

# An International Focus

*The Singapore International Commercial Court was established in 2015 as a forum for the resolution of international commercial disputes, including those involving derivatives. Sir Bernard Eder, one of the court's international judges and a former judge at the High Court of England and Wales, talks to IQ about the court's first five years and how it has continued to operate during the pandemic*

**IQ:** Can you describe the role of the Singapore International Commercial Court (SICC)?

**Sir Bernard Eder (BE):** The SICC was launched on January 5, 2015 as a division of the Singapore High Court. It aims to provide an internationally accepted framework for the resolution of international commercial disputes at a trusted neutral venue, in accordance with substantive principles of international commercial law. It is therefore a national court, with all its coercive powers, but with a division set up specially to serve the international business community in resolving disputes in an efficient and cost-effective manner. The SICC was the result

of extensive study of international best practices for commercial disputes, headed by a high-level working group, with the aim of developing provisions sensitive to the unique needs of international commercial users and the commercial bar.

It was launched to meet a perceived demand gap, and what the SICC aims to provide is a tailored alternative to arbitration – a place where businesses that operate internationally can seek a court judgment with the confidence that it will be a high-quality decision delivered in an efficient and impartial manner by judges of repute and with relevant industry knowledge.

The SICC is a key part of Singapore's plan to position itself as an international

dispute resolution forum, alongside the other options of the Singapore International Arbitration Centre (SIAC) and the Singapore International Mediation Centre (SIMC). It also taps into the strong international reputation that Singapore has for the rule of law, which is defined by judicial independence, competence and efficiency, and the eradication of corruption.

In short, the SICC offers court-based adjudication of international commercial disputes, even when such disputes have no connection with Singapore and are not governed by Singapore law. As such, it provides an alternative to international arbitration in a court setting with a difference – where each case will be adjudicated by

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experienced specialist commercial judges, with international judges from both civil law and common law traditions sitting with Singapore judges, and where parties may be represented by foreign lawyers in matters where there is no substantial connection to Singapore.

As a division of the Singapore High Court, there is a right of appeal to the Singapore Court of Appeal unless parties contract otherwise. This compares favourably with international arbitration where parties only have one shot to have their rights determined.

**IQ:** Are you seeing increased interest from international parties choosing Singapore as a forum for dispute resolution? Why might parties opt for the SICC?

**BE:** The awareness and reputation of the SICC and the jurisprudence it has built over its first five years strongly indicate its selection as the jurisdiction for contracts involving transnational parties, although there is inevitably a time lag for disputes to arise from these contracts and for such disputes to come to the court after settlement attempts have failed.

Another indication of increased interest is the frequency of the SICC being discussed at meetings and conferences, as well as articles written by both academics and practitioners. Parties might consider using the SICC as the dispute resolution forum for the following reasons.

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We also have a panel of experienced judges, comprising specialist commercial judges from Singapore and international judges from both civil law and common law traditions. There are now 16 international judges from seven jurisdictions (Australia, Canada, France, Hong Kong, India, the UK and the US), who sit alongside experienced judges from Singapore. Three of these 16 international judges were former heads of their respective judiciaries in Australia, Canada and the UK.

Parties may be represented by foreign counsel of their choice in certain matters that have no substantial connection with Singapore. Foreign lawyers will be granted a right of audience before the SICC, so long as they satisfy the registration requirements. They may appear and make submissions in any relevant proceedings, give advice, prepare documents and provide any other assistance, including proceedings in the Court of Appeal if an appeal is eventually filed. This allows parties to work with counsel they are comfortable with, expanding the range of options available to them. As of December, 2020, 87 foreign lawyers from 13 jurisdictions, including Queen's counsel and senior counsel, had registered with the SICC.

Another factor is the ease of joining related parties to a dispute – highly relevant in multi-party or multi-contract matters. An international commercial court, if structured correctly, is also apt for resolving disputes where there are multiple connected parties or where there is a string of upstream or downstream contracts.

Finally, there is availability of appeal, plus a broad enforcement-of-judgments footprint – treaties and arrangements cover close to 40 jurisdictions, including the major financial centres. For other jurisdictions, enforcement would be by action on a judgment debt.

A unique feature of the SICC is procedural flexibility, as it adopts international best practices for commercial disputes. Its procedures may be tailored to suit parties' preferences in several aspects, such as determination of foreign law (by submissions), document production, confidentiality and rules of evidence. Also, costs are at the discretion of the court. This makes the SICC an uncommon common law court, and some practitioners have commented that it is arbitration in →

→ litigation – with the advantages of international arbitration over traditional litigation, plus the advantages of published judgments, the right of appeal, and the hearing of disputes involving multiple parties that require third and related parties to be joined to the proceedings. The charges at the SICC, especially for large sums involved, are also competitive vis-à-vis international arbitration.

A group of disputes that will benefit from adjudication by the SICC are those arising from contracts where certain model clauses or laws are applied worldwide, and the interpretation of these clauses, as well as publication of those judgments, allow for the development of a standard interpretation. This is very much the situation in disputes arising from clauses in the ISDA Master Agreement. A good example is my own decision in the SICC in *Macquarie Bank Limited versus Graceland Industry*, which was concerned with the calculation of the close-out amount specified in clause 14 of the ISDA Master Agreement.

