Market Intelligence

DISPUTE RESOLUTION 2022

Global interview panel led by Simon Bushell of Seladore Legal

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Getting the Deal Through

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DISPUTE RESOLUTION 2022

Singapore

Mohammed Reza is a Singapore advocate who regularly acts and advises on disputes involving financial institutions and multinational corporations across various business sectors.

He is an experienced trial, appellate and arbitration advocate in the technical fields of banking and investment, energy, insurance, sport and in a range of corporate disputes. Much of Reza's work is international in scope and he advises clients across a range of contentious and non-contentious commercial and employment law issues.

Reza has been described by legal directories and clients as an 'astonishingly good commercial advocate' who 'spearheads the disputes team at Simmons & Simmons, which specialises in financial market disputes for financial institutions, banks, and multinational corporations' and who is 'absolutely first-rate' and possesses 'extraordinary intellectual energy'. He is also recognised for 'his expertise on multi-jurisdictional financial and funds disputes', being 'well versed in Singapore compliance matters' and his ability to 'digest and analyse voluminous amounts of complex information in a very short space of time' to provide clients with advice that is 'always clear, concise and commercial'.

Reza would like to thank dispute resolution associate Mr Darren Low for his assistance. Darren's practice straddles a broad range of litigation, appeal court hearings, as well as SIAC and ICC arbitrations.

1 What are the most popular dispute resolution methods for clients in your jurisdiction? Is there a clear preference for a particular method in commercial disputes? What is the balance between litigation and arbitration? What are the advantages and disadvantages of the most popular dispute resolution methods?

Litigation and arbitration remain by far the most popular dispute resolution methods.

There have recently been transformational changes to Singapore's Rules of Court designed to modernise litigation in the Singapore Courts. These changes will undoubtedly have a significant impact on the way cases are litigated through our court system, although it remains to be seen how users would react to the new Rules. For now, it is too early to tell whether the new Rules would tip the balance for or against litigation.

Prior to the official launching of the Singapore International Commercial Court (SICC) in January 2015, the preferred mechanism to resolve complex international disputes for parties who have no connection to Singapore was arbitration. Arbitration has the added advantage of keeping the dispute between parties and its resolution confidential. Over time, it was not uncommon for arbitration to be criticised as being more expensive and time-consuming as compared to court litigation, and if both parties give up the right to appeal, there is no real opportunity to correct what one party may feel is an erroneous arbitration decision. What the SICC does is incorporate many of the attractive features of arbitration while preserving the avenue for an appeal and is becoming an increasingly popular forum to resolve cases that are commercial and international in nature.

2 Are there any recent trends in the formulation of applicable law clauses and dispute resolution clauses in your jurisdiction? What is contributing to those trends? How is the legal profession in your jurisdiction keeping up with these trends and clients' preferences? What effect has Brexit had on choice of law and jurisdiction clauses?

While transactional documents (corporate M&A, finance) are still largely governed by English law, practitioners have started to see more clauses stipulating the governing law to be Singapore. There are also increasing instances where the parties select jurisdiction clauses in favour of the Singapore Courts.

The neutrality of the Singapore Courts combined with the robustness of Singapore law has no doubt had an impact on swaying parties to incorporate Singapore governing law clauses in their contracts. Additionally, the nationality of the parties and the jurisdiction in which the dispute arises are key factors in


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predicting whether any given case is to be decided by way of Singapore law and/or in the Singapore Courts.

It is open to speculation whether Brexit has persuaded parties to depart from English law governed contracts but I do not think that Brexit has made an appreciable impact on choice of law and jurisdiction clauses in Singapore.

3 How competitive is the legal market in commercial contentious matters in your jurisdiction? Have there been recent changes affecting disputes lawyers in your jurisdiction? How is the trend towards 'niche' or specialist litigation firms reflected in your jurisdiction?

Singapore's legal market is highly competitive and the market has seen an increase in the number of boutique and specialist litigation outfits. It was not too long ago that Singapore opened up its dispute resolution legal market to foreign firms and, now, both local and foreign firms can be instructed to handle most international arbitration matters. Generally, Singapore lawyers will handle arbitration-related

"Singapore continues to remain popular as a forum for international arbitration."

court proceedings in the High Court, but foreign registered lawyers can appear before the SICC and arbitration-related matters can be heard in the SICC.

Singapore enjoys a reputation as one of the world's premier arbitration regimes and its establishment of a world-class restructuring and insolvency regime means there is increasing demand for legal expertise and underscores the need for all firms to stay at the forefront.

Another related development is the availability of conditional fee agreements (CFA). Beginning 4 May 2022, solicitors and clients may enter into CFAs for prescribed categories of proceedings such as international and domestic arbitration and certain SICC proceedings. This is a welcome development but it remains to be seen how this will affect the competitive landscape as a whole.

4 | What have been the most significant recent court cases and litigation topics in your jurisdiction?

A number of significant decisions were recently handed down by the Singapore Courts in the past year.

