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The SICC as a dispute resolution option in BRI disputes

Address by Sir Bernard Rix, International Judge, SICC, at the “Belt and Road Investment Disputes: The International Legal Landscape for Chinese Investors and Counterparties” seminar on 9 May 2018



Infrastructure and construction projects have traditionally been meat and drink for international arbitration as a medium for dispute resolution. That, of course, is a given. However, and particularly in the context of the Belt and Road Initiative (BRI), it could be worth looking at the Singapore International Commercial Court (SICC).

Let me list some of the factors which can be taken into account.

First, the SICC possesses some of the virtues of arbitration:

- it offers the flexibility of foreign counsel representation,
- a flexible and modern procedure which the parties have the ability to mould to their own wishes,
- among the most technologically-modern of any courts in the world,
- English language as the unifying language of international trade, and
- the availability of a tribunal which, either when selected by the parties or assigned by the Court, sits in panels of three – the three-person panel, as in arbitration, facilitates careful and balanced analysis and fact-finding and has the ability to render appeals less likely.

The important factor of disclosure is among the considerations which fall into the context of procedure. The SICC has done away with general disclosure as a given, and is willing to adopt an arbitral-style request-driven disclosure system based for instance on the IBA Guidelines. The phrase “**arbitration in litigation**” has been used by some to describe the process.

Second, SICC jurisdiction offers advantages which are not available in arbitration. It depends, of course, on what you want. High on the list under this heading is the availability in court of multi-party and multi-contract proceedings. **Notoriously, arbitration does not do the multi-party and multi-contract bit well; but the Court does.** This is perhaps particularly relevant to infrastructure and construction disputes, given the multiplicity of contractors and sub-contractors involved. Quite apart from the sub-contractors involved in the actual construction work itself, disputes so often involve consultants who are fundamental to the design of the work, as well as banks and insurers. The SICC does this problem of unifying the dispute process well; arbitration does it poorly.

Third, there are considerations which are common to arbitration and court processes, but where the SICC may be able to do it better – particularly costs and delays. The Court can manage the control of both perhaps better than arbitration can. I think it is probably widely appreciated these days that arbitration has if anything become more expensive than litigation. It is in general not much faster, and in many cases, slower.

Fourth, there are factors which reflect a positive choice of virtues or vices. Thus, is confidentiality a virtue or a vice of arbitration? There is a growing controversy about this. Perhaps transparency is the greater virtue, assuring the long term legitimacy and accountability of arbitration, without which it will be wounded. At any rate,

even in the immediate position, one virtue of litigation is that the work product of it – the judgment – is available, and provides greater certainty and predictability to all concerned in the infrastructure industry, with its standard forms of contract and standard terms.

Another example of this positive choice between virtues and vices is the question of appeal. Arbitration on the whole does not do appeals. The SICC offers the possibility of appeal, but only one level of appeal – Singapore’s highest court, the Court of Appeal – where SICC International Judges may sit. An appeal, with its authoritative settling of issues of law, can be a significant advantage; but it depends on what you want. In prospect, an appeal may be thought of as trespassing upon finality. But in retrospect, many losers want to test a significant legal issue on appeal, and regret the loss of the opportunity to do so. **An appeal, or at least the potential availability of one, can lend legitimacy to the process as a whole.**

In this connection, I raise the intriguing question of what happens when you have a three-judge panel at first instance. Do you have a five-judge panel on appeal? Well, that could be available. But I might point out that in an SICC appeal from a three-judge panel which took place on 7 May 2018, the appeal panel was itself made up of three judges, but three chief justices or their equivalent: thus the Court of Appeal comprised Chief Justice Sundaresh Menon, ex-Chief Justice of Canada, Justice Beverly McLachlin PC, and ex-President of the UK Supreme Court, Justice Lord Neuberger of Abbotsbury. There cannot be many courts in the world that can muster that sort of roster!

Fifth, on the subject of enforcement, I would observe that most large-scale infrastructure projects involve reputable companies which could not operate if they did not meet their obligations, whether in the form of awards or judgments. Moreover, Singapore has achieved an importance in this part of the world which would make most companies anxious not to be a defaulter here. In any event, it can be observed that there is recent precedent for the enforcement of a Singapore High Court judgment in China: by the Nanjing Intermediate People’s Court in December 2016. Even more importantly, the Nanjing Court’s enforcement was endorsed and listed by the Supreme People’s Court of China in May 2017 as

an example among other Chinese judgments of how China is responding in the context of BRI to the need for international judicial recognition.

