Published on e-First 31 August 2017

Commentary

ON APPEAL FROM SINGAPORE INTERNATIONAL COMMERCIAL COURT

On 12 May 2017, the Singapore Court of Appeal heard and rendered its first decision in relation to an appeal from a decision of the Singapore International Commercial Court ("SICC"). The Court of Appeal's written decision was subsequently reported as *Jacob Agam v BNP Paribas SA* ("*Jacob Agam*"). This article sets out highlights relating to the management and determination of the *Jacob Agam* appeal. It also discusses the attractiveness of appeal mechanisms in the resolution of international commercial disputes, and takes a closer look at the appellate mechanism in SICC, drawing illustrations from the *Jacob Agam* appeal.

Justin **YEO***
LLB (Hons) (National University of Singapore);
Advocate and Solicitor (Singapore);
Assistant Registrar, Supreme Court of Singapore.

I. Introduction

1 The Singapore International Commercial Court ("SICC") was launched in January 2015. It was a dispute resolution mechanism specially designed to offer a world-class facility for resolving international commercial disputes through litigation.[1] Positioned alongside the Singapore International Arbitration Centre and the Singapore International Mediation Centre, the establishment of SICC is aimed at providing an entire suite of dispute resolution services for users

---

* This author was involved, in his capacity as assistant registrar of the Supreme Court of Singapore, in the management of the matter that culminated in the first Court of Appeal decision in relation to an appeal from a decision of the Singapore International Commercial Court ("SICC"). The author is grateful to Ms Teh Hwee Hwee, Deputy Registrar of the Supreme Court of Singapore and Divisional Registrar of SICC, who provided valuable comments on an earlier draft of this article. All errors in this article remain solely the author's own.

1 Chief Justice Sundaresh Menon, response at the Opening of the Legal Year 2015 (5 January 2015) at para 20(b) <http://www.supremecourt.gov.sg/docs/default-source/default-document-library/media-room/response-by-cj---opening-of-the-legal-year-2015-on-5-january-2015-(final).pdf> (accessed 29 May 2017).

© 2017 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

to choose from, and is an important part of Singapore's aim to be a leading international dispute resolution hub in Asia.[2]

2 Following the launch of SICC, there was widespread interest in comparing what SICC offered with what was available in international commercial arbitration. Many of these differences have been highlighted and discussed elsewhere.[3] This article focuses on one of the key differences, *viz*, the availability of an appellate mechanism in SICC.

3 On 12 May 2017, the Singapore Court of Appeal heard and rendered its first decision in relation to an appeal from the decision of SICC.[4] Shortly thereafter, the Court of Appeal furnished detailed grounds in its written decision reported as *Jacob Agam v BNP Paribas SA*[5] ("*Jacob Agam*").

4 This article first provides an overview of the *Jacob Agam* appeal. It, thereafter, discusses the attractiveness of appeal mechanisms in international commercial dispute resolution systems, and takes a closer

---

2 This point has been repeatedly made by the Government as well as in Parliament. See, *eg*, *Singapore Parliamentary Debates, Official Report* (5 March 2014), vol 91; (16 May 2014), vol 92; (10 March 2015), vol 93; (15 January 2016), vol 94; (6 April 2016), vol 94; (3 March 2017), vol 94 (Mr K Shanmugam, Minister for Law); see also the press release by the Ministry of Law, "Legislative Changes Tabled to Establish the Singapore International Commercial Court and to Update the Regulatory Framework for the Legal Profession" (7 October 2014); Ms Indranee Rajah, Senior Minister of State for Law, Ministry of Law, speech at the Litigation Conference 2015 (16 March 2015).

3 See, *eg*, the official brochure of the Singapore International Commercial Court ("SICC") available at: http://www.sicc.gov.sg/documents/docs/SICC%20 Brochure.pdf (accessed 29 May 2017). The brochure highlights differences such as: (a) independent appointment of adjudicators in SICC; (b) availability of joinder of third parties in SICC; (c) open court proceedings; and (d) option of appeal in SICC. The differences between SICC and international commercial arbitration have also been canvassed in various speeches and articles: see, *eg*, Chief Justice Sundaresh Menon, "International Commercial Courts: Towards a Transnational System of Dispute Resolution", opening lecture at the Dubai International Financial Centre Courts Lecture Series 2015 (19 January 2015); Ashvin Thevar, "The SICC: Competitor, Companion or Captain?" *Singapore Law Gazette* (July 2015) at p 28; Denise Wong, "The Rise of the International Commercial Court: What Is It and Will It Work?" (2014) 33(2) *Civil Justice Quarterly* 207 and Chief Justice Sundaresh Menon, "Origins and Aspirations: Developing an International Construction Court" (2014) *International Construction Law Review* 341.

4 For completeness, the first sets of appeals filed against a decision of the Singapore International Commercial Court were brought by way of cross-appeals against the decision in *Telemedia Pacific Group Ltd v Yuanta Asset Management International Ltd* [2016] SGHC(I) 6. However, the appeals have not yet been heard by the Court of Appeal.

5 [2017] SGCA(I) 1.

© 2017 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

look at the framework for appeals from SICC, drawing illustrations from the *Jacob Agam* appeal where appropriate.

II. The *Jacob Agam* appeal

5 The appellants in the *Jacob Agam* appeal were Jacob and Ruth Agam. They were Israeli nationals who owned, through several companies, a number of properties in France and Monaco.[6] The respondent was BNP Paribas SA, which was the parent company of BNP Paribas Wealth Management ("Wealth Management"), a bank incorporated in France.[7]

6 In November 2015, Wealth Management commenced an action in the Singapore High Court, claiming about €30m from the appellants as guarantors of the obligations of two of the appellants' companies. The action was transferred from the High Court to SICC in April 2016.

7 By virtue of a merger effected by a written merger agreement under the French Commercial Code, the respondent succeeded to the assets and liabilities of Wealth Management.[8] The written merger agreement was in French, and provided, *inter alia*, (in translation) that the respondent "shall be generally subrogated purely and simply on the Closing Date in all the rights, legal actions, obligations and miscellaneous commitments of Wealth Management".[9]

8 On 27 October 2016, the respondent applied to be substituted for Wealth Management in the action.[10] The matter was heard in SICC at first instance by a *coram* comprising Steven Chong J (as he then was)[11] and International Judges[12] Roger Giles[13] and Dominique Hascher.[14] On 17 February 2017, the first instance court allowed the substitution sought, for reasons published in *BNP Paribas Wealth Management v Jacob Agam*[15] ("*Jacob Agam (First Instance)*").

