7TH ANNUAL CONFERENCE OF THE INTERNATIONAL ACADEMY OF CONSTRUCTION LAWYERS

"THE ROLE OF COMMERCIAL COURTS IN THE MANAGEMENT OF COMPLEX DISPUTES"

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The Honourable the Chief Justice Sundaresh Menon

Supreme Court of Singapore

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1. A very good day to all of you. Seven years ago, I had the honour to address you at the inaugural edition of this Conference in Miami in 2014. It is a pleasure to join you once again, and a privilege to be doing so alongside Chief Justice Wagner and Chief Justice McLachlin, both among my most illustrious judicial colleagues in the world, and with whom I share a history of having built a legal career on the solid foundations of a practice in construction law.

2. Today, I would like to outline some concerns over the 'complexification' of commercial disputes, and especially, of construction disputes, and to consider the consequences that this is likely to have for our approach to the resolution of such disputes. This audience is no stranger to complex disputes, nor to the challenges that complexity poses to our ability to do justice sensibly and effectively. The perennial complaints of excessive cost and delay are well-known, and I do not propose to rehearse them today. Instead, I would like to focus on the class of disputes which are so factually rich and complex that

they have become practically impossible to properly adjudicate.

3. I propose to approach this in two parts: first, by providing an overview of the complexity problem and the challenges that it poses; and second, by suggesting that we need to re-imagine the way we manage and address such disputes. I will then briefly conclude with some thoughts on the role that international commercial courts might play in this endeavour.

I. The Complexity Problem

4. As our world becomes more complex, so have our disputes. Nowhere is this more keenly felt than in the field of international construction projects. Here, factual, technical and procedural complexity are often inescapable, if not *definitional* features.[1]

5. By all accounts, the complexification of construction disputes is gathering pace. This seems to be driven by at least three factors. First, there is the sheer size and scale of the projects themselves. In the words of Lord Justice Jackson, some project contracts are now "so vast that no human being could possibly be expected to read them from beginning to end".[2]

6. Indeed, as the number and size of mega-projects continues to grow, so too will the number and size of mega-*disputes*;[3] in 2019, one infrastructure consultancy reported handling a single dispute worth US$1.5b.[4] This leads to the second point, which is that the higher the stakes involved, the greater the

tendency to adopt *extremely* adversarial approaches towards dispute resolution. This invariably complicates the task of managing and resolving the dispute at hand. It is not uncommon in such cases to hear of counsel taking a 'scorched earth' approach, leaving no stone unturned, and putting to the tribunal every argument, at times seemingly without regard to its legal merit.[5] In arbitration, this is sometimes done as part of a strategy of seeding the ground for a possible due process challenge of the award, in case of an unfavourable outcome. In these cases, losing the argument is simply not an option, despite the simple reality that every argument tends to produce at least one loser!

7. Finally, technology threatens to feed, even super-charge, the complexities inherent in construction disputes. The digital revolution has enabled the creation of massive quantities of documentation and data,[6] which hinders efforts to keep in check the costs and delays that attend the resolution of these disputes. In a striking illustration of the scale of the problem, one law firm on a tight deadline to submit the statement of claim in a dispute arising from the construction of an airport found itself presented with seven terabytes of data – that is, seven million *million* bytes of data – comprising some 15 million individual documents.[7]

8. Where does this leave us and how might this affect our approach to dispute resolution? While our existing processes may have worked well in earlier times

when the factual questions involved were relatively narrow or straightforward, the world we live in today is infinitely more complex. Construction disputes involving numerous separate contracts and invoices spanning tens of thousands of pages are now par for the course.[8] In the literature on construction disputes, accounts of cases involving in excess of 10,000 pages of written submissions are not uncommon.[9]

9. To a point, complexity can be mitigated by careful and sensible case management. But the worry is that we may be past that point; that cases have gotten so complex and large that we have reached the limits of their litigability in a conventional way. In a fascinating and thought-provoking article, Professor Jörg Risse speaks of what he refers to as the 'complexity problem'.[10] Take, for example, a case involving 10,000 pages of written submissions – which, is an actual instance recounted in the article. Assume the arbitrator takes about 6 minutes to read a page, and therefore reads about 10 pages in an hour; she would need 1,000 hours just to read those submissions – about 6 months of concentrated reading, by Prof Risse's reckoning.[11] Of course, this does not include the time that she would need to refresh her mind of what had been read days, weeks or months earlier; to think about how it all comes together, or does not, as the case may be; or to verify what is written. And then there is the need to take that in conjunction with the equally weighty material on the opposite side; and finally, to evaluate all of that before making a decision.

