Published on e-First 3 February 2023

RECOVERABILITY OF FOREIGN LAWYER COSTS IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT

Parties in proceedings before the Singapore International Commercial Court (the "SICC") may incur foreign lawyer costs, sometimes in addition to Singapore lawyer costs. In *Kiri Industries Ltd v Senda International Capital Ltd* [2022] 3 SLR 174, the SICC left open the question whether foreign lawyer costs are legally recoverable by a successful party who was represented by Singapore counsel in SICC proceedings. This article explores this and other issues in the SICC, having regard to the legislation, principles and policy applicable to SICC proceedings.

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I. Introduction

1 The Singapore International Commercial Court (the "SICC") was established in January 2015 as a division of the High Court of the Republic of Singapore, the latter of which has since 2021 been renamed as the General Division of the High Court[1] (the "General Division"). The SICC's primary jurisdiction is to hear and try any action that is (a) international and commercial in nature; (b) one that the General Division may hear and try in its original jurisdiction; and (c) one that satisfies such other conditions as the Singapore International Commercial Court Rules 2021 (the "SICC Rules 2021") may prescribe.[2] The SICC's jurisdiction also includes, *inter alia*, hearing any proceedings relating to international commercial arbitration that the General Division may hear under the International Arbitration Act 1994,[3] and any proceedings relating to corporate insolvency, restructuring or dissolution under the Insolvency,

1 See the Supreme Court of Judicature Act 1969 (2020 Rev Ed) s 18A. According to Art 94(1) of the Constitution of the Republic of Singapore (2020 Rev Ed), the Supreme Court of Singapore consists of the Court of Appeal and the High Court (which in turn consists of the Appellate Division and the General Division).

2 See Supreme Court of Judicature Act 1969 (2020 Rev Ed) s 18D(1) and Singapore International Commercial Court Rules 2021 (S 924/2021) O 2 r 1.

3 2020 Rev Ed. See Supreme Court of Judicature Act 1969 (2020 Rev Ed) s 18D(2) and Singapore International Commercial Court Rules 2021 (S 924/2021) O 23 r 3.

Restructuring and Dissolution Act 2018[4] that are international and commercial in nature.[5]

2 The SICC has made significant strides in its achievements since its launch, adding no less than 95 written judgments to the corpus of jurisprudence revolving around international commercial litigation. Appeals arising from decisions of the SICC over the past years have also generated no less than 25 written judgments from the Court of Appeal,[6] which is Singapore's apex court.[7] The written judgments issued by the SICC and the Court of Appeal include landmark decisions of significant interest to the international legal community, ranging from interpreting the International Swaps and Derivatives Association Inc Master Agreement,[8] dealing with novel disputes concerning cryptocurrency trading and automated contracts,[9] to dealing with applications seeking to set aside arbitral awards made in arbitrations conducted under bilateral investment treaties.[10]

3 The Bench panel of the SICC includes the Chief Justice, Justices of the Court of Appeal, Judges of the Appellate Division, Judges of the High Court as well as International Judges from various leading jurisdictions outside of Singapore (*ie*, Australia, Canada, China, France, Hong Kong, India, Japan, the UK and the US).[11] The SICC also maintains a register of foreign lawyers who have successfully applied for full or restricted registration status with the SICC[12] (and which thereby confers upon them

4 2020 Rev Ed.

5 See Supreme Court of Judicature Act 1969 (2020 Rev Ed) s 18D(2)(*c*) and Singapore International Commercial Court Rules 2021 (S 924/2021) O 23A r 2.

6 Section 29C(2) read with para 1(*f*) of the Sixth Schedule to the Supreme Court of Judicature Act 1969 (2020 Rev Ed) provides that any appeal against a decision of the SICC is to be made to the Court of Appeal.

7 For completeness, it should be highlighted that parties in SICC proceedings may agree to limit the right or scope of any appeal arising from the SICC's decision on their dispute. See Supreme Court of Judicature Act 1969 (2020 Rev Ed) Fourth Schedule, para 3 and Fifth Schedule, para 5.

8 *Macquarie Bank Ltd v Graceland Industry Pte Ltd* [2018] 4 SLR 87.

9 *B2C2 Ltd v Quoine Pte Ltd* [2019] 4 SLR 17 and *Quoine Pte Ltd v B2C2 Ltd* [2020] 2 SLR 20.

10 *Lao Holdings NV v Government of the Lao People's Democratic Republic* [2021] 5 SLR 228. The arbitral awards in question were awards arising out of arbitrations conducted under the auspices of the International Centre for Settlement of Investment Disputes and the Permanent Court of Arbitration.

11 See "Judges" *Singapore International Commercial Court* <https://www.sicc.gov.sg/about-the-sicc/judges> (accessed 16 November 2022). The international judges are well-established former judges and jurists in their home jurisdictions, including former chief justices or the equivalent.

12 See "Register of Foreign Lawyers" *Singapore International Commercial Court* <https://www.sicc.gov.sg/registration-of-foreign-lawyers/foreign-lawyers>

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certain professional privileges in the SICC, such as for example the right to appear and plead in SICC proceedings).[13] As at the time of writing this article, the total number of SICC-registered foreign lawyers stands strong at no less than 88, comprising experienced legal practitioners from at least 17 jurisdictions across the world.[14] This gives parties seeking to have a dispute resolved in the SICC the benefit of having considerable options in engaging counsel of their choice for direct legal representation,[15] as long as their dispute meets the criterion of "offshore case".[16]

4 Parties nevertheless retain the equally attractive option of engaging Singapore-qualified counsel for direct legal representation or co-counselling undertakings in SICC proceedings, given Singapore's reputable status as a high-quality international legal services hub supported by a strong ecosystem of legal institutions and infrastructure producing well-trained, competent and hardworking advocates and solicitors called to the Singapore Bar.[17] At the same time, where Singapore counsel is engaged by a party in SICC proceedings, it is also not uncommon that the party may also consider enlisting the services of foreign lawyers, particularly if the matter in dispute involves foreign elements.

5 This article seeks to examine the circumstances in which a party in SICC proceedings may incur foreign lawyer fees which can be the subject of an order of costs made by the SICC at the conclusion of proceedings. To achieve this, Part II of this article will provide an overview of the costs compensation regime in the General Division (including the SICC) as the basic premise. This will be followed by an analysis in Part III of what the positions are likely to be in respect of the question of recoverability of foreign lawyer fees under various scenarios. Part IV concludes with some closing remarks about how the analyses set out in Part III fit into the overarching mission and objectives of the SICC.

(accessed 16 November 2022). See also Legal Profession (Representation in Singapore International Commercial Court) Rules 2014 (S 851/2014) r 12.

13 See Legal Profession Act 1966 (2020 Rev Ed) s 36P.

14 These are Australia, Belgium, the British Virgin Islands, Canada, France, Hong Kong, India, Indonesia, Japan, Malaysia, New Zealand, the People's Republic of China, South Korea, Switzerland, the UK, the US and Vietnam.

15 See *Report of the Singapore International Commercial Court Committee* (November 2013) at paras 36–41 and Singapore Parl Debates; Vol 92, Sitting No 17; [4 November 2014].

16 See, *eg*, O 3 r 1 read with O 3 r 3 of the Singapore International Commercial Court Rules 2021 (S 924/2021). An "offshore case" is generally an action that has no substantial connection with Singapore.

17 See Yasmin Lambert, "Early Reforms Recast Singapore as Hub for Legal Services" *Financial Times* (27 June 2019) <https://www.ft.com/content/3d9129f0-8e93-11e9-a1c1-51bf8f989972> (accessed 16 November 2022).

II. Costs compensation regime in the Singapore International Commercial Court

A. Costs regime in the General Division of the High Court

6 Given that the SICC is established as a division of the General Division,[18] it is useful to begin this section with a brief overview of the costs regime maintained in the General Division.

7 Prior to 1 April 2022, the procedural rules applicable to SICC proceedings were conjoined with the domestic rules of court[19] (the "Rules of Court 2014"). This body of rules was revoked with effect from 1 April 2022, at the same time as the entry into force of two new sets of procedural rules: (a) the Rules of Court 2021 which apply to non-SICC proceedings;[20] and (b) the SICC Rules 2021 which are the SICC's first fully standalone procedural rules since its establishment in 2015.

8 The rules governing the costs regime for non-SICC proceedings are contained in O 59 of the Rules of Court 2014[21] and O 21 of the Rules of Court 2021.[22] Substantively, the costs regimes for non-SICC proceedings under these two sets of rules are largely the same.[23] Notably, the respective Appendices G to the Supreme Court Practice Directions

18 See para 1 above.

19 *Ie*, the Rules of Court (2014 Rev Ed) ("Rules of Court 2014"). The SICC procedural rules were set out in O 110 of the Rules of Court 2014, and with certain modifications and exclusions expressly provided in relation to the default procedural rules that would apply to domestic non-SICC proceedings. See Rules of Court 2014 O 110 r 3. Examples of such modifications or exclusions can be found in O 110 r 21 (relating to discovery and inspection of documents) and O 110 r 46(6) (relating to the costs regime) of the Rules of Court 2014.

