



# Standing International Forum of Commercial Courts

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## Report of the fourth full meeting

Hosted by the Federal Court of Australia and the  
Supreme Court of New South Wales

October 2022



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# Introduction

The fourth full meeting of the Standing International Forum of Commercial Courts (SIFoCC) was a welcome opportunity for the membership to meet in person for the first time since the second full meeting of SIFoCC in 2018 in New York.

Following the success of the third full meeting hosted online by Singapore in 2021, the hosts in Sydney delivered SIFoCC's first hybrid full meeting. Although there is no equivalent for meeting in person, the format of a hybrid meeting has proved its value and is likely to be a permanent feature of SIFoCC's full meetings going forward.

The fourth full meeting saw a record attendance in terms of overall numbers and range of jurisdictions, and breadth and depth of delegations. The content was focused on issues of great relevance, which engaged all. Important relationships were made or developed further, and ideas shared and explored.

SIFoCC's next full meeting will take place in the Middle East in early 2024.



# List of attendees

Attendees in bold font attended in person. Attendees in regular font attended online.

Name	Court	Jurisdiction
<b>Chief Justice Lord David Hope of Craighead KT</b>	<b>Chief Justice of the Abu Dhabi Global Market Courts</b>	<b>Abu Dhabi</b>
<b>Justice Kenneth Hayne</b>	<b>Justice of the Abu Dhabi Global Market Courts</b>	<b>Abu Dhabi</b>
<b>Mrs Linda Fitz-Alan</b>	<b>Registrar and Chief Executive, Abu Dhabi Global Market Courts</b>	<b>Abu Dhabi</b>
<b>Chief Justice James Allsop AO</b>	<b>Federal Court</b>	<b>Australia (Fed)</b>
<b>Justice Michael Lee</b>	<b>Federal Court</b>	<b>Australia (Fed)</b>
<b>Justice Katrina Banks-Smith</b>	<b>Federal Court</b>	<b>Australia (Fed)</b>
<b>Justice Craig Colvin</b>	<b>Federal Court</b>	<b>Australia (Fed)</b>
<b>Chief Justice Andrew Bell</b>	<b>Chief Justice of New South Wales</b>	<b>Australia (NSW)</b>
<b>Justice Julie Ward</b>	<b>President of the Court of Appeal, New South Wales</b>	<b>Australia (NSW)</b>
<b>Justice David Hammerschlag</b>	<b>Chief Judge in Equity, New South Wales</b>	<b>Australia (NSW)</b>
<b>Justice James Stevenson</b>	<b>Supreme Court, New South Wales</b>	<b>Australia (NSW)</b>
<b>Justice Lisa Nichols</b>	<b>Supreme Court, Victoria</b>	<b>Australia (Vic)</b>
<b>Justice Jim Delany</b>	<b>Supreme Court, Commercial Court, Victoria</b>	<b>Australia (Vic)</b>
<b>Judicial Registrar Claire Gitsham</b>	<b>Commercial Court, Victoria</b>	<b>Australia (Vic)</b>
<b>Chief Justice Ian Winder</b>	<b>Chief Justice of the Bahamas</b>	<b>The Bahamas</b>
<b>Senior Justice Indra Charles</b>	<b>Supreme Court</b>	<b>The Bahamas</b>
<b>Justice Simone Fitzcharles</b>	<b>Supreme Court</b>	<b>The Bahamas</b>

Name	Court	Jurisdiction
Shaikh Khaled Alkhalifa	Vice President of the Supreme Judicial Council, Head of the Cassation Court	Bahrain
Judge Alsowaidi	President of the Commercial High Court	Bahrain
Dr Reyadh Seyadi	Judge of the Commercial Court	Bahrain
Dr Aseel Zimmo	Adviser to the Chief Justice of Bahrain, Supreme Judicial Council	Bahrain
Judge Marcus Livio	Federal Judge	Brazil
Justice Theophilus	Court of Appeal (Observer)	Cameroon
Chief Justice Geoffrey Morawetz	Ontario Superior Court of Justice, Chief Justice of Ontario	Canada
<b>Justice Nick Segal</b>	<b>Permanent Judge, Grand Court of the Cayman Islands (Financial Services Division)</b>	<b>Cayman Islands</b>
Ms Shen Hongyu	Deputy Chief Judge of the Fourth Civil Division of the Supreme People's Court	People's Republic of China
Ms Sun Xianghuang	Judge of the International Commercial Court, Supreme People's Court	People's Republic of China
Mr Xi Xiangyang	Judge of the International Commercial Court, Supreme People's Court	People's Republic of China
Mr Zhang Xuemei	Judge of the International Commercial Court, Supreme People's Court	People's Republic of China
Mr Yang Enqian	Judge of the Suzhou International Commercial Court	People's Republic of China
Ms Mei Yu	Judge of the Beijing International Commercial Court	People's Republic of China

<b>Name</b>	<b>Court</b>	<b>Jurisdiction</b>
Ms Long Fei	Deputy Director of the Co-ordination and Guidance Office of the International Commercial Court	People's Republic of China
<b>Hon Wayne Martin AC QC</b>	<b>Judge of the Dubai International Financial Centre Courts</b>	<b>Dubai</b>
Mrs Amna Owais	Chief Registrar, Dubai International Financial Centre Courts	Dubai
Ms Delvin Sumo	Assistant Registrar, Dubai International Financial Centre Courts	Dubai
<b>Chief Justice Lord Ian Burnett of Maldon</b>	<b>Lord Chief Justice of England and Wales</b>	<b>England and Wales</b>
<b>Sir Geoffrey Vos</b>	<b>Master of the Rolls and Head of Civil Justice</b>	<b>England and Wales</b>
<b>Sir Keith Lindblom</b>	<b>Senior President of Tribunals</b>	<b>England and Wales</b>
Justice Gerhard Wallbank	Commercial Court	Eastern Caribbean
<b>Judge Fabienne Schaller</b>	<b>International Commercial Chamber, Paris Court of Appeal</b>	<b>France</b>
<b>Judge Paul Louis Netter</b>	<b>President, Tribunal de Commerce de Paris</b>	<b>France</b>
<b>Dr Jan Tolkmitt</b>	<b>Judge of the Federal Court of Germany</b>	<b>Germany</b>
Ms Ulrike Willoughby	Judge of the Court of Appeal of Frankfurt	Germany
Lady Justice Gertrude Tokornoo	Supreme Court	Ghana
<b>Hon Mr Justice Joseph Fok</b>	<b>Permanent Judge of the Court of Final Appeal of Hong Kong</b>	<b>Hong Kong SAR</b>
<b>Justice Jonathan Harris</b>	<b>President, Competition Tribunal</b>	<b>Hong Kong SAR</b>

<b>Name</b>	<b>Court</b>	<b>Jurisdiction</b>
<b>Hon Geoffrey Ma</b>	<b>Former Chief Justice of Hong Kong</b>	<b>Hong Kong SAR</b>
Justice Anthony Chan	High Court	Hong Kong SAR
Justice Russell Coleman	High Court	Hong Kong SAR
<b>Hon Mr Justice Sanjay Kishan Kaul</b>	<b>Supreme Court</b>	<b>India</b>
<b>Hon Mr Justice Sanjiv Khanna</b>	<b>Supreme Court</b>	<b>India</b>
<b>Hon Mr Justice V. Ramasubramanian</b>	<b>Supreme Court</b>	<b>India</b>
<b>Hon Mr Justice Sudhanshu Dhulia</b>	<b>Supreme Court</b>	<b>India</b>
<b>Mr Chirag Bhanu Singh</b>	<b>Registrar, Supreme Court of India</b>	<b>India</b>
Hon Dr Justice D. Y. Chandrachud	Supreme Court	India
<b>Justice Prateek Jalan</b>	<b>Justice of the High Court of Delhi (and SIFoCC Judicial Observation Programme alumnus)</b>	<b>India</b>
Chief Justice Syarifuddin	Chief Justice of Indonesia	Indonesia
<b>Justice Syamsul Maarif</b>	<b>Supreme Court</b>	<b>Indonesia</b>
<b>Dr Aria Suyudi, SH, LLM</b>	<b>Special Staff to Chief Justice of the Supreme Court of Indonesia</b>	<b>Indonesia</b>
<b>Chief Justice Dr Faiq Zadan</b>	<b>President of the Supreme Judicial Council of Iraq</b>	<b>Republic of Iraq</b>
<b>Judge Taghreed Al-Ibadi</b>	<b>Rusafa Court</b>	<b>Republic of Iraq</b>
<b>Judge Ibraheem Kamil</b>	<b>Rusafa Court</b>	<b>Republic of Iraq</b>
<b>Justice David Barnville</b>	<b>President of the High Court</b>	<b>Republic of Ireland</b>
<b>Justice Denis McDonald</b>	<b>Head of the Commercial Court, High Court</b>	<b>Republic of Ireland</b>

