

CROSS-BORDER LITIGATION: COMITY AND CULTURE CLASH

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A. THE CULTURE CLASHES THAT MAY ARISE IN DISPUTE RESOLUTION IN ASIA

1. South East Asia is made up of 11 sovereign states with a combined population of approximately 636 million people.
2. Singapore, Brunei, Myanmar and Malaysia's legal systems are based on the common law, whereas Indonesia, Laos, Cambodia, Thailand and the Philippines follow the civil law tradition. This gives rise to clashes in the way that legal proceedings are typically conducted. Accordingly, Singapore as an arbitration hub has seen a meteoric rise in Asia – Singapore is now the 3rd most preferred seat in the world after London and Paris.² This is because arbitrations allow for flexible rules and procedures that can facilitate differences in legal traditions. Having said that, there may be issues of enforcement of arbitral awards in certain Asian jurisdictions. Accordingly, parties should consider getting personal guarantees and/or other forms of security from counterparties and their directors.
3. Furthermore, Western counterparts doing business in Asia should also be aware that in Asia, mediation is increasingly popular as it allows the parties to maintain business relationships while resolving their dispute. Accordingly, you may wish to consider mediation before commencing legal action or sending a demand letter as the commencement of legal proceedings may offend the counterparty.
4. In Asia, many transactions are still largely done based on trust, especially in the less developed countries. Accordingly, the documentation may be very basic or non-existent. This presents a problem when a dispute arises.

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² <http://siac.org.sg/#>

B. THE SINGAPORE INTERNATIONAL COMMERCIAL COURT

5. The Singapore International Commercial Court (“SICC”) was established in 2015 to counter the problems of arbitration, namely:
 - (a) over-formalisation of, delay in, and rising costs of arbitration;
 - (b) concerns about the legitimacy of and ethical issues in arbitration;
 - (c) the lack of consistency of decisions and absence of developed jurisprudence;
 - (d) the absence of appeals; and
 - (e) the inability to join third parties to the arbitration.
6. It is a division of the High Court of Singapore, but it takes many elements of flexibility from arbitration. For example, the SICC has jurisdiction to hear a case which has no connection with Singapore whatsoever, other than the parties’ agreement for the court to hear the matter.
7. Generally, the SICC has the jurisdiction to hear and try an action if:
 - (a) the claim in the action is of an international and commercial nature;
 - (b) the parties to the action have submitted to the SICC’s jurisdiction under a written jurisdiction agreement; and
 - (c) the parties to the action do not seek any relief in the form of, or connected with, a prerogative order (including a mandatory order, a prohibiting order, a quashing order or an order for review of detention).³
8. Enforcement of money judgments in foreign countries require comity. In this regard, the Singapore courts have entered into memoranda with China, Bermuda, Qatar, the state of Victoria in Australia. The memoranda are not binding but they set out a

³ Order 110 Rule 7 of the Rules of Court

process of cooperation.⁴ A money judgment from the courts of Singapore may be recognised and enforced in China on the basis of reciprocity (see Article 6).

9. Culture clashes may be reduced in the SICC as:

(a) There are foreign judges to hear foreign law case – judges hail from Delaware, New South Wales, U.K., France, Canada, Hong Kong and Japan.⁵ Generally in cases with no substantial connection to Singapore, parties may appoint foreign legal representation to appear before the court.

(b) Discovery obligations can also be tailored to the parties' cultural preferences. The Court may, on the application of a party, order that any rule of evidence in Singapore law shall not apply and such other rules of evidence (if any) whether found in foreign law or otherwise shall apply instead.⁶ Such an application can be made if all parties agree on the rules of evidence that shall not apply, and any rules of evidence that shall apply instead.

10. More information may be found at: https://www.sicc.gov.sg/docs/default-source/legislation-rules-pd/sicc_user_guides.pdf

⁴ https://www.sicc.gov.sg/docs/default-source/default-document-library/spc-mog-english-version---signed.pdf?sfvrsn=141f49df_0

⁵ <https://www.sicc.gov.sg/about-the-sicc/judges>

⁶ Order 110, Rule 23(1) of the Rules of Court