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Where did you grow up?

I grew up in a little city called Binche in the French-speaking part of Belgium, in the south of the country. It had only 10,000 inhabitants. The Carnival of Binche is world-famous and is part of the UNESCO world cultural heritage. The city was very wealthy at that time, with a healthy economy. I had a very pleasant childhood.

My father was a jeweler like my grandfather. I have one sister who is 9 years younger than me and one brother who is 13 years younger. Both of them are doctors.

What is your most enduring childhood memory?

Probably the conversation I had with my father concerning my
Besides that, I remember we travelled a lot in Europe. At that time, no further than Europe. That’s also when I started to enjoy good food, as my parents enjoyed going to nice restaurants. My father was a lover of good wine. Even today, each time I visit him he tells me, “When you come, bring me a good bottle of wine, a good one!” To him, a good bottle of wine is probably a good bottle of Bordeaux or Burgundy, but preferably a red Bordeaux.

In terms of food, Belgium has a few specialties other than the typical steak and French fries. I can mention, for example, stoemp (mixture of potatoes and various types of vegetables) and sausage. And in the Flemish part of Belgium, we have Waterzooi. It’s a dish which is done with chicken and in a sort of soup. I’ve been told the expatriates living in our country love Belgium because they say that the food is better than in France.

**What skill, hobby or talent do you have which is not well known?**

I have a second love, which is art. I love art. I have an eye for art. As you see here [pointing to the art pieces hanging on the office wall], these are photographs from Java. I have a beautiful collection of contemporary art, and I collect art continuously. I spend a lot of time going to art galleries and art fairs, and visiting antique dealers. When I arrive in the office in the morning, the first thing I do is read the new catalogues that I have received. I’d say I dream in art!

I also have one of the best collections in the world of travel books to China, since the 16th century, with several original editions of Marco Polo, for example. But I am selling this collection in November at Sotheby’s because my children are not interested. I will probably start collecting other things. I collect a lot of things: I have antique furniture, I also collect ancient Indonesian art (Batak in particular) and I love architecture.

I also enjoy scuba-diving, especially in the region. I spend a lot of time in Southeast Asia, in particular Bali. I spend most of my holidays in Bali, in my family house there. I also go...
While snorkelling in Komodo, I saw these huge manta rays and I said, “Now, I must start scuba diving.”

As a scuba-diver, I love sharks. One of the best places in the region to see sharks is Sipadan in Malaysia. I have also dived in Komodo several times, where there are a lot of manta rays. In fact, before I started to scuba dive, I just did snorkelling. While snorkelling in Komodo, I saw these huge manta rays and I said, “Now, I must start scuba diving.”

You said at the inaugural YSIAC Conference in 2015 that “A good memorial should read like a good novel”. What is your favourite novel?

It’s true that a good memorial should read like a good novel – the story unwinds progressively and in a very logical order from the beginning towards the end. Unfortunately, nowadays, this is very often a dream, because it’s very rare to get a memorial which reads like a novel.

Nowadays I have so much reading to do even during my holidays that I am a bit tired of reading more! So I read easy things – art magazines and art books. I don’t read many novels anymore. You ask me what is my favourite novel from my childhood. It is probably Le Petit Prince by Saint-Exupery.

What do you like about Singapore?

I love Singapore, and I have considered moving here several times. Although I have my office in Brussels, I am rarely in Brussels. I don’t have arbitrations in Belgium; I have arbitrations all over the world, from Latin America to Korea, but not in Belgium.

Singapore is so well-organised. It’s very clean, very disciplined and very efficient, especially when you compare it to Europe, where you often have the impression of total disorganisation at all levels. I don’t live here of course, but it seems to me like a dream place to live in. It’s a very vibrant city. You have the impression that everything takes place here. It is also close to everywhere – within an hour or so you are in various countries, in other cultures.

Do I have problems with the heat? Definitely not. I spend a lot of time in Indonesia so the heat in Singapore does not bother me. In fact, I rather have problems with the air-conditioning, which is often too cold.

I must add that my eldest daughter lives and works in Singapore. So it’s a great pleasure for me and my wife to come here and see our
grandchildren. Maybe one day I will move here.

**Who do you consider your personal or professional mentor, and what was the single most important lesson that you learned from him or her?**

I learnt the same thing from my father and my professional mentors. Both my father and my two professional mentors taught me to work hard, to be extremely rigorous and imaginative.