First, in the realm of cryptocurrency disputes, the Singapore High Court issued its first proprietary and worldwide freezing injunction against persons unknown in aid of a victim of an alleged cryptocurrency theft (*CLM v CLN* [2022] SGHC 46). The case recognised cryptocurrencies as property for the purposes of such injunctions and was a decision that aligned Singapore jurisprudence with other countries.

Second, the insolvencies of major commodity traders and short-term disruptions of physical supply has impacted many players in the oil and gas market, including banks. The collapse of oil trader Hin Leong has spawned a number of ongoing civil and criminal proceedings. Other corporate failures linked to allegations of fraud are the Agritrade and ZenRock sagas. ZenRock was also a prominent oil trader.

Third, in the employment space, the Tripartite Alliance for Fair and Progressive Employment Practises guidelines will be made into law. This is designed to tackle, among other things, discrimination against employees in the workplace.

5 What are clients' attitudes towards litigation in your national courts? How do clients perceive the cost, duration and the certainty of the legal process? How does this compare with attitudes to arbitral proceedings in your jurisdiction?

Litigation in the Singapore Courts is generally fast and efficient with robust case management and the Singapore judiciary enjoys a well-earned and stellar reputation.

Singapore also continues to remain popular as a forum for international arbitration, given its neutrality and the confidence of international parties that they will have their disputes resolved fairly and efficiently. Based on the Singapore International Arbitration Centre (SIAC)'s 2021 Annual Report, the SIAC saw its third-highest caseload in its 30 years with 469 new cases, with the total sum in dispute totalling US$6.54 billion. Nevertheless, there is a perception that arbitration is generally more expensive and disputes can take longer to resolve especially if there are challenges to the tribunal's jurisdiction. Arbitration awards are also susceptible to setting aside applications on the ground that the arbitration was conducted contrary to the agreement of the parties. That said, Singapore's judicial philosophy is strongly pro-arbitration and awards may only be set aside under certain narrow grounds provided in the International Arbitration Act and UNICITRAL Model Law on International Commercial Arbitration.

6 Discuss any notable recent or upcoming reforms or initiatives affecting court proceedings in your jurisdiction (including any changes as a result of the covid-19 pandemic).

Sweeping changes to Singapore's civil procedure rules came into operation on 1 April 2022. The new rules are intended to modernise and improve the efficiency of the litigation process and are contained in the Rules of Court 2021 (the Rules). Previously, Singapore's rules largely resembled the civil procedure rules in the United Kingdom before the Woolf reforms. The Rules generally do not apply to proceedings in the Singapore International Commercial Court, which has its own set of applicable rules.

Some of the key features of the Rules include:

- Under the Rules, parties now have the duty to consider resolving the dispute amicably prior to the commencement and during the course of proceedings. A party is to make an offer of amicable resolution before commencing an action unless the party has reasonable grounds not to do so.
- Litigation should no longer be conducted in a step-by-step fashion and, as far as possible, the Court must order a single application pending trial to be made by each of the parties. This will happen quite early on in the litigation process and the single application must deal with all matters that are necessary for the case to proceed expeditiously.
- The Court may, after pleadings have been filed and served but prior to any exchange of documents, order the parties to file their written factual evidence.
- The parties must, as far as possible, agree on one common expert. The Court will consider matters such as the method of questioning and remuneration to be paid early on.

7 What have been the most significant recent trends in arbitral proceedings in your jurisdiction?

In the SIAC's 2021 annual report, it was reported that the largest sum in dispute in a single case in 2021 was US$1.95 billion. This was more than double the highest sum seen in 2020. It is the third highest sum seen in the past five years, with the SIAC administering a US$2.38 billion dispute in 2018 and US$3.47 billion dispute in 2016.

This is highly encouraging as Singapore is only beginning to emerge from a two-year battle with the covid-19 pandemic. This data cements a trend in which high-value international arbitrations are regularly being administered by the SIAC despite the challenges faced throughout the globe.

The continued global economic environment is expected to lead to an increase in the number of disputes across many sectors as businesses seek to defer or reschedule performance of debt, and try to recoup some of their pandemic losses.

The rapid growth of the tech sector and the continued digital innovation will impact the commercial disputes landscape in cases involving cryptocurrency and blockchain technologies.

In terms of jurisprudence, the Singapore Court of Appeal has recently handed down the *BZW v BZV* case, which is of much interest. In short, the Court of Appeal set aside part of an arbitral award on the ground that there was a breach of the rules of natural justice. The Court of Appeal found that the tribunal failed to apply its mind to the essential issues arising from the parties' arguments and had also adopted a chain of reasoning that had no nexus with the parties' submissions. Both of these issues were connected to the making of the award. The Court of Appeal declined to remit the issue to the tribunal.

This was different from a situation where the tribunal did apply its mind but either failed to comprehend the submissions or comprehended erroneously. In this

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"Instances of mediation are on the rise and should be encouraged."

latter type of case, there may be an error of fact or law and the award will not be set aside.

8 What are the most significant recent developments in arbitration in your jurisdiction?

Singapore remains by far the most popular common law jurisdiction in South East Asia for arbitration. The SIAC continues to grow from strength to strength. Singapore was recently polled to be among the most preferred seats in the world for international arbitration.

