

Singapore Chamber of Maritime Arbitration Annual Conference 2015

“The Future of Maritime Dispute Resolution”

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Opening keynote address by Chief Justice Sundaresh Menon

Mr Goh Joon Seng, Chairman of the Singapore Chamber of Maritime Arbitration

Fellow Judges

Ladies and gentlemen

I. Introduction

1 Fifty years have passed since Singapore emerged as a fledgling state in a world of uncertainty. During that time, the volume of global sea trade expanded from 1.6 billion tonnes in 1965 to 10.3 billion tonnes in 2015¹ - and we, as a port nation, have reaped significant rewards from this phenomenal growth. Singapore is one of the busiest container ports in the world. In 2014, we handled 33.55 million Twenty-foot Equivalent Units (TEUs) of containers.²

¹ Martin Stopford, *Will the next 50 years be as chaotic as the last?*, Lloyd's List (15 May 2015)

² *PSA Container Throughput Performance for 2014*, PSA International News Release (19 January 2015), available at: <https://www.globalpsa.com/wp-content/uploads/nr150119.pdf> (accessed at 20 October 2015).

2 It is true that Singapore's success as a maritime hub must, to a large extent, be attributed to her excellent geographical location³ which sees her situated along many major sea-trade routes. But that cannot be the only reason. Throughout these years, Singapore has faced substantial competition from other ports also situated in the region. Hence, geographical location alone cannot provide a satisfactory explanation for the good standing that Singapore has enjoyed and continues to enjoy. The search for other explanations yields some ready results.

3 For one thing, to remain competitive, Singapore has developed comprehensive, state-of-the-art infrastructure to facilitate maritime trade. The first move in this direction was the establishment of the Tanjong Pagar container port – the first Southeast Asian container port – on 23 June 1973. That was 42 years ago and we have never looked back. Indeed, in keeping with an unremitting pursuit of excellence, on the very same day 42 years later, Phases 3 and 4 of our Pasir Panjang Terminal were officially opened. Upon the projected completion of this S\$3.5 billion project by the end of 2017, Singapore will be equipped to handle a total of 50 million TEUs of containers annually.⁴ And impressive as this may be, it should

³ Michael Pryles, "Singapore: The Hub of Arbitration in Asia", available at <http://www.siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-27-02/articles/198-singapore-the-hub-of-arbitration-in-asia> (accessed at 20 October 2015).

⁴ *Singapore Prime Minister Opens PSA's Latest S\$3.5 Billion Pasir Panjang Terminal Phases 3 and 4 Development*, PSA Singapore Terminals News Release (23 June 2015), available at: <https://www.globalpsa.com/wp-content/uploads/nr150623.pdf> (accessed at 20 October 2015).

be recalled that this in turn foreshadows the eventual realisation of a megaport in Tuas which will further raise container throughput capacity to 65 million TEUs.⁵

4 Aside from the direct port services offered at our terminals, Singapore has also developed various ancillary services to ensure a conducive environment for the advancement of a unique, highly-specialised industry that accounts for about 7% of her GDP.⁶ These services range from shipbroking to shipping finance to bunkering.

5 As has been the case with other major centres for sea trade such as London, New York and Hong Kong, the growth of the maritime industry in Singapore has also been accompanied by her emergence as a centre for maritime dispute resolution. This is not unusual given that the particularities of the maritime industry render it a fertile breeding ground for conflict and controversy which in turn makes having a competent and effective dispute resolution system an acute necessity. Aside from the sheer volume of transactions handled by the maritime industry as evidenced by the fact that seaborne trade accounts for over 80 per cent of the total volume of

⁵ *How Singapore's Port Helped Change the Country's Economy*, Channel NewsAsia (21 April 2015), available at <http://www.channelnewsasia.com/news/business/singapore/how-singapore-s-port/1796336.html> (accessed at 20 October 2015).

⁶ Speech by Mr Lui Tuck Yew (Minister for Transport), Singapore Maritime Foundation's New Year Cocktail Reception (7 January 2014), available at http://www.news.gov.sg/public/sgpc/en/media_releases/agencies/mot/speech/S-20140107-1 (accessed at 20 October 2015).

global trade activity and over 70 per cent of its total value,⁷ the maritime industry also has to contend with the inevitable uncertainties of the sea as well as the vicissitudes of commercial life. As the past President of the London Maritime Arbitrators Association, Mr Bruce Harris has observed, the maritime business is one where:⁸

... the unexpected always happens, both at sea and in ports. Delays occur, damage is caused, losses are suffered; all with very great frequency.

6 The development and evolution of our dispute resolution services to keep pace with the changing needs of a sophisticated international community has thus been an important part of our overall effort to achieve success as a maritime hub. For instance, in response to parties' preference for flexible arbitration processes, the Singapore Chamber of Maritime Arbitration ("SCMA"), which was originally established as a constituent of the Singapore International Arbitration Centre ("SIAC"), was re-established in 2009. As the SIAC developed increasingly sophisticated institutional rules and processes, the SCMA opted to focus on providing support for *ad hoc* arbitration to cater for the particular needs of *this* industry. Thus, the SCMA Expedited Arbitral Determination of Collision Claims ("SEADOCC"), a "small claims" collision service, was instituted in 2013 following consultation with various stakeholders such as P&I Clubs, lawyers and other

⁷ *World Economic Situation and Prospects 2012* (United Nations, 2012) at p 44, available at: http://www.un.org/en/development/desa/policy/wesp/wesp_archive/2012wesp.pdf (accessed at 20 October 2015).

⁸ Bruce Harris, "Maritime Arbitration in London" (February 2000) at p 21.

maritime players. We have also recently established the Singapore International Mediation Centre (“SIMC”) and the Singapore International Commercial Court (“SICC”) to provide parties with yet further viable alternatives to resolve their transnational commercial disputes.

7 As we celebrate SG50, a commemoration of 50 years of success and growth as a nation, it is a fact that the maritime industry has played an important part in this journey. And we have ample reason to be optimistic that this will continue to be the case. At the same time, we have to an increasing degree, in recent years, focused on developing our legal infrastructure in order to establish Singapore as a regional hub for the resolution of transnational commercial disputes.

