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Welcome Address

On 15 May 2018, the SIAC kicked-off the SIAC Congress Week with two panel sessions on “Multiplicity – Managing Parallel Proceedings Under Multiple Instruments” at Maxwell Chambers. The event was well-attended, with a crowd of over 165 attendees. Addressing a room filled to capacity, Mr Kevin Nash (Deputy Registrar & Centre Director, SIAC) noted that this was an increasingly relevant topic to the international arbitration community, and anticipated that the event would facilitate a robust discussion among the panel and audience.

Mr Nash also briefly highlighted SIAC’s initiatives to manage multiple proceedings, such as the joinder and consolidation procedures under the SIAC Rules 2016, and more recently, its proposed protocol to consolidate international arbitral proceedings across different institutions.

Panel Session 1: Contract / Contract Parallelism

Parallel proceedings could take many different forms, each raising complex issues that would have been difficult to cover in a one-hour session. The panel therefore limited their discussion to “contract / contract parallelism”, which the moderator, Mr Matthew Secomb (Partner, White & Case), defined as “two related contract disputes before two different legal fora at the same time.” This definition included parallel arbitrations and parallel arbitration and court proceedings, but excluded non-contractual (e.g. treaties) parallelism.

Despite the narrower framework for discussion, the panel still covered a diverse range of issues and left the attendees with plenty to think about after the session.

Parallel arbitrations

Are parallel arbitrations always undesirable?

Mr Alastair Henderson (Managing Partner (Southeast Asia), Herbert Smith Freehills LLP) observed that arbitrators and counsel would usually consider parallel arbitrations to be undesirable as they tended to be untidy, inefficient and prone to inconsistent decisions on similar issues. There were, however, exceptions to this. For instance:

a. Parallel arbitrations that were expensive as a whole might actually be cheaper for the individual party that only needed to participate in a small and narrowly-focused arbitration.
b. A party without time and cost restraints might consider multiple proceedings preferable, if only to frustrate its opponents.

Mr Dinesh Dhillon (Co-Head, International Arbitration, Allen & Gledhill) also noted that parallel proceedings were sometimes unavoidable, particularly if a dispute fell under separate contracts with different rules, institutions and parties. Further, consolidation required parties to agree and compromise. This could prove difficult, as some parties might end up in an undesired forum, before a tribunal they did not choose.

\textit{Arbitrator appointments}

Several specific issues arose in relation to arbitrator appointments, including:

a. Should an arbitrator disclose his nominations if he was nominated in parallel proceedings? Dr Michael Pryles AO PBM (Founder President & Member, SIAC Court of Arbitration; Independent Arbitrator) considered various possible scenarios but ultimately concluded that arbitrators should always disclose their nomination in one arbitration to the relevant parties in a related arbitration, so as to minimise potential objections to their eventual appointment.

b. As counsel, when should the same arbitrator be appointed to sit in parallel arbitrations? Mr Stephen Moriarty QC (Head of Chambers, Fountain Court Chambers) noted that counsel might wish to appoint the same arbitrator when consistency was needed — both to reduce the risk of incompatible decisions, and more strategically, to ensure that a favourable decision in one arbitration extended to the others.

c. Is there a potential conflict between an arbitrator’s disclosure and confidentiality obligations if he or she was appointed in parallel arbitrations? Mr Moriarty and Mr Henderson agreed that a conflict might potentially arise, particularly when detailed disclosure needed to be made and both arbitrations were composed of different parties.

d. Should an arbitrator decline a nomination if there was a potential conflict, or should the parties / institution decide? Dr Pryles proposed that an arbitrator should not decline an appointment unless the conflict was material, as this would otherwise deprive the appointing party of the right to choose its own arbitrator.

\textit{Parallel arbitration and court proceedings}

What can be done if an arbitration which is started in Singapore is ignored and the respondent commences proceedings in a foreign court?

Mr Henderson suggested that a party could either apply for a stay of proceedings from the foreign court (which might not work if the foreign court was hostile to arbitration), or seek an anti-suit injunction from the Singapore court (and threaten contempt of court proceedings if the injunction was ignored). Dr Pryles also raised the possibility of going to an emergency arbitrator or to the tribunal for relief.

What should arbitrators do if they receive an anti-arbitration injunction from a court?

Dr Pryles stated that he would ignore any anti-arbitration injunction from a jurisdiction other than the seat of the arbitration, as his primary obligation was to protect the arbitration agreement. However, Mr Dhillon also cautioned that this might make it difficult for the claimant to enforce any eventual award in that particular jurisdiction.

If both the court and the seat of the arbitration were in the same jurisdiction, Dr Pryles accepted that the arbitration might have to be stayed, since the court could potentially set aside any award the tribunal made. However, he would be tempted to ignore it in the interests of justice if the...
court in that jurisdiction had a poor record of upholding the rule of law.

Panel Session 2: Treaty / Contract Parallelism

(The second half of the event was reported by Lee Chia Ming, Senior Associate, Dentons Rodyk & Davidson LLP.)

The second panel session delved into the opportunities, challenges, and potential issues arising in the context of parallel proceedings at both contract and investment treaty levels.

Mr Toby Landau QC (Member, SIAC Court of Arbitration; Barrister and Arbitrator, Essex Court Chambers) kicked off the panel session by charting the general landscape in which scenarios of multiplicity could arise – of particular relevance was the scenario where a contracting party might attempt to rely on the other party’s breach of contract to bring not only a claim in contract but also an investment treaty claim.

Setting the scene, Mr Landau canvassed strategic reasons as to why a party might attempt to achieve or avoid multiplicity of actions, and proposed tools that could aid these objectives.

Noting that a claimant only needed to win once to prevail, Mr Landau remarked that a claimant might strategically commence multiple and separate proceedings to increase its chances of winning and to maximise pressure on the respondent. Tactical tools to maintain multiplicity included commencing each arbitration in a different seat and before different arbitrators, and insisting on confidentiality in each proceeding.

Conversely, a respondent needed to successfully defend itself in every proceeding. Bearing this in mind, a respondent could tactically seek to avoid multiplicity in various ways, ranging from seeking parties’ consent to consolidate proceedings (a measure apparently oft-overlooked by zealous lawyers) to applying for stay of treaty proceedings or taking out anti-arbitration injunctions.

Next, Ms Koh Swee Yen (Co-Chair; YSIAC Committee; Partner, WongPartnership LLP) tackled the question of how a breach of contract would practically play out in investment treaty arbitration. This was pertinent as the foreign investor often has many options to protect its rights: in contract, domestic legislation, and bilateral/multilateral investment treaty. Ms Koh emphasised that the foreign investor ought to consider commencing parallel proceedings for breach of treaty against the host state and breach of contract against the contracting entity. Multiple proceedings ought not always be seen as abusive as they might be necessary to safeguard against a successful jurisdictional objection in any one forum.

In addition, Ms Koh shared that, in order for a contractual breach to amount to a treaty breach, generally the contractual breach has to comprise conduct contrary to the relevant treaty standard, and the government must have conducted itself in a sovereign
capacity; an umbrella clause could also have the effect of elevating a contractual breach to a treaty breach.

Thereafter, Mr Cavinder Bull, SC (Vice-President, SIAC Court of Arbitration; Chief Executive Officer, Drew & Napier LLC) addressed the issue of *res judicata* in the context of conflicting decisions in parallel proceedings on the same issues. In particular, Mr Bull highlighted *Ampal-American Israel v Egypt* in which the ICSID tribunal held certain findings in earlier ICC proceedings to be *res judicata* in the ICSID proceedings despite there being no identity of parties to both proceedings—the parent company was the claimant in the ICSID proceedings, but was not a party to the ICC proceedings; its subsidiary was party to the ICC proceedings but not the ICSID proceedings—as the tribunal nevertheless considered the parent-subsidiary relationship sufficiently close to establish that element of *res judicata*.

Finally, Mr Wade M. Coriell (Partner, Deputy Head of International Arbitration Practice, King & Spading) discussed the difficulties of double recovery in multiple proceedings, noting that the New York Convention lacked a provision to set aside an award on grounds of double recovery. Mr Coriell suggested that an arbitral tribunal could incorporate a bar on double recovery into the award, which the enforcing court could deal with. Mr Coriell also discussed, in the context of *Mobil v Venezuela*, the uncertainties surrounding contractual limitation of liability clauses in investment treaty cases.

