Evening Talk with Mr Toby Landau QC

On 31 March 2015, SIAC hosted an evening talk with Mr Toby Landau QC at Baker & McKenzie. Wong & Leow. Mr Landau spoke on the topic “Recent Developments in the Defeat of International Awards”. The oversubscribed event saw 120 attendees being treated to an intriguing evening with Mr Landau.

Mr Landau explored recent developments in leading jurisdictions where the defeat of international arbitral awards could actually be seen as truly pro-arbitration, contrary to widespread criticism. For starters, he described the common perception of the term “pro-arbitration” as self-evident events of national courts recognising and enforcing arbitral awards, or refusing to set aside awards. He opined that “pro-arbitration” as a nomenclature should not be used to mask the fundamental premise that courts cannot always refuse to set aside arbitral awards and cannot always recognize and enforce arbitral awards.

The architecture of the New York Convention and the Model Law is premised on a limited range of fundamental safeguards. The range is so limited that Articles II and V of the Convention and Articles 35 and 36 of the Model Law must be understood to be the “irreducible minimum”. In particular, one fundamental safeguard in the system is the de novo standard of review of an arbitral award on the issue of jurisdiction.

Mr Landau observed that national courts have elevated the “pro-arbitration” policy to a question of law and in some instances the court’s refusal to set aside arbitral awards or to recognise and enforce arbitral awards is immediately branded as “anti-arbitration”. Clear anti-arbitration cases where courts have presumably gone on the wrong side are typically the product of tactics used by lawyers to evade arbitration. Examples include: (a) party ignores arbitration agreement and litigates but court refuses to stay court proceedings; (b) court finds an incorrect application of the governing law to be in breach of public policy, e.g. ONGC v Saw Pipes; (c) court grants anti-arbitration injunction despite clear arbitration agreement e.g. Hubco v WAPDA; and (d) courts hearing a public interest writ petition filed by a third party on the subject of an arbitration.

Against this backdrop, Mr Landau examined three cases, namely, the English Supreme Court decision in Dallah v Pakistan (cf French court decision), the Singapore Court of Appeal decision in PT First Media v Astro (cf Hong Kong first instance court decision), and the Singapore High Court decision in Laos v Sanum, where he opined that the defeat of arbitral awards were in fact pro-arbitration. In these cases, the courts implemented the essential safeguard in the system of arbitration by conducting a de novo review of the arbitral award on jurisdiction. The result of the review per se is not as important as getting the process of review right. Reference to the arbitral tribunal is also irrelevant and misses the point. Regardless of how esteemed the tribunal may be, it has no mandate without consent. Mr Landau emphasised that it is unprincipled to say that it is wrong to undertake an unwinding of the arbitral process to find consent, and it is mere confusion to say that such cases which defeat arbitral awards are necessarily anti-arbitration.

To conclude, Mr Landau cautioned that the system of arbitration demands checks and balances. If the essential fundamental safeguards are not operating properly, to quote Irving Berlin “there may be trouble ahead”.

Eunice Chan
Associate, Drew & Napier LLC
for YSIAC

YSIAC Publications Sub-Committee:
Darius Chan,
Simon Dunbar,
Foo Yuel Min,
Jonathan Lim
Melissa Thng

Interview with: Mr Toby Landau QC
Read about:
1. Are all institutional rules now basically the same?
2. The Hidden Amiable Compositeur

[from Left to Right] Chan Leng Sun, Lim Seok Hui, Toby Landau QC, Wong Kien Keong
1 Are all institutional rules now basically the same?

By Jonathan W. Lim
For YSIAC, Kluwer Arbitration Blog

Most institutional rules share a common procedural framework for arbitral proceedings—the origins of which are traceable to the first set of ICC Rules in 1922. This skeletal framework broadly describes the lifecycle of the arbitration, and provides for the order of pleadings, constitution of a tribunal, conduct of proceedings, and making of the award, in a manner that accords parties and arbitrators substantial leeway to tailor the process to their needs.

Certain other features are by now common to virtually all modern institutional rules, whether they are promulgated in Cairo, Vienna or Singapore. Convergence here, as in the field of international arbitration more generally, has seemed inevitable. Most if not all rules contain provisions that guarantee a basic level of fairness to parties or the process; and also provisions that reduce the risk of technical defects that can frustrate proceedings, such as rules on competence-competence or corrections to awards.

That is not to say that all institutional rules are the same. Arbitral institutions are ultimately competitors, both as quasi-regulators and as service providers, and this has driven innovation amongst institutions that have encouraged appreciable differences between rules.

This post maps out, based on a sample of four leading arbitral institutions—the ICC, ICDR, LCIA, and SIAC—some key practical differences between institutional rules, in terms of speed, cost, and professional oversight.

**Need for Speed**

Speed and efficiency have traditionally been regarded as advantages enjoyed by arbitration over national court proceedings. In recent years, however, arbitral proceedings have attracted criticism for more-significant-than-expected expense and delay.

