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(SINGAPORE) ALLIANCE

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2022 arbitration case law from the Singapore courts

In this October edition of Arbitration insights from Singapore, we start by examining Singapore's increasing status as one of the leading global hubs for international dispute resolution.

Any Singapore developments will inevitably influence developments elsewhere around the world. In particular, with an increasing number of arbitration cases seated in Singapore and also a rising number of applications to enforce foreign arbitration awards in Singapore, the decisions of the Singapore courts will form a key source of jurisprudence in the development of international arbitration law.

With this in mind, we review four Singapore court judgments on arbitral matters from across 2022: a case from this month on the enforcement of foreign emergency interim awards in Singapore, a case from June on the finality of an arbitration award, and two cases from March on non-existence arbitral institutions and the importance of pleadings respectively.

Singapore's position in the global disputes landscape

Singapore's arbitration institution, the Singapore International Arbitration Centre ("**SIAC**") was established in 1991 and today has offices in not only Singapore but also Mumbai, New York, Shanghai, and Seoul[1]. The last revision to the SIAC's arbitration rules was the 6th Edition (the "**SIAC Rules 2016**"), which came into force on 1 August 2016 and have been translated into, amongst other languages, Arabic, Chinese, Indonesian, Japanese, Korean, Thai and Vietnamese[2].

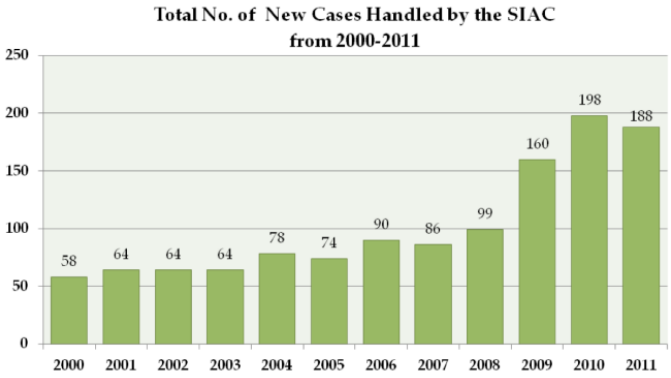
The SIAC Annual Report 2011 states that "*[f]or cases filed in 2011, the total sum in dispute amounted to S$1.32 billion. The average claim amount was S$7.03 million, an increase on S$6.82 million for 2010. The highest claim amount for 2011 was S$304 million, contrasting with the highest claim of S$261 million in*

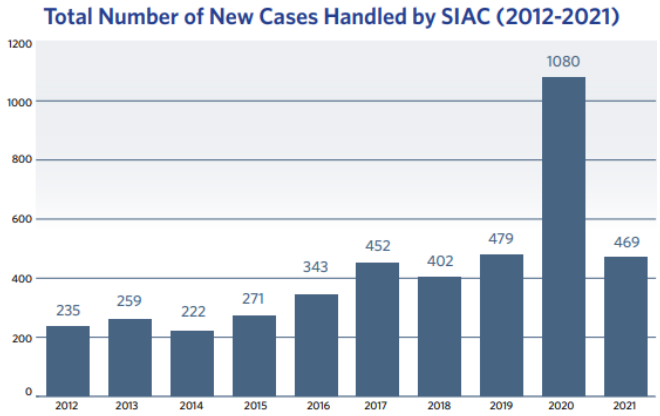
[1] https://siac.org.sg/siac-rules-2016#

