THE SINGAPORE LAUNCH OF MUSTILL & BOYD ON COMMERCIAL AND INVESTOR-STATE ARBITRATION (3RD EDITION)

"The Internationalisation of Arbitration Law"

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I. Introduction

1. Good evening, ladies and gentlemen. Let me begin by extending my heartiest congratulations to David and the whole team on completing the third edition of *Mustill & Boyd on Commercial and Investor-State Arbitration*, and on its successful launch. For those of us who have had the privilege of working in this field, this seminal work really requires no introduction. Indeed, not long after its first edition was published, it received widespread acclaim from all quarters, and very quickly established itself as *the* leading text on commercial arbitration.[1] And this was undoubtedly so in this part of the world.

2. But as you have heard, nearly four decades have passed since the second edition of this book was published in 1989, and in that time, the arbitration

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* I am deeply grateful to my colleagues, Assistant Registrars Wee Yen Jean and Bryan Ching, for all their assistance in the research for and preparation of this address.

1 See, for example, M Sornarajah, "Book Review: Commercial Arbitration by Sir Michael J. Mustill & Stewart C. Boyd" [1989] Sing JLS 360 ("**Sornarajah Book Review**").

landscape has undergone profound transformation.[2] For one thing, the rise of Investor-State Dispute Settlement has seen a change in the title of the work. And notably, while the major arbitration seats back then at the time of the second edition were mainly in the West, there are now a number of jurisdictions across the globe which each attract a significant share of the world's commercial and investment arbitration work.[3] I need only refer to the results of the 2021 QMUL International Arbitration Survey where Singapore tied with London as the most preferred seat in the world, with Hong Kong, Beijing, Shanghai and Dubai also among the top ten most preferred seats.[4] Equally significant is the finding that three of the five most preferred arbitral institutions now hail from Asia, with the Singapore International Arbitration Centre leading the way.[5]

3. It is therefore unsurprising that arbitration has emerged as the most transnational area of legal practice today, supported by a growing profession of practitioners who are expected to familiarise themselves with an increasingly sophisticated and robust framework of laws, rules and practices. And while arbitration can be described as a *largely* self-governing system of dispute resolution, the courts in key commercial nodes play a crucial supervisory role – first, by developing, interpreting and applying the relevant laws and rules; second,

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2 Sundaresh Menon CJ, "The Pursuit of Justice: Securing Trust in Arbitration", keynote address at the SIAC Annual India Conference 2024 at paras 6–13.

3 Catherine Rogers, "Is International Arbitration in a Race to the Top?" (*Kluwer Arbitration Blog*, 15 March 2018).

4 Queen Mary University of London, "2021 International Arbitration Survey: Adapting Arbitration to a Changing World" ("**2021 QMUL Survey**") at page 6.

5 See 2021 QMUL Survey at page 10.

by facilitating the coordinated resolution of arbitration disputes; and third, importantly, as noted by Paul in his remarks, by speaking to one another and by driving and supporting cross-border collaboration and dialogue.[6]

II. The Growing Convergence of Arbitration Law and its Limits

4. Given all this, it would not be unreasonable to expect a more or less uniform understanding of the norms and practices of international arbitration. And this is proving to be true to a certain degree, because we are seeing the emergence of a growing consensus and convergence in several important areas of arbitration law and practice, both among courts and between arbitral institutions. Siddarth has spoken of the shared policy concerns that underpin the approaches taken in England and in Singapore to the question of the law applicable to the arbitration agreement, and let me offer just two other examples:

(a) The first relates to the courts *setting sensible standards for the conduct of arbitration*, so as to secure procedural fairness while deterring cynical and improper invocations of due process.[7] In *Jaguar Energy*, our Court of Appeal held that in assessing due process challenges to arbitral awards, the court should consider whether "what the tribunal did … falls within the range of what a *reasonable* and fair-minded tribunal in those circumstances might

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6 Sundaresh Menon CJ, "Arbitration and the Transnational System of Commercial Justice: Charting the Path Forward", keynote address at the 25th Annual International Bar Association Arbitration Day (23 February 2024) at para 5.

