

## ARTICLE

# REGULATORY COMPETITION AND THE GROWTH OF INTERNATIONAL ARBITRATION IN SINGAPORE

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CITED: (2018) 23 *Appeal* 165

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## INTRODUCTION

In September 2016, Singapore's Court of Appeal overturned the decision of a lower court and upheld an international arbitration tribunal's finding that a bilateral investment treaty signed with China extends to Macao.<sup>1</sup> This closely watched decision confirmed the commitment of Singapore's national courts to a tradition of minimal intervention in, and support for, international arbitration. Singapore's reputation as an arbitration-friendly jurisdiction was, by extension, reaffirmed.

In the last decade, Singapore has become a leading global hub for international arbitration.<sup>2</sup> The Singapore International Arbitration Centre ("SIAC") is one of the foremost arbitral institutions in the world.<sup>3</sup> SIAC's caseload has increased rapidly over the past decade, and in March 2017 it reached an active caseload of approximately 650 cases.<sup>4</sup>

This paper will argue that Singapore's success can be attributed to the state's engagement in "regulatory competition." Recognizing the revenue potential created by the phenomenon of forum shopping within international arbitration, the government has made every effort to provide arbitration-friendly legislation and infrastructure in an effort to attract arbitration to its jurisdiction. In addition to joining the 1958 New York Convention and adopting the United Nations Commission on International Trade Law ("UNCITRAL") Model Law, the government has attracted arbitration largely by ensuring its courts have a strong tradition of the rule of law and a policy of non-intervention in arbitral decisions, supporting the continuing growth of SIAC, and offering Asia's largest fully-integrated dispute resolution complex at Maxwell Chambers.

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1 *Sanum Investments Ltd v Government of the Lao People's Democratic Republic*, [2016] SGCA 57 [*Sanum*].

2 Jawad Ahmad & Andre Yeap, "Arbitration in Asia" (3 September 2013), *Global Arbitration Review*, online: <<https://globalarbitrationreview.com/insight/the-asia-pacific-arbitration-review-2014/1036763/arbitration-in-asia>> archived at <<https://perma.cc/9YZG-VJ3G>>.

3 Gary Born, *International Arbitration: Law and Practice*, 2nd ed (London: Kluwer Law International, 2015) at §1.06 [Born, *International Arbitration*].

4 Singapore International Arbitration Centre, "Statistics" (3 January 2018), online: <[www.siac.org.sg/2014-11-03-13-33-43/facts-figures/statistics](http://www.siac.org.sg/2014-11-03-13-33-43/facts-figures/statistics)> archived at <<https://perma.cc/9D9H-5NJP>> [SIAC, "Statistics"].

This paper proceeds in four major parts. Part I discusses the market aspect of international arbitration, in particular the practice of forum shopping. Part II explains how the phenomenon of forum shopping leads states to engage in regulatory competition as they compete with one another for business. Part III argues that Singapore recognizes international arbitration as an opportunity for economic development—and consequently engages in regulatory competition through efforts to make itself arbitration friendly. Part IV explores these efforts in detail, with references to the *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* ("Sanum") decision.

## I. ARBITRATION AGREEMENTS AND FORUM SHOPPING

One of the distinguishing features of international arbitration is that it is largely consensual in nature: arbitration generally occurs pursuant to an arbitration agreement between the parties.<sup>5</sup> Recognizing that international commercial transactions and investments sometimes give rise to costly and time-consuming disputes, parties take pains to minimize, or at least manage, the uncertainty associated with the resolution of potential disputes by including an arbitration agreement in their contracts.<sup>6</sup> This agreement can be drafted in whatever terms the parties wish and, as international arbitration scholar Gary Born explains, are largely a "product of the parties' interests, negotiations, and drafting skills."<sup>7</sup> Article 7(1) of the UNCITRAL Model Law provides that "[a]n arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement."<sup>8</sup> Arbitration clauses are the most popular, with one estimate suggesting that as many as 90 percent of all international commercial contracts contain an arbitration clause.<sup>9</sup> Despite the fact that arbitration agreements can come in all shapes and sizes, they generally include several common elements, the most crucial being:

- (a) the agreement to arbitrate; (b) the scope of disputes submitted to arbitration;
- (c) the use of an arbitral institution and its rules; (d) the seat of the arbitration;
- (e) the method of appointment, number and qualifications of the arbitrators;
- (f) the language of the arbitration; and (g) a choice of law clause.<sup>10</sup>

Drafting parties are incentivized to pick and choose the institution, seat, rules, laws, and arbitrators that will provide the best likelihood of reaching the desired outcome at the lowest cost.<sup>11</sup> Because the parties have so many options to choose from, the possibilities are presented as a kind of market:

5 Born, *International Arbitration*, *supra* note 3 at §1.07.

6 Ali Assareh, "Forum Shopping and the Cost of Access to Justice: Cost and Certainty in International Commercial Litigation and Arbitration" (2012) 31 *JL & Com* 1 at 5.

