

Singapore International Commercial Court issues first decision

A Legal Update from Dechert's International Arbitration
Group

June 2016

Following the establishment of the Singapore International Court (**SICC**) in January 2015, the SICC issued its first decision on 12 May 2016 in the case of *BCBC Singapore Pte Ltd and another v PT Bayan Resources TBK and another* [2016] SGHC(I) 01 (***BCBC Singapore v PT Bayan Resources***).

In this client briefing, we provide:

- ▶ an explanation of the key features of the SICC;
- ▶ an overview of the SICC's first decision; and
- ▶ a brief analysis of the circumstances in which SICC litigation might be suitable for the resolution of cross-border commercial disputes.

Key features of the Singapore International Commercial Court

The SICC blends some of the hallmarks of international commercial arbitration with those of domestic court litigation. In particular, the principle of party autonomy, which is a cornerstone of international arbitration, is reflected to some degree in the procedures of the SICC. Specifically, parties to SICC proceedings can determine the applicable rules of evidence, can choose to be represented by foreign counsel, can have limited document disclosure, and can choose to keep the proceedings confidential.

Many of the procedures adopted by the SICC, however, will also be familiar to domestic court litigators. This includes a standing body of judges whose appointment is not dependent upon support from one or more parties, the provision of necessary infrastructure by the state such as court facilities, and a right of appeal.

These features are expanded upon below.

- ▶ **Rules of procedure:** proceedings before the SICC are governed by the Singapore Rules of Court as supplemented by the SICC Practice Directions and SICC User Guides.
- ▶ **Jurisdiction:** the SICC can exercise jurisdiction over 'international' and 'commercial' disputes referred to it by an agreement of the parties, or, importantly, cases which are transferred to it from the Singapore High Court upon a party's application or by the High Court's own motion. In practice, parties to cases before the Singapore High Court which are international in nature are routinely invited by the court to consider agreeing to a transfer of the case to the SICC.
- ▶ **Foreign representation:** parties may be represented by foreign lawyers (ie lawyers who are not admitted to the Singapore bar) in 'offshore cases', which are defined as those where (a) Singapore law is not the law applicable to the dispute; or (b) the only connections between Singapore and the dispute are the parties' choice of Singapore law as the law applicable to the dispute and the parties' submission to the jurisdiction of the SICC.
- ▶ **Confidentiality:** SICC proceedings will generally be heard in open court. Consistent with the principle of party autonomy, however, parties can apply for the proceedings to be confidential. In determining whether to make a confidentiality order, the SICC will consider whether the case is an 'offshore case' and whether the parties have agreed that the proceedings should be confidential.
- ▶ **Joinder:** the SICC has the power to join third parties (other than a state or the sovereign of a state) to a suit before the Court. This includes the power (at least in theory) to join parties which have not submitted to the jurisdiction of the SICC.

- ▶ **Limited document disclosure:** the discovery and inspection procedures applicable to regular court proceedings do not apply to SICC proceedings. Instead, the SICC provides for a streamlined document production process inspired by the International Bar Association Rules on the Taking of Evidence in International Arbitration (*IBA Rules of Evidence*).
- ▶ **Flexible rules of evidence:** litigants can select the rules of evidence that the SICC will apply. For example, parties may prefer that the IBA Rules of Evidence apply rather than the Singapore law of evidence, which will otherwise apply by default.
- ▶ **Standing body of judges:** the SICC panel of judges comprises 15 Singaporean judges from the Singapore High Court and Court of Appeal, alongside 12 International Judges from Australia (2 judges), Austria (1), France (1), Hong Kong (1), Japan (1), the United Kingdom (4), and the United States (2). The International Judges are appointed to the SICC panel for a fixed period of time (which has not been disclosed) and are assigned cases by the Chief Justice of Singapore, Sundaresh Menon.
- ▶ **Right of appeal:** unless otherwise agreed by the parties, decisions of the SICC can be appealed to the Singapore Court of Appeal, the highest court in Singapore. Consistent with the principle of party autonomy, parties can agree to exclude the right of appeal altogether, or agree to limit its scope to specific grounds such as a breach of natural justice in the proceedings or lack of jurisdiction.
- ▶ **Quorum:** disputes referred to the SICC will ordinarily be heard by a single judge at first instance and by three judges on appeal. The Chief Justice may at his discretion increase this to three judges to hear a dispute at first instance or five judges on appeal.
- ▶ **Enforcement of SICC judgments:** SICC judgments can be enforced in jurisdictions which have reciprocal enforcement arrangements with Singapore, namely Australia, Brunei Darussalam, Hong Kong, India (with the exception of the State of Jammu and Kashmir), Malaysia, New Zealand, Pakistan, Papua New Guinea, Sri Lanka, the United Kingdom and the Windward Islands.

