

Commentary

THE SINGAPORE INTERNATIONAL COMMERCIAL COURT IN ACTION

Illustrations from the First Case¹

The Singapore International Commercial Court (“SICC”) rendered its first written judgment in its first case on 12 May 2016, setting a significant milestone since its establishment in 2015. The procedural aspects of the SICC’s first case offer many valuable insights on several key features of the SICC. This commentary seeks to elucidate these insights for the reader, particularly on matters relating to the transfer of proceedings to the SICC, the strength of the SICC panel, the discovery regime, the determination of questions of foreign law, registered foreign lawyers and their participation, as well as confidentiality applications. This commentary also considers some practice issues relating to case management, the use of technology, appeals, as well as fees and costs for proceedings in the SICC.

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¹ The authors were involved in the transfer and/or management of the first Singapore International Commercial Court (“SICC”) case in their capacity as registrars of the Supreme Court of Singapore, and set out in this article a description of what they observed as highlights of the case from the time it was transferred to the court on 4 March 2015 to the time judgment was rendered by the court for the first tranche of the trial on 12 May 2016 in *BCBC Singapore Pte Ltd v PT Bayan Resources TBK* [2016] SGHC(I) 1. The authors are grateful to Ms Cornie Ng, Ms Una Khng, Mr Paul Chan, Ms Joan Janssen, Mr Mark Mangan and Ms Eunice Chua who have provided valuable comments on an earlier draft of this article. All errors in this article are solely the authors’ own.

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I. Introduction

1 5 January 2015 saw the birth of the Singapore International Commercial Court (“SICC”), a new institution that was brought from vision to reality within a short span of two years.²

2 The establishment of the SICC was primarily motivated by two key ideas:³ first, the recognition that the exponential and unprecedented growth of commercial activity in Asia would be accompanied by a need for institutions to resolve transnational commercial disputes swiftly, efficiently and predictably, while providing a basis for developing a freestanding body of commercial law;⁴ and second, Singapore’s drive to provide an entire suite of dispute resolution services so as to bolster her status as a hub for resolving commercial disputes.⁵

² Chief Justice Sundaresh Menon, “Response by Chief Justice Sundaresh Menon: Opening of the Legal Year 2015” (5 January 2015) at para 24, available at <[http://www.supremecourt.gov.sg/docs/default-source/default-document-library/media-room/response-by-cj---opening-of-the-legal-year-2015-on-5-january-2015\(final\).pdf](http://www.supremecourt.gov.sg/docs/default-source/default-document-library/media-room/response-by-cj---opening-of-the-legal-year-2015-on-5-january-2015(final).pdf)> (accessed 26 May 2016).

³ Chief Justice Sundaresh Menon, “Response by Chief Justice Sundaresh Menon: Opening of the Legal Year 2015” (5 January 2015) at para 20, available at <[http://www.supremecourt.gov.sg/docs/default-source/default-document-library/media-room/response-by-cj---opening-of-the-legal-year-2015-on-5-january-2015\(final\).pdf](http://www.supremecourt.gov.sg/docs/default-source/default-document-library/media-room/response-by-cj---opening-of-the-legal-year-2015-on-5-january-2015(final).pdf)> (accessed 26 May 2016).

⁴ Chief Justice Sundaresh Menon, “Response by Chief Justice Sundaresh Menon: Opening of the Legal Year 2015” (5 January 2015) at para 20(a), available at <[http://www.supremecourt.gov.sg/docs/default-source/default-document-library/media-room/response-by-cj---opening-of-the-legal-year-2015-on-5-january-2015\(final\).pdf](http://www.supremecourt.gov.sg/docs/default-source/default-document-library/media-room/response-by-cj---opening-of-the-legal-year-2015-on-5-january-2015(final).pdf)> (accessed 26 May 2016). See also Sundaresh Menon, “Origins and Aspirations: Developing an International Construction Court” [2014] ICLR 341 at 344.

⁵ See Chief Justice Sundaresh Menon, “Response by Chief Justice Sundaresh Menon: Opening of the Legal Year 2015” (5 January 2015) at para 20(b), available at <[http://www.supremecourt.gov.sg/docs/default-source/default-document-library/media-room/response-by-cj---opening-of-the-legal-year-2015-on-5-january-2015\(final\).pdf](http://www.supremecourt.gov.sg/docs/default-source/default-document-library/media-room/response-by-cj---opening-of-the-legal-year-2015-on-5-january-2015(final).pdf)> (accessed 26 May 2016). The complete suite of international dispute resolution services would include litigation at the SICC, arbitration at the Singapore International Arbitration Centre and mediation at the Singapore International Mediation Centre.

3 A high-level committee comprising eminent local and foreign jurists was appointed to study the viability of establishing the SICC and to propose a framework for doing so.⁶ The committee submitted its report on 29 November 2013 and the Government welcomed the recommendations made by the committee.⁷ The proposal to establish the SICC went through a two-month public consultation from 3 December 2013 to 31 January 2014.⁶⁷ The legal framework to establish the SICC, which included amendments to the Constitution of the Republic of Singapore,⁹ the Supreme Court of Judicature Act⁸ and the Legal Profession Act,⁹ was finalised in the fourth quarter of 2014, prior to its launch in January 2015.¹⁰

4 There has been extensive publicity on and significant interest in the SICC, its procedures and its processes.¹¹¹² Of particular interest is whether and how the SICC can better serve the needs of the international business community by resolving disputes cost-efficiently and in a manner that is predictable and commercially sensible.

6 The Committee was co-chaired by Senior Minister of State for Law, Indraneel Rajah SC, and the then-Judge of Appeal V K Rajah JA. See *Report of the Singapore International Commercial Court Committee* (November 2013).

7 See Ministry of Law website, "Public Consultation on the Report of the Singapore International Commercial Court Committee" <<https://www.mlaw.gov.sg/news/public-consultations/public-consultation-on-SICC-committee-report.html>>

⁶ See Ministry of Law website, "Public Consultation on the Report of the Singapore International Commercial Court Committee" <<https://www.mlaw.gov.sg/news/public-consultations/public-consultation-on-SICC-committee-report.html>> (accessed 26 May 2016).

⁷ Rev Ed, 1999 Reprint. See Constitution of the Republic of Singapore (Amendment) Act 2014 (Act 39 of 2014).

⁸ Cap 322, 2007 Rev Ed. See Supreme Court of Judicature (Amendment) Act 2014 (Act 42 of 2014).

⁹ Cap 161, 2001 Rev Ed. See Legal Profession (Amendment) Act 2014 (Act 40 of 2014).

¹⁰ See SICC website, "Establishment of the SICC" <<http://www.sicc.gov.sg/About.aspx?id=21>> (accessed 26 May 2016).

¹¹ The publicity was received both in Singapore and abroad. See, eg, "Singapore's Planned International Commercial Court to Take Legal Business Away from London and Hong Kong" *South China Morning Post* (12 February 2014); Laura Philomin, "Singapore to Remake Itself As Asia's Legal Hub with New Commercial Court" *Reuters* (12 February 2014); Andre Yeap SC, "Eastern Star – New Courts to Ensure Singapore's Place at the Top" *LexisNexis Dispute Resolution Blog* (21 August 2014) <<http://blogs.lexisnexis.co.uk/dr/eastern-star-new-courts-toensure-singapores-place-at-the-top>> (accessed 26 May 2016); Monidipa Fouzder, "Singapore Lures Judicial Talent for Commercial Court" *The Law Society Gazette (UK)* (5 January 2015) <<http://www.lawgazette.co.uk/law/singapore-lures-judicialtalent-for-commercial-court/5045813.fullarticle>> (accessed 26 May 2016); Alastair Henderson & Chinnawat Thongpakdee, "The New Frontier: Singapore Launches the Singapore International Commercial Court Offering a New Forum for Dispute Resolution in Singapore" *Herbert Smith Freehills Asia Disputes Notes* (6 January

