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SIAC Congress Recap: SIAC Virtual Congress 2021 Plenary Session on Interplay between International Arbitration and International Commercial Courts

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The Singapore International Arbitration Centre ("**SIAC**") hosted its annual Congress virtually for the second consecutive year on 10 September 2021. 2021 also marks the 30th anniversary of the SIAC. In his keynote speech Mr K Shanmugam SC, Minister for Home Affairs and Minister for Law, Singapore, congratulated SIAC on successfully completing 30 years. He commended SIAC for keeping pace with the requirements of international businesses by introducing various innovative mechanisms over the last 30 years, like emergency arbitration and early dismissal provisions. However, he predicted that the next 30 years will be challenging as (i) the issues involved in disputes are becoming more complex, especially with the world reeling under Covid-19; (ii) new areas of disputes are coming up, like climate change; and (iii) new fora for dispute resolution will continue to emerge, giving parties more choices. SIAC released video presentations commemorating the milestone, which can be accessed here (part 1, part 2, part 3and part 4).

Plenary Session | International Commercial Courts and International Arbitration – Friends or Rivals?

In the 2021 Queen Mary International Arbitration Survey, 90% of the respondents preferred international arbitration as the method for resolving cross-border disputes. However, in recent times, specialised international commercial courts have also been established across the globe for a similar purpose. The prominent examples include the Dubai International Financial Centre Courts ("**DIFCC"**), the Singapore International Commercial Court ("**SICC**") and the China International Commercial Court. In this context, the co-moderators, Professor Lawrence Boo and Dr Michael Pryles sought to explore:

- first, whether the international commercial courts play a complementary role or compete with international arbitration; and
- second, the appropriateness of international commercial court judges acting as arbitrators.

This post provides an overview of the discussion.

Dr Pryles set the stage by remarking that while arbitration works in conjunction with the courts, it would be naïve to ignore the fact that there is, at least, a perceived element of competition between the two systems. Mr Geoffrey Tao Li Ma opined that the two systems complement each other. He observed that most jurisdictions have a statutory leaning towards courts having a complementary role with arbitration – in terms of courts granting interlocutory reliefs and enforcing arbitral awards. There is no competition between the two systems as the courts are not vying for a greater share of litigation. However, Justice Ma explained that seen in a broader context, both courts and arbitration are part of the same system of administration of justice i.e. both provide the parties with the ability to resolve disputes properly and justly. This is where litigants will have a choice to make between the two systems. In this sense, the two systems could be seen to be competing with each other.

Professor Boo distinguished between a domestic court's supportive function and the dispute resolution function of the international commercial courts. Justice Judith Prakash, who is also a Judge of the SICC, explained that SICC was set up because it was perceived that there was a need for a court institution specialising in international commercial dispute resolution, which could complement dispute resolution by arbitration. She noted that in dealing with international disputes, domestic courts are limited by their jurisdictional requirements and also by the fact that they deal with domestic law. To fill these lacunae, the SICC was set up, which borrows certain best practises from arbitration. The SICC has an international panel of judges hailing from both the common and civil law jurisdictions. Before the SICC, unlike a domestic court, matters of foreign law are decided as a matter of law by way of counsel submissions and not as a matter of fact. The parties have the freedom to use counsel of their choice – foreign counsels can represent their clients before the SICC. Lastly, she also highlighted that there are some disputes which are not arbitrable, like insolvency. In such instances, SICC may be available as an option. She concluded that both systems are complementary but there may be some competition. However, in her view, the field of international commercial relations is so vast that it is a question of "*providing a buffet*" i.e. ultimately, it is up to the parties to choose between arbitration and international commercial courts.

Justice Beverley McLachlin opined that there is no competition between the two systems. She commented that arbitration is set within the context of rule of law. Every agreement specifies the applicable law to that agreement. So, in a substantive way, arbitration is dependent on the laws that have been formulated by judges in courts.

Like Justice Prakash, Dr Michael Hwang also viewed the two systems as competitors as well as complementary. He elaborated that these two systems are competitors because both aim to solve disputes arising from the same cross-border transactions. Like international arbitration, SICC also offers a neutral slate of judges hailing from different systems of law, confidentiality and flexibility of procedure.

International Commercial Court Judges acting as Arbitrators – A New Take on Double Hatting?

In the second part of the session, the panellists discussed a more nuanced aspect of the interplay between international commercial courts and arbitration. The discussion focussed on whether it is appropriate for a member of an international commercial court ("**International Judge**") to act as

an arbitrator in the jurisdiction of that court. For context, Dr Pryles set out the following two scenarios:

- first, when co-arbitrators are looking to appoint a presiding arbitrator, then is it appropriate for the co-arbitrators to approach an International Judge when they know that the court is considering an appeal from an award made by one of the co-arbitrators?
- second, would an International Judge be embarrassed to accept appointment in that court's jurisdiction knowing that that court could entertain a set-aside application of any decision / award made by the judge in the arbitration proceedings?

Justice Ma referred to the tenets of conflict of interest, actual or perceived and concluded that, in principle, there is no reason why an International Judge cannot sit as an arbitrator within the jurisdiction of that international court. But, he explained that when a non-permanent International Judge takes up an arbitrator appointment and owing to his court commitments, if he / she sits as an arbitrator after the court hours, this would appear improper. This situation, according to him, is actually a perception issue and not really a matter of conflict of interest.

On the aspect of embarrassment for an International Judge in accepting arbitral appointments, Justice McLachlin reminisced that earlier in Canada there were no separate courts of appeal. In case of an appeal, the judges would sit *enbanc* to determine that appeal. So, it was usual for judges to sit in appeal and overrule decisions made by their fellow judges, and this system was never viewed from the prism of embarrassment.

Dr Hwang, who was formerly the Chief Justice of DIFCC, explained the DIFCC policy which enjoined the judges from accepting appointments in arbitrations where the seat was in DIFC. The reason for this policy *inter alia* was to avoid any embarrassment as well as the theoretical possibility that in case of a challenge to an award seated in DIFC, one of the parties might object to the DIFCC hearing that challenge on the ground of possible conflict. Dr Hwang added that since the International Judges frequently act as arbitrators, the chance of such a challenge is quite high.

As a possible solution, Professor Boo suggested that in the Singapore context, perhaps, the judges of the domestic courts may refrain from acting as an International Judge of the SICC.

On this point, Justice Prakash clarified that it is beneficial to have International Judges bring in the additional experience, which is useful while dealing with matters of international disputes.

With more international commercial courts coming into existence, inevitably, there will be a corresponding increase in instances when International Judges end up acting as arbitrators. While this particular practice does not strictly come within the ambit of double hatting but, as articulated by the panellists, it may lead to a new discussion on double hatting in the future.

Conclusion

SIAC turned 30 in 2021. It also emerged as the most preferred arbitral institution in Asia and achieved its highest ever case load. Concurrently, Covid-19 brought the world to a grinding halt – throwing up new challenges for dispute resolution, like virtual hearings. The verdict of the plenary session is clear that arbitration is not the default mechanism for resolving all cross-border disputes. There is certainly room for international commercial courts to co-exist and flourish. Given the

rapidly changing world around us, SIAC has its work cut out in order to maintain its position as a leading global arbitral institution.

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