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YSIAC WRITING COMPETITION 2020: THE WINNING SUBMISSIONS

by Kate Apostolova, Freshfields Bruckhaus Deringer

YSIAC organises an annual essay competition. This year, the format of the competition was revamped and participants were asked to draft and submit a written brief for a procedural application in a mock arbitration.

We received a total of 84 entries from 25 jurisdictions, including Australia, Austria, Canada, Ethiopia, France, Germany, Indonesia, Italy, Korea, Nigeria, the Philippines, Romania, Russia, Serbia, Singapore, Thailand, the UK, the US, and Vietnam.

Our panel of judges, comprising Mr Chan Leng Sun, SC (Deputy Chairman, SIAC Board of Directors; Senior Counsel and Arbitrator, Essex Court Chambers Duxton), Ms Julie Bédard (Member, SIAC Court of Arbitration; Head, International Litigation & Arbitration Group for the Americas, Skadden) and Mr Joaquin P. Terceño (Counsel, Freshfields Bruckhaus Deringer (Tokyo)), were tasked to select the submissions from the best Claimant and the best Respondent.

The briefs submitted by Mr Alvin Tan (Associate, Schellenberg Wittmer (Singapore)) and Mr Choo Hao Ren, Lyndon (Associate, OC Queen Street LLC (Singapore)) were awarded the best Claimant and best Respondent respectively.

The winners were afforded the opportunity to role play as mock counsel, and presented their winning submissions at the "YSIAC Writing Competition 2020: Winners' Mock Hearing webinar" held on 18 November 2020.

Background of Case Scenario

By way of background, the mock case concerns a dispute over a distribution agreement between a Claimant and a Respondent.

The Claimant was Huckleberry Corporation, an English company, one of the leading distributors of precious infinity jewels in Asia. The Respondent was Narcissus International, which was a UAE company and one of the largest and most successful companies in the world which cut and polished infinity jewels for usage by customers. In 2012, the parties entered into a distribution agreement for the distribution of infinity jewels in Asia. But in 2019, the Respondent terminated the agreement allegedly because of poor performance by Huckleberry. Huckleberry initiated SIAC arbitration under the agreement.

We asked participants to submit briefs in relation to a procedural application addressing two procedural issues: *(a)* whether to excuse the attendance at the hearing of a witness unwilling to testify and *(b)* whether to allow for two witnesses to testify via video-conference.

The Claimant's counsel, Mr Alvin Tan, argued that:

1. Its witness should be excused from giving testimony at the hearing; and

2. The Respondent's witnesses should not be allowed to testify via video-conference.

The Respondent's counsel, Mr Lyndon Choo, argued that:

1. Its witnesses should be allowed to testify via video-conference; and

2. The Claimant's witness should not be excused from giving testimony, and in the absence of such testimony, the witness' evidence should be ignored.

Excerpts from the winning submissions are reproduced below.

YSIAC would like to thank our panel of judges, the prize sponsor Freshfields Bruckhaus Deringer, the supporting organisations, the YSIAC Publications Subcommittee and SIAC for helping to organise the YSIAC Writing Competition 2020.

Top Row (Left to Right): Ms Kate Apostolova, Mr Alvin Tan and Mr Lyndon Choo
Bottom Row (Left to Right): Mr Chan Leng Sun, SC, Ms Julie Bédard and Mr Joaquin P. Terceño

CLAIMANT'S WRITTEN SUBMISSIONS (excerpt)

I. Introduction

1. These are the Claimant's written submissions in relation to the two pre-hearing issues set out by the Arbitral Tribunal (the "Tribunal") in its email to the parties dated 25 June 2020. A brief summary of the facts leading up to these two issues are as follows

2. On 17 June 2020, counsel for the Respondent wrote an email to the Tribunal[1] requesting that its two witnesses, Ms Caprice Marvellous ("Ms Marvellous") and Mr Diamond, be allowed to be cross-examined by video-conference instead of physically at the in-person hearing on 12-16 October 2020.

3. On 19 June 2020, we, counsel for the Claimant, wrote an email to the Tribunal[2] stating the Claimant's objection to the Respondent's request.

4. In addition, we informed the Tribunal that one of the Claimant's witnesses, Mr Casper Americano ("Mr Americano") is now unable to continue testifying because he had been fired by his previous employer for testifying against the Respondent, and now risks the same consequence with his new employer who also has business relationships with the Respondent. The relevant details of these circumstances will be emphasised in our submissions below.

5. Mr Americano made clear in his letter to us that he would change his mobile number and email and would no longer involve himself with the Claimant and the Respondent's dispute[3]. The Claimant has made five attempts to contact Mr Americano since, all of which have been unsuccessful.

6. As a result, while Mr Americano has already submitted a written witness statement, he will be unavailable to attend the hearing. In our 19 June 2020 email to the Tribunal, we sought to reserve the Claimant's right to, at the conclusion of the hearing, request that Mr Americano's written witness statement be admitted into evidence and considered by the Tribunal.