7 Sundaresh Menon CJ, "The Transnational System of Commercial Justice and the Place of International Commercial Courts", lecture in Bahrain (9 May 2023) ("**Bahrain Lecture**") at para 35.

have done".[8] And in applying this test, the court should accord a margin of deference to the tribunal's exercise of its *procedural* discretion.[9] Significantly, by framing the test as one of reasonableness, we adopted an approach that is very similar to those that have been applied by other courts to determine whether there has been a breach of due process. This includes courts in the UK, the US, New Zealand, Spain and China, among others.[10]

(b) My second example relates to the *actual conduct of the arbitration itself*. A prominent example of this is the IBA Rules on the Taking of Evidence, which are said to be used in approximately 60% of all arbitrations.[11] The IBA Rules are a prime example of convergence – they were carefully crafted to reflect both common law and civil law procedures, and then revised to incorporate the best practices of international arbitration.[12]

5. Looking ahead, we will require greater convergence in areas such as these if the law is to continue serving as the currency of trust for globalisation and cross-border commerce. This is because legal differences and uncertainty invariably

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8 *China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another* [2020] 1 SLR 695 ("***Jaguar Energy***") at [98].

9 *Jaguar Energy* at [103].

10 Sundaresh Menon CJ, "Dispelling Due Process Paranoia: Fairness, Efficiency and the Rule of Law", Chartered Institute of Arbitrators (CIArb) Australia Annual Lecture 2020 (13 October 2020) at para 25.

11 Joseph E Neuhaus, Andrew J Finn and David S Blackman, "The 2020 IBA Rules on the Taking of Evidence in International Arbitration: A History and Discussion of the 2020 Revisions" (*Global Arbitration Review*, 12 October 2023).

12 Bahrain Lecture at para 21.

increase transaction costs and impede growth; and they also create incentives for impermissible forum shopping.[13]

6. But all that being said, the reality is that complete uniformity is neither achievable nor, perhaps, even desirable as the ultimate goal. I suggest there are at least two reasons for this in the context of arbitration – first, the element of public policy and, second, the highly competitive nature of the arbitration landscape, both of which we have touched on today. I will elaborate on these points in the course of the time that remains.

III. Arbitrability

7. Let me begin with the concept of arbitrability. This, in essence, concerns the question of whether the subject matter of a dispute is of such a nature that it would be contrary to *public policy* for that dispute to be resolved by arbitration. In Singapore, the concept of arbitrability finds legislative expression in s 11 of the International Arbitration Act (or "**IAA**"),[14] which provides that "[a]ny dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless it is contrary to public policy to do so".

8. However, as our Court of Appeal observed in *Tomolugen*, and as you heard David point out, the scope and extent of the concept of arbitrability was left

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13 Sundaresh Menon CJ, "The Law of Commerce in the 21st Century: Transnational Commercial Justice Amidst the Wax and Wane of Globalisation", lecture hosted by the University of Western Australia Law School and the Supreme Court of Western Australia (27 June 2022) ("**Perth Lecture**") at para 17.

14 International Arbitration Act 1994.

undefined by Parliament, and so it falls to the courts to trace its proper contours incrementally. We in Singapore have held that avoidance claims that arise upon insolvency are not arbitrable,[15] and so too are disputes over the liquidation of a company.[16] But among courts, it is unavoidable that there will be divergent results in this area, because the issue of public policy is invariably and inevitably a domestic law inquiry. Conceptions of public policy will vary from one jurisdiction to another, and a notable example are disputes over oppressive or unfairly prejudicial conduct towards minority shareholders. We held in *Tomolugen* that such disputes, especially as to the underlying factual differences, are arbitrable, but it would appear that under Indian law for example, as Salim mentioned, these claims are likely not to be arbitrable and must be brought before the Indian National Company Law Tribunal.[17] This is in fact an issue that will manifest itself in a number of areas where specialist tribunals have been established in India.

9. But while complete uniformity on questions of arbitrability is perhaps unrealistic, we may nevertheless see meaningful convergence on the *approach* that courts take when dealing with such issues – particularly on the applicable law that determines the arbitrability of a dispute. As you heard from David, in *Anupam Mittal*, we held that in determining whether a dispute is arbitrable in Singapore at the pre-award stage, we should consider the public policy of *both*

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15 *Larsen Oil and Gas Pte Ltd v Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore)* [2011] 3 SLR 414.

16 *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2016] 1 SLR 373 ("***Tomolugen***") at [78].

17 *Anupam Mittal v Westbridge Ventures II Investment Holdings* [2023] 1 SLR 349 ("***Anupam Mittal***") at [61].

the law governing the arbitration agreement, and that of the law of the seat. And in reaching this conclusion, we noted that the "public policy" referred to in s 11 of the IAA, which I mentioned earlier, is not limited or circumscribed in any way, and its natural meaning may therefore be read as referring to the public policy of *any* relevant jurisdiction, not only that of Singapore.[18] And given that the arbitration agreement is the foundation of the tribunal's *jurisdiction*, it was also in our view clear that the law of the arbitration agreement had to be considered in determining questions of arbitrability.[19] To do otherwise would, we thought, be to allow an arbitration to proceed notwithstanding a possible jurisdictional deficit in the tribunal, under the very instrument giving rise to the duty to arbitrate.