As for my professional mentors, they were from the time when I was in university and the early years of practice. One was a very well-known law professor in international law, Professor Francois Rigaux. The second was a law professor who was quite famous and specialised in international contract and liability issues, Professor Roger Dalcq.

I remember the first case that I got at the bar. Professor Dalcq instructed me to study the case. After studying the case, I told Professor Dalcq that we were going to lose because the jurisprudence was against us. He reacted strongly and said that we had to win and consequently to find all arguments to convince the judge to change the law. In the end, we indeed won the case. It was a great lesson for me.

**How did you first get involved in international arbitration?**

That’s a long story. Whilst I was in university, I was introduced to the general editor of the Journal of International Business Law, a French legal periodical which deals with international commercial matters. He asked me to be on the Board of Editors and to be the contact person for the Institute of the International Chamber of Commerce (ICC), which is its academic side. I regularly took part in its activities. I organised various events and seminars relating to international commercial arbitration. This was my entrance into the international arbitration world.

In 1980, the Brussels bar organised a professional trip to mainland China and I joined the trip. I was travelling alone as my wife was expecting at that time. I had to share a room with a gentleman who was the President of the Belgian Arbitration Centre. When I came back from China, I got my first appointment as an arbitrator. I was 34 years old. I remember it was a default arbitration. I got my first fee, which was the equivalent of S$2,000. It was a small case and I was the sole arbitrator. That was in 1981.

I must also add that Professor Dalcq, with whom I worked at the bar, had a few international arbitration cases which were very rare at the time. Since I was the only one at the firm
who was fluent in English, he asked me to assist him in those international arbitration cases. This was at the firm known as Janson Baugniet and it was the first law firm I worked at. It is still the oldest traditional firm in Belgium. They were the number 1 law firm in Belgium at the time.

What is the strangest thing you have seen happen in an arbitration?

Sometimes people ask me whether I have war stories but I must say that I’ve never really encountered any exceptional problems or situations.

In one case, there was a witness who admitted outright during the hearing that he had lied. The case involved a dispute over a joint venture for the construction of hospitals in the Middle East.

After the first project was completed, the claimant in the arbitration thought at that time that it was the end of the joint venture. However, the reality is that the other joint venture partner continued with hospital projects without informing his partner, who only discovered what was happening some 15 years later. Hence, the arbitration began.

The problem was related to document production. The witness for the respondent party had previously stated that all the documents had disappeared since they concerned matters from a long time ago. At the hearing, for some unknown reason, the witness admitted that, whilst the respondent had told the tribunal that the documents were no longer available, they in fact had the documents. I then asked where the documents were. The witness answered, “Here, with my lawyer.”

In the late 1980s, in an arbitration in Syria, a country where I loved to travel (to Palmyra in particular), I had a Syrian co-arbitrator. Each time the tribunal had to discuss a procedural issue the Syrian co-arbitrator insisted “I must first discuss with my party”. After we had rendered the award against the Syrian company, the Syrian co-arbitrator invited us to a nice restaurant in Damascus. During dinner, he apologised for drafting a dissenting opinion. He said he had to do it otherwise he would have been sent to jail. The lawyer who had drafted the contract which was the subject matter of the dispute was himself in jail.

What are some best practices in international arbitration?

First, the submissions should be focused on the real issues. Counsel should also avoid sending letters of complaint every other day. There should not be too many witnesses and experts. Just those which are necessary. The expert reports should also not be too long and should be very clear and in a language understandable for a layman. The oral submissions should also be presented in a logical order, focused on the issues.

Unfortunately, the reality is that in many large cases, the first submissions run to 400, 500 or 600 pages. And the reply submissions are even longer. This is much too long. The situation is even worse in investment arbitrations. For example, everyone who practises investment arbitration knows what fair and equitable treatment is. Yet, many large law firms have huge databanks of precedents and will include several hundreds of pages of case law on the issue. This is unnecessary. Moreover, when you have submissions that are that long, by the time you arrive at the last page, you have forgotten what you have read in the beginning. I am definitely in favour of concise submissions, focused on the real issues.

Also, very often, submissions are repetitive. This leads the tribunal to wonder whether counsel...
doubts the intelligence of the Tribunal such that they have to repeat their submissions in order for the tribunal to understand.

What are the three key traits of effective advocates who have argued before you?

The three key traits are: the ability to be extremely focused, rigorous and clear in their submissions.

What is your response to those who criticise the party-appointment system as flawed and lacking the neutrality associated with a judge in litigation proceedings?