In sum, panel session 2 was an excellent primer on the potential rewards and lurking pitfalls of parallel proceedings where investment treaty and contract converge. It provided invaluable insights as to how one could begin to map out and strategically navigate this complex yet immensely exciting field.
Mr Toby Landau QC (Member, SIAC Court of Arbitration; Barrister and Arbitrator, Essex Court Chambers) opened the Colloquium. This Colloquium was the second experiment of its kind, and Mr Landau promised only two things: that the Colloquium would be neither boring nor superficial.

The subject was “When can a contract be expropriated?” In other words, when did a State conduct a taking for which the State must offer compensation.

The Colloquium would unfold in the manner of a Socratic symposium. Dr Jean Ho (Assistant Professor Faculty of Law, National University of Singapore) assumed a task not unlike that of Socrates when he met with the sophist practitioners.

Dr Ho began with her strongest revelation. Any right which arose under a contract might not necessarily be an object of expropriation. She explained that the expropriation must afflict property, unless the subject treaty allows for any contractual right to be expropriated. Under general international law, contractual rights might be the object of expropriation, but they must bear proprietary characteristics. Therefore, the threshold question was one which tribunals might be prone to overlook; namely, were the rights purportedly violated actually those which may be the object of expropriation? If not, investors might look to the other rights and remedies under international treaties.

Dr Ho reminded that only States could expropriate. To do so, the State must substantially deprive the contracting partner of a benefit. Thus, she elucidated on the sovereign act requirement in addition to the cancellation element. She noted the State might have justification for cancellation. Dr Ho offered a general endorsement of the Vigotop Ltd. v. Hungary stackable analysis. She favored its integration of judging public policy justifications, its examination of contractual rights, and its final look at state abuse of contractual rights.

Dr Ho’s presentation was grounded, sensible, and logical. Importantly, she turned her focus towards straightforward and conventional expropriation. In other words, she concerned her presentation with the outright takings which States had genuinely foreswore to protect investors against.

The sophist practitioners received it all with varying degrees of acceptance, but leavened by veiled criticism, primarily targeted at what had been left out.

Mr Salim Moollan QC (Barrister, Essex Court Chambers), the moderator for the panel discussion, had no direct challenges to Dr Ho’s oeuvre. Instead, he expressed concern that OECD investment Tribunals had not kept up with the complexity and diversity of stakeholders in corporate shares.

Ms Davinia Aziz (Senior State Counsel, International Affairs Division, Attorney-General’s Chambers) wasted little time with pleasantries. “What about
State-owned Enterprises?”, she pressed in light of China’s One Belt One Road. “Could State-owned Enterprises conduct be attributed to the State?” “And how ever could the Vigotop three-step analysis apply to attribution?” States would want predictability with regard to such attribution.

Dr Romesh Weeramantry (Foreign Legal Consultant, Clifford Chance) made some trenchant observations about the interplay of domestic courts and international tribunals. He expounded on the problems which might arise should domestic courts rule against investor conduct on contract. Dr Weeramantry wondered whether the investor-State dispute resolution process might give effect to self-curing provisions within subject contracts. His final recommendation was for tribunals to pause proceedings and send instructions to a domestic court to determine certain obligations. Following which, tribunals might enforce the court’s decree, or perhaps disregard it should it display overt bias or unfairness.

Mr Chan Leng Sun, SC (Deputy Chairman, SIAC, Global Head of Arbitration, Baker McKenzie) appeared to agree with Dr Ho concerning the need for a rigorous property test. He lamented the lack of a defined term for “property” in many investment treaties, and urged tribunals to look to municipal law to define “property”. Mr Chan closed with a powerful image illustrative of property; one can own the lighthouse, but not the light it offers.

Mr Rodman Bundy (Partner, Eversheds Harry Elias) tackled thorny issues arising out of the calculation for compensation. He questioned the fantastical sums for compensation the Iran Claims Tribunal had reached through its forward-looking extrapolations of oil profits, even though oil prices had actually collapsed in the 1980s. He asserted that State action duress in settlement of arbitration might be wrong, and perhaps remediable; but whatever else such duress might be, it was not expropriation.

Dr Ho’s initial retort expressed equal parts perplexity and dismay at the "book’s worth of comments." However, she recovered quickly. “Investors are creative”, she reminded. The implication was that investors were at least a little “too” creative. The Vigotop test was sound, but she offered that tribunals at times distort it when they blend the three steps of the analysis. Nonetheless, she dismissed the attribution challenge offhand and took the view that the issue on attribution was “not prominent” simply because expropriation required sovereign action. She observed that global and public perceptions swayed and influenced trends.

On that note, Professor Nicolas Jansen Calamita (Head, Investment Treaty Law & Policy, Principal Research Fellow; Research Associate Professor, Centre for International Law (Singapore); National University of Singapore) closed the Colloquium. He extolled the dual career track of practitioner and academic. But the Academic-Practitioner Colloquium had underscored how these two realms remained nearly worlds apart. Still, the Colloquium offered an entrancing interplay between the two, and a second effort towards rapprochement.

The Colloquium attracted a good turnout of 100 attendees, and fulfilled Mr Landau’s two opening promises - providing sufficient depth and drawing enough captivation to spare.
The annual SIAC-CIArb debate once again lived up to its billing as an engaging and entertaining debate between a truly international set of arbitration practitioners. The motion for this year’s debate was “This House believes that Arbitral Institutions should hold Tribunals and Parties accountable for delays and increased costs through their Powers of the Purse”. The speakers appealed to the audience’s hearts, minds, and even their wallets in order to win what has become one of the most popular events on the Singapore arbitration calendar.

Held this year at the Sofitel Singapore City Centre in Singapore, Ms Lim Seok Hui (CEO, SIAC) welcomed an audience of more than 220 attendees before introducing Mr Chou Sean Yu (Chairman of CIArb (Singapore branch); Partner, WongPartnership LLP) as moderator who got proceedings underway.

Mr Paul Friedland (Member, SIAC Court of Arbitration; Partner, White & Case) was first to the lectern, arguing for the affirmative. He opened with the dire warning that delay and cost was the single biggest threat to international arbitration, citing the success of the Singapore International Commercial Court as an example of parties’ frustration and willingness to try other options. It was accepted that Tribunals perhaps have the option to penalise dilatory behaviour with cost awards, but the power was seldom used. It was then put that to leave the problem in the hands of the arbitrators was to do nothing.

As a solution, Mr Friedland argued that arbitral institutions held a proven record in tackling such issues. Given that the institutions were not directly affected by the views of its users in the same way that arbitrators and counsel are, the institutions would be best placed to tackle the problem without fear of commercial reprisals. After all, if such actions increased cost and time efficiency, the ranking of that effective institution would surely increase against its peers. Thus if the audience was serious about dealing with the issue of delay and cost, Mr Friedland appealed to “vote for courage and not fear of the new”, and pass the motion.

Ms Loretta Malintoppi (Arbitrator, 39 Essex Chambers) put forward a different view for the opposition, stating that the motion would allow arbitral institutions to treat practitioners as children. The argument that a swift arbitration must be less expensive than a longer arbitration was shown to be flawed as a good award was seldom quick and inexpensive. Ms Malintoppi reminded the audience whose “purse” would be affected if the motion was to be allowed. It was not the parties who were primarily responsible for delay in proceedings it was argued, but often their counsel in seeking to secure any perceived advantage. Similarly, an arbitrator was not concerned with the cost of providing the award when compared to its enforceability. Institutions should not penalise arbitrators for seeking to ensure that the relevant award would not be set aside.

Ms Malintoppi concluded by stating that institutions must
be mindful of their role in the arbitration community; "for if the tailor goes to war with the baker, he must henceforth bake his own bread...".

Mr Stephen Moriarty QC (Head of Chambers, Fountain Court Chambers) was entertaining in his reply for the motion. He rejected the suggestion that "delay [was] not necessarily a bad thing" as the end users in arbitration have repeatedly listed delay as a "serious turn off". It was suggested that an "arbitration doctor" could be appointed in a beleaguered case to ascertain the cause of the delay and sanction the offending party appropriately, including the costs of the appointment.

