Testimonials

I have had the privilege of prosecuting the very first case heard before the SICC upon its formation and a number of cases beyond that as well. The SICC is a stand out for the sheer intellectual ability of its judges and their steadfast commitment to procedural and adjudicative rigor and fairness. One simply could not ask for more.

Francis Xavier S.C. , Rajah & Tann Singapore LLP

"The SICC is a truly unique dispute resolution option for cross-border commercial disputes. It combines the flexibility, expertise and best practices of international arbitration with the rigour and discipline of one of the world's leading judicial systems.

It has long been a complaint that international arbitration too frequently fails to achieve its promises of efficiency and economy. Arbitral proceedings can be lengthy, cumbersome, and costly. Tribunals increasingly labour under "due process paranoia" – or the reluctance to impose strict procedural limits for fear of a subsequent challenge to their award or themselves. And whilst arbitration continues to be a highly effective mechanism, and the international default for reasons of neutrality and the enforceability of awards, there is a recognised need for alternative options.

SICC proceedings are conducted according to state-of-the-art procedural rules. They allow for a bespoke approach to each dispute, including the type of pleadings / memorials to be used; the evidential rules to be applied; the approach to document production; the approach to expert evidence; and the nature and structure of hearings. The result is that the process can resemble an international arbitration, or a traditional court hearing, or indeed anything in between. But what is most critical is the fact that the process is conducted within the context of a court structure, led by highly qualified and experienced judges from a wide range of juridical backgrounds (both common and civil law). The result is a procedure that is robust, fast and extremely efficient, with room for neither dilatory tactics nor any kind of redundancy."

Toby Landau QC, Essex Court Chambers

Case Study 1

Landmark decision by the Court of Appeal on cryptocurrency and computer automated contracts

Quoine Pte Ltd v B2C2 Ltd[1] is the first legal dispute in Singapore involving cryptocurrency. The central and most difficult issue in this case was how the doctrine of mistake could be applied in the field of cryptocurrency trading which used deterministic computer algorithms without any direct human

[1] [2020] SGCA(I) 02. https://go.gov.sg/sicc-judgment-2020-sgca-02

involvement (i.e. algorithms which always produce the same output when provided with the same input). Notwithstanding the novel circumstances, the Court of Appeal gave guidance on how existing legal principles governing the doctrine of mistake could still be meaningfully adapted and applied.

This case involved a dispute between Quoine Pte Ltd ("**Quoine**"), an operator of a cryptocurrency exchange platform ("**Platform**"), and B2C2 Ltd ("**B2C2**"), who traded on said Platform entirely using its algorithmic trading software with little to no human involvement.

Due to Quoine's failure to make certain necessary changes to critical operating systems on the Platform, a chain of events was set off leading to 13 trades ("**Disputed Trades**") being concluded between B2C2 and 2 other traders on the Platform (the "**Counterparties**").

B2C2 had offered to sell one type of cryptocurrency (Ethereum), for another type (Bitcoin) at a particular rate as part of B2C2's pre-configured algorithm. The Counterparties accepted this offer through Quoine's pre-configured algorithms. This resulted in the Disputed Trades being concluded without any human involvement wherein the Counterparties contracted to pay B2C2 250 times the market rate of the said cryptocurrencies. When Quoine became aware of the Disputed Trades, it cancelled and reversed the transactions.

B2C2 sued Quoine, with the case transferred to the SICC with the parties' consent. B2C2 claimed that Quoine's unilateral cancellation of the Disputed Trades and reversal of the transactions was in breach of contract and/or breach of trust.

The matter was heard at first instance before International Judge Simon Thorley ("**Thorley IJ**") who ruled in favour of B2C2 and found that there was both a breach of contract and trust by Quoine. In so doing, Thorley IJ rejected the defences advanced by Quoine, including the contention that the Disputed Trades were void or voidable on the basis of unilateral mistake.

Quoine's appeal was heard by a 5-member coram of the Court of Appeal. Due to the novelty and complexity of the matter, Professor Goh Yihan from the Singapore Management University was also appointed as *amicus curiae* to assist the Court of Appeal.

Breach of contract and unilateral mistake

On the breach of contract issue, a 4-judge majority, with Chief Justice Sundaresh Menon delivering the judgment, ("**CA Majority**") affirmed Thorley IJ's decision, on slightly different grounds, that the Disputed Trades were not void on the basis of unilateral mistake at common law.

The CA Majority found that there was simply no mistake by the Counterparties as to a term of the sale transactions with B2C2. The Counterparties had committed to transact on the Platform using pre-determined algorithms in such a way that they would not be able to know when a contract would be formed and on what terms. The Disputed Trades were executed on the basis of the parties' respective algorithms which performed exactly as programmed.