¹² 5) <<http://hsfnotes.com/asiadisputes/2015/01/06/the-new-frontier-singapore->

(accessed 26 May 2016). launches-the-singapore-international-commercial-court-offering-a-new-forum-for-dispute-resolution-in-singapore> (accessed 26 May 2016); Rajah & Tann, "What You Should Know about the Singapore International Commercial Court" *Client Update* (January 2015) <<http://eoasis.rajahtann.com/eoasis/lu/pdf/2015-01-SICC.pdf>> (accessed 26 May 2016); Claire Huang, "Singapore's Newest International Commercial Court Set to Thrive" *The Business Times* (12 January 2015) <<http://www.businesstimes.com.sg/government-economy/singaporesnewest-international-commercial-court-set-to-thrive>> (accessed 26 May 2016); Emmanuel Chua & Gitta Satryani, "The Singapore International Commercial Court: Friend or Foe to International Arbitration in Singapore?" *Kluwer Arbitration Blog* (14 January 2015) <<http://kluwerarbitrationblog.com/2015/01/14/the-singapore-international-commercial-court-friend-or-foe-to-internationalarbitration-in-singapore>> (accessed 26 May 2016); ASEAN Briefing website, "Singapore to Become Southeast Asia Legal Hub with Opening of International Commercial Court" (4 February 2015) <<http://www.aseanbriefing.com/news/2015/02/04/singapore-become-southeast-asian-legal-hub-opening-internationalcommercial-court.html>> (accessed 26 May 2016); Norsuria Jani & Farhah Hayati Mamat, "Dispute Resolution Mechanisms in Singapore for Crossborder Islamic Finance Transactions" *Asian Legal Business* (1 March 2015) <<http://www.asianlegalonline.com/features/dispute-resolution-mechanismssingapore-crossborder-islamic-finance-transactions/71109>> (accessed 26 May 2016); Yu-Jin Tay, Matthew Shaw & Chun-Pin Yap, "Singapore Launches International Commercial Court" *DLA Piper International Arbitration Newsletter* (30 March 2015) <<https://www.dlapiper.com/en/singapore/insights/publications/2015/03/international-arbitration-newsletter-q1-2015/singapore-launches-international-commercial-court>> (accessed 26 May 2016); Matthew J Skinner, John Rainbird & Zara Shafruddin, "Singapore Opens International Commercial Court" *Jones Day Commentary* (May 2015) <<http://www.jonesday.com/singapore-opensinternational-commercial-court-05-18-2015>>; K C Vijayan, "New Court to Hear \$1b Dispute Case" *The Straits Times* (11 May 2015); Shaun Leong, "Planting the Seeds for an International Rule of Law – The Commercial Court of England and Wales and the SICC" *Allen & Overy* (12 May 2015) <<http://www.allenoverly.com/publications/en-gb/Pages/Planting-the-Seeds-for-anInternational-Rule-of-Law--The-Commercial-Court-of-England-and-Wales-andthe-SICC.aspx>> (accessed 26 May 2016); Lorraine Anne Tay & Dharma Sadasivan, "The New Singapore International Commercial Court As a Forum for Resolving Brand Licensing Disputes in Asia" *Asian Legal Business* (1 July 2015) <<http://www.legalbusinessonline.com/features/new-singapore-internationalcommercial-court-forum-resolving-brand-licensing-disputes-asia>> (accessed 26 May 2016); K C Lye & Darius Chan, "The Singapore International Commercial Court: A Challenge to Arbitration?" *Norton Rose Fulbright Banking and Finance Disputes Review* (November 2015) <<http://www.nortonrosefulbright.com/knowledge/publications/134011/the-singapore-international-commercial-court-achallenge-to-arbitration>> (accessed 26 May 2016); K C Vijayan, "\$1.1b Dispute is First Case Heard" *The Straits Times* (21 November 2015); Stephen J Brogan, "Singapore's Leadership in Advancing the Rule of Law" *The Straits Times* (19 January 2016); Johannes Landbrecht, "The Singapore International Commercial Court (SICC) – An Alternative to International Arbitration?" (2016) 34 *ASA Bulletin* 112; Katharine Freeland, "Singapore: Dispute Resolution Hub" *The Law Society Gazette (UK)* (7 March 2016) <<http://www.lawgazette.co.uk/practice/singapore-dispute-resolution-hub/5054039.article>> (accessed 26 May 2016); Swee Siang Boey, Jonathan Choo & Navin Joseph Lobo, "International Commercial Dispute Resolution: The Singapore International Commercial Court"

Bird & Bird (21 April 2016) <<http://www.twobirds.com/en/news/articles/2016/>
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5 Just slightly more than a year after its launch, the SICC rendered its first judgment in *BCBC Singapore Pte Ltd v PT Bayan Resources TBK*¹⁴ (“*BCBC v PT Bayan Resources*”).

6 This commentary first examines procedural aspects of *BCBC v PT Bayan Resources* which illustrate certain key features of the SICC, namely, the transfer of proceedings to the SICC, the strength of the SICC panel, the discovery regime, the determination of questions of foreign law, registered foreign lawyers and their participation, as well as confidentiality applications. It then turns to consider practice issues relating to case management, the use of technology, appeals, as well as fees and costs for proceedings in the SICC.

II. A closer look at procedural aspects of *BCBC v PT Bayan Resources*

7 Shortly after the launch of the SICC, the SICC received its first case, *BCBC v PT Bayan Resources*, on 4 March 2015 by way of a transfer from the High Court pursuant to O 110 r 12 of the Rules of Court.¹⁵ By way of brief background, the case concerned a joint venture in Indonesia between publicly listed parties from Australia and Indonesia (including their associated companies) to exploit a patented technology developed in Australia to produce and sell upgraded sub-bituminous coal from East Kalimantan, and involved a complex contractual matrix.¹⁶ The parties involved were variously incorporated in Singapore, Australia and Indonesia. The counsel involved were from two of the largest law firms in Singapore. The plaintiffs and the second defendant by counterclaim were represented by a team from Rajah & Tann LLP led by Francis Xavier SC, while the defendants were represented by a team from Drew & Napier LLC led by Davinder Singh SC.

8 The hearing of the first tranche of the trial in *BCBC v PT Bayan Resources* commenced about eight months after the case was

[global/icdr-the-singapore-international-commercial-court](http://www.sicc.gov.sg/HearingsJudgments.aspx?id=72)> (accessed 26 May 2016). See also Mohan R Pillay & Toh Chen Han, *The SICC Handbook* (Sweet & Maxwell, 2016).

14 [2016] SGHC(I) 1. For a copy of the full judgment, see SICC website, “Recent Judgments” <<http://www.sicc.gov.sg/HearingsJudgments.aspx?id=72>> (accessed 26 May 2016).

15 Cap 322, R 5, 2014 Rev Ed. See also *BCBC Singapore Pte Ltd v PT Bayan Resources TBK* [2016] SGHC(I) 1 at [6] and [81].

16 See Supreme Court of Singapore website, “Media Summaries” (12 May 2016) <<http://www.supremecourt.gov.sg/news/media-summaries/bcbc-singapore-pte-ltd-and-anor-v-pt-bayan-resources-tbk-and-anor>> (accessed 31 May 2016).

transferred.¹³ The first tranche related to the issues of contractual construction and some issues of Indonesian law, while issues relating to the alleged breach of contract were reserved to be determined in later tranches.¹⁴ The first tranche was initially fixed for a period of 15 days, from 16 November 2015 to 4 December 2015, but the evidence-taking process was completed six days ahead of schedule on 26 November 2015, with a full day of hearing for closing submissions conducted thereafter on 14 January 2016.¹⁵ The SICC rendered its first written judgment on 12 May 2016. The judgment has attracted much interest and, amongst other things, has been hailed as a “masterclass” in how to deal with rules of interpretation, public policy and the implication of terms.¹⁶

9 This commentary turns to consider in greater detail the procedural aspects of *BCBC v PT Bayan Resources* that illustrate certain key features of the SICC.

A. Transfer of proceedings to the SICC

10 *BCBC v PT Bayan Resources* was the first case transferred to the SICC from the High Court. Order 110 r 12(4), as at the time of the transfer,¹⁷ provided that a case may be transferred from the High Court to the SICC only if the following requirements were met:

- (a) the High Court considers that the requirements in O 110 rr 7(1)(a) and 7(1)(c) have been satisfied, that is, the claims “are of an international and commercial nature”, and the parties “do

¹³ See *BCBC Singapore Pte Ltd v PT Bayan Resources TBK* [2016] SGHC(l) 1 at [81]–[82].

¹⁴ *BCBC Singapore Pte Ltd v PT Bayan Resources TBK* [2016] SGHC(l) 1 at [86].

¹⁵ See Supreme Court of Singapore website, “Media Summaries” (12 May 2016) <<http://www.supremecourt.gov.sg/news/media-summaries/bcbc-singapore-pte-ltd-and-anor-v-pt-bayan-resources-tbk-and-anor>> (accessed 26 May 2016).

¹⁶ Tom Jones, “SICC Hands Down First Judgment” *Global Arbitration Review* (24 May 2016) <<http://globalarbitrationreview.com/news/article/35351/sicchands-down-first-judgment/>> (accessed 26 May 2016), citing Rashda Rana SC, a dual qualified English-Australian barrister and arbitrator from 39 Essex Chambers in London. See also 6 St James Hall website, “Dominique Hogan-Doran SC reports on the Singapore International Commercial Court’s First Case” <<http://www.sixstjameshall.com.au/news/2016/5/15/singapores-new-international-commercial-court-issues-first-written-judgment>> (accessed 26 May 2016).

¹⁷ Order 110 r 12 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) was recently amended with effect from 1 January 2016 *vide* the Rules of Court (Amendment No 3) Rules 2015 (S 756/2015).

not seek any relief in the form of, or connected with, a prerogative order”,¹⁸

(b) the High Court considers that the SICC will assume jurisdiction in the case,²³

(c) the High Court considers that it is more appropriate for the case to be heard in the SICC; and

(d) either a party has, with consent of all other parties, applied for the transfer, or the High Court, after hearing the parties, orders the transfer on its own motion.

11 *BCBC v PT Bayan Resources* was transferred on the court’s own motion after the parties were heard. The case is illustrative of disputes that would be considered suitable for transfer from the High Court to the SICC and the factors that would be relevant in considering whether a case should be transferred.