7 Born, *International Arbitration*, *supra* note 3 at §1.07.

8 United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration 1985: with amendments as adopted in 2006*, No E.08.V.4 (2008), online: <[www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf)> archived at <<https://perma.cc/43GJ-NPH7>>.

9 KP Berger, *International Economic Arbitration* (Denver: Kluwer, 1993). However, despite the fact that this figure is widely circulated in international arbitration scholarship (the author came across this statistic in four scholarly sources), it is likely inflated. As Born observes, the 90 percent figure "lacks empirical support and is almost certainly substantially inflated: in reality, significant numbers of international commercial transactions—certainly much more than 10 percent of all contracts—contain either forum selection clauses or no dispute resolution provision at all" (Gary Born, *International Commercial Arbitration: Commentary and Materials*, 2nd ed (The Hague: Kluwer, 2009) at 71). However, he accepts that in cross-border commercial transactions, the parties are "more likely than not" to include an arbitration clause in their contracts (*Ibid*).

10 Born, *International Arbitration*, *supra* note 3 at §1.07.

11 Joshua Karton, *The Culture of International Arbitration and the Evolution of Contract Law* (Oxford: Oxford University Press, 2013) at 63.

Arbitration is often presented quite overtly as a kind of market where the clients are able to choose from a palette of potential arbitrators according to the nature of their problems, their affinities, and above all their strategies. The parties—and their advisors—thus choose their terrain, their arms, and the rules of the game that will govern their confrontation.<sup>12</sup>

One of the most important choices a party must make is the location of the seat, as the seat indicates the law governing the arbitration (the “*lex arbitri*”). As there is almost complete freedom to designate any state as the seat of arbitration (depending on the interests of the parties), there is a plethora of options available, and the process of choosing one is referred to as “forum shopping.”<sup>13</sup> The seat is where an award has its “formal legal or judicial jurisdiction, and where the arbitral award will be formally made.”<sup>14</sup>

This has important consequences because the seat usually determines, among other things, the procedural law of the arbitration, the national courts responsible for issues relating to the constitution of the tribunal, and the national courts responsible for the annulment of arbitral awards.<sup>15</sup> As arbitration scholar Christopher Drahozal notes, a number of key considerations go into forum shopping, including: “The accessibility of the site to the parties, the availability of necessary infrastructure, and the applicability of a treaty (for example, the New York Convention) providing for the enforceability of arbitral awards.”<sup>16</sup> However, the most important consideration is legal, “because the law governing the arbitration [...] is typically considered to be the law of the country where the proceedings are held and the award enforced.”<sup>17</sup> According to a study conducted by arbitration scholar Joshua Karton, the formal legal infrastructure of a state (including such factors as “the ‘arbitration-friendliness’ of the state’s arbitration laws, its courts’ track record of enforcing arbitration agreements and awards, and the neutrality and professionalism of its judiciary”) was cited by corporate counsel as the most important influence on parties’ choice of a seat of arbitration.<sup>18</sup> Because of the importance of these considerations to the parties’ choice of seat, there is evidence to suggest that states engage in “regulatory competition” as they compete amongst themselves to accommodate these needs and make themselves an attractive arbitration destination.<sup>19</sup>

## II. REGULATORY COMPETITION AND THE MARKET OF INTERNATIONAL ARBITRATION

Owing to the consensual nature of international arbitration, as Drahozal explains, parties are likely to choose the state “that best serves their interests, subject to the informational costs of evaluating alternative arrangements,” as their seat of arbitration.<sup>20</sup> If parties *ex ante* were better off with another seat of arbitration, they would, all else being equal, name that other seat in their arbitration agreement.<sup>21</sup>

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12 *Ibid* at 57.

13 *Ibid.*

14 Born, *International Arbitration*, *supra* note 3 at §1.07.

15 *Ibid.*

16 Christopher Drahozal, “Regulatory Competition and the Location of International Arbitration Proceedings” (2004) 24:1 *Intl Rev of L & Economics* 371 at 373 [Drahozal, “Regulatory Competition”].

17 *Ibid.*

18 Karton, *supra* note 11 at 70.

19 Christopher Drahozal, “Commercial Norms, Commercial Codes, and International Commercial Arbitration” (2000) 33:1 *Vanderbilt J of Transnational L* [Drahozal, “Commercial Norms”].

20 *Ibid* at 101.