Sixth and lastly, I can mention the significance of Singapore itself, which is perhaps more easily done by an outsider. **Particularly in BRI terms, Singapore is well-positioned for the role of an efficient neutral forum.** It is, after all, geographically close to where the infrastructure is being built. The difficulties of distant time zones are mitigated. Moreover, Singapore is well-endowed with excellent lawyers, highly-experienced in construction and in project finance, and is also well-endowed with all other service providers who might be necessary to participation in BRI litigation, such as experts of all kinds, engineers, bankers and insurers. And I will close by mentioning also the growing judicial conferencing which has been developing in the last year between senior figures of Singapore and China. There were exchanges in June 2017 at the Nanning Forum, then in Beijing for the inaugural Singapore-China Legal and Judicial Roundtable in August 2017, where an MOU on judicial cooperation was signed by the nations’ respective Chief Justices, and further in November 2017 at the 2nd Qianhai Legal Intelligence Forum.

And here I will leave my brief remarks with the thought that the SICC is an ideal dispute resolution option in BRI disputes. Thank you for your kind attention.



The above presentation was given at a seminar organised by 20 Essex Street. It focused on potential disputes that may arise from the BRI, and the various dispute resolution options that are available and suitable.



Revision to SICC Model Clauses

For greater clarity, the SICC has (on 7 June 2018) refined the existing model clauses for pre-dispute submission to jurisdiction, by setting an exclusive jurisdiction clause as a default. Parties may also consider a non-exclusive jurisdiction clause, although they may not be able to avail themselves of the benefits under the Hague Convention on Choice of Court Agreements – these would include the judgment recognition and enforcement framework provided.

You may view the updated model clauses here: http://www.sicc.gov.sg/docs/default-source/guide-to-the-sicc/sicc_model_clauses.pdf



Update to the Note of Enforcement of SICC Judgments

The Note of Enforcement of SICC Judgments, which is found on the SICC website, has been updated and highlights four modes by which SICC judgments may be enforced. They are enforcement under the Hague Convention on Choice of Court Agreements, enforcement under the common law cause of action on a debt, enforcement under a civil law procedure and enforcement by way of registration, pursuant to a bilateral treaty. This updated Note of Enforcement gives a new perspective on the enforceability of SICC judgments.

You may view the Note of Enforcement here: https://www.sicc.gov.sg/docs/default-source/guide-to-the-sicc/sicc_enforcement_guide.pdf

Justice Kannan Ramesh Speaks in Qatar Conference

On 13 May, the Qatar University College of Law, in cooperation with the Qatar International Court and Dispute Resolution Centre, held a conference on “The Rise of International Courts” in Doha. The conference covered several topics ranging from the history of commercial courts to various court procedures used. Justice Kannan Ramesh, a Singapore High Court Judge and also Judge of the SICC, delivered the second keynote address. His illuminating address was on the role of international commercial courts in influencing the wider business culture.

Titled “International Commercial Courts: Unicorns on a Journey of a Thousand Miles”, he made the case for the harmonisation of commercial law and how that will be advantageous to the commercial world “where transnational businesses know with clarity what their legal standing, entitlements and responsibilities are for transactions they are undertaking, regardless of where they may transact or where they may eventually litigate disputes or restructure economic issues”. Justice Ramesh shared that the future is looking bright in this area as 29 courts from 21 countries met in London last year for the inaugural Standing International Forum of Commercial Courts, and it was fruitful in that the courts were willing to collaborate further with concrete plans already lined up.

He further highlighted the advantages of international commercial courts, using the SICC as an example. The SICC is truly international, not just in the type of matters it hears, but also its Bench which consists of eminent Singapore and international jurists. Another key feature is that parties may be represented by foreign counsel if they choose to. Foreign lawyers only need to register with the Court and comply with the stated requirements.

“Hence, litigants can be assured that there will be an SICC Judge who has the relevant expertise to appreciate the context and decide the dispute, and a lawyer best suited to represent their interests.”



Justice Ramesh presenting at the SICC Conference 2018 in January

Justice Ramesh emphasised the customisability of the SICC due to its flexibility of procedures. For example, if parties agree to apply rules found in foreign law instead of Singapore rules of evidence, the SICC will allow for it. And while court hearings are usually open, the SICC may also “make the necessary orders to preserve the confidentiality of the proceedings” so as to protect parties’ commercially-sensitive interests.

