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BY EMAIL (LIM Sing Yong@mLaw.gov.sg)

& POST

Dear *Sing Yong*

PUBLIC CONSULTATION ON SINGAPORE INTERNATIONAL COMMERCIAL COURT ("SICC") - RELATED BILLS 2014

We refer to MinLaw's email of 9 April 2014 inviting the Law Society to provide feedback on the above consultation.

2 The consultation was referred to our practice committees and has been considered by Council.

3 The views of the Law Society are set out below with regard to some of the amendments. We would be grateful if these views can be taken into consideration.

I) Constitution of the Republic of Singapore (Amendment) Bill

Clause 3 / Article 22

The Constitution of the Republic of Singapore (Amendment) Bill contains amendments to Article 22 (1) of the Constitution of the Republic of Singapore, which provides that the President will have the discretion to refuse to (i) make an appointment; or (ii) revoke any appointment in relation to the International Judges of the Supreme Court.

4 The term "International Judge" introduced under the Bill may provide the impression that the judge is qualified to adjudicate across various jurisdictions. It is suggested that it may be appropriate to retain the term "Associate Judge" as recommended by the Report of the SICC Committee dated 29 November 2013 or use terms such as "SICC Judge" or "Judge of the SICC" to lend more accuracy to the position.

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Clause 4 / Article 94

Article 94 of the Bill amends the composition of the Supreme Court to allow an International Judge appointed under Article 95 (3) of the Bill to exercise the powers and perform the functions of a Judge of the High Court in accordance with the terms of his appointment. The said Article allows the International Judge to (i) sit in the High Court; and (ii) sit in the Court of Appeal on such occasions as the Chief Justice requires.

5 The composition of the Court of Appeal should be limited to the local judiciary even for appeals arising from SICC cases. This will preserve the Court of Appeal as a Singapore institution and will ensure greater consistency in the development of the law. International Judges should not form a part of the constitution of the Court of Appeal even if such appeals relate to the SICC matters.

II) Supreme Court of Judicature (Amendment) Bill

Clause 7 / Section 18A to 18 D

The Supreme Court of Judicature (Amendment) Bill introduces new s18A, s18B, s18C and s18D in relation to the establishment of the SICC. S18A of the Bill provides that SICC shall be a division of the High Court and the SICC proceedings shall be conducted according to the provisions of the Supreme Court of Judicature Act ("SCJ Act") as the Act would apply to any original civil jurisdiction proceeding before the High Court. In relation to the jurisdiction of the SICC, s18B of the Bill provides that the SICC shall hear and try any action:

- (a) that is of an international and commercial nature; and*
- (b) that the High Court may hear and try in its original civil jurisdiction.*

S18B also provides that the SICC shall have regard to the international and commercial character of its jurisdiction in hearing and trying any action and in exercising its powers.

6 Council notes with reference to a previous meeting between Council and MinLaw that:

- The proposed framework of the SICC was supposed to have no impact on the jurisdiction of the High Court or the livelihood of local lawyers.
- The framework would keep in mind concerns of the local Bar while allowing SICC to admit foreign lawyers ("FL") as counsel since it can potentially deprive local lawyers of a brief.
- The SICC was to be established to promote Singapore as the forum for resolving international disputes (akin to the international jurisdiction in UK), which have no connection with Singapore and would otherwise not be heard in Singapore.

7 We note that the above mentioned intention is only partly reflected under s18B of the Bill since the exact scope of jurisdiction has been left to be determined by the rules formulated under the SCJ Act. Council is of the view that jurisdiction is a matter that should be set out clearly in the SCJ Bill to provide transparency on the nature of cases that will fall within the ambit of SICC.

8 The SICC Committee Report dated 29 November 2013 ("Report") does not expressly provide that the SICC jurisdiction is limited only to disputes of an international and commercial nature. The concern is that the ambiguity of SICC jurisdiction may give rise to a situation where cases may be directed to SICC, even though such matters fall within the realm of the High Court.