Mr Moriarty accepted that such an option might result in more work for the legal teams, but in order to tackle delay, it would likely initially require more cost. That might not be a bad thing according to the proposition, as to do so would create a "virtuous circle" where, in the name of tackling delay, practitioners might charge more fees from the same set of instructions. It was put to the audience that it was therefore the duty of those in the profession to vote for the motion to be passed; if only to give themselves a pay rise. A mercenary position perhaps, but one which knew its voters!

Mr Thio Shen Yi, SC (Joint Managing Partner, TSMP Law Corporation) concluded the arguments for the opposition with a Chinese proverb: "Heaven is high and the Emperor is far away"; the institutions were set too far apart from the parties to understand who was at fault for delay.

Mr Thio urged the audience to tackle the root of the problem, rather than penalising parties after the fact. As it was primarily counsel who would frustrate proceedings in attempting to gain an edge, it was submitted that institutions might assist by introducing "choice architecture". By asking parties to comment on the performance of the arbitrators, and similarly arbitrators on the performance of counsel, institutions could compile useful rankings on practitioners’ performance. In the era of "big data", trend analysis could be developed in order to assist clients and institutions in appointment of counsel and arbitrators. The result would incentivise practitioners to improve their conduct without financial incentives or consequences.

As parties considered the arguments, the panel of judges provided their views. Dr Claudia Annacker (Member, SIAC Court of Arbitration; Partner, Cleary Gottlieb Steen & Hamilton), Dr Eun Young Park (Member, SIAC Court of Arbitration; Partner, Kim & Chang) and Mr V K Rajah, SC (Senior Counsel, Arbitrator, Essex Court Chambers Duxton (Singapore Group Practice)) all refused the motion. However, it was suggested that institutions could assist in developing ethical standards and guidelines in international arbitration in order to be able to hold offending counsel and arbitrators to account.

The audience were not quite so unanimous, with Mr Chou declaring a slim victory for the opposition with a 52.7% of the vote. The debate did not end there however as the discussion continued into an enjoyable evening of wine and camaraderie.
SIAC Congress:
Welcome Address, Keynote Speech and Opening Address
by Nicholas Liu and Joel Quek, WongPartnership LLP

Welcome Address by the Chairman of SIAC

Mr Davinder Singh, SC (Chairman of SIAC; Executive Chairman, Drew & Napier LLC), opened the SIAC Congress by touching on just a few of SIAC’s many milestones, including its growth from a fledgling institution to one with the second highest caseload in the world, spanning 58 jurisdictions and six continents. He noted that the Singapore government and the judiciary had been instrumental in supporting arbitration through sensible legislation and rules that were constantly updated to meet changing commercial needs. To a remarkable extent, Singapore had managed, through its judicial decisions as well as colloquia and other events, to shape hotly contested areas of international arbitration law.

Turning to the future of SIAC, Mr Singh observed that SIAC was not only an institution, and its success could not be measured only in numbers: it was also an idea and an opportunity, one which must remain compelling and open to young practitioners as well as the more experienced ones. The arbitration community had to support newcomers trying to get their foot in the door, and to maintain and enhance diversity.

Equally, there was a need to make arbitration more transparent for parties, through means including the use of questionnaires inviting feedback on arbitrators. Costs-wise, SIAC’s novel proposal (the brainchild of Mr Gary Born, President of the SIAC Court of Arbitration) for a cross-institution consolidation protocol was an idea whose time had come. Its acceptance or otherwise would be a test of the willingness of institutions around the world to rise above themselves for the benefit of users.

Finally, SIAC’s Investment Arbitration Rules were a welcome first step in the development of investor-State specific rulesets for arbitration.

Mr Singh concluded his welcome address by predicting further growth for SIAC as an idea and an opportunity, and inviting all present to accompany SIAC on the next stage of its journey.
Keynote speech by the Chief Justice of Singapore

Chief Justice Sundaresh Menon (Supreme Court of Singapore) then delivered his keynote speech on the special role and responsibility of arbitral institutions in shaping the future of international arbitration. Like Mr Singh’s welcome address, the Chief Justice’s speech was forward-looking yet well-rooted in the past. Arbitral institutions had transitioned from their original position of passive stewardship to one of thought leadership. SIAC was a case in point, having achieved – in the past year alone – the launch of the SIAC Academy, the organisation of the first SIAC–CIL Academic–Practitioner Colloquium, and the publication of its memorandum on a cross-institution consolidation protocol.

Historical forebears such as early modern guild tribunals and post-Industrial Revolution trade associations had provided the blueprint for modern arbitral institutions. These had come to dominate the arbitration field because they offered pre-established rules and procedures, obviating the need to negotiate otherwise contentious detail, provided much-needed logistical and administrative support, and ensured a degree of quality control.

Nonetheless, international arbitration had its flaws. A survey conducted by the Queen Mary University of London had set out the main sources of dissatisfaction among users including, most commonly, the high costs of arbitration. The Chief Justice observed that although none of the users’ dissatisfactions stemmed from institutional arbitration specifically, arbitral institutions were uniquely placed, and expected, to address these dissatisfactions. Indeed, they had done a great deal toward fulfilling their mandate through innovations including the emergency arbitrator procedure. The Chief Justice attributed such successes to three main factors: first, the fruitful dialogue between the “epistemic community” of international arbitration (a phrase used by Gabrielle Kaufmann-Kohler); second, the healthy competition between arbitral institutions as market players, which led to mutual learning and the adoption of best practices in order to attract users; and third, the ability of arbitral institutions to reality-test ideas in the field and gather feedback on their efficacy.

Having taken stock of these accomplishments, the Chief Justice examined (deploying for the third time, one might note, the lawyerly best practice of the “rule of three”) three key respects in which arbitral institutions, including SIAC, could shape the future of international arbitration.
First, regarding costs, the Chief Justice noted that the lion’s share of costs were the legal fees of counsel. Arbitral institutions could help to manage such fees through procedures such as summary disposal and by encouraging the consideration of parties’ conduct in the arbitration in awarding costs. Arbitrators should also be encouraged to take an active role in case management through the issuance of guides or codes of best practices.

Second, regarding conduct, arbitral institutions should address the reality of divergent, culturally-linked ideas of arbitral ethics. Institutional codes of ethics for arbitrators were useful for providing a common frame of reference. More controversial was the question of to what extent arbitrators and arbitral institutions should regulate the conduct of counsel. The Chief Justice’s personal view was that a tribunal could bring potential misconduct by counsel to the attention of the relevant bar association, which could then be left to take such action as it thought appropriate.

Third, arbitral institutions should ensure continuity. Age without experience was no guarantee of expertise; consequently, younger practitioners needed opportunities to gain experience and equip themselves for larger roles in the future. To that end, SIAC might consider a “low bono” programme to allow younger practitioners of at least five years’ post-qualification experience to act as arbitrators in lower-value disputes.

The Chief Justice concluded by lauding the communal force of will, pluck, and desire for improvement which had led Singapore and SIAC to achieve their successes in international arbitration thus far, and expressed his confidence that this would continue into a bright future.

Opening address by the Minister for Finance

The trio of speeches and addresses was rounded off by a practical, commercially-focussed opening address from Mr Heng Swee Keat (Minister for Finance, Singapore), on the impact of global trends on international arbitration in Singapore. The centre of gravity had shifted towards Asia, and the growth of China and India, and the Asia-Africa Growth Corridor would catalyse further growth. Already, ASEAN was the world’s 6th largest economy, with a combined GDP of US$2.56 trillion, and intra-ASEAN trade was projected to exceed US$375 billion by 2025.

Increasing commerce within Asia and ASEAN brought with it an increased need among the business community for professional services, including dispute resolution services. Investors required an assurance that any disputes would be handled in a neutral, fair, and impartial manner. Singapore was in a good position to cater to this growing demand, being situated in the heart of Asia, where the rule of law was upheld, and offering a trusted and stable legal system with a full suite of dispute resolution options.
Mr Heng highlighted a few institutions of particular prominence, including SIAC, the Singapore International Mediation Centre, and the Singapore International Commercial Court, which provided a court-based option. Major international institutions had also set up offices here. Moreover, users had their pick of not only institutions, but also legal representation – lawyers of any nationality could be engaged, and almost half of the world’s top 100 firms by revenue had a presence in Singapore. One growth area was infrastructure financing in Asia, projected to hit US$26 trillion of expenditure over the next 15 years. Singapore’s professional services (including law firms) could help bridge the technical/structuring gap between projects seeking financing and financiers seeking projects in which to invest.

