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The YSIAC Conference 2017, held in Singapore on 9 June 2017, attracted almost 200 delegates from 12 jurisdictions, with delegates attending from places as far away as Sint Maarten, the United Kingdom and the United States.

The theme of this year’s Conference was “Evolution and Innovation: Keeping Pace with the Future of Arbitration”, which explored the various innovations in international arbitration and how one should evaluate, approach and keep pace with these innovations.

The Conference kicked off with a Welcome Address by Mr Davinder Singh, SC (CEO, Drew & Napier LLC; Chairman, SIAC Board of Directors). In his speech, Mr Singh highlighted SIAC’s commitment towards bright, young arbitration practitioners from all around the world, who were “hungry to get their first appointments as arbitrators” and make a name for themselves in the international arbitration field. Mr Singh said he was impressed and touched by the determination, drive, energy and enthusiasm of these young arbitration practitioners, who lacked only the right opportunities, and who would be committed to devote a great deal of time and attention to the cases if they were appointed as arbitrators. Mr Singh called on the young arbitration practitioners to partner with SIAC, and stated his willingness to meet these young practitioners to understand better the challenges that they faced in succeeding in the field of international arbitration and what SIAC could do to help them achieve their goals.

The insights and conclusions drawn from the speed conferencing sessions were then summarised and presented by the moderators in two plenary sessions chaired by Mr Duncan Matthews QC (Barrister and Arbitrator, 20 Essex Street Chambers).
Turning the spotlight to the in-house counsel user, the final panel was a GC Panel titled “The General Counsel’s Perspective on the Future of International Arbitration”. The Panel comprised a stellar line-up of GCs, namely Mr Bhaskar Chandran (Group President, Legal, GMR Group), Mr Cameron Ford (Corporate Counsel, Rio Tinto), Ms Geraldine Lim (Regional Legal Director, Heineken Asia Pacific), and Ms Valerie Tan (Country Head Legal, ABN AMRO Bank N.V., Singapore Branch), and was moderated with great aplomb by Mr Chelva Rajah, SC (Managing Partner, Tan Rajah & Cheah; Member, SIAC Board of Directors).

This interactive session provided delegates with an opportunity to engage in an interesting dialogue with the end users of arbitration on how they perceived and utilised the arbitration mechanism to meet their corporate goals, and how arbitration could be reformed to better serve the needs of corporate organisations.

The highlight of the Conference was the feisty debate that followed, on the motion “This House Believes that Arbitrators become Better with Age”. Moderated by Mr Darius J. Khambata, SC (Member, SIAC Court of Arbitration), the speakers for the motion were Ms Foo Yuet Min (Director, Drew & Napier LLC; Member, YSIAC Committee) and Mr Toby Landau QC (Barrister and Arbitrator, Essex Court Chambers; Member, SIAC Court of Arbitration) and the speakers against the motion were Mr Emmanuel Gaillard (Head, International Arbitration Practice, Shearman & Sterling LLP; Member, SIAC Court of Arbitration) and Mr Jern-Fei Ng (Barrister, Essex Court Chambers; Member, YSIAC Committee).

Ms Lim Seok Hui, CEO of SIAC, closed the Conference by thanking the speakers and sponsors, for contributing to the success of this flagship biennial YSIAC event. The day ended with Friday evening networking drinks for the delegates.
Speed Conferencing Sessions

Session 1: Confidentiality: Keeping Information Confidential in the Arbitration and From Third Parties in an Era of Greater Transparency

Ooi Huey Hien (Dentons Rodyk & Davidson)

The participants expressed concerns about the potential abuse of the cloak of confidentiality in arbitrations. It was discussed that confidentiality was a shield that could be misused in cases where fraud, corruption, or bribery were canvassed or alleged in previous arbitration proceedings. In these areas, transparency was important to the chances of success of a claim based on fraud, corruption or bribery. The question then, was whether the cloak of confidentiality in arbitrations would detract from the public interest.

One participant described his experience in a criminal proceeding where one of the parties had sought to canvass matters already determined by an arbitrator in an award. The question was whether confidentiality applied to bar the use of the arbitration award, and if not, then whether issue estoppel and res judicata following from the arbitration award could bar the re-determination of these matters in the criminal proceedings. In that case, the party was allowed to use the award without waiving confidentiality and succeeded in proving that these same issues were subject to res judicata and/or estoppel from being raised in the criminal proceedings.

Apart from the public interest arguments against confidentiality, especially in investor-state arbitrations, the participants noted that the degree of transparency mattered as well. If one thinks deeper, the application of confidentiality is in degrees. An area in which there could be a varying degree of confidentiality applied is in the publication of awards. To what extent should awards be publicised? Is it sufficient if the names of the arbitrators and the parties are redacted? The non-publication of awards may well impact on the development of the quality of future arbitral awards, and impact businesses or industries where decisions concern matters of public interest (e.g., investor state arbitrations, arbitrations concerning a subject matter or product which could have a potential impact on large sectors of society). Yet, the publication of an award (and of the factual matrix supporting that award) may run afoul of confidentiality which the parties had envisioned in undertaking the arbitration in the first place. It was suggested that the parties could cater for exceptions to the confidentiality rule (and the extent of such confidentiality) in respect of certain disputes which would justify transparency. Interesting concerns were also raised about arbitrations involving listed companies – did the shareholders have a right to know of the outcome of a major arbitration dispute? Were the outcomes of such disputes material such that they ought to be announced? What sort of information ought to be in the announcement for the company’s officers to discharge their duties to make such information public, and yet at the same time achieve a balance in preserving the company’s interests by controlling the amount of information that is in the public domain?

Lastly, confidentiality may not be a practical concept especially when it comes to enforcement. It was noted that the enforcement of an award (or the attempt to set it aside or challenge it in court) typically requires a party to enclose the award in the court documents so that the award would form part of the public record. Other participants felt that in their experience, it would be best to request that the parties be anonymised on the face of the court record when a setting aside application is made. In Singapore, it was noted that a party could apply to have the file sealed or heard in camera to preserve confidentiality.