<b>Name</b>	<b>Court</b>	<b>Jurisdiction</b>
<b>Mrs Justice Carole Barnaby</b>	<b>Supreme Court (and SIFoCC Judicial Observation Programme alumnus)</b>	<b>Jamaica</b>
<b>Judge Nishizawa Kentaro</b>	<b>Tokyo District Court</b>	<b>Japan</b>
Judge Doaa Al Omari	Amman First Instance Court	Jordan
Judge Sanabel Al-Smadi	Amman First Instance Court	Jordan
Judge Ashraf Shammout	Economic Court	Jordan
Judge Madiyar Balkan	Supreme Court	Kazakhstan
Chief Justice Lord Jonathan Mance	Chief Justice of the Astana International Financial Centre Court	Kazakhstan
Mr Christopher Campbell-Holt	Registrar and Chief Executive, Astana International Financial Centre Court	Kazakhstan
Hon Elizabeth Tanui	Deputy Registrar (and SIFoCC Judicial Observation Programme alumnus)	Kenya
Hon Heston Nyaga	Chief Magistrate, Milimani Commercial Court	Kenya
<b>Judge Junheyon Yi</b>	<b>Seoul High Court</b>	<b>Republic of Korea</b>
<b>Judge Yoon Jong Kim</b>	<b>Presiding Judge, Daejeon District Court</b>	<b>Republic of Korea</b>
<b>Judge Min Kyung Kim</b>	<b>Daejeon District Court</b>	<b>Republic of Korea</b>
Judge Jung-Ah Lee	Anyang Branch of Suwon District Court	Republic of Korea
<b>Justice Nallini Pathmanathan</b>	<b>Federal Court of Malaysia</b>	<b>Malaysia</b>
<b>Justice Zainol Abidin Ahmad Fairuz</b>	<b>Federal Court of Malaysia, High Court of Kuala Lumpur</b>	<b>Malaysia</b>
Registrar Willem A. Visser	Netherlands Commercial Court	Netherlands



<b>Name</b>	<b>Court</b>	<b>Jurisdiction</b>
Justice Susan Thomas	Chief Judge of the High Court of New Zealand	New Zealand
Justice Ian Gault	Auckland High Court	New Zealand
Justice Jill Mallon	Wellington High Court	New Zealand
Justice Francis Cook	Wellington High Court	New Zealand
Justice Nnamdi O. Dimgba	High Court	Nigeria
Justice Ibrahim Buba	High Court	Nigeria
Lord Justice Mark Horner	Court of Appeal	Northern Ireland
Lady Chief Justice Siobhan Keegan	Chief Justice of Northern Ireland	Northern Ireland
Justice Said Mansoor Ali Shah	Supreme Court	Pakistan
Associate Justice Samuel Gaerlan	Supreme Court	Philippines
Associate Justice Rodil Zalameda	Supreme Court	Philippines
Judge Wilhelmina J. Wagan	Regional Trial Court	Philippines
Lord John Thomas of Cwmgiedd	President of the Qatar International Court	Qatar
Sir William Blair	Chairman of the Qatar Financial Centre Regulatory Tribunal, Judge of the Qatar International Court	Qatar
Mr Faisal Rashid Al-Sahouti Al-Mansoori	Chief Executive of the Qatar International Court and Dispute Resolution Centre	Qatar
Chief Justice Faustin Ntezilyayo	Chief Justice of Rwanda	Rwanda
Lord Alistair Clark	Court of Session	Scotland

Name	Court	Jurisdiction
Dr Ahmed Al Abudi	Head of Commercial Disputes at the Supreme Court	Saudi Arabia
Judge Ebraheem Al Atram	Head of Riyadh Commercial Court	Saudi Arabia
Judge Abdulaziz Al Zamel	Judge at the Supreme Judicial Council	Saudi Arabia
Chief Justice Desmond Babatunde Edwards	Chief Justice of Sierra Leone	Sierra Leone
Justice Emanuel Roberts	Supreme Court	Sierra Leone
Justice Lornard Taylor	Resident Judge, Fast Track Commercial Court	Sierra Leone
<b>Chief Justice Sundaresh Menon</b>	<b>Chief Justice of Singapore</b>	<b>Singapore</b>
<b>Justice Philip Jeyaretnam</b>	<b>Supreme Court</b>	<b>Singapore</b>
<b>Justice Kannan Ramesh</b>	<b>Justice of the High Court</b>	<b>Singapore</b>
<b>Mr Phang Hsiao Chung</b>	<b>Deputy Registrar, Supreme Court</b>	<b>Singapore</b>
Khurshed Haron	Assistant Director, Office of Public Affairs	Singapore
Jovine Costantine	Senior Resident Magistrate (Observer)	Tanzania
Chief Justice Mabel Agyemang	Chief Justice of the Turks and Caicos Islands	Turks and Caicos Islands
Mr Justice Anthony Gruchot	Supreme Court	Turks and Caicos Islands
Ms Aisha de Four	Executive Director, Office of the Chief Justice	Turks and Caicos Islands
Antonio Emanuel	Judicial Research Assistant	Turks and Caicos Islands
Chief Justice Alfonse Owiny-Dollo	Chief Justice of Uganda	Uganda
Justice Stephen Mubiru	Head Judge, Commercial Court	Uganda

<b>Name</b>	<b>Court</b>	<b>Jurisdiction</b>
Justice Anna Bitature	Deputy Head Judge, Commercial Court (and SIFoCC Judicial Observation Programme alumnus)	Uganda
Justice Susan Abinyo	Commercial Division	Uganda
Justice Cornelia Sabiiti	Commercial Court	Uganda
Hon Bart Katureebe	Chief Justice (Emeritus) of Uganda	Uganda
<b>Hon Loretta A. Preska</b>	<b>Senior District Judge, US District Courts - Southern District of New York</b>	<b>United States of America</b>
<b>Judge Jennifer Schecter</b>	<b>State Courts, Commercial Division, New York</b>	<b>United States of America</b>
<b>Justice Nigel Kalonde Mutuna</b>	<b>Supreme Court</b>	<b>Zambia</b>
<b>Mr Justice Lameck Mwale</b>	<b>High Court Commercial Division</b>	<b>Zambia</b>

## GUESTS

### In person:

H.E. Margaret Beazley AC KC, Governor of New South Wales

Hon Tom Bathurst AC KC

Uncle Allan Murray of the Gadigal people

Hon Mark Speakman SC MP, Attorney General of New South Wales

Hon Mark Dreyfus KC, Attorney General of the Commonwealth of Australia

Ms Sandie Okoro, former General Counsel of the World Bank and General Counsel of Standard Chartered Bank

Mr David Gonski AC, former Chair of ANZ, of the Board of Guardians of Australia's Future Fund, and of Herbert Smith Freehills



## **Online:**

Ms Susan Dunn, Chair of the Association of Litigation Funders and Board Member, International Legal Finance Association

Judge Dominique Hascher, Co-Chair of the Judiciary Committee, International Council for Commercial Arbitration

George Lim, SC, Chairman, Singapore International Mediation Centre

Professor Colin Mayer CBE, FBA, Lead of the British Academy's Future of the Corporation Programme

Gerald Rosen, former Federal Judge and mediator in the Detroit bankruptcy proceedings, USA

## **AUSTRALIA LEADS**

**Ms Carmel Dollisson, Programme Co-ordinator, Federal Court of Australia**

**Mr Chris D'Aeth, Executive Director and Principal Registrar, Supreme Court of New South Wales**

## **SIFoCC SECRETARIAT**

### **In person:**

**Ms Grace Karrass, Head of SIFoCC Secretariat**

**Ms Adenike Adewale, SIFoCC Secretariat**

**Mr Ben Yallop, Private Secretary to the Lord Chief Justice of England and Wales**

**Mr Matthew Gaunt, Head of International, Judicial Office of England and Wales**

Technology: Mr Matthew Corcoran

### **Judge with day-to-day responsibility for SIFoCC:**

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

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# Themes

## **Theme 1: Towards an integrated system of dispute resolution – commercial courts, arbitration and mediation**

### **Context**

The notion of enforcement is becoming more normal, with the New York Convention, Singapore Mediation Convention, Hague and the SIFoCC Multilateral Memorandum on Enforcement.

It is time to focus beyond enforcement to how the different arms of the system – commercial courts, arbitration and mediation – should be looking at each other more generally.

It is important to recognise that there are a range of jurisdictions at different stages in the journey, with different balances between commercial courts, arbitration and mediation.

