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研究ノート

The “SICC”: International Commercial Litigation

– A New Major Development in the Field of International Commercial Dispute Resolution –

DENJAKIN Viktor

Ⅰ） Introduction:

In our transnational legal society, international commercial dispute resolution plays an increasingly large role, as the ties of the international business community, accelerated by the process of globalization, seem to grow ever closer. Consequently, disputes arising from border-crossing business relationships increasingly become the everyday-matters lawyers and courts find themselves dealing with.

Inspired by this development the author[1) 2)] undertook an internship at the “SICC – The Singapore International Commercial Court”[3)] a part of the Singapore Supreme Court to acquire insight and firsthand experience of the new frontier in international commercial dispute resolution.

Leaving Mediation aside, there are two major options to choose from for resolving

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international commercial disputes, arbitration, and litigation. While in arbitration a private tribunal determines the outcome of the dispute by issuing an award, litigation occurs in courts with the dispute being resolved by a court judgment.

Ⅱ） Historic Development:

The origin of dispute resolution is naturally as old as mankind. This is clearly illustrated in the stories and history that has been passed down to us throughout the centuries and even millennia. One such epic story of ancient dispute resolution is the tale of King Solomon, who passed harsh judgment on two women arguing over a single child and their right to motherhood.[4] The rule of law and trade regulations grew more sophisticated as throughout centuries shaped by the great empires of the "Old World" such as the Great Roman and the Great British Empire, to whom arbitration was no foreign concept.[5] Nevertheless, prior to the 21st century litigation was the common means of commercial dispute resolution.

That changed drastically with the establishment of the multilateral New York Convention in 1958, "The Convention on the Recognition and Enforcement of Foreign Arbitral Awards,"

2）The author would like to express his sincere gratitude for the invaluable learning experience he received at the Singapore International Commercial Court from Justice Sir Henry Bernard Eder IJ and to Ms Teh Hwee Hwee, Deputy Registrar of the Supreme Court of Singapore, and Divisional Registrar of the Court of Appeal and the Singapore International Commercial Court, Ms Una Khng, Assistant Registrar of the Supreme Court of Singapore for making the internship possible and supervising him during his attachment with the court. In relation to this work my deepest appreciation for assistance in reviewing the article goes to Prof. Susumu Masuda, Mr. Huw Watkins and Ms. Bich-Huyen Nguyen.

3）The Singapore International Commercial Court is a part of the Singapore Supreme Court, existing beside the High Court and subordinate to the Court of appeal; Singapore International Commercial Court, https://www.sicc.gov.sg/Home.aspx（last visited May 20, 2018）.

4）Kings 3: 16-28, see generally the biblical story of King Solomon: Two women living under the same roof gave birth to one child each within days of difference. One of the children died, and both women claimed to be the mother of the surviving child. Unable to solve their dispute by themselves, the women went to the King. King Solomon asked for a sword and offered to cut the child in two, and give half to each claimant. The real mother of the living child opposed, and agreed to give the child to the other woman; this other woman rejected and asked for the partition. Wise King Solomon found for the first woman, disposing that the child was to be given to her, alive, as she was the mother. The population of the king's territory held him as a wise man, and feared him.

5）Earl S. Wolaver, *Historical Background of Commercial Arbitration,* 83 U. Pa. L. Rev. 132, 146（1934-1935）.

which assured the international enforceability of arbitral awards in 24 nations initially with many more joining subsequently, making arbitration attractive for private sector cross-border commerce.[6] This development ultimately caused a complete paradigm-shift; the promise of international enforceability led to a steady influx of cases for arbitral tribunals,[7] eventually deposing litigation as the most preferred means for international commercial dispute resolution.[8]

Arbitration's newly acquired dominant position in global trade remained mostly unchallenged until the early 21st century. That, however, may change soon with the enactment of the Convention of 30th June 2005 on "Choice of Court Agreements." This convention is a multilateral treaty under The Hague Conference on Private International Law (HCCH), which attempts to promote international commercial litigation by establishing international recognition of judgments the same way the New York Convention did it for arbitration in 1958.[9] Consequently, international commercial courts were established by a number of states, among them the Singapore International Commercial Court, which came into being on the 5th January 2015 and has flourished ever since.[10]

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6) Overview of the members of the New York Convention by date of signature and ratification, http://www.newyorkconvention.org/countries

7) Dean of the Faculty of Law at the University of Sydney Gillian Triggs, address at the Australian Centre for International Commercial Arbitration (ACICA): "New York Convention one of the success stories of public and private international law" (Feb. 28, 2008).

8) JOSEPH LOOKOFSKY & KETILBJØRN HERTZ, EU-PIL: European Union Private International Law in Contract and Tort (JurisNet LLC & DJØF Publishing Copenhagen 1st ed. 2009), Quote: "A 2006 study based on University of London research and interviews with experienced in-house counsel at 143 multinational corporations with revenues topping $500 million showed that 73% prefer arbitration to litigation."; *International Arbitration Survey: Improvements and Innovations in International Arbitration,* survey (Queen Marry University of London, U.K.) Oct. 26, 2015, at 5, Quote: "The current survey is broader in scope and has sought the opinions of stakeholders at all levels in international arbitration. This wider respondent group showed a strong preference for arbitration over other options such as cross-border litigation or mediation. 90% of respondents said that international arbitration is their preferred dispute resolution mechanism, either as a stand-alone method (56%) or together with other ADR (34%)."

