Costs recovery in the SICC: A different regime

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The recovery of legal costs and disbursements (costs) by one party against another, after the substantive merits of a case is determined by the court, is a common feature of common law systems. Historically, common law courts had no inherent jurisdiction to award costs and the right to seek recovery of costs was a statutory remedy first introduced in England in the 13th century. Statutes on costs gradually evolved over time to become the costs regime that is known today.

Two of the most important principles in the recovery of costs are that (i) as a general rule "costs follow the event", that is to say, that the costs of legal proceedings are usually awarded to the successful litigant; and (ii) costs are in the discretion of the court. The question of recovery of costs in legal proceedings in the Singapore International Commercial Court came into sharp focus in the recent decision of *CPIT Investments Limited v. Qilin World Capital Limited and another* [2018] SGHC (I) 02 in which Ramsey IJ had to consider whether recovery of costs in legal proceedings in the general High Court and recovery of costs in the SICC proceeded on different principles. Ramsey IJ's answer was in the affirmative and, in doing so, he set out useful principles and guidance for future use by litigants in the SICC.

In the CPIT Investments case, the plaintiff sued two defendants in legal proceedings commenced in the general High Court, which were then transferred to the SICC. The result of the litigation was not a success for the plaintiff on all fronts. The plaintiff failed to establish liability on the part of the first defendant. The plaintiff succeeded on one of its causes of action against the second defendant but failed to succeed in its second and third causes of action. The plaintiff sought recovery on the basis that it was, on the whole, successful in the litigation and if any discount was to be made for the failure in some of its causes of action, then such discount ought to be no more than 15%. The plaintiff also asked for costs on an "indemnity basis" because it had served an offer to settle on the defendants and had obtained a substantially better result from the court's judgment. The defendants accepted that the plaintiff was the successful party but argued that it should not be entitled to recover the whole of the costs because it failed on some of its causes of action. The defendants submitted that an issue-based approach should be adopted and argued that the plaintiff should only recover 40% of its costs. Ramsey IJ considered the specific and detailed arguments of the parties. His decision, rearranged here in litigation sequence to aid understanding, contained the following principles or guidelines:

(1) If proceedings are commenced in the general High Court the costs rules relating to litigation in the general High Court and the costs guidelines in the Supreme Court Practice Directions apply until such time when the case is transferred to the SICC.

(2) When a case is transferred from the general High Court to the SICC, the general High Court or the SICC may direct that the costs guidelines in the Supreme Court Practice Directions apply or the parties may agree that the costs guidelines apply. The costs guidelines in the Supreme Court Practice Directions do not apply automatically to SICC proceedings.

(3) Absent any direction from the general High Court or the SICC that the costs guidelines in the Supreme Court Practice Directions apply, the SICC can (but is not obliged to) take the costs guidelines into account.

(4) In relation to legal proceedings in the SICC (and subject to the foregoing), the basis for costs orders in the SICC was the costs rules relating to proceedings in the SICC and not the costs rules relating to proceedings in the general High Court.

(5) This was because the costs rules for the general High Court contained a separate regime for costs in the general High Court, including the definition of "standard" and "indemnity" costs and also the manner in which costs might be ordered, which differed from the costs rules of the SICC.

(6) The costs rules for the SICC were supplemented by the SICC Practice Directions.

(7) The rules on costs in relation to offers to settle were intended to operate in the context of the costs rules for the general High Court and do not apply to SICC proceedings. However, the SICC can take the fact of an unbeaten offer to settle into account in determining costs recovery.

(8) In all litigation, it is not unusual for there to be an element where the successful party has been unsuccessful; but it is only matters that the SICC court determines has materially affected time and legal expenditure in litigation that should move the SICC court to make a provision or discount of the recoverable costs.

(9) An SICC Court can take an unbeaten offer to settle into account and, for example, allow recovery of costs from the date of the unbeaten offer as if the successful party did not fail in any element of its case.

(10) It is essential that the SICC Court is provided with a sufficient breakdown of the costs so that the paying party can make appropriate comments on the reasonableness of the costs and understand the work carried out for those costs, better still if there was an identification of the work with costs broken down into hours spent at hourly rates.

(11) An SICC trial judge may himself or herself assess the quantum of costs and disbursements recovery for interlocutory proceedings for which no independent costs order was made as well as costs and disbursements recovery for all other parts of the proceeding.

Ramsey IJ's decision draws a clear distinction between costs recovery for general High Court cases and costs recovery in the SICC, emphasizing that practitioners should be alive to the fact that there is a different costs regime in the SICC. This is evident from his pointing to the absence of the "standard" and "indemnity" bases for awarding costs in the SICC costs regime and the presence of the rule that the unsuccessful party must pay the "reasonable costs" of the proceedings. In order to appreciate the full importance of what Ramsey IJ has said it is necessary to understand it in context. The SICC was created to enhance Singapore's status as a leading forum for legal services and commercial dispute resolution by creating a platform to catalyze the further growth of the legal services sector and the internationalization of Singapore law. The object was and is to draw upon attributes, which have enabled Singapore to become a leading Asian seat for international arbitration, to establish new dispute resolution offerings for international commercial disputes within a court setting. The term "reasonable costs" should be understood in an international context rather than a purely domestic context where there might be social policy concerns of lack of access to justice.