Some of this criticism may not always be justified—but institutions have nevertheless responded with a range of new offerings to address this perception. These include provisions ranging from full expedition of the arbitral process to emergency arbitrator provisions.

Among the institutional rules surveyed, only the ICDR and SIAC Rules contain expedited procedures. The ICDR’s International Expedited Procedures were recently introduced in 2014. They apply either where “no disclosed claim or counterclaim exceeds US$250,000”, or where parties agree to the application (ICDR Rules, Art. 1.4). There is a presumption that cases up to US$100,000 will be decided on documents only, without the need for an oral hearing. Where they apply, the parties get by default, unless agreed otherwise: the expedited appointment of a sole arbitrator within 10 days of ICDR’s transmission of a list of arbitrators, an expedited timetable for pleadings and/or a hearing within 60 days of the arbitrator’s procedural order, and an award within 30 calendar days of the close of hearings/submissions (International Expedited Procedures, Art. E-6-10). This high-speed, truncated process seems appropriate for small and relatively straightforward cases.

The SIAC Expedited Procedure has a potentially wider scope of application. Under the SIAC Rules, at any time before the constitution of the tribunal, any party may apply to the Registrar in writing for the arbitral proceedings to be conducted in accordance with the Expedited Procedure. This is available so long as any one of three criteria is satisfied—that is, where: (a) the aggregate amount in dispute does not exceed SGD$5,000,000; (b) the parties agree; or (c) in cases of “exceptional urgency” (Rule 5.1).

Compared to the ICDR procedure, the SIAC Expedited Procedure provides a greater role for the arbitral institution and tribunal, thus allowing for a more flexible process. The determination as to whether the procedure applies is left to the discretion of the President of the SIAC Court (Rule 5.2). A sole arbitrator is appointed by default, although the President may choose to appoint otherwise. The SIAC Rules do not specify timelines for each stage of the expedited process, besides stipulating that an award needs to be rendered within 6 months of the tribunal’s constitution, and that the Registrar may shorten any time limits under the SIAC Rules. All this leaves the control of arbitral proceedings largely in the hands of the arbitral tribunal, supported by the SIAC as necessary.

The SIAC Expedited Procedure has been around since July 2010, and has been relatively popular with parties. From July 2010 to December 2014, the SIAC received a total of 159 applications, of which 107 requests for the Expedited Procedure were granted. In 2014 alone, the SIAC received 44, and granted 23, applications (Annual Report).

The ICC and LCIA Rules contain no such fast-track procedures. The ICC rules do, however, incorporate procedures that are designed to enhance efficiency, such as its trademark Terms of Reference procedure, and provisions requiring parties and the arbitral tribunal to...
“make every effort to conduct the arbitration in an expeditious and cost-effective manner” (Arts 22.1, 23). The LCIA Rules include provisions allowing for the expedited formation of the arbitral tribunal in a case of “exceptional urgency,” and the expedited appointment of a replacement arbitrator (Arts. 9A, 9C).

Emergency arbitrator provisions allowing parties to obtain interim relief before the constitution of a tribunal are available under all the institutional rules surveyed.

Among the institutions surveyed, the ICDR was the first to introduce the emergency arbitrator provisions (2006), followed by the SIAC (2010), the ICC (2012) and then the LCIA (2014). The ICDR and SIAC have had the most experience. Indeed, as of December 2014, the SIAC has seen 42 applications, with emergency arbitrators appointed in all 42 cases, and interim relief granted in whole or in part in 24 cases (Annual Report).

There are only nuanced differences between the emergency arbitrator provisions, which are otherwise similar. Only the SIAC and ICDR Rules fix a timeframe for appointing of the emergency arbitrator, with the ICDR committing that it “shall appoint” an emergency arbitrator “[w]ithin one business day” (Art. 6.2), and the SIAC Rules providing that the President “shall... seek to appoint” an emergency arbitrator “within one business day” (Schedule 1, para. 2). The LCIA Rules merely state that the LCIA Court “shall determine the application as soon as possible” (Art. 9B), and the ICC Rules provide for an emergency arbitrator to be appointed “within as short a time as possible, normally within two days” (Appendix V, Art. 2).

Costs vary depending on the institution, the size and complexity of the dispute, and whether or not the dispute goes to a hearing.

As for the emergency arbitrator’s decision, the ICDR, LCIA and SIAC Rules provide that this may be either take the form of an “order” or “award,” while the ICC Rules provide that the emergency arbitrator’s decision may only take the form of an “order.”

Counting the Cost

The choice of an arbitral institution has obvious implications on the costs of the arbitration. In addition to the arbitrators’ fees, the costs of an institutional arbitration include the institutions’ administrative fees, filing fees and the costs of any expert or other assistance the tribunal may require.

Institutional rules incorporate different cost structures, and use one of a combination of two methods for calculating and fixing costs: a defined hourly rate; or a rate calculated by reference to the amount in dispute (ad valorem). Costs vary depending on the institution, the size and complexity of the dispute, and whether or not the dispute goes to a hearing.

