Enforcing foreign awards in Indonesia

The ultimate goal of arbitration is to secure an enforceable arbitration award. Arbitration awards are not self-executing in Indonesia as it requires court assistance. This article will provide an overview of the regulatory framework of the enforcement of foreign arbitration awards, and the risks and pitfalls in Indonesia.

There are two key stages in enforcing foreign awards in Indonesia: the registration at the Central Jakarta District Court and an application for an exequatur at the same court.

**Enforcement process**

Indonesian arbitration is governed under the Arbitration Law of 1999 and the New York Convention, as ratified through Presidential Decree No. 34 of 1981. There are two key stages in enforcing foreign awards in Indonesia: the registration at the Central Jakarta District Court and an application for an exequatur at the same court.

**Registration**

Arbitrators or their proxies are the parties who must register an award. The registration normally takes one day if all required documents are complete.

Domestic awards must be registered within 30 days after they are rendered, the failure of which will render them unenforceable. However, this requirement does not apply to foreign awards. This was affirmed by the Supreme Court in *Pertamina v Lirik Petroleum* in 2010. Nonetheless, the winning party should be cautious of judiciary activism in Indonesia. The prudent approach is to register the award immediately to mitigate the risk that the foreign award may somehow be considered as a domestic award.

Generally, awards rendered outside Indonesia are labelled foreign awards (foreign seat arbitration), while awards rendered within Indonesia are labelled domestic awards (domestic seat arbitration). Nonetheless, in *Pertamina v Lirik Petroleum*, the Supreme Court viewed an award as a foreign award because the arbitration was administrated under the ICC rules, although the seat of arbitration was Jakarta.

**Exequatur**

Foreign awards are enforceable in Indonesia only if the winning party obtains an exequatur from the Chairman of the Central Jakarta District Court. If the Republic of Indonesia is a party to the arbitration proceeding, the exequatur is issued by the Supreme Court.

To apply for an exequatur, an applicant must submit: (a) original or authenticated copy of the award; (b) original or authenticated copy of the agreement that is the basis of the award; (c) declaration from the diplomatic envoy of the Republic of Indonesia in the country where the award is rendered, stating that this country is bilaterally and/or multilaterally bound to an agreement with the Republic of Indonesia concerning recognition and enforcement of arbitration awards; and (d) the translations of documents (a) to (c) above (if applicable).

After obtaining an exequatur, the winning party may apply to the competent District Court for a writ of execution if the losing party, after being duly summoned and so requested by the court, does not comply with the award.
Recourse against foreign awards

There are two recourses against an arbitration award: annulment of the award, and refusal to enforce the award.

Annulment

The Arbitration Law does not adopt the Model Law on annulment of arbitration awards.

Under Article 70 of the Arbitration Law, arbitration awards can be annulled if: (a) after the award was rendered, a letter or document submitted in the examination proceedings was admitted as forged or declared as a forgery; (b) after the award was rendered, dispositive documents having been concealed by the opposing party were discovered; or (c) the award was a result of fraud by one of the parties during the arbitration proceedings. The elucidation of Article 70 provides “Reasons for setting aside mentioned in this article must be proven by a court decision. If the court decides that the reasons are proven or are not proven, this court decision can be used by the court as a basis to grant or reject an application.”

The Arbitration Law does not clarify if the annulment applies to both domestic and foreign awards.

Some commentators argue that Article 70 is inoperative. Under Article 71, an annulment application must be submitted within 30 days after the registration at the relevant court, while Article 59 (1) requires the award to be registered at the relevant court within 30 days after it is rendered. This means that the applicant has 60 days at the most to obtain a court decision proving the reasons under Article 70 before submitting an application for annulling the award.

Notwithstanding the foregoing, in PT Padjadjaran Indah Prima v. PT Pembangunan Perumahan [2008], PT SMG Consultants v. Indonesian National Board of Arbitration (BANI) [2012], PT Binasantara Muliatato v. PT Bawana Margatama [2012], PT Nindya Karya v. PT Transfocus [2013] and PT Bank Permata v. PT Nikko Securities Indonesia [2013], the Supreme Court in has consistently argued that an applicant must obtain a court decision before submitting an application for annulling an award.