20 This is the effective substitute of the Rules of Court 2014 in so far as non-SICC proceedings are concerned. Order 1 r 2 of the Rules of Court 2021 (S 914/2021) ("Rules of Court 2021") provides for the revocation of the Rules of Court 2014, subject to certain saving and transitional provisions.

21 Despite its revocation, the Rules of Court 2014 continue to apply to proceedings commenced in the General Division before its revocation date (*ie*, 1 April 2022), until the disposal of those proceedings by the General Division. See the saving and transitional provisions in the First Schedule to the Rules of Court 2021.

22 The Rules of Court 2021 apply to proceedings commenced in the General Division on or after 1 April 2022. Order 21 of the Rules of Court 2021 should be read together with O 2 r 13 of the same.

23 Certain more significant changes have been held in abeyance for the time being, following the Ministry of Law's public consultation on an earlier draft of the Rules of Court 2021. See paras 115–119 of Ministry of Law, *Response to Feedback from Public Consultation on the Civil Justice Reforms: Recommendations of the Civil Justice Commission and the Civil Justice Review Committee* (11 June 2021) <https://www.mlaw.gov.sg/files/news/public-consultations/2021/Consolidated_Response_to_Civil_Justice_Public_Consultation_Feedback.pdf> (accessed 16 November 2022).

corresponding with each of these two sets of rules,[24] which lay down the guidelines for party-and-party costs awards in the Supreme Court, essentially prescribe identical guideline range figures for costs awards in non-SICC proceedings.

9 A key and crucial doctrinal feature underpinning the costs regime under O 59 of the Rules of Court 2014 and O 21 of the Rules of Court 2021 is the concept of assessment of costs on two possible bases: the standard basis and the indemnity basis. Order 21 rr 22(2), 22(3) and 22(4) of the Rules of Court 2021 (which are *in pari materia* with O 59 rr 27(2), 27(3) and 27(4) of the Rules of Court 2014) exemplify the distinction between costs assessed on the standard basis and costs assessed on the indemnity basis:

> (2) On an assessment of costs on the standard basis, a reasonable amount in respect of all costs reasonably incurred is to be allowed, and any doubts which the Registrar may have as to whether the costs were reasonably incurred or were reasonable in amount are to be resolved in favour of the paying party; and in these Rules, the term 'the standard basis', in relation to the assessment of costs, is to be construed accordingly.
>
> (3) On an assessment on the indemnity basis, all costs are to be allowed except insofar as they are of an unreasonable amount or have been unreasonably incurred, and any doubts which the Registrar may have as to whether the costs were reasonably incurred or were reasonable in amount are to be resolved in favour of the receiving party; and in these Rules, the term 'the indemnity basis', in relation to the assessment of costs, is to be construed accordingly.
>
> (4) Where the Court makes an order for assessment of costs without indicating the basis of assessment or on any basis other than the standard basis or the indemnity basis, the costs are to be assessed on the standard basis.

10 In practical terms, the distinction between these two bases of costs assessment lies in the *burden of proof* of reasonableness of the costs incurred by the party in whose favour costs are to be awarded. In *Kiri Industries Ltd v Senda International Capital Ltd*,[25] the SICC explained this distinction succinctly as follows:[26]

> The difference between standard and indemnity costs lies in the burden of proof. When assessing costs on the 'indemnity basis', any doubts as to *reasonableness* are resolved in favour of the receiving party. On the other hand, in assessing costs on a 'standard basis', any doubts as to *reasonableness* are resolved in favour

24 See Supreme Court Practice Directions 2013 Appendix G (read with para 99B of the same) which corresponds to the Rules of Court 2014, and Supreme Court Practice Directions 2021 Appendix G (read with para 138 of the same) which corresponds to the Rules of Court 2021.

25 [2022] 3 SLR 174.

26 *Kiri Industries Ltd v Senda International Capital Ltd* [2022] 3 SLR 174 at [71].

> of the paying party: see O 59 r 27(2), O 59 r 27(3). The basis of assessment is the same but the burden of proof is shifted. In practice, this difference in the burden of proof has led to indemnity costs being typically materially higher. However, conceptually, 'reasonableness' remains the common thread in O 59 r 27, and the only distinction between standard and indemnity costs is in whose favour any doubts over reasonableness are resolved. [emphasis in original]

11 Party-and-party costs are generally assessed on the standard basis, meaning that an order of costs on the indemnity basis is the exception rather than the norm and requires justification typically focusing on the unreasonableness of the paying party's conduct.[27]

12 It is also important to appreciate that an assessment of costs on the indemnity basis does not amount to assessing costs in such manner as to bring about a full and complete reimbursement by the paying party of the receiving party's reasonable legal expenses incurred in relation to the court proceedings (*ie*, assessing *solicitor-and-client* costs). The basic principle that costs awarded "should be no more than an indemnity – not a full and complete indemnity – to the party concerned against expenses to which he has been put in the litigation"[28] has been a longstanding one, even to date.[29] Such basic principle is a manifestation of the law's policy of enhancing access to justice for all, as explained by the Court of Appeal in *Maryani Sadeli v Arjun Permanand Samtani*:[30]

> Ultimately, *our* legal regime on costs recovery is calibrated in a manner such that full recovery of legal costs by the successful party is the exception rather than the norm. What we need to bear in mind is that this state of affairs is not something which exists to prejudice the winning party in litigation, but is a manifestation of the law's policy of *enhancing access to justice for all*. Put another way, unrecovered legal costs is something which is part and parcel of resolving disputes by seeking recourse to *our* legal system and all parties who come before our courts must accept this to be a *necessary incidence* of using the

27 See *Airtrust (Hong Kong) Ltd v PH Hydraulics & Engineering Pte Ltd* [2016] 5 SLR 103 at [17]–[53]. This is, however, not to say that the conduct of the receiving party is totally irrelevant. See, *eg*, Rules of Court 2021 O 21 r 4 and Rules of Court 2014 O 59 r 7.

28 See *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* [1992] 3 SLR(R) 622 at [33].

29 A recent proposal by the Civil Justice Commission recommending that solicitor-and-client costs be pegged to the amount of recoverable party-and-party costs (so as to ensure that a successful litigant would not be out-of-pocket for his legal costs) was "withdrawn and is to be re-visited at a more appropriate juncture". See para 117 of Ministry of Law, *Response to Feedback from Public Consultation on the Civil Justice Reforms: Recommendations of the Civil Justice Commission and the Civil Justice Review Committee* (11 June 2021) <https://www.mlaw.gov.sg/files/news/public-consultations/2021/Consolidated_Response_to_Civil_Justice_Public_Consultation_Feedback.pdf> (accessed 16 November 2022).

30 *Maryani Sadeli v Arjun Permanand Samtani* [2015] 1 SLR 496 at [34]. See also *Basil Anthony Herman v Premier Security Co-operative Ltd* [2012] 2 SLR 616 at [5].

> litigation process. It is in this light that the general rule must be understood. [emphasis in original]

13 For proceedings to which O 59 of the Rules of Court 2014 applies, the default position is that a party in whose favour costs are awarded is not allowed to recover party-and-party costs premised on "costs for getting up the case by and for attendance in Court of more than 2 solicitors", unless otherwise certified by the court.[31] This default "two counsel rule" has been judicially clarified to engender a "notional" approach (rather than a strict arithmetic "headcount" approach) whereby the court awards costs taking into account work that would reasonably and proportionately[32] have been performed by a *notional* two-solicitor team. This was on, *inter alia*, the reasoning that:[33]

> … If the work done by the legal team is, in totality, proportionate to the matter at hand, and may reasonably and realistically have been done by a notional two-man team, there seems to be no reason to limit the court to considering only the work done by two actual counsel and to disregard all other work done.

14 The position under O 21 of the Rules of Court 2021 is slightly different, in that there is no equivalent of the default "two counsel rule" imposed under O 59 of the Rules of Court 2014. Instead, O 21 rule 2(2) of the Rules of Court 2021 simply provides that in exercising its power to fix or assess costs, the court must have regard to "all relevant circumstances", including, *inter alia*, "the number of solicitors involved in the case for each party".

B. Costs regime in the Singapore International Commercial Court

15 Under the Rules of Court 2014, the starting point for costs assessments in respect of SICC proceedings was O 110 rule 46.[34] In particular, O 110 rule 46(1) provided that:[35]

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31 See Rules of Court 2014 O 59 r 19(1). See also Rules of Court 2014 O 59 r 19(3) read with O 59 Appendix 1, para 1, which requires the court to be satisfied that the use of two solicitors is reasonable.