I fully disagree with Jan Paulsson that arbitrators should be appointed by the arbitral institution. It is a basic tenet of arbitration that the parties to the dispute can appoint an arbitrator of their choice.

The best scenario is when the two party-appointed arbitrators agree on the appointment of the chairperson. They have the experience and they know who is best able to chair a particular case. My experience with chairpersons appointed by institutions has not always been good. When the ICC has to appoint a chairperson, they refer to a national committee and you do not always know on what basis the chairperson is selected. On the other hand, when the two party-appointed arbitrators jointly appoint the chairperson, there is immediately conviviality and confidence in the process.

If any one arbitrator is partisan, he/she will be neutralised by the other two arbitrators. This phenomenon remains relatively rare, but I must confess that in some areas of the world, it is almost cultural for an arbitrator not to be 100% neutral and to favour the party of the same nationality which has appointed him or her.

If you had to choose, would you prefer to act as arbitrator or counsel and why?

For decades, I have acted as litigator in court and as arbitrator. Nowadays, I act only as an arbitrator. I made this decision 15 years ago and have no regrets. So far, I have been arbitrator in about 450 cases. What is fascinating in arbitration is that you have cases involving all potential sectors of activity and it is fascinating to encounter
new problems all the time. When I think of Belgian lawyers who deal with traffic cases day after day, I realise that it must be terribly boring. So I feel very privileged.

Another fascinating aspect of international commercial arbitration, contrary to what happens in court litigation, is that you tend to get more cases as you get older. Some of my co-arbitrators are over 80 years old and they still have a full case load.

Having formerly acted as counsel, I sometimes get frustrated sitting as an arbitrator when the advocate fails to make arguments that I would make if I were in his shoes. I say to myself “This gentleman has a good case, but he is going to lose”. But, unfortunately, I cannot tell the advocate what he or she has to argue.

How has dispute resolution and the role of disputes counsel changed from the time you started practice?

It has changed considerably and for the worse.

When I started, arbitration was very simple: you had a first meeting to agree on the procedural agenda; you would exchange submissions; and finally, have a one- or two-day hearing.

This all changed when the IBA promulgated the Rules on Taking Evidence in International Commercial Arbitration. Document production - which rarely happened before - has developed year after year and has totally changed the landscape in international arbitration. Document production has become a major part of the arbitration process and one of the most expensive.

Nowadays, the tendency is for lawyers to be less focused, produce too many witnesses, file submissions that are too long and produce expert reports which are like trains passing in the dark. An American lawyer once told me that in the United States, you don’t have to be a good lawyer to be a successful practitioner. I find that to be the case and not only in the United States.

These days, lawyers are often overworked and very often do not comply with the procedural timetable. In fact, I have not had one single case in the last six to seven years where a party has not requested for an extension of time.

A lot of firms take on too many cases and, despite having a team of 70 lawyers, frequently get

“...The three key traits [of effective advocates] are: the ability to be extremely focused, rigorous and clear in their submissions...”
overwhelmed by the process of document production.

In short, the increased complexity of cases and the fact that law firms take on too many cases has changed dispute resolution for the worse.

If not a lawyer and arbitrator, what occupation would you have chosen?

I would have liked to be a hotel manager in a large international hotel chain because I like management, architecture and design, and I love to travel. It would be possible for me to be quite creative in this role.

In terms of the hotels that I like, Marina Bay Sands has a very interesting design, but I would never stay there. It is like Grand Central Station at rush hour.

When I am Singapore, I always stay at the Shangri-La’s Valley Wing because of the greenery and the quality of service. In Bali, I love, in particular, several hotels in Ubud. They have a great design.

What advice would you give young arbitration practitioners who are just starting out?

First, make yourself indispensable. Next, be rigorous, be creative and work hard. If you have these four traits, you will succeed.

But don’t be impatient. I see a lot of talented lawyers who say “I am almost 40 and am still not receiving appointments”. I started getting a lot of appointments only when I was 43 or 44.

My best advice for young lawyers who want to get appointments is to create a network. People who are your age and also want to get appointments are not your competitors. You should try to create a synergy with them. And of course, you must publish. Many of my publications have generated appointments.

Young lawyers should also specialise. I receive a lot of appointments related to multi-contract, multi-party disputes because that is my main specialisation.