12 The factors that were taken into account were recorded in the brief grounds for the order of transfer dated 4 March 2015, and were as follows:

(a) First, in relation to the nature of the dispute, it was observed that the case concerned a transnational business dispute involving parties, business interests and commercial dealings in different jurisdictions.²⁴

(b) Second, with respect to the reliefs sought, the claim and counterclaim of the parties arose mainly from alleged breaches of agreements relating to a joint venture for the application of a patented technology to produce upgraded coal from East Kalimantan for sale and the business and operations of the joint venture company that was incorporated in Indonesia. In addition, damages were sought for alleged breaches of guarantee, misrepresentation and negligence, and inducement to enter into the joint venture. The parties did not seek any relief in the form of, or connected with, a prerogative order.

13 It was further observed that the dispute was at its root concerned with the commercial expectations of the parties in respect of a large-scale industrial project that bore significant and substantial international elements, and therefore would, subject to necessary consequential orders, be more appropriately dealt with by the SICC as

¹⁸ A prerogative order refers to a mandatory order (formerly known as *mandamus*), a prohibiting order (formerly known as a prohibition), a quashing order (formerly *cont’d on the next page*)

known as *certiorari*) or an order for the review of detention (formerly known as a writ of *habeas corpus*): see the First Sched to the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed).

23 This was a requirement as at the date the transfer order was made on 4 March 2015. The requirement was removed *vide* the Rules of Court (Amendment No 3) Rules 2015 (S 756/2015). 24 See para 7 above.

the SICC is a division of the High Court specifically established to hear and resolve international commercial disputes.

14 Having heard the parties on the issue of the transfer of the proceedings to the SICC, and in view of the foregoing factors, the High Court made an order for transfer together with various consequential orders.

B. Strength of SICC panel and benefits to users

15 The SICC has a panel of specialist commercial judges comprising Judges of the Supreme Court of Singapore¹⁹ and International Judges.²⁰ The International Judges, who hail from a mix of civil law and common law jurisdictions – Australia, Austria, France, Hong Kong, Japan, the UK and the US²¹ – have extensive and diverse expertise in commercial litigation. The strength of the SICC’s panel of judges is one of the key advantages that potential court users can expect to benefit from when they take their cases to the SICC. The diversity of the panel is another advantage especially where there are issues of foreign law or commercial practices in key jurisdictions in the world outside Singapore that are in dispute.

16 Proceedings may be heard in the SICC before one or three judges at first instance.²² After *BCBC v PT Bayan Resources* was transferred from the High Court to the SICC, the Chief Justice directed a three-judge *coram* to be constituted to hear the case pursuant to O 110 r 53(1)(b).

17 The judges assigned to the *coram* were High Court Judge Quentin Loh and International Judges Vivian Ramsey and Anselmo

¹⁹ Defined as meaning “the Chief Justice, a Judge of Appeal or a Judge of the High Court”. See Art 2(1) of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint).

²⁰ Article 95(4) of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) provides:

In order to facilitate the disposal of business in the Supreme Court, the President may, if he, acting in his discretion, concurs with the advice of the Prime Minister ... appoint a person who, in the opinion of the Chief Justice, is a person with the necessary qualifications, experience and professional standing to be an International Judge of the Supreme Court.

²¹ See SICC website, “Judges” <<http://www.sicc.gov.sg/Judges.aspx?id=30>> (accessed 26 May 2016).

²² Rules of Court (Cap 322, R 5, 2014 Rev Ed) O 110 r 53.

Reyes. The members of the *coram*, who have been described as “international legal heavyweights”,²³ have a wealth of commercial law practice knowledge and expertise as evinced by their professional biographies:

- (a) Quentin Loh J was appointed as a Judicial Commissioner in 2009 and, later, a Judge of the Supreme Court in 2010. Prior to joining the Bench, he was the head of the Building and Engineering Construction and Insurance and Reinsurance practice groups, and a key member of the international arbitration group in one of Singapore’s largest law firms. As a High Court Judge, he continues to specialise in the hearing of complex commercial cases in the Supreme Court.
- (b) Vivian Ramsey J was a Judge of the High Court (Queen’s Bench Division) of England and Wales for nine years, during which he also served as the Judge in charge of the Technology and Construction Court. He has an active arbitration practice and is a visiting professor at the Dickson Poon School of Law at King’s College, London.
- (c) Anselmo Reyes J served as a Judge in the Hong Kong Court of First Instance from 2003 to 2012, where he specialised in arbitration, commercial and admiralty matters. He is a professor of legal practice in the Faculty of Law at the University of Hong Kong and also has an active arbitration practice in commercial matters.

18 As will be seen later in the course of this commentary, the combined expertise and experience of the *coram* was brought to bear at regular case management conferences (“CMCs”), and at the trial to sharpen the issues in dispute and to facilitate a focused and effective court process that resulted in the hearings being completed ahead of schedule.

C. Rules of discovery in the SICC

19 The traditional discovery model in common law jurisdictions requires the parties to a civil suit to disclose all documents which are relevant to the issues in the suit, including those which are or have at any time been in their possession, custody or power. At the initial stage of discovery (usually referred to as general discovery), each party is expected to disclose documents on which the party relies or will rely, as

²³ Tom Jones, “SICC Hands Down First Judgment” *Global Arbitration Review* (24 May 2016) <<http://globalarbitrationreview.com/news/article/35351/sicc-hands-down-first-judgment/>> (accessed 26 May 2016).

well as documents which could support or adversely affect the party's case or another party's case.²⁴ Apart from general discovery, a party may also make an application for the specific discovery of a particular document or class of documents if the party believes that the party from whom discovery is sought has, or at some time had, these in his possession.²⁵ This discovery process may be foreign to some civil law jurisdictions and to those practising international arbitration. In keeping with its character as an international court, the procedure for disclosure of documents in the SICC is simplified from the traditional discovery model in common law jurisdictions. The objective is to make the process manageable and acceptable to the parties and lawyers from different legal traditions, and also to facilitate a quicker and more cost-efficient resolution of disputes.

20 Under O 110 r 21, the default position is that the rules for general discovery in O 24 do not apply to proceedings in the SICC. The regime for disclosure of documents in the SICC is provided for in O 110 rr 14–20 and is limited to documents relied upon and requested – either agreed or ordered. In other words, each party is required to provide all documents available to it on which it relies.²⁶ A party may also serve a request to produce other documents on any person.²⁷ If the recipient of the request objects to the production of documents,³⁴ the requesting party may apply to the SICC for an order for the production of documents.²⁸ This is a process that is commonly practised in international arbitration. In fact, the provisions relating to disclosure of documents in SICC proceedings are largely based on the International Bar Association Rules on the Taking of Evidence in International Arbitration 2010.²⁹

21 In *BCBC v PT Bayan Resources*, the High Court, when ordering the transfer, made various consequential orders pursuant to O 110 r 12(5)(d) for general discovery that had already commenced based on O 24 to continue and to be completed on the same legal basis. This addressed the concern raised by counsel for the defendants that general discovery would be necessary in view of the allegations involving, *inter alia*, fraud. The provisions for specific and further discovery under O 24 r 5 and other relevant parts of O 24 were consequently ordered to continue to apply to give proper effect to the

²⁴ Rules of Court (Cap 322, R 5, 2014 Rev Ed) O 24 r 1.

²⁵ Rules of Court (Cap 322, R 5, 2014 Rev Ed) O 24 r 5.

²⁶ Rules of Court (Cap 322, R 5, 2014 Rev Ed) O 110 r 14(1).

²⁷ Rules of Court (Cap 322, R 5, 2014 Rev Ed) O 110 r 15(1). 34

Rules of Court (Cap 322, R 5, 2014 Rev Ed) O 110 r 16.

²⁸ Rules of Court (Cap 322, R 5, 2014 Rev Ed) O 110 r 17(1).

²⁹ For a copy of the International Bar Association Rules on the Taking of Evidence in International Arbitration 2010, see International Bar Association website, "Practice Rules and Guidelines" <http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx> (accessed 26 May 2016).

existing orders and directions for discovery. This was considered to be necessary since applications for specific and further discovery would invariably be tied to discovery that had been given or that was to be completed in accordance with the O 24 principles – for example, if general discovery was found to be inadequate for any reason and specific and further discovery becomes necessary.

22 It should be noted that with effect from 1 January 2016, O 110 r 21 was amended³⁰ to clarify that both the SICC and the High Court (when ordering a transfer) may order that the general discovery procedure under O 24 continues to apply to a case transferred from the High Court to the SICC. This provides for full flexibility in the SICC proceedings: while the parties are generally able to benefit from costs and time savings that can be achieved with the limited disclosure of documents regime at the SICC, where the justice of the case so requires (such as cases involving allegations of fraud and conspiracy), they may possibly seek and obtain an order for the traditional discovery regime to apply.

D. Determination of questions of foreign law

23 In *BCBC v PT Bayan Resources*, the parties successfully sought and obtained an order pursuant to O 110 r 25 for certain questions of applicable Indonesian law to be determined on the basis of submissions instead of proof. This is an option not traditionally available under the common law for determining questions of foreign law. Before turning to the options available *vis-à-vis* questions of foreign law in the SICC, it is helpful to first consider a brief comparative survey of how questions of foreign law are dealt with in other courts.