10. This might be an extreme example, but the fact is that such disputes already exist, and I suggest that even those that fall well within these parameters would nonetheless be extremely difficult, if not practically impossible, to fairly adjudicate using conventional methods. This is not for incompetence or want of trying; the reality, rather, is that there *are* cognitive limits to our ability to absorb, retain and synthesise information.[12] While we might rely on aids and techniques to boost and stretch those limits, there comes a point when the human mind and will must yield to physical limits; logic lapses into mental shortcuts and heuristics, and the fair and proper adjudication of the dispute then becomes, in Prof Risse's words, "a fiction".[13]

II. A Way Forward: Re-imagining the Pathways to Justice

11. If this is not an unrealistic scenario, what can we do to address this? Two broad strategies have been developed to tackle the problem of managing such disputes – one prophylactic, the other reactive.

A. Containing disputes

12. The first of these involves trying to *contain* disputes *before* they get too complex to manage. This strategy is especially useful when applied to seemingly complex disputes which have become more than the sum of their numerous but individually far smaller parts. Such disputes become exacerbated not always because they involve interlocking issues which must necessarily be determined together; but rather because the resolution of their

otherwise discrete parts had not been promptly pursued, and instead were postponed before later being consolidated.[14] There is, in this context, significant scope for the promotion of processes and procedures aimed at resolving small, discrete disputes quickly and cheaply, so that these are not left to fester and eventually snowballed into much larger issues. There are examples to validate such an approach.

13. Statutory adjudication, for example, has seen considerable success in various jurisdictions around the world, and prominently in the United Kingdom.[15] It offers the parties a quick and straightforward means of obtaining a decision in as little as 28 days with a much streamlined evidentiary process.[16] Although such decisions are only temporarily binding at law, anecdotal evidence suggests that in the majority of cases, the losing party is content to treat the decision as final and often will not challenge it subsequently in arbitration or litigation.[17]

14. Dispute boards are also gaining popularity, particularly in North America.[18] These come in different forms and structures, but share the objective of nipping incipient disputes in the bud quickly and informally, whether through the facilitation of party negotiations, or by the issuance of a non-binding or temporarily binding decision.[19] There is also some statistical evidence to suggest that dispute boards are effective at preventing disputes from arising and escalating; various surveys indicate that upwards of 90% of matters

addressed by dispute board panels tend to be settled in the wake of the panel's recommendations,[20] and more than half the projects for which a dispute board is empanelled reported zero disputes crystallised.[21]

15. If the deployment of such processes have helped reduce the incidence of disputes that reach unmanageable levels of complexity, then surely, we should devote far more attention than we presently do to thinking about how to improve and strengthen those processes.

B. Downsizing disputes

16. The second strategy applies where a dispute has *already* become so complex as to be unmanageable. Faced with such disputes, drastic measures may be needed to *downsize* the dispute. This will require, first and foremost, active and robust case management. This could take the form of setting limits on the length of written submissions, the use of 'chess clock' time management at oral hearings, and strict adherence to procedural orders regarding the admissibility of fresh evidence or arguments. The making of such directions may draw cries of breach of due process, but I would argue that doing nothing – thus resulting in judges or arbitrators not being able properly to decide the dispute – is a far greater threat to the parties' right to be heard. When we introduced strict page limits for appellate submissions in our court, this was met with howls of protest. My response at the time was that there was a far better chance that concise and manageable submissions would actually be

read, digested and engaged with, than would an unrestrained stream of consciousness.

