

## SICC NEWS

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## International Dispute Resolution Courts: Retreat or Advance?

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(The following are summarised excerpts from Lucy Reed's John E.C. Brierley Memorial Lecture, "International Dispute Resolution Courts: Retreat or Advance?", delivered at the McGill University Faculty of Law in Montreal, Canada, on 11 September 2017.)

My thesis is that international businesses expect and deserve a wide choice of first-class dispute resolution mechanisms. Where there are first-class domestic courts suitable for cross-border disputes, the parties are free to choose them. Where the local courts are not up to high standards, the parties will continue to use international commercial arbitration. For investment treaty disputes, we have to be prepared to accept the new "Investment Court System", and also, we should be open to existing and new hybrids of domestic international commercial courts.

Let me first address – and put aside – the threat of taking more international commercial disputes to "regular" domestic courts to escape the flaws of international commercial arbitration. International arbitration can and should trump "regular" domestic courts for most international commercial disputes.

But, why is there a stubborn contingent – the new Calvo-ists – who would retreat from international arbitration to domestic courts? And, no doubt, much of the attraction of an "Investment Court System" lies in its similarity to domestic courts.

Why not consider the hybrid of domestic international commercial courts? Such courts are part of the municipal legal order, with their international profile coming from their case load, bench, bar and/or rules.

To start, what are the desirable traits of an international commercial court? Sir William Blair, in Charge of the London Commercial Court, has presented a compelling list of what users desire from international commercial dispute resolution: (1) certainty; (2) accessibility; (3) predictability; (4) transparency; (5) independence; (6) experience and expertise of the tribunal; (7) efficient case management; and (8) effective outcome.

This list grows longer when we look at international commercial courts, particularly with those already up-and-running.

First and foremost is the London Commercial Court, established in 1895. V.K. Rajah, SC, among many, attributes the London Commercial Court's success to "the global standing of English commercial law, the fairness and consistency of English judges, and the ready access to quality representation in London".<sup>1</sup> Who can disagree? But is it an international court, as we know the world post-1895, post-1945, post-2008? With due respect, I think not. Despite its welcomed international outlook, this is meant to be and is an English court, with English judges, with

1 V.K. Rajah, SC, "W(h)ither adversarial commercial dispute resolution?", 33 *Arbitration International* 17, 26 (2017).

English procedure, requiring English counsel, in London. I submit it is not the best model for all, and not for Asia.

There is also a suite of international commercial courts in the Gulf, in Dubai, Qatar and Abu Dhabi. Given that all three are driven by their host governments' business attraction strategies, and English common law-based, are they really *international* commercial courts? Again, I think not. There are other recent initiatives, and even a "Standing International Forum of Commercial Courts".

Will a panoply of international commercial courts be effective? It is too soon to tell. It is not too soon to tell that the competition for cases is fearsome. I would not put my money on the chances of success for so many courts, because there are countless international arbitration centres with little to do except market.

***I would put my money on the Singapore International Commercial Court (SICC), if only because Singapore has succeeded so brilliantly with Maxwell Chambers, with Singapore International Arbitration Centre (SIAC), with the Singapore International Mediation Centre (SIMC).*** Singapore has invested substantial funds and talent towards becoming the leading international dispute resolution centre in Asia, and one of the best globally.

While many of us have been caught up in the Arbitration-vs-Courts-vs-Investment Courts debate, the SICC has quietly been going about its business. And it has started to fulfil ambitions far broader than the London Commercial Court or other courts.

The bench consists of Singapore High Court and Court of Appeal judges, and international judges from civil and common law jurisdictions. This civil-common law makeup is more than window-dressing given that, as reported by Chief Justice Menon, 36% of SIAC's cases involve parties with a civil law background.<sup>2</sup>

The SICC also welcomes properly-qualified foreign lawyers, which is reflected in the broad definition (on paper) "offshore cases". Nonetheless, in their comments on the legislation, foreign lawyers voiced concerns that the SICC would interpret the concept of "offshore case" narrowly, to protect the High Court bar. This has not happened.

By September 2017, the Court had rendered 13 judgments and the Court of Appeal had decided its first appeal. Overall, they are encouraging to Singaporean and foreign parties and counsel alike.