9) Ronald A. Brand & Paul M. Herrup, The 2005 Hague Convention on Choice of Court Agreements – Commentary and Documents 244, 245 (Cambridge University Press, 1st ed. 2008).

10) The SICC passed more than 20 judgments since it's establishment and many more are expected to be passed in 2018; Singapore International Commercial Court, https://www.sicc.gov.sg/HearingsJudgments.aspx?id=72 (last visited 20 May, 2018).

Ⅲ） Arbitration vs. Litigation vs. SICC-Approach on “Streamlined Litigation”:

The choice of the dispute resolution method naturally varies on a case-to-case basis, as each have their advantages and disadvantages.

As mentioned above, arbitration[11] continues to be the most popular means of international commercial dispute resolution. This used to be the case, due to the perception of the key actors in international commerce, who considered arbitration to be inter alia, fast-paced, comparably cheap, conveniently enforceable and strictly confidential. This perception has slightly shifted, as institutionalized arbitration today proves often to be neither fast nor cheap, although confidentiality and enforceability are still perceived as distinct advantages.[12] A further attraction is that parties are able to choose their own arbitrators, which may generate confidence in the competence and neutrality of the tribunal as a whole.

Unlike arbitration, where tribunals may try to avoid a strict win-lose situation, by issuing an award that grants the losing party a satisfactory minimum,[13] litigation tends to be the preferred tool if one or both parties are beyond reconciliation and unwilling to compromise. In such cases, the public nature of litigation can be advantageous for parties because it can be utilized for “blaming and shaming” of the competitor or rehabilitation in the public if a party would be wrongly accused of misconduct. The possibility to appeal the judgment can also be attractive to parties, especially so, in cases regarding innovative fields of commerce where the court’s decision would have precedential value.

With this controversy in mind, the SICC attempts to create a new “streamlined litigation,” which is globally competitive with international commercial arbitration in the field of transnational commercial disputes.

11）Within arbitration as a means to dispute resolution there is a significant difference between the institutional arbitration, which is held before an established tribunal and thus is more formal and the ad hoc arbitration. Ad hoc arbitration gives parties, even more, autonomy and flexibility. The confines of this paper don’t allow for an indebt analysis and distinction between the different types of arbitration and will focus on institutional arbitration. Despite the aforementioned, the rational in most points is applicable to ad hoc arbitration as well.

12）Joseph Lookofsky & Ketilbjørn Hertz, Transnational Litigation and Commercial Arbitration 814（JurisNet LLC & DJØF Publishing Copenhagen, 3rd ed. 2011）.

13）Id.

A) Jurisdiction:

Arbitral tribunals have no original jurisdiction to call their own since jurisdiction is derived from the power of government. Only a state's government can exercise the rule of law over its citizens within its sovereign territory. To fulfill this purpose the state uses the judiciary as an intermediary, which is both, responsible for exercising the to apply the law, while simultaneously guarding the law and the citizens from the arbitrariness of a government, thereby upholding the rule of law. That role, within a state, is fulfilled by national courts, which are parts of the municipal body and thus have original jurisdiction within the state's sovereign territory.

Arbitral Tribunals are for-profit-organizations acting and competing within the free market of international commercial dispute resolution services. Their "jurisdiction" arises purely out of contract: either private contracts between individuals or through state-state treaties. It is given substance by recognition by national governments and courts and the willingness of private parties to voluntarily subject themselves to that "jurisdiction." This can be seen in national arbitration acts and contractual arbitration agreements between disputing parties, determining the designated arbitration tribunal.

(a) SICC Approach on Jurisdiction:

The Singapore International Commercial Court has as the name suggests its original jurisdiction within the sovereign territory of Singapore. According to Section 18D of the Supreme Court of Judicature Act read with Order 110 Rule 7 ROC, the SICC has jurisdiction if the claims between the parties are of an international[14] and commercial[15] nature, and the parties to the action designated the SICC as the dispute resolution body in a written jurisdiction agreement.[16] Thus, the scope of cases the SICC has jurisdiction over in large similar to the scopes set out for international commercial arbitration in Singapore in Section 5 (2) International Arbitration Act[17] and Article 1 (1) of the UNCITRAL Model Law.[18]

14) Supreme Court of Judicature Act, Chapter 322, Section 80 - Rules of Court, Order 110, Rule 1 (2) (a) (Sing.): "a claim is international in nature if (i) the parties to the claim have their places of business in different States (ii) none of the parties to the claim have their places of business in Singapore; (iii) at least one of the parties to the claim has its place of business in a different State from — (A) the State in which a substantial part of the obligations of the commercial relationship between the parties is to be performed; or (B) the State with which the subject matter of the dispute is most closely connected; (iv) the parties to the claim have expressly agreed that the subject-matter of the claim relates to more than one State"; infra note 30.