In addition, following Singapore's recent ratification of the 2005 Hague Convention on Choice of Court Agreements, which will come into force in Singapore on 1 October 2016, SICC judgments can also be recognised and enforced in states which are party to the Convention. At the moment this comprises Mexico and 27 members of the European Union (ie all members except Denmark). The United States and Ukraine have also signed but are yet to ratify the Hague Convention.

For countries not party to the Hague Convention, and which do not have a reciprocal enforcement arrangement with Singapore, the enforceability of Singapore court judgments will be determined by the domestic laws of the jurisdiction in which enforcement is sought.

The SICC decision in *BCBC Singapore v PT Bayan Resources Tbk*

The dispute in *BCBC Singapore v PT Bayan Resources Tbk* arose out of a joint venture between parties incorporated in Australia and Indonesia, with associated companies incorporated in Singapore. The joint venture sought to exploit a patented technology to produce and sell upgraded coal from East Kalimantan, Indonesia. Various developments in the course of the joint venture led to the project incurring greater expenses than the parties had envisaged, including the passing of Indonesian legislation relating to the determination of benchmark prices for the sale of coal.

This led to a S\$1 billion claim first filed in the Singapore High Court in December 2011, which was transferred to the SICC on the High Court's own motion in March 2015 despite what appears to be an objection by one or both of the parties. The Singapore High Court ordered the transfer to the SICC on the basis that the case concerned a

transnational business dispute involving parties, business interests and commercial dealings spanning multiple jurisdictions.

The Chief Justice of Singapore appointed Singapore High Court Judge Quentin Loh and International Judges Vivian Ramsey (United Kingdom) and Anselmo Reyes (Hong Kong) to hear the case. The court applied Singapore law, which expressly governs the joint-venture agreements in question.

The SICC's first ruling addressed the nature and scope of the parties' contractual obligations. In summary, the SICC held as follows.

- ▶ On a proper construction of the joint venture agreements, PT Bayan Resources Tbk (**Bayan Resources**) was not obliged to provide funding to the project.
- ▶ The court declined to decide whether Bayan Resources was under an obligation to supply coal and/or assist in procuring coal during the time period in question as insufficient evidence had been adduced to enable the court to do so.
- ▶ The arrangement between the parties for the supply of coal was not void for illegality as it was not contrary to Indonesian laws in relation to the sale of coal. The arrangement was also not void for uncertainty since the parties had agreed upon a broad overarching framework which renders performance possible.
- ▶ The court dismissed Bayan Resource's counterclaim, holding that BCBC Singapore did not have an implied contractual duty to use reasonable skill and care to be expected of a competent designer, builder and operation of the coal preparation and briquetting plants.

The remaining issues, such as whether there has been a breach and the consequences of any breach, will be determined in subsequent phases of the litigation. The SICC granted the parties 30 days to consider the judgment after which a case management conference will be held to determine next steps in the conduct of the case.

Analysis of SICC litigation

Last month's decision of the SICC provides a timely reminder that SICC litigation may be a viable option for parties seeking to resolve certain cross-border commercial disputes. To assist those contemplating when that might be, we set out below a number of the advantages of SICC litigation as compared to other forms of international dispute resolution.

Pros

- ▶ **Potentially faster resolution of disputes:** the SICC process could potentially lead to disputes being resolved within a shorter timeframe than in international arbitration. The SICC has a standing body of judges, thus avoiding the delays associated with having to constitute an arbitral tribunal. Further, as a court-based process, the SICC can be expected to be more forceful and less accommodating of delaying tactics than some arbitral tribunals have proven to be.
- ▶ **Greater independence:** the right of parties in international arbitration to choose their own arbitrator or otherwise influence the composition of an arbitral tribunal has been criticised by some commentators on the basis that it may undermine the independence and credibility of the arbitral process. In contrast, parties to an SICC case have no influence over who hears a dispute.