9 On a separate note, members have suggested that it will be helpful if MinLaw conducts dialogue sessions with the Bar since the proposed amendments will have a widespread impact on the members.

10 The Bill provides for extending the application of the Rules of Court to SICC proceedings also. However, it may not be feasible to apply the Rules of Court in relation to all SICC proceedings given that SICC is expected to hear cases based on foreign law emanating from civil law jurisdictions as well.

III) Evidence (Amendment) Bill

Clause 6 / Section 59A and 59B

Sections 59A and 59B of the Evidence (Amendment) Bill have been introduced to deal with matters relating to foreign law. S59A provides the Court with the power to take judicial notice of foreign law in any civil proceeding where the court has to form an opinion on any aspect of the law of a foreign country. S59B applies in cases where the court, in any civil proceedings, has to form an opinion on any aspect of the law of a foreign country, the court may make an order that proof of the law of that foreign country shall be dispensed with and that the law of that foreign country shall be determined on the basis of submissions in accordance with s59B (2) of the said Bill.

11 On the aspect of establishing proof of foreign law, some members are concerned about ensuring whether the applicable foreign law will be accurately applied during SICC proceedings since foreign law is not required to be pleaded or proved in such proceedings. To that end, it will be helpful to know if there are any plans to extend the application of Order 101 of the Rules of Court under the SCJA to other jurisdictions.

IV) Legal Profession (Amendment) Bill

Clause 2 / Part IV B / Sections 36O, 36P, 36Q, 36R, 36S, 36T, 36U and 36V

Part IVB has been introduced, by way of the Legal Profession (Amendment) Bill to provide for registration of FLs to act in relation to SICC proceedings. S36P provides that, without prejudice to s15 of the Legal Profession Act ("LPA") dealing with adhoc admissions, an FL registered under the section is permitted to do any of the following:

- (i) appear and plead in any SICC proceedings;*
- (ii) appear and plead in the Court of Appeal in any SICC proceedings;*
- (iii) represent any party in any SICC proceedings or an appeal in that regard;*
- (iv) give advice, prepare documents and provide any other assistance in relation to or arising out of any SICC proceeding or its appeal.*

Any application for registration under s36P should be made to the SICC registrar.

S36Q of the said Bill provides that an FL registered under s36P is subject to the control of the Supreme Court and shall be liable, on due cause shown, to have his registration under s36P cancelled. Complaints against an FL registered under s36P should be made to the SICC registrar and the registrar shall, thereafter, make a request to the Chief Justice to appoint a complaints committee, which will include an FL representative as well. S36R of the Bill prescribes the procedure for review of a decision of the complaints committee and such review will be done by a Judge. S36S provides that an FL registered under s36P may, inter alia, have his registration cancelled or suspended based on the complaint proceedings.

Further, the section empowers the Court to inform the authority in the home jurisdiction of the FL as well. S36V provides that the Rules Committee may make rules in relation to matters arising under Part IVB.

12 S36P(1)(4) of the Bill allows registered FLs to provide advice, prepare documents, and provide any other assistance in relation to or arising out of any relevant proceedings or relevant appeal. The scope of the provision is unclear and we would like to seek clarification on whether the section permits an FL registered under Part IVB to provide legal advice prior to the commencement of any relevant proceedings. If so, this creates a significant loophole in the present system by allowing FLs registered under s36P an opportunity to advise on Singapore law since any disputes involving international parties, which is of an international and commercial nature falls within the ambit of the SICC even if questions of Singapore law may be involved.

13 According to s36P(3) of the Bill, registration to allow FLs to appear before SICC is determined solely by the SICC Registrar, however, this is not in line with the position under paragraph 36 of the Report, which provides that the present system of allowing Queen's Counsel or FLs of equivalent distinction on an ad hoc basis in certain cases shall apply to cases transferred from the Singapore High Court to the SICC as well. Such a registration process becomes a purely administrative exercise when there is no legislative mandate. Further, the process itself is distinct from the ad hoc admission procedure of FLs in local proceedings under the LPA. This disparity may cause difficulties, for example, a counsel who is not admitted ad hoc by the Court can nonetheless be registered as an FL to appear in SICC proceedings.

