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Arbitration in Singapore and Hong Kong

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INTRODUCTION

Traditionally, disputes have been settled in courts established by law. However, arbitration has emerged as a new method of dispute resolution over courts. National courts witness the same issues over and over again: dispute resolution is too slow, not always trustworthy and sometimes even corrupt. Arbitration is an alternative dispute resolution mechanism which is private and confidential in nature, outside of the courts. It comes as no surprise then, that resorting to alternative dispute resolution (ADR) is regarded as a viable alternative. Of the many advantages is that parties can choose language, destination and even judges.

Globalization has increased cross border transactions which involves parties of different nationalities. In cross-border contracts, the dispute resolution clause is significant. Because of its speed, efficiency and flexibility, businesses prefer arbitration over traditional dispute resolution mechanisms.[1] Nowadays, it is well established that international arbitration is the dispute resolution method of choice for cross-border transactions and disputes relating to foreign direct investment. The bigger the amount in dispute, the more likely it is that the dispute will be referred to arbitration.[2]

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[1] *See* PRICEWATERHOUSE COOPERS, *Corporate choices in International Arbitration Industry Perspectives,* http://www.pwc.com/gx/en/arbitration-dispute-resolution/assets/pwc-international-arbitration-study.pdf (last visited on April 5, 2017)

[2] *See* PRICEWATERHOUSE COOPERS, *International Arbitration: Corporate Attitudes and Practices 2008* https://www.pwc.co.uk/assets/pdf/pwc-international-arbitration-2008.pdf (last visited on April 5, 2017)

Both Singapore and Hong Kong have emerged as the leading destinations for arbitration in the world.

ARBITRAL DESTINATIONS IN ASIA

Asia is still a developing region in the world. According to the World Investment Report, the developing Asia is the largest recipient of foreign direct investment in the world.[3] Singapore and Hong Kong are one of the leading economies in Asia. Every investment faces the risk of enforcement and effective enforcement comes when there is an effective dispute resolution mechanism in place. As Asia begins to dominate the global economy, major arbitral venues are competing for an increasing number of disputes. International arbitration has firmly established its roots in Asia, with Hong Kong and Singapore featuring prominently at the vanguard of its continued development in the region. Hong Kong and Singapore have maintained an aggressive course to promote their respective jurisdictions as pro-arbitration and business-friendly communities. In 2008, the International Court of Arbitration of the International Chamber of Commerce (ICC) decided to locate their Asian offices in both Hong Kong and Singapore. In deciding to do so, Jason Fry, the secretary general of the ICC Court, stated:

> "We are very excited by these two steps, which reflect our conviction that the Asia-Pacific region is of significant importance to the future of ICC Dispute Resolution Services."[4]

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[3] *See* UNCTAD, World Investment Report, 2016, http://unctad.org/en/PublicationsLibrary/wir2016_en.pdf
[4] Hong Kong Circle, *International Arbitrator Expands Global Reach,* http://www.hketowashington.gov.hk/dc/circle/Nov-Dec08/Articles/article04.htm *(last visited Apr 6, 2017)*

The traditional arbitration hubs of London and Paris are both the most widely used and preferred seats; Geneva, New York and Stockholm each also represent a significant share of the market. The greatest momentum is perhaps shown by Hong Kong and Singapore, which were the third and fourth most popular seats respectively. This momentum is indicated by the fact that, in both cases, the percentage of respondents who preferred those seats exceeded the percentage of respondents who have used them the most over the past five years (by 8% for Hong Kong and 5% for Singapore). This is a greater difference in percentage than for any of the other seats in the top seven, which suggests that both seats may attract users in greater numbers in the future.[5]