The moderators for this session were Ms Yoko Maeda (Counsel, City-Yuwa Partners) and Ms Tan Weiyi (Principal, Baker McKenzie Wong & Leow).
“Is there an international style of advocacy?” The moderators, Ms Julie Raneda (Counsel, Schellenberg Wittmer Pte Ltd; Member, YSIAC Committee) and Mr Koh Junxiang (Associate Director, Clasis LLC, Singapore) asked, as they opened the speed conferencing session with a group of participants from both civil and common law jurisdictions.

For the younger lawyers with little hearing experience, it was intriguing to listen to the more experienced lawyers share their war stories. It was not uncommon to hear of different nationalities involved in one arbitration, or of a common law-trained lawyer arguing before a civil law-trained tribunal (and vice versa) – i.e., an Australian lawyer arguing before a Swiss tribunal, or a Swiss lawyer arguing before an Indian arbitrator. Given the varied stories, it was difficult to identify or formulate a truly “international” style of advocacy.

Regardless of whether the tribunal was common law-trained or civil law-trained, a few similar principles could be identified. It is always important to understand the tribunal, and answer the tribunal’s questions. A cross-examiner’s overly aggressive approach (which may work well in a litigation setting) does not sit well in international arbitration. Such principles appeared to be consistent with the tribunal’s expectations. One of the participants, a tribunal secretary, helpfully shared her experience from the tribunal’s perspective.

At the end of the session, it was certainly the hope of the younger lawyers that they too would one day have the opportunity to use such practical tips, and have their own war stories to share.

The moderators for this session were Mr Koh Junxiang (Associate Director, Clasis LLC, Singapore) and Ms Julie Raneda (Counsel, Schellenberg Wittmer Pte Ltd; Member, YSIAC Committee).
Session 3: Arbitrator Conflicts of Interests

Kenneth Tan (Mayer Brown)

This session was a perennial favourite: arbitrators’ conflict of interests. Although encompassing a wider universe of sub-topics and sub-issues, discussions revolved around those gaining the most attention today. We were fortunate to hear views from a diverse audience, with attendees comprising arbitration practitioners, arbitrators, barristers and in-house counsel.

No discussion of the topic of arbitrators’ conflict of interest would be complete without visiting the role and relevance of the IBA Guidelines on Conflicts of Interests in International Arbitration (“IBA Guidelines”). Practitioners will be familiar with its history: these guidelines were intended to establish an international standard for ascertaining when the independence and impartiality of an appointed arbitrator may be called into question. More than ten years after its adoption by the IBA Council in 2004, the guidelines have seen widespread use but not without critical reappraisal by the arbitration community as well as courts around the world. The English High Court’s decision in W Limited v M Sdn Bhd is one recent example that attracted much attention during the session. This decision emphasised that as far as English law was concerned the IBA Guidelines were precisely that – guidelines that do not conclusively establish a ground for challenging an appointment.

Attendees expressed a potpourri of views on this proposition. Some suggested that the IBA Guidelines should be treated as more than just guidelines but a form of soft law that informs whether an arbitrator’s appointment is tainted by actual or apparent bias. Others, while maintaining that the IBA Guidelines should not be treated as such, opined that the guidelines nevertheless had utility, at the very least as a baseline for identifying when further inquiries into the propriety of an arbitrator’s appointment should be made.

Commentaries on the utility and role of the IBA Guidelines prompted discussions of whether the instrument had provoked or facilitated a phenomenon of increasingly frequent challenges to the appointment of arbitrators, and whether this phenomenon in fact existed. The participants offered anecdotes suggesting that challenges to arbitral appointments were indeed on the rise, and often for purely tactical motives of delaying or derailing the arbitration. Many agreed that a contributing factor was the practice of arbitrators being directly appointed by the parties in dispute. This dialogue harkened back to the SIAC-CIARB Debate held the day before on the motion, “This House Believes that the Practice of Party-Appointed Arbitrators is a Moral Hazard in International Arbitration and Should Be Abolished”. At the conclusion of the debate, the judging panel (comprised of eminent practitioners in the field) was split, with no firm conclusion on the motion. If practitioners were divided on the subject, it would seem that users were not. The majority of users attending the session opined that, despite the risks accompanying the phenomenon of party-appointed arbitrators, they believed that the ability to directly participate in the constitution of the Tribunal, including by appointing arbitrators, was one of arbitration’s unique and fundamental attractions.

The moderators for this session were Ms Suegene Ang (Partner, WongPartnership LLP) and Mr Rishab Gupta (Counsel, Shardul Amarchand Mangaldas & Co; Member, YSIAC Committee).
One of the key changes introduced in the SIAC Rules 2016 is a provision for the early dismissal of claims and defences (Rule 29). Given the relatively new rules, the moderators, Ms Deepa Somasunderam (Associate (Barrister), Mishcon de Reya) and Ms Shannon Tan (Partner, Rajah & Tann Singapore LLP) helpfully provided the participants with a brief overview of the mechanisms of the new rules.

Rule 29 of SIAC Rules 2016 provides that a party may apply to the Tribunal for the early dismissal of a claim or defence on the basis that (a) a claim or defence is manifestly without legal merit; or (b) a claim or defence is manifestly outside the jurisdiction of the Tribunal.

These rules are an industry first, and modeled after Rule 41 of the ICSID Arbitration Rules. For the Singapore-qualified and English-qualified participants, these new rules also reflect the summary procedures available in litigation. Under the Singapore Rules of Court, a plaintiff may apply for summary judgment against a defendant who has no triable defence, or a defendant may apply to strike out a claimant’s claim if the claim, among others, does not disclose a reasonable cause of action.

The consensus amongst the participants was that they welcomed the new rules on early dismissal of claims and defences. The purpose of the new rules was to enable parties to save time and costs when faced with frivolous claims or defences.