8 Given the confluence of these factors, and keeping with the theme of this year’s conference, I suggest that this is a good time to look towards the future of maritime dispute resolution, and in particular, to examine the choices that are and will be available to the maritime community from among the different modes of dispute resolution offered in Singapore. I propose to do this by first providing an overview of the differing interests of parties involved in different types of maritime disputes, which in turn might influence their choice as to the most appropriate mode of dispute resolution. I will then elaborate on why I think it is important that we make available to users a suite of dispute resolution methods that they can choose from in order to address their varying needs and interests; before turning to consider the three principal methods, namely arbitration, mediation and litigation. In so doing, I

hope to lay the groundwork for this conference, where members of the maritime community can become more acquainted with the depth and breadth of the maritime dispute resolution ecosystem in Singapore.

II. TAXONOMY OF MARITIME DISPUTES

9 Aside from their volume and frequency, maritime disputes are typified by their expansive variety. On a general level, a lawyer's involvement in maritime disputes is demarcated between what is commonly and somewhat colloquially referred to as "wet work" and "dry work".

10 "Wet work" involves things happening on water. It typically concerns casualties or accidents in one form or another, such as collisions or sinkings, and it will usually entail invoking the admiralty jurisdiction of our courts, at least for the arrest of the ship in question; but this does not necessarily mean that the final resolution of the dispute will be by way of litigation. A single dispute in this area also tends to implicate a host of interested parties including ship owners, cargo owners, charterers, crew, salvors and P&I Clubs each of whom might have some interest or suffered some loss or damage as a result. It can of course involve other third parties if the collision involves damage to property such as a wharf.

11 "Dry work", on the other hand, commonly refers to things that arise out of a wide spectrum of contractual relationships between very different parties. These may involve short-term relationships arising for example, from the international sale

of goods; or from contracts for the carriage of goods. There are also mid-to-long-term relationships arising from charter parties or from shipbuilding contracts. Separate contractual relationships may also be interconnected by way of chains that arise from sub-contracting arrangements. “Dry work” disputes often tend to involve issues such as contractual interpretation and breaches of contract, although there are also tortious claims that sometimes arise in this category.

12 Even just from this brief comparison of “wet work” and “dry work”, it is evident that there are distinct features associated with disputes falling under each category. Moreover, even *within* each broad category, there can be significantly different and distinct types of issues that arise. Disputes concerning defective goods under a contract for the sale of goods, late delivery under a consignment contract, non-payment of charter hire, liquidated damages for delayed completion of a shipbuilding project and the non-payment of monies due under a letter of credit, give rise to a broad range of matters that, at the highest level, are linked essentially just by the fact that a contract is involved and that at some point, some aspect of the subject matter of that contract will probably have something to do with the sea!

III. FACTORS INFLUENCING THE CHOICE OF DISPUTE RESOLUTION METHOD

13 This leads me to the first substantive point I want to make, which is that given this considerable diversity in the nature of the disputes that may arise within the maritime industry, it would be wrong to suppose that there is a one-size-fits-all

method that is ideally suited to resolve all types of shipping disputes. I suggest that arbitration, litigation and mediation each present distinct advantages and attractions and the focus of our attention should be on identifying the *appropriate* mode of dispute resolution that should be adopted. This in turn will depend on the particular features of the dispute in question, and the varying interests of the parties to that dispute. I make five observations in this context.

14 First, disputes that involve multiple parties or parties who are connected (and whose relationships are therefore regulated) by different contracts, including possibly by way of sub-contracting arrangements, may sometimes be better suited to litigation than those that involve only the direct parties to a single contract. For example, disputes that arise out of a shipbuilding contract may frequently also concern problems associated with the sub-contracting of related services such as engineering, naval design and architecture, or the construction of major subassemblies. These disputes might benefit from litigation which by virtue of the consolidation and joinder powers that are vested in the courts, can to a greater degree ensure coherence and consistency in the approach that is taken to resolving disputes that may affect parties along the entire contractual chain.⁹

⁹ Cyril Chern & Christopher Koch, Efficient Dispute Resolution in the Maritime Construction Industry – Dispute Boards in Maritime Construction, (2007) *The Transnational Dispute Management Journal* 5.

15 Second, there will be categories of cases that involve the interpretation of commonly found terms or standard forms that may benefit from an authoritative court decision on the point that will be published and hence be readily accessible as compared to the award of an *ad hoc* arbitral tribunal concerned ultimately only with the resolution of the particular dispute over the particular contract that is before it. While it is true that parties might care more about the resolution of their individual disputes than the development of jurisprudence, authoritative court rulings on common terms allow these terms to be treated as a type of “legal commodity”¹⁰ which can play a central role in the smooth operation of commercial markets. Parties who tend to repeatedly encounter disputes involving similar or common clauses might well prefer a mode of dispute resolution that can provide a settled interpretation. This observation by Lord Diplock in a case concerning standard terms found in charterparties is a very useful and if I may say so, pertinent reminder:¹¹

The ... purpose served by standards clauses is that they become the subject of exegesis by the Court so that the way in which they will apply to the adventure contemplated by the charter-party will be understood in the same way by both the parties when they are negotiating its terms and carrying them out.

16 Although from a slightly different context, I can illustrate this point by reference to the recent decision of our Court of Appeal in *PT Perusahaan Gas Negara*

¹⁰ James Allsop, “International Commercial Law, Maritime Law and Dispute Resolution: The Place of Australia, New Zealand and the Asia Pacific Region in the Coming Years”, Address to the 33rd Annual Maritime Law Association of Australia and New Zealand (28 September 2006).

¹¹ *Federal Commerce and Navigation Co Ltd v Tradax Export SA (The “Maratha Envoy”)* [1978] AC 1 at 8.

