SIFoCC

Standing International Forum of Commercial Courts

Report of the Fifth Full Meeting

Hosted by the Qatar International Court and Dispute Resolution Centre at Qatar University, Doha, Qatar

April 2024

Contents

Introduction

Following the success of the 4th Full Meeting in Sydney in October 2022 which was hosted by the Federal Court of Australia and the Supreme Court of New South Wales, the Fifth Full Meeting of the Standing International Forum of Commercial Courts (SIFoCC) saw some 50 jurisdictions hosted by the Qatar International Court and Dispute Resolution (QICDRC) at Qatar University, Doha in April 2024. Other jurisdictions joined online.

This report captures some of the roundtable discussion over two days by commercial (and appellate) courts across the world, with a range of topics such as: AI in the world and in the handling and resolution of disputes; developing the relationship between commercial courts and arbitration and mediation; corporate activity and the Rule of Law, including in the context of climate change; class actions and litigation funding; and moving towards greater transnational cooperation.

List of attendees

AFRICA

Botswana

In person:

- Chief Justice Terence Tsatsilakgosi Rannowane, Chief Justice of Botswana
- Judge Keborapele Bashi Moesi, High Court of Botswana
- Ms Lebogang Jacqueline Botha, Deputy Registrar, High Court of Gaboron

Cameroon

Online:

- Justice Theophilus Tayi Tatsi, Court of Appeal of Cameroon

Eswatini

In person:

- Chief Justice Bheki Maphalala, Chief Justice of the Kingdom of Eswatini
- Justice Doris Tshabalala, Commercial Court of Eswatini
- Justice Cyril S Maphanga, Commercial Court of Eswatini
- Justice Khontaphi Duduzile Manzini, Commercial Court of Eswatini

The Gambia

In person:

- Chief Justice Hassan Jallow, Chief Justice of the Gambia
- Judge Omar Njie, Supreme Court of the Gambia

Ghana

In person:

- Justice Sedina Agbemava, High Court (Commercial Court)

Online:

- Justice Adelaide Abui Keddey, High Court (Commercial Court)
- Justice Emmanuel Atsu Lodoh, High Court

- Justice Afi Agbanu Kudomor, High Court (Commercial Court)
- Justice Francis Obiri, High Court (Commercial Court)
- Justice Afia Adu-Amankwa, High Court (Commercial Court)

Malawi

In person:

- Justice Lovemore Paul Chikopa SC, Judge President, Malawi Supreme Court of Appeal

Namibia

In person:

- Mr. Justice Hosea Angula, Deputy Judge-President of the High Court
- Mr. Justice Shafimana F.I. Ueitele, Judge of the High Court
- Elsie Elizabeth Schickerling, Registrar of the Supreme and High Courts
- Ms. Michelle Melissa Jagger, Research Assistant to Justice Angula

Nigeria

In person:

- Justice Binta Nyako, Federal High Court of Nigeria

Rwanda

In person:

- Justice Clotilde Mukamurera, President, Commercial High Court
- Justice Valens Nkurunziza, Vice President, Commercial High Court

Sierra Leone

In person:

- Justice Lornard Taylor, Resident Judge, Fast Track Commercial Court

South Africa

In person:

- Judge Yvonne Thokozile Mbatha, Supreme Court of Appeal of South Africa
- Justice Rammaka Steven Mathopo, Constitutional Court of South Africa
- Judge Matodzi Brian Nemavhidi, Specialised Commercial Crimes Court (Gauteng Division)
- Judge Dawn Mohanlall Soomaroo, Durban Specialised Commercial Crimes Court

Uganda

In person:

- Chief Justice Alfonse Owiny-Dollo, Chief Justice of Uganda
- Hon. Bart Katureebe, Chief Justice Emeritus of Uganda
- Professor Andrew Khaukha, Technical Advisor to the Judiciary of Uganda

Online:

- Anna Mugenyi Bitature, Deputy Head Judge Commercial Court, Uganda
- Judge Susan Abinyo, High Court (Commercial Division)

Zambia

In person:

- Justice Kazimbe Chenda, High Court (Commercial Division)

Online:

- Chief Justice Mumba Malila, Chief Justice of Zambia
- Justice Koreen Etambuyu, High Court (Commercial Division)
- Ms. Annie Nsama Chisanga, Registrar, Commercial Court of the High Court of Zambia

Asia

Cambodia

Online:

- H.E. Chiv Songhak, Secretary of State, Ministry of Justice
- H.E. Tanheang Davann, Secretary of State, Ministry of Justice
- H.E. San Sorphorn, Under Secretary of State, Ministry of Justice
- H.E. Mong Monichariya, President of the Appeal Court of Tboung Khmum Province

Online observers:

- H.E. Ly Tayseng, Deputy Chairman of the Legal and Justice Council, Ministry of Justice
- H.E. Heng Chhay, Deputy Chairman of the Legal and Justice Council, Ministry of Justice
- H.E. Nhean Somonin, Member of the Legislative and Justice Council, Ministry of Justice

People's Republic of China

Supreme People's Court

In person:

- Justice Shumei Wang, Standing Member of the Adjudication Committee; President of the 3rd Circuit Court of the Supreme People's Court of China
- Judge Hongyu Shen, Chief Judge of the Fourth Civil Division of the Supreme People's Court of China
- Judge Xiaoding Jiao, Fourth Civil Division of the High People's Court of Guangdong Province
- Consultant Official Fan Zhang, International Co-operation Department, Supreme People's Court of China

International Commercial Court

In person:

- Judge Yu Mei, Beijing International Commercial Tribunal
- Judge Enqian Yang, Suzhou International Commercial Tribunal

Hong Kong SAR

In person:

- Chief Justice Andrew Cheung, Chief Justice of Hong Kong
- Mr Justice Joseph Fok, Permanent Judge of the Court of Final Appeal of Hong Kong
- Mr Justice Jonathan Harris, President of the Hong Kong Competition Tribunal

India

In person:

- Mr Justice Manoj Misra, Judge, Supreme Court of India
- Acting Chief Justice Manmohan of Delhi High Court
- Justice Prateek Jalan, Delhi High Court
- Mr Justice M Sundar, Judge, High Court of Madras
- Mr Justice Suraj Govindaraj, Judge, High Court of Karnataka

Indonesia

In person:

- Justice Lucas Prakoso, Supreme Court of Indonesia

- Justice Rahmi Mulyati, Supreme Court of Indonesia
- Dr. Aria Suyudi, SH., LLM, Special Staff to Chief Justice of the Supreme Court of Indonesia

Japan

In person:

- Judge Ryuta Goto, Tokyo District Court

Online observer:

- Judge Yusuke Mori

Kazakhstan

AIFC

In person:

- Chief Justice Lord Burnett, Chief Justice of the AIFC Court
- Mr. Christopher Campbell-Holt, Registrar and Chief Executive, AIFC Court

Supreme Court

Online:

- Judge Madiyar Balken, The Supreme Court of Kazakhstan

Malaysia

In person:

- Justice Nallini Pathmanathan, Federal Court of Malaysia
- Justice Ahmad Fairuz Zainol Abidin, Federal Court of Malaysia

Pakistan

In person:

- Justice Syed Mansoor Ali Shah, Supreme Court of Pakistan
- Justice Jawad Hassan, Judge of the Commercial High Court of Lahore

Philippines

In person:

- Judge Maria Cecilia Chua, Regional Trial Court Branch 2 Batangas City
- Judge Retrina Fuentes, Executive Judge of the Regional Trial Court, Davao City

- Judge Andres Soriano, Regional Trial Court Branch 148 Makati City
- Ms. Bernadette Bathan-Basuel, Court Attorney VI, Supreme Court of the Philippines

Online:

- Ms Pauline Angela Carillo, PET Supervising Judicial Staff Officer of the Supreme Court of the Phillippines
- Ms Alyssa Diaz, Executive Assistant IV of the Supreme Court of the Philippines
- Ms. Donna Ametyst Bernardo, Court Attorney VI, Supreme Court of the Philippines

Republic of Korea

In person:

- Justice Tae-Ak Rho, Supreme Court of South Korea
- Judge Eui Young Lee, Gwangju High Court
- Judge Min Kyung Kim, Incheon District Court
- Judge Philbok Lee, Sungnam Branch of Suwon District Court

Online:

- Justice Junhyeon Yi, Seoul High Court
- Justice Jiyong Jang, Suwon High Court
- Justice Yoon Jong Kim, Daejeon District Court
- Justice Kisu Kim, IP High Court

Singapore

In person:

- Chief Justice Sundaresh Menon, Chief Justice of Singapore
- Justice Philip Jeyaretnam, Supreme Court of Singapore
- Justice Yihan Goh, Supreme Court of Singapore
- Mr Phang Hsiao Chung, Deputy Registrar, Supreme Court of Singapore

Sri Lanka

In person:

- Chief Justice Jayantha Jayasuriya, Chief Justice of Sri Lanka
- Justice Mahinda Samayawardhena, Judge of the Supreme Court

Australasia

Federal Court of Australia

In person:

- Hon. James Allsop AC, Former Chief Justice of the Federal Court of Australia
- Justice Bernard Murphy, Federal Court of Australia
- Justice Michael Lee, Federal Court of Australia

Australia, New South Wales

In person:

- Chief Justice Andrew Bell, Chief Justice of New South Wales
- Justice Scott Nixon, Supreme Court of New South Wales

Australia, South

In person:

- Justice Mark Livesey, President of the Court of Appeal, Supreme Court of South Australia

Australia, Victoria

In person:

- Justice Jim Delany, Supreme Court, Principal Judge, Commercial Court

New Zealand

In person:

- Justice Ian Gault, Auckland High Court

Papua New Guinea

In person:

- Justice John Carey, National and Supreme Court
- Justice Thomas Anis, Judge Administrator, Commercial Court

Europe

France

In person:

- Judge Fabienne Schaller, President of the International Commercial Chamber, Court of Appeal, Paris
- M. Patrick Sayer, President of the Tribunal De Commerce De Paris

Germany

In person:

- Dr. Patrick Melin, Presiding Judge of Stuttgart Commercial Court

Spain

In person:

- Dr. Ignacio Sancho, Judge of the Supreme Court

Republic of Ireland

In person:

- Justice David Barniville, President of the High Court
- Justice Denis McDonald, Head of the Commercial Court, High Court

United Kingdom

England and Wales

In person:

- Chief Justice Lady Sue Carr, Lady Chief Justice of England & Wales
- Sir Geoffrey Vos, Master of the Rolls and Head of Civil Justice of England & Wales
- Mr Justice David Foxton, Judge in Charge of the Commercial Court of England & Wales

Online:

- Mrs Justice Joanna Smith, Technology and Construction Court
- Mr Justice David Waksman, Judge in Charge of the Technology and Construction Court

Northern Ireland

In person:

- Madam Justice Denise McBride, High Court of Northern Ireland

Scotland

In person:

- Lord Craig Sandison, Court of Session

Middle East

United Arab Emirates

Abu Dhabi

ADGM

In person:

- Chief Justice Lord David Hope of Craighead KT, Chief Justice of the Abu Dhabi Global Market (ADGM) Courts
- Justice Andrew Smith, Judge of the Abu Dhabi Global Market Court
- Mrs Linda Fitz-Alan, Registrar and Chief Executive, Abu Dhabi Global Market Court

Bahrain

In person:

- Judge Fatima Faisal Hubail, President of the Reorganization and Bankruptcy Court of Bahrain; member of the Supreme Judicial Council of Bahrain

Dubai

DIFC

In person:

- H.E. Justice Shamlan Al Sawalehi, Senior Court of Appeal Judge and Judge in Charge of Arbitration Division of the DIFC Courts
- Justice Michael Black, Senior Court of Appeal Judge and Judge in Charge of Digital Economy Court.
- Ms Ayesha Bin Kalban, Registrar, Dubai International Financial Centre Courts

Online:

- Ms Amna Al Owais, Chief Registrar, Dubai International Financial Centre Courts

Dubai Courts

Online:

- Judge Dr. Hamda Alsuwaidi, Judge of Courts of First Instance

Jordan

Online:

- Judge Sanabel Al-Smadi, Amman First Instance Court
- Judge Doaa Al Omari, Amman First Instance Court

Republic of Iraq

In person:

- Chief Justice Dr Faiq Zidan, President of the Supreme Judicial Council of Iraq
- Judge Taghreed Al-Ibadi, Judge of First Instance Court (Commercial Cases in Baghdad/Rusafa)
- Judge Ibraheem Al-Shemari, Judge of First Instance Court (Commercial Cases in Baghdad/Rusafa)
- Judge Ammar Ahmed Mustafa, Judge of the Court of First Instance, specialized in commercial cases in Karkh

Qatar

- H.E. Ibrahim bin Ali Al Mohannadi, Minister of Justice of Qatar
- H.E Hassan bin Lahdan Alhassan Almohanadi, Chief Justice of Qatar; President of the Supreme Judiciary Council of Qatar

QICDRC

In person:

- Lord John Thomas of Cwmgiedd, President of the Qatar International Court
- Justice Yongjian Zhang, Judge of the Qatar International Court
- Sir William Blair, Chairman of the Qatar Financial Centre Regulatory Tribunal
- Her Honour Frances Kirkham, Justice of the Qatar International Court
- Justice Muna Al-Marzouqi, Justice of the Qatar International Court
- Mr Faisal Rashid Al-Sahouti Al-Mansoori, Chief Executive of the Qatar International Court and Dispute Resolution Centre
- Mr Umar Azmeh, Registrar, QICDRC
- Mr Abdullatef AlMohannadi, Deputy Registrar, QICDRC

Qatar Investment and Trade Court

In person:

- Judge Khalid bin Ali Al Obaidly, President of the Qatar Investment and Trade Court

Saudi Arabia

In person:

- Judge Salman Alfawzan, Deputy Minister for Judicial Affairs
- Judge Abdulaziz Alrodiman, Head of Riyadh Appeal Court
- Judge Ebraheem Alatram, Head of Riyadh Commercial Court
- Judge Mamdoh Alalmai, Judge at the Commercial Court

North America and the Caribbean

Bermuda

Online:

- Chief Justice Larry Mussenden, Chief Justice of Bermuda

Canada

In person:

- Chief Justice Geoffrey Morawetz, Ontario Superior Court of Justice, Chief Justice of Ontario
- Judge Graeme Mew, Superior Court of Justice (Ontario)

Cayman Islands

In person:

- Justice Nick Segal, Permanent Judge, Grand Court of the Cayman Islands (Financial Services Division)

Eastern Caribbean

Online:

- Judge Gerhard Wallbank, BVI Commercial Court

Jamaica

In person:

- Chief Justice Bryan Sykes, Chief Justice of Jamaica
- Mrs Justice Carole Barnaby, Judge of the Commercial and Civil Divisions of the Supreme Court of Jamaica
- Mrs Justice Stephane Jackson-Haisley, Supreme Court of Jamaica

Turks & Caicos Islands

In person:

- Mr. Justice Anthony Gruchot, Judge of the Supreme Court of Turks and Caicos

Online:

- Lady Chief Justice Mabel Agyemang, Chief Justice of Turks & Caicos
- Justice Chris Selochan, Judge of the Supreme Court of Turks & Caicos

United States of America

New York

New York Federal

In person:

- Hon. P. Kevin Castel, Senior District Judge, US District Courts – Southern District of New York

Online:

- Hon. Loretta A. Preska, Senior District Judge, US District Courts – Southern District of New York

New York State

In person:

- Judge Joseph A. Zayas, Chief Administrative Judge, United States of America, New York State Unified Court System
- Hon. Rolando Acosta, United States of America (NY), New York State Unified Court System, Appellate Division, former Presiding Justice

Pennsylvania

In person:

- Hon. Gary Glazer, Senior Judge, Pennsylvania

Guests:

In person:

- Mr Anurag Bana, Senior Project Lawyer, International Bar Association (IBA)
- Mr Roscoe Banks, Associate General Counsel, QFC Authority
- Ms Yasmin Batliwala, CEO, Advocates for International Development (A4ID)
- Mr Tim Bisong, Country Director (The Gambia), Justice Defenders
- Mr Marcus Cato, Chair of the Chartered Institute of Arbitrators in Africa
- Mr Samad Chowdhury, Second Secretary Human Rights and Justice, FCDO
- Ms Susan Dunn, International Legal Finance Association, Chair of the Association of Litigation Funders
- Mr Emmanuel Finndoro-Obasi, Director of Trade and Investment, Africa House
- Mr Simon Knowles FRS, Chief Technology Officer, Graphcore
- Mr Daniel Leader, Partner, Leigh Day
- Mr Jordan Lee, Chief Strategy Officer, Pogust Goodhead
- Professor Colin Mayer CBE, FBA, Emeritus Professor of Management Studies at the Said Business School, University of Oxford, The British Academy; Lead for "The Future of the Corporation"
- Ms Catriona Nicol, Senior Legal Counsel, QFC Authority
- Professor Marike Patrani Paulsson, International Council for Commercial Arbitration
- Ms Lucy Robinson, Criminal Justice Policy Adviser, FCDO
- Mr Jon Shields, Rule of Law Programme Manager, FCDO

Online:

- Dr Karen Brewer, Secretary General, Commonwealth Magistrates' and Judges' Association
- Ms Fiona Connell, Asian Development Bank
- Ms Briony Eales, Judicial Capacity Building Team Leader: Environmental and Climate Change Law, Office of the General Counsel, Asian Development Bank
- Judge Isabela Ferrari, Federal Court of Brazil
- Ms Katherine B. Forrest, Partner, Paul Weiss Rifkind Wharton & Garrison LLP, former US District Judge (Southern District of New York)
- Mr Thomas Goodhead, Global Managing Partner, Pogust Goodhead
- Eric Horvitz, Chief Scientific Officer, Microsoft

- Ms. Vanja Karth, Faculty of Law, University of Cape Town
- Judge Marcus Livio, Federal Court of Brazil
- Mr Farruh Malikov, Head of the International Relations Department, Supreme Court of Uzbekistan
- Ms Christina Pak, Principal Counsel and Head of Law and Policy Reform, Asian Development Bank

Qatar leads

In person:

- Mr Abdolrahman Abdulkarim K., PR and Liaison Officer, QICDRC
- Ms Myra Villanes, Executive Assistant, QICDRC
- Ms Shithal Shetty, Head Of IT, QICDRC
- Ms Fatma Al Bishri, Manager, Marketing and Communications, QICDRC
- Ms Mary Starr Martinez De Guzman, Marketing and Communications Assistant, QICDRC
- Mr Omar Ashour, Senior Branding Specialist, QICDRC
- Ms Shaikha Mohd Al Jaber, Senior Marketing Specialist, QICDRC
- Mr Ayah Shadid, PR & Communications, QICDRC
- Mr Waed Hajbakri, PR & Communications, QICDRC
- Mr Abdulla Baker AB Abdulla, Director of Administration, QICDRC
- Mr Moath Al Herbawi, IT Support, QICDRC
- Mr Jervis Jehu Omicting, IT Support, QICDRC
- Mr Khalifa Mahjob, Facilities Management Officer, QICDRC

Staff to delegates

In person:

- Mr Peter Fred Lochomin, Uganda Chambers of the Chief Justice of Uganda, Personal Assistant to Chief Justice of Uganda
- Ms Wendy Cheung, Administrative Assistant to the Chief Justice of Hong Kong SAR
- Mr Nasser Alsaeed, Judicial Portfolio, Saudi Arabia
- Mr Abdulla Bin Sulaih, Judicial Portfolio, Saudi Arabia
- Ms Ma Regine Callueng, Executive Assistant IV of the Supreme Court of the Philippines

SIFoCC Secretariat

In person:

- Ms Adenike Adewale, Head of SIFoCC Secretariat
- Ms Courteney Rose, International Strategy Manager and Assistant to Head of Secretariat, International Team, Judicial Office
- Ms Simran Chard, Assistant to Head of SIFoCC Secretariat, Royal Courts of Justice
- Ms Amy Shaw, Joint Interim Chief Executive, Judicial Office
- Ms Lucy Atkinson, Principal Private Secretary to the Lady Chief Justice, Judicial Office

(SIFoCC Technology: Mr Matthew Corcoran and Mr Chris Conderson from Amplitude)

Rapporteur

In person:

- Ms Maya Chilaeva, barrister, Quadrant Chambers, London

SIFoCC Steering Group

Lord John Thomas of Cwmgiedd, Chair of the SIFoCC Steering Group

Hon. James Allsop (former Chief Justice of the Federal Court of Australia)

Sir William Blair (Chair of the Qatar Financial Centre Regulatory Tribunal)

Chief Justice Andrew Cheung (Chief Justice of Hong Kong) with Mr Justice Jonathan Harris (President, Competition Tribunal)

Hon. Bart Katureebe (Chief Justice Emeritus of Uganda)

Hon. Geoffrey Ma (Former Chief Justice of Hong Kong)

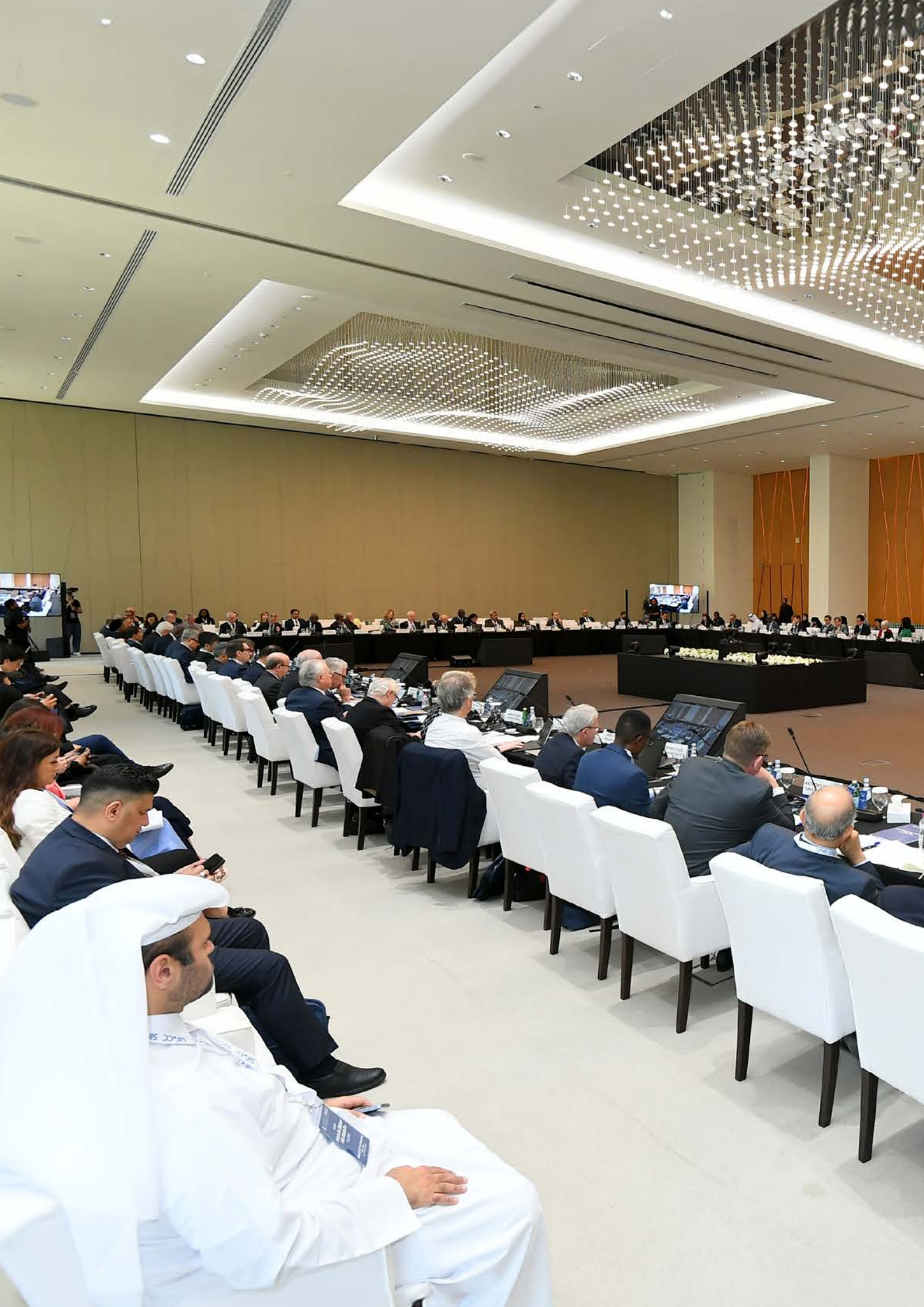
Chief Justice Sundaresh Menon (Chief Justice of Singapore)

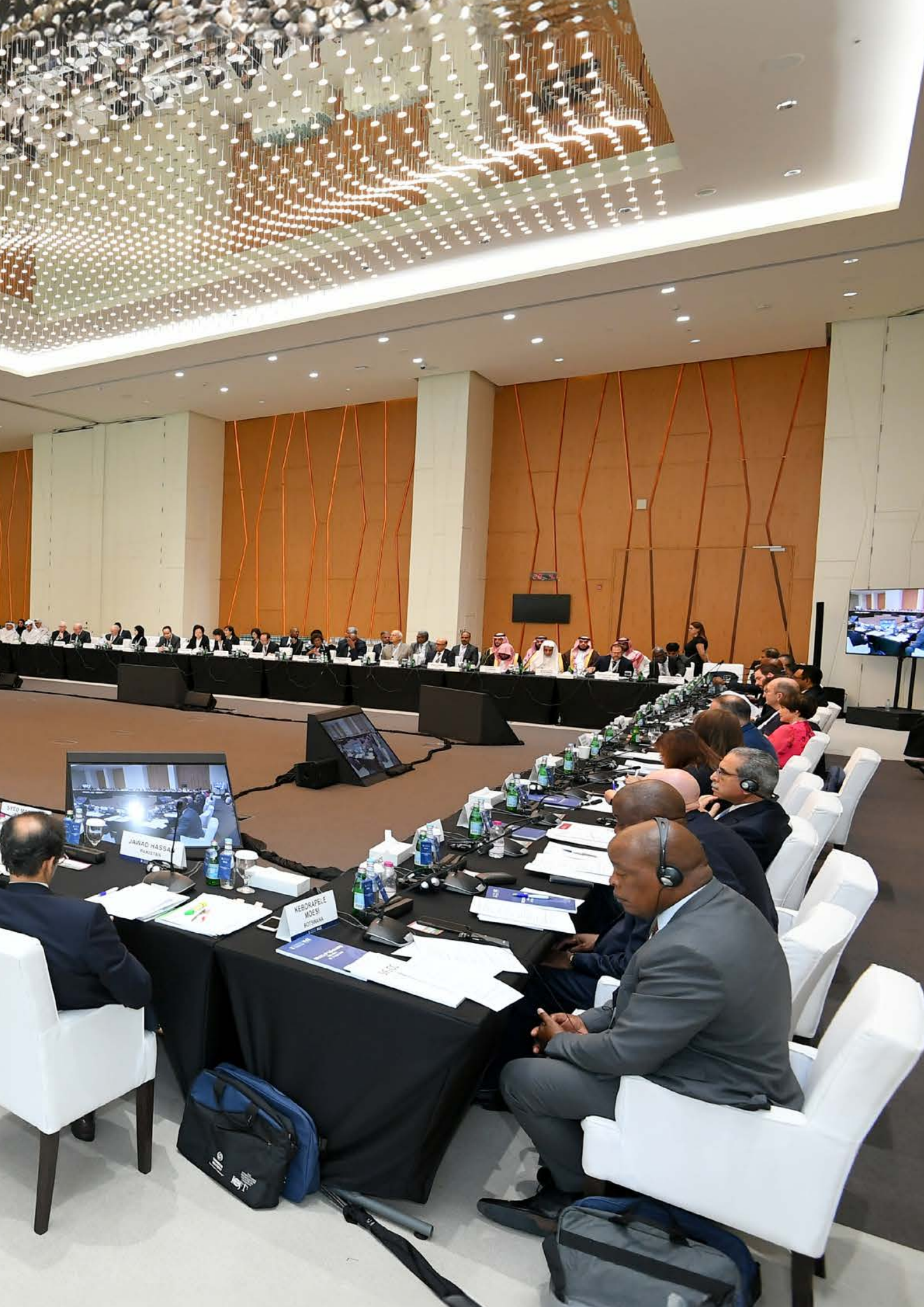
Hon. Loretta Preska (Senior Judge, former Chief Justice, US District Courts, Southern District of NY, USA)

Sir Geoffrey Vos (Master of the Rolls and Head of Civil Justice, England & Wales)

Judge with day-to-day responsibility for SIFoCC:

Mr Justice Robin Knowles CBE (Judge of the Commercial Court of England & Wales)




JAWAD HASSAN
PAKISTAN
KEBONAPELE MOESI
BOTSWANA

The Standing International Forum of Commercial Courts

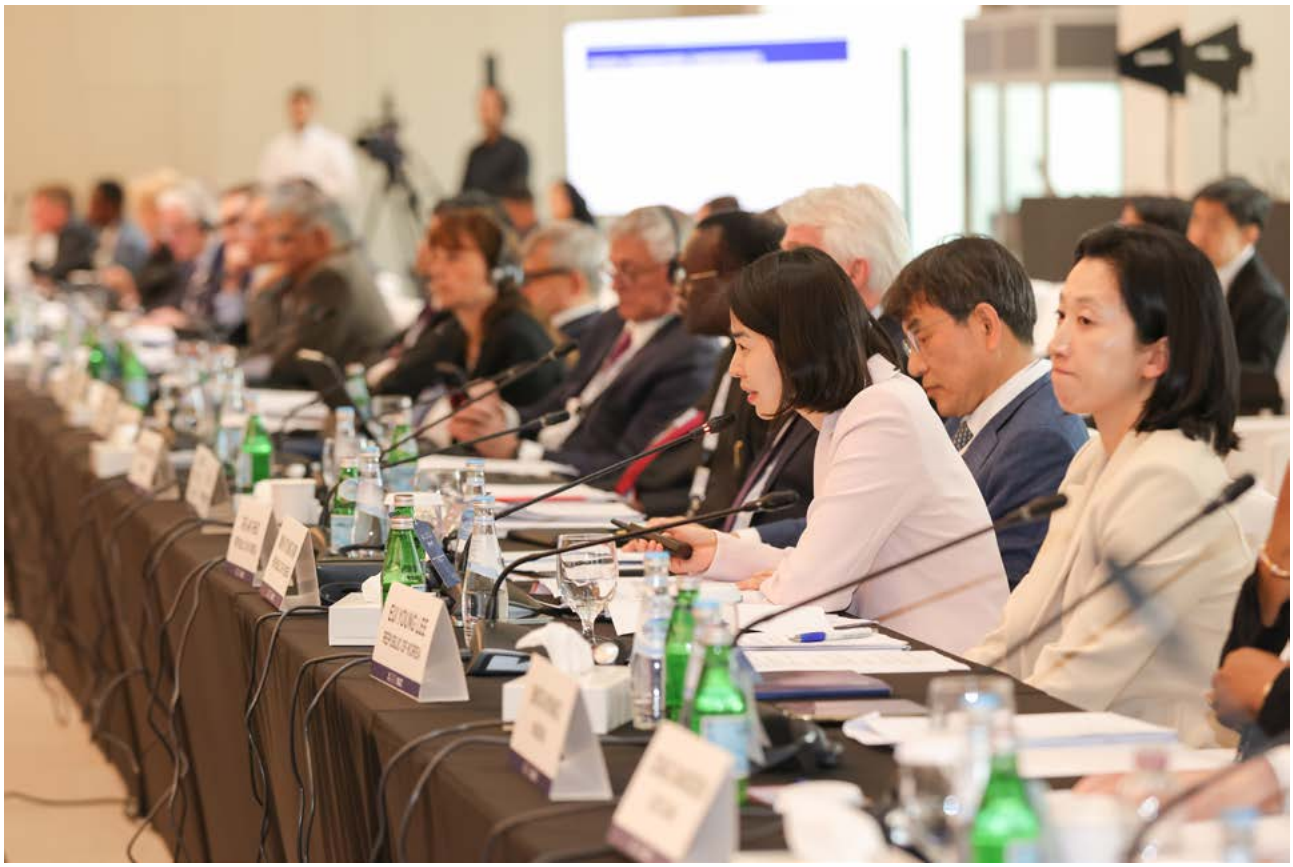
Fifth Full Meeting, Doha, Qatar

Hosted by Qatar and The Qatar International Court and Dispute Resolution Centre

Saturday 20 and Sunday 21 April 2024

In person at Qatar University and also streamed

All times shown are local, Doha, time



Programme

Saturday 20th April 2024	
0800	Transport from principal hotels to the University
0840	**Registration and refreshments**
0915	**Welcome from host country and region**
	Mr Faisal Rashid Al-Sahouti Al-Mansoori, CEO of the Qatar International Court and Dispute Resolution Centre (QICDRC) [5 mins]
0920	**Welcome remarks** **Lord John Thomas,** Chairman of SIFoCC's Steering Group; President of the QICDRC [5 mins]
0925	**SIFoCC Progress Report** **Ms Adenike Adewale**, Head of Secretariat, SIFoCC **Mr Justice Robin Knowles**, Judge with day-to-day responsibility for SIFoCC [10 mins]
0935	**Judicial Roundtable Discussion Theme 1 (first part): AI in the world; AI in the handling and resolution of disputes** Joint Chairs: **Chief Justice Andrew Bell [New South Wales]**, Chief Justice of New South Wales **Justice Frances Kirkham [Qatar]**, Qatar International Court **Justice Ian Gault [New Zealand]**, High Court of New Zealand **Introduction and Context** by the Chairs [5 mins]

Saturday 20th April 2024

Short opening guest address and conversation: [30 mins]

Mr Simon Knowles, Chief Technology Officer, Graphcore: "Intelligence: artificial and human"

Mr Eric Horvitz, Chief Scientific Officer, Microsoft [on-line]

Professor Colin Mayer CBE, FBA; Emeritus Professor of Management Studies at the Said Business School, University of Oxford: "AI and the Corporation"

Roundtable questions: [20 mins]

Short addresses: "Perspectives on AI"

Justice Yihan Goh [Singapore], Supreme Court of Singapore [5 mins]

Justice Manmohan [India], Acting Chief Justice of the Delhi High Court, India [5 mins]

Judge Isabela Ferrari [Brazil], Federal Court of Brazil [5 mins: on-line]

Judge Ebraheem Alatram [Saudi Arabia], Head of Riyadh Commercial Court of the Kingdom of Saudi Arabia [5 mins] [translated]

Roundtable discussion, first part [20 mins]

1110 **Coffee/ Tea Break**

1140 **Theme 1 (continued, second part): AI in the world; AI in the handling and resolution of disputes**

A short address by Chat GPT, facilitated by **Ms Simran Chard**, SIFoCC Secretariat [5 mins]

Further short addresses:

Justice Lucas Prakoso/ Justice Rahmi Mulyati [Indonesia], Supreme Court of Indonesia [A perspective from a G20 economy, with 17,000 islands] [5 mins]

Mrs Justice Joanna Smith [England & Wales], Judge of the Technology & Construction Court, England & Wales [AI in disputes with complex facts and urgent commercial deadlines] [5 mins: on-line]

Chief Justice Hassan Jallow [The Gambia], Chief Justice of The Gambia [Experience with technology to date: the challenges where resources are limited for court, profession and country] [5 mins]

Saturday 20th April 2024	
	Roundtable discussion, second part [30 mins]
	Further short addresses: **Judge Kevin Castel [New York, USA]**, U.S. District Judge, Southern District of New York [Issues for the profession] [5 mins] **Ms Katherine B. Forrest**, Partner, Paul, Weiss, Rifkind, Wharton & Garrison LLP, former U.S. District Judge, Southern District of New York [Increasing understanding in the profession and the judiciary] [5 mins: video]
	Closing address: "Rule-making for AI in Dispute Resolution" **Sir Geoffrey Vos [England & Wales]**, Master of the Rolls and Head of Civil Justice, England & Wales; member of SIFoCC's Steering Group [15 mins]
1250	**Short Address:** "The Rule of Law and the importance of justice and justice systems" **Lady Chief Justice Sue Carr [England & Wales]**, Lady Chief Justice of England & Wales [10 mins]
1300	**Lunch**
1400	**Judicial Roundtable Discussion Theme 2: Developing the Relationship between Commercial Courts, Arbitration and Mediation** Chair: **Chief Justice Sundaresh Menon [Singapore], Chief Justice of Singapore; m**ember of SIFoCC's Steering Group **Introduction and Context by the Chair** [5 mins]
	Short opening addresses: **Justice Wang Shumei [China]**, Standing Member of the Adjudication Committee, and President of the Third Circuit Court, of the Supreme People's Court of China [10 mins] **Judge Fabienne Schaller [France]**, President, International Commercial Chamber, Court of Appeal, Paris [10 mins] **Chief Judge Joseph Zayas [New York, USA]**, Chief Administrative Judge of the New York State Unified Court System [5 mins]
	Roundtable discussion, first part [15 mins]

Saturday 20th April 2024

Further short addresses:

Lord Ian Burnett [AIFC, Kazakhstan], Chief Justice of the AIFC Court, Kazakhstan [5 mins]

Justice Shamlan Al Sawalehi [DIFC, Dubai], Senior Court of Appeal Judge and Judge in Charge of Arbitration Division of the DIFC Courts, Dubai [5 mins]

Chief Justice Alfonse Owiny-Dollo [Uganda], Chief Justice of Uganda [5 mins]

Professor Marike Paulsson, International Council for Commercial Arbitration (ICCA) [5 mins]

Justice Prateek Jalan [India], Justice of the Delhi High Court, India [5 mins]

Roundtable discussion, second part: [20 mins]

Short closing observations:

Justice Carole Barnaby [Jamaica], Supreme Court of Jamaica [5 mins]

Hon. Bart Katureebe [Uganda], Chief Justice Emeritus of Uganda, member of SIFoCC's Steering Group [5 mins]

1540 **Coffee/ Tea Break**

1600 **International Best Practice in Case Management: SIFoCC Observation Programme 2023 (OP23)**

Chair: **Justice Nallini Pathmanathan [Malaysia]**, Federal Court of Malaysia

Introduction by the Chair [2 mins]

Report on the 4th SIFoCC Observation Programme (OP23): Ms Adenike Adewale, Head of SIFoCC Secretariat [3 mins]

Saturday 20th April 2024

Presentation on the OP23 Further Practical Commentary and Examples to SIFoCC's 2020 Working Presumptions on International Best Practice in Case Management facilitated by the Chair [30 mins]:

Justice Kazimbe Chenda [Zambia], Judge of the Commercial Court of Zambia

Justice Jawad Hassan [Pakistan], Judge of the Commercial High Court of Lahore, Pakistan

Justice Fatima Faisal Hubail [Bahrain], President of the Reorganisation and Bankruptcy Court of Bahrain; member of the Supreme Judicial Council of Bahrain

Justice Valens Nkurunziza [Rwanda], Vice President of the High Court of Rwanda

Justice Mahinda Samayawardhena [Sri Lanka], Judge of the Supreme Court of Sri Lanka

Justice Lornard Taylor [Sierra Leone], Judge of the Commercial Court of Sierra Leone

A few short questions from round the table [5 mins]

Short closing observations by the Chair [3 mins]

1645 **Update: Litigation Funding and Arbitration Funding by third parties**

Chair: **Hon Loretta Preska [New York, USA]**, Senior Judge (former Chief Judge) US District Court, Southern District of New York; member of SIFoCC's Steering Group

Introduction by the Chair [5 mins; on-line]

Short guest addresses:

Ms Susan Dunn, International Legal Finance Association, Chair of the Association of Litigation Funders [An update; the current issues; possibilities ahead] [5 min]

Mr Thomas Goodhead, Global Managing Partner, Pogust Goodhead [A perspective from an international class action firm based in Australia, Brazil, Netherlands, UK and US] [5 mins]

Mr Daniel Leader, Partner, Leigh Day [An international perspective, including a focus on Africa] [5 mins]

Saturday 20th April 2024	
	Short addresses: **Judge Patrick Melin [Germany]**, Presiding Judge, Stuttgart Commercial Court, Germany [5 mins] **Justice Michael Lee [Australia]**, Federal Court of Australia [5 mins]
	Roundtable discussion [15 mins]
1730	**First Group Photograph**
1750	**Short introduction to the Museum of Islamic Art**
1815	**Second Group Photograph**
1900	**Dinner at the Museum of Islamic Art**
1915	**Welcome and Remarks: His Excellency Ibrahim bin Ali Al Mohannadi**, Minister of Justice of Qatar [5 mins] [Arabic; English written text]
2115	Finish and transport to principal hotels

