international convention would actually generate the anticipated benefits. The concern was that formalising the enforcement of settlement agreements would in fact diminish the value of mediation as a flexible solution.[52] Some delegates questioned whether an international regime created by a convention might result in a

“more cumbersome review of settlement agreements” than under domestic mechanisms, through which settlement agreements “could circulate as contracts without any formalities or control in any State, the situation being different for foreign judgments and arbitral awards”.[53]

30. At one point, the very form of the endeavour itself was questioned. The Working Group debated whether the instrument should take the form of a convention, or a softer international instrument such as a set of model legislative provisions. Those in favour of preparing a convention highlighted that a binding instrument would promote certainty, while those who preferred model legislative provisions pointed out that the concept of enforcement of mediated settlements was “quite new in certain jurisdictions and that providing a uniform regime through the preparation of a convention might not be desirable or feasible”.[54]

31. Suffice to say, the mood in 2017, just two years ago, was not optimistic. The chairperson of the Working Group, Ms Natalie Morris-Sharma from Singapore, recounted how at almost every meeting, one of the delegations would issue a statement expressing reservation with the project. Matters came to a head at the 66th session of the Working Group in February 2017, when a raging snowstorm forced the closure of the UN headquarters in New York. This left the delegates scrambling to find an alternative venue to continue their discussions. They found this in the form of a small, stuffy

conference room into which the 40 delegates packed themselves.[55]

32. In that most unlikely and unfavourable of circumstances, the Working Group found compromise and forged consensus. It was agreed that enforcement would take place in accordance with the rules and procedure of each state but under the conditions that were laid down in the convention, and that a model law and convention would be prepared simultaneously.[56] Two years later, the herculean efforts of the Working Group are on international display today, in the form of the very first UN treaty on mediation.

### *B. The workings of the Convention*

33. Let me briefly examine the structure and content of the Singapore Convention. The framing of the Convention was designed to garner the maximum amount of international support while maintaining sufficient definition in the most important aspects of the framework, so as to ensure certainty and uniformity in its application. From an early stage, it was decided that the Convention should draw upon the best features of one of the most successful international instruments – the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, better known as "the New York Convention". The New York Convention has been described as the "cornerstone of the international arbitration system"[57] and most of us here today are undoubtedly well-acquainted with it.

34. Like the New York Convention, the Singapore Convention is a

relatively brief document of only 16 articles. The first laudable feature of the Singapore Convention is that it is clear and precise in its scope. This arose from the resolution of the Working Group in 2016 that the Convention should only prescribe clear, simple, and objective criteria for determining whether a settlement agreement falls within the scope of the instrument.[58] Only international commercial disputes are relevant to the Convention, and each of those terms “international” and “commercial” are carefully defined in Article 1. In order for a dispute to be “international”, one of two criteria must be satisfied: first, that at least two parties to the settlement agreement have their places of business in different states; or second, that the state in which the parties have their places of business is different from either the state in which a substantial part of the obligations under the settlement agreement is performed, or the state with which the subject matter of the settlement agreement is most closely connected. The meaning of “commercial” is explained by exclusion. Article 1 expressly excludes from the ambit of the Convention settlement agreements that concern transactions for personal, family or household purposes, or that relate to family, inheritance, or employment law.

35. On the issue of enforcement, Article 3(1) of the Convention is unequivocal as to the primary obligation of member states to enforce settlement agreements. However, in relation to the modalities of enforcement, the Convention leaves the procedure to the discretion of

member states, requiring only that enforcement take place "in accordance with [each Party's] rules of procedure and under the conditions laid down in the Convention". This approach is consistent with that of Article III of the New York Convention, and acknowledges the significant divergence in national legislation and practice on procedures for the enforcement of settlement agreements.[59]

36. That discretion, however, is coupled with a "ceiling" established by the prescribed circumstances in which member states may refuse to recognise and enforce settlement agreements. This approach of setting a maximum, but not a minimum, level of control is again inspired by the New York Convention, Article V of which identifies the grounds upon which recognition and enforcement of arbitral awards may be refused. Professor Emmanuel Gaillard, a leading authority on arbitration, has described this method of control as the "genius of the New York Convention";[60] and it was therefore prudent of the Working Group to also adopt it for mediation.