21 *Ibid.*

Because of this freedom of choice, national governments wishing to win the business of arbitration proceedings must compete amongst each other to provide the most attractive jurisdiction. The idea that states engage in competition to gain business from arbitration proceedings can be accounted for by economics expert Albert Breton's theory of "competitive governments":

In contrast to a view of government as a monolith or monopoly, whose policies are typically viewed [...] as the product of rent-seeking behaviour by special interest groups that have captured Leviathan, [this theory] argues that governments [...] are intensely competitive in a wide variety of dimensions.<sup>22</sup>

In this theory, regulatory competition engenders "lively competition" among national regulators as to which country or countries' regulatory approach "will become the model for international standards or regulatory norms."<sup>23</sup> In the context of international arbitration, states compete to provide the regulations that are most likely to attract international arbitration to their jurisdictions.<sup>24</sup> Generally, this means that they have established or amended their national arbitration laws in order to make them more "friendly" to international arbitration, "in particular by removing restrictions on arbitration procedures or by narrowing the grounds on which awards may be challenged."<sup>25</sup> As one commentator puts it, "[c]ountries have, without shame, exhibited their desire to attract the business of arbitration" by "climb[ing] on the 'hospitable-jurisdiction-to-arbitration' bandwagon."<sup>26</sup> Although regulatory competition scholarship is generally concerned with the provision of competitive laws and policies,<sup>27</sup> this paper broadens this understanding somewhat. For example, this paper understands regulatory competition to also include the government's provision of institutions and infrastructure, as will be discussed below.

One of the most common features of arbitration-friendly states, as Karton explains in *The Culture of International Arbitration and the Evolution of Contract Law*, is that their arbitration laws permit an expanded scope of party autonomy (in matters such as choosing the governing substantive and procedural rules of law) and arbitral powers (in matters such as the tribunal having the power to make determinations as to its own jurisdiction), while restricting the role of national courts.<sup>28</sup> For example, the SIAC website advertises that the Singapore courts offer "maximum judicial support of arbitration and minimum intervention."<sup>29</sup> As mentioned above, Karton's survey revealed that corporate counsel cited these features as being the most important influence on parties' choice of a seat of arbitration.<sup>30</sup> Due to the importance of these considerations, 78 states and 109 jurisdictions have enacted legislation based on the Model Law on International Commercial Arbitration.<sup>31</sup> These changes act as low-cost "marketing strategies," intended to signal to

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22 Michael Trebilcock, "Trade Liberalization and Regulatory Diversity: Reconciling Competitive Markets with Competitive Politics" (1998) 6:1 European J of L & Economics 5 at 8, discussing Albert Breton, *Competitive Governments* (New York: Cambridge University Press, 1996).

23 *Ibid* at 29.

24 Karton, *supra* note 11 at 68.

25 *Ibid*.

26 Drahozal, "Regulatory Competition", *supra* note 16.

27 For example: Drahozal, "Regulatory Competition", *supra* note 16.

28 Karton, *supra* note 11 at 68.

29 Singapore International Arbitration Centre, "What Singapore Has to Offer" (4 January 2018), online: <[www.siac.org.sg/64-why-siac](http://www.siac.org.sg/64-why-siac)> archived at <<https://perma.cc/9ZES-6VJZ>> [SIAC, "What Singapore Has to Offer"].

30 See Karton, *supra* note 11 at 70.

31 United Nations Commission on International Trade Law, "Status—UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006" (3 Jan 2018), online: <[www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html)> archived at <<https://perma.cc/ZK48-CDC2>>.

the international arbitration community “the user friendliness of their legal environment and of the quality of services offered in these jurisdictions.”<sup>32</sup>

According to a study by Drahozal, this regulatory strategy is effective. Using a panel of countries that enacted new arbitration laws from 1994 to 1999, the study revealed a statistically significant increase in the number of International Chamber of Commerce (“ICC”) arbitrations held in countries after enactment.<sup>33</sup> The estimated increase in the number of ICC arbitrations held within a country is 26.95 percent for major arbitration countries and 18.39 percent for the full sample.<sup>34</sup> Because the study had to rely only on published data from ICC arbitrations and not arbitrations administered by other institutions (or ad hoc arbitration proceedings), Drahozal suggests that the study’s estimates likely reflect the minimum increase that results from the new arbitration legislation.<sup>35</sup>