Furthermore, it is also unclear if Article 70 is limitative, i.e. whether one can introduce reasons other than the ones that have been stipulated under Article 70. This is largely due to inconsistent texts between Article 70 and the general elucidation of the Arbitration Law. While Article 70 is seemingly exhaustive, the general elucidation of the Arbitration Law suggests otherwise as it potentially opens the room for other reasons for annulling an award. The Supreme Court on several occasions has failed to provide consistent guidance here. In PT Padjadjaran Indah Prima v. PT Pembangunan Rumah [2008], as further upheld in PT Cipta Kридatama v. Indonesian National Board of Arbitration (BANI) [2011] and PT Sumi Asih v. Vinmar Overseas Ltd [2012], the Supreme Court argued that Article 70 is limitative. However in Comarindo Express Tama Tour & Travel v. Yemen Airways [2005], the Supreme Court annulled a BANI award because of the absence of a valid arbitration agreement. The same was also applied in PT Royal Industries Indonesia v. PT Identrust Security International, et al [2013].

On 11 November 2014, the Indonesian Constitutional Court issued Decision No. 15/PUU-XII/2014 to invalidate the elucidation of Article 70 of the Arbitration Law, on the basis that it is unconstitutional. It argued that the elucidation of Article 70 has created legal uncertainty, particularly on whether a court decision proving one of the reasons under Article 70 has been fulfilled is needed to annul an arbitration award.

While the Constitutional Court decision confirms that one can commence an annulment process without a court decision, it is still unclear if the Indonesian courts will allow the applicant to introduce reasons other than the ones provided under Article 70 to annul an arbitration award.

Foreign award is not subject to annulment?

Generally, Indonesian courts cannot hear any application for annulling foreign awards. One of the landmark decisions on this is the 2007 Supreme Court decision in Perusahaan Pertambangan Minyak dan Gas Bumi Negara (Pertamina) v. Karohu Bodos Company LLC. In this case, Pertamina submitted an annulment application of an arbitration award rendered in Geneva under the UNCITRAL Arbitration Rules. Pertamina was successful at the district court level, but this was later overturned by the Supreme Court in the cassation and civil process.

In PT Bungo Raya Nusantara v. PT Jambi Resources Limited [2010], the Supreme Court upheld the above decision. In that case, Bungo submitted an annulment application of SIAC award to the court. The Supreme Court later dismissed Bungo’s application.

Refusal to enforce the award

Under Presidential Decree No. 34 of 1981, Indonesia will apply the New York Convention based on the “reciprocity principle”, i.e. an award is enforceable if the issuing State is a party to the New York Convention.

Furthermore, an award is enforceable if the subject of the dispute arises out of legal relationships, either contractual or otherwise, which are considered as commercial under Indonesian law. Under the Arbitration Law, commercial sector includes the following areas: (a) commerce; (b) banking; (c) finance; (d) capital investment; (e) industry; and (f) intellectual property rights.

While the Constitutional Court decision confirms that one can commence an annulment process without a court decision, it is still unclear if the Indonesian courts will allow the applicant to introduce reasons other than the ones provided under Article 70 to annul an arbitration award.
Additionally, an award is enforceable if it does not contravene Indonesian public policy, which is the only reason of refusal under the New York Convention adopted by Indonesia. The Arbitration Law does not specifically define matters contravening public policy. In the absence of clear statutory guideline, it would not be surprising if parties can introduce new grounds under the pretext of public policy to challenge foreign awards in Indonesia.

The most recent case regarding the interpretation of public policy is *Astro Nusantara International B.V. (Astro) v. PT Ayunda Prima Mitra (Ayunda)* concerning the enforcement of an SIAC award granting an anti-suit injunction. Under the award, Ayunda was ordered not to continue its litigation proceedings against Astro at the South Jakarta District Court, particularly because the subject matter of the dispute fell under the arbitration clause.

Ayunda, however, refused to comply with the award, as the South Jakarta District Court had asserted jurisdiction over Ayunda’s case against Astro. Responding to this, Astro lodged an application for an exequatur to the court, but was unsuccessful. The court held that the award violated the sovereignty of the Republic of Indonesia because it intervened the state’s judicial process, although the award essentially compelled Ayunda to adhere to the arbitration clause. The Supreme Court also accepted this reasoning.

### The Emergency Arbitrator and Expedited Procedure in SIAC: A New Direction for Arbitration in Asia

In July 2010, the new SIAC Rules were promulgated which provided for two new and innovative provisions for parties: the emergency arbitrator and the expedited procedure. Both procedures have proven remarkably successful in providing parties with alternative means to obtain immediate relief and reduce time and costs in the resolution of their dispute.

**Emergency Arbitrator**

The emergency arbitrator provisions were introduced in the SIAC Rules in order to address situations where a party is in need of emergency interim relief before a Tribunal is constituted. SIAC was the first international arbitral institution based in Asia to introduce emergency arbitrator provisions in its arbitration rules.