7. On 21 June 2020, counsel for the Respondent wrote an email to the Tribunal[4] requesting that Mr Americano's written statement be excluded.

8. The two issues arising from these facts are:

a. whether the Tribunal should excuse the attendance at the hearing of the Claimant's witness unwilling to testify; and

b. whether the Tribunal should allow for the Respondent's two witnesses to testify via video-conference.

II. The Tribunal should excuse Mr Americano's non-attendance at the hearing and admit his written statement into evidence.

[1] Annex 1 - Email from Respondent's counsel to Tribunal dated 17 June 2020
[2] Annex 2 - Email from Claimant's counsel to Tribunal dated 19 June 2020
[3] Annex 4 - Final email from Mr Casper Americano to Claimant's counsel dated 1 June 2020
[4] Annex 3 - Email from Claimant's counsel to Tribunal dated 19 June 2020

9. The Tribunal should reject the Respondent's request to exclude Mr Americano's evidence because Mr Americano has shown valid reasons and exceptional circumstances for not appearing at the hearing.

10. The applicable rules here are the IBA Rules of the Taking of Evidence in International Arbitration 2010 (the "IBA Rules"), which the parties have expressly incorporated into their arbitration agreement[5].

11. Article 1.1 of the IBA Rules provides that its rules "shall govern the taking of evidence" in an arbitration if the parties have agreed to apply them.

12. Article 4.7 of the IBA Rules provides that:

"If a witness whose appearance has been requested pursuant to Article 8.1 fails without a valid reason to appear for testimony at an Evidentiary Hearing, the Arbitral Tribunal shall disregard any Witness Statement related to that Evidentiary Hearing by that witness unless, in exceptional circumstances, the Arbitral Tribunal decides otherwise." (emphasis added)

13. The phrasing of Article 4.7 indicates two stages of application.

14. At the first stage, Article 4.7 only applies in the specific event that a witness fails to appear for testimony at a hearing "without a valid reason". Thus, if a witness shows a valid reason for his non-appearance, the Tribunal does not even have to consider whether to disregard his witness statement. The witness statement is admitted without question.

15. Only where a witness fails to show a valid reason for his non-appearance, then Article 4.7 requires that the Tribunal should ordinarily disregard his witness statement, unless there are "exceptional circumstances" which justify admitting his witness statement.

A. Article 4.7 does not apply because there is a "valid reason" for Mr Americano's non-appearance at the hearing.

16. It is uncontroversial that pressure from a witness's employer to not testify in a dispute constitutes "valid reason" for that witness's non-attendance at a hearing. The authors of "A Guide to the IBA Rules on the Taking of Evidence in International Arbitration" (Oxford University Press 2019) explained:

"7.157 Whatever the position taken, and depending on the facts of the case, there undoubtedly are risks attached to application of the requirement to disregard the evidence of a witness who fails to attend a hearing. For example, if the only evidence that a party has on a particular issue is the witness statement of a witness who is no longer under the control of that party (for example, because he has left their employment and now works for a competitor), is it fair to disregard that witness statement when the witness refuses to attend the evidentiary hearing? Could such a situation lead to a challenge to the award?

7.158 In practice, the tribunal's power not to disregard a statement when a valid reason has been tendered by the party affected provides a mechanism for balancing the legitimate interests of the parties. In the example just mentioned, it may be open to the party relying on the witness statement to explain to the tribunal that—despite all reasonable efforts on its part, including an offer of reasonable time costs and expenses—the witness is not prepared to attend the hearing and has made clear that his refusal is the result of pressure being exerted on him by the new employer. A tribunal may regard such circumstances as constituting a 'valid reason' for the purposes of the Article 4.7 exception." (emphasis added)

17. The example in the commentary illustrates an essential point that a witness should not risk his relationship with his employer (i.e. his livelihood) in order to give evidence in a dispute, especially when that witness no longer has or does not have any personal interest in that dispute.

18. In this case, Mr Americano's fear of jeopardizing his employment is legitimate and valid. He had already been dismissed by his previous employer, G.E.M, for testifying against the Respondent. He was told by his boss at G.E.M. when he was fired that he had "caused trouble for G.E.M. with Narcissus" by doing so[6].

19. Further, his boss explained that "…Narcisuss doesn't take this kind of thing lying down. You really should have known better than to paly hero and stick your neck out for other people[7]."

20. These words suggest that a person whose company has business dealings with the Respondent should be concerned that testifying against Narcissus would result in negative implications to his company

[5] Annex 5 - Non-exclusive Distribution Agreement between Huckleberry and Narcicuss, at Article 10
[6] Annex 4 - Final email from Mr Casper Americano to Claimant's counsel dated 1 June 2020
[7] Annex 4 – Final email from Mr Casper Americano to Claimant's counsel dated 1 June 2020

and to his employment. Here, Mr Americano is rightfully concerned because his new employer also has business dealings with Narcissus.