Under the ICC Rules, the ICC International Court of Arbitration (the “ICC Court”) fixes both the arbitrators’ and the institution’s fees on an ad valorem basis according to a fee scale, or alternatively at the ICC Court’s discretion where the amount is not stated (Art. 37.1, Appendix III, Arts. 2.1, 2.5, 4). The ICC Court has the discretion to depart from the fee scale, but only where it is “deemed necessary due to the exceptional circumstances of the case” (Art. 37.2). Under the ICC Rules, decision-making on the arbitrators’ fees lies exclusively with the ICC Court (Art. 37.3); there is no provision for party agreement to override the ICC Court’s determination on costs.

The SIAC Rules likewise adopt an ad valorem remuneration scheme for the arbitrators’ and the institution’s fees. As a recent survey on Global Arbitration Review demonstrates, the SIAC costs on the ad valorem scale are lower than the ICC’s for any and all amounts in dispute. Also, unlike the ICC Rules, the arbitrators’ fees are calculated ad valorem only by default under the SIAC Rules. There is flexibility for parties to opt out by agreeing to “[a]lternative methods of determining the tribunal’s fees” prior to the constitution of the tribunal (Rule 30.1).

Among the institutional rules surveyed, the LCIA Rules uniquely provide for both the arbitrators’ and the institution’s fees (with the exception of the one-time registration fee) to be determined based on hourly rates, which are capped in the Rules’ Schedule of Arbitration Costs (Art. 28.1). Arbitrators are to agree in writing on their hourly rate before they are appointed by the LCIA Court. The LCIA Rules also provide for a refund of the deposit paid by the parties if the actual arbitration costs are less than the amount of deposit provided (Art. 28.7).

Like the LCIA Rules, the ICDR Rules provide for arbitrators to be compensated on a daily or hourly rate (Art. 35.2). Unlike the LCIA Rules, however, the ICDR Rules do not provide a cap for the hourly rate. Also, the determination of the rate under the ICDR Rules is made after the constitution of the tribunal (Art. 35.2), rather than at the pre-appointment stage under the LCIA Rules. As for the administrative fees, the ICDR adopts an ad valorem system in accordance with its Administrative Fee Schedules, and has two options for claimants and counterclaimants: a standard fee schedule with a two-payment schedule, and a flexible fee schedule, which has a three-payment schedule that offers lower (but non-refundable) initial filing fees but with potentially higher total administrative costs if the case proceeds to hearing.

The ad valorem system adopted by the SIAC and ICC has the advantage of transparency and certainty for the end-user; there is upfront clarity about what the fees would look like for any given arbitration.2

Under the fee schedule, the SIAC caps its administration fees at SG$95,000, where the sum in dispute is above SG$100 million, and caps the arbitrator’s fees at SG$2 million, where the sum in dispute is above SG$500 million. See 2013 SIAC Rules, Schedule of Fees.

One potential downside, however, is that the amount in dispute does not necessarily correlate with the complexity of the dispute, and so the arbitrator and/or institution may be under-compensated in a low-value but complex dispute, or over-compensated in a simple but high-value dispute.
dispute. Institutions such as the SIAC and ICC address this by assessing the actual costs of the arbitration at the end of a case, based on factors such as complexity, number of hearings, the arbitrators’ efficiency and so on (Rule 32.1, 2014 Practice Note, at para. 15). According to the SIAC, actual costs tend to fall within 75%-80% of the initial estimated fee cap based on the sum in dispute, and any excess deposits after this assessment are refunded to parties.

In contrast to the *ad valorem* system, a fixed hourly rate for the arbitrators’ fees, as set by the LCIA or ICDR, may be fairer in compensating arbitrators in relation to the complexity and scale of a case; it may also ultimately be cheaper for parties than *ad valorem* fees in a big case. However, the downsides of an hourly rate are that it may not encourage efficiency on the part of the arbitrators, and that it does not give the parties much upfront certainty about the likely cost of their arbitration.

**Professional Assistance and Oversight**

One of the strengths of institutional arbitration is the access to professionalised supervision by the arbitral institution. The institution is usually staffed by specialised professionals capable of providing valuable input on, and guided by a governing body of experienced practitioners capable of deciding on important issues such as arbitrator challenges, seat selection and so on. Institutions do this in varying degrees.

The ICC’s supervisory role is organized around a professional Secretariat and the ICC Court, with the former staffed by qualified and experienced lawyers who are specialists in the field, and the latter comprising experienced arbitration professionals from all over the world. Under the ICC Rules, awards can only be rendered after they have been scrutinized, for issues of not just form but also substance, and then approved by the ICC Court as to their form (Art. 33). This review and scrutiny process has been cited as a key attraction of ICC arbitration, and is often used to justify the ICC’s higher fees.