(1) Comparative survey

24 From a comparative perspective, there are a variety of ways in which questions of foreign law may be determined by the courts. The general approaches may broadly be classified as the “adversarial” approach, the “court-driven” approach and the “hybrid” approach.

25 The “adversarial” approach is the traditional approach in England, Australia and other Commonwealth jurisdictions, including Singapore.³¹ Under this approach, foreign law must be proven by the party who pleads it.³² This almost invariably involves evidence on foreign law being given by expert witnesses, with expert witnesses

³⁰ *Vide* the Rules of Court (Amendment No 3) Rules 2015 (S 756/2015).

³¹ Roger Michalski, “Pleading and Proving Foreign Law in the Age of Plausibility Pleading” (2011) 59 *Buff L Rev* 1207 at 1250–1253.

³² Trevor Hartley, “Pleading and Proof of Foreign Law: The Major European Systems Compared” (1996) 45 *ICLQ* 271 at 283.

typically subjected to “searching cross-examination”, often for the adverse party’s purposes of discrediting their testimony.³³

26 The “court-driven” approach features in many continental European jurisdictions such as Germany, Austria, Switzerland, France and Italy.³⁴ This approach places the principal responsibility on the courts to find and apply foreign law correctly. While there are variations across continental Europe, the courts generally conduct independent investigation or private research of the relevant foreign law in question;³⁵ in certain jurisdictions, judges are even presumed to know or be capable of ascertaining the content of the foreign law.³⁶ As such, expert evidence is generally not required under the “court-driven” approach.

27 Some jurisdictions employ what has been called a “hybrid” approach. For instance, the US model involves adversarial presentations of fact and law, whilst also relying on courts to resolve questions of foreign law independently of the actions and intentions of the parties.³⁷ The evidence of foreign law offered by the parties does not have to be formally authenticated under the evidential rules, and the parties may present evidence in a variety of formats, including unsworn statements representing their understanding of foreign law.³⁸ The level of court intervention often extends to the conducting of investigations of foreign

³³ Trevor Hartley, “Pleading and Proof of Foreign Law: The Major European Systems Compared” (1996) 45 ICLQ 271 at 274 and 283.

³⁴ Roger Michalski, “Pleading and Proving Foreign Law in the Age of Plausibility Pleading” (2011) 59 Buff L Rev 1207 at 1254–1261.

³⁵ Trevor Hartley, “Pleading and Proof of Foreign Law: The Major European Systems Compared” (1996) 45 ICLQ 271 at 274.

³⁶ Roger Michalski, “Pleading and Proving Foreign Law in the Age of Plausibility Pleading” (2011) 59 Buff L Rev 1207 at 1260.

³⁷ It should be noted that the American approach has been criticised for being conceptually incoherent, resulting in conflicting procedural approaches. The difficulties come to the fore particularly in the light of the recent requirement that parties must plead plausible positions on pain of dismissal should they fail to do so. This is a reference to the “plausibility” pleading regime, which was introduced for all civil suits in the US by *Ashcroft v Iqbal* 129 S Ct 1937 (2009) and *Bell Atlantic Corp v Twombly* 550 US 544 (2007): see Roger Michalski, “Pleading and Proving Foreign Law in the Age of Plausibility Pleading” (2011) 59 Buff L Rev 1207 at 1212. Plaintiffs are now uncertain as to how much and what to include in their pleadings, and whether these should include expert testimony, verbatim statements of foreign law, analysis of foreign case law and so forth, while defendants are saddled with the tremendous burden of having 21 days to make factual inquiries, research and develop foreign law arguments, and serve their pleaded defence: see Roger Michalski, “Pleading and Proving Foreign Law in the Age of Plausibility Pleading” (2011) 59 Buff L Rev 1207 at 1211 and 1214.

³⁸ See r 44.1 of the Federal Rules of Civil Procedure 2015, and see the numerous cases cited in Roger Michalski, “Pleading and Proving Foreign Law in the Age of Plausibility Pleading” (2011) 59 Buff L Rev 1207 at 1230.

law even where no party has raised a foreign law claim or defence in the dispute.³⁹

(2) *The SICC model*

28 The SICC offers parties the flexibility of adopting the traditional “adversarial” approach, an approach of determining foreign law by way of submissions, or indeed, even a combination of *both* approaches in the same case. This last-mentioned scenario materialised in *BCBC v PT Bayan Resources*, where the SICC received both evidence and submissions on Indonesian law from various experts of Indonesian law. In particular, evidence on Indonesian law in *BCBC v PT Bayan Resources* was taken from an Indonesian law academic and an Indonesian legal consultant, and submissions on Indonesian law were received from two members of the Indonesian Bar.⁴⁰

29 Under the traditional approach, the SICC may determine a question of foreign law by way of proof, which is usually carried out by way of the parties tendering sworn statements on the foreign law in question. It bears mention that in a unique modification of the traditional approach, the SICC in *BCBC v PT Bayan Resources*, with the parties’ concurrence, proceeded on the basis that the oral testimony of one of the plaintiffs’ expert witnesses “would not be subject to cross-examination but with the reservation that not everything he submitted was necessarily accepted by the Defendants”.⁴¹ This approach of dispensation with cross-examination would presumably have helped to streamline the process of determining issues of foreign law while reserving to the parties the ability to take issue with the positions taken by the expert witnesses in court.

30 The alternative approach available in the SICC (that is, determining questions of foreign law on the basis of submissions) is similar to the model commonly adopted in international arbitration.⁴² Under this approach, the SICC may determine such questions on the basis of submissions, whether oral or written or both.⁴³ This approach bears some elaboration.

³⁹ Roger Michalski, “Pleading and Proving Foreign Law in the Age of Plausibility Pleading” (2011) 59 Buff L Rev 1207 at 1210–1211.

⁴⁰ See *BCBC Singapore Pte Ltd v PT Bayan Resources TBK* [2016] SGHC(I) 1 at [184] and [187].

⁴¹ See, eg, *BCBC Singapore Pte Ltd v PT Bayan Resources TBK* [2016] SGHC(I) 1 at [187].

⁴² See *Report of the Singapore International Commercial Court Committee* (November 2013) at para 34. See also Denise Wong, “The Rise of the International Commercial Court: What Is It and Will It Work?” (2014) 33(2) CJK 207 at 216.

⁴³ See s 18L of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) and O 110 r 25(1) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed).

31 The determination of foreign law by submissions at first instance is an *option* that is available to the parties in the SICC. It is neither a mandatory nor a default position. Upon the application of a party, the court will consider whether to proceed on the basis of submissions. So long as a party makes such an application and the court is of the view that proceeding on the basis of submissions would be appropriate, there is no requirement for all parties to consent to such an arrangement.⁴⁴

32 It should be noted that the SICC provides several unique safeguards to provide a measure of quality control in respect of arrangements that could be made for foreign counsel to appear and make submissions on foreign law before the SICC:

(a) For instance, before allowing such an arrangement, the court must be satisfied that all parties are or will be represented by counsel who are competent to submit on that foreign law.⁴⁵ This envisages that the court has to have some way of ascertaining the quality of the proposed foreign counsel before the court will even make an order to allow foreign law to be determined on the basis of submissions. In this regard, it should be noted that the *curriculum vitae* of proposed Indonesian law experts were tendered by the parties to the court for its consideration in *BCBC v PT Bayan Resources* before an order pursuant to O 110 r 25 was made.

(b) It is also a prerequisite that the relevant foreign law expert must successfully obtain either full or restricted registration with the SICC.⁴⁶ The registration of foreign lawyers will be elaborated upon later in this commentary,⁵⁴ but for present purposes, it suffices to mention here that the requirements prescribed for registration ensure that registrants are, among other things, sufficiently proficient in the English language, have read and understood and agree to abide by the Code of Ethics,⁴⁷ are of good standing in the jurisdiction the law of which they most frequently practise, and have not been disbarred, struck off, suspended, ordered to pay a penalty, censured or reprimanded in their capacities as a legal

⁴⁴ Rules of Court (Cap 322, R 5, 2014 Rev Ed) O 110 r 25(1).

⁴⁵ Rules of Court (Cap 322, R 5, 2014 Rev Ed) O 110 r 25(1). Such counsel must further satisfy the definition of “foreign lawyer” under s 2(1) of the Legal Profession Act (Cap 161, 2009 Rev Ed) in order to be granted registration with the SICC in accordance with s 36P of the same Act and the Legal Profession (Foreign Representation in Singapore International Commercial Court) Rules 2014 (S 851/2014).

⁴⁶ See O 110 r 25(4)(c) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) read with s 36P of the Legal Profession Act (Cap 161, 2009 Rev Ed). ⁵⁴ See paras 39–43 below.