32 See generally *Lin Jian Wei v Lim Eng Hock Peter* [2011] 3 SLR 1052 on the principle of proportionality.

33 See *Trans Eurokars Pte Ltd v Koh Wee Meng* [2015] SGHCR 6 at [32].

34 See *CPIT Investments Ltd v Qilin World Capital Ltd* [2018] 4 SLR 38 at [12].

35 Order 110 r 46(2) of the Rules of Court 2014 likewise provides the same in respect of costs relating to appeals from the SICC to the Court of Appeal: "The unsuccessful party in any appeal from the [SICC] to the Court of Appeal, or in any application to the Court of Appeal, must pay the reasonable costs of the appeal or application to the successful party, unless the Court of Appeal orders otherwise."

> The unsuccessful party in any application or proceedings in the [SICC] must pay the *reasonable costs* of the application or proceedings to the successful party, unless the [SICC] orders otherwise. [reference added; emphasis added]

16 Order 59 of the Rules of Court 2014 was expressly disapplied in respect of SICC proceedings, pursuant to O 110 r 46(6). This meant that the standard and the indemnity bases for costs assessment[36] are not available concepts in the SICC costs regime.[37]

17 Order 110 r 46 of the Rules of Court 2014 was further supplemented by para 152 of the Singapore International Commercial Court Practice Directions[38] (the "SICC Practice Directions"). In particular, para 152(3) of the SICC Practice Directions provided that the circumstances which the SICC may take into consideration in ordering "reasonable costs" under O 110 r 46(1) included the following:

> (*a*) the conduct of all parties, including in particular –
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> (i) conduct before, as well as during the application or proceeding;
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> (ii) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue; and
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> (iii) the manner in which a party has pursued or contested a particular allegation or issue;
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> (*b*) the amount or value of any claim involved;
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> (*c*) the complexity or difficulty of the subject matter involved;
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> (*d*) the skill, expertise and specialised knowledge involved;
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> (*e*) the novelty of any questions raised;
>
> (*f*) the time and effort expended on the application or proceeding.

18 The SICC Practice Directions did not, however, contain an equivalent of Appendix G,[39] which had been described to be a set of domestic "standard fee ranges" which "will often be lower, sometimes significantly lower, than the actual fees incurred even if these fees are 'reasonable' in the widest sense of that word".[40] This lack of an equivalent of Appendix G in the SICC costs regime is consistent with the policy

36 Explained in paras 9–10 above.

37 See *CPIT Investments Ltd v Qilin World Capital Ltd* [2018] 4 SLR 38 at [15]: "it is clear that the usual High Court costs regime in O 59 was intended to be replaced with the simpler regime in O 110 r 46".

38 Effective 1 April 2022. The SICC Practice Directions were issued pursuant to O 110 r 54 of the Rules of Court 2014.

39 See para 8 above.

40 See *B2C2 Ltd v Quoine Pte Ltd* [2019] 5 SLR 28 at [10].

considerations underlying litigation in the SICC, as elucidated in *B2C2 Ltd v Quoine Pte Ltd*:[41]

> … The SICC is a court empowered to resolve commercial disputes on the international stage. The parties come before the SICC either by consent or if the High Court orders the transfer of an appropriate case, they will normally be commercial entities, and there will be an international dimension to the disputes. Whilst the social policy of enhancing access to justice underlies, and should underlie, the approach to assessing reasonable costs in international commercial litigation, there are other policy considerations in play as well. Commercial disputes are, as the name suggests, focused on commerce and the making of money. Paragraph 152(3) [of the SICC Practice Directions] sets out considerations which commercial people would understand as being factors which are intended to enable the court to draw a proper and clear line as to what expenditure is necessary to succeed in the litigation and what is in excess of that expenditure. A successful commercial litigant should not be out of pocket if it has prosecuted its claim or defence sensibly and, more specifically, without enhancing the cost of the litigation as a means of seeking to oppress the losing party.
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> …
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> … What O 110 r 46 of the ROC and para 152 of the SICC Practice Directions are clearly indicating is that successful litigants before the SICC can expect to receive reasonable compensation for the expenditure that they have properly incurred.

19 Two important qualifications must, however, be borne in mind. The first is that the SICC in assessing "reasonable costs" under O 110 r 46(1) of the Rules of Court 2014 may, in appropriate circumstances,[42] still have regard to the domestic costs guidelines set out in Appendix G, subject to the appropriate weight to be accorded based on the circumstances of the case.[43]

20 The second is that the policy considerations underlying litigation in the SICC did not go so far as to enjoin the recovery of party-and-party costs in SICC proceedings in the measure of full and complete reimbursement of the receiving party's solicitor-client costs, even as "reasonable costs" awarded in the SICC are generally envisaged to exceed costs assessed on the indemnity basis had the proceedings otherwise

41 [2019] 5 SLR 28 at [12]–[14].

42 Especially in the situation where the case has been transferred from the General Division to the SICC under O 110 r 12(4) of the Rules of Court 2014.

43 See *CPIT Investments Ltd v Qilin World Capital Ltd* [2018] 4 SLR 38 at [25]; *B2C2 Ltd v Quoine Pte Ltd* [2019] 5 SLR 28 at [17]; *DyStar Global Holdings (Singapore) Pte Ltd v Kiri Industries Ltd* [2020] 4 SLR 28 at [14]; and *CBX v CBZ* [2022] 1 SLR 88 at [28].

been disposed of domestically in the General Division.[44] The justification for this was held by the SICC in a recent case to flow from a dissimilarity in the manner in which the concept of "reasonableness" is to be applied by the courts in order to validate a costs claim, as a matter of statutory interpretation:[45]

> Importantly, there are two ways in which the concept of 'reasonableness' appears in O 59 [of the Rules of Court 2014]. First, the costs incurred by a party must be 'reasonably incurred'. Second, the *amount* of the 'reasonably incurred costs' that are to be awarded to the receiving party must be 'reasonable'. To illustrate, consider a situation where a party has incurred five items of costs. The first question is: of those five items, how many were 'reasonably incurred'. Assuming that only three of the items were 'reasonably incurred', the total amount of these three items is calculated. If the total amount is 'X' dollars, only a 'reasonable amount' of 'X' will be awarded to the receiving party. That is, based on the circumstances of the case, the court may award any percentage of 'X' to the receiving party. In short, there is a *double* attenuation of costs based on the consideration of 'reasonableness' in an assessment under O 59.
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> On the other hand, this does not appear to be the case in O 110 r 46 of the [Rules of Court 2014], where there is only one mention of the concept of 'reasonableness', *ie*, 'reasonable costs'. The plain words of the provision therefore suggests that, in contrast to O 59, there is only a *single* attenuation under *one broad inquiry as to reasonableness*. This may reasonably lead to the conclusion that the costs awarded in the SICC will generally be higher, depending of course on the circumstances of the case.
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> [emphasis in original]

21 The SICC in that case was alive to a possible view that the "double attenuation" approach discerned from the domestic costs regime may, after all, be encompassed by the SICC costs regime's single reference to "reasonable costs". However, the SICC in that case ultimately declined to adopt that view on the basis that:[46]

> … while costs must still be 'reasonable', the policy concern of 'access to justice' is replaced by the *commercial consideration* of ensuring that a successful litigant is not generally out of pocket for prosecuting their claim in a sensible manner. Thus, as long as the costs are sensibly and reasonably incurred, a party in the SICC ought to be able to claim them – in other words, there is only a single attenuation, as earlier described. [emphasis in original]

22 The last sentence in the passage quoted above seems to encapsulate the court's view that attenuation under the yardstick of "reasonableness" is applied predominantly only at the stage where the inquiry is focused

44 *Kiri Industries Ltd v Senda International Capital Ltd* [2022] 3 SLR 174 at [79].
45 *Kiri Industries Ltd v Senda International Capital Ltd* [2022] 3 SLR 174 at [72]–[73].
46 *Kiri Industries Ltd v Senda International Capital Ltd* [2022] 3 SLR 174 at [77].

on whether the items of costs claimed have been "sensibly and reasonably incurred". As long as the receiving party is able to make good its case to the satisfaction of the court within the parameters of that stage of inquiry, the SICC generally would not embark on an additional attempt at "attenuating" the *quantum* claimed under each of the costs items found to have been "sensibly and reasonably incurred".