37. The grounds for refusal of recognition and enforcement were designed by the Working Group to be limited, exhaustive, simple to implement, easy to verify, and yet stated in general terms so as to give interpretive flexibility to enforcing authorities.[61] These grounds, set out in Article 5 of the Singapore Convention, largely mirror those of the New York Convention. Enforcement may be refused, for instance, where a party to the

settlement agreement was under some incapacity; the settlement agreement was null, void or incapable of being performed; there was a serious breach of standards by the mediator; or where granting relief would be contrary to the public policy of the member state.[62]

38. Article 7 of the Singapore Convention is one of a species known as "more-favourable-right" provisions. It declares that the Convention will not deprive an interested party of any right to avail itself of a settlement agreement to the extent allowed by the law or the treaties of a member state. The Working Group considered that this provision would effectively deal with any overlaps or gaps between the Convention and other instruments, while promoting the enforcement of settlement agreements.[63] The New York Convention's own more-favourable-right provision has, in fact, been regarded as one of its cornerstones and a technique of considerable foresight, because it has supported rather than stultified the progressive liberalisation of the law of international arbitration that has occurred after its adoption in 1958.[64]

39. The Singapore Convention on Mediation is a well-crafted and carefully calibrated instrument. Like the New York Convention, it avoids the trap of over-regulation and sets its sights squarely on the single most important objective – which is the *obligation* to enforce settlements – rather than focusing on the modalities. It refines that with a tried and tested set of

exceptions to enforcement, modelled after those of the New York Convention, so as to reduce the scope of discretion on the part of enforcing states. It supports the further development of national laws and treaties on mediation by recognising that the rule which should prevail in the event of any conflict is neither the more recent nor the more specific, but that which is more favourable to the recognition and enforcement of mediated outcomes. That is entirely consistent with the policy of the Convention.

40. Of course, only time will tell whether the Singapore Convention will achieve the almost universal level of support currently enjoyed by the New York Convention, but I am confident that it will; and that is the subject of the final part of my address to which I now come.

## V. The rise of international commercial mediation

41. I believe that the time has come for international commercial mediation to shake off the typecast of "*alternative*" dispute resolution and join the ranks of international arbitration and court litigation as *primary* options for resolving cross-border disputes. Mediation has for decades stood in the long shadow of international arbitration and litigation as a mode of cross-border dispute settlement. As I have explained, this has largely been because of concerns over the enforceability of mediated outcomes. As the "missing … piece in the international dispute resolution enforcement framework",[65] the adoption of the Singapore Convention has filled that gap and I believe it will

herald a bright new future for international commercial mediation.

42. I suggest that three other major forces will also drive the ascendance of international commercial mediation in the coming decades: first, Asia's cultural affinity with mediation; second, the rise of Asian corporates; and third, the growing recognition of the importance of dispute containment. I will discuss each in turn, beginning with the issue of culture.

### *A. Cultural affinity*

43. It is worth noting that the practice of mediation has deep roots not just in Singapore, but in Asia more generally. Varieties of the indigenous form of mediation that I described in my opening remarks were carried out in many other Asian countries, including China,[66] Brunei,[67] Indonesia,[68] Malaysia,[69] the Philippines,[70] South Korea,[71] Thailand,[72] and Vietnam.[73] This comes as no surprise given that the principles and processes of mediation have long resonated with the cultures of many Asian countries, where great value is placed on social harmony, relationships, compromise, collectivism and respect.[74]

44. This cultural inclination toward mediation persists today, even as the region has modernised and globalised. In a 2011 survey by the International Institute for Conflict Prevention and Resolution amongst in-house counsel and external counsel from the Asia-Pacific region, 72% of the respondents indicated that their company or firm generally had a positive view of mediation

as a mode of dispute resolution, exceeding even arbitration; and 78% said that their company or clients had used mediation to resolve disputes sometime in the preceding three years.[75]

45. The extent to which legal systems in Asia have incorporated mediation into their dispute resolution frameworks evidences this. For instance, in 2012, China amended its Civil Procedure Law to adopt the principle of "mediation first", which requires parties to civil cases to first attempt mediation before they explore other methods of dispute resolution.[76] In 2014, Hong Kong introduced a Practice Direction that allows the court to stay proceedings for the purposes of mediation where this is appropriate.[77] Hong Kong has also established a Mediation Accreditation Association to consolidate the accreditation process of mediators under a single professional body, thereby enhancing public confidence in mediation as a dispute resolution option.[78]