(Persero) TBK v CRW Joint Operation [2015] 4 SLR 364. We were called upon to interpret certain clauses found within the FIDIC Conditions of Contract for Construction,¹² a set of standard terms for international construction contracts that provides, amongst other things, for a multi-tiered dispute resolution process which requires disputes to be referred to a Dispute Adjudication Board (“DAB”) before being submitted to arbitration. The issue was whether cl 20.7 of those standard terms contemplated that a decision of the DAB which was challenged by one of the parties could itself be enforced by way of an arbitral award in the event of a party’s failure to comply with that decision, without having to refer the non-compliance of that party as a separate and discrete breach of the contract to the DAB for a separate decision. After considering the drafting history of the clause as well as other clauses found within the standard form, we held by a majority that it was not necessary to refer the non-compliance with the decision of the DAB back to the DAB as a precursor to arbitration, and that a DAB decision that had not been complied with, could be enforced directly by way of arbitration.

17 That might not sound terribly exciting or the stuff of “legal commodities” that promote the smooth operation of commercial markets. But in fact, prior to our decision, the very same clause had been interpreted multiple times by various

¹² *Conditions of Contract for Construction: For Building and Engineering Works Designed by the Employer* (International Federation of Consulting Engineers, 1999 Ed).

arbitral tribunals which had come to varying conclusions.¹³ Whether every stakeholder in the industry ultimately agrees with our decision is irrelevant. There might be detractors just as there will be supporters. But that pronouncement of the Court of Appeal, has at least put forward a closely reasoned analysis of the issue which is now widely available to other courts, arbitral tribunals and academic commentators. It is true that in this particular context FIDIC itself had issued a clarification but the example nevertheless goes to illustrate the basic point which is that courts can and historically *have* played a central role in settling the law. And this includes the law that is reflected in standard form contracts or common terms that are widely used “legal commodities” in industries such as this one.

18 Third, it must equally be recognised that some disputes may necessarily involve enforcement across many borders and legal systems some of which may be certain or at least predictable and others which might be less so. Here it becomes important, as well, to consider who the counterparty is. If one is embarking on a new relationship as opposed to dealing with a counterparty with whom there is a settled and established relationship, greater attention would then have to be given to the subject of enforcement. But the inquiry does not necessarily end there; is the counterparty in a jurisdiction with which there are effective arrangements for

¹³ See, for *eg*, ICC Cases 16119, 18320 and 16948. See also Christopher R Seppälä, “Commentary on Recent ICC Arbitral Awards dealing with Dispute Adjudication Boards under FIDIC Contracts”, ICC Dispute Resolution Bulletin 2015 (Issue 1) for a discussion on these varying approaches.

enforcement either of court judgments or of arbitral awards? It has to be said that the more one expects to encounter enforcement difficulties, the greater will be the attraction of arbitration. This follows from the widespread adoption of the New York Convention¹⁴ which serves as an effective framework for the international enforcement of arbitral awards.

19 But as I have said, this is not a conclusive consideration. For instance, disputes such as those concerning letters of credit that involve parties such as banks may be more easily enforced across borders. Also, a court judgment, if it can be enforced by way of reciprocal enforcement agreements, may yield a result more quickly and effectively than an arbitral award that would otherwise have to contend with the risk of being the subject matter of setting aside applications or face opposition in recognition and enforcement proceedings. Depending on the jurisdiction, these can sometimes be complicated and time consuming.

20 Fourth, disputes that arise out of mid- to long-term contracts as well as situations which involve parties who are engaged in strong long-term commercial relations may often benefit from more amicable or less contentious forms of dispute resolution such as negotiation and mediation. These methods preserve the parties' working relationship and also allow the parties to resolve their differences in an

¹⁴ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 UNTS 38 (1958)

expeditious and cost-effective manner even as they continue to perform the contract with the least possible disruption. They also enable the parties to retain control over the terms on which their dispute is going to be resolved, since even where a third party mediator is involved, he or she cannot *impose* an outcome on the parties. Moreover, mediation helps the parties in developing and maintaining longstanding relationships. This may often not be the position with litigation and arbitration. Thus, in the context of charter parties, one maritime lawyer has observed:¹⁵

The close relationship between the different parties in the industry have had the result that they are not keen to refer their disputes to litigation as this is interpreted by some to be a hostile act, and for the past two years I have on many occasions prepared notes to shipowners or charterers for use in their settlement discussions as even the presence of lawyers in the conference room, had been seen as an act of hostility.

21 A common feature of long-term contracts, especially in the infrastructure industry, but elsewhere as well, to a growing degree, is the use of multi-tiered dispute resolution clauses. These usually provide for mediation or negotiation as a prelude to mandatory processes such as arbitration or litigation; and often may also include the device of adjudication by a Dispute Board consisting of experts in the industry who can make quick interim decisions during the course of the works. These will temporarily resolve disputes as they arise during the course of the project and on this basis, the parties shelve the heavy duty work of finally determining the dispute until after the project has been completed.

¹⁵ Jørgen Rasch, *Dispute Resolution in the Third Millennium*, 14th International Congress of Maritime Arbitrators (October 2001).

22 In *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and another* [2014] 1 SLR 130 (“*IRC v Lufthansa*”), our Court of Appeal upheld the effectiveness of these clauses. In the context of a specific multi-tiered dispute resolution clause, we held that when parties had clearly contracted for a specific set of dispute resolution procedures as preconditions for arbitration, then, absent any question of waiver, those preconditions had to be complied with before any party could have recourse to arbitration; and we set aside the arbitral award in that case on the basis that the preconditions to arbitration had not been complied with and the arbitrators therefore did not have jurisdiction. In particular, although there had been some “high-level” meetings between various people in the respective organisations of the parties, the multi-tiered dispute resolution clause in question required that certain specific persons had to meet in an attempt to resolve any dispute and this, they had not done.

23 In the same decision, we also signalled the need to take the stipulated tiers of an agreed dispute resolution process seriously in that we were not content to readily find there had been substantial compliance with the stipulated procedures.

24 My last point in this context of identifying factors that bear on a party’s choice of dispute resolution method, concerns the matter of costs. It is a point that should go without saying, but because transnational commercial dispute resolution is an endeavour that tends to involve high stakes and a specialised domain, there is a

tendency to lose sight of this. From the client's perspective, they, at least hitherto, have tended to be heavily reliant on the advice of the specialists they have engaged and they can often end up feeling as though they are caught in a nightmare which seems to be wholly beyond their control.