[2] https://siac.org.sg/siac-rules-2016

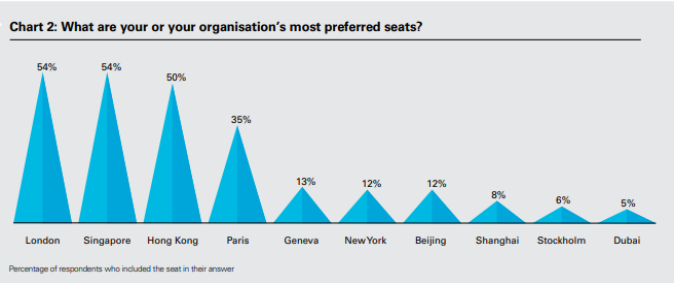
2010."[3] Ten years later, the equivalent wording in the SIAC Annual Report 2021 is "[*t*]*he total sum in dispute for all new case filings with SIAC amounted to … S$8.85 billion … The average value for all new case filings was … S$29.49 million … The highest sum in dispute for a single administered case was … S$2.64 billion*"[4].

The following two charts from the aforementioned SIAC Annual Reports for 2011 and 2021 illustrate the growth in the number of arbitration cases handled by the SIAC across the last two decades:





In the Queen Mary University of London International Arbitration Survey released in May 2021, the SIAC was ranked as the most preferred arbitral institution in the Asia Pacific, and second among the world's top five arbitral institutions, and Singapore jointly ranked with London as the most popular seat in the world, and was the most preferred seat in the Asia-Pacific[5]:



Whilst the SIAC is arguably the most visible element of Singapore's international dispute offering, it is by no means the only one.

The Singapore International Court ("**SICC**") was officially launched on 5 January 2015[6] as a division of the General Division of the Singapore High Court and part of the Supreme Court of Singapore[7] to deal with transnational commercial disputes. The latest edition of the SICC's procedural rules, the *SICC Rules 2021*, came into operation on 1 April 2022[8].

In addition, the SICC's panel of judges include amongst many others: Chief Justice Sundaresh Menon, the Chief Justice of the Singapore Supreme Court; Justice Lord Neuberger of Abbotsbury, former President of the UK Supreme Court; Justice Lord Jonathan Hugh Mance, former Deputy President of the UK Supreme Court; Justice Sir Bernard Rix, former Judge in charge of the Commercial Court of London; Justice Sir Vivian Ramsey, former Judge in charge of the Technology and Construction Court of London; and Justice Yuko Miyazaki, the sixth female Justice of the Supreme Court of Japan[9].

In matters of arbitration, Singapore's *International Arbitration Act 1994* has been updated with the 2020 revised edition, which came into force on 31 December 2021 (the "**IAA**")[10]. Case 1 below covers the interpretation of this act.

[3] https://siac.org.sg/wp-content/uploads/2022/06/SIAC_Annual_Report_2011.pdf
[4] https://siac.org.sg/wp-content/uploads/2022/06/SIAC-AR2021-FinalFA.pdf
[5] https://siac.org.sg/wp-content/uploads/2022/06/SIAC-AR2021-FinalFA.pdf
[6] https://www.sicc.gov.sg/about-the-sicc/establishment-of-the-sicc
[7] https://www.sicc.gov.sg/about-the-sicc/overview-of-the-sicc
[8] https://sso.agc.gov.sg/SL/SCJA1969-S924-2021?DocDate=20211202
[9] https://www.sicc.gov.sg/legislation-rules-pd/rules-court
[10] https://sso.agc.gov.sg/Act/IAA1994

Consistent with initiatives to internationalise Singapore's international dispute offering, there has been a liberalisation in respect to dispute funding through amendments to the *Civil Law Act 1909* in 2017[11] and the *Civil Law (Third-Party Funding) (Amendment) Regulations 2021*[12]. In addition, the rules on the fee structures which lawyers can provide was liberalised in respect of outcome related fee structures on 4 May 2022 pursuant to the *Legal Profession (Amendment) Act 2022*[13] and the *Legal Profession (Conditional Fee Agreement) Regulations 2022*[14]. For further details, please see the lead article from the June 2022 edition of our Arbitration insights from Singapore titled "Disputes funding – legislative changes sweep HK and Singapore"[15].