However, as one participant pointed out, the effectiveness of the new rules remains untested. There was a lively discussion on the meaning of “manifestly without legal merit” or “manifestly outside the jurisdiction of the Tribunal” – i.e., what is the threshold for “manifestly”? Does the threshold differ in the common law and civil law jurisdictions? The participants also discussed the scope of Rule 29.3, which grants the tribunal the discretion whether to allow the application. Without any precedents at hand, it was anyone’s guess as to the factors or circumstances that a tribunal would take into account when exercising its discretion.

The last part of the discussion dealt with the enforceability of an order or award made by a tribunal under the new rules. To the common law-trained participants, enforceability should not be an issue given that the summary procedure mechanism is also available in court litigation. A participant from a civil law jurisdiction, however, provided a different view. She doubted whether the domestic court would recognise an order or award made under the new rules, since the summary procedure mechanism is not available in her jurisdiction.

With increased awareness of the new rules and other institutions like the Stockholm Chamber of Commerce joining the bandwagon, it is likely that the new rules would be tried and tested soon. Until then, the interesting questions raised during the speed conferencing session remain open to discussion.
In recent months, one of the most popular topics in Singapore’s international arbitration arena has been third party funding. The Civil Law (Amendment) Bill 2016 provides that third party funding will be permitted in international arbitration, and establishes a regulatory framework for third party funders. The introduction of third party funding brings Singapore in line with other major seats of arbitration, and hopefully, enhances Singapore’s position as a leading seat for international arbitration.

The speed conferencing session moderated by Mr Sunil Abraham (Partner, Cecil Abraham & Partners) and Ms Jeong Hye Ahn (Partner, Yulchon LLC) sparked a lively discussion on the impact of third party funding in international arbitration.

In relation to the issue of security for costs, the participants were divided. One participant opined that the third party funding would be used as a factor in support of the defendant’s application for security for costs. This is because third party funding evinces, prima facie, the claimant’s inability to fund its arbitration. Another participant was quick to disagree. A claimant does not necessarily lack the ability to fund its arbitration when it seeks third party funding – i.e., multinational companies use third party funding for budgeting reasons.

Another area of discussion was the issue of cost allocations. Interesting questions which arose included, "Does the tribunal take into account the existence of a third party funder when allocating costs?", and "Is the claimant obliged to disclose the third party funding agreement to the tribunal, and if so, to what extent?".

During the session, one participant also raised the concern that third party funding may be abused, and result in frivolous claims in international arbitration. However, this concern was more apparent than real. To the third party funders, funding an arbitration is a long-term investment. As such, the funders undertake a stringent scrutiny and evaluation of the claims before deciding to fund an arbitration. As another participant pointed out, it is likely that the claim has a strong or reasonable prospect of success (i.e., not a frivolous claim) when a third party funder funds the arbitration. The existence of a third party funder may also cause the defendant to consider the prospect of settlement.

Based on the participants’ discussions, it was clear that third party funding raises novel considerations for both parties and tribunal, especially on the issue of costs. It remains to be seen how such issues are resolved, and how third party funding would affect the landscape of international arbitration in Singapore.
This speed conferencing session involved a lively discussion on how the doctrine of privilege applies to documents and other evidence in international arbitration. By way of background, in the common law tradition, privilege broadly applies to protect all communications between a lawyer and his or her clients from being disclosed without the consent of the client. In contrast, in many civil law jurisdictions, there is no concept of privilege, and the parties have the right to use any document which may support their position. The discussion thus focused mainly on how the expectations of parties, in coming from different jurisdictions with different privilege laws, can be reconciled.

The moderators for this session, Mr. Nicholas Lingard and Ms. Priscilla Lua, started the discussion by pointing out the common law and civil law dichotomy, and asking the participants to suggest how a tribunal should decide which law to apply to issues relating to privilege. For example, should privilege be deemed to be a substantive right governed by the law of the contract? Or should it be construed as a procedural issue to be governed by the law of the seat of arbitration?

A Korean participant in the session provided her view from a civil law perspective. She agreed that there is no concept of privilege in Korea, a civil law jurisdiction. She also pointed out that parties from civil law jurisdictions typically would expect their disclosure to be limited in legal proceedings, as civil law judges would play a more investigative role. This is in contrast to common law jurisdictions where discovery is mainly party-driven.

The participants then discussed how these differing expectations can be resolved. It emerged from the discussion that the idea of applying the law of the seat of arbitration to govern privilege might not be appropriate. This is because the seat of arbitration may often not bear any relation to the transaction between the contracting parties, and the documents may not necessarily be created in the seat of arbitration. Parties’ expectations may thus be disregarded, where the law of the seat is applied to decide whether such documents should be disclosed.

Other suggestions raised during the session include a “most favoured nation” approach, where the tribunal would adopt, amongst the jurisdictions of the parties, the law which affords the most protection to the documents. This would ensure that there is a level playing field between the parties. The participants also explored the idea of having the parties incorporate the choice of law rules into the contract. However, such a clause might be hard to negotiate from the outset, and commercial parties rarely place close attention to privilege concerns when entering into contracts. Another suggestion was to use the IBA rules, or some other transnational standard.

Overall, the discussion may have left the group with more questions than answers. Nonetheless, it was certainly a thought-provoking session which made the participants more aware of the unsettled issues relating to privilege in international arbitration and the possible ways to address them.

The moderators for this session were Mr Nicholas Lingard (Partner, Freshfields Bruckhaus Deringer LLP; Member, YSIAC Committee) and Ms Priscilla Lua (Senior Associate, Clifford Chance Asia).
Session 7: Interim Relief From Courts and Tribunals: Lessons Learned

Philip Tan (White & Case)

This speed conferencing session addressed the issues relating to interim relief provided by courts and tribunals. Questions for the participants included: What factors do you consider when you are picking a forum, i.e. whether to go to the court or an arbitral tribunal, to seek interim relief? What are the implications for your choice? How do the laws of the jurisdiction, in which you seek interim relief, matter?