EMERGENCE OF SINGAPORE AS A LEADING ARBITRATION VENUE

The active promotion of international arbitration in Singapore is a fairly recent phenomenon, dating back about 25 years. Situated at the crossroads of South East Asia, and in between the sea lanes of communication that sit astride China and India, Singapore's geography and trade links put it in a unique position to market itself as the premier arbitration hub for Asia. Its enviable geographic location is buttressed by a legal regime and legislative framework that is arbitration-friendly and fiercely observant of the rule of law. Underpinning this is a government that is dedicated to promoting Singapore as an arbitration hub for Asia.[6]

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[5] *See* WHITE & CASE, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration,* http://www.arbitration.qmul.ac.uk/docs/164761.pdf

[6] Jawad Ahmad and Andre Yeap SC, *Arbitration In Asia,* http://globalarbitrationreview.com/insight/the-asia-pacific-arbitration-review-2014/1036763/arbitration-in-asia (last visited Apr 20, 2017)

Significantly, business community perceives Singapore as a neutral venue for arbitration, and the repeatedly strong ranking of the country in corruption indices underpin the legislative environment. In turn, Singapore's legal regime is supported by a world-class arbitration infrastructure in the shape of Maxwell Chambers, a purpose-built facility that houses a number of world-class arbitral institutions. The Singapore judiciary's philosophy towards arbitration was most succinctly captured in the following terms by the Court of Appeal judgment in Tjong Very Sumito v Antig Investments Pte Ltd.[7]

> "An unequivocal judicial policy of facilitating and promoting arbitration has firmly taken root in Singapore...The role of the court is now to support, and not to displace, the arbitral process."

Singapore is challenging established centers for arbitration such as London, Paris and Stockholm. Case filings at the Singapore International Arbitration Centre (SIAC) have increased by more than 300 per cent in the past 15 years. In 2000, Singapore handled 58 cases but numbers rose dramatically after the financial crisis. In 2015 there were 271 filings. This was a 22 per cent increase on 2014's total. By contrast, the London Court of Arbitration had 326 arbitrations referred to it in 2015, up 10 per cent on 2014. Singapore is fast catching up.[8]

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[7] [2008] SGHC 202

[8] Jane Croft, *Singapore is becoming a world leader in arbitration,* (June 2, 2016) https://www.ft.com/content/704c5458-e79a-11e5-a09b-1f8b0d268c39

2016 was a record breaking year for Singapore's main arbitral institution, the Singapore International Arbitration Centre (SIAC), and the ICC[9]:

- SIAC administered 343 new cases from 56 jurisdictions, representing almost a 400% rise from a decade ago and a 27% increase from 2015.
- SIAC handled a total amount in dispute of US$11.85 billion), nearly three and half times the amount in 2014.
- The ICC Court recorded 966 new cases filed in 2016, with the average monetary value in dispute rising from US$63 million in 2014 to US$84 million in 2015.
- Singapore was also named the number one seat of ICC arbitration in Asia for five years running and the fourth most preferred seat globally for ICC arbitration.

Over 84% of all new Singapore seated SIAC arbitrations and 71% of all new Singapore seated ICC arbitrations filed in 2015 were international in nature, involving one or more non-Singaporean parties.

The attraction of arbitration in international business transactions in Singapore is attributable to its:

- Strong rule of law.
- Arbitration legislation based on the UNCITRAL Model Law on International Commercial Arbitration 1985 (UNCITRAL Model Arbitration Law).
- Supportive judiciary.

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[9] Lim Tat, *Arbitration procedures and practice in Singapore: Overview,* https://uk.practicallaw.thomsonreuters.com/3-381-2028?__lrTS=20170609163158757&transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1 (last visited Apr 6, 2017)

- Confidentiality of arbitration proceedings
- Cutting-edge arbitration facilities at Singapore's Maxwell Chambers.