10. If we take a step back, I suggest that the approach we adopted in *Anupam Mittal* is consistent with the supervisory role of commercial courts. In dealing with an area of law that has become highly transnational, it might be quite inadequate to examine issues only through the narrow lens of our own law. Instead, to the extent that it is *not* prohibited by our legislation, we should adopt a more *systemic* approach when confronted with such issues, in order to facilitate the coherent and orderly resolution of disputes.

11. On a lighter note, you heard David mention that the doctrine of arbitrability was not dealt with at any great length in the previous edition of this book. This was, in fact, one of the criticisms mentioned in a review penned by Professor M

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[18] *Anupam Mittal* at [48].

[19] *Anupam Mittal* at [54].

Sornarajah at that time, one of our leading experts in arbitration. He had, unsurprisingly, praised the book as "a work of great industry, thought and care", which was "excellent by any academic yardstick".[20] But, he did offer some minor criticism of the book. He observed that "[t]he authors do not face the issue of arbitrability of disputes in a convincing manner" and that "on controversial issues, the law is stated in a rather soft fashion". I am happy to say that you will find significant coverage of the doctrine of arbitrability in this latest edition; and as you may have gathered already from the remarks we have heard, I think it is safe to say that this group of authors has not shied away from addressing thorny issues that do not admit of easy answers.

IV. The Law Governing the Arbitration Agreement

12. Let me turn to our second area of discussion – the law governing the arbitration agreement. The applicable test in Singapore was set out by the High Court in *BCY*,[21] and this was then applied by the Court of Appeal in cases such as *Anupam Mittal*. The test as you have heard comprises three stages:[22]

(a) First, whether the parties *expressly* chose the law of the arbitration agreement.

(b) Second, if there was no express choice, whether they had made an *implied* choice of the law governing the arbitration agreement. This

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20 Sornarajah Book Review**.**

21 *BCY v BCZ* [2017] 3 SLR 357.

22 *Anupam Mittal* at [62].

is likely to be the same as the expressly chosen law of the substantive contract, unless there are clear indications to the contrary.

(c) And finally, if neither an express nor implied choice can be discerned, *the system of law with which the arbitration agreement has its closest and most real connection*.

13. As you heard from Siddharth, this test is broadly similar to that adopted by the majority of the UK Supreme Court in *Enka*,[23] and in the recent decision of the Supreme Court in *UniCredit*, the court observed that similar approaches had been adopted in the Netherlands, Japan, India, Australia and the US.[24] But while the approach to this issue in these jurisdictions may have converged for now, this may change in the light of the new UK Arbitration Bill, which arises from the Law Commission's Review of the Arbitration Act, and which proposes a new s 6A that would establish a default rule that the law applicable to the arbitration agreement is the *law of the seat*, unless the parties *expressly* agree otherwise. There were two things underlying this, as you heard from Siddharth. The Law Commission took the view that the law in *Enka* was "complex and unpredictable",[25] and it also took the view that the recommended reform would ensure that "more arbitration agreements [are] governed by the law of England and Wales". This would, as

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23 *Enka Insaat Ve Sanayi A.S. v OOO Insurance Company Chubb* [2020] UKSC 38 ("***Enka***").

24 *UniCredit Bank GmbH v RusChemAlliance LLC* [2024] UKSC 30 ("***UniCredit***") at [56], citing Gary Born, *International Commercial Arbitration*, 3rd ed (Kluwer Law International, 2021) at pages 553–558.

25 United Kingdom Law Commission, Review of the Arbitration Act 1996: Final Report and Bill (Law Com No 413) ("**Law Commission Final Report**") at paras 12.20 and 12.74.

they put it, avoid "undermining" the parties' decision to arbitrate in England and Wales, by subjecting it to a foreign law that might potentially be "less generous" on issues such as arbitrability and separability.[26]

14. Some have argued that the new s 6A will not fully give effect to the principle of party autonomy, suggesting that it might effectively disregard the parties' implied choice of law.[27] I do not intend to delve into that debate today. But if I return to a point I made earlier, the impending reform in the UK shows one of the reasons why complete uniformity in arbitration law is unlikely to be attained. The reality is that countries all over the world are continuously engaging and consulting their users to better understand their needs, their requirements and their expectations, so that they can introduce reforms which they think might help them attract a larger share of the arbitration work. We see this in Singapore as well. Since the IAA was enacted in 1995, it has been amended no less than 12 times, and that demonstrates our Government's proactive stance in working with our stakeholders in the arbitration community to shape our legislative regime such that we can serve arbitration users to the best of our ability.[28] So, this I think shows how our laws are likely to remain somewhat different, even as we might move in a particular trend or direction towards overall convergence on broad themes.

