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The Rise of the International Commercial Court

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Good morning colleagues in the world of international commercial dispute resolution.

1 Presenting a paper at the first plenary session of any conference, especially in the morning, can have its challenges. More so when you are presenting before participants who have either just flown in from other time zones, or worse, arrived in Hong Kong early so as to enjoy the culinary delights the previous night. For any presenter, there is the choice of trying to entertain, impart information or stimulate discussion, or if you are ambitious, all of the above. I will just try to attain a more modest objective – keep you awake for the next fifteen minutes before the introduction of the next speaker. Obviously, in this time frame I can only touch the surface in commenting on the rise of international commercial courts.

2 At the time when the common law world looked to English law and legal institutions for absolute guidance, Lord Denning MR in 1973, confident in the superiority of the English courts situated in London said in *The Atlantic Star* [1973] QB 364, 382:

> *No one who comes to these courts asking for justice should come in vain ... The right to come here is not confined to Englishmen. It extends to any friendly foreigner. He can seek the aid of our courts if he desires to do so. You may call this 'forum-shopping' if you please, but if the forum is England, it is a good place to shop in, both for the quality of the goods and the speed of service.*

3 So now we have other international dispute resolution institutions putting out their shingles (in their modern electronic form) seeking to attract international commercial dispute resolution shoppers to their door. As an example, we have the Singapore International Commercial Court ('**SICC**') which has developed in a very short period of time. This has been helped by extensive promotional and marketing work, and funds given to the SICC by the government in Singapore over and above the baseline budget for the specific purpose of financing the creation of the new division of the existing Court. The SICC has been well received by the international legal community due to the quality of judges and judgements. I will return later to discuss briefly the Singapore experience.

4 It is apparent that the commercial legal international world is changing, and has been for some time now. There is a strong willingness (on the part of courts and lawyers) to learn from others outside their own domestic institutions and law, and to adopt an international outlook. The divide between the common law and the civil law is narrowing. The divide between Western outlook and the Eastern and Middle Eastern outlook is also narrowing, although there will always be cultural differences.

5 It should come as no surprise that there is a rise in the number of international commercial courts. There is a growing importance of international conventions which govern commercial dealings, along with the increased growth of international trade and commerce. This increase in international trade and commerce has inevitably lead to a corresponding increase in commercial disputes. Such disputes are often more complex than disputes involving only a single jurisdiction, usually being subject to at least two different legal systems, cultures and laws.

6 The growth and complexity of international trade and commerce in itself brings a considerable demand and scope for various forms of dispute resolution. A party to an international dispute may have a preference not to be subject to the laws and courts of the country of the other trading partner, and look for forum neutrality. There may be concern about finding courts in some jurisdictions which are capable of competently resolving commercial disputes, and being free of any actual or perceived bias or corruption. Then some litigants have a preference to avoid litigation through any traditional court litigation system. Consequently, many international agreements governing cross-border transactions include clauses which stipulate an alternative dispute resolution process to be followed outside a domestic court. The form which international dispute resolution takes on can vary greatly: the most common forms are arbitration, mediation, and increasingly now recourse to international commercial courts.

7 We all know that arbitration has enjoyed a renaissance as a dispute resolution process for international disputes. Arbitration has always had its roots in international commercial dispute resolution. Merchant guilds in Europe developed arbitration as a swift and fair method for dealing with commercial disputes across borders.

8 It is often said that international arbitration offers the advantages of speed, cost-efficiency, finality, and subject-matter expertise of the arbitrator. Whether these advantages are real now may be debated, but the real advantages to arbitration are privacy (confidentiality) and forum neutrality.

9 There are limitations on arbitration as a dispute mechanism:

- If the culture of the parties is a preference to resolve disputes consensually (by negotiation, mediation or conciliation), arbitration may be too adversarial or confrontational;
- Arbitration of complex commercial disputes may not be quicker and cost less than if the dispute were to be resolved through the traditional court process.

10 I should interpolate here that domestic courts are moving closer to adopting some of the arbitration processes, so to be efficient, speedy, and cost conscious. Just focussing on the Federal Court of Australia and its Commercial Practice Area, we have incorporated (where appropriate) the Redfern Discovery procedure, memorial procedure for evidence and early document disclosure, and the dispensing with formal pleadings with a Concise Statement of Facts and Issues. The Court is now focussed (and has coercive powers to fulfil this focus) on moving away from process driven litigation to the proportionate dispute resolution of each individual case.