The Singapore International Meditation Centre ("**SIMC**") was officially launched on 5 November 2014[16] and has developed its own set of *Mediation Rules*[17]. More recently, in the context of mediation, the UN General Assembly adopted the United Nation's *Convention on International Settlement Agreements Resulting from Mediation* on 20 December 2018[18]. The Convention's signing ceremony was held in Singapore on 7 August 2019, and entered into force on 12 September 2020. It is now known as the Singapore Convention[19]. The Singapore legislation that gives effect to the Singapore Convention is the *Singapore Convention on Mediation Act 2020* and the 2020 revised edition came into operation on 21 December 2021[20].

Finally, the Singapore Ministry of Law organises an annual international disputes conference, Singapore Convention Week. The most recent Singapore Convention Week was held from 29 August to 2 September 2022 with the UNCITRAL Academy at its heart[21].

Case studies

Case 1: *CVG v CVH* [2022] SGHC 249: Enforceability of emergency interim awards[22]

Judgment was handed down by Chua Lee Ming J in the General Division of the Singapore High Court on 7 October 2022. The matter concerned an application to enforce an emergency interim award (the "**Award**") of an emergency arbitrator made in Pennsylvania, United States, in the International Centre for Dispute Resolution ("**ICDR**") arbitration proceedings following the termination of various agreements governing a Singapore franchise business on 20 May 2022.

The claimant filed its Demand for Arbitration and Application for Emergency Measures of Protection Including Injunctive Relief on 27 May 2022. On 15 June 2022, the Emergency Arbitrator issued the Award. On 29 June 2022, the claimant filed its application for permission to enforce the Award in Singapore. On 7 July 2022, the assistant registrar made an enforcement order. On 22 July 2022, the defendant filed the application to set aside the enforcement order to which this judgment relates.

One of the issues in dispute was whether the term "*foreign award*" (section 29 IAA) includes foreign interim awards made by an emergency arbitrator and, in turn, whether the Award could be enforced in Singapore. Chua Lee Ming J held "*on a purposive interpretation, the term 'arbitral award' in s 27(1) of the IAA includes awards by emergency arbitrators. Consequently, s 29 of the IAA applies to foreign awards by emergency arbitrators*."

A further issue in dispute was whether the Award was binding within the meaning of section 29(2) of the IAA. Chua Lee Ming J held that "*the test under s 29(2) of the IAA was whether the Award was 'binding', not whether the Award was 'final'…it was clear from Art 7(4) of the ICDR Rules that the Award was 'binding'*."

The judgment provides a timely reminder that foreign emergency interim awards are in principle enforceable in Singapore pursuant to the IAA.

[11] Section 5B(2), Civil Law Act 1909 (2020 Rev Ed)
[12] Civil Law (Third-Party Funding) (Amendment) Regulations 2021
[13] Legal Profession (Amendment) Act 2022
[14] Legal Profession (Conditional Fee Agreement) Regulations 2022
[15] June 2022 edition of Arbitration insights from Singapore
[16] https://simc.com.sg/mediating-in-singapore/
[17] https://simc.com.sg/v2/wp-content/uploads/2022/06/20220610-SIMC-Mediation-Rules-Clean.pdf
[18] http://simc.com.sg/v2/wp-content/uploads/2020/04/UN-Convention-on-..Mediation.pdf
[19] https://simc.com.sg/the-singapore-convention-on-mediation/
[20] https://sso.agc.gov.sg/Act/SCMA2020
[21] https://www.singaporeconventionweek.sg/
[22] https://www.elitigation.sg/gd/s/2022_SGHC_249

Case 2: *York International Pte Ltd v Voltas Ltd* [2022] SGHC 153: The finality of an award[23]

Judgment was handed down by S Mohan J in the General Division of the Singapore High Court on 30 June 2022. The matter concerned whether an arbitrator was *functus officio* once a conditional final award has been rendered by the arbitrator in the arbitral proceedings.