In light of the legislative effort of drafting and approving a new arbitration law designed to make the state a more attractive seat, it seems reasonable to question why governments go through the trouble of engaging in regulatory competition. In short, becoming a venue for arbitration, particularly international arbitration, can be a highly lucrative business.<sup>36</sup> A variety of interest groups have an incentive to support the enactment of arbitration-friendly legislation.<sup>37</sup> For example, arbitration institutions earn fees from administering arbitration proceedings, and hotels charge for conference rooms and accommodations.<sup>38</sup> Arguably the major beneficiaries, however, are local lawyers and arbitrators.<sup>39</sup> In addition to earning fees from additional arbitrations, lawyers trained in that country will be better able to compete for business overseas and to negotiate arbitration agreements with foreign investors.<sup>40</sup> This has led scholars to suggest that regulatory competition to supply arbitration-friendly legislation may in fact be driven by lawyers rather than legislators.<sup>41</sup>

Proponents of the enactment of new or revised arbitration laws frequently cite the substantial economic benefits that are anticipated.<sup>42</sup> For example, during the Parliamentary debates on the *Arbitration Act* of 1979, Lord Cullen of Ashborne famously ventured an estimate that “a new arbitration law might attract to England as much as [GBP]500 million per year of ‘invisible exports,’ in the form of fees for arbitrators, barristers, solicitors, and expert witnesses.”<sup>43</sup> However, critics have been quick to suggest that the economic benefits of regulatory competition may be overstated. For example, international arbitration scholars Yves Dezalay and Bryant Garth note:

In England, the partisans of reform of arbitration estimated that millions of pounds were being lost to London and its legal profession from the fact of legislation perceived by their foreign counterparts as too restrictive and

32 Drahozal, “Regulatory Competition”, *supra* note 16 at 373.

33 *Ibid* at 373.

34 *Ibid* at 383.

35 *Ibid* at 382.

36 Drahozal, “Commercial Norms”, *supra* note 19 at 102.

37 *Ibid*.

38 Drahozal, “Regulatory Competition”, *supra* note 16 at 373.

39 Luke Nottage, “The Vicissitudes of Transnational Commercial Arbitration and the *Lex Mercatoria*: A View From the Periphery” (2000) 16:1 *Arbitration International* 53.

40 Tom Ginsburg, “The Culture of International Arbitration” (2003) 39:1 *Vanderbilt J Transnat'l L* 1335.

41 Christopher Drahozal, “Arbitrator Selection and Regulatory Competition in International Arbitration Law” in Christopher Drahozal & Richard Naimark, eds, *Towards a Science of International Arbitration: Collected Empirical Research* (The Hague: Kluwer Law International, 2005).

42 Drahozal, “Regulatory Competition”, *supra* note 16 at 374.

43 W Laurence Craig, William Park & Jan Paulsson, *International Chamber of Commerce Arbitration*, 2nd ed (Dobbs Ferry: Oceana Publications, 1990) at 467.

costly. The same individuals today admit that the estimates, widely reported by the press, were complete inventions.<sup>44</sup>

The results of Drahozal's aforementioned study, however, reported an (approximately) 18 to 27 percent estimated increase in the number of ICC arbitrations held within a country after that country had promulgated new or revised arbitration laws.<sup>45</sup> This suggests that these changes actually do attract arbitration. As a result, many countries, including Singapore, appear set on continuing to court international arbitration proceedings for the foreseeable future.

### III. SINGAPORE'S DEVELOPMENT AS A HUB FOR INTERNATIONAL ARBITRATION

Twenty-five years ago, international arbitration in Singapore was almost non-existent.<sup>46</sup> Today it is recognized as a leader in international arbitration in Asia, and as a growing hub for international arbitration globally.<sup>47</sup> This is demonstrated, not only by the fact that SIAC has been recognized as one of the fastest growing arbitral institutions in the world (in 2016 it had 343 new cases),<sup>48</sup> but also by the fact that over 80 percent of these cases are international.<sup>49</sup>

Singapore has achieved this by fully engaging in regulatory competition. Remarks by Minister of Law K. Shanmugam at an Arbitration Dialogue organized by the Ministry of Law in 2011 support this assertion. He stated that Singapore intends to be at the "leading edge of thinking in international arbitration,"<sup>50</sup> and he went on to explain the government's unequivocal approach to arbitration:

As I tell the arbitration practitioners we meet, our approach in Singapore is: we see a problem, and where it can be solved legislatively, we are in a position to do that within three to six months. For example, in almost every jurisdiction, you might get cases which sometimes are not consistent with how we want arbitration to be supported. We came across such a case from the High Court and the situation was sorted out legislatively within four months. That is the approach we take when we have a court system and judicial philosophy now which is extremely supportive of arbitration as well. They intervene in appropriate cases; they do not take a completely hands-off approach, but totally supportive and in line with international thinking.<sup>51</sup>

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44 Yves Dezelay & Brian Garth, *Dealing in Virtue* (Chicago: The University of Chicago Press, 1996) at 299.