Sunday 21st April 2024	
0800	[Steering Group only] – Transport from principal hotels to the University for breakfast meeting of the SIFoCC Steering Group at 0830 [Volunteer delegates only] Transport from principal hotels to Qatar University for breakfast with students at 0830
0910	**[All other delegates]** Transport from principal hotels to Qatar University for Day 2 of the Full Meeting (arrive 0930)
0950	All seated

Sunday 21st April 2024	
1000	**The Second SIFoCC Keynote Address** **"The Spirit of the Judicial Task and the Importance of International Judicial Dialogue"** Welcome to the keynote address: **H.E Hassan bin Lahdan Alhassan Almohanadi**, President of the Supreme Judiciary Council of Qatar; Chief Justice of Qatar [5 mins] / **Judge Khalid bin Ali Al Obaidly,** President of the Qatar Investment and Trade Court Introduction to the speaker: **Justice Michael Lee**, Federal Court of Australia [3 mins] **Keynote speaker: Hon. James Allsop AC**, former Chief Justice of the Federal Court of Australia; member of SIFoCC's Steering Group [40 mins] Vote of thanks to the speaker: **Lord John Thomas**, President of the Qatar International Court and Dispute Resolution Centre; Chairman of SIFoCC's Steering Group [3 mins]
1100	**Informal judicial, guest and student discussion with refreshments**
1135	**Judicial Roundtable Discussion Theme 3: Corporate activity and the rule of law** Chair: **Mr Justice Robin Knowles [England & Wales]**, Commercial Court, London; Judge with day-to-day responsibility for SIFoCC **A short roundtable debate and discussion:** "Corporations, corporate responsibility, directors' duties" [60 mins], including: **Professor Colin Mayer CBE, FBA**; Lead for The British Academy's Project on "The Future of the Corporation"; Emeritus Professor of Management Studies at the Said Business School at the University of Oxford **Mr Jordan Lee**, Chief Strategy Officer, Pogust Goodhead **Justice Bernard Murphy [Australia]**, Federal Court of Australia **Justice Jim Delany [Victoria]**, Supreme Court of Victoria, Australia
	Addresses: **Ms Briony Eales**, Judicial Capacity Building Team Leader, Environmental and Climate Change Law, Asian Development Bank [A short review worldwide of private law climate change disputes to date] [5 mins: on-line] **Justice Said Mansoor Ali Shah [Pakistan]**, Supreme Court of Pakistan: "Climate change and commercial courts" [15 min]

Sunday 21st April 2024	
	Roundtable discussion [15 mins]
	Short closing observations: **Chief Justice Jayantha Jayasuriya PC [Sri Lanka]**, Chief Justice of Sri Lanka [5 mins]
1315	**Lunch**
1415	**Short presentation:** **Mrs Linda Fitz-Alan [ADGM, Abu Dhabi]**, Registrar and Chief Executive, Abu Dhabi Global Market Courts: "Recognition and enforcement and Blockchain" [5 mins; including video]
1425	**Judicial Roundtable Theme 4: Towards greater transnational judicial cooperation** Joint Chairs: **Chief Justice Andrew Cheung [Hong Kong SAR]**, Chief Justice of Hong Kong; member of SIFoCC's Steering Group **Justice Jonathan Harris [Hong Kong SAR]**, President, Competition Tribunal, Hong Kong SAR
	Introduction and Context by the Chairs [5 min]
	Short opening addresses: **Judge Shen Hongyu [China]**, Chief Judge of the Fourth Civil Division, The Supreme People's Court of China [5 min] **Justice Tae-ak Rho [Korea]**, Supreme Court of South Korea with **Judge Dr. Min Kyung Kim [Korea]**, Incheon District Court [10 mins] **Justice Ryuta Goto [Japan]**, Tokyo District Court, Japan [5 min] **A short guest contribution:** **Christina Pak**, Principal Counsel and Team Leader, Law and Policy Reform, Asian Development Bank [5 min; on-line]
	Roundtable discussion, first part [15 mins]

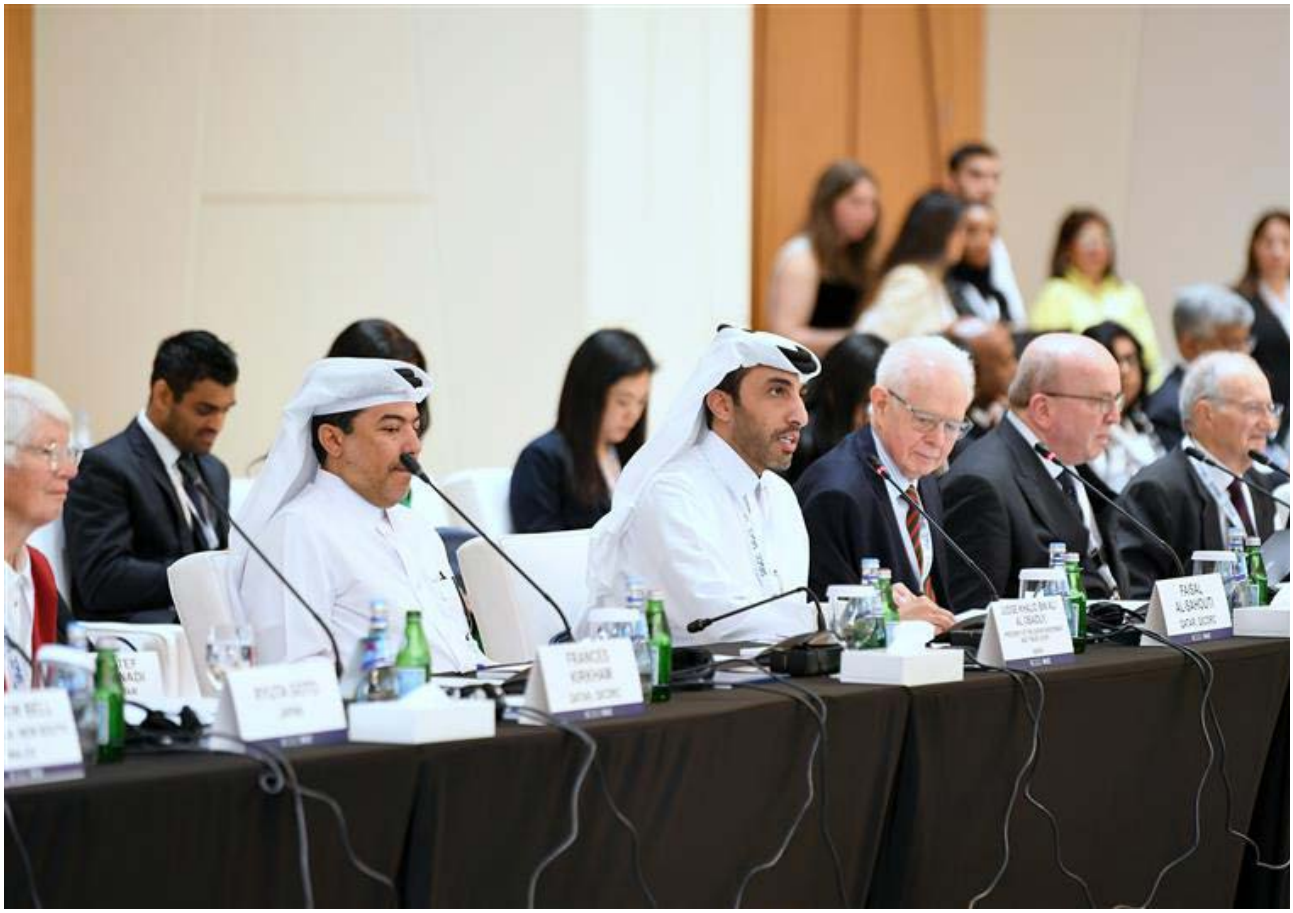
Sunday 21st April 2024	
	Further short addresses: **Chief Justice Olukayode Ariwoola [Nigeria]**, Chief Justice of Nigeria [5 mins] **Chief Justice Geoffrey Morawetz [Canada]**, Chief Justice of Ontario, Canada [5 mins] **Justice Mark Livesey [South Australia]**, President of the Court of Appeal, South Australia; Vice Chair of the Judges' Forum of the International Bar Association [5 mins]
	Roundtable discussion, second part [15 mins]
	Short closing observations: **Chief Justice Dr Faiq Zaidan [Iraq]**, President of the Supreme Judicial Council of Iraq [10 min] **Sir William Blair (QICDRC, Qatar]**, Qatar International Court and Dispute Resolution Centre; member of SIFoCC's Steering Group [5 min]
1600	**Coffee/ Tea Break**
1625	**Closing addresses** Introduced and chaired by: **Chief Justice Lord David Hope KT [ADGM, Abu Dhabi]**, Chief Justice of the Abu Dhabi Global Market Court [5 mins] **Mr Justice David Barniville [Republic of Ireland]**, President of the High Court, Republic of Ireland; Chair of the Judges' Forum of the International Bar Association [10 mins] **Chief Justice Bryan Sykes OJ [Jamaica]**, Chief Justice of Jamaica [10 mins] **Judge Yong Zhang [QICDRC, Qatar]**, Judge of the Qatar International Court; Judge of the Singapore International Court; former Chief Judge of the Fourth Civil Division, The Supreme People's Court of China [10 mins]

Sunday 21st April 2024	
1710	**Agreed actions and forward look** **Lord John Thomas** Agreed actions and forward look [10 mins] Short demonstration of the new website by **Ms Courteney Rose**, SIFoCC Secretariat [3 mins] A thank you to Qatar: [2 mins] Rapporteur: **Ms Maya Chilaeva**, barrister, Quadrant Chambers, England & Wales
1730	Transport from University to principal hotels Transport from University to QICDRC for **First QICDRC Visit** [1800-1900]. **[Please note: this visit must be pre-booked please as there are limited places available]**

Monday 22nd April 2024	
	[Please note: visits and tour must be pre-booked please as there are limited places available] **Second QICDRC Visit** is Monday 1000-1100 [departing principal hotels at 0930] **Visit to Qatar's Investment and Trade Court** is Monday 1200-1300 [departing QICDRC at 1130] An **Afternoon Tour of Souq Wafiq** is also available on Monday [departing principal hotels at 1630; returning 1830]

Extract from Opening Address

Delivered by Mr Faisal Rashid Al-Sahouti Al-Mansoori, Chief Executive of the Qatar International Court and Dispute Resolution Centre



'A little under two years ago, the world came to Doha for another significant international event, the FIFA World Cup in 2022. I have often described SIFoCC, to my non-legal friends, as the World Cup for Judges. And, in fact, it is even more international than the football world cup. We have in the room today, both in person and online, over 170 Judges from 6 continents, and 56 jurisdictions. These are extraordinary figures and demonstrate that the world's judiciaries regard the opportunity to convene as truly important – today, perhaps even essential. It also shows how truly international SIFoCC as an organisation is and will continue to be.

Alongside others, Qatar is pleased to play its part, not just for sport, but also for justice, international legal cooperation, and the rule of law. As a country that is striving further to develop its legal services sector, Qatar and its justice system and its profession are proud to have this meeting of SIFoCC take place here in Doha, the first city in the MENA region to host. It is a boon for Qatar's justice system and legal profession to host, and it is in line with the values of the 2030 National Vision to aid social, human, economic, and environmental development.

The international flavour of SIFoCC and its emphasis on collaboration between courts and judges from different jurisdictions, knowledge-sharing, raising standards of practice, access to justice and a firm commitment to the rule of law, truly chime with the values and objectives of the QICDRC. We are an international court in the classic sense of the word, with some 16 judges hailing from 12 jurisdictions, covering common law, civil law, and Islamic law. Our Judges collaborate closely, share their diverse knowledge, and produce robust judgments which draw in principles and best practices from different legal traditions, strengthening the rule of law'.

Short Updating Report on SIFoCC

Adenike Adewale, Head of Secretariat of SIFoCC

I am pleased to serve as Head of Secretariat, in succession to Grace Karrass, who sends warm best wishes to all.

I have the support of Courteney Rose and Simran Chard, and from the wider UK Judicial Office. I am also grateful for the support I receive from officials and staff from other member jurisdictions.

As Head of Secretariat, I work alongside Sir Robin Knowles who is the Judge with day-to-day responsibility for SIFoCC. He is accountable to the Steering Group.

The growth of the SIFoCC membership and the enhancement of relations among existing member jurisdictions has been one of our main objectives and we have not been alone in achieving this goal. This platform is a unique gathering. Everyone is strengthened by conversations such as these.

SIFoCC is proud to have worked with a range of partners. These include the Asian Development Bank and the World Bank; the Commonwealth Magistrates and Judges Association (CMJA); The British Academy; Foreign, Commonwealth & Development Office (FCDO) and ROLE UK; the International Bar Association; the International Council for Commercial Arbitration and the Chartered Institute of Arbitrators; IADRU; Justice Defenders; and Advocates for International Development (A4ID). Some of these have been able to join this meeting.

The Steering Group of SIFoCC, chaired by Lord John Thomas, has a membership drawn from five continents. It comprises Hon James Allsop, Sir William Blair, Chief Justice Andrew Cheung with Justice Jonathan Harris, Chief Justice Emeritus Bart Katureebe, Hon Geoffrey Ma, Chief Justice Sundaresh Menon, Hon Loretta Preska and Sir Geoffrey Vos.

Sir Robin Knowles and I wish to thank the Steering Group, led by Lord John Thomas, for its guidance and, above all, its trust.

Mr Justice Robin Knowles CBE, Judge with day-to-day responsibility for SIFoCC

At any one time, SIFoCC's agenda focuses on four themes, with additional subjects identified for update. The agenda has moved from themes one cannot do without (case management, enforcement of judgments, technology) to themes that the world needs to work on (AI, climate change, corporate legal responsibility).

Since the last Full Meeting in Sydney, we have held on-line judicial roundtables on litigation, arbitration and mediation, on case management, and on climate change. These have included roundtables focused on Africa and on Asia.

SIFoCC has led sessions at the invitation of and in partnership with the host organisation at meetings of the CMJA, the Commonwealth Lawyers Association and the International Bar Association. At London International Disputes Week a SIFoCC panel included participation from France, England, The Cayman Islands and Qatar. A meeting of professional bodies, commercial institutions and associations in London to explain and report on SIFoCC was well received and attended, and we hope other SIFoCC member jurisdictions might do something similar.

We have been asked to develop our contribution to construction disputes, to maritime disputes, and others.

Without SIFoCC, competition between jurisdictions could so easily be negative, relationships between judiciaries and jurisdictions would be fewer, and good practice would be obscured. The rule of law would be all the poorer when it is needed more than ever.

Thank you to Qatar, and QICDRC for the meeting ahead. The QICDRC officers and staff and the SIFoCC Secretariat have worked as a single team in preparation. Adenike Adewale and I thank everyone on the QICDRC side of that team, led by Faisal Rashid Al-Sahouti Al-Mansoori as CEO and Umar Azmeh as Registrar.

A report of the Fourth Full Meeting in Sydney was published in February 2023.
We propose a fuller report from this meeting than we have attempted before, so that the exceptional content of the meeting can be better shared with judicial colleagues and with the wider legal profession. Maya Chilaeva, barrister, generously serves as our Rapporteur.

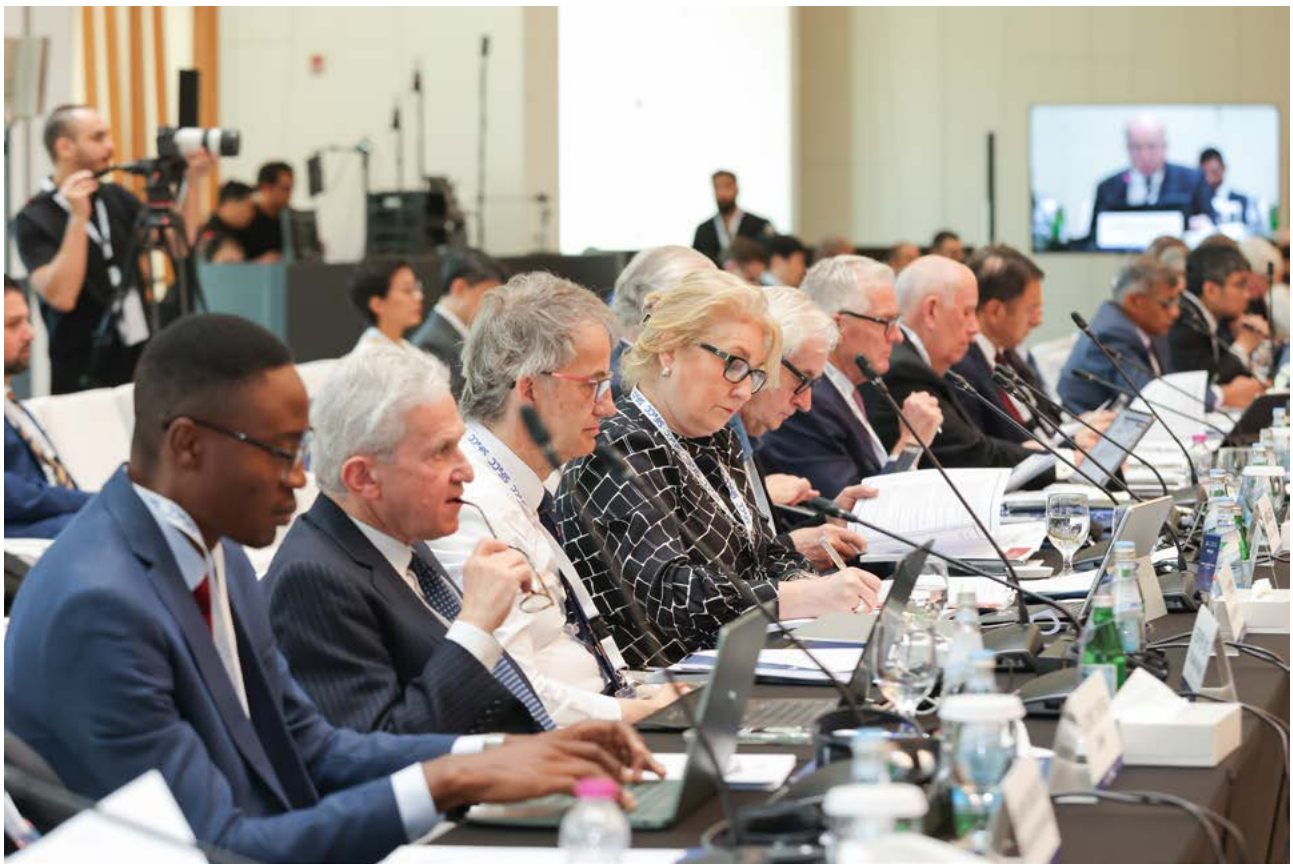
We welcome distinguished guests at this meeting from law firms Leigh Day; Paul Weiss Rifkind and Pogust Goodhead; from Graphcore (by its Chief Technology Officer); from Microsoft (by its Chief Scientific Officer); from the International Council for Commercial Arbitration (ICCA); and from the Emeritus Professor of Management Studies at Said Business School, Oxford.

I offer my complete thanks to Adenike Adewale for her work as Head of Secretariat.

Short Address

Delivered by Lady Chief Justice Sue Carr, Chief Justice of England and Wales

The Rule of Law and the importance of Justice and Justice systems



It is a pleasure to have been asked to give this short address. I am assured – and no doubt you will be assured to hear - that it must be a short address, as it is lunchtime!

It is, of course, seven years since SIFoCC was established. At its first meeting in 2017, there were just 25 jurisdictions represented. One year later, at its second meeting, there were 35. Not a bad start. By its third meeting in 2021, there were 37. Slower growth then was all too understandable as countries across the world dealt with the effects of the Covid-19 pandemic. By 2022 though, it had grown to 45 members. And today, SIFoCC encompasses 57 jurisdictions which, when taken together, amount to 70% of the G20 and span 6 continents.[1]

[1] https://sifocc.org/about-us/history-of-sifocc/

That development over such a short period of time is remarkable. As courts and judiciaries we could have continued to stand apart from one another: each our own metaphorical island. But in truth no court is or can be an island unto itself. SIFoCC's increasing success gives the lie to any suggestion that we could stand alone in not-so-splendid isolation. More than that it underscores a broader point. That courts are better equipped, better able to achieve their constitutional functions if they – and we as judges – can come together, exchange views, and learn from each other.

We have done each of those things. Best practice in case management. The Observation programme. Consideration of issues such as third-party litigation funding; an area with which we in England and Wales are grappling, and one that this Forum discussed at its last meeting in Sydney. Each one an example of where we have learnt from each other and, as the first of SIFoCC's objectives puts it, shared best practice in commercial dispute resolution.

Sharing best practice is not an end in itself. It must always be done for a purpose. Most obviously to support the rule of law; SIFoCC's second objective. And in thinking of that we need to be clear in our minds about how courts can and do support that objective. Most obviously we do so through adjudication. It is often said that the primary function of courts is to resolve disputes. No one could sensibly doubt that. We need to be careful though. It should not be thought of as the court's sole or exclusive function.

Our civil courts support the rule of law in three fundamental ways. Through their judgments, they help to guide behaviour. Promoting lawful conduct. Helping to minimise the prospect that disputes arise. They thus help to **prevent** disputes arising. Access to courts and, again to guidance given from their judgments, helps promote effective consensual resolution. Helping to minimise expenditure of party time and resources on dispute resolution, and thus helping to promote the utilisation of those resources on the parties' primary social and economic activities. And the third way. Well that, of course, is **adjudication**.

Prevention, resolution and adjudication. Three ways in which our courts promote the rule of law. Where commercial disputes are concerned, it is crucially important that we always bear these three functions in mind. Not just commercial disputes though. As with courts, commercial disputes do not stand in isolation. They too are part of the wider whole. Commercial disputes can have an impact on families. They can give rise to and be affected by criminal liability, not least where fraud is concerned.

In developing our approach to commercial disputes, we must not just bear in mind the court's three functions as identified, but equally we must consider the interrelationship between different types of dispute. The more commercial courts can help guide lawful behaviour and help to minimise the prospect that disputes arise through the clarity of their judgments amongst other things, the more effective they will be in helping to promote the rule of law, business confidence, and economic growth to the benefit of society, locally, nationally and globally.

The importance of these points should remind us that our dialogue through SIFoCC should not just focus on how we can better manage and resolve disputes through adjudication. It should continue to focus our minds on how we can most appropriately integrate prevention, resolution and adjudication; an issue considered by SIFoCC in Sydney and one to which some of our discussions at this meeting return as our approaches develop, not least in the light of continuing digitisation of our court processes.

There is another point that flows from consideration that no court is an island unto itself. The great benefit of SIFoCC is that it enables judiciaries to build fruitful relationships at the highest level. At the heart of effective dialogue and understanding is connection. SIFoCC helps to foster the former through providing the basis for us all to meet and connect in person. Much as online meetings are beneficial, an in-person meeting remains the gold standard.

It seems to me that these connections and dialogues are all the more important when one looks at the every increasing and complex challenges that we face – new to us all and which do not stop at borders – climate change and society's relationship with AI to name but two.

We cannot just work between ourselves. Public understanding and confidence in our courts requires us to build effective dialogue with civil society; to make that broader social connection. Judges should, of course, speak through their judgments. But they need not be limited to doing so. There is much we can do to help promote public understanding of the role and importance of commercial courts in particular, and our justice systems in general. Whether it is taking steps to make our judgments more accessible, promoting various forms of public legal education, or contributing to educative programmes in schools, we need to take steps to be more open to wider society.

And in this I do not just mean that within our own jurisdictions we should be more open and connected to wider society. But we could and should take steps to foster an understanding of each other's courts within our own jurisdictions. Legal academics are known to enjoy comparative study. We need not let them have all the fun! The more we foster such an understanding, not least of the importance of the rule of law, of our commitment to it and how we give effect it, as well as how it benefits all our jurisdictions, the better placed we will be to build and enhance confidence in our courts. And the better placed our courts will then be to foster economic growth and the benefits it provides to us all as the UN rightly recognised in 2015 through its Sustainable Development Goals.[2] As its Goal 16.3 put it, *'Promote the rule of law at the national and international levels and ensure equal access to justice for all.'* SIFoCC has already played a significant role in helping to achieve that goal. The more we develop our dialogue both amongst each other and in an outward-facing way, the more we will be able to do help give effect to it.

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[2] Transforming our world: the 2030 Agenda for Sustainable Development, UN Doc. A/RES/70/1 < **Transforming our world: the 2030 Agenda for Sustainable Development | Department of Economic and Social Affairs**>.

Theme 1: AI in the World; AI in the Handling and Resolution of Disputes

Co-chaired by: Chief Justice Andrew Bell, Chief Justice of New South Wales; Justice Frances Kirkham, Qatar International Court; Justice Ian Gault, High Court of New Zealand

Guest Experts: Eric Horowitz, Chief Scientific Officer, Microsoft; Simon Knowles FRS, Chief Technology Officer, Graphcore; Professor Colin Mayer CBE, FBA, Emeritus Professor of Management Studies at the Said Business School, University of Oxford

Prepared judicial contributions from: Singapore, India, Brazil, Indonesia, England and Wales, The Gambia, Saudi Arabia, USA, Germany and France.

A. Introduction[3]

As the roadmap leading to this discussion recognised, at its broadest the setting involves exploration of what AI means for human society.

On 30 November 2022, OpenAI publicly launched ChatGPT. A month earlier, the fourth full meeting of SIFoCC took place in Sydney, where generative AI was not even on the agenda. Fast forward just over 17 months, AI has become a priority topic. ChatGPT, now in its fourth iteration, is accompanied by other applications, including bespoke legal tools. International law firms are developing their own AI platforms. In short, AI is a significant force in the world, and presents both challenges and opportunities.

Commercial courts, commercial law, and the rule of law, may have a crucial part to play in whether and where AI contributes successfully or unsuccessfully in the world. In turn, AI may have a crucial contribution to make to commercial courts, commercial law, and the rule of law.

This field is rapidly evolving, crosses borders, and is complex. Judges, often stretched by limited resources, have little time to tackle the myriad issues arising from this technology. International judicial dialogue and cooperation will be crucial in addressing future challenges. Governments are unlikely to lead the way, so judges must proactively engage, within constitutional boundaries.

Education is the first step.

[3] Chief Justice Andrew Bell, Chief Justice of New South Wales.

B. Briefing by guest experts

Simon Knowles FRS, Chief Technology Officer, Graphcore

"Intelligence: artificial and human"

You will have heard that artificial intelligence, AI, is the "new big thing". We have taken the first steps on a path to mechanise intellectual work, and to free ourselves from the limits of human problem-solving capacity – much as, from the invention of the steam engine 300 years ago, we have mechanised physical labour.

AI will soon be pervasive. AI will mediate our access to information. AI will produce our entertainment. Some AI will be embodied, as robots. To some AI we will grant agency, to organise our lives and make decisions on our behalf.

We all have our hopes and fears for this revolution. My greatest hope is that it will bring the end of disease – that AI will help us to analyse any human pathology, and to synthesise a cure using the emergent techniques of biochemical engineering, such as clustered regularly interspaced short palindromic repeats (CRISPR). The end of disease is not beyond the reach of sufficient intelligence, eventually. I also hope that AI will help humans to organise themselves in very large numbers, so that large corporations, national health and transport services, and governments, can achieve the efficiency that small groups of humans are capable of.

Today AI is nascent, and to some extent hype has overtaken reality.

But the reality is already astonishing. I can converse with a computer as I would with an adult human. AI is fluent in many languages and knowledgeable in many subjects. I can ask it to paint an original picture in the style of Monet and it will do a fine job. I can even ask it to make a short movie of my nephew battling aliens on Mars, and it will do so at cinema resolution, with an original storyline and soundtrack. More seriously, I can already ask it to propose candidate molecules for target pharmacological properties, or to design a media strategy to defeat a political opponent.

None of these capabilities seemed likely even five years ago. As an engineer at the core of this evolution, I might pretend that we saw it all coming. We did not. We had our hopes, but even the deepest experts in this endeavour are astonished at the rate of progress. This velocity makes preparing for an AI future difficult, for technologists, for businesses, and of course for legislators.

I will say a little about how today's AI technology works, so that you can see where we are, on the arc of progress.

AI is computation. Understanding and mechanising intelligence is perhaps the ultimate goal of computer science. An AI is a program running on a computer, receiving input data and generating output data.

We are used to thinking of computers as calculators – deductive machines which can produce the correct answer to a problem very quickly, provided we humans first discover a method of solution and encode that as a computer program.

AI brings two new things to computers. Firstly, *induction*, the generation of *plausible* results where there is no singular correct result. Secondly, *learning* – AI does not need a human to provide a problem-solving program, because like us it can learn from examples and hints. The computer code behind AI defines only how to infer and how to learn. What is learned – the actions of the AI – is derived from the data itself.

Aside from the prospect of greater intellectual capacity, AI has some major advantages over biological intelligence in the job of learning. Anyone familiar with children will recognise the difficulty of training each new human intelligence. A trained AI can be cloned. A skill learned by one AI can be copied to others. An army of AIs can amortise the work of learning even one skill – they can each learn from different training data and then pool the effect of their learning.

A true intelligence needs three components.

The first is communication, the ability to extract meaning from input data, and to express outputs coherently and/or eloquently to humans. The data may be a mix of words, diagrams, pictures, videos, sounds, mathematics, computer code. All the modes used by humans for the communication of ideas.

The second component is knowledge. Like humans, AI remembers a comparatively small amount of intrinsic knowledge in its "brain" but can refer to a much larger body of extrinsic information such as the internet.

The third component, and the hardest to measure, is reasoning. Formally this boils down to planning the use of tools, such as mathematics or algorithms.

AI technologists have made progress in mechanising all three of these components – communication, knowledge, and reasoning – but AI is at a different stage of maturity in each. This can lead to premature judgement of AI's capability and potential.

Today's AIs are primarily good communicators with relatively weak grounding in knowledge and even weaker reasoning capability. But this forum will not underestimate the power of eloquent communication in the expression of intelligence.

The operation of modern AI can be understood in terms of one remarkably simple objective – to predict the most plausible next item in a sequence of items. The items might be words in a passage of text, or sounds in a passage of speech or music, or small patches of pixels in an image or video. In the language of AI these are all referred to as *tokens*. The AI determines the most plausible next token in the sequence by reference to the statistics of a vast number of token sequences on which it was trained. Those learned statistics are stored in a data structure called a *model*.

Humans start any interaction with an AI by providing a *prompt* sequence, for example a sequence of words forming a question. The AI will simply generate the most plausible next word to extend the sequence. Then the next, and so on, until it determines that the next most plausible word is no word at all – the sequence is complete. The user may continue the conversation by adding further words, and the AI will respond by trying to complete the newly extended sequence.

I have over-simplified this description of modern AI, but not by much. We have discovered that this simple process – iteratively predicting the next token in a sequence – is sufficient to learn to speak all human languages, to emulate great painters, to recall knowledge from a vast corpus of training data, and to perform elementary reasoning.

In other words, maintaining the coherence of a word sequence is sufficient to maintain a coherent flow of ideas, and to retrieve relevant knowledge. This remarkable discovery might lead us to question the nature of our own mental processes. Just as we now better understand the complex emotions of humans by reference to hormones and other chemicals in the body, so too we might come to understand our thinking in terms of a token-by-token generator operating according to a statistical model built up from our experience.

The mechanism is not perfect. Sometimes a coherent sequence of words can represent an incoherent sequence of ideas. The AI can make something up, because it determines a word sequence to be plausible and it is not concerned with truth. This is called *hallucination*, but should be interpreted more broadly than that phenomenon in humans. It means the generator can introduce invention or irrationality into an otherwise coherent response.

Hallucination arises primarily from an incomplete AI – the generator is not sufficiently anchored to ground truth knowledge. Humans sometimes display a similar deficiency. Rapid progress is being made in reducing this problem, primarily by forcing the AI to align to an extrinsic knowledge base, such as the internet or something more curated.

AI will inherit human biases from training data we have authored. But beyond that, I urge you not to *anthropomorphise* – that is, don't assume AI should be like human intelligence. We have, through scientific endeavour, discovered the first non-biological intelligence. Now that we know that is possible, we will look for other species, and will probably discover many. Just as the steam engine wasn't the last word in engines.

The processes of learning and inference in AI are different from those of the biological brain, and AI necessarily has a very different learning experience to a human. Our minds are realised in the 100 trillion synaptic connections of our brains. We can now build an AI with similar complexity. But it will not think like us. We should look to the opportunities of *complementarity*, not just emulation of human intelligence or superiority over it.

As an aside, I should say something to distinguish pre-AI technology. Many of you will have used software for years for things like document summarization or language translation. This is possible at some quality level without AI, using complex heuristics designed by human experts. But AI can learn to do these things without expert help, and already out-performs.

Finally, a word on cost, and therefore control. AI is now commercially useful. From this threshold its development should benefit from an economic flywheel. And the mechanisation of intelligence will be an accelerator for all other fields of human enquiry. It will cause technological advance to speed up across a broad front. AI will accelerate global productivity, and wealth disparity between high-technology nations and low-technology nations.

AI is expensive to create. Given sufficient training data and sufficient model capacity, the capability of an AI depends primarily on the computational work applied to training it. Millions of dollars of computer time are required today for each attempt to train a new large language model from scratch. Those attempts don't always succeed. Billions of dollars have already been spent by private companies on computers to do such work continuously.

Those computers are full of silicon chips. Semiconductor manufacturing is a hot-spot of global trade protectionism, and the desire to control AI is magnifying that. And those computers require considerable energy. AI computers are being designed today with dedicated electrical power plants which would suffice for a small city.

Unless governments decide to democratise AI, intelligence capability will concentrate in the largest commercial and state actors.

Let me close with a summary of the key points I have raised.

AI is nascent, but it is real. The mechanisation of intelligence will surely have greater impact on humanity than the industrial revolution, and it is happening far faster.

Today we have one species of AI. It will help us to discover others. AI will not think like us. But how it behaves depends almost entirely on how it is trained – that is under our control.

AI is difficult to engineer and very expensive, so power will concentrate in the hands of few.

Eric Horowitz, Chief Scientific Officer, Microsoft

We are in a fascinating era for technology, witnessing impressive glimpses of general intelligence in AI models, displaying powers of composition, generalisation, abstraction, and synthesis.

These advancements come from scaling simple methods to create complex internal representations of the world, surprising even long-term researchers. And ongoing research aims to address the scientific foundations of these advancements.

Despite uncertainties, it is widely recognised that scaling will continue to reveal new capabilities, with AI evolving rapidly and models like GPT-5 potentially being game-changers within 18 months.

The next 25 to 50 years may be historically significant due to technological transitions, impacting commercial courts and requiring mechanisms and policies for effective human-AI collaboration.

AI systems raise issues of accuracy, reliability, fairness, accountability, transparency, security, and privacy, with new legal grey areas emerging, including questions about responsibility, liability, intellectual property, copyright, and privacy.

AI can be used maliciously for deception, posing risks to democratic processes and potentially leading to a post-epistemic world.

Different regulatory frameworks reflect cultural and policy attitudes, with the US AI Bill of Rights emphasising transparency and accountability, while the EU AI Act categorises AI systems by risk and enforces strict rules and penalties.

Today's AI models offer new capabilities, such as summarisation, data analysis, and facilitating discussions, which can aid international courts in legal research, translation, predictive analysis, documentation, and education.

Professor Colin Mayer CBE, FBA, Emeritus Professor of Management Studies at the Said Business School, University of Oxford

"AI and the corporation"

AI will have significant implications for the future of corporations as legal entities, particularly in areas such as corporate purpose, decision-making, and governance.

AI will significantly impact corporations as legal entities in three main ways: (a) by providing information; (b) by offering advice; and (c) by taking decisions.

Information

The potential of AI to enhance the ability of companies to process information in determining the likely consequences of any decision on the success of the corporation is self-evident. AI will allow companies not only to ascertain the consequences of decisions in the long-run under different scenarios of future developments but also to evaluate the likely responses of competitors and regulators and optimise their behaviour accordingly. As a tool of competitive strategizing, it will have a transformative effect on the conduct of firms.

Advice

The second aspect of AI is as a source of advice. Much of the more routine advice that companies receive will be rapidly replaced by AI. Consultancies are having to re-evaluate the role that they will be able to play as increasingly sophisticated forms of AI come on stream. Viewed simply as advice, which remains the responsibility of boards to decide whether to accept or reject, it does not raise particularly significant issues or concerns and should be welcomed as a source of improved decision taking by boards.

Indeed, as will be explored in greater detail as part of Theme 3,[4] AI will provide courts as well as companies with an extremely powerful tool for determining the effects that companies have on not just their members, their shareholders, but all those parties on whom they impact.

Decision-taking

However, it is in relation to the third aspect – namely decision-taking – that I believe that the most profound issues arise. So long as the board of directors are, as it is said "in the loop" and ultimately responsible for decisions taken then AI remains in the realms of information and advice. But what is becoming increasingly in the realms of science fact rather than science fiction is that AI machines take decisions not simply offer advice without human intervention.

You might say that, well that should simply be ruled out of court, not admissible, and indeed some jurisdictions are moving in the direction of requiring that human directors remain in the loop. But that may not be as easy to enforce as it might appear. As with much in corporate law, it may not be the law that is the ultimate adjudicator of conduct. The power of the market and competition may be overwhelming.

In the presence of machine learning, we are aware of the risks of humans losing control in military conflict. In essence the wars of the future will be determined by the relative rates of machine learning. But so too will competition between firms and conflicts between firms and their regulators because regulators will themselves be no more than self-learning algorithms.

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[4] Corporate activity and the rule of law

There will be two fundamental requirements to avoid the dire consequences of this. First that machines be programmed to serve mankind and, second, that the companies that develop the algorithms have a duty to serve all of mankind now and for the indefinite future. And that comes on to the purpose of the corporation as well as AI, on which further discussion can be found under Theme 3.

At this point, I only have time to emphasize that AI illustrates the urgency of sorting this out now because AI poses a much more immediate and serious existential threat to humanity from failing to get this right than climate change or global warming.

It also provides particularly powerful insight into what is the real source of the problem. It is not a problem of who can bring derivative actions or to whom the board is accountable. It is simply a matter of "what is success" if it is determined by AI machines who are creating immense value for their members, who may of course themselves be AI machines.

C. Brief judicial updates on AI from a selection of jurisdictions

(1) Singapore[5]

Singapore launched its second National AI Strategy in December 2023. The government committed $1 billion for AI development over the next five years. The focus is on developing AI in a responsible way and in line with the rule of law.

Singapore's Infocom Media Development Authority introduced a new AI governance framework for generative AI. There have been few AI-related cases so far, but notable examples include (a) cases on algorithmic trading of cryptocurrencies and the contractual doctrine of unilateral mistake *(Quoine v B2C2 Ltd (2020))* and (b) cases considering whether non-fungible tokens ("NFTs") can be considered property for proprietary injunctions.

Future legal issues may include questions such as whether AI systems should have legal rights, such as being recognised as the inventors of certain patents under the Singapore Patents Act, as similar questions have arisen in other jurisdictions. The question of how to ascribe liability for harms caused by AI systems is also expected to arise. The Singapore Land Transport Authority has approved the testing of autonomous vehicles by private operators in Singapore. As these trials expand in scale, courts may need to deal with questions of liability. The Singapore Law Reform Committee issued a report in September 2020 on the attribution of civil liability in accidents involving autonomous vehicles.

[5] Justice Yihan Goh, Supreme Court of Singapore.

In August 2023, Singapore courts signed a Memorandum of Understanding to develop an AI program for the Small Claims Tribunal to assist with legal queries and case preparation.

AI may have a role to play in dispute resolution in at least the following three areas. First, in small claims disputes. Indeed, an AI platform is already being developed to assist litigants in person with small claims. Secondly, in maintenance applications in family proceedings, where AI can provide first-instance determinations based on objective criteria, offering quick and affordable outcomes for distressed families. Thirdly, in traffic accident cases, which tend to be straightforward and pattern-based, and otherwise consume significant court time. In each of these instances, any AI-determined outcomes would likely maintain the right for a decision to be reviewed by a human judge. This right would be unqualified, and would be accompanied by potential cost consequences if the AI determination is found to be correct.

(2) India[6]

Currently, Generative AI is being used in India's Supreme Court to improve access to justice for the ordinary person. India is a diverse country with 22 official languages. Accurate transcriptions of court proceedings have enabled many litigants who do not speak English to participate despite language barriers.

Furthermore, to make the judicial system more user-friendly, judgments from commercial courts are being translated into local languages.

The e-Committee of the Supreme Court of India is developing a tool called "AI Saransh". This tool will generate summaries of the parties' pleadings, highlighting contentious issues and summarising relevant case law.

Generative AI is still unstable and can produce incorrect results confidently. An example is the well-known *Avianca* case where ChatGPT provided inaccurate information.