17. A second, more radical means of downsizing the dispute might entail the use of representative sampling. In a dispute involving thousands of defects, it may be practically impossible to require proof of each and every defect in the assessment of damages. To deal with such cases, some courts[22] have endorsed an approach under which the result obtained in relation to a smaller, more manageable representative sample may be extrapolated to the wider set. In *Amey LG Limited v Cumbria County Council*,[23] an employer claimed damages against a roadworks contractor for thousands of instances of allegedly defective patching and surfacing works. The claim was advanced on the basis of a sample set of the works revealing a certain rate of defects, which the employer argued could be extrapolated to the larger set, with the result that its claim for damages would balloon from some £22,000 – based purely on the sample set – to £1.69m – when extrapolated to the entire works. Though the larger claim was ultimately dismissed on the basis that the sample evidence was insufficiently representative, the important point for our purposes is the Court's endorsement of the employer's argument that the substantial quantities of patching and surfacing works made it "completely impractical" for the employer to have inspected every item of work.[24] While it remains unclear whether such an approach will be accepted in cases where proof of each defect is theoretically possible, even if prohibitively expensive,

we should surely be leaning in that direction.

18. Building on this, we might even consider the development of *voluntary* protocols under which parties might agree certain ground rules, such as carving out a set of “excluded” low-value claims for which recovery is pegged to the percentage eventually recovered in respect of the main “non-excluded” claims.

19. Some of these suggestions detract somewhat from the common wisdom that justice requires the fullest possible determination of all the facts. But whilst accuracy is undoubtedly important, it is surely an essential element of justice – in particular, *access* to justice – that the time and resources expended in that quest are contained within sensible and proportional limits.

20. What underlies all these suggestions is the need to forge a shift of mindset – one that moves away from a narrower view of justice as requiring an exhaustive search for the truth, to one which embraces processes and procedures which, whilst not as thorough, are nonetheless capable of producing sufficiently reliable decisions quicker and at less cost. Indeed, if the popularity and success of adjudication and dispute board procedures are anything to go by, it seems fair to say that there is some readiness to forgo *exhaustive* due process in favour of speed, economy and a ‘good enough’ decision.[25] But beyond this, if we accept Prof Risse’s argument, as I am inclined to, then in these cases the exhaustive search for the truth is, in truth,

a chimera; a comforting illusion that helps us feel better about our quest for justice by allowing us to believe that we have at least tried our best. Do we really believe this is what the parties would want if they were presented with a brutally frank and honest assessment of the realities?

III. Conclusion: The Role of International Commercial Courts

21. Let me conclude by touching on the role that international commercial courts, or ICCs, might play in the management of complex disputes.

22. I had earlier suggested that a change of mindset is required. I want to leave you with the thought that ICCs may be well placed to support this endeavour. Many of the suggestions I have outlined call for robust approaches to case management, which may give rise to due process concerns. Unfounded as these concerns tend to be,[26] the fact remains that arbitrators may find themselves somewhat constrained. ICCs, on the other hand, are less susceptible to what has been termed due process paranoia. The Singapore International Commercial Court ("SICC"), for instance, empowers its judges with wide and flexible powers of case management, and robust case management is a hallmark of our dispute resolution process. In a recent case in which no less than 37 interlocutory applications were filed, procedural timelines were enforced through active, judge-led case management: deadlines were set for the filing of applications so that trial dates would not be derailed; page limits were imposed for written submissions; and time banks

were used to keep the length of oral submissions in check.[27]

23. ICCs can offer other features that make them uniquely suited to the resolution of complex international construction disputes: these include flexibility of procedure, rights of audience for foreign counsel and the ability to join third parties, to name a few. Of course, one must be satisfied as to the quality of the decision-makers. In this regard, ICCs, including the SICC, tend to boast strong line-ups of internationally renowned judges. The SICC bench includes five fellows of the Academy, including Chief Justice McLachlin, Sir Vivian Ramsey, Prof Doug Jones and most recently, Judicial Commissioner Philip Jeyaretnam. One of the ways in which ICCs can leverage on such expertise is through the creation of specialised lists, and this is an initiative we are presently exploring.