In Addition to that, by virtue of Order 110 Rule 7（2）, 12 ROC, the SICC can hear and determine cases, which are transferred to the SICC from the High Court, where they originally commenced, by court order, regardless whether the parties have submitted to the SICC jurisdiction.

B） Efficiency:

While it remains undisputed that especially in the past cross-border litigation often proved to be a drawn-out and costly process, it is wrong to simply assume that arbitration is the faster and cheaper way to resolve the dispute.[19)]

If one party's interests are best served by dragging out the arbitral proceedings it has a variety of means to drag out the process. A party can raise questions about the validity of the arbitration clause before a national court,[20)] if the clause itself gives reason to doubt its validity,[21)] even in UNCITRAL Model Law countries.[22)] An evasive opponent could further

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15）Id. at Order 110 Rule 1（2）（b）: "a claim is commercial in nature if（i）the subject matter of the claim arises from a relationship of a commercial nature, whether contractual or not, including（but not limited to）any of the following transactions:（A）any trade transaction for the supply or exchange of goods or services;（B）a distribution agreement;（C）commercial representation or agency;（D）factoring or leasing;（E）construction works;（F）consulting, engineering or licensing;（G）investment, financing, banking or insurance;（H）an exploitation agreement or a concession;（I）a joint venture or any other form of industrial or business cooperation;（J）a merger of companies or an acquisition of one or more companies;（K）the carriage of goods or passengers by air, sea, rail or road;（ii）the claim relates to an in personam intellectual property dispute; or（iii）the parties to the claim have expressly agreed that the subject matter of the claim is commercial in nature"; infra note 30

16）In addition, the action must be one that the Singapore High Court may hear and try in its original civil jurisdiction and the parties do not seek any relief in the form of, or connected with, a prerogative order.

17）International Arbitration Act（Ger.）, http://www.siac.org.sg/images/stories/articles/rules/IAA/IAA%20Aug2016.pdf（last visited May 20, 2018）.

18）UNCITRAL Model Law on International Commercial Arbitration, https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf

19）Walter Mattli, *Private Justice in a Global Economy: From Litigation to Arbitration,* 925 International Organizations 44（2001）.

20）Ralph H. Folsom, Principles of International Litigation and Arbitration 69（Jesse H. Choper et al. eds., 1st ed. 2016）.

21）The German Federal Court of Justice held that the violation of the form requirements pursuant to Section 1031（5）German Civil Procedure Code leads to the invalidity of the entire clause, Bundesgerichtshof [BGH] [Federal Court of Justice], May 19, 2011, Az. III ZR 16/11.

challenge the national enforceability of an arbitration award in front of a national court.[23] Further, the constant growth in the number of international commercial disputes and thus the number of arbitrations[24] means that many arbitrators, like national courts, have a backlog of cases.[25]

Naturally, the costs grow proportionately to the length of the process. This goes for arbitration, as well as for litigation because aside from the arbitration fees, which can be substantial because they are geared to the amount in controversy,[26] the bulk of the procedural costs are counsel fees. Particularly in arbitration, legal counsel is often criticized for being inefficient and "overlawyering" on one hand, and tribunals are criticized for being too reluctant to act decisively to prevent unnecessary maneuvers by counsel.[27]

Arbitrating parties have a high degree of freedom to determine how the arbitral proceedings are to be commenced and what procedural and evidential rules will be applied. Litigation is a governmental process of passing judgment, thus more formal and thoroughly regulated than the private arbitration tribunals decision process, especially in comparison to ad hoc arbitration. Depending on the jurisdiction e.g. in the USA the Discovery/E-Discovery - document production can be extensive and burdensome, thereby significantly drawing out the process, and parties are well within their rights to demand exhaustive disclosure - for better or worse.[28]

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22) Civil Procedure Code (Ger.): "Section 1032 Arbitration agreement and proceedings brought before the courts (1) Should proceedings be brought before a court regarding a matter that is subject to an arbitration agreement, the court is to dismiss the complaint as inadmissible provided the defendant has raised the corresponding objection prior to the hearing on the merits of the case commencing, unless the court determines the arbitration agreement to be null and void, invalid, or impossible to implement."

23) Folsom, supra note 20, at 69.

24) Karen Maxwell, "Arbitration statistics: and the winner is...," Thomson Reuters: Practical Law Arbitration Blog (Mar. 23, 2017), http://arbitrationblog.practicallaw.com/arbitration-statistics-and-the-winner-is/, Quote: "Stepping back, the general picture is one of the continued popularity of arbitration as a dispute resolution mechanism. Institutional statistics covering the last 10 years indicate a general upward trend, with some annual variations, and some institutions establishing themselves over time as market leaders."