### **Objectives**

Our objectives are to:

- pool ideas and experience of how commercial courts can best work together with arbitration and mediation organisations to raise standards across the board
- consider together the expectations of commercial courts of arbitration, and arbitration's expectations of commercial courts
- explore the thematic and strategic linkages between litigation, arbitration

and mediation – the opportunities to break up the processes or handle cases in a progression, with mediation taking its place in a sequence or infused into a process for dealing with a case, and with lessons from the civil law tradition

- examine the best use of commercial courts, arbitration and mediation to achieve solutions – test cases, international cases, achieving business outcomes, finality, avoiding delay, tackling backlog, and further progress on enforcement

## **Theme 2: Managing complexity and the 'complexification' of disputes**

### **Context**

Individual cases can make huge demands on available resources. The expectations of the parties and their legal teams are growing, and there are consequences for other litigants.

Quite apart from technology in court, commercial courts face a shared challenge of keeping up-to-date with technology in commerce to understand the cases to be heard.

Some cases are almost unmanageable, and a trend of 'complexification' has been identified.

In common law systems, the shared challenge of making disclosure and discovery work well remains.

## Objectives

Our objectives are to:

- reimagine the way we manage and address complexity, including the almost unmanageable
- discuss the appropriate use of commercial court resources, while being ready to deal with all disputes that need to be handled
- share experience of appropriate and successful ways for judges to keep up-to-date with technology in commerce
- share experience of enhanced case management techniques (and use of technology) for cases of the highest complexity
- understand ‘complexification’ – what it is, what causes it and how to address it

## Theme 3: The future for corporate legal responsibility, purpose and governance

### Context

Global issues are now central issues for business and investment, from modern slavery to the environment to climate change.

They will increasingly be at the centre of commercial disputes, and the resolution of commercial disputes will affect the development of these global issues.

There are huge implications for corporate governance and responsibilities and the future of corporate structures, including offshore companies and remote directorships.

## Objectives

Taking climate change and the environment as a focused lens, our objectives are to:

- look at the implications for corporate legal responsibility beyond shareholder value and immediate regulation
- consider how commercial courts can be informed, prepared and equipped to play their part
- recognise the areas where commercial courts may need to anticipate and lead, including the development of the concept of corporate purpose, the future of corporate standards, responsibilities and structures, and the compass of directors’ duties
- reflect on the importance of compliance and reporting, enforcement and judicial co-operation (internationally and cross-border)
- reflect on the relationship of the rule of law to climate change



## **Theme 4: Jurisdictional conflicts internationally**

### **Context**

Jurisdictional conflicts will spread across various industries in the future, including patent, antitrust, competition and insolvency, and more generally as business operates across global platforms (with large technology companies as an increasingly important example).

In some areas there are no fully developed internationally accepted rules for solving jurisdictional conflicts. Given this, there is an increased need for co-operation and discussion between national courts.

This theme includes the question of international issue estoppel across a range of civil and common law courts and in a variety of settings, as well as estoppel in international arbitration.

### **Objectives**

Taking cross border insolvency (and perhaps patents) as a focused lens, our objectives are to:

- examine how commercial courts can resolve international or cross-border jurisdictional conflicts generally
- reflect on SIFoCC's role as a forum for exchange between commercial courts

## **Other work**

### **Litigation funding**

#### **Context**

It is clear from SIFoCC's meetings in New York in 2018 and Singapore in 2021 that litigation funding is a growing subject.

Monitoring and sharing experience will be important, including in the context of access to justice (including class actions), standards and avoiding arbitration.

#### **Objectives**

Our objectives are to:

- continue the engagement on litigation funding, ensuring awareness and promoting standards
- enable SIFoCC's membership to consider a statement of international best practice principles
- reflect on whether litigation funders are part of the justice system, part of the finance system or both, and the consequences

### **Judicial Observation Programme**

#### **Context**

In accordance with SIFoCC's objective to support the rule of law and help developing jurisdictions build capacity in commercial dispute resolution, the SIFoCC Judicial Observation Programme has taken place twice so far with great success. Growing alumni remain active members of the SIFoCC community and often contribute and engage across a range of subjects.

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# Extracts from the opening address by Hon Mark Dreyfus KC, Attorney General of the Commonwealth of Australia

On behalf of the Australian government, I am delighted to welcome you to the fourth meeting of the Standing International Forum of Commercial Courts.

I would like to sincerely thank the Federal Court of Australia and the Supreme Court of New South Wales for jointly hosting this event, and the steering group for the invitation. It is a pleasure to be here and to join my fellow speakers – including senior judicial officers, judges and eminent chief justices from around the world – as well as so many esteemed members of the Australian judiciary.

...

The Standing International Forum of Commercial Courts brings together members of the judiciary from more than 40 nations from various legal traditions – an event that recognises the importance of international judicial co-operation to global stability and prosperity.

It has now been five years since the forum's inaugural meeting at London in 2017. I would like to congratulate you all on the work that has been conducted to date – including guiding a new organisation through the challenges of the COVID-19 pandemic. That the forum has pressed through those challenges is a testament

to the importance of the contributions of so many in attendance today. From its inception, the forum was 'a unique gathering of commercial courts' – bringing together those with a shared interest in strengthening the work of commercial courts – including judicial representatives from all corners of the world.

...

The rule of law is a vital component of good government.

But the rule of law is also vital to commercial activity. Clear and enforceable rules allow us to do business with one another with confidence. Access to transparent and predictable means of dispute resolution allow us to resolve disagreements efficiently and fairly. Perhaps most importantly, properly functioning laws and legal systems ensure that economic opportunity and the benefits of economic growth are shared by all.

The members of this forum clearly understand the value of commercial courts in promoting the rule of law in trade, investment and consumer confidence.

This is a point that has been emphasised in previous meetings, including by Chief Judge Janet DiFiore at the forum's second meeting in New York:

“When businesses feel confident about litigating in our commercial courts and perceive that the rule of law is working as intended, they not only are more comfortable investing in our economies – but also come to understand the urgency in maintaining strong and independent courts of their own.”

As Attorney General of Australia, I am proud of this country's tradition of strong and independent courts. I welcome the participation of the Australian judiciary in co-operative efforts to promote the rule of law internationally.





## Seating plan

	<b>Zalameda</b> – Philippines	SIFoCC	<b>Wagan</b> – Philippines
	<b>Gaerlan</b> – Philippines		<b>Colvin</b> – Australia (Fed)
<b>Fitz-Alan</b> – Abu Dhabi	<b>Hayne</b> – Abu Dhabi		<b>Banks-Smith</b> – Australia (Fed)
<b>Dr Suyudi</b> – Indonesia	<b>Maarif</b> – Indonesia		<b>Lee</b> – Australia (Fed)
	<b>Stevenson</b> – Australia (NSW)		<b>Horner</b> – Northern Ireland
	<b>Hammerschlag</b> – Australia (NSW)		<b>Fok</b> – Hong Kong
	<b>Ward</b> – Australia (NSW)		<b>Harris</b> – Hong Kong
	<b>Mwale</b> – Zambia		<b>Schecter</b> – United States of America
<b>Al-Mansoori</b> – Qatar	<b>Mutuna</b> – Zambia		<b>Preska</b> – United States of America
<b>Yallop</b> – England and Wales	<b>Burnett</b> – England and Wales		<b>Ma</b> – Hong Kong
<b>Gaunt</b> – England and Wales	<b>Vos</b> – England and Wales		<b>Tolkmitt</b> – Germany
	<b>Kaul</b> – India		<b>Blair</b> – Qatar
<b>Singh</b> – India	<b>Ramasubramanian</b> – India		<b>Menon</b> – Singapore
	<b>Ramesh</b> – Singapore		<b>Bell</b> – Australia (NSW)
<b>Chung</b> – Singapore	<b>Jeyaretnam</b> – Singapore		<b>Lindblom</b> – England and Wales
	<b>Yi</b> – Korea		<b>Allsop</b> – Australia (Fed)
	<b>Jon Kim</b> – Korea		<b>Thomas</b> – SIFoCC
	<b>Kyung Kim</b> – Korea		<b>Knowles</b> – SIFoCC
<b>Adenike Adewale</b> – SIFoCC	<b>Buba</b> – Nigeria		<b>Guest / Karrass</b> – SIFoCC
	<b>Dimgba</b> – Nigeria		<b>Guest</b>
	<b>S Thomas</b> – New Zealand		<b>Schaller</b> – France
	<b>Mallon</b> – New Zealand		<b>Pathmanathan</b> – Malaysia
	<b>Gault</b> – New Zealand		<b>Hope</b> – Abu Dhabi
	<b>Cooke</b> – New Zealand		<b>Kentaro</b> – Japan
	<b>Dr Zidan</b> – Iraq		<b>Fairuz</b> – Malaysia
	<b>Al-Ibadi</b> – Iraq		<b>Khanna</b> – India
	<b>Kamil</b> – Iraq		<b>Dhulia</b> – India
	<b>Barniville</b> – Republic of Ireland		<b>Netter</b> – France
	<b>McDonald</b> – Republic of Ireland		<b>Segal</b> – Cayman Islands
	<b>Martin</b> – Dubai		<b>Nichols</b> – Australia (VIC)
	<b>Barnaby</b> – Jamaica		<b>Delaney</b> – Australia (VIC)
	<b>Jalan</b> – India		<b>Gitsham</b> – Australia (VIC)