But I realise that international arbitration has become very competitive and not as easy as it used to be.
YSIAC Lunchtime Talk with Toby Landau QC

*Apparent Bias: Paranoia On The Clapham Omnibus*  

By Akansha Bhagat

SIAC

Seah Lee

SIAC

SIAC Congress Week 2016 kicked off with Toby Landau QC’s lunchtime talk on the issue of apparent bias. Opening remarks were delivered by Lim Seok Hui (CEO, SIAC and SIMC) and Nish Shetty (Partner & Head of International Arbitration and Dispute Resolution (SEA), Clifford Chance) introduced Mr Landau.

In his talk, Mr Landau addressed the complicated issue of bias, examining and making a critique of the development of the law relating to apparent bias by the national courts of England and Singapore, in international commercial arbitration, investment arbitration and interstate arbitration.

At the outset, Mr Landau noted the distinction between actual and apparent bias, observing that the former is not always a viable tool, since it requires proof of actual animus which is difficult to procure. He explained that of the three core justifications on the basis of which the doctrine of apparent bias was developed by the national courts, this difficulty in proving actual bias, is the first. The second is the existence of unconscious bias...
which rules out the application of any test devised to determine actual bias, and the third is the need for general public administration of justice to ensure confidence in the legal system, *i.e.* that justice must not only be done but also be seen to be done. Together, these core justifications necessitated the formulation of a test that was pinned on more objective criteria and risk thresholds.

To preface his discussion of the test for apparent bias, Mr Landau examined the indicators of apparent bias, and looked first at the two commonly discussed indicators - impartiality and independence. He explained his view that independence should not be treated as a separate indicator since there can be no merit in a claim for lack of independence unless this lack of independence results in partiality. He argued that independence (as a factor that can aid in determining a subjective state of mind) should be used to assist in determining whether an individual may or may not be impartial and should not be a separate indicator. He noted that especially in arbitration, which frequently involves decision makers who are sector specialists and are necessarily familiar with people and players in a given sector, it was unrealistic to require independence of arbitrators.

In discussing how the law of bias has been developed by national courts, Mr Landau noted that in accordance with the recognised principle that no man should be a judge in his own cause, situations where a decision maker had an interest in the outcome of the decision are prohibited. He noted that historically, in common law jurisprudence, such an ‘interest’ was restricted to a direct pecuniary interest, but following the decision in *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 2)* (1999) this had been expanded to include certain non-pecuniary interests. He explained that beyond this principle, however, the courts have sought to avoid laying down any hard and fast rules to determine apparent bias and the only aid available is the
Real Possibility Test.

The Real Possibility Test is applied to assist with determining apparent bias and asks whether there is (a) a real possibility (b) that a reasonable person/ a fair-minded observer (c) having considered the facts (d) concludes that there is a reasonable bias. In Singapore, this test has been articulated as the reasonable suspicion test, which is met where the court is satisfied that a reasonable member of the public would make an inference as to bias, even if the court would actually take a different view on the facts.

Mr Landau stressed that in the development of the law relating to apparent bias by the national courts, there has been no attempt to formulate specific answers as to what constitutes apparent bias. The courts recognise the danger associated with such an attempt and have expressly noted that there neither is, nor can there be, a precise or mathematical formula that can be applied in situations of alleged apparent bias.

The situation relating to apparent bias in international arbitration, however, is in Mr Landau’s opinion, out of control. He noted that although the same core justifications apply to the development of the doctrine of apparent bias in the arbitration sphere, and the test evolved by the courts has, in Sierra Fishing Company & Others v Hasan Said Farran & Others, been affirmed to apply in arbitration as well, in practice the manner in which counsel and arbitrators treat bias in arbitration is very different.

Mr Landau opined that among the main ‘culprits’ for this are the IBA Guidelines on Conflicts of Interest in International Arbitrations (IBA Guidelines) which are supposed to reflect internationally agreed standards. However, he noted that although the IBA Guidelines set out the general standards for apparent bias, they then list out criteria that give rise to doubts as to impartiality and categorise these by seriousness (particularly the non-waivable red category which specifies what results in ‘justifiable doubt’). The IBA Guidelines therefore lay out exactly the sort of mathematical formula that the courts have cautioned against.

While the idea behind the IBA Guidelines was to deal with challenges more speedily and to simplify the life of an arbitrator,
what has happened in practice is that they serve as a charter for challenges, and provide the vocabulary required to formulate a challenge, which has resulted in an explosion in the number of challenges arbitration has seen over the last few years. Consequently, Mr Landau believes that the man on the Clapham omnibus – that hypothetical ordinary and reasonable person, long used by the courts to decide whether a party has acted as a reasonable person would – has, in the sphere of arbitration, suffered from an episode of paranoid psychosis.