In the context of interim relief, urgency was predictably at the top of the participants’ minds when they thought about these questions. The group discussed the issues relating to rushing to a court or an arbitral tribunal with a very limited notice period to the adversary. A main concern was that this might prejudice the application if sufficient notice was not given. One of the participants pointed out that Hong Kong allows for ex parte applications to seek interim relief if the need for such relief is truly urgent.

Enforceability was another key consideration. Some of the participants were in-house counsel, and from the commercial parties’ perspective, they emphasised the importance of being able to enforce interim relief in the relevant courts. This concern extends especially to interim relief granted by arbitrators. One of the participants voiced the concern that emergency relief provided by an arbitral tribunal may not necessarily be enforced under the New York Convention, and that it is normally up to the local legislation in the relevant jurisdictions to provide for such enforcement. Furthermore, there was a perception amongst the group that the quality of interim relief granted by arbitrators may vary considerably depending on the arbitral tribunal. Arbitrators also seem to have little enthusiasm for giving interim relief.

Another related topic covered in the discussion was security of costs. Security of costs orders would require the claimant to provide security in a certain amount, so that the respondent can recover its costs if the claims are dismissed and such costs are awarded by the court or tribunal. The participants discussed how often applications for security of costs are made, and when such applications would be granted. Considerations included whether the other side had a pattern of not paying, whether it was a special purpose vehicle (SPV), and whether there was a guarantee from a corporate parent. Third party funding was also brought up during the discussion, and a few participants voiced their concerns over whether courts and arbitral tribunals could make awards against third party funders.

Overall, it was certainly a fruitful and engaging session where both in-house counsel and private practitioner participants were able to share their experiences and learn about key considerations regarding interim relief from different perspectives.

The moderators for this session were Mr Andrew Battison (Partner, Allen & Overy; Member, YSIAC Committee) and Ms Gitta Satryani (Senior Associate, Herbert Smith Freehills LLP).
Session 8: Contractual Waivers of Setting-Aside Rights: Valid or Not

Philip Tan (White & Case)

The topic for this speed conferencing session was on whether contractual waivers of setting-aside rights were valid or not. The YSIAC Conference participants came from many different jurisdictions, including China, India, England, France, Japan and of course, Singapore. This allowed the group to discuss which countries allowed or prohibited the contractual waiver of setting-aside rights, and the rationale behind each position.

Countries which prohibit such contractual waivers include China, Japan and India. Jurisdictions allowing for such contractual waivers include France. There are also a few countries which adopt a middle ground – for example, in England, parties can waive their right to appeal questions of law, but cannot waive the right to challenge procedural irregularities in the arbitration proceedings. In Singapore, the right to appeal a question of law can be waived, but courts have not gone further to address whether the right to apply for the setting aside of an arbitral award can be waived. There was also an interesting reference to Switzerland, where it seems that contractual waivers would be upheld in their entirety as long as the parties are not Swiss.

The general consensus among the participants was that the rationale for prohibiting such contractual waivers was based on jurisprudential principles of justice and fairness, and to ensure that parties are not left without a proper remedy. On the other hand, freedom of the parties to contract was the main argument in favour of allowing such contractual waivers. The participants explored what this freedom to contract means. Parties may wish to agree to waive their right to challenge the award in order to avoid lengthy and costly challenges before state courts. However, concerns over true consent may arise where there is inequality in bargaining power, for example in an employer-employee context. In such contexts, courts may take a stricter approach against upholding a contractual waiver of setting-aside rights.

The participants also discussed further nuances relating to such contractual waivers. For example, the group discussed whether there should be a need for the parties to specify in the contract exactly what rights they are waiving. This is in contrast to another possible approach of allowing the parties to waive their set-aside rights by merely referring to institutional rules which allow for waiver of set-aside rights. The group also discussed the distinction between pre-dispute and post-dispute waivers, and the extent to which such waivers can or should be allowed. In addition, the participants explored concerns regarding enforcement, in that if such a waiver agreement is held to be invalid after an award is rendered, the award might not be enforceable under the New York Convention.

Overall, the discussion proved to be an enthusiastic and productive exchange of thoughts, ideas and experiences. The success of this discussion was certainly a testament to the diverse range of nationalities and backgrounds of the participants at the YSIAC Conference.

The moderators for this session were Mr Moazzam Khan (Partner, Nishit Desai Associates; Member, YSIAC Committee) and Ms Zoe Li Zhang (Senior Associate, Zhong Lun Law Firm (Beijing Office)).
The proposition was put forward that mediation and arbitration were in competition – because, if mediation succeeds, arbitration is not required. It was observed that this was more so from the perspective of the lawyers involved since generally, the more protracted the dispute, the more fees are earned. It was also discussed that mediation had an upper hand in the sense that it allowed the parties to control the legal process and pursue solutions in a dispute which was not available to it by way of its strict legal rights in an arbitration and/or litigation.

However, mediation and arbitration could also go hand-in-hand. What was at the centre of discussion was the need for the parties to be comfortable with departing from their strict legal positions and viewing the mediation or arbitration only from that angle. Parties, and especially counsel, needed to be more open to the benefits of mediation and arbitration, and being open to both processes whether in a linear fashion or when both avenues were undertaken concurrently. In this regard, one of the participants from India commented that mediation was invoked in the Indian court process from the start of the proceedings when the prospect of mediation would be discussed in preliminary hearings between the parties together with the court.

It was also discussed that what has perhaps escaped counsels’ minds when they go about pursuing their clients’ claims (thereby leading to a perception that mediation and arbitration are foes), is the need, and the benefits, of preserving the commercial relationship between the parties in dispute. Applying this value by becoming more open to mediation could improve and extend the longevity of the parties’ relationship, and could also improve the relationship between the lawyer and his client (through the lawyer adding value to the dispute resolution process and the clients’ long term relationship with the other party).