46. More recently, Vietnam has made important and impressive efforts to enhance the use of mediation. I understand that in May last year, the Vietnam Mediation Centre ("VMC"), the first of its kind in the country, was launched.[79] Just two months after that, the VMC released a set of Mediation Rules and a Model Mediation Clause.[80] The Supreme People's Court of Vietnam has also recently piloted a court-annexed mediation model in 16 provinces, and I am told that the pilot project achieved high settlement rates of between 76% and

80%.[81]

47. These successes have led Vietnam to prepare a Bill on At-Court Mediation and Dialogue that I understand will be presented to the Vietnam National Assembly for its consideration and adoption. The Bill is a comprehensive instrument governing mediation conducted before the initiation of civil, family, and labour cases.[82] It sets out protections on confidentiality, identifies the responsibilities of the court in relation to the mediation process, codifies the rights and obligations of parties engaging in mediation, and establishes criteria for mediators and their appointment, discharge, rights, and duties.[83] The Bill also provides that once a decision is reached, the outcome will be recorded by the mediator and the court will then issue a "decision on recognition". From that decision, no appeal will be allowed unless the court is satisfied of one of a narrow list of grounds – for instance, if there was deception, intimidation or coercion, or a contravention of law, social ethics, or responsibilities to the state.[84]

48. The Bill establishes a comprehensive, balanced and well-considered framework that promotes mediation, circumvents potential pitfalls, and gives the disputing parties certainty that their settlement agreement will – barring exceptional circumstances – be given full effect. It is a tremendous achievement which will go a long way to promote the use of mediation in Vietnam, and I offer you my heartiest congratulations and wish it every

success.

49. I believe the enduring cultural affinity that Asian countries have long had with mediation, coupled with their intensifying efforts to strengthen mediation regimes and the rapid growth of mediation institutions and court-annexed mediation – as has been the experience in Vietnam in recent years – will fuel the popularity of mediation as a mode of cross-border commercial dispute resolution in Asia.

### *B. The rise of Asian corporates*

50. I turn to the next factor, which is the rise of Asian corporates. The demand-side growth of emerging economies in Asia is accompanied by increasing maturity and sophistication on the supply side of these economies. According to a 2019 report by the McKinsey Global Institute, the rise of Asian corporates has been "game-changing". In 1997, Asia accounted for only 36% of the 5,000 largest firms globally, but that share increased to 43% a decade later, with companies from Vietnam, the Philippines, Kazakhstan and Bangladesh entering and climbing up that list. The 2018 Fortune Global 500 ranking reveals that 210 of the world's 500 biggest companies by revenue are Asian.[85] These companies are also moving up the value chain, venturing from the industrial and automotive sectors into areas such as technology, finance and logistics.[86]

51. Within Asia, it is *Southeast Asia* that has been identified by the

majority of top executives in a 2019 Citibank survey as the market that offers the most opportunities for growth.[87] Vietnam, which has achieved more than 6% GDP growth per annum for the past 5 years,[88] is an important reason for that focus, attention, and success. Vietnam has become the second-largest exporter of electronic goods amongst the ASEAN economies, and its competitive wage costs, quality human capital, infrastructure investment and economic stability have all been identified as reasons why Vietnam is an increasingly attractive place for businesses.[89] An important aspect of the region's growth is the rapid expansion of its digital economy. Southeast Asia is a highly-connected region of the world – it has 350m internet users across its six largest countries, which is more than the entire population of the United States. A 2018 survey by Google and the Singapore investment company Temasek Holdings found that Southeast Asia's digital economy will triple in size to US$240bn by 2025. Vietnam itself has seen its digital economy more than triple since 2015.[90]

52. As the heart of the global economy moves toward Asia, and South-east Asia moves into the very centre of the economic slipstream, I believe that the region will see growing demand, led by Asian businesses, for a method of dispute resolution that is not only expeditious, efficient and cost-effective, but that produces outcomes that are easily enforceable wherever business is done. As Asian businesses grow in size and significance, they will have increasingly have the clout to determine the method by which

disputes should be resolved. That will multiply the effect of the Asian preference for mediation on the use of international commercial mediation.

