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KEYNOTE ADDRESS ON APPROPRIATE DISPUTE RESOLUTION FOR TRANSNATIONAL PROJECTS IN THE ASIAN CONTEXT

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I. Introduction

1 Today's conference demonstrates once again the close cooperation between Singapore and China in finding optimal solutions for international commercial dispute resolution. Earlier this year, on 1 April, China's Supreme People's Court and the Singapore Supreme Court signed the *Memorandum of Understanding on Cooperation on the management of international commercial disputes in the context of the Belt and Road Initiative (BRI) through a Litigation-Mediation-Litigation (LML) framework* ("MOU"). The signing was witnessed by PRC Premier Li Qiang and Singapore's Prime Minister, Lee Hsien Loong.

2 The MOU provides a framework for the Singapore International Commercial Court ("SICC") and the China International Commercial Court to collaborate and share information. Consistent with the MOU, but applicable broadly to all disputes coming before the SICC, the SICC has developed the Litigation-Mediation-Litigation ("Lit-Med-Lit") Framework in partnership with the Singapore International Mediation Centre ("SIMC"). This enables matters to be moved between the institutions for attempts at mediation which, if successful, would result in an enforceable judgment of the SICC.

3 The topics for today's conference relate to three broad areas: infrastructure projects, maritime trade, and intellectual property and technology. What they have in common is the importance of appropriate and effective dispute resolution for large-scale projects which typically involve long-term relationships and multiple parties. On one hand, such projects may give rise to many relatively small disputes between participants over the course of their lifetime and it is important for there to be mechanisms for such smaller disputes to be managed and resolved with a view to protecting the success of the project. On the other hand, they may also give rise to multi-faceted and complex disputes that need to be approached differently in terms of conflict management. Procedural flexibility and the availability of different appropriate dispute resolution methods are critical. These are the key features of Singapore's modern-day approach to dispute resolution.

4 The SICC is a division of the General Division of the Singapore High Court. Matters in the SICC are heard by Singapore judges specialised in commercial law, as well as international judges who come from both civil and common law jurisdictions. Our bench of international judges includes a Chinese Judge, Justice Zhang Yongjian.

5 Flexibility and adaptability are part of SICC's approach. Close, early, and continuous judge-led case management is combined with party choice to make procedures responsive to the context of each dispute. Parties to proceedings in the SICC may choose one of three adjudication tracks, namely the Pleadings Adjudication Track, the Statements Adjudication Track, and the Memorials Adjudication Track. The Pleadings Adjudication Track starts with the exchange of pleadings, which set out the material facts for each party. This helps to define the issues, and is more akin to the traditional common law process. Under the Statements Adjudication Track, parties will only file witness statements setting

out the evidence relevant to their claims and defences. This is also akin to the traditional common law procedure for originating summonses. The Memorials Adjudication Track involves parties sequentially filing memorials that combine evidence and submissions on the law. This track adopts more of a civil law approach.

6 In connection with infrastructure projects, the SICC has established the "Technology, Infrastructure and Construction List" ("TIC List"). Our rules, protocols, and procedures have addressed the complexity of construction disputes as well as the context of multiparty involvement. For example, submissions for discovery applications may be organised into schedules with hyperlinking to facilitate comprehension. The same method of presentation may be employed in respect of defect claims. Expert witness conferencing is readily employed, and judges take an active role in managing expert evidence. For example, judges can make directions for meetings and joint reports. Finally, there is the Simplified Adjudication Process Protocol for streamlining the resolution of smaller-value claims that form part of a big bundle of distinct claims.

7 It is obvious that the world is far more complex than it once was. There are at least three broad sources of this ever-increasing complexity. First, there is increasing technical complexity. To be an expert today means to know more and more about less and less. It is not unusual for large disputes to involve not just single experts, but teams of experts in related disciplines.

8 Secondly, organisational complexity has continued to increase. Any project or enterprise is a complex exercise, involving numerous skills and trades. These must all be coordinated in time and space.

9 The third complexity is the explosion of recorded communications. In the past, what mattered would be processed contemporaneously into notes such as

minutes of meetings. Too often today, decision-makers are expected to plough through mountains of instant messages and oceans of raw audio and video recordings that are hard to make sense of.

10 The combination of these complexities leads to an information overload on decision-makers, including judges and arbitrators. There are two principal ways to counteract this complexity and make the resolution of disputes more manageable.

11 One is to put in place mechanisms for the early resolution of disputes when they remain small, and when the consequences of a decision either way have yet to build up. The other is to unbundle large-scale disputes, which includes directing different parts of the overall dispute down the avenue for resolution most appropriate to that part of the matter. I will elaborate on each of these in turn.