25) This trend is illustrated by statistics provided by the Financial Industry Regulatory Authority ("FINRA"); https://www.finra.org/arbitration-and-mediation/2016-dispute-resolution-statistics

26) In complex and/or dragging matters the arbitrator fees can increase unforeseeably - e.g. Article 3 Appendix III International Chamber of Commerce Rules of Arbitration (ICC), https://iccwbo.org/publication/appendix-iii-icc-rules-expertise/

27) Queen Mary University survey, supra note 8, at 30.

Arbitration, theoretically, aims to limit Discovery/E-Discovery - document production attempting to increase efficiency, however, parties often forget to set out certain evidence rules in the arbitration agreement. In absence of an agreement thereto, evidence production in a significant number of arbitral proceedings, especially in the USA, tend to reach litigation-like proportion.[29] Particularly where the arbitrator is unwilling to act decisively to restrict parties to limited categories of documents.

（a） SICC Approach on Efficiency:

After taking into account the above-illustrated situation, where parties find themselves struggling, trying to choose the "least unfavorable"[30] option, the SICC aims to offer a middle way, by creating a swift and cost-efficient form of international commercial litigation.

In order to achieve this, Singapore legislated to create a new and efficient legal framework for the SICC. The facilitation of SICC proceedings is best illustrated by Order 110 of the "Rules of Court"（ROC）[31] the procedural code and the SICC "Practice Directions"[32]（PD）.

（1） Strict Schedule for Submissions

The SICC works before and during the trial in accordance with a strict schedule. Filing claims, responding with a defense and counterclaim, reply and defense to the counterclaim as well as the reply thereto all have to be done within a maximum of two weeks of each other unless an extension of time is agreed to or granted, in accordance to Order 18 Rule 2, 3, 12, 18 ROC. The SICC is a court of law and thereby in a strong position in respect to the parties. A court is less likely to give parties leeway. This contrasts with often indulgent arbitral tribunals,

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28）（E-）Discovery can be easily abused a process tactical tool, especially in cases where one of the parties is significantly underfinanced or the legal counsel is poorly staffed and the opposite party purposely insists on an extensive discovery process, knowing that the opponent is put under significant financial strain.

29）Giacomo Rojas Elgueta, Understanding Discovery in International Commercial Arbitration through Behavioral Law and Economics: A Journey inside the Minds of Parties and Arbitrators, 16 Harv. Negot. L. Rev. 165, 172（2011）.

30）Gary Born, International Arbitration: Law and Practice 10（Kluwer Law International 2nd ed. 2015）.

31）Supreme Court of Judicature Act, Chapter 322, Section 80 - Rules of Court（Sing.）, https://sso.agc.gov.sg/SL/SCJA1969-R5?ProvIds=legis#legis

32）International Commercial Court Practice Directives（Sing.）, https://www.supremecourt.gov.sg/docs/default-source/default-document-library/sicc-practice-directions---amended-version-（final）77b73133f22f6eceb9b0ff0000fcc945.pdf

who may fear the consequences for enforceability of their award if they cut-off a party for failure to meet a submission date. In addition, tribunals are composed of private arbitrators, who may consider future appointment prospects when making their decisions. If a party misses a submission in a SICC-trial, the court may close the pleadings as is unless there is an agreement for an extension of time or unless reasons are provided to justify an extension of time and the extension of time is granted by the court.

(2) Case Management Conference

To further promote the efficiency of the trial, the SICC holds an early "case management conference" ("CMC") that, in accordance with Paragraph 75 (2) PD, is generally fixed two weeks after the close of pleadings. Parties are required to submit a case management bundle, their memorandums, a list of issues in dispute and a case management plan in accordance with Paragraphs 76, 78-81 (2) PD, at least one week prior to the CMC. Due to the early submissions, the SICC-judges like the parties prepare themselves for the CMC, as all participants must be able to discuss all issues raised in the case management conference. The in-depth knowledge of the case by the judge(s) in such an early state enables the court to steer the parties towards the crucial issues in dispute, enabling the parties to gather only the relevant evidence.[33] The importance of the CMC as an element of the SICC-litigation becomes clear as the court can sanction the parties if they fail to comply with the aforementioned requirements pursuant to Paragraph 82 (4), (5) PD.[34]

(3) Evidence Rules

Pursuant to Order 110 Rule 23 (1) a), b) ROC, the SICC is not bound to apply the Singapore rules of evidence. If the parties apply to deviate from the Singapore rules of evidence and mutually agree on the application of other rules, "such other rules of evidence (if any), whether such rules are found in foreign law or otherwise, shall apply instead." Consequently, the parties can freely choose any "foreign law" if appropriate in the dispute or

33) If the complexity of the case requires it, the court can order subsequent CMCs.

34) Supra note 31, at Paragraph 82 (4); "Where a party fails to comply with any directions (including any timelines directed) by the Court, the other party may make an application to the Court to: a) direct the non-complying party to comply; b) impose costs or other sanctions for the non-compliance; and/or c) seek directions on the further conduct of the cause or matter."

“otherwise” agree on a set of Guidelines like the IBA guidelines for international commercial arbitration.