- ▶ **Quality decisions:** SICC litigation may lead to higher quality decisions than that rendered by some (but certainly not all) arbitral tribunals. As noted above, the SICC panel of judges includes experienced judges of the Singapore High Court and Court of Appeal, as well as former judges of the High Court of England and Wales, the High Court of Australia, and the Delaware Supreme Court.
- ▶ **Costs:** litigation in the SICC could be a cheaper alternative to arbitration for some disputes. Administration and arbitrator's fees are fixed by reference to the sum in dispute in a Singapore International Arbitration Centre (**SIAC**) arbitration. By contrast, fees applicable to SICC proceedings will depend on the actual work undertaken by the Court. This is calculated with reference to the documents filed by the parties and any interlocutory applications, the number of hearing days required, and possible appeal proceedings. As illustrated in Table 1 below, a S\$10 million claim could potentially be resolved at the SICC for half the administration and judicial cost that could be incurred in a SIAC arbitration.

Table 1 Comparison of SIAC and SICC fees in S\$ for a claim amount of S\$10 million

	SIAC ¹			SICC ²	
	Sole arbitrator	Three arbitrators		Single judge	Three judges
Filing fee	\$2,000 ³		Commencement fee	\$3,300	\$4,950
Administration fee (maximum) ⁴	\$38,800		Case Management hearing	\$3,300	\$6,600
			Certification of exchange of affidavits of evidence-in-chief	\$2,750	\$6,050
			Setting down for trial	\$1,100	\$2,750
			Filing of an interlocutory application (inclusive of the first half-day hearing)	\$3,500	\$10,500
Venue costs (per day)	\$6,050 ⁵		Hearing fee (interlocutory application)	\$7,875	\$23,625
Tribunal fees (maximum) ⁶	\$161,900	\$485,700	Hearing fee (trial)	\$70,000	\$210,000
Total	\$208,750	\$532,550	Total	\$91,825	\$264,475

¹ The SIAC figures are based on the SIAC Schedule of Fees (effective as of 1 June 2016) annexed to the SIAC Rules (2016). For further information, see *A Guide to the SIAC Arbitration Rules*, M Mangan, L Reed and J Choong, (Oxford University Press 2014), pp 215 – 216.

² The SICC figures are based on the Singapore Rules of Court (Chapter 322, Section 80) and the SICC Practice Directions (with effect from 1 January 2015). The SICC figures are based on an action commenced by writ with 5 days of interlocutory hearings, 20 days of trial and no appeal proceedings.

³ The SIAC filing fee of S\$2,000 is applicable to overseas parties. A filing fee of S\$2,140 is applicable to Singapore parties.

⁴ SIAC calculates administration fees on an ad valorem basis. In practice, the actual administration fees payable will depend on factors such as the complexity of the case and its duration. SIAC will generally receive 75 to 80 per cent of the maximum fees payable under the SIAC Schedule of Fees. For further information, see *A Guide to the SIAC Arbitration Rules*, M Mangan, L Reed and J Choong, (Oxford University Press 2014), pp 215 – 216.

⁵ This figure is based on the use of a medium hearing room at Maxwell Chambers, Singapore for five days.

⁶ In practice, arbitrators are not typically paid the maximum fees payable under the SIAC Schedule of Fees. The fee actually paid to the arbitrator will depend on the complexity of the case, its duration, and the extent to which the arbitration was conducted diligently and fairly. A SIAC tribunal will generally receive 75 to 80 per cent of the maximum fees payable under the SIAC Schedule of Fees. For further information, see *A Guide to the SIAC Arbitration Rules* (Oxford University Press, 2015), pp 215 – 216.

Potential disadvantages

While SICC litigation may well on occasion be cheaper than SIAC arbitration as demonstrated above, there are certain disadvantages to SICC litigation that would need to be considered before it is chosen as a means of resolving international commercial disputes.

