



THE SINGAPORE INTERNATIONAL COMMERCIAL COURT

Introduction

Singapore has been a trade bridge between the East and the West for close to 200 hundred years. It has one of the busiest ports and one of the best airports underlying its fantastic transportation links. For one of the most densely populated places on earth, the traffic flows smoothly, people get to places reliably on the metro network and there is a large number of taxis that gets you anywhere you need to be in about 10 minutes, or 20 if getting to or from the airport.

It is choc-a-bloc with quality hotels catering to various budgets. It is safe, secure, clean, has plenty of trees and the shopping is to die-for. It is a cultural hot-pot with four official languages and a staggering choice of cuisine from all over the world where a full meal can be had for less than US\$5 or if one prefers, there are many Michelin-starred delights to opt for. There are 3.6 million citizens comprising three major Asians: the Chinese, the Indians and the Malays in this tiny spot in the middle of the Malay Archipelago. The other 1.5 million residents hail from literally everywhere else in the world.

Almost everyone you encounter will speak English.

The rule of law prevails and the penchant of its citizens to follow-the-rules is legendary. It is a top venue for international arbitrations and the judiciary is recognized to be of the very highest standard. The Honourable the Chief Justice is the current Patron of the Chartered Institute of Arbitrators (CIArb).

Law of the Forum

The law, including the law of contracts, is based on the English common law that is so familiar to Commonwealth jurisdictions, but infused with pragmatic and logical flavour. Court judgments frequently survey the state of the law from diverse backgrounds including European, English, Canadian, American, Australian, Hong Kong and New Zealand before reaching a conclusion that is rational and justiciable. A recent study found that the Singapore courts considered over 1,500 foreign cases in 2013.

Decisions of the higher courts are binding on the lower courts and as such, the state of the law is clear and discernible.

The Courts

The Singapore judiciary took pioneering pro-active steps over a decade ago to increase efficiency by active case-management, an approach that has been emulated in many other jurisdictions. The use of technology and electronic filing of records is cutting-edge.

After tackling and mastering speed, attention has now been focused on costs.

High Court

The High Court Judges are of the highest calibre and experience, many of whom were commercial lawyers with a wealth of experience in cross-border transactions.

From the High Court, there is only one level of appeal to the Court of Appeal. Respect and confidence in the Court of Appeal, both domestic and international, has never been higher. If mistakes have been made in the lower courts, a common sentiment is that the Court of Appeal will get-it-right.

A large number of international litigants choose to resolve their disputes in the High Court, which embraces a benchmark timeline of 18 months from start to finish. An appeal to the Court of Appeal takes up another short 6 months or so.



Singapore International Commercial Court

As successful as international arbitration has grown, there are rumblings that some of its strengths have been turned on its head.

Justice Quentin Loh, a Senior Counsel prior to his elevation to the High Court bench, has been quoted: "There has been increasing criticism of international arbitration, that it is getting more expensive, taking longer, less transparent because of confidentiality – all this will be dealt with and disappear with a commercial court."

Further, since there is no over-arching governing body controlling international arbitrators and counsel, some disquiet over consistency, conduct and ethics has arisen. Also, arbitral awards are very difficult to overturn, even if it is wrong. While some might see this as a strength in giving finality, thwarted justice may be too high a price to pay. There is much to be said that when parties contract to refer a dispute to arbitration they intended for a right (not convenient) decision to be made.

With the launch of the Singapore International Commercial Court ("**SICC**") in 5 January 2015, there is now an additional alternative that should be considered by international litigants.

Structure

The SICC is a division of the Singapore High Court. Its proceedings are governed by the Rules of Court with key rules that differentiate its proceedings from regular High Court proceedings.

Jurisdiction

The SICC's jurisdiction can be invoked when:

- the claim in the action is of an international and commercial nature; and
- the parties to the action have submitted to the SICC's jurisdiction under a written jurisdiction agreement.

An application can be made for a pre-action certificate from the SICC stating that the case is appropriate for proceedings in the SICC.