Mr Heng observed that Singapore’s success was contingent on an open, rule-based international legal order. China’s Belt and Road Initiative (a program to strengthen its trade routes and connections with the rest of the world) and the establishment of the Asian Infrastructure Investment Bank were two examples of movement towards increased openness and inclusiveness, which would benefit all parties. Mr Heng then outlined three responses which he wished to see Singapore implement in the future.

First, to look outwards and work together with other Asian states. Two examples of such efforts were the launch of Infrastructure Asia, which will facilitate Asian infrastructure projects by connecting stakeholders across the value chain, and the Lawyers Go Global program, which aims to support Singaporean law firms venturing abroad.

Second, to keep innovating in response to changing conditions, as reflected in Singapore’s ASEAN Chairmanship theme of “Innovation and Resilience”. Mr Heng cited (in addition to examples which had been raised by the previous speakers) Parliament’s adoption of legislative amendments permitting third-party funding of arbitration.

Third, to keep up with disruptive technology. Software exists which uses data from past cases to predict the outcome of future cases, affecting the decisions of disputants as well as how lawyers give advice. Further, online dispute resolution could in time develop into a viable alternative to or substitute for conventional arbitration.

Finally, Mr Heng expressed his hope that Asia’s growth unlocked opportunities for all. Singapore, SIAC, and the arbitration community as a whole would be able to share in and contribute to those opportunities by responding appropriately to the changing landscape.
SIAC Congress: Panel Discussion on the Future of International Arbitration

by Derric Yeoh, Schellenberg Wittmer Pte Ltd

The panel discussion on the future of international arbitration was a thought-provoking session with a panel consisting of the following esteemed panellists: the Honourable Chief Justice Sundaresh Menon (Supreme Court of Singapore), Prof Lawrence Boo (Member, SIAC Court of Arbitration; Independent Arbitrator, The Arbitration Chambers), Prof Lucy Reed (Member, SIAC Court of Arbitration; Director, Centre for International Law (Singapore); Professor, Faculty of Law, National University of Singapore), and the moderator, Mr Chelva Rajah, SC (Member, SIAC Board of Directors; Managing Partner, Tan Rajah & Cheah).

The discussion focused on the three main aspects of the Chief Justice’s keynote speech on the future of international arbitration: costs, conduct and ethics, and continuity.

Costs

Both Prof Boo and Prof Reed agreed with the Chief Justice’s observation that the large part of the growing arbitration costs came from the fees of the parties’ legal counsel. The panellists discussed the role of arbitral institutions in controlling the overall costs of arbitration, such as by developing rules which encourage greater efficiency (e.g. summary disposal procedures) and to allocate costs according to party efficiency. Professor Boo commented that the general reluctance which arbitral institutions have in controlling the costs of the arbitration stemmed from their fear of antagonising their users and stakeholders in what is already a competitive environment between arbitral institutions. He concluded that arbitral institutions ultimately have to take a stand on whether to be pro-arbitrator, pro-parties, or pro-arbitration to guide their decision in how far they would be willing to go to control arbitration costs.

While these suggestions are certainly helpful, in the author’s humble opinion, it is the parties who should bear the brunt of the responsibility in lowering arbitration costs, since they are ultimately the ones benefitting from the lower arbitration fees and therefore have the greatest incentive to do so. Parties also have the most power to make changes to arbitration costs, either by negotiating for lower fees and rates or by retaining more cost-efficient legal counsel to do so. The fact that arbitration costs are high may therefore indicate that while parties would prefer to have lower arbitration fees, they are still willing to pay top dollar for the best legal counsel.

Conduct and ethics

There was much discussion about the issue of conduct and ethics in international arbitration. Chief Justice Menon observed that “ethics” in international arbitration was often used in a pejorative manner. Ethics is certainly a sensitive issue not least because of the various legal implications which arise from unethical conduct by parties, arbitrators, or legal counsel, but also because of the tendency for moralising which hinders meaningful progress on a workable code.

Prescient of this issue, Chief Justice Menon suggested that the current objective should be to identify the most important ethical issues and to create a patchwork of common points which, over time, could form a minimum global standard. At the present moment, such ethics codes could be drafted to be specific to a country or arbitral institution, such as an ethics code for Singapore-seated arbitrations.
There was also the question of how to deal with lawyers who had fallen foul of these ethics codes in international arbitration. Prof Reed commented that it would usually be sufficient for the offending lawyer to be chastised in front of his colleagues to achieve a deterrent effect, while Chief Justice Menon suggested that arbitrators could also report the offending lawyer to the relevant bar association for disciplinary action at the end of the arbitration.

Continuity

On the issue of continuity in preparing future generations for international arbitration, Prof Boo agreed with Chief Justice Menon’s suggestion for arbitral institutions to have “low-bono” schemes to allow younger practitioners to gain experience as arbitrators in smaller-value disputes. Professor Boo also shared his observation regarding the increasing trend of Chinese-English bilingual arbitrations and exhorted the younger generations for international arbitration by having quality and targeted training for talented practitioners of both genders and all nationalities. While it is undesirable and inevitable that some aspiring arbitration practitioners will be left out in the cold because of the limited opportunities, the keen competition may be what is necessary to discover the most talented and motivated young practitioners who will be the continuity in international arbitration.

Conclusion

The panel discussion provided many valuable insights and suggestions for arbitral institutions to implement and chart the future of arbitration in the key areas of costs, ethics, and continuity.
Mr Alan Thambiayah (Member, SIAC Court of Arbitration; Professional Arbitrator, The Arbitration Chambers) moderated the panel session on the latest proposal by SIAC on cross-institution consolidation of arbitral proceedings. The panel included Mr Chan Leng Sun, SC (Deputy Chairman, SIAC Board of Directors; Principal, Global Head of Arbitration, Baker McKenzie Wong & Leow), Prof Bernard Hanotiau (Member, SIAC Court of Arbitration; Partner, Hanotiau & van den Berg), Dr Michael Hwang, SC (Chartered Arbitrator, Michael Hwang Chambers LLC), Mr Prakash Pillai (Partner, Clyde & Co Clasis Singapore), Dr Michael Pryles AO PBM (Founder President & Member, SIAC Court of Arbitration; Independent Arbitrator), Mr Nish Shetty (Head of Litigation & Dispute Resolution (Asia Pacific), Clifford Chance), Ms Ariel Ye (Member, SIAC Court of Arbitration; Partner, King & Wood Mallesons) and Mr Andre Yeap, SC (Senior Partner, Head of International Arbitration Practice, Rajah & Tann Singapore LLP).

Mr Yeap began the discussion by introducing how different arbitration institutions’ rules on consolidation of proceedings operate. He highlighted the differences between the consolidation requirements under the SIAC and ICC Rules by applying them to a hypothetical case involving multiple parties and arbitration agreements. The comparison illustrated that the SIAC Rules were generally more flexible.

Mr Chan spoke next, providing an overview of the options SIAC considered for the cross-institution consolidation mechanism, with an emphasis on adopting a new, standalone consolidation protocol and the formation of a joint committee appointed by the participating institutions. He also explained the circumstances and necessities that led to such a proposal, which resonated well with the audience.

The ensuing panel discussion primarily covered major topics in the proposal and potential challenges: (i) mechanism for consolidation; (ii) administration of consolidated arbitrations; (iii) standards for consolidation; and (iv) enforcement-related issues.

In terms of mechanism for consolidation, Dr Pryles compared the functionality and practicality of two options proposed by SIAC. He then concluded that the standalone protocol with a joint committee was the better option. However, he cautioned that determining
which arbitration institutions were to be the signatories to the protocol and how to respect the parties’ intentions under an arbitration agreement could be challenging. He stressed that since arbitration “[was] not litigation”, the advantages and disadvantages of consolidation should be carefully scrutinised when adopting the new mechanism.

