

# Dispute Resolution Hotline

April 27, 2015

## SINGAPORE INTERNATIONAL COMMERCIAL COURT: RESOLVING INDIAN DISPUTES

Following on its vision to become the leading dispute resolution hub in the Asian region, the Parliament of Singapore passed three bills<sup>1</sup> bringing in the legal framework for establishment of the Singapore International Commercial Court ("SICC"). The SICC was formally established on January 5, 2015 as a division of the Singapore High Court and part of the Supreme Court of Singapore.

Under the current framework, SICC will be an international court with specialist jurists hearing international commercial disputes including dispute governed by foreign laws<sup>2</sup> and is modeled to be the equivalent of the commercial courts in London and New York.

SICC provides a court setup which imbibes the flexibility and certain benefits that arbitration offers. While such a hybrid structure has certain undoubted benefits over arbitration, it comes with its inherent limitations as well.

### SICC: SALIENT FEATURES

#### International & Commercial Claim

The SICC may try only those claims which are international and commercial in nature.

A claim is considered '*commercial*' if it arises from any relationship of commercial nature. Commercial relationships include, amongst others, concession agreements, joint ventures, consulting, engineering or licensing, as well as construction works, investment, financing, banking or insurance relationship.<sup>3</sup>

A claim is '*international*' if<sup>4</sup> –

- The parties have agreed by written agreement to submit their claim to the SICC and the parties have their place of business in different states;
- None of the parties to the claim have their place of business in Singapore;
- A substantial part of the obligation of the commercial relationship between the parties is to be performed outside any state in which any of the parties have their place of business;
- The place with which the subject matter of the dispute is most closely connected is outside any state in which any of the parties have their place of business; or
- The parties to the claim have agreed expressly that the subject-matter of the claim relates to more than one state.

#### Default Exclusive jurisdiction

An agreement to submit to the jurisdiction of the SICC, in the absence of any express contractual provision to the contrary, is considered as grant of exclusive jurisdiction to the SICC to decide the dispute.

SICC may decline to assume jurisdiction in an action if it is not "appropriate" for the action to be heard by SICC. While there are no guidelines provided for what is considered "appropriate", SICC would have to have regard to its international and commercial nature.

The tests applicable for determination of whether it would be "appropriate" for SICC to assume jurisdiction over a dispute may be similar to that applicable under the doctrine of *forum non conveniens*. However, the threshold for establishing that another court would be an appropriate court to try the dispute would be considerably high considering that the statute itself provides that the jurisdiction clause would be considered as an exclusive jurisdiction clause and that connecting factors or lack thereof must not be the sole basis for declining jurisdiction. Thus, considering the statutory mandate, the adoption of SICC as the dispute resolution forum by the parties would normally reflect as a clear and strong choice of forum to the exclusion of others.

#### Panel of Jurists

Unlike the commercial courts in London, a unique feature of SICC is the presence of eminent foreign jurists along with the judges from the Singapore Supreme Court on its panel of judges. In the first panel appointed for the next three years, the international jurists are from both civil and common law jurisdictions. This step is, undoubtedly, taken to make the SICC attractive to parties of all nations, civil and common.

#### Inclusion of Third Parties

Jurisprudence is continuously developing on situations where two arbitrations could be consolidated or where third parties to the arbitration agreement could be made parties to the arbitration. In fact arbitral institutions are now modifying their rules to incorporate provisions for consolidation of arbitrations such as the Hong Kong International

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Arbitration Center. However, inclusion of third parties in arbitration continues to remain a contentious issue and is occasionally viewed as a drawback to the arbitration process especially in cases on related transactions or back to back transactions.

SICC however, being part of the Singapore Supreme Court has the authority to join third parties to the disputes however such party may not necessarily be a party to the agreement to submit to SICC's jurisdiction.

## Evidence

A notable departure from a usual court setup is the ability of SICC to derogate from the Singaporean law on evidence. SICC may adopt rules of evidence under any foreign law or otherwise upon a suitable application from the parties. Rules of evidence in this regard, include the law relating to privilege such as attorney client privilege or confidentiality attached to official communications in certain cases. This feature is fairly similar to arbitration where parties have the flexibility to adopt their own applicable rules of evidence.

Another departure from usual court procedure is in regard to dealing with questions of foreign law. SICC gives liberty to the parties to seek that the questions of foreign law be decided on basis of submissions, which otherwise would have been required to be proven by evidence as a question of fact.

## Representation by Foreign Counsel

For a case before the SICC any of the parties may appoint and be represented by any foreign counsel from outside Singapore. However the liberty to be represented by a foreign counsel is limited to "offshore cases", i.e., a matter which has no substantial connection to Singapore. "Substantial connection" maybe considered as existing in case (a) 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) the *only* connection between the dispute and Singapore are the parties' choice of Singapore as the law applicable to the dispute and the parties' submission to the SICC's jurisdiction.

## Confidentiality

The SICC, in a deviation from the usual court proceedings, makes provisions for keeping disputes and proceedings to a dispute confidential upon application by a party. In this regard, the SICC may order (a) a case to be heard in camera, (b) the information / documents in a matter to not be revealed or published and / or (c) the Court file to be sealed.