It was observed that more thought should go into incorporating mediation and arbitration into a single set of proceedings. The SIAC-SIMC Arb-Med-Arb protocol at the Singapore International Arbitration Centre was discussed as a good example. It was observed that other leading arbitration centres do offer mediation services (for instance the International Chamber of Commerce) but do not promote it as actively as Singapore International Arbitration Centre.

The benefits of mediation were also discussed, in that mediation was generally perceived as a short and quick manner of dispute resolution. However, one of the participants also observed that there were complex mediations that could be conducted over a few sessions, which could go on for months. In a mediation in which that participant had been involved, witness statements had even been filed (though such witness statements were not as formal as in actual arbitration – for instance, they were not affirmed).

Ultimately, the group concluded that mediation was not a foe to arbitration (and vice versa), and the role of counsel in building up relationships and resolving disputes could be enhanced if both mediation and arbitration were considered and utilised.
The main concern was, are lawyers’ jobs safe from advances in artificial intelligence?

Currently, there is already highly sophisticated software that can perform extremely accurate discovery by sorting voluminous documents, in a much shorter period of time than a human lawyer can. There is even software such as Ross Software, which specialises in analysing facts and which (based on a set of pre-conditions) can generate fairly accurate advice or research results on a particular aspect of the case. Such software is self-learning and so becomes more and more accurate over time. Other examples are software generating smart contracts (which can then be used, or edited by lawyers or lay persons), software that can guide litigation strategy, and even software that can profile judges based on the cases they have already decided and calculate the likely outcome if a particular judge hears the case.

How advanced is such software, and can it replace the lawyers who are doing the tasks performed by such software?

The consensus, as guided by the moderators, was that such software could replace or at least assist low value tasks such as review of documents or provision of simple advice normally performed by junior associates. It was opined that this freed up junior associates’ time for higher value work. On the other hand, there was the argument that it was through going through the grind with such lower value work that junior associates get the training (and through it, the skills and analytical capabilities) required to generate higher value work. In other words, in using artificial intelligence, the legal community may actually be doing a disservice to itself and juniors may lack the sufficient training to think and analyse at a higher level.

There was also the question of trust that can or should be placed in such programmes. How much would the lawyers be able to trust an “automated” work product that comes from such software? In terms of discovery, how sure are the lawyers that the software did not miss out a “smoking gun”? In terms of simple advice or standard form contracts, how certain are the lawyers that a critical factor had been adequately considered and dealt with by the programme in generating the work product? What was clear, therefore, was that in legal work, the reasoning and the process of generating the work product were equally important, if not more important, than the product itself.

The discussion concluded with most agreeing that such tools could be used to complement practice, and so e-discovery software could be used to detect gaps in evidence and research software could be used to fill gaps in research. Weak artificial intelligence could be effectively harnessed to perform low level tasks to keep clients’ costs low, and to increase efficiency. What was important to note was that though artificial intelligence would probably not replace human lawyers in this lifetime, these advances are very real, and happening quickly.

The moderators for this session were Ms Holly Blackwell (Senior Foreign Legal Consultant, King & Wood Mallesons; Member, YSIAC Committee) and Mr Daryl Chew (Partner, Shearman & Sterling LLP).
PLENARY SESSION -
Conclusions from Speed Conferencing Sessions Part I & II

Arvin Manooseegaran (K&L Gates)

The conclusions drawn from the “speed conferencing” sessions were presented by the moderators in two plenary sessions chaired by Mr Duncan Matthews QC. A number of interesting insights was shared as highlighted below.

Ms Yoko Maeda and Ms Tan Weiyi shared that confidentiality was important in certain industries but that transparency was preferred when it came to investor-state disputes. It was also felt that publication of awards, albeit with the parties’ names redacted, would assist in the development of the law as well as to enable future parties to assess their chances of success before a particular Tribunal.

Ms Julie Raneda and Mr Koh Junxiang discussed the different approaches to cross-examination and oral advocacy in arbitration and the importance of playing to one’s Tribunal. As for arbitrator conflicts of interests, Ms Suegene Ang and Mr Rishab Gupta said that while participants were concerned about the neutrality of party appointed arbitrators, they suggested greater involvement of arbitral institutions as a check.

Ms Deepa Somasunderam and Ms Shannon Tan discussed the summary procedures in the SIAC Rules 2016. The consensus was that it was a step in the right direction but that it remained to be seen whether a Tribunal would exercise the power to dismiss claims or defences summarily. Mr Sunil Abraham and Ms Jeonghye Ahn discussed the impact of third party funding in arbitration and its impact on applications for security for costs as well as disclosure requirements relating to third party funding arrangements.

Mr Nicholas Lingard and Ms Priscilla Lua addressed choice of law issues in relation to privilege. Some participants suggested that the expectations of the parties should be taken into account at the time the communication is made or when the contract was entered into. Mr Andrew Battison and Ms Gitta Satryani shared some of the lessons learned from courts and tribunals in the context of interim relief. For example, depending on urgency and the jurisdiction, one might wish to obtain interim emergency relief from a Tribunal rather than a national court.

On the validity of contractual waivers of setting-aside rights, Mr Moazzam Khan and Ms Zoe Zhang concluded that such waivers would most likely be impermissible as it involved questions of public policy and judicial sovereignty in India and China, whereas in the UK a waiver is permissible if confined to questions of law. Mr Jae Min Jeon and Ms Hazel Tang shared their group’s perspectives on the compatibility of arbitration and mediation and concluded that the “arb-med-arb” process was commendable as it shortened the arbitration process.

Artificial intelligence (AI) and its impact on the future of arbitration attracted much interest and laughter. Mr Daryl Chew and Ms Holly Blackwell shared that existing technology can predict how a judge might rule in a certain case and how junior associates and even arbitrators might be replaced one day by robots. However, the feeling was that the arbitration process still required a human element and that AI-augmented practice was the way forward.
The title of this session was “The General Counsel’s Perspective on the Future of International Arbitration”. The panel comprised Mr Bhaskar Chandran (Group President, Legal, GMR Group), Mr Cameron Ford (Corporate Counsel, Rio Tinto), Ms Geraldine Lim (Regional Legal Director, Heineken Asia Pacific) and Ms Valerie Tan (Country Head Legal, ABN AMRO Bank N.V., Singapore Branch). The session was moderated by Mr Chelva Rajah SC (Managing Partner, Tan Rajah and Cheah).