II. Timely management of small disputes

12 In the context of large infrastructure projects where the project might last several years, small disputes, if left unresolved, may have several unwelcome effects. One is to harm and sour the relationship between participants in the project. This naturally impacts efficiency and may diminish or disrupt the level of communication needed for genuine cooperation. Another is that even small disputes swell over time, because one of the effects of time is that the consequences of any determination of who is right and who is wrong grow.

13 This insight led to the introduction of Dispute Boards. These first gained popularity with the growth of international construction projects. Demand grew for ways to address issues as they arose, and to do so quickly on a temporary or interim basis. Such early management and resolution forestalled the escalation of such issues into project-threatening fights. The use of Dispute Boards has become

widespread through the adoption of FIDIC forms of contract. In our context, there is the Singapore Infrastructure Dispute Management Protocol ("SIDP") which is incorporated into Optional Module E to the Public Sector Standard Conditions of Contract (PSSCOC"). Optional Module E was introduced by Singapore's Building and Construction Authority ("BCA") in 2020. This module aims to reduce cost, minimise variations, and expedite completion. It does so by encouraging teamwork and cooperation among stakeholders. Early sharing of information and open communication facilitate the early identification of risks. This leads to prompt solving of problems that occur during construction. Under the SIDP, processes are put in place to help avoid full-blown disputes and encourage early dispute resolution. The SIDP provides for the empanelling of a Dispute Board that deals with disputes on an interim basis during the course of construction.

14 Similar insights prompted the development of statutory adjudication under national statutes such as Singapore's Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed).

15 Statutory adjudication offers a fast and inexpensive method of enforcing payments for work done (or related goods and/or services supplied) in the construction industry on a provisional basis. The full merits of the dispute are deferred to arbitration or court process. In the meantime, parties must proceed on the basis of the interim adjudication. Contractors use statutory adjudication to obtain a quick, rough-and-ready answer to the question of how much they are due. This answer is temporary and subject to further review in arbitration or court. What it does is facilitate payment such that the contractor, rather than the owner, has use of the money pending final determination of the merits. It arose from concern that if and when owners or contractors higher up the chain of contracts withheld or delayed payments for work done, the cash flow of contractors lower

down the chain would be blocked or impeded. Interestingly, the temporary answer given by statutory adjudication is often accepted by parties as a "good enough" outcome for everyone. Often, parties do not feel the need to spend the time and money on finding out the "true" and final answer. This observation suggests that a quick, rough-and-ready answer given within a few months may in fact sometimes be more useful to businesses than an in-depth and forensically meticulous answer achieved only years later.

IV. Practical unbundling of big complex disputes

16 I turn now to appropriate dispute resolution methods in the context of big, complex disputes. Here, the question is how parties may choose the best ways (plural) to resolve different parts of their dispute. Naturally, the parties' lawyers are under an ethical duty to guide their clients towards the most cost-effective and expeditious methods of dispute resolution. But like their clients, the lawyers may be too caught up in the minutiae of the dispute to identify appropriate alternatives in a timely way.

17 Let me then highlight another option that parties can adopt as an example of what might be called collaborative dispute resolution. I am referring to having a professional "signalperson". The signalperson's role is to act objectively in the interests of the project by directing parties to the appropriate tracks for resolving particular disputes arising in the course of the project. Under the contract, parties could appoint a person who is not to act as mediator, member of a dispute resolution board, evaluator, or arbitrator. Instead, this person assesses disputes as they arise and channels parties to what in his or her assessment is the most appropriate mode for resolving that dispute, whether that be mediation, neutral evaluation, interim adjudication, arbitration, or litigation. In the context of construction projects, such a person could channel bilateral disputes to an arbitrator, while funnelling multiparty disputes to a court that readily

accommodates such multiparty disputes like the SICC. Such a channelling service might be provided by appropriate institutions such as mediation centres, so that the contracting parties can choose an institution for this purpose rather than a named individual.

18 I will turn shortly to the practicalities and usefulness of mediation. But before I do so, may I be permitted to make a philosophical point? Courts and other tribunals find their origin in the human desire that injustices be remedied. We speak of doing justice, but what we really mean is remedying injustice: stopping one person from infringing the rights of another, or compensating the victim for the infringement. Mediation in and of itself has only an indirect relationship to justice because it focuses on the interests of the parties and not merely their rights. This makes mediation attractive, because it may rescue parties from the zero-sum game of a formal adjudication where one party must lose for the other to win. Importantly, however, if mediation is unmoored from the legal system and the possibility of redress in court is cut off, it may favour the party with greater bargaining power. That would advantage the strong over the weak. For this reason, it is important that fully adjudicated legal remedies remain available and accessible—it is essential that vindication in court will not take too long or be too costly. It is necessary to anchor mediation within the broader context of a fair and efficient court system. Parties who know that the legal case can in principle be fully litigated within a reasonable time will be better placed to reach mediated outcomes that are substantively just. This accommodates both parties' interests without overriding either party's desire for justice.