Judges

The Judges who will sit on the SICC include 14 Singapore Judges and 12 International Judges that have been appointed to date. The 12 International Judges are:

- The Honourable Ms Carolyn Berger (United States of America), retired from the Supreme Court of Delaware in 2014;
- The Honourable Justice Patricia Bergin (Australia), Chief Judge in Equity of the Supreme Court of New South Wales;
- The Honourable Mr Roger Giles QC (Australia), Judge in the Dubai International Financial Centre Courts and formerly Judge of Appeal of the Supreme Court of New South Wales
- The Honourable Dr Irmgard Griss (Austria), Deputy Member of the Austrian Constitutional Court and formerly President of the Austrian Supreme Court

- The Honourable Justice Dominique T. Hascher (France), Judge of the Supreme Judicial Court in France
- The Honourable Mr Dyson Heydon AC QC (Australia), formerly Judge of the High Court of Australia and Judge of the New South Wales Court of Appeal
- The Honourable Sir Vivian Ramsey (United Kingdom), formerly High Court Judge (Queen's Bench Division) of the Royal Courts of Justice of England and Wales
- Mr Anselmo Reyes (Hong Kong), formerly Judge of the High Court of First Instance in Hong Kong
- The Right Honourable Sir Bernard Rix (United Kingdom), formerly Lord Justice of Appeal in the Court of Appeal of England and Wales
- Professor Yasuhei Taniguchi (Japan), Professor Emeritus at Kyoto University and formerly Member of the Appellate Body of the WTO
- Mr Simon Thorley QC (United Kingdom), formerly Deputy High Court Judge in England and Wales
- Sir Henry Bernard Eder (United Kingdom), formerly a Judge of the High Court of England and Wales

Commencement – Two Choices

Like a court action, there are two routes to commencing an action. First, the regular route of a writ of summons or, second, an expedited route of an originating summons. Proceedings in which a substantial dispute of fact is likely to arise must be begun by writ; while proceedings that do not involve substantial dispute of fact but is centred on questions of law may be begun by originating summons.

It should be noted that even under the regular track of the writ, in very clear cases, a plaintiff may opt to pursue summary judgment, which can potentially save time and costs if successful.

Procedure – Writ

In a writ action, the writ must be accompanied with a Statement of Claim. A challenge to the SICC's jurisdiction must be made within stipulated timelines. Otherwise, the defendant will be required to enter an Appearance and file a Defence (and Counterclaim) within stipulated timelines, failing either, default judgment can be recorded.

Within a stipulated timeline, the plaintiff would be required to file a Reply (and Defence to Counterclaim).

The SICC will then fix the first active Case Management Conference. The parties will be required to set out beforehand the (a) the pleadings; (b) a Case Memorandum setting out the general nature of the case and the issues which are expected to arise, preferably agreed by the parties; (c) a List of Issues, again, preferably agreed by the parties; and (d) a proposed Case Management Plan.

The Case Management Plan will set out key considerations for the conduct of the case including:

- whether specific rules of evidence are to be used (such as the IBA Rules on the Taking of Evidence in International Arbitration ("**IBA Rules**"));
- whether questions of foreign law are to be determined on the basis of submissions instead of formal expert proof;

- whether there are to be any confidentiality orders;
- whether there is to be one trial Judge or three trial Judges;
- the timelines for the production of documents (the first being for all documents that a party relies, and second for specific requests which are consistent with those of the IBA Rules);
- the number of witnesses of fact and expert witnesses;
- the respective fields of the expert witnesses and conduct of expert evidence including whether a single Court expert could suffice or even the holding of a 'hot tub' panel examination;
- estimates of costs incurred and expected costs if the matter proceeds to trial;
- the expected length of the trial; and
- the expected period during which trial may be fixed.

After all interim procedural disputes (such as injunctions, summary judgment, amendments of pleadings or requests for better information) are resolved and production of documents completed, the evidence of the parties are to be filed in the form of Affidavits of Evidence-in-Chief.

The court will then call for a Pre-Trial Case Management Conference to ensure that the matter is ready. Time-limits may be given for cross-examination and re-examination of witnesses.

The matter then proceeds to trial.