# Programme

## Day 1: Thursday 20 October

### Welcome to country:

**Uncle Allan Murray** of the Gadigal people (with appreciation to the Metropolitan Local Aboriginal Land Council) introduced by **Chief Justice Andrew Bell**

### Welcome remarks:

**Hon Mark Dreyfus** KC, Attorney General of the Commonwealth of Australia introduced by **Chief Justice James Allsop**

### Opening remarks:

**Lord John Thomas**,  
Chair, SIFoCC steering group

**Chief Justice James Allsop**,  
Federal Court of Australia

### SIFoCC progress report

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

**Grace Karrass**, Head of Secretariat, SIFoCC



## **Theme 1: Towards an integrated system of dispute resolution - commercial courts, arbitration and mediation (part 1)**

### **Introduction by the Co-Chairs:**

**Chief Justice Sundaresh Menon**, Singapore

**Sir William Blair**, Chair of the Qatar Financial Centre Regulatory Tribunal, Qatar International Court

### **Short opening address:**

**Sir Geoffrey Vos**, Master of the Rolls and Head of Civil Justice, England and Wales

### **Short opening guest addresses:**

**Judge Dominique Hascher**, Co-Chair of the Judiciary Committee, International Council for Commercial Arbitration

**George Lim SC**, Singapore Mediation Convention [5 mins]\*

### **Roundtable discussion**

### **Further short addresses:**

**Justice S.K. Kaul**, Supreme Court of India

**Judge Shen Hongyu**, Deputy Chief Judge of the Fourth Civil Division of the Supreme People's Court, People's Republic of China

**Justice Jim Delany**, Supreme Court of Victoria, Australia

**Justice Nnamdi O. Dimgba**, High Court of Nigeria



## **Theme 1: Towards an integrated system of dispute resolution - commercial courts, arbitration and mediation (part 2)**

### **Address:**

**Chief Justice (Emeritus) Bart Katureebe**, Uganda

### **Further short addresses:**

**Chief Justice Lord Jonathan Mance**, Astana International Financial Centre Court and International Arbitration Centre, Kazakhstan

**Associate Justice Samuel Guerlan**, Supreme Court of the Philippines

**Hon Wayne Martin AC KC**, Judge of the Dubai International Financial Centre Courts, Dubai, United Arab Emirates

### **Continued roundtable discussion**

### **Short closing observations:**

**Justice David Barniville**, President of the High Court, Republic of Ireland

### **Lunch**

### **Address:**

**Chief Justice Dr Faiq Zidan**, President of the Supreme Judicial Council, Republic of Iraq





## Theme 2: Managing complexity and the 'complexification' of disputes (part 1)

### Introduction by the Co-Chairs:

**Justice Nallini Pathmanathan**, Federal Court, Malaysia

**Judge Fabienne Schaller**, International Commercial Chamber, Paris Court of Appeal, France

### Short opening address:

**Justice D.Y. Chandrachud**, Supreme Court, India ('Leveraging technology towards dispute resolution in commercial courts')

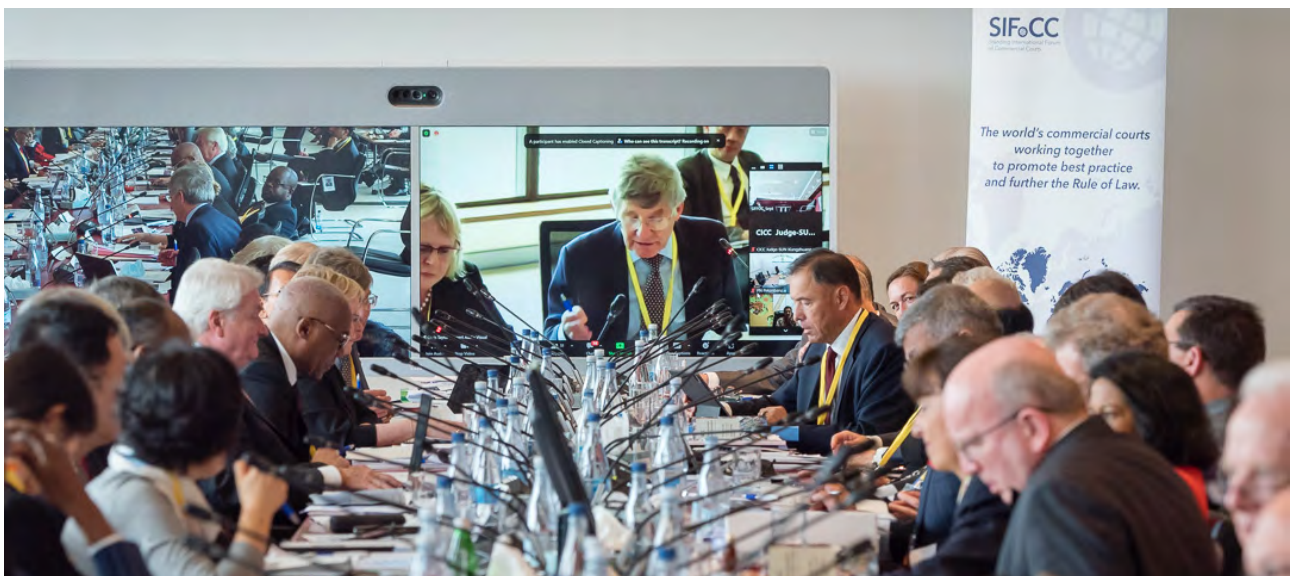
### Further short opening address:

**Justice David Hammerschlag**, Chief Judge in Equity, New South Wales

### Roundtable discussion

### Further short address:

**Judge Sun Xiangzhuang**, International Commercial Court of the Supreme People's Court, People's Republic of China





## **Theme 2: Managing complexity and the 'complexification' of disputes (part 2)**

### **Short addresses:**

**Justice Lisa Nichols**, Supreme Court of Victoria

**Judge Jennifer Schecter**, State Courts, Commercial Division, New York

**Lord Justice Mark Horner**, Court of Appeal, Northern Ireland

### **Continued roundtable discussion**

### **Short closing observations:**

**The Hon Mr Justice Joseph Fok**, Permanent Judge of the Court of Final Appeal of Hong Kong

### **Feedback from SIFoCC Judicial Observation Programme participants**

Current alumni: India, Jamaica, Kenya, Philippines, Sri Lanka, The Gambia, Uganda

### **Opening remarks:**

**Lord Chief Justice Ian Burnett**, England and Wales

### **Short film with alumni interviews**

### **Live alumni interviews and Q&A:**

Chaired by **Justice Julie Ward**, President of Court of Appeal, New South Wales, with:

**Ms Justice Carole Barnaby**, Supreme Court, Jamaica

**Justice Prateek Jalan**, Justice of the High Court of Delhi, India

### **Closing remarks:**

**Lord Chief Justice Ian Burnett**, England and Wales

## Keynote address (in the Banco Court)

Chief Justice Sundaresh Menon, Singapore:

SIFoCC playing its part as a cornerstone of a transnational system of justice

Introduced by **Chief Justice Andrew Bell**, New South Wales

Vote of thanks by **Justice Julie Ward**, President of Court of Appeal, New South Wales

## Photographs, reception and dinner at Government House, at the kind invitation of the Governor of New South Wales

### Welcome and remarks:

Her Excellency Margaret Beazley AC KC, Governor of New South Wales



## Day 2: Friday 21 October 2022

### Inside the Sydney courts

Divide into groups for discussion sessions led by federal and state commercial judges on the history, jurisdiction and management of commercial cases

### Theme 3: The future for corporate legal responsibility, purpose and governance with a focused lens on climate change (part 1)

#### Introduction by the Co-Chairs:

**Chief Justice James Allsop**, Federal Court of Australia

**Sir Keith Lindblom**, Senior President of Tribunals, England and Wales

#### Short opening guest addresses:

**David Gonski** AO, former Chair of ANZ, of the Board of Guardians of Australia's Future Fund, and of Herbert Smith Freehills

**Professor Colin Mayer** CBE, FBA, Lead of the British Academy's Future of the Corporation Programme

**Sandie Okoro**, former General Counsel of the World Bank and General Counsel of Standard Chartered

#### Roundtable discussion

#### Further short addresses:

**Mr Justice Nick Segal**, Grand Court of the Cayman Islands

### **Theme 3: The future for corporate legal responsibility, purpose and governance with a focused lens on climate change (part 2)**