Functus officio is the Latin phrase to denote that, having completed or accomplished the intended task or function, a person or body possesses no further authority or legal competence. In the realm of arbitration proceedings, disputes occasionally arise as to whether an arbitrator is *functus officio* or whether they still possess a reserve of jurisdiction to determine issues that one party contends have not yet been disposed of.

The plaintiff had applied to court for a declaration that the sole arbitrator in the SIAC arbitration did not have jurisdiction to issue a further award in that arbitration. At the core of the parties' dispute was whether an award issued by the arbitrator in 2014, entitled "*Final Award*" (the "**2014 Award**"), resolved all the issues in the arbitration such that the arbitrator became *functus officio*, and therefore no longer retained jurisdiction to issue any further award.

It was common ground between the parties that an award can be "*final*" in a number of ways. As explained by the Court of Appeal in *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364 at [51]–[53], an award can be "final" in the following ways:

> "*(a) First, an award is 'final' if it resolves a claim or a matter in an arbitration with preclusive effect (i.e. the same claim or matter cannot be re-litigated).*
>
> *(b) Second, a 'final' award can refer to an award that has achieved a sufficient degree of finality in the arbitral seat. In other words, the award is no longer susceptible to being appealed against or being subject to annulment proceedings in the arbitral seat.*
>
> *(c) Third, a 'final' award can refer to the last award made in an arbitration which disposes of all remaining claims*."

It was not in dispute that the 2014 Award was "*final*" in the first and second ways described above. The central question was whether the 2014 Award dealt with all the issues that were the subject of the Arbitration, such that the 2014 Award is final in the third sense.

Before moving to the decision, S Mohan J referenced the English case of *Konkola Copper Mines plc v U&M Mining Zambia Ltd* [2014] EWHC 2374 (Comm), as support for the general proposition that a conditional award can be "final" in all of the three ways described above. The following passage from Cooke J's decision was quoted:

> "*I do not see why, as matter of principle…an award cannot be final and conclusive in its terms where it clearly provides for specific relief, including payments of money, which only bites at a point in the future…Such an award is complete and final on its own terms, albeit conditional. Whilst this might present difficulties for enforcement purposes, that is nothing to the point and does not prevent it from being an award which binds the parties.*"

S Mohan J held that it was:

> "*clear from the 2014 Award that the Arbitrator made a decision on the quantum that the plaintiff was liable to pay the defendant…instead of reserving his jurisdiction to make a quantum award at a later point in time…*
>
> *the Arbitrator intended for the 2014 Award to be fully dispositive of all issues in the Arbitration, such that he does not possess jurisdiction to issue any further award. In this regard, I find it significant that the Arbitrator did not expressly reserve any jurisdiction in the 2014 Award, despite acknowledging in the 2021 Decision that any reservation of jurisdiction would have been made 'in clear and categorical language' …*
>
> *I also find that the 2014 Award did, as a matter of fact, fully resolve all the disputes that formed the subject of the Arbitration. Accordingly, there is in*

[23] https://www.elitigation.sg/gd/s/2022_SGHC_153

> *my view no doubt that the 2014 Award is 'final' in the third sense described [above] …*
>
> *the fourth and final reason for my conclusion [is] that the 2014 Award did not reserve any jurisdiction to the Arbitrator to issue a further award*. "

S Mohan J therefore found that the 2014 Award was final and dispositive of all the issues in the Arbitration, such that the Arbitrator became *functus officio* once the 2014 Award was issued.

Case 3: *Shanghai Xinan Screenwall Building & Decoration Co. Ltd.* [2022] SGHC 58: Non-existent arbitral institution[24]

Judgment was handed down by Philip Jeyaretnam J in the General Division of the Singapore High Court on 18 March 2022. The matter concerned an application by a Chinese party to enforce a foreign arbitration award against a Singaporean party. On 3 August 2021, the Chinese party obtained leave to enforce under section 19 of the IAA. On 20 August 2021, the Singaporean party filed an application under section 31 of the IAA to set aside the order to enforce.