The SIAC’s organizational structure is similar to the ICC’s. It has a Court of Arbitration that also comprises leading arbitration professionals from the world over, and an experienced Secretariat with specialist qualified lawyers to manage the administration of cases. Similar to the ICC, under the SIAC Rules, all SIAC awards are scrutinized in draft by the Registrar for issues of both form and substance, and can only be rendered by the tribunal if approved by the Registrar as to their form (Rule 28.2). Under the SIAC Rules, the Registrar manages the formal review and scrutiny process, although the Registrar may, where appropriate, consult the SIAC Court before approving the draft award as to its form (2014 Practice Note, at para. 31). According to the SIAC, timelines for scrutiny are shorter than at the ICC: 2 to 4 weeks for draft final awards, and 2 days in the case of emergency arbitrator orders and awards.

In contrast, the LCIA and ICDR Rules do not expressly contemplate any formal review or scrutiny. However, while not expressly required under their rules, the LCIA and ICDR offer a reduced form of professionalised assistance and oversight. The ICDR’s practice, for instance, is to have a case manager assigned to every case, who would review the award for any clerical, typographical or arithmetical errors, or whether it contains all necessary elements for enforcement, before it is finalized and signed. Similarly, the LCIA Secretariat provides “proofreading” services if required by the arbitral tribunal.

One of the strengths of institutional arbitration is the access to professionalised supervision by the arbitral institution... guided by a governing body of experienced practitioners capable of deciding on important issues such as arbitrator challenges, seat selection and so on. Institutions do this in varying degrees.

**Conclusion**

There are many other differences, besides those mentioned above, between the institutional rules of leading arbitral institutions. These include important innovations such as the Arb-Med-Arb clause developed jointly by the SIAC and the Singapore International Mediation Centre, as well as the new Article 18 and Annex to the 2014 LCIA Rules that purport to regulate professional conduct. Despite the general trends towards convergence and harmonization, it is clear that points of divergence between institutional rules remain. That should be seen as a good thing; after all, such differences expand the range of choices available to corporate counsel and other users of arbitration.

---

2. See ICDR Guide, at paras. 1.98, 1.113 and 27.02.
3. Arb-Med-Arb is a tiered process where a dispute is first referred to arbitration before mediation is attempted. If parties are able to settle their dispute through mediation, their mediated settlement may be recorded as a consent award. The consent award is generally accepted as an arbitral award, and, subject to any local legislation and/or requirements, is generally enforceable in approximately 150 countries under the New York Convention. If parties are unable to settle their dispute through mediation, they may continue with the arbitration proceedings.
Where did you grow up?

TL: I grew up in Northwest London, in one house that was home throughout my entire childhood, and in which my mother still lives, with my school at the end of the garden. Actually not in the garden; it was on the other side of the wall – I thought that may need some clarification.

What is your favourite childhood memory?

TL: Sitting with my grandfather, who lived to the age of 102, and hearing him read aloud a battered edition of the Michelin restaurant guide that was dated around 1950. He used to verbally eat his way around Europe through restaurants which had closed around 30 years before. This was a regular, and fascinating event.

What is your favourite restaurant then?

TL: So this can be anywhere? My favourite restaurant is a place called Waris Nehari. It’s a tiny shack in the inner city of Lahore, old Lahore. It has virtually no space to sit inside, so they put plastic chairs on the road outside, with folding tables and newspaper table cloths. They serve only one item – Nehari. This is beef that has been very slowly cooked overnight. And if anyone saw it from any health and safety organisation, it would immediately be stopped, and the proprietors arrested. It’s on the road. You eat with one hand and swat flies away with the other. It is so delicious it’s actually an emotional experience.

How often do you go to Waris Nehari?

TL: I go there all the time. This is because I have a double life – half my life is based in London and half in Pakistan. But I’m not suggesting that any of you try Waris Nehari without medical advice. You have to build up your immunity first. And you have to let me know if you do try it, as I can make local emergency arrangements.

What skill or talent do you have that is not well known?

TL: I play the cello, which most people don’t know. I have played the cello for about 30 years. Notwithstanding the length of time, I am still terrible. But it is one of my favourite pastimes. Often, I find myself playing alone, because people leave the house quite quickly. I am very committed to it even though other people would rather I try something else, I think. I’ve been taking lessons recently even. If you were to ask my daughter how bad my cello playing is, she would have quite a lot to tell you. It is also not portable. When I was growing up and I started playing cello, my father once took me aside and asked if I had ever thought of changing to the piccolo, because he used to have to carry my cello around, as we went from bad orchestra practice to even worse orchestra practice.

I do have another talent actually, and this one I am proud of. Whilst sitting in Lahore with no electricity, with immense heat, sweating, amidst overwhelming dust and chaos, I am able to take a conference call and, from my voice, give the impression that I am in some posh air-conditioned office in London. That is a skill which has taken some time to perfect.

You know what my wife would say actually about my skills? This one is probably unprintable. She says I am highly, highly skilled in flower arranging. I haven’t publicised this because I think it may damage my general macho image. But I do actually have great skill in this field, despite trying to suppress it.