Even though Prof Hanotiau agreed that adopting the standalone consolidation protocol had more benefits, he noted that there were practical issues to consider such as whether the institutions would want to adopt a separate set of rules for cross-institution consolidation and when consent for such consolidation should be obtained. The latter point prompted an interesting discussion among the panellists and the floor, discussing the form of consent, enforceability of an award rendered under the proceeding, “opt-in” or “opt-out” options for certain institutions, and whether an express consent for cross-institution consolidation was required.

Regarding the administration of consolidated arbitrations, Mr Pillai highlighted the importance of setting fair and clear criteria for determining which institution should retain administering authority. Mr Pillai identified various criteria that could be used for such determination, including the number of cases, aggregate value of disputes, time of commencement of arbitrations, subject matter of the dispute, and nationality of parties. He then advocated that the aggregate value of disputes would likely be the most practical criterion. Ms Ye advocated a different criterion, stating that the nature of the legal relationship between the disputes to be consolidated should be given more weight.

Prof Hanotiau then touched on the standards for consolidation, which would normally require a compatible arbitration agreement with the same seat, governing law, arbitration language, consent, and a close relationship between the subject matter of the disputes. Nevertheless, as also noted by Mr Yeap, there was still ambiguity as to how the different requirements under the various arbitration rules should be reconciled in formulating the cross-institution consolidation mechanism. For example, whether the parties to both arbitrations must be identical.

Prof Hanotiau and Dr Hwang also shared their experiences with conducting multiple arbitration proceedings through de facto consolidation or by “conjoinder” under different sets of rules to avoid inconsistencies and inefficiency.

Lastly, the panel discussed whether there were any fundamental concerns about cross-institutional consolidation which might affect the enforceability of the awards or create grounds for challenge before the national courts. Mr Shetty opined that as national arbitration laws generally allowed parties to decide on consolidation, the approach taken in the SIAC protocol that parties have consented in advance by selecting institutional rules that provided for cross-institution consolidation, should not pose any significant enforcement issues in most jurisdictions. However, Ms Ye added that application of arbitration rules that were substantially different from the rules to which the parties had agreed to consolidation might instigate due process challenges.

While it was generally agreed that consolidation allowed more efficient resolution of disputes and minimised the risk of inconsistent decisions, existing institutional arbitration rules permit consolidation only where the related arbitration agreements are compatible by incorporating the same arbitration rules. However, the lack of a mechanism for cross-institutional consolidation has limited the effectiveness of consolidation. The panel discussion on the “ground-breaking” proposal by SIAC was an important step towards a more coordinated effort to enhance the efficiency and efficacy of the arbitral process by facilitating robust dialogue between arbitration institutions and the users.
SIAC Congress:
The Gold Standard: Enforcement of SIAC arbitral awards
by Tan Weiyi, Baker McKenzie Wong & Leow

The enforceability of an award would be an important consideration for any party choosing to resolve its disputes through the arbitral process. While most SIAC arbitral awards have been voluntarily complied with by the parties, they have also stood up to scrutiny in jurisdictions across the world where enforcement proceedings were necessary.

Led by Mr Cavinder Bull, SC (Vice-President, SIAC Court of Arbitration; Chief Executive Officer; Drew & Napier LLC), the eminent panel of speakers who hail from both common law and civil law jurisdictions took us on a "trip around the world", exploring recent developments and trends on enforcement of awards in various countries, including Singapore, India, China, Indonesia, Vietnam, Thailand, the United Kingdom and the United States.

Commencing with Singapore, Mr Christopher Chuah (Partner, Head of Infrastructure, Construction & Engineering Practice, WongPartnership LLP) provided an update on two recent court decisions involving applications to set aside arbitral awards, which reinforced the pro-arbitration stance that Singapore has been well known for. Mr Wade M. Coriell (Partner, Deputy Head of International Arbitration Practice, King & Spalding) further commented that Singapore's robust approach to enforcement, as well as the familiarity of Singapore Judges with arbitration, has made it a popular jurisdiction for the enforcement of awards.

In contrast, the position in India seemed less straightforward. Mr Darius J. Khambata, SC (Member, SIAC Court of Arbitration) and Mr Vyapak Desai (Head of International Litigation & Dispute Resolution Practice, Nishith Desai Associates) provided a broad overview of developments in India over the years. Although India was one of the first countries to ratify the New York Convention, the courts have in the past not been entirely consistent in their approach to certain issues with respect of the enforcement of domestic and foreign arbitral awards, leading to some uncertainty. However, recent judgments have provided more clarity around the issues and current developments have demonstrated that the Indian courts have become more aware of commercial issues around the enforcement of arbitral awards.

Moving to the civil law jurisdictions, China proved to be an interesting jurisdiction given significant developments in recent years. Since 2015, the Supreme People's Court has required local courts to unify the standards applied in respect of the judicial review of arbitral awards. The Chinese courts have also made progress in their interpretation and application of the New York Convention. Prof Liu Jingdong (Director of International Economic Law Department, the Institute for International Law Studies of Chinese Academy of Social Sciences) explained that in the context of China's Belt & Road Initiative, the courts have taken a supportive attitude towards international commercial arbitration. Statistics have shown that the Chinese courts have enforced a vast majority of foreign arbitral awards. From

Left to Right: Mr Yu-Jin Tay, Mr Vyapak Desai and Dr Mohamed Idwan ('Kiki') Ganie
2015 to 2017, there were only 3 cases where enforcement of the award was entirely refused.

Ms Ariel Ye (Member, SIAC Court of Arbitration; Partner, King & Wood Mallesons) elaborated on the statistics relating to the enforcement of SIAC awards in China. From 2014 to 2017, 20 cases were challenged in the Chinese courts, and all 20 involved the enforcement of an SIAC award. In 18 cases, the awards were enforced. The popularity of SIAC arbitration with Chinese parties seemed evident. In most of these cases, the challenge to enforcement was mounted on the basis that the respondent Chinese party did not participate in the arbitration, but this argument was rejected by the Chinese courts.

The developments in India and China have been encouraging. Closer to home however, it would seem there might still be room for improvement. Mr Yu-Jin Tay (Partner, Mayer Brown JSM) opined that the climate in Vietnam and Thailand appeared to be what China and India were about a decade ago.

In Vietnam, only slightly more than half of the awards were enforced. One of the challenges arose from a provision that enforcement would only be allowed if it was not contrary to the basic principles of law in Vietnam. Perhaps unsurprisingly, this provision has been used to introduce challenges to the enforcement of awards and allow appeals on merits by the back door. This contrasted with the position in China, where the Chinese courts have opined that violation of Chinese law did not equate to violation of public policy for the purpose of considering an application for the enforcement or setting aside of an arbitral award.

In Thailand, whilst 80% of awards in commercial cases were enforced, the position was vastly different for cases involving the government or state-owned enterprises. Arising from a high profile arbitration that the state lost 15 years ago, the government has appeared to be anti-arbitration and few government contracts have provided for arbitration as the chosen dispute resolution mechanism.

Dr Mohamed Idwan (‘Kiki’) Ganie (Managing Partner, Lubis Ganie Surowidjojo) explained the process of enforcement of awards in Indonesia and shared some interesting trends and statistics. In Indonesia, SIAC has been seen as providing the "Gold Standard" for arbitral institutions, and SIAC arbitrations have almost been synonymous with "foreign arbitrations". Admittedly, there have been challenges to the multi-step process in the enforcement of awards but overall, there were still advantages in choosing arbitration over litigation.

Our "trip around the world" extended beyond the Asia Pacific region, as Mr Coriell spoke about recent developments in the United Kingdom and the United States. Explaining some of the intricacies of each system, Mr Coriell shared some of the enforcement strategies that have been adopted by disputing parties in these jurisdictions. Relating the discussion back to the SIAC, Mr Coriell also commented that US Judges were becoming increasingly familiar with SIAC awards.