23 As at the time of writing this article, it was to be seen whether the Court of Appeal would likewise adopt the same perspective. Perhaps it might be said that the reasoning of the SICC just mentioned may no longer be as extant in the light of the new SICC Rules 2021 which came into effect on 1 April 2022.[47] This is because O 22 r 3(1) of the SICC Rules 2021 (which can reasonably be considered to be *in pari materia* with O 110 r 46(1) of the Rules of Court 2014) is framed in wording which more unambiguously suggests that "reasonableness" (and proportionality[48]) serves as an essential yardstick that is *equally* ubiquitous to *both* stages of the court's logical inquiry – *ie*, whether the costs items as claimed have been reasonably (and proportionately) incurred, and if so, whether the quantum claimed under those costs items are reasonable (and proportionate). Order 22 r 3(1) of the SICC Rules 2021 provides:

> Without affecting the scope of the Court's discretion in Rule 2(1), and subject to any provisions to the contrary in these Rules, a successful party *is entitled to costs and the quantum of any costs award will generally reflect the costs incurred by the party entitled to costs,* ***subject to the principles of proportionality and reasonableness.*** [emphasis in italics and bold italics added]

24 What, then, should account for the more generous costs awards to be expected in respect of SICC proceedings compared to the Appendix G domestic cost guidelines, if not for the "double attenuation" hypothesis? In this author's respectful view, one needs to look no further than the fact of the displacement of the domestic "public interest to keep costs

47 The SICC's decision in *Kiri Industries Ltd v Senda International Capital Ltd* [2022] 3 SLR 174 was rendered on 8 December 2021.

48 See *Perry, Tamar v Esculier, Bonnet Servane Michele Thais* [2022] 4 SLR 362 at [15]:

> … one factor that the court should take into account is the value of the claim and that care should be taken to ensure that a successful party has not spent more on the case than its value merits. Proportionality is a close relation to reasonableness but proportionality in relation to the value of the claim is not the only aspect of proportionality that has to be considered. Reasonableness has to be considered in the round and this will include proportionality in relation to the issues that arise for decision. Where difficult questions of law or fact arise, it may well be reasonable to incur greater costs in relation to a case of a given value than would be the case in relation to a straightforward case of similar value. There is no mathematical test that can be applied and little help will generally be obtained from comparing the sums awarded by way of costs in one case with those in another.

within reasonable limits", on account of the international and commercial character[49] of the SICC. Such domestic public interest was succinctly explained by the High Court in *Basil Anthony Herman v Premier Security Co-operative Ltd*:[50]

> … The important purpose of the exercise of assessing costs is to ensure that the receiving party is given a fair amount of money towards compensating the costs he expended in pursuit of his cause. *It is not to compensate him for every cent he expended even* ***if they were reasonably expended****. It is in the public interest to keep costs within reasonable limits.* [emphasis in italics and bold italics added]

25 As we have seen, the SICC has in fact expressed a similar consideration in this regard before, as its earlier judgment in *B2C2 Ltd v Quoine Pte Ltd*[51] demonstrates.[52] In this author's respectful opinion, the rationale for the SICC costs regime is probably better more simply explained as a direct function of the SICC having an international and commercial character sufficiently distinguishing it from its domestic counterparts within the General Division, along with their characteristically communitarian policy imperatives.[53] Indeed, as this article was about to be published, the Court of Appeal handed down a judgment putting to rest the "double attenuation" hypothesis and affirming the position that:[54]

> … in proceedings in the SICC, access to justice considerations are superseded by the commercial consideration of ensuring that a successful litigant is not out of pocket. However, it does not follow from this alone that the inquiry into

49 See, *eg*, Singapore International Commercial Court Rules 2021 (S 924/2021) O 2 r 3(2) and Rules of Court 2014 O 110 r 8(3), specifying the "international and commercial character" of the SICC.

50 [2012] 2 SLR 616 at [5]. See also a similar exposition by the Court of Appeal in *Maryani Sadeli v Arjun Permanand Samtani* [2015] 1 SLR 496 at [34], quoted in para 12 above.

51 [2019] 5 SLR 28.

52 See para 18 above. This decision was also referred to in *Kiri Industries Ltd v Senda International Capital Ltd* [2022] 3 SLR 174 at [76].

53 This distinguishing feature may, nevertheless, not be as absolute and as immutable in the unique situation where a case is transferred from the General Division to the SICC, as is possible under O 2 r 4(1) of the Singapore International Commercial Court Rules 2021 (S 924/2021) or O 110 r 12(4) of the Rules of Court 2014 (as the case may be). This article does not propose to delve into the unique treatment that the SICC would accord to such cases in its costs assessment, which by and large is dependent on the specific circumstance of the case. For a quick appreciation of the complexities involved in such situations, see, *eg*, *CBX v CBZ* [2022] 1 SLR 88 and *CPIT Investments Ltd v Qilin World Capital Ltd* [2018] 4 SLR 38.

54 *Senda International Capital Ltd v Kiri Industries Ltd* [2022] SGCA(I) 10 at [32]–[41]. The Court of Appeal further reaffirmed the view that because of the international and commercial nature of the disputes that come to be litigated in the SICC, "[t]he policy of enhancing access to justice is therefore less relevant in the SICC". See *Senda International Capital Ltd v Kiri Industries Ltd* [2022] SGCA(I) 10 at [42]–[59].

> 'reasonable costs' should exclude the inquiry into whether the costs incurred are, on the whole, reasonable in amount. The commercial consideration underlying the SICC is not a justification either for the parties to chalk up runaway costs or for the court to cease to scrutinise the overall quantum of the successful party's claimed costs. The assessment of 'reasonable costs' by definition entails an inquiry into whether the claimed costs were reasonably incurred *and* are reasonable in amount. … In short, it is incorrect to hold that the inquiry under O 110 r 46 should only be one about whether the claimed costs were reasonably incurred and excluding the question of whether they are reasonable in amount, and there is nothing on the face of O 110 r 46(1) that justifies such an interpretation. [emphasis in original]

III. Recoverability of foreign lawyer fees in Singapore International Commercial Court proceedings

26 In *Kiri Industries Ltd v Senda International Capital Ltd*,[55] the SICC observed that "[t]here is no local decision that has expressed any views on the recoverability of foreign lawyer fees".[56] The SICC in that case declined to express any substantive views on whether foreign lawyer fees should or should not be recoverable as a general rule, although at the same time it remarked that:[57]

> … It seems incorrect to say that they should never be awarded, given the international nature of disputes before the SICC. Much will depend on the circumstances. However, even if such fees are claimable, it seems to us that a cogent explanation has to be provided as to why it was necessary to engage foreign counsel when representation was retained for the proceedings in the SICC.

27 In that case, the action was first commenced in the General Division, with Singapore counsel engaged by the parties. Singapore counsel continued to represent the parties in the proceedings after the case was transferred to the SICC. The successful claimant claimed, *inter alia*, S$1,355,097.86 worth of disbursements for work done by its *foreign* (Indian) counsel, mainly relating to affidavits, pleadings and other papers that were filed in court.[58] In disallowing those disbursements, the SICC found that the claimant failed to provide any cogent explanation as to why the claimant needed foreign counsel's involvement when it already had separate representation from a Singapore law firm.[59] The SICC further opined that the claimant "ought not to be allowed to recover those expenses as disbursements if they were incurred as a matter

55 [2022] 3 SLR 174.
56 *Kiri Industries Ltd v Senda International Capital Ltd* [2022] 3 SLR 174 at [99].
57 *Kiri Industries Ltd v Senda International Capital Ltd* [2022] 3 SLR 174 at [99].
58 See *Kiri Industries Ltd v Senda International Capital Ltd* [2022] 3 SLR 174 at [98].
59 See *Kiri Industries Ltd v Senda International Capital Ltd* [2022] 3 SLR 174 at [100].

of convenience, or simply because of deep pockets and a willingness to spend".[60]

28 It must be appreciated that the case was not declared or determined to be an "offshore case".[61] Had it been so, legal fees incurred as a result of any direct representation by registered foreign lawyers would have been amenable to being assessed as compensable direct legal costs related to the proceedings (rather than in the form of disbursements), subject to the principle of "reasonableness" as provided for in O 110 r 46(1) of the Rules of Court 2014 (as applicable in that case).[62] The discussion that follows therefore proceeds by drawing a fundamental distinction between an action which is an "offshore case" and an action which is not.

A. Offshore cases

29 To recap, an action in the SICC qualifies as an "offshore case" if it has no substantial connection with Singapore. The following are actions defined as amounting to having "no substantial connection with Singapore":[63]

> (a) an action where Singapore law is not the law applicable to the dispute and the subject matter of the dispute is not regulated by or otherwise subject to Singapore law; or
>
> (b) an action where the only connections between the dispute and Singapore are the parties' choice of Singapore law as the law applicable to the dispute and the parties' submission to the jurisdiction of the SICC.

30 Two exceptions to the above definition of "offshore case" exist, namely:[64]

> (a) Any proceedings under the International Arbitration Act 1994 that are commenced by way of any originating process.

60 *Kiri Industries Ltd v Senda International Capital Ltd* [2022] 3 SLR 174 at [100].