The CA Majority also agreed with Thorley IJ that there was no unilateral mistake in equity as B2C2 lacked the requisite knowledge of the Counterparties' mistake. B2C2 had not programmed its

algorithm software with the awareness or intention to take advantage of a mistaken bid by a counterparty.

On this point, International Judge Jonathan Mance ("**Mance IJ**") dissented from the CA Majority and was of the view that there was a unilateral mistake in equity which rendered the Disputed Trades voidable. While the CA Majority focused strictly on the programmer's knowledge at the time of programming up to the point of formation of the contract, Mance IJ propounded a broader test of equitable mistake which asked if a reasonable trader with knowledge of the market circumstances would have thought that a fundamental mistake had occurred.

As we enter into the age of smart contracts, contracts will be formed and concluded in milliseconds and on terms automatically determined by pre-determined computer algorithms without any human intervention. To allow a general right for parties to relook the reasonableness of their transactions and dispute the validity of the contract will likely introduce considerable uncertainty.

In this commercial reality, the CA Majority's approach provides welcome certainty to contracts where parties have committed to the use of algorithmic processes and have chosen not to bargain for a right to review, confirm or invalidate any ensuing contract that might emerge from the arrangements they had committed to.

Breach of trust

On the breach of trust issue, an interesting question arose as to whether cryptocurrency could be regarded as a species of property that is capable of being held on trust. While this point was not disputed by the parties in the Court below, Thorley IJ nevertheless considered that cryptocurrency appeared to satisfy all the characteristics in the classic definition of a property right.

On appeal, the Court of Appeal noted that while there may be good reasons to consider cryptocurrency as a species of property, there were also difficult questions as to the type of property that is involved. Ultimately, the Court of Appeal declined to reach a definite conclusion on this issue as it found that there was no certainty of intention to create a trust based on the evidence. Accordingly, the Court of Appeal reversed Thorley IJ's decision on this point and held that there was no breach of trust by Quoine.

The observations by Thorley IJ and the Court of Appeal on this complex issue have been very recently considered and cited with approval by the New Zealand High Court[2] which conclusively ruled that cryptocurrencies could be considered as property that could be held on trust.

The views expressed in this article are the writers' and do not necessarily reflect those of the Supreme Court of Singapore and the SICC.

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[2] *Ruscoe v Cryptopia Limited (in liquidation)* [2020] NZHC 728 at [76]–[83], [148], [162]–[166].

“Jon practises in all aspects of intellectual property law and has advised and acted for clients from a range of industries such as luxury brands, pharmaceuticals, information technology, and solar energy."

“Alvin has been involved with various IP litigation before the Singapore High Court, spanning both trademark and patent disputes. He is also involved in the management of client trademark portfolios and advises on the filing strategies both in Singapore and overseas."

Case Study 2

SICC Provides Guidance On 2002 ISDA Master Agreement - *Macquarie Bank Limited v Graceland Industry Pte Ltd* [2018] 4 SLR 87

Before the Singapore International Commercial Court ("**SICC**"), Macquarie Bank Limited ("**Macquarie**") claimed US$1.2 million from Graceland Industry Pte Ltd ("**Graceland**") for breach of an over-the-counter commodity swap agreement in respect of 30,000 metric tonnes of urea (the "**Transaction**").

In holding that Macquarie was entitled to terminate the Transaction and recover a "Close-out Amount" of US$ 1.2 million, the Court provided guidance on the 2002 ISDA Master Agreement which is likely to be welcomed by participants in the derivatives market for the reasons discussed below.

1. The Court found that there was a binding agreement evidenced by the long form confirmation Macquarie sent to Graceland

The Court found that Macquarie and Graceland had agreed that the swap would be on the terms of a draft long form confirmation ("**LFC**") circulated between the parties. The draft LFC in turn incorporated the terms of the 2002 ISDA Master Agreement. This agreement was evidenced by an LFC sent by Macquarie which Graceland agreed to.

This finding accords with the market's expectation of how LFCs work – in circumstances where time does not allow for the negotiation and execution of an ISDA Master Agreement before transacting, market participants typically document a swap using an LFC after having reached an agreement on the swap.

At the same time, while the Court affirmed that an express and direct reference to the ISDA Master Agreement was effective to incorporate its terms, its decision serves as a reminder this might not incorporate certain provisions of the ISDA Master Agreement which had to be expressly "specified" in the Schedule to the ISDA Master Agreement.

2. Computation of the Close-out Amount

The SICC also provided useful guidance on the computation of the Close-out Amount, in particular the objective "*commercially reasonable*" standard introduced by the 2002 ISDA Master Agreement.