Procedure – Originating Summons

Unlike a writ action, an originating summons avoids the need for pleadings. The originating summons which contains the prayers sought is accompanied with the supporting affidavit(s). A challenge to the SICC's jurisdiction must be made within stipulated timelines. Otherwise, the defendant will be required to file a reply affidavit(s) within stipulated timelines.

If necessary, parties may request or be asked to attend a Case Management Conference, otherwise the matter proceeds to the hearing before a single-Judge.

Procedure – Appeals

An appeal from a writ action or an originating summons lies to the Court of Appeal and must be made within a stipulated timeline (one month).

The Court of Appeal may comprise a court of 1, 2, 3, or 5 Judges.

Fees

The court fees (which are inclusive of the cost of the Judges) are modest. They are:

Stage	Single-Judge (S\$)	3-Judges (S\$)
For a pre-action certificate	3,500	NA
On first filing by a party in either a writ action or originating summons	3,300	4,950
On notice of the first Case Management Conference (writ only)	3,300	6,600
On Affidavits of Evidence-in-Chief (writ only)	2,750	6,050
On being ready for trial (writ only)	1,100	2,750
On any interlocutory application (1/2 day hearing)	3,500	10,500

The fees at the Court of Appeal are:

Stage	1-Judge (S\$)	2-Judges (S\$)	3-Judges (S\$)	5-Judges (S\$)
On filing Case	NA	9,000	10,750	14,250
On any interlocutory application (1/2 day hearing)	3,500	7,000	10,500	17,500

Cost Award

The SICC will order cost awards depending on whether a party succeeds. The Singapore court cost awards almost never amount to a full indemnity. Accordingly, successful parties should only expect partial recovery of costs.

It should further be noted that cost awards are likely to be on an issues-based approach where a party that pursues an unreasonable argument may expect to receive an adverse cost consequence. This is a significant policy that was announced by the Honourable the Chief Justice at his speech during the Opening of the Legal Year 2014:

"We also expect, with greater frequency, to make costs awards based on the way major issues were decided in the case. This is already done from time to time and its greater use will bring us in line with practices in other comparable jurisdictions."

It should be noted above that during the Case Management Conference, parties are to give estimates of costs incurred and expected costs if the matter proceeds to trial. There will therefore be early transparency of the costs that each party is being charged and will be charged by their lawyers. Conceptually, parties will be discouraged from deviating from their estimates when they present their bills on cost awards, and serves to control over-inflated claims.

Enforcement

As a judicial body, it has at its disposal in Singapore the immediate enforcement mechanisms of the courts.

Although an SICC judgment is not enforceable under the New York Convention as an arbitral award, under reciprocal arrangements with the United Kingdom, Australia, New Zealand, Sri Lanka, Malaysia, Brunei, Hong Kong, Pakistan, India and Papua New Guinea, a judgment of the SICC is enforceable.

A SICC judgment may also be enforceable as a debt in many other countries.

Comment

The SICC offers a potent hybrid mix of the attractive and differentiating features of international arbitration and court litigation.

The key strengths of the SICC we identify are:

- **Confidence:** In addition to the tested and selected current and former High Court judges (the quality of their decisions are published and of public record), respected jurists from other common law and civil law jurisdictions have been appointed to sit in the SICC. There is no question that these decision-makers are impartial, possess excellent judicial temperament and are legally sound.
- **Regulated:** As the SICC is part of the High Court of Singapore, the judiciary maintains authority over its proceedings and any matter of conduct and ethics. It also means that benchmarks will be set for timelines and efficiency.
- **Justice:** The public record of its decisions and the scrutiny available by an appeal to the Court of Appeal means that the right decision will be made and the rule of law will be upheld.
- **Faster:** The case-management prowess of the Singapore courts have been married with some of the light-touch rules that is familiar in international arbitration. International arbitration-style discovery and evidentiary rules are indicated. A party may even choose the faster originating summons process to resolve a dispute where there is little factual dispute and only questions of law is posed. The foreseeable result is that proceedings will move at a good clip.
- **Cheaper Fees:** The SICC fees are published and fixed. They are undoubtedly reasonable, if not a bargain, for the anticipated quality of adjudication in comparison with the administrative fees and arbitrator fees payable in an international arbitration.
- **Lower Costs:** The efficiency of proceedings and the transparency of legal fees charged by the respective legal teams should also lead to lower legal fees.
- **Reasonable Cost Shifting:** The award of costs on a final result will also be moderated by the court and can be expected to be scrutinized and be reasonable.
- **Adding Parties:** Unlike an international arbitration which is hampered by its inability to join parties to proceedings when they have not agreed to, the SICC, like any other court, has the power and authority to join third parties into proceedings where justice requires. This overcomes arbitration situations where multiple proceedings are necessitated or Tribunals make decisions with less than a full set of relevant evidence and facts. It should be noted that