45 Drahozal, "Regulatory Competition", *supra* note 16 at 383.

46 Ahmad & Yeap, *supra* note 2.

47 *Ibid.*

48 SIAC, "Statistics", *supra* note 4.

49 Alvin Yeo & Chou Sean Yu, "Singapore", *Global Arbitration Review 2016* (18 May 2015) at 92, online: <[www.globalarbitrationreview.com/benchmarking/the-asia-pacific-arbitration-review-2016/1036915/Singapore](http://www.globalarbitrationreview.com/benchmarking/the-asia-pacific-arbitration-review-2016/1036915/Singapore)> archived at <<https://perma.cc/2K2M-TPDJ>>.

50 Shaun Lee, "News Update: SIAC Opens its First Overseas Office in Mumbai" (30 April 2013), *Singapore International Arbitration Blog* (blog), online: <[singaporeinternationalarbitration.com/2013/04/30/news-update-siac-opens-its-first-overseas-office-in-mumbai/](http://singaporeinternationalarbitration.com/2013/04/30/news-update-siac-opens-its-first-overseas-office-in-mumbai/)> archived at <<https://perma.cc/AC3U-D6NS>> [Lee]; Ahmad & Yeap, *supra* note 2.

51 Singapore, Ministry of Law, *Opening Speech by Minister of Foreign and Law, Mr K Shanmugam, at the Ministry of Law Arbitration Dialogue*, (1 November 2011), online: <[www.mlaw.gov.sg/news-speeches/opening-speech-by-minister-for-foreign-affairs-and-law-mr-k-shanmugam-at-the-ministry-of-law.html](http://www.mlaw.gov.sg/news-speeches/opening-speech-by-minister-for-foreign-affairs-and-law-mr-k-shanmugam-at-the-ministry-of-law.html)> archived at <<https://perma.cc/JD32-93YD>>; Ahmad & Yeap, *supra* note 2.

Singapore's strong commitment to being at the "leading edge" of international arbitration provides insight into how states can successfully engage in regulatory competition and market themselves as attractive arbitration destinations.<sup>52</sup>

Shortly after attaining internal self-governance in 1960, Singapore had a gross domestic product ("GDP") per capita of USD428 and faced an uncertain future.<sup>53</sup> Today Singapore has an estimated GDP per capita of USD55,252.40, making it one of the richest countries in the world.<sup>54</sup> With few natural resources, much of the city-state's development has been credited to effective and firm governance.<sup>55</sup> Singapore's government practices a form of state-capitalism, which essentially ties the ruling People's Action Party's legitimacy to remain in power with competent economic management and the ability to deliver sustained economic growth.<sup>56</sup> As Singapore scholars have observed, "the link between economic legitimacy and political power in Singapore cannot be understated."<sup>57</sup> Consequently, the government has worked hard to ensure that Singapore maintains a regulatory climate hospitable to business. It has been rewarded for its efforts:

For the past eight years, the World Bank has recognized Singapore as having the best regulatory and economic environment in the world for doing business [in June 2016, however, it slipped to second place, behind New Zealand]. Transparency International consistently ranks Singapore in the top five countries in the world for having the lowest level of corruption. The *Wall Street Journal* and The Heritage Foundation consistently rank Singapore in the top few countries in the world with respect to economic freedom. The Asian Corporate Governance Association has repeatedly ranked Singapore as having the best corporate governance in Asia.<sup>58</sup>

In light of Singapore's commitment to economic growth, it is unsurprising that it would seek to market itself as an arbitration-friendly jurisdiction. In addition to generating revenue from the fees associated with arbitration, it has been argued that non-Western and developing states must "opt in" to the Western system of arbitration "in order to maintain and grow business relationships with Western partners."<sup>59</sup> In other words, the benefits of adopting arbitration-friendly laws go beyond attracting arbitrations, and include attracting business in general. Developing a robust system of private international dispute resolution may even be a precondition for economic growth in the modern era of globalized commerce.<sup>60</sup> For example, Robert Briner, a former President of the Iran-United States Claims Tribunal, has observed:

[A]rbitration accompanied the growth of international commerce. It saw its role as offering the tools best suited to international business to resolve disputes whenever they arose. The major institutions especially see their role

<sup>52</sup> Lee, *supra* note 50.

<sup>53</sup> Tan Cheng-Han, Dan W Puchniak, & Umakanth Varottil, "State-Owned Enterprises in Singapore: Historical Insights into a Potential Model for Reform" (2015) 28:2 Colum J Asian Law 61 at 65.

<sup>54</sup> Global Finance, "Singapore GDP and Economic Data", *Global Finance* (28 December 2017), online: <[www.gfmag.com/global-data/country-data/singapore-gdp-country-report](http://www.gfmag.com/global-data/country-data/singapore-gdp-country-report)> archived at <<https://perma.cc/22NJ-2FNE>>.