53. As member states to the Singapore Convention enact legislation to give effect to their enforcement obligations, the international business and legal communities will soon recognise that there is no longer any reason to distrust mediation or the effectiveness of its outcomes. Before long, we may perhaps see international commercial mediation emerging as the first option for commercial dispute resolution. What was once an "alternative" method of dispute resolution will then become the first port-of-call.

### *C. The new philosophy of dispute containment*

54. This brings me to my third point, which concerns the growing recognition of the importance of dispute containment. In a survey of more than 300 participants during the 2016 Global Pound Conference in Singapore, comprising government officials, judges, practitioners, and members of industry, participants were asked for their views on what the future of dispute resolution would resemble. The responses gathered consistently underscored a "pressing need to move beyond the tried and tested approaches to dispute resolution" and, in particular, to "focus on [the] prevention or management of disputes before they escalate". Panellists spoke about the need to encourage parties to explore non-adjudicative processes before taking the dispute to arbitration or to court, and emphasised

the importance of managing and de-escalating conflicts in the pre-trial phase.[91]

55. The results of the Global Pound survey tell an important tale – they indicate that a fundamental shift is going on in the global culture of dispute resolution, driven by a growing sense that we ought to be thinking about addressing conflicts and disputes in a different, better and wiser way. In his forthcoming book titled *Online Courts and the Future of Justice*,[92] Professor Richard Susskind powerfully advocates for the need to reorient our justice systems so as to focus on dispute containment and avoidance, and not merely on dispute resolution. Much better, he argues, to nip a dispute in the bud than to let it fester and escalate. But that is not the philosophy of conventional adjudicative and adversarial processes, which tend to promote the continuation rather than the conclusion of disputes. We need to reimagine our justice system in this light.

56. I believe that momentum is gathering for a paradigm shift in the philosophy of dispute settlement, as the legal community increasingly realises that dispute resolution inhabits only one corner of that broader canvas. As Professor Susskind puts it, civil justice is quickly approaching a "fluoride moment",[93] brought about by the recognition that prevention is better than cure, and that we would be able to drastically reduce the number of disputes that come before our courts if only we were to make the appropriate

investment in dispute containment and avoidance.

57. In the United Kingdom, “online courts” adopting this new philosophy have been planned and are gradually being introduced. The processes of these courts begin with online evaluation and facilitation, which aim to help users better understand their problems and seek to resolve them with the help of trained facilitators who mediate and assist in the negotiations. The aim is to bring many, if not most, disputes to a speedy and fair conclusion without the involvement of judges; and it is only if the dispute persists that it proceeds to the online judges for dispute resolution.[94]

58. In the State Courts of Singapore, dispute containment is promoted not only by the judge-mediators I mentioned earlier but also through an online negotiation and mediation platform for small claims and community disputes, which has resulted in significant time and cost savings for parties and the court. Between the launch of the platform in July 2017 to February this year, more than 1700 small claims have undergone e-Negotiation and 602 of these, or about 35%, have been amicably settled as a result.[95]

59. I believe that this evolution in the philosophy of dispute resolution will, in combination with the ever-expanding boundaries of what technology can achieve, open a new chapter for civil justice. And within that new chapter, the ascendancy of mediation – which embodies the spirit of dispute containment – will become its dominant theme.

## VI. Conclusion: a new golden age of mediation

60. Let me conclude by revisiting some remarks that I delivered in 2012, at the keynote address of the Congress of the International Council for Commercial Arbitration (ICCA). My address concerned the rise of international commercial arbitration, and I suggested that "the sun [was] ris[ing] over [a] glorious, golden age of arbitration". Arbitration will undoubtedly continue to be one of the pre-eminent modes of international dispute resolution, as will court litigation, especially with the rise of international commercial courts in recent years.

61. But I am confident that the adoption of the Singapore Convention on Mediation heralds a new era for the resolution of cross-border commercial disputes. Just as the New York Convention did for arbitration in the 1950s, the Convention will unlock the potential of international commercial mediation by removing what has perhaps been the greatest obstacle to its ascendance. In the coming decade, as the global economic order continues to reorient itself towards Asia, I believe we will see the sun rise over a new, golden age of international commercial mediation.

62. Thank you all very much.

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