#### **Short addresses:**

**Chief Judge Susan Thomas**, High Court, New Zealand

**Justice Said Mansoor Ali Shah**, Supreme Court, Pakistan

#### **Continued roundtable discussion**

#### **Short closing observations:**

**Justice Philip Jeyaretnam**, Supreme Court, Singapore

#### **Lunch**

#### **Address:**

**Chief Justice Andrew Bell**, Supreme Court of New South Wales

### **Theme 4: Jurisdictional conflicts internationally**

#### **Introduction by the Co-Chairs:**

**Hon Geoffrey Ma**, former Chief Justice, Hong Kong SAR

**Judge Jan Tolkmit**, Federal Court of Germany

#### **Short opening addresses:**

**Justice Syamsul Maarif**, Supreme Court, Indonesia

**Presiding Judge Yoon Jong Kim**, and **Junhyen Yi**, High Court Judge, Republic of Korea

**Sandie Okoro**, General Counsel of Standard Chartered

#### **Roundtable discussion**

#### **Short closing observations:**

**Justice Sanjiv Khanna**, Supreme Court of India

**Justice Jonathan Harris**, President, Competition Tribunal, Hong Kong SAR

**Justice Kannan Ramesh**, High Court, Singapore

**Chief Justice Geoffrey Morawetz**, Ontario, Canada

## **Radar topic: Commercial (third-party) litigation funding**

### **Introduction and short update by the Chair:**

**Hon Loretta Preska**, former Chief Judge of the US District Court, New York

### **Short update:**

**Justice Michael Lee**, National Co-ordinating Judge in the Commercial and Corporations National Practice Area, Federal Court, Australia

### **Short guest update:**

**Susan Dunn**, Chair, Association of Litigation Funders and Board Member, International Legal Finance Association

## **Roundtable updates, comments, questions and answers**

### **Closing addresses:**

**Chief Justice Lord David Hope**, Abu Dhabi Global Market Courts, Abu Dhabi

**Chief Justice Faustin Ntezilyayo**, Rwanda

### **Agreed actions, forward look and details of next full meeting:**

**Lord John Thomas**, Chair, SIFoCC steering group

### **Final remarks:**

**Chief Justice James Allsop**, Federal Court of Australia

**Chief Justice Andrew Bell**, Supreme Court of New South Wales





## Progress report (as of October 2022)

SIFoCC is five years old. Its membership is now at 45 jurisdictions from six continents and from common law and civil law traditions. This includes 70% of the jurisdictions that make up the G20.

We welcome Pakistan, Indonesia and Zambia as the latest members. We are delighted that the Republic of Korea and Japan have decided to become members after a period as observers.

As we mention the Republic of Korea, we honour the memory of Presiding Justice SK Yoon who died this year. He was wholly committed to the work of SIFoCC and its objectives. SIFoCC's three objectives remain to:

- share best practice
- help courts to work together to make a stronger contribution to the rule of law
- support countries looking to develop their commercial dispute resolution arrangements

SIFoCC's publications attract increasing interest. The international case management principles have helped jurisdictions reviewing or revising their procedures. The Multilateral Memorandum on Enforcement of Commercial Judgments for Money, in its second edition with supporting commentary, is increasingly noted by practitioners. Like the two COVID-19 memoranda addressing the use of technology experienced during the pandemic, the Multilateral Memorandum on Enforcement was built from contributions across the global membership.

Events have been put around these publications. In the last 18 months, SIFoCC has held online roundtables on case management, both international and focused on Africa as a region. With the notable assistance of the National Judicial Academy of India, there have been roundtables on technology and case management. SIFoCC's work has supported a multi-year programme of judicial training in The Gambia. We were excited to learn that the Republic of Korea set up a group of judges within the country to study issues discussed by SIFoCC and prepare for this full meeting.

SIFoCC has continued to work in partnership. This has included with the Commonwealth Magistrates and Judges Association, the Commonwealth Lawyers Association, and the International Council for Commercial Arbitration. A partnership with the British Academy has brought important contributions to theme 3 at this full meeting, on corporate legal responsibility and climate change.

Since the Singapore full meeting, there have been SIFoCC panel discussions at the Commonwealth Lawyers Association meeting in the Bahamas on case management best practice (the panel included the now Chief Justice of the Bahamas), and the Commonwealth Magistrates and Judges Association meeting in Ghana on corporate legal responsibility (the panel included the Chief Justice of Rwanda). I was invited to speak at the Commonwealth Lawyers Association's conference on mediation in Belfast. Hon Loretta Preska of New York

gave the international keynote address for SIFoCC at this year's London International Disputes Week.

The third iteration of the SIFoCC Judicial Observation Programme was held this year, this time with participation from judges nominated by Jamaica, India, the Philippines and Kenya. There will be feedback on the programme later today. With every iteration, alumni of the programme grow.

At all times, the steering group warmly encourages member jurisdictions to raise ideas. The Secretariat is here to help. It is here for the membership. We make a particular call for ideas where regional events, including online, might be valuable to the membership.

As judge with day-to-day responsibility for SIFoCC I would like to pay grateful tribute to the Secretariat, led by Grace Karrass, who is assisted by Nike Adewale, for all their work on SIFoCC. Supported by the Secretariat, SIFoCC's steering group has met five times since the Singapore full meeting. Its discussion is increasingly substantive rather than simply organisational. The world needs SIFoCC's work, including at this meeting, more than ever.

Warm and deep thanks to Australia's Federal Court and New South Wales Court host team in realising this fourth full meeting. There has been an outstanding working relationship.

**Mr Justice Robin Knowles CBE (Judge of the Commercial Court of England and Wales).** Judge with day-to-day responsibility for SIFoCC.



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# Key points discussed

## Theme 1: Towards an integrated system of dispute resolution – commercial courts, arbitration and mediation

Some of the points made are listed here.

- Dispute resolution needs to be geared towards transnational commerce.
- Increasingly multi-tier dispute resolution clauses are used. These linkages make it particularly important for everyone to understand each other's perspectives and practices.
- The focus will be on what we will share with counterparts and what we will learn from them, advancing the idea of a system. This subject needs to be addressed in a formal and co-ordinated way. Since dispute resolution enables commerce to run smoothly, a lack of co-ordination is not satisfactory.
- Integration is a challenge, but a necessary one if we are to draw together the disparate strands which exist. Only courts could do this authoritatively.
- Enforced mediation has been mentioned, but that is only one strand. There is an opportunity to venture beyond that and think about how procedures could be developed to work better. SIFoCC is the ideal place to take forward that task.
- Effective mediation depends on an effective culture.
- We envisage single transferable data sets for each court and asynchronous interactions between witnesses, experts and lawyers. We should consider the use of artificial intelligence and algorithmic technologies to distil precedents and make sense of large bodies of data.
- The type of dispute being resolved would be about to change too, increasingly on block-chain and with electronically transferable documents. Lawyers, judges and arbitrators would need to understand how these technologies work.
- For small civil cases in England and Wales, cases come into a portal and flow into a funnel through that portal.
- Collaboration between arbitrators and courts is a two-way street. There is important work going on. What do the courts expect from arbitrators? What do judges find most helpful when assessing challenges?
- An integrated system calls on courts to apply international standards. National judiciaries shouldn't work in a secluded environment. Commercial courts have the will and means to assess best practices in an effort to provide the system with the legal certainty.

- Efforts must consider usage of the system if there is to be trust. Parties in almost every case in Singapore attempted mediation before trial. There had been a reluctance to mediate because of a lack of enforcement.
- 55 countries have signed the Singapore Mediation Convention, representing more than half of the world's population. More are expected to sign.
- International arbitration has become very expensive. With the growth of international courts, disputants now have more choice. They look for the quickest and least expensive way to resolve disputes, with access to justice and acting in the best interests of the parties.
- Since 2016 a new constitution in Zambia states that the judiciary must provide alternative dispute resolution mechanisms – mediation was a division of their courts. The judiciary provides training for mediators and for lawyers in mediation advocacy. Arbitration had been seen as removing business from judges, but judges had been taken through the process and training to show it was complementary.
- Open justice is critical. It has to be open to scrutiny.
- On the conflict of interests of arbitrators, in China cases are often encountered on how to determine their impartiality and independence. Could SIFoCC develop a memorandum on this?
- Another area to consider is the timely disposal of proceedings. The problem in Indonesia is that a party might go to the judge as mediator instead of a registered professional.
- In Australia, many arbitrators are retired judges and mediators too. They are favoured as they bring their experience as lawyers. One issue for consideration is whether a profession of arbitrators and mediators should have different skills rather than bringing their skills as practising lawyers and judges, in order to reap the benefits of a variety of approaches.
- In India, private mediators have worked well in settling disputes.
- Another problem perceived by some is that mediators are often judges and steeped in judgecraft.
- There comes a sweet spot in a dispute where it is apt to settle. It may be desirable to put in place a resolution path and have a mediator involved to liaise with the parties to find the optimum time to resolve matters.
- In the USA, if the trial is by the judge, they don't get too involved in settlement unless the parties agree. Usually they prefer someone else as they feel more relaxed disclosing details. It can be better to have someone private with more specialised knowledge – for example, in the area of intellectual property.