On average, an emergency arbitrator takes about 8 to 10 days to render its award / order after having heard the parties. However it is not uncommon to see an emergency award / order passed in as little as 2 days in certain cases.

Since the introduction of the emergency arbitrator provisions and until 31 December 2014, a record number of 42 applications have been filed with SIAC. Of these, 24 applications were granted by the emergency arbitrator (four by consent and four in part) and 14 were rejected. No orders were made in four applications as the applications were withdrawn.

In 2014 alone, of the 197 cases administered by SIAC, 12 requests for the appointment of an emergency arbitrator were received. The applications were received predominantly from Singaporean parties (6 applications) and Indian parties (3 applications). All applications were accepted by the President of the Court of Arbitration and emergency arbitrators were appointed in all 12 applications.

Cases in which applications for emergency relief were filed arose from a broad range of sectors, including shipping, distribution agreements, corporate joint ventures, international trade, general commercial agreements and construction disputes.

The types of relief sought included preservation orders, freezing orders, orders permitting access to inspect a property, Mareva injunctions and general injunctive relief.

A counter-application filed by one of the parties to a SIAC arbitration presented novel questions to the Court of Arbitration. In one case, SIAC received an application for the appointment of an emergency arbitrator from the claimant. The President accepted the application and appointed an emergency arbitrator in respect of the claimant’s application. The day after the emergency arbitrator’s appointment, the respondent also filed an application for the appointment of an emergency arbitrator and alleged that they, too, are entitled to emergency relief prior to the constitution of the tribunal. The President decided to accept the counter-application and decided that the same emergency arbitrator should be appointed in respect of the counter-application. The emergency arbitrator thereafter heard the applications together, but issued separate interim awards in respect of each.

On average, an emergency arbitrator takes about 8 to 10 days to render its award / order after having heard the parties. However it is not uncommon to see an emergency award / order passed in as little as 2 days in certain cases.
Orders and awards issued by emergency arbitrators have been voluntarily complied with in most instances. They have also been effectively enforced as, for example, in *HSBC PI Holdings (Mauritius) Ltd v Avitel Post Studioz Ltd and others* [2014], where the Bombay High Court, in the exercise of its jurisdiction to grant interim measures of protection, directed relief in terms of the emergency arbitrator awards.

Awards issued by emergency arbitrators are enforceable under Singapore law. Singapore’s international Arbitration Act was amended in 2012 to provide for the enforceability of the awards and orders issued by emergency arbitrators in Singapore-seated arbitrations and also arbitrations seated outside Singapore. This made Singapore the first jurisdiction globally to adopt legislation for the enforceability of such awards and orders in Singapore.

**Expedited Procedure**

The second innovative element introduced in the 2010 SIAC Rules was the expedited procedure. The expedited procedure was a time and cost saving option available in appropriate cases to parties who agree to refer their disputes to arbitration under the SIAC Rules.

Under the SIAC Rules, a party may make an application for the expedited procedure prior to the full constitution of the Tribunal (a) where the amount in dispute does not exceed SGD 5,000,000, (b) where the parties so agree, or (c) in cases of exceptional urgency.

The President of the Court of Arbitration thereafter determines, after considering the views of the parties, whether to accept the application.

If the President decides to accept the application, the case shall be referred to a sole arbitrator unless the President determines otherwise, and the award shall be made within six months from the constitution of the tribunal, unless the Registrar extends the time in exceptional circumstances.

Since its introduction in 2010, the expedited procedure has proved to be quite popular with parties. As of 31 December 2014, SIAC has received a total of 159 applications, of which 107 requests were granted. In 2014, SIAC received 44 requests and accepted 23.

In *AQZ v. ARA* [2015] SGHC 49, the Singapore High Court recently upheld an award issued under the expedited procedure.

In dismissing the application to set aside the award, the High Court found that the SIAC Rules 2010 applied to the proceedings on the basis of the presumption that reference to rules in an arbitration clause refers to those rules in force at the date of the commencement of the arbitration, provided that they contain mainly procedural provisions. Here, the arbitration was commenced when the SIAC Rules 2010 were in force, and the plaintiff has not contended that the SIAC Rules 2010 contained mainly substantive provisions.