In the first judgment in *BCBC Singapore v Bayan Resources TBK*,<sup>3</sup> a mixed bench offered insights into how the Court would determine questions of foreign law and permit foreign lawyers to appear. In *Teras Offshore Pte Ltd v Teras Cargo Transport (America) LLC*, International Judge (IJ) Sir Bernard Eder construed the "off-shore" case test broadly, finding that the dispute did not have a substantial connection with Singapore.<sup>4</sup> In the *Telemidia Pacific Group and the Yuanta Asset Management International Group* cases, the losing Hong Kong

defendants applied for a stay of execution on grounds (in part) that they risked non-recovery after appeal because the plaintiffs were not Singapore residents. IJ Patricia Bergin dismissed the application, with the pointed finding that: "if parties embrace the jurisdiction of an International Court to determine their dispute, there should be little force in a claim that seeks to rely upon the international status of one or other of the parties to claim that the orders of the Court should not be enforced".<sup>5</sup>

Even a brief review of early SICC cases prompts additions to Judge Blair's list of legitimacy factors for international commercial dispute resolution. These include: (1) public interest in public justice; (2) the safety net of appellate review of legal issues; (3) accountability of full-time judges; (4) independence of full-time judges; (5) coercive power; (6) joinder and consolidation power; (7) freedom of choice of party representation; (8) known ethics standards for counsel and judges; and (9) a flexible approach to procedure, evidence, and case management.

***What about enforcement of SICC judgments? Leaving rogue states and claimants aside, the reality is that business-to-business parties generally comply with judgments and awards. As for the outliers, hard experience shows they can and will evade enforcement despite the New York Convention. The 2015 Hague Convention on Choice of Court Clauses potentially is a game-changer; the more inclusive the Convention is, the more attractive the SICC may become.***

The path forward? I predict a slow-but-steady stream of cases for the SICC. The jurisprudence will grow. We will learn just how problematic enforcement of judgments proves to be. Depending on such developments – and business growth in Asia – parties will begin to put SICC clauses in contracts.

To conclude, I repeat my submission that there is room for first-class international commercial courts. The courts' mission, as articulated by Chief Justice Menon, will be "to build a trustworthy, competent and commercially sensible system to resolve transnational commercial disputes ... [and] function alongside arbitration and fill a gap in the suite of transnational dispute resolution mechanisms".<sup>6</sup> The courts' constituency will be the subgroup of transnational parties that requires or prefers: appellate rights; permanent rather than ad hoc judges; general transparency, and the related development of commercial jurisprudence that generally public proceedings allow; and, representation by ethical counsel of their choice.

To date, the SICC stands out as the uniquely genuinely international choice.

Please visit [www.sicc.gov.sg/Media.aspx?id=92](http://www.sicc.gov.sg/Media.aspx?id=92) to access the full Lecture.

2 Sundaresh Menon, "International Commercial Courts: Towards a Transnational System of Dispute Resolution", Opening Lecture for the DIFC Courts Lecture Series 2015, at 18.

3 *BCBC Singapore Pte Ltd v PT Bayan Resources TBK* [2016] SGHC (I) 01.

4 *Teras Offshore Pte Ltd v Teras Cargo Transport (America) LLC* [2016] SGHC (I) 02.

5 *Telemidia Pacific Group and Another v Yuanta Asset Management International Limited and Another* [2017] SGHC (I) 03 at [32].

6 Note 2, Menon at 42.

## Meet Nathan Pillow QC, a Registered Foreign Lawyer of the SICC



*By Nathan Pillow QC, Barrister, Essex Court Chambers*

I first learnt about the SICC from my involvement in the Singapore legal services market, as an English barrister involved in international commercial arbitration. The plans for the SICC, and its creation and development, have been important

news for practitioners of international commercial dispute resolution in the region and beyond.

I decided to register, and now regularly renew my registration, as a Registered Foreign Lawyer (RFL) in the SICC because it is a natural extension of and complement to my practice as an international dispute resolution specialist with a common law background. It enables me to offer my legal services to international clients who might prefer to have their disputes resolved in a neutral court venue, while providing me with opportunities to visit and work in Singapore, which I always enjoy greatly.

***For me, the SICC's principal benefit and unique selling point is its combination of state-backed, well-developed and highly trusted legal authority alongside a flexible, party-led and international approach to commercial dispute resolution.*** The SICC combines the benefits of the excellent reputation of the Singapore legal system and its jurisprudence, with Singapore's role as the regional centre of trade and a well-established neutral venue for international commercial dispute reso-

lution. With its impressive cadre of International Judges, who bring high-level commercial judicial experience from around the world, the SICC's offering is unusual yet attractive for parties engaged in international trade - and their lawyers.