In summary, the Court's decision on this issue provides assurance to the market that in determining the Close-out Amount, there will be a range of procedures and results which the Determining Party may choose from. The onus is on the party challenging the determination to prove that the objective standard of commercial reasonableness was not observed by the Determining Party.

Graceland had argued that it was not a "*commercially reasonable procedure*" for Macquarie to determine the Close-out Amount as at 8 July 2014, because it involved the completion of a large volume of swaps in an illiquid market that typically experienced low volumes. Graceland argued that Macquarie should have waited until the following day to obtain a commercially reasonable quotation for a portion of the 30,000 metric tonnes of urea.

The Court concluded that it was commercially reasonable for Macquarie to have determined the Close-out Amount on 8 July. Among various reasons, the Court observed that it would have been impossible for Macquarie to have predicted the direction of the urea swap market from 8 to 9 July and that if it had waited until 9 July, it would have taken on the risk of further adverse price movements and even greater losses. The Court also observed that although it may have been commercially reasonable for Macquarie to have acted differently (as Graceland argued), this did not mean it was commercially unreasonable for Macquarie to have acted in the way it did.

Finally, the Court held that the Determining Party is entitled to include operations costs and brokerage costs in its calculation of the Close-out Amount. The Court also noted the costs did not have to be actually incurred, so long as they were losses or costs which a Determining Party would have incurred in executing replacement transactions. However, such costs should be commercially reasonable and, particularly in the case of operations costs, adequately documented by the Determining Party.

3. Other Points to Note

As the SICC found on the facts that there were no misrepresentations, mistakes and/or breach of fiduciary duty by Macquarie (as alleged by Graceland), it was unnecessary for the SICC to decide on Macquarie's reliance on various contractual clauses to counter these allegations. At the same time, the SICC noted that the Unfair Contract Terms Act would not be applicable since the parties did not contract as "*consumer*" or on one of the parties' "*written standard terms of business*".

The views expressed in this article are the writers' and do not necessarily reflect those of the Supreme Court of Singapore and the SICC.

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Case Study 3

SICC INDICATES WILLINGNESS TO EXERCISE ITS DISCRETION WHEN DETERMINING COSTS TO DETER AN AWARD DEBTOR FROM (MIS)USING THE SET ASIDE APPLICATION - *BYL & Anor v BYN* [2020] SGHC(I) 12

In August 2019, the Plaintiffs applied to the High Court to set aside an award in an arbitration on the basis of an arbitrator's apparent bias. The case was transferred to the SICC and subsequently dismissed. The decision by International Judge Anselmo Reyes in *BYL & Anor v BYN*, rendered on 11 May 2020, deals with the costs of the Plaintiffs' unsuccessful setting aside application. Reyes IJ's decision is significant for two reasons. **First**, it affirms the SICC's discretion and willingness to depart from the High Court's scale of costs (even in relation to transfer cases), which – if applied – would have entitled the successful party to a costs order of no more than S$15,000 (approximately US$10,000) regardless of the complexity and quantum of the issues raised in the set aside proceedings. **Second**, it underscores the importance of providing sufficient particulars to justify the costs claimed, without which they will be rejected.

The decision articulates, and also addresses, the concern of many users of arbitration, namely that the lack of a realistic costs order in set aside applications in Singapore may have inadvertently provided mischievous unsuccessful parties with a low-cost opportunity to delay performance. As noted by Reyes IJ, without a meaningful costs order, "*the successful party would in effect be subsidising the unsuccessful party's attempt to avoid having to honour an award*". His decision is therefore very much welcomed.

Background facts

It was undisputed between the parties that the Plaintiffs had to pay the Defendant's costs since the Defendant prevailed. However, when the case was transferred, the Deputy Registrar left open the question of whether the High Court costs regime set out in Appendix G of the Supreme Court Practice Directions ("**Appendix G**"), would apply to any part of the proceedings. If Appendix G was applied, an award on costs would be limited to a maximum of S$15,000 (the scale applicable to a one-day hearing of an originating summons).

The Defendant submitted that they should be entitled to recover their entire costs amounting to S$235,000 in legal fees, plus an additional S$15,700 in disbursements, as they were reasonably incurred. The sum of S$235,000 included the legal fees of (1) Defendant's Singapore counsel involved in the set aside application (S$133,400), (2) Defendant's counsel who had conduct of the arbitration and assisted in the preparation of various evidence in the set aside application (S$84,300), and (3) Indian counsel who advised on aspects of Indian law relevant to the set aside (S$1,500). (By contrast, the Plaintiffs incurred approximately S$800,000-900,000 for the entire set aside proceedings.)