The High Court ruled further that the expedited procedure in the SIAC Rules 2010 can override the parties’ agreement for arbitration before three arbitrators even if the contract was entered into before 1 July 2010. The High Court stated that “[a] commercially sensible approach to interpreting the parties’ arbitration agreement would be to recognise that the SIAC President [has] the discretion to appoint a sole arbitrator. Otherwise, regardless of the complexity of the dispute or the quantum involved, a sole arbitrator can never be appointed to hear the dispute notwithstanding the incorporation of the SIAC Rules 2010 which provide for the tribunal to be constituted by a sole arbitration when the expedited procedure is invoked.”

Undoubtedly, the availability of emergency relief and the expedited procedure is a welcome and effective alternative to parties who are seeking interim relief, who may be hesitant to navigate the uncertain or unknown terrain of local courts of other jurisdictions, as well as those looking to cut costs in terms of time and money. Instead, SIAC’s emergency arbitrator and expedited procedure provisions provide parties with a swift and efficient means to obtain immediate and enforceable relief within the neutral, confidential, and cost-effective environment of international arbitration.
INTERVIEW

with Tan Ai Leen

Interviewers: Simon Dunbar, Melissa Thng

What is your favourite restaurant or type of food?

TAL: Anything local. I don’t really like restaurants and I prefer hawker centres like Old Airport Road. There is a good seafood stall there (though I cannot remember the name, we just head there by default), a stall selling durian pastries, the soursop juice stall, the wanton mee1 stall, the Whitley Road big prawn noodle stall. If I want a treat, I can get some Lau Fu Zi char kway teow.2 I also like the Redhill market near my home. There is a very good herbal soup stall, an authentic xiao long bao3 stall and a very nice black sauce char siew4 wanton mee stall. Generally, I love good Penang food and am always on the lookout for authentic assam laksa5 and bak kut teh (the black, herbal kind). 6

What do you most like to do in your free time?

TAL: I love cooking and eating. It is a passion I share with my husband and we often cook together at home, and recently our children have started to pick up the same hobby! My husband and I also share a food blog, where we share our recipes (which mostly come out of “reverse engineering” our favourite dishes). Our latest project is perfecting the herbal version of bak kut teh – but everything depends on the herbal mix. Every Chinese herbal shop has its own trade secrets – so right now we are trying to decipher what all the individual herbs are.

A fun fact about our food blog is that we get quite an international readership, particularly from the USA. I suppose we take for granted that good local food is so easily accessible here – people elsewhere have no

but to try and make it themselves! We have also found that we get the most hits from our confinement food7 recipes like pig’s trotters with black vinegar or anything confinement food related.

Do you have a skill or talent which is not well known?

TAL: I like to draw. When I was younger I would always volunteer to do the illustrations for hall bulletins, newsletters, etc. or draw my own comic strips! I find it to be very therapeutic and peaceful, especially when you are doing it by yourself.

What is your favourite childhood memory?

TAL: I come from a very unusual family and I have a lot of fond memories growing up. One of my fondest memories is of playing with my cousins who were from Kuala Kubu Bahru, we would visit them and go and find some waterfall to play in the whole day. We also spent a lot of time in Templer’s Park off Kuala Lumpur. This would be every month or so, we would have a huge family outing and go eat amazing Indian food. It was so simple and carefree.

How did you first get involved in international arbitration?

TAL: Completely by accident, actually. When I was a pupil, my boss just happened to ask if I was free to take notes in an arbitration which he was involved in. I happened to be free and that’s how it started.

What do you like to do in your free time? I love cooking and eating. It is a passion I share with my husband and we often cook together at home, and recently our children have started to pick up the same hobby! My husband and I also share a food blog, where we share our recipes.

– Tan Ai Leen

1Wanton mee or wonton noodles is a Cantonese noodle dish which is popular in Guangzhou, Hong Kong, Malaysia, Singapore and Thailand.

2Char kway teow, literally “stir-fried ricecake strips”, is a popular noodle dish in Malaysia, Singapore, Brunei and Indonesia. The dish is considered a national favourite in Malaysia and Singapore. It is made from flat rice noodles, stir-fried over very high heat with light and dark soy sauce, chili, a small quantity of belachan, whole prawns, deshelled blood cockles, bean sprouts and chopped Chinese chives. The dish is commonly stir-fried with egg, slices of Chinese sausage and fishcake, and less commonly with other ingredients.

3Xiao long bao is a type of steamed bun (baozi) from the Jiangnan region of China. They are considered a kind of “soup dumpling”.

4Char siew is a popular way to flavor and prepare barbecued pork in Cantonese cuisine.