61 In accordance with its definition under O 110 r 1(1) of the Rules of Court 2014, and read with Legal Profession Act 1966 (2020 Rev Ed) s 36O(1) and Legal Profession (Representation in Singapore International Commercial Court) Rules 2014 (S 851/2014) r 3(2) .

62 For SICC proceedings commenced on or after 1 April 2022, the applicable rule is O 22 r 3 of the Singapore International Commercial Court Rules 2021 (S 924/2021).

63 See Singapore International Commercial Court Rules 2021 (S 924/2021) O 3 r 3(2). See also Rules of Court 2014 O 110 r 1(2)(*f*).

64 See Singapore International Commercial Court Rules 2021 (S 924/2021) O 3 r 3(1). See also Rules of Court 2014 O 110 r 1(1).

(b) An action *in rem* (against any ship or any other property) under the High Court (Admiralty Jurisdiction) Act 1961.[65]

31 The legislative intent behind the SICC's legal framework is clear, in that a party in an "offshore case" in the SICC may be represented directly by a foreign lawyer of the party's choice, provided that the foreign lawyer is registered with the SICC.[66] The foreign lawyer must be registered as a *full* registration foreign lawyer pursuant to s 36P(1) of the Legal Profession Act 1966,[67] in order to be able to do all or any of the following:

(a) Appear and plead in any "relevant proceedings" (defined essentially as proceedings in the SICC)[68] or in any proceedings that are preliminary to any "relevant proceedings".

(b) Appear and plead in any "relevant appeal" (defined essentially as appeals made to the Court of Appeal or the Appellate Division of the High Court)[69] or in any proceedings that are preliminary to a "relevant appeal".

(c) Represent any party to any "relevant proceedings" or "relevant appeal" in any matter concerning those proceedings or that appeal, including any proceedings that are preliminary to any "relevant proceedings" or "relevant appeal" in any matter concerning those preliminary proceedings.

(d) Give advice, prepare documents and provide any other assistance in relation to or arising out of any "relevant proceedings" or "relevant appeal", including any proceedings that are preliminary to any "relevant proceedings" or "relevant appeal".

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65 2020 Rev Ed.

66 See Singapore Parl Debates; Vol 92; Sitting No 17; [4 November 2014].

67 2020 Rev Ed.

68 See Legal Profession (Representation in Singapore International Commercial Court) Rules 2014 (S 851/2014) r 3(2) read with Legal Profession Act 1966 (2020 Rev Ed) s 36O(1).

69 See Legal Profession (Representation in Singapore International Commercial Court) Rules 2014 (S 851/2014) r 3(1) read with Legal Profession Act 1966 (2020 Rev Ed) s 36O(1). For the time being, an appeal arising out of a decision of the SICC lies directly to the Court of Appeal: see Supreme Court of Judicature Act 1969 (2020 Rev Ed) Sixth Schedule, para 1(*f*) read with s 29C. There is, nevertheless, a possibility of a transfer of an appeal made from the Court of Appeal to the Appellate Division of the High Court: see s 29E read with Supreme Court of Judicature Act 1969 (2020 Rev Ed) s 35(2)(*b*). It further appears that in the event that an SICC appeal is indeed transferred from the Court of Appeal to the Appellate Division of the High Court, the *coram* sitting in the Appellate Division of the High Court may similarly consist of international judges drawn from the SICC bench: see Supreme Court of Judicature Act 1969 (2020 Rev Ed) s 5A read with Constitution of the Republic of Singapore Art 95(10).

32 Against this backdrop, it would follow that a successful party represented by a full registration foreign lawyer can expect ordinarily to recover the measure of costs he has expended in engaging such foreign lawyer in respect of the SICC proceedings, to the extent that such costs were reasonably (and proportionately) incurred.[70]

33 In this regard, and for completeness, it further bears highlighting that the charging of professional fees by a full registration foreign lawyer relating to SICC proceedings (including any appeal arising therefrom) in no way falls foul of the general prohibition under the Legal Profession Act 1966 safeguarding certain exclusive privileges enjoyed by Singapore-qualified advocates and solicitors.[71] In particular, although s 33 of the Legal Profession Act 1966 prescribes, *inter alia*, an offence for any "unauthorised person"[72] acting as an advocate or solicitor, with s 36(1) further stipulating that "[n]o costs in respect of anything done by an unauthorised person as an advocate or a solicitor or in respect of any act which is an offence under section 33 are recoverable in any action, suit or matter by any person whomsoever", s 36P(1) of the same Act expressly confers a full registration foreign lawyer the right to perform any or all of the work described in para 31 above, "[d]espite anything to the contrary in this Act".

34 This would appear to be broadly consistent with the sister regime maintained under s 15 of the Legal Profession Act 1966 for *ad hoc* admission of a foreign lawyer to practise as an advocate and solicitor in Singapore, which is another option for foreign legal representation in respect of SICC proceedings (including any appeal arising therefrom).

35 In other situations, where for example a successful party in an "offshore case" is represented by (a) a Singapore-qualified advocate and solicitor; or (b) a Singapore-qualified solicitor registered under s 36E of the Legal Profession Act 1966 to practise Singapore law in a Joint Law Venture or its constituent foreign law practice, a Qualifying Foreign Law Practice or licensed foreign law practice,[73] it is envisaged that any costs sought to be recovered by that party for engaging any additional foreign lawyer must be claimed as disbursements, and even then the party is

70 See para 23 above.

71 See Legal Profession Act 1966 (2020 Rev Ed) s 29 on the privileges of advocates and solicitors in Singapore.

72 See Legal Profession Act 1966 (2020 Rev Ed) s 32(2) for the definition of "unauthorised person", which technically does not exclude a foreign lawyer registered with the SICC.

73 See Legal Profession (Regulated Individuals) Rules 2015 (S 701/2015) r 14(1)(*c*) read with r 2(1), essentially permitting such a solicitor to do any or all of the work listed under para 31 above.

expected to provide cogent explanation as to why it was necessary to engage the foreign lawyer when representation in either of the two forms described was retained in the proceedings.[74]

B. Non-offshore cases

36 In so far as non-offshore cases are concerned, the basic options for legal representation in respect of SICC proceedings (including any appeal arising therefrom) remain largely available, in that parties may choose to engage lawyers falling under the following categories:

(a) A Singapore-qualified advocate and solicitor.

(b) A foreign lawyer admitted on an *ad hoc* basis pursuant to s 15 of the Legal Profession Act 1966.[75]

37 Where a Singapore-qualified advocate and solicitor was retained for legal representation in the proceedings, the position as discussed in para 35 above should likewise apply if a foreign lawyer was additionally engaged by the successful party to render legal services related to the SICC proceedings (*ie*, the additional foreign lawyer fees can, at best, be sought to be claimed from the paying party as *disbursements*, subject to the successful party's burden of justifying to the standard of "cogent explanation" the *need* to engage any foreign lawyer). In contrast, where a foreign lawyer admitted on an *ad hoc* basis pursuant to s 15 of the Legal Profession Act 1966 was engaged, it is likely that the position as described in para 32 above (relating to the scenario where a full registration foreign lawyer has been engaged in an "offshore case") would similarly apply, in that the successful party can expect ordinarily to recover the measure of costs he has expended in engaging the foreign lawyer in question.

38 The difference between these two scenarios would chiefly lie in the fact that the foreign lawyer costs sought to be recovered in the former scenario is subject to a more demanding standard of justification (*ie*, "cogent explanation" on the *need* to have engaged any foreign lawyer), whereas in the latter scenario the party seeking costs need only satisfy the court of the "reasonableness" (and proportionality) of having incurred the foreign lawyer costs as claimed.

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74 See *Kiri Industries Ltd v Senda International Capital Ltd* [2022] 3 SLR 174 at [99].

75 Note, however, that in the specific context of proceedings commenced in the SICC under the International Arbitration Act 1994 (2020 Rev Ed) (which is excepted from the definition of "offshore case"), the courts will generally not grant *ad hoc* admission of a foreign lawyer pursuant to s 15 of the Legal Profession Act 1966 (2020 Rev Ed). See para 39 below.

39 It will be recalled that there are two express exceptions to the definition of "offshore case", one of which is any proceedings under the International Arbitration Act 1994 that are commenced by way of any originating process[76] ("IAA proceedings"). Even though the SICC (being a division of the General Division) has jurisdiction "to hear any proceedings relating to international commercial arbitration that the General Division may hear and that satisfy such conditions as the Rules of Court may prescribe",[77] the more recent case law has indicated that the SICC will generally not grant an *ad hoc* admission of a foreign lawyer pursuant to s 15 of the Legal Profession Act 1966 in respect of IAA proceedings, given "Parliament's clearly-stated intention that parties in arbitration-related matters heard in the [SICC] must be represented by Singapore-qualified lawyers" and the fact that "the SICC's bench comprises experienced local and foreign judges would count *against* the supposed need for foreign senior counsel"[78] [emphasis in original]. In practice, this means that parties in IAA proceedings commenced in the SICC should generally seek legal representation from Singapore-qualified advocates and solicitors, even if foreign lawyers had represented (or are representing) parties in the arbitration proceedings in question.