- In New Zealand the legal profession has become increasingly better at knowing when the right time is to refer to mediators. They are looking at wider interests and not what we as judges are considering.
- In the Philippines, a lack of open-mindedness is a barrier to overcome. There is a lot of interest in integrating the different types of conflict resolution. It is possible to structure it to do well and be effective. It is important to encourage the development of professionalisation in these areas, particularly mediation which can be seen as a different type of process. When a respected figure becomes a professional mediator, growth of the practice of mediation can follow.
- The idea of an integrated system needs careful thought about confidentiality.
- Arbitration integration would be difficult in a jurisdiction like Malaysia where there would be an encroachment on judicial power. But it is a matter of interest and would be useful if there was a way of hiving off specialist areas.
- If a court has jurisdiction over a multi-party dispute, all are involved.
- If there are stand-out people not going to arbitration, there are powers of compulsory reference to referees. These are not adjudicative, but skilled technical people who can hear the case informally and produce a report, to be adopted or not, with generally limited rights of leading further evidence.
- In the Australian context, a common data set accompanies a dual role for a judicial officer, of decision-maker and mediator. This can have a significant impact on reducing the cost of preparation for mediators with the parties. It also enables the judicial officer to monitor the case and jump in at an appropriate time to help them find the right moment for resolution.
- Judges in Germany already form part of an integrated solution. They are asked to look for settlement to the case at an early stage. They explore whether or not it is possible and if so, to what extent the parties are ready to settle the case. A preliminary legal assessment is made. The judge often proposes to the party a sound solution to the conflict which often initiates a settlement or negotiations between parties.
- It is important for courts and judges not to lose sight of the fact that these are public institutions, and we should not be too eager to force justice into private resolution. Firstly, it is helpful for the public to know and see that disputes can be settled openly, efficiently and fairly. That sends out a positive message. Secondly, in a common law system the law does evolve. It is only through publicly available judgments that the common law can develop. We must not lose sight of our principal role as judges.



- The Supreme People's Court in China has created a platform used by 350,000 arbitrators with 20,000 cases settled every day. It connects with the national bank and others. The problem is small claims and consumer disputes. It is difficult to mediate and use the platform for commercial litigation.
- In Jamaica, mediation takes so long that it is seen as an event rather than a process. It is suspected that the reason for a weak success rate is the lack of disclosure between the parties to identify fertile ground for settlement. The court is not in a position to manage the issue through to conclusion, and the timing issues lead to a significant backlog.
- While our experiences differ, there are common themes. There is almost universal support for mediation. Less universal is the support for arbitration. It is much easier to see an integration of a court process for mediation than for arbitration.



## Theme 2: Managing complexity and the 'complexification' of disputes

Some of the points made are listed here.

- Is there a complexity which makes some cases too difficult to fix?
- Can we remove complex elements without detracting from the case?
- What is the level of trade-off we are prepared to tolerate?
- One of the barriers to having effective judges is the lack of understanding of expert matters.
- In New South Wales, Australia, there is power to obtain the assistance of any person and the court can act on the advice given. The court can consult confidentially to help them understand, most often in cases involving technology. An example is a dispute between programmers. The parties identified an engineer who sat with the judge on the bench. The judgment revealed the expert advice and showed how the judge had acted on it should they wish to appeal.
- In India, complexity of disputes manifests itself in multiple ways. Information overloads complexity.
- Commercial matters are complex because they can involve interface between law and policy.
- Technology can be used to resolve some complexity.
- In India, an e-filing system has been developed as a complete end-to-end solution. E-filing is not yet made mandatory but is being pushed for. E-files are bookmarked, allowing easy navigation. It is accessible, efficient and transparent.
- Technology can be used not just to simplify but to reduce the pendency. The e-courts project in India has developed a digital court.
- Can technology be used to address the inherent complexity of the case itself?
- The best cannot be the enemy of the good. As complexity takes over lives and data grows, and more and more detail becomes available in cases, we need to take a decision on how technology can help. It's all very well to say data can be uploaded, but people can't look through millions of documents.
- At the moment we think about information in an analogue way. A word processing system is not a smart system. We need smart programming to get to the real issues in a case. Technology can help, but we need to stop thinking about doing the same things digitally that we used to on paper, and start thinking smart and about how to resolve cases more economically and quickly. Otherwise the rule of law is completely questioned.
- There is another aspect of technology. In a very complex intellectual property case involving bioengineering, it would have taken weeks teaching the judge, even though those matters were not in dispute, through witnesses. Instead there was a seminar system, educating the judge by an agreed expert.

- The role of experts and their duties are understood but there are some who morph quickly into advocates. Maybe it is up to the judges to remind them of the limits of their role.
- There is power in the Cayman Islands to appoint an assessor.
- Providing judges with some additional training and technical support would be helpful.
- The City of Detroit filed for bankruptcy and the state took over city services. Bankruptcy judges appointed a mediator in the bankruptcy, and he appointed some others for sub-issues. The art collection was also at stake. All philanthropic institutions were asked to preserve the collection, and millions were given. It became known as the Grand Bargain. In a purely judicial environment, this could never have happened.
- Common law jurisdictions assume everything that takes place is part of a judicial function. We need to deconstruct this for judges to be effective. We need to allow them to focus on their true function, using technology as an enabler but confining judges to the judicial function.
- We will need, as judges, more expertise ourselves to tackle the commercial disputes of the future in a knowledgeable way. One of the things which has drawn users to commercial courts is expertise. In England and Wales, independent of any particular case, seminars on cutting-edge commercial issues are available. A process of regular education to increase general expertise does not run the risk of the warnings about transparency.
- The biggest challenge is to have an effective change management strategy in each jurisdiction.
- Approaching complex cases with a proactive mindset instead of a negative one is the basis for dealing with complexity, and is crucial.
- In Victoria, Australia, attempts to deal with complexity are not uniform and some might seem old-fashioned. Judges must impose limits on volume. Enforcing page limits and excluding documents go some way to minimising complexity as they drive the parties to act responsibly. The judges tend to think it best to avoid lengthy prepared statements. Use of referees can be a highly effective way of limiting matters for decision, narrowing and crystallising the issues. The referee is questioned by the judge and parties, and the judge could then decide on their answers.
- In the New York commercial division, we have moved to word limits instead of page limits. Discovery minutes avoid duplication. We hyperlink requirements in judicial papers to cases.
- There is no 'one size fits all' approach. At the outset, work out what fits for that particular case. Many benefit from early dispositive motions and discovery is limited on a substantial part of the case. The ordering of core documents shared at an early stage is crucial to settlement. Find the sweet spot and an effective culture for resolution. Another useful mechanism is a requirement for attorneys to meet and confer at regular stages. They can eliminate portions

of the case, narrowing issues for the judiciary. Together these narrow the scope of the litigation and lighten the load for the court.

- In Northern Ireland we have set up a commercial hub, which is a specialist court. It sits throughout Northern Ireland. It looks for contentious issues which could help settle wider action. The hub provides judges for early neutral evaluation. There are three key stages: early direction hearing, case management conference and pre-trial review. This replaced the old review system. Northern Ireland is indebted to SIFoCC's publication on best practice case management principles for the practice direction for our hub, having borrowed from it heavily.
- The issue common to us all is a need for robust case management. The early identification of issues in dispute is of obvious importance.
- It is going to require a difference in the way we schedule our work. More time to case management means more preparation time.
- The more complex the case, the more ready we must be to accept that the standard of proof may be lower. We have to cope with different levels of certainty.
- SIFoCC could valuably form a working group on this subject.





### Theme 3: The future for corporate legal responsibility, purpose and governance with a focused lens on climate change

Some of the points made are listed here.

- The concept of legislation for a corporation that sets out what directors must look at is flawed. If the judges or the legislature determine directors must look at all stakeholders, the board might be so busy looking at all the stakeholders that they won't have time to look at any properly.
- A director needs a compass, and the best one is the shareholders.
- You have to be able to look at stakeholders - the judiciary in Australia has given that to boards - and to look at clients.
- The issue at hand, not resolved in Australia, is whether a director has to look at the short term or long term in making these decisions.
- If those who run companies are looking at the long term, all of the other issues come into play.
- Companies have customers, employees, stakeholders who are regulators, and investors. Each of these areas comes down to humans and each wants to be proud and to make money.
- The question of long term versus short term is essential. Our companies should become long-term rail destinations, where the train keeps going but people can get on and off as they wish.
- How do you state the purpose? In the long term they need to follow the compass for the stakeholder benefit.
- Should there be an attempt to define what an independent director is, rather than what the purpose of the entity is?
- The legislature often leaves it to companies to make decisions for the betterment of society.
- Corporations should follow the responsibilities of individuals.
- It may be overprescribing to give them the requirement for purpose or tell them they need to exist to do good, but a long-term focus on shareholder wealth generally holds the line. Most people want to do the right thing and if left to that, will do so.
- Business is going through a profound change. This reflects a steady and necessary evolution in public attitudes towards business and its perceived role and responsibilities in society.
- The last few years have seen the emergence of alternative views that place greater significance on the role of business in promoting the interests of society and the environment more generally.
- That is particularly, but not exclusively, reflected in issues concerning climate change and global warming.
- These developments have in turn given rise to a growing expectation on commercial courts to adjudicate over matters that have not featured so prominently in the past.