21. Furthermore, far less exacting situations have been considered by an arbitral tribunal to be "valid reason" for a witness's non-attendance under Article 4.7 of the IBA Rules. In ICC Partial Award dated November 2012 cited in 'Extracts from ICC Case Materials on the Taking of Evidence with References to the IBA Rules' (2016) 1 ICC Dispute Resolution Bulletin 127, a tribunal decided that a witness who did not live in the same country as where the hearing had valid reason not to attend the hearing because he had limited means to meet the costs of attendance.

22. If a lack of financial means to attend the hearing constitutes "valid reason" under Article 4.7, then the risk of jeopardizing one's employment and entire livelihood must, a fortiori, also constitute "valid reason" for one's non-attendance.

B. Even if Article 4.7 applies, there are "exceptional circumstances" which justify admitting Mr Americano's witness statement.

23. Even if the Tribunal disagrees with the Claimant that there is "valid reason" for Mr Americano's non-attendance at the hearing, there are "exceptional circumstances" which justify admitting Mr Americano's witness statement.

24. Mr Americano is an important witness and his testimony goes directly towards the Tribunal's assessment of the core factual issue in this case.

25. The Claimant's entire damages claim in this arbitration rests on its factual allegation that the Respondent pressured the Resellers to choose Geranium as their preferred distributor rather than the Claimant[8]. The Respondent denies this factual allegation, asserting that it allowed each Reseller to freely choose their distributor[9]. As such, the core factual issue in this arbitration is whether the Resellers experienced this alleged pressure from the Respondent.

26. Mr Americano was the Regional Manager of G.E.M., one of the Respondent's Resellers. He was in charge of purchasing jewels on behalf of G.E.M. from a distributor. He was directly involved in the process of appointing and switching distributors on behalf of G.E.M.[10]and therefore had the first-hand experience of how difficult it was, and whether such difficulty was caused or created by the Respondent. Accordingly, his testimony provides the most direct evidence on this matter.

27. In contrast, although the Respondent's witness, Ms Marvellous, also claims to have been involved in G.E.M.'s process of appointing and switching distributors, she worked in a managerial capacity, unlike Mr Americano who was executing the process. As the CEO of the company, she would not have been as "hands-on" in the distributor appointment process as Mr Americano had, as all the other affairs in the company would also have required her attention (such as sales, logistics, etc). The fact that she has now moved on to the CEO position of a company in a completely different industry (movie-making) shows that her experience and expertise was focused on broader management and entrepreneurship rather than on hands-on execution within G.E.M.

28. As such, even if Mr Americano reported to her, and even if she was "ultimately responsible" for calling decisions on distributors, she is unlikely to have the same direct knowledge of whether the switching process was difficult as Mr Americano who was actually executing the process. To wholly disregard Mr Americano's evidence would greatly dim the light on the truth of this matter.

29. Specific consideration should also be had to the Claimant's position as the claimant in this arbitration. The Claimant has the burden of proof to establish the facts supporting its cause of action. Admitting the statement of an important witness of the Claimant would allow the Claimant to put forth its full case and completely ventilate its dispute. Admitting the statement and then assessing its appropriate weight[11] (taking into account the lack of cross-examination[12]) would be preferable to shutting out an important piece of evidence completely. This position is adopted by a leading commentator:

"Defects in evidence are therefore usually taken into account in evaluating its credibility, weight and value, rather than in rulings on admissibility.[13]"

30. Accordingly, the Tribunal should dismiss the Respondent's request for the Tribunal to disregard

[8] Claimant's Notice of Arbitration dated 24 September 2019
[9] Response to Notice of Arbitration dated 8 October 2019
[10] Witness Statement of Mr Casper Americano
[11] Article 9.1 of the IBA Rules provide that the tribunal has the power to assess the weight of any evidence.
[12] Gary B. Born, International Commercial Arbitration (Second Edition), 2nd edition (Kluwer Law International 2014), at p.2285: "If the witness has a compelling excuse (*e.g.*, serious illness), then the tribunal may choose not to disregard the witness statement – although its credibility will be affected by the lack of any cross examination".
[13] Gary B. Born, International Commercial Arbitration (Second Edition), 2nd edition (Kluwer Law International 2014), at p.2311

Mr Americano's witness statement.

RESPONDENT'S WRITTEN SUBMISSIONS (excerpt)

I. Introduction

1. These are the Respondent's submissions filed pursuant to the Learned Tribunal's directions dated 25 June 2020, for submissions to be filed in relation to two issues: (a) whether the Learned Tribunal should excuse the attendance at the hearing of the Claimant's witness unwilling to testify and (b) whether the Learned Tribunal should allow for the Respondent's two witnesses to testify via video-conference.