14 In relation to the registration of FLs under s36P, the Law Society should have a right to raise objections under s36P before the SICC Registrar permits an FL to be registered under the said provision.

15 S36V of the Bill provides for subsidiary legislation to be made in relation to matters under Part IVB of the Bill. FLs registered to appear before the SICC and Court of Appeal should be subject to the same disciplinary process as the other categories of FLs regulated under the LPA. FLs appearing before the SICC should also be bound by the Legal Profession (Professional Conduct) Rules in parity with other categories of FLs under the LPA. Accordingly, Council is of the view that the Legal Profession (Professional Conduct) Rules should similarly apply to FLs acting as counsel in SICC matters, especially, when they have duties towards the court and fellow lawyers.

16 Further, while the ability of FLs to appear before the SICC would attract more regional and international lawyers, members remain concerned about this category of FLs appearing before the SICC since they may not be full-time lawyers or residents of Singapore.

17 In relation to the composition of the complaints committee under s36Q of the Bill, it is not certain if the inclusion of an FL will assist the tribunal in any way given that the FL need not be a registered as an FL for 12 years but be of 12 years standing.

18 There appears to be a disparity in the complaint process for Singapore lawyers and that for FLs appearing before the SICC. In particular, if the complaints committee decides there is cause for sufficient gravity, the complainant needs to make an application for disciplinary proceedings, failing which the complaint is deemed withdrawn. This is not required for a Singapore lawyer and the processes should be the same for both groups.

19 It is also suggested that it should be provided in the Bill that any punishment imposed on a registered FL should be reported to his home jurisdiction to ensure that any other necessary action is also taken and that the punishment meted out here is not toothless.

Other Suggestions

Section 32, 62, 63 to 67 of the Evidence Act

20 It is envisaged that the SICC Rules and practice directions would follow international best practices for commercial dispute resolution such as those adopted by the English Commercial Court. In light of the same, Council suggests that proceedings before the SICC may be excluded from the applicability of the following rules under the Evidence Act ("EA"):

- (i) the hearsay rule (as encapsulated in sections 62 and 32 of the EA); and
- (ii) the best evidence rule (as encapsulated in sections 63 to 67 of the EA).

21 Members note that a number of jurisdictions, including England, have already done away with the mechanistic application of the hearsay and best evidence rules, preferring instead to focus on and place appropriate weightage on the evidence concerned (*See observations made in this regard by Court of Appeal in Jet Holding Ltd v Cooper Cameron (Singapore) Pte Ltd at [57] to [65] and [77]*). Further, it may also be relevant to note that arbitration proceedings are conducted without the rule against hearsay evidence and the same may be incorporated for SICC proceedings as well.

General Remarks

22 While the Council welcomes the proposal to establish the SICC, Council would also like to reiterate that it is important for all the stakeholders involved in the process of establishing the SICC to understand the overall context and rationale for its establishment. The Law Society looks forward to the guidelines on the scope of discretionary powers to be exercised and hopes its views will be sought in the exercise of that discretion.

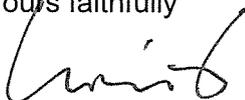
23 As a representative body of the local Bar, Council is concerned that the flexibility allowed in the proposed regime for FLs to advise and act in legal proceedings in Singapore in relation to the SICC matters, may have an adverse effect on commercial litigation practice for Singapore lawyers. Council is of the view that the proposed regime may be providing an indirect opening for FLs to enter the litigation practice area in Singapore, and the possibility of abuse or disguised participation by FLs cannot be wholly discounted.

V) Closing remarks

24 The Law Society thanks MinLaw once again for engaging members in the consultation.

25 However, an oft feedback received from members of the bar is that the given timeframe of 3 weeks is insufficient to consider all the issues raised in the Bills.

Yours faithfully



Lok Vi Ming, SC
President, The Law Society of Singapore