There is a conflict between health rights, AI, and Indian law. Philips has a pilot programme for a handheld ultrasound device with an AI add-on that interprets images. This device could address the shortage of radiologists in India's tribal and underdeveloped areas. Philips plans to offer it for $1 or $2 a day in poor countries. However, strict Indian regulations on ultrasound machines, due to concerns about gender-based abortions, hinder its rollout.

At a recent AI conference in New Delhi, the Chief Justice of India suggested taking small steps, such as using AI for minor cases like traffic violations, cheque bouncing, and motor vehicle accident claims.

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[6] Justice Manmohan, Acting Chief Justice of the Delhi High Court.

(3) Brazil[7]

The technological revolution in the Brazilian judiciary began in 2006 with the introduction of the Law of the Electronic Process. This initiative led to the digitalisation of nearly all ongoing cases (~99%) and 87% of historical cases.

The next phase focuses on automating repetitive tasks to handle the large caseload and improve judicial productivity. This included developing tools for classifying cases, automatic notifications, and collecting money judgments.

The third stage saw the adoption of advanced AI systems, with ~150 initiatives currently in use or testing. These systems include chatbots for providing information to litigants and tools for identifying connections and legal precedents using natural language processing ("NLP"), similarity learning, and neural networks. The Brazilian Supreme Court's "Victor" system, trained with machine learning, can rapidly identify topics that may qualify for an appeal (those with broader public significance), significantly reducing analysis time from 40 minutes to seconds.

To oversee these systems, the National Council of Justice ("NCJ") launched the SINAPSES platform in 2020. This platform centralises AI model supervision, control, and auditing. In the same year, the NCJ regulated AI tools in the judiciary, focusing on issues like opacity, discrimination, and data curation.

The development of these systems was driven by judges with programming skills. Their interdisciplinary expertise and visionary leadership were crucial in creating these innovative solutions.

The CODEX project, recently launched by the NCJ, aims to create the world's largest repository of judicial data. This project started from the manual submission of lawsuit information via a system called "DATAJUD" by civil servants, which often included incomplete and non-standardised metadata.

Seeing the potential of available electronic formats, Judiciary leaders initiated CODEX to automate data extraction, including lawsuit documents, for deeper analysis through algorithms.

[7] Judge Isabela Ferrari, Federal Court of Brazil.

The project is structured in two phases:

- Phase 1: Focuses on collecting structured data for business intelligence and training simpler AI tools.
- Phase 2: Involves analysing documents from over 260 million cases. Completing this phase will enable precise analysis, information standardisation, and support for jurimetrics and AI-generated document creation. This will shift the question from "what can we do with AI" to "what should we not do with AI", as almost anything, including the concept of a robot judge, could become possible.

Currently, CODEX is acquiring the necessary database. Once complete, it will pave the way for advanced transformations. This journey highlights the evolution from creating electronic systems to forming a comprehensive data repository, setting the stage for rapid advancements once CODEX is fully operational.

The Brazilian judiciary has embraced generative AI tools, generating both excitement and concern.

On the negative side, ChatGPT has already prompted a disciplinary investigation. In a federal court, a judge issued a ruling based on a non-existent precedent. The error was uncovered when it was revealed that a civil servant had used ChatGPT to draft the decision, which went unnoticed due to the high volume of cases.

Despite this setback, supporters of generative AI believe it holds great potential for judicial development. A working group has been formed to examine and regulate the use of AI in the judiciary. Additionally, judicial institutions are now offering courses on legal writing with ChatGPT, which have attracted interest from judges.

With the extensive CODEX database and various machine learning applications, generative AI is set to become a key element in the evolution of the judiciary. In Brazil, the next two years are expected to be more transformative than the past 18 years combined.

(4) Indonesia[8]

AI is not currently widely used in Indonesian courts. Its use is limited to "soft AI" that supports judges, primarily in simple cases. For instance, an electronic traffic law enforcement system uses AI for automated enforcement of traffic violations. An algorithm-based system for automatic panel appointments in the Supreme Court considers case complexity and judge workload.

The judiciary is committed to modernisation and recognises the potential of AI to improve court services. Indonesia has a strong foundation for future implementation of AI due to its large digital database of judgments spanning over 10 years. An early

[8] Justice Lucas Prakoso and Justice Rahmi Mulyati, Supreme Court of Indonesia.

detection system is being developed to help judges find similar cases, ensuring consistency in decision-making.

However, the court system faces several challenges. There is a struggle to increase the use of e-litigation and electronic case hearings. Ethical concerns also exist about relying solely on AI for final judgments, particularly because AI lacks important human qualities, for example compassion. The cost of AI training is also an important factor to consider.

Looking ahead, AI could play a larger role in certain types of cases, for example in resolving family law disputes, in divorce and inheritance cases. AI recommendations could help parties reach agreement on certain issues before involving judges, potentially saving time and money. The approach to integrating AI into the judicial system in Indonesia will likely focus on using AI proportionally to support human judges, maintaining human involvement in the judicial process while leveraging the capabilities of AI. AI is not expected to replace judges.

(5) England and Wales[9]

In England and Wales, the guidelines for judges, heavily influenced by the approach in New Zealand, address three main issues, namely understanding, confidentiality and responsibility.

As regards the first of those points, judges must understand that AI models such as ChatGPT predict the next most likely word rather than providing a database of information. This means AI cannot be regarded as reliable for factual accuracy, and judges must be aware of this limitation to avoid proceeding on the wrong basis.

Secondly, judges must not feed confidential information into public chatbots, as this information could become publicly accessible. While private chatbots are being developed, using a public chatbot for confidential information would be a significant error.

Thirdly, judges must remember that their work product, regardless of the tools used, is their responsibility. It is not the responsibility of the AI or chatbot used.

There will likely be discussions at the next SIFoCC meeting about the liability for using or not using AI in circumstances where it could be beneficial. Ultimately, a judge's work product remains their own responsibility, as does that of any lawyer.

In England and Wales, efforts are underway to create a digital justice system. This system aims to integrate mediation, arbitration, litigation, and pre-action dispute resolution processes online. AI will play a role in this system by directing people to the appropriate portal, ombudsman, or dispute resolution process, and by keeping them informed about their cases. This use of AI is expected to enhance the efficiency and reliability of the judicial process, benefiting those it serves.

[9] Sir Geoffrey Vos, Master of the Rolls and Head of Civil Justice, England & Wales.

The Technology and Construction Court[10]

To stay ahead of this rapidly evolving technology, the Technology and Construction Court ("TCC") of England and Wales has established an AI committee, which aims to:

- Encourage constructive use of new technology.
- Protect courts and users from potential adverse effects of new technology.
- Develop new procedural rules and practices for AI use in disputes.

Disclosure[11] is a key area where AI is already having an impact. Since 2016, predictive coding has been used for disclosure in large commercial cases. The TCC was the first UK court to develop an e-Disclosure Protocol. Newer AI tools, including generative pre-trained models such as ChatGPT, are being adopted by UK law firms. These advanced AI models can conduct context searches and interrogate documents to answer questions about document sets, processing a vast range of inputs quickly, including images. A significant challenge for the courts will be verifying the reliability of these models and the sources of their answers.

The use of AI does pose risks and challenges. One example is the issue of AI "hallucinations" – errors due to insufficient training data, incorrect assumptions, or biases. However, once confidence in the reliability of these AI models is established, faster and cheaper methods of conducting disclosure are expected to become commonplace.

Beyond disclosure, the ability of AI to interrogate evidence is promising. It should help parties quickly identify evidence relevant to key issues, saving hours of human work and reducing costs. This efficiency could make meeting tight commercial deadlines for documentary evidence more feasible.

During hearings, judges need to have relevant evidence readily accessible. Generative AI can swiftly and accurately interrogate this evidence, allowing judges to compare witness statements for consistency with other evidence sources. In appropriate cases, AI can test human judgment against numerous "what if" scenarios, informing decision-making with provisional outcomes.

While AI is likely to transform the litigation landscape, there is scepticism about the role of algorithmic judges in the TCC, at least in the near future. AI may never replicate the nuances of human judgment required in multifaceted and complex disputes. Despite this, it is evident that AI will significantly transform the litigation landscape, possibly faster than anticipated.

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[10] Mrs Justice Joanna Smith, Judge of the Technology & Construction Court, England & Wales.

[11] Or "discovery". The process by which the parties are required to provide to each other the documents (usually contemporaneous and including electronic documents) that are relevant to the issues in dispute.

(6) The Gambia[12]

Judicial independence is fundamental to the administration of justice. This independence must be paired with measures to promote efficiency to ensure the rule of law is upheld. To this end, a five-year judiciary strategy plan has been developed in The Gambia, outlining several key objectives and goals, which include the following:

- Improving the efficiency of court processes and service delivery.
- Harnessing technology to support court functions and improve access to courts and tribunals.
- Ensuring effective justice through efficient court rules, preventing delays, and enhancing court management systems.
- Establishing efficient records management systems.

A significant focus is on digitising and automating court processes, such as recording and transcribing court proceedings and digitalising the serving and filing of court documents. Strengthening the court-connected ADR system and establishing specialised courts and tribunals are also important components of the plan.

Achieving these goals requires substantial resources. In The Gambia, the needs to the judiciary must compete with other pressing demands in the social sector, such as education, health, and shelter, within the context of scarce and limited resources. Therefore, international cooperation is critically important to strengthen the rule of law. In this regard, The Gambia has received support from international partners, including the United Kingdom, USA, European Union, Nigeria, Ghana, the United Nations and SIFoCC.

(7) Saudi Arabia[13]

The Saudi Arabian Ministry of Justice (MOJ) is leading efforts to integrate AI into the country's legal system, aiming to enhance service quality and streamline processes. These initiatives cover a range of applications, from automating routine tasks to assisting in the creation and amendment of legal rules.

A key focus of the MOJ's AI strategy is leveraging data analysis to predict case outcomes, potentially revolutionising the approach to legal proceedings. This technology shows promise in clarifying and simplifying both domestic and international commercial cases, making the legal system more accessible and efficient.

[12] Chief Justice Hassan Jallow, Chief Justice of The Gambia.

[13] Judge Ibrahim Alatram, Head of Riyadh Commercial Court of the Kingdom of Saudi Arabia.

Whilst embracing these technological advancements, the MOJ places paramount importance on data protection and maintaining high standards in decision-making processes, particularly when handling AI-related cases. This reflects a commitment to balancing innovation with ethical considerations in the pursuit of a more effective legal framework.

(8) USA[14]

The rapid advancement of AI technology has started to significantly impact the legal profession, and it presents both challenges and opportunities.

A cautionary tale from the New York courts in early 2024 highlights the potential pitfalls of AI in legal proceedings. In a civil lawsuit involving an airline, a lawyer relied on legal precedents generated by ChatGPT, which it transpired had been fabricated by the chatbot, leading to the imposition of costs sanctions on the lawyer. This incident underscores the critical need for lawyers and judges to be vigilant in verifying AI-generated information and to develop skills in identifying analytical shortcomings in AI-produced data.

The integration of AI into legal practice requires education and training programmes for both the judiciary and legal professionals. Some courts have already established task forces to develop training initiatives addressing the use of AI in disclosure[15] and to consider related ethical and evidentiary issues.

(9) Germany[16]

In Germany, the legal landscape is experiencing a significant shift due to an influx of class action lawsuits. This surge has prompted lawyers to adopt AI technology to efficiently generate legal briefs for numerous claimants. The widespread use of AI by legal professionals has, in turn, created a ripple effect that extends to the judiciary. Judges are now grappling with the need to embrace AI solutions themselves to effectively manage and organise these mass cases.

The EU has been proactive with regulations such as the General Data Protection Regulation ("GDPR") and the AI Act, aiming to set guidelines for the development and use of AI. However, these regulations may already be struggling to keep pace with the rapid advancements in AI technology.

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[14] Judge Kevin Castel, US District Judge, Southern District of New York; Ms Katherine B. Forrest, Partner, Paul, Weiss, Rifkind, Wharton & Garrison LLP, former US District Judge, Southern District of New York.

[15] See above.

[16] Dr. Patrick Melin, Presiding Judge of Stuttgart Commercial Court.

(10) France[17]

In France, and across Europe, the integration of AI into the legal system has sparked debate and regulatory change. The newly adopted EU AI Act classifies justice as being at "high-risk", because of the potential threats AI poses to public interest and fundamental rights protected by EU law.

Despite the recent change in regulation, it may still not be enough to protect fundamental rights, because of the speed of change in AI technology. Existing regulations such as the GDPR focus on protecting personal data, which is important because AI systems rely on large datasets. However, such regulations may not fully address the challenges posed by AI in commercial cases. In such cases, the use of AI often involves the generalisation of open data, including company information, rather than just individual data.

This raises questions about whether and how to protect parties from the "adverse" use of legal decisions, as AI can analyse publicly available rulings, potentially giving parties access to extensive data beyond a company's current disclosure obligations. One proposed course is the anonymous publication of court decisions to protect the identities of involved parties and reduce data misuse. However, this approach is not foolproof, because sophisticated AI systems may still be capable of de-anonymising data, potentially identifying the companies or individuals involved. It is important to take into account this additional risk when considering how to implement AI in the legal system.

D. Roundtable discussion

The points, observations and thoughts below were among those raised in roundtable discussion between the judges and including the guest experts.

(1) AI in the world and in commerce

AI is an inevitable development that cannot be ignored, particularly by the judiciary.

Generative AI, unlike any technology before it, enhances humanity's ability to think, reason, learn, and express ourselves. It is not merely a search engine but a thought engine. So, it is no surprise that Generative AI is considered the fourth industrial revolution.

Commercial law is fundamentally a user's law. Entrepreneurs are known for their adventurous spirit, risk-taking appetite, and creativity. Commercial lawyers and litigants are unlikely to ignore any technology that is easily accessible, legally permissible, has immense future potential, and above all, increases profitability.

[17] Judge Fabienne Schaller, President of the International Commercial Chamber, Court of Appeal, Paris; M. Patrick Sayer, President of the Tribunal De Commerce De Paris.

Looking ahead, the proliferation of AI is likely to generate new legal challenges, particularly in areas such as intellectual property, licensing, contracts, insurance, and the use of deep fake evidence. The legal profession must prepare for an increase in AI-related claims and disputes.

The question was posed whether Decentralised Autonomous Organisations (DAOs) would or should be recognised as having a legal personality?

AI can spread easily since it only requires a smartphone, which many people already own.

Developing countries face significant shortages of skilled labour. AI could alleviate this shortfall, not by replacing existing workers, but by helping them become more productive.

(2) AI in dispute resolution

The current state of AI technology presents both opportunities and limitations in its application to legal processes.

Over the years, commercial disputes have become more complex and lengthier. When commercial laws were originally enacted in most countries, no one anticipated a "borderless world" where transactions could be completed across continents with the click of a smartphone button.

In a borderless world, countries must agree on basic principles for using AI in courts. Until then, judges should adopt best international practices, which must be flexible to accommodate local contexts.

Dispute resolution cannot be reduced to applying mathematical formulae. AI cannot replicate human attributes such as equity, justice, empathy, and understanding the underlying dispute. Therefore, Generative AI cannot replace human judges.

AI still struggles with tasks that require human reasoning, empathy, and nuanced judgment. This limitation means that, for now, AI is better suited to administrative and analytical tasks rather than judicial decision-making.

There are however many positives. AI offers significant potential for improving efficiency in legal processes, including assessing claims, drafting briefs, and predicting court proceedings. Moreover, AI can enhance access to justice by facilitating the creation of comprehensible pleadings or statements of case and translating legal language for litigants in person.

AI technology is already transforming various aspects of legal work, such as document review, legal research, and predictive analytics. These capabilities can make legal processes more efficient and cost-effective. For instance, AI is good at analysing large datasets, which is particularly useful during disclosure exercises in large commercial disputes. AI can also perform intricate calculations quickly and accurately, which can assist with the assessment of damages in straightforward cases such as maintenance

disputes in family proceedings. By automating these tasks, AI both reduces the time and resources required and minimises the risk of human error. AI has the potential to streamline complex disputes, particularly those involving large volumes of documents, potentially saving time and money.

(3) AI and access to justice

One of the most promising aspects of AI in the legal context is its potential to bridge the access to justice gap. The growing access to justice gap is a significant challenge facing justice systems worldwide. This gap is becoming increasingly severe and simply increasing the number of judges and lawyers will not suffice to address the issue. What is required is a paradigm shift in our approach to this problem. AI could provide valuable tools necessary to bridge this gap effectively.

For example, the development of AI-powered platforms for resolving small claims disputes is a promising avenue. In many jurisdictions, these cases are often handled by litigants in person, which can be challenging and intimidating for those unfamiliar with legal processes. By leveraging AI in this context, it may be possible to provide more accessible, user-friendly guidance and support, potentially increasing the number of people who can effectively navigate the small claims process.

The application of AI in maintenance determinations within family proceedings presents another valuable opportunity. These cases typically involve applying objective criteria to determine appropriate maintenance orders. In the often emotionally charged and distressing context of family disputes, AI could offer quick, cost-effective, or even free initial resolutions. This approach could significantly reduce the financial and emotional burden on families, providing faster resolutions and potentially freeing up court resources for more complex cases.

Another area where AI could have a substantial impact is in resolving traffic accident disputes. These disputes, while generally straightforward, consume a considerable amount of court time due to their volume. The pattern-based nature of many traffic accident disputes makes them well-suited for resolution through AI-powered tools.

(4) Fairness, ethics and public confidence

Despite its potential, the deployment of AI in the legal field must be approached with caution. Several key ethical issues arise from the use of AI in legal processes which, if not carefully thought through and managed, could undermine public confidence in the justice system.

Discussions about AI in dispute resolution must consider ethical issues such as bias. In societies with socio-economic inequities like gender bias and hereditary monopolies, the quality of input datasets is crucial for fair outcomes, especially in justice dispensation. Often, users are unaware of the datasets used to train AI tools, leading to the “black box” phenomenon.

AI systems are only as unbiased as the data they are trained on. If the training data contains biases, AI can perpetuate or amplify these biases, leading to unjust outcomes. Further, biases introduced by AI can be difficult to detect and can result in systematically unfair decisions.

The use of AI in dispute resolution raises issues regarding party autonomy, particularly when parties choose to have their disputes adjudicated by AI systems. While party autonomy is a fundamental principle in arbitration and alternative dispute resolution, the introduction of AI as an adjudicator pushes the boundaries of this principle. As AI technology continues to advance, it will be important to develop clear guidelines and safeguards to ensure that party autonomy in choosing AI adjudication does not compromise the integrity and fairness of the legal process.

(5) Transparency and reliability

While AI can process vast amounts of data quickly, there are concerns about its accuracy and reliability. AI systems, especially complex ones like deep learning models, often operate as "black boxes", which makes it difficult to understand how they arrive at decisions. This opacity can lead to errors or inaccuracies in AI-generated outputs. The phenomenon of AI "hallucinating" or producing incorrect information further exacerbates these concerns. Further, the opaque nature of decision-making makes it difficult to verify or challenge AI-driven decisions, which raises questions about the appropriateness of using AI in judicial decision-making.

When AI is used as an expert advisor by a judge, it is important to define the extent of judicial discretion in accepting or rejecting the advice of an AI. This balance between AI assistance and judicial discretion needs to be carefully managed to ensure that AI enhances rather than undermines judicial decision-making.

Establishing accountability in AI-assisted decision-making is a significant challenge. When an AI system makes an error or causes harm, determining who should be held responsible – developers, users, or the AI itself – is complex. Current legal frameworks do not recognise AI systems as entities capable of legal agency or moral responsibility, meaning liability must be attributed to the humans involved in developing, implementing, and using the AI system.

(6) Confidentiality and privacy

A further area of concern is confidentiality. Lawyers must exercise caution when inputting confidential client information into AI tools, as this data may be compromised or inadvertently used in responses to other users.

AI systems often require access to large amounts of data, including sensitive personal information. Ensuring the privacy and security of this data is very important. Effective anonymisation of data will become increasingly challenging, and AI systems working with large datasets might inadvertently expose individuals' identities, and this might undermine trust and confidence in the legal system.

(7) Intellectual property

Generative AI systems often require vast amounts of data to train effectively, and much of this data is sourced from the internet, including copyrighted works. This practice has led to several lawsuits particularly in the US, alleging that AI companies have infringed on copyrights by using protected works without permission. Ensuring proper attribution and addressing copyright infringement are important for protecting the rights of original creators while fostering innovation in AI technologies. As the legal landscape continues to evolve, it will be important to develop frameworks that balance these competing interests effectively.

Each mobile handset we use contains an average of 3,000-4,000 patents, such as those for noise cancellation and voice telephony. These devices operate globally, requiring different manufacturers to use the same patents to ensure interoperability. Consequently, the same patent infringement suit can be filed in any country, with different jurisdictions taking different views on cross-border issues. This diversity in perspectives strains the concept of "ease of doing business", creating a latent desire for change.

(8) Regulation

Different jurisdictions have adopted AI at varying speeds and for different applications, influenced by factors such as ethical concerns, cultural reasons, and cost.

Others, such as Canada, have developed guidelines on an interim basis to remain agile and responsive to new advancements.

As the nature of commercial transactions is increasingly international, the approach or response to challenges posed by AI transcend borders and the approach to regulation will need to be coordinated and international.

(9) Legal training and education

One specific area of concern is that the widespread adoption of AI in legal research and writing may lead to a decline in the critical thinking and writing skills of future lawyers. The legal profession must address this risk by ensuring that AI tools complement, rather than replace, the development of thoughtful and persuasive legal argument.

While AI can enhance productivity, there are concerns about the potential displacement of lawyers and judges and reduced government funding for the judiciary. AI should be viewed as a supplement to human work, not a replacement, as human oversight will likely always be necessary to maintain users' confidence in the system.

As AI tools become more integrated into judicial processes, there is a need to adapt legal education to prepare future judges and lawyers for working alongside AI. This includes understanding the capabilities and limitations of AI and ensuring that AI can be used without undermining lawyers' and judges' critical reasoning skills.

E. Concluding remarks

(including from Sir Geoffrey Vos MR, Head of Civil Justice, England & Wales, and from the Guest Experts)

There is a broad consensus that AI is inevitable and cannot be ignored. Commercial entities, litigants, and consumers will increasingly use AI, and legal issues arising from AI will need to be resolved by courts.

In terms of the response to AI, there appears to be a divide between those who are enthusiastic about the potential of AI, even in judicial decision-making, recognising its potential to resolve small claims, clear backlogs, and determine maintenance in divorces, and those who are more cautious and argue that AI should remain a tool for evaluation and advice, not decision-making.

It will be important to find the balance between these competing viewpoints, to enable the court system to leverage AI for quick, affordable research and decision-making, while upholding the core values of justice and the rule of law; all the time recognising the rapid speed at which AI is evolving, with significant implications for the legal system.

As to the strengths and limitations of AI: AI excels at communication but struggles with human reasoning, thinking, and empathy – possibly because machines cannot suffer, unlike humans. This distinction is crucial when considering the future use of AI in the judiciary.

The next 25 years will be transformative for humanity, possibly marking the beginning of the "Machine Age" (following the Stone Age, the Iron Age, and the Industrial Revolution). It is essential to focus on how AI will be used by consumers and businesses and its impact on resolving commercial and consumer disputes.

There are different cultural perspectives on AI. In Africa and India, the pace of adoption of AI is slower. In contrast, in Singapore, AI is already assisting in judicial decision-making. There are different approaches to AI also in Germany, Indonesia, and Brazil, which highlights the need for a broad perspective on this issue.

Various types of AI are now being developed, far beyond large language models. Clients will demand the use of AI if it proves economically advantageous, and this in turn will necessitate the regulation of the use of AI by lawyers and judges. However, there are concerns that regulation may take too long and lack a global, culturally inclusive perspective.

There are inherent difficulties with the idea of AI working alongside humans. AI lacks empathy, human-level thinking, and may be biased, yet it can process and summarise information rapidly. One important question is whether this represents the thin end of the wedge for automated decision-making.

A further key issue which must be addressed is confidence. Judges and lawyers serve businesses and individuals, and all tools used must command their confidence. Therefore, it is essential to ensure that any AI tools employed are trustworthy and inspire confidence in those we serve.

It is crucial to identify the nature of the dispute when considering the role of AI. In cases such as determining whether a child should be taken from their parents due to alleged bad parenting, it is highly unlikely that any mother would have confidence in a machine making that decision. Such sensitive matters require the human empathy that only a human judge can provide.

Conversely, in commercial litigation, where the issue might be a time frame for filing a document – commercial litigants might trust a decision generated by a machine. AI can draw on extensive data and training to resolve procedural issues efficiently. This perspective is consistent with the view from Singapore on using AI for resolving small claims.

Ultimately, the role of AI depends on the type of issue being resolved. Extrapolating from one type of dispute to another is risky. While AI can evaluate personal injury damages based on precedents, people must still have access to a human judge in whom they have confidence. There must always be an option to appeal to a human judge to maintain public confidence in the judicial process. Without this, trust in the legal system would erode.

F. Summary

AI is nascent but real, poised to impact humanity profoundly. It is a development that the judiciary cannot ignore.

The subject is relevant to the issues that will arise in disputes, especially commercial disputes, that courts worldwide will be asked to decide, and to the future of how courts decide disputes.

Given the international nature of many commercial transactions and legal disputes, the disparate adoption of AI will require a coordinated international response.

Currently, we have one type of AI, which can be deployed to perform specific tasks. However, the rapid evolution of AI technology suggests that future iterations may diverge significantly from our current understanding.

AI systems do not “think” in the same way humans do, but their behaviour is shaped by human training. This means that it may be possible to train AI systems to “exhibit” human qualities such as empathy, and to make sophisticated legal decisions.

The integration of AI into judicial decision-making raises ethical, legal and practical challenges. Addressing these issues thoughtfully and responsibly will be critical to harnessing the potential of AI to promote a fair and just legal system.

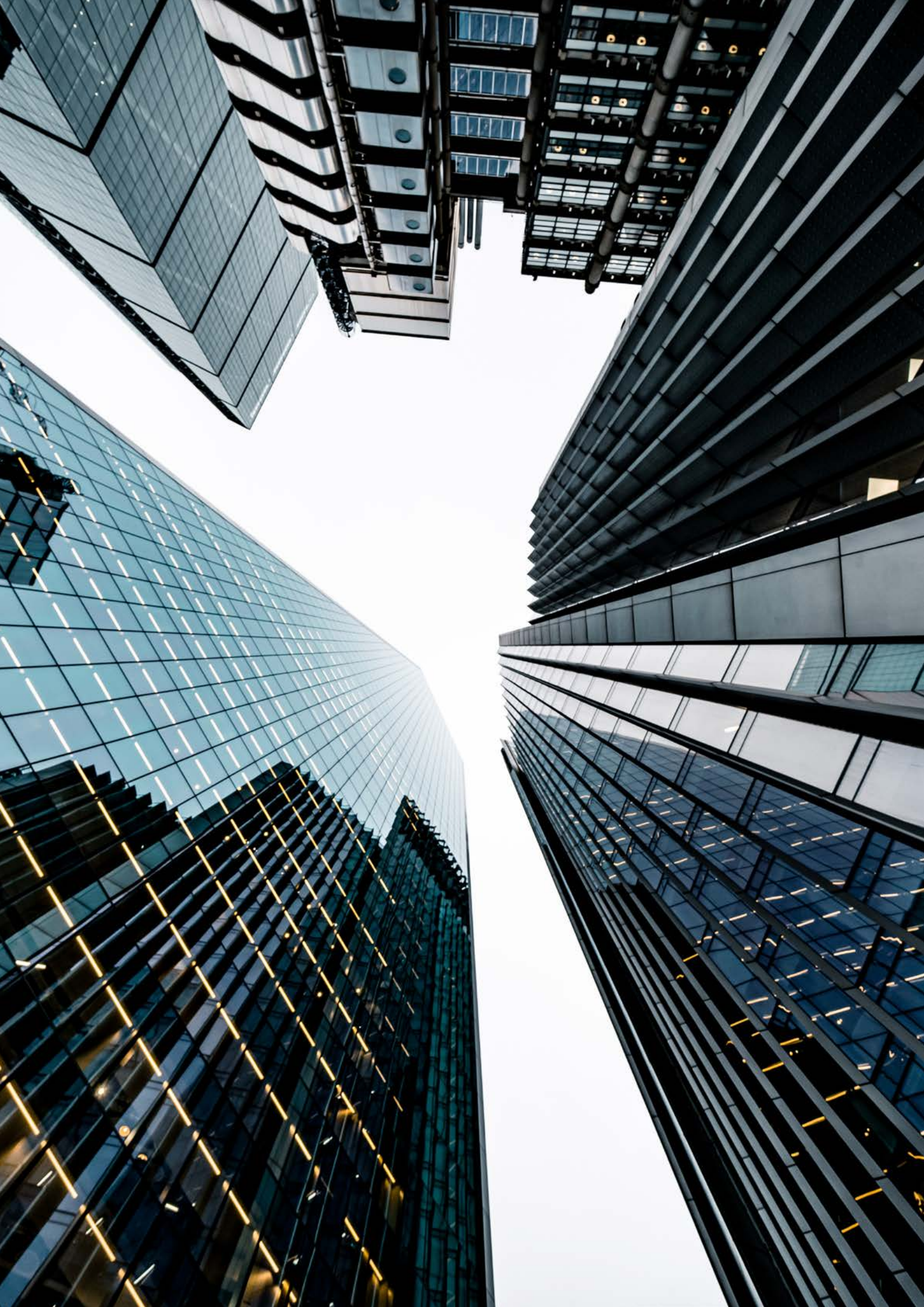
There is a significant disparity in terms of adoption of AI across different legal systems and jurisdictions, influenced by factors such as economic resources, technological infrastructure and regulatory frameworks. This means that while some jurisdictions are at the forefront of adoption of AI, others are not.

AI holds significant potential to address the growing access to justice gap, by making legal services more efficient, affordable and widely available.

However, the uneven adoption of AI may exacerbate the access to justice gap. It may also produce non-uniform standards and regulations resulting in inconsistencies in how AI is applied and governed across different legal systems.

Without harmonised approaches, there is a risk of creating a patchwork of practice or regulations that could hinder cross-border activity and create uncertainty for businesses and individuals.

International judicial dialogue and cooperation will be essential in developing consistent regulatory frameworks that address the ethical and legal challenges posed by AI, while promoting access to justice and users' confidence in the justice system.



Theme 2: Developing the Relationship Between Commercial Courts, Arbitration and Mediation

Chaired by: Chief Justice Sundaresh Menon, Chief Justice of Singapore

Guest expert: Professor Marike Paulsson, International Council for Commercial Arbitration (ICCA)

Prepared judicial contributions from: China, France, USA, Kazakhstan AIFC Courts, Dubai DIFC Courts, Uganda, India, and Jamaica

A. Introduction

Commercial courts (including appellate courts), arbitration and mediation all play a vital role in supporting transnational commerce by ensuring that the disputes that come out of commercial transactions are resolved fairly, efficiently and in a way that accords with core rule of law values and expectations.

However, while there may be broad agreement on the goals, parties to these disputes can sometimes find that their expectations are not met. Session 2 explored the ways in which these different modes of dispute resolution can be aided by viewing them as components of a system, so that as far as possible the pitfalls and challenges facing these types of disputes are avoided.

The session considered the following issues:

- How to establish an effective path to the integrated use of litigation, mediation and arbitration.
- What is the role of the court in setting appropriate standards for the conduct of arbitration and mediation?
- More generally, to examine what is needed to achieve confidence across litigation, mediation and arbitration, improving appropriate use and enforcement.
- Are there doctrines that can be used to minimise the re-litigation of issues in transnational disputes?

B. Roundtable discussion

The points, observations and thoughts below were among those raised in roundtable discussion between the judges and including the guest expert.

(1) Integrated approaches to international commercial dispute resolution

Commercial disputes, especially those involving international elements, can lead to fragmentation and inefficiency, with parallel proceedings in different forums. This increases the risk of inconsistent decisions, causes delay, and increases costs. Further, enforcing outcomes across different jurisdictions can be problematic. As a result, disputes (and funds) remain tied up in litigation, undermining businesses activity and confidence in the legal system.

An integrated approach to dispute resolution is necessary to address these challenges. By viewing commercial courts, arbitration, and mediation as parts of a cohesive system, the legal process can be more efficient and effective.

One example of an integrated approach can be seen in the Chinese courts, particularly through the China International Commercial Court (CICC). The CICC's "one-stop" platform integrates litigation, arbitration, and mediation, offering a streamlined process for resolving international commercial disputes. This system allows parties to move seamlessly between dispute resolution mechanisms, promoting efficiency and reducing delays.

The CICC has also established an international committee of experts to assist with the interpretation of foreign law and to support the mediation process. This internationalised platform has drawn attention for its effectiveness in facilitating cross-border dispute resolution, particularly in cases where multiple jurisdictions are involved. By creating a centralised system that integrates mediation and arbitration within the court framework, the CICC helps minimise the risks of inconsistent decisions and ensures that decisions are enforceable across borders.

Some jurisdictions have introduced models that integrate ADR into the court system, ensuring that settlements are legally enforceable and compliant. For example, France introduced the "Amicable Settlement Hearing" in 2023, integrating ADR mechanisms directly within civil and commercial courts. This process, overseen by a separate "amicable judge" with full access to case documents, is confidential and structured to facilitate enforceable agreements. If no agreement is reached, the case returns promptly to the original judge, avoiding delays.

Another model involves courts taking a proactive approach to managing disputes by integrating ADR, judicial facilitation, and technology. For example, the Commercial Division of the New York Court has an ADR program that allows disputes to be referred to mediation or neutral evaluation at any stage, providing flexibility for complex international cases. This model encourages parties to select their mediators, fostering a

collaborative approach to dispute resolution. Judges may also issue preliminary rulings to narrow down issues, making mediation more focused and effective. At the same time, arbitration is being expanded for complex technology disputes under international rules, with an increasing focus on how the integration of AI can further improve efficiency (**see also Theme 1**).

(2) The court's supervisory role and mediation

The supervision of mediation by commercial courts varies across different jurisdictions.

In some, like France, mediation is mandatory before litigation, though parties are not required to settle. This approach has been effective, indicating strong acceptance and integration of mediation within the judicial process.

In Singapore, mediation is mandatory in certain areas such as family law but not in commercial disputes, where it is encouraged, with potential cost consequences for those who refuse.

Other jurisdictions encourage but do not require mediation.

In Australia, judges encourage mediation, expecting all large commercial disputes to at least attempt it. Courts proactively discuss the best timing for mediation and use referees to ensure efficient case management if mediation fails.

Similarly, Chinese courts encourage mediation. The CICC allows parties to seek mediation both before starting legal proceedings and during litigation. As regards enforcement, under Chinese Civil Procedure Law, there is a well-established mechanism for judicial confirmation of mediation agreements. If the court finds the agreement complies with the law, it will issue a confirmation order, giving the agreement the same effect as a compulsory enforcement order.

(3) How can commercial courts supervise arbitration effectively and efficiently?

To supervise arbitration effectively and efficiently, commercial courts must strike a balance between supporting and overseeing arbitrations without undermining their private nature.

This balance is important for maintaining the attractiveness of a jurisdiction as an arbitration venue

Many courts follow the United Nations Commission on International Trade (UNCITRAL) model, which standardises key aspects such as appointing arbitrators, tribunal jurisdiction, and enforcing awards.

While court intervention is generally limited, exceptions arise, particularly in cases of corruption or fraud, as seen in two recent London cases[18] which led to the setting aside of substantial awards.

In the second of the two cases there was in truth no arbitration award. The case underscores the importance of courts verifying the authenticity of arbitration agreements and awards to maintain trust in the system (also relevant here is the presentation on blockchain by the Abu Dhabi Global Market "ADGM" Court in Abu Dhabi).

Chinese courts have shown a proactive role in ensuring that arbitration agreements and awards comply with Chinese law, particularly when foreign arbitral awards are involved. The CICC, for example, provides a framework for reviewing awards and dealing with enforcement issues, including interim measures, such as property preservation orders, that assist the arbitration process.

In cases of disputed arbitration awards, China provides a structured approach. For example, under Chinese Civil Procedure Law, if a party challenges an arbitral award on the grounds of fraud, corruption, or lack of due process, the CICC can review the case and set aside or refuse to enforce the award if necessary.

To further improve court supervision of arbitration, more jurisdictions are developing specialised arbitration divisions within courts. The Dubai International Financial Centre "DIFC" Courts have established a highly effective arbitration division, which handled claims worth approximately £3 billion in 2023. This approach is also being adopted by France, which is extending supervisory jurisdiction over arbitrations (see also Theme 4).

Assisting with the enforcement of arbitral awards is another important issue. Common law jurisdictions provide valuable remedies such as worldwide freezing orders and anti-suit injunctions to assist in enforcement. There is a growing interest in these remedies from civil law jurisdictions, highlighting the need for a more comprehensive approach to enforcement across different legal systems (**see also Theme 4**).

In addition to these operational aspects, commercial courts also have a role in setting broader standards for arbitration. Three factors – confidence, diversity, and cost – were identified as being particularly relevant in this context.

- As regards confidence, one of the main concerns in arbitration is the potential lack of impartiality, particularly with party-appointed arbitrators. The practice of allowing parties to appoint their own arbitrators can create perceptions of bias.
- Diversity within the arbitration community is another important factor. The arbitration community has faced criticism for lacking diversity, with a relatively small, homogenous group of arbitrators often being selected for high-profile cases.

[18] *Federal Republic of Nigeria v Process & Industrial Developments Limited* [2023] EWHC 2638 (Comm); *Contax Partners Inc BVI v Kuwait Finance House* [2024] EWHC 436 (Comm).

This lack of diversity can undermine the perception of fairness and inclusivity in the arbitration process, as well as limit the range of perspectives and expertise brought to bear on complex disputes.

- The cost of arbitration is also a concern, with users reporting that they found the process to be prohibitively expensive. High costs can also erode confidence in arbitration as an accessible and equitable option.

The answer to some problems may be at the legislative level. For example, in South Africa, the Prevention and Combating of Corrupt Activities Act (PRECCA) addresses corruption and bribery in arbitration involving South African parties.

Commercial courts also have a role to play. They can help restore confidence in arbitration by establishing clear guidelines and expectations which are common across jurisdictions.

(4) Are there doctrines that can be used to minimise the re-litigation of issues in transnational disputes?

Many jurisdictions adopt a strong principle of "non-revision" and non-relitigation i.e., once a decision is made in a foreign jurisdiction, courts generally do not re-examine the merits of the case but focus on specific criteria to determine whether the decision should be recognised and enforced.

In some jurisdictions, foreign judgments are recognised automatically, which means they are considered to have legal standing without necessarily being immediately enforceable (France). Although enforcement still requires a separate process (exequatur), French courts cannot reject these judgments simply because they disagree with the reasoning of a foreign judge. Generally, decisions will be recognised and enforced if (a) the foreign court has jurisdiction under its own laws; (b) the judgment does not violate international legal principles; and (c) the judgment has not been obtained through fraud.

Foreign arbitral awards are treated as independent "international justice decisions" and French courts are not bound by decisions of the courts of the seat. Because France does not have a doctrine of transnational issue estoppel, even if an arbitral award has been annulled by the courts in the country of the seat of the arbitration, it can still be recognised and enforced in France.

In other jurisdictions, transnational issue estoppel is a developed principle and applies to foreign judgments generally, as well as in the specific context of decisions by a seat court in international arbitration (Singapore).

Other jurisdictions do not formally recognise transnational issue estoppel, but courts are expected to follow international best practices, especially in addressing public policy challenges and bias in enforcing arbitration awards (India). This means that courts can still give weight to decisions from the seat of arbitration by adopting persuasive reasoning, following international standards, and citing international case law.

One significant challenge in commercial disputes is their growing complexity, often involving multiple parties. Arbitration, being a bilateral process, is less suited to handle multi-party claims. In contrast, commercial courts are better equipped to manage such cases and apply doctrines such as collateral estoppel to prevent re-litigation (England and Wales).

Another issue that can arise in complex disputes involving subsidiaries and third parties is that some parties may be bound by arbitration agreements. These agreements may require certain entities to resolve their disputes through arbitration. However, when other parties, such as subsidiaries or non-signatories, are not covered by these agreements, their disputes often end up being handled separately in court. This fragmentation complicates the resolution process and increases the likelihood of the same issues being re-litigated, which can lead to inconsistent outcomes and further delays.

Arbitration, although intended to be a flexible method of resolving disputes, often falls short in addressing the full scope of multi-party conflicts. Enforcing arbitration agreements in isolation can overlook the broader context of the dispute, leading to inefficiencies and the potential for issues to be re-litigated in different forums.