6 *Jacob Agam v BNP Paribas SA* [2017] SGCA(I) 1 at [3].
7 *Jacob Agam v BNP Paribas SA* [2017] SGCA(I) 1 at [4].
8 *Jacob Agam v BNP Paribas SA* [2017] SGCA(I) 1 at [8].
9 *Jacob Agam v BNP Paribas SA* [2017] SGCA(I) 1 at [14].
10 *Jacob Agam v BNP Paribas SA* [2017] SGCA(I) 1 at [16].
11 Chong J was appointed as a permanent Judge of Appeal on 1 April 2017.
12 International Judges of the Supreme Court of Singapore are appointed under Art 95(4)(*c*) of the Constitution of the Republic of Singapore (1999 Reprint).
13 International Judge of the Supreme Court of Singapore and former Judge of the New South Wales Court of Appeal.
14 International Judge of the Supreme Court of Singapore and Judge of the Supreme Judicial Court of France.
15 [2017] SGHC(I) 2.

© 2017 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

9 The appellants, thereafter, took out an application to the first instance court, praying for a declaration that the leave of court was *not* required for an appeal against the entire decision in *Jacob Agam (First Instance)*. In the alternative, they prayed for leave to appeal against the decision.

10 The application was heard by Chong JA on 5 April 2017.[16] As a preliminary issue, Chong JA directed the appellants to clarify their position on the requirement for leave.[17] If their position was that leave was *not* required, they should proceed directly with the appeal; the prayer for a declaration would only be entertained if there was "genuine uncertainty" on whether leave was required.[18] Alternatively, if their position was that leave was *required*, the court would hear the prayer for leave.

11 In the circumstances, the appellants elected to proceed on the basis that leave was required. After hearing parties, Chong JA granted leave to appeal against *Jacob Agam (First Instance)*, limited to a single issue framed as follows: "[w]hether the Court had erred in its interpretation of Sections 14A to 14C and 55B to 55C of the Banking Act (Cap. 19) in determining that Court approval was not required in the instant case".[19]

12 On application by the appellants and with the consent of the respondent, Chong JA ordered that the appeal be expedited. Allowing the appeal to proceed on the usual appeal timelines would mean that the trial, which had been fixed in August 2017,[20] would have to be vacated simply to determine the issue of substitution of the respondent. This would have unnecessarily delayed the resolution of the matter.

13 The appellants filed the notice of appeal to the Court of Appeal on 12 April 2017. In view that this was an expedited appeal, the Court of Appeal convened a case management conference later the same day, conducted by one of the members of the appeal *coram*, Judith Prakash JA. The conference was attended by lead counsel on both sides. At the conference, Prakash JA gave directions for an expedited process that departed from the usual filing requirements and timelines for

16 Order 110 rule 53(1A) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) provides that any one of the three judges on the *coram* may hear any interlocutory application.
17 This is evident from the certified transcript of the hearing of SICC Summons No 9 of 2016, dated 5 April 2017.
18 *The Xin Chang Shu* [2016] 3 SLR 1195 at [9] and [52].
19 *Jacob Agam v BNP Paribas SA* [2017] SGCA(I) 1 at [2].
20 This is evident from the certified transcript of the hearing of SICC Summons No 9 of 2016, dated 5 April 2017.

© 2017 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

appeals prescribed by the Rules of Court[21] ("RoC"). Amongst other things, Prakash JA ordered the parties to promptly file and exchange written arguments and an agreed bundle of documents, so as to facilitate the expedited hearing of the appeal.

14 The Registry of the Supreme Court issued a formal written notice to the parties the next day, informing them of the tentative period within which the Court of Appeal would hear the matter, as well as setting out administrative guidelines for the filing of documents that were ordered by Prakash JA.

15 On 12 May 2017, the appeal was heard by a Court of Appeal *coram* comprising Sundaresh Menon CJ, Prakash JA and International Judge Dyson Heydon.[22] The public gallery was filled by members of the legal profession, media[23] and the general public.

16 At the hearing, counsel for the appellants raised three main arguments:

> (a) First, the appellants contended that the term "subrogated" in the merger agreement should be given its common law meaning, and if so, the respondent had no independent right to sue the appellants, and could only sue in the name of Wealth Management.[24] Since Wealth Management no longer existed, there was no legal person with standing to sue the appellants.[25] It should be noted that this argument went *beyond* the issue of law for which leave had been granted, but the appellants claimed that they were entitled to appeal this issue *as of right*, given that the first instance court's interpretation of "subrogation" was a "decisive" one.[26] The Court of Appeal emphasised that the appellants should have given the respondent sufficient notice of this intended approach.[27] Be that as it may, the Court of Appeal pragmatically allowed the appellants to proceed on this argument, on the basis that it would be "more economical and efficient" to deal with the "substance of the arguments", as there would be "little point in

21 Cap 322, R 5, 2014 Rev Ed.

22 International Judge of the Supreme Court of Singapore and former Judge of the High Court of Australia.

23 See, *eg*, "Judges in the Court of Appeal to decide if BNP Paribas has breached Singapore Banking Regulations" *Nasdaq GlobalNewswire* (11 May 2017) and Grace Leong, "Siblings Lose Appeal against BNP Paribas" *The Straits Times* (13 May 2017), an article published the day after the appeal was heard.

24 *Jacob Agam v BNP Paribas SA* [2017] SGCA(I) 1 at [26(a)] and [26(b)].

25 *Jacob Agam v BNP Paribas SA* [2017] SGCA(I) 1 at [26(c)].

26 *Jacob Agam v BNP Paribas SA* [2017] SGCA(I) 1 at [23].

27 *Jacob Agam v BNP Paribas SA* [2017] SGCA(I) 1 at [24].

© 2017 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

debating the law about whether the appeal did lie as of right if it were clear that even if it did, it ought to be dismissed on the merits".[28]

(b) Second, the appellants submitted that s 55B of the Singapore Banking Act[29] required Wealth Management to satisfy certain conditions, including obtaining the court's approval, before a transfer of its business could take place. In their view, for policy reasons, the expression "without prejudice" in s 55B(2) of the Banking Act indicated that a bank could not disregard the requirements necessary to complete a transfer.[30] Furthermore, the expression "any law" in the same provision should be interpreted to mean "Singaporean law" or "any written law", so as to ensure that the safeguards afforded by the need for ministerial or court approval could not be circumvented.[31]

(c) Third, the appellants argued that once Wealth Management had decided not to seek the court's approval under s 55B of the Banking Act, it should have applied to the Minister for approval under s 14A of the Banking Act.[32]

17 After engaging counsel on the issues for an hour and a half, the Court of Appeal stood down to deliberate the matter. The Court of Appeal delivered its judgment about half an hour later, providing brief oral reasons for dismissing the appeal, and ordering costs (of the appeal and of the leave application before Chong JA) fixed at $24,000 plus disbursements in favour of the respondent. The Court of Appeal also indicated that it would publish detailed written grounds of its decision in due course.

18 The Court of Appeal, subsequently, released its written decision (that is, *Jacob Agam*) dated 18 May 2017. The decision was, shortly thereafter, made available on the SICC website, together with an accompanying summary.[33] The decision was also published on the

28 *Jacob Agam v BNP Paribas SA* [2017] SGCA(I) 1 at [23].
29 Cap 19, 2008 Rev Ed.
30 *Jacob Agam v BNP Paribas SA* [2017] SGCA(I) 1 at [32]–[33].
31 *Jacob Agam v BNP Paribas SA* [2017] SGCA(I) 1 at [37]–[38].
32 *Jacob Agam v BNP Paribas SA* [2017] SGCA(I) 1 at [41].
33 The written decision can be found on the Singapore International Commercial Court website, available at http://www.sicc.gov.sg/HearingsJudgments.aspx?id=72 (accessed 29 May 2017), while the summary of the decision is available at http://www.sicc.gov.sg/Media.aspx?id=98 (accessed 29 May 2017).

