

Consider Litigating in Singapore for International Commercial Disputes

(An edited extract of International Judge Sir Bernard Rix's speech at the IBA 6th Asia Pacific Regional Forum Biennial Conference on 28 February 2019. This was part of the Plenary Session titled "Shall we arbitrate or mediate and where?".)



To the question "arbitrate or mediate?", I would generally say "mediate", because it is better to leave a dispute with a handshake than to suffer the twin imposters of victory or defeat in arbitration.

But, I have been invited here as a judge of the Singapore International Commercial Court (SICC), so I will share about Singapore as a regional dispute resolution centre in Asia.

There are at least three international dispute resolution tribunals in Singapore which offer a choice between arbitration, mediation – and litigation!

For arbitration, there is the well-regarded Singapore International Arbitration Centre, and for mediation, the Singapore International Mediation Centre. The SICC is the newest, established in 2015.

Whilst a court, the SICC has been designed to be as independent as possible of domestic characteristics; it has even been called "arbitration in litigation". Let me then suggest that if you do not want to mediate, and prefer to arbitrate, you can consider litigating in the SICC instead.

First, the SICC possesses some of the virtues of arbitration: it offers the option of foreign counsel representation without the need to register with the Singapore Bar, a set of flexible and modern procedures which parties have the ability to mould to their own wishes, and is one of the most technologically modern courts in the world. The availability of a tribunal which, although not selectable by parties, comprises judges from Singapore and international judges from civil and common law jurisdictions, and who are available to sit 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 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.

Second, SICC offers advantages which are not available in arbitration. High on the list is the availability in court of multi-party and multi-contract proceedings. This is 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 contractors who are fundamental to the design of the work, as well as banks and insurers. Courts unify the dispute process well, while arbitration does it poorly.

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Sir Bernard Rix is one of 16 international judges (IJs) of the SICC. Together with our Singapore High Court bench, the IJs form a diverse and experienced panel of specialist commercial judges. Moreover, they come from both civil law and common law traditions. To find out more about our judges, visit <https://www.sicc.gov.sg/about-the-sicc/judges>.

Third, the SICC manages the control of cost and delay better than arbitration. It is probably widely appreciated these days that arbitration has become more expensive than litigation, and in many cases slower too.

Fourth, there are factors which reflect a positive choice of virtues or vices. Thus, is confidentiality a virtue or a vice of arbitration? Perhaps transparency is the greater virtue, assuring the long-term legitimacy and responsibility of arbitration, without which it will be wounded. One virtue of litigation is that the judgment is available, and provides greater certainty and predictability, especially where standard forms of contract and standard terms are concerned.

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 to Singapore’s highest court—the Court of Appeal, where SICC judges can sit. An appeal, with its authoritative settling of issues of law, can be a significant advantage. 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.

Fifth, on the subject of enforcement, I observe that many international disputes 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 Asia which would make most companies anxious not to be a defaulter there. In any event, 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 The People’s Republic of China in May 2017 as a reference judgment of how China is responding in the context of the Belt & Road Initiative to the need for international judicial recognition. There are also many treaties of which Singapore is a party to for the mutual enforcement of judgments, such as the Hague Convention on Choice of Court Agreements which applies to the European Union as a whole.

Lastly, 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 who are highly experienced in all forms of international business and in project finance. It is also home to all the other service providers who might be necessary to international business, such as engineers, bankers and insurers.

So, in sum, arbitrate or mediate? Mediate, because mutual settlement is best. But, if you must dispute, then why not litigate in Singapore? 5

NEWS

A First Fresh Filing of its Kind to the SICC

The SICC has received its first fresh filing of an application to set aside certain parts of an arbitral award. This comes in the wake of the amendments to Section 18D of the Supreme Court of Judicature Act Cap. 322, which came into effect on 1 November 2018. Section 18D(2) of the Act gives the SICC jurisdiction to hear “any proceedings relating to international commercial arbitration that the High Court may hear and that satisfy such conditions as the Rules of Court may prescribe”.

As with all cases heard in the SICC, this application would be heard by a coram drawn from a distinguished panel of Singapore High Court judges and eminent international judges. 5



SICC OUT & ABOUT

As an international commercial court, the SICC is always looking for ways to extend its reach, beyond the shores of Singapore. And it is even more heartening when there are respected legal professionals who are able to speak about and on behalf of the Court.

Senior Counsel Speaks on the SICC in New York

Mr Chan Leng Sun SC, Advocate at Essex Court Chambers Duxton, was in New York on 7 February, to give a lecture hosted by the Center for International Commercial & Investment Arbitration, Columbia Law School. As a member of the SICC Committee that put forth recommendations to set up the Court, Mr Chan shared on the rationale for setting up the SICC and its unique features. The lecture was attended by the Center Director, LLM and JD candidates, and several practitioners, and they learnt about the SICC's offerings like judicial independence, possibility of appeal, published judgments, and the ability to join third and related parties.

