

SICC conducts full trial through use of remote communication technology

The COVID-19 pandemic has underscored the immense contribution that technology can make to the continuity of proceedings at the Singapore International Commercial Court (SICC). Instead of simply adjourning all hearings for an indefinite period, the SICC implemented remote hearings. Following Chief Justice Sundaresh Menon's message on 29 May 2020 announcing the exit of "Circuit Breaker" period and the need for caution as the "Circuit Breaker" measures were lifted progressively, the SICC continued the use of video conferencing for various hearings after 1 June 2020.

The SICC conducted a full trial from 13 to 17 and 20 to 22 July 2020 through the use of remote communication technology. The eight-day trial was presided by International Judge Sir Bernard Eder from London, with witnesses giving evidence from Hong Kong, Malaysia and Singapore as well as counsel conducting the trial from their respective homes and offices in Singapore. When asked on his preparations prior to the hearing, Justice Eder replied, "Careful advance preparation and an agreed protocol are essential. It is also important that the documents are readily accessible in electronic form so that the documents can be referred to as necessary without delay during cross-examination and submissions."

As to what were the challenges of a virtual trial and steps taken to ensure that the trial proceeded smoothly, Mr Victor Low, an IT Engineer from the Computer Information Systems Department of the Supreme Court, mentioned that dropped calls were the most common issue with about 90% of those dropped calls due to poor internet connection from the participants outside of the court. The most common reason was the quality and speed of the internet line of the witnesses from the respective countries outside Singapore. These were ultimately resolved by getting the witnesses to testify from a location with a strong internet connection. Justice Eder commented, "Despite the challenges, the Zoom platform worked well and the trial was completed within the allocated time. Needless to say, this could not have been achieved without the full co-operation of the counsel teams on both sides and the unstinting support and assistance of the staff from the SICC Registry".

Personal Secretary to Justice Eder, Ms Anne Sim, was on work from home (WFH) arrangement was the Zoom host throughout the trial. She commented, "With a laptop...it couldn't get any more mobile!". Needless to say, remote hearings have by and large proven to be a feasible, convenient and effective solution that has helped the SICC embrace technology and change mindsets and practices – reinforcing the choice of the SICC as a prime destination for dispute resolution.

"The conduct of a full witness trial in the SICC over 8 days with counsel, witnesses, interpreters, transcribers, Court staff and Judge all in different locations and some 80 large bundles (perhaps 40,000 pages) presents significant logistical challenges. Careful advance preparation and an agreed protocol are essential. It is also important that the documents are readily accessible in electronic form so that they can be referred to as necessary without delay during cross-examination and submissions."

Justice Sir Bernard Eder

PERSPECTIVES

SICC INDICATES WILLINGNESS TO EXERCISE ITS DISCRETION WHEN DETERMINING COSTS TO DETER AN AWARD DEBTOR FROM (MIS)USING THE SET ASIDE APPLICATION



Written by: Gitta Satryani (Partner), Gerald Leong (Associate), and Lim Tse Wei (Associate), Herbert Smith Freehills LLP

In August 2019, the Plaintiffs applied to the High Court to set aside an award in an arbitration on the basis of an arbitrator's apparent bias. The case was transferred to the SICC and subsequently dismissed. The decision by International Judge Anselmo Reyes in *BYL & Anor v BYN*, rendered on 11 May 2020, deals with the costs of the Plaintiffs' unsuccessful setting aside application. Reyes IJ's decision is significant for two reasons. **First**, it affirms the SICC's discretion and willingness to depart from the High Court's scale of costs (even in relation to transfer cases), which – if applied – would have entitled the successful party to a costs order of no more than S\$15,000 (approximately US\$10,000) regardless of the complexity and quantum of the issues raised in the set aside proceedings. **Second**, it underscores the importance of providing sufficient particulars to justify the costs claimed, without which they will be rejected.

The decision articulates, and also addresses, the concern of many users of arbitration, namely that the lack of a realistic costs order in set aside applications in Singapore may have inadvertently provided mischievous unsuccessful parties with a low-cost opportunity to delay performance. As noted by Reyes IJ, without a meaningful costs order, *"the successful party would in effect be subsidising the unsuccessful party's attempt to avoid having to honour an award"*. His decision is therefore very much welcomed.