2. Before this Learned Tribunal today are preliminary issues concern ing the attendance of three witnesses at the hearing currently scheduled on 12 – 16 October 2020. One of the Claimant's witness has refused to attend the hearing while two of the Respondent's witnesses are unable to attend the hearing in-person due to other commitments and have offered to give evidence via video-conference.

3. It is the Respondent's position that: I. The Learned Tribunal should not excuse the Claimant's witness from attendance at the hearing; and II. The Learned Tribunal should allow the Respondent's two witnesses to testify via video-conference.

II. The Learned Tribunal should not excuse the Claimant's witness from attendance at the hearing

4. The Claimant's witness' attendance at the hearing should not be excused because: (a) The absence of the Claimant's witness from the hearing is inconsistent with parties' agreement; (b) The absence of the Claimant's witness from the hearing is not supported by good cause or justified by extraordinary circumstances; and (c) The Respondent is significantly prejudiced by the absence of the Claimant's witness at the hearing.

(a) The absence of the Claimant's witness from the hearing is inconsistent with parties' agreement

5. The Learned Tribunal ought to be give effect to Parties' agreement for witnesses to be present at the hearing.

6. Under the non-exclusive distribution agreement entered between parties on 1 May 2012 (**"Agreement"**), parties have contemplated and agreed under Clause 10, that any dispute shall be resolved via arbitration "*in accordance with the Arbitration Rules of the Singapore International Arbitration Centre*" and that parties "*further agree to incorporate the IBA Rules on the Taking of Evidence in International Arbitration*".[1]

7. Clause 25.4 of the 2016 version of the rules of the Singapore International Arbitration Centre (**"SIAC Rules"**) provides that "*if the witness fails to attend for oral examination, the Tribunal may place such weight on the written testimony as it thinks fit, disregard such written testimony, or exclude such written testimony altogether.*"[2]

8. Rule 8.1 of the International Bar Association Rules on the Taking of Evidence in International Arbitration (**"IBA Rules"**) provides that each witness shall *"appear for testimony at the Evidentiary Hearing if such person's appearance has been requested by any Party or by the Arbitral Tribunal"*.[3] Rule 4.7 of the IBA Rules further provides that if a witness *"fails without a valid reason to appear for testimony at an Evidentiary Hearing, the Arbitral Tribunal shall disregard any Witness Statement related to that Evidentiary Hearing by that witness"*.[4]

9. The parties' agreement that witnesses ought to be present and heard at the hearing is also reflected in the Pre-Hearing Procedural Order (**"Procedural Order"**). Order 9.3 provides that "[f]*ailure to make a witness available for cross-examination will result in the exclusion of that witness' evidence, absent extraordinary circumstances or a showing of good cause as determined by the Tribunal*".[5]

10. The importance that the parties place on the need for a hearing can also be seen from the fact that parties have already re-fixed the hearing date once, when it was not possible to have the hearing back in April.[6]

11. Given parties' agreement which has been reproduced above, the Learned Tribunal should be slow to excuse the Claimant's witness from his attendance at the hearing. This is especially so given that the Claimant has failed to provide good cause or extraordinary circumstances to justify an extension of such indulgence.

[1] Statement of Agreed Facts at p. 5.
[2] Singapore International Arbitration Centre Rules 2016 ("**SIAC Rules**"), Rule 25.4.
[3] International Bar Association Rules on the Taking of Evidence in International Arbitration ("**IBA Rules**"), Rule 8.1.
[4] IBA Rules, *supra* n 3, Rule 4.7.
[5] Pre-Hearing Procedural Order ("**Procedural Order**"), Order 9.3.
[6] Statement of Agreed Facts at p. 4.

(b) The absence of the Claimant's witness from the hearing is not supported by good cause or justified by extraordinary circumstances.

12. The Claimant has also failed to provide good cause or extraordinary circumstances to justify the absence of its witness from the hearing.

13. Order 9.3 of the Procedural Order provides that the evidence from a witness who is not available for cross-examination will be excluded, unless "*good cause*" or "*extraordinary circumstances*" are shown.[7] A similar standard is applied under the IBA Rules.[8] Where a party is unable to show "good cause" for the witness' absence from the hearing, a tribunal is unlikely to find the exceptional circumstances exist to justify his absence.[9]

14. Under the IBA Rules, "good cause" is shown if the witness is physically incapacitated, requires to undergo a medical procedure urgently, suffers an inability to travel to the hearing as a result of visa requirements, or faces threats that have been proven to the satisfaction of the tribunal.[10] The basis for excusing a party's failure to present a witness generally stems from an event preventing attendance, which was unforeseeable at the time that the witness statement was proffered.[11] To avoid abuse of the exception, a high standard should be applied in determining whether "good cause" or exceptional circumstances exist.[12]

15. The Claimant is unable to show that there is "good cause", and therefore is similarly unable to show "exceptional circumstances", for its witness' absence from the present hearing for the following three reasons.