The arbitration provision contained in the relevant contracts provided:

> "*Any dispute arising from or in relation to the contract shall be settled through negotiation. If negotiation fails, the dispute shall be submitted to China International Arbitration Center for arbitration in accordance with its arbitration rules in force at the time of submission*."

The Singaporean party did not participate in the underlying arbitration proceedings before the China International Economic and Trade Arbitration Commission ("**CIETAC**"), resulting in an award in which it was recorded that CIETAC found that it had jurisdiction. In the instant proceedings, the Singaporean party raised two serious jurisdictional and procedural defects under Chinese law in the arbitral proceedings.

The first defect arose from the alleged choice of a non-existent arbitral institution, which would render the arbitration agreement invalid under Chinese law. This was said to establish a challenge to the award's enforcement under section 31(2)(b) of the IAA. The second defect arose from the reference in the award to CIETAC's domestic provisions even though the counterparty was a Singaporean entity. This was said to form the basis of a challenge under section 31(2)(e) of the IAA.

The grounds in sections 31(2)(b) and 31(2)(e) of the IAA read as follows:

> "*(b) the arbitration agreement is not valid under the law to which the parties have subjected it or, in the absence of any indication in that respect, under the law of the country where the award was made;*
>
> *…*
>
> *(e) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place*".

The Singaporean party contended that, under articles 16 and 18 of the Arbitration Law of the People's Republic of China, parties must select an arbitral institution. Where one is not selected in the original arbitration agreement, there must be a supplementary agreement between parties choosing an arbitral institution. Otherwise, the arbitration agreement is void. If the arbitration agreement is void, then parties would have to seek recourse in a national court that has jurisdiction over the matter.

The Singaporean party argued that because the arbitration agreements named an arbitral institution that technically did not exist, they were void by virtue of article 18. Accordingly, the Chinese party should have commenced proceedings in court instead, either in China or Singapore.

Philip Jeyaretnam J stated that, absent waiver or estoppel, a respondent to an arbitration is not precluded, by its failure to challenge jurisdiction before the tribunal or at the seat, from raising challenges to jurisdiction, including challenges to the validity of an arbitration agreement, at the stage of enforcement.

[24] https://www.elitigation.sg/gd/s/2022_SGHC_58

Thus, his task was to construe the arbitration agreements in the contracts to determine whether CIETAC was right to conclude that it was indeed the selected arbitral institution. In this regard, he stated that "*an arbitration agreement is to be construed like any other commercial agreement, with a view to giving effect to the intention of the parties as objectively expressed in it*" and to "*the principle of effective interpretation in the law of arbitration, the aim of which is to facilitate and protect party autonomy by striving to make an arbitration clause effective and workable*".

His starting point was that parties in this case intended to resolve their disputes by arbitration, that this take place in China and that it be administered by the institution that they called "China International Arbitration Center". The intention was not that the parties chose a non-existent institution to administer their arbitration. He found that the "*objective intention of the parties must be that an existing arbitral institution administer the potential arbitration*". He went on to examine whether the arbitration agreements evinced a common intention relating to that arbitral institution. Through examination of the possible arbitral bodies in China, the judge found that only one of the five major arbitral institutions was the likely intended organization.

Philip Jeyaretnam J therefore held that when parties agreed on "China International Arbitration Center", they in fact agreed on CIETAC, although with inaccurate transcription into the contracts. That inaccuracy did not "*nullify the parties' consent to arbitration or their choice of CIETAC*". He also commented that:

> "*[c]ourts in other jurisdictions have taken similar approaches to arbitration agreements which name so-called 'non-existent' institutions, striving to give effect to parties' choice of arbitration by identifying the intended but misnamed institution*."

Accordingly, it was held that the tribunal had issued a binding award and the Singaporean party's application to set aside the order was dismissed despite the inaccuracy in the arbitration agreements.