Said Mr Chan after the lecture: "The SICC is a hybrid system, rooted in a modern and trusted judiciary but incorporating practices from arbitration that make it more than just a domestic court. Moreover, it bypasses some of the more archaic rules of evidence, for example by allowing foreign law to be admitted through submissions instead of expert testimony."



Taniguchi IJ Represents the SICC in Japan

The Singapore Ministry of Law and the Japan Association of Arbitrators, together with Maxwell Chambers in Singapore and the Japan International Dispute Resolution Centre, organised the Japan-Singapore International Legal and Dispute Resolution Conference on 12 March in Tokyo, Japan. About 250 government officials, practitioners, in-house counsel and more gathered to hear from speakers about navigating the complexities of the global and Asian marketplace and how dispute resolution institutions can meet the needs of Japanese and Singapore businesses.

International Judge (IJ) of the SICC, Prof Yasuhei Taniguchi, a well-respected academic and legal professional in Japan, spoke at the Conference. He highlighted that the formation of SICC's international judiciary was an unprecedented step, and added that four Japanese lawyers are presently registered with the Court and may represent parties depending on the nature of the dispute. Prof Taniguchi also mentioned that SICC judgments may be enforced in Japan as the Tokyo District Court had previously enforced a Singapore High Court judgment in 2006.

The SICC hosts visits from foreign delegates regularly, as well as presents at conferences and seminars in Singapore. The SICC Development team often seeks opportunities to feature the Court at various legal and corporate platforms.

Venturing into the Derivatives Market

On 21 February, the International Swaps and Derivatives Association, Inc. (ISDA) organised a conference in Singapore titled "Derivatives Disputes: Litigating and Arbitrating the ISDA Master Agreements". Assistant Registrar of the Supreme Court of Singapore, Mr Colin Seow, expounded on the SICC's unique features such as the option for foreign representation where foreign parties can retain their foreign counsel to act for them in the Court, without the need to instruct new lawyers.

He concluded by sharing a SICC case that involved a contract based on an ISDA Master Agreement – *Macquarie Bank Ltd v Graceland Industry Pte Ltd*. The case exemplified the SICC's strengths in its effective and efficient case management, with the 100-page judgment rendered within two months. The judgment also set out several useful points of guidance relating to ISDA Master Agreements.

Visit <https://bit.ly/2uLc1iP> to read the above-mentioned judgment.



SICC OUT & ABOUT

SICC Presents at the Singapore Cooperation Programme

A group of 29 government and judicial officials from countries around the world, including Bhutan, Tanzania and Ukraine, came to Singapore under the Singapore Cooperation Programme run by the Ministry of Foreign Affairs. They were in town from 4 to 8 March, and learnt about the three key dispute resolution options – arbitration, litigation and mediation.

For litigation, besides visiting the SICC and getting acquainted with the various technologies used in the court room, the SICC Development team also shared the Court's unique features that set it apart from arbitration and mediation. The participants learnt about SICC's flexible procedures like the option to apply for confidentiality orders and the ability to adopt rules of evidence that parties are more familiar with.



Visit by Guangdong Lawyers Association

More than 20 lawyers from the Guangdong Lawyers Association were in Singapore for an exchange programme organised by the Law Society of Singapore. Besides being attached to Singapore law firms, the lawyers were also acquainted with the Singapore legal system and law practices. On 12 March, they visited the SICC and learnt of the Court's advantages. Besides the traditional benefits of the court system like the availability of appeal as well as published judgments, the SICC also allows for a party to proceedings to be represented by foreign counsel who are registered with the Court. ⑤

Enforcement of SICC Judgments

SICC judgments are enforceable in many jurisdictions, both civil and common law. You may access a Note on enforcement of SICC judgments here: <https://bit.ly/2YEshWJ>

SICC Model Clauses

The SICC has model clauses available, including clauses for submission of disputes to the jurisdiction of the SICC (both pre- and post-dispute) and in relation to the parties' rights of appeal. You may view them here: https://www.sicc.gov.sg/docs/default-source/guide-to-the-sicc/sicc_model_clauses.pdf

Registered Foreign Lawyers

As at 15 April 2019, the SICC has 85 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 www.sicc.gov.sg/registration-of-foreign-lawyers/foreign-lawyers

Latest Judgments

12 March 2019

Kiri Industries Ltd v Senda International Capital Ltd and Anor [2019] SGHC(I) 02: <https://bit.ly/2TQ64v1>

14 March 2019

B2C2 Ltd v Quoine Pte Ltd [2019] SGHC(I) 03: <https://bit.ly/2U87G8p>

12 April 2019

Malayan Banking Bhd v Barclays Bank PLC [2019] SGHC(I) 04: <https://bit.ly/2INpoHn>

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