Mr Rajah SC opened the session by highlighting the continued rise in the popularity of international arbitration as a preferred form of dispute resolution among commercial parties. This trend was perhaps most evident in how a number of law firms was setting up independent international arbitration practice departments, and more countries were taking steps to set up their own arbitration centres to get a slice of the arbitration pie.

Mr Rajah SC asked if companies with a large volume of international contracts such as Rio Tinto would ensure that all of these contracts contain an arbitration clause. Mr Ford shared that this was not the case for Rio Tinto. He explained that contracts would be broadly grouped according to how developed the national courts in that particular country where the contract was to be performed are. A certain “crystal-ball gazing” was required to first, determine the likely nature of a dispute which could arise under that contract, and second, to decide whether it would be more advantageous for that dispute to be resolved by way of either arbitration or litigation.

The panelists were then asked how involved they would normally be when it came to instructing counsel on an arbitration. Mr Chandran gave a resounding yes. He said that in GMR’s experience, the local court proceedings in India continue to take a long time to resolve disputes, and arbitration presented itself as a much faster and efficient alternative. This element was particularly critical for the GMR Group given that it often undertakes massive construction projects involving airports and energy plants.

Following on from this, Mr Rajah SC asked if companies with a large volume of international contracts such as Rio Tinto would ensure that all of these contracts contain an arbitration clause. Mr Ford shared that this was not the case for Rio Tinto. He explained that contracts would be broadly grouped according to how developed the national courts in that particular country where the contract was to be performed are. A certain “crystal-ball gazing” was required to first, determine the likely nature of a dispute which could arise under that contract, and second, to decide whether it would be more advantageous for that dispute to be resolved by way of either arbitration or litigation.

The panelists were then asked how involved they would normally be when it came to instructing counsel on an arbitration. Mr Chandran said that his team at the GMR Group would be exceptionally involved, in particular ensuring that counsel did not lose sight of the overarching commercial objectives sought to be achieved in that dispute. A similar view was shared by Ms Tan, who admitted that her background in private
practice meant that she and her team at ABN AMRO Bank N.V. had a tendency to be very involved in the brief. She joked that this meant sometimes calling counsel out on their mistakes, prompting nervous laughter from members of the audience.

Mr Rajah SC next asked if the panellists were prepared to accept a system where it is the arbitral institution which appoints all of the arbitrators in a three-member tribunal. A range of views was proffered. Mr Ford was supportive of the notion, and opined that institution-appointed arbitrators could help reduce an atmosphere of what he termed “due process paranoia” (referring to situations where a party-nominated arbitrator might be seen as being unfairly deferential to the party nominating him or her). The rest of the panellists, however, took a contrary view and saw benefits to having party-nominated arbitrators, particularly where the dispute called for arbitrators with a certain subject-matter expertise. Mr Chandran added that this gave parties the flexibility to nominate arbitrators who were sensitive to a particular set of cultural norms, and therefore likely be in a better position to contextualise and understand the dispute.

The discussion concluded with a discussion of whether it remained important that an arbitral award be enforceable under the New York Convention. Unsurprisingly, the panelists replied in the affirmative.

Ms Lim took the opportunity to share that, in Heineken’s experience, there were a number of contracts which continue to provide for litigation as a means of dispute resolution, adding that, “The scale of our contracts sometimes does not justify [the use of arbitration]. We don’t build airports!” In response, Mr Rajah SC only had this to say: “Ah but you give strength to those who do!”, causing the room to roar with laughter, and ending the session nicely.
Debate

Motion: This House Believes that Arbitrators Become Better with Age

Arvin Manooseegaran & Kenneth Tan (K&L Gates & Mayer Brown)

Do arbitrators age like fine wine (and does fine aging continue in perpetuity)? Can youthful vitality make up for relative lack of experience and, in the final analysis, what defining qualities does one look for in a ‘good’ arbitrator?

These were the questions that arose at the YSIAC Conference’s closing debate, with the motion being “This House believes that arbitrators become better with age”. The motion was inspired by what many perceived to be a practice in international arbitration of putting a premium on seniority when nominating arbitrators, particularly in high-stakes disputes.

Speakers for the motion, Mr Toby Landau QC (Essex Court Chambers) and Ms Foo Yuet Min (Drew & Napier LLC) sought to elucidate the wisdom underpinning a preference for senior arbitrators. Undergirding their support for the motion was, amongst other things, the proposition that with age came heightened experience and wisdom, and the notion that one can never have too much of either. Speakers against the motion, Mr Emmanuel Gaillard (Shearman & Sterling LLP) and Mr Ng Jern-Fei (Essex Court Chambers), sought to put these propositions to the test. In questioning the assumption that one necessarily gets better with age, speakers against the motion reminded audiences that old habits die harder with time. As Mr Gaillard put it with one illustration: “stupidity is a disease that is seldom cured by age”. Mr Ng also highlighted that arbitration disputes came in all types and forms, with some more suitably determined by younger arbitrators. The wider point Mr Ng made is that what makes an arbitrator suitable for a case turns on far more factors than age and all the attendant virtues that might come with it.

The audience ultimately voted against the motion by a slight majority. This conclusion was, perhaps, unsurprising for an audience comprised of young arbitration practitioners. This is, after all, the YSIAC Conference.
Is More Transparency in International Commercial Arbitration a Good Thing?

By
Gabriel Li Zhengliang
Drew & Napier LLC

Winner of the YSIAC Essay Competition 2017

Summary

In 2014, the United Nations Commission on International Trade Law (UNCITRAL) implemented the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration. This was a key milestone in the worldwide trend towards increasing transparency in international arbitration. With the dust beginning to settle on the adoption of greater transparency in investor-state arbitration, proponents of greater transparency began to seek a similar review of transparency in international commercial arbitration. This paper addresses the question posed with three propositions.