- In its programme of work on the future of the corporation, the British Academy drew on the advice of an international body of business leaders, policymakers and academics. Its recommendations centred around the debate on the purpose of business, which has been influential on business practice, policy and education in the past. It suggested a notion of the purpose of business which has been widely supported and adopted by businesses around the world: "The purpose of business is to produce profitable solutions for the problems of people and planet, not profiting from creating problems for either."
- In view of the wide support from business, could the British Academy proposals provide a helpful basis for identifying approaches that commercial courts could take in addressing newly emerging issues?
- It may be possible to advance consideration of corporate legal responsibility without waiting on changes in legislation. There may be sufficient room for interpretation, appreciation, understanding or further analysis of existing corporate and company laws for the courts to incorporate interests of parties beyond their shareholders.
- It is in this spirit that a framework for corporate legal responsibility based on corporate purpose might be developed, with corporate law reform possibly proceeding in parallel to affirm evolving legal practice.
- The relevance of time horizons and the importance of the long term feature frequently in these discussions.
- We are simply misstating the nature of profit. It should derive from wealth creation for the benefit of others, not wealth transfer or diversion at the expense of harm to others. Greater transparency in reporting on true costs and profits is required to allow those investing in, affected by, or dependent on business to know who to trust and reward.
- There are two types of objections that are raised against this, often at the same time. The first is that this is impossible and unrealistic, and it is unworldly to expect business to do it. The second is that this is already the way in which respectable businesses run their affairs, so there is nothing that needs to change. The answer to the first objection is the second.
- The British Academy programme has suggested that fundamental to addressing these problems is a clearer appreciation of the reason why business and financial institutions exist and their reason for being – namely their purpose.
- What is the role of the courts in this regard? The answer suggested is to ensure that the law, and the rule of law, play their full and proper part towards business practices based on true costs and profits and supportive ownership, governance, measurement, and incentive arrangements becoming the convention.

- Society has changed. The expectation of companies has changed. The way companies behave has to change.
- These kinds of conversations are becoming more complex for companies and directors.
- Reputational risk can now bring a company down more effectively than ever before. Lawyers are in the room all the time. Reputational risk can ruin you overnight. Banks and institutions are very aware of this when we're advising. When we talk about environmental, social and corporate governance, it has huge reputational risk.
- Companies are there to support their communities in the widest sense. Without people and community we wouldn't have a business. Prosperity for those communities is our benefit.
- When we look at what is needed in the environmental, social and corporate governance arena, remember 'social' as that will come to the fore.
- There's a metaverse coming with another whole set of issues.
- If, when you look at the law, you accept that the long term is what the director should aim at, as soon as you put in the long term the rest fits in.
- A smart company will anticipate tightening regulation and think ahead, saving itself the trouble of becoming embroiled in avoidable proceedings. That is a long-term view.
- We see regulation as our primary source of telling us what to do. In regulated industries it's a different mindset. From a regulatory perspective, how you account for capital you can use is by looking in the long term to make sure you're not lending more than you should. That comes in through the regulation to make us behave better. Understanding that dynamic is important.
- A world of companies is not just public, but includes the private owner.
- We talk about the long term to flex the compass of fiduciary duty, but what about who that fiduciary duty is owed to? Shareholders might not be the ones who require conduct to be long term.
- In commercial courts we have to decide questions of private law rather generally more than public law. This is the sharp end.
- One of the problems is that business is inherently short term. If someone uses a single-purpose vehicle that is bad for the environment over a short period, we have to decide if that activity is illegal and the cases in this area are about the interpretation of aspirational statutes which don't say what the bad things are.
- Offshore jurisdictions are protective of financial services and sensitive to the adverse impact of additional expense and regulation. The appetite to manage large-scale regulation is constrained.

- The Cayman Islands recognise climate change as a major risk for the jurisdiction. It realises it must be a good global citizen to protect its reputation. It will be easier for the Cayman Islands to adopt new corporate governance restrictions when there is no competitive disadvantage in doing so. The Cayman Islands have not enacted an obligation on directors to have regard to certain third parties.
- We need to have an eye on tort law to consider its impact.
- Developments in New Zealand law at present consider how laws of the indigenous population play a part, particularly relevant to climate change legislation.
- New Zealand inherited its common law system from England, but Māori society was the source of its first law. New Zealand has a treaty dating back to 1840, a written agreement between Crown and Māori chiefs. Broadly, the treaty gave Māori authority over their tangible and intangible treasures, which is where the environment comes in. English common law only applies as far as applicable to the circumstances of New Zealand. The Māori law may be applicable in some circumstances.
- It is time to sit down and rethink the purpose of business. It is more important in the wake of the catastrophic floods in Pakistan, for example.
- Profit should not be made at the expense of all else. No business should harm the planet. Like humans, corporates need not to work in isolation but are an integral part of nature and should respect it.
- Judges and courts deal with what is in front of them at the moment. What should courts do about it given that limited role?
- There is a view in favour of courts accepting change in social values and of backing their decisions. We would never have dreamt 50 years ago of our cases being decided in the same way. There is space for judges making decisions, but it has to be done correctly.
- It is important for commercial judges to have a clear understanding of how they can respond to background social change. What happens to small companies and small disputes?
- As judges, there are two types of situations. When the global picture matures to a point where legislators have put frameworks in place, then as judges we have the opportunity to give meaning to those provisions. It is important to do so in a consistent way.
- In the second area, of directors and corporate responsibilities, we see a lot of difficulty for courts to step in and develop standards and duties. What do we do with small companies? Or investment funds that wish to maximise funds for unit holders? What do we do with companies having cash flow issues?

- In Jamaica there are fundamental freedoms and horizontal application of charter rights, including the right to enjoy a healthy, productive environment.
- This debate seems to be heading in the direction of fundamental questions around the boundaries of judicial power, and the separation of powers and the appropriateness of judges weighing in.
- We're talking in an environment where there seems to be a premise that the views of all our jurisdictions are the same. We have most of the biggest countries in the world here. The underlying political views are not uniform. It would be a strong thing for judges to come together to seek to impose a collective view.
- The view that this may be a matter for Parliament or a legislature deserves respect, and it is difficult. But the common law world should keep in mind that fiduciary duties came from the common law and from equity. They were framed at a time when the drivers were simpler. These are judge-made contributions in their origin. Can the judges stand aside when the point is being put to them that there needs to be a reframing?
- Some have a concept that certain types of dispute are not justiciable.
- In Singapore, directors have a duty to focus on the company. How this fits with sustainability reporting remains an open question.
- We must not overstep the boundaries of judicial power, but we shouldn't be an obstacle to society's response to the climate change crisis either.



## Theme 4: Jurisdictional conflicts internationally

Some of the points made are listed here.

- Jurisdictional conflicts have occurred recently in planning law, illustrating the point. There is the use of anti-law. Such conflicts have even given rise to World Trade Organisation proceedings. They increase costs and consume precious time.
- Given a lack of international conventions, may the principle of comity provide guidance?
- Is there a case for direct guidance between courts?
- The metaverse is here. Anyone who is a gamer will understand the virtual world. There are already cases relating to intellectual property rights within games, where you can buy branded products. Where there is an open metaverse, challenges will arise with the cross-jurisdictional issues we're already thinking about. Customary law is starting in the metaverse.
- Where antisuit injunctions are granted as a matter of contract law, they seem straightforward but they become interesting where proceedings are restrained in the other jurisdiction. It can get quite stark with jurisdictional clashes, and not just a matter of contract law. The nominated forum will have an interest in enforcing the contract, but the place of restraint will often have a different view. You anticipate being restrained. Conflict arises.
- We need a pragmatic approach to this. The word that resonated is comity.
- Comity is all very well. The truth is that you have a tension between holding people to the contract and taking into account a whole range of factors including comity. It would be useful for SIFoCC to consider these questions, but we'll come across substantive law.
- Where the substantive law is different, you're bound to get a case where the hard law has to be dealt with, but there are an overwhelming number and variety of cases. When the UK was a member of the EU, one of the major problems we faced was a new regime for extradition where it was agreed that some aspects of the enforcement of arrest warrants would be passed to judges. Judicial dialogue became necessary.
- The UK had success in family cases and in understanding what is happening by exchanges between judges, rather than just relying on the parties.
- There are cases where there can't be co-operation, but it can be very valuable. Any project will need further defining.
- In the Cayman Islands case, there is the idea of judges from different jurisdictions having hearings at the same time. It is a good opportunity to foster understanding and common sense can be brought to bear.