Evidence-in-chief of a witness is generally, according to Order 38 Rule 2（1）ROC, to be submitted in form of an affidavit and contain only facts the witness is able to prove from his own knowledge. Generally, the witness attends the trial for cross-examination unless ordered otherwise by the court or the parties mutually agree that the witness's attendance is obsolete. The witness can give the evidence-in-chief orally if a party applies thereto and the court grants leave pursuant to Order 38 Rule 2（4）ROC.

The testimonies of expert witnesses too, are generally to be submitted in form of an affidavit, according to Order 40A Rule 3（1）ROC. In cases requiring more than one expert witness, the court can order the parties to take expert witness evidence concurrently（“hot tubbing”）pursuant to Paragraph 90 PD.

（4） Submission of Evidence

All submissions of evidence and relevant documents for the SICC-trials are to be performed through a prescribed electronic filing system（“eLitigation”）[35] by thereto-authorized legal representatives, pursuant to Paragraph 44 PD.

（5） Pre-Trial Conference

Pursuant to Paragraph 85 PD, Approximately 4 to 8 weeks before the trial the court will fix（unless inappropriate）a Pre-Trial Conference（“PTC”）. The parties have to prepare and deliver to the court, at least 7 days prior to the conference, the updated case management bundle and a list of the remaining issues in dispute as well as a draft of the trial-timetable. Latter has to realistically display how much time parties intend to spend on what part of their oral submissions during the trial. During the PTC, the court once more explores with the parties the crucial issues in dispute and the relevance of submissions, as well as discusses the trial-timetables presented（as elaborated above in（3））.

（6） Trial & Judgment

The court proceedings of the SICC are essentially common law proceedings[36], given that

35）E-Litigation, https://www.elitigation.sg/_layouts/IELS/HomePage/Pages/Home.aspx

most international and all the Singapore judges have a common law background. Consequently, unlike arbitrators who are often reluctant to direct parties, the judges are highly involved in the proceedings and decisive in their actions, which in turn benefits the pace of the trial.[37)]

The opening statements are, in accordance with Paragraph 119（1）e PD, restricted to a maximum of 20 pages.

The tedious examination of evidence-in-chief witnesses is substituted by the affidavit, leaving only cross-examination and re-examination to be commenced during the trial in accordance with Paragraph 111, 120（2）PD.

The court can limit the time parties are granted for closing oral submission, in accordance with Paragraph 122（3）, if deemed appropriate.

The SICC Judges can render the judgment orally right after the closing submissions in open court, or adjourn to write the judgment: see Order 42 Rule 1 ROC.[38)] Pursuant to Order 57 Rule 4 ROC, after the Judgment is pronounced it can be appealed during a one-month period.

（7） Joinder of Third Party

The court can by law, according to Order 110 Rule 9 and Order 15 Rule 4 ROC, make other parties than the initial plaintiff and defendant join a case proceeding as a party on either side or as a third party, if appropriate. Order 110 Rule 9（2）ROC further provides that a State or the sovereign of a State may not be made a party to an action in the SICC unless the State or the sovereign has submitted to the jurisdiction of the SICC under a written jurisdiction agreement.

C） Legal Representation:

Unlike litigation, where a representing attorney needs to have a right of audience（usually

36）The SICC is currently considers to establish a framework of rules to accommodate civil law proceedings in the future. However whether at all or when that might happen is still uncertain.

37）To the efficiency of the SICC proceedings the author stands witness after personally observing a highly complex international commercial dispute being heard, including the final submissions, in little more than one week, while the court consistently was extremely accurate and precise about all aspects of the trial.

38）The full written judgment, of about 100 pages, on the case the author witnessed during his affiliation with the SICC was issued just approximately 2 months after the closing submission.

arising out of admission to practice in the relevant jurisdiction), arbitration gives the parties the advantage of moving forward with a legal counsel of their choice. This can be important for businesses that have their own legal departments, thus don't need or want to hire and pay outside counsel, what helps to keep costs low while reducing the circle of people engaged in disputes which could affect sensible information.

（a） SICC Approach in Legal Representation:

Lawyers are officers of the court and as such generally need to be admitted in the respective jurisdiction to be able to represent a client in court. This general rule may be waived under certain circumstances in the context of international commercial litigation as the SICC has proven. Order 110 Rule 1, 37 ROC in conjunction with Section 36P of the Legal Profession Act, as well as the Legal Profession（Foreign Representation in Singapore International Commercial Court）Rules 2014, allow "registered foreign lawyers" to independently represent a party in court when handling cases with no substantial connection to Singapore but the SICC was chosen as the dispute resolution body.[39)]

D） Transparency:

One key element for the success of arbitration's success in international commercial dispute resolution is that it is not public and the parties can be bound by confidentiality agreements. A significant number of cases in international commercial disputes are technology, media and telecommunications law（TMT）disputes and deal with high-value IP and other sensitive business information that would potentially hurt one or both parties, while profiting competitors, if that information would be revealed in open court. The same is true for Joint Ventures and M&A deals which are often subject to arbitration.[40)] Consequently, arbitrating parties often have a mutual interest in resolving their dispute "quietly."