What do you think of this (pointing to a vase of flowers in the office of the CEO of SIAC)?

TL: I could have done better. I didn’t want to be rude, but when I saw it, I immediately thought “I could have done better”. It has been plonked. And I am speaking from a technical point of view here: a clear case of being plonked in the vase. [On the SIAC CEO’s protest] Of course it’s a nice plonking; if it has to be plonked, this is a very good way of doing it. I can tell you were unprepared to deal with an expert flower arranger.

What is your idea of a perfect holiday?

TL: Somewhere where there is no BlackBerry coverage, no mobile phone coverage, and absolute impossibility to log on. So, have you had a perfect holiday?

TL: No. I’m looking at North Korea at the moment, as possibly a BlackBerry-free area but I’m not sure if that’s the case. I have wanted to research and author a guide to BlackBerry-free areas of the World - a travel guide for people like me - places you can go and cannot be contacted.
What kind of films do you like to watch, and what was the last film you watched?

TL: I’m addicted to period dramas - any film that’s set in some historic period; anything with period costumes. I’m the only member of my family who’s addicted to this, which means I don’t get to watch them very often.

The last film I did watch, just to indicate who actually wins in terms of the choice, was a Bollywood film, which as far as I could tell, lasted for about 7 hours and there were no subtitles. I didn’t have the temptation to get up and dance in the middle, although everyone else I was with did. I tend to watch a lot of long Bollywood films, but I come out of them not quite knowing what was going on. I think this is a talent as well - the ability to survive very long Bollywood films.

The last period drama I watched was probably Downton Abbey – so not a film. I’m afraid I like things like Jane Austen films and Brontë when they are done well – which tends to be unpopular in the family, as you can imagine. And I don’t even get to watch them on flights. Flights for me are for catching up with work.

What is your favourite thing about Singapore?

TL: It’s the collective energy here. It’s a palpable feeling that anything is possible, which is very different from many other countries. That might be the first serious answer I’ve given you. There is something in the air here. There is lots to say about Singapore but that is something that is very unique.

How did you first get involved in international arbitration?

TL: I specialised in arbitration as a student – in the last century. When I came to Essex Court Chambers – I’ve been at Essex Court Chambers all my professional life – it was an example of being at the right place at the right time. At that moment, the UK government was revising the English Arbitration Act, and they had just done a very large public consultation. They were swamped with responses and materials which they had to collate. They were desperately looking for somebody young, available, and cheap to be seconded to the government for about three months to work on this. And I was young, available and cheap. So I sat in a windowless room at the bottom of some awful building in the middle of the British Government, and I worked for three months. Incidentally, I worked throughout next to a sign on the wall which said “DANGER, ASBESTOS”. For three months, I drafted and then I had a lucky break by being asked to work with Lord Saville to actually draft the final act. And that was my launch really. And I have spent the rest of my career apologising for the Act.

It’s a curious thing - when you start at the English bar, things can happen by chance. You do one case, and then you get more cases of the same type, and that’s how you build up a practice. In fact, when I first started, I had a case on waste disposal – that is, rubbish. So, the clerks started telling people that I know a lot about rubbish. I then got a stream of rubbish cases. I was fast becoming a world authority on rubbish. I had in my mind that I would be remembered in future with a publication: *Landau on Rubbish*. It was a close thing, because it was that or international arbitration. Finally, I put my foot down and said I am not doing any more rubbish cases. Life could have been different. In fact, I could have been interviewed now by the “Young International Rubbish Association” or something.

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

TL: That is actually easy to answer: I have one particular mentor, who is Johnny Veeder. I must say many people have guided me and many people have been generous and helpful. Whenever I’m asked as to the keys to making your way in this strange field, I always think it is having a good mentor, who is generous. By that I mean somebody who not only is a true mentor but somebody who actually gives their time and then also gives credit. I have had many people who helped me along the way, but one particular mentor, perhaps more than any other, is Johnny Veeder. To this day, he is frequently in my mind. When I come across professional issues or difficulties, I often try to think through his eyes, and try to work out what he would do. He also introduced me to my wife – three times in one day! I think he realised I was a bit slow, so he was not going to take any risk.
If not a lawyer and arbitrator, what would you like to be?

TL: For us narrow workaholics, that is always a difficult question. But if I had the ability, then I might have been a professional cellist. My family would be laughing at this point. But that was never an option. I often recount the following true story: I come from a long line of doctors. All my family were doctors – everybody. There were no lawyers at all. Medicine was not really an option for me because science gave me up when I was about 14. I was patiently saying, you know, I’m happy to let this relationship develop, but science didn’t want to have any involvement with me. So, I went to my father when I was aged 14 and I said to him: “I have decided that I’m not going to be a doctor”. I said: “I think I am going to be a lawyer”. And he said to me: “Well law is alright, but what the family really needs is a good plumber”. And in retrospect that would have been quite a lucrative option.

I might also have been a diplomat.