Order 110, rule 46(1) provides that “[t]he unsuccessful party in any application or proceedings in the Court must pay the reasonable costs of the application or proceedings to the successful party, unless the Court orders otherwise”. Costs recovery expressed in terms of an “unsuccessful party” having to bear the “reasonable costs” of the “successful party” unless the Court orders otherwise is far easier for those unaccustomed to common law litigation to understand than common law terminology such as “costs follow the event”, “costs in the cause”, “costs in the application” and costs on a “standard basis” and on an “indemnity basis”. It is also language that is familiar to those involved in international arbitration. Some civil law countries refer to the costs of arbitration being “borne by the unsuccessful party”, the allocation of costs by taking into account the “outcome of the proceedings”, an order that one party “compensates” the other party. Procedural rules in arbitration may also refer to the costs of arbitration being borne “by the unsuccessful party”, to costs awards reflecting “the parties’ relative success and failure in the award or arbitration” or having regard to “the outcome of the case”.

The full importance of Ramsey IJ’s distinction that there is a different costs recovery regime comes to light when one considers that just as litigation in the SICC can be conducted by Singapore-qualified lawyers on both sides, it can also be conducted by Singapore-qualified lawyers instructed by international law firms on one or both sides. It can also be conducted by foreign lawyers who have registered with the SICC, including barristers and Queen’s Counsel on one or both sides, or with registered foreign lawyers and Singapore-qualified lawyers as co-counsel. This may be demonstrated by comparing party representation in the CPIT Investments case itself with party representation in a hypothetical case involving different types of counsel and solicitors. In the CPIT Investments case, the parties were both represented by Singapore law firms. It followed from this that Ramsey IJ thought fit to refer to the various ways in which the costs guidelines for general High Court litigation could apply or be taken into account in SICC litigation. Indeed, Ramsey IJ took the costs guidelines into account in the CPIT Investments case when he assessed some aspects of the quantum of costs. However, the costs guidelines for general High Court litigation may not always be as relevant as it was in the CPIT Investments case. It may be seen from the other ways in which SICC litigation may be conducted that the costs guidelines for general High Court litigation, which are designed with litigation conducted by Singapore-qualified lawyers only in mind, may not be as relevant or may be completely irrelevant in other cases. In such instances, it may be relevant to refer to other sources of costs recovery, such as the recovery of costs in international arbitration or the recovery of costs in other international commercial courts in persuading an SICC judge what costs to order.

A convenient starting point in the search for material to submit to an SICC judge on costs recovery might be the UNIDROIT Principles of Transnational Civil Procedure , which are standards for adjudication of transnational commercial disputes, all or some of which nations may choose to implement as part of their law . The principles on costs provide that “[t]he winning party ordinarily should be awarded all or a substantial portion of its reasonable costs” and that “[e]xceptionally, the court may withhold or limit costs to the winning party when there is clear justification for doing so. The court may limit the award to a proportion that reflects expenditures for matteres in genuine dispute and award costs against the winning party who has raised unnecessary issues or been otherwise unreasonably disputatious. The court in making costs decisions may take account of any party’s procedural misconduct in the proceeding”.

Another source of material may be the principle in international arbitration that costs are recovered through the concept of reasonableness and proportionality. The UNCITRAL Arbitration Rules, for example, provides for costs recovery “to the extent that the arbitral tribunal determines that the amount of such costs is reasonable”. Other arbitration rules provide that in making an award, the tribunal may order a party to pay “the whole or part of reasonable expenses incurred by the other party in presenting its case”. Arbitral tribunals also employ the concept of proportionality and keep in mind that costs incurred should not be disproportionate with the value of the claim. This is an acknowledged concept in costs recovery in general High Court litigation and is linked with the concept of reasonableness of costs. It would not be surprising, therefore, that the concept of proportionality features in costs recovery in SICC litigation.

Future cases on costs recovery in SICC litigation are likely to develop and refine the texture of the traditional, underlying indemnity philosophy in costs recovery that “[c]osts as between party and party are given by the law as an indemnity to the person entitled to them” . Cost recovery scenarios yet to be explored and determined include (i) whether the costs of instructing solicitors to Singapore counsel are recoverable in SICC litigation, particularly if the instructing solicitors are not a Singapore firm and need to work with a Singapore firm to file papers in the SICC, and (ii) the extent to which the costs of counsel and co-counsel or between a solicitor and the costs of an external counsel might be regarded to be overlapping. For now, litigants are well advised to pay close attention to the guidance given by Ramsey IJ.

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