24. All these features put ICCs in good stead to serve as a useful complement to international arbitration in the resolution of complex international construction disputes. This neatly dovetails with a crucial point made earlier by Chief Justice Wagner – that the courts and arbitration co-exist alongside one another in a relationship of *complementarity* rather than competition. International arbitration remains the most popular mechanism for the resolution of complex construction disputes. And national courts, including ICCs, continue to *support* arbitration by, amongst other things, enforcing agreements to arbitrate, making interim orders in support of arbitral

proceedings, and applying sensible standards of due process when considering applications to set aside or enforce arbitral awards.[28] In addition, they can also contribute to the continuing dialogue on best practices for the management and resolution of these disputes by developing their own innovative responses.

25. I am confident that ICCs will, in these ways, not only play an increasingly significant role as one of the principal partners of arbitration, but also as one of the key pathways to justice for parties seeking sensible dispute resolution solutions in this age.

26. Thank you very much.

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[1] According to the 2019 Queen Mary University of London International Arbitration Survey titled "Driving Efficiency in International Construction Disputes" at p 10, "factual and technical complexity", "large amounts of evidence" and the presence of "multiple claims and/or multiple parties" were selected by respondents as the most defining features of international construction arbitration.

[2] *Triple Point Technology, Inc v PTT Public Company Ltd* [2019] 1 WLR 3549 at [57]: "Many people draft different sections of the contract and specification. The final contract is an amalgam of all these efforts. Sometimes, although not in this case, the contracts are so vast that no human being could possibly be expected to read them from beginning to end."

[3] See, for example, Boston's Central Artery/Tunnel Project, also known as the "Big Dig", which was a 15-year, US$15b project: see Kurt L Dettman, Martin J Harty and Joel Lewin, "Resolving Megaproject Claims: Lessons from Boston's 'Big Dig'" (2010) 30 The Construction Lawyer.

[4] See the Arcadis 2020 Global Construction Disputes Report ("Arcadis 2020") at p 10. In 2013, disputes values in the US tripled in value to $34.3m and rose in the UK to their highest value since the Arcadis reports began at $27.9m: Construction Global, "Construction disputes rise in value to $32.1m in 2013" (10 June 2013): <https://www.constructionglobal.com/construction-projects/construction-disputes-rise-in-value-to-dollar321million-in-2013>.

[5] Klaus Peter Berger, "The Need for Speed in International Arbitration" (2008) 25 Journal of International Arbitration 595 at pp 595-596.

[6] Thomas J Stipanowich, "Managing Construction Conflict: Unfinished Revolution, Continuing Evolution" (2014) 34 The Construction Lawyer ("Stipanowich") at p 24.

[7] TLS London, A Transperfect World, "Using Legal Technology to Navigate Complex Data in Construction Arbitration" (9 October 2020): <https://www.transperfect.com/blog/using-legal-technology-navigate-complex-data-construction-arbitration>.