Or florist?

Well I can’t publicise that… I might actually have been a world leading flower arranger...

**What is a good example of international arbitration at it’s best? ...**Arbitration is at its best when it is not formulaic. It can be very short and it can be efficient and it can just be creative.

- Toby Landau QC

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

TL: Many years ago, I was arguing a case in Washington, D.C.. I was co-counselling with Lucy Reed and Professor Martin Hunter.

The Tribunal consisted of three well-known international personalities. I won’t name them but the Chairman in particular is somebody I know very well; someone everybody knows well. Professor Hunter had to argue a particularly bad point. I had just started practice. I was sitting there trying to look professional. Martin Hunter argued the point, and it sounded terrible. The Chairman of the Tribunal said he didn’t understand the point, and asked him to repeat it. Martin repeated the point. And this time it sounded even worse. The Chairman said: “Professor Hunter, you are going to have to help me. I just don’t understand the point you are making”. This went on and on. And each time the point was explained, it sounded even more ridiculous. Finally, the Chairman said: “Professor Hunter, I am going to give you one last opportunity. Do you think you could help us to explain the point, perhaps another way?” At this point, Professor Hunter had a moment of pure inspiration. He replied: “Oh, that point – no, no, that point will be... addressed by Mr Landau.”

And the strangest thing that ever happened to me is that the Chairman started to laugh – because, apparently, all blood had drained from my face. And he did one of those internal giggles where you are trying to stop, to stifle a maniacal laugh, which makes it all get worse and worse. His face went bright red and he was moving and shaking like this (gestures) – because he just couldn’t stop laughing. In fact he couldn’t breathe, I think. And then he started making these odd imploding noises. At which point suddenly got up, and ran out of the hearing room – because he thought laughing on transcript would have been worse. So we were all left with a truncated tribunal and a Chairman who was laughing outside of the room trying to get out the giggles so that he could come back in.

What is a good example of international arbitration at its best? And its worst?

TL: When international arbitration is at its best and reaches its true potential, it is something that looks very different from court, and very different from our standard model. Arbitration is at its best when it is not formulaic. It can be very short and it can be efficient and it can just be creative. So, where a tribunal has decided to do something **totally** different, that is arbitration at its best, I think. It could be that the tribunal suddenly decides that it is not going to have a normal adversarial process. It is going to start being inquisitorial on one issue, which might be the “killer” issue, and curtail all the normal process. And what I’m describing is not common. But, for me, that is what I am constantly yearning for, which is just a realisation of the true potential of the process, what it **can** be.

And, at its worst, is when it is just dead and formulaic. When you have a case that is crying out for something different but everybody is on autopilot. And that’s really the norm. You just go through standard steps and standard phases, and it becomes cumbersome and needless.

So, to be at its best it needs either experienced or brave arbitrators?

TL: Yes – absolutely right. I completely agree – it is both of those. It is the experience to know what to do and the courage to do it. It is about taking a risk, when the easy option is to go on autopilot, because nobody will ever criticise you for doing what everybody else does. And that’s as counsel and as arbitrator. As counsel you have to be accountable to your client. So you need to be brave – both as counsel and arbitrator. And there are very few people out there who are brave, actually.
That’s why I think the best kind of arbitrator—and this is something Johnny Veeder taught me—is the reluctant arbitrator. Because that is not somebody who is looking over his or her shoulder at the next appointment. It is not somebody whose career depends on it. And it’s not somebody who needs to please anybody. A reluctant arbitrator is the counsel who occasionally sits, and is simply there to do the best he or she can, regardless of their reputation, regardless of future invitations, conferences, tittle-tattle.

And it is important that the arbitrators are engaged early enough in the case. There can be a tendency to wait…until after the post-hearing briefs. It is true—you put it off. This is the curse of the post-hearing brief. You know it is going to come later, so you just wait for that. And meanwhile you are overtrading on other cases.

Do you think parties have access to enough information about the quality and suitability of arbitrators? If not, what can be done to improve this?

TL: Revolution!

No, I think they don’t. There’s one issue which I think is a problem here and that is the international conference circuit. Not naming any names (although I’m so tempted…), what I think happens is that people build reputations through conferences. There are amongst us people who are very good at conferences. They appear regularly and they might present well. But that is no indication as to how they will actually be when you see them in a hearing. And sometimes it is quite surprising how people are when they are faced with technical issues or law or actually just running a case out of the familiar environment of a conference. And I think people use conferences as an opportunity to get information on arbitrators and, to me, that is an imperfect source. So, there are, I think, people who are being maintained in our field by a sort of “legend” status, and it is not warranted.

So, to be at its best it needs either experienced or brave arbitrators?

I think the best kind of arbitrator... is the reluctant arbitrator... the counsel who occasionally sits, and is simply there to do the best that he or she can, regardless of their reputation, regardless of future invitations, conferences, tittle-tattle.