UNIQUE ADR METHODS IN SINGAPORE

If arbitration is too aggressive for a company, Singapore also offers mediation and conciliation services. The country's International Mediation Centre opened in November 2014 and has collaborated with the SIAC to offer a service known as Arbitration-Mediation-Arbitration (Arb-Med-Arb). This allows parties to attempt mediation after they start arbitration proceedings. If they settle their dispute, this is classed as a consent award, which can be enforced in more than 150 countries. If they cannot settle, the parties continue to arbitration. Three such Arb-Med-Arb cases were filed in 2015.[10]

THIRD PARTY FUNDING

Both jurisdictions are known for adopting competitive and innovative arbitration laws to promote themselves as leading seats of arbitration. Recently, both jurisdictions have made significant steps towards formally permitting the use of third party funding ("TPF") for international arbitration in their municipal arbitration laws.

TPF has traditionally assisted parties with the costs of litigation and arbitration where they would not otherwise have had the resources to protect their rights under a contract.

[10] *Supra* note 8

That paradigm is changing: users of TPF now include parties with significant means who view TPF as a financing tool or, in some circumstances, as an opportunity to bring on board a party with substantial expertise in the tracing and recovery of assets, thereby adding value to the litigation or arbitration process. Although TPF is gaining momentum for parties to litigation and arbitration in jurisdictions such as England & Wales, Australia, the United States, and various EU States, it is yet to find a solid footing in Singapore and Hong Kong.[11]

Indeed, until recently, Singapore went so far as to prohibit TPF for international arbitration proceedings, and Hong Kong did not expressly permit it. In both cases, this was largely because TPF was considered to offend the age-old English doctrines of maintenance and champerty, which sought to prevent *"...gambling in litigation, or of injuring or oppressing others by abetting and encouraging unrighteous suits, so as to be contrary to public policy..."*[12]

In Singapore, the doctrine of champerty applied to both public litigation and private arbitration, so as to prohibit the use of TPF in Singapore.[13] Similarly, in Hong Kong, whilst the decision of Mr Justice Neil Kaplan (as he was then) in *Cannoway Consultants Limited v Kenworth Engineering Limited*[14] found that champerty did not apply to arbitration, the later Court of Final Appeal decision in *Siegfried Adalbert Unruh v Hans-Joerg Seeberger*[15] expressly left open this question.

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[11] Sapna Jhangiani and Rupert Coldwell, *Third-Party Funding for International Arbitration in Singapore and Hong Kong – A Race to the Top,* http://kluwerarbitrationblog.com/2016/11/30/third-party-funding-for-international-arbitration-in-singapore-and-hong-kong-a-race-to-the-top/ (last visited Apr 5, 2017)
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*

Importantly, however, the Ministry of Law (the "Ministry") in Singapore and the Law Reform Commission of Hong Kong (the "Commission") have both recently taken steps towards the introduction of TPF for international arbitration into their respective laws.

HONG KONG CONFIRMS ARBITRABILITY OF IP RIGHTS

In recognition of the increasing volume of disputes relating to intellectual property rights ("IPR"), Hong Kong has introduced new amendments to the Ordinance, confirming that IPR disputes may be resolved by arbitration, and that it is not contrary to Hong Kong public policy to enforce arbitral awards involving IPR.[16]

At present, there is no specific legislative provision addressing the arbitrability, or otherwise, of IPR in Hong Kong. The Arbitration (Amendment) Bill 2016 (the "Bill"), introduced into the Legislative Council on 14 December 2016, would insert such provisions by way of a new Part 11A containing new Sections 103A-J.[17]

The new sections variously: define terms relating to IPR disputes (Sections 103A-C); confirm that such disputes may be arbitrated (Section 103D); clarify the status of licensees who are not party to the arbitration (Section 103E); and provide that an arbitral award may not be set aside, or refused enforcement, only because the award involves an IPR. (Section 103F-G).