25 Some of these points can be illustrated by reference to the famous, or perhaps more correctly, the notorious, arbitration concerning "The Solitaire". The "Solitaire arbitration" was at least at that time, the largest maritime arbitration ever to take place in London. It spanned nearly a decade. The dispute itself arose when Allseas, a major offshore pipelay and subsea construction company, unilaterally terminated a \$230 million shipbuilding contract two years after it had awarded the contract to a Singapore company, Sembawang Corporation ("SembCorp") in 1993, for the conversion of one of its bulk carriers, the "Solitaire", into a pipe-laying vessel. Allseas alleged that SembCorp had failed to make adequate progress in carrying out the works while SembCorp counterclaimed that Allseas's termination of the shipbuilding contract was wrongful.

26 Arbitrators were appointed in October 1996 and the arbitration hearings commenced in London in January 1997. By the conclusion of the first stage of the arbitration in 2002, by which time one arbitrator had resigned and another had passed away, nine awards concerning liability had been rendered following four major hearings, five minor hearings and four appeals to the English Commercial Court. Scores of lawyers and experts had been involved. A total of two million

documents and 24,000 drawings had been referred to and parties incurred legal fees that amounted to tens of millions of pounds.¹⁶

27 As the arbitration trudged along, with further applications to appeal to the English Commercial Court, the insurers withdrew cover for legal expenses after it was discovered that legal fees had accumulated to some £50 million for each party by July 2004.¹⁷ To put this in context, SembCorp's counterclaim at that point, of £56.3 million, was only slightly more than the legal fees it had incurred. Its counterclaims were heard in another tranche of hearings in 2005. In 2006, a decade after the commencement of an arbitration that must have exerted an immense toll on the parties including their senior management, the parties concluded a full and final settlement of all their disputes.¹⁸

28 It is well beyond the ambit of my address this morning to attempt to extract the lessons that may be drawn from this saga but at the very least it serves as a grave reminder of the importance of making informed decisions about how we wish our

¹⁶ *Largest Arbitration in History Ends First Stage*, *The Lawyer* (25 March 2002), available at: <http://www.thelawyer.com/largest-arbitration-in-history-ends-first-stage/77211.article?adfesuccess=1> (accessed on 20 October 2015).

¹⁷ *Allseas Liable for DWS Fees as P&I Club Gard Wins Cap*, *The Lawyer* (26 July 2004), available at: <http://www.thelawyer.com/allseas-liable-for-dws-fees-as-pi-club-gard-wins-cap/111260.article> (accessed on 20 October 2015).

¹⁸ SembCorp Industries and Allseas Joint Press Release, *SembCorp and Allseas reach full and final settlement for Solitaire Arbitration* (31 March 2006), available at http://www.allseas.com/public/bestanden/2006_0331_Settlement_Solitaire_arbitration.pdf (accessed at 20 October 2015).

disputes to be resolved. This covers everything from the initial selection of a dispute resolution mechanism through the actual conduct of the dispute itself. The choice of dispute resolution mechanism will have a bearing, inevitably, on how quickly (or not) disputes are resolved and how extensive will be the resources to be expended towards that end. Such resources include not only the obvious direct costs arising from the legal fees, but hidden costs such as the breakdown of commercial relationships, excessive wastage of management resources and reputational loss. With the benefit of hindsight, I think there will be no shortage of alternative and happier storylines that could be written for the “Solitaire arbitration”.

29 Before I leave this point, I should make it clear that I am not suggesting at all that the “Solitaire arbitration” should stand as *evidence*, much less *proof* of the shortcomings of arbitration. All modes of dispute resolution have the potential to go contrary to expectations. But this, I think, validates my real point which is that there are quite significant factors that can and should drive the choice that the parties make as to the *appropriate* method of dispute resolution, and the more choices there are, the more likely it should be that parties can then select the most *appropriate* mode of dispute resolution given the types of disputes they can expect to encounter in their areas of commercial activity. This brings me to our dispute resolution philosophy in Singapore which is being developed to address these precise challenges.

IV. OUR DISPUTE RESOLUTION PHILOSOPHY

30 In a speech I recently delivered in Mumbai, I spoke of the challenges facing the transnational trading community, which will have profound significance for our legal system¹⁹. The observations I made on that occasion were directed at commercial disputes generally but they also apply to the specific context of the maritime industry. The first is the exponential growth of international trade that has given rise to a corresponding increase in the volume of disputes. The second is the fact that these disputes have also grown in complexity, requiring a greater degree of technical sophistication; and with the great surge in transnational dealing, also an appreciation of cross border legal issues. These challenges in some respects pull against the widespread desire for the dispensation of justice that is swift, practical, and cost-effective. This makes it essential for us to innovate and evolve our legal frameworks for dispute resolution so as to enable us to better meet these needs.

31 Without question, in recent decades, international arbitration has provided the biggest part of the answer to the maritime community's call for an international commercial dispute resolution system. International arbitration has played a much-needed and timely role first, by providing a neutral and specialised forum for the resolution of such disputes. It also held the promise of flexibility and confidentiality in

¹⁹ Sundaresh Menon, "Singapore: Leading Asia in Dispute Resolution" (Opening Remarks for the Seminar organised by the Ministry of Law, Mumbai, India) (9 September 2015), available at https://www.supremecourt.gov.sg/data/doc/ManagePage/6003/MinLaw_Seminar_Dispute_Resolution_in_Singapore.pdf (accessed at 20 October 2015),

the resolution of complex disputes.²⁰ Second, and more importantly, as I have already observed, arbitral awards have the desired quality of being enforceable across uncertain international borders by virtue of the New York Convention. It can thus be said with some force that arbitration is ingrained in the dispute resolution culture of the maritime industry.

32 But international arbitration does not stand alone. James Allsop, the Chief Justice of the Federal Court of Australia has observed that:²¹

... A good court system is vital for the health and well being of arbitration in any country. The skill and efficiency of the courts in supervision, enforcement and collateral assistance is vital for successful arbitration.