⁴⁷ The Code of Ethics is found in the First Sched to the Legal Profession (Foreign Representation in Singapore International Commercial Court) Rules 2014 (S 851/2014).

practitioner in any jurisdiction.⁴⁸

33 If the court is minded to grant the application to permit the determination of foreign law by way of submissions, the court is required to specify in its order one or more persons who may make submissions on the relevant questions of foreign law on behalf of each party.⁴⁹ In addition to considering the parties' submissions on foreign law, the court may also have regard to the legislation of the relevant foreign country, decisions of the courts of the foreign country, judgments of the Singapore courts on similar questions of foreign law and any other material that in the view of the court is authoritative or persuasive in determining or interpreting the foreign law in question.⁵⁰

34 On a related note, the SICC in principle also has the option of relying on any applicable memorandum of understanding entered into with the courts of New South Wales, the Dubai International Financial Centre and the State of New York to refer questions of law involving the laws of those jurisdictions to the respective courts for determination.⁵¹

35 In an appeal from any decision of the SICC to the Court of Appeal, the Court of Appeal may determine any question of foreign law on a basis similar to that adopted at first instance.⁵² However, whereas at first instance a party's application is required, the Court of Appeal may determine questions of foreign law on the basis of submissions *on its own motion*, regardless of whether a party takes out an application for the same, or whether the first instance court had done so.⁶¹

36 The option of allowing foreign law to be determined on the basis of submissions can in practice translate into savings in time and costs since evidence of foreign law is received directly without cross-examination and re-examination. It is perhaps for these reasons that the parties in *BCBC v PT Bayan Resources* applied for questions of foreign law to be determined by submissions and applied to register one foreign lawyer each to make such submissions. The fact that there was no need for lengthy cross-examination of experts further helped to

⁴⁸ See rr 5 and 6 of the Legal Profession (Foreign Representation in Singapore International Commercial Court) Rules 2014 (S 851/2014).

⁴⁹ Rules of Court (Cap 322, R 5, 2014 Rev Ed) O 110 r 25(3).

⁵⁰ Rules of Court (Cap 322, R 5, 2014 Rev Ed) O 110 r 26(4).

⁵¹ This innovative procedure was first utilised between the Singapore courts and the English High Court in *Westacre Investments Inc v The State-Owned Company Yugoimport SDPR* [2009] 2 SLR(R) 166 and *Westacre Investments Inc v Yugoimport SDPR* [2008] EWHC 801.

⁵² Rules of Court (Cap 322, R 5, 2014 Rev Ed) O 110 r 29(1)(a). 61

Rules of Court (Cap 322, R 5, 2014 Rev Ed) O 110 r

29(1)(b).

expedite the process of the trial and was likely a factor that contributed to the early completion of the first tranche of the trial.

37 It remains to be seen, however, whether determinations of the court in relation to the questions of Indonesian law will be considered findings of law or of fact. The approach taken in common law jurisdictions (save for the US) is generally to regard decisions on foreign law as findings of fact, while the approach in the civil law countries is generally to regard them as findings of law. The precise status of the court's determination on the question of foreign law affects both the standard of appellate review and the precedential value of the court's decision:

(a) **Standard of appellate review.** Where the determination of foreign law is treated as a question of law, appellate courts generally probe into the *accuracy* of the determinations of law, typically under a *de novo* standard, instead of inquiring as to whether determinations of questions of foreign law were sufficiently proven.⁵³ In contrast, where the determination of foreign law is treated as a question of fact, the opposite position is generally taken. However, it should be noted that even under the "traditional" adversarial system where decisions on foreign law are treated as findings of fact, English appellate courts have found that foreign law, "although a question of fact, is a question of fact of a peculiar kind".⁵⁴ Accordingly, it has been noted that the threshold for an English appellate court to reverse a finding of foreign law is usually lower than that in respect of a "normal" fact.⁵⁵

(b) **Precedential value of the court's determination on question of foreign law.** If the court's determination were to be taken as a finding of law, it would in theory generally be binding on a future (subordinate) court's decision on the same point of foreign law. If, however, the court's determination were to be taken as a finding of fact, it would not generally be binding on future cases, although it might still provide persuasive guidance. The dichotomy between the precedential value of findings of law and those of fact may not, however, be as stark in the context of determinations made on questions of *foreign law*. For example, in English law, there is a "quasi-precedent" rule⁵⁶ which provides that where a point of foreign law has previously been decided by an English court, that decision may, subject to

⁵³ See Roger Michalski, "Pleading and Proving Foreign Law in the Age of Plausibility Pleading" (2011) 59 Buff L Rev 1207 at 1235.

⁵⁴ See Trevor Hartley, "Pleading and Proof of Foreign Law: The Major European Systems Compared" (1996) 45 ICLQ 271 at 284.

⁵⁵ Trevor Hartley, "Pleading and Proof of Foreign Law: The Major European Systems Compared" (1996) 45 ICLQ 271 at 284.

⁵⁶ Established by s 4(2) of the English Civil Evidence Act 1972 (c 30).

certain conditions, be cited in subsequent cases as evidence of the foreign law.⁵⁷ It should be emphasised, however, that the prior English decision under such a rule merely creates a rebuttable presumption and is not strictly binding.⁵⁸

38 There is also an interesting question on whether the parties may agree in advance that a determination of foreign law by the court be treated as a finding of fact or a finding of law, but this point did not arise in *BCBC v PT Bayan Resources*.

E. Registered foreign lawyers and their participation

39 Foreign qualified lawyers do not usually have the right to practise local law, much less have a right of audience in the local courts. There are, generally, only limited exceptions to this rule. For instance, in Singapore, it is possible for distinguished foreign lawyers, such as Queen's Counsel or counsel of equivalent distinction, to appear in specific cases if the court is satisfied that they have special qualifications or experience pertaining to the case.⁵⁹ However, the courts have traditionally been quite circumspect in permitting any form of *ad hoc* admission of foreign counsel. In other words, the right of audience in courts is usually reserved exclusively for qualified persons within the jurisdiction in question.

40 For the purposes of SICC proceedings, the parties may in certain cases be represented by foreign lawyers who must be registered with the SICC.⁶⁰ In this regard, two forms of registration are available, namely full registration and restricted registration. Foreign lawyers who apply for and obtain full registration may appear before the SICC in "offshore cases",⁷⁰ which are cases which have no substantial connection with Singapore.⁷¹ Those who have applied for and obtained restricted registration⁷² are more limited in the scope of their foreign representation and may appear only in specific cases to make submissions on specific questions of foreign law.⁷³

41 The first two foreign lawyers who received restricted registration were the Indonesian lawyers who appeared before the SICC to make submissions on Indonesian law in *BCBC v PT Bayan Resources*. They are qualified legal practitioners in Indonesia and founding partners

⁵⁷ See Trevor Hartley, "Pleading and Proof of Foreign Law: The Major European Systems Compared" (1996) 45 ICLQ 271 at 283, fn 59.

⁵⁸ Trevor Hartley, "Pleading and Proof of Foreign Law: The Major European Systems Compared" (1996) 45 ICLQ 271 at 283, fn 59.

⁵⁹ Legal Profession Act (Cap 161, 2009 Rev Ed) s 15.

⁶⁰ See s 36P of the Legal Profession Act (Cap 161, 2009 Rev Ed) and para 26 of the SICC Practice Directions on SICC website, "SICC Practice Directions" <<http://www.sicc.gov.sg/LegRulesPD.aspx?id=43>> (accessed 26 May 2016).

in their respective Indonesian law firms.⁷⁴ The terms of reference under their registration were to address questions relating to the issue of alleged illegality under Indonesian law of the commercial arrangements entered into between the parties in question. Along with two other foreign law experts, they filed written reports on the relevant questions of Indonesian law. On the day of the closing submissions for the first tranche of the trial, they were given the opportunity to attend and address the court directly on the relevant questions of Indonesian law.⁷⁵

70 “Offshore case” is defined under O 110 r 1(1) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) as “an action which has no substantial connection with Singapore, but does not include an action *in rem* (against a ship or any other property) under the High Court (Admiralty Jurisdiction) Act (Cap. 123)”. For more information on what constitutes an “offshore case”, see Pt V of the SICC Practice Directions on SICC website, “SICC Practice Directions” <<http://www.sicc.gov.sg/LegRulesPD.aspx?id=43>> (accessed 26 May 2016) and Note 3 of the SICC User Guides on SICC website, “SICC User Guides” <<http://www.sicc.gov.sg/LegRulesPD.aspx?id=44>> (accessed 26 May 2016).

71 For the purposes of the definition of “offshore case”, it is provided in O 110 r 1(2)(f) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) that:

... an action has no substantial connection to Singapore where –

- (i) 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
- (ii) 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 Court.

For more information, see Note 3 of the SICC User Guides on SICC website, “SICC User Guides” <<http://www.sicc.gov.sg/LegRulesPD.aspx?id=44>> (accessed 26 May 2016).

72 Pursuant to s 36P(2) of the Legal Profession Act (Cap 161, 2009 Rev Ed) and rr 4(2) and 6 of the Legal Profession (Foreign Representation in Singapore International Commercial Court) Rules 2014 (S 851/2014).

73 Legal Profession Act (Cap 161, 2009 Rev Ed) ss 36P(1) and 36P(2).

74 See *BCBC Singapore Pte Ltd v PT Bayan Resources TBK* [2016] SGHC(I) 1 at [184(b)] and [187(a)].

75 *BCBC Singapore Pte Ltd v PT Bayan Resources TBK* [2016] SGHC(I) 1 at [184] and [187].