- There is a case for refraining from antisuit injunctions if possible as it exacerbates the problem. But it is best to find common ground.
- What is judicial comity? To some it is acceptance or recognition. To others it is co-operation.
- The second aspect is that adjudication is not an aim in itself.
- With unknown or unfamiliar foreign laws, there can be difficulty getting advice on those foreign laws.
- This must be looked at holistically.
- The enemy is time. Where enforcement of a judgment is called for or where a debtor is incapable of honouring the judgments, time is essential in both scenarios.



## Radar topic: Commercial (third-party) litigation funding

Some of the points made are listed here.

- Legislation in the USA is being directed to transparency in litigation funding. Individual states are taking divergent approaches to litigation funding.
- There have been calls for some regulation of fees, some less restrictive and others very restrictive. Some laws virtually prohibit litigation funding entirely.
- It is a global issue.
- There is an interesting project by the European Law Institute which gives insight into international developments. The project is there to help develop principles and guidance.
- Some cases couldn't proceed without funding because the amounts are so small. If funding is not available, then consumers wouldn't have a route to redress.
- It is important not to forget the role of the advisor and their role in any agreement.
- It is clear that there are still lots of lawyers who don't fully understand it.
- It is incumbent on us to ensure those who use funding understand it. There is work for us to do to ensure that those advising understand what it is and what funding does.
- Some funders do make themselves liable for adverse costs.
- The cases are not the funders' cases.
- Funders don't set the value or budget. They pay the bills.
- The funding fee may be capped. To suggest that if things don't turn out as anticipated, pay should be capped is open to debate.
- It is absolutely necessary to recognise the inherent conflicts that arise.
- The court has to rely on senior practitioners for the parties in coming to the settlement of cases.
- In Europe, very few countries have adopted national rules where the states have a strong legal aid system.
- Legal aid was a way of ensuring access to justice. In France, legal aid is very strong and they don't have funded third-party litigation.
- There are lots of diverging rules in Europe, which is why the European Parliament wants to put together common standards.

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# SIFoCC Judicial Observation Programme

Two of SIFoCC's three objectives include sharing best practice and supporting countries to offer effective means for resolving commercial disputes. The SIFoCC Judicial Observation Programme is a form of peer-to-peer judicial engagement to serve those objectives. The impetus for developing the programme came from the first full meeting of SIFoCC in 2017.

Under SIFoCC's Judicial Observation Programme, Chief Justices from a number of member jurisdictions are invited to nominate one or two serving judges to spend an intensive week in the commercial courts of another (host) jurisdiction. The nominee will be in the company of a small number of nominees from other jurisdictions. In this way, the nominees can develop judicial relationships with each other and between their jurisdictions, as well as with the host jurisdiction. In time the nominees become alumni.

There have been three iterations of the programme to date: hosted by London (2018), Singapore (2021) and London (2022). It is hoped that other SIFoCC member jurisdictions will volunteer to host at future dates. Nominees who have participated to date have been from India, Jamaica, Kenya, the Philippines, Sri Lanka, The Gambia and Uganda.

## Feedback from participants

- It was an enriching and significant experience.
- The opportunity to sit in court was an honour. My key takeaway is that it brings commonalities into focus, but also the distinctions and the challenges each jurisdiction faces.

## What has been the most valuable aspect?

- Seeing the depth and detail of preparation in pre-trial, the gatekeeping in sending cases to other courts rather than the Commercial Court, and the use of additional part-time judges to increase bench strength. The co-operation between the bar and bench was also valuable to observe.
- For me, it was being able to observe judges, judgecraft, the intricacies and seeing someone more experienced in the delivery of oral judgments. There is a tremendous level of engagement between the bench, bar and other stakeholders. Some think too much can give the perception of bias, so it was good to see people working together. Now we have stakeholder meetings in Jamaica.

### **What improvement or expansion would you like to see?**

- I would like to have had more exposure to aspects of court administration and listing.
- I really got what I needed from the programme.
- Ways of demonstrating challenges faced in developing jurisdictions so that there is more cross-fertilising of ideas.

### **What have you taken back?**

- Delivery of more oral judgments.
- Stakeholder meetings to improve judicial engagement.
- Being stricter with counsel in narrowing down issues and case management, with improving pendency in mind.
- Reports have been produced and shared with leadership judges and it is hoped further implementation will take place.

### **Online or in person - what's better?**

- In person! It's good to be online if you can't otherwise make it, but for this sort of interaction it is much better to be in the same physical space.
- Relationship and friendship building works much better face-to-face.

There is value in taking back to our own jurisdictions new ideas, practices and procedures. There have also been requests to continue involvement with SIFoCC. Some judges have gone on to contribute to SIFoCC working groups. The Secretariat would be pleased to provide assistance to any hosts. It is not simply one-way: this is a dialogue, and we all learn from each other.



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# SIFoCC playing its part as a cornerstone of a transnational system of commercial justice

## Key messages from the keynote address delivered by the Hon Chief Justice Menon, Singapore

1. In order to support a globalised, interconnected world, we should develop and sustain a transnational system of commercial justice. This involves pursuing meaningful convergence in the commercial laws of jurisdictions around the world, and regarding international commercial law and international commercial dispute resolution as parts of a system rather than mere compilations of rules.
2. International judicial dialogue is an important driver of meaningful convergence. This takes place not only through the publication of judgments which are considered by courts in other jurisdictions, but also through direct communication and collaboration between judges across jurisdictions. Examples of this include organisations like SIFoCC, and the extremely successful use of court-to-court communication in cross-border insolvency cases.
3. There are a number of ways in which we can intentionally work to enhance the transnational system of commercial justice. One is by developing common approaches to the management of conflicts over where and how a transnational dispute should be resolved, and the standards that should apply to the conduct of arbitration and mediation. Another is by raising the capabilities of adjudicators to tackle challenges such as the growing complexity of disputes, and to address the new legal issues that will be raised by global problems such as climate change.

These are all areas in which SIFoCC is well-placed to contribute. Moving forward, SIFoCC should build formal relationships with leading arbitration and mediation institutions and bring the stakeholders in the transnational system of commercial justice together in an ongoing conversation, to ensure that dispute resolution providers around the world are equipped to support the delivery of justice nationally and internationally.

A full transcript of the address can be found [here](#).



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# Links and further reading

## Materials

- YouTube link to recording of keynote address given by the Hon Chief Justice Menon
- Full text of keynote address given by Chief Justice Menon, Singapore
- Paper on litigation funding in the United States by Hon Loretta Preska
- Paper on court experts by Justice David Hammerschlag, New South Wales, Australia
- Introductory remarks by Sir Keith Lindblom, England and Wales, on theme 3
- Remarks delivered by Justice Maarif, Indonesia, on theme 4
- Remarks delivered over lunch by Chief Justice Zidan, Iraq
- YouTube link to interviews with previous SIFoCC Judicial Observation Programme participants
- Closing remarks given by Chief Justice Ntezilyayo, Rwanda

## Pre-reading

- Speech by Sir Geoffrey Vos - 'Mandating mediation: The digital solution' (Chartered Institute of Arbitrators: Roebuck Lecture 2022)
- Speech by Chief Justice Sundaresh Menon - 'The complexification of disputes in the digital age' (Goff Lecture 2021, 9 November 2021)
- Pre-recorded address on the Detroit bankruptcy by Chief Judge Rosen
- Discussion paper for SIFoCC by the British Academy - 'Implications of the British Academy future of the corporation findings for corporate legal responsibility'
- Adapted scenarios presented to the Commonwealth Magistrates and Judges Conference (Ghana, September 2022)
- Speech by Chief Justice James Allsop 'Piercing the corporate veil: recent international developments' to the 30th Annual Conference of the Banking and Financial Services Law Association (26 August 2022)
- International Best Practice in Case Management (SIFoCC)
- Multilateral Memorandum on Enforcement of Commercial Judgments for Money, second edition, with international working group commentary (SIFoCC)

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## **SIFoCC steering group:**

Lord John Thomas of Cwmgiedd (Chair of the SIFoCC steering group)

Chief Justice James Allsop (Chief Justice of Australia's Federal Court)

Sir William Blair (Chair of the Qatar Financial Centre Regulatory Tribunal and Judge of the Qatar International Court)

Justice Jonathan Harris (President, Competition Tribunal, Hong Kong SAR) representing Chief Justice Andrew Cheung

Hon Bart Katureebe (Chief Justice Emeritus of Uganda)

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

Chief Justice Sundaresh Menon (Chief Justice of Singapore)

Hon Loretta Preska (Senior Judge and former Chief Justice, US District Courts, Southern District of New York, USA)

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

## **Judge with day-to-day responsibility for SIFoCC:**

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