33 This is true because the courts remain the gateway through which arbitral awards enter a national legal system. The more enlightened and sensitive the court system is to the international legal framework, the greater the prospect that this occurs in a way and to a degree that accords with the expectations that are inherent in international instruments such as the New York Convention. This extends to all aspects of this potential interface from recognition and enforcement of an award, recourse against an award and other forms of curial assistance during the course of the proceedings.

²⁰ Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell, 2nd Ed, 1991) at paras 1-42–1-44.

²¹ *Supra* n 10, at p 10.

34 By acting in accordance with such instruments as the New York Convention and the Model Law²² and denying force or effect to awards, in the limited circumstances when, but only when, this is indeed warranted, courts in fact enhance the standing and legitimacy of arbitration as a whole. Thus, as between international arbitration and courts, it can be said that a symbiotic relationship exists.

35 But beyond this, courts have innovated and increasingly see themselves not just as the best man to the bridegroom that is modern international arbitration. Courts also increasingly see themselves playing an active role in their own right in the changing dispute resolution landscape of this century. This has culminated in such developments as the establishment of specialised international commercial courts in Dubai, the SICC in Singapore and specialist commercial lists in Singapore and elsewhere.

36 Mediation too, has in recent times, shaken off its erstwhile tag as the ineffectual cousin of litigation and arbitration. Today, it is gaining substantial recognition as a valuable and cost-effective method of commercial dispute resolution in its own right.

²² United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration*, 24 ILM 1302 (1985)

37 We see each of these three general modes of dispute resolution as representing a viable dispute resolution option. Each is attractive in its own way, the choice among them depending on the parties and on their particular needs. Because of this recognition, we have in recent years, taken the initiative of conceptualising, creating and developing institutions dedicated to each of these three alternative modes of dispute resolution. The result of these efforts is that users can find a complete suite of dispute resolution services gathered in one geographical location and that users may therefore choose the most *appropriate* mode of dispute resolution geared towards the needs of the types of disputes they are likely to encounter.

A. *Arbitration*

38 I begin with arbitration. When I delivered the keynote address for the 2013 edition of this conference,²³ I spoke of the emergence of Singapore as a seat for maritime arbitration. This was against the backdrop of the then recent adoption in November 2012 of Singapore as the third seat of arbitration in all Baltic and International Maritime Council (“BIMCO”) standards forms, a set of standard terms which are incorporated in about 70% of the world’s contracts for maritime trade. Since its re-establishment in 2009, the SCMA has enjoyed considerable success. As

²³ Sundaresh Menon, “Emergence and Development of Singapore as a Seat in International Maritime Arbitration” (Keynote Address for the Singapore Chamber of Maritime Arbitration Conference) (4 September 2013), available at: <http://www.scma.org.sg/pdf/seminar20130904KeynoteAddress.pdf> (accessed at 20 October 2015).

compared to the 6 disputes it handled in 2009, the SCMA handled 25 disputes in 2014, of which 22 involved international parties.

39 Singapore's standing as a seat for maritime arbitration received a further boost recently with the release this year of the latest revision of the New York Produce Exchange Time Charter which involved BIMCO, the Association of Ship Brokers and Agents and our very own Singapore Maritime Foundation ("SMF"). This latest revision of the most widely used standard time charter party in the dry cargo sector of the industry includes Singapore as one of the three named seats for arbitration alongside London and New York.²⁴

40 Our courts have supported this by standing firm in our "unequivocal judicial policy of facilitating and promoting arbitration."²⁵ In *AKN and another v ALC and others and other appeals* [2015] 3 SLR 488, the Court of Appeal reinstated parts of an arbitral award that had been set aside in its entirety by the High Court on account of breaches of natural justice. In allowing the appeal partially, the Court of Appeal emphasised the important difference between an arbitral tribunal's absolute failure to even consider an argument and its decision, no matter how uninformed and mistaken, to reject an argument. Similar to what we had said in another recent Court

²⁴ *Launch of NYPE 2015 – A Joint Effort by ASBA, BIMCO and SMF on the Industry's most Widely Used Standard Form of Dry Cargo Time Charterparty*, Singapore Maritime Foundation Press Release (16 October 2015)

²⁵ *Tjong Very Sumito and others v Anting Investments Pte Ltd* [2009] 4 SLR(R) 732 at [28].

of Appeal decision, *BLB and others v BLC and another* [2014] 4 SLR 79, we held that a mistake on the part of the tribunal would not warrant setting aside the award no matter how egregious that mistake was. In reaffirming the pro-arbitration policy of the Singapore judiciary, we made the following observation at [37]:

A critical foundational principle in arbitration is that the parties choose their adjudicators. Central to this is the notion of party autonomy. Just as the parties enjoy many of the benefits of party autonomy, so too must they accept the consequences of the choices they have made. The courts do not and must not interfere in the merits of an arbitral award and, in the process, bail out parties who have made choices that they might come to regret, or offer them a second chance to canvass the merits of their respective cases. This important proscription is reflected in the policy of minimal curial intervention in arbitral proceedings, a mainstay of the Model Law and the IAA.

41 Singapore has undertaken a conscious and ongoing project to develop itself into a successful arbitration hub. At the same time, it is incumbent on the arbitration community to do what it must to address the challenges it faces. I don't propose to revisit these today having spoken of them on several other occasions.

42 But there is one aspect that we should think about and this returns to one facet of the issue that was touched on by Chief Justice Allsop – namely the interface between the courts and arbitration. I have said that the courts play an important gatekeeping role. I have also touched on the widespread acceptance of the New York Convention that serves as an internationally accepted framework to give effect to agreements to arbitrate and the awards that they give rise to. The efficacy of arbitration as an international system for the resolution of transnational commercial

disputes would be greatly strengthened if courts were to move towards greater convergence in their approach to widely accepted instruments such as the New York Convention and the Model Law.