40 However, it remains to be seen whether a successful party in IAA proceedings commenced in the SICC may nevertheless be allowed to raise a claim for the recovery of any foreign lawyer fees incurred in such proceedings. In this regard, it may be worth noting that s 35 of the Legal Profession Act 1966 expressly disapplies the general prohibition[79] against any "unauthorised person" acting as an advocate and solicitor. In particular, s 35(1) of the Legal Profession Act 1966 provides:

> **35.** —(1) Sections 32 and 33 do not extend to —
>
> (*a*) any arbitrator or umpire lawfully acting in any arbitration proceedings;

76 See para 30 above. In respect of the other exception (*ie*, an action *in rem* (against any ship or any other property) under the High Court (Admiralty Jurisdiction) Act 1961 (2020 Rev Ed)), there is a dearth of material explaining its rationale, although it would not be unreasonable to assume that similar policy considerations relating to legal representation in IAA proceedings would *mutatis mutandis* apply, having regard to the relatively specialised field in which Singapore-qualified advocates and solicitors practising admiralty law operate.

77 See Supreme Court of Judicature Act 1969 (2020 Rev Ed) s 18D(2)(*a*). See also Singapore International Commercial Court Rules 2021 (S 924/2021) O 23 r 3 on the further conditions prescribed for the purpose of the SICC's jurisdiction in this regard.

78 See *Re BSL* [2018] SGHC 207 at [20] and *Re Gearing, Matthew Peter QC* [2020] 3 SLR 1106 at [84]–[86].

79 Mentioned earlier in para 33 above.

> (*b*) any person representing any party in arbitration proceedings; or
>
> (*c*) *the giving of advice, preparation of documents and any other assistance in relation to or arising out of arbitration proceedings except for the right of audience in court proceedings.*
>
> [emphasis added]

41 It seems arguable that a reading of s 35(1)(*c*) of the Legal Profession Act 1966 would suggest that where a foreign lawyer – short of appearing in IAA proceedings in court – was engaged by a party to give advice, prepare documents and render any other assistance "in relation to or arising out of" the arbitration proceedings in question, a claim by the party for recovery of costs so incurred may not be met with a categorical rejection from the outset.[80] This could be the result of a carefully calibrated balance that the Singapore legislature has found appropriate to strike: between on the one hand the starting premise that foreign lawyers enjoy broad entitlement to be engaged to participate in international arbitrations held in Singapore,[81] and on the other hand a policy refrain that parties cannot simply by virtue of having had foreign representation in their arbitration proceedings expect to insist on the continuity of such representation in national court proceedings related to the arbitration.[82]

42 Seen in this perspective, the middle ground that s 35(1)(*c*) of the Legal Profession Act 1996 purports to establish seems to be a recognition,

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80 *Cf* s 36 of the Legal Profession Act 1966 (2020 Rev Ed), which flows as a consequence of an application of ss 32 and 33 of the same Act.

81 See Singapore Parl Debates; Vol 59, Sitting No 6; Cols 424–428; [27 February 1992], overruling an earlier High Court ruling in *Turner (East Asia) Pte Ltd v Builders Federal (Hong Kong) Ltd* [1988] 2 MLJ 280 that foreign lawyers are prohibited from appearing in arbitration proceedings in Singapore under the earlier iterations of ss 32 and 33 of the Legal Profession Act 1966 (2020 Rev Ed). The legislative intent, as shared in Parliament by the then-Minister for Law, was that:

> [T]he exclusive right of practising Singapore advocates and solicitors to practise law and act as an agent in legal proceedings will not apply to arbitration where the law applicable to the dispute is foreign law. If the applicable law is Singapore law, foreign lawyers can still appear in arbitration proceedings if they appear jointly with a local practising advocate and solicitor. This requirement of appearing jointly gives flexibility to enable the client and the lawyers to decide whether the foreign lawyer is assisted by, or is to assist, the local lawyer. If Singapore law is the applicable law, then Singapore lawyers must be involved because logic and reason require this of us. This requirement of jointly appearing also acts as a safeguard as the local lawyer can advise the foreign lawyer on aspects of the local law which the foreign lawyer may not have expertise or sufficient expertise.

82 See *Re BSL* [2018] SGHC 207 at [20], citing Singapore Parl Debates; Vol 94, Sitting No 56; [9 January 2018].

at the very least, of the possibility that continuity of *assistance* by a foreign lawyer in IAA proceedings can potentially be justifiable *depending on the circumstances of each case*. This proposition is arguably analogous to the approach once adopted in *Re Joseph David QC*[83] ("*Re Joseph David QC*") in the context of an application for *ad hoc* admission of an English Queen's Counsel for the purposes of an IAA proceedings in the High Court, where the High Court held that:[84]

> … In view of the strong emphasis on developing international arbitration law in Singapore, it would be very much in line with the wider public interests to admit the Applicant in relation to the pending matters before the High Court. It must, however, be stressed that this does not mean that in future every application involving the same Queen's Counsel who has been the lead counsel in the arbitration proceedings below will be favourably viewed. Not only must the legal issues be of sufficient difficulty and complexity, the Court must also be convinced that the issues argued are inextricably linked to the arbitration proceedings and that there will be a real benefit in having the same counsel assist the Court. *A matter centric approach that pays particular attention to the sufficiency of complexity and difficulty of the issues raised will have to be adopted.* [emphasis added]

43 Granted, *Re Joseph David QC* was decided some three years before the SICC was established. As such, it is questionable whether the *result* in *Re Joseph David QC* admitting a foreign lawyer on an *ad hoc* basis is something that we will see repeated in the context of IAA proceedings in the SICC today.[85] However, it is equally important to note that the *reasoning* in *Re Joseph David QC* still appears to by and large continue to enjoy currency in cases subsequent to the establishment of the SICC citing it[86] – even most recently in an application (unsuccessfully) made under s 15 of the Legal Profession Act 1966 for *ad hoc* admission of a foreign lawyer in IAA proceedings that had been transferred to the SICC.[87]

44 In sum, if the "middle ground" proposition discussed in para 42 above is to be accepted, it is submitted that costs incurred as a result of *continuity* of foreign lawyer *assistance* in IAA proceedings before the SICC may stand to be recoverable (in the form of disbursements), on the claiming party's proof to the standard of "cogent explanation" as to why such assistance was needed having regard to the circumstances of the matter – such as the complexity and difficulty of the issues raised in the IAA proceedings. In the case where no foreign lawyer is involved

83 [2012] 1 SLR 791.
84 *Re Joseph David QC* [2012] 1 SLR 791 at [59].
85 See para 39 above.
86 See, *eg*, *Re BSL* [2018] SGHC 207 at [14]–[15] and [20].
87 See *Re Gearing, Matthew Peter QC* [2020] 3 SLR 1106 at [24].

in the underlying arbitration proceedings (for example, where only Singapore-qualified advocates and solicitors are acting for parties in the arbitration), any claim for disbursements incurred as a result of foreign lawyer assistance in the related IAA proceedings should expect to be met with greater scrutiny by the court. The quantum awarded by the court will, ultimately, be subject to the overarching principle of reasonableness (and proportionality).[88]

C. Mediation relating to disputes in the Singapore International Commercial Court

45 With the enactment and entry into force of the Mediation Act 2017[89] on 1 November 2017, exceptions similar to s 35 of the Legal Profession Act 1966[90] were introduced to the Legal Profession Act 1966 by way of a new s 35B(1):

> **35B.** —(1) Sections 32 and 33 do not extend to —
>
> (*a*) any certified mediator conducting any mediation;
>
> (*b*) any mediator conducting any mediation which is administered by a designated mediation service provider;
>
> (*c*) any foreign lawyer representing any party in any mediation that —
>
> (i) is conducted by a certified mediator or administered by a designated mediation service provider; and
>
> (ii) relates to a dispute involving a cross-border agreement where Singapore is the venue for the mediation; or
>
> (*d*) any foreign lawyer registered under section 36P and representing any party in any mediation that relates to a dispute in respect of which an action has commenced in the Singapore International Commercial Court.

46 These provisions were designed to "support international commercial mediation in Singapore by providing flexibility for parties intending to mediate to choose their own mediators and counsel, and encourage foreign mediators and counsel to use Singapore as a venue for mediation".[91]

88 See para 23 above.
89 2020 Rev Ed.
90 See para 40 above.
91 See Singapore Parl Debates; Vol 94, Sitting No 31; [10 January 2017].