An extremely informative session, the whirlwind journey illustrated the overall trends in each country and the different levels of sophistication in dealing with enforcement issues. But one thing was clear - despite differences, we are all headed in the same direction.
SIAC Congress: 
Debate: This House Believes that Arbitral Institutions are Best Placed to Chart the Future of International Arbitration

by Jeffrey Jeng, Jones Day

The SIAC Congress 2018 concluded with a spirited debate between eminent members of the arbitration community. The debate motion was: “This house believes that arbitral institutions are best placed to chart the future of international arbitration.” Dr Claudia Annacker (Member, SIAC Court of Arbitration; Partner, Cleary Gottlieb Steen & Hamilton) and Mr Toby Landau QC (Member, SIAC Court of Arbitration; Barrister and Arbitrator, Essex Court Chambers) argued for the motion. Mr Jern-Fei Ng QC (Member, YSIAC Committee; Barrister, Essex Court Chambers) and Mr Alastair Henderson (Managing Partner (Southeast Asia), Herbert Smith Freehills LLP) argued against the motion. Mr Chelva Rajah, SC (Member, SIAC Board of Directors; Managing Partner, Tan Rajah & Cheah) acted as the moderator.

Dr Annacker kicked off the debate by making four points in support of the motion. First, she argued that institutions have rule-making capabilities. She provided examples of how amendments to institutional rules have addressed issues like delay, costs, and concerns involving investor-State dispute settlement (ISDS). Second, Dr Annacker argued that institutions could adopt soft law instruments which could provide guidance to arbitrators and counsel. Third, as appointing authorities, institutions have control over the quality and diversity of arbitrators. As evidence, Dr Annacker noted that the recent increase in appointments in female arbitrators has been driven by institutions. Fourth, she argued that institutions, in overseeing the conduct of arbitrations, have an enforcement role which would preserve the integrity of the arbitral process.

In response, Mr Ng argued that the arbitral community as a whole has been, and would continue to be, best placed to chart the future of arbitration. While institutions have a role in shaping the future of arbitration, other actors in the arbitral community like national courts, counsel, and arbitrators were the driving force behind changes. Mr Ng mentioned in particular that counsel and arbitrators – end-users – created the Equal Representation in Arbitration Pledge (The Pledge). The Pledge, in turn, catalysed the increased diversification of the pool of arbitrators. He also argued that innovations like expedited procedure and emergency arbitrations came into existence as a response to these end-users’ demand.

Taking an opposite view, Mr Landau supported the motion by arguing that institutions are best placed to take the leadership role in driving change in arbitration. He raised the concern that many dispute resolution professionals, which included arbitrators and counsel, were subject to forces of self-interest and could not be adequate instruments of change. Institutions in contrast, have overcome the inertia of these interests and taken the lead in implementing innovations that addressed issues like costs, efficiency, and flexibility. He further suggested that institutions have developed into sophisticated entities with the infrastructure that allowed for the engagement of all stakeholders in arbitration through consultation exercises, users committees, and market research.

Mr Henderson argued that institutions should work alongside the arbitral

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1 The views and opinions set forth herein are the personal views or opinions of the author; they do not necessarily reflect views or opinions of the law firm which he is associated.
community to implement change and innovation. He stated that the institution’s position as a contributor to change and innovation in the arbitral community was secure. However, he proposed that the vision and imagination of the entire community would be required as institutional perspectives, while vital, only afforded one viewpoint. Mr Henderson identified courts, technology providers, users councils, and experts as being able to contribute different perspectives that needed to be considered in charting the future course for arbitration.

In closing for the opposition, Mr Ng argued that those supporting the motion provided no concrete evidence of institutions having tried to shape the future of arbitration in the past. Mr Ng highlighted how, in contrast, his side had provided “The Pledge” as evidence of end-users coming together to drive the future of international arbitration. Mr Ng raised several more points, including points on how market research was often conducted by non-institutions and how users communities were integral in institutions.

Mr Landau rebutted Mr Ng point by point. With regard to evidence, he said that arbitral institutions’ leadership in addressing the backlash to ISDS was the clearest example of institutions shaping the future of arbitration. He further observed that The Pledge was put together with information that institutions provided. Institutions have also taken the lead in appointing more female arbitrators in response to The Pledge. As for market research, Mr Landau said that institutions provided granular and regional market research rather than high-level research. He also pointed out that users committees were undergirded by institutions.

After the audience members submitted their votes, Mr Rajah declared that the motion was carried by a narrow margin.
SIAC, in conjunction with YSIAC and the International Bar Association’s Arb 40 Subcommittee, held an Award Writing Workshop designed around the Toolkit for Award Writing published by the International Bar Association’s Arb40 Subcommittee, on 18 May 2018 in Singapore.

The workshop featured a prominent line-up of speakers and trainers: Dr Michael Pryles AO PBM (Founder President & Member, SIAC Court of Arbitration; Independent Arbitrator), Mr Richard Tan (Independent Arbitrator), Mr Hiroyuki Tezuka (Member, SIAC Court of Arbitration; Partner, Nishimura & Asahi), Mr Daryl Chew (Partner, Shearman & Sterling LLP) and Ms Koh Swee Yen (Co-Chair, YSIAC Committee; Partner, WongPartnership LLP).

(The first half of the event was reported by Samuel Leong, Associate, Norton Rose Fulbright.)

Welcome Remarks and Introduction to the Toolkit and Training Programme

The workshop kicked off with an introduction by Ms Koh to the Toolkit for Award Writing. Ms Koh, who was a co-chair of the IBA Arb40 Subcommittee at the time that the Toolkit was published, explained that the Toolkit was designed to act as a guide for young arbitration practitioners when approaching the drafting of their first awards. This was timely as various arbitral institutions have taken steps to increase the diversity of arbitrators appointed.

Keynote Speech

In his keynote speech, Dr Michael Pryles encouraged the participants at the workshop to consider that, even though an arbitral award would likely be read only by a handful of individuals, an arbitral award would be legally binding and enforceable in almost 160 jurisdictions under the New York Convention. This was in contrast to most judicial decisions, which would be typically enforceable in fewer countries. It would therefore be important for arbitrators to ensure that their awards satisfied the conditions for enforceability under the arbitration agreement signed by the parties and the relevant laws governing the arbitration.

Dr Pryles took the participants through his five “Cs” in award writing: Clarity, Coherence, Conciseness, Comprehensiveness, and Certainty. A useful test to apply to the writing of an award, according to Dr Pryles, was to ask whether a person who knew nothing about the case could comfortably read the award and understand what had taken place in the proceedings. When explaining the importance of certainty in drafting awards, he emphasised that it was an arbitrator’s duty to make findings and determinations that were definitive and mandatory, and not merely to provide an opinion on matters or vague comments on the case. Dr Pryles also recommended preparing a list of issues to be agreed to by the parties, if possible, which would then be addressed and determined in the award.

Formal and Procedural Requirements of Arbitral Awards

Mr Richard Tan then addressed the participants on the formal and procedural requirements of arbitral awards. Mr Tan led a comprehensive discussion on the necessary elements of a valid and enforceable arbitral award. He spoke on the importance of the place where the award was made (especially where the arbitral seat was not a Model Law jurisdiction) and discussed the various titles commonly used by arbitrators to label their awards at different stages of the arbitral proceedings.

According to Mr Tan, it would ultimately be incumbent on every arbitrator to consider the enforceability of awards rendered because an invalid award would, simply, not be useful to anyone. While it might not be possible for an arbitrator to take into account the specific
requirements for enforcement in every jurisdiction, it would be important for an arbitrator to keep in view, when drafting an award, the question of where the award might eventually be enforced.

(The second half of the event was reported by Kate Apostolova, Senior Associate, Freshfields Bruckhaus Deringer.)

To get ahead of the game called “arbitration”, there was also a session on best practices in drafting an arbitral award. This session was not only useful for the younger first-time arbitrators, but also the more seasoned arbitrators seeking a refresher.

What would be the focus of this session, I asked myself? Practically speaking, the parties mainly read the last page of the award, the dispositif, to check whether their clients won or lost or if the baby was split. I expected this would be a short session focusing on the drafting of the last page of an award.

Obviously, this is an oversimplification. There is no doubt that the writing of a well-reasoned award is critical. It becomes especially important if the award is challenged—through a set-aside or challenge to enforcement procedure—so there is a lot more that goes into an award. Surprisingly, there are very few practical guides available to assist arbitrators in the drafting process. This session sought to fill this gap.

**Practical Considerations for Drafting an Award**

In her presentation, Ms Koh Swee Yen stressed the importance of several key practical considerations for drafting an award. She recommended that arbitrators start planning at the appointment stage and start the drafting early, especially the procedural history section of the award.