Notwithstanding the abovementioned, a judgment if considered to be of major legal interest maybe directed to be published in law reports etc. However, parties would again have the right to make an application to ensure the confidentiality of such judgment.

## Appellate Body

A judgment of SICC may be appealed to the Court of Appeal. However, the parties while contracting may limit or completely exclude/waive such right of appeal. The judges of the Court of Appeal would also come from the SICC Panel which would include International Judges.

## Enforceability

Given the nature of the SICC, that of a division of the judiciary of Singapore, the orders / judgments would be liable to be enforced in Singapore and other jurisdictions in the same manner as any other judgment from a Singaporean Court. Enforcement of foreign judgments in various countries is usually brought about by reciprocal arrangement between countries. Singapore currently has limited reciprocal arrangements with other countries, and intends to widely expand its network of treaties to improve upon the enforceability of judgments. One of the principal means whereby Singapore intends to achieve this is through signing and ratification of the Hague Convention by different countries. This would clearly make SICC judgments widely enforceable and a truly effective forum in wide variety of cases.

## SICC VIS-À-VIS ARBITRATION

The SICC framework aims at striking a balance between the practices of arbitration and court system. It is no surprise that the SICC incorporates certain key features of arbitration.

The SICC seeks to keep intact the autonomy of the parties. Jurisdiction of the SICC can be invoked by an agreement between parties. During the case proceedings too, foreign law may be applied substantively and for the process of evidence, based on the understanding between the parties. Confidentiality of the proceedings could also be protected by the parties.

However, the SICC in this process combines these features with the essential elements of court procedure in so far as it gives the option of joinder of third parties and reserves the power to call for evidence and documents from third parties who are not party to the proceedings. This gives the SICC a wider power to investigate the matter, provide contracting parties with the adequate relief and pass orders which would be effective against third parties too. This is unlike arbitration, where the tribunal has no power to pass any directions or orders against third parties.

Further, SICC being a division of the Singapore High Court, has the power to decide even those cases which are non-arbitrable in nature, in so far as they satisfy the international and commercial criteria.

Dissimilarity also lies in a party's lack of independence to choose the jurists adjudicating its dispute at the SICC. Unlike arbitration where the litigating parties have the liberty to decide the number and names of the arbitrators, the strength of the panel and individual jurists who would hear a case is decided by the SICC.

The execution and enforcement of a SICC decision is also different from that of an arbitral award. An arbitral award is usually enforced in most countries through the New York Convention. Considering that around 150 countries are signatories to the New York Convention, arbitral awards are widely enforceable as compared to the judgments of SICC. To that extent SICC decisions are at a disadvantageous footing compared to arbitral awards.

## ENFORCEMENT OF SICC JUDGMENTS IN INDIA

As per Section 44-A of the (Indian) Code of Civil Procedure, 1908, judgments of a superior court of a reciprocating

territory may be enforced and executed in India as if it was a decree of an Indian Court provided the judgment satisfies certain requirements such as it was pronounced by a court of competing jurisdiction, is on the merits of the case, is not opposed to natural justice, does not sustain a claim founded on a breach of Indian law or fails to apply Indian law where it was applicable.<sup>5</sup>

India recognizes the Singapore as a reciprocating territory and the High Court of Singapore has been classified as a superior court, judgments of which are enforceable in India<sup>6</sup>. Accordingly, the judgments of SICC are enforceable in India.

A SICC jurisdiction clause is statutorily intended to have an effect of waiver by parties to any recourse against enforcement of the judgment or order. However, the requirement stipulated for enforcements of foreign judgment in India are mandatory in nature. Therefore, the waiver by parties of any recourse to court or tribunal against judgment of SICC would not prevent parties from raising the defense under Section 13 of the (Indian) Code of Civil Procedure, 1908 at the time of enforcement of the judgment in India.

## CONCLUSION

SICC is now the third important international commercial dispute resolution forum established in Singapore, the other two being the Singapore International Arbitration Centre and the Singapore International Mediation Centre.

It would be an available choice for dispute resolution forum for contracts with Indian parties or India related contracts considering that judgments of SICC should be enforceable in India. However, on the face of it appears SICC would be a choice for parties who inherently do not seek arbitration as the process for dispute resolution or are faced with likely situations which would not be arbitrable or would require coercive powers of a court.

SICC is in its nascent stages and would require time and effort to develop into a mature dispute resolution body with rich jurisprudence. However considering the Singapore's sterling reputation it provides an attractive choice for users.

— Ashish Kabra & Vivek Kathpalia

You can direct your queries or comments to the authors

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<sup>1</sup> 1. Constitution of the Republic of Singapore (Amendment) Bill 2014;

<sup>2</sup> 2. Supreme Court of Judicature (Amendment) Bill 2014;

<sup>3</sup> 3. Legal Profession (Amendment) Bill 2014.

<sup>2</sup> Singapore Parliamentary Report (2014, November 4), Vol. 92

<sup>3</sup> Order 110 Rule 1(2) (b) of Rules of Court

<sup>4</sup> Order 110 Rule 1(2) (a) of Rules of Court

<sup>5</sup> Section 13 of the (Indian) Code of Civil Procedure, 1908

<sup>6</sup> Notification G.S.R. No. 1225 issued on June 17, 1968

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