42 The registration criteria, together with the interest of the parties to instruct the most suitable lawyers to represent them, serve to ensure quality of the foreign counsel in question. As mentioned earlier, as part of the registration process, the foreign lawyers must also undertake to abide by the Code of Ethics to comply with the prescribed standards of professional and ethical responsibility that serve to ensure fair play and the integrity of proceedings in the SICC.

43 The SICC registry maintains a register of foreign lawyers which is readily accessible on the SICC website.⁶¹ As of 31 May 2016, 71 foreign lawyers, many of whom are Queen’s Counsel or Senior Counsel, hold valid registration with the SICC. The jurisdictions, the law of which these registered foreign lawyers most frequently practise, are Australia, Canada, Cayman Islands, Dubai International Financial Centre, Hong Kong SAR, Malaysia, New Zealand, India, Indonesia, Japan, South Korea, Switzerland, the Philippines, the UK and the US.

F. Confidentiality applications

44 The SICC was established as a division of the High Court of Singapore under s 18A of the Supreme Court of Judicature Act. Proceedings before the SICC are therefore court-based and carried out in a courtroom setting in the Supreme Court premises.⁶²

45 This would imply that the principle of open justice as enunciated by the High Court in its decision of *Tan Chi Min v The Royal Bank of Scotland plc*⁶³ similarly applies to proceedings before the SICC. The virtues of the principle of open justice include the ability of the SICC proceedings and, by extension, SICC judgments to contribute towards the development of an international *lex mercatoria*⁶⁴ through the

⁶¹ See SICC website, “Register of Foreign Lawyers” <<http://www.sicc.gov.sg/ForeignLawyer.aspx?id=102>> (accessed 26 May 2016).

⁶² The SICC committee in the *Report of the Singapore International Commercial Court Committee* (November 2013) at para 17 expressly indicated that:

... [t]he SICC must be a superior court of law in order to maximise the international enforceability of its decisions under existing arrangements. This means that the SICC needs to be part of the Supreme Court of Singapore, as any other court would be considered a subordinate court by virtue of Article 93 of the Constitution of the Republic of Singapore ... In this regard, the SICC could be constituted as a statutory division of the High Court ... The SICC’s jurisdictional limits would be the same as that of the Singapore High Court.

⁶³ [2013] 4 SLR 529 at [8]–[14].

⁶⁴ See Chief Justice Sundaresh Menon, “International Commercial Courts: Towards a Transnational System of Disputes Resolution” (19 January 2016) at para 29 <<http://www.supremecourt.gov.sg/docs/default-source/default-document-library/media-room/opening-lecture---dific-lecture-series-2015.pdf>> (accessed 26 May (cont’d on the next page))

publication of its jurisprudence on international commercial⁶⁵ disputes coming before it – this is the wider and longer term goal of the SICC.⁶⁶

46 Nevertheless, the designers of the SICC were also mindful to cater, in appropriate cases, for certain confidentiality safeguards which may be applied for by the parties in proceedings before the SICC.⁶⁷ After all, as a matter of practice, it is not uncommon for the parties in litigation to seek orders from the courts to protect the confidentiality of certain information, such as trade secrets and price or other commercially sensitive information.

47 The result is a finely balanced approach where the SICC may, on the application of a party, make confidentiality orders in accordance with O 110 r 30. It should be noted that, as provided for under O 110 r 30(2)(a), regard may be given to “offshore cases” as defined in O 110 r 1(1) when the SICC is deciding whether to make any confidentiality order in a particular case.⁶⁸ Regard may also be given to any agreement between the parties on the making of a confidentiality order.⁶⁹ Under such an approach, it would appear that both the public interest of open justice and the countervailing private interest of safeguarding confidential information are taken into account in making the SICC a pragmatic, flexible and attractive forum for dispute resolution.

48 *BCBC v PT Bayan Resources* further exemplifies some good examples of how confidentiality may in appropriate cases be safeguarded in the course of SICC proceedings:

(a) **The granting of confidentiality orders.** Before the commencement of the trial proceedings, the parties by mutual consent applied for and obtained orders under O 110 r 30(1).⁷⁰ The orders include the following: (i) that certain documents relating to, *inter alia*, financial reports and technical drawings

⁶⁵). It is also envisaged that the SICC, through its open and transparent judgments, can help in establishing internationally accepted norms on how to correctly interpret certain standard commercial contractual clauses. One notable recent example of the Singapore courts fulfilling such a function can be seen in *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364 where the Court of Appeal interpreted certain clauses found in the International Federation of Consulting Engineers (FIDIC) standard form contracts.

⁶⁶ See also *Report of the Singapore International Commercial Court Committee* (November 2013) at para 32.

⁶⁷ See *Report of the Singapore International Commercial Court Committee* (November 2013) at para 33.

⁶⁸ This is in line with the views expressed in the *Report of the Singapore International Commercial Court Committee* (November 2013) at para 33.

⁶⁹ Rules of Court (Cap 322, R 5, 2014 Rev Ed) O 110 r 30(2)(b).

⁷⁰ Order 110 r 30(1) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) provides that the SICC may, on the application of a party, make all or any of the following orders: (a) that the case be heard in camera; (b) that no person must reveal or (*cont'd on the next page*)

be sealed; (ii) that no person shall reveal or publish the sealed documents; and (iii) if necessary, any cross-examination or re-examination relating to the contents of the sealed documents during the trial shall be heard in camera.

(b) The preparation of a “confidential bundle” for the trial.

The parties further agreed to tender, in addition to their usual bundles of documents, a “confidential bundle” for the court’s use during the trial. The “confidential bundle” contained documents which were confidential and in respect of which the parties obtained the confidentiality orders mentioned above. The “confidential bundle” was referred to during cross-examination whenever reference to any confidential document was made by the examining counsel and was not revealed to the members of the public who attended and observed the court proceedings.

(c) Reserving the option to clear the courtroom during trial.

The option of clearing the courtroom of members of the public at appropriate junctures of the trial whenever evidence relating to confidential information is required to be addressed in court was given by the court to the parties. This, in addition to the confidentiality orders and the preparation of a “confidential bundle”, was an additional practical means of achieving a balance between open justice and confidentiality in SICC proceedings.

(d) Limiting disclosure of documents to members of the public who apply to inspect the case file.⁸⁵

In light of the confidentiality orders that were made by the court, the approval of any request for inspection by non-parties was granted subject to all affidavits of evidence-in-chief containing documents previously sealed by the court (including the annexure to the summons seeking the confidentiality orders, which identified in some detail the documents sought to be sealed) being excluded from inspection.

49 It should be highlighted for completeness that O 110 r 31 provides that the court must direct that a judgment made by the court may be published in law reports and professional publications if the court considers the judgment to be of major legal interest. The

publish any information or document relating to the case; and (c) that the court file be sealed.

⁸⁵ The procedure for making a request for case file inspection is set out in O 60 r 4 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed).

publication of judgments ensures respect for the rule of law and supports the development of jurisprudence. However, as this must be balanced against the parties’ possible need for confidentiality in some

matters, O 110 rr 31(2) and 31(3) provide that a party may, at any time before the court delivers its judgment, inform the court of any matter that the party wishes to remain confidential,⁷¹ and where the court considers that there are any matters which the party reasonably wishes to remain confidential, it must either give directions (a) for those matters to be concealed in publishing the judgment of the court; or (b) for the judgment not to be published for ten years (or such shorter period as the court may order) after the date of the judgment if it is not possible or practicable for the judgment to be published without revealing those matters. In *BCBC v PT Bayan Resources*, it is understood that there was no separate application made under O 110 r 31(2).

III. Practice issues

A. Active case management

50 The SICC adopts an active, judge-led approach towards case management. Effect is given to such an approach in para 77(2) of the SICC Practice Directions⁷² which provides, *inter alia*, that “[t]he Judge will play an active role in the management of the proceedings and may, after discussion with counsel, make such order or give such direction as the Judge thinks fit” in a CMC.

51 An active, judge-led approach does not mean that the parties in SICC proceedings may adopt a passive stance, leaving the court to move their case to trial. Paragraph 81 of the SICC Practice Directions, for example, expressly requires all parties attending a CMC to be “prepared to discuss the issues raised in the Proposed Case Management Plan” as set out in a prescribed form.⁷³

52 The active case management approach was adopted by the SICC in *BCBC v PT Bayan Resources*, where a total of 12 CMCs were conducted over the course of nine months. These CMCs included instances when the parties requested urgent attendance before the court in order to sort out certain issues relating to trial preparation and the conduct of the trial – for example, issues relating to discovery of documents and affidavits of evidence-in-chief. In this regard, it is noteworthy to mention that in one such instance, an urgent CMC was convened within three working days upon the defendants’ request for an urgent hearing before the *coram*. The CMC proceeded seamlessly with Vivian Ramsey

⁷¹ This may include the fact that the party was involved in the proceedings.