39）SICC: "A foreign lawyer who is granted full registration may do all or any of the following: a）appear and plead in any relevant proceedings; b）appear and plead in the Court of Appeal in any relevant appeal; c）represent any party to any relevant proceedings or relevant appeal in any matter concerning those proceedings or that appeal（as the case may be）d）give advice, prepare documents and provide any other assistance in relation to or arising out of any relevant proceedings or relevant appeal," Singapore International Commercial Court, https://www.sicc.gov.sg/ForeignLawyer.aspx?id=101（last visited May 20, 2018）.

40）Queen Mary University of London - The 2016 International TMT Dispute Resolution Survey, p. 9, 20, http://www.arbitration.qmul.ac.uk/media/arbitration/docs/Fixing_Tech_report_online_singles.pdf

While in many cases this assessment may be factually true, it is delusional to expect that arbitrated matters are entirely safe from becoming public knowledge. As mentioned above, arbitration agreement, arbitral procedures and arbitration awards can often be the subject of litigation in public courts, undermining the anonymity of former arbitral proceedings.[41)]

One of the most important tasks of the court is to create legal certainty and nurture societies trust into a legal system that is free from corruption and arbitrariness through consistent and sound logic in the rulings passed by the court. This certainty can be achieved through the publicity of the trial and creation of precedent, which enables the public not just to understand, but also to police the court's reasoning. Just as important is, that these rulings and the reasoning behind it underpin the practice of commerce and ultimately leads to the development of trade and law at the same time.[42)]

（a） SICC Approach on Transparency:

The SICC is a litigating court, thus the approach of national courts discussed above is its usual modus operandi. The court's role in the global context is unique and potentially crucial. International commerce is a global matter that does affect each and every country regardless whether it is common law or civil law jurisdictions. Where the SICC has jurisdiction over an action as described above, it is able to apply foreign law, both substantially and by application of foreign evidence rules. The SICC is therefore in a position to contribute to creating precedents that may provide guidance for the business community although the precedents may not be binding in foreign jurisdictions.[43)]

According to Order 110 Rule 30（1）ROC, the parties can apply to the court to make an exception from the principle of the public trial and issue an order of confidentiality. Despite dealing with international commercial disputes, legally the SICC is a national court of Singapore. Consequently, the court's relationship with the principle of publicity is ambivalent, which is, naturally, to be applied stricter if cases affect the people of Singapore than if they

41）Alexis C. Brown, Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration, 16 Am. U. Int'l L. Rev. 969, at 974, 975（2001）.

42）Chief Justice of England and Wales, Lord Thomas of Cwmgiedd, The Bailii Lecture（Mar. 9, 2016）.

43）Fostering that development of law now, is more crucial than ever, since for approximately 60 years the development stagnated in large parts, due to the overwhelming majority of commercial disputes being dealt through arbitration, behind closed doors. International commercial litigation is the only feasible means to live up to this outstandingly important function within the concept of the rule of law.

don't. That is according to Order 110 Rule 30（2）ROC the court has to take into consideration whether the case is an "offshore case"[44] or the parties made any agreements that would support such an order of the court.

E） Enforceability:

Possibly the most important trait of arbitration is its international enforceability. This is important because an award as such is only a "contractual obligation" endorsed through multilateral treaties and not enforceable by itself. It must be enforced through a national court decision within its jurisdiction.[45]

Today more than 150 countries are members of the "New York Convention," therefore bound to adjust their domestic legislation accordingly, so the courts would accept foreign awards under certain circumstances.[46] While some countries are more reluctant to accept arbitral awards[47] than others, the general approval of international commercial arbitration is constantly rising.[48] An award is final and not subject to appeal or substantial control by national courts.[49]

The result of a Litigation is a judgment and has legal force as such; "contra rem iudicam

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44）Supra note 30, at Order 110 Rule 1: "offshore case" means 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）."

45）That is natural since arbitration tribunals are private organizations. It would create an irreconcilable conflict with the rule of law and democratic principles if an organization that is essentially a business could enforce their own decisions domestically and even abroad.

46）E.g. - The German legislator met the obligations under the New York Convention by drafting rules within the Civil Procedure Code which specify under what conditions an award should be granted enforceability, by whom it can be granted enforceability as well as when enforceability is to dispute or deny. These rules can be found in the 10th Book of the German Civil Procedure Code, https://www.gesetze-im-internet.de/englisch_zpo/index.html

47）Amr A. Shalakany, *Arbitration and the Third World: A Plea for Reassessing Bias under the Specter of Neoliberalism,* 41 Harv. Int'l. L. J. 419, 468（2000）.

48）Folsom, supra note 20, at 64.