16. First, while the Claimant has asserted that one of its witness has "*lost his job because he submitted his witness statement in this proceeding*" and "*he fears that he will jeopardize his current position if he appears to testify*",[13] the evidence before the Learned Tribunal does not support such baseless assertions.

17. The letter from its witness which the Claimant has produced, contains merely a one-sided account by the witness that he had been terminated and that the reason might be linked to the Respondent.[14] However, even the Claimant's witness himself did not rule out the possibility of reasons for his termination, including the differences with his supervisor. The exercise of determining whether there is "good cause" is a factual inquiry.[15] This Learned Tribunal has yet to hear evidence from the Respondent or the one Mr N. Fastidio (the Claimant's witness' supervisor) and it would be premature to conclude that the Respondent is responsible for the witness' absence from the hearing.

18. The present case is easily distinguishable from previous cases where threat / pressure from a party has been found to be a valid reason to excuse attendance of a witness of the opposing party. In previous cases, the attendance of witnesses was excused where credible evidence was shown of threats made in the form of harassment, court prosecutions, or legal action taken.[16] The Respondent has stated on record that it has not threatened / pressured the Claimant's witness,[17]and there is no evidence to the contrary. For the reasons stated above, the evidence provided by the Claimant is wholly inadequate.

19. Second, a distinction must be made between cases where a witness is unable to, and cases where a witness is unwilling to attend a hearing. The exceptions to Rule 4.7 of the IBA Rules are narrow, and only apply when a witness is unable, as opposed to unwilling, to attend a hearing.[18] Even if the allegations by the Claimant's witness are true (which the Respondent denies), any threat or retaliation from the Respondent is not the reason for the witness' failure to attend the hearing. The Claimant's witness chose not to partake in the present hearing for his personal reasons[19] – in other words, he is unwilling and not unable to attend the hearing. As such, the reasons proffered by the Claimant cannot constitute "good cause" to excuse the attendance of

[7] Procedural Order, *supra* n 5, Order 9.3.
[8] IBA Rules, *supra* n 3, Rule 4.7.
[9] Roman Khodykin & Carol Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration* (OUP, 2019) ("**Roman Khodykin**"), para 7.151.
[10] Roman Khodykin, *supra* n 9, paras 7.148 and 7.149.
[11] Nathan D. O'Malley, *Rules of Evidence in International Arbitration: An Annotated Guide* (Routledge, 2012) ("**Malley**"), para 4.56.
[12] Roman Khodykin, *supra* n 9, para 7.152.
[13] Statement of Agreed Facts at p. 10.
[14] Statement of Agreed Facts at p. 11.
[15] Malley, *supra* n 11, para 4.53.
[16] *Caratube International Oil Company LLP v The Republic of Kazakhstan* (Award, 5 June 2012) ICSID Case No. ARB/08/12 pp 22, 55; *Enron Creditors Recovery Corp Ponderosa Assets LLP v The Argentine Republic* (Decision on the Application for Annulment of the Argentine Republic) ICSID Case No. ARB/01/3 para 177.
[17] Statement of Agreed Facts at p. 12.
[18] Malley, *supra* n 11, para 4.55; Roman Khodykin, *supra* n 9, para 7.148.
[19] Statement of Agreed Facts at p. 11.

its witness.

20. Third, while the Claimant may seek to argue that the alleged threats / pressure from the Respondent has caused its witness' inability to attend the hearing, such an argument is baseless, and must be rejected. On the facts, the Claimant's witness has not alleged that he is facing pressure from his current employer for his involvement in the current arbitration.

(c) The Respondent is significantly prejudiced by the absence of the Claimant's witness at the hearing

21. The Respondent is significantly prejudiced by the absence of the Claimant's witness at the hearing since it would be unable to cross-examine the witness and test the veracity of his testimony.

22. Even though the Claimant's witness may have confirmed the truth of his testimony in writing,[20] the veracity of his allegations can only be tested and challenged adequately through the process of cross-examination. Cross-examination is the "*greatest legal engine ever invented for the discovery of truth*",[21] and is necessary for the full and fair ventilation of issues in question. The failure to provide a party a fair and equal right to a hearing is a ground for challenging a tribunal's eventual award for procedural impropriety.[22]

23. By seeking this Learned Tribunal's indulgence to excuse the Claimant's witness from attendance at the hearing, the Claimant is trying to make the admission of that witness' testimony a *fait accompli,* without giving the Respondent a fair and equal opportunity to examine the witness and put his testimony under scrutiny.

20 Statement of Agreed Facts at p. 11.

21 Roman Khodykin, *supra* n 9, para 7.142; Peter Spuijbroek, "Witness Evidence in International Commercial Arbitration" (University of Amsterdam, 2013) ("**Peter Spuijbroek**"), para 9.