<sup>55</sup> Cheung-Han, Puchniak, & Varottil, *supra* note 53 at 65.

<sup>56</sup> *Ibid* at 86.

<sup>57</sup> *Ibid*.

<sup>58</sup> *Ibid* at 65-66.

<sup>59</sup> Edward Leahy & Carlos Bianchi, "The Changing Face of International Arbitration" (2000) 17:4 J Int'l Arb 19 at 58.

<sup>60</sup> Karton, *supra* note 11 at 109.

in facilitating the growth of international business by offering the necessary tools to resolve the disputes arising in international business.<sup>61</sup>

In other words, arbitration is essential to business because it offers tools that local courts often cannot. Arbitration is generally considered to be more impartial, expedient, flexible, cost-effective, and confidential than many national court systems.<sup>62</sup> Because of the efficient services they provide, international arbitration lawyers have been referred to as “transaction cost engineers”<sup>63</sup> and arbitrators have famously been called “men of affairs, not apart from the marketplace.”<sup>64</sup> It has been posited that, since commerce requires an effective, predictable, and legitimate dispute resolution system, arbitration is *itself* a commercial institution:

The workings of international commercial arbitration have a considerable impact on the security of business investments and on the transaction costs of resolving transnational disputes. International commercial arbitration, therefore, should be seen as a key institution in the structuring of international markets.<sup>65</sup>

Given Singapore’s commitment to economic development it is unsurprising then that it would strive to be at the “leading edge” of international arbitration.<sup>66</sup>

#### **IV. REGULATORY COMPETITION IN ARBITRATION-FRIENDLY SINGAPORE**

The greatest factor underpinning the success of Singapore’s arbitration model is the government’s commitment to promoting Singapore as a global international arbitration hub through regulatory competition.<sup>67</sup> First and foremost, it has developed an arbitration-friendly formal legal structure—a key factor considered by corporate counsel when drafting arbitration agreements.<sup>68</sup> Singapore is a signatory to the New York Convention, and the UNCITRAL Model Law is a “cornerstone” of its *International Arbitration Act*.<sup>69</sup> When that legislation was amended in 2009, in response to industry feedback canvassed by the Ministry of Law, it was tellingly done with the express intent of keeping “[Singapore’s] *International Arbitration Act* modern, effective and arbitration-friendly”; and as acknowledged at the second reading of that amendment, by Minister of Law K. Shanmugam, “[t]his will in turn help to keep Singapore at the forefront as a top international arbitration centre.”<sup>70</sup>

Furthermore, the government has ensured that Singapore’s courts maintain a tradition of minimal curial intervention in international arbitrations—a feature which SIAC

61 Robert Briner, “Globalization and the Future of Courts of Arbitration” (2000) 2:1 Eur J L Reform 439 at 444.

62 Born, *International Arbitration*, *supra* note 3 at §102.

63 Drahozal, “Commercial Norms”, *supra* note 19 at 107.

64 *Commonwealth Coatings Corp v Cont'l Casualty Corp*, 393 US 145 at 150 (1968).

65 Dezelay & Garth, *supra* note 44 at 7.

66 Lee, *supra* note 50.

67 Ahmad & Yeap, *supra* note 2.

68 Karton, *supra* note 11 at 70.

69 SIAC, “What Singapore Has to Offer”, *supra* note 29; *International Arbitration Act* (Cap 143A, 2002 Rev Ed Sing).

70 Singapore, Parliament of the Republic of Singapore, *Official Reports—Parliamentary Debates (Hansard)*, 11th Parl, 2nd Sess, Vol 86, No 86 (19 October 2009) at (columns) 1631-1632 (K Shanmugam), online: <[https://sprs.parl.gov.sg/search/topic.jsp?currentTopicID=00003591-WA&currentPubID=00004793-WA&topicKey=00004793-WA.00003591-WA\\_1%2B%2B](https://sprs.parl.gov.sg/search/topic.jsp?currentTopicID=00003591-WA&currentPubID=00004793-WA&topicKey=00004793-WA.00003591-WA_1%2B%2B)> archived at <<https://perma.cc/F4C7-QA78>>; Ahmad & Yeap, *supra* note 2.

advertises on its webpage.<sup>71</sup> The Singapore judiciary's approach towards arbitration is succinctly captured in the following quotes from a Court of Appeal judgment: "[a]n unequivocal judicial policy of facilitating and promoting arbitration has firmly taken root in Singapore"<sup>72</sup> and "[i]n short, the role of the court is now to support, and not to displace, the arbitral process."<sup>73</sup>