© 2017 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

Singapore Law Watch website[34] (a daily legal news service) and the Singapore Law website[35] (a website for updates on Singapore commercial law).

19 The Court of Appeal's reasons in the written decision may be summarised as follows:

(a) First, the word "subrogated" in the merger agreement could not be given its common law meaning where, as was the case in the appeal, doing so would contradict the entire substance of the merger agreement.[36]

(b) Second, the appellants' proffered interpretation of the s 55B of the Banking Act was incorrect. The appellants' understanding of "without prejudice" was contrary to the plain meaning of the provision, and the policy arguments raised overlooked other provisions in the Banking Act, which ensured that the transfer of a bank's business could only be made to an entity that was licensed to carry on banking business in Singapore.[37] Furthermore, the expression "any law" could refer to any law in the world.[38] In this regard, the appellants' policy arguments concerning circumvention of safeguards also fell away because s 55B(2) of the Banking Act dealt only with transfers to transferees that were already licensed in Singapore.[39]

(c) Third, the appellants' argument that Wealth Management should have applied to the Minister under s 14A of the Banking Act was incorrect, as that provision was permissive, not mandatory.[40]

---

34 http://www.singaporelawwatch.sg. As the Singapore Law Watch website is a daily legal news service, the publication of *Jacob Agam v BNP Paribas SA* [2017] SGCA(I) 1 on that website is available only for three months from the date of publication. Thereafter, the decision is available on LawNet, Singapore's leading subscription-based legal research portal, http://www.lawnet.sg (accessed 8 August 2017).

35 See *Jacob Agam v BNP Paribas SA* [2017] SGCA(I) 1 at the Singapore Law website, http://www.singaporelaw.sg/sglaw/laws-of-singapore/case-law/free-law/court-of-appeal-judgments/22831-jacob-agam-and-another-v-bnp-paribas-sa (accessed 29 May 2017).

36 *Jacob Agam v BNP Paribas SA* [2017] SGCA(I) 1 at [30].

37 *Jacob Agam v BNP Paribas SA* [2017] SGCA(I) 1 at [31]–[35].

38 *Jacob Agam v BNP Paribas SA* [2017] SGCA(I) 1 at [36].

39 *Jacob Agam v BNP Paribas SA* [2017] SGCA(I) 1 at [40].

40 *Jacob Agam v BNP Paribas SA* [2017] SGCA(I) 1 at [41]–[42].

© 2017 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

III. Attractiveness of appeal mechanisms

20 The availability of appellate recourse in SICC stands in stark contrast to the general practice in international commercial arbitration.

21 International commercial arbitration was built on a model in which the appointed tribunal would render a conclusive decision on a matter submitted to it. While it is open to parties to come to an agreement permitting a more comprehensive appeal,[41] most international commercial arbitration is conducted on the basis of arbitral rules for which there is no right of appeal to a higher tribunal or to a court.[42]

22 Although courts remain the ultimate guarantors of the enforceability of arbitral awards in the sense that the relevant court may set aside or refuse to enforce an award, courts do not generally sit in appeal over the decision of arbitral tribunals.[43] For

41 For example, the American Bar Association has noted that:

> In some cases, parties to a large dispute may want a more comprehensive appeal than is permitted [under the relevant statutes]. They can accomplish this (without sacrificing the efficiency of arbitration) by providing for an appeal to a second arbitrator or panel of arbitrators on traditional legal grounds. An appeal within the arbitration framework can be conducted quickly and cost effectively, without significantly delaying the final resolution of the case.

See American Bar Association, "Benefits of Arbitration for Commercial Disputes" at p 7 <https://www.americanbar.org/content/dam/aba/events/dispute_resolution/committees/arbitration/arbitrationguide.authcheckdam.pdf> (accessed 29 May 2017). Christopher Drahozal and Quentin Wittrock suggested that parties may consider "providing for some sort of appeals process or expanding the grounds on which courts can review awards": "Is There a Flight from Arbitration?" (2008–2009) 37 Hofstra L Rev 71 at 88. Elsewhere, it has been observed that in arbitration:

> Parties … are free to exclude any right of appeal to the courts. Equally, if parties happen to be of the view that they should have 'a fundamental right to a second shot if the first shot misfired', or if they simply desire a correct decision more than they do speed and finality, they are free to agree on an internal appeal mechanism of their choosing.

See Rowan Platt, "The Appeal of Appeal Mechanisms in International Arbitration: Fairness over Finality?" (2013) 30 J Int'l Arb 531 at 533.

42 See, *eg*, Art 3.2 of the Hong Kong International Arbitration Centre Administered Arbitration Rules 2013; Art 35 of the International Chamber of Commerce Rules of Arbitration 2017; Art 26.8 of the London Court of International Arbitration Arbitration Rules 2014 and r 32.11 of the Singapore International Arbitration Centre Rules 2016.

43 In Singapore, Australia and Canada, amongst other jurisdictions where there is a dual arbitration regime (*ie*, separate domestic and international regimes), while there is a limited right to appeal on a question of law under the domestic regime, there is no right to appeal to a court under the international arbitration regime. See, in the Singapore context, the International Arbitration Act (Cap 143A, 2002 Rev Ed) *contra* the Arbitration Act (Cap 10, 2002 Rev Ed).

© 2017 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

instance, the UNCITRAL Model Law on International Commercial Arbitration (1985)[44] ("Model Law") provides that recourse against an international arbitral award may be made "only by an application for setting aside" the award.[45] Under the Model Law, the grounds on which a court will set aside or refuse to enforce an arbitral award are limited.[46]

23 This absence of appeal has been considered one of the strengths of international commercial arbitration.[47] This is due in part to the emphasis on the principle of finality in arbitration.[48] Many users of arbitration prefer to avoid prolonged appellate proceedings, so as to reduce the time and costs expended in achieving a resolution of the dispute.[49] Based on a 2015 survey conducted by the Queen Mary School of International Arbitration, 77% of survey respondents did not favour the inclusion of an appeal mechanism on the merits.[50]

---

44 UNCITRAL Model Law on International Commercial Arbitration 1985, GA Res 40/72, UN GAOR, 40th Session, Supplement No 17, Annex 1, UN Doc A/40/17, UN Sales No E.95.V.18 (1985) ("Model Law").

45 Model Law, Art 34(1). In the Singapore context, see s 19B of the International Arbitration Act (Cap 143A, 2002 Rev Ed), read with Art 34(1) of the Model Law.