22 Roman Khodykin, *supra* n 9, para 7.145; Peter Spuijbroek, *supra* n 21, paras 43, 48, and 52–53; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan* (Award, 27 August 2009) ICSID Case No. ARB/03/29, para 303; *Generica Limited v Pharmaceutical Basics Inc* 125 F3d 1123 (7th Cir. 1997).

EVENT AT THE NEW YORK ARBITRATION WEEK 2020 BY THE YOUNG INTERNATIONAL ARBITRATION PRACTITIONERS OF NEW YORK

By Kirsten Teo, De Almeida Pereira

As part of the New York Arbitration Week 2020, on November 19, 2020, the Young International Arbitration Practitioners of New York (**YIAP-NY**) held a 3-part series of guided virtual networking sessions on the overall theme of 'Resilience in Times of Crisis: A Look Beyond New York's Borders'. Capitalising on the virtual format of the New York Arbitration Week, YIAP-NY collaborated with young practitioners' groups in various time zone-appropriate jurisdictions, to engage with friends and colleagues who would not otherwise have been able to attend in person in New York.

The first session focused on the Asia Pacific region and the discussion was led by Ms Preeti Bhagnani (Partner, White and Case) and Ms Christine Sim (Associate, Herbert Smith Freehills), with introductions by Ms Liang-Ying Tan (Co-Chair and Co-Founder, YIAP-NY; YSIAC Committee Member; Senior Associate, Herbert Smith Freehills), and Ms Rekha Rangachari (Executive Director, New York International Arbitration Center). Ms Adriana Uson (YSIAC Committee Member; Head (Americas), SIAC) and Ms Kirsten Teo (YSIAC Committee Member; DC Counsel, International Arbitration, De Almeida Pereira) facilitated the breakout networking sessions.

Top Row (Left to Right): Ms Kirsten Teo, Ms Rekha Rangachari and Ms Liang-Ying Tan
Bottom Row (Left to Right): Ms Christine Sim, Ms Adriana Uson and Ms Preeti Bhagnani

The substantive topics discussed during this session included the adaptability of arbitrators and arbitral institutions in conducting and managing virtual hearings, and the opportunities provided to younger arbitration practitioners to participate in or to attend online arbitral hearings. The question of whether there was a confidence crisis in Asia in the effectiveness of the investor-state dispute settlement (**ISDS**) mechanism, and topics in connection with the Singapore Convention on Mediation (**Singapore Convention**), such as whether mediation is accurately perceived as an Asian preference, whether parallels can be drawn between the New York Convention and the Singapore Convention, whether mediated settlements would yield more successful enforcement rates as compared to arbitral awards, and whether the failure to enforce mediated settlements may be considered a breach of treaty obligations, were also discussed.

The subsequent 30-minute networking breakout sessions drew lively discussions and insightful comments as participants from a myriad of jurisdictions including Singapore, Dubai, Turkey, Hong Kong, the UK, and various parts of the US shared highlights from their unique dispute resolution experiences. The networking sessions, guided by the substantive topics identified by the opening speakers, provided a wonderful opportunity for members and colleagues of the YIAP-NY to reconnect, encourage one another, and to stay engaged in the practice of international arbitration.

CAN PARTIES TO SIAC ARBITRATIONS SEEK DISCOVERY IN U.S. COURTS?

By Christine Sim, Herbert Smith Freehills[1]

The United States (**U.S.**) is a strong contributor to SIAC's caseload. In 2019, 65 U.S. parties, including parent and subsidiary companies, arbitrated at SIAC. A significant number of U.S. arbitrators also serve on tribunals in SIAC arbitrations. On 2 December 2020, SIAC launched its Americas office.

With the cases involving U.S. parties expected to grow from 2021 onwards, parties to SIAC arbitration may face the question: *can I seek discovery of documents or witness evidence before U.S. courts in support of my case?*

The vast majority of SIAC arbitrations are private, international commercial arbitrations. Recently, various U.S. Federal Circuit Courts have split into two camps over the question whether a party to such private international commercial arbitration is entitled to seek court-ordered discovery.

The question stems from the 2004 U.S. Supreme Court's decision *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), which left open the question whether "foreign or international tribunal" under Section 1782 of the U.S. Code (**28 USC § 1782**) includes private international arbitrations such as SIAC commercial arbitrations.

Currently, courts in the 4th, 6th and 9th Circuits appear to be in favour of granting discovery in aid of private international arbitration. On the opposite side are decisions from the 2nd, 5th, and 7th Circuits. It would take the U.S. Supreme Court to resolve this split. On 7 December 2020, a petition for a writ of certiorari to the U.S. Supreme Court was filed in the 7th Circuit.

Court ordered discovery may be available in respect of SIAC arbitration before certain U.S. courts

At the close of 2019, the 6th Circuit granted § 1782 discovery in the context of a DIFC-LCIA arbitration seated in Dubai (*Abdul Latif Jameel Transportation Company v. FedEx Corporation*, 939 F.3d 710 (6th Cir. 2019). A subpoena for documents from parent company FedEx Corp. as well as the deposition testimony of its corporate representative was sought. Abdul Latif Jameel Transportation Company had two contracts with the party to the arbitration FedEx's Saudi subsidiary and alleged that FedEx Corp. had been involved in contract negotiations as well as the performance of these two contracts.