Background facts

It was undisputed between the parties that the Plaintiffs had to pay the Defendant's costs since the Defendant prevailed. However, when the case was transferred, the Deputy Registrar left open the question of whether the High Court costs regime set out in Appendix G of the Supreme Court Practice Directions ("**Appendix G**"), would apply to any part of the proceedings. If Appendix G was applied, an award on costs would be limited to a maximum of S\$15,000 (the scale applicable to a one-day hearing of an originating summons).

The Defendant submitted that they should be entitled to recover their entire costs amounting to S\$235,000 in legal fees, plus an additional S\$15,700 in disbursements, as they were reasonably incurred. The sum of S\$235,000 included the legal fees of (1) Defendant's Singapore counsel involved in the

set aside application (S\$133,400), (2) Defendant's counsel who had conduct of the arbitration and assisted in the preparation of various evidence in the set aside application (S\$84,300), and (3) Indian counsel who advised on aspects of Indian law relevant to the set aside (S\$1,500). (By contrast, the Plaintiffs incurred approximately S\$800,000-900,000 for the entire set aside proceedings.)

The Plaintiffs, on the other hand, argued that costs prior to the transfer to SICC must be assessed in accordance with the High Court costs regime for a setting-aside application, i.e. Appendix G. While the Defendant was entitled to its "reasonable costs" post-transfer, the Plaintiffs argued that the SICC should nonetheless have regard to Appendix G in making an assessment of what would constitute reasonable costs and consequently, the Defendant should only be entitled to a costs order in the region of S\$15,000, in line with Appendix G.

SICC's decision

With respect to the applicable principles, and the relevance of the High Court's costs regime reflected in Appendix G, Reyes IJ made the following findings.

(1) Following the transfer, and in the absence of contrary directions from the Deputy Registrar, costs should be assessed by reference to the SICC costs regime contained in Order 110 Rule 46 of the Rules of Court, allowing a successful party to recover its "reasonable costs". In other words, the SICC was not bound by or restricted to Appendix G. Indeed, Reyes IJ noted that where the recoverable costs under Appendix G constituted a significant discount to a party's reasonable costs *"there could be an incentive to the unsuccessful party to delay having to pay on an award by putting up unmeritorious applications to set aside the same"* and that unsuccessful party (if Appendix G were to be applied strictly), *"would not be bearing the reasonable economic cost of its failed attempt at delay"*. As a result, Reyes IJ held that the position in Appendix G should not be the normal position unless there was compelling justification.

(2) No compelling justification to apply Appendix G strictly existed here. Unlike in *BXS v BXT (Costs)*, the parties in this case did not have a shared understanding that the transfer to SICC would not affect the way costs were to be assessed (as a result of the transfer). To the contrary, the evidence indicated that parties had exceeded the S\$15,000 limit even before the case was transferred and given what was at stake, i.e. an award of US\$102 million, the parties expected to incur further significant costs to defend their respective positions.

(3) Nevertheless, and affirming the position in *CPIT Investments Ltd v Qilin World Capital Ltd* [2018] 4 SLR 38 and *BXS v BXT* [2019] 5 SLR 48, Reyes IJ noted that Appendix G could serve as a "reality test" in determining what would constitute reasonable costs.

Turning to the question of reasonableness, Reyes IJ scrutinised every component of the Defendant’s costs to determine the extent to which each item met the “reasonable costs” standard. In the end, the Court awarded only S\$82,500, slightly over a third of the total amount of S\$235,000 claimed. It should be noted however that Reyes IJ applied a significant discount to the amount claimed not because he found them to be unreasonable, but because the Defendant appeared not have provided sufficient particulars to the costs claimed such that it was not possible for Reyes IJ to determine their reasonableness. For example, Reyes IJ stated that no particulars were provided in relation to the fees of the Defendant’s counsel in the arbitration (S\$84,300), other than a short statement that they were involved in preparing the affidavit in order to avoid duplication of work (on the basis that as counsel in the arbitration, they would have been more familiar with the underlying facts than the Defendant’s Singapore counsel who was engaged for the set aside application). Reyes IJ noted that without further details, the fees appeared excessive as much of the narrative of events in the affidavit had been set out in the challenge within the arbitration, and awarded S\$28,100 for the costs of the Defendant’s arbitration counsel instead.