[8] See *China Machine New Energy Cop v Jaguar Energy Guatemala LLC and another* [2020] 1 SLR 695 at [39] and [141(b)].
[9] Jörg Risse, "An inconvenient truth: the complexity problem and limits to justice" (2019) Arbitration International 291 ("Risse") at pp 292-293. This excludes exhibits annexed to the written submissions, which ran for additional thousands of pages.
[10] Risse describes this 'complexity problem' as arbitration's "inconvenient truth" – a truth we are loath to acknowledge, but which we ignore at our own peril: see Risse at pp 296-297.
[11] Risse at p 293: this derives from the assumption that since many major law firms expect 150 billable hours per month per fee earner, 1,000 billable working hours in six months seems a fair assumption.
[12] Risse at p 297.
[13] Risse at p 293.
[14] See Stipanowich at p 3: "More emphasis was placed on lawyered, adversarial processes, with many disputes being postponed and eventually consolidated in massive arbitration or litigation proceedings."
[15] Adjudication is now the most common dispute resolution method in the UK: see Arcadis 2020 at p 18.
[16] Thomson Reuters Practical Law, "Adjudication: A quick guide": <https://uk.practicallaw.thomsonreuters.com/8-381-7429?transitionType=Default&contextData=(sc.Default)&firstPage-true>. Note that the 28 days can be extended by agreement.
[17] Robert Gaitskell, Speech at the Society of Construction Arbitrators Annual Conference 2005, "Current Trends in Dispute Resolution – Focus on ICC Dispute Resolution Boards" (14 May 2005) ("Gaitskell") at para 7.2; Rashda Rana, "Is Adjudication Killing Arbitration?" (2009) 75 The International Journal of Arbitration, Mediation and Dispute Management 223 at p 226; John Uff, "Dispute Resolution in the 21st Century: Barriers or Bridges?" (2001) The International Journal of Arbitration, Mediation and Dispute Management 4 at p 15: "The availability of an impartial 'first round' decision will usually be sufficient to deter further more costly disputes"; Jackson J, "Address by Jackson J to TECBAR, TeCSA and SCL (2005) 21 Construction Law Journal" 265 ("Jackson") at p 271.
[18] Gaitskell at paras 8.5-8.6. See also Arcadis 2020 at pp 20 and 23.
[19] Gaitskell at paras 8.1-8.3.
[20] See Gaitskell at para 8.4, noting that "[e]xperience shows that Dispute Boards are successful, that is, they deal with and finally dispose of virtually all the disputes that come before them. Broadly, it seems that something in the order of 97% of disputes referred to a DB will not go beyond that procedure into arbitration or litigation". See also Ann McGough, Dispute Resolution Board Foundation, "Growth of Dispute Boards Around the World: DRBF Database", stating that over 98% of matters going to a dispute board do not go on to later arbitration or litigation.
[21] See Stipanowich at fn 42, citing Carol Menassa & Feniosky Pena Mora, "Analysis of Dispute Review Boards Application in US Construction Projects from 1975 to 2007" (2010) 26 J Manage Eng 65, stating that more than 90% of cases heard by dispute review board panels settled in the wake of panel recommendation, and that no disputes were ever heard by the panel in 50% of projects; see also Michael Patchett-Joyce, "Specialist Techniques for Construction Dispute Resolution: How Many Ways Can the Cat Be Skinned?" (2017) 4 BCDR International Arbitration Review 73 at p 84, noting that one survey found that in 60% of projects with a dispute board, no dispute was experienced.
[22] Representative sampling has also been relied on in the United States, such as in the context of the assessment of civil penalties in respect of fraudulent claims for government benefits, where individual prosecutions can involve tens of thousands of claims: see Joe D Hesch and Mia Yugo, "Can Statistical Sampling Be Used to Prove Liability Under the FCA or Does Each Provision of the Statute Require Individual Proofs?" (2017) 41 American Journal of Trial Advocacy 335. In *Tyson Foods Inc v Bouaphakeo, et al*, No 14-1146 (22 March 2016), the Supreme Court of the United States declined to establish general rules governing the use of statistical evidence in all class action cases, but observed that at times, "a representative sample is the only practicable means to collect and present relevant data establishing a defendant's liability": see Paul Weiss, "The US Supreme Court Issues Decision Allowing Use of Statistical Sampling and Representative Evidence by Class Action

Plaintiffs in *Tyson Foods*" (25 March 2016): <https://www.paulweiss.com/media/3411480/25mar16flsaalert.pdf>.

[23] [2016] EWHC 2856 (TCC) ("*Amey*").

[24] *Amey* at para 1.23.

[25] Richard Wilmot-Smith QC, "Due process and issues which prey on the minds of arbitrators and clients alike" (2021) 40 Civil Justice Quarterly 98 at p 101; Jackson at p 271, stating, in relation to the popularity of adjudication, that "[t]he inference must be that the business community generally feel that rough and ready justice is a price worth paying, in order to avoid the delay, the expense and the sacrifice of management time which is inherent in full-blown arbitration or litigation."

[26] Sundaresh Menon CJ, Speech at the Chartered Institute of Arbitrators Australia Annual Lecture 2020, "Dispelling due process paranoia: Fairness, efficiency and the rule of law" (13 October 2020) at paras 36-48.

[27] See *Hai Jiao 1306 Limited v Yaw Chee Siew and other suits* [2020] 5 SLR 21 for the judgment of the SICC.

[28] Sundaresh Menon CJ, Speech at the Chartered Institute of Arbitrators Australia Annual Lecture 2020, "Dispelling due process paranoia: Fairness, efficiency and the rule of law" (13 October 2020) at para 24.