Ms Koh highlighted that the main consideration arbitrators should keep in mind was to protect the award. The key question to ask was: “How to draft an enforcement-proof award?”. She further explained that one of the most common grounds for challenging an award was breach of natural justice or due process violations, a very broad category (as evident by court jurisprudence). To avoid a successful challenge on this ground, Ms Koh recommended ensuring that all parties have an equal opportunity to present their case.

Ms Koh also noted that care should be taken when using Tribunal secretaries to draft arbitral awards. She used one case to illustrate this point. In *P v Q & Ors* [2017] EWHC 148, the Chairman had sent an email, which was intended for the Tribunal secretary, by mistake to one of the Claimant’s lawyers (who had on the previous day emailed a letter to the Tribunal on one of the interlocutory decisions). The email attached the Claimant’s lawyer’s cover email and asked: “Your reaction to this latest from [the Claimant]?” The Claimant filed a challenge with the LCIA Court on various grounds, including that the Tribunal improperly delegated its role to the secretary.

For additional practical considerations for drafting an award, you can refer to the IBA TOOLKIT FOR AWARD WRITING, Chapter 3: Practical Considerations for Drafting an Award.

**Content of the Award**

Mr Daryl Chew started his presentation on the content of the award with a picture of a box of chocolates. He then asked: “What do arbitral awards have in common with chocolate?” The audience was baffled. Mr Chew reminded the audience of the 1994 movie “Forrest Gump”, where the lead character Forrest Gump (played by Tom Hanks) said: “My mom always said life was like a box of chocolates. You never know what you’re gonna get.” Mr Chew likened arbitral awards to a box of chocolates—some were sweeter than expected, some were bittersweet and some “you just do not like”.

The main question Mr Chew answered during this session was: What should be included in an award? He discussed certain mandatory requirements, without which the award would be at risk of being set aside. Mr Chew
noted that an arbitrator should include in the award the basis of jurisdiction, the applicable laws and the procedural rules. Mr Chew also said that an award should adequately record the procedural history. A sentence to the effect: “The procedural history is set out in the Tribunal’s Procedural Orders Nos. 1 through 25” is not likely to be sufficient. A detailed procedural history would help demonstrate compliance with due process and equal treatment. It would also be especially important if there were a non-participating party. The arbitrator should make sure that the non-participating party has had ample opportunity to appear and present its case, and meticulously document in the award the efforts the Tribunal made to notify the party, to give the party extensions of time, etc.

There was also some discussion about the dispositif. Mr Chew emphasised that the goal of the dispositif would be for a person to immediately understand what the Tribunal had decided. It should be clear so the enforcement authorities would know what to do and generally, should not impose conditions.

For more information on the content of the award, you can refer to the IBA TOOLKIT FOR AWARD WRITING, Chapter 4: Content of the Award.

Tips and Techniques for Drafting

On tips and techniques for drafting, Mr Hiroyuki Tezuka started by setting the record straight and noted that in his view there would not be any such checklist a Tribunal could look at right before it started to draft the award. There would only be a checklist with the steps to be taken before starting to draft the award.

For example, it is critical that the Parties’ positions are clarified before the Tribunal closes the proceedings. Imagine a case where the contract provides: “Liquidated damages imposed unless owner is solely attributable for the delay.” Each party alleges that the other party is solely responsible for the delay. What if the Tribunal found that both parties are responsible? What would be the logic/theory for reduced liability? Contributory negligence? What if the parties had not pleaded contributory negligence?

Mr Tezuka also provided some tips on expert evidence. He recommended considering joint reports from the experts from both sides and expert conferencing, which might help narrow down the issues on which the experts disagree. The Tribunal also might, upon consent by the Parties, direct the damages experts to work jointly, as the Tribunal’s experts, and to calculate damages based on the Tribunal’s instructions.

For other useful sources of information, Mr Hiroyuki Tezuka referred the audience to resources such as the IBA TOOLKIT FOR AWARD WRITING, Chapter 5: Tips and Techniques for Drafting, and “How to Draft Enforceable Awards under the Model Law”, Michael Hwang SC & Joshua Lim.
**Practical Group Exercise**

The participants were divided up into small groups for this segment of the workshop.

Mr Chew was the moderator for my group, where we discussed the mock award in the case of *Gatsby Wines v Domaine Tresbonvin*, SIAC Arb No. 256 of 2016.

The group’s overall impression of the award was that it was not well drafted, the bias in favor of the Respondent was blatant, it was rather emotional and personal when it should be neutral, based on the record and on logical reasoning.

The group noted there were at least two issues in the cover page of the award: (i) it was not appropriate to call the award a “decision”; rather, it should be called an “award”; and (ii) it was not appropriate for the Tribunal to mention the Tribunal secretary to the parties for the first time on the cover page of the award.

The group also noted there was no procedural history. The arbitrator tried to set out the procedural history in “Section I. The Arbitration Proceedings”, but (i) he failed to say when he was appointed as an arbitrator; (ii) he did not mention the day of closing of the proceedings; (iii) he did not mention the Tribunal secretary; and (iv) he did not mention the fact that these were expedited proceedings.

The arbitrator also tried to set out the facts in “Section III. The Parties and Their Conflicting Claims”. However, it was not clear from that section (i) what the agreed facts were; (ii) what the disputed facts were; and (iii) what he found the established facts to be. Typically, the group acknowledged that it would be best to have separate sections summarising the Respondent’s arguments, the Claimant’s arguments and the Tribunal’s findings.

Finally, “Section IV. Jurisdictional Challenge” was very conclusory and not very clear. The arbitrator also stated: “Had Respondent hired counsel with legal skills equal to Tresbonvin’s wine-making expertise, Respondent would have realised that many Tribunals and courts have found jurisdiction under clauses misnaming the intended arbitral institutions.” This was an example of the arbitrator getting inappropriately personal.

In terms of structure, the group thought the award was difficult to follow as there was no table of contents and there were hardly any headings. The arbitrator was also not consistent in his use of terms and phrases and party names.

Finally, the *dispositif* was quite deficient as well: (i) it did not specify interest rate; (ii) it failed to decide on cost claims; and (iii) it did not specify which claims are dismissive. The arbitrator also switched the Claimants and Respondents in the dispositive.

**Closing Remarks**

In his succinct concluding remarks, Mr Tezuka left the young arbitrators with two excellent points: (i) aim high; and (ii) be patient.

First, Mr Tezuka advised participants that even though they might be young and the first case they might get as arbitrator may be small, they should be aware that this still involved a final award. As arbitrator, one’s responsibility is very serious and so Mr Tezuka’s advice was that young practitioners should not set their target so low as to simply draft an award that will not be set aside. Their role as arbitrators would be to write an award that was persuasive and acceptable to even the losing party – that should be the target.

Second, for those participants who had not previously acted as an arbitrator, Mr Tezuka’s advice was to seek out an opportunity to work as a Tribunal secretary, so as to observe how experienced arbitrators handled cases. This would provide them with the chance to observe the tribunal’s deliberations to understand what it takes to be a good arbitrator. Mr Tezuka noted that it would be very difficult to think about what one should do without having good examples. Even though the work as Tribunal secretary would at times be administrative, including proofreading, printing, etc., one would certainly be rewarded for such work by being given a very practical opportunity to see how arbitrators handled cases.
“Twilight Issues” in International Arbitration
by Zara Fung, Norton Rose Fulbright and
Amy Tan, Drew & Napier LLC

(The first half of the event was reported by Zara Fung, Associate, Norton Rose Fulbright.)

“Twilight Issues” in International Arbitration was a stand-out seminar at this year’s SIAC Congress Week, attracting an impressive turnout of 160 attendees. This event confronted some of the most challenging issues faced by tribunals and counsel in arbitration today. Collectively termed “Twilight Issues”, these areas of law – amongst them issues of privilege, res judicata, interest and interim relief – often stump even the most seasoned practitioner, not the least because of the first, most pressing question: how does one begin to address these areas in the context of an arbitration?