5Assam laksa is a sour, fish-based soup. The main ingredients for assam laksa include shredded fish, normally kembung fish or mackerel, and finely sliced vegetables including cucumber, onions, red chillies, pineapple, lettuce, common mint, Vietnamese mint or laksa mint, and pink bunga kantan (torch ginger). Assam laksa is normally served with either thick rice noodles or thin rice noodles (vermicelli).

6Bak-kut-teh is a Chinese soup popularly served in Malaysia and Singapore. The name literally translates as “meat bone tea”, and, at its simplest, consists of meaty pork ribs simmered in a complex broth of herbs and spices.

7Confinement food is often served to new mothers who are recuperating from childbirth in order to replenish their energy.
I was also asked to work on one of the very first international SIAC cases in 1997 and it was very exciting. This was my first experience with international arbitration and it was my first time dealing with a case governed by a different law, I think it was New York law, and it got me interested in international arbitration and the different styles of lawyering involved.

As a personal preference, I preferred arbitration to court work because I felt that you could move to the substance of the case very quickly.

**Who do you consider to be your mentor(s)?**

**TAL:** Everyone. I truly believe you learn something from everyone you work with – old or young, good or bad. Every experience is a learning one.

I do however especially appreciate what my bosses over the years have done for me. Now that I am a more senior lawyer myself and the shoe is on the other foot, I can really appreciate the time, effort and patience they spent teaching me the basics and guiding me along in the early years of my practice.

**Do you think it is better for young lawyers to spend time learning the basics of everything or specialise early?**

**TAL:** Well, I got into arbitration by accident so I do not necessarily believe early specialisation is the best way to go. Young lawyers nowadays are more certain about what they want and where they are going. I have seen many of them who have a plan for their careers and have taken concrete steps by way of internships and other initiatives to break into that specialization. Their drive is very impressive and I think it is good if they know what they want but it is not for everybody.

When I was in university, I thought that I would practise intellectual property law. It was kind of natural as I loved art and writing, and I thought it was right up my alley. It is good to keep an open mind because sometimes you never know that you will love something until you try it.

What eventually attracted me to litigation/dispute work was the human element of it all. There is a story behind every case and in order to do it well you need to understand people, their psychology and how people function.

My advice for young lawyers: You can plan all you want but life takes over. You may have a family to think about and there are so many other variables that can affect your initial plan. Try everything, work really hard and like what you are doing – then it will work out. Maybe it is even better to try everything, but don’t force yourself to do anything you do not like too long while you’re at it – that’s probably more accurate too.

**If not a lawyer, what would you like to be?**

**TAL:** A comedy writer for Saturday Night Live. I have been picking up autobiographies of Tina Fey and Amy Poehler recently and it’s probably an attempt to live vicariously. I really like what they do for a living - it’s creative and intellectual.

If you were to ask me “who” I would like to be, the answer would be Kristen Wiig. She is so versatile that she can be anybody – and she writes those skits too.

**What is a regular day as the SIAC Registrar like?**

**TAL:** There is no regular day – every day is a surprise! There are so many cases - each with different types of issues that require the Secretariat’s attention. The issues raised can range from matters of costs, legal issues, preparing briefings to the President of the Court, etc.. Whatever the issue, it always goes through me or my Deputy so I kind of know what is going on generally on the cases – but we do deal with many cases due to our heavy caseload so we have to decide and move on to the next one in the course of the day.

Preparing briefing notes for the Court is especially challenging. The Court consists of some of the most brilliant – and the busiest – people in international arbitration. The counsel have to be able to condense all the relevant information and law into a brief for them. For my part, I oversee everything and that is why I make it a point to ensure that I get good, experienced people to work as counsel at the SIAC.

**There seems to be a fairly high turnover of personnel within the SIAC. Is this a problem or is it intentional?**

**TAL:** It is intentional as most of our lawyers come in for a 2-3 year term before moving on. Many people see the SIAC as a stepping stone before moving on to prestigious jobs at well-regarded law firms internationally.
On our part, we do not see the regular turnover as a negative. In fact, it is conducive to change as the constant influx of new blood means new networks are being developed by the SIAC. Also, as I said before, most of our alumni join top law firms and this facilitates the building or strengthening of ties between the SIAC and the legal community. Many of our alumni are now based overseas and so this really helps us to grow our international network.

I strongly encourage young lawyers who are interested in arbitration to consider joining us for a year or two if they can. I think many lawyers would find it quite eye-opening to see what goes on behind the scenes at an institution and how it thinks and functions. We are also incredibly nice to work with and a very close team.

Can you give us a little insight into how things are managed at the SIAC?