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[26] Law Commission Final Report at paras 12.72–12.73.

[27] See, for example, the evidence of Professor Alex Mills before the Special Public Bill Committee of the House of Lords on 14 February 2024, available at https://committees.parliament.uk/oralevidence/14273/pdf; and the evidence of Mr Matthew Weiniger KC on 21 February 2024, available at https://committees.parliament.uk/oralevidence/14319/pdf.

[28] Minister for Culture, Community and Youth and Second Minister for Law Mr Edwin Tong SC at the Singapore Institute of Arbitrators' 40th Anniversary Dinner (30 November 2022).

V. Recognition and Enforcement of Foreign Judgments Obtained in Breach of Arbitration Agreements

15. I turn, finally, to the topic that was the subject of Paul's remarks – the recognition and enforcement of foreign judgments obtained in breach of arbitration agreements. And the question is whether proof of such a breach would be a valid defence to recognition and enforcement, in the absence of a provision equivalent to s 32 of the UK Civil Jurisdiction and Judgments Act,[29] and where the foreign judgment does not originate from a country covered under the Reciprocal Enforcement of Foreign Judgments Act in Singapore (or "**REFJA**").[30]

16. I will not say too much about this issue, given that, as Paul observed, it has not yet been dealt with by our courts. But I will make just two brief points:

(a) The first is to highlight the decision of our Court of Appeal not in an arbitration setting, but in an intellectual property case – *Merck*[31] – which dealt with the doctrine of transnational issue estoppel. One element of this doctrine is that the foreign judgment must be *capable of being recognised*; and in that context, we considered it desirable that there be broad convergence in the defences that are available to the recognition of such judgments under the common law, as with defences available under comparable statutes such as

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29 Civil Jurisdictions and Judgments Act 1982.

30 Reciprocal Enforcement of Foreign Judgments Act 1959.

31 *Merck Sharp & Dohme Corp (formerly known as Merck & Co, Inc) v Merck KGaA (formerly known as E Merck)* [2021] 1 SLR 1102 ("***Merck***").

the REFJA and the Choice of Court Agreements Act.[32] We observed that the common law should "generally be developed in a manner that is compatible and consistent with legislation which covers a broadly similar area".[33] Paul's suggestion is therefore not out of step with what has already been judicially observed.[34]

(b) And second, I have in a number of speeches called for a *systemic* approach to transnational commercial justice, rather than a court- or jurisdiction-centric one.[35] Indeed, I made the same point earlier when discussing the doctrine of arbitrability. A systemic perspective is in my view a matter of growing importance and even of necessity, if the law is to support the growth of cross-border trade effectively, and this would also enhance the consistent development of important transnational legal norms. And all of this must surely apply with particular force to the field of arbitration, given just how transnational this area of law is, and its widespread usage in international commerce. So, this too resonates with Paul's suggested approach on this issue. That having been said, these are just some extra-judicial musings!

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32 Choice of Court Agreements Act 2016.

33 *Merck* at [37].

34 See also *The Republic of India v Deutsche Telekom* [2024] 1 SLR 56 at [122].

35 Perth Lecture at para 24; Sundaresh Menon CJ, "Transnational Relitigation and the Doctrine of Transnational Issue Estoppel", paper delivered at the 8th Judicial Seminar on Commercial Litigation (14 March 2024) at para 25.

VI. Conclusion

17. Allow me to conclude. The internationalisation of arbitration law has resulted in a real need for judges and practitioners to understand the areas in which meaningful convergence has already been attained or is attainable, and those where differences persist and are likely to persist. That is what, I suggest, will make this latest edition of *Mustill & Boyd* such a valuable resource, given the very comprehensive nature of the work that not only examines the common areas but also highlights and explains the areas of differences in a very accessible and comprehensive manner. Although the book principally focuses on English law and practice, it offers considerable coverage of the law of other key jurisdictions, such as Singapore, Hong Kong, France and Australia; and it also provides a detailed commentary on the rules of the major arbitral institutions. And so, for all these reasons, to David, Salim, Siddharth and Paul, I am delighted to join all of you in supporting the launch in Singapore of the third edition of the book and I have no doubt that it will be as well-received as its previous editions were. I also very much hope that the 4th edition will not be 40 years in the making! Thank you very much and congratulations again.