This position was reaffirmed by the highly anticipated *Sanum* decision in September 2016. The Court of Appeal overturned the decisions of the Singapore High Court and upheld an UNCITRAL tribunal's finding that a bilateral investment treaty signed with China extended to Macao.<sup>74</sup> Furthermore, the decision demonstrated the high degree of professionalism and competence of Singapore's courts: "The court's willingness to engage and tackle complex questions of customary international law and treaty interpretation is evident throughout the judgment—where relevant, the court applied commentary by international jurists and decisions by investment tribunals."<sup>75</sup> Arbitrating parties can, therefore, feel confident in the knowledge that Singapore's judges are well versed in the rule of law and capable of grappling with complex legal issues.<sup>76</sup> Additionally, in January 2015 the government also established the new Singapore International Commercial Court ("SICC"). This court involves an adjudicative court process managed by the Singapore High Court, and has been designed to complement mediation at the Singapore International Mediation Centre ("SIMC") and arbitration at SIAC.<sup>77</sup> The SICC offers foreign parties access to a neutral international court as well as 11 renowned international jurists who have been appointed as "international judges."<sup>78</sup>

Another key feature that makes Singapore an arbitration-friendly jurisdiction is the government's provision of excellent infrastructure. The government's decision to establish the not-for-profit SIAC in 1991 has been called the nation's "first step" towards establishing "a world-class arbitration hub."<sup>79</sup> Since then, the government has made a concerted effort to raise SIAC's profile. The institution's rise to prominence likely would not have been possible without significant government support. As one Singapore-based observer notes:

The support given is very important [...], the encouragement of the government officials, making available their time, making available support systems, and facilitating legislative changes such as allowing foreign lawyers and foreign arbitrators to be involved [...]. More and more liberties were granted by them.<sup>80</sup>

In addition to generating revenue from fees, SIAC is also providing revenue for Singapore's national courts, as roughly 50 percent of cases filed at SIAC have included Singapore as the seat of arbitration.<sup>81</sup> Should any arbitral issues come before the court, they will profit.

<sup>71</sup> SIAC, "What Singapore Has to Offer", *supra* note 29.

<sup>72</sup> *Tjong Very Sumito and Others v Antig Investments Pte Ltd*, [2009] 4 SLR 732 at para 28 [*Tjong Very Sumito*; Ahmad & Yeap, *supra* note 2].

<sup>73</sup> *Tjong Very Sumito*, *supra* note 72 at para 29; Ahmad & Yeap, *supra* note 2.

<sup>74</sup> *Sanum*, *supra* note 1.

<sup>75</sup> Jonathan Lim, Gary Born, & Dharshini Prasad, "Sanum v. Laos (Part 1): The Singapore Court of Appeal Affirms Tribunal's Jurisdiction under the PRC-Laos BIT", *Kluwer Arbitration Blog* (10 November 2016), online: <[www.kluwerarbitrationblog.com/2016/11/10/sanum-v-laos-the-singapore-court-of-appeal-affirms-tribunals-jurisdiction-under-the-prc-laos-bit/](http://www.kluwerarbitrationblog.com/2016/11/10/sanum-v-laos-the-singapore-court-of-appeal-affirms-tribunals-jurisdiction-under-the-prc-laos-bit/)> archived at <<https://perma.cc/DWV5-DPA4>>.

<sup>76</sup> Karton, *supra* note 11 at 69.

<sup>77</sup> Yeo & Yu, *supra* note 49 at 92.

<sup>78</sup> *Ibid.*

<sup>79</sup> Ahmad & Yeap, *supra* note 2.

<sup>80</sup> Karton, *supra* note 11 at 70.

<sup>81</sup> *Ibid.*

SIAC is conveniently located inside the Maxwell Chambers facility, which opened in 2010. Maxwell Chambers is Asia's largest fully-integrated dispute resolution complex, and also houses the SICC and the SIMC.<sup>82</sup> As the Minister of Law, K. Shanmugam, explained at the inaugural SIAC Congress in 2014, the three institutions present a "complete suite of dispute resolution offerings to parties, especially those with cross-border disputes."<sup>83</sup> The presence of such facilities and the services they provide is a huge draw for arbitrating parties.<sup>84</sup>

Singapore has also employed direct incentives to attract arbitrations to its jurisdiction.<sup>85</sup> For example, in 2008, legislators promulgated a five-year tax break for international arbitration practitioners whose work involves arbitration hearings held in Singapore.<sup>86</sup> As Karton explains, this effectively reduced the cost of arbitration because practitioners are able to offer reduced fees.<sup>87</sup> Singapore has also reduced barriers to entry by conveniently not requiring foreign professionals to obtain temporary work visas when participating in local arbitrations and mediations.<sup>88</sup>