11 Closely aligned to arbitration, but adding to its advantages and trying to limit its disadvantages, there has been an emergence of international commercial courts. They can provide privacy and forum neutrality, but with the advantages of court processes. They include, the London Commercial Court, the Qatar International Court, and the courts of the Dubai International Financial Centre, the Abu Dhabi Global Market, the relatively newly established SICC and the Astana International Finance Centre Court. This last mentioned Court formally came into existence on 1 January 2018, and Sir Rupert Jackson will be informing you in his presentation of its function and operation. Then on 25 June 2018, the Supreme People's Court issued the *Provisions of the Supreme People's Court on Several Issues concerning the Establishment of International Commercial Courts* and on 29 June 2018, the China First and Second International Commercial Courts were established in Shenzhen City and Xi'an City respectively.

12 These courts have features when compared with traditional domestic courts which make them able to respond well to the needs and realities of international commerce. It is imperative that these courts so respond. Furthermore, each of these courts are municipal courts in that they are established under the legislation of the States in which they are situated, with jurisdiction to hear international cases. They commonly deal with international commercial matters,

sometimes including matters where more than one party is foreign to the State within which the court is based.

13 Establishing international commercial courts does not take away from the usefulness of international commercial arbitration, but gives another option of dispute resolution that is available to parties involved in international commerce. For instance, parties may still want a particular expert arbitrator or arbitrators in the subject matter of the dispute, and go to arbitration for this purpose.

14 I want to mention two further matters concerning the rise of international commercial courts. First, the host governments will need to ensure that the international commercial courts have a structure that ensures their integrity free from potential corruption and interference. Not only must there be the legal framework for their establishment, jurisdiction and function, but there must be a legislative or constitutional framework to ensure that corruption or interference with the court process is prevented (to the extent possible with any human institution). Unless the potential parties to the international commercial court process can be confident in the framework for disputation being sound in all respects (including free from improper outside interference and corruption) the attraction of a particular international court will fade. This involves more than just the appointment of respected and ethical decision-makers, chosen from well-respected international or domestic courts. It involves the States which establish, support, promote, and fund the international commercial court to have a framework in place which ensures the court's integrity and independence.

15 Secondly, there is the important issue of consistency and what has been called "harmonisation" of substantive laws, practices and ethics. Many commentators have referred to this, and the importance of establishing international commercial law principles and norms.

16 In 2015, the Chief Justice of Singapore, Chief Justice Sundaresh Menon in presenting a lecture entitled "International Commercial Courts: Towards a Transnational System of Dispute Resolution", in Dubai, observed:

> *[Arbitration] was not designed to provide an authoritative and legitimate superstructure to facilitate global commerce. It cannot, on its own, adequately address such things as the harmonisation of substantive commercial laws, practices and ethics.*
>
> *This is where I believe that international commercial courts have a potentially important role to play. Such courts can be instrumental in facilitating the harmonisation of commercial laws and practices. They also represent an avenue for the advancement of the rule of law as a normative ideal in global commerce. This is because there will be greater external scrutiny of their decisions and processes, with*

increased pressure to justify decisions against international norms.

17 Earlier in 2013 he remarked:

> *... 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.*

18 Without harmonisation of substantive laws, practices and ethics, different legal systems and international commercial courts, with their different cultures and rules, create uncertainties and additional costs for international business. The rule of law in international markets is supported when all commercial courts (both domestic and international) learn from each other and develop legal principles to take into account the decisions of commercial courts in a variety of jurisdictions. "Jurisdictional silos" should be a thing of the past, and hopefully the rise of international commercial courts will assist in the harmonisation process.

19 To a similar end in the community of world commercial courts, in 2016, there was established the Standing International Forum of Commercial Courts. The object of the Forum was 'to build on and develop a more systematic approach to providing a common approach to the resolution of disputes' as was stated by the proposer of the Forum, Lord Chief Justice Thomas - 'Commercial Justice in the Global Village: The Role of Commercial Courts' (speech delivered to the Dubai International Financial Centre Academy of Law, 1 February 2016).

20 The Forum was first convened on 5 May 2017 in London. The second meeting of the Standing International Forum of Commercial Courts will take place in New York on 27 and 28 September 2018, where I go to after this conference to represent the Federal Court of Australia with Chief Justice Allsop AO, along with my colleagues from the Supreme Courts of Victoria and New South Wales. The attendees include judicial members of various commercial courts from many jurisdictions in addition to Australia, including the Gambia, Ghana, Nigeria, Sierra Leone, Uganda, People's Republic of China, Hong Kong SAR, Japan, Kazakhstan, Malaysia, Philippines, Singapore, Sri Lanka, New Zealand, France, Germany, Netherlands, Republic of Ireland, United Kingdom, Abu Dhabi, Dubai, Iraq, Qatar, Saudi Arabia, Canada, Cayman Islands, Eastern Caribbean and United States of America.

