

# Kluwer Arbitration Blog

## Should Court Actions Arising Out of International Arbitration Disputes Be Heard At the Singapore International Commercial Court?

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Short answer: Yes for some actions, but not all. Here is why.

The Singapore International Commercial Court (“**SICC**”) was launched in January 2015 and provides litigants with the benefits of court proceedings and international arbitration without the constraints and setbacks of either option.

Thus far, murmurs of concern have focused on the extent to which the SICC would ‘eat into’ Singapore’s bustling international arbitration market. These concerns are, however, misconceived. The SICC’s value may lie in it exercising curial review of arbitration-related court actions.

The typical arbitration-related court actions are challenges to awards, enforcement of foreign awards, jurisdictional review and stay of proceedings in favour of arbitration. In some of these actions, a foreign law or an evidential issue is pertinent and the SICC may be preferred over local courts because of the SICC’s unique features.

### **SICC Judges Qualified In Foreign Law**

The SICC comprises a panel of international judges from common law and civil law jurisdictions and it is expected that this list will grow over time. Should a foreign legal issue arise in the proceedings then having an SICC judge qualified in that area of law projects legitimacy and credibility to the SICC judgment. For example, if enforcement proceedings of a foreign award rendered in France are brought in Singapore, the award-debtor may allege that it was not a signatory to the arbitration agreement under the applicable French law. In this situation, it will be highly effective for one of the judges presiding over the action to be qualified in French law. Whatever the outcome may be of that decision, one would hope that subsequent court proceedings elsewhere will be persuaded by the fact that a French qualified judge expressed his or her opinions on the existence of an arbitration agreement where French law was critical.

Additionally, unlike in ordinary court proceedings, questions of foreign law at the SICC can be determined on the basis of submissions by counsel instead of expert opinions, which saves costs. The SICC also permits, in certain circumstances, foreign lawyers to appear before the SICC and, thus, foreign counsel could follow a dispute from arbitration to court proceedings.

### **Non-Domestic Rules Of Evidence Can Apply**

Subject to the Rules of Court, the SICC may depart from Singapore rules of evidence. Presently, the only means by which other rules of evidence shall apply will be through party agreement. Foreign parties may find this appealing because the SICC can be liberated from domestic rules of evidence.

A poignant illustration of the application of domestic rules of evidence may be found in the context of the admission of fresh evidence under a *de novo* jurisdictional review of an investment arbitration seated in Singapore. This was one criticism that the authors made against the Singapore High Court's ruling in *Government of the Lao People's Democratic Republic v Sanum Investments Ltd* [2015] 2 SLR 322 which concerned a jurisdictional review arising out of an Award on Jurisdiction by an investment arbitral tribunal (read the post [here](#)). The High Court admitted new evidence based on a relaxed version of the *Ladd v Marshall* [1954] EWCA 1 test which was influential to the outcome. It may not be desirable to strictly impose local evidential rules on investment disputes that have no connection to the jurisdiction of the reviewing court and, thus, the SICC's flexibility towards the applicable rules of evidence would make it a more attractive forum for arbitration-related court proceedings.

### **SICC Can Attract More International Arbitrations**

As a broader point flowing from the above, the SICC is of an international character and would promote the notion of arbitration as a "delocalised" form of dispute resolution. This has the potential to attract more investment disputes to Singapore given its international character. In particular, it ameliorates the risk of any parochialism associated with national courts exercising curial control over investment disputes commenced under the UNCITRAL Arbitration Rules. This would bring investment disputes seated in Singapore closer to the delocalised ICSID Convention whereby the only means for recourse against the award is through an annulment committee. The SICC is also appropriate for international commercial arbitrations for precisely the same reasons - reducing the risks of parochialism and ensuring that Singapore arbitrations are guided only by international standards.

It is not uncommon for national judiciaries (perhaps by training or instinct) to reason their decisions on international law issues from a domestic perspective. For instance, the majority's opinion in the U.S. Supreme Court in *Re BG Group plc v. Republic of Argentina BG Group Plc. v. Republic of Argentina*, (no. 12-138, 572 U.S. (Mar. 5, 2014), Opinion of the Court) had treated the UK-Argentina BIT as a contract entered into by private parties - as opposed to an international treaty entered into by states - and had applied legal presumptions derived from American law and not the 1969 Vienna Convention on the Law of Treaties.

## **No subject-matter jurisdiction issues**

As a division of the High Court of Singapore, the SICC has jurisdiction over any action provided the following conditions are satisfied:

- (a) The action is one that the High Court may hear and try in its original civil jurisdiction;
- (b) The action satisfies such other conditions as the Rules of Court may prescribe; and
- (c) The action is international and commercial in nature.

With respect to conditions (a) and (b), arbitration-related court actions can be heard and tried at the High Court in its original civil jurisdiction. The SICC would also have the same judicial powers as the High Court.

With respect to condition (c), the requirements for a claim to be international means that the claim has an international component:

- (a) The parties have a written jurisdiction agreement providing for the resolution of a claim by the SICC and, at the time when the agreement was concluded, the parties have their places of business in different States;
- (b) None of the parties have their places of business in Singapore;
- (c) One of the following places is situated outside any State in which any of the parties have their places of business:
  - (i) Any place where a substantial part of the obligations of the commercial relationship between the parties that is to be performed; or
  - (ii) Any place with which the subject-matter of the dispute is most closely connected.
- (d) Or whether the parties have expressly agreed that the subject matter relates to more than one State.

(Order 110, Rule 1 (2) of the Rules of Court)

A claim is commercial in nature if the subject-matter of the claim arises out of a relationship of a commercial nature. The Rules of Court provide a non-exhaustive list of types of transactions: distribution agreements, an exploitation concession, joint venture or any other form of industrial or business co-operation, investment, financing, banking or insurance.

Thus, the SICC appears to cater for the same types of disputes that could be subject to an international arbitration dispute in Singapore.

## **How arbitration-related court actions will come before the SICC**

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Currently, there are only three ways:

- (a) Parties could, conceivably, agree in their dispute resolution clause to have all court-actions arising out of any arbitration seated in Singapore to be heard at the SICC;
- (b) Absent such a prior agreement, once a dispute has arisen and proceedings have commenced at the Singapore High Court the parties can agree that the matter be transferred to the SICC; and
- (c) The Singapore High Court has inherent jurisdiction to transfer a case to the SICC.

Having launched this year, it is unlikely for parties to designate the SICC as the preferred curial court in their dispute resolution clauses. Subject to how the SICC's reputation develops, this sentiment may change. It is also unlikely for acrimonious parties to come to any agreement once a dispute has arisen. Thus, the Singapore High Court will need to take lead in transferring the cases to the SICC in the first instances.

## **Conclusion**

Not all arbitration-related court actions may need to be heard at the SICC since some cases will not require the SICC's unique features. For instance, a challenge to the award on the basis that procedural due process was not respected (for example, insufficient time to present evidence) could be heard either before the Singapore High Court or the SICC. This type of challenge, however, would not trigger any foreign law or evidential issues and, thus, there would be no greater value added in having the SICC hear the case over the Singapore High Court. This type of challenge would also have less risk of parochialism because the inquiry would be restricted to the procedural conduct of the arbitration. Moreover, some cases will arise between local parties and, as far as perception goes, it would be appropriate for the Singapore High Court to hear the case. In this sense, both the SICC and the local high court serve complementary purposes in catering for all types of arbitration-related actions. Combined they can solidify Singapore's place as a leading destination for international disputes.

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