43 What is at stake here may go beyond narrower concerns as to whether arbitration is cost and time efficient. Rather, this ultimately goes to the credibility of arbitration's claim to be a global dispute resolution system that can sustain us into the future as we encounter disputes that will increasingly cut across many borders. I return here to a point I made when I delivered the Patron's Address at the Centenary Conference of the Chartered Institute of Arbitrators in London in July this year.²⁶

44 Globalisation has made arbitration accessible to a global audience. At the same time, the people who have come to embrace arbitration do not necessarily share the same cultural inheritances, ethical beliefs, value systems or even philosophies of law. This is only to be expected given the pluralistic world that we live in. Moreover, we would have to be wilfully blind to pretend that the rule of the law is understood consistently in every jurisdiction. Tightly drafted national arbitration laws may not always deliver as well as they should depending on the judicial environment in which they are expected to operate.

²⁶ Sundaresh Menon, "Patron's Address" (Chartered Institute of Arbitrators London Centenary Conference) (2 July 2015), available at [https://www.ciarb.org/docs/default-source/centenarydocs/london/ciarb-centenary-conference-patron-39-s-address-\(for-publication\).pdf?sfvrsn=0](https://www.ciarb.org/docs/default-source/centenarydocs/london/ciarb-centenary-conference-patron-39-s-address-(for-publication).pdf?sfvrsn=0) (accessed at 20 October 2015).

45 A term that has been coined to describe this sort of phenomenon is “glocalisation”,²⁷ a portmanteau of globalisation and localisation. With party autonomy and consent as its cornerstones and with its immense international spread in recent years, arbitration, unsurprisingly, is especially amenable to glocalisation. But the result of this can be an incongruous international system consisting of a plurality of arbitral seats, much like spokes from the same wheel that are bent in different directions and angles, producing a wheel that is out of shape. The wheel still looks like a wheel, and feels like a wheel. It can even run like a wheel, just not as fast or as straight as it should.

46 A fully homogenous international system, unlike a perfect wheel, is fanciful. Moreover, plurality should be managed more than obviated because a certain degree of differentiation breeds healthy competition. What is needed, therefore, is a common structural foundation across a good number of effective arbitral seats that speaks to the central identity of international arbitration, but yet can accommodate variations to account for the political, social and economic idiosyncrasies within each seat. Hence, even if the spokes may still not be perfectly aligned, we would have made significant progress in the development of a viable international system of dispute resolution that can sustain us into the future.

²⁷ For the origins of this term, see Roland Robertson & Kathleen White, “Globalization: An Overview” in *Globalization: Critical Concepts in Sociology* (Roland Robertson & Kathleen White gen eds) (Routledge, 2003) at p 35.

47 At least a partial response to this can and should come from the courts, if judges sought to be mindful of the arbitration jurisprudence in other jurisdictions and do what they can to strive for convergence. The prospects of this happening would be enhanced also by greater judicial collaboration and dialogue. I have spoken elsewhere about the periodic dialogues that take place among the commercial judges of Hong Kong, New South Wales and Singapore and it is hoped that this will be supplemented with the inclusion of commercial judges from Shanghai and Mumbai in the next edition of this event due to be held next year. In a similar vein, the judiciaries of ASEAN have established a joint platform for judicial training and development and it is anticipated that such training in arbitration will be conducted in Singapore sometime next year. Moreover, the judicial chapter of the International Council for Commercial Arbitration has been conducting training programmes for judges on arbitration generally and particularly in relation to the *New York Convention* for some time. Such efforts are undoubtedly to be encouraged in the context of an endeavour to promote convergent approaches towards defining and understanding the relationship between the courts and arbitration.

48 We in Singapore have expended considerable efforts to develop our arbitration ecosystem. Our courts will continue to support this effort. It is fair to say that in the international dispute resolution space, our leading brands are the SIAC and even Maxwell Chambers while the SCMA is a fast emerging brand in its own right. We will

continue to expend these efforts. But we will also invest in the promotion of the other offerings.

B. Mediation

49 Let me turn then to mediation. As Brad Berenson, the Vice President and Senior Counsel for Litigation and Legal Policy of General Electric has astutely observed, “winning cases is not the same as winning in business”.²⁸ Prolonged and costly disputes that disrupt business relationships ultimately detract from a company’s bottom line regardless of the outcome in the particular litigation or arbitration.

50 It is unsurprising then that mediation has emerged as a form of dispute resolution the value of which is being appreciated to a rapidly growing degree. Its advantages include the promise of timely and cost-effective settlement of disputes. At the same time, mediation has contributed significantly to reducing court dockets and trials. Most notable is its high success rate as is reflected by the statistics. In its 2014 audit, the UK Centre for Effective Dispute Resolution (“CEDR”) reported that out of the £9 billion worth of commercial claims mediated from May 2013 to May 2014, just over 75% of the cases settled on the day of the mediation and another

²⁸ Brad Berenson, “The Mediation Imperative: Why Successful Companies Cannot Afford to Ignore Mediation” (Singapore Mediation Lecture 2014) (25 September 2014) at p 7, available at <http://www.mediation.com.sg/assets/downloads/singapore-mediation-lecture-2014/02-Berenson-Singapore-Lecture-Sept-25-2014.pdf> (accessed at 20 October 2015),

11% settled shortly after.²⁹ The savings enjoyed in the event of a successful mediation are also very substantial. The CEDR reported in the same audit that mediation in 2014 alone was expected to save £2.4 billion in management time, relationships, productivity and legal fees.³⁰

51 The increased relevance of mediation can also be seen in its growing acceptance within the maritime industry. Standard mediation clauses have been incorporated in widely used standards terms such as the BIMCO Standard Law and Arbitration Clause³¹ and the LMAA Mediation Terms.³² Cargill, the operator of the world's largest dry bulk charter fleet has also incorporated CEDR mediation into its EuroMed Charter Party.³³

52 We established the Singapore Mediation Centre ("SMC") in 1997. The cases mediated at the SMC are primarily private commercial matters. Since its

²⁹ CEDR, *The Sixth Mediation Audit: A Survey of Commercial Mediator Attitudes and Experience* (22 May 2014), available at: <http://www.cedr.com/docslib/TheMediatorAudit2014.pdf> (accessed at 20 October 2015).