Courts have a role in minimising the risk of re-litigation. While generally they cannot compel the consolidation of separate arbitrations without the consent of all parties, they can use procedural tools to encourage such consolidation. One such tool is a case management stay, where the court pauses its proceedings and requires parties bound by an arbitration agreement to first resolve their disputes through arbitration.

Courts can also strongly encourage parties to consolidate all related disputes, whether through arbitration or litigation, into a single forum. This approach helps prevent duplicative proceedings and reduces the risk of conflicting outcomes. For example, courts in Singapore have successfully used these methods to facilitate more efficient dispute resolution. However, such consolidation often requires the cooperation of all parties involved, which can be challenging in practice.

C. Concluding remarks

Justice Carole Barnaby, Supreme Court of Jamaica

Arbitration plays an important role, particularly due to the ease of enforcing arbitration awards, which is vital for economies like Jamaica that rely heavily on foreign direct investment. Investors need assurance that disputes will be resolved efficiently, both in terms of speed and the quality of the decision-making process.

ADR should be viewed not just as an alternative to courts but as part of a collaborative relationship with mediation and litigation. This collaboration can help avoid enforcement issues and improve the overall effectiveness of the dispute resolution process.

Different jurisdictions have different approaches to the recognition and enforcement of arbitration awards. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards has been incorporated into Jamaican domestic law, which strengthens the application of the UNCITRAL Model Law in the country.

Jamaica is a signatory to the Singapore Convention on Mediation, but has not yet incorporated or ratified it into law.

There are concerns about the capacity of courts in smaller and developing jurisdictions, which often face competing social concerns and lack the developed commercial judicial systems of larger jurisdictions. Collaboration through capacity building and the appointment of more specialised judges in these courts of smaller jurisdictions could be highly beneficial.

It is essential to share best practices and experiences through working groups and organisations such as SIFoCC, focusing on common values to enhance dispute resolution mechanisms.

Hon. Bart Katureebe, Chief Justice Emeritus of Uganda

It is important to address the challenges posed by AI and to emphasise the importance of effective collaboration through knowledge sharing, especially for those with advanced AI systems.

In the field of ADR, some jurisdictions have more established strengths and precedents. Therefore, it is important to develop comparable procedures and processes to facilitate easier enforcement. Jurisdictions should actively learn from each other's experiences.

SIFoCC provides a valuable platform for exchanging ideas in this regard, as do regional forums.

D. Summary

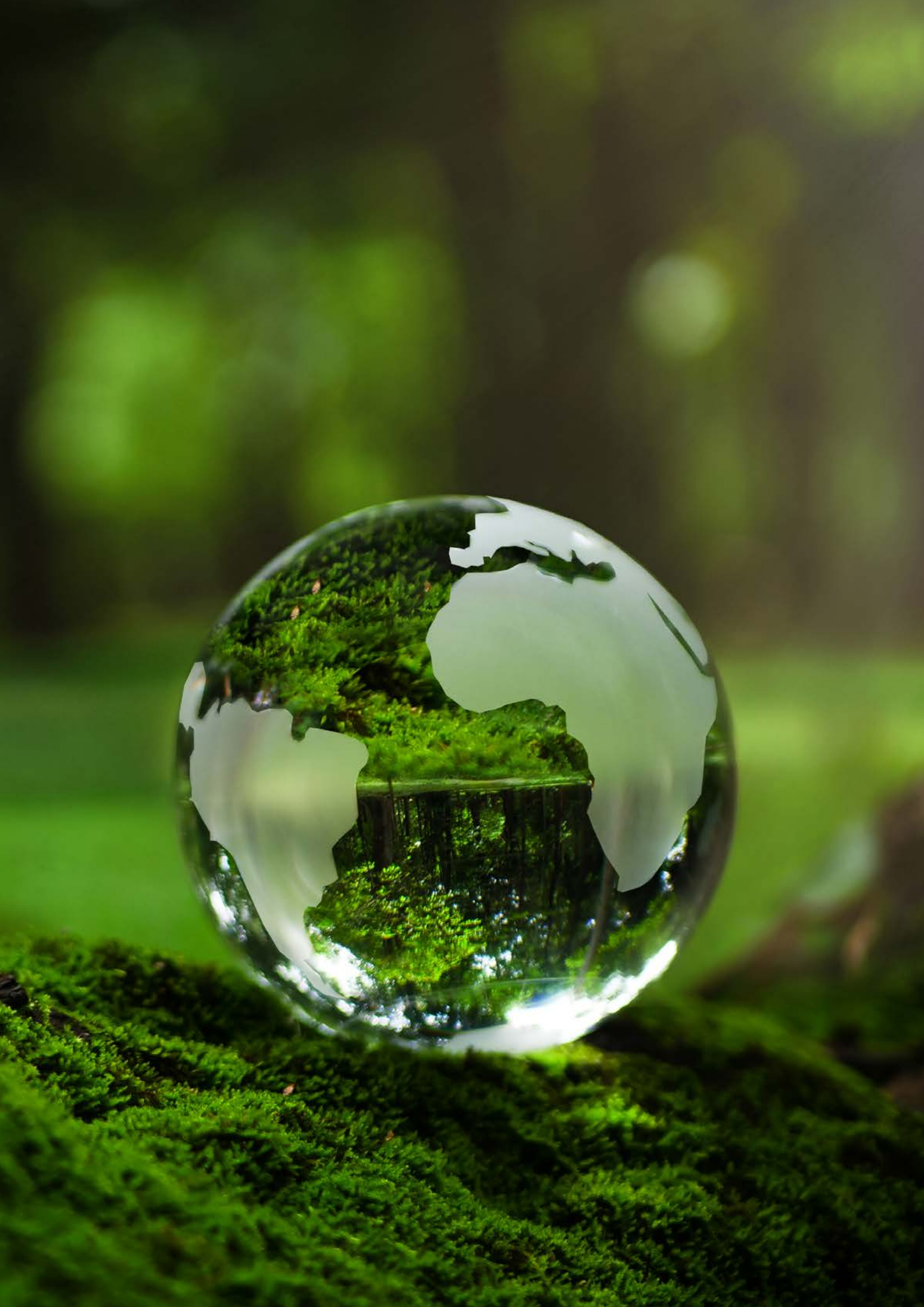
As commercial disputes become increasingly complex, it is important to involve the legal profession in capacity building and fostering a culture that emphasises creative, imaginative, and practical approaches to dispute resolution.

A key strategy is to view litigation, arbitration, and mediation as interconnected components of a comprehensive system. When used in an integrated manner, these methods can improve the efficiency and effectiveness of the legal process.

While each method has its own distinct features and functions differently across various jurisdictions, closer coordination among them can help reduce inefficiencies and delays caused by re-litigation or parallel proceedings in different forums. This integrated approach also helps maintain high standards across all three methods.

In terms of enforcement, one of the key strengths of arbitration is the New York Convention, which is highly valued for its ease of use and predictability. This success raises the question of how to similarly improve the recognition and enforcement of court judgments. SIFoCC has already made significant strides in this area with its Multilateral Memorandum on Enforcement of Commercial Judgments for Money (now in its Second Edition), which has been well received. Future SIFoCC meetings could further explore ways to enhance recognition and enforcement.

There may also be potential for developing a Multilateral Memorandum focused on addressing jurisdiction disputes which are discussed in Theme 4.



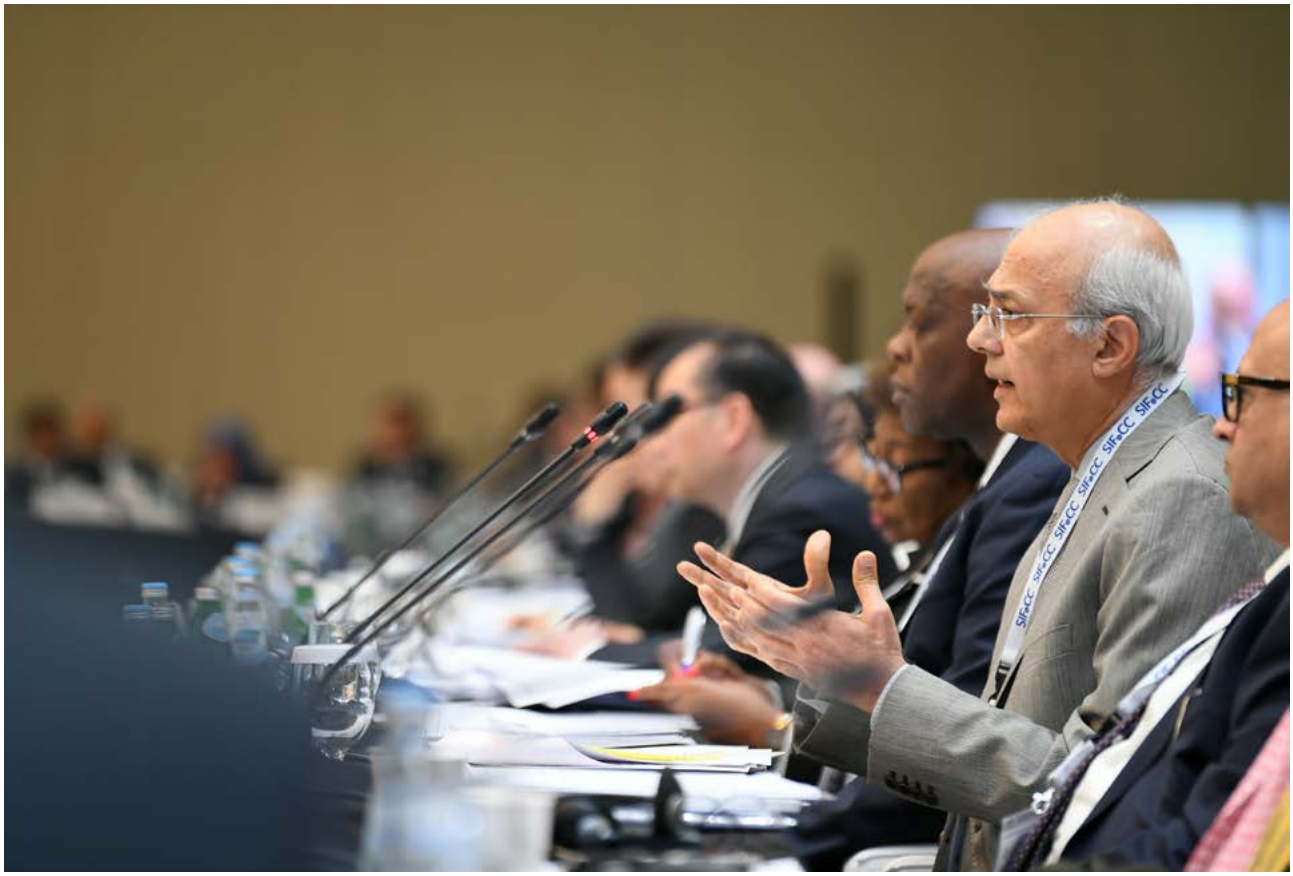
Theme 3: Corporate Activity and the Rule of Law, Including Climate Change and Commercial Courts

Chaired by: Mr Justice Robin Knowles, Commercial Court, London

Guest Experts: Professor Colin Mayer CBE, FBA, Emeritus Professor of Management Studies at the Said Business School at the University of Oxford; Ms Briony Eales, Judicial Capacity Building Team Leader, Environmental and Climate Change Law, Asian Development Bank

Debate Leads: Justice Bernard Murphy, Federal Court of Australia; Justice Jim Delany, Supreme Court of Victoria, Australia; Mr Jordan Lee, Chief Strategy Officer, Pogust Goodhead

Prepared judicial contributions from: Pakistan, Sri Lanka



A. Introduction

Some of the challenges the world faces may mean that it has to consider further its understanding of some of the usual patterns of legal rights and obligations, and concepts, in national and transnational commerce. And more may be demanded of the law's structures such as corporations.

Where procedural and substantive law needs to be developed, transparency, understanding and stability will be important.

The session on Theme 3 focused on these and related issues. Before the session, delegates were provided with a short scenario.[19] The session involved a short debate centred on this scenario, with a focus on corporations, corporate responsibility and directors' duties (including fiduciary duties).

The discussion included a particular focus on climate change, continuing to concentrate on private law issues arising in corporate and commercial contexts.

Session 3 aimed to:

- encourage further exploration and exchange regarding legal responsibility, purpose, and governance in corporate and business activities.
- increase understanding among Commercial Courts worldwide of emerging substantive and procedural law issues.[20]
- help in considering ways in which SIFoCC can assist in keeping Commercial Courts globally informed of developments and ensuring the rule of law plays its part.

[19] The scenario was developed from the SIFoCC 4th Full Meeting in Sydney, through conference discussion arranged between SIFoCC and the Commonwealth Magistrates and Judges Association (CMJA), and also with the benefit of some roundtable academic discussion in partnership with the British Academy.

[20] Including (as mentioned in Sydney) identifying where scientific matters have been accepted as common ground, and considering to what extent it is possible to identify a baseline body of scientific aspects that do not have to be relitigated in each case.

B. The short debate

Scenario (first part)

"A State has substantial forests. It has mineral resources reached by mining. Its modest economy depends on fishing.

In 2009 the State entered into a Contract with a Company that was incorporated overseas.

The Contract is for a 35-year fixed term. It provides that the Company is entitled to fell trees and to mine and fish in the State, all for export. The Contract states that the Company may use methods of its choice and that there is no limit to the scale of its operations.

At the time the State considered this was the only way to get investment into these areas and that investment would bring employment. Under the Contract, the State also receives ten percent of the export value of timber and mineral resources and a small fixed annual fee for the right to fish.

Today, in 2024, the way in which and scale at which the Company is felling and fishing and mining are said to have adverse climate change and environmental consequences, to pollute, and to be unsustainable.

Attempts by the State to renegotiate the Contract fail.

The Company's position is that the contract has 10 years to run and that if the State does not honour the Contract, then the Company will be entitled to damages in the amount of the profit it would have made for those 10 years. A liability at this level would cause enormous damage to the State's economy.

All but one of the Company's directors are companies. The Board of the Company has decided that the Contract is a valuable asset, and the Company is in business to exploit it for profit. For a number of the directors who were companies the vote of those companies at the Board was cast by a decision those companies reached using AI.

A majority of the Company's shareholders is believed to support the Board's view, but a significant minority (institutional and individual) is concerned that the Board's strategy on felling, fishing and mining does not take sustainability properly into account and the felling, fishing and mining should be reduced.

There is a dispute over what the Board's fiduciary and other duties require, and some shareholders propose to take this question to the Court of the Company's country of incorporation. Some of the Board welcome this proposal because it will provide a judicial answer to what their duties require them to do.

In fact, the State asks the Court of the State to address the question whether the fiduciary and other duties of the Company's Board require the Board to alter the way in which and scale at which the Company is felling and mining and fishing."

Questions (first part)

Q1 We are now centuries on from the point where a corporation was first recognised as a legal person and the legal duties of directors were first framed. In light of the place and effect of the corporation in the world today, and that of its directors, will the duties of a Board need closer examination by Courts?

As a Guest Expert, Professor Colin Mayer CBE, FBA offered initial remarks to this effect:

> The duties of a Board will need closer examination by Courts.
>
> There are three reasons why notions of director duties need to evolve. The first is the growing environmental and social impacts of companies and the increasing environmental and social constraints under which they operate. The second and frequently conflicting pressure comes from financial markets to maximize short-term profits. The third is changing societal views about the role of the corporation in the 21st century which emphasize their broader environmental and social responsibilities in the context of long-term sustainability.
>
> The issue is not with the content of the duties themselves. Existing duties to act with due care and diligence and in the best interest of the company already require directors to consider and disclose climate change risks, reinforced by financial reporting obligations. The problem lies in the fact that these duties are owed solely to the company. Broadening the scope of these duties to include other stakeholders is a matter for legislation. A key issue for courts to examine is the criteria for granting derivative leave to pursue directors.

Other points, observations and thoughts among those raised in debate and then wider roundtable discussion included:

1. In this hypothetical scenario, minority shareholders could seek leave on behalf of all shareholders to challenge the board's decisions. The main obstacles are proving that the case is brought in good faith and in the best interests of the company.
2. Shareholders should be given leave to prompt courts to closely examine directors' duties and their performance.

Q2 Today, do we have a truer understanding of corporate "purpose", "success" and "profit"?

As a Guest Expert, Professor Colin Mayer CBE, FBA offered initial remarks to this effect:

> Corporate law around the world in one form or another in general formulates directors' duties in terms of promoting the interest or success of a company. The interest or success of a company derives from its reason for being – its existence and creation – namely its purpose. Until recently corporate purpose has been increasingly linked to financial performance – profit. However, over the last few years, concerns about the effect of this on the environment and society has led to a reconsideration of corporate purpose which emphasizes not only the size of profits but their source and sustainability. Boards of companies are expected to consider long-term value creation and risks associated with the sustainability of profits. This sheds new light on what is meant by financial success and profit and whether they derive from benefits or detriments imposed on others.

Other points, observations and thoughts among those raised in debate and then roundtable discussion included:

1. The global conversation around corporate purpose, success, and profit is shifting towards a more holistic understanding that includes environmental, social, and governance (ESG) considerations. This transformation highlights the need for businesses to adopt long-term perspectives and for boards to consider a wider array of factors in their decision-making processes. As a result, courts may need to adapt to these changes by ensuring that directors are held accountable for the broader impacts of their actions.
2. New accounting principles and past disasters have prompted a reconsideration of what "success" and "profit" truly mean. For instance, if James Hardie[21] had accounted for future costs – both personal and financial – its products would not have been deemed profitable. Yet, for many years, it was one of Australia's most profitable companies. Similarly, a large uranium mine in Australia was recently decommissioned, leaving the company unable to restore the land to its natural state. Fortunately, Rio Tinto, the parent company, intervened to rehabilitate the site. This situation underscores the necessity for companies to include future costs in their financial statements, a practice that is often overlooked. There is a growing need for a long-term perspective that considers the environmental and social costs of business operations, including the impact of climate change.

[21] James Hardie was an Australian company that manufactured and sold asbestos-containing products. The company's products were widely used in Australia and other countries, but they were also linked to serious health problems.

3. The board's fiduciary duty is traditionally owed to the corporation itself. However, the corporation has a duty of care to others, which includes accounting for potential liabilities as future costs when evaluating profit. Selling an inherently dangerous product for short-term profit, which exposes the corporation to liability, is reckless and likely a breach of fiduciary duty by the directors.
4. Companies are increasingly expected to focus on sustainable value creation rather than short-term financial gains. This means considering not just the size of profits but also their source and sustainability.
5. Corporate Social Responsibility (CSR) principles are increasingly being integrated into legal frameworks and corporate strategies, emphasising responsible business practices that consider stakeholders beyond shareholders.

Q3-4 Should the question of the duties of a Board be framed in terms of duties to the Company, or more widely? If framed in terms of duties to the Company, but with a requirement to have regard to wider interests (here, the community and the environment) how is a Board held accountable?[22] How does a duty to the Company work alongside a duty to others that the Company's activity may affect?

As a Guest Expert, Professor Colin Mayer CBE, FBA offered initial remarks to this effect:

> Duties of a Board should be framed more widely. However, in considering the broader context within which corporate success and profit should be evaluated, it is important not to confuse this with a "stakeholder view" of the firm.
>
> Historically, the shift from public law chartering and licensing to private law incorporation narrowed directors' duties from broad public interests to those of the company. This shift led to significant growth and prosperity by focusing on precise corporate purposes and avoiding directors being accountable to everyone, which would mean being accountable to no one. However, this focus has also been linked to environmental degradation, biodiversity loss, inequality, social exclusion, and mistrust.
>
> The issue is not the focus on corporate success and profit but rather the definitions of success and profit. Profit, derived from the Latin *proficere* (to advance and progress), should come from advancement, not decline. Directors' duties remain to the company but should ensure that the company's interests do not conflict with public or environmental interests. This means the fiduciary duty of loyalty is to the shareholders, but there is also a duty of care to those affected by the company's operations.

[22] Directors are in some systems already required (as a duty to the company) to act in good faith to promote the company's success, considering long-term consequences, employee interests, and the impact on the community and environment.

Success should not come from promoting shareholder interests at the expense of others, which is merely wealth transfer, not wealth creation. Directors must ensure that in promoting the company's success, they do not harm customers, communities, the environment, and those on whom they depend, such as employees, suppliers, and governments. This involves ensuring companies do not profit by imposing costs on others and that companies bear the costs of avoiding and rectifying the detriments they cause.

Failure is reflected not only in the negative impacts on others but also in inadequate systems to avoid and rectify such outcomes. In the scenario, directors must ensure that fulfilling the contract does not mean profiting from environmental and social detriments. The reported profits should reflect the true costs of avoiding, rectifying, or remedying these detriments, alongside operating and capital costs. Accurate measurement of fair profit and true costs ensures the company has the right incentives to fulfil the contract responsibly.

Without determining true costs and fair profit, regulation alone will not solve the problem, as companies will lobby and litigate against regulations that impact their profits. This case illustrates that corporate success should not come at the expense of the environment and society. The long term does not necessarily solve the problem, as it can conceal issues and delay penalties. Companies may distribute profits, borrow, or rely on limited liability to avoid costs when penalties materialise, as seen with Carillion and Thames Water in the UK.

Other points, observations and thoughts among those raised in debate and then roundtable discussion included:

1. Aligning private interests with the avoidance of detriments requires companies to incur the true costs of their impacts. This ensures that they do not impose expenses on others.
2. From a public international law perspective, a key principle is that no rules of law, official acts, or private actions can derogate from principles that have acquired the status of *jus cogens*. The duty to protect the environment and the duty for responsible exploitation of natural resources have acquired this status. This principle is reflected in regional human rights instruments, such as the African Charter, which imposes a duty on states to protect the environment. This Charter has been domesticated and is now part of the domestic law in many African countries. As a result, no private contracts, public actions, or private actions can derogate from these duties. These principles – environmental protection and responsible resource exploitation – override any private interests or arrangements. This would give courts the authority to refuse to recognise or set aside any contracts that conflict with these principles.
3. From a conventional corporate law perspective, the board's duty is to protect the company's success and benefit, not just profit. Therefore, the board must consider

the company's long-term future. The board must adequately review the impact of its actions on long-term profitability and success, analysing these matters with sufficient care and attention. There is a real risk of the company being exposed to liability to third parties for its actions, even under a state contract. These potential liabilities must be considered by the board when deciding whether to enforce or modify the contract.

Q5 How do we approach decisions relevant to corporate purpose, success and strategy that have been reached using AI?

Points, observations and thoughts among those raised in debate and then roundtable discussion included (**see also Theme 1** on "AI in the world"):

1. Issues of attribution and responsibility, and questions of intent and knowledge, will require close study where a decision is said not to be made by a human being.
2. But in addition, the use of AI in corporate decision-making offers significant opportunities to enhance the understanding and execution of corporate purpose, success, and strategy. By leveraging analytical capabilities of AI, companies can make more informed and sustainable decisions. However, this requires a balanced approach that integrates insights from AI with human oversight and ensures the decision-making process is ethical, transparent and in accordance with duty of care standards.
3. AI offers significant potential in assessing how corporate profits and success impact human and environmental well-being. When combined with satellite, social networking, and blockchain technologies, AI can determine, audit, and verify the extent to which companies contribute to or mitigate environmental, biodiversity, employee, or supply chain issues:
    a. Combined with satellite technology, AI can analyse satellite data to monitor the conditions of individual trees and plants, identifying sources of pollution and attributing deterioration accurately.
    b. With social networking, AI can gauge the genuine opinions of employees, communities, and customers about their companies, providing a clearer picture of corporate impact on stakeholders.
    c. And with blockchain technology, AI can trace the provenance of products and ensure transparency in the treatment of individuals within supply chains.
4. These technologies enable the precise determination, verification, and auditing of companies' negative impacts and true costs, making it feasible to hold companies accountable for their environmental and social footprints.

Scenario (second part)

"The State invites the Court of the State to rule now that if the State did not honour the Contract the damages should be less than the Company contends."

Questions (second part)

Q6 In this type of context, should Courts be readier to answer contract law questions in advance of breach or termination rather than afterwards?

Points, observations and thoughts among those raised in debate and then roundtable discussion included:

1. Courts should be more willing to consider issues ahead of a breach.
2. It is clear that certainty and transparency benefit both businesses and directors. Courts could adopt a proactive approach whereby directors would be able to bring queries before the court to seek guidance; this would reduce potential disputes.
3. To avoid overburdening the courts, it may be possible to use AI to assist in providing preliminary advice to board members.
4. There are two primary legal options to consider: declaratory relief and specific performance.
5. Declaratory relief involves the court issuing a statement on the rights and obligations of the parties under a contract. However, if there are legal precedents in the jurisdiction that may prevent courts from giving advisory opinions before a breach or termination, these may make this option problematic.
6. Specific performance is a remedy which does not require proof of breach, only a reasonable apprehension of one. This proactive approach allows courts to be forward-looking in assessing potential future damages rather than only addressing past breaches.
7. In the context of this scenario, when assessing damages within the remaining 10 years of the contract, courts should consider existing laws, the impact of shareholder activism, and causation issues. They must evaluate whether the company would have performed the contract, factoring in the potential influence of shareholder views and any likely changes, such as the state entering into new conventions or passing new laws.
8. For damages beyond the 10-year period, courts should anticipate potential legislative actions, such as the state requiring cleanup and remediation efforts at the end of the contract. Realistically assessing these future possibilities ensures that judicial decisions are relevant and appropriate, and reflect the reality of the situation.

9. The challenge in deciding questions in advance is whether we are certain enough of the hypothetical facts to express a legal opinion. When parties agree and offer a few formulations, it is feasible. The more speculative the scenario, the less useful the court's answer will be.

Q7 Do Courts need to be prepared to re-examine how contract damages are to be calculated in cases like this?

Points, observations and thoughts among those raised in debate and then roundtable discussion included:

1. This question argues for a principle of state compensation exceptionalism. That is far from a fanciful notion; in most legal systems, the knowledge that compensation must come from public funds exerts downward pressure on award sizes, sometimes explicitly and sometimes subliminally. But the courts have other tools at hand.
2. One reason the investment treaty arbitration structure has fallen into disrepute is that lawyers litigating those cases find liability more interesting than quantum. These large compensation awards rest on very thin evidential and analytical foundations. One side presents a discounted cash flow forecast claiming vast sums, while the other offers no alternative, leaving the tribunal with limited choices. We must rigorously test the counterfactual assumptions in such claims. Most businesses fail rather than succeed, except when they are subjects of compensation claims.
3. Legal doctrines of mitigation and remoteness can also reduce awards.

Scenario (third part)

"There is a pollution incident in the State as a result of the Company's operations. The pollution is said to have contaminated local drinking water and caused serious illness among the local population.

The local population cannot afford to bring proceedings against the Company to compensate for the harm caused by the incident.

Litigation funders are identified. The local community wish to seek injunctions against the Company (to stop future damage) as well as damages for harm already caused, but question whether the litigation funders will be interested in anything other than damages.

There is a question whether representatives from the local community should be entitled to represent all the local community save for those from the local community who 'opt out', or only those from the local community who 'opt in'."

Questions (third part)

"Q8 What are the strategic considerations for litigation funders? What should be the approach of the Courts?"

A Guest Expert Mr Jordan Lee, Chief Strategy Officer, Pogust Goodhead offered initial remarks to this effect:

> When considering the strategic objectives of a litigation funder in this case, it's helpful to understand how litigation funds are structured, the nature of their investors, and their performance metrics. Typically, these funds aim to generate above-market returns that are uncorrelated with capital markets, often within a short timeframe. At first glance, seeking an injunction might seem unnecessary and unattractive. However, investors in litigation funds place value on key performance indicators, one of which is the ability to deploy capital impactfully, focusing on access to justice and environmental, social, and governance (ESG) matters. Therefore, seeking an injunction may be consistent with funders' interests, as it demonstrates that the litigation is impactful.

Other points, observations and thoughts among those raised in debate and then roundtable discussion included:

1. Some jurisdictions have an established system for litigation funding. Others do not. Jurisdictions in the latter category express differing levels of enthusiasm for adopting such a system.
2. Further, in many countries litigation funding is governed or affected, at least in part, by legislation.
3. Litigation funding is unsophisticated, and litigation funders, like parties' lawyers, sometimes misbehave and that can affect the proper administration of justice. However, experience shows that close court supervision of both funders and lawyers leads to significant access to justice benefits, by reducing costs and increasing returns for group members.
4. A view was expressed that success in these cases comes down to three key factors:
    - Disclosure – funders must disclose terms to the court and the other side (with necessary redactions).
    - Courts supervise funders' charges to ensure reasonable rates of remuneration.
    - Transparency and competition are important. One experience was that an open funding market has driven rates down.

On this view, as regards this specific scenario, the court should allow the case to proceed, assuming these conditions are met.

5. Jurisdictions such as Australia prefer the opt-out approach to this sort of litigation. There are ongoing debates within Australian courts about the timing of this process. One of the tools used in this regard is "soft class closure", where, during ordered mediation, individuals must register or opt out. If the case does not settle at mediation, they can still participate in the trial.
6. The scenario suggests that the case could only be advanced with funding support. Another possibility is involvement from an environmental agency. In Australia, the Environmental Protection Authority can prosecute or advance cases with environmental impacts. Considering the global nature of climate challenges, international environmental authorities could develop mechanisms to bring proceedings in different countries on behalf of affected local people who cannot afford to litigate.
7. This approach requires considering standing and whether local courts would accept an international body with a mission to enforce and uphold environmental standards to bring properly funded proceedings, possibly with contributions from governments. This could be an alternative to litigation funding in cases involving significant environmental impacts.

8. Some jurisdictions grant standing to members of the public to bring a claim, regardless of whether they are directly affected by the environmental harm.[23]
9. The European Court of Human Rights recently granted standing in a climate change dispute in a way considered unorthodox by others.[24]

Final observations

These final observations were among those made at the close of the debate:

1. The discussion has been inventive, suggesting new ways to broaden directors' duties and corporate obligations to protect natural resources and prevent climate damage.
2. However, a note of caution is needed. Commercial courts achieve international respect because businesses value the certainty and predictability of the legal system. Commercial courts must continue to provide certainty.
3. While Commercial Courts should be inventive, climate legislation itself should be left to national governments and international treaties.
4. The role of the judiciary is to apply existing laws predictably and intelligently, and with an understanding of the societal consensus on the importance of protecting the planet for future generations.

C. Climate Change and Commercial Courts

(1) Briefing by Guest Expert

Ms Briony Eales, Judicial Capacity Building Team Leader, Environmental and Climate Change Law, Asian Development Bank

"A short review worldwide of private law climate change disputes to date"

The alarming emissions gap is the cause of increased climate change litigation worldwide.

The private sector faces many challenges in adapting to climate change, particularly due to incomplete legal frameworks. As of 2023, no country had passed an economy-wide climate law with specific obligations for companies to achieve net zero or meet biodiversity targets. This lack of regulation explains the rise in litigation based on existing frameworks and why boards of directors are trying to understand their fiduciary duties regarding climate obligations.[25]

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[23] The Zambian Environmental Management Act defines the environment as "the common heritage for present and future generations".

[24] ECtHR, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, no. 53600/20, judgment (Grand Chamber) of 9 April 2024. Both the majority opinion and the dissent are important.

[25] E.g. *Sarah Butler-Sloss & Others v Charity Commission* [2022] EWHC 974.

There are various types of litigation targeting corporations in private law, with courts responding to cases seeking damages or changes in company behaviour. These include claims of corporate responsibility, directors' duties, human rights violations, and climate washing. A key challenge for courts is determining how and when to incorporate climate change and environmental law principles into commercial cases.

Courts must balance existing precedents, democratic principles, and the separation of powers against the existential climate crisis.[26] Historically, the law has adapted to new challenges using judicial tools and relevant evidence. Increasingly it is necessary to look at climate science, which is becoming more precise, to find answers to these disputes.

Courts generally accept climate science as common ground, often referring to reports by the Intergovernmental Panel on Climate Change ("IPCC") that state climate change is a threat to human wellbeing and planetary health. These reports reflect scientific consensus and are credible, approved by governments party to the Paris Agreement. Courts are testing evidence as it relates to specific disputes.

In the recent decision in the Swiss senior women's case[27], the European Court of Human Rights summarised relevant evidence to test whether the Swiss government failed to adopt measures capable of reducing emissions and achieving net neutrality by 2050.

We will continue to see novel climate cases within the private sector. For example, in New Zealand, the *Smith v Fonterra* case[28] has the Supreme Court allowing an appeal to proceed, finding a reasonable argument for a cause of action against the top seven fossil fuel emitters under the tort of negligence. The court acknowledged that cumulative causation with multiple parties causing emissions should receive evidence and policy analysis, and noted the common law obligation or tradition to develop through trials rather than strike-out applications.

This echoes the European Court of Human Rights' stance that courts must take climate litigation seriously. It is legitimate, and courts must engage seriously with these issues.

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[26] Note for example *ClientEarth v Board of Directors of Shell plc* [2023] EWHC 1897 (Ch) and commentary at *ClientEarth v Shell* "What future for derivative claims" by Lord Carnwath at lse.ac.uk.

[27] (See also above) ECtHR, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, no. 53600/20, judgment (Grand Chamber) of 9 April 2024.

[28] *Smith v Fonterra Co-Operative Group Ltd* [2024] NZSC 5.

(2) Judicial Address

Justice Mansoor Ali Shah (Supreme Court of Pakistan)

"Climate Change and Commercial Courts"

[The address is at pages 150 - 157 of the Report]

(3) Roundtable Discussion

The points, observations and thoughts below were among those raised in roundtable discussion between the judges and including the guest experts.

In certain jurisdictions, there is a noticeable absence of jurisprudence or legal action concerning climate change. Despite being acutely aware of the adverse effects on their environments, these areas struggle to find ways to be proactive. The courts are seeking methods to educate the public about legal avenues for holding polluters accountable. There is a belief that commercial courts could play a pivotal role in this effort, but guidance and support are necessary to initiate meaningful progress.

Elsewhere, the situation is exacerbated by a lack of civil legal aid, making it difficult for local communities to combat environmental exploitation by foreign corporations. These corporations often engage in practices like overfishing local waters, building factories in coastal towns, and exporting resources while leaving behind significant environmental damage. The discharge of toxic waste and the dumping of unwanted materials on beaches are common issues, leaving local populations vulnerable and without recourse.

For these communities, the need for litigation funding is pressing. Poverty and limited access to legal support mean that any form of financial assistance for legal action is highly sought after. In such desperate situations, ethical concerns about the sources of funding become secondary. Unfortunately, only a few civil society organisations are willing to take on these complex cases, highlighting the disparity in perspectives depending on one's circumstances.

Some countries are debating which courts should handle climate change disputes, specifically whether they should be treated as solely commercial or more broadly involving civil, public, labour, environmental, and commercial law. The address of Justice Mansoor of the Supreme Court of Pakistan (above) is relevant here.

In France, the French Parliament resolved this in 2021 by passing legislation that treats climate change issues as extending beyond corporate concerns. The legislation states that climate change litigation should be handled by civil courts in the first instance. This decision highlights the recognition that climate change impacts multiple legal areas, not just commercial interests, requiring a comprehensive judicial approach.

Similarly, South Africa recognises climate change as a human rights issue, particularly affecting the poor. The South African Climate Bill, once enacted, is expected to strike a balance between economic development and human rights protection.

D. Concluding remarks

(including from Chief Justice Jayantha Jayasuriya PC, Chief Justice of Sri Lanka, and from others)

Evolving corporate duties

Traditional duties of corporate boards, which have historically focused on maximising shareholder profits, must evolve to incorporate broader environmental and social responsibilities. This includes considering the long-term sustainability of their actions and the true costs of their operations, including environmental and social impacts.

Courts are increasingly called upon to interpret and enforce these evolving duties. However, while courts can play a role in holding companies accountable, significant changes to corporate duties and responsibilities may require legislative action to broaden the scope of these duties to include other stakeholders beyond shareholders.

Aspects of disputes

Technology, particularly AI combined with satellite imaging and blockchain, can assist in monitoring and verifying the environmental impact of corporate activity. This could lead to more accurate assessments of conduct where there are issues of corporate environmental responsibilities and liabilities.

Courts are beginning to see examples of some points of climate science being treated as common ground rather than as issues in dispute.

There may be scope for courts to address contract law questions in advance of potential breach. This could involve providing advisory opinions or declaratory relief to clarify parties' rights and obligations before disputes escalate.

International principles and cooperation

Some jurisdictions, particularly in developing economies, consider environmental protection and responsible exploitation of natural resources as overriding principles that should not be derogated by private contracts.

There is a need for greater international cooperation to address the legal aspects of climate change and environmental protection.

Resources for disputes

Greater international cooperation could involve creating mechanisms for international bodies to bring legal actions on behalf of affected communities, particularly in cases where local populations do not have the resources to litigate.

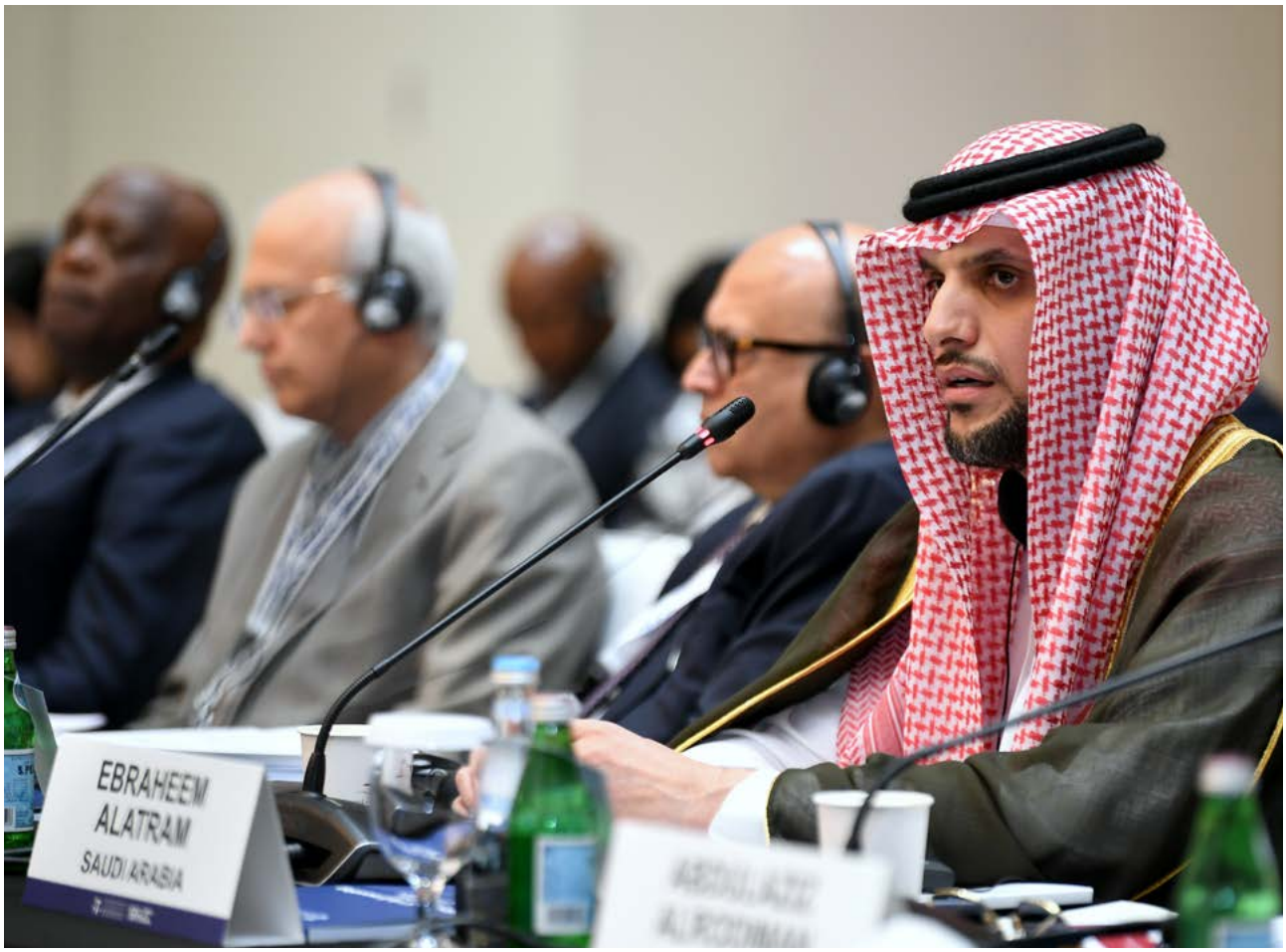
Litigation funding is an important tool for enabling legal recourse, particularly in cases involving significant environmental and social impacts. However, its effectiveness depends on careful regulation and supervision.