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[16] Matthew Townsend, *Arbitration in Hong Kong: The Year of the Monkey in Hindsight,* http://kluwerarbitrationblog.com/2017/02/25/arbitration-in-hong-kong-the-year-of-the-monkey-in-hindsight/?print=print (last visited Apr 5, 2017)

[17] *Id.*

Sections 103I-J concern patents, and provide inter alia that the validity of a patent may be put at in issue in arbitral proceedings.[18]

The Bill also coincides with a recent initiative of the Hong Kong International Arbitration Center (HKIAC) to create a panel of arbitrators for IPR disputes. HKIAC's new panel comprises more than thirty experts with expertise related to IP.[19]

CHOICE OF COUNSEL

It was not too long ago that foreign lawyers could not freely represent parties in an arbitration seated in Singapore. This changed in 2004 as part of the Singapore Government's efforts to liberalize the legal industry in Singapore and promote Singapore as a preferred venue for arbitration. As a result, the Legal Profession Act was amended to allow anyone to represent a party in an arbitration seated in Singapore and carry out work otherwise reserved for advocates and solicitors, the term used to describe Singapore qualified lawyers who are licensed or authorised to practise in Singapore.[20]

SINGAPORE INTERNATIONAL COMMERCIAL COURT

[18] *Id.*
[19] *Id.*
[20] Emmanuel Chua and Gitta Satryani, *The Singapore International Commercial Court: Friend or Foe to International Arbitration in Singapore?* http://kluwerarbitrationblog.com/2015/01/14/the-singapore-international-commercial-court-friend-or-foe-to-international-arbitration-in-singapore/?print=print (last visited Apr 5, 2017)

The Singapore International Commercial Court ("**SICC**") was officially launched over 2 years ago. In the words of Chief Justice Menon, the SICC is intended to *"build upon and complement the success of [Singapore's] vibrant arbitration sector and make [Singapore's] judicial institutions and legal profession available to serve the regional and the global community"*. The SICC will take on high-value, complex, cross border commercial cases, operating as a division of the Singapore High Court. In addition to the existing panel of High Court judges, the SICC will also have local and international jurists appointed to its panel.[21]

Building on the success of Singapore's arbitration sector, the SICC seeks to further boost Singapore's value as a leading forum for legal services and international commercial dispute resolution, offering litigants the option of having their disputes adjudicated by a panel of experienced judges comprising specialist commercial judges from Singapore and international judges from both civil law and common law traditions.[22]

Singapore prides itself in having an efficient, competent and honest judiciary. For years, Singapore has sought to position itself as a neutral venue for dispute resolution between parties from different jurisdictions. In building upon its trusted hub status, Singapore has benefitted from the following advantages:

a. a well-developed and business-friendly legal system based on the common law;
b. lawyers who are commercially experienced;
c. sound judges; and

[21] *Id.*
[22] *Id.*

d. an increasingly sophisticated commercial jurisprudence.[23]

While parties may be able to pursue their claims in international arbitration, they may prefer to resolve their disputes in the SICC to take advantage of a well-designed court-based mechanism which will enable parties to avoid one or more of the following problems often encountered in international arbitration:

a. over-formalisation of, delay in, and rising costs of arbitration;
b. concerns about the legitimacy of and ethical issues in arbitration;
c. the lack of consistency of decisions and absence of developed jurisprudence;
d. the absence of appeals; and
e. the inability to join third parties to the arbitration.

The SICC serves as a companion rather than a competitor to arbitration as it seeks to provide parties in transnational business with one more option among a suite of viable alternatives to resolve transnational commercial disputes. It enhances Singapore's share of the global legal services pie without compromising Singapore's success as a seat of international arbitration as well as the international recognition and acclaim enjoyed by the Singapore International Arbitration Centre (SIAC).[24]

DEVELOPMENT OF MEDIATION AS AN ADR MECHANISM

Mediation, is a key component of Singapore's ambitions as it complements both arbitration and litigation by offering an avenue for parties to amicably solve their problems with

[23] *Id.*
[24] *Id.*

the aid of a professional facilitator. It can help parties fast-track their way to obtaining an enforceable arbitral award or order of court if used in conjunction with other modes of dispute resolution.