Section I argues that greater transparency of arbitral decisions is beneficial. The current system which favors the non-publication of arbitral decisions should be forsaken. It is not true that transparency needs to come at the expense of confidentiality. Rather, it is possible to pursue both ideals in tandem through the publication of anonymized decisions. The publication of arbitral decisions is likely to increase the certainty and predictability of arbitral outcomes. Greater transparency would also increase arbitration’s legitimacy. Further, arbitration would be given the invaluable opportunity of influencing the development of the commercial law through the publication of arbitral decisions.

Section II argues that greater transparency of arbitral proceedings is detrimental. The current practice of holding private arbitral proceedings is appropriate. Unlike arbitral decisions, greater transparency of arbitral proceedings is likely to come at the expense of confidentiality. It is just not possible to have a public hearing and still maintain confidentiality. Moreover, international commercial arbitration and investor-state arbitration are separate fields. Calls for greater transparency in investor-state arbitration cannot simply be transplanted and used to justify greater transparency in international commercial arbitration. It is also unwise to introduce public proceedings merely to inspire greater confidence in the field.

Section III argues that greater transparency of arbitral panels is desirable. Currently, there is a dearth of resources which provide parties with information about the qualifications and performance of arbitral panels. This opacity is unsatisfactory.

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Greater transparency of arbitral panels would equip parties with the information required to make informed appointments. It is also relatively easy to set up an arbitrator feedback system. Moreover, the creation of a feedback system for arbitrators is likely to raise their levels of accountability.

I. Greater transparency of arbitral decisions is beneficial

Currently, most arbitral decisions are not published. This system is unsatisfactory. It is suggested that the current stance on the publication of arbitral decisions should be forsaken for a system which embraces greater transparency.

First, greater transparency of arbitral decisions need not come at the expense of confidentiality. It is possible for transparency and confidentiality to be pursued in tandem. For example, article 41 of the Vienna International Arbitration Centre (VIAC) Rules 2013 allows VIAC to publish anonymized summaries of arbitral awards unless a party objects to the publication. A similar rule exists in rule 32.12 of the Singapore International Arbitration Centre (SIAC) Rules 2016 which allows SIAC to publish an award with parties’ consent where the names of the parties and other identifying information have been redacted.

These systems show that it is possible to design a system which achieves greater transparency of decisions without sacrificing confidentiality. Greater transparency is achieved as publication is no longer precluded. At the same time, confidentiality is preserved as a veil of anonymity is introduced over the parties. Moreover, parties are given the right to withhold consent over publication if they feel that the redaction has not been extensive enough. This acts as a safeguard, assuring parties that their confidentiality will definitely be protected. Greater transparency of arbitral decisions can thus be achieved without sacrificing confidentiality. This removes the sting of a major concern which prevents many from supporting publication.

Second, greater transparency of arbitral decisions would increase the certainty and predictability of arbitral outcomes. Past arbitral awards are likely to have precedential value to all parties involved in arbitration. It is not surprising that a majority of the respondents in the 2015 Queen Mary University of London International Arbitration Survey

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Gruner, D. M. (2003). Accounting for the Public Interest in International Arbitration:
revealed that they appreciated the academic value of publishing arbitral awards. Parties can rely on past decisions to formulate strategies for existing disputes. Tribunals can also check their current decisions against past decisions to confirm that key considerations were not omitted. Publishing arbitral decisions is thus beneficial as it increases the certainty and predictability of arbitral outcomes.

Third, greater transparency of arbitral decisions can increase arbitration’s legitimacy. Today, opacity is usually treated with a great deal of suspicion and skepticism. Shrouded in opacity, arbitrators are given free rein to make decisions in whatever way they deem fit, sometimes, even possibly ignoring the law. Even if arbitrators do not make arbitrary decisions, the potential for abuse is likely to greatly diminish the perceived legitimacy of the field. On the other hand, the publication of arbitral decisions exposes an arbitrator’s work to public scrutiny. This is likely to place great pressure on arbitrators to publish well-reasoned decisions. A reduction in the real and perceived incidence of arbitrary decisions would greatly boost arbitration’s image as a legitimate form of dispute resolution. Greater transparency of arbitral awards is thus beneficial as it can increase arbitration’s legitimacy.

Fourth, greater transparency of arbitral decisions can give arbitration the invaluable opportunity of developing commercial law albeit in an indirect way. In the 2016 Bailii lecture, Lord Thomas suggested that arbitration had grown to a point where it was effectively stunting the growth of commercial law through the courts. The popularity of arbitration meant that lesser cases were being heard in courts and published as judgments. It is suggested that a simple solution to this problem is the publication of anonymized arbitral awards. Such an approach would allow the reasoning behind arbitral awards to make its way into the public domain.

Whilst published arbitral decisions may not be binding, well-reasoned decisions can still be highly persuasive. These decisions, if truly persuasive, also have the potential to become law when they are adopted by the state courts via the conventional litigation route. Appointed judges would continue to act as gatekeepers, who are tasked with overseeing the development of commercial law, as they will be empowered to decide on which points can be elevated from

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7. Speech delivered by Lord Neuberger at the Chartered Institute of Arbitrators Centenary Celebration, Hong Kong (20 March 2015), titled “Arbitration and the Rule of Law” at [22]–[23].
8. Speech delivered by Lord Thomas at The Bailii Lecture 2016, Hong Kong (9 March 2016), titled “Developing Commercial Law through the Courts”.
mere persuasive value (arbitral decision) to binding authority (court judgment). The ability to influence the development of the law would certainly help to cement the status of arbitration as a legitimate form of dispute resolution. Greater transparency of arbitral decisions is thus also beneficial as it gives arbitration the invaluable opportunity of influencing the development of commercial law.