He concluded his address with the enforceability of SICC judgments. He outlined the various instruments available that recognise the Court’s judgments, ranging from formal agreements like The Hague Convention on Choice of Court Agreements to enforcement based on the principle of reciprocity, notably with China. While commercial courts presently do not have the absolute numbers of the New York Convention, they do not necessarily pale in comparison. Much like arbitration is a consensual dispute resolution process, the SICC also requires parties to consent to jurisdiction. Justice Ramesh added: “Given that consent underpins jurisdiction, as in arbitration, I see no reason why decisions of commercial courts should carry a different outcome. Indeed, I would expect judgments of international commercial courts to be even more respected and therefore more readily honoured.”

An Afternoon with Academia from the Philippines



On 13 April, three representatives from the De La Salle University in Manila, Philippines, visited the SICC to understand more about its features and benefits to the region’s commercial community. They wanted to better inform their students of Commercial Law in the School of Business about the Court as an effective dispute resolution option, especially in the context of the ASEAN Economic Community. The delegation, led by Dr Jocelyn P. Cruz, Chair of the Department, learnt about SICC’s flexible procedures that were akin to arbitration’s, yet offered the availability of appeal and joining of related parties in multi-party/multi-contract situations.

In-house Counsel Worldwide Summit 2018



IJ Anselmo Reyes (seated on extreme right) shared about how the SICC complements arbitration in the dispute resolution sphere.

The biennial In-house Counsel Worldwide (ICW) Summit was held in Toronto, Canada, from 29 April to 1 May in conjunction with the Annual Conference of the Canadian Corporate Counsel Association. Themed “Beyond Borders: Business and Law in the Global Village”, the three-day event saw close to 400 attendees from around the world. The SICC participated in a panel discussion titled “Beyond Conventionality: Knowing Your Options in Dispute Resolution”, with IJ Anselmo Reyes as one of five panellists. He expounded on the SICC’s attributes that embody the “arbitration in litigation” concept, allowing parties flexibility in the procedures



IJ Beverley McLachlin (third from left) joined IJ Reyes and three senior committee members of the SCCA (from right) at the Summit, which was held at her home ground.

yet with litigation advantages such as confidentiality in proceedings and a Court-appointed tribunal. Recently-appointed IJ Beverley McLachlin was also present at the Summit. “SICC’s presence in two consecutive ICW Summits speaks well of its positive reception among major corporations around the world. Having both Justice Anselmo Reyes and Justice Beverley McLachlin present served as further testament to the Court’s credibility,” said Wong Taur Jiun (extreme right in above photo), President of the Singapore Corporate Counsel Association (SCCA).

Fruitful Exchanges with Chinese Legal Representatives

Endorsed by the Supreme People’s Court of China, the Benchmark Chambers International (BCI) is a non-profit organisation that is building an informational database meant to serve Chinese businesses involved in the Belt and Road Initiative, in addition to several other services. The Vice President of BCI, Mr Li Leiming (third from right in the photo), together with two representatives, visited the SICC and were intrigued by many of its features, such as having case management conferences prior to hearings and the use of video conference technology to conduct them for the convenience of parties based outside Singapore.

The Vice President of the People’s Republic of China’s National Judges College, Ms Feng Wenli, led a delegation of six to visit the Supreme Court of Singapore, including the SICC. The SICC outlined its various attributes



like allowing for foreign representation and doing away with general discovery for document production that make it one-of-its-kind in court-based dispute resolution in the world. Such visits allow for valuable knowledge exchanges and facilitate greater collaboration to further the quality of the judiciary in our respective countries.



Latest Judgments

The SICC has issued 24 written judgments to date. A full list of these judgments maybe accessed at <http://www.sicc.gov.sg/hearings-judgments/judgments>.

[4 May 2018] Judgment on Macquarie Bank Ltd v Graceland Industry Pte Ltd [2018] SGHC(I) 05: <http://goo.gl/sXWG3p>



Registered Foreign Lawyers

As at 31 May 2018, the SICC has 77 registered foreign lawyers (RFLs) on its register. Foreign lawyers are welcome to apply to be registered with the SICC. To view the full list of RFLs and find out more about registration, please visit <http://www.sicc.gov.sg/registration-of-foreign-lawyers>