Mr Landau stated that the increase in the number of challenges to arbitrators has had a very serious adverse impact on arbitration. It has given rise to defensive actions against arbitrators and an increase in risk for arbitrators (such as when signing disclosure statements.) More importantly, it has resulted in a disconnect between arbitration law and the position taken by the courts, which is problematic because the chances that a challenge to an arbitrator will ultimately be heard by a court are high. The recent decision in *W Ltd v M SDN BHD* highlights this disconnect. In this case, the court held that notwithstanding that a non-waivable red list disclosure had not been made, there was no risk of bias in the instant case and that the IBA Guidelines were wrong in this regard.

Mr Landau considered inter-state arbitration next, and noted that the doctrine of apparent bias had no space at all in this arena. The *Mauritius v. United Kingdom (Chagos Island Case)* held that the apparent bias test did not apply and the only ground for the removal of a judge or arbitrator of the ICJ was if they had prior involvement in the subject matter of the dispute itself. Mr Landau said he found this surprising, given that the UNHRC has commented on the need for a fair trial and mentioned the doctrine of apparent bias as part of the safeguards needed to ensure a fair trial.

In conclusion, Mr Landau noted there was a need to go back to first principles, as worked out and limited by the courts. He stated that the courts have long dealt with situations of apparent bias without nailing down a precise formula, but in arbitration it has become an area of micromanagement, resulting in stunting innovation, causing defensive posturing and a growing disconnect between what practitioners in arbitration law do and what the courts think they should do.
Keynote Address by Mr. K. Shanmugam, Minister for Home Affairs and Law at the SIAC Congress 2016

By Raj Panchmatia
Khaitan & Co

The participants at the SIAC Congress 2016 had the privilege of being addressed by Mr. K. Shanmugam, Minister for Home Affairs and Law of the Republic of Singapore on May 27, 2016. In his speech, Mr. Shanmugam laid out his vision of Singapore emerging as the New York of the East, with the foundational values of trust, neutrality, and efficiency being firmly ingrained in its institutions, such as the SIAC. Mr. Shanmugam took this opportunity to extend his appreciation to Dr. Michael Pryles, the Founder President of the Court of Arbitration of SIAC, for nurturing the institution through its early days and enabling it to embark on its journey of emerging as the pre-eminent arbitral institution in the East.

Mr. Shanmugam thereon updated the audience on the recent strides made by the Government of Singapore, including the recent strategic partnership with the Australian Government. Such efforts at growth have also been made by SIAC in recent years, with the establishment of overseas offices in Mumbai in 2013 and Shanghai in 2016. A related memorandum of agreement has also been entered into for the establishment of a representative office at the upcoming Gujarat International Finance Tec-City (GIFT City). With India and China being among the leading foreign users of SIAC, the establishment of such local bodies marks a new phase of growth and advancement for the SIAC. The other significant developments which Mr. Shanmugam highlighted included the creation of the SIAC Users Council by SIAC in September 2015 and the proposed expansion and upgrading of Maxwell Chambers by the Singapore Government.
Mr. Shanmugam further confirmed the commitment of the Government towards creating and sustaining a legal environment conducive to the functioning of SIAC and the continued development of Singapore as an arbitration-friendly jurisdiction in the midst of an ever growing Asian market. He assured the assembled audience that the Ministry of Law would continue to ensure the legislative framework would remain supportive of Singapore’s dispute resolution regime. In this regard, he reported that the Government was at present actively considering proposals received from various stakeholders to facilitate third party funding of arbitration.

In conclusion, Mr. Shanmugam laid out the philosophy behind his Government’s approach in the belief that Singapore would prosper with its Government adopting progressive and market-friendly policies. He reiterated his belief in the continued strengthening and growth of SIAC and the expansion of its role in providing world class services to lawyers and other stakeholders. With Singapore having successfully established itself as the leading place of arbitration in Asia, Mr. Shanmugam laid out before the audience Singapore’s and the SIAC’s goal of working towards emerging as the leading global dispute resolution hub in its next phase of growth.
Opening Session Q&A

What is the Future of Singapore’s Arbitration Landscape?

By

Hoe Jia Lin
King & Spalding LLP

“...SIAC will continue to play a “central role globally”, particularly given possibilities of investor-State dispute settlement.”