Following in 2020, the 4th Circuit decided that § 1782 discovery was available to parties to international commercial arbitration in the context of a UK-seated tribunal operating under the CIArb rules regarding an aircraft fire (*Servotronics, Inc. v. Boeing Co.*, No. 18-2454 (4th Cir. March 30, 2020). Servotronics had petitioned the U.S. district court for the service of subpoenas on three South Carolina residents, all current or former Boeing employees, to give testimony regarding their role in troubleshooting and investigating the aircraft engine fire. In contrast, as described in the section below, a similar application was litigated by the same parties in the 7th Circuit, where the court took the opposite view.

> "..In 2019, 65 U.S. parties, including parent and subsidiary companies, arbitrated at SIAC. .."

In *HRC-Hainan Holding Co., LLC, et al v. Yihan Hu, et al*, 20-15371, the claimants in a CIETAC arbitration asked the District Court for Northern California, San Francisco, for discovery of documents in relation to a dispute over a healthcare facility and its intellectual property. The subpoenas in question were served by the claimants on the respondent, a Chinese woman living in California, along with her companies and her U.S. bank. The claimants accused the respondent of improperly transferring her interest in the healthcare facility to her mother. The magistrate judge had ruled in February 2020 that § 1782 discovery was available for private international arbitration.

However, the ongoing 9th Circuit appeal in *HRC-Hainan Holding Co., LLC, et al v. Yihan Hu*, may reverse the availability of court-ordered discovery

[1] Any comments contained in this article should not be taken as the view of any of the offices of Herbert Smith Freehills, nor any of the clients, partners, associates, employees or entities associated with the firm.

in aid of private international arbitrations including SIAC arbitrations. In November 2020, the 9th Circuit ordered the parties to file briefs addressing whether interpreting § 1782 as including private arbitrations would create a conflict with the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Court ordered discovery in aid of SIAC arbitrations may be limited in the majority of U.S. courts

In contrast to the 4th Circuit's position on discovery of evidence for the same arbitration regarding the aircraft engine fire discussed above, the 7th Circuit decided that § 1782 discovery was not available to parties arbitrating under the CIArb Rules. The 7th Circuit reasoned that the legislature could not possibly have intended to provide foreign litigants with more expansive discovery than what was available to domestic U.S. arbitrations (*Servotronics Inc. v. Rolls-Royce PLC*, No. 19-1847 (7th Cir. Sept. 22, 2020)). These diverging decisions demonstrate the uncertainty that potential discovery applicants involved in SIAC arbitrations could face if they were to seek U.S. discovery in different jurisdictions.

Regarding an ICC arbitration in Mexico, the 2nd Circuit previously denied a § 1782 application seeking discovery from U.S. individuals and entities. When more recently presented with a CIETAC arbitration, on 9 July 2020, the 2nd Circuit concluded that CIETAC tribunals were privately constituted and affirmed its position that § 1782 discovery was not available to private international arbitration (*In Re Application of Hanwei Guo*, No. 19-781 (2d Cir. July 8, 2020).

In an attempt to distinguish CIETAC from other more private arbitral institutions, the applicant had argued that CIETAC was originally established by the Chinese government and qualified as a state-sponsored authority. However, the court disagreed, finding that CIETAC now operates as a largely private commercial arbitration body. CIETAC had asserted its institutional independence and impartiality, free from any government or administrative interference in its handling of cases. Therefore CIETAC did not qualify as a "foreign or international tribunal" that derived its authority from the government, falling outside the scope of § 1782.

The 3rd Circuit, *In re: Application of EWE Gass*, is currently addressing the same issue in another § 1782 appeal in support of an arbitration under the German Arbitration Institute (**DIS**) rules and seated in Germany. The Delaware U.S. District Court had denied discovery in *EWE Gasspeicher GMBH v. Halliburton Co.*, Case No. 20-1830. This is another case to watch in addition to the 9th Circuit appeal discussed above.

Comparison to court ordered discovery in aid of international arbitration in Singapore

Singapore has dealt with similar issues regarding the courts' facilitation of document production and compelling of witness evidence. Compared to the position taken by the 4th and 6th Circuits permitting § 1782 discovery, document production is unlikely to be ordered by a Singapore court in the context of an ongoing international commercial arbitration. Generally, the rationale in Singapore is that procedural issues relating to the conduct of an arbitration are best left for the tribunal to decide. Section 12A(2) of the Singapore International Arbitration Act (**SIAA**) limits the type of procedural orders available to parties to foreign-seated arbitrations before the Singapore courts as it excludes court orders for discovery of documents or interrogatories.