SIAC awards have also been the subject of foreign landmark decisions. For example, in a decision handed down by the Supreme Court of India (ISC) in August 2021, the ISC decided to allow the enforcement of an emergency arbitrator's order that was handed down in proceedings governed by the SIAC Arbitration Rules. The emergency arbitrator had handed down an award to restrain a transaction concerning two Indian entities, Future Group and Reliance Industries.

Singapore's International Arbitration Act 1994 was amended to boost Singapore's position as a hub for international commercial dispute resolution. The third-party funding regime now covers international and domestic arbitrations and related court and mediation proceedings. Conditional fee agreements are also now allowed for arbitration proceedings.

9 How popular is ADR as an alternative to litigation and arbitration in your jurisdiction? What are the current ADR trends? Do particular commercial sectors prefer or avoid ADR? Why?

Instances of mediation are on the rise and should be encouraged. Negotiated outcomes increase commercial certainty for all parties, reduces litigation risk and has the potential to save much time and costs.

The Singapore authorities are cognisant of ADR's potential as a dispute resolution mechanism. As previously mentioned, the new Singapore Rules of Court impose a duty on parties to consider resolving all disputes amicably prior to commencing, and during the course of, proceedings. A party is to make an offer of amicable resolution before commencing the action (unless he or she has reasonable grounds not to do so) and the other party must not reject such an offer (unless he or she has reasonable grounds to do so). This increases the reach of ADR to all categories of case to which the new Rules of Court apply.

It is difficult to prognosticate the impact the new Rules would have on litigation in the High Court of Singapore, much less arbitration. Parties who are involved in high-value employment-related disputes generally already consider ADR as employees, even high-level ones, typically consider at the start whether their objective is to achieve a negotiated settlement.

The new Rules may not have the desired impact at encouraging settlement in areas where negotiated settlements are not the norm. One example in my estimation is where a joint venture between parties has terminated in circumstances where the parties' relationship has broken down.

10 What is the position in relation to litigation funding in your jurisdiction? Is funding available? Have there been any significant developments in this area in your jurisdiction?

Singapore is taking an incremental but increasingly expansive approach to the availability of third-party funding. Third-party funders are expanding their operations in Singapore and becoming increasingly active in the Singapore dispute resolution space.

Since March 2017, third-party funding agreements have been recognised as valid and enforceable so long as (1) the third-party funder is a 'qualifying third-party funder' and (2) the funds are for the purpose of prescribed dispute resolution proceedings. Such funding was initially available for international arbitration proceedings and related mediation and court proceedings. Availability of funding was also available for other limited categories of case, such as applications to stay court proceedings to enforce arbitration agreements and proceedings to enforce arbitral awards.

The most recent development in this area was in June 2021 where the government prescribed additional dispute resolution proceedings for which third-party funding was available. Availability of funding was extended to domestic arbitration proceedings, related mediation and court proceedings and, importantly, proceedings that are commenced (and that remain) in the SICC.

This is a significant development for litigants and funders alike. It also nicely dovetails with recent developments in case law on the recoverability of costs in SICC proceedings. In the *Kiri Industries Ltd* judgment that was handed down on 8 December 2021, the SICC awarded the successful party approximately S$8.1 million in costs, the bulk of which pertained to costs incurred after the case was transferred to the SICC from the High Court. While *Kiri Industries Ltd* was not a case where the successful party was funded by a third party, it can be contemplated that the principles in that case may apply to one where the successful party was indeed so funded. It will only be a matter of time before such issues arise for consideration in the SICC.

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The Inside Track

What is the most interesting dispute you have worked on recently and why?

One matter involved an international funds transfer between two reputable international financial institutions. The case concerned a novel point of law, namely whether one bank was liable to reimburse another in circumstances where the latter had transferred a sum of money to a third party pursuant to a SWIFT message instruction that the first bank sent the second but that it later sought to cancel. The SICC made reference to various SWIFT materials that gave voice to the market understanding of the effect of certain SWIFT Message Type Standards, and found that there was an implied contract requiring the first bank to reimburse the second.

The decision also reiterated the point that the contract between a bank and its customer is independent from its contract with its correspondent bank, and addressed the issue of what a bank should do when its statutory duty to fight against financial crime potentially conflicts with its contractual duties towards its customer or third parties.

What do you consider to have been the most significant legal development or change in your jurisdiction of the past 10 years?

Singapore's calibrated approach to the introduction of international firms into the Singapore market.

Singapore continues to require outstanding specialist legal talent in light of the government's continued push to enhance Singapore's status as a global legal hub. The landscape today is noticeably different from that of 10 years ago.

What key changes do you foresee in relation to dispute resolution in the near future arising out of technological changes?

Covid-19 has seen the Singapore Courts use remote hearing technology on a large scale. There is value to having an in-person trial, and remote hearings should never wholly replace in-person proceedings because body language, facial expressions and other non-verbal cues of witnesses can be lost, but it may be the case that Zoom hearings become the norm for interlocutory applications and case management hearings.

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