***Whenever it is relevant and appropriate, I remind clients (and colleagues) of the possibility – and potential benefits – of considering an SICC jurisdiction clause in their commercial agreements; or making an ad hoc agreement to take an existing or brewing dispute to the SICC.*** I particularly highlight the benefits of the rigour, structure and certainty that the Singapore court system can bring to the resolution of commercial disputes; as well as the advantages of its transparent and developed jurisprudence – including the opportunity to appeal to a higher court where necessary (as well as the right of the parties to agree to exclude or restrict appeals, if that is what they prefer).

As testament to the above-mentioned attributes of the SICC, the first case (BCBC Singapore v PT Bayan Resources) to proceed in the SICC and to reach a judgment after trial provides a good example of how the SICC combines the authority and control of a national court with the flexibility accorded to commercial parties to agree or influence the way in which their commercial dispute is managed and resolved. The phased approach to the litigation has enabled the case to proceed in “tranches” before a three-judge panel, making it streamlined and cost-efficient - as well as enabling the parties to consider their commercial positions in light of the judgment on each tranche, rather than waiting for an all-or-nothing outcome at the end of what could otherwise be a very long and costly single trial.

Although it will inevitably take time for SICC jurisdiction clauses in commercial contracts to feed through into litigation, I hope that the SICC will become a destination of choice for commercial parties with international commercial disputes, including those with no other connection to Singapore, who want a trusted neutral venue that combines the authority and transparency of a court system with many of the benefits of international arbitration (such as flexibility, an avowedly international approach, and multi-judge panels).

### Registered Foreign Lawyers

As at 30 November 2017, the SICC has 73 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/ForeignLawyer.aspx?id=101](http://www.sicc.gov.sg/ForeignLawyer.aspx?id=101)

From November 2017, a foreign lawyer on the SICC Register of Foreign Lawyers who is registered under section 36P of the Legal Professions Act (Cap 161) is exempted from the requirement of having a valid work pass, subject to the fulfilment of several conditions. Please visit [www.sicc.gov.sg/ForeignLawyer.aspx?id=101](http://www.sicc.gov.sg/ForeignLawyer.aspx?id=101) for more details.

## Exchange of Letters between the SICC and Keio University Law School

Recognising the value of cooperation to enhance the understanding of different legal systems, traditions and practices, the SICC and the Keio University Law School (KLS) signed an Exchange of Letters on Student Attachment Opportunities on 27 October 2017. Outlined in this agreement, the SICC may select up to two suitable student candidates undertaking KLS' master's degree programme in Global Legal Practice for attachment to the SICC for no more than two weeks. The students could observe and study court proceedings in the SICC, and meet the judiciary involved in the SICC, amongst other matters. This collaboration will further SICC's bond with the Japanese academia, which is a key pillar of the country's legal infrastructure.



### SICC Out & About

## Making Inroads in Singapore and Beyond

*SICC continues to attract the interest of judiciary, academia and legal professionals, not just from within Singapore but from various parts of Asia as well.*



### A Presentation to the Tokyo Bar

Technology made cross-border communication possible on 14 September when some members of the Tokyo Bar watched a pre-recorded SICC presentation in Tokyo, Japan. SICC's International Judge, Professor Yasuhei Taniguchi, was also in attendance to lend his support and to shed more light on the SICC's attributes. Mr Teruo Kato, an attorney who facilitated this event and also a strong supporter of the SICC, shared that the presentation was well-received. "I hope we will be able to organise similar events to build more awareness within the Japanese legal community. The SICC, with its ability to appeal and to join related parties, amongst other advantages, is an attractive dispute resolution solution," he said.

### SICC Meets Delegation from Kazakhstan

On 15 September, the Governor of Astana International Finance Centre (AIFC), Mr Kairat Kelimbetov led a five-member delegation to the SICC. The visit was timely as the AIFC is scheduled to be launched in January 2018, and will operate on the basis of Common Law. The presentation on the SICC sparked off an engaging and fruitful discussion about the SICC's unique features. Mr Kelimbetov was especially interested in SICC's panel of international judges and how they are appointed. The meeting ended with a possibility of future collaborations between the SICC and the AIFC with opportunities for knowledge exchanges between both institutions.

### Latest Judgments

[17 November 2017] Judgment for **BNP Paribas SA v Jacob Agam and Anor**: [www.sicc.gov.sg/documents/judgments/2017\\_SGHC\(I\)\\_10.pdf](http://www.sicc.gov.sg/documents/judgments/2017_SGHC(I)_10.pdf)

### 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: [www.sicc.gov.sg/documents/docs/SICC\\_Model\\_Clauses.pdf](http://www.sicc.gov.sg/documents/docs/SICC_Model_Clauses.pdf)