However, not all of Singapore's success as an arbitration hub can be attributed to these regulatory competition efforts. First and foremost, English is the working language of Singapore. It is taught as an official language in schools, and English is used in Singapore's judiciary and legislature. As the global language of business, the prevalence of English is certainly a draw for international arbitration. The high number of SIAC clients from English-speaking countries supports this assertion.<sup>89</sup>

Second, political neutrality has undoubtedly played a role in boosting the country's popularity.<sup>90</sup> Singapore has the good fortune of being situated "at the crossroads of South East Asia, and in between sea lanes of communication that sit astride China and India."<sup>91</sup> Singapore's geography and trade links, therefore, "put it in a unique position to market itself as the premier arbitration hub for Asia."<sup>92</sup> One commentator attributes Singapore's increasing popularity as an arbitral seat to the fact that Singapore is a "truly neutral venue in Asia."<sup>93</sup> Statistics on the nationality of the parties who frequent SIAC reflect the institution's convenient geography. As discussed by leading arbitration practitioners Alvin Yeo and Chou Sean Yu in their *Global Arbitration Review* profile on Singapore, of the 81 percent of international cases filed with SIAC in 2014:

The highest number of filings in 2014 was generated by parties from China, closely followed by parties from the United States and India. 2014 saw a significant increase in the number of cases involving parties from the United States, which rose in the ranking to become the largest foreign user of SIAC arbitration. Cases involving parties from Australia, Malaysia and the UK also increased in 2014, with Malaysia and the UK sharing a joint

<sup>82</sup> SIAC, "What Singapore Has to Offer", *supra* note 29.

<sup>83</sup> Yeo & Yu, *supra* note 49 at 92.

<sup>84</sup> Karton, *supra* note 11 at 70.

<sup>85</sup> *Ibid* at 69.

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*

<sup>89</sup> Singapore International Arbitration Centre, "Profile of Cases" (5 January 2018), online: <[www.siac.org.sg/2014-11-03-13-33-43/facts-figures/profile-of-cases](http://www.siac.org.sg/2014-11-03-13-33-43/facts-figures/profile-of-cases)> archived at <<https://perma.cc/VPZ8-R9GW>>.

<sup>90</sup> Ahmad & Yeap, *supra* note 2.

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.*

<sup>93</sup> Karton, *supra* note 11 at 71.

fifth ranking. The other parties in the top 10 list of foreign users were Hong Kong, South Korea, Indonesia and Thailand. SIAC received cases from parties from 58 jurisdictions in 2014. SIAC users came from a wider range of jurisdictions in 2014 than in 2013, and included parties from Mongolia and Papua New Guinea.<sup>94</sup>

While Singapore is an established regional hub for international arbitration the government nevertheless has ambitions further afield. For example, in an effort to raise its international profile, Born (again, a leading international arbitration scholar) was appointed as the new president of the SIAC Court of Arbitration in 2015, replacing the founding president Michael Pryles.<sup>95</sup> In a letter written on the commencement of his term in April 2015, Born is said to have noted that a primary goal going forward would be to bolster SIAC's position as one of the most global international arbitration institutions in the world.<sup>96</sup> Finally, notwithstanding its dominant regional position in Asian international arbitration, SIAC would seek to strengthen its global position by ensuring that it be the preferred choice for users worldwide vis-à-vis international dispute resolution.<sup>97</sup>

## CONCLUSION

Twenty-five years ago, international arbitration in Singapore was almost non-existent. Today the country is recognized as the leader in international arbitration in Asia, and as a growing hub for international arbitration globally.

Singapore's success can be attributed to the state's engagement in regulatory competition. Recognizing the revenue potential created by the phenomenon of forum shopping within international arbitration, the government has made every effort to provide arbitration-friendly legislation and infrastructure with the goal of attracting arbitrations to its jurisdiction. In addition to joining the New York Convention and adopting the UNCITRAL Model Law, the government has attracted arbitration largely by ensuring its courts have a strong tradition of the rule of law and a policy of non-intervention in arbitral decisions, supporting the continuing development of SIAC, and offering Asia's largest fully-integrated dispute resolution complex at Maxwell Chambers. However, Singapore's success can also be attributed to factors unrelated to regulatory competition. These include the use of English as the language of business as well as having a central geographic location in Asia and a policy of political neutrality. Nevertheless, the government's strategic engagement in regulatory competition has undoubtedly contributed to Singapore's developing role as a leader in international arbitration.

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<sup>94</sup> Yeo & Yu, *supra* note 49 at 92-93.

<sup>95</sup> *Ibid* at 93.

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*