Following on from Minister Shanmugam’s keynote address which traced the history of SIAC’s current success at its Silver Jubilee, the opening session Q&A addressed the future of SIAC and Singapore’s arbitration landscape. The session, moderated by Mr Toby Landau QC, answered questions from the perspective of the Singapore Government (represented by Minister K Shanmugam) and SIAC (represented by SIAC Court President, Mr Gary Born). Mr Landau posed questions relating to recent developments in, and criticisms of, international arbitration, and took questions from the audience relating to the Government and the SIAC’s future plans for arbitration.

Toby Landau: What are Singapore’s long-term goals in relation to its role as a global hub for dispute resolution?

Minister stated that “Law follows commerce”. There will be tremendous growth in the region and greater integration of regional economies. While the Trans-Pacific Partnership (“TPP”) is an important agreement bringing Singapore together with the US, Canada, Peru, Mexico etc., this economic integration will happen even if the TPP is not implemented. With a strong regional and global economy,
and a strong economic and legal framework in Singapore, providing stability and the rule of law, the landscape will grow.

Mr Born noted that with the increasing integration of global trade, the biggest question mark for SIAC’s continued success is ourselves. SIAC has achieved its success (and will continue to do so) through continued hard work, extraordinary commitment to international arbitration ideals, state-of-the-art rules, and the pro-arbitration stance of Singapore courts. With the release of SIAC’s new investment arbitration rules, SIAC will continue to play a “central role globally”, particularly given possibilities of investor-State dispute settlement (“ISDS”) under the TPP and new generation bilateral investment treaties.

**Audience Question: What is the Government doing to assist Singapore law firms to compete effectively with major players on the international arbitration stage?**

Minister replied that the Government provides the framework for our law firms to benefit, through high-quality training for law firms and the right fiscal incentives for arbitration in Singapore. Our lawyers also have to prove that they are of the quality for international parties to pick, and they have done so.

**Audience Question: How can SIAC attract more civil law arbitrations?**

Mr Born commented that there has been an increasing trend in civil law arbitrations over the years, which is expected to continue. The SIAC Rules facilitate this as it is neither common nor civil law.

**Toby Landau: What is the Government’s response to the many criticisms of ISDS?**

Minister explained that the Government is still finding its way towards a landing on this. Having started his career as a commercial litigator, the Minister is familiar with the traditional view of the courts in enforcing parties’ agreements. From that perspective, States should be held to the ISDS mechanisms they agree to. On the other hand, as a Minister, he can understand how it may be unattractive for domestic policies, such as on health issues, to be subject to claims under ISDS.

In summary, we can look forward to Singapore’s continued growth as a regional hub for international arbitration over the next 25 years, and an even bigger celebration at SIAC’s golden jubilee. It will be interesting to see how Singapore and SIAC embrace new opportunities (such as greater regional and global economic growth, more investment agreements providing for ISDS and more civil law arbitrations) and handle new challenges (including criticisms of ISDS).
The Opening Plenary Session, which was moderated by Mr Alvin Yeo, SC (Chairman & Senior Partner of WongPartnership LLP), involved an insightful and erudite discussion between five esteemed panellists and Mr Yeo on the future of investment arbitration in Asia with a focus on SIAC’s draft Investment Arbitration Rules.

Mr Yeo kick-started matters by observing how the SIAC, as a global arbitration institution, has always been staying with and pushing ahead of the curve—the draft Rules being an eminent example of this; and how this has facilitated the growth of the Asian arbitration circuit.

The panellists provided perceptive explanations as to why more Asian parties will be involved in investment arbitration in the future. It was observed that it is no coincidence that such growth coincides with a fast-expanding Asian economy, increased legal sophistication of Asian investors and counsel alike, as well as the emergence of institutional rules geared toward efficiency and discipline in case management.

On the topic of efficient case management, the panellists acquainted us with how the draft Rules could serve to expedite arbitral proceedings at all stages of the proceedings. By streamlining processes, imposing reasonable, yet strict, timelines, and introducing innovative mechanisms, such as the summary dismissal procedure, the draft Rules could simultaneously maximise the value and minimise the costs of investment arbitration.

Nonetheless, the nature of investment arbitration would naturally require a concern for the interests beyond those of the parties, and the panellists discerningly emphasised the need to foreshadow the impetus identified by the global community to enhance the transparency of proceedings.
Other than the publication of awards or public screenings, there is also the potential of allowing third party involvement, an aspect that the draft Rules seek to introduce.

But, as noted by the panellists, any award would be pointless if it could not be enforced. The panellists proceeded to very helpfully dissect the clause under the draft Rules stating that the parties agree to waive their rights to any form of appeal, review or recourse to any state court or other judicial authority, and provided a thoughtful walkthrough on how such a waiver may operate against statutory reliefs available in various jurisdictions.