⁷² See SICC website, “SICC Practice Directions” <<http://www.sicc.gov.sg/LegRulesPD.aspx?id=43>> (accessed 26 May 2016).

⁷³ See Form 10 of Appendix B of the SICC Practice Directions in the SICC website, “SICC Practice Directions” <<http://www.sicc.gov.sg/LegRulesPD.aspx?id=43>> (accessed 26 May 2016).

and Anselmo Reyes IJJ leading the conference using teleconferencing and videoconferencing facilities in England and Hong Kong respectively.⁷⁴ The matter for which the defendants requested an urgent hearing was roundly settled at the CMC.

53 The CMCs helped ensure a cost-effective, focused and expeditious resolution of the issues in *BCBC v PT Bayan Resources* in at least two ways:

(a) The CMCs narrowed the issues in dispute. Through the court's active role in case management, and with counsel's co-operation, the parties managed to significantly narrow and frame the issues in dispute by mutual agreement. As highlighted by the court in *BCBC v PT Bayan Resources*, the parties through discussions at the CMCs were able to agree on the formulation of "certain issues as to the true meaning of a number of provisions in various agreements".⁷⁵

(b) The decision to hear the case in stages served to assist the parties in better structuring their litigation resources, having regard to the mountain of paper and electronic documents that needed to be thoroughly trawled through for the purposes of the entire trial.⁷⁶ Indeed, there was also reason to believe that staging the proceedings in tranches could enable the parties to re-evaluate the merits of their own respective cases in the light of the court's judicial pronouncements on the legal construction of the contract in question, thereby making it possible for the issues reserved for later tranches to be further narrowed down if not settled pursuant to further negotiations.

54 As a result of the court's case management and counsel's co-operation in trial preparation, the evidence-taking process in the trial of the first tranche ended six days earlier than expected, thereby translating to substantial time and costs savings for the parties.

⁷⁴ It should also be mentioned that O 110 r 53 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) has recently been clarified *vide* the Rules of Court (Amendment No 3) Rules 2015 (S 756/2015) to provide in a new O 110 r 53(1A) that any one of the three judges appointed for any SICC proceedings may hear any interlocutory application or case management conference in those proceedings. Such is an example of the flexibility with which the SICC manages its judicial recourses as best suited for the circumstances of every case.

⁷⁵ See *BCBC Singapore Pte Ltd v PT Bayan Resources TBK* [2016] SGHC(I) 1 at [6].

⁷⁶ *BCBC Singapore Pte Ltd v PT Bayan Resources TBK* [2016] SGHC(I) 1 at [87], where the court indicated, *inter alia*, that for the first tranche, "the scope of admissible evidence was limited".

B. Use of technology

55 To further facilitate the litigation process, the SICC is equipped with the latest court technology.

56 The SICC utilises an electronic filing service known as the Integrated Electronic Litigation System (“eLitigation”) that was purposebuilt to manage all cases in the Supreme Court.⁷⁷⁷⁸ Users have convenient and secure access to the service via the internet, enabling them to file and access documents electronically, obtain reminders through e-mail and short messaging system (commonly known as “SMS”) alerts and so on.⁷⁹ Foreign lawyers who are registered with the SICC are also able to access eLitigation.⁸⁰ All of these innovations allow the SICC to function effectively as a virtual court and registry for the convenience of the parties and lawyers who may not be based in Singapore or who may regularly have to be in transit.

57 Technology is also used to facilitate the actual hearings in court and in chambers. There is currently a dedicated courtroom for SICC hearings which is equipped with cutting-edge technology, including the following:

(a) Multiple screens for the bench, the bar and the public gallery, as well as a large digital display screen that can support a four-way videoconference in full sight of all who are in the courtroom. Where necessary, interactive high-definition touchscreen panels can be made available, thereby allowing witnesses to make markings or annotations directly on screen and save these as separate exhibits for future reference.⁸¹

(b) Support for advanced litigation technology, including evidence and trial management systems. For example, Opus 2’s Magnum and Realtime platforms – touted as “the most advanced electronic bundle, electronic presentation of evidence and court transcription systems available anywhere in

⁷⁷ See para 43 of the SICC Practice Directions in SICC website, “SICC Practice Directions” <<http://www.sicc.gov.sg/LegRulesPD.aspx?id=43>> (accessed

⁷⁸ May 2016) and para 101 of the Supreme Court Practice Directions at the Supreme Court of Singapore website, “Supreme Court Practice Directions” <<http://www.supremecourt.gov.sg/rules/practice-directions/supreme-courtpractice-directions>> (accessed 26 May 2016).

⁷⁹ See SICC website, “Electronic Filing Service” <<http://www.sicc.gov.sg/Services.aspx?id=54>> (accessed 26 May 2016).

⁸⁰ See para 48 of the SICC Practice Directions in SICC website, “SICC Practice Directions” <<http://www.sicc.gov.sg/LegRulesPD.aspx?id=43>> (accessed 26 May 2016).

⁸¹ See Form 7 of the SICC Practice Directions in SICC website, “SICC Practice Directions” <<http://www.sicc.gov.sg/LegRulesPD.aspx?id=43>> (accessed 26 May 2016).

the world”⁸² – were successfully deployed in a similar courtroom during a trial by the High Court.⁸³

(c) Teleconference, videoconference and audio-visual facilities are readily available in the SICC. These are particularly useful in view of the SICC’s international character. For example, in *BCBC v PT Bayan Resources*, several of the CMCs were conducted by the three judges, with one or two of the International Judges conducting the hearing by way of teleconference or videoconference. In other words, the hearings proceeded smoothly and seamlessly despite the judges being based in up to three different countries at the same time. There were also occasions where the parties tendered physical documents to court, which were projected via document cameras in real time to the judges sitting remotely. There appears to be little reason in principle why foreign lawyers or parties cannot avail themselves of such communication facilities and appear before the SICC via such technology where necessary. Indeed, in *BCBC v PT Bayan Resources*, the plaintiffs’ counsel requested and obtained leave of the court to arrange for the plaintiffs’ Sydney-based business development counsel to have access to remote real-time connection service for an instantaneous transcript of the oral closing submissions hearing on 14 January 2016, so that the business development counsel could observe the proceedings in real time from overseas.

(d) Users of the SICC also have access to digital transcription services of various forms. The Supreme Court’s digital transcription service facilitates digital audio recording of court proceedings and the preparation of transcripts.⁸⁴ If greater immediacy is required, users may also apply for daily or even real-time transcription services.⁸⁵ For example, the first tranche of the trial in *BCBC v PT Bayan Resources* was heard with the support of real-time transcription services, with professional stenographers delivering transcribed text to the screen within seconds of the words being spoken in court.

⁸² See the Law Society of Singapore website <<http://www.lawsociety.org.sg/conference/litigation2015/sponsorship.aspx>> (accessed 26 May 2016).

⁸³ This was the case culminating in the reported judgment of *Global Yellow Pages Ltd v Promedia Directories Pte Ltd* [2016] 2 SLR 165.

⁸⁴ See SICC website, “Use of Technology at the SICC” <<http://www.sicc.gov.sg/Services.aspx?id=51>> (accessed 26 May 2016).

⁸⁵ See SICC website, “Use of Technology at the SICC” <<http://www.sicc.gov.sg/Services.aspx?id=51>> (accessed 26 May 2016).

IV. Appeals

58 Decisions of the SICC at first instance are generally appealable to the Court of Appeal. Appeals may be heard by three or more Judges of Appeal.⁸⁶ In keeping with the international character of the SICC, International Judges may be appointed to sit in the Court of Appeal to hear any such appeals from the SICC.⁸⁷ Notably, a number of the International Judges have extensive experience in appellate review as former appellate judges in their respective home jurisdictions.

59 To provide maximum flexibility for the parties, the right and scope of appeal may be excluded, limited or varied by prior agreement of the parties. This is expressly provided for in the SICC Practice Directions,⁸⁸ and model clauses are available to assist the parties who wish to so exclude, limit or vary the right and scope of appeal.⁸⁹

60 The parties may also apply, by way of a letter to the Registrar, to have five judges to be designated to hear the appeal.⁹⁰ Again, a model clause is available to assist the parties who wish to agree (subject to the relevant rules and procedures) that the appeal will be heard by five judges on appeal.⁹¹

V. Fees and costs

61 Order 110 r 47 prescribes the court fees that are applicable for SICC cases, as well as appeals from a SICC judgment or order. For cases commenced in the High Court and transferred to the SICC, the court fees applicable to SICC cases apply only if the High Court has ordered that the fees payable in the SICC should be applicable instead.⁹² In making the transfer order in *BCBC v PT Bayan Resources*, the High Court had, for avoidance of doubt, stated that the hearing fees and court fees payable

⁸⁶ See s 30(1) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed). See also para 24(1) of the SICC Practice Directions in SICC website, "SICC Practice Directions" <<http://www.sicc.gov.sg/LegRulesPD.aspx?id=43>> (accessed 26 May 2016).

⁸⁷ Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) s 29(4).

⁸⁸ See para 139(3) of the SICC Practice Directions in SICC website, "SICC Practice Directions" <<http://www.sicc.gov.sg/LegRulesPD.aspx?id=43>> (accessed 26 May 2016).

