

# Kluwer Arbitration Blog

## The Singapore International Commercial Court: Friend or Foe to International Arbitration in Singapore?

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At the opening of the legal year in Singapore on 5 January 2015, the Singapore International Commercial Court (“**SICC**”) was officially launched. In the words of Chief Justice Menon, the SICC is intended to “*build upon and complement the success of [Singapore’s] vibrant arbitration sector and make [Singapore’s] judicial institutions and legal profession available to serve the regional and the global community*”. The SICC will take on on high-value, complex, cross border commercial cases, operating as a division of the Singapore High Court. In addition to the existing panel of High Court judges, the SICC will also have local and international jurists appointed to its panel.

### Jurisdiction

The launch of the SICC follows shortly after the opening of the Singapore International Mediation Centre (“**SIMC**”) in November 2014. Unlike the SIMC’s Arb-Med-Arb protocol that envisages mediation as a complement to the arbitral process, the SICC appears at first blush to be a possible competitor to international arbitration in Singapore as it offers formal adjudication of cases which are of a commercial and international nature.

The SICC is governed by amendments to various instruments including the Supreme Court of Judicature Act, the Legal Profession Act and the Rules of Court, as well as the enactment of secondary rules specific to the SICC such as the new Singapore International Court Practice Directions (“**SICC Practice Directions**”) and the Legal Profession (Foreign Representation in Singapore International Commercial Court) Rules 2014 (“**SICC Foreign Representation Rules**”).

The new Part III to the SCJA confers jurisdiction on the SICC to try an action or a claim that is:

1. international and commercial in nature;
2. one that the High Court may hear and try in its original civil jurisdiction; and
3. satisfies other conditions as may be prescribed by the Singapore Rules of Court.

The newly introduced Order 110 Rule 1 of the Rules of Court sets out some relevant definitions. A claim is considered ‘commercial’ if it arises from any relationship that is commercial in nature. The definition includes a non-exhaustive list of relationships – identical to the list found in Article 1(1) of the Model Law set out in the First Schedule of the International Arbitration Act (“**IAA**”) – such as concession agreements, joint ventures, consulting, engineering or licensing, as well as

construction works, investment, financing, banking or insurance relationship. A claim will be considered ‘international’ if:

1. the parties have agreed by written agreement to submit their claim to the SICC and the parties have their place of business in different states;
2. none of the parties to the claim have their place of business in Singapore;
3. a substantial part of the obligation of the commercial relationship between the parties is to be performed outside any state in which any of the parties have their place of business;
4. the place with which the subject matter of the dispute is most closely connected is outside any state in which any of the parties have their place of business, or
5. the parties to the claim have agreed expressly that the subject-matter of the claim relates to more than one state.

Conditions 2 to 5 are similar to Section 5(2) of the IAA, which determines if a Singapore-seated arbitration is considered to be an international arbitration and therefore subject to it.

### **Transfers from the High Court**

Significantly, a claim may end up being heard before the SICC even in the absence of the parties’ submission to the SICC’s jurisdiction, as the High Court can transfer cases to the SICC of its motion. Parties to international commercial transactions that satisfy any of the conditions 2 to 5 above, and that have submitted to the jurisdiction of the Singapore courts, may therefore see their claim being referred to the SICC by the High Court (which would have had original civil jurisdiction over the claim). In practice, such transfers will be effected by way of a notice from the High Court to parties informing that the matter has been transferred to the SICC, and giving the parties the opportunity to show cause within a specified time as to why the matter ought to remain with the High Court. It is understood that several such notices have already been issued in pending cases.

Parties who would like a claim to be heard by the SICC without waiting for such a referral to take place may obtain from the SICC what is known as a “pre-action certificate”. If granted, this certifies as conclusive that the claim in question is international and commercial in nature (and, where applicable, is an “offshore case”, which characterisation affects the choice of counsel, discussed further below).