49）Unless a dispute arises between the parties under the restrictive exceptions stipulated by the New York Convention, Article V New York Convention; United Nations Conference on International Commercial Arbitration, Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V, *opened for signature on* 10 June, 1958, 330 U.N.T.S. 38, https://treaties.un.org/doc/Publication/UNTS/Volume%20330/v330.pdf

non audietur."[50] Unlike arbitration awards court decisions give the parties the right to appeal during a certain period. If a party does not appeal or the Court of Appeal upholds the ruling it can be enforced domestically. International enforcement of judgments often proved difficult in the past, creating uncertainty in cross-border litigation and "Certainty is of primary importance in all commercial transactions".[51]

(a) The SICC Approach on Enforceability:

SICC decisions are judgments, thus enforceable domestically. Enforcement abroad requires cooperation from the respective court of the foreign jurisdictions. This cooperation can be either treaty-based, by means of registration among the British common-law jurisdictions or by means of a national law allowing enforcement of foreign judgment in accordance with international legal practice.

The "Hague Convention of 30 June 2005 on Choice of Court Agreements" is a multilateral treaty that ensures the international enforceability among the signatory jurisdictions.[52] Enforcement is possible among certain Commonwealth countries and Hong Kong by means of registration under the Reciprocal Enforcement of Commonwealth Judgments Act and the Reciprocal Enforcement of Foreign Judgments Act.[53] Certain civil law jurisdictions, among them Germany, provide enforcement mechanisms in their civil procedure codes if the foreign judgment is not in conflict with domestic law.[54]

F) Impartiality:

Arbitration is a polarizing topic in the context of impartiality. On one hand, it is considered one of the advantages of the concept that by choosing arbitrator parties can avoid

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50) A fundamental Roman legal principle that still applies today and translates as: "One is not to be heard in a decided matter."

51) *Mardorf Peach & Co Ltd v Attica Sea Carriers Corp of Liberia, The Laconia* [1977] A.C. 850 at 878 (U.K.)

52) Overview over the current participants of the Hague Convention on the Choice of Court Agreements, https://www.hcch.net/en/instruments/conventions/status-table/?cid=98; Text of the Hague Convention, https://www.hcch.net/en/instruments/conventions/full-text/?cid=98

53) Reciprocal Enforcement of Commonwealth Judgments Act, https://sso.agc.gov.sg/Act/RECJA1921; Reciprocal Enforcement of Foreign Judgments Act, https://sso.agc.gov.sg/Act/REFJA1959

54) Supra note 45, Civil Procedure Code: Section 328 "Recognition of foreign judgments," Section 722 "Enforceability of foreign judgments", Section 723 "Judgment for enforcement" (Ger.).

potentially bias national judges（litigation）, on the other hand, arbitrators have their own financial interests that may conflict with completely impartial decision making. This is the case if an arbitrator speculates to get more "future-business"[55] for one of the parties. In the worst cases, some companies went as far as to create their own arbitration tribunal（"pocket arbitration"）.[56]

Parties who would be at risk to litigate in a foreign jurisdiction often prefer arbitration because they are afraid of the Judge being biased in favor of the domestic party. That assumption is plausible as national interests, for example in a dispute over a country's natural resources, can be at stake and the level of political influence in the court system varies from country to country.

（a） The SICC Approach on Impartiality:

While not unreasonable in the historical context, this assumption has merit in the context of international commercial litigation as the SICC abundantly illustrates. As foreseen in Order 110 Rule 34 ROC, often neither of the disputing parties will be from Singapore（"offshore cases"）what by logic necessity excludes partiality.[57] In a domestic case, impartiality is still preserved, as the SICC provides judges from different jurisdictions in commercial disputes, which are employed for a three years term and have no strong national affiliations.[58]

55）The Swedish Supreme Court held in *Anders Jilken（"AJ"）v. Ericsson AB,* "The bias rules are intended to preserve the objective administration of justice and it is essential that the rules are applied in such a manner that an arbitrator covered by such a rule does not participate in proceedings notwithstanding that, in certain cases, there is no basis to assume that, in the administration of the case or the award, he will allow himself to be a affected by his relationship with one of the parties," *Anders Jilken（"AJ"）v. Ericsson AB* [2007]: T 2448-06（Swed.）.

56）Even after the reform of the national arbitration act in 2015 Russia is still struggling with the problem of "Pocket Arbitration Courts." Prominent decisions in the past were e.g. *Lukoil Energoseti LLC v. MK LLC* the decree of the SAC No. 16541/11 dated 22 May 2012 in case No. A50-5130/2011 and *SOFID LLC v. OJSC Sberbank* the decree of the SAC No. 1567/13 dated 16 July 2013 in case No. A56-48511/2012.

57）Singapore Supreme Court of Judicature Act, Chapter 322, Section 80 - Rules of Court, Order 110, Rule 34 "When action may be treated as offshore case（O. 110, r. 34）34. An action is to be treated as an offshore case in any of the following circumstances, unless the Court subsequently decides that the action is not or is no longer an offshore case:（a）there is exhibited, in accordance with Rule 43（1）, a pre-action certificate stating that an intended action is an offshore case;（b）a party has filed an offshore case declaration;（c）the Court decides under Rule 36 that the action is an offshore case."