Theme 4: Towards Greater Transnational Judicial Cooperation

Chaired by: Chief Justice Andrew Cheung, Chief Justice of Hong Kong and Justice Jonathan Harris, President of the Competition Tribunal, Hong Kong SAR

Guest Expert: Christina Pak, Principal Counsel and Team Leader, Law and Policy Reform, Asian Development Bank

Prepared judicial contributions from: China, South Korea, Japan, Nigeria, Canada, South Australia, Abu Dhabi (ADGM Courts), Iraq and Qatar (QICDRC)



A. Introduction

The challenges that confront the world today are global in nature and require transnational collaboration. In all types of jurisdictions, business crosses borders more than ever. Consistency and certainty are as a result more valuable than ever. Whatever shape the future of globalisation takes the law - and the rule of law - will remain a critical part of the infrastructure of commerce.

The session on Theme 4 focused on the importance of a transnational system of commercial justice, in both procedural and substantive terms,[29] and explored the following issues:

- What is meant by "judicial cooperation"? What is practical? What is a realistic aspiration?
- Bringing about more systemised and recognisably familiar systems of and approaches to dispute resolution.
- Finding means for the development of common approaches to manage and reduce jurisdictional conflicts.
- The best assistance SIFoCC can give, including through convening and dialogue and as a platform for exchange.

The session featured a guest contribution from the Asian Development Bank (ADB), as well as updates from various jurisdictions across both common law and civil law systems, and a roundtable discussion of the key themes.

B. Briefing by guest expert

Ms Christina Pak, Principal Counsel and Team Leader, Law and Policy Reform Asian Development Bank

There is a growing demand for judicial capacity building in commercial and investment law issues, particularly in countries transitioning to a dynamic market economy. Commercial courts are facing an increasing need to adjudicate complex disputes with sustainable development implications, such as private law climate finance and energy transition cases.

To address this need, international organisations such as the ADB and the United Nations (UN) are supporting judicial capacity building and cooperation efforts. The ADB has launched several initiatives, including the Asia Pacific Judges Network on the Environment (APJNE), which aims to strengthen environmental law and governance in the Asia-Pacific region.

[29] The theme was discussed by Chief Justice Sundaresh Menon of Singapore in his SIFoCC 2022 keynote address. **SIFoCC playing its part as a cornerstone of a transnational system of commercial justice – SIFoCC**

The APJNE is a judicial network that brings together judges from across the region to share knowledge, experiences, and best practices in environmental adjudication. This has resulted in the establishment of specialised green courts, improved access to justice, and enhanced jurisprudence in the region.

Given the increasing complexity of commercial disputes and the need for effective and sustainable dispute resolution mechanisms, there are many opportunities for further judicial cooperation, including between judges of commercial and environmental courts.

C. Contributions from a selection of jurisdictions

(1) China

In an effort to promote transnational judicial cooperation, the Supreme People's Court of China has announced significant amendments to the country's Civil Procedure Laws (CPL), which took effect on 1 January 2024.

Four provisions in particular are aimed at resolving jurisdictional conflicts and improving the recognition and enforcement of foreign judgments:

- *Forum non conveniens:* Article 282 introduces the principle of *forum non conveniens*, allowing Chinese courts to dismiss cases in favour of a more convenient foreign jurisdiction if certain conditions are met. This change is expected to reduce jurisdictional conflicts and streamline cross-border legal processes.
- Parallel proceedings suspension mechanism: Article 281 establishes a suspension mechanism for parallel proceedings, enabling courts to temporarily halt litigation when similar cases are concurrently heard in different jurisdictions. This provision aims to prevent duplicative legal efforts and conflicting outcomes.
- Respect for party autonomy in jurisdictional agreements: under Article 280, Chinese courts will respect parties' autonomy by recognising exclusive foreign court agreements. Courts may decline to hear cases if an exclusive foreign jurisdiction has been agreed upon and accepted. This change supports the parties' freedom to choose their preferred jurisdiction and makes it easier to determine which court has authority.
- Recognition and enforcement of foreign judgments: Article 298 sets clearer standards for recognising and enforcing foreign judgments based on international treaties and the principle of reciprocity. Article 300 outlines specific grounds for refusing to enforce foreign judgments, including lack of jurisdiction, due process violations, fraud, conflicting judgments, and violations of Chinese public policy.

Significant progress has been made in recognising and enforcing foreign judgments. In June 2017, the China Asia Justice Forum established a standard of presumptive reciprocity for judicial cooperation with Asian judiciaries, moving away from China's previous de facto reciprocity practices.

In March 2019, the Qingdao Intermediate Court recognised a South Korean judgment based on reciprocity, marking a milestone in international legal cooperation. Similarly, the National Courts' Conference has standardised the handling of international civil and commercial cases, defining three categories of reciprocity: legal reciprocity, mutual understanding, and diplomatic commitment.

One significant example of legal reciprocity was a March 2022 decision by the Shanghai Maritime Court to recognise a UK court judgment for the first time, which illustrates the growing acceptance of foreign judgments in China.

(2) Hong Kong

In Hong Kong, commercial courts frequently handle cases involving jurisdictional questions and how jurisdiction should be exercised when it is discretionary. An example of this complexity is transnational debt restructuring, where coordinating hearings of associated applications across multiple jurisdictions becomes necessary.

A unique feature of Hong Kong is that, although it is part of one unitary state, it has an independent legal system, fundamentally different from that of the mainland. Hong Kong operates under an English-language common law system, whereas Mainland China uses a Chinese-language civil law system. Although jurisdictional issues between Hong Kong and the mainland are not technically "foreign" in the sense of occurring between separate states, many of the issues and practical problems they encounter are similar to those that arise between independent states. As a result, this subject is of considerable relevance to Hong Kong.

Discussions on judicial cooperation are often dominated by judges from major English-speaking common law jurisdictions. However, three of the world's four largest economies – China, Japan, and South Korea – operate under civil law systems and do not use English as their primary language. As highly industrialised nations and major trading partners, their perspectives are valuable to understanding the broader landscape of global commerce. Hearing from judges in these jurisdictions will provide insights into their unique challenges and approaches.

(3) South Korea

In 2023, South Korean courts handled over 5,000 transnational cases requiring judicial cooperation with approximately 12 different jurisdictions. This reflects South Korea's status as an export-driven economy. The primary aspects of transnational judicial cooperation in these cases include the taking of evidence and the serving of legal proceedings abroad.

As a civil law jurisdiction, Korean courts bear the responsibility for serving court documents, and they have strict rules in this regard. Failures in service, whether due to deadlines being missed or the wrong address being used, can result in significant procedural delays. When a defendant resides overseas and the representative is in

Korea, direct service risks impinging on the foreign country's judicial sovereignty. Therefore, it is important to collaborate with the foreign nation to ensure proper service.

When serving documents to Korean nationals and the foreign country is a signatory to the Vienna Convention on Consular Relations, service can be executed via the Korean consulate. This process is relatively straightforward. However, in the absence of this framework, service must take a more protracted diplomatic path involving the respective countries' ministries and courts. This approach can be time-consuming and is vulnerable to inaction by foreign authorities.

Recognising these challenges, South Korea acceded to the Hague Service Convention in 2000 and has entered into bilateral treaties on judicial cooperation. Pursuant to 30 such conventions, service is conducted through a designated central authority in the foreign country. This approach has proven to be more efficient and reliable.

Judicial cooperation is essential when it comes to taking evidence abroad. This typically involves situations where a key witness is based in a foreign country or where assistance from a foreign court is necessary to obtain other forms of evidence. The taking of such evidence can be facilitated through the Korean consulate under the Vienna Convention, the Hague Evidence Convention, and other bilateral treaties.

One successful example of judicial cooperation is the judgment of the Seoul High Court dated 19 September 2014 in Case No. 2014 Na 1449. In this case, the Seoul High Court considered the issue of the authenticity of a painting purportedly created by the renowned Chinese artist. The defendant, an art seller, had commissioned the sale of this painting to the plaintiff, an art gallery owner. The plaintiff subsequently sold the painting to a Dutch buyer. However, after the sale, the buyer contested the authenticity of the painting, prompting the plaintiff to agree to a refund. The plaintiff then sought damages from the defendant to recover the amount.

The most straightforward way to verify the authenticity of the painting was to consult the supposed creator, who resided in China. The Chinese judiciary provided assistance for the witness examination of the artist through the bilateral treaty on judicial cooperation between Korea and China. During the witness examination held in a Beijing court, the artist unequivocally stated that the painting in question was not his work, conclusively addressing the issue. This case illustrates how effective judicial cooperation can result in a swift and fair resolution of disputes.

However, there are also instances where judicial cooperation can be challenging, particularly where there are delays or where a foreign court is non-responsive. Further, if a foreign authority does provide a response but fails to follow procedures set out in the relevant convention, documents may have to be retained, causing further delays and costs. As a result, cases may have to be resolved with important documentary gaps.

One example where such delays were problematic is a case where a Korean company advanced a claim against a Mongolian airline.[30] The Korean plaintiff and an executive of the Mongolian airline had signed a General Sales Agency Agreement, and the plaintiff had made the required deposit. However, the airline later contended that the executive was unauthorised to enter such an agreement and returned the deposit.

As the executive was under investigation by Mongolian prosecution in relation to this issue and a key participant in the negotiations resided in Mongolia, the Korean court reached out to Mongolia for cooperation pursuant to a bilateral treaty. Regrettably, no response was received from Mongolia for over three months, and the court proceeded to a decision in the absence of this important witness.

In another case, the claimant sought damages arising out of an accident that occurred in China.[31] With the key witness in China, the Korean court requested permission from the Chinese authorities to cross examine the witness online at the Korean Consulate. Although permission was granted, the response arrived five months later, by which time the parties had decided to settle.

Based on its experiences, the Korean judiciary makes the following recommendations to improve judicial cooperation:

- A specialised team should be established to handle international judicial requests. This team would manage and coordinate requests from other countries. By having a centralised system, requests could be handled quickly and efficiently, reducing paperwork and avoiding delays.
- A shared agreement should be developed to outline procedures for international cooperation. This agreement would provide clear steps and guidelines for everyone involved, ensuring consistency and preventing confusion across different countries.
- Less strict rules should be implemented for voluntary witnesses. This would make it easier for voluntary witnesses to give evidence and would encourage more witnesses to cooperate, allowing the legal process to move faster and enabling the collection of important evidence without delays.
- Building trust and understanding between countries should be prioritised. If countries understand each other's legal systems better, they are more likely to collaborate and to do so more effectively.

Separately, on the subject of *forum non conveniens* – it was previously believed that civil law jurisdictions such as Korea would not adopt the principle of *forum non conveniens*. However, this has changed, as Korea incorporated the principle into its private international law in 2022. Even prior to this amendment, Korea had a test for establishing jurisdiction based on a "*substantial connection*", which considered similar factors to

[30] Seoul High Court, Judgment of 27 January 2022, Case No. 2020Na2012958.

[31] Suwon High Court, Case No. 2020Na18091 (case settled).

those in *forum non conveniens*. The explicit adoption of this principle under Korean law means that experiences, tests, and precedents from common law countries will now significantly influence Korea's future practices. This development means that a forum such as SIFoCC which facilitates dialogue between civil and common law jurisdictions is likely to be increasingly important.

(4) Japan

In October 2022, the "Business Court" opened in Tokyo. This new facility houses divisions of the Tokyo District Court specialising in commercial, intellectual property, business restructuring, and insolvency disputes, as well as the Tokyo High Court's appellate divisions for intellectual property disputes. These divisions were previously located with other divisions in a different building.

The Business Court was established to better meet user expectations by enhancing cooperation among these divisions, promoting specialisation, and increasing efficiency through advanced technology.

Arbitration-related disputes, which were previously distributed across various divisions within the Tokyo District Court, are now exclusively handled by the Commercial Division and the Intellectual Property Division within the Business Court. This change aims to improve expertise in handling these disputes.

The Business Court is expected to serve as a key forum in Japan for transnational judicial cooperation, as it frequently deals with transborder disputes. Dialogue among judges from various jurisdictions is essential, and the Business Court has hosted visits from judges worldwide. For example, the Business Court successfully held an International IP Judicial Symposium with participation from judges across multiple jurisdictions, which underscores its focus on international collaboration.

The Business Court has drawn on the experiences of foreign jurisdictions. For years, young judges have been sent abroad to study foreign judicial systems, with a focus on digital technology and efficient dispute resolution. For example, Japanese judges have visited the Rolls Building in London to learn from their practices.

On the topic of international jurisdiction, in Japan, specific rules in this regard are set out in the Code of Civil Procedure. However, some issues, such as whether a Japanese court has jurisdiction when the same dispute is pending in another country, are open to interpretation. The Supreme Court of Japan has ruled that Japanese courts can consider the existence of a parallel dispute in another country when deciding whether there are special circumstances to dismiss the case.

(5) Nigeria

Nigeria is committed to transnational judicial cooperation. It has been a consistent participant in SIFoCC events since the inaugural Full Meeting in London in 2017. Nigerian judges have also engaged in specialised forums to improve their expertise in specific areas such as intellectual property law, for example the World Intellectual Property Organisation (WIPO) Judges Forum.

To further institutionalise these learning experiences, Nigeria's National Judicial Council is considering integrating insights from SIFoCC into the training curriculum for Nigerian judges. This includes potentially participating in the SIFoCC Observation Programme to improve their understanding of international best practices. The Nigerian delegation, including the Administrator of the National Judicial Institute, is committed to use these opportunities to improve judicial education and cooperation.

(6) Canada

Judicial cooperation is particularly valuable to Canada in defining the courts' role in upholding arbitration agreements while preserving judicial independence.

Canada operates under a federal system with both federal and provincial arbitration regimes, predominantly governed by provincial legislation aligned with the UNCITRAL Model Law (except in Quebec, which follows its Civil Code).

Canadian courts are generally arbitration-friendly, intervening only in specific, narrow circumstances, such as issues of jurisdiction, procedural unfairness, or conflicts with public policy. However, there is a disparity in arbitration expertise among judges, especially outside major commercial centres, leading to some uncertainty in decisions.

SIFoCC could improve judicial cooperation by developing a multilateral memorandum on jurisdictional disputes, focusing on the role of courts in arbitration. This would help with judicial education, promote consistency across jurisdictions, and ultimately contribute to greater commercial certainty.

(7) Australia

There are two key areas where judicial cooperation would be of great value: improving judicial independence and clarifying the rules governing international dispute resolution.

For commerce to thrive, the judiciary must be independent. This means not only following international principles but also ensuring courts are properly funded, structured, and operated to maintain their independent decision-making power. SIFoCC can help strengthen this independence through judicial dialogue and exchange of experiences and ideas.

While common rules govern international commerce, their application varies across jurisdictions, leading to inconsistencies. SIFoCC can help harmonise these rules, making

commercial law more predictable and stable. It can also help judges understand cultural differences in enforcement, guiding them on when to intervene and when to exercise restraint.

South Australia has engaged in exchanges with other appellate courts to understand different approaches and practices. SIFoCC could facilitate similar exchanges, allowing judges to learn from each other and improve their handling of complex commercial matters.

(8) Abu Dhabi (ADGM Courts)

In recent years, forecasts have predicted an exponential rise in the global supply chain management market. Cross-border payments are also estimated to exceed $250 trillion by 2027, reflecting a $100 trillion increase within a decade. It is anticipated that this would drive global businesses and investors to increasingly rely on international commercial courts to enhance the speed, efficiency, and effectiveness of enforcing monetary judgments worldwide.

In response, the ADGM Courts have focused on transforming the enforcement process through digitization. For example, by developing a blockchain-based solution that digitises the first mandatory step in enforcement: the verification or certification of judgments. This solution is built around the concept of a digital record, which securely stores the essential metadata of a monetary judgment on the blockchain. The ledger is accessible only to the originating and enforcing courts via a web portal, eliminating the need for parties to manually file a certified copy of the judgment. This enables both courts to manage the process in real time, without manual checks or intermediaries.

To support this innovation, the ADGM Courts have also drafted rules with smart contract protocol options, explanatory memoranda, and a framework for establishing a consortium of international commercial courts as members of the blockchain. The belief is that this fits with the purpose of SIFoCC, which is to ensure that businesses and markets benefit from shared best practices among courts, keeping pace with rapid commercial changes.

A video demonstrating the process of a judgment proceeding from the originating court to the enforcing court through our blockchain solution can be accessed via this link: **ADGM Courts Presentation**

(9) France

A major recent development is the proposal by the Ministry of Justice to give the Paris Court of Appeal a more prominent role in overseeing international arbitration in France. Specifically, to give the Paris Court of Appeal national jurisdiction over international arbitration cases. This centralisation is intended to ensure that there is the necessary judicial expertise in arbitration and set-aside proceedings.

D. Roundtable discussion

The points, observations and thoughts below were among those raised in roundtable discussion between the judges.

(1) The meaning of "judicial cooperation"

"Judicial cooperation" refers to the development of methods and mechanisms to reduce the negative effects of conflicts of laws, promote consistency and predictability in court decisions across different jurisdictions, and enhance the efficiency and effectiveness of dispute resolution.

Key aspects of judicial cooperation include the following:

- Developing methods to reduce the negative effects of conflicts of laws, such as private international laws and uniform law, to ensure that court decisions are consistent and predictable across different jurisdictions;
- Making arrangements for the reciprocal enforcement of civil and commercial judgments between jurisdictions;
- Cooperation at the procedural level, particularly in cases involving parallel proceedings in multiple jurisdictions, to achieve a more efficient management of cases;
- Transnationalism, or the concept of international cooperation across judicial systems, is a critical aspect of judicial cooperation. It involves considering the need for cooperation with other jurisdictions in judicial reforms, rather than focusing solely on domestic improvements;
- Judicial cooperation is also about the sharing of best practices to raise international standards in commercial dispute resolution.

(2) New areas and methods of judicial cooperation

There was a broad consensus among the delegates in favour of new methods and mechanisms to promote judicial cooperation in the modern world.

Some methods discussed included the following:

- Developing a framework to connect and harmonise the rules of different jurisdictions, to achieve greater cooperation and coordination between them. A successful example of this on a smaller scale is the Greater Bay Area, where judges from Guangdong, Hong Kong, and Macao participate in moot trials to directly compare their legal practices and promote closer judicial cooperation;
- Increasing procedural cooperation, especially in cases with parallel proceedings in multiple jurisdictions. This includes synchronising hearings and sharing evidence, submissions, and draft judgments between courts, as successfully practiced by Hong Kong and the Cayman Islands;

- Harmonising procedural laws to facilitate international arbitration, with a focus on increasing certainty in the enforcement of arbitral awards across different jurisdictions;
- Identifying and empowering central authorities within jurisdictions to facilitate swift cooperation in processes such as taking evidence abroad and serving documents. Within the European Union, cooperation is streamlined and efficient, which means that the taking of evidence abroad can be organised swiftly through a central authority. However, the experience outside the EU can be much less efficient. Improving these mechanisms would significantly improve the effectiveness of transnational litigation;
- Focusing on judicial education and training, particularly in areas such as AI, where there is an opportunity for common ground. Such training would improve understanding of how AI technology can be applied in the legal world and lead to more consistent and informed decision-making globally;
- Improving judicial cooperation in verifying the validity or authenticity of judgments for enforcement;
- Developing principles (such as *forum non conveniens*) to assist in judicial cooperation.

The adoption of common law principles such as *forum non conveniens* in civil law jurisdictions such as China and Korea is an interesting development. While *forum non conveniens* is a doctrine of judicial abstention, aimed at directing litigation to the most appropriate forum, it raises the question of whether we might also see the adoption of anti-suit injunctions (ASIs), which have the potential to create jurisdictional conflicts. Both are interconnected common law mechanisms that influence venue selection and forum shopping. Developing principles around these doctrines and understanding their application across borders could assist in fostering judicial cooperation.

(3) The assistance SIFoCC can provide

(a) Promoting judicial dialogue

For example, by organising workshops focused on specific themes, such as jurisdictional conflicts, enforcement of foreign judgments, and international commercial arbitration, to aid mutual understanding and uniformity of practice.

Judicial dialogue can also improve the actual and perceived independence of courts through discussion of areas such as court funding, court structure, case and appeal management, handling of foreign evidence, and judicial education and training practices across jurisdictions.

(b) Serving as a platform for exchange of information

For example, by assisting with the development of an online resource centre with a database of laws, regulations, and court decisions from different jurisdictions.

(c) Judicial capacity building

SIFoCC's peer to peer Observation Programme is an example. Another is providing training and education programs for judges to improve best practice and raise standards internationally.

(d) Judicial education

By developing new educational tools and resources such as a multilateral memorandum on jurisdictional disputes, including specifically addressing the role of courts in arbitration. Such a document would provide valuable guidance to judges who may not have extensive experience in arbitration matters and would help to foster a more uniform approach to arbitration-related disputes, improving commercial certainty for users.

E. Concluding remarks

(1) Chief Justice Dr Faiq Zaidan, President of the Supreme Judicial Council of Iraq

The importance of international cooperation between judicial authorities cannot be overstated in today's interconnected world. As globalisation has blurred borders and increased the complexity of legal challenges, particularly in the areas of organised crime, terrorism, and financial disputes, the need for collaboration across national justice systems has become essential rather than optional.

National justice systems are under increasing pressure from transnational issues that surpass the capabilities of individual countries. Crimes such as terrorism, money laundering, and human trafficking have evolved beyond national borders, making it necessary for judiciaries to work together. Effective international cooperation involves not only the exchange of information and expertise but also the development of mechanisms for criminal extradition, enforcement of rulings, and mutual legal assistance. This collective approach strengthens global commitment to upholding the rule of law and achieving justice.

This SIFoCC conference represents a significant opportunity to explore and develop strategies for further improving international judicial cooperation.

(2) Sir William Blair, Qatar International Court and Dispute Resolution Centre

No court is an island. This captures the essence of SIFoCC's mission. Another critical aspect of judicial cooperation is addressing the growing issue of international crime. To tackle such challenges effectively, transnational judicial cooperation is essential.

It has been observed by one speaker that "transnational cooperation is coming", and the key question is how far it will go, which will largely depend on judges. Progress depends on finding common ground, and that begins with meetings such as this. There was initially a concern that obstacles to transnational cooperation might outweigh the potential benefits, but it is clear that much has been achieved already, particularly at a regional level.

One notable concept is "presumptive reciprocity" in recognising and enforcing foreign judgments. This doctrine allows one jurisdiction to recognise a foreign judgment without waiting for reciprocal action, which is a significant step forward. The blockchain demonstration was also valuable, as it effectively shows how the authenticity of a judgment may be established, though the question of recognition is of course a question of law.

Statutory cooperation, the development of specialised business courts, and networks such as the Asia Pacific Women Judges Network, all foster relationships and contribute to progress.

The New York Convention has been a monumental success for international commerce. The Hague Judgments Convention addresses jurisdiction outside of contractual contexts. The controversial question that arises in this context is about determining when a court should be considered to have jurisdiction in an international dispute, especially when one or more of the parties involved have not agreed to that court's jurisdiction. This issue involves balancing the enforcement of judgments across borders with respecting the sovereignty and legal frameworks of different countries. The Hague Judgments Convention seeks to address this difficult area, but the question of jurisdiction remains a contentious and complex topic. This was an area discussed at the 2019 SIFoCC meeting in New York. It may be time for SIFoCC to revisit this topic, given the detailed contributions on this area from a number of jurisdictions.

While bilateral judicial engagement is common and welcome, there is a lack of substantial multilateral engagement – this is where SIFoCC plays a crucial role. These meetings are valuable, but they should be milestones in ongoing work. SIFoCC is a long-term project, and our efforts must continue between meetings.

F. Summary

The session highlighted the increasing necessity for transnational judicial cooperation in a globalised world, where businesses and legal issues frequently cross borders. Consistency and predictability in legal outcomes are important for maintaining the rule of law in international commerce.

Judges from diverse legal systems shared how their courts are adapting to these demands, with key developments including:

- Legal reforms to address jurisdictional conflicts and improve the recognition and enforcement of foreign judgments (China).
- Strategies for managing transnational cases, particularly in serving documents and taking evidence abroad (South Korea).
- Expanding the oversight of the Paris Court of Appeal to include arbitration (France).

Delegates recognised the need for new frameworks to harmonise legal rules across jurisdictions. Key proposals included:

- Developing frameworks to increase harmony between the legal systems of different jurisdictions.
- Improving cooperation on a procedural level in cases involving parallel proceedings.
- Focusing on improving judicial training in emerging areas such as AI to improve judicial education and decision-making.

The adoption of common law principles such as *forum non conveniens* in civil law jurisdictions (e.g., China and Korea) was seen as a positive development. However, this may require greater attention to be paid to the related issue of ASIs, which can create confrontation between jurisdictions.

SIFoCC was identified as playing an important role in promoting judicial dialogue and cooperation on a multilateral rather than bilateral level, and building capacity by providing programs for judges to enhance best practices and raise global judicial standards.

Litigation Funding and Arbitration Funding by Third Parties

Chaired by: Hon Loretta Preska, Senior Judge (former Chief Judge) US District Court, Southern District of New York

Guest speakers: Ms Susan Dunn, International Legal Finance Association, Chair of the Association of Litigation Funders; Mr Thomas Goodhead, Global Managing Partner, Pogust Goodhead; Mr Daniel Leader, Barrister, Partner, Leigh Day

Prepared judicial contributions from: USA, Germany, Australia

This session focused on the litigation funding landscape and its evolution globally, highlighting its implications for legal systems, access to justice, and regulatory frameworks.

Litigation funding has transformed significantly in recent years. In the United States, its growth was catalysed by the aftermath of the 2008 financial crisis, which saw an increase in the use of third-party funding to manage the rising costs of litigation. Meanwhile, jurisdictions across Europe, Australia, and beyond have seen rapid developments, with litigation funding becoming an increasingly integral part of legal practice. These trends underscore the need for a comprehensive analysis of how different legal systems are adapting to and regulating this burgeoning industry.

The role of litigation funding in facilitating access to justice, including in large-scale and complex litigation is material. It can allow claimants, who might otherwise be unable to pursue legal action, to bring claims against well-resourced defendants. However, this industry also raises critical questions about its impact on the integrity of legal systems, the potential for abuse, and the balance between public and private interests in the administration of justice.

The diversity in regulatory approaches – from the permissive frameworks in some US states to the more restrictive regimes in parts of Europe – reflects the ongoing debate over the appropriate balance between encouraging litigation funding and safeguarding legal principles.

The session provided insights from leading experts across multiple jurisdictions, exploring in detail the challenges and opportunities presented by litigation funding. **See also Theme 3** ("Corporate activity and the rule of law").

(1) Hon Loretta Preska Senior Judge (former Chief Judge) US District Court, Southern District of New York

"The current landscape and challenges of litigation funding in the United States"

[Please see Judge Preska's paper annexed to this report.]

(2) Ms Susan Dunn, International Legal Finance Association, Chair of the Association of Litigation Funders

"Global trends and strategic developments in litigation funding; the current issues; possibilities ahead"

My firm, Harbour Litigation Funding, is the largest private litigation funder in the world, backed by various sources, including US Ivy League endowment money. Only 2-5% of the cases presented to my firm are actually financed, amounting to approximately 30-50 cases per year. This highlights that, despite perceptions, only a small fraction of cases that are run in courts around the world are actually funded by litigation funders.

I. Recent international developments

Since 2023, there has been a notable shift from funding single cases to supporting group and class actions, especially in jurisdictions such as the Netherlands and England and Wales, whereas in jurisdictions such as Australia, class action regimes are already well-developed and are heavily reliant on external funding. These group and class actions simply would not proceed without financial support due to their high costs. For example, Harbour Litigation Funding is funding 100,000 women in their equal pay claims against five supermarkets. Each of these claims individually is relatively modest, at £20,000 each. The claimants could not afford to pursue these large corporates for the claims they are looking for without funding.

In Australia, regulatory changes initially had a chilling effect on the litigation funding market, effectively halting it. However, these changes were reversed once it was realised that the absence of funding was detrimental to the justice system.

In England and Wales, the Competition Appeal Tribunal, which deals with anti-cartelist claims, sees every one of these cases in that forum being funded. The nature of the claimants is diverse in nature and their claims would not be able to proceed without litigation funding.

In England, a recent Supreme Court decision in a case called *R (on the application of PACCAR Inc and others)* [2023] UKSC 28 ruled that litigation funding agreements are captured by the same regulations which govern the way lawyers run contingency fees. This had the effect of making all litigation funding agreements unenforceable because they had never been contemplated as contingency fee agreements because the funders are simply not the lawyers running the cases. All the funders do is pay the bills. This decision, along with public and legislative pressure (partially fuelled by a televised

drama about sub-postmasters), led to new legislation aimed at reversing the Supreme Court's ruling and restoring the previous status quo.

In Ireland, there has been an increase in litigation funding specifically in arbitration cases.

In Germany, there is a cap on litigation funding, which effectively prevents funding for cases, making them economically unviable.

II. Disclosure of funding agreements

There has been a trend towards greater disclosure of funding agreements, particularly in European legal venues. The Chartered Institute of Arbitrators and European Law Institute are currently working on drafting principles and guidance for the claimants and users of litigation funding. This guidance is necessary because although litigation funding might seem straightforward, it is still not well understood by many practitioners and judges.

III. Class actions

Litigation funding plays a vital role in the development of jurisprudence, particularly in class actions that would otherwise be impossible to pursue.

There is an ongoing debate in England regarding whether additional regulation of litigation funding is needed, particularly in relation to the recoverability of funding charges.

IV. Conclusion

Litigation funding continues to be an important element in the justice system, enabling cases to proceed that would otherwise be financially unfeasible. It is likely we will see more and more use of funding in the future.

(3) Justice Michael Lee, Federal Court of Australia

"Judicial oversight in Australia's litigation funding market"

Australia is recognised as having one of the most mature class action litigation funding markets in the world. The current issues in this area revolve around managing a system that has historically had low barriers to the commencement of collective claims and the funding of those claims.

Three key principles are essential to this discussion:

- The first is access to justice. It is fundamental to the rule of law that citizens should be able to vindicate their claims.
- Secondly, protections for claimants - there should be safeguards in place for those who wish to avail themselves of the justice system.

- Third, the integrity of the civil justice system is crucial to upholding the rule of law, and appropriate guardrails must be established to maintain this integrity.

The first principle is largely uncontroversial – access to justice is universally accepted as a cornerstone of the rule of law. However, the real controversy arises with the second and third principles, particularly in relation to the role of the courts in controlling how class actions are conducted in Australia.

Historically, class actions in Australia were handled by a small pool of law firms, but this landscape has changed significantly. Today, there are 43 large law firms and 25 litigation funders actively operating in the market. This growth has sparked public debate about the extent to which the legislature should be involved in regulating litigation funding.

The view from the courts is that the judiciary is best positioned to control how litigation funding operates. After all, litigation funding involves the use of public resources – namely, the court system – for the generation of private gain. It is the central role of the courts to ensure that this is done in a manner that does not undermine the integrity of the legal system.

Australia has thus far managed to maintain good control through judicial oversight, but this will continue to be a topic of debate. For those unfamiliar with litigation funding, the Australian experience may provide valuable insights into how a mature system operates and how judicial control can be effectively maintained.

(4) Judge Patrick Melin, Presiding Judge, Stuttgart Commercial Court, Germany

"Litigation funding and collective redress in Germany"

Traditionally, the German jurisdiction has permitted third-party funding of lawsuits without specific regulation, but it has taken a rather sceptical and restrictive approach, particularly in mass cases involving large numbers of potential clients, which may be particularly lucrative for third-party financiers. However, this is gradually changing. The legislative and judicial attitudes towards third-party financing have become more liberal, and litigation funding in Germany is reportedly expanding rapidly.

To provide a brief overview of the relevant developments, it is important to understand that German civil procedure has traditionally focused almost exclusively on claims brought by individual plaintiffs. Class actions or other forms of collective redress did not exist in Germany and were viewed with scepticism, particularly from a judicial perspective. Concerns about provoking mass claims and creating a trial industry have often outweighed considerations of access to justice.

However, the landscape is shifting with regard to collective redress. A significant factor in this change is the influence of the EU, which has adopted several directives encouraging member states to implement forms of collective redress in specific areas of law. Recent mass cases, such as the "Dieselgate" scandal in Germany, have

demonstrated that the traditional civil procedure system, limited to individual claims, is ill-equipped to handle cases involving mass damages with large numbers of claimants.

In response, Germany has adopted several instruments of collective redress, albeit limited in scope. Most recently, the German legislature implemented the European Representative Actions Directive, which marks a significant step forward by allowing the collective enforcement of claims for damages.

However, this is not possible through class action suits but rather via certain qualified legal entities, such as consumer protection organisations, that can bring claims on behalf of consumers. With the advent of such forms of collective redress, one might think that third-party financing in Germany is becoming more lucrative.

Nonetheless, third-party financiers still face obstacles in Germany, particularly in the field of collective redress. One aspect of German law that generally limits third-party financing is the statutory prohibition, with limited exceptions, on lawyers agreeing to success-based fees with their clients.

Third-party financing risks being seen as a circumvention of this general prohibition. For instance, if there is any agreement between a financier and the lawyers involved in the litigation that allows the lawyers to financially benefit from the portion of the award going to the third-party financier, it is considered a circumvention of the prohibition on success-based fees. In such cases, lawyers are only entitled to the regular fees provided by statutory law in Germany.

Recently, in mass cases where individual mandates between the client and attorney are impractical, third-party financiers have had clients assign their claims to them, allowing them to bundle the claims and achieve economies of scale. To pursue these claims, financiers have registered themselves under German legal services law as “debt collectors”. This has raised questions about whether actions brought by third-party financiers as debt collectors violate German legal services law, which generally restricts who can provide certain forms of legal services.

In recent years, however, the German High Court has issued several decisions in favour of third-party financiers, adopting a broad interpretation of the services that can be offered by such financiers acting as debt collectors under German legal services law. Despite this, a degree of legal uncertainty remains.

Finally, in the area of collective redress, various statutory instruments that allow for certain forms of collective redress or the bundling of individual claims simultaneously attempt to limit the activities of third-party financiers. For example, the law implementing the European Representative Actions Directive, mentioned earlier, includes a specific provision stating that a collective action is inadmissible if financed by a third party promised more than 10% of the proceeds of the case.

Thus, while the influence of third-party financing in Germany is undoubtedly growing, significant legislative and judicial obstacles remain.

(5) Mr Thomas Goodhead, Global Managing Partner, Pogust Goodhead

"A perspective from an international class action firm based in Australia, Brazil, Netherlands, UK and US"

An article in the Australian Financial Review discussed the opening of a Pogust Goodhead office in Sydney, alongside other US and UK law firms expanding into Australia. The Australian Chamber of Commerce and Industry, the Business Council of Australia, and the AI Group expressed concerns that these overseas firms, backed by large litigation funders, aim to wage "lawfare" on the Australian stock exchange. The chief executive of the Australian Industry Group warned that Australia's relatively loose rules around class actions have made it an attractive target for foreign-funded legal speculators, likening it to "moths to a flame".

In contrast, the perspective from England and Wales, shaped by the Postmasters scandal, led to significant proposed legal reforms. Alex Chalk, the Lord Chancellor and Secretary of State for Justice, introduced legislation to reverse the effects of the Paccar decision. Chalk highlighted that third-party litigation funding enables individuals to bring complex claims against well-resourced corporations - claims they otherwise could not afford. He also noted that uncertainty around litigation funding could undermine England and Wales's position as a global hub for commercial litigation and arbitration, and broader access to justice.

Australia and the UK offer two contrasting but not contradictory views on litigation funding. On one hand, it's important to acknowledge that unscrupulous law firms and funders, if left unchecked, may exploit the system by pursuing unmeritorious claims driven solely by financial incentives rather than justice. There are legitimate concerns that these actors could undermine the integrity of the legal system.

On the other hand, without litigation funding, many corporate misdeeds, frauds, and anti-competitive practices would go unchallenged, leaving victims without a real chance of achieving substantive justice.

There is a middle ground where responsible litigation funding can facilitate access to justice while avoiding misuse.

At Pogust Goodhead, it seems that large group actions or very large class actions are nearly impossible to pursue without litigation funding, except in the most straightforward cases. For instance, its highest-profile case, and the largest group litigation of its kind in history, is the ongoing litigation in the English courts against BHP and Vale, two of the world's largest mining companies. The firm represents nearly 660,000 Brazilians in a long-running case concerning the collapse of the Fundão dam in Mariana, Brazil. In 2015, this disaster released 50 million cubic meters of toxic waste into

the River Doce, causing 19 deaths, displacing thousands, and destroying an area of land the size of Portugal.

BHP estimates that their costs for solicitors alone through to the first instance of trial will be £108 million. Given the scale of such cases, which involve servicing clients around the world and bearing all associated costs, even a well-funded legal aid system would struggle without litigation funding.

The "loser pays" rule, prevalent in the UK and Australia, makes after-the-event (ATE) insurance indispensable in litigation. If ATE insurance were removed or became inaccessible, the upfront costs of litigation would become prohibitive, severely limiting access to justice.

One trend that Pogust Goodhead has embraced, particularly in the US, is "portfolio litigation financing", where financial risk is spread across different cases. For instance, in 2023, the firm managed a $552.5 million portfolio funding facility that was cross-collateralised over 26 different cases litigated in various jurisdictions. This approach substantially reduces risk for the funder and, in turn, reduces the cost of capital for our firm, which benefits claimants by lowering the financial burden compared to the high multiples typically sought by litigation funders.

In jurisdictions such as the Netherlands and Australia, class action mechanisms and opt-out systems are available. These mechanisms have a dual effect: they facilitate judicial regulation and positive control over litigation funding, ensuring that returns are adequate and monitored. However, opt-out systems can also lower returns, increasing the financial risks involved.

From the perspective of managing a class action law firm, I recognise the need for regulation of litigation funders. The growth of hedge funds and individual investors entering the litigation funding space, seeking outsized returns without adhering to established rules, poses risks. I can see a case for regulation, including potential caps on deductions from damages and mandatory disclosure of funding arrangements. However, I would caution that the judiciary should be wary of defendants using attacks on funding arrangements as a tactic to delay or derail proceedings, thereby avoiding focus on the merits of the claims.

Litigation funding is particularly important in cases involving transnational torts and economic disasters. Ideally, the courts in the countries where these incidents occur should be able to hear these cases, but in reality, this is often not the case. Litigation funding allows these cases to be heard in jurisdictions with better access to justice.

Litigation funding also promotes equality of arms, ensuring that lawyers are adequately remunerated, and cases are brought before the most efficient and well-resourced courts. While litigation funding does not necessarily level the playing field, it does provide access to sophisticated lawyers, experts, and well-managed courts. Despite the

need for careful management and regulation, litigation funding is ultimately a force for good, ensuring that justice is accessible to those who need it most.

(6) Mr Daniel Leader, Barrister and Partner, Leigh Day

"An international perspective, including a focus on Africa"

I. Introduction

I specialise in group actions, international human rights, environmental law cases against multinational corporations (MNC) on behalf of communities and individuals from around the world, particularly Africa.

II. The Legal Landscape for Environment Sustainability and Governance (ESG) Litigation

It is fair to say that the rise of international human rights and environmental litigation against MNCs is now a global phenomenon. The world of corporate accountability has radically changed from where we were 25 years ago when I first began to work in this area.

Back then if an impecunious community in the global south was seeking redress against a MNC for grievous human rights and environmental abuses the prospect of any redress was extremely limited. Corporate impunity was and in many parts of the world remains the norm.

But the legal landscape has transformed in the last two decades and there have been two striking developments:

- The proposition that businesses have human rights responsibilities to those impacted within their "sphere of influence" has become mainstream, culminating in the adoption of the UN Guiding Principles on Business and Human Rights in 2011.
- Judiciaries and governments in the global north are increasingly holding companies domiciled in their jurisdictions to account for serious harms caused by their foreign subsidiaries.

And just in the last few years there have been significant legal developments. To give just three examples:

- In 2020 in the case of *Nevsun* which concerned allegations of forced labour and slavery in a mine in Eritrea, in a landmark judgment the Canadian Supreme Court ruled that parent companies can be held directly liable for violations of customary international law.
- In 2021, the Dutch Court of Appeal ruled against Shell's parent company in favour of Nigerian communities impacted by oil pollution – the culmination of 13 years of litigation.

- In the last four years the UK Supreme Court has unanimously ruled twice in landmark judgments in favour of African communities in large scale environmental claims against two MNCs - the cases of *Vedanta* and *Shell*.