Case 4: *Phoenixfin Pte Ltd and Others v Convexity Ltd* [2022] SGCA 17: Importance of pleadings[25]

Judgment was handed down by Sundaresh Menon CJ, Judith Prakash JCA and Steven Chong JCA in the Singapore Court of Appeal on 7 March 2022. The matter concerned an appeal against a High Court decision to set aside part of an arbitral award.

The matter concerned the termination of an IT security consulting services agreement governed by English law on 30 September 2019. The underlying arbitration proceedings were commenced in Singapore under the *SIAC Rules 2016*, using the expedited procedure, on 14 October 2019. The procedure anticipates completion of arbitral proceedings within six months. On 2 October 2020, the arbitration tribunal issued her final award (the "**Award**").

One of the issues in dispute was whether there had been a breach of natural justice on the grounds that a party did not have a full opportunity to address a particular issue, following an unsuccessful application to amend its case shortly before the evidentiary hearing and following exchange of witness statements. Although the legal issue in question was permitted by way of counsel submissions.

The High Court had held that:

1. Part of the Award would be set aside on the basis that there had been a breach of natural justice which prejudiced the respondent;
2. that the arbitral tribunal had exceeded the scope of submission to arbitration; and
3. that the Tribunal had acted contrary to the arbitral procedure agreed to between the parties.

[25] https://www.elitigation.sg/gd/s/2022_SGCA_17

In the judgment, it was held that pleadings are not determinative in arbitration in the same way that they might be before a court, citing *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972, in which the High Court observed at [52] that *"an issue which surfaces in the course of the arbitration and is known to all the parties would be considered to have been submitted to the arbitral tribunal even if it is not part of any memorandum of issues or pleadings".*

The judgment went on, however, to state that where the issue is either factual, or a mixture of fact and law:

> "*a party needs to be able to question the evidence produced in support of the issue as well as have the chance to itself introduce relevant rebuttal evidence. And in order to do all this, there has to be clarity and precision regarding what issue is being raised and what evidence will be relied on to support it. It is in situations like this that the pleadings will assume a more significant role in indicating the kind of opportunity that natural justice requires to be given and in preventing 'unexpected surprises'*."

The judges found on the question of whether the party had a full opportunity to address a particular issue that:

> "[it] *was not an issue that was known to all the parties in the dispute and the Tribunal's reintroduction of the same came as an unexpected surprise (and an unpleasant one at that) to the respondent who did not have a fair opportunity to address it … This was particularly so as the [issue] was a mixed question of law and fact …*
>
> *As such, the Tribunal could not make a finding on the [issue] which was a question of mixed fact and law, when the issue was unpleaded and no evidence had been led by the appellants on it. The respondent did not have an opportunity to adequately respond to the appellants' case, since the case had never been established …*
>
> *Given [the] conclusion on the issue of whether there had been a breach of natural justice, it followed that the Tribunal was not entitled to consider the [issue] and that it was outside the scope of submission.*"

The appeal was therefore dismissed, and the Singapore High Court's decision was upheld. The judgment provides a timely reminder of the importance of pleadings, in particular on issues that are a mixed question of fact and law.

Conclusion

As will be evident, Singapore has become one of the leading international disputes hubs in the world, and the pace of development continues to be rapid. 2022 has seen a wide variety of arbitration-related matters decided by the Singapore courts, of which the four cases discussed in this article are only a few.

The Stephenson Harwood global arbitration team will continue to monitor the arbitration-related decisions being handed down by the Singapore courts, and should you have queries on any particular case, please do not hesitate to get in touch with members of the team.

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Our success is built on your success

190+
Partners

1100+
People worldwide

49
Top rankings for individuals

8
Offices worldwide

26%
Of our people are based in Asia

40
Languages spoken by our staff

90+
Countries in which our clients are

73%
Revenue growth in the last seven

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