Ⅳ） Summary of SICC Key Elements:

As set out above, the legislation conferring jurisdiction on the SICC is very wide in scope. The SICC may therefore potentially adjudicate disputes that could otherwise be filed in domestic courts or in arbitral institutions.[59)]

In terms of efficiency, the SICC（pre-）trial proceedings significantly improved in comparison to the time-honored litigation of the last century in terms of efficiency. Before the trial, the strict schedule, the multitude of pre-trial conferences, exclusive use of electronic document submission as well as the early devised trial schedule unburdens the trial significantly before it even begins. The use of affidavits, the freely selectable rules of evidence, the possibility to limit time and volume of certain submissions induce the trial to focus on the crucial points while sorting out irrelevant issues. The high level of involvement by the judges, thus in-depth knowledge of each case and their decisive performance in the proceedings further benefit the pace of the trial.

The SICC took a big step by permitting "registered foreign lawyers" to advocate in "offshore" cases what surely will be appreciated by foreign litigants. This can potentially reduce their costs of litigation significantly as parties often have their own domestic in-house legal counsel or registered foreign counsel of choice, who can advocate in front of the SICC. This, potentially, is a very attractive feature of the SICC if the court will manage to facilitate it fast paced and conveniently accessible.

What some might call cherry picking, in terms of publicity and confidentiality, should greatly benefit the SICC in the future as it is able to combine the publicity of the trial in litigating openly, as well as issue orders of confidence（predominantly in "offshore" cases）if deemed appropriate, what used to be one of the biggest advantages of international commercial arbitration.

Admittedly the enforcement of SICC judgments, while underway, yet falls short in comparison to the almost global acceptance of arbitral awards. However, with the Hague

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58）The SICC employs highly qualified and well-respected international judges, who in most cases are former either High Court or Supreme Court judges in their home jurisdictions. Currently, the SICC employs judges from Australia, Canada, France, Hong Kong, Japan, USA and UK; Singapore International Commercial Court, https://www.sicc.gov.sg/Judges.aspx?id=30（last visited May 20, 2018）.

59）See above, page 4, 5 under "SICC approach on Jurisdiction."

Convention expanding and the Commonwealth countries and territories which reciprocally accept judgments by means of registration the SICC already has a not insignificant sphere of influence globally. In addition, many civil law jurisdictions are likely to enforce SICC judgments due to coded civil procedure provisions.

Further, the SICC's use of an international panel of highly respected jurors is an innovative and effective solution to overcome the fear of the potential partiality of domestic judges.

Ⅴ） Conclusion & Outlook:

The Dispute over the one best international dispute resolution method is unlikely to be resolved anytime soon, if ever.

Recent developments are likely to improve the reputation and standing of litigation in the global legal society. These beginnings, due to the creation of modern international commercial courts such as the SICC, which account for many prior shortcomings of cross-border litigation, making it faster, easier accessible and internationally enforceable, will surely bear fruit.

This new "Streamlined Litigation" is more competitive than ever as it significantly invaded arbitrations biggest fields of advantage such as efficiency and flexibility while holding on to traditional advantages of litigation such as transparency, impartiality and highest quality judgment based on precedent and natural legal development.

Many countries（among which some are the world's biggest）already appear committed to recognizing and enforcing foreign judgments soon under the Hague Convention. The Convention has been signed by the EU（except Denmark）（2009）, USA（2009）, Singapore（2015）, Ukraine（2016）, China（2017）and Montenegro（2017）; and to date, Mexico（which ratified in 2007 without first signing）, the EU（except Denmark）（2015）and Singapore（2016）have ratified the Hague Convention. As it happened with the New York Convention before, most of the world is most likely to follow in time.

Should this prognosis come to pass, it is reasonable to expect for "Justicia's Scale" to tip towards international commercial litigation. However, it should be noted that even if this new approach towards litigation does succeed, it can't ultimately compete with the flexibility of arbitration used correctly. As such, while the balance may shift to a certain degree, it is unlikely that litigation will displace arbitration completely.

The perfect opportunity to observe this shift in preference is Singapore. The Singapore International Arbitration Center（SIAC）[60] has already installed itself as one of the most sophisticated arbitration tribunals in the world. With the establishment of the SICC being a pioneer in international commercial litigation a competition over the commercial disputes is naturally to arise.

Surely points can be made to support both opinions, whether the relationship between litigation and arbitration is either exclusive or complementary. Considering the stated above the author tends to side with the latter position.

Arbitration can profit from a sophisticated litigation practice because it helps to speed up the arbitral process by creating precedents to rely upon, while litigation could be greatly unburdened by the reduced case-influx because of arbitration. These systems are naturally complementary rather than competitive, if operated efficiently these systems could greatly benefit the legal and business society.

This time the baby, unlike in the case of King Solomon, the international commercial dispute market being the figurative baby, could actually be “split in the middle.”

60）Singapore International Arbitration Center, http://www.siac.org.sg/（last visited May 20, 2018）.