Published judgments with clear grounds of decision allow for commercial certainty – law firms advising their clients on their obligations under the ISDA Master Agreement can refer to such authoritative decisions. Similarly, in construction, there is widespread use of significant standard-form contracts with wide cross-cultural appeal, such as *Fédération Internationale Des Ingénieurs – Conseils* contracts. This enhances the benefits of developing a coherent jurisprudence, which would be lacking should such disputes be resolved through arbitration, as awards arising from them are confidential.

One measure of success of any court is its judgments and decisions. The SICC has released 79 judgments to date, involving

parties of 33 nationalities with claims ranging from S\$1.2 million (\$903,000) to S\$1 billion. These judgments are available to the public, and many of them have been praised or received favourable assessments by leading commentators around the world.

**IQ:** What measures have been taken to make Singapore a viable and attractive option for foreign counterparties when choosing a forum for dispute resolution?

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**BE:** In the 2018 international arbitration survey jointly conducted by Queen Mary University of London and White & Case LLP, respondents rated Singapore the third most preferred venue for dispute resolution.

This is unsurprising as Singapore has become a major hub in Asia for both financial and legal services, serviced by an integrated communications network to the rest of the world. Its status was burnished with the signing of the Singapore Convention on Mediation in August 2019.

The SICC is a key part of Singapore’s plan to position itself as an international dispute resolution forum, alongside the other options of the SIAC and the SIMC. Singapore has established a strong international reputation for the rule of law, which is defined by judicial independence, competence and efficiency, and the eradication of corruption. In the World Justice Project Rule of Law Index 2020, Singapore was ranked 12th in the world, and the first among Asian countries. Among the different factors, it was ranked first for order and security and third for the absence of corruption and regulatory enforcement.

**IQ:** What are the challenges involved in adjudicating on disputes involving complex financial instruments like derivatives?

**BE:** Such cases are uniquely suitable for a court like the SICC. The main disputants would have the ability to bring third and fourth parties into the same proceedings to prevent inconsistent findings, even if the third and subsequent parties do not agree. The SICC would have the power to customise litigation to suit the dispute and is well able to case manage such complex disputes – for example, through

consolidation of proceedings or issues, or having cases or issues heard sequentially but all before the same tribunal. Time and costs would be minimised by streamlining the expert evidence and agreed issues and

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facts common to different aspects of the proceedings. The SICC’s coercive powers are available against any party trying to apply dilatory tactics. All of this would result in an efficient, cost-effective resolution of the multiple disputes spawned by such complex matters.

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**IQ:** How important is international cooperation among commercial courts?

**BE:** In May 2017, senior judges from 25 jurisdictions met in London for the inaugural Standing International Forum of Commercial Courts (SIFoCC), and for a second time in September 2018. This signalled a clear intention by commercial courts that they are eager to work together to support commerce and international business. The intention was to establish collaboration between the jurisdictions to achieve cross-border recognition and enforcement of court judgments.

One of the key achievements of SIFoCC was the Multilateral Memorandum on Enforcement of Commercial Judgments for Money, published in June 2019, which describes how an overseas commercial judgment for money can be most simply and practically enforced in other jurisdictions.

Closer collaboration between international commercial courts is a glimpse at a rare opportunity to achieve consistency and certainty across jurisdictions. Businesses want to know what laws govern their dealings and what rights and duties they have, which is often a difficult feat when transactions occur across borders. With

such harmonisation of commercial law or approaches, businesses that operate internationally will know, with clarity, their rights and duties, regardless of where the transactions occur, resulting in lower costs of operations and greater certainty and confidence.

This then allows the SICC, and international commercial courts in general, to present a tailored alternative to other modes of dispute resolution, including arbitration or mediation, in appropriate circumstances.

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**IQ:** How are commercial courts having to respond to the coronavirus pandemic? What challenges have the courts faced, and do you think any of the measures introduced in response to the virus will become permanent?

**BE:** The COVID-19 pandemic has had an important impact on the conduct of hearings in the SICC, as well as in other courts in Singapore and around the world. Except for the period between April 7, 2020 and June 1, 2020, when the courts in Singapore heard only essential and urgent matters, the majority of hearings have proceeded since June 2, 2020 using remote communication technology such as Zoom. In the SICC, this has worked very well – and has enabled the court to continue its work as an important forum for the resolution of international disputes during these unprecedented times.

In fact, even before the onset of the pandemic, the SICC had embraced virtual hearings. Since 2019, there have been

some 25 cases in which at least one case management conference or hearing at the SICC was conducted at least partially through video conference (VC) and three cases or originating summons hearings conducted at least in part via VC.

Needless to say, the conduct of virtual hearings is not without some logistical difficulties. Access to fast and secure internet is obviously a prerequisite. It is also imperative that all concerned – including the court, counsel and any witnesses – have ready access to relevant documents in their different locations. Different time zones can also present a challenge. For example, since London is eight hours behind Singapore time, a virtual hearing in which I was one of the judges started at 1.30am London time.

Earlier this year, I was engaged in a full eight-day SICC trial conducted remotely with the assistance of the SICC registry. I was sitting in my home in London with counsel joining from their respective offices and witnesses giving evidence (some through interpreters) from Malaysia and elsewhere. From my perspective, it has worked extremely well with no hitches.

There is no doubt that virtual hearings require careful preparation in advance to ensure they can take place in an efficient way, always mindful of the critical need to ensure the case is conducted fairly for all parties. With the assistance of the SICC registry, the experience of the SICC in conducting virtual hearings has led the way in international dispute resolution. Even after the pandemic ends, it seems likely that, where appropriate, the practice of conducting virtual hearings will continue. **IQ**