In support of foreign-seated arbitrations, section 12A of the SIAA only provides Singapore courts with the power to make interim orders to preserve evidence. In addition, an applicant is expected to meet requirements of urgency and necessity. Further, section 12A(7) provides that a Singapore court order under section 12A(2) shall cease to have effect once the arbitral institution or tribunal makes an order that expressly relates to the court order.

Witnesses located within Singapore can be compelled to give evidence under Section 13 of the SIAA. This express power gives Singapore courts wider powers than what is currently available before some U.S. courts, including those in the 2nd, 5th and 7th Circuits in the granting of discovery applications in aid of private, international commercial arbitrations. As described above, in *In Re Application of Hanwei Guo*, No. 19-781 (2d Cir. July 8, 2020), the 2nd Circuit denied the request for discovery of evidence from four investment banks operating in the U.S. arising from their work as underwriters in an IPO that was related to the arbitration.

Section 13 (1) of the SIAA provides that any party to an arbitration agreement may apply for a subpoena to testify or a subpoena to produce documents. Section 13(2) empowers courts to issue a subpoena to testify or to produce documents, or to compel the

attendance of a witness located within Singapore to appear before an arbitral tribunal. In *Laos v Sanum Investments Ltd* [2013] SGHC 183, the High Court granted subpoenas under section 13 of the SIAA to compel the production of an audit report from a third party in support of an ICSID arbitration. Additionally, section 13 diverges from the requirement under Article 27 of UNCITRAL Model Law that a party must have prior approval of the tribunal to seek such assistance from the courts.

Court ordered discovery for investor-State arbitration

A handful of SIAC arbitrations have involved sovereign states. U.S. courts have drawn a clear distinction between private and public international arbitration. Investor-State tribunals are deemed to be public dispute resolution bodies. Accordingly, several U.S. courts have opened the door for investors and States to seek court-ordered discovery.

For example, *In re Application of Chevron Corporation (S.D.N.Y. 2010)*, the court granted discovery of film records from a documentary made in the context of a domestic class action that gave rise to the investor-State dispute. The court concluded that the investment tribunal was not established by private parties. Instead, it was an international tribunal formed pursuant to the US-Ecuador BIT. Similarly, in support of another investor-State arbitration, *In re Caratube Int'l Oil Co., No. 10-0285, 2010 WL 3155822 (D.D.C. Aug. 11, 2010)*, the D.C. District Court proceeded on the basis that an ICSID tribunal fell within the scope of § 1782. However, the court eventually exercised its discretion not to grant such discovery, giving primacy to ICSID arbitration procedures and the parties' reference to the IBA Rules on the Taking of Evidence.

Such discovery may also be available in respect of the enforcement in the U.S. of arbitral awards against a sovereign State. In *Republic of Argentina v. NML Capital*, 573 US 134 (2014), the claimant requested documents relating to Argentina's assets from two banks operating in the U.S., Bank of America and Banco de la Nación Argentina. The U.S. Supreme Court ruled that Argentina was not protected by sovereign immunity with regard to discovery applications.

Although Singapore has not drawn such a clear distinction between public and private arbitral tribunals, a subpoena for documents in aid of investor-State arbitration is similarly available under section 13 of the SIAA (see L*aos v Sanum Investments Ltd* [2013] SGHC 183 described above). However, in contrast to the general availability of § 1782 discovery in aid of investor-State arbitrations before U.S. courts, such discovery appears to be unavailable under section 12A of the IAA before Singapore courts. Instead, parties to investor-State arbitration are limited to the scope of discovery available under section 13 of the SIAA.

Conclusion

Parties to private, commercial SIAC arbitrations should carefully consider all available options when seeking court discovery in aid of their case. This is especially important when the documents sought are located in a jurisdiction different from the location of the subpoenaed party. Certain U.S. courts have permitted extra-territorial discovery of documents: for example, *In re del Valle Ruiz*, No. 18-3226 (2d Cir. 2019), the 2nd Circuit decided that § 1782 discovery could require a U.S. banking affiliate to produce documents located overseas as long as these were within the U.S. entity's possession, custody or control.

The position regarding discovery in aid of private international arbitration in Singapore is different to the U.S. and strikes a balance between the U.S. courts that are currently in opposing camps. On the one hand, compared to the position of some U.S. courts that have assumed the powers to grant § 1782 discovery in aid of private international arbitration, the Singapore arbitral regime appears generally more deferential to the tribunal's powers over procedural issues. On the other hand, compared to other U.S. courts that have rejected the application of § 1782 to private international arbitration, the Singapore courts appear to have more expansive powers to compel the taking of evidence within its jurisdiction.

Nevertheless, discovery applications are similarly available in both jurisdictions to parties to investor-State arbitrations. Thus, it appears that parties to investment treaty arbitration governed by the SIAC Investment Arbitration Rules would have similar opportunities to seek discovery before both the Singapore and U.S. courts.