TAL: Well, we have the case management team which manages all the cases we have day-to-day. I oversee their work. We also have a finance team that works closely with the case management team on the cases as they form two halves of the core product. We also have a business development arm which is in charge of marketing and publicity.

The Court oversees all matters relating to the application of the SIAC Rules. If we need to consult the Court on matters relating to the Rules or the Practice Notes, or matters of arbitration law, the Secretariat will usually prepare a briefing note for a committee of the Court. It is quite illuminating to draw on their experience and you find that everyone can have a very interesting and different view of matters.

At the end of the day, we are always concerned about ensuring enforceability of our awards. Everything we do is geared with that goal in mind. The institutional mindset is very different from private practice. In private practice, lawyers are generally able to proceed on the basis of their client’s instructions and can run with an argument as long as they have the legal basis to do so. It is different when you sit in the institution because you need to ensure that your decisions are as correct as can be based on the available information on each case at that time. There is very little risk that you can take because that decision would affect not only the present case but other cases moving forward.

What kind of movies/shows do you like to watch? What was the last movie you watched at the cinema?

TAL: Anything. I love watching movies and the most recent movie I watched was just last night – Tomorrowland. But, the best movie I watched this year was Kingsman: The Secret Service. It was unexpected and clever and I really enjoyed it. I generally love anything with Michael Caine, whether he is playing the (spoiler alert) bad guy or a lonely vigilante.

You have worked in private practice and in-house; how does working as SIAC Registrar compare?

TAL: It is different. But I think having a background in both private practice and as an in-house lawyer really helps because those roles are focused on different things. As a lawyer in private practice, you are in the business of arguing cases. As in-house counsel, you operate more as a control function. Your job is to identify risks ahead of time and manage those risks. An in-house role requires more management knowledge and expertise and communications with various stakeholders in the company. After having been in-house, I can really
understand how having a dispute can be regarded by a user as one of the most disruptive things that can happen to a business unit which is trying to focus its limited time and resources on generating revenue (aside from those industries where dealing with disputes is a routine part of doing business).

It is important therefore that users can have faith and trust that all parts of the dispute resolution process (counsel, institution, tribunal) will work effectively and efficiently to resolve the dispute. The goal for dispute resolution providers must be to make the process as smooth and painless as possible for all participants so that they will be repeat customers. In some ways I think the best thing an institution can do is to be “seen and not heard” – too much. It should be present and functioning but should operate like a well-oiled machine in the background, allowing parties, counsel and arbitrators to get on with resolving the dispute.

From an institutional perspective, what traits do you look for in an arbitrator or potential arbitrator?

TAL: I actually did a quick survey with my team on this before the interview. Our collective view is that we look for the following traits in the following order of importance (although, ideally you would find all three): (1) Good; (2) Fast; and (3) Courteous.

By “Good” we are referring to the quality of the award and the decision-making during the arbitration, the ability to focus on what needs to be done, marshalling the proceedings and building consensus within the Tribunal.

By “Fast”, we are referring to the time taken to produce the award. The availability of arbitrators and their willingness to devote enough time to the arbitration are also key factors.

Finally, we say “Courteous” because it is important that SIAC arbitrators are professional, courteous and respectful to everyone involved in the process.

What do you see as the biggest challenges and opportunities currently facing international arbitration?

TAL: I think the biggest challenge is managing the perception of international arbitration. As arbitrations are necessarily confidential, it is difficult to highlight and promote the successes. But the failures manage to come to the surface more easily – through challenges to awards or remarks made at conferences. As a result, we hear a lot about the problems of international arbitration but very little about the benefits.

In terms of opportunities, I think there are still plenty of opportunities for international arbitration to grow. It is, in my view, the main dispute resolution product which works in the context of cross-border disputes with parties from different legal and cultural backgrounds.

Do you think there is a future for arbitration given the criticisms of length and cost and the introduction of the SICC and SIMC?

TAL: I don’t see either the SICC or the SIMC as a threat to arbitration. They are very different creatures altogether, although I must say that SIAC has a very close working relationship with SIMC. Arbitration and mediation do and should work hand-in-hand to provide parties with an overall dispute resolution solution. The SICC is meant to appeal to a different market – parties who want a court-based resolution of their international disputes but who were previously taking those disputes to other courts. I think it is good that Singapore offers all three alternatives under one roof.

With the growing convergence among rules and institutional practices, is there a risk that institutions become indistinguishable?

TAL: Definitely not – never! Although there may be similarities in the rules, I think of each institution as having its own individual personality. SIAC has always been doing things in its own way. When we look at potential developments or rule changes we consider whether they will be suitable for us and for our markets, and in making that assessment, our overriding concern is to ensure the enforceability of awards.