### **Adaptation of arbitration ‘best practices’**

Given the resounding success in promoting Singapore as an international arbitration hotbed, the SICC has inevitably taken some of its cues out of that playbook. The following represent some of the notable features of arbitration that have been adapted for the SICC:

#### ***The SICC panel of jurists***

Every claim to be tried by the SICC will be heard by a single judge or a panel of three judges. Unlike in international arbitration, the number of judges on the bench will be a decision for the court. It can be expected that claims involving a higher value or of a more complex nature will more likely be referred to a panel of three judges, although there is no definitive criteria. Neither is it clear if parties will have any say in the matter.

One of the distinguishing features of the SICC is that its composition of judges will include not only the judges of the High Court (of which the SICC is a division) but also foreign jurists, who in the opinion of the Chief Justice, have the necessary qualifications, experience and standing to be

appointed as an International Judge. The first cohort of international judges have been appointed for a period of three years with effect from 5 January 2015, and hail from both civil and common law jurisdictions. These are:

- The Honourable Ms Carolyn Berger (United States of America)
- The Honourable Justice Patricia Bergin (Australia)
- The Honourable Mr Roger Giles (Australia)
- The Honourable Dr Irmgard Griss (Austria)
- The Honourable Justice Dominique T. Hascher (France)
- The Honourable Mr Dyson Heydon AC QC (Australia)
- The Honourable Sir Vivian Ramsey (United Kingdom)
- Mr Anselmo Reyes (Hong Kong)
- The Right Honourable Sir Bernard Rix (United Kingdom)
- Professor Yasuhei Taniguchi (Japan)
- Mr Simon Thorley QC (United Kingdom)

This adapts the practice of international arbitration where parties have the ability to appoint an arbitrator with specific legal qualifications to determine a dispute, although it is far more limited in scope as it does not permit the parties to the dispute to make an express choice of which judge or judges they wish to preside over their action.

#### *(Limited) freedom to choose counsel*

It was not too long ago that foreign lawyers could not freely represent parties in an arbitration seated in Singapore. This changed in 2004 as part of the Singapore Government's efforts to liberalize the legal industry in Singapore and promote Singapore as a preferred venue for arbitration. As a result, the Legal Profession Act was amended to allow anyone to represent a party in an arbitration seated in Singapore and carry out work otherwise reserved for advocates and solicitors, the term used to describe Singapore qualified lawyers who are licensed or authorised to practise in Singapore.

Taking a leaf from this, parties to an SICC dispute may not appoint and be represented by a foreign counsel of their choice, albeit upon the fulfillment of certain conditions.

The first of this is registration. Any foreign lawyer (i.e. a lawyer who is not called to the bar in Singapore) who is qualified (and certified by the relevant authority in the jurisdiction in which he/she is qualified) to practise law in any part of the world, has at least five years' experience in advocacy before any court or tribunal, and is sufficiently proficient in the English language to conduct the proceedings may register. The foreign lawyer must also give an undertaking in the affidavit accompanying the application for registration to comply with the Code of Ethics issued under the amended LPA.

A party may be represented by registered foreign counsel in SICC proceedings without the any involvement of local Singapore counsel in an "offshore case". This is defined in the amended Rules of Court as a case which has no substantial connection to Singapore either because (i) Singapore law is not the law applicable to the dispute and the subject matter of the dispute is not regulated by or otherwise subject to Singapore law, or (ii) the *only* connection between the dispute and Singapore are the parties' choice of Singapore as the law applicable to the dispute and the parties' submission to the SICC's jurisdiction. The SICC PD contains examples and illustrations as to the type of cases which may be classified as an offshore case.

Where a case is not considered to be an “offshore case”, a registered foreign counsel may only represent the party in question in respect of aspects of foreign law on which the said counsel is qualified to advise. This form of restricted registration is regulated by the new Part IVB of the Legal Profession Act read with the SICC Foreign Representation Rules and the SICC PD. In this case, it is expected that local counsel will have primary conduct of the matter as if it were a matter before the High Court, with assistance from the registered foreign counsel as co-counsel and not as expert on foreign law.