- ▶ **Enforcement difficulties:** it is generally easier to enforce an international arbitral award in foreign countries than a court judgment. The 1958 New York Convention facilitates the enforcement of an arbitral award in any of the 156 states which are party to the New York Convention. While as noted above, Singapore has reciprocal enforcement arrangements with a number of jurisdictions and has recently ratified the Hague Convention, these would presently only facilitate enforcement of Singapore court judgments in 39 states which are identified above.
- ▶ **Right of appeal:** the right of appeal in SICC proceedings may be a disadvantage from the perspective of parties desiring finality after a first-instance decision. With that said, an agreement between the parties to exclude or limit the scope of the right of appeal will be upheld by the SICC.
- ▶ **Inability to nominate a member of the court:** some parties, and perhaps most, may prefer international arbitration over SICC litigation for the reason that they can influence the composition of the arbitral tribunal, whereas judges for an SICC case will be appointed by the Chief Justice of Singapore from the current 27 members of the SICC panel of judges.
- ▶ **Costs:** litigation at the SICC may not be a cheaper alternative to arbitration for claims that are relatively low in value or where the proceedings are particularly complex or involve a high number of hearing days. (For instance, the parties' opening submissions in the English High Court case of *Three Rivers District Council and ors v The Governor and Company of the Bank of England* [2006] EWHC 816 (Comm) took a record total of 199 days, which would have been handled infinitely faster in an international arbitration, possibly in as little as half a day for the opening submissions.)
- ▶ **Limited caseload:** While the SICC is a long way from reaching full capacity, ultimately there will be a limited number of cases it will be able to handle each year. The Court has 27 judges, most of whom perform other roles. The Singaporean judges on the Court hold concurrent appointments with the Singapore High Court. Similarly, the International Judges on the SICC panel may continue to hold judicial appointments in the courts of their home jurisdictions or sit on arbitral tribunals. In contrast, there is a limitless pool of arbitrators that parties or arbitral institutions can draw upon to determine disputes. Indeed, a record 271 new cases were filed with SIAC in 2015, which were referred to over 120 arbitrators.⁷ The SICC is unlikely ever to be able to handle a caseload of that magnitude.

In practice, SICC litigation is likely to be of most interest for international commercial cases where enforcement is contemplated in Singapore itself, in a country with which Singapore has a reciprocal enforcement arrangement, or in a country which has ratified the Hague Convention.

Alternatively, the SICC might be of interest in circumstances where enforcement of the court's decision is unlikely to be necessary. In that regard, we are aware of instances where companies work so closely together on one or more projects that they are confident that they will not require the enforcement of a decision resolving a dispute between them in order for it to be complied with. In essence, some contractual parties may only require a decision from a neutral decision-maker by which they are prepared to abide. Naturally, a decision to adopt SICC dispute

⁷ As at 31 December 2015, 126 arbitrators were appointed to determine SIAC cases which were filed in 2015. The total number of arbitrators appointed for all 271 SIAC cases filed in 2015 will be greater as there are a number of cases for which arbitrators had yet to be appointed as at that date.

resolution procedures in those circumstances must be taken very carefully as it is always possible that a deeply ingrained relationship could break down such that enforcement of a decision abroad ultimately does become necessary.

Conclusion

The SICC is an innovative manifestation of the Singapore government's ambition to strengthen Singapore's role as a hub for legal services throughout the Asian region. It would be unwise to bet against it succeeding. Indeed, there are presently four cases pending before the SICC, with many more likely to be referred to it in the future.

This briefing was written by Dechert partner Mark Mangan and associate Claire Chong.

For more information and guidance on these issues, please contact:



Mark Mangan
Partner, Singapore
+65 6730 6983
mark.mangan@dechert.com



Claire Chong
Associate, Singapore
+65 6730 6989
claire.chong@dechert.com



Henry Defriez
Associate, Singapore
+65 6730 6987
henry.defriez@dechert.com

© 2016 Dechert LLP. All rights reserved. This publication should not be considered as legal opinions on specific facts or as a substitute for legal counsel. It is provided by Dechert LLP as a general informational service and may be considered attorney advertising in some jurisdictions. Prior results do not guarantee a similar outcome. Dechert (Singapore) Pte Ltd does not advise on Singapore law other than in the context of arbitrations.

Thank You

For further information,
visit our website at dechert.com

Dechert practices as a limited liability partnership or
limited liability company other than in Dublin and
Hong Kong.

Dechert
LLP