21 The Forum will focus on how to go about sharing of judicial experience and expertise globally. The agenda (as far as relevant putting aside refreshments, group photographs, receptions, and

dinner) includes specific topics such as the role and value of commercial courts from a court users' perspective, litigation funding by third parties, case management and the effective use of technology in a modern court.

22 I do not have the time allotted to me to detail the various facts and statistics relating to the establishment, objectives, jurisdiction, or composition of each of the established international commercial courts to demonstrate some of the benefits they bring to international commercial dispute resolution. However, I briefly will talk about the SICC as an example, as it shows some of the advantages of an international commercial court.

23 The SICC was officially launched on 5 January 2015. The website of the SICC, the equivalent of the old shop shingle, proclaims the primary objective of the Court is to help expand the legal services sector by making Singapore a prime destination for the resolution of international commercial disputes.

24 Since this commencement, judges have been appointed to the SICC from both common and civil law countries all over the globe, including Singapore, the United States, Australia, Austria, France, England, Hong Kong and Japan. The judges have diverse academic and juridical backgrounds, but all have a commercial focus.

25 Generally, the SICC has the jurisdiction to hear and try an action if:

(1) The claim in the action is of an international and commercial nature;

(2) The parties to the action have submitted to the SICC's jurisdiction under a written jurisdiction agreement; and

(3) The parties to the action do not seek any relief in the form of, or connected with, a prerogative order (including a mandatory order, a prohibiting order, a quashing order or an order for review of detention).

26 The SICC may also hear cases which are transferred from the Singapore High Court. Third or subsequent parties may be joined to an action where the SICC has or assumes jurisdiction or in a case transferred to the SICC from the High Court. The SICC will not decline to assume jurisdiction in an action solely on the ground that the dispute between the parties is connected to a jurisdiction other than Singapore, if there is a written jurisdiction agreement between the parties to submit the claim for resolution by the SICC.

27 The benefits of SICC proceedings include the following:

- Parties can apply for the proceedings and judgment to remain confidential;
- Third parties can be joined - a procedure not available in arbitration because arbitration clauses bind only the parties that agreed to them, which means parties that ought to be involved in the resolution of a dispute may not be obliged to join;
- Considerable flexibility is accorded to the SICC with respect to the application of the rules of evidence and also in relation to the determination of foreign law. Thus the Singapore rules of evidence do not, in all cases, have to be applied and questions of foreign law can be decided by submission rather than proof, which may, in some cases, expedite proceedings;
- The SICC's judgement turnaround is proving to be quick and reliable.

28 Some commentators have articulated that one foreseeable issue with SICC decisions is that they are only enforceable if the country in which enforcement is being sought has a treaty with Singapore decreeing that foreign judgments are to be recognized and enforced. That concern may be allayed if the Hague Choice of Court Convention, which came into force 1 October 2015, gains traction. It provides for signatory States to respect choice of jurisdiction clauses and so further legitimises international litigation and the decisions handed down by international commercial courts, like the SICC.

29 Finally, I will be disowned by my Australian colleagues if I do not mention one further matter – an Australian International Commercial Court.

30 There have been numerous appeals for an international commercial court to be established in Australia. A good place to shop for quality and service, to use the expression of Lord Denning MR. Whilst London may have been seen as the traditional home of international commercial litigation, the focus for the establishment of international commercial courts has shifted also to the Middle East and Asia. Furthermore, the manner of which international commercial courts throughout the world have been established and developed provides useful guidance in the establishment of an Australian International Commercial Court.

31 Just as in other countries, an international commercial court in Australia would need to be supported by a legislative regime, promoted internationally and be properly funded. Clearly a number of constitutional considerations would need to be taken into account having regard to the Australian Federal structure.

32 So to conclude, I observe that just as the setting up of the SICC was a significant step in the development of international commercial dispute resolution in the Asia Pacific Region, so has been the rise of other international commercial courts in the development of international commercial dispute resolution globally. As long as these courts remain free from improper interference and maintain their neutrality, are able to attract members and legal practitioners of experience and quality, and become known for their integrity and transparency, their popularity as an option for international commercial dispute resolution will grow. This will be to the advantage of the international commercial community and will promote the establishment of principles of internationally accepted norms of proper commercial behaviour.

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