Whilst nowhere as extensive as the changes made in respect of arbitration, the latest amendments are significant insofar as they allow, for the first time, representation and advocacy by foreign counsel before the Singapore courts.

In reality, however, the occasions on which parties may exclusively appoint foreign counsel on the basis that the only connection with Singapore is the parties’ choice of Singaporean law or submission of the case to the SICC may be few and far between. The reality is that Singapore is an international commercial hub where many multinational corporations have set up headquarters and made use of the banking and financial system. All of these can represent a connection to Singapore. To mitigate this, the SICC PD has clarified that the fact that funds connected to the dispute or incorporation in Singapore (or the existence of Singapore shareholders) will not in and of itself amount to a substantial connection between the dispute and Singapore. Without this clarification, those cases may immediately be disqualified from being an offshore case under this limb.

#### ***Domestic rules of evidence may not apply***

The amended Supreme Court of Judicature Act also permit parties to submit on foreign law (through registered foreign counsel qualified to submit on that law) rather than to prove such law through expert evidence as traditionally required under the domestic rules of evidence.

In addition, the SICC is not bound by the domestic rules of evidence at all and may apply other rules of evidence whether they are found in a foreign law or otherwise, if the parties make an application for it. The amended Rules of Court makes it clear that the reference to rules of evidence includes any rule relating to legal professional privilege and the taking of evidence.

#### ***Confidentiality***

One of arbitration’s attractive features is the private and confidential nature of the proceedings. In contrast, court proceedings are normally not confidential and tend to be open to the public.

To bridge this gap, the amended rules of court allows the SICC, on the application of a party, to order (i) a case before it to be heard in private, (ii) parties not to disclose any information relating to the case, and/or (iii) the file on the case be sealed. In making this order, the SICC will have regard to factors such as the parties’ prior agreement on this as well as whether the case is an offshore case (which may be more likely to be subject to such confidentiality orders as it is not likely to affect the interest of the public in Singapore).

#### **Is the SICC a friend or foe to international arbitration in Singapore?**

Notwithstanding the unique features of the SICC that seek to marry the best of international arbitration and Singapore court practices, the SICC is unlikely, at least in these initial stages, to persuade users who are currently drawn to the cross-border advantages of international arbitration

to exclude arbitration agreements in favour of submission to the SICC. One primary reason is the ease of cross-border enforcement that arbitration continues to provide. In contrast, an SICC judgment, being a judgment of the Singapore court, may not be as easily enforced abroad in the absence of a litigation equivalent to the New York Convention.

The Singapore Government is reportedly studying Singapore's possible accession to the Hague Convention on the Choice of Court Agreements and there have also been discussions about reciprocal enforcement possibilities within the ASEAN framework, but the Hague Convention is not yet in force, and there has been little indication thus far that Singapore would be prepared to enter into reciprocal arrangements for the mutual enforcement of ASEAN judgments.

Nonetheless, the SICC fulfills a very important function insofar as it widens the offering available in the Singapore courts to those who cannot or choose not to, for whatever reasons, refer their disputes to arbitration. It provides those users with some of the attractive features available in arbitration, such as flexibility on the rules of evidence, wider choices of counsel for the right circumstances, and specialist expertise in foreign law amongst the judges hearing the dispute.

On a broader level, the SICC may even provide further impetus to the growth of international arbitration in Singapore. At least in its initial stages, it can be expected that the Singapore High Court will be proactive in using their powers to refer suitable cases to the SICC to increase the profile and experience of the SICC. This will in turn further enhance the profile and reputation of Singapore as a dispute resolution centre, which can only be helpful for the continued growth of commercial arbitration in Singapore. As the SICC develops, it will also build a body of jurisprudence which will contribute to the internationalisation of Singapore law and Singapore legal services.

The launch of the SICC is an exciting development that brings about renewed opportunities for arbitration and dispute resolution in Singapore. It will be interesting to witness in the coming months the evolution of the SICC through use and experience, and the value that it will bring to the growth of Singapore as dispute resolution hub.

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