Panel Session I: Twilight Issues and National Law

In “Twilight Issues and National Law”, the panellists – Professor George A. Bermann (Jean Monnet Professor of EU Law and Director, Center for International Commercial and Investment Arbitration, Columbia Law School), Professor Lawrence Boo (Member, SIAC Court of Arbitration; Independent Arbitrator, The Arbitration Chambers), Mr KC Lye (Partner, Norton Rose Fulbright (Asia) LLP) and Dr Michael Pryles AO PBM (Founder President & Member, SIAC Court of Arbitration; Independent Arbitrator) – embarked on a spirited discussion on the role of national law in unpacking this basket of issues.

What exactly defines these “twilight issues”? Professor Bermann kicked off the session by defining this term to mean issues encountered in arbitrations that were repeatedly encountered, potentially determinative, and yet, not consistently regulated. They were also issues that escaped the parameters of the usual “golden elements” of arbitration – the arbitration rules, the contract, and the arbitration clause. However, Professor Bermann was also quick to highlight that despite these similarities, there could be no blanket solution or norms set to address these issues. Instead, the best that the panellists could hope to do was discuss the extent to which national law could be utilised to address these “twilight issues”.

Dr Pryles, despite admitting to being informed of the motion only 48 hours prior to the event, contributed significant insight to the relevance of national law in arbitration. Tapping on his 15 years of experience as a professor of conflicts of laws, he observed that, notwithstanding the international nature of an arbitration dispute, national law had its place in determining “twilight issues” for two reasons. First, there was presently no international standard to address these issues. Second, as a matter of habit, counsel and tribunals would naturally be comfortable with utilising their own national law in determining an issue.

However, Dr Pryles admitted that there could never be a one-size-fits-all solution given the diverse nature of “twilight issues”, which spanned questions of jurisdiction, admissibility, limitations, and interlocutory relief. That said, working with those broad classifications, Dr Pryles sought to propose a solution – that national law should govern issues relating to arbitrability, limitation, and jurisdiction, but not where there were issues concerning principles with universal concepts such as corruption, waiver and res judicata.

Ultimately, he concluded that what would be desirable was for international standards to be developed to address these issues.

The floor then moved to Mr Lye, who was handed the task of addressing which national law should apply – the law of the contract, or the law of the place of the arbitration?

With self-deprecating honesty, Mr Lye admitted that these “twilight issues” touched on
one of the key triggers of legal agoraphobia – a lawyer’s inability to make a decision in a rule-free environment. He did, however, propose that the preferred law to apply would be the law of the contract, being the law that was most closely associated with the most sacrosanct principle of arbitration – party autonomy. However, he admitted that even so, the law of the contract may not work well for all issues, and that question of workability would ultimately depend on how in sync in the “twilight issue” at hand jived with the substance of the contract. At the probing of Professor Bermann, Mr Lye also admitted that there were some “twilight issues” for which the law of the contract would simply not make sense – for example, limitation.

With that, the time was then handed to Professor Boo, who offered, in his words, a “provocative” counter-approach – the law of the seat of the arbitration. His argument was simple – given that the court of the seat of the arbitration would be the first to decide on any quasi-procedural or procedural issues that would arise in an arbitration (such as discovery, disclosure and privilege), that law must be considered. Professor Boo also highlighted that the court of the seat of the arbitration would also be crucial when considering the nature of the relief sought – and to that end, he posited that parties must have considered these issues when deciding on the seat of the arbitration. This was quickly countered by Mr Lye, who stood by his position that it was the law of the contract that parties would apply their minds to in choosing a preferred body of law, although he admitted that this ultimately turned on whether the issue at hand was a substantive or procedural one. Professor Boo agreed and threw another hat into the ring – the law of the place of enforcement, the enforcement of an arbitration award being the perfect example of a hybrid issue that was procedural in nature, but with substantive effect.

As expected, no definitive solution could be reached. Nonetheless, there was a consensus across the panel that it would be appropriate for the drafters of institutional rules to address some of these “twilight issues”, although the “how” and the “what” remained to be determined. However, considering that the program was fast approaching the time for a
Panel Session II: Twilight Issues and International Standards
(The second half of the event was reported by Amy Tan, Senior Associate, Drew & Napier LLC.)

The second panel session, “Twilight Issues and International Standards”, was chaired by Professor Bernard Hanotiau (Member, SIAC Court of Arbitration; Partner, Hanotiau & van den Berg), and explored whether international standards were possible and how they could be achieved.

The first panellist, Professor Janet Walker (Arbitration Place, Toronto), espoused the framework for the application of international standards to twilight issues.

With a background in private international law and comparative procedural law, Professor Walker observed that there was an internal coherence of legal systems. While she noted the problems in transplanting methods and techniques from one legal system to another (e.g. class actions), constituting a coherent legal system might provide context, guidance and insight.

Professor Walker noted that the concept of a transnational civil legal system (as highlighted in Chief Justice Sundaresh Menon’s keynote speech at the SIAC Congress 2018) was improbable some years ago, but the Principles of Transnational Civil Procedure have since been developed and adopted by UNIDROIT.

Other examples of international standards on procedural issues included the IBA Rules on the Taking of Evidence and the general practice that limits on subsequent disclosure are subject to challenge. Yet, on the other end of the spectrum, issues such as arbitrability, which also sit in the context of the larger regulatory structure, may require more care before international standards can be achieved.

Professor Walker ended with a comment that achieving international standards should not mean that we “blind ourselves to the wonderful diversity of approaches”, and encouraged arbitrators to adopt a bespoke approach and tailor each case to give parties maximum efficiency and resolution of each dispute.

The second panellist, Mr Toby Landau QC (Member, SIAC Court of Arbitration; Barrister and Arbitrator, Essex Court Chambers), asked why international standards should be applied in relation to twilight issues, whether they have emerged, where to find these standards and when they were accepted as international standards.

Why: Inconsistent application of conflict of laws analysis to determine twilight issues have undermined confidence and led to legitimacy complaints (think ICSID). International standards might be useful in two ways: First, in determining how the twilight issues should be characterised, and second, in ascertaining the applicable rule.

What: Mr Landau proposed three options: First, Article V of the New York Convention and the conflict of law principles set out therein. Second, traditional customary international law. Third, notions of “international standards”, which included soft law, international practices and consensus that were continuously being developed.

Where: Mr Landau proposed six places to find the third type of “international standards”: First, rules, guidelines, protocols published by international bodies and institutions. Second, national law insofar as there was consensus and coherence. Third, publicly available decisions. Fourth, commentary and academia. Fifth, proposals by the international arbitral community (e.g. Redfern schedule, Stern schedule etc). Sixth, word on the arbitral street, i.e. what people have been saying at conferences.

When: These sources have different means of testing whether they have been elevated to the level of an “international standard” e.g. uptake, number of references, etc. While Mr Landau noted...
that the tests might be uncertain, he explained that it would be akin to people crossing a meadow. At first, people would make a track and flatten the grass. There might be different tracks and paths, but eventually, one path would become defined and would become the only way to cross the meadow. It would be hard to define when that would happen, but one would know when it did happen – then that would be internationally accepted.

The last panellist, Dr Michael Hwang, SC (Chartered Arbitrator, Michael Hwang Chambers LLC), discussed the role of tribunals in contributing to the emergence of an international standard. Dr Hwang departed from theory and shared personal experiences in introducing the concept of hot-tubbing and witness conferencing to arbitrations in Singapore.

After being introduced to hot-tubbing in Taiwan, Dr Hwang considered the early articles of Dr Wolfgang Peter, and sought to introduce hot-tubbing in a few of the arbitrations that he was involved in. After several attempts, the use of hot-tubbing proliferated and was even introduced into the Rules of Court in Singapore.

Emboldened by the success of hot-tubbing for experts, Dr Hwang applied the concept to factual witnesses in a construction arbitration and reduced the time for hearing from the scheduled 7-8 weeks to 4-5 weeks.

Now, hot-tubbing for experts has become routine, and witness conferencing has been provided for at Article 8(3)(f) of the IBA Rules on the Taking of Evidence.

Dr Hwang remarked that international standards needed to be tested against the law of the land – the institutional rules and the national law. Ultimately, procedure has always been in the discretion of the tribunal, who might override parties to achieve procedural fairness as required.

The panel discussion was engaging, fruitful and charted a path towards the proliferation of applicable international standards to twilight issues in international arbitration.