46 See Art 34 of the Model Law. The grounds on which an arbitral award may be set aside can be classified into three broad categories, *ie*: jurisdictional grounds (*eg*, non-existence of valid and binding arbitration clause, other grounds that go to adjudicability of the claim); procedural grounds (*eg*, failure to give proper notice); and substantive grounds (*eg*, breach of public policy at the place of arbitration). See *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 at [27]. Some of these were touched on in Chief Justice Sundaresh Menon, "Judicial Attitudes towards Arbitration and Mediation in Singapore", speech at the ASEAN Law Association Malaysia (ALA) & Kuala Lumpur Regional Centre for Arbitration (KLRCA) Talk & Dinner 2013 (25 October 2013) at paras 33–55.

47 Christopher Drahozal & Quentin Wittrock, "Is There a Flight from Arbitration?" (2008–2009) 37 Hofstra L Rev 71 at 104, citing David Lipsky & Ronald Seeber, "The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by US Corporations" (January 1998) <http://digitalcommons.ilr.cornell.edu/icrpubs/4> (accessed 29 May 2017).

48 Rowan Platt, "The Appeal of Appeal Mechanisms in International Arbitration: Fairness over Finality?" (2013) 30 *Journal of International Arbitration* 531 at 531.

49 For instance, the American Bar Association has observed that "[a]rbitration provides finality and does so quickly and economically because lengthy, expensive appeals like those encountered in court are not available": see American Bar Association, "Benefits of Arbitration for Commercial Disputes" at p 7 <https://www.americanbar.org/content/dam/aba/events/dispute_resolution/committees/arbitration/arbitrationguide.authcheckdam.pdf> (accessed 29 May 2017). See also Rowan Platt, "The Appeal of Appeal Mechanisms in International Arbitration: Fairness over Finality?" (2013) 30 *Journal of International Arbitration* 531 at 558, where it is observed that "the vast majority" of arbitration users favour the finality of arbitration awards.

50 Queen Mary School of International Arbitration, University of London & White & Case, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*, at p 8 <http://www.arbitration.qmul.ac.uk/docs/164761.pdf> (accessed 29 May 2017).

© 2017 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

24 While this may suggest that there is widespread support for a one-tier dispute resolution system *sans* appellate recourse, the statistic must be understood in the context that the respondents were "stakeholders at all levels in international arbitration", a vast majority of whom were repeat users of arbitration.[51]

25 It is also useful to compare the results of the 2015 survey with those of a similar survey conducted by the Queen Mary School of International Arbitration in 2006.[52] As a rough gauge, and keeping in mind that the respondents to the surveys were not the same,[53] the percentage of respondents who favoured an appeal mechanism increased from 9% (in 2006) to 23% (in 2015) – an increase of about 150%.[54] On deeper analysis of the surveys, the actual increase in support may be even greater than the 150% figure suggests. The respondents to the 2006 survey were drawn entirely from in-house counsel,[55] of which

---

51 Queen Mary School of International Arbitration, University of London & White & Case, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*, at pp 5 and 51, <http://www.arbitration.qmul.ac.uk/docs/164761.pdf> (accessed 29 May 2017). Seventy per cent of the respondents (and 81% of the organisations they represent or with which they are connected) have been "involved in more than five international arbitration over the past five years": at p 51.

52 Queen Mary School of International Arbitration, University of London & PriceWaterhouseCoopers, *International Arbitration: Corporate Attitudes and Practices 2006* <http://www.arbitration.qmul.ac.uk/docs/123295.pdf> (accessed 29 May 2017).

53 The 2006 survey involved 103 respondents, comprising: heads of legal department (36%); general counsel (20%); counsel from legal departments (19%); deputy general counsel (8%); and others (17%): see Queen Mary School of International Arbitration, University of London & PriceWaterhouseCoopers, *International Arbitration: Corporate Attitudes and Practices 2006* <http://www.arbitration.qmul.ac.uk/docs/123295.pdf> (accessed 29 May 2017) at p 24. In contrast, the 2015 survey involved 763 respondents, comprising: private practitioners (49%); arbitrators and counsel in equal proportion (12%); arbitrators (11%); in-house counsel (8%); academics (4%); arbitral institution staff (2%); expert witness (2%); and others (12%): see Queen Mary School of International Arbitration, University of London & White & Case, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*, at p 51 <http://www.arbitration.qmul.ac.uk/docs/164761.pdf> (accessed 29 May 2017).

54 Queen Mary School of International Arbitration, University of London & PriceWaterhouseCoopers, *International Arbitration: Corporate Attitudes and Practices 2006*, at p 15 <http://www.arbitration.qmul.ac.uk/docs/123295.pdf> (accessed 29 May 2017); Queen Mary School of International Arbitration, University of London & White & Case, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*, at p 8 <http://www.arbitration.qmul.ac.uk/docs/164761.pdf> (accessed 29 May 2017).

55 Queen Mary School of International Arbitration, University of London & PriceWaterhouseCoopers, *International Arbitration: Corporate Attitudes and Practices 2006*, at p 2 <http://www.arbitration.qmul.ac.uk/docs/123295.pdf> (accessed 29 May 2017). This is also evident from the types of respondents to the 2006 survey: at p 24.

© 2017 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

an overwhelming 91% rejected the idea of an appeal mechanism. In contrast, nine years later, amongst the in-house counsel subgroup of the 2015 survey, the lack of an appeal mechanism had become the third most frequently selected "worst characteristic" of international arbitration.[56] It is also notable that a growing number of arbitral institutions either offer optional internal appeal mechanisms, or empower parties to agree on their own appeal mechanisms.[57]

26 There, therefore, seems to be growing support for the availability of appeal mechanisms in the resolution of international commercial disputes. This increase may be attributed, at least in part, to the heightened recognition in recent years that the absence of appeal engenders two main difficulties:

> (a) First, the absence of appeal means that decisions that are incorrect, whether on the law or on the facts of the case (or both), remain final and binding on the parties.[58]
>
> (b) Second, the absence of appeal may sometimes paradoxically result in increasing (rather than decreasing) the time and costs incurred. This is because without the possibility of substantive appeal, parties are thrown into "a 'one shot' contest, in which the winner takes it all".[59] Under such

---

56 Queen Mary School of International Arbitration, University of London & White & Case, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*, at p 8 <http://www.arbitration.qmul.ac.uk/docs/164761.pdf> (accessed 29 May 2017). If all respondents are taken into consideration, 17% of respondents found the lack of an appeal mechanism to be one of the top three "worst characteristic[s]" of international arbitration: at p 7.

57 See, *eg*, Art 28 of the Arbitration Rules of the European Court of Arbitration (2015) (which provides for "appellate arbitral proceedings"), Section II of the International Arbitration Chamber of Paris Rules of Arbitration (2015) (which provides for "two-tier arbitration proceedings") and Art 39 of the Procedural Rules of the Spanish Court of Arbitration (2011) (which provides for "arbitration appeal"); see also Rowan Platt, "The Appeal of Appeal Mechanisms in International Arbitration: Fairness over Finality?" (2013) 30 *Journal of International Arbitration* 531 at 548–551 and 558 and Erin Gleason, "International Arbitral Appeals: What Are We So Afraid of?" (2007) 7(2) *Pepperdine Dispute Resolution Law Journal* 269 at 290–291.