Other points to note

As noted earlier, the decision to award reasonable costs which are not limited to or pegged strictly to Appendix G and allow for meaningful substantive recover of the costs of defending an award, is very much welcomed to arbitration users. It is worth

noting that Reyes IJ was able to apply the SICC costs regime because the issue of costs assessment (and the application of Appendix G) was not fixed or determined prior to or at the time of transfer. It will be interesting to see if users of arbitration will start to include an exclusive submission to the SICC’s jurisdiction clause for their arbitration agreements (in which Singapore is selected as the seat), in order to avail themselves to the SICC’s costs regime, and prevent the application of Appendix G to their arbitration-related court proceedings.

Additionally, Reyes IJ analysis of the Defendant’s costs submissions highlights the importance of costs breakdowns in future SICC costs assessments. Ultimately, the Defendant failed to recover a significant portion of its costs as Reyes IJ felt it did not have enough information to determine if the Defendant’s costs was reasonable. Further, he emphasised the role of the parties’ proposed Case Management Plans in costs assessment. These plans acted as indicators of the work that had been done as at that date. Notably, the Defendant’s plan gave the appearance that the Defendant’s Singapore counsel’s fees overlapped with those of its other advisers, which justified an 81% discount on its Singapore counsel’s pre-CMC fees. Therefore, in the event that a party uses multiple sets of counsel in a set aside application, it is crucial to demonstrate their respective work scopes to avoid, or minimise, any finding of duplication which may lead to a reduction in the amount of recoverable costs on account that those costs were not reasonably incurred.

Gitta Satryani is a partner who specialises in complex cross-border disputes and international arbitration. She has a particular focus on disputes involving Indonesia and also advises commercial entities, states and SOEs on a broad range of issues relating to cross-border projects including dispute avoidance strategies and investment structuring.

Gerald Leong is an associate based in Singapore office specialising in mitigating, managing and resolving complex cross-border commercial disputes. His experience spans a broad range of sectors including projects, construction, telecommunications, commodities and regions including North and Southeast Asia, Australia, and the Middle East.

Lim Tse Wei is an associate based in Kuala Lumpur specialising in international commercial arbitration and cross-border disputes. He was called to the Malaysian and English Bars and represents and advises multinational clients in complex cross-border commercial and investment disputes across a range of sectors.

[The views expressed here are the writers’ and do not necessarily reflect those of the Supreme Court of Singapore and the SICC.]

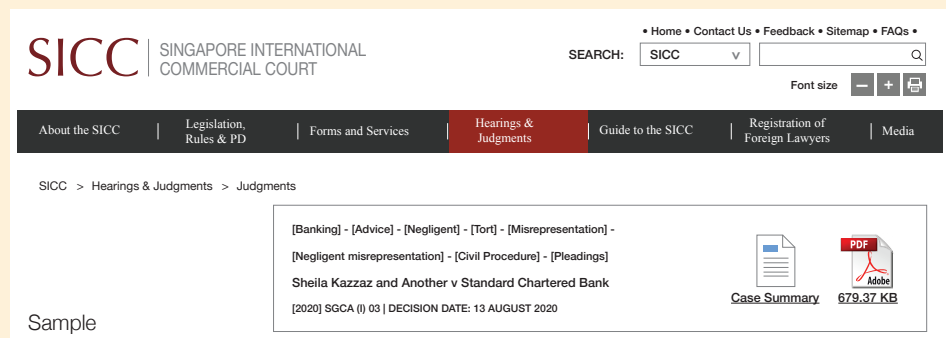
NEWS

JUDGMENTS PAGES ON SICC WEBSITE REVAMPED WITH KEYWORDS, DESCRIPTORS AND CASE SUMMARIES

All judgments of the SICC and related Court of Appeal matters are available on the SICC website. Since July, searches for SICC judgments were made more convenient. Not only do keywords and descriptors now accompany each judgment, but the respective case summaries are placed side by side with the judgments for ease of reference.