it is not a requirement that the third party sign a jurisdiction agreement and neither is it a requirement that the claim involving the third party be international or commercial in nature.

- **Discovery:** The discovery requirements avoids the excesses and expense of US or UK-style discovery and adopts the best of international practice.
- **Confidential:** In line with international arbitration, parties are expressly given the option of seeking to make proceedings confidential and conducted out of the public eye. When decisions are published, it is expected that names and identifying indicia can be redacted to preserve the confidentiality granted. Without the confidential cover, the record of proceedings will be available for public inspection.
- **Foreign Counsel:** Unlike regular litigation where foreign law needs to be formally proven by expert evidence, upon qualification foreign counsel can be allowed to join the legal team to submit on foreign law. Further, where Singapore law plays no part in the dispute, or where the only Singapore connection is the choice of Singapore law and use of the SICC, a party may seek to be represented entirely by foreign registered lawyers.

Model Clause

If parties wish to provide for dispute resolution at the SICC in its contracts, the following clauses can be used:

- (a) **Governing Law.** This Agreement shall be governed by and construed in accordance with the laws of [*state a jurisdiction*]. Sub-clauses (b)-(c) below form a separate and distinct agreement from the rest of this Agreement. [*If a law other than Singapore law is selection, add: Notwithstanding the governing law of this Agreement, sub-clauses (b)-(c) below shall be governed by and construed in accordance with the laws of Singapore.*]
- (b) **Jurisdiction.** With respect to any suit, action or proceedings relating to any dispute arising out of or in connection with this Agreement including any dispute arising out of or in connection with the negotiation, validity or enforceability of this Agreement, this sub-clause, sub-clauses (a) and/or (c) ("**Proceedings**"), each party irrevocably:-
- (i) submits to the [exclusive/non-exclusive]* jurisdiction of the Singapore International Commercial Court ("**SICC**");
 - (ii) waives any objection which it may have at any time to the laying of the physical venue of such Proceedings;
 - (iii) waives the right to object, with respect to such Proceedings, that the SICC does not have any jurisdiction over the relevant party;
 - (iv) waives any objection to the SICC assuming jurisdiction over such Proceedings on the ground that the dispute between the parties is connected to a jurisdiction other than Singapore; and agrees, to the extent permitted by applicable law, that the bringing of Proceedings in any one or more jurisdictions shall not preclude the bringing of Proceedings in the SICC.
- (c) **Compliance with Orders.** With respect to Proceedings brought in the SICC, each party irrevocably:-
- (i) agrees to carry out and to take any step necessary to carry out any judgment or order of the SICC without undue delay;
 - (ii) waives any recourse to any court or tribunal outside Singapore against any judgment or order of the SICC, and against the recognition or enforcement of such judgment or order, insofar as such recourse can be validly waived; and



(iii) agrees to submit, for the purposes related to or connected with the recognition or enforcement of any judgment or order of the SICC, to the jurisdiction of the following courts and tribunals outside Singapore:

a. *[list all jurisdictions as are appropriate].*

b.

For the avoidance of doubt, nothing in this clause shall be construed to mean that any party expressly and/or impliedly intends or agrees to exclude, for the purposes related to or connected with the recognition or enforcement of any judgment or order of the SICC, the jurisdiction of any court or tribunal not specified herein.

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