Finally, the panel concluded the session with a penetrating discussion on the ground-breaking provision under the draft Rules which allows a tribunal to order the disclosure of the existence and details of a party’s third party funding arrangement. While of significant potential utility, the panel also astutely identified various hurdles that would have to be overcome for such a provision to calibrate the optimal balance between the pros and cons of third-party funding.

By streamlining processes, imposing reasonable, yet strict, time lines, and introducing innovative mechanisms, such as the summary dismissal procedure, the draft Rules could simultaneously maximise the value and minimise the costs of investment arbitration.
Second Plenary Session

Effective Management of Arbitrations: SIAC Rules on Joinder, Intervention, Consolidation and Multiple Contracts

By
Rebeca Eibisch
Jones Day

After lunch, the Second Plenary Session commenced. Led by the moderator, Mr Chan Leng Sun, SC (Principal, Baker & McKenzie. Wong & Leow), the panellists—Cameron Ford (Corporate Counsel, Rio Tinto); Ronnie King (Partner, Ashurst); Prof Bernard Hanotiau (Partner, Hanotiau & van den Berg); Dr Michael Pryles, AO PBM (Arbitrator, 20 Essex Street); and Andre Yeap, SC (Senior Partner, Rajah & Tann)—offered their opinions as to the draft 2016 SIAC rules (the 2016 Rules) on joinder, intervention, consolidation and multiple contracts.

Joinder and Intervention

The panel discussed the main changes to the joinder provisions:

- Applications for joinder can be made by both a party and a non-party to the arbitration, to join either a party or a non-party to the arbitration agreement;
- Applications may now be made to the court prior to the appointment of any arbitrator; and
- Prior to such appointment, an additional party may be joined without consent if that party is also a party to the arbitration agreement.

The panel rebutted concerns that the provisions were too complex, stating that joinder provisions are always going to be complex and that the SIAC provisions are comparable to the corresponding provisions in other institutions.

Consolidation

While the 2013 Rules were silent on consolidation, the 2016 Rules set out a process that allows parties and non-parties to apply to the court (prior to the constitution of the tribunal) or to the tribunal for the consolidation of multiple arbitrations.

The panel commented on the significant difference between the provisions as they relate to consolidation by the court and
consolidation by the tribunal. Draft Rule 8.1 allows the court to consolidate when all the claims are “made under the same arbitration agreement”, whereas in Draft Rule 8.5, the tribunal may consolidate when “the arbitration agreements are compatible, the arbitrations are between the same parties and the same tribunal has been appointed in each of the arbitrations”. The panel commented that practitioners should be conscious of the distinction when considering the stage at which they should apply for consolidation.

**Multiple Contracts**

In response to market demand for efficient and cost-effective methods of resolving disputes arising out of or in connection with multiple contracts, the 2016 Rules introduced a streamlined process for commencing disputes regarding the same.

The claimant may file either: (i) multiple notices of arbitration concurrently with an application for consolidation; or (ii) a single notice of arbitration that will be deemed to have commenced multiple arbitrations and to be an application to consolidate all such arbitrations.

It was unanimously agreed by the panel that in today’s society of complex cross-border transactions, frequently involving multiple parties, provisions such as these are necessary to ensure the ongoing success and relevance of arbitration as a means of dispute resolution.

**General Conclusions**

The panel considered that arbitration has an inherent limitation stemming from its foundation on privity of contract and party autonomy. These principles are increasingly proving to be less important to clients who want their disputes resolved as efficiently as possible. It was noted that if the arbitral process does not adapt to the changing market, it may drive people to the courts. The panel agreed that the 2016 Rules were a welcome step to ensure SIAC’s continued success.

(Eds. Note: The SIAC Arbitration Rules 2016, which became effective on 1 August 2016, have since been published on the SIAC website at www.siac.org.sg.)
Closing out the substantive portion of the SIAC Congress 2016, the Users’ Dialogue Session recalled The Honourable the Chief Justice Sundaresh Menon’s warning at ICCA 2012 that although we are living in “the golden age of arbitration... the time is upon us to reflect on what we must do in order to ensure that the arbitration industry remains sustainable for the next generation and for generations after”. The panel’s moderator, Mr David Bateson, noted that respondents to the Queen Mary University of London 2015 International Arbitration Survey had identified “cost” as arbitration’s worst feature and the “lack of speed” as its fourth worst feature. The Survey also highlighted that this was partly attributable to “due process paranoia” – a reluctance by tribunals to act decisively in certain situations for fear of the arbitral award being challenged because of a party not having had the chance to fully present its case.