³⁰ *Ibid.*

³¹ *BIMCO Standard Dispute Resolution Clause*, BIMCO Special Circular No 1 of 2002 (16 January 2002), available at: https://www.bimco.org/~media/Chartering/Special_Circulars/SC2002_01_16.ashx (accessed at 20 October 2015).

³² The LMAA Mediation Terms (2002), available at <http://www.lmaa.london/uploads/documents/LMAAMediation02.pdf> (accessed at 20 October 2015).

³³ See Charles Measter & Peter Skoufalos, "The Increasing Role of Mediation in Resolving Shipping Disputes" 26 *Tulane Maritime Law Journal* 515 (2001–2002) at p 520.

establishment, more than 2,600 disputes have been mediated under its auspices with an overall settlement rate of 72.5%.

53 The SMC has also partnered with various key industry representatives to develop industry-focussed mediation schemes which better serve each industry's specialised needs. Of particular interest is SMC's partnership with the Singapore Maritime Academy, the Institute of Professional Maritime Development and Training and the Marine Offshore Oil and Gas Association to conduct the Advanced Mediation Course for Maritime Shipping and Accreditation. This endeavour has been in place since 2013 and it seeks to train qualified and professionally accredited mediators focussed on the maritime industry.

54 Beyond this, in keeping with our aim of offering dispute resolution services to cater to the needs of international business, the SIMC was launched in November last year. This project was conceived having regard to the needs of the growing Asian market which with its particular cultures and mind sets, is likely to seek structured and quality dispute resolution services that are less adversarial than litigation and arbitration.³⁴

³⁴ Sundaresh Menon, "Building Sustainable Mediation Programmes: A Singapore Perspective" (Speech delivered at the Asia-Pacific International Mediation Summit, New Delhi, India) (14 February 2015), available at: <https://www.supremecourt.gov.sg/data/doc/ManagePage/5801/Asia-Pacific%20International%20Mediation%20Summit%20-%20speech%20by%20CJ.pdf> (accessed at 20 October 2015).

55 As the first organisation in Asia focused on offering international commercial mediation services, the SIMC's objective is to deliver quality international mediation services under the auspices of its own mediation rules. It boasts a panel that includes 28 international mediators and experts specialised in the maritime field covering a range of areas from maritime insurance to ship operations. Further, the SIMC offers various forms of logistical and administrative support in the course of the mediation process to facilitate the conduct of the mediation as well as to ensure that parties are familiar with the mediation process.

56 The SIMC, in conjunction with the SIAC, also offers a unique "Arb-Med-Arb" protocol that synergises mediation and arbitration proceedings and allows for a seamless transition between arbitration services offered by the SIAC and mediation services offered by the SIMC.

57 Whilst most multi-tiered dispute resolution clauses provide for what are referred to as "Med-Arb" procedures under which parties proceed to arbitration if and when mediation fails, the "Arb-Med-Arb" protocol provides for commencement of arbitration before mediation is attempted.

58 The "Arb-Med-Arb" protocol has specifically been designed for international businesses including maritime businesses that may value finality and enforceability in addition to flexibility and confidentiality. Because mediation follows the commencement of arbitration, where the mediation is successful (as it often proves

to be), the mediation settlement may then be recorded as a consent award which can then be enforced readily under the New York Convention. If the mediation is unsuccessful, the parties may then seamlessly proceed with arbitration.

59 The SIMC offers a promising new platform for dispute resolution that may be well-directed towards the needs of the business community. It also represents a significant step towards developing a more comprehensive range of mediation services in Singapore that may in turn generate substantial cost-savings in the long term.

C. *Litigation*

60 I turn to the final part of my remarks this morning, litigation. We have long recognised the need for an efficient and skilled court that is well-placed to assess commercial, including maritime matters. We placed specialised Judges on a maritime list some years ago and their efforts have contributed significantly over the years to the robust development of our maritime jurisprudence. Current members of the Bench with acknowledged expertise in shipping include Justices Judith Prakash, Belinda Ang, Quentin Loh and Steven Chong. It may also be noted that some of this jurisprudence has received judicial and academic endorsements within the Commonwealth including from courts in the UK, Hong Kong and New Zealand.³⁵

³⁵ The Court of Appeal decision in *The Permina 108* [1975–1977] SLR 221 has been cited with approval in Hong Kong (*The Sextum* [1982] HKLR 356, New Zealand (*The Fua Kavenga* [1987] 1 NZLR 550) and the UK (*The Span Terza* [1982] 1 Lloyd's Rep 225) despite
(*cont'd on next page*)

This in turn promotes our attractiveness as a location for the resolution of disputes likely to involve points of law that require an authoritative ruling.

61 Aside from this, the SICC was launched this January as a fully constituted municipal court but with an unmistakable international dimension. Because of its unique consent-based jurisdiction and commercially-minded philosophy and rules, it is envisaged that the SICC will primarily hear three categories of cases:

- (a) The first category relates to those in which parties have agreed on an *ad hoc* basis to have their disputes resolved in Singapore at the SICC.
- (b) The second category relates to cases involving a choice of court clause found in a contract which provides that the SICC will resolve all disputes arising out of the transaction or contract.
- (c) The third category relates to cases transferred from the High Court to the SICC in the light of their international and commercial character.

62 Significantly, within each of the three categories of cases, the court may, if the requirements for joinder in the SICC are met, join third parties to the proceedings regardless of whether they have consented to be joined. In this regard, the SICC is

being contrary to a prior House of Lords decision in *The Eschersheim* [1976] 2 Lloyd's Rep 1.

well-suited for the purposes of coherently resolving disputes involving a multitude of parties or contractual chains.