47 Under O 9 r 5 of the SICC Rules 2021, the SICC (or the appellate court, as the case may be) may, *inter alia*, give directions to "facilitate the parties' attempt at alternative dispute resolution" (if parties are agreeable to alternative dispute resolution) or otherwise "make any order necessary to facilitate the amicable resolution of the dispute". Where an action is placed in the SICC's Technology, Infrastructure and Construction List,[92] the SICC Rules 2021 further provide that each party "must consider the use of alternative dispute resolution".[93] In the event that the parties reach a settlement through alternative dispute resolution, the court may record a consent order on the terms of the settlement.[94]

48 Given the value and importance that the SICC's dispute resolution regime places on alternative dispute resolution (of which mediation is a key mode), parties in SICC proceedings should find ample opportunity to consider the feasibility of mediation, which is expected to be more the norm than the exception.[95] In practice, it may also not be uncommon to see international and commercial disputes brought to the SICC pursuant to a multi-tier dispute resolution clause requiring mediation to be attempted as a condition precedent to the commencement of a court action.[96]

49 Thus, in an "offshore case"[97] where a successful party retains legal representation from a full registration foreign lawyer, s 35B(1)(*d*) of the Legal Profession Act 1966 arguably becomes the starting premise for possible recovery – where appropriate – of costs incurred by virtue of his foreign lawyer's representation in respect of "any mediation that relates to a dispute in respect of which an action *has commenced* in the [SICC]" [emphasis added]. An example of a situation which may be considered appropriate is where the successful party's opponent has displayed

92 See Singapore International Commercial Court Rules 2021 (S 924/2021) O 28.

93 See Singapore International Commercial Court Rules 2021 (S 924/2021) O 28 r 11(1).

94 See Singapore International Commercial Court Rules 2021 (S 924/2021) O 9 r 5(3) and O 28 r 11(3).

95 See also Singapore International Commercial Court Rules 2021 (S 924/2021) O 9 r 1(2), providing that "[a]t the first case management conference, the [SICC] may determine the adjudication track and give consequential directions, *including on alternative dispute resolution*" [emphasis added]. See further Singapore International Commercial Court Rules 2021 (S 924/2021) O 9 r 3(*c*), providing that prior to a case management conference, the parties must "consider the possibility of alternative dispute resolution, and be prepared to inform the [SICC] of the suitability of the case for alternative dispute resolution".

96 The enforceability of such a condition precedent in a multi-tier dispute resolution clause can be gleaned from *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd* [2013] 1 SLR 973 at [103] and *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd* [2014] 1 SLR 130 at [62].

97 See paras 29–31 above.

unreasonable abortive conduct in respect of the mediation, such as to generate unnecessary and wasteful costs in respect of the mediation.[98] Such costs are most likely claimable as direct legal costs rather than as disbursements, in light of the successful party having legal representation from a full registration foreign lawyer pursuant to s 36P(1) of the Legal Profession Act 1966.

50 In other situations, while assuming the same adverse conduct on the part of the opponent, the recoverability of any wasteful costs incurred by the successful party due to foreign lawyer representation in respect of mediation arguably could stem from s 35B(1)(*c*) of the Legal Profession Act 1966 instead,[99] provided that the conditions stipulated therein are fulfilled.[100] Whether such costs ought to be recoverable as direct legal costs or disbursements will likely depend on the circumstances. For instance, in the situation of a non-offshore case, any foreign lawyer representation costs in respect of mediation, if claimable, should be raised as an item of disbursement. In the scenario where mediation was attempted pursuant to a multi-tier dispute resolution clause *prior to* the commencement of an action in the SICC that qualifies as an "offshore case", it is submitted that the foreign lawyer representation costs in respect of mediation, if claimable, can instead be raised as an item of direct legal costs, provided that the foreign lawyer is a full registration foreign lawyer under s 36P(1) of the Legal Profession Act 1966.

D. Cases where questions of foreign law are involved

51 Thus far, a number of mentions have been made to *full* registration foreign lawyers in the SICC. Another one of the unique features of the SICC concerning legal representation should also be highlighted for completeness – namely, the possibility of a party appointing a *restricted*

98 See, in particular, Singapore International Commercial Court Rules 2021 (S 924/2021) O 22 r 3(2)(*e*)(iv), providing that in considering the principles of proportionality and reasonableness in a costs assessment, the court may have regard "to all relevant circumstances", including "whether the conduct of the parties, *including conduct in respect of alternative dispute resolution*, facilitated the smooth and efficient disposal of the case" [emphasis added]. Order 22 r 3(2)(*e*)(i) also provides that the parties' conduct "before, as well as during the application or proceeding" may be taken into account.

99 See para 45 above.

100 See Legal Profession Act 1966 (2020 Rev Ed) s 35B(2) for definitions of, *inter alia*, "certified mediator", "designated mediation service provider" and "cross-border agreement" mentioned in s 35B(1)(*d*).

registration foreign lawyer or a registered *law expert*,[101] where a question of foreign law is to be determined in an SICC proceeding.[102]

52 The court may, upon application by a party, order that "a question of foreign law be determined on the basis of submissions instead of proof, specifying one or more persons who may submit on the question of foreign law".[103] The SICC procedural rules further provide that before making such an order, the court must be satisfied that each party is or will be represented by a counsel, restricted registration foreign lawyer or registered law expert who is suitable and competent to submit on the relevant question of foreign law.[104]

53 A foreign lawyer with restricted registration status or a law expert registered with the SICC[105] may do all or any of the following:[106]

(a) Appear in any "relevant proceedings"[107] solely for the purposes of making submissions on such matters of foreign law as are permitted by the SICC (or the appellate court).

(b) Appear in the appellate court in any "relevant appeal"[108] solely for the purposes of making submissions on such matters of foreign law as are permitted by the SICC (or the appellate court).

(c) Give advice and prepare documents solely for the purposes of making submissions, in any "relevant proceedings" or "relevant appeal", on such matters of foreign law as are permitted by the SICC (or the appellate court).

54 Thus, where the court allows an application for a question of foreign law to be determined on the basis of submissions instead of proof, the following persons may be engaged by parties to address the court on the relevant question of foreign law:

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101 For the definition of "law expert", see Legal Profession Act 1966 (2020 Rev Ed) s 36O(1).

102 See Supreme Court of Judicature Act 1969 (2020 Rev Ed) s 18M read with Legal Profession Act 1966 (2020 Rev Ed) ss 36P(2) and 36PA. See also *Report of the Singapore International Commercial Court Committee* (November 2013) at para 34.

103 See Singapore International Commercial Court Rules 2021 (S 924/2021) O 16 r 8(1) and Rules of Court 2014 O 110 r 25(1).

104 See Singapore International Commercial Court Rules 2021 (S 924/2021) O 16 r 8(2) and Rules of Court 2014 O 110 r 25(2).

105 For the procedures concerning the application for registration of these two categories of persons, see Legal Profession (Representation in Singapore International Commercial Court) Rules 2014 (S 851/2014) rr 6 and 12B.

106 See Legal Profession Act 1966 (2020 Rev Ed) ss 36P(2) and 36PA(1).

107 See n 68 above.

108 See n 69 above.

(a) a *full* registration foreign lawyer listed in the SICC's Register of Foreign Lawyers,[109] provided that the court is satisfied that the foreign lawyer is suitable and competent to submit on the relevant question of law ("Scenario 1");

(i) in an "offshore case",[110] this may include any *full* registration foreign lawyer who is currently representing a party in the SICC, subject to the same requirement of suitability and competence to submit on the relevant question of foreign law ("Scenario 2");

(b) a *restricted* registration foreign lawyer approved by the court ("Scenario 3"); and

(c) a registered *law expert* approved by the court ("Scenario 4").

55 It is envisaged that costs incurred in engaging a full or restricted registration foreign lawyer or a registered law expert under Scenarios 1, 3 and 4 should generally be recoverable by the successful party in the form of disbursements, in order not to conflate such costs with the direct legal costs incurred as a result of any primary legal representation retained by the party. On the other hand, where Scenario 2 is concerned, it would not seem objectionable that costs incurred relating to the question of foreign law may be subsumed as part of the entire direct legal costs claimed by the successful party, given that the full registration foreign lawyer is properly representing the successful party in respect of the SICC proceedings. In any case, the quantum awarded by the court is subject to the overarching principle of reasonableness (and proportionality),[111] including the court's assessment as to whether all points of foreign law raised in submissions

109 The Register of Foreign Lawyers is published on the SICC website at <https://www.sicc.gov.sg/registration-of-foreign-lawyers/foreign-lawyers> (accessed 16 November 2022). A *full* registration foreign lawyer is typically required to provide an undertaking at the time of registration or renewal of registration stating that:

> … if the Singapore International Commercial Court, [the Court of Appeal or the Appellate Division of the High Court] makes an order permitting me to make submissions on a question of foreign law in, and on behalf of a party to, any pertinent proceedings (as defined in rule 2 of the Legal Profession (Representation in Singapore International Commercial Court) Rules 2014) or any relevant appeal from any judgment given or order made in those proceedings, I will appear, and give advice and prepare documents, in those proceedings or in that appeal, solely for the purposes of making submissions on that question of foreign law.