19 With this in mind, I suggest that it is beneficial for disputes be mediated after proceedings have been filed in court: mediation can then take place with the encouragement and, ultimately, the supervision of that court. Parties who know and understand their rights may nonetheless conclude that it is in their interests

to resolve their dispute without pursuing the fight to the bitter end. Commercial relationships may be preserved, and time and costs may be saved.

20 I would make five observations about mediating in the context of an ongoing litigation at the suggestion or direction of the court.

21 First, it is important to stress that mediation must take place separately from the adjudicative process and not be conducted by the person who is to decide the merits of the dispute. Successful mediation requires the mediator to be let into the confidence of each side in turn *in the absence of the other*. This is antithetical to the general principles of fair hearing on which adjudicative processes are based.

22 Secondly, courts may in principle direct unwilling parties to mediate. This course of action is no more objectionable than enforcing a prior contractual agreement to mediate. In practical terms, however, ordering a mediation where one party is adamant that it will not settle and wants to litigate its rights is likely to be a waste of time. It would merely delay the adamant party's access to justice without any countervailing benefit.

23 Thirdly, because mediation is suggested or directed by the court, it sidesteps the problem of neither party wanting to be the first to suggest mediation (in case this be perceived as weakness).

24 Fourthly, filing proceedings helps parties shape and define the contours of their case, so that the issues for mediation are properly established. A common difficulty with mediating in the early stages of a dispute is that parties do not have enough information—not just about their own case, but also about the opposing party's case.

25 Fifthly, it can be said that there is a time in any dispute where parties are more likely to settle successfully—a sweet spot if you like. This usually occurs

after they know enough about their respective cases, but before they have descended into unbridgeable hostility. However, exactly when this sweet spot arises is likely to differ from case to case and from party to party. This means that pre-determining—whether by contract or by rules of court—when mediation should occur may not be the best approach. Instead, there should be procedural flexibility of two kinds: first, flexibility in the processes of the adjudicative body, so that the body can consider with counsel the desirability of mediation at different stages; and second, flexibility in the processes of the mediating body, so that mediation can be carried out quickly and efficiently regardless of the stage of the dispute. The SICC and the SIMC's Lit-Med-Lit Framework achieves the requisite procedural flexibility.

26 Let me then return to the point that some disputes are very complex. They have so many facets. They often involve numerous claims and counterclaims. Consequently, they are difficult to resolve fairly and efficiently by one mode of dispute resolution alone. For such disputes, the possibility of mediating certain aspects of a dispute while leaving others to be fully litigated is truly beneficial. A good example would be technically complex construction disputes where there are contractual aspects, defects aspects, and delay aspects. It is sensible to hive parts of the dispute off for other modes of dispute resolution. To take an example, a construction dispute might involve numerous defects claims, but what counts as a 'defect' may also involve an element of contractual interpretation. It makes sense for the court to interpret the contract first. After that, an evaluator or assessor may be delegated the task of applying the court's interpretation to decide what the defects are.

V. Linking interim decisions directly to international commercial courts

27 Typically, decisions and determinations of an interim contractual adjudicator such as a dispute board must first be reflected in an arbitration award

before it can be enforced by a court. This means three stages to the process. Is there a way to simplify the process for enforcing the outcome of temporary and contractually-mandated adjudication, so that a party who has secured a decision in its favour is entitled to have it enforced summarily upon application to the Court notwithstanding that the decision was not made within a statutory regime of adjudication? If the temporary adjudicators decide that one party should pay the other certain sums of money, the court cannot directly grant judgment to that effect. That would be a final decision raising an issue estoppel on its merits. The conceptual answer is for the court to order specific performance of the paying party's obligation to comply with the temporary determination of how much should be paid. That too would be a final order, but the result is simply that the paying party has performed its obligation to comply and the subsequent adjustment (if any) would then take account of that compliance in the same way that happens when the obligation is complied with voluntarily. My suggestion is that appropriate bodies explore crafting an effective model clause that facilitates this, one that perhaps specifically refers to a particular court and process. Such a clause should include an express obligation to comply with the outcome of the contractually-mandated adjudication process pending the final resolution of the dispute. This would be particularly useful in international construction projects where there is no statutory adjudication regime in the country where construction is taking place. For example, there could be express choice of the Statements Track under the SICC Rules. This could potentially simplify the enforcement of decisions made by contractual adjudication in the context of international construction projects. The important thing is to expressly choose a court that has powers, rules, and processes consistent with the task of summarily enforcing the obligation to comply with such decisions.

VI. Conclusion

28 In conclusion, this conference offers an important opportunity to strengthen and develop the cooperation between China and Singapore in relation to transnational commercial dispute resolution. The presentation and panel discussions that follow promise to confront the challenges in this area, and I am heartened and encouraged by the emphasis on building bridges and connections, navigating and finding solutions, and making bold advances. I thank you for your attention.