It therefore fell to the panel at the Congress to consider how the revised SIAC Rules on the Emergency Arbitrator provisions and Expedited Procedure, as well as the Arb-Med-Arb procedure, could aid in reducing time and costs, whilst ensuring that all relevant issues would have the opportunity to be fully ventilated in the arbitration proceedings.

On the Emergency Arbitrator procedure, the panel noted that the current iteration worked well in balancing these competing concerns, and the revisions to the SIAC Rules had been incremental in nature. However, it was observed that while the incidence of voluntary compliance by parties with, and consistent enforcement by
courts of, emergency orders was encouraging, it was still unclear how enforcement of such orders would fare in important jurisdictions such as Indonesia, the Philippines, China and India. Further, while the Law Commission of India had proposed amendments to the Indian Arbitration Act to recognise the enforceability of emergency orders, these amendments were ultimately not approved by the Indian Parliament.

On the Expedited Procedure, it was noted that recent case studies demonstrated tangible time and costs savings for parties adopting the procedure, and that the revisions to the SIAC Rules provided further flexibility – by allowing an expedited arbitration to proceed on the normal track where the parties so agreed. The panel sounded a note of caution that whilst the compressed procedure suited a claimant who had sufficient time to prepare for proceedings, a respondent could be unfairly placed on the back foot. The panellists agreed that the Expedited Procedure needed to be utilised with care because of the potential unfairness that could be occasioned to respondents.

Finally, on the Arb-Med-Arb procedure and the concomitant time and costs savings of a negotiated settlement, a comment from the panel was that from the perspective of in-house counsel, the attractiveness of this mechanism would depend largely on the amount in dispute and the relationship that the organisation had with the counterparty across jurisdictions. It was further noted that one issue which commonly arose when considering mediation was that in-house counsel and their business team sometimes had differing views on whether a firm or conciliatory stance ought to be taken with the counterparty. It was suggested that a simply drafted Notice of Arbitration could satisfy these competing interests – by demonstrating that one was serious about the claim, whilst preserving the broader commercial relationship.

(Eds. Note: The SIAC Arbitration Rules 2016, which became effective on 1 August 2016, have since been published on the SIAC website at www.siac.org.sg.)
The social highlight of the SIAC Congress Week was the SIAC Charity Gala Dinner, a black-tie event in celebration of SIAC’s 25 years in arbitration, which featured a charity auction in support of the Community Justice Centre (CJC). The CJC is a Singapore charity that provides support to litigants-in-person including the homeless, disabled and victims of domestic violence. Over 350 guests attended the Gala Dinner with Mr Chelva Rajah, SC, a member of SIAC’s Board of Directors, keeping the mood festive and everyone entertained as Master of Ceremonies for the evening.

Ms Lim Seok Hui, CEO of SIAC and SIMC, opened the evening with a Welcome Speech and Toast. She thanked members of the SIAC Congress Organising Committee for their hard work, and presented them with tokens of appreciation. In celebration of SIAC’s 25 years, Ms Lim introduced some members of the present and former management of SIAC, and invited them up on stage for a toast along with the Chairman, President and members of SIAC’s Board of Directors and Court of Arbitration.
Ms Indranee Rajah, Senior Minister of State, Ministry of Finance and Ministry of Law, and the Charity Gala Guest of Honour, delivered an engaging Opening Address. She was followed by Judicial Commissioner See Kee Oon, Presiding Judge, State Courts, who spoke about the CJC, its mission and projects. A short, touching video on the CJC was screened, leaving hardly a dry eye in the room.

The Gala Dinner featured both a silent auction and a live auction to raise funds for the CJC. The highlight of the evening was the live auction by guest auctioneer Mr Thio Shen Yi, SC and President of the Law Society of Singapore and Joint Managing Director of TSMP Law Corporation, who “sold” Mr Toby Landau QC as “trainee for a day” for a respectable SGD10,000 to leading India lawyer and a member of SIAC’s Board of Directors, Mr Rajiv Luthra.

SIAC would like to express its sincere thanks and utmost appreciation to all donors and bidders for their participation in the charity auction and their generous cash pledges. We are delighted to have been given the opportunity to partner with CJC and members of the international arbitration community to support the CJC’s charitable programmes.