Previously, users had to toggle to the ‘Media’ section of the website to retrieve case summaries, and then navigate back to the “Hearings and Judgments” tab to download the judgment. Also, for readability (especially on mobile devices), the case summaries are now in HTML format – doing away with the need to download a PDF file in order to read the case summary.

Do check out the revised pages at <https://go.gov.sg/sicc-judgments>



WEBINAR

AN ALTERNATIVE FORUM FOR DISPUTE RESOLUTION -
SICC FIVE YEARS ON

21 SEPTEMBER 2020 | 4PM - 6PM

Join us for an exciting webinar to discover the SICC's developments and achievements over the past five years, and how it may prove beneficial to legal practitioners and in-house counsel seeking cost-effective options for dispute resolution. Listen to an eminent panel as they share their experiences in the SICC and discuss what the future holds for the Court in particular, and international commercial dispute resolution in general.

Five years on from the launch of the Singapore International Commercial Court (SICC) in 2015, the SICC has made its mark as a preferred forum for international dispute resolution. The SICC has been well received by the international legal community not just for the quality of judgments, but the unique and flexible features and practices of the SICC. This has resulted in the Court being described as 'arbitration in litigation', where one may have the benefits of arbitration but with some added advantages of litigation, and possibly a faster turnaround time. What's more, even in the midst of the current COVID-19 pandemic, the SICC was able to continue to function by implementing virtual hearings and practices that have permitted case management conferences and hearings to proceed expeditiously.

The webinar is scheduled for Monday, 21 September, commencing at 4pm Singapore time. Registration is free, and shall be via the Zoom platform. For more details on the speakers, panel and programme, click <https://www.sicc.gov.sg/media/events>. The registration link can be found at: <https://go.gov.sg/sicc-webinar-five-years-on-210920>

Latest Judgments

31 August 2020

Sheila Kazzaz and another v Standard Chartered Bank and others
[Civil Procedure] - [Costs]

[2020] SGHC (I) 19

13 August 2020

Sheila Kazzaz and Another v Standard Chartered Bank
[Banking] - [Advice] - [Negligent] - [Tort] - [Misrepresentation] -
[Negligent misrepresentation] - [Civil Procedure] - [Pleadings]

[2020] SGCA (I) 03

17 July 2020

CBX and another vs CBZ and others
[Arbitration] - [Award] - [Recourse against award] - [Setting aside]

[2020] SGHC(I) 17

16 July 2020

Singapore Airlines Ltd v CSDS Aircraft Sales & Leasing Inc
[Civil Procedure] - [Pleadings] - [Further and better particulars] -
[Rules of court] - [Evidence] - [Witnesses] - [Attendance]

[2020] SGHC(I) 18

13 July 2020

Hai Jiao 1306 Ltd and others v Yaw Chee Siew
[Contract] - [Contractual terms] - [Express terms] - [Best
endeavours] - [Breach] - [Misrepresentation]

[2020] SGHC(I) 16

7 July 2020

The Star Entertainment QLD Ltd v Wong Yew Choy and another matter
[Contract] - [Illegality and public policy] - [Section 5(2) Civil Law
Act (Cap 43, 1999 Rev Ed)]

[2020] SGHC (I) 15



Registered Foreign Lawyers

As at 23 Aug 2020, the SICC has 81 registered foreign lawyers (RFLs) on its register. Foreign lawyers are welcome to apply to be registered with the SICC. To view the full list of RFLs and find out more about registration, please visit <https://go.gov.sg/sicc-registration-foreign-lawyers>



SICC Model Clauses

The SICC has model clauses available, including clauses for submission of disputes to the jurisdiction of the SICC (both pre- and post-dispute) and in relation to the parties' rights of appeal. You may view them here: https://www.sicc.gov.sg/docs/default-source/guide-to-the-sicc/sicc_model_clauses.pdf



Enforcement of SICC Judgments

SICC judgments are enforceable in many jurisdictions, both civil and common law. You may access a Note on enforcement of SICC judgments here: <https://go.gov.sg/enforcement-money-judgments>