63 As to the composition of the panel of adjudicators, they consist of the Judges of the Supreme Court, Senior Judge and retired Chief Justice Chan Sek Keong and a group of International Judges appointed for a period and assigned to cases on an *ad hoc* basis. There is no shortage of judges with maritime expertise on the panel. International maritime judges on our SICC bench include such eminent jurists as Sir Bernard Rix, Sir Bernard Eder and Prof Anselmo Reyes. Our pool of adjudicators also includes some judges who come from civil law systems and who can offer a perspective from the civilian tradition and this might appeal to parties more acquainted with that system of law. This is potentially important in the maritime context given the growth of sea-trade in the ASEAN and East Asian regions which consist mainly of civil law jurisdictions. Although matters will usually be heard at first instance by a single Judge, the Chief Justice may, on the application of the parties or if he thinks appropriate, designate three Judges to hear a case. Further, the assignment of a Judge or Judges to each case will generally be at the direction of the Chief Justice who would consider, amongst other things, the subject-matter of the dispute, the nature of the issues likely to arise and the particular experience of the Judges.

64 The SICC also offers simplified court processes and affords greater opportunity for the parties to craft their own procedures. This is of especial importance in the

light of maritime parties' preference for flexible *ad hoc* arbitration. Discovery rules are premised on the International Bar Association rules³⁶ and, instead of "general discovery", parties are required to provide documents which they seek to rely on within the time and in the manner ordered by the court. Hence there should not ordinarily be excessive discovery.

65 Judgments of the SICC are judgments of the Supreme Court because the SICC is a division of the High Court. SICC judgments will therefore enjoy the benefits of reciprocal enforcement arrangements which Singapore already enjoys with countries such as the UK, India and Hong Kong. Furthermore, the Hague Choice of Court Convention ("the Hague Convention"),³⁷ which Singapore has recently signed, has just come into force on 1 October following the deposit by the EU of its instrument of approval in June 2015. As a convention designed to establish a system for the recognition of curial decisions issued pursuant to choice of court agreements, the Hague Convention has been touted as litigation's answer to the New York Convention. With Mexico and 27 EU member states already party to the treaty and Singapore and the US as signatories, the Hague Convention has the potential to be a game-changer for the enforcement of judgments of our courts (including the SICC) as and when Singapore ratifies the treaty. In the specific context of maritime law, while the Hague Convention does not cover certain

³⁶ International Bar Association Rules on the Taking of Evidence in International Arbitration (2010).

³⁷ Convention on Choice of Court Agreements, 44 ILM 1291 (2005).

maritime matters³⁸ as well as the carriage of passengers and goods,³⁹ many areas of maritime and shipping law remain covered, including marine insurance, non-emergency towage and salvage, as well as shipbuilding, ship mortgages and liens.⁴⁰

66 Lastly, one of the key features of the SICC is its anticipated contribution to the development of commercial jurisprudence with an international flavour. In the specific context of maritime law, while the SICC will advance jurisprudence that is consanguine with our own maritime jurisprudence, this will inevitably be developed with the input of our international judges who bring with them extensive knowledge and experience in international maritime law and practices. The SICC aspires to build a trustworthy, competent and commercially sensible system to resolve transnational commercial disputes and possibly play a role in the revival of a regional *lex mercatoria*, modelled on that which once governed the merchants of the Middle Ages.⁴¹ As the equivalent of a municipal court with an international flavour, the SICC is poised to play an important role in our dispute resolution tool kit.

³⁸ *Ibid*, Article 2(2)(f).

³⁹ *Ibid*, Article 2(2)(g).

⁴⁰ Trevor Hartley & Masato Dogauchi, *Explanatory Report on the 2005 Hague Choice of Court Agreements Convention* (2013) at paras 30 and 59, available on: <http://www.hcch.net/upload/expl37final.pdf> (accessed at 20 October 2015).

⁴¹ Sundaresh Menon, “International Commercial Courts: Towards a Transnational System of Dispute Resolution” (Opening Lecture for the Dubai International Financial Centre Courts Lecture Series 2015) (19 January 2015), available at: <https://www.supremecourt.gov.sg/data/doc/ManagePage/5741/Opening%20Lecture%20-%20DIFC%20Lecture%20Series%202015.pdf> (accessed at 20 October 2015).

67 In this regard yet another initiative that will play an important part is the Asian Business Law Institute (“ABLI”) which will be launched in January 2016. To be established under the auspices of the Singapore Academy of Law, the ABLI’s mission will be to undertake legal research projects that provide thought leadership to promote the convergence of business laws in Asia. The ABLI will bring together leading judges, academics and lawyers from across the region and beyond to collaborate in this venture. It will also provide a forum for businesses to interact with and articulate their commercial perspectives and needs to the legal community. It is my hope that with the establishment of the ABLI, Asia will be able to make meaningful strides towards legal convergence in the field of commercial law.

V. CONCLUSION

68 There was a time when ADR was an acronym that stood only for Alternative Dispute Resolution. This seems to confine the understanding of dispute resolution methods such as arbitration and mediation within the perspective of a negative definition: they are *alternatives* in the sense that they are *not* the usual or preferred methods. In the context of a legal framework that seeks to serve the transnational trading environment of this century, it is obvious that this is a woefully inadequate and misplaced perspective.

69 We in Singapore seek to meet the need for a vibrant and robust centre that can serve the wider region in which we are situated by providing a rich tool kit of different dispute resolution methods. In this environment, ADR could be modernised and

brought up to date to stand for *Appropriate* Dispute Resolution.⁴² Under this conceptualisation, arbitration, litigation and mediation are not competing in a flat and mono-dimensional zero-sum game. Rather they each seek to enhance their strengths and attractions so that the users they seek to serve have the advantage of finding the appropriate tool that *best* serves their needs.

70 I have no doubt that in this vision, each of these institutions - the SICCC, SCMA, SIAC, SMC, SIMC and the ABLI - and our municipal courts will work together to advance our goal of establishing a truly international hub for commercial and maritime dispute resolution. As we close the chapter on our first 50 years as a nation and as an independent legal system, we can look ahead with anticipation because the golden age of maritime dispute resolution in Singapore is only just dawning. Thank you.

⁴² The term appropriate dispute resolution has been previously referred to in other dialogues, see, for eg, Chan Sek Keong, *Keynote Address for the Alternative Dispute Resolution (ADR) Conference* (4 October 2012). The term has also been utilised by institutions such as the Superior Court of California for the County of San Mateo, see http://www.sanmateocourt.org/court_divisions/adr/ (accessed at 22 October 2015).