See Legal Profession (Representation in Singapore International Commercial Court) Rules 2014 (S 851/2014) Second Schedule, Form 1.

110 See paras 29–31 above.

111 See para 23 above.

at the trial or substantive hearing had been properly pleaded, identified or agreed by the parties.[112]

E. Proceedings in the Singapore International Commercial Court relating to corporate insolvency, restructuring or dissolution

56 On 1 October 2022, legislative amendments came into effect further specifying that the SICC has jurisdiction to "hear any proceedings relating to corporate insolvency, restructuring or dissolution" that are international and commercial in nature and which satisfy such conditions as the procedural rules may prescribe.[113] Ancillary legislative amendments were introduced at the same time to refine foreign lawyers' scope of representation in respect of such proceedings in the SICC. In this regard, the new s 36P(1A) of the Legal Profession Act 1966 stipulates that a foreign lawyer granted full registration under s 36P of the same Act may not – "except as otherwise prescribed" – plead any matter without the permission of the SICC (or the appellate court, as the case may be) or make a submission on any matter of Singapore law in such proceedings.[114]

57 For completeness, the new r 14(1A) of the Legal Profession (Regulated Individuals) Rules 2015 also stipulates that a Singapore-qualified solicitor registered under s 36E of the Legal Profession Act 1966 to practise Singapore law in a Joint Law Venture or its constituent foreign law practice, a Qualifying Foreign Law Practice or licensed foreign law practice, is subject to similar restrictions. However, an ostensible difference in treatment between a s 36E solicitor and a s 36P full registration foreign lawyer in this particular instance is that there appears to be no express caveat in the form of the wording "except as otherwise prescribed" retained in respect of a s 36E solicitor. In practice, however, this difference is unlikely to be significant.[115]

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112 See, *eg*, *Esben Finance Ltd v Wong Hou-Lianq Neil* [2021] 3 SLR 82 at [111]–[113].

113 See Supreme Court of Judicature Act 1969 (2020 Rev Ed) s 18D(2)(*c*) read with Singapore International Commercial Court Rules 2021 (S 924/2021) O 23A r 2.

114 Rule 3A of the Legal Profession (Representation in Singapore International Commercial Court) Rules 2014 (S 851/2014) defines, for the purposes of s 36P(1A) of the Legal Profession Act 1966 (2020 Rev Ed), "relevant proceedings", "relevant appeal" and "proceedings that are preliminary to any relevant proceedings or relevant appeal" to essentially mean proceedings relating to corporate insolvency, restructuring or dissolution that the SICC has jurisdiction to hear (including contempt of court proceedings related thereto).

115 For example, even though the restriction against "mak[ing] a submission on any matter of Singapore law" appears to be more absolute *vis-à-vis* a s 36E solicitor as compared to a s 36P full registration foreign lawyer, the legislative intent seems to be that a s 36P full registration foreign lawyer "will not be permitted to make a submission on a matter of Singapore law": see Singapore Parl Debates; Vol 95, Sitting No 46; [12 January 2022]. Note also that r 14(1A) of the Legal Profession (Regulated

(cont'd on the next page)

58 The factors that the SICC (or the appellate court, as the case may be) may take into account in deciding whether to grant permission to a s 36P full registration foreign lawyer to "plead any matter" pursuant to s 36P(1A)(*a*) of the Legal Profession Act 1966[116] are also substantively the same as those prescribed in respect of a s 36E solicitor,[117] as follows:

> (a) the nature of the factual and legal issues involved in the proceedings;
>
> (b) the role of the solicitor or foreign lawyer (as the case may be) in the proceedings; and
>
> (c) the extent of the international elements involved in the proceedings, including:
>
> > (i) the amount of assets or properties in one or more foreign countries;
> >
> > (ii) the obligations and liabilities that are governed by the laws of one or more foreign countries; and
> >
> > (iii) the governing law of the underlying agreement.

59 In summary, a s 36P full registration foreign lawyer is generally permitted *by default* to do the following in any proceedings relating to corporate insolvency, restructuring or dissolution that the SICC has jurisdiction to hear, in appeals arising therefrom or in any proceedings that are preliminary to those proceedings and appeals ("prescribed proceedings"):[118]

Individuals) Rules 2015 (S 701/2015) appears to only partially carve out certain acts that a s 36E solicitor would otherwise ordinarily have been able to perform in accordance with r 14(1)(*c*) of the Legal Profession (Regulated Individuals) Rules 2015 (S 701/2015) (which basically mirrors s 36P(1) of the Legal Profession Act 1966 (2020 Rev Ed) that is applicable to a s 36P full registration foreign lawyer).

116 Section 36P(1B) of the Legal Profession Act 1966 (2020 Rev Ed) provides that in considering whether to grant permission to any full registration foreign lawyer to plead any matter pursuant to s 36P(1A)(*a*), the SICC (or the appellate court) "may take into account any relevant factor, including the prescribed factors".

117 See Legal Profession (Representation in Singapore International Commercial Court) Rules 2014 (S 851/2014) r 3B (relating to a s 36P full registration foreign lawyer) and Legal Profession (Regulated Individuals) Rules 2015 (S 701/2015) r 14(1B) (relating to a s 36E solicitor).

118 See Legal Profession Act 1966 (2020 Rev Ed) ss 36O(1), 36P(1) and 36P(1A) read together with Legal Profession (Representation in Singapore International Commercial Court) Rules 2014 (S 851/2014) rr 3(1) and 3(2)(*ca*). Section 36P(1A) of the Legal Profession Act 1966 (2020 Rev Ed) only partially carves out from the list of things that a full registration foreign lawyer is permitted to do pursuant to s 36P(1) of the Legal Profession Act 1966 (2020 Rev Ed).

(a) Appear and represent any party to a prescribed proceeding (but not so far as to "plead any matter" to the court[119] or "make a submission on any matter of Singapore law").

(b) Give advice, prepare documents and provide any other assistance in relation to or arising out of a prescribed proceeding (as long as none of these amounts to "plead[ing] any matter" to the court[120] or "mak[ing] a submission on any matter of Singapore law").

60 Accordingly, a successful party in such proceedings who has retained the services of a s 36P full registration foreign lawyer can expect ordinarily to recover the measure of costs he has expended in engaging the foreign lawyer, to the extent that such costs are found to be (a) justifiably incurred in accordance with what the foreign lawyer was permitted to do in respect of the proceedings; (b) reasonable; and (c) proportionate.

IV. Conclusion

61 Foreign legal representation is an important consideration for parties in international commercial dispute resolution, and most certainly an area that the SICC dispute resolution framework pays keen attention to in facilitating (rather than limiting) parties' choice of foreign counsel in SICC proceedings. Singapore's overall policy stance has consistently been one of ensuring that parties looking to Singapore as a venue to resolve their international commercial disputes are by no means deprived of their choice of foreign counsel in most cases, which reflects Singapore's serious commitment to its mission of maintaining its status as an internationally attractive hub for the resolution of such disputes, be it by way of mediation, arbitration or litigation.

62 As the SICC continues to grow in its caseload, questions relating to the recoverability of foreign lawyer costs in or related to SICC proceedings are expected to surface with increasing frequency. By addressing the various circumstances in which foreign lawyer costs may be recoverable in relation to SICC proceedings, this article seeks to add

119 The phrase "plead any matter" is taken to mean make submissions to the court, given the Second Minister for Law's explanation at the Second Reading of the amendment Bill. See Singapore Parl Debates; Vol 95, Sitting No 46; [12 January 2022]:

> … a foreign lawyer with full registration may *submit on matters* in the prescribed proceedings, subject to the following restrictions: one, the foreign lawyer will only be allowed to *submit on matters* with permission granted by the Court; and two, the foreign lawyer will not be permitted to make a submission on a matter of Singapore law. [emphasis added]

120 See Singapore Parl Debates; Vol 95, Sitting No 46; [12 January 2022].

to the existing literature aiding commercial parties in making a more enriched decision in arriving at a choice of international commercial dispute resolution mechanism most suitable to their needs. In particular, this should encourage contracting parties (including their legal advisors) to, if so desired, incorporate into contracts a model dispute resolution clause in favour of the SICC[121] now having a greater benefit of appreciating the prospects of recovering foreign lawyer costs in relation to proceedings in the SICC, should the need arise one day.

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121 The model clauses are published on the SICC's website at <https://www.sicc.gov.sg/model-clauses> (accessed 16 November 2022).