In tandem with this a number of European countries have put in place mandatory Human Rights Due Diligence (HRDD) laws which, for the first time, placed legal obligations on parent companies to ensure their subsidiaries and supply chains are free of human rights and environmental abuses. Failure to do so can give rise to civil liability. In the last month, the EU adopted The Corporate Sustainability Due Diligence Directive (CSDDD), so Human Rights Due Diligence laws will now be adopted by all member states.

The UK is lagging behind on HRDD laws but the developing common law jurisprudence on parent company liability in tort law has gone a long way in filling the legislative gap.

In the two recent Supreme Court judgments referred to, the Supreme Court significantly broadened the potential scope of parent company liability which can arise in a wide variety of ways, for example by virtue of operational control, guidance and policy frameworks.

In turn that jurisprudence is having ripple effects around the world and now being relied upon in other common law jurisdictions such as Canada, South Africa and New Zealand.

In the UK a large number of successful cases have been brought – perhaps more than any other jurisdiction to date.

In broad terms the cases concern environment and human rights abuses but there is now a new frontier of cases which concern supply chain liability and greenwashing litigation.

The cases are mostly brought as group actions and generally the size of the group can vary from about 100 to tens of thousands of claimants.

Importantly, in environmental cases the claimants often seek damages in lieu of injunctive relief to clean up and restore their polluted environment.

So, like it or not, it is clear MNCs are increasingly facing litigation risk if they turn a blind eye to human rights and environmental abuses in their group and supply chain.

Much like our discussion about AI, I suspect we are at the foothills of ESG litigation and that there will be a considerable expansion of such cases in the years to come across multiple jurisdictions.

III. Litigation Funding

What has any of this got to do with litigation funding?

These cases are clearly complex, costly and hugely time consuming. The Claimants are faced with Defendants with extensive resources. Unless there is an early settlement, if there is to be a semblance of equality of arms legal costs can quickly mount.

And the litigation can last for many years. For example, the case of *Okpabi v Shell* which is before the High Court in London and which also concerns oil spills in Nigeria was first issued in 2015 and is now entering into its 10th year. There is still no trial in sight.

Traditionally these cases have been brought using conditional fee agreements (CFAs) (and have been funded by the law firms themselves), but the burden and risk involved is too great for all but the most well-resourced law firms.

As a result, litigation funding is an all-important means of resourcing such group actions, sharing risk and improving access to justice for communities which would have no other means of seeking redress.

The balance to strike is not an easy one, since clearly it is imperative that the claimants themselves retain the lion share of any compensation.

There are also some cases which litigation funders will not be able to back – such as clean up claims where there may be no or little in the way of damages to provide the funder with a return.

But there can be no doubt that litigation funding allows for the possibility of impecunious claimants in the global south to seek redress for serious harms, where it was previously impossible to do so. That has to be a very welcome development.

ANNEX

"The current landscape and challenges of litigation funding in the United States"

The Honourable Loretta A. Preska, Senior Judge, United States District Court for the Southern District of New York[32]

I. Current State of the Litigation Funding Industry

The industry of third-party litigation funding encompasses multiple benefits, opportunities, and implications. Third-party litigation funding (or litigation funding) is a process through which a third party agrees to fund the litigation costs of a pending lawsuit in exchange for some or all of the award. Litigation funding is akin to traders, making an investment in a certain stock, but, instead, funders are betting that they will succeed at trial. As the CEO of Burford Capital has put it, "litigation doesn't fluctuate like the stock market does."[33]

For decades, litigation funding has been part of the fabric of other countries' legal systems. But only recently, in the wake of the 2008 financial crisis, did the industry of litigation funding sprout in the United States.[34] Its popularity has increased as the fees and expenses of bringing a case to trial have grown cost prohibitive for all but large corporations.[35] As of today, the global investment market of litigation funding generates annual revenues of approximately $17.2 billion, of which the U.S. share is approximately $4.5 billion.[36] Last year, firms among the 200 highestgrossing U.S. law firms were allocated nearly $1 billion through litigation funding.[37] This amount, and its use by some of the largest law firms, signals a growing acceptance of litigation funding in the United States from a budgetary standpoint and at a "cultural level."[38]

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[32] Senior Judge, United States District Court for the Southern District of New York. Judge Preska gratefully acknowledges the assistance of Samantha Helgason, Law Clerk, Fordham University School of Law, Class of 2021; Christine Goncalves, Judicial Intern, Fordham University School of Law, Class of 2025; and Carly Zdankowski, Judicial Intern, Benjamin N. Cardozo School of Law Class of 2023, in the preparation of this paper.

[33] 60 Minutes, Litigation Funding: More investors fund lawsuits, as rules and transparency lag behind, YouTube (July 24, 2023), **https://www.youtube.com/watch?v=Dfr2UnnlgE8**.

[34] What You Need to Know About Third Party Litigation Funding, U.S. Chamber of Commerce Institute for Legal Reform (Feb. 7, 2023), **https://instituteforlegalreform.com/what-you-need-to-know-about-third-party-litigation-funding**.

[35] Litigation Finance, Omni Bridgeway, **https://omnibridgeway.com/litigation-finance**.

[36] Litigation Funding Investment Market Outlook (2023 – 2033), Future Market Insights Inc., **https://www.futuremarketinsights.com/reports/litigation-funding-investment-market**; US Litigation Funding Investment Market 2024-2033, Custom Market Insights (Jan. 2024), **https://www.custommarketinsights.com/report/us-litigation-funding-investment-market**.

[37] Justin Henry, The Am Law 200 Stepped Up Their Use of Litigation Funding Last Year, New York Law Journal, Mar. 28, 2024, at 1 (noting that the data drawn by Westfleet surveyed litigation funders during a 12-month activity period concluding on June 30, 2023. The report also only includes litigation activities involving a party based in the U.S.)

[38] Id.

With such persistent use, the inconsistencies inherent in litigation funding have become more prevalent, leading to states, courts, and proponents and opponents of litigation funding speaking on the issue of how properly to regulate litigation funding in the United States.

II. Litigation Funding and Its Implications

A. Litigation Funding Generally

Litigation funding is a mechanism by which a third party enters into a contract with a litigant to assist him or her in paying for a pending lawsuit in exchange for *potential* repayment of the loan; namely, the third party only gets repaid if the funded litigant wins his or her case.[39]

The funder is typically a litigation finance firm, which may be supported by venture capitalists, institutional investors, those in the private equity field, or similar types of entities and/or individuals.[40] These types of funders have the most access to financing, making the risk of unsuccessful litigation less burdensome, which allows litigants to pursue their claims more vigorously by utilizing all available resources.[41] Moreover, some, but only the minority, of litigation financing firms are publicly traded companies; two prominent companies today are Burford Capital and Omni Bridgeway.[42]

The traditional model of funding has been for a litigation funder to finance a case and share in the potential recovery. But another, newer method is the monetization of claims.[43] That is, funders advance a portion of the potential recovery to a party before there has been a resolution of the litigation.[44] In just two years, the share of new commitments allocated to the monetization of claims has grown from 8%, in 2021, to 21%, in 2023.[45]

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[39] See Wilson Elser, Litigation Funding May Soon Be Addressed by New York's Legislature, Nat'l L. Rev., Nov. 20, 2021, **https://www.natlawreview.com/article/litigation-funding-may-soon-be-addressed-new-york-s-legislature**.

[40] See Elser, supra note 8; N.Y. City Bar, Report to the President by the New York City Bar Association Working Group on Litigation Funding 4–5 (2020).

[41] See id.

[42] See Elizabeth Korchin et al., The Third Party Litigation Funding Law Review: USA (2021), **https://www.lexology.com/library/detail.aspx?g=66de1180-f371-4be9-8dfc-5739d826225a**; see also Barney Thompson, Litigation finance industry opens up to private investors, Financial Times (Aug. 23, 2018), **https://www.ft.com/content/03921f5e-a49a-11e8-926a-7342fe5e173f**; IMF Bentham and Bentham IMF to become Omni Bridgeway, see also Omni Bridgeway, **https://omnibridgeway.com/insights/blog/blog-posts/blog-details/global/2020/02/25/imf-bentham-and-bentham-imf-to-become-omni-bridgeway** (detailing IMF Bentham and Bentham IMF's merger which in turn resulted in the creation of a single entity, Omni Bridgeway).

[43] Justin Henry, The Am Law 200 Stepped Up Their Use of Litigation Funding Last Year, New York Law Journal, Mar. 28, 2024, at 1 (noting that the data drawn by Westfleet surveyed litigation funders during a 12-month activity period concluding on June 30, 2023. The report also only includes litigation activities involving a party based in the U.S.)

[44] Id.

[45] Id.

At present, plaintiffs are more commonly funded than defendants, but some speculate that, with the rise of third-party litigation funding, funders will soon be "expected to step up their pursuits of defendants" as well.[46] In the context of commercial litigation funding, most thirdparty litigation funding agreements are made directly between a funder and a claimant.[47]

Third-party litigation funding typically falls into one of two categories: consumer litigation funding or commercial litigation funding. The former usually funds much smaller claims, such as personal-injury and divorce.[48] Commercial third-party litigation funding, on the other hand, usually funds litigation for large corporate entities, focusing more on claims involving "antitrust, intellectual property, and business-contract issues."[49] The most common type of claims are patent claims, which comprise 20% of the thirdparty litigation funding deals.[50] While fewer commercial-based litigations are funded than consumer-based, commercial-based cases are often much larger, averaging between $500,000 and $5 million.[51]

While both types of financing implicate many of the same concerns, there are some key differences. For example, an issue inherent in consumer third-party litigation funding is the fact that the litigant is usually less sophisticated than a commercial entity or a law firm, potentially resulting in unequal bargaining power between the litigant and the funder.[52] This imbalance could allow the funder to, among other things, exert control over the litigation or charge the funded party unreasonable interest rates.[53]

B. The Need and Motivation for Litigation Funding

Litigation funding is used for a variety of reasons, and the litigant, law firm, and funder pursue third-party litigation funding for the potential benefits that may come along with it. However, the benefits awarded to each party differ, resulting in each having different motivations to use such financing.

On the litigant side, the primary use of litigation funding is to allow plaintiffs to pursue

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[46] See Is Funding Defendants the Future of Disputes?, Legal 500 (last visited Feb. 21, 2022), **https://www.legal500.com/fivehundred-magazine/editors-views/is-funding-defendants-the-future-of-disputes/**.

[47] See W. Bradley Wendel, Are There Ethical Pitfalls in the Use of Third-Party Litigation Funding?, 80 The Advoc. (Texas) 51 (2017).

[48] United States Government Accountability Office, Third Party Litigation Financing (2022), **https://www.gao.gov/assets/gao-23-105210.pdf**.

[49] Joseph J. Stroble & Laura Welikson, Third-Party Litigation Funding: A Review of Recent Industry Developments, Def. Couns. J., Jan. 2020, at 6–7.

[50] See Patrick Leahy, Shine Light on Third-Party Litigation Funding of US Patents, Bloomberg Law (Apr. 28, 2023), **https://news.bloomberglaw.com/us-law-week/shine-light-on-third-party-litigation-funding-of-us-patents**.

[51] Cassandra Burke Robertson, Proposed Committee Recommendation to the Study Committee on Third-Party Funding of Litigation and Arbitration 2, 3–4 (2020).

[52] See Austin T. Popp, Federal Regulation of Third-Party Litigation Finance, 72 Vand. L. Rev. 727, 737 (2019).

[53] See id.

claims they would not have been able to prosecute otherwise.[54] In other words, access to deeper pockets gives litigants the freedom to retain counsel, conduct discovery, file motions, and the like, all of which might not be possible without financial backing.

This risk-shifting benefit also empowers law firms to take on more cases than they otherwise would have been able to. Since many attorneys and law firms do not accept cases on a contingency fee basis, third-party litigation funding provides an alternative financing mechanism that gives litigants options as to whom they hire as counsel.[55]

Although the focus of U.S. litigation funding to date has largely been on commercial litigation, there is an untapped opportunity to fund larger-scale actions, such as class and collective actions. In class and collective actions, the first hurdle that a prospective group must overcome is to determine how to finance the fees and costs of litigation.[56] That is, if a contingency fee arrangement is not available to the class or collective, then an issue arises of how to afford the costs as a group. Litigation financing overcomes this initial hurdle, which, in turn, permits parties with viable claims to have their day in court. Although this type of funding is still rare and largely unexplored in the United States, it has been utilized in other countries, such as Australia, England, and parts of Europe.[57] As such, it could be a future area of development in the United States that ushers in a more diverse field of litigants.

From a funder's perspective, there are a few different motivations to invest. ***First,*** and obviously, the prospect of winning a judgment creates a financial incentive for these funders.[58] The potential return on a funder's investment can be large, especially for major investors, such as hedge funds and companies whose primary purpose is to provide such financing.[59] ***Second****,* funders can increase their brand recognition and ultimately expand their client bases. On these two points, we've seen litigation funders, in the U.S., embrace groundbreaking technology to help to produce predictive analyses and case assessments that drive up the success rates of their investments.[60] Funders, such as Legalist and Qanlex, are even using artificial intelligence to help them identify optimal cases for investment.[61] Legalist's algorithm, for example, is called "the truffle sniffer," and it searches for lawsuits based on the court, judge, and claim type.[62] Another firm, VWM Capital, has long used algorithmbased technology to help promote awareness and increase the number of people with access to litigation funding.[63]

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54 See Korchin et al., supra note 11.

55 See Stroble & Welikson, supra note 18, at 2.

56 Consumer Trends 2024: The future of Class Action funding, DWF Group (Jan. 23, 2024), **https://dwfgroup.com/en/news-and-insights/insights/2024/1/ct24-the-future-of-class-action-funding**.

57 United States Government Accountability Office, supra note 13.

58 See Korchin et al., supra note 11.

59 See Is Funding Defendants the Future of Disputes?, supra note 15.

60 The trends that shaped litigation funding in 2023, VWM Capital, **https://vwmcapital.com/insight/the-trends-that-shaped-litigation-funding-in-2023/**.

61 Emily R. Siegel, AI Helps Litigation Funders Mine Court Dockets for Legal Gold, BLOOMBERG LAW (Mar. 1, 2024)

62 Id.

63 The trends that shaped litigation funding in 2023, supra note 29.

Third, and quite interestingly, some firms have started to fund litigation to champion specific social justice causes. For example, two litigation funds were founded in 2023 for precisely this purpose. James Burnham launched Vallecito Capital – a $50 million fund designed to back cases that support a conservative policy mission.[64] Separately, Aristata Capital, a firm partially backed by Democratic donor George Soros, has already invested in nine lawsuits aimed at holding corporations accountable for violations of environmental and human rights.[65]

C. The Concerns Implicated by Litigation Funding

The growing popularity of litigation funding has also raised a host of new issues for courts and for legislatures. The key issues inherent in litigation funding concern the common law doctrines of maintenance and champerty, state usury laws, the role of litigation funding in cases, the ethical obligations of attorneys, and the degree to which disclosure of funding should be required.[66] Proponents and opponents of litigation funding regulation have differing beliefs as to how restrictive a regulatory regime is necessary.

(1) Maintenance and Champerty

The earliest forms of litigation funding were known as the common law doctrines of champerty and maintenance.[67] Champerty, "maintaining a suit in return for a financial interest in the outcome," and maintenance, "helping another prosecute a suit,"[68] were, and still are, prohibited by some states.[69] "By definition, maintenance and champerty prohibit third-party litigation funding."[70] These prohibitions were put in place to avoid the filing of frivolous lawsuits that may unnecessarily consume the courts' time and resources.[71] Another concern leading to such prohibitions was that a third party may agree to fund a suit for personal or political reasons, rather than to benefit the client and facilitate the efficient functioning of the justice system.[72] However, some states that once prohibited champerty and maintenance have now abandoned those prohibitions, reasoning that they actually impede the efficient resolution of disputes[73] or deprive

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64 Emily R. Siegal & Justin Wise, Capital Flows Into Litigation Funds With Social Justice Impact, Bloomberg Law (Feb. 2, 2024, 5:00 AM), **https://news.bloomberglaw.com/business-and-practice/capital-flows-into-litigation-funds-with-social-justice-impact**.

65 Id.

66 See Korchin et al., supra note 11.

67 See N.Y. City Bar, supra note 9, at 5–6.

68 In re Primus, 436 U.S. 412, 425 (1978).

69 See N.Y. City Bar, supra note 9, at 6–7.

70 Ethics Comm. of the Com. and Fed. Litig. Section of the N.Y. State Bar Ass'n, Report on the Ethical Implications of Third-Party Litigation Funding 11 (2013).

71 See id.

72 See Robertson, supra note 20, at 4.

73 See N.Y. City Bar, supra note 9, at 6–7.

plaintiffs of an opportunity to litigate their otherwise meritorious claims.[74] But among the states that still recognize champerty and maintenance, many apply the theories behind such doctrines to invalidate litigation funding agreements.[75]

(2) Usury

Another issue inherent in litigation funding occurs when courts apply their state's usury laws to determine the validity of funding agreements, sometimes finding that because the agreement is structured as a loan rather than as an investment, usury laws apply. Usury is regulated at the state level, leading to states' applying such laws inconsistently across the board. However, usury laws are more applicable to consumer, rather than commercial, litigation financing transactions because for a transaction to be considered usurious, the borrower generally must have an absolute obligation to repay the funder.[76] Accordingly, because most litigation funding agreements are structured either as an investment or as a non-recourse loan, both by which the funder has a contingent right to some of the plaintiff's recovery—rather than being structured as a recourse loan—many courts are reluctant to apply their state's usury laws to commercial financing transactions.[77]

(3) Issues Pertaining to Parties

At the trial court level, parties disagree whether a litigation funder's involvement in a case affects the underlying merits. In one of my recent cases, two minority shareholders of Argentine energy company YPF SA – the Petersen Energía plaintiffs and the Eton Park plaintiffs – filed suit against YPF and the Republic of Argentina for claims arising from the Republic's takeover of YPF. Because of the number and complexity of the issues presented, and several interlocutory appeals, the case has extended over nine years. Four years into the case, Burford purchased a portion of the plaintiffs' claims and stood to gain, what was said to be, a more than 37,000 percent return on its initial investment.[78] The Republic of Argentina – unsuccessfully – challenged Burford's involvement, arguing that the terms and effect of Burford's agreement with the plaintiffs violated New York State's champerty law because plaintiffs had relinquished control of their claims in exchange for a lumpsum payment and a reduced percentage of any recovery, and Burford's sole motive was profit.

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[74] See Lyra Gao, Litigation Funding: The Case for New York to Revise Section 489, Colum. Undergraduate L. Rev., Oct. 4, 2020, **https://www.culawreview.org/journal/litigation-funding-the-case-for-new-york-to-revise-section-489**.

[75] See N.Y. City Bar, supra note 9, at 6–7.

[76] See Korchin et al., supra note 11; Wendel, supra note 16, at 52.

[77] See Korchin et al., supra note 11; Wendel, supra note 16, at 52; see, e.g., Anglo-Dutch Petrol. Int'l, Inc. v. Haskell, 193 S.W.3d 87 (Tex. App. 2006).

[78] Emily R. Siegal, Argentina Appeals a $16 Billion Verdict in Litigation-Funded Case, Bloomberg Law (Oct. 11, 2023), **https://news.bloomberglaw.com/business-and-practice/argentina-appeals-16-billion-verdict-in-litigation-funded-case**; Alison Frankel, This billion-dollar case against Argentina's YPF wouldn't exist without litigation funding. Is that a good thing?, Reuters (Apr. 3, 2023), **https://www.reuters.com/legal/litigation/column-this-billion-dollar-case-against-argentinas-ypf-wouldnt-exist-without-2023-04-03/**; see also Defendants' Memorandum of Law in Support of Their Motion to Dismiss, Petersen Energia Inversora, S.A.U. v. Argentine Republic, No. 15 Civ. 2739 (S.D.N.Y Aug. 30, 2019), ECF No. 111.

At trial, the Republic also argued that because a large portion of any recovery would go to Burford, the Court should award either no pre-judgment interest or a lower rate of interest. However, I held that the relevant inquiry was what damages were owed to compensate plaintiffs, not how plaintiffs have used or will use the damages awarded to them.[79] The Republic "owe[d] no more or less" because of Burford's participation.[80] The case was brought by "plaintiffs against a defendant for its wrongful conduct towards them."[81] Accordingly, in September of 2023, I entered a final judgment against the Republic in the amount of $16.1 billion – the largest judgment ever entered in the Southern District of New York. Of the total judgment amount, $14.4 billion was awarded to the Petersen Energía plaintiffs, and $1.7 billion was awarded to the Eton Park plaintiffs. Burford is reportedly entitled to 35 percent of the overall recovery;[82] although the case is currently on appeal.

Another issue that has appeared in recent cases is whether a litigation funder can go one step beyond financing a claim to step into the shoes of a plaintiff. This question was recently presented in several multidistrict litigation cases pending in the District of Minnesota and in the Northern District of Illinois. In 2019, Burford provided Sysco Corporation – a plaintiff in a pair of price-fixing MDLs pending in the District of Minnesota – with approximately $140 million to finance Sysco's claims in the two MDLs.[83] In exchange, Sysco was required to inform Burford of any offers to settle and to obtain Burford's consent prior to accepting a settlement offer.[84] Throughout the litigation, Sysco and Burford disagreed over whether to settle Sysco's claims, with Burford consistently opposing settlement in favor of advancing the litigation. On June 28, 2023, Sysco agreed to assign its litigation claims to Carina Ventures LLC – a limited liability company founded by Burford solely to acquire Sysco's claims.[85] Carina Ventures and Sysco then filed a joint motion in both MDLs to substitute Carina Ventures for Sysco as plaintiff, so that Burford, through Carina Ventures, could step into the shoes of Sysco to negotiate its preferred settlement terms.[86] Predictably, defendants opposed the motions for substitution, arguing that the assignment of claims to Carina Ventures violated rules of champerty under state law.[87]

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79 Findings of Fact and Conclusions of Law, Petersen Energia Inversora, S.A.U. v. Argentine Republic, No. 15 Civ. 2739 (S.D.N.Y Sept. 9, 2023), ECF No. 493.

80 Id.

81 Id.

82 U.S. Judge Orders Argentina To Pay $16 Billion for Expropriation of YPF Oil Company, Associated Press (Sept. 15, 2023), **https://apnews.com/article/argentina-ypf-preska-burford-petersen-eton-18d2dc00f0a1f9fa0233292edd1e57cb**.

83 Order Denying Motion to Substitute Party, In Re: Pork Antitrust Litigation & In Re: Cattle and Beef Antitrust Litigation, No. 18 Civ. 01776 (D. Minn. Feb. 9, 2024), ECF No. 2104, at 6.

84 Id. at 7.

85 Id. at 9.

86 Joint Motion for Substitution, In Re: Pork Antitrust Litigation, No. 18 Civ. 1776 (D. Minn. June 29, 2023), ECF No. 1940; Joint Motion for Substitution, In Re: Cattle and Beef Litigation, No. 22 Civ. 3031 (D. Minn. Apr. 21, 2023), ECF No. 277.

87 Order Denying Motion to Substitute Party, supra note 52 at 14-15.

Federal Magistrate Judge John F. Docherty, who is presiding over the matters, denied the motions for substitution, holding that "[t]he largest harm that condoning Burford's efforts to maximize its return on investment would cause is the harm of forcing litigation to continue that should have settled."[88] Judge Docherty reasoned that Burford only sought to extract a larger settlement payment to increase its return on investment and to establish a benchmark settlement amount by which to measure future settlements in as-yet-undisclosed financing arrangements.[89] Judge Docherty concluded that Burford's private interests "cannot overcome the strong public policy in favor of settling lawsuits or the public policy in favor of allowing litigants to control their own cases."[90]

Conversely, in another, related antitrust MDL pending before District Judge Thomas M. Durkin in the Northern District of Illinois, Carina Ventures and Sysco jointly moved to substitute Carina Ventures for Sysco as plaintiff following Sysco's assignment of its claim to Carina Ventures. There, however, Judge Durkin approved the substitution of Carina Ventures for Sysco, holding that "[l]ike litigation funding agreements, such assignments are a fact of modern litigation," and substitution would streamline the litigation process.[91]

Although these are related MDLs based on federal antitrust claims and involve the same plaintiff, the same litigation funder, and a motion for substitution, the outcomes in the District of Minnesota differed from the outcome in the Northern District of Illinois based on the judge and the jurisdiction.

(4) Attorney Ethical Obligations

Attorneys' professional conduct is generally outlined in the Model Rules of Professional Conduct, and Model Rule 5.4 is particularly relevant. Model Rule 5.4, which has been adopted by every state in some form, prohibits lawyers/law firms from sharing legal fees with a nonlawyer.[92] Accordingly, an attorney's ethical obligations may be violated in situations where the law firm, rather than the claimant, is a direct party to the funding agreement.[93] This issue may arise where the law firm stands to benefit financially from a third-party funding agreement, anticipates receiving future funding from the investor, or has "an attorney-client relationship with the funder based on other representations."[94] However, courts have generally found that a lawyer's participation in a commercial litigation financing agreement does not violate Model Rule 5.4.[95]

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88 Id. at 17.

89 Id.

90 Id. at 18.

91 Order Granting Motion to Substitute Party, In Re Broiler Chicken Antitrust Litigation, No. 16 Civ. 8637 (N.D. Ill. Mar. 21, 2024), ECF No. 7184 at 2, 5; Joint Motion for Substitution of Plaintiff, In Re Broiler Chicken Antitrust Litigation, No. 16 Civ. 8637 (N.D. Ill. June 23, 2023), ECF No. 6630.

92 See Model Rules of Pro. Conduct r. 5.4(a) (Am. Bar Ass'n 2002).

93 See Korchin et al., supra note 11.

94 David Riskin, Third-Party Litigation Financing: Ethical Issues for Attorneys (2022).

95 See Korchin et al., supra note 11; see also Brandes v. N. Shore Univ. Hosp., 18 Misc.3d 1112(A), 856 N.Y.S.2d 496, 2008 WL 80629 (Sup. Ct. Queens Co. Jan. 8, 2008); Heer v. N. Moore St. Devs., LLC, 36 N.Y.S.3d 93 (N.Y. App. Div. 2016).

In April of 2024, the New York City Bar Association proposed to amend New York State's Model Rule 5.4 to clarify how litigation funding should fit into the broader legal landscape.[96] The amendments would require firms to inform clients of any preexisting financial arrangements with non-lawyers that might impact representation of the client.[97] This proposal comes on the heels of other State Bars' initiatives to relax the requirements of Model Rule 5.4 in an effort to increase access to legal services for lower and middle income populations.[98]

(5) Disclosure and Transparency

The existence of litigation financing agreements is often not disclosed to the litigant's attorney, the court, and/or the jury, and this lack of transparency has several potentially negative consequences. One substantial consequence is that nondisclosure inhibits the court and counsel from properly assessing potential conflicts of interest.[99] One such conflict involves the possibility that funders will attempt to control the litigation, either pursuant to the agreement or more indirectly by, for example, influencing the litigant's decision to accept or not accept a settlement offer.[100] Such control could interfere with counsel's professional judgment and ability to make strategic litigation decisions solely for the benefit of his or her client, leading to a conflict of interest.[101]

Chief Judge Colm F. Connolly, who sits on the U.S. District Court for the District of Delaware, has echoed the need for transparency in litigation.[102] Chief Judge Connolly expressed that parties in a recent series of intellectual property cases pending before him had failed to disclose their connections to litigation funder IP Edge. Consequently, he intends to implement certain disclosures to boost transparency among future parties.[103] He further noted that such measures may have an added benefit for judges as they operate as a "measure of self-protection against potential hidden conflicts of interest when a party … turns out to have an undisclosed connection to the judge."[104]

Nondisclosure may also inhibit one or both parties from making "a realistic and tangible assessment of the prospects of settlement."[105] It further impedes a court's ability to assess fully any motions for fee-shifting.

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96 Emily R. Siegal, Litigation Funders Set to Prosper in Proposed NY Rule Change, Bloomberg Law (Apr. 10, 2024, 5:31 AM), https://news.bloomberglaw.com/business-and-practice/litigation-funders-set-to-prosper-in-proposed-ny-rule-change.

97 Id.

98 Id.

99 See Stroble & Welikson, supra note 18, at 10.

100 See id. at 17–18.

101 See id. at 17.

102 Emily R. Siegal & Michael Shapiro, Judge Urges Discipline for Lawyers Who Hid IP Litigation Funder (Correct), Bloomberg Law (Dec. 7, 2024 4:00 PM), **https://news.bloomberglaw.com/business-and-practice/judge-urges-discipline-for-lawyers-who-hid-ip-litigation-funder**.

103 Id.

104 Id.

105 Stroble & Welikson, supra note 18, at 10-11.

Some states and/or specific courts require parties to disclose third-party litigation funding agreements, but the majority do not. And those that do require disclosure have varying degrees and types of rules and/or laws, making such requirements inconsistent amongst different states and courts.[106] Wisconsin, is currently the only state with legislation requiring the disclosure of funding at the outset of litigation in commercial transactions specifically.[107] Some courts, like federal trial courts in Wisconsin and Delaware, require disclosure of any third-party financing arrangements via standing orders at the outset of litigation.[108] Further, "approximately half of the federal circuit courts and one-quarter of the federal district courts" require publicly traded third-party funders to disclose their financial interest at the outset of litigation in order to consider any conflicts of interest; but those requirements usually do not impact litigation arrangements because most litigation financing firms are privately held.[109] Due to these inconsistencies, there is disagreement as to how much disclosure should be required.

With the rise of litigation financing, there has also been an increased recognition of the tension between the desire for disclosure of litigation funding agreements and the need for attorney-client privilege and work product protection.[110] These doctrines are implicated, in part, because third parties typically conduct due diligence before agreeing to fund a case. In doing so, funders often request documents and information from the litigant and/or counsel that would otherwise be considered privileged or protected as work-product.[111] Not only do funders request information to aid in their initial decision whether to invest in a case, but they also often require party or counsel thereto to provide continuous status updates throughout the case.[112]

One of the main questions that arises out of the foregoing issues is whether disclosure of potentially privileged information by a litigant or counsel waives attorney-client privilege or workproduct protection.[113] Regarding the former doctrine, the majority of courts to consider this question have held that such disclosure *does* waive attorney-client privilege.[114] For example, a federal court in the Northern District of Illinois has held that "any documents otherwise protected by the attorney-client privilege that [the plaintiff] shared with any prospective funder [loses its] protection under the attorney-client

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[106] See N.Y. City Bar, supra note 9, at 16–17.

[107] See Korchin et al., supra note 11; Wis. Stat. § 804.01(2)(bg) (2017).

[108] What You Need to Know About Third Party Litigation Funding, U.S. Chamber of Commerce Institute for Legal Reform (Feb. 7, 2023), https://instituteforlegalreform.com/what-you-need-to-know-about-third-party-litigation-funding/. Additionally, in 2018, the Northern District of California began requiring parties in any class, collective, or representative action to provide the court with the identity of anyone that is funding a claim or counterclaim. Id. (citing U.S. District Court for the Northern District of California, Standing Order for all Judges of the Northern District of California on the Contents of Joint Case Management System, § 19 (eff. Nov. 1, 2018)).

[109] Korchin et al., supra note 11.

[110] See Stroble & Welikson, supra note 18, at 13.

[111] See id.

[112] See id.

[113] See id. at 14.

[114] See id.

privilege when shared with third party funders."[115] When privilege is waived, the party arguing against disclosure often asserts the "common interest" exception, but most jurisdictions only apply the exception if the common interest is legal in nature, not solely commercial, and if disclosure is carried out "to further that specific legal interest."[116] However, other courts have held that documents related to third-party litigation funding do not fall under the exception at all.[117]

Regarding work-product protection, most courts to consider the issue of waiver have held that materials disclosed to a third-party that would ordinarily be protected are indeed protected and are thus not discoverable.[118] For example, a federal district court in Texas has held that "documents prepared with the assistance of counsel and created with the intent of coordinating potential investors to aid in future possible litigation were protected by the work-product doctrine," notwithstanding the fact that they were disclosed to the funder.[119] However, the court highlighted that there was also a nondisclosure agreement in place, and thus disclosure "did not substantially increase the likelihood that an adversary would come into possession of the materials."[120] Conversely, some courts have held that a third-party litigation agreement itself is not protected as work product "because it does contain the mental impressions of an attorney concerning the substance of the litigation."[121]

(6) Other Issues

In response to disclosure and transparency issues, there is a mounting concern, in the U.S., that foreign governments could fund litigation to undermine U.S. national security. The Chamber of Commerce Institute for Legal Reform has specifically noted that thirdparty litigation funding could permit foreign competitors to advance their strategic interests against individuals, corporations, and entire industries through the United States' judicial system and its resources.[122] The Institute presents a hypothetical example where a country's sovereign wealth fund provides capital to a third-party litigation funding firm, which then finances a lawsuit against a major U.S. technology company.[123] The Institute argues that, for purposes of this hypothetical, no legal parameters are in place to prevent the investing country from accessing sensitive information, produced in

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[115] Miller UK Ltd. v. Caterpillar, Inc., 17 F. Supp. 3d 711, 734 (N.D. Ill. 2014).

[116] See Stroble & Welikson, supra note 18, at 14.

[117] See id. at 16–17; see, e.g., Miller, 17 F. Supp. 3d 711.

[118] See Stroble & Welikson, supra note 18, at 15.

[119] Id. (citing Mondis Tech., Ltd. v. LG Elecs., Inc., Nos. 2:07-CV-565-TJW-CE, 2:08-CV-478-TJW, 2011 WL 1714304 (E.D. Tex. May 4, 2011)).

[120] Id.

[121] Id.

[122] Michael E. Leiter et al., ILR Briefly a New Threat: The National Security Risk of Third Party Litigation Funding, U.S. Chamber of Commerce Institute for Legal Reform (Nov. 22, 2022), **https:/instituteforlegalreform.com/wp-content/uploads/2022/11/TPLF-Briefly-Oct-2022-RBG-FINAL-1.pdf**.

[123] Id.

the lawsuit under the broad discovery rules in the U.S.[124] Access to third-party litigation funding also may arguably give foreign adversaries a chance to involve major U.S.-based companies in timeconsuming litigation so that they can help competitors to advance their agendas.[125]

- There are also concerns that the rising utilization of litigation funding may lead to an increase in the filing of frivolous lawsuits because there is generally only minimal risk involved for funded parties if their case is unsuccessful.[126] On that note, there are also concerns about a potential increase in litigation costs due to the substantial resources available to funded parties as compared to those available to self-funded parties.[127]

III. State-by-State Approach to Commercial Litigation Funding

At present in the United States, the legal and regulatory third-party litigation framework only exists at the state level. There have been attempts to regulate third-party litigation funding at the federal level, but none has been successful thus far.[128] As such, each state or state court to employ some sort of framework has done so differently, leading to inconsistent applications amongst the states.[129] Such restrictions relate to issues involving champerty and maintenance, disclosure and discovery, the imposition of monetary limits on funding, or requirements that the agreement includes certain terms or protective devices. Moreover, there are even some states that prohibit litigation funding entirely. This patchwork approach to state regulation has been referred to as "laboratories of democracy," which, in turn, could encourage the implementation of a federal framework, necessitate a complete ban against third-party funding, or demonstrate that a federal framework is unnecessary. The following sections provide an overview of the individual approaches different states have taken to regulate third-party litigation funding.

A. The Most Hospitable States to Commercial Litigation Funding

(1) Texas

Regarding disclosure and the discoverability of third-party litigation funding information, the federal court in the Eastern District of Texas has held that such information should be protected as work product and that disclosure of otherwise protected information to possible or actual funders should not waive privilege if there is a nondisclosure agreement in place.[130] Regarding disclosure of the agreement itself, the Eastern District

[124] Id.

[125] Id.

[126] Stroble & Welikson, supra note 18, at 2.

[127] Id.

[128] See Korchin et al., supra note 11.

[129] See Robertson, supra note 20, at 4.

[130] See *United States v. Ocwen Loan Servicing*, 2016 WL 1031157, at *6 (E.D. Tex. Mar. 15, 2016); Mondis Tech., 2011 WL 1714304, at *3.

has ordered the disclosure of the funder's identity, while also holding, however, that funder-litigant communications specifically can remain confidential.[131]

(2) New York

New York courts have generally held that third-party litigation agreements are valid and enforceable.[132] One potentially applicable statute restricting litigation financing is New York's Judiciary Law Section 489, which bars "buy[ing] or tak[ing] an assignment of . . . a bond, promissory notes, bill of exchange, book debt, or other thing in action, or any claim or demand, with the intent and for the purpose of bringing an action of proceeding thereon."[133] However, the statute contains a safe harbor provision exempting transactions that have an aggregate purchase price of $500,000 or more.[134] Accordingly, because commercial litigation funding transactions generally involve cases exceeding $500,000, the safe harbor applies to most assignments of claims.[135] Moreover, most litigation funding agreements do not assign a claim in the first place; rather the claimant retains the claim, and the funder receives a portion of the recovery if successful.[136] Therefore, Section 489 is typically not implicated in the first place,[137] and no New York court to date has invalidated a traditional third-party litigation agreement based on the state's prohibition of champerty.[138]

The only other legislation in New York governing litigation funding—which has been introduced but is not yet enacted—is the Consumer Litigation Funding Act.[139] However, that statute would only cover consumer third-party litigation, and the state does not currently have any bills or other proposed regulations aimed directly at commercial third-party litigation.

Regarding disclosure, New York courts often find that third-party litigation funding materials are not relevant to the case and are thus not subject to disclosure.[140] However, in the context of attorney-client privilege, the U.S. District Court for the Southern District of New York has held that because the funder was not a party to the litigation with a common legal interest in the outcome of the litigation, but instead only had a common

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131 See *United States v. Homeward Residential Inc.*, 2016 WL 1031154, at *5 (E.D. Tex. Mar. 15, 2016).

132 See, e.g., *Echeverria v. Estate of Lindner*, 801 N.Y.S.2d 233 (N.Y. Sup. Ct. 2005).

133 N.Y. Jud. Law § 489(1).

134 N.Y. Jud. Law § 489(2).

135 Maria Decker, Litigation Finance and State Law—What Should Counsel Know?, Above the Law (June 3, 2021), **https://abovethelaw.com/2021/06/litigation-finance-and-state-law-what-should-counsel-know/**.

136 See id.

137 See id.

138 Steven Friel & Jonathan Barnes, Litigation Funding 2021 94–95 (2021).

139 See S. 9105, 2017–2018 Leg. Sess. (N.Y. 2018); S. 4555, 2019–2020 Leg. Sess. (N.Y. 2019); S. 705, 2021–2022 Leg. Sess. (N.Y. 2021); S. 2702, 2023-2024 Leg. Sess. (N.Y. 2023).

140 See, e.g., Kaplan v. SAC Cap. Advisors LP, No. 12-CV-9350-VM-KNF, 2015 WL 5730101 (S.D.N.Y. Sept. 10, 2015); Benitez v. Lopez, No. 17-CV-3827-SJ-SJB, 2019 WL 1578167 (E.D.N.Y. Mar. 14, 2019).

financial interest, the common interest exception did not apply.[141] Accordingly, the information shared with the funder was not protected by attorney-client privilege.[142]

Finally, the Ninth Circuit in 2020 certified to the New York Court of Appeals a question of whether a third-party litigation funding agreement "may qualify as a 'loan' or a 'cover for usury' where the obligation of repayment arises not only upon and from the client's recovery of proceeds from such litigation but also upon and from the attorney's fees the client's lawyer may recover in unrelated litigation."[143] The New York Court of Appeals accepted the question but has yet to render a decision.[144]

(3) Ohio

Ohio differs from Texas and New York because it *does* have a statute governing litigation funding, which requires the agreement to include specific wording and disclaimers to the funded party.[145] However, this statute has been considered "relatively permissive" because it does not require disclosure to the court and does not limit the amount of interest the funder can charge the funded party.[146] However, of note, Ohio is amending its third-party litigation funding statute to require more transparency and disclosure.[147] Additionally, in the context of federal multi-district litigation, specifically, the Northern District of Ohio has required parties to disclose to the court in camera the existence of a funding agreement.[148]

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[141] See Cohen v. Cohen, No. 09 Civ. 10230 (LAP), 2015 WL 745712, at *4 (S.D.N.Y. Jan. 30, 2015) ("[The funder] is not a party to this litigation, and there has been no suggestion that she has any legal claim against Defendants whatsoever. She thus cannot possibly share any legal interest with Plaintiff sufficient to invoke the common interest doctrine. Although the two may have a common financial interest in the outcome of this litigation, that relationship does not fall into the narrow category primarily reserved for co-litigants pursuing a shared legal strategy." (citation omitted)).

[142] See id.