On some developments, I think we have definitely been one of the first to introduce them in the region. For example, since the introduction of the Emergency Arbitrator mechanism in 2010, given the number of Emergency Arbitrator proceedings we have administered, we have developed a substantial body of internal precedents, as well as case law. We are also developing a pool of experienced Emergency Arbitrators – that’s a natural thing.

The depth of experience among the SIAC Court members has also been instrumental in guiding the development of our rules, practice notes and internal processes. I think one important strength of the SIAC is that we are not afraid to make decisions that are in the longer-term interest of ensuring enforceable awards.

"Biggest challenges currently facing international arbitration? …I think the biggest challenge is managing the perception of international arbitration. Because arbitrations are necessarily confidential, it is difficult to highlight and promote the successes.

- Tan Ai Leen"
What are your pet peeves when dealing with counsel? Or what are the common complaints?

TAL: There are two pet peeves in particular that came to mind: (1) when counsel call us to ask for legal advice (which we are not in a position to provide); and (2) what we call “forum shopping” among different members of the Secretariat (it doesn’t work, see very close team comments earlier).

If you could give one tip to counsel when dealing with institutions, what would it be?

TAL: Be courteous – to everyone, especially the receptionist who is usually a very well-loved person in the institution. We have some particular cases where callers have been rude to our support staff and that’s pretty unacceptable. I feel that courtesy and professionalism go a long way, particularly in the relative small international arbitration community and the even smaller circle of front-line employees in institutions.

Given the success of the Expedited Procedure and Emergency Arbitrator rules, are there any interesting things the SIAC is working on now to improve the administration of cases?

TAL: Sorry – I can’t give any previews! But I would say that we are working to refine our procedures every day. Almost every refinement to our internal procedures, our practice notes and ultimately our rules comes out of issues that we are facing on a day-to-day basis in live cases.

Do you think parties have access to enough information about the quality and suitability of arbitrators? Is there more that institutions can do to improve this?

TAL: I don’t think they do. This is mostly because of sensitivity surrounding saying anything negative about a particular arbitrator. At the same time, one possibility is for counsel and users to share their good experience with a particular arbitrator. Ultimately, parties will have to be guided by experienced counsel.

I am not sure it would be appropriate for institutions to do more than we already do by maintaining a panel of arbitrators which are considered, vetted, and reviewed periodically.

Can and should institutions do more to promote diversity in arbitral tribunals? What more can or should be done? Would an alternative appointment mechanism help?

TAL: I think we have to be careful when considering diversity. While diversity is a good thing, it should not come at the expense of merit (our good, fast and courteous categories). It also depends on what you mean by diversity, if you are talking about the question of whether there should be more women on arbitral tribunals, as a woman, I would feel really sad if I was appointed just because I’m a woman; I would want to be appointed because of my ability. I think growing the pool of potential arbitrators is one way we encourage greater diversity. As an institution, we are always open to considering new talent as potential arbitrators. I think it is important that we look not only at maintaining a strong panel of leading arbitrators but that we also look to develop the next generation of arbitration talent, particularly from this region, who will be the leading arbitrators of the future.

Is there a risk that institutions become indistinguishable?

…since the introduction of the Emergency Arbitrator mechanism in 2010, given the number of Emergency Arbitrator proceedings we have administered, we have developed a substantial body of internal precedents, as well as case law. We are also developing a pool of experienced Emergency Arbitrators – that’s a natural thing.

- Tan Ai Leen
The Sixth Circuit Court of Appeals recently ordered a fund management committee (‘SBC’) to arbitrate its dispute with Navistar International (‘Navistar’) – at Navistar’s request – despite the fact that Navistar refused SBC’s own request for arbitration, ignored SBC’s formal notice of arbitration, and then litigated SBC’s claim in court for over a year (Art Shy v Navistar International Corporation, 781 F.3d 820, 2005).

This decision confirms the uncertain state of U.S. law regarding waiving the right to arbitrate. The Federal Arbitration Act (‘FAA’) provides that a court shall stay a court action commenced in the face of a valid arbitration agreement provided that “the applicant for the stay is not in default in proceeding with such arbitration” (9 U.S.C. § 3).

The majority of U.S. circuit courts interpret the FAA as requiring that the party seeking to compel arbitration must not have caused its opponent “prejudice.” This most commonly arises in the form of undue cost or delay. Yet the amount of prejudice required differs greatly from circuit to circuit. The Sixth Circuit’s decision in Art Shy illustrates the difficulties in applying the prejudice standard, and raises the question of whether arbitration waiver should require prejudice at all.

