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

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Ladies and gentlemen

I. Introduction

1 In addressing dispute resolution for transnational construction projects it is essential not simply to describe what exists but also how we can make it better. This is a never-ending task of reform. Every generation must strive to make improvements, sometimes incremental and sometimes radical. In doing so, we can learn from and build on what has worked for others, keeping in mind the different traditions and contexts of different legal systems. This evening we have a gathering of distinguished practitioners not just from India and Singapore but also from Australia, the United Kingdom and elseqhere. This conference is a great learning opportunity. Courts can learn from arbitration, and vice versa. Procedures must fit the context of the area of dispute resolution under consideration. They must also meet the needs of the

relevant sector of society. Thus, I will begin by briefly identifying the key features of cross-border construction disputes before making four points, as follows:

(a) There is demand from businesses for "good enough justice" if this can be delivered quickly and at lower cost;

(b) Our focus must be on **appropriate** dispute resolution – managing disputes by channelling them or parts of them to the most appropriate dispute resolver;

(c) Complex multi-party disputes call out for the application of modern court powers and procedures and in the cross-border context internationalisation of courts is helpful;

(d) The problem of how to promptly enforce interim adjudicatory decisions in international construction may be solved by contractually linking to a chosen international commercial court.

2 So, a few words about construction disputes. Construction projects typically involve long-term relationships between multiple parties. They involve highly complex organisation and performance of countless tasks across limited time and scarce space. The tasks involved in a modern construction project are undertaken by a host of different experts. The project generates endless communications. Where in the past these were processed and given order contemporaneously in the form of minutes and reports, today they are often left in their raw unprocessed form unless and until a dispute occurs – I am referring to the mountains of emails and oceans of WhatsApps that plucky lawyers either fall off or drown in as they seek to navigate a path through the maze and morass.

3 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.

4 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

5 In the context of large infrastructure projects where the project might last several years, small tears in the relationship between parties may, if left unresolved, become festering wounds. Early treatment is best.

6 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 Singapore, we now have the Singapore Infrastructure Dispute Management Protocol ("SIDP") which is incorporated into Optional Module E to the Public Sector Standard Conditions of Contract (PSSCOC"). This module is an example of collaborative contracting. It encourages teamwork and cooperation among stakeholders. Under the SIDP, processes are put in place to help avoid full-blown disputes and encourage early dispute resolution. This includes a Dispute Board that deals with disputes on an interim basis during the course of construction.

7 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). Let me respectfully commend to you here

in India statutory adjudication as a form of "good enough" justice that meets the needs of industry. It offers a fast and inexpensive method of enforcing payments for work done 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 adjudicated amount. Interestingly, the temporary answer given by statutory adjudication is often accepted by parties as a "good enough" outcome for everyone, good enough for both the performing party and the paying party to accept. 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 sometimes be more useful to businesses than an in-depth and forensically meticulous answer achieved only much much later.

III. Practical unbundling of big complex disputes

8 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 fighting the other side to identify the best way forward.

9 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 neutral and 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 channelling purpose rather than a named individual.

10 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. Complex construction disputes may have distinct but related aspects such as contractual interpretation, defects assessment, and delay analysis. 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 on this point. After that, an evaluator or assessor may be delegated the task of applying the court's interpretation to decide what the defects are, as well as costs of repair.

IV. Big complex cross border construction disputes and commercial courts

11 I now turn to my third point, which concerns the role of commercial courts in the resolution of complex construction disputes. I make the preliminary observation that courts are the cornerstone and foundation of systems of justice. Courts provide access to justice, and strive to do so with time and cost efficiency,

as well as proportionality. The foundational role of courts is supported by three points. First, arbitration is ultimately subject to a degree of supervision by the court at the seat of arbitration and arbitration awards often require enforcement by courts before they are paid. Secondly, all other modes of dispute resolution require participants to consider what the result would be if the matter were litigated in court. Arbitrators apply the governing law of the contract to decide the matter as if they were judges in that country. Parties engaged in mediation decide what is a fair offer and what a reasonable settlement is against the backdrop of what they might have to pay or get to receive if the matter were fully litigated. Thirdly, courts develop jurisprudence and the law in a transparent and open way. Courts issue judgments that anyone can read, and will have precedent value. We need courts to develop and adapt the law to a rapidly changing world.

12 With this in mind, commercial courts have a critical role to play in relation to complex disputes. When it comes to cross-border complex disputes generally, and to the field of international commercial arbitration in particular, courts that have an international outlook are well-placed to provide a supportive, facilitative and ultimately nurturing role in the emerging system of transnational justice.

13 This brings me to the SICC. The SICC is part of the Singapore High Court. Matters in the SICC are heard by Singapore judges specialised in commercial law, as well as eminent international judges who come from both civil and common law jurisdictions. Our bench of international judges includes an Indian Judge, retired Supreme Court Justice Arjan K Sikri.

14 Of course, Singapore has always been a commercial centre. Our own judges have deep commercial expertise. Moreover, our court proceedings have always been in the international language of business, namely English. Investors into Singapore have long had confidence in our courts. We are recognised as a neutral venue for resolution of disputes that have no connection with Singapore,

between parties from different countries. So why then establish the SICC? The clue lies in the word "international". First, there is the SICC's international bench of both civil and common lawyers. This helps in two ways. One is in individual cases, where the coram can be matched with the dispute to bring to bear relevant subject matter and governing law expertise. The other is in how the SICC melds civil and common law procedures, as well as procedures developed in the world of arbitration. 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.

15 The second international element is in party's choice of counsel. In qualifying matters, we hear directly from counsel trained in any non-Singapore law relevant to the dispute, both on that foreign law and the application of that foreign law to the facts. More than a hundred non-Singapore lawyers have registered to practise at the SICC, including a sizeable group of Indian lawyers. This is not simply about party confidence but also a way of helping us in our quest to develop best-in-class processes.

16 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 make directions for expert meetings and joint reports. They engage in active early ad detailed case management.

V. Linking interim decisions directly to international commercial courts

17 I turn to my fourth and final point concerning linking interim decisions directly to enforcement by international commercial courts. 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. Of course, often dispute board decisions are complied with voluntarily. Nonetheless simplifying how the outcome of temporary and contractually mandated adjudication is enforced remains important. Could we design a way for the party who has secured a decision in its favour to have it enforced summarily upon application to 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 a money judgment to that effect. That would be a final decision raising an issue estoppel on the 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.

V. Conclusion

18 In conclusion, this conference offers an important opportunity to discuss how to strengthen, reform and develop methods of transnational commercial dispute resolution. This is urgent given the vast volume of infrastructure projects in the works or in the pipeline in India and in Asia. The panel discussions that follow promise to confront the challenges in this area. I thank you for your attention, and wish you an exciting few days ahead.