- Toby Landau QC

But equally, I think that a good training for arbitrators is to be counsel. And a lot of arbitrators never have that experience or haven’t had that experience for a long time, and they sometimes lose sight of what it’s really like to litigate a case.

What are the hallmarks of a good arbitrator?

TL: An open mind—and I mean a really, really open mind. It is amazing how few of our brethren that would include. Somebody who is able to listen and actually be persuaded. And somebody who will put in the hours and actually work. It is a hard job being an arbitrator and it is not an easy option. And there are a depressing number of people in the field who treat it as something of an easy option and don’t necessarily roll up their sleeves to the extent that they might.

I’m not so in favour of Catherine Rogers’ idea of websites with rankings, as this could well be divisive, difficult to maintain and very subjective. I can’t really think of a better answer than to say that the days of confidentiality probably are numbered. As we’ve seen in investor-state arbitration, the best way to see how arbitrators are is to see what they’ve done. And that’s best just accessed for what it is. It may be that confidentiality should now be reassessed. There are many ways to have arbitrators named without having the parties named, or of moving cases more into the public domain.

You are described as “a phenomenal advocate” (Chambers UK Bar 2015).

TL: Who by, my mother? (laughs)
What do you think are the hallmarks of a good advocate?

TL: I think, perhaps, the most significant is the ability to climb inside the head of whoever you are trying to persuade. And this means that there isn’t an absolute standard for anyone. It’s really “horses for courses”. It is to understand the particular nature and needs of your audience and to change depending on who you are speaking to and who you are trying to persuade. So, not to be formulaic again. It is difficult for anybody to lay down rules about advocacy – it’s a very personal thing. But, having been an arbitrator, and listening, I think that is the most important issue – the ability to actually help your arbitrator. And to help the arbitrator, you need to understand the arbitrator and the way that he or she is thinking and what is actually going to assist. And very often I think advocates might make brilliant presentations but they are not hitting the mark because they haven’t really climbed inside the head of whoever’s on the other side of the table.

Does this then lead to repeat appointments of arbitrators well known to counsel?

TL: Yes, it can. I am not suggesting that’s a good thing. In terms of advocacy, you need to have the ability to climb into the head of the arbitrator. Advocates who have that on their radar will choose someone who they think they know well.

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

TL: Legitimacy – that’s obviously more focused on investor-state arbitration. But I think it applies to commercial arbitration also. We’ve got to the stage where arbitration is the standard, recognised system of dispute resolution but it is still dominated by a relatively small number of practitioners. I think it is at risk of becoming inward-looking and I have always strived for it to be outward-looking and inclusive.

When I started, I was thought of as a freak. A freak – for having this odd ailment of being young. Everybody would be looking over my shoulder waiting for Mr Landau to arrive and I had to keep saying actually it was me. Everybody was ancient, and male, and western European, basically. That has changed a lot. The young groups that have started have helped that. The first young group – YIAG – was thought of by Johnny Veeder, who at the time was well over 40. It was his inspiration. Things have now opened up much more. It’s certainly better than it was. But it is still inward looking, such that we risk the outside world considering it illegitimate.

What do you think are the hallmarks of a good advocate?

...It is to understand the particular nature and needs of your audience and to change depending on who you are speaking to and who you are trying to persuade.

- Toby Landau QC

Do you think the conference circuit perpetuates that?

TL: It does. Because it is forever following the same routine. It wouldn’t if it brought in or involved new people every time. But it’s not like that. That’s the reason for my Masterplan - my plan for a conference to end all conferences. Everybody would come together and agree that we would never meet again. But then I realised that this wasn’t practical because people want to meet. So my Revised Masterplan, which I have to say I do think is masterful (but I’m the only one who thinks so...) is that we start to arrange an international Coffee Break - because the coffee break is the only reason why people go to conferences. They don’t go there to listen. They’re waiting for the coffee break to network. So let’s have an international Coffee Break. You could have 20 minutes in the middle to justify people’s expenses – with somebody saying something, it doesn’t matter what, as a break between coffee breaks.
An arbitrator who decides a case by reference to general notions of fairness and equity, rather than in accordance with a strict application of legal rules, is generally referred to as an amiable compositeur or as deciding ex aequo et bono (even though these notions are not completely synonymous, the terms will be used interchangeably here). In such cases, the arbitrator will, as a rule, be acting with the express authorisation of the parties.

However, there may be situations in which arbitrators, without being so empowered, take it upon themselves to depart from the terms of the contract or a rigorous application of the law and, in effect, act as hidden amiables compositeurs.

A recent post here on the Kluwer Blog reported the results of a survey of experienced U.S. arbitrators, which revealed a worrying statistic: It appears that one quarter of the respondents to the survey indicated that, "at least some of the time", they felt free to follow their own sense of equity and fairness in rendering an award, even if the result would be contrary to applicable law.

Members of an arbitral tribunal may engage in “horse-trading”. This can stem from a genuine difference of opinion as to the facts of the law.