[143] Fast Trak Inv. Co. v. Sax, 962 F.3d 455, 459 (9th Cir. 2020), certifying questions to 35 N.Y.3d 997 (N.Y.).

[144] See Fast Trak Inv., 35 N.Y.3d 997.

[145] See Ohio Rev. Code Ann. § 1349.55 (2008).

[146] See Robertson, supra note 20, at 6.

[147] See Eric Heisig, Ohio Senators Mull Litigation Funding Disclosures Bill, Law360 (Feb. 7, 2023), **https://www.law360.com/articles/1573998/ohio-senators-mull-litigation-funding-disclosures-bill**.

[148] See In re Nat'l Prescription Opiate Litig., 327 F. Supp. 3d 1064 (N.D. Ohio 2018).

B. States with State-Level Regulation of Commercial Litigation Funding

Among the states that allow litigation funding, very few have statutes expressly regulating litigation financing. As previously mentioned Wisconsin has a statute requiring disclosure of third-party litigation funding agreements at the outset of litigation, which applies to both consumer- and commercial-based litigation funding arrangements.[149] To date, Wisconsin seems to be the only state that statutorily requires disclosure of commercial litigation third-party litigation funding agreements.[150]

C. States with Court Rules or Regulations Governing Commercial Litigation Funding

The following section provides an overview of the states that allow litigation funding but restrict it in some way through court decisions or local court rules.

(1) Illinois

Illinois does not have express legislation or regulations governing commercial-based third-party litigation funding, and litigation funding is typically permitted by the courts.[151] While Illinois has a statutory prohibition against maintenance,[152] courts often find it inapplicable to commercial litigation finance agreements, absent "officious intermeddling" on behalf of the funder.[153] Moreover, several Illinois courts have held that funding agreements and communications with funders, particularly if made pursuant to a non-disclosure agreement, are protected as work product.[154]

(2) California

In California, commercial litigation funding is generally permitted, which may stem, in part, from the fact that California never adopted laws prohibiting champerty and maintenance.[155] The State Bar of California Committee on Professional Responsibility and Conduct issued an opinion, in 2020, expressing its support for litigation funding. At the same time, the Committee cautioned attorneys to be cognizant of ethical issues implicated by the use of third-party litigation funding agreements.[156] Regarding disclosure, however, the federal trial court in the Northern District of California issued a standing order requiring parties in class, collective, or representative actions to

[149] See Wis. Stat. § 804.01(2)(bg).

[150] West Virginia has a statute requiring disclosure of all consumer litigation financing arrangements, but it does not cover commercial-based transactions. See W. Va. Code § 46A-6N-5 (2019). Utah also has a statute regulating litigation funding, but that, too, only applies to consumer litigation funding. See Utah Admin. Code. r. 152-57.

[151] See Decker, supra note 104.

[152] See 720 Ill. Comp. Stat. 5/32-12.

[153] *Miller UK Ltd. v. Caterpillar*, Inc., 17 F. Supp. 3d 711 (N.D. Ill. 2014).

[154] See *Art Akaine LLC v. Art & Soulworks LLC*, No. 19 C 2952, 2020 WL 5593242 (N.D. Ill. Sept. 18, 2020); *Fulton v. Foley*, No. 17-CV-8696, 2019 WL 6609298 (N.D. Ill. Dec. 5, 2019); *Viamedia, Inc. v. Comcast Corp*., No. 16-cv-5486, 2017 WL 2834535 (N.D. Ill. June 30, 2017); Miller, 17 F. Supp. 3d at 739.

[155] See Friel & Barnes, supra note 107, at 101.

[156] State Bar of Cal. Standing Comm. on Pro. Resp. and Conduct, Formal Op. 2020-204 (2020).

disclose the identities of any third-party funders.[157] Yet courts are often reluctant to order discovery of litigation funding information or disclosure of the agreement itself.[158] At least one federal trial court in California has found that communications between a party and a funder do not waive privilege, particularly if made pursuant to a nondisclosure agreement.[159]

(3) Delaware

In Delaware, contrary to California, prohibitions against champerty and maintenance are recognized.[160] However, litigation funding is generally permitted in Delaware as long as it is clear that the funder is not exerting control over the litigation.[161] Additionally, while Delaware does not have any state-wide regulations governing disclosure, Chief Judge Connolly of the U.S. District Court for the District of Delaware has signaled that the court plans to strengthen its standing order with additional transparency and disclosure measures.[162] Moreover, the Delaware Court of Chancery has also held that work-product protections remain intact notwithstanding disclosure of such information to a third-party funder.[163]

(4) New Jersey

New Jersey does not currently have any express legislation in place to govern thirdparty litigation funding, and courts have consistently rejected prohibitions on champerty and maintenance.[164] However, as of 2021, the U.S. District Court for the District of New Jersey has required the disclosure of funding, including the funder's identity, whether the agreement requires the funder's approval for litigation or settlement decisions, and a description of the funder's financial interest in the litigation. Notably, though, this order does not require disclosure of the agreement itself.[165] The same federal trial court held that the work-product protection still applied to information shared with a third-party

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[157] See N.D. Cal. Standing Order on the Contents of Joint Case Management System (effective Nov. 1, 2018); see also N.Y. City Bar, supra note 9, at 16.

[158] See *MLC Intell. Prop., LLC v. Micron Tech*., Inc., No. 14-cv-03657-SI, 2019 WL 118595 (N.D. Cal. Jan. 7, 2019).

[159] See, e.g., *Odyssey Wireless, Inc. v. Samsung Elecs. Co*., Nos. 3:15-cv-01738-H, 3:15-cv-01743-H, 3:15-cv-01735-H, 2016 WL 7665898 (S.D. Cal. Sept. 20, 2016).

[160] See Decker, supra note 104.

[161] See N.Y. City Bar, supra note 9, at 18; see also Charge Injection Techs., Inc. v. E.I. DuPont De Nemours & Co., No. 07C-12-134-JRJ, 2015 WL 1540520 (Del. Super. Ct. Mar. 31, 2015).

[162] See Chief Judge Connolly, D. Del. Standing Order Regarding Third-Party Litigation Funding Arrangements (effective Apr. 18, 2022) (requiring a funded party to disclose to the court (1) "[t]he identity, address, and, if a legal entity, place of formation of the Third-Party Funder(s);" (2) "[w]hether any Third-Party Funder's approval is necessary for litigation or settlement decisions in the action, and if the answer is in the affirmative, the nature of the terms and conditions relating to that approval;" and (3) "[a] brief description of the nature of the financial interest of the Third-Party Funder(s)").

[163] See, e.g., Carlyle Inv. Mgmt. v. Moonmouth Co., No. 7841-VCP, 2015 WL 778846 (Del. Ch. Feb. 24, 2015).

[164] See Friel & Barnes, supra note 107, at 102.

[165] D.N.J. Civ. R. 7.1.1 (effective Aug. 5, 2021).

funder.[166] The state court system, by contrast, does not require any disclosure of third-party funding.

(5) Arizona

Additionally, Arizona does not have express legislation or regulations in place to govern third-party litigation funding, and the state does not recognize the common law prohibition of champerty.[167] Moreover, a ruling out of the U.S. District Court for the District of Arizona has held that funding arrangements are protected as work product, but disclosure of the funder's identity is not protected.[168]

D. The Least Hospitable States to Commercial Litigation Funding

The following states are known to have the most restrictive regulatory regimes governing the use of third-party litigation funding.[169] Alabama courts almost entirely prohibit litigation funding agreements, reasoning that such agreements "are [a] form of speculating on litigation and are therefore void as against public policy."[170] Kentucky, on the other hand, went so far as to enact a statute completely prohibiting third-party litigation funding based on its prohibition of champerty.[171]

Colorado typically applies state usury laws to litigation finance, which severely restricts use of litigation funding in that jurisdiction.[172] Similarly, a Pennsylvania state court "reaffirmed its prohibition on champerty and applied it to invalidate a litigation financing agreement."[173] However, federal courts in Pennsylvania have held that communications with a litigation funder are protected as work product.[174] North Carolina is also relatively restrictive, often concluding that litigation funding agreements are void, as they run afoul of the state's prohibitions on champerty and maintenance.[175] While North Carolina courts have occasionally permitted for such agreements to stand, it has only done so in "very limited circumstances."[176]

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[166] See In re Valsartan N-Nitrosodimethylamine (NDMA) Contamination Prods. Liab. Litig., No. CV 19-2875, 2019 WL 4485702 (D.N.J. Sept. 18, 2019).

[167] See *Landi v. Arkules*, 835 P.2d 458 (Ariz. Ct. App. 1992).

[168] See *Cont'l Cirs. LLC v. Intel Corp*., 435 F. Supp. 3d 1014 (D. Ariz. 2020).

[169] See Robertson, supra note 20, at 6.

[170] Id.; *Wilson v. Harris*, 688 So.2d. 265 (Ala. Civ. App. 1996).

[171] See Robertson, supra note 20, at 6; Ky. Rev. Stat. Ann. § 372.060.

[172] See Robertson, supra note 20, at 6.

[173] See id.; see also *WFIC, LLC v. LaBarre*, 148 A.3d 812 (Pa. Super. Ct. 2016).

[174] See *Lambeth Magnetic Structures, LLC v. Seagate Tech. (U.S.) Holdings, Inc.*, Nos. 16-538, 16-541, 2018 WL 466045 (W.D. Pa. Jan. 18, 2018).

[175] See *Charlotte-Mecklenburg Hosp. Auth. v. First of Ga. Ins. Co*., 455 S.E.2d 655 (N.C. 1995).

[176] See Friel & Barnes, supra note 107, at 104.

IV. Federal Regulation of Commercial Litigation Funding

In the background, there has been a growing dialogue surrounding whether a federal framework is needed to standardize practices on a national level. On the one hand, the United States Chamber of Commerce, for example, has pushed for federal legislation to regulate thirdparty litigation funding, urging the adoption of, among other things, uniform disclosure requirements.[177] On the other hand, the American Association for Justice has opposed legislation restricting third-party litigation funding, arguing instead that individual courts, not the government, should manage issues such as disclosure.[178] Furthering the foregoing agenda, in 2019, the Uniform Law Commission ("ULC") created the Study Committee on Third-Party Funding of Litigation and Arbitration ("Committee") to consider whether there is a need for uniform or model laws.[179] However, the Committee noted that inconsistency amongst the states may be beneficial as different approaches will lead to innovation.[180]

The Litigation Funding Transparency Act, which was first introduced in 2019, and then reintroduced in 2021, has been one of the most prominent attempts to regulate litigation funding at the federal level.[181] This Act "would require disclosure of any agreement between (1) a party in any class action lawsuit filed in federal court or in any claim that is aggregated in a federal multi-district litigation proceeding and (b) any third-party commercial enterprise that has a contingent interest in the outcome of the case."[182] It would also require disclosure of the funder's identity. Despite support for this bill, it has yet to pass in the Senate.[183]

Proponents of federal regulation have also urged the Advisory Committee for the Federal Rules of Civil Procedure to amend Rule 26(a)(1)(A) to require disclosure of all third-party litigation funding agreements. The Advisory Committee has taken a "wait and see" approach, choosing instead to monitor the status and usage of litigation funding in federal courts.[184]

Most recently, in response to growing concerns about the use of litigation funding and its implications on U.S. national security, there has been a movement to harmonize regulation at the federal level. In September of 2023, bipartisan legislation for federal regulation of third-party litigation funding reached the U.S. Congress. The proposed bill would stop "foreign entities and governments from funding litigation in America's

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[177] See Robertson, supra note 20, at 5.

[178] See id.

[179] See id. at 1.

[180] See id.

[181] See Litigation Funding Transparency Act of 2019, S. 471, 116th Cong. (2019); Litigation Funding Transparency Act of 2021, S. 840, 117th Cong. (2021).

[182] See id.; see also N.Y. City Bar, supra note 9, at 19.

[183] See GovTrack, **https://www.govtrack.us/congress/bills/117/s840** (last visited Apr. 1, 2024).

[184] See Stroble & Welikson, supra note 18, at 13.

courts."[185] The bill would require disclosure of all thirdparty litigation funding, ban foreign governments from participating as third-party funders, and require the Department of Justice to author a third-party litigation funding report.[186]

V. Recent Developments

There are also ongoing efforts at the global level to regulate litigation funding. Last summer, Britain's Supreme Court held that litigation funding agreements would be classified as damages-based agreements and, therefore, would need to comply with applicable regulations.[187] Any failure to comply with the regulations would render a third-party litigation agreement unenforceable.[188] As of early March of 2024, that decision was in flux, however, as the Ministry of Justice announced that the Government would introduce legislation in England and Wales to "restore the position that existed before the Supreme Court's ruling."[189] Many have opined that the UK Supreme Court's decision had "damaging effects," arguing that victims should have access to justice, especially when they are going up against massive corporations.[190]

While the legal status of these agreements has been up in the air in the UK, commercial litigation funds, such as Winward Ltd., have been undergoing loan-style agreements that are not contingent on a particular litigation result to circumvent the UK Supreme Court's decision.[191]

VI. Conclusion

Overall, the rise in third-party litigation funding reflects a vital shift in the dynamics of legal financing. This shift presents both opportunities and challenges for the future. As the industry advances, navigating ethical considerations and proposed legislative and regulatory regimes will be crucial to creating a stable and fair judicial system.

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[185] Bipartisan Federal Legislation Tackles Foreign Influence in Third Party Litigation Funding, U.S. Chamber of Commerce Institute for Legal Reform (Sept. 15, 2023), **https://instituteforlegalreform.com/blog/bipartisan-federal-legislation-tackles-foreign-influence-in-third-party-litigation-funding/**.

[186] Id.

[187] Jane Croft, UK Supreme Court deals blow to litigation funding industry, Financial Times (July 26, 2023), **https://www.ft.com/content/7ed8e9c4-e733-4601-8499-1c6aab278515**.

[188] Id.

[189] UK to reverse top court's ruling on litigation funding, Reuters (Mar. 3, 2024), **https://www.reuters.com/world/uk/uk-reverse-top-courts-ruling-litigation-funding-2024-03-04/**.

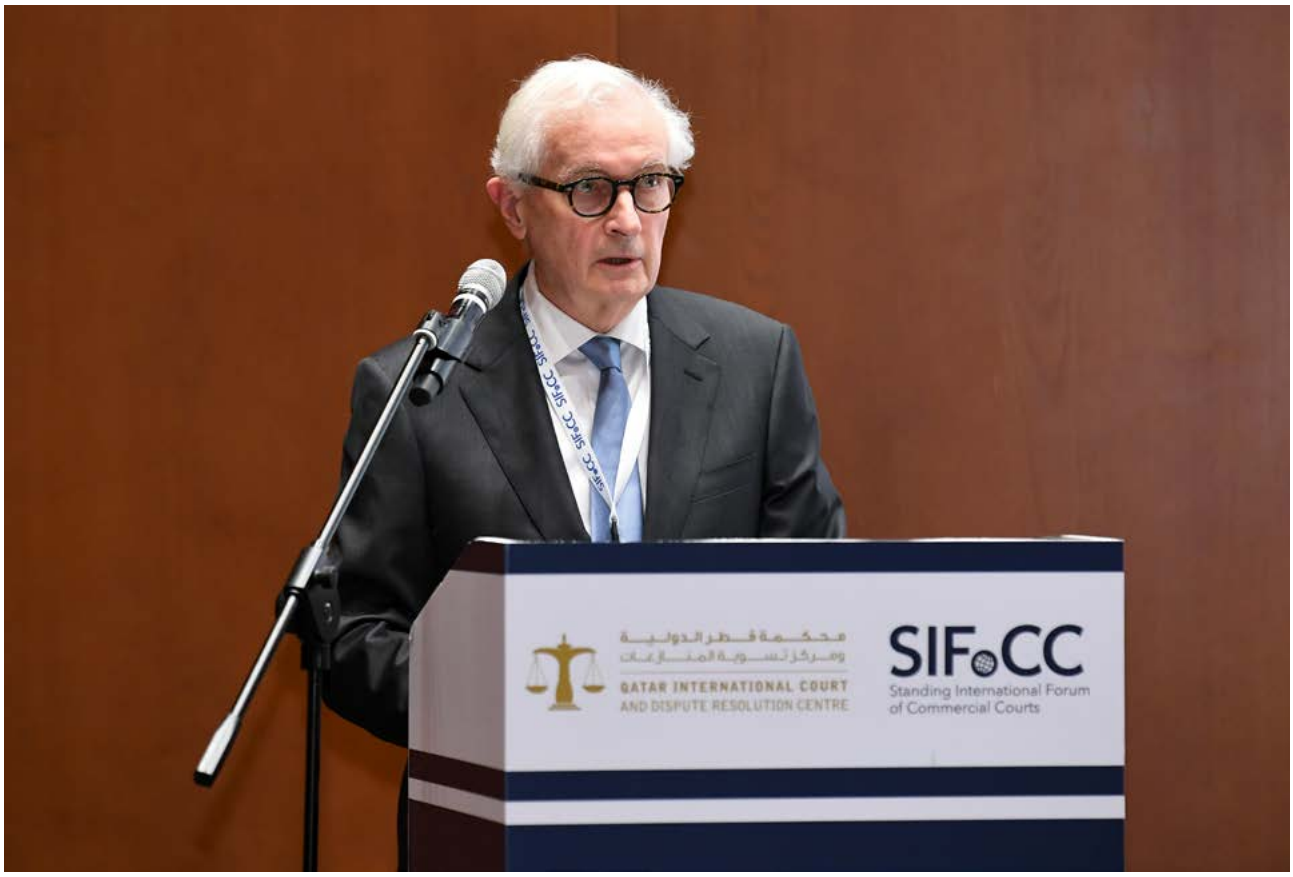
[190] See id.

[191] Emily R. Siegel, Rocade Capital Aids UK Litigation Funder with $126.7 Million, Bloomberg Law (Feb. 27, 2024), **https://news.bloomberglaw.com/class-action/rocade-capital-backs-new-uk-litigation-funder-with-100-million**.

The Third SIFoCC Keynote Speech (Doha, 2024)

The Honourable James Allsop AC, Former Chief Justice of the Federal Court of Australia

"The Spirit of the Judicial Task and the Importance of International Judicial Dialogue"



Minister for Justice of Qatar, Chief Justice of Qatar, Your Excellencies, Chief Justices, Judges, colleagues, ladies and gentlemen.

It is a great honour and a privilege to be asked to give this keynote address. I am very grateful for the opportunity.

First, I wish to acknowledge and thank Sir Robin Knowles for his assistance in coming to the topic of my paper this evening and for his most helpful comments on drafts. I had been undecided about what to say at such a gathering, such an important gathering, as this: Whether I should talk about SIFoCC, or commercial law, or a particular legal subject. Sir Robin's gentle nudging and suggestions led me, really both of us, to think that I should talk about those things, but through a lens of some universality or commonality of experience, and transcendence. That said, the paper is my responsibility, and to the extent it deals with my personal reflections drawn from my experience in the law and as a Judge, I take full responsibility for all shortcomings.

Towards the end of this address, I have included a personal reflection upon a deceased former colleague. I have done so because it was the best way to encapsulate and express *from experience* the nature of the spirit of the judicial task. Abstract expressions of indefinable qualities often fail to bring home the essence of a subject. That reflects the limitation of abstract language: the limits of text, which is an endemic feature of any legal system built on the written word. A description of experience often conveys more than abstracted analysis.

An opportunity such as this is unique. We have a gathering of Ministers of State, diplomats, Chief Justices, Judges, court officers, scholars, students and the general public, many of whom come from all around the world, representing diverse cultures and legal systems, held in a place and region that, for millennia, has been central, both geographically and culturally, to human, commercial and societal exchanges and development: a place of cultural depth and sophistication.

Thus, it is appropriate to elevate discussion, to some degree, in the way we contemplate the judicial task. This is particularly so because the judicial task is timeless, incapable of precise definition, understood experientially and emotionally, as well as intellectually, and central to a just civil society.

The title of this address contemplates the existence or presence of the spirit of the judicial task. Spirit is indefinable; it involves the pervading theme or essence of how one performs the task, reflecting why one does the task, and whom and what the task serves.

It is not self-evident where to begin in an explanation of the judicial task. That is because there are few, if any, static points of position at which to begin. It is, perhaps, helpful to begin by saying something of the law and what is involved in resolving disputes under the law. This is an apt point of departure because, in order to appreciate the nature of the judicial task and why the spirit of the task is so important, indeed essential, to the creation or inspiring of a sense of justice being done, one must reflect upon the law itself and what it is, what it is not, and what resolving disputes under the law means. This assists in giving human, and not only theoretical, form to the Rule of Law.

"What is law?" is a large jurisprudential and philosophical question. For a working description today, and recognising the diversity of cultures and societies present, one can say that law includes various constituent materials: statutes or codes, the judicial interpretation of their meaning, judicial rule making, rules, principles and customs. These imperfectly segregated materials are drawn from parliaments, executive decrees, custom, history, social values, and expectations. They are all basally human, societal and by reference to customary activity within and between societies. How these materials combine, disengage, change and apply to (sometimes complex) factual circumstances, is both a legal and a social question. This must be so, as law is a binding agent, part of the structural form and tissue, of human society: its form, content and application being determined or shaped by its social, and its human, character and context.

One of America's greatest scholar-judges, Oliver Wendell Holmes once said in a remarkable speech he gave to Boston law students in 1897,[192] that the law did not suffer from too much theory, but rather not enough, as long as theory was conceived of as getting to the bottom of the subject. He recognised and understood that there was an inexpressible binding of theory and human experience in the law, and that the legal system[193] had a final title to respect, not because it was a Hegelian dream, but because it was part of the lives of people.

The biographer[194] of one of the United States' greatest Judges, Benjamin Cardozo, drawing on his close understanding of Cardozo's work, called law 'organisable morality'. Such was not a definition, nor was it some denial of the authority of the rule-making organs of the State, and their rules and principles, nor was it a denial of some essential attributes of law: definition, textual clarity, and the requisite degree of available certainty and stability. Rather, it was a pointing in the direction of societal context and reason in which the daily struggles of humans take place, overpower, wealth, safety, freedom, religion and belief, sustenance, sometimes survival, and, in the broadest sense, human happiness and meaning.

Notwithstanding the presence of these materials of statutes and codes and their interpretation, rules, principles, and custom all recorded with such textual clarity as is possible, the law is not a complete, exhaustive and self-referential system containing the legal answers to all legal problems that are thrown up by the circumstances of life. Often, the logical application of the text of a statute or rule does not provide the clear or definitive answer to a concrete legal problem thrown up by circumstances.

Social and human values, in the silent and imperceptible movement of society, are ever present in the law. One needs perspective, sometimes of time, sometimes of quiet reflection, to appreciate how the resolution of concrete legal problems by law and legal technique can be affected deeply by social values, by a sense of balance, and by a

[192] "The Path of the Law" in Holmes Collected Papers (Constable & Co London 1920) at 167

[193] Although speaking of the common law, his remarks can be understood as wider in significance.

[194] *Beryl Levy Cardozo and Frontiers of Legal Thinking* (Oxford University Press New York 1938)

suspicion of the worth of simple general propositions taken to their logical conclusions. Law, like life, can sometimes be simple; but often, indeed generally, neither is.

Further, the law and its application, being the judicial task, often involves dealing with, and reconciling, opposites and antitheses, sometimes seeming irreconcilables that pervade both life and law, and which lie at the heart of dispute resolution and of the day-to-day exercise of the judicial task. This can be seen in the relationship between certainty and uncertainty, rule, principle and exception; in the endemic difficulty, sometimes impossibility, of definition, despite the essentiality of the requisite degree of definition; of the need for taxonomical structure and precision, where possible in the expression of abstract concepts, all in the face of the implicit wholeness of human relational ideas drawn from thought, feeling and emotion; and above all, it can be seen in the limits, but the illuminating power, of text – of words.

These reconciliations make up (though we may not realise it as we do it) much of our task as Judges to express and apply the law for the individuals who come before us and for the society and the people which and whom we serve.

All the above reflects the reality that many legitimately disputed questions for resolution under law have no one 'correct' answer that is to be ascertained by reading and applying the pre-existing text of rules, or by deductive logic. Evaluation of contending and conflicting considerations is usually present. The rule or principle may not be directly applicable, and analogical reasoning may be required; or the rule, if clear in expression, may not provide for simple application, but for evaluative characterisation of facts, even if the primary facts are uncontested.

This evaluation, and the struggle with and resolution of, often present opposites or antitheses in many contested questions is difficult to grasp even for trained lawyers of the highest calibre. Even when grasped and accepted, there is the question of disputed views in the resolution of these opposites, of these uncertainties, and of these evaluations, in a particular case. This is not to say (far from it) that there is a personal or institutionally embedded incoherence or choice in the law or in its application. But it is to say that for the acceptance of the results and decisions of the dispute resolution process (the judicial task) there is the need for the presence of a legitimising character of the process. Here, we come to judicial power, and to the spirit of the judicial task.

The judicial task involves the deployment of power, State power. But it is a unique form of power. It is in essence protective in character – whether of the individual, or of the group, or of society, or, sometimes, of the judicial institution itself. It is not assertive or self-wilful, as other forms of public power properly are. It protects by declaring and enforcing rights, duties and obligations of the individual, of the group and of the State, according to law. This is done by upholding the law in resolving disputes or controversies between citizens or subjects and between the State and citizens or subjects, peacefully, fairly, respecting the dignity of the litigants, and where appropriate, exhibiting mercy. In so doing, the judicial power of the State is the civilised substitute for the gun and the gang.

But the nature of the power is not abstractly defined. It is experiential, to be described, not defined. When deployed or exercised, it is felt, emotionally, almost physically: as *justice* being done: at the sentence of the convicted person; at the pronouncement of the order for custody of the child; at the order of bankruptcy of the insolvent debtor; at the judgment for money that may cause financial ruin.

These deeply moving and sometimes, indeed often, harmful, acts must come from persons who are disinterested, fair, decent, human in character and appearance, yet aloof and abstracted to a degree, trusted and respected in wisdom and learning, with a recognition that they act selflessly, fairly and impartially, charged as manifestations of just State power, though with humanity that necessarily involves the possibility of human failing.

One can see from this *description* (not definition) of the person to wield the judicial power (human and fallible, but still a manifestation of just State power) another of the antitheses or opposites in the judicial task: the abstract and the human, hinting at the intertwining of the theoretical and the experiential.

Both the judicial task, and the judicial power involved within it, have a relationship with the society and the people they serve. That is one of the reasons why it is wrong to *define* judicial power or an element of it such that it denies to it the possibility of recognition in another society. For the power to be judicial, however, and even though much is contextual, there still must be recognisable within it certain characteristics that give it its universality and recognisable commonality of qualities and features suited to the function.

The characteristics of the undertaking of the judicial task and the exercise of judicial power may take on different forms or hues in different societies. But they all have an indefinable call that resonates to, and is recognised by, the human condition – not only abstractedly or theoretically, in the mastering of the law and in understanding its process, but also experientially and emotionally in its effect: producing the feeling that justice is being, or has been, done.

These characteristics illuminate the spirit of the task. It is, to a degree, abstracted: knowing the law, with its text, form and logic, thinking about and organising the evidence and rationalising the law to the facts. However, the spirit of the task also involves the manner of its undertaking. This involves the elements or qualities of judicial technique that can be described in human and experiential terms, and which can inspire, even in the most cynical of litigants, a (perhaps grudging) respect for, and (at least residually) a trust in, the proper and decent exercise of the judicial power that is affecting them.

These qualities include skill, thoughtful learning born of study, diligence, reasonable despatch and efficiency, faithfulness to the text and meaning of the law, impartiality, fairness, a lack of anger or emotion, the application of reason and practical judgement, as well as courage when necessary, and an exhibiting of the respect and empathy for, and a recognition of the dignity of, all before the Court, which recognises the

powerlessness and reduced position of all put into the position of the litigant – the dependence upon the judgement of others. When present, these qualities coalesce and conspire to deny the arrogance of position and the arrogance of power. The importance of all these qualities comes from the interrelationship all have between the human and the abstract.

The spirit of the judicial task (involving these qualities) does not come from high policy or grand expression; rather it comes from what must be done on a daily basis in the application of the law in life's small, sometimes selfish and mundane, intersections concerning people going about their lives and businesses, where the elements to which I have referred assume a daily modesty in expression, and in context. But that modesty in expression and context reaches back towards the fusing of theory and law with the experientially human features of the exercise of the task to which I have referred. The spirit of the task comes from its modest application to the humans in question, to the conflicts in resolution, to the pages of the lives of people.

Given the nature and character of SIFoCC as dealing with commercial courts this discussion of the judicial task and its spirit might helpfully turn to commerce and commercial law.

One should not be too starry-eyed about the nobility of the middleman or trader. Yet, out of the, to a degree, selfish character of the search for commercial gain, one derives some of the most important and enduring conceptions in the law, such as the bargain, good faith and fair dealing, unjust enrichment, the unconscionability of the exorbitant bargain, salvage and general average, to name a few. Such is another opposite or antithesis embedded in the law.

More particularly, in an increasingly transnational and international world, commercial courts, in particular, are more regularly meeting questions of principle and judgement that require a balance of national interest and respect for, or at least consideration of, commercial parties and courts of other countries. The activity of commerce is international and, so, the character of commercial law for that activity must also be, to a proper degree, international.

Commerce can be seen to play an instrumental role in bringing otherwise isolated and disparate groups and societies into contact and into relations. The growth in wealth associated with trade allowed (for better or worse, as the case may be) nations to expand beyond their existing territories and led to the foundation of new settlements. A moment's reflection upon the trading circles and routes spanning the world before European colonisation began in the 15th century would inform the necessary connection of habit, custom, law and reciprocity amongst North Asia, South East Asia, South Asia and the Sub-Continent, Central Asia, Africa, the Middle East, the Mediterranean and Europe, and the Baltic[195].

In order for commerce to grow, its participants needed to be able to deal with each other peacefully and with mutual benefit. Commerce was instrumental for the development of a modern public and private international law system and for the development of the broad and crucial, though not well defined, concept of comity. Comity has, from its beginning, been inextricably linked to international commerce, and indeed owes its very existence to the pressures and demands of commerce and of transnational trade. It is a doctrine built upon the recognition, as expressed by Ulrich Huber, that *"nothing could be more inconvenient to commerce and to international usage than that transactions valid by the law of one place should be rendered of no effect elsewhere on the account of a difference in the law"*.[196]

This underpinning feature of the necessity for a proper degree of comity in the conduct of transnational commerce gives the commercial law that regulates international commerce its unique characteristic: That it is the law *of an activity,* an international activity, and not just the law of a particular place or of a particular people or society.

Perhaps the clearest illustration of this is maritime law which can be seen as a distinct branch of the law rooted in maritime, and international commercial, *activity*. It is the law of maritime activity and of seafaring commerce. It was once placed by a great American professor, John Henry Wigmore in his beautiful work, *A Panorama of the World's Legal Systems*[197] as one of the 16 *legal systems* in the world. This was not antiquarian fancy; it was legal reality. Wigmore recognised that maritime law was not the law of a place or of a people, but a general body of law from shared common experience in facing the exigencies, risks and perils (human and physical) faced in the timeless activity of seaborne commerce. This led and leads to the formation of common principles, even if there are differences between individual national laws in their adoption and adaption of the common principles.

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[195] JL Abu-Lughod before European Hegemony: The World System AD 1250-1350 (1989) Oxford University Press; JL Abu-Lughod "The World System in the 13th Century: Dead End or Precursor?" Essays on Global and Comparative History (1993) American Historical Association.

[196] Ulrich Huber De Conflictu Legum as translated in Ernest Lorenzen Selected Articles on the Conflict of Laws (1947 Yale University Press) at 164-165.

[197] Three Volumes: St Paul West Publishing 1928.

Ultimately, laws of societies grow from the roots of the group and of the place, and comparative law can be seen through the metaphor of a canopy of leaves and branches linking these different trees of national law growing from the earth of separate peoples and places. Maritime law and to a degree, international commercial law, are quite different. They are the law of maritime and commercial *activity* and of the humans who engage in it across the world. The metaphor of their manifestation is the rising of the springs of national law from the underlying stream of common principle below.

One of the most beautiful expressions of this came from Justice Jackson in the United States Supreme Court in 1953 in *Lauritzen v Larsen*[198]. He was dealing with the proper construction of United States seafarers' compensation legislation[199] and whether or not it applied to a foreign seafarer on board a foreign ship injured while the ship was in New York Harbour. The seafarer's relationship with the ship and ship owner was entirely framed by articles of employment, the proper law of which was the same nationality of the flag of the ship and of his citizenship. Justice Jackson, having referred to "a non-national or international maritime law of impressive maturity and universality", said:

> ***"International maritime law in such matters as this does not seek uniformity and does not purport to restrict any nation from making and altering its laws to govern its own shipping and territories. However, it aims at stability and order through usages which considerations of comity, reciprocity and long range interest have developed to define the domain which each nation will claim as its own."***

This reflects the practical reality of international commercial principle even when applied by national Courts. Involved in the conception of international maritime law is the recognition of a coherent body of rules and principles with roots and history in maritime commerce over centuries, recorded in Codes and decisions in many parts of the world. As such, it may not bind nation states of its own force, but it is adopted and adapted into national laws retaining its source and inspiration from the international maritime law.[200]

One can see from this that just as international commerce brings different societies together, so do shared international legal principles.

An example of these shared principles is the similarity of text of maritime codes and principles around the world. Thus maritime law is best taught, I found, not by focusing upon one particular nation's laws, but through a study of conventions, of codes from different countries and of common principles.[201] When teaching shipping law in Australia, colleagues and I taught from multiple codes and statutes to illustrate the commonalities and nuances of differences in national legal systems across the world.

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[198] 345 US 871 at 581-582.

[199] The Jones Act

[200] *American Insurance Co v 356 Bales of Cotton* 26 US 511 at 545-546 (1828); *The Lottawanna*, 88 US 558 at 572-573 (1874); The Tolten [1946] P 135 at 142

[201] The finest illustration of this method of teaching is to be found in Tetley *International Maritime and Admiralty Law* (Les Editions Yvon Blais 2002)

We particularly used the text of the Chinese Maritime Code and the Chinese Maritime Procedure Law. These were carefully drafted and carefully translated through the 1980s and 1990s under the guidance of the deeply scholarly work of the great maritime universities in China, in particular the Shanghai and Dalian Maritime Universities. These codes are of the highest quality and, translated into English, are works of elegant, balanced simplicity that capture the meaning and spirit of international maritime law and practice taken from prevailing international conventions and principles.

Thus, it must be appreciated that the societies and people that are served by the judicial task include those engaged in international commercial activity, including States, as well as merchants and traders.

I have earlier sought to emphasise that the importance of the judicial task and its spirit is to engender confidence in those who come before the court in the decision-making that will affect their lives and businesses. The nature of international commerce and international commercial law means that the task is not limited to engendering the *loyalty* of the citizen or subject of the particular country or polity served by the court, but extends to inspiring the *confidence* of all those involved in international commerce: to the foreign State or merchant or trader, to the stranger.

The spirit of the judicial task is the proper approach to the duty to succeed in *that* task. The importance of the task and its spirit is not just what is done, but how it is done. The process is both analytical and intensely human; it is both abstracted and experiential; it reflects a social or human bond between the State, manifested in the court, and the person, including the stranger, such as the international merchant or trader, who comes before it.

What then is the importance of international judicial dialogue? Why engage in it? In what way is it valuable? Is it part of the judicial task?

At this point, I need to indicate how I came to think about judicial dialogue. When I became Chief Justice of the Federal Court of Australia in 2013, I began to think more thoroughly than I had before about international judicial dialogue. Previous Chief Justices of the Federal Court had put in place relationships of bilateral dialogue and assistance with Courts of a number of countries: the Supreme Courts of Vietnam, of Indonesia, of Papua New Guinea, and Vanuatu; and with the Supreme People's Court of the People's Republic of China. Some were more wide ranging in subject matter than others. Some focused on organisational and case management concerns; some involved mentoring younger judges; some, especially that with the Supreme People's Court, involved detailed exchange on subject matter of mutual interest, in that case, maritime and shipping law and practice.

Whilst some may have been viewed as the giving of assistance by one Court to the other, that would have been to narrow a lens properly to understand the nature of the relationship. All these relationships were deeply mutually beneficial in their aims and undertaking.

All these relationships involved resources – time and human resources, as well as precious Court funding. I asked myself: Why were we doing this? We have litigants before us who deserve our time; and the resources from the taxes placed upon all citizens should be devoted to that judicial task. The same question was sometimes asked of me by colleagues and friends. If one answered by reference to the benefits to Australia by some projection of influence or recognition, one could be met by the legitimate riposte that this was not the judicial task; it was foreign policy, soft power and influence, and so the domain of government of the day.

The answers to all the above questions as to the legitimacy of undertaking judicial dialogue should, by now, be seen to be found in an appreciation of the nature and the importance of the judicial task and of its spirit. No Judge can fully appreciate the nature and importance of what he or she does without appreciating how Judges of other countries, systems and traditions *undertake the same task*.

The exchange and the dialogue, bi-lateral or multi-lateral, brings out an appreciation of different perspectives, of the varied contexts of the same or similar problems, of connections, of common principles, and of common underlying values. This gives strength, or perhaps a basis to question, one's own system's principles and approaches, and equips one to approach the judicial task of reconciling all the opposites and antitheses, of which I have spoken, in a national and international context, taking proper account of reciprocity and comity, of the nature of the international activity, and of the content of international commercial legal principle.

Further, for a Judge or court to approach contemporary problems of the judicial task, whether of the development of legal principle or the preparation to meet new challenges, with a rejection of the need for an understanding of how colleagues around the world are dealing with these problems might be thought to be foolish or arrogant.

Let me illustrate by saying something of the programme for this Fifth Full Meeting.

The first theme of the meeting, Artificial Intelligence, is of great importance. AI will affect forever how the administration of justice is practically undertaken. It is essential that Courts engage with the science and technology in this area. Not to do so would cede to others a licence to masquerade as the only source of so-called 'accurate' decision-making, and to deny to the Courts the assistance they need in dealing with the choking thickets of digital information that envelop us in the digital world, which is only increasing exponentially.

That engagement will not, however, do away with the need for both the judicial task and its spirit. One might be able to have a machine mimic the judicial task and its embodied spirit, including in dealing with all the reconciliations of the task addressing questions with no necessarily correct answer; but that is hardly the point.

Nevertheless, how machine-learnt processes of abstraction and synthesis may affect and assist human engagement and justice are deep questions for the future. The notion of the complementarity of two ways of thinking: an AI way of thinking and a human way of thinking, mentioned by Colin Mayer and Simon Knowles yesterday, is of particular importance. Complementarity may give another perspective, perhaps as large as it did in quantum mechanics with Bohr and Heisenberg in 1927 in the Copenhagen Interpretation. The difficulty of grasping the boundary (if a boundary line is an apt conception) between human and machine judgement or thinking, and knowing whether it is one or the other, is perhaps not a world away from the co-existence and complementarity of waves and particles, and their changing by the act of measurement, and the necessary uncertainty inherent in quantum physics, ridiculed by Schrodinger and his posited cat in the box that could not be both dead and alive at the same time. Contemplating or reconciling opposites in physics is perhaps echoed in contemplating the opposites and antitheses in algorithmic prediction and mimicking, abstract and theoretical reasoning, and the human and the experiential reality of the whole. We are, after all, beginning to discuss human consciousness.

To try and find our way in that undertaking without intense and regular exchange with colleagues around the world, such as has already taken place at this meeting, would doom the individual response to narrowness, provincialism, and likely inadequacy.

The second theme, developing the relationship between commercial Courts, arbitration and mediation simply cannot be addressed other than through dialogue with judicial colleagues, with arbitrators, and with mediators, from as many jurisdictions as possible. That dialogue is essential to the deepening of the understanding and strength of the *international justice system,* which is comprised of national commercial Courts, international Courts, arbitration institutions, arbitrators, mediation institutions, mediators, and the legal profession around the world.

This legal system, described so well by Chief Justice Menon in his keynote address at the last Full Meeting in Sydney in October 2022, is framed by one of the most important international conventions ever passed and adopted: the New York Convention on the Recognition and Enforcement of International Arbitral Awards, and also by the Recognition of Courts Convention, the UNCITRAL Model Law on Arbitration, the Singapore Mediation Convention, numerous soft law instruments and a non-binding, but extant, international maritime law and international commercial law.

The strength of the tissue of such a system depends upon regular dialogue.

The matters and subjects in the second theme are not capable of being fully discussed other than within an international meeting such as SIFoCC and in dialogue spawned by it.