58 For example, parties have sometimes criticised the difficulty of mounting an appeal against an unfair arbitral decision: see Christopher Drahozal & Quentin Wittrock, "Is There a Flight from Arbitration?" (2008–2009) 37 Hofstra L Rev 71 at 71–72.

59 Chief Justice Sundaresh Menon, "International Commercial Courts: Towards a Transnational System of Dispute Resolution", opening lecture at the Dubai International Financial Centre Courts Lecture Series 2015 (19 January 2015) at para 48 <http://www.supremecourt.gov.sg/docs/default-source/default-document-library/media-room/opening-lecture---difc-lecture-series-2015.pdf> (accessed 29 May 2017). A similar point is made in three other pieces by Sundaresh Menon CJ, *ie*: "Origins and Aspirations: Developing an International Construction Court" (2014) *International Construction Law Review* 341; "The Transnational

(*cont'd on the next page*)

© 2017 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

circumstances, parties may find themselves incentivised to invest an extensive amount of resources in legal battle.[60] Related to this, arbitrators may be motivated to permit protracted legal battles between the parties, *inter alia*, because they are cognisant of the finality of their decisions.[61]

27 In contrast, appellate recourse provides the opportunity for legal and factual error-correction, thus providing an aggrieved party with a second chance to be heard on matters that affect its substantive rights, often before a larger tribunal or a tribunal with greater seniority. It may also help to mitigate the parties' incentive to throw the proverbial kitchen sink at the first instance.

28 In addition, the availability of appellate recourse contributes to the development of jurisprudence. While this may not be a factor expressly considered by the parties in choosing a dispute resolution system, it is a "public good"[62] that brings with it important systemic advantages of a system of appeals:

Protection of Private Rights: Issues, Challenges, and Possible Solutions" (2014) *Asian Journal of International Law* 1 at 10 and "International Arbitration: The Coming of a New Age for Asia (and Elsewhere)", opening address at the International Council for Commercial Arbitration Congress 2012, at para 27 <http://www.arbitration-icca.org/media/0/13398435632250/ags_opening_speech_icca_congress_2012.pdf> (accessed 29 May 2017); see also Denise Wong, "The Rise of the International Commercial Court: What Is It and Will It Work?" (2014) 33(2) *Civil Justice Quarterly* 207 at 219.

60 Chief Justice Sundaresh Menon, "International Arbitration: The Coming of a New Age for Asia (and Elsewhere)", opening address at the International Council for Commercial Arbitration Congress 2012, at paras 26–27 <http://www.arbitration-icca.org/media/0/13398435632250/ags_opening_speech_icca_congress_2012.pdf> (accessed 29 May 2017); see also Mohan Pillay & Toh Chen Han, *The SICC Handbook: A Guide to the Rules and Procedures of the Singapore International Commercial Court* (Sweet & Maxwell, 2016) at p 135, para 8.02.

61 Chief Justice Sundaresh Menon, "International Arbitration: The Coming of a New Age for Asia (and Elsewhere)", opening address at the International Council for Commercial Arbitration Congress 2012, at paras 26–27 <http://www.arbitration-icca.org/media/0/13398435632250/ags_opening_speech_icca_congress_2012.pdf> (accessed 29 May 2017). Another reason is that arbitrators are generally keen to avoid the setting aside of their awards and may, therefore, have a tendency to "be more liberal in admitting evidence, allowing more extensive document production processes, and granting extended hearing time": see Chief Justice Sundaresh Menon, "The Transnational Protection of Private Rights: Issues, Challenges, and Possible Solutions" (2014) *Asian Journal of International Law* 1 at 10, citing Thomas Stipanowich, "Arbitration: The 'New Litigation'" (2010) U Ill L Rev 1 at 13 and 15.

62 Chief Justice Sundaresh Menon, "Origins and Aspirations: Developing an International Construction Court" (2014) *International Construction Law Review* 341 at 352.

© 2017 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

(a) First, appellate recourse provides a safeguard against incorrect decisions, some of which may otherwise ossify into legal norms governing transnational commerce.[63] In so doing, it helps to buttress the quality and legitimacy of, as well as public confidence in, the dispute resolution mechanism in question.[64]

(b) Second, appellate recourse helps to establish legal principles and to ensure a level of consistency in decision-making. This provides guidance for parties, enhances the predictability of outcomes[65] and contributes towards the creation of a coherent body of authoritative and definitive precedents.[66] Taking the appellate framework in judicial systems as an illustration – decisions of appellate courts are generally

---

63 In the context of international commercial arbitration, while there is no formal *de jure* doctrine of precedent, there is increasingly a practice resembling *de facto* precedent. In other words, future arbitrators may refer to, cite and rely on prior decisions. A prominent example is the case of *Dow Chemical v Isover Saint Gobain* (1984) IX Y B Com Arb 131 at 136–137, where it is stated:

> The decisions of these [arbitral] tribunals progressively create caselaw which should be taken into account, because it draws conclusions from economic reality and conforms to the needs of international commerce, to which rules specific to international arbitration, themselves successively elaborated should respond.

See also Gabrielle Kaufmann-Kohler, "Arbitral Precedent: Dream, Necessity or Excuse?" (2007) 23(3) ArbIntl 357; Mark Weidemaier, "Toward a Theory of Precedent in Arbitration" (2010) 51 Wm & Mary L Rev 1895 at 1909 and James Fry, "Regularity through Reason: A Foundation of Virtue for International Arbitration" (2011) 4(1) *Contemporary Asia Arbitration Journal* 57.

64 Indeed, the absence of appeals in arbitration has been observed to adversely impact the legitimacy of arbitration and the lack of public confidence in international arbitral systems: see, *eg*, Erin Gleason, "International Arbitral Appeals: What Are We So Afraid of?" (2007) 7(2) *Pepperdine Dispute Resolution Law Journal* 269 at 271–272.

65 Chief Justice Sundaresh Menon, "Shaping the Future of Dispute Resolution & Improving Access to Justice", speech at the Global Pound Conference Series 2016 (17 March 2016) at para 26(c) <http://www.supremecourt.gov.sg/Data/Editor/Documents/[Final]%20Global%20Pound%20Conference%20Series%202016%20-%20'Shaping%20the%20Future%20of%20Dispute%20Resolution%20%20Improving%20Access%20to%20Justice'.pdf> (accessed 29 May 2017).

66 Chief Justice Sundaresh Menon, "International Arbitration: The Coming of a New Age for Asia (and Elsewhere)", opening address at the International Council for Commercial Arbitration Congress 2012 <http://www.arbitration-icca.org/media/0/13398435632250/ags_opening_speech_icca_congress_2012.pdf> (accessed 29 May 2017) at para 80; see also Jeffrey Stempel, "Keeping Arbitrations from becoming Kangaroo Courts" (2007–2008) Nev L J 251, which notes that increasing the scope of appellate review of arbitration awards would serve as a safeguard against incorrect or unfair arbitration rulings and Richard Mosk, "Trends in International Arbitration" (2011) 18 *Southwestern Journal of International Law* 103 at 108, quoting Judge Charles Brower's concern that international arbitration may result in "crises of legitimacy", given that it, *inter alia*, "lacks generally accepted appellate or other control mechanisms".