Of course, one should be wary of drawing hasty conclusions from such statistics, or of extrapolating general trends for the international arbitration community as a whole. Indeed, the respondents to this particular survey appear to be predominantly active as arbitrators in domestic cases. Nearly half of them indicated that international disputes only made up 1-10% of their caseload in the past five years. It may also be useful to bear in mind that, historically, arbitration in the United States bore many resemblances to amiable composition and, in some domestic contexts, still does.

Nevertheless, this statistic could be seen as a manifestation – albeit a rather extreme one – of an underlying phenomenon that may also exist in international arbitration, whereby arbitrators depart from or temper the effect of applicable rules of law, or reach other forms of compromise results, without being expressly empowered to act as amiable compositeur. This issue is often dealt with under the misnomer “splitting the baby”. To the extent that this refers to a purported tendency of arbitrators to thoughtlessly divide claims down the middle, i.e. award approximately 50% of the amount(s) claimed, the notion has, quite rightly, been challenged as a myth, supported by little or no empirical evidence.

However, "baby-splitting" is often used to denote a wider range of issues resulting in awards that are not justified by fact and/or law. For example, in some cases the losing party might be awarded what seems to be a consolation prize, or the amount of the winning party’s claims might be reduced, with little or no legal justification. In others, the arbitral tribunal may appear to have taken a shortcut when determining the quantum of damages rather than fully coming to grips with complex rules of valuation.

Nearly half of [the surveyed U.S. arbitrators] indicated that international disputes only made up 1-10% of their caseload in the past five years.

The possible reasons for such "compromise awards" are manifold:

• In some cases, the compromise may be the result of the inability or, more rarely, the unwillingness of the arbitrator(s) to fully comprehend complex issues of fact or law. Unfamiliarity with the applicable law may play a part here. Indeed, it may be the case that not all, or even none, of the members of the arbitral tribunal have in-depth knowledge of the relevant legal framework.

• Members of an arbitral tribunal may engage in "horse-trading". This can stem from a genuine difference of opinion as to the facts or the law. It may also (again more rarely) occur where one arbitrator actively promotes the arguments of the party that appointed him, possibly in the hope of repeat appointments. This tactic can be more or less successful, depending on how attached the chairman of the tribunal is to having a unanimous decision.

• And to come back to the point raised at the start of this post, compromise awards may also come about where arbitrators, without being empowered to do so by the parties, decide the case by reference to general notions of fairness and equity, rather than in accordance with a strict application of legal rules. In such cases, the arbitrators’ reliance on fairness and equity will not necessarily be directly apparent. They may seek to justify the result of the award by reference to the applicable legal rules, but without actually determining the effect of those rules. Hence the difficulty in identifying such cases of hidden amiables composition.
The last scenario distinguishes itself from the first two in that arbitrators who reach such "equitable" decisions most likely believe that what they are doing is right, even if it is not quite (procedurally) correct. They may also believe that, despite not having been expressly authorised to act as amiables compositeurs, they are entitled to do so pursuant to a general expectation of the parties that arbitral tribunals, unlike national courts, will temper the effect of strict legal rules with a dose of fairness.

There may be a grain of truth in this perception of the parties' ex ante expectations. Indeed, during an e-convention hosted in London in October 2014 in which approximately 150 delegates from over 20 countries took part, 54% of the delegates falling into the category of arbitration "users" indicated that they agreed with the following statement:

"In international disputes, arbitrators should always be empowered to make binding decisions based solely on what is fair and equitable (possibly ignoring applicable laws), unless the parties expressly agree otherwise."

The delegates in question therefore appear to have presumed that arbitrators were empowered to decide ex aequo et bono unless specifically prohibited from doing so. However, this presumption is not mirrored in national laws or any other sources of authority. On the contrary, most national laws (including those that have adopted Art. 28(3) of the UNCITRAL Model Law) and most institutional rules provide that the arbitral tribunal may decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorised it to do so.

Given the above, it is surprising that both arbitrators and arbitration users, in two wholly independent surveys, have indicated a belief that there is an implicit power for arbitrators to decide according to principles of equity and fairness. Of course, "fairness" is, above all other considerations, what users look for in arbitration, or indeed in any dispute resolution mechanism. But "fairness" in this context means ensuring that the arbitrators are impartial and fair-minded and that the requirements of fair and due process are met. It cannot, by any stretch, be understood as a blanket authorisation allowing considerations of fairness and equity to trump the applicable rules of law. On this point, there is perhaps a need to educate users and practitioners, at least those less familiar with international commercial arbitration standards and practices.

It may be the case that a hidden amiable compositeur is acting with the best of intentions and even according to the expectations of some users. It may also be the case, however, that arbitrators rely on notions of fairness and equity to justify (to or amongst themselves) shortcuts in the decision-making process. Either way, if the misapprehension described above is allowed to persist, it could end up fuelling the myth that arbitrators do in fact engage in baby-splitting or that they lack intellectual integrity. There can therefore be no room for the hidden amiable compositeur in international arbitration.