A dispute over data

The dispute between SBC and Navistar arose in 2009 over data provided by Navistar to SBC under an agreement that contained an arbitration clause (‘the Agreement’). Negotiations continued until August 2009 when SBC first requested that Navistar engage in arbitration to resolve the dispute. Navistar demurred, causing SBC to send a formal notice of dispute to Navistar in May 2010. Navistar did not respond. Further requests for information from SBC, and objections by Navistar continued throughout 2011.

By March 2012 SBC had decided to resort to litigation. It sought to intervene in on-going litigation against Navistar in the District Court for the Southern District of Ohio. This litigation had been commenced by the beneficiaries of the fund that SBC managed. SBC’s motion to intervene alleged that Navistar had withheld data that SBC was entitled to under the Agreement. Navistar resisted SBC’s motion, arguing that SBC should commence an independent action. The District Court allowed SBC’s intervention in February 2013, and SBC duly filed its complaint soon thereafter.

In March 2013 Navistar filed its response to SBC’s complaint. The response obliquely referred to the Agreement’s dispute resolution clause. It did not, however, mention the word ‘arbitration,’ nor did it allege that the clause was binding. The District Court duly rejected Navistar’s arguments, ordering Navistar to provide the information that SBC sought. In light of the information received from Navistar, SBC amended its complaint in August 2013. Navistar then moved to dismiss the amended complaint on the grounds that it was subject to the Agreement’s arbitration clause.

In March 2014 the District Court found that Navistar had waived its right to arbitrate under the Agreement through its behaviour before and during the litigation. Specifically, the District Court emphasised that Navistar had ignored SBC’s initial request for arbitration; failed to respond to SBC’s formal dispute notice; and failed to raise arbitration as a defence to SBC’s motion to intervene. Navistar appealed.

The Sixth Circuit, which covers Michigan, Ohio, Kentucky and Tennessee, allowed Navistar’s appeal. The majority held that none of Navistar’s actions, taken individually or as a whole, amounted to waiver of its right to arbitrate under the Agreement.

Addressing the District Court’s concerns, the majority explained Navistar’s silence in respect of SBC’s request for arbitration, and subsequent formal notice of dispute, was a mere litigation strategy: an attempt to “stare down” SBC. To the extent that Navistar’s delay caused prejudice to SBC, the majority found that SBC was at least partly to blame, reasoning that SBC should have sought a court order compelling Navistar to arbitrate.
Conclusion

The Art Shy decision demonstrates that even proactive plaintiffs who raise arbitration at an early stage cannot always avoid a subsequent, mid-litigation change of forum. More generally, the decision illustrates how the prejudice standard creates uncertainty and hinders arbitration. For these reasons, it should be discarded.

Should waiver require prejudice?

The decision in Art Shy raises many issues about the application of the prejudice standard. Most notably, the majority failed to consider at all the prejudicial effect on SBC of Navistar’s failure to raise arbitration in a timely manner; namely, three additional procedural skirmishes and a delay of 16 months. If this delay and expense did not sufficiently prejudice SBC so as to amount to waiver by Navistar, it is difficult to imagine the level of prejudice that would. Yet, despite the flaws in this decision, the bigger question remains whether waiver should require prejudice at all.

Increasing the requirements for a party to waive its right to arbitrate may be viewed as supportive of arbitration in the United States. But reading extra requirements, such as prejudice, into the FAA does not support arbitration. Rather, it creates uncertainty that is anathema to the efficient resolution of disputes.

First, the prejudice requirement encourages parties to try to litigate disputes first. If the litigation does not appear to be going their way, they can then resort to arbitration. This reinforces out-dated notions of arbitration as a subsidiary form of dispute resolution, to be used only when litigation is not possible or not desirable. Further, if an opposing party challenges recourse to arbitration, the varying prejudice standards applied across (and within) U.S. circuit courts give parties ample grounds on which to allege waiver.

Second, the prejudice standard imposes systemic costs. The desirability of the U.S. as an arbitral seat is not helped by a non-uniform interpretation of the FAA. Yet introducing a normative requirement such as prejudice into the FAA can only serve to fragment arbitration law across U.S. jurisdictions.

Ultimately, the prospect of waiving their right to arbitrate should compel parties to choose a forum at the earliest possible stage. Allowing a party to participate in litigation until they cause prejudice to an opposing party only serves to create expense and delay for all parties.