© 2017 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

> binding on lower courts[67] and are of significant persuasive value to future courts of co-ordinate jurisdiction.[68] These decisions and reasoning may remain persuasive even outside the judicial system in question – for instance, it is not uncommon for decisions of internationally-reputable courts to be referred to and engaged with by foreign courts,[69] practitioners and academics. Over time, decisions and practices of reputable commercial courts (and their apex courts) may facilitate the development of substantive transnational commercial laws and practices, setting in place a platform for establishing an international *lex mercatoria*.[70]

29 The attractiveness of appeal mechanisms, therefore, ultimately depends on the interests and preferences of the disputing parties, as well as the institutional purpose and design of the dispute resolution system in question.

---

67 In the context of the Court of Appeal and the Singapore International Commercial Court ("SICC"), the SICC Committee observed that on matters of Singapore law, decisions of the Court of Appeal (including decisions of the Court of Appeal on appeals from SICC) will be binding on subsequent decisions of the High Court and SICC. See *Report of the Singapore International Commercial Court Committee* (November 2013) at fn 33 <https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Annex%20A%20-%20SICC%20Committee%20Report.pdf> (accessed 29 May 2017).

68 This has been referred to as "horizontal *stare decisis*". See, *eg*, Walter Woon, "Precedents that Bind – A Gordion Knot: *Stare Decisis* in the Federal Court of Malaysia and the Court of Appeal, Singapore" (1982) 24 *Malaya Law Review* 1 at 2.

69 For an excellent empirical study into the incidence of foreign courts referring to and engaging with decisions of the Singapore courts, see generally Goh Yihan & Paul Tan, "The Next Leap Forward: The Spread of Singapore Law" in *Singapore Law – 50 Years in the Making* (Goh Yihan & Paul Tan eds) (Academy Publishing, 2015) at p 835 ("*The Next Leap Forward*"). Of specific relevance to matters dealt with by the Singapore International Commercial Court (and the Court of Appeal on appeal therefrom), which are necessarily of an "international" and "commercial" nature (see s 18D(*a*) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) and O 110 r 7(1)(*a*) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed)), is that the vast majority of Singapore judicial decisions cited by foreign courts concern commercial law: see *The Next Leap Forward* at p 867.

70 Chief Justice Sundaresh Menon, "International Commercial Courts: Towards a Transnational System of Dispute Resolution", opening lecture at the Dubai International Financial Centre Courts Lecture Series 2015 (19 January 2015) at para 29 <http://www.supremecourt.gov.sg/docs/default-source/default-document-library/media-room/opening-lecture---difc-lecture-series-2015.pdf> (accessed 29 May 2017) and Chief Justice Sundaresh Menon, "Shaping the Future of Dispute Resolution & Improving Access to Justice", speech at the Global Pound Conference Series 2016 (17 March 2016) at para 26(c) <http://www.supremecourt.gov.sg/Data/Editor/Documents/[Final]%20Global%20Pound%20Conference%20Series%202016%20-%20'Shaping%20the%20Future%20of%20Dispute%20Resolution%20%20Improving%20Access%20to%20Justice'.pdf> (accessed 29 May 2017).

© 2017 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

IV. Framework for appeals from SICC

30 The provision of an appellate mechanism in SICC was one of the matters considered by the 2013 committee to study the viability of developing a framework for the establishment of SICC ("SICC Committee"). The SICC Committee recommended that decisions of SICC should be appealable to "a Court of Appeal whose *coram* will comprise international jurists from the SICC Panel and/or Judges from the Singapore Court of Appeal".[71] This recommendation was accepted by the Government and operationalised with effect from the launch of SICC in January 2015.

A. Overview of appeals to Court of Appeal

31 The default position in SICC is that first instance decisions may generally be appealed to the Court of Appeal. This appellate mechanism is built on the existing framework for appealing decisions of the High Court to the Court of Appeal.[72]

32 In terms of the number of judges hearing each appeal, appeals will generally be heard by a *coram* comprising three or more judges.[73] However, there may be departures from this position:

> (a) For instance, an appeal may be heard by five judges where the Chief Justice so directs, or where the parties have agreed that this should be so and the Chief Justice does not direct otherwise.[74] In this regard, the SICC Practice Directions provides a procedure for a party to apply for five judges to hear

71 *Report of the Singapore International Commercial Court Committee* (November 2013) at para 35 <https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Annex%20A%20-%20SICC%20Committee%20Report.pdf> (accessed 29 May 2017).

72 For more details on the appeal framework, see *SICC Procedural Guide* (January 2017); Mohan Pillay & Toh Chen Han, *The SICC Handbook: A Guide to the Rules and Procedures of the Singapore International Commercial Court* (Sweet & Maxwell, 2016) at pp 133–150 and Teh Hwee Hwee, Justin Yeo & Colin Seow, "The Singapore International Commercial Court in Action – Illustrations from the First Case" (2016) 28 SAcLJ 692 at 717–720.

73 Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) s 30(1); Singapore International Commercial Court Practice Directions (January 2017) at para 24(1).

74 Rules of Court (Cap 322, R 5, 2014 Rev Ed) O 110 r 53(2); Singapore International Commercial Court Practice Directions (January 2017) at para 24(2).

© 2017 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

the appeal,[75] and SICC has provided a model clause relating to the parties' agreement on the size of the appeal *coram*.[76]

(b) Another departure from the general position relates to certain specific types of appeals that may be heard by two judges.[77] These appeals concern "relatively contained issues",[78] such as appeals against interlocutory judgments, judgments on assessments of damages or taking of accounts and judgments rendered in proceedings other than a trial.[79]

33 With regard to the composition of the appeal *coram*, an appeal may be heard by a *coram* comprising the Chief Justice and Judges of Appeal.[80] The Chief Justice may also assign International Judges, Senior Judges or Judicial Commissioners to hear an appeal from SICC.[81] It bears mention that a number of International Judges bring with them extensive experience as former appellate judges in their respective jurisdictions.[82] In this regard, *Jacob Agam* is the first decision of the Court of Appeal in which International Judge Heydon sat as part of an appellate *coram*.

B. Features to minimise unnecessary expense of time and costs from appeals

34 While the availability of appeal promises to enhance the correctness and authoritativeness of decisions, this must be balanced

---

75 Singapore International Commercial Court Practice Directions (January 2017) at para 24(3).

76 The clause provides that "The parties agree that, subject to the relevant rules and procedures governing proceedings before the Singapore International Commercial Court, the [*describe the relevant proceedings before the SICC or use the relevant defined term (if any)*] shall be heard … before [3 Judges/5 Judges]* on appeal": Singapore International Commercial Court Model Clauses <http://www.sicc.gov.sg/documents/docs/SICC_Model_Clauses.pdf> (accessed 29 May 2017).