II. Greater transparency of arbitral proceedings is detrimental

Currently, most arbitral proceedings are carried out in private. Nevertheless, some critics have suggested that the public should be granted access to these arbitral proceedings. In this regard, it is suggested that greater transparency of arbitral proceedings is detrimental as the practice of holding private proceedings is appropriate.

First, greater transparency of arbitral proceedings is likely to come at the expense of confidentiality. Unlike arbitral decisions, it is not possible to achieve transparency and confidentiality in tandem when it comes to arbitral proceedings. It is just not possible to let the public into arbitral proceedings without letting them know who the parties to the proceedings are. Moreover, there are genuine reasons why confidentiality must be maintained. Apart from preserving the reputation of commercial entities, confidentiality also encourages effective and dispassionate dispute resolution as opposed to emotive trial by press release. Confidentiality further protects valuable and highly commercially-sensitive information from being disclosed. Introducing broad obligations to engage in open arbitral proceedings might result in more harm than good should it come at the expense of confidentiality.

Second, greater transparency of arbitral proceedings is unnecessary since public interest concerns rarely arise in international commercial arbitrations. International commercial arbitration is not the same as investor-state arbitration. Public policy interests concerns such as democratic deficits and allegations of government misconduct are rarely implicated. International commercial arbitration is also unlikely to affect state conduct and legislation. In fact, most international commercial arbitrations have little impact beyond the disputing parties and their immediate affiliates as issues of public policy rarely arise in a great majority of commercial disputes. It is strongly suggested that calls for transparency of proceedings in investor-state arbitrations cannot simply be transplanted and used to justify greater transparency of proceedings in international commercial arbitration. Put simply, greater transparency of arbitral proceedings is not suitable for international commercial arbitration.

Third, greater transparency of arbitral proceedings does not necessarily inspire greater public confidence in international commercial arbitration. Public hearings do not generate genuine interest in arbitral cases. In fact, in cases where the public can attend

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12 Ibid at p2780.
13 Supra n 10 at p211.
16 Ibid.
arbitration hearings like the North American Free Trade Agreement arbitrations, the public exhibited little interest in attending hearings. This strongly suggests that the need for arbitral proceedings to be transparent is not as important as what some transparency advocates sometimes claim. Moreover, critics have argued that public hearings do not equate to transparency as the non-legally trained audience “would not understand the procedural technical nuances or the legal reasoning and conflict of laws issues”. There are better means of inspiring greater confidence in the field than via the introduction of open proceedings which comes at the expense of much valued confidentiality.

III. Greater transparency of arbitral panels is desirable

Currently, there is a dearth of resources which provide parties with information about the qualifications and performance of arbitral panels. This opacity is unsatisfactory. It is suggested that greater transparency of arbitral panels is desirable.

First, greater transparency of arbitral panels will allow parties to make more informed appointments. Apart from information regarding the academic and professional qualifications of arbitrators, it would be beneficial for parties to have access to a greater amount of information about an arbitrator’s perceived work ethos, efficiency, and case expertise. More recently, there has even been a suggestion for arbitrators to reveal their caseload so that parties can appoint an arbitrator who has a manageable workload. A greater amount of information about the arbitral panel is likely desirable as it would empower parties to make informed appointments.

Second, the provision of greater information about arbitral panels is likely to raise the level of accountability involved in arbitrations. Accountability is especially important for arbitrators as they exercise a quasi-judicial function. Like judges, arbitrators are given the power to decide on the potential fate of parties that appear before them. However, unlike judges, arbitrators are protected by a great deal of opacity since their work is not likely to be published. Arbitrators are also not required to take a judicial oath nor are they appointed via a rigorous appointment process. An opaque system would allow ineffective arbitrators to thrive. On the other hand, the introduction of a simple feedback system and some yardstick for users to rate the performance of arbitrators is likely to shed some light on an arbitrator’s performance and raise his/her levels of accountability. This is likely to pressure arbitrators to deliver well-reasoned decisions which they can be held accountable for. Greater transparency is likely beneficial as it would raise the level of accountability of arbitrators.

Third, it is not difficult to collate feedback on arbitral performance. Currently, SIAC has a feedback form and the Hong Kong International Arbitration Centre (HKIAC) has an arbitration evaluation system. The implementation and collation of arbitrator feedback is likely to be a cost-effective means of

17 Meg Kinnear has observed, “[i]n reality, few people attend these hearings (perhaps a reflection of how technical and dry proceedings can be!)”. See http://www.oecd.org/dataoecd/6/25/36979626.pdf (accessed 1 May 2017).
19 Supra n 5 at p7.
21 Supra 7 at [43].
22 Speech delivered by ex-Chief Justice Geoffrey Ma at the Chartered Institute of Arbitrators Centenary Celebration, Hong Kong (20 March 2015), titled “Arbitration and the Rule of Law” at [6].
providing parties with greater information regarding arbitrator performance. A detailed questionnaire can simply be drafted by arbitral institutions with feedback from the public.Whilst these systems may not be perfect, the process of gathering feedback would give the public another means of differentiating arbitrators during appointments. Arbitrators would also be able to identify areas in their work which they can work on improving. This will in turn raise the quality of arbitrators and improve international commercial arbitration as a whole. Greater transparency of arbitral panels would shed light on the performance of arbitrators and this is likely to be beneficial for international commercial arbitration.

Conclusion

In conclusion, greater transparency is beneficial in some areas of international commercial arbitration that are currently shrouded in opacity. In this regard, it is suggested that more systems should embrace greater transparency through the publication of arbitral decisions and through the provision of greater information about the qualifications and performance of arbitrators. At the same time, it is important to note that greater transparency is not beneficial in every aspect of international commercial arbitration. Sometimes, there are genuine reasons which support continued confidentiality. One such area is the practice of keeping arbitral proceedings private. “Sunlight is said to be the best of disinfectants”. It is encouraging that many are contemplating greater transparency in international commercial arbitration. Nevertheless, proponents of such change should always be reminded that whilst “sunlight is the best of disinfectants, it can also burn”.

26 Supra n 7 at [22].