Recognizing the potential to grow the international mediation space in Singapore, in April 2013, a Working Group, comprising local and international experts and co-chaired by Mr. Edwin Glasgow CBE QC and Mr. George Lim SC, was set up by the Chief Justice of Singapore Sundaresh Menon and the Ministry of Law to assess and make recommendations on how to develop Singapore as a center for international commercial mediation.[25]

In its report submitted later the same year, the Working Group recognized the need for enhanced and sophisticated dispute resolution services for cross-border disputes to support the rise in trade and investment in Asia.[26] The Working Group made various recommendations, including: (a) the establishment of an international mediation service provider offering a panel of international mediators and experts as well as user-centric products and services; (b) the establishment of a professional mediation standards body; and (c) the enactment of a Mediation Act to strengthen the legal framework for mediation.[27]

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[25] Ministry of Law, Press release, *Commercial Dispute Resolution Services in Singapore Set to Grow*, 3 December 2013, https://www.mlaw.gov.sg/news/press-releases/icmwg-recommendations.html

[26] Ministry of Law, Annex A, *Recommendations Of The Working Group to Develop Singapore into a Centre For International Commercial Mediation* *https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/FINAL%20ICMWG%20Press%20Release%20-%20Annex%20A.pdf*

[27] Ministry of Law, Annex A, *Recommendations Of The Working Group to Develop Singapore into a Centre For International Commercial Mediation* *https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/FINAL%20ICMWG%20Press%20Release%20-%20Annex%20A.pdf*

These recommendations were welcomed by the Singapore Government and resulted in the establishment of SIMC and the Singapore International Mediation Institute ("SIMI"), which were both officially launched on November 2014. The Mediation Act is still a work in progress but will be designed to address issues of confidentiality of mediation communications and enforceability of mediated settlement agreements.[28]

In order to meet the needs of users looking for quicker and cheaper hybrid dispute resolution options, SIAC and SIMC collaborated to offer an arbitration-mediation-arbitration ("arb-med-arb") service. It is an innovation that deals with issues arising out of combining mediation and arbitration, including enforceability of mediated settlement agreements and maintaining the integrity of the mediation and arbitration process.[29]

Using this service, parties first refer their dispute to arbitration at the SIAC. After the exchange of the Notice of Arbitration and Response to the Notice of Arbitration, as well as the appointment of the arbitral tribunal, the arbitration is held in abeyance so that parties can attempt mediation. If the parties enter into a settlement agreement during mediation, they have the option to request the tribunal to record the settlement agreement as a consent award. If the parties fail to resolve their dispute through mediation, they may continue with the arbitration proceedings.[30] The SIAC-SIMC Arb-Med-Arb Service is governed by an Arb-Med-Arb Protocol, which provides a clear framework for the smooth conduct of the arb-med-arb process, including

[28] George Lim SC and Eunice Chua, *Mediation Goes Global in Singapore,* http://simc.com.sg/mediation-goes-global-in-singapore/ (last visited Apr 10, 2017)
[29] *Id.*
[30] *Id.*

stipulating an 8-week maximum timeframe within which mediation must be completed.[31] The Arb-Med-Arb Protocol aims to enhance process integrity and enforceability of the mediated settlement agreement by enabling its conversion into an arbitral award whilst providing control mechanisms to ensure efficient and effective dispute resolution.[32] Parties wishing to avail themselves of the Arb-Med-Arb Protocol may insert a model Singapore Arb-Med-Arb clause in their contracts or subsequently agree to adopt the Protocol after the commencement of arbitration proceedings.[33]

CONCLUSION

Both Singapore and Hong Kong offer efficient dispute resolution solutions for the world business community. The systems at the respective places seems to work perfectly. While Hong Kong benefits from its proximity to China, Singapore caters to the rest of Asia including India. What is most amazing is that the number of cases coming to these jurisdictions which have no bearing to them geographically. Singapore and Hong Kong represent the globalization of dispute resolution in the world.

[31] *Id.*
[32] *Id.*
[33] *Id.*