⁸⁹ See SICC website, "Singapore International Commercial Court Model Clauses" at cl III(A) and III(B) <http://www.sicc.gov.sg/documents/docs/SICC_Model_Clauses.pdf> (accessed 26 May 2016).

⁹⁰ See para 24(3) of the SICC Practice Directions in SICC website, "SICC Practice Directions" <<http://www.sicc.gov.sg/LegRulesPD.aspx?id=43>> (accessed 26 May 2016).

⁹¹ See SICC website, "Singapore International Commercial Court Model Clauses" at cl III(C) <http://www.sicc.gov.sg/documents/docs/SICC_Model_Clauses.pdf> (accessed 26 May 2016).

⁹² See O 110 rr 12(5)(c) and 47(1)(c) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed).

in the High Court would, pursuant to O 110 r 12(5)(c), continue to apply to the case after its transfer.

62 This is an appropriate juncture to consider the issue of fees payable for litigating a case in the SICC generally. There are two fee components applicable to proceedings commenced in the SICC, namely, court fees and hearing fees. The former relates to fees that are payable at particular stages in the proceedings (*eg*, upon filing of originating processes or applications), while the latter refers to fees payable depending on the duration for which matters are heard or tried in the SICC or the Court of Appeal. The court fees and hearing fees will be elaborated upon in turn for proceedings in the SICC as well as for appeals from the SICC to the Court of Appeal.

A. Court fees in the SICC

63 The court fees payable depend on the number of judges on the *coram*. Unlike in the High Court where the court fees payable are determined based on documents that are filed, court fees in the SICC are payable at various milestones in the court proceedings.

64 The court fees payable in the SICC for an action heard by a single judge are S\$10,450.⁹³ It is S\$20,350 if the case is heard by a *coram* of three judges.⁹⁴ The court fees for each interlocutory application, which also include the second fee component of hearing fees, are S\$3,500 and S\$10,500 for a half-day hearing before a single judge and three judges respectively. The expenses for document-filing and case management and the expenses of the judges are included in the prescribed court fees. Other than these court fees and hearings fees, which are also prescribed in the Rules of Court and set out below,¹⁰⁹ no separate fees are payable by the parties.

65 The relevant provision setting out the court fees in the SICC is O 110 r 47(2).⁹⁵

⁹³ This figure does not include interlocutory applications. For the filing of an interlocutory application before a single judge (inclusive of the first half-day hearing), the court fees payable are S\$3,500: see O 110 r 47(2) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed).

⁹⁴ This figure does not include interlocutory applications. For the filing of an interlocutory application before a *coram* of three judges (inclusive of the first half-day hearing), the court fees payable are S\$10,500: see O 110 r 47(2) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed). 109 See paras 66–71 below.

⁹⁵ The parties are required to pay and maintain a deposit from which the court fees and hearing fees are to be deducted. See Pt VII of the SICC Practice Directions in SICC website, “SICC Practice Directions” <<http://www.sicc.gov.sg/LegRulesPD.aspx?id=43>> (accessed 26 May 2016).

B. Court fees for appeals from the SICC to the Court of Appeal, etc

66 The court fees payable for appeals from the SICC to the Court of Appeal also depend on the number of judges hearing the matter on appeal. The hearing of substantive appeals will generally be conducted by three or five judges, and the court fees are S\$10,750 and S\$14,250 respectively.

67 The court fees for an *application* before the Court of Appeal are separately provided for and vary according to the size of the *coram* that is assigned to hear the application based on the provisions in the Supreme Court of Judicature Act and the Rules of Court relating to the constitution of the Court of Appeal.

68 The relevant provision for court fees for appeals from the SICC to the Court of Appeal is O 110 r 47(3).⁹⁶

C. Hearing fees in the SICC

69 Unlike in the High Court, in the SICC, a single rate is applicable whatever the quantum of claim. Rather than being determined on an *ad valorem* basis, the amount of hearing fees payable depends on the number of hearings, the length of each hearing, as well as the number of judges assigned to hear the matter. For example, for each day (or part thereof) of a trial or a hearing of an originating summons, the hearing fees payable would be S\$3,500 for a single-judge court and S\$10,500 for a three-judge court.⁹⁷

D. Hearing fees for appeals from the SICC to the Court of Appeal

70 For hearings before the Court of Appeal, there is similarly a single rate that is applicable regardless of the quantum involved. Based on the experience of the High Court, most of the hearings for substantive appeals to the Court of Appeal are completed within a day. If this pattern is replicated in substantive appeals from the SICC to the Court of Appeal, the court users of the SICC can expect to pay hearing fees of S\$10,500 if the appeal is heard by three judges and S\$17,500 if heard by five judges.

⁹⁶ The appellant is required to pay and maintain a deposit from which the court fees and hearing fees are to be deducted. See Pt VII of the SICC Practice Directions in SICC website, "SICC Practice Directions" <<http://www.sicc.gov.sg/LegRulesPD.aspx?id=43>> (accessed 26 May 2016).

⁹⁷ See O 110 r 48(2) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed).

71 For example, for each day (or part thereof) of a hearing of a substantive appeal before a three-judge and a five-judge Court of Appeal, the hearing fees payable are S\$10,500 and S\$17,500 respectively.⁹⁸

E. Costs

72 Related to fees is the issue of costs. Order 110 r 46(6) provides that O 59, which relates to the taxation of costs by the High Court⁹⁹ in proceedings in the High Court, does not apply in the SICC. Instead, in the SICC, the judge or judges who have heard and dealt with the case, and who are therefore familiar with the issues in dispute and the conduct of the parties in the litigation, will deal with issues relating to costs as the justice of the case requires.

73 Order 110 r 46(1) provides that the reasonable costs of any application or proceeding in the SICC are to be borne by the unsuccessful party unless the court orders otherwise. The other provisions in O 110 r 46 provide various orders the court may make in considering the question of costs, as well as the circumstances which it may take into account in determining the reasonable costs of any application or proceedings.¹⁰⁰ The circumstances which the court may take into account include the following:¹⁰¹

- (a) the conduct of all parties, including in particular –
 - (i) conduct before, as well as during the application or proceedings;
 - (ii) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue; and (iii) the manner in which a party has pursued or contested a particular allegation or issue;
- (b) the amount or value of any claim involved;
- (c) the complexity or difficulty of the subject matter involved;

⁹⁸ Rules of Court (Cap 322, R 5, 2014 Rev Ed) O 110 r 48(3).

⁹⁹ Proceedings for taxation of costs are conducted by registrars of the Supreme Court at first instance.

¹⁰⁰ See also para 152 of the SICC Practice Directions in SICC website, "SICC Practice Directions" <<http://www.sicc.gov.sg/LegRulesPD.aspx?id=43>> (accessed 26 May 2016).

¹⁰¹ See para 152(3) of the SICC Practice Directions in SICC website, "SICC Practice Directions" <<http://www.sicc.gov.sg/LegRulesPD.aspx?id=43>> (accessed 26 May 2016).

- (d) the skill, expertise and specialised knowledge involved;
- (e) the novelty of any questions raised; and
- (f) the time and effort expended on the application or proceeding.

VI. Concluding thoughts

74 *BCBC v PT Bayan Resources* is significant in many ways. The complexity of the matter provided an excellent stress test for the rules and procedures of a new institution. With the flexibility exercised by the court as well as counsel, a massively complex commercial dispute was heard about eight months after its transfer to the SICC, with a thorough judgment issued about four months after the conclusion of the first tranche of trial. The first case is therefore a good illustration of the strengths of the SICC as well as the quality and flexibility of its procedures.¹⁰²

75 At the time of writing, there are four other cases pending before the SICC. The first involves a dispute between foreign parties concerning alleged breaches of agreements for the raising of funds and investments, and was heard by International Judge Patricia Bergin. The second case involves parties from Singapore and the US in a dispute over works to be carried out for certain liquefied natural gas projects in Australia, and will be heard by International Judge Bernard Eder. The third case involves a claim by a French bank against two Israeli individuals on personal guarantees securing loans disbursed by the bank to French and Danish corporations owned by the Israeli individuals. A three-judge *coram*, comprising High Court Judge Steven Chong and International Judges Dominique Hascher and Roger Giles, has been assigned to hear the case. The fourth case involves an action brought by two companies incorporated in the British Virgin Islands against four Japanese nationals and another company incorporated in the British Virgin Islands for misappropriation of moneys. A three-judge panel, comprising High Court Judge Quentin Loh and International Judges Yasuhei Taniguchi and John Dyson Heydon, has been assigned to hear the case. These cases will certainly provide further illustrations of the key features of the SICC and how the SICC can serve the dispute resolution needs of the international business community, and will no doubt be followed with interest.

¹⁰² See Nicholas Lingard *et al*, "The Singapore International Commercial Court Gets off to a Flying Start: First Judgment Released Only Four months after Closing Submissions" Freshfields Bruckhaus Deringer website (30 May 2016) <<https://communications.freshfields.com/SnapshotFiles/540819bc-1f4c-4904-a948-10c04e293f90/Subscriber.snapshot>> (accessed 30 May 2016).