77 Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) s 30(2); Singapore International Commercial Court Practice Directions (January 2017) at para 24(5).

78 Mohan Pillay & Toh Chen Han, *The SICC Handbook: A Guide to the Rules and Procedures of the Singapore International Commercial Court* (Sweet & Maxwell, 2016) at p 135, para 8.09.

79 Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) s 30(2); Singapore International Commercial Court Practice Directions (January 2017) at para 24(5).

80 Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) s 29(1). At the time this article was prepared, there were five permanent Judges of Appeal: Chao Hick Tin, Andrew Phang Boon Leong, Judith Prakash, Tay Yong Kwang and Steven Chong JJA.

81 Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ss 29(3) and 29(4).

82 Teh Hwee Hwee, Justin Yeo & Colin Seow, "The Singapore International Commercial Court in Action – Illustrations from the First Case" (2016) 28 SAcLJ 692 at 717.

© 2017 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

against the need for the cost-effective and expeditious disposal of disputes (in general) and commercial disputes (in particular).

35 To this end, the SICC appeal framework offers three features that help to minimise the unnecessary expense of time and costs occasioned by appellate recourse:

(a) a calibrated framework governing leave to appeal;

(b) the power of the court to order that an appeal be expedited; and

(c) the option of excluding or limiting the right of appeal.

(1) Calibrated framework governing leave to appeal

36 While first instance decisions of SICC are generally appealable to the Court of Appeal, this is qualified by a calibrated framework governing leave to appeal. Briefly, whether a first instance order may be appealed to the Court of Appeal depends on which of the following three categories the order falls within:

(a) The first category relates to orders that are *non-appealable in any event*. These include consent orders,[83] orders that are expressly declared to be final by any written law in force,[84] as well as orders of SICC: (i) granting unconditional leave to defend any proceedings; (ii) unconditionally setting aside a default judgment; (iii) refusing to strike out pleadings, (iv) granting leave to amend pleadings; (v) ordering or refusing further and better particulars or interrogatories, and so on.[85]

(b) The second category relates to orders that are *appealable only with the leave of SICC or, alternatively, the Court of Appeal*.[86] These include orders made where the amount in dispute falls below the prescribed jurisdictional limits of the court,[87] where the only issue on appeal relates to costs or fees for hearing dates,[88] summary decisions on interpleader summonses where facts are not in dispute,[89] as well as orders of SICC relating to most other interlocutory applications, including:

83 Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) s 34(1)(*d*).
84 Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) s 34(1)(*e*).
85 Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) s 34(1)(*a*), read with the Fourth Schedule.
86 For the principles relating to the granting of leave to appeal, see *Singapore Civil Procedure 2017* vol 1 (Foo Chee Hock JC gen ed) (Sweet & Maxwell, 2017) at para 57/16/13.
87 Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) s 34(2)(*a*).
88 Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) s 34(2)(*b*).
89 Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) s 34(2)(*c*).

© 2017 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

(i) refusing leave to amend pleadings; (ii) ordering or refusing discovery or inspection of documents; (iii) refusing a stay of proceedings, and so on.[90] For these matters, the party desiring to appeal against the decision of SICC at first instance must make an application to the first instance court for leave to appeal.[91] In considering whether to grant leave to appeal, the merit of a possible appeal is one of the factors that the court may take into consideration.[92] The court may either grant or refuse leave, or grant leave to appeal on specific issues.[93] If a prospective appellant is dissatisfied with the court's decision regarding leave, he may make an application to the Court of Appeal to seek the necessary leave.[94] The Court of Appeal may decide the leave application without hearing oral arguments, thus saving time and costs for the parties.[95]

(c) The third category relates to orders that are *appealable as of right*. These include orders of SICC in the trial, or applications that have the effect of finally disposing of the substantive rights of the parties (such as summary judgment, setting aside of a default judgment or striking out of an action).[96]

37 Guiding considerations in this trifurcated categorisation include the importance of the order in question, that is, whether the order may

90 Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) Fifth Sched.

91 Section 35 of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) provides that where an application may be made to either the High Court (including the Singapore International Commercial Court ("SICC")) or the Court of Appeal, it shall be made in the first instance to the High Court (or SICC, as the case may be). However, the application can be made to the Court of Appeal directly where there are special circumstances which make it impossible or impracticable to apply to the first instance court: see *Singapore Civil Procedure 2017* vol 1 (Foo Chee Hock JC gen ed) (Sweet & Maxwell, 2017) at para 57/16/3.

92 The prospect of success on appeal is a factor to be considered in deciding whether leave to appeal will be granted: see *Singapore Civil Procedure 2017* vol 1 (Foo Chee Hock JC gen ed) (Sweet & Maxwell, 2017) at para 57/16/13.

93 See *Singapore Civil Procedure 2017* vol 1 (Foo Chee Hock JC gen ed) (Sweet & Maxwell, 2017) at para 57/16/14.

94 Rules of Court (Cap 322, R 5, 2014 Rev Ed) O 57 r 2A. For the avoidance of doubt, this application is *not* an appeal, as the Court of Appeal determines the application in its "incidental appellate jurisdiction": see *Singapore Civil Procedure 2017* vol 1 (Foo Chee Hock JC gen ed) (Sweet & Maxwell, 2017) at para 57/16/3.

95 Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) s 34A. There has not been occasion for the Court of Appeal to proceed under this provision insofar as appeals from the Singapore International Commercial Court are concerned. However, the Court of Appeal has decided leave applications without hearing oral arguments for appeals from the High Court.

96 See *OpenNet Pte Ltd v Info-Communications Development Authority of Singapore* [2013] 2 SLR 880 at [14]–[18]; see also *The Nasco Gem* [2014] 2 SLR 63 at [9].

© 2017 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

effectively dispose of proceedings or bring about severe consequences for a party.[97] While there may sometimes be difficulty in determining whether an order is interlocutory (such that it falls within the second category) or final (such that it falls within the third category),[98] the trifurcated categorisation generally provides a useful filter for appeals. It sieves out appeals which are peripheral to the main action or which do not actually concern the substantive rights of parties.[99] In this way, the framework seeks a balance between the expeditious disposal of a matter, and ensuring that important matters continue to be filtered upwards to the Court of Appeal.

38 At the hearing of the leave application in the *Jacob Agam* appeal, the first instance court granted leave to appeal, but limited the leave to a single issue of law.[100] In granting leave to appeal on this issue, the first instance court recognised that the issue at hand was novel, and that it was important to have an authoritative interpretation of the relevant provision by the highest court in the land: a decision by the Court of Appeal would provide guidance on a consistent approach in relation to mergers of foreign financial institutions.[101] The leave-to-appeal framework, therefore, helped to streamline the grounds on which the appeal was brought, ensuring that the apex court had occasion to render an authoritative decision on the novel issue at hand. For completeness, it should be noted that – for the reasons previously stated[102] – the Court of Appeal allowed certain issues to be argued notwithstanding that leave had not been granted for those issues.