The third theme of corporate activity and the rule of law throws up important issues in international commerce. Questions of a legal, moral and policy kind involved in the carrying on of business, including exploitation of resources in third party countries, the organisation of corporate groups and the responsibility of the parent and major corporate elements in the group for overall group behaviour will be fundamental to the development of a coherent remedial system in the coming century. Again, it is difficult to see how this can be properly addressed by Judges of one jurisdiction without understanding, from close dialogue, how other countries may approach the problem.

The fourth theme of greater international judicial co-operation is self-evidently a subject that can only be dealt with in the form of a meeting such as this. The importance of international judicial co-operation cannot be over emphasised. Working together, whether in parallel insolvency cases, or in working through competing claims to jurisdiction, and in understanding the quality of the work of other Courts and other Judges can only come from familiarity with the Judges of those Courts personally and institutionally.

Judicial dialogue is not only important to the law, but also it is important to understanding other systems. When Judges share their experiences, they learn and share aspects of the judicial task and its spirit that are often incapable of precise written expression. That helps Judges appreciate, from dialogue and from new perspectives gained thereby, the reality of the spirit of the judicial task and its indefinable character, as well as its importance.

I will finish by giving an example of a living embodiment of the spirit of the task which reveals its indefinable character. One of the greatest of Australia's legal scholars and Judges died last year, far too young. His name was Paul Finn. He was a well-published scholar and prolific judge, of great quality. Like all Judges of the Federal Court in the 1990s and 2000s, he had the task of dealing with a great many immigration cases – which were often hopeless in law, but always replete with human hopes and fears. In a beautifully written obituary, the following was recorded as the words of an Iranian applicant before Paul at the conclusion of a hearing about the refugee status of the man:

> ***"It does not matter to me if I win or lose, as I sense that the Judge is a spiritual man, who treated me with such respect, that I know he will do what is right."***

This was a human recognition of the Judge's dutiful engagement in the task, in the process, that revealed to this man, with his intelligent insight, that something deep and important had taken place in his experience with, and of, the Judge. This is not imagined. It is the social bond of justice being manifested among, and recognised by, humans who come together in an act of supplication before State power and authority. It is a bond that is achieved by the engagement of a fallible human in the task of ascertaining and impartially applying the law in a careful, detailed and abstracted way and by the respect shown to the dignity of the parties. The Iranian man had the insight and poetic gift to express these things. Many litigants without such gifts nevertheless *feel* the same thing, even if they do not conceptualise it, or do not, or cannot, express it in language. Indeed, this experience emotes a feeling that often cannot be expressed, otherwise than by the statement that justice has been done.

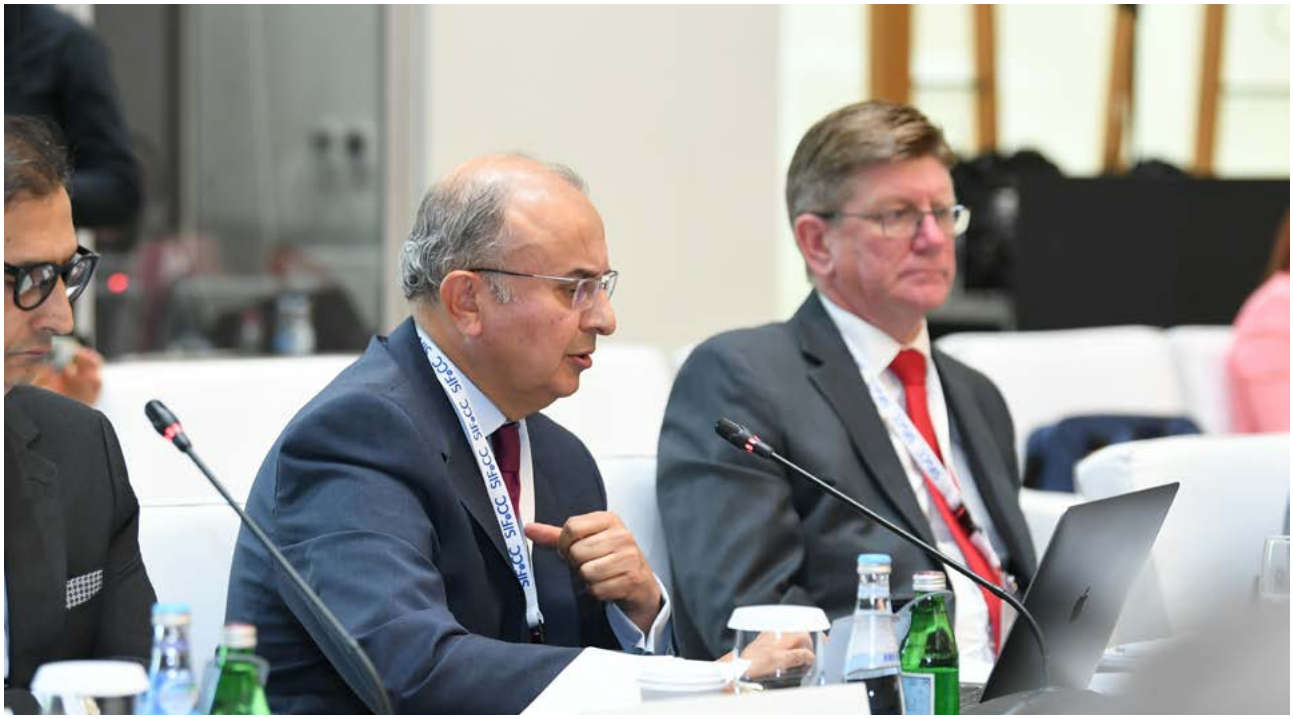
The proper execution of the judicial task and the spirit which the task embodies are essential for a just society embodying the Rule of Law and for the health of commerce, including international commerce and international commercial law. That the Iranian man's case was about his claim for asylum, not one about commerce such as one for breach of contract, does not deny the relevance of how he felt, to the expectations of all litigants before a court, including, but perhaps especially for our purposes today, the foreign State or merchant or trader before a commercial court: the stranger engaging in international commerce.

These matters lie at the heart of the importance of international judicial dialogue and of organisations such as SIFoCC in strengthening international commerce and international commercial law, in strengthening ourselves as Judges, and in strengthening relations across and between societies. This strengthening will come through recognising that the common task, which we are privileged to share, involves a spirit of an indefinable character, being one which engages human consciousness in the recognition of justice.

Speech

Justice Syed Mansoor Ali Shah, Supreme Court of Pakistan

Climate Change and Commercial Courts



According to the World Bank Doing Business Report (2009), commercial courts play a central role in supporting businesses and economic development.[202] Commercial cases have been prioritized as they take significance over the other cases. The prioritization criteria can vary, based on the judicial philosophy, the legal framework of the country, and specific societal needs. But invariably, commercial cases top the list because they have significant economic impact. Against this backdrop, a commercial court (specialized court which is established to settle disputes arising from commercial or business activity)[203] can ensure an efficient marketplace, promote economic growth and stability by ensuring that all parties adhere to the rule of law in commercial dealings. These commercial matters are therefore integral to the economy, commerce and foreign investment to any country.

[202] Doing Business (2009), The World Bank < **https://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB09-FullReport.pdf**>

[203] However, prioritizing economic cases should be balanced with the need to ensure justice in all areas, including personal rights and social issues. A well-rounded approach might include the creation of specialized courts for different types of disputes, ensuring that while economic cases are handled efficiently, other important areas of law are not neglected. This could help maintain a balanced judicial system that supports both economic growth and social justice.

Commercial courts have therefore several unique characteristics that make it stand out from regular courts. These include:

i. **Expertise in business and economic matters** – which can lead to better informed and accurate decisions.

ii. **Efficiency** – commercial courts can handle cases more swiftly than general courts, reducing the time and expense associated with prolonged legal disputes.

iii. **Predictability and Consistency** – commercial courts can provide more predictable and consistent rulings, which is beneficial for economic planning and investment.

iv. **Encourages foreign investment** – by resolving disputes efficiently and effectively, these courts maintain a stable business environment, encouraging domestic and foreign investments.

v. **Innovation and flexibility to adapt** – commercial courts can adapt more quickly to changes in economic circumstances and emerging issues like digital economy disputes, intellectual property, and complex financial products and perhaps artificial intelligence ("**AI**").

If the heart and soul of a commercial court is to nurture the economy, commerce, trade and international investment in a country and support and strengthen businesses – how can it ignore the most serious existential threat to the economy and businesses, i.e., climate change. Just like the intersection between AI and commercial courts we discussed yesterday, I argue that commercial courts cannot possibly ignore understanding climate change and dealing with disputes and regulatory issues relating to climate change. I also argue that commercial courts are best suited to deal with climate issues as they largely impact businesses and there are no specialized courts in the world that are equipped to deal with businesses, economy, commerce and the issues of climate change. It is perhaps time that the commercial courts rise to the occasion and take up this challenge.

It would be accurate to say that one of the major impacts of climate change in developing countries is on the economy, though they extend beyond economic implications as well. Developing countries like Pakistan are often particularly vulnerable to the impacts of climate change and these impacts can significantly affect their economies in various ways:

i. **Agricultural Impact:** Many developing countries have economies that are heavily dependent on agriculture. Climate change can lead to less predictable weather patterns, droughts, floods, and changing temperatures, all of which can reduce agricultural productivity. This not only affects national food security but also livelihoods dependent on agriculture, leading to economic instability.

ii. **Health Impact:** Increased temperatures and changing weather patterns can lead to more frequent and severe health problems, including heat-related illnesses and the spread of vector-borne diseases like malaria. The healthcare costs and lost productivity due to illness can place additional burdens on already strained economic resources.

iii. **Infrastructure Damage:** Extreme weather events, such as hurricanes, floods, and storms, which are becoming more frequent and intense due to climate change, can cause significant damage to infrastructure. Repairing and rebuilding infrastructure requires substantial financial resources, which can divert funds from other developmental activities. *Pakistan – devastating floods 2022 – loss in billions of dollars*.

iv. **Water Resources:** Changes in precipitation patterns and the melting of glaciers can lead to water scarcity or flooding. This not only affects agriculture but also requires investment in new water management systems, which can be costly.

v. **Displacement and Migration:** Climate change can lead to displacement of people, particularly from areas severely affected by sea-level rise, droughts, or extreme weather. This displacement can lead to urban crowding and increased demand for services and infrastructure in new areas, leading to economic and social stresses.

vi. **Economic Inequality:** Climate change can exacerbate existing economic inequalities. Vulnerable populations in developing countries often have fewer resources to adapt to climate change, which can further entrench poverty and limit economic development.

vii. **Impact on GDP:** The cumulative effect of these factors can lead to a decrease in GDP growth rates.

To be more precise, climate change affects businesses in the following manner:

i. **Supply Chain Disruptions:** These disruptions can lead to delays, increased costs, and difficulty in obtaining raw materials, all of which can affect production and profitability.

ii. **Operational Costs:** Increased temperatures and other climate-related changes can raise energy demand for cooling systems, impacting operational costs. Additionally, businesses may need to invest in adaptation measures such as water-efficient processes, disaster-resistant infrastructure, or alternative energy sources, which can be costly.

iii. **Market Changes:** Climate change can shift market demands. For instance, agricultural businesses might need to change the types of crops they grow based on shifting climatic zones, or tourism businesses might see fluctuations in visitor numbers due to changing weather patterns.

iv. **Regulatory and Policy Changes:** Governments in developing countries might implement new policies to mitigate or adapt to climate change, such as carbon pricing, emissions regulations, or mandatory sustainability practices. While these policies aim to address climate change, they can also create challenges for businesses to comply with, often requiring additional investment.

v. **Financial Instability:** The economic impacts of climate change can lead to broader financial instability in a region. This can affect consumer purchasing power, leading to reduced demand for various goods and services. It can also make it more difficult for businesses to secure financing as lenders might view them as high-risk if they are significantly impacted by climate variability.

vi. **Investment and Growth Opportunities:** On a positive note, climate change also presents opportunities for businesses in developing countries. There is growing potential in sectors like renewable energy, sustainable agriculture technologies, and climate resilience services. Businesses that can innovate and adapt may find new growth avenues and gain competitive advantages.

Globally, there is already noticeable trend toward integrating environmental considerations into commercial litigation:

- **Environmental, Social, and Governance (ESG)**[204] **Issues:** There is increasing scrutiny on how companies address ESG issues, with a significant focus on environmental impacts and sustainability. This scrutiny can lead to more cases being brought before commercial courts as stakeholders hold companies accountable for their ESG commitments and disclosures.
- **International Standards and Commitments:** With international agreements like the Paris Agreement shaping policies and regulations, businesses operating across borders may face complex legal challenges related to compliance with differing national regulations and standards on climate change.

The intersection between businesses and climate change becomes more nuanced when we look at:

- **Carbon Emissions:** Many businesses, especially in manufacturing, energy, and transportation sectors, are major sources of greenhouse gas emissions.
- **Reduction Commitments:** Increasingly, companies are committing to reduce their carbon footprints through various means such as improving energy efficiency, investing in renewable energy, and enhancing supply chain sustainability.
- **Innovation and Technology:** Businesses invest in research and development of sustainable technologies, such as renewable energy, energy-efficient appliances, and biodegradable materials. The environment of the case was that the entire case is fall within the case of the country of the case and the other issues predominantly of the case.
- **Implementation of Best Practices:** Companies can implement best practices in climate management, such as water recycling, waste reduction, and sustainable sourcing.
- **Green Finance:** Businesses can influence markets through green bonds and other financial instruments that fund climate resilient projects.

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[204] Environmental, Social and Governance ("ESG") is a framework used by investors and companies to evaluate the extent to which an organization is acting responsibly towards the environment, society, and in its governance practices. ESG criteria help measure the sustainability and ethical impact of an investment in a company or business.
a) Environment criteria considers how a company performs as a steward of nature. This includes how it manages risks and opportunities related to environmental challenges, such as climate change, resource depletion, waste and pollution.
b) Social criteria examine how a company manages relationships with employees, suppliers, customers, and the communities where it operates. This includes issues like labor standards, human rights, and impact on local communities.
c) Governance involves a company's leadership, executive pay, audits, internal control, and shareholder rights. This criterion assesses the company's leadership, compensation practices, audits, internal controls, and shareholder rights.

- **Investment Decisions:** The business sector has the power to direct investments towards sustainable ventures and away from fossil fuels, significantly influencing market trends and corporate behaviours.
- **Lobbying for Sustainable Policies:** Businesses can lobby for policies that promote climate sustainability, carbon pricing, and renewable energy subsidies.
- **Setting Industry Standards:** Businesses can set high environmental standards that go beyond compliance, pushing entire industries towards more sustainable practices.
- **Corporate Responsibility and Accountability:** There is a growing trend for businesses to disclose their climate impact as part of their annual reporting, which includes detailing with their carbon emissions and sustainability efforts.
- **Stakeholder Engagement:** Companies are increasingly engaging stakeholders, including customers, employees, and communities, in their sustainability efforts, thus raising awareness and fostering a collaborative approach to environmental stewardship.
- **Driving Consumer Choices:** Businesses have the ability to shape consumer behaviour through the products and services they offer. By providing sustainable options and educating consumers about the environmental impact of their choices, businesses can drive significant changes in consumer behaviour.
- **Sustainable Supply Chains:** Businesses can ensure that their supply chains are sustainable, involving everything from raw material extraction to manufacturing and distribution.

Overall, businesses have a dual role as both contributors to climate change and powerful agents for climate action. Their ability to innovate, influence markets, and implement sustainable practices is vital for global efforts to mitigate and adapt to climate change.

The idea that commercial courts can play a central role in promoting business sustainability and climate resilience rests on the following argument:

- **Expertise in Commercial Matters:** Commercial courts possess deep expertise in business law and understand the complexities of commercial operations and transactions. This makes them well-suited to adjudicate cases involving climate sustainability and international commitments of businesses.
- **Regulatory Challenges:** These involve disputes over the implementation or interpretation of regulations and policies. Parties may challenge governmental actions or inactions, such as the issuance of permits for greenhouse gas-emitting facilities, or the adequacy of government policies on climate change mitigation and adaptation.

- **Public Trust Doctrine:** Some cases are based on the public trust doctrine, arguing that the government has a duty to protect the atmosphere for public use and future generations. Litigants may seek to compel governments to take action to reduce carbon emissions and protect natural resources affected by climate change.
- **Tort Claims:** These involve claims against companies or governments for causing harm through greenhouse gas emissions. Plaintiffs may seek compensation for damage caused by climate-related events like floods, hurricanes, or droughts, arguing that the defendant's emissions contributed to these events. Loss and damage agreement- loss and damage has to be determined by some body. Commercial courts are ideally suited for that.
- **Corporate Disclosure:** These disputes focus on whether companies have adequately disclosed climate-related risks in their financial reporting. Investors may sue companies for failing to disclose how climate change could impact their business operations and financial health.
- **Environmental Impact Assessments:** Disputes may arise over the adequacy of environmental impact assessments for projects likely to contribute to climate change or be affected by it. Litigants may argue that certain projects, like building new coal-fired power plants, have not fully considered climate impacts.
- **International Disputes:** These involve cross-border issues of climate change, where actions in one country significantly impact another. These can be handled through arbitration panels of the commercial courts, focusing on violations of international treaties and agreements.
- **Contractual Commitments:** Contracts involving renewable energy projects, emissions trading schemes, or green technology deployments can lead to disputes that end up in commercial courts. For example, disputes may arise over the performance of parties in agreements linked to the construction of renewable energy facilities or the delivery of carbon credits. Many businesses are now incorporating sustainability clauses into their contracts with suppliers and partners. Commercial courts can enforce these agreements, thus ensuring that sustainability commitments are legally binding and upheld.
- **Adjudicating Complex Disputes:** As businesses transition towards sustainability, new types of disputes will likely emerge, such as those related to carbon credits, renewable energy projects, and sustainability reporting. Commercial courts are ideally positioned to adjudicate these complex cases given their understanding of business practice.
- **Influence Corporate Governance:** Through their rulings, commercial courts can influence corporate governance practices, encouraging companies to integrate climate risk assessment and sustainability into their governance frameworks.

- **Insurance Claims:** As climate change increases the frequency and severity of extreme weather events, related insurance claims can result in complex disputes about coverage terms, liabilities, and damages. Commercial courts may be called upon to adjudicate these disputes.
- **Corporate Governance:** Shareholders may bring lawsuits against companies alleging failures in disclosing climate-related risks, mismanaging resources related to climate change, or not complying with relevant environmental laws. Such cases might focus on directors' and officers' fiduciary duties to manage risks related to climate change.

To effectively take on this role, commercial courts would need to undergo certain adaptations. These include:

- **Training in Climate Science and Sustainability:** Judges and court staff may require training in climate science and sustainability to better understand the cases before them.
- **Developing Specialized Knowledge:** Courts could develop specialized branches or panels focused on environmental and sustainability cases, similar to how some have specialized in intellectual property.
- **Building commercial corridors than just commercial courts:** To make commercial courts more effective there has to be a dedicated "commercial corridor," or specialized pathway, from lower courts all the way up to the supreme court.

In our country – having a commercial court only at the district level has little impact as the sluggishness of the appellate structure gets to the commercial cases also – therefore, unless there is commercial corridor – all the way to the Supreme Court, the commercial court paradigm will be no more than a mirage which might erode public confidence. In essence, by expanding their expertise to include climate sustainability and environment science, commercial courts could provide the data of the same in the said matters: in the same course of the issues. In essence, by expanding their expertise to include climate sustainability and environmental science, commercial courts could play a pivotal role in ensuring that businesses not only comply with current regulations but also embrace broader responsibilities towards building a sustainable future. This approach could make commercial courts central forums in the drive towards a more climate resilient and environmentally conscious global economy.

Qatar redefined the FIFA World Cup, let Qatar also redefine commercial courts to take on climate change.

The Fourth SIFoCC Judicial Observation Programme (OP23)

Further Practical Commentary and Examples to SIFoCC's 2020 Working Presumptions on International Best Practice in Case Management

Chaired by Justice Nallini Pathmanathan of the Federal Court of Malaysia, this session was rooted in the SIFoCC working presumptions on international best practice in Case Management.

Those working presumptions were originally developed in 2020 by a SIFoCC International Working Group of judges, chaired by the Hon James Allsop AC then Chief Justice of the Federal Court of Australia) and Sir Peter Gross (former Senior Presiding Judge of England & Wales) and further assisted by a Panel of Experts. They have been endorsed by SIFoCC's membership as a whole.

As published, the presumptions "seek to state, at an appropriate level of generality, the fundamental elements of, and approach to, case management. The purpose of the document is to provide a principled framework for individual courts to develop more particular approaches, rules or practice notes suitable for their individual requirements, situations, legislative contexts and circumstances".

SIFoCC's Judicial Observation Programme has been effective and popular with SIFoCC's membership. It allows the opportunity for Judges from a number of jurisdictions to spend, together, an intensive week in the commercial courts of a host jurisdiction. Attendees are then able to share useful practice more widely with their colleagues in their own jurisdiction. Lasting relationships are built between attendees.

SIFoCC's 4th Judicial Observation Programme was held in London in 2023. The attendees were Justice Mahinda Samayawardena of Sri Lanka, Justice Lornard Taylor of Sierra Leone, Justice Valens Nkurunziza of Rwanda, Justice Kazimbe Chenda of Zambia, Justice Jawad Hassan of Pakistan and Justice Fatima Faisal Hubail of the Kingdom of Bahrain.

On their welcome initiative, the judges collaborated to prepare an extended edition of the working presumptions by adding commentary and examples to illustrate the working of the presumptions in their jurisdictions. The results were explained in this session at SIFoCC's Fifth Full Meeting.

The original and underlying International Best Practice in Case Management can be found on the SIFoCC website under 'Publications' here:
SIFoCC Presumptions of Best Practice in Case Management 2020 – SIFoCC

Similarly, the International Best Practice in Case Management - Extended Edition: April 2024 as prepared by the Observation Programme judges can each be found here:
International Best Practice in Case Management (Extended Edition 2024) – SIFoCC

Short address from Justice Nallini Pathmanathan of Malaysia

"The needs of the commercial and business communities of the world for transnational commercial litigation outcomes that are timely, predictable and cost efficient have intensified significantly and will continue to do so.

This is all the more so when such disputes are dealt with by national or domestic commercial courts in different jurisdictions globally. The reality is that there subsists a fear of litigation in a foreign jurisdiction amongst litigants. Born out of an unfamiliarity with the legal culture, coupled with misgivings as to whether due process is a part of the legal culture in a foreign jurisdiction, anxiety about the possibilities of bias and therefore inevitably, concern with regards to the outcome. While the reality is generally far removed from such perceptions, there is no doubt the existence of institutions such as SIFoCC go a considerable way to dismantling such perceptions.

The Observation Programme is an important programme that demonstrates how this is achieved. The participating judges were able to observe, consider and adopt or adapt day to day practices in Case Management and it is clear that they benefited considerably. An arguably more significant aspect of this collaboration is that the judges achieved a degree of mutual trust and respect, the importance of which cannot be over emphasised as it goes directly towards attaining the same degree of trust and respect between jurisdictions.

In small bites, this programme works towards the convergence of the procedural aspects of commercial dispute resolution in terms of certainty, procedural coherence, and timeliness, all of which are important components of the rule of law.

At a macroscopic level, it is a reality that national courts exercising domestic law comprise the elements of an international order and shape international order. This is because of the important role they play, even more so today, in adjudicating transnational disputes. Domestic courts assume the role of transnational rule makers by directly interpreting national and international laws. Judges therefore shape transnational law in the process of adjudicating in their domestic courts.

In this context, judicial dialogue among judges in a forum like SIFoCC provides an important mould of diffusion of legal norms. The interaction here is not limited to what is gathered in the Observation Programme alone but also serves to diffuse legal norms transnationally. In the current context, it is procedural, but potentially there is nothing to preclude a more global legal approach as to substantive law being involved.

Ultimately in an ideal world, one hopes that this leads toward what has been termed 'global jurisprudence' in relation to legal norms. In this increasing polarised world, it is important that bridges are built by weaving together the divergent threads of different jurisdictions so as to achieve, if possible, the constituent features of an international order that captures both the practices of the recognised jurisdictions that play a significant role in shaping such an order while ensuring that the practices, precedents and legal culture of the lesser known jurisdictions are given space and consideration. SIFoCC is uniquely placed to achieve such global governance in relation to the resolution of commercial disputes transnationally. The judges have demonstrated this effectively via the Observation Programme."

Closing Addresses to SIFoCC's Fifth Full Meeting

Chief Justice Lord David Hope KT, Chief Justice of Abu Dhabi Global Market Court; former Justice of the Supreme Court of the United Kingdom

We have a common aim. That is to ensure that our commercial courts, wherever they may be, provide the best possible system for the resolution of disputes within the jurisdictions that we serve. That is what the rule of law is all about. There is no system that does not have room for improvement; that does not have a problem somewhere that is in need of a solution. So, the opportunity to learn from each other is for all of us – a welcome feature of what we have been up to in these past two days.

Our focus has been wide as we have been invited to look outwards as well as to ourselves, to work together in areas where our organisation can really make a difference. There is strength in numbers after all. Our meeting has brought together 57 jurisdictions spread across 6 continents. For me, it has been a huge privilege to work alongside all of you during these various discussions. We all have a part to play in the development of international and transnational systems across the world.

The question that we must now ask ourselves is what we are taking away from this meeting. What have we learned that we did not know before? What stands out? What can each of us do within our various jurisdictions as we plan the way forward for our own courts and the wider community to which we all belong?

Justice David Barniville, President of the High Court of the Republic of Ireland

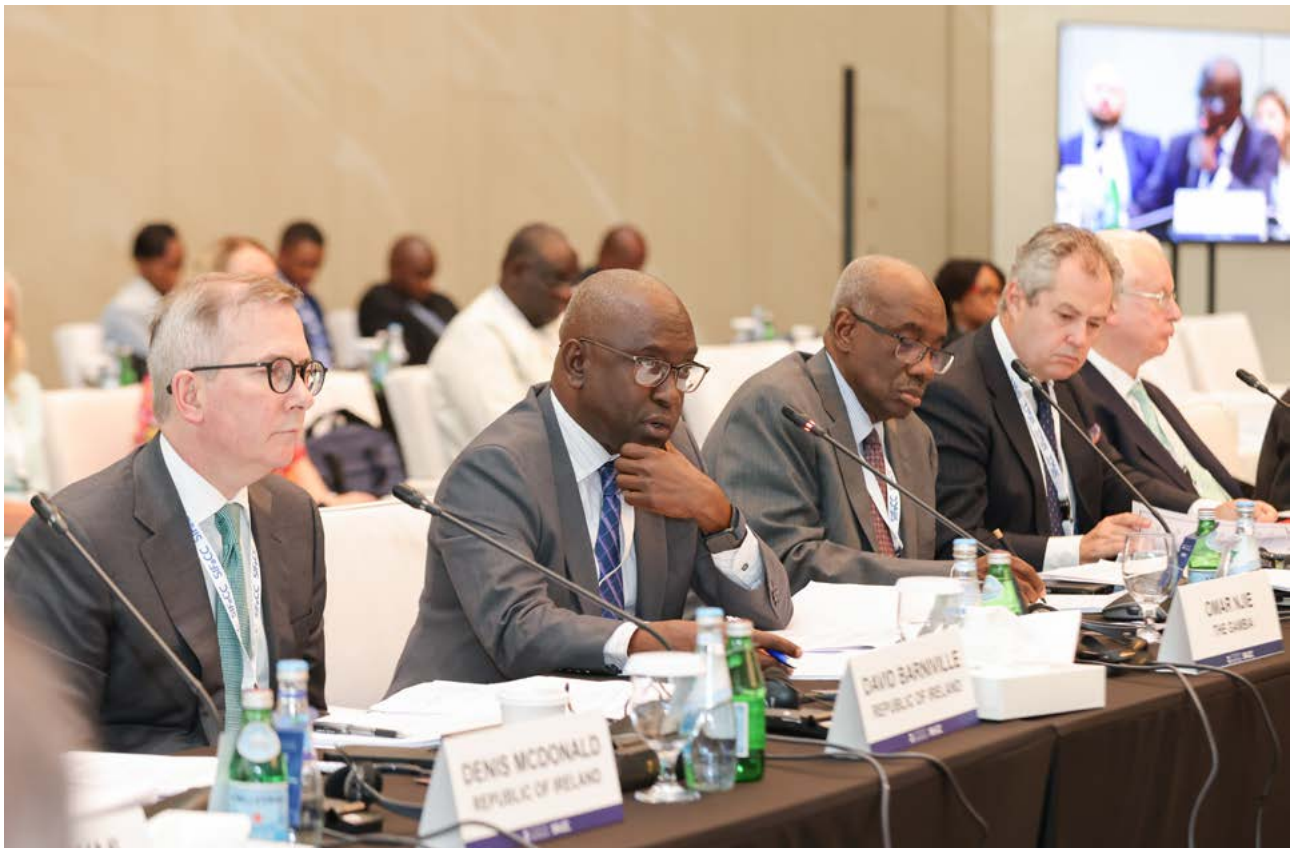
Justice Barniville gave reflections on the first of SIFoCC's three objectives - "Sharing of best practice between our courts and by encouraging courts to work together to keep pace with rapid commercial change".

Providing an overview of the sessions that took place across the two days, he concluded that the benefits of an in-person meeting are relevant when one is considering whether the objective of sharing best practice has been achieved.

There are lessons to be learned at formal presentations and meetings and these are enormously significant. The real tangible benefit and value is in what we learn from colleagues during the meetings and informally. In relation to Artificial Intelligence, he suggested that a common guideline may be useful for members in the area of AI. He also reiterated points made with regards to the value of judicial training in this area.

CJ Barniville gave three examples of areas where the Republic of Ireland has significantly benefited from these interactions.

1. At discussion in the SIFoCC Meeting in Sydney, the delegation from the Republic of Ireland had picked up valuable and relevant material on issues that cross our desks or judicial benches, e.g. case management, the incorporation of effective ADR procedures and disclosure and discovery of documents. These discussions have informally continued with a number of jurisdictions on issues such as third-party funding. The information received at Sydney has enabled the Republic to progress discussions amongst their judiciary and legal profession, designed to try and implement the learning received at the meeting.
2. Informal exchanges with French colleagues have enabled much closer and intensive bilateral relations to be developed between their commercial court and the International Commercial Chamber of the Paris Court of Appeal and Paris Commercial Court. This has culminated in a mini "stage" (a commercial court judge from Ireland sitting with colleagues from the Paris Court of Appeal) as well as the Paris Court of Appeal hosting the IBA judges' forum.
3. Close relations developed with counterparts in the Commercial Court of England and Wales have enabled valuable exchanges of information to take place where cases of identical nature occur at the same time in both jurisdictions, e.g. the Russian insurance claims in the aircraft leasing cases. The discussion has enabled better case management on these cases in Ireland. The relationships developed in such meetings generates confidence in other jurisdictions where orders made in international restructuring cases are sought to be enforced.



Chief Justice Bryan Sykes, Chief Justice of Jamaica

Mr. Chairman and members of this distinguished body, I have been asked to make a few remarks on the Standing International Forum of Commercial Courts' (SIFoCC's) third objective, that is, supporting developing countries in their own work on resolving disputes.

Commercial Courts have proliferated all over the world, with some jurisdictions being more mature than others. Regardless of the level of maturity and development, commercial courts exist – as do all courts – for the primary purpose of settling disputes in the most cost-effective manner, in the shortest time possible for that jurisdiction, while meeting minimum standards of natural justice.

In light of the discussions surrounding artificial intelligence; the relationship between commercial courts, arbitration and mediation; and international best practices in case management, it seems that a sound administrative support structure which enables commercial courts to take full advantage of digital solutions including AI, alternative dispute resolution mechanisms and best-case management practices is an imperative for courts within developing countries.

In the first instance one might ask, what does SIFoCC have to do with sound administrative support? After all, is this not a matter solely for the domestic court? In one sense it is, but if SIFoCC is to realise its full potential then it must begin to think about how commercial courts operate administratively. The first suggestion I would make in this regard is that SIFoCC begins to think of the optimal administrative structure of an efficient commercial court. There is enough experience in this body to determine a structure that works best.

Secondly, SIFoCC should begin to think in terms of time standards for commercial cases of different types. Why is this important? Unless there is a finish line for different types of cases, how will we know whether a commercial court is efficient and effective, assuming that its adjudicative processes are fair and it meets the minimum standards of what common lawyers refer to as natural justice. Once those standards are established, we must then consider what intermediate milestones must be met if cases are to be determined within the established time standard. In short, SIFoCC can begin to think of differentiated case management (DCM) processes that will provide a blueprint around which commercial courts should organize themselves to meet the time standards set.

Thirdly, for DCM to work, there must be data collection. Bryan Ostrom and others from the National Centre for State Courts – in the context of criminal case management – said "*becoming a high performance court starts with gathering the information needed to appraise the results of current practice, make the necessary changes, and measure progress towards the court's goals*". This applies equally to commercial courts.

SIFoCC should accordingly encourage its members to collect data on their commercial courts and use that data to inform policy, practices, and procedures. No sophisticated software is required for this. Microsoft Excel has sufficient in it to begin this process of data collection and analysis. The National Centre for State Courts has in its literature formulae for the calculation of clearance rates, disposal rates, hearing date certainty, and court congestion. These are basic steps that can begin to give a commercial court a picture of its performance. They are not costly and can work even in a paper-based court system.

Data collection and analysis, over time, will give an insight into court performance. It will assist in identifying the distinct stages of litigation in numeric terms. For as Lord Kelvin said, the analysis of "*if you cannot express what you are talking about then your knowledge of it is of a meagre kind*" the data will permit the court to begin to manage its processes better. The data may highlight, for example, that there is a shortage of staff to do the necessary back-office work to ensure resolution in a timely manner.

The data analysis in the context of time standards will inevitably prompt the mind to ask, how can cases be made to progress faster without compromising quality? This in turn will cause a court to examine its proceedings, processes, procedural rules, statute governing the operation of the commercial court, rules of practice and the like.

The analysis may reveal that a major source of delay is the judicial officer. The officer may be very contemplative and mull over a decision for an excessively long time. Thus, the selection of judicial personnel becomes of importance. The fact of the matter is that judicial officers vary in their efficiency and so in a commercial court, in addition to having judges there with significant legal acumen you may want to have judges who have the desire and the skill to work quickly and efficiently and get the case done in the shortest possible time, without compromising the quality of the decision making. In short, what we are talking about is the selection of judicial personnel who are able to digest significant amounts of information quickly, be able to identify the issues in the case early in the day, and who are unafraid to make tough decisions. This brings me to my fourth point.

SIFoCC can provide intellectual and moral support for reforms being undertaken in developing jurisdictions by placing judiciaries in contact with each other, to provide advice and assistance for reform and improvement in commercial court practices. Not all countries are at the same stage of development however, so the solutions found to problems would need to be appropriate to the technological and work culture of the judiciary being assisted.

SIFoCC can assist by providing opportunities for exposure and training. This has been done and is being done. To get the full benefit of these initiatives, it is critical that developing countries select for participation judicial officers who absorb training and very importantly, judicial officers who will return home and implement what has been learned, to the extent appropriate for the jurisdiction.

Fifth, I come to the important point of the budget. Judiciaries do not levy taxes or have means of raising the budget which is necessary to undertake their work. The budget comes from either the executive or the legislature. Judiciaries therefore need to learn the language of those who control the purse strings and to communicate with those persons effectively. Effectively here means not only understanding what you are saying but persuading the executive or legislature to act in your favour. Judiciaries must be able to execute and demonstrate the benefits to their jurisdictions of efficient and reliable commercial courts. We must accordingly learn the language of strategic planning, and SIFoCC may consider using such facilities as it has in assisting commercial courts of developing countries in these regards.

Justice Yongjian Zhang, Judge of the Qatar International Court and of the Singapore International Court; Former Chief Judge of the Fourth Civil Division of the Supreme People's Court of China.

As we approach the conclusion of this esteemed forum, I would like to express my profound gratitude to the steering committee, with particular commendation extended to Lord Thomas, Bill, and Robin, for their gracious invitation.

My appreciation also goes to the Qatar International Court and Dispute Resolution Centre (QICDRC) for the honour of being selected as a member of the delegation to participate in the Fifth Full Meeting of the Standing International Forum of Commercial Courts (SIFoCC).

This has been a unique opportunity to convene with such an illustrious assembly of colleagues, and to benefit from the wealth of knowledge and experience present in this gathering.

For two decades, I have had the privilege of serving in the Supreme People's Court (SPC) of China. It is a pleasure to see Ms. Wang and Ms. Shen, who delivered exceptional speeches at this meeting, and who were once my office neighbours at the SPC. Together, we have shared the experience of hearing cases in a collegial panel.

Upon my retirement from the SPC, I was appointed to the bench of the Singapore International Commercial Court (SICC) with great support from Chief Justice Sundaresh Menon, and to the bench of the QICDRC at the recommendation by Lord Thomas and Sir William. These appointments have afforded me the invaluable opportunity to sit alongside esteemed colleagues from various jurisdictions, from which I have learned a great deal.

Robin kindly asked me to share my thoughts and feelings as a former judiciary member from mainland China, now serving as an international judge.

The significance of International Commercial Courts has been a recurring theme throughout our discussions, and I wish to contribute some personal reflections on this matter. The International Commercial Court is a beacon for in-depth communication and understanding among legal systems worldwide.

Throughout my career, I have witnessed the emphasis that courts from different jurisdictions place on exchanging ideas and interacting with their international counterparts.

Before my retirement, I had the privilege of participating in numerous exchanges and interactions with judicial authorities from various regions and countries. For example, I joined the Chief Justice of the SPC on several visits to Singapore, engaging in dialogue with Chief Justice Menon of the Singapore Supreme Court on cutting-edge judicial issues. I also had the opportunity to collaborate with my SPC colleagues and Sir William, who retired as the Chief Judge of the Commercial Court in London, on annual research into specific issues in commercial litigation and dispute resolution.

These experiences have been incredibly enriching, yet it is important to recognise that the discussions during these visits, while valuable, often lacked the depth that comes with prolonged engagement. The International Commercial Court provides a platform where judges from different countries and legal systems can engage in more profound exchanges.

In one particular case, my colleagues and I on the panel engaged in an extensive and deep exploration of the application of force majeure and the doctrine of frustration. We considered the facts, conditions, and consequences relevant to these legal concepts, taking into account the specific circumstances of the case. The depth of exploration achieved in this context far exceeds what is typically possible in visit-based discussions.

Furthermore, the International Commercial Courts inspire a greater sense of innovation and creativity. It is a remarkable experience to serve as an international judge and sit on the same bench with colleagues from different countries and jurisdictions. Despite our diverse cultures and experiences, we face the same cases and apply the same rules. The diversity of perspectives, however, leads to more robust debates and, consequently, more innovative and inspired outcomes.

Thirdly, the convergence of different legal systems is perfectly embodied within the International Commercial Courts.

Generally speaking, mainland China adheres to the civil law system, and as a judge of the SPC, my approach to cases was grounded in ascertaining the facts and applying the correct laws or regulations. It is noteworthy that, several years before my retirement, the SPC had already begun to implement a guiding case system. This system involves the selection of cases from various court levels, primarily the Supreme Court and provincial high courts, which, after deliberation by the SPC Judicial Committee, may

become guiding cases. While these guiding cases do not have binding authority, they are intended to be referenced and applied by judges in similar cases, with an obligation to explain any deviation from their guidance. This guiding case system, while distinct from case law, represents a constructive effort to blend the written law system with case law principles.

The SICC operates within the common law tradition, while the QICDRC represents a novel legal system. For the Qatar Financial Centre a comprehensive set of written laws and regulations was enacted that judges are expected to apply in resolving disputes. Simultaneously, the QICDRC has demonstrated a commendable respect for precedent, which is a hallmark of common law systems.

As we reflect on the rich discussions of this forum, I am reminded of the words of the esteemed Justice Oliver Wendell Holmes, Jr., who said, "The life of the law has not been logic; it has been experience." Our collective experiences as jurists, from different corners of the world, breathe life into the law we practice and interpret. It is through our shared experiences that we find common ground and forge new paths in the pursuit of justice.

In conclusion, the discussions and insights shared during this forum have been invaluable. The role of International Commercial Courts in facilitating the resolution of complex commercial disputes in our increasingly interconnected world cannot be overstated. As we part ways, let us carry forward the spirit of collaboration and mutual understanding that has been the hallmark of this gathering.

Once again, I extend my sincerest thanks to all participants for their contributions and look forward to the continued evolution and success of our collective judicial endeavors. May the bonds forged here continue to strengthen our shared commitment to justice and the rule of law.

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Our Guests

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Hon. James Allsop AC (former Chief Justice of the Federal Court of Australia)

Sir William Blair (Chair of the Qatar Financial Centre Regulatory Tribunal)

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