The Plaintiffs, on the other hand, argued that costs prior to the transfer to SICC must be assessed in accordance with the High Court costs regime for a setting-aside application, i.e. Appendix G. While the Defendant was entitled to its "reasonable costs" post-transfer, the Plaintiffs argued that the SICC should nonetheless have regard to Appendix G in making an

assessment of what would constitute reasonable costs and consequently, the Defendant should only be entitled to a costs order in the region of S$15,000, in line with Appendix G.

SICC's decision

With respect to the applicable principles, and the relevance of the High Court's costs regime reflected in Appendix G, Reyes IJ made the following findings.

(1) Following the transfer, and in the absence of contrary directions from the Deputy Registrar, costs should be assessed by reference to the SICC costs regime contained in Order 110 Rule 46 of the Rules of Court, allowing a successful party to recover its "reasonable costs". In other words, the SICC was not bound by or restricted to Appendix G. Indeed, Reyes IJ noted that where the recoverable costs under Appendix G constituted a significant discount to a party's reasonable costs "*there could be an incentive to the unsuccessful party to delay having to pay on an award by putting up unmeritorious applications to set aside the same*" and that unsuccessful party (if Appendix G were to be applied strictly), "*would not be bearing the reasonable economic cost of its failed attempt at delay*". As a result, Reyes IJ held that the position in Appendix G should not be the normal position unless there was compelling justification.

(2) No compelling justification to apply Appendix G strictly existed here. Unlike in *BXS v BXT (Costs)*, the parties in this case did not have a shared understanding that the transfer to SICC would not affect the way costs were to be assessed (as a result of the transfer). To the contrary, the evidence indicated that parties had exceeded the S$15,000 limit even before the case was transferred and given what was at stake, i.e. an award of US$102 million, the parties expected to incur further significant costs to defend their respective positions.

(3) Nevertheless, and affirming the position in *CPIT Investments Ltd v Qilin World Capital Ltd* [2018] 4 SLR 38 and *BXS v BXT* [2019] 5 SLR 48, Reyes IJ noted that Appendix G could serve as a "reality test" in determining what would constitute reasonable costs.

Turning to the question of reasonableness, Reyes IJ scrutinised every component of the Defendant's costs to determine the extent to which each item met the "reasonable costs" standard. In the end, the Court awarded only S$82,500, slightly over a third of the total amount of S$235,000 claimed. It should be noted however that Reyes IJ applied a significant discount to the amount claimed not because he found them to be unreasonable, but because the Defendant appeared not have provided sufficient particulars to the costs claimed such that it was not possible for Reyes IJ to determine their reasonableness. For example, Reyes IJ stated that no particulars were provided in relation to the fees of the Defendant's counsel in the arbitration (S$84,300), other than a short statement that they were involved in preparing the affidavit in order to avoid duplication of work (on the basis that as counsel in the arbitration, they would have been more familiar with the underlying facts than the Defendant's Singapore counsel who was engaged for the set aside application). Reyes IJ noted that without further details, the fees appeared excessive as much of the narrative of events

in the affidavit had been set out in the challenge within the arbitration, and awarded S$28,100 for the costs of the Defendant's arbitration counsel instead.

Other points to note

As noted earlier, the decision to award reasonable costs which are not limited to or pegged strictly to Appendix G and allow for meaningful substantive recover of the costs of defending an award, is very much welcomed to arbitration users. It is worth noting that Reyes IJ was able to apply the SICC costs regime because the issue of costs assessment (and the application of Appendix G) was not fixed or determined prior to or at the time of transfer. It will be interesting to see if users of arbitration will start to include an exclusive submission to the SICC's jurisdiction clause for their arbitration agreements (in which Singapore is selected as the seat), in order to avail themselves to the SICC's costs regime, and prevent the application of Appendix G to their arbitration-related court proceedings.

Additionally, Reyes IJ's analysis of the Defendant's costs submissions highlights the importance of costs breakdowns in future SICC costs assessments. Ultimately, the Defendant failed to recover a significant portion of its costs as Reyes IJ felt it did not have enough information to determine if the Defendant's costs were reasonable. Further, he emphasised the role of the parties' proposed Case Management Plans in costs assessment. These plans acted as indicators of the work that had been done as at that date. Notably, the Defendant's plan gave the appearance that the Defendant's Singapore counsel's fees overlapped with those of its other advisers, which justified an 81% discount on its Singapore counsel's pre-CMC fees. Therefore, in the event that a party uses multiple sets of counsel in a set aside application, it is crucial to demonstrate their respective work scopes to avoid, or minimise, any finding of duplication which may lead to a reduction in the amount of recoverable costs on account that those costs were not reasonably incurred.

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