(2) Power to order that appeal be expedited

39 The second mechanism for minimising the unnecessary expense of time and costs is the power for SICC or the Court of Appeal

---

97 For more details on the trifurcated approach, see Teo Guan Siew, "Recent Amendments to the Supreme Court of Judicature Act and the Subordinate Courts Act" *Singapore Law Gazette* (January 2011).

98 See, for instance, *The Nasco Gem* [2014] 2 SLR 63 at [7]–[14], cited in *Jacob Agam v BNP Paribas SA* [2017] SGCA(I) 1 at [23].

99 The Court of Appeal has noted in *The Nasco Gem* [2014] 2 SLR 63 at [14(b)] that where an application is, *inter alia*, "peripheral to the main hearing determining the outcome of the case", one will have to apply the tests set out in *OpenNet Pte Ltd v Info-Communications Development Authority of Singapore* [2013] 2 SLR 880 and *Dorsey James Michael v World Sport Group Pte Ltd* [2013] 3 SLR 354 to determine if the application is interlocutory and, therefore, appealable only with the leave of court.

100 See paras 10–11 above.

101 This is evident from the certified transcript of the hearing of SICC Summons No 9 of 2016, dated 5 April 2017.

102 See para 16(a) above.

© 2017 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

to order that an appeal be expedited.[103] An order for expedition, if made, can significantly reduce the amount of time spent for the disposal of an appeal.

40 The rules governing expedited appeals from SICC are the same rules governing such appeals from the High Court.[104] Briefly, a party may make an application for an appeal to be expedited. The party may do this at any stage of the proceedings, either by way of a formal application, or an *ad hoc* oral one.[105] If the court is of the view that the appeal is "one of urgency",[106] it has wide-ranging discretion to manage the expedition of the appeal "in the interests of justice", including dispensing with compliance with, or modifying the applicability of, any subsidiary legislation or practice directions.[107] While the requirement of "urgency" is not defined in the RoC, the court is likely to exercise its discretion in a manner that prevents litigants from abusing the expedited appeal process.[108]

41 In the *Jacob Agam* appeal, the application for expedition of the appeal was made orally by the appellants.[109] The order for expedition made by Chong JA, coupled with the case management directions given by Prakash JA (on behalf of the Court of Appeal), enabled the appeal to be heard and determined without the need to vacate the dates for the trial of the substantive action.[110] The *Jacob Agam* appeal is, therefore, an example of how the option of expedited appeal may, in appropriate circumstances, help to avoid any unnecessary delay occasioned by appellate recourse.

103 Rules of Court (Cap 322, R 5, 2014 Rev Ed) O 57 r 20.
104 An example of a case in which an order for expedited appeal from the High Court was made is reported in *Beckkett Pte Ltd v Deutsche Bank AG* [2011] 2 SLR 96. In that case, an order for expedited appeal was made in late October 2010 for an appeal against the decision of the High Court dated 24 September 2010. The Court of Appeal heard the substantive appeal on 1 December 2010 and dismissed the appeal on the same day, with detailed written grounds of decision rendered on 20 December 2010.
105 Rules of Court (Cap 322, R 5, 2014 Rev Ed) O 57 r 20.
106 Rules of Court (Cap 322, R 5, 2014 Rev Ed) O 57 r 20(1).
107 Rules of Court (Cap 322, R 5, 2014 Rev Ed) O 58 r 20(4); for more details, see *Singapore Civil Procedure 2017* vol 1 (Foo Chee Hock JC gen ed) (Sweet & Maxwell, 2017) at paras 57/20/1–57/20/5.
108 See *Singapore Civil Procedure 2017* vol 1 (Foo Chee Hock JC gen ed) (Sweet & Maxwell, 2017) at para 57/20/1.
109 See para 12 above.
110 See paras 10, 11 and 13 above.

© 2017 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

(3) Option of excluding or limiting the right of appeal

42 The third mechanism for minimising the expense of time and costs occasioned by appeals is the option for parties to exclude or limit the right of appeal to the Court of Appeal. In SICC, the right to and scope of appeal is subject to any prior agreement between the parties.[111] This allows the parties to, *ex ante*, determine the extent to which they wish to trade off the benefits of an error-correction avenue against the expense and delay that may be occasioned by appeals.

43 Parties have broad autonomy in determining the extent and scope of appeal. Those who wish to preserve the option of appeal but to limit its scope may do so by limiting appeals to: specific issues in question (whether of fact, law or both); defects in the validity and scope of the jurisdiction agreement; the narrow grounds for setting aside arbitral awards under the Model Law, and so on.[112] Those who are willing to accept the risk of uncorrected errors of fact and law, in favour of a "one shot" approach akin to that in arbitration, may exclude appellate recourse altogether.

44 To facilitate the above, SICC has provided model clauses to give effect to excluding or limiting the scope of appeal.[113]

V. Conclusion

45 The availability of appeal in SICC, coupled with the features to minimise unnecessary expense and delay from appeals, will be attractive to parties who prioritise the need for an error-correcting avenue, or who wish to avoid the "one shot" contest that is characteristic of arbitration. Ultimately, the availability of appeal is a factor for parties to consider in choosing a mechanism most appropriate for resolving their disputes.

---

111 Singapore International Commercial Court Practice Directions (January 2017) at para 139(3)(a). This was one of the recommendations of the Singapore International Commercial Court Committee: see *Report of the Singapore International Commercial Court Committee* (November 2013) at para 35 <https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Annex%20A%20-%20SICC%20Committee%20Report.pdf> (accessed 29 May 2017).

112 Some of these examples were cited by the Singapore International Commercial Court Committee: *Report of the Singapore International Commercial Court Committee* (November 2013) at para 35 <https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Annex%20A%20-%20SICC%20Committee%20Report.pdf> (accessed 29 May 2017).

113 These model clauses are available on the Singapore International Commercial Court website, http://www.sicc.gov.sg/documents/docs/SICC_Model_Clauses.pdf (accessed 29 May 2017).

© 2017 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.

46 The *Jacob Agam* appeal, which was brought on an expedited basis, presented the Court of Appeal with its first opportunity to hear and determine an appeal from the decision of SICC. Within a very short time, the apex court granted the parties an authoritative determination of the matter in dispute, and provided the public (in general) and the business community (in particular) a detailed reasoned decision on a novel point of law.

47 The appeal lays another significant milestone in the history of SICC, and is testament to how Singapore's efficient, cost-effective and commercially-savvy judicial system can be brought to bear on transnational commercial disputes.[114]

---

114 Chief Justice Sundaresh Menon, "International Commercial Courts: Towards a Transnational System of Dispute Resolution", opening lecture at the Dubai International Financial Centre Courts Lecture Series 2015 (19 January 2015) at para 26 <http://www.supremecourt.gov.sg/docs/default-source/default-document-library/media-room/opening-lecture---difc-lecture-series-2015.pdf> (accessed 29 May 2017).

© 2017 Contributor(s) and Singapore Academy of Law.
No part of this document may be reproduced without permission from the copyright holders.