Highlights from the SIAC Virtual Congress 2021

Page 2

Welcome Address & Keynote Speech

by Rebecca Nakad, *Associate, Al Tamimi & Company*

Page 5

Plenary Session – How International Arbitration and International Commercial Courts play Unique, Important and Complementary Roles in International Dispute Resolution?

by Piyush Prasad, *Counsel (Foreign Law), WongPartnership LLP*

Page 8

The Multi-Million Dollar Question – Will the Pandemic and Governments' Responses to it Lead to a Spike in Investor-State Arbitrations?

by Trina Tan, *Associate, Omni Law LLC*

Page 11

Lunchtime Roundtable – Shifting Paradigms in International Arbitration: Arbitral Tribunals, Party-Nominated Arbitrators and Diversity

by Peace Adeleye, *Associate, Kenna Partners*

Page 14

The Role of Arbitral Institutions in Controlling the Time and Costs of Arbitral Proceedings

by Samuel Teo *and* Samuel Wittberger, *LLB (Hons), National University of Singapore Faculty of Law*

Welcome Address & Keynote Speech

by Rebecca Nakad, *Associate, Al Tamimi & Company*

Mr Davinder Singh, SC

Although most jurisdictions around the world are incrementally easing and alleviating their respective COVID-19-related social restrictions, there has been an increasing reliance and shift to remote meetings and virtual hearings in parallel to the running of in-person arrangements. This underscores the use of technology in the "new normal" going forward.

In this context, and after the success of SIAC's first virtual Congress in 2020 as a key platform bringing legal practitioners together to share knowledge and best practices, this year's SIAC Congress was hosted virtually for the second consecutive year on 10 September 2021. Attracting a crowd of over 700 attendees, the SIAC Congress 2021 took place as part of the Singapore Convention Week 2021 and is especially special this year given that it coincides with SIAC's 30th anniversary.

In this year's Congress, SIAC brought together practitioners and specialists with structured discussion sessions on perennial topics. These topics included how SIAC could support its users (namely businesses), counsel and arbitrators on paramount issues related to arbitration. The agenda included plenary sessions on the interplay between international arbitration and international commercial courts, investor-state arbitrations, shifting paradigms in international arbitrations in respect of arbitral tribunals, party-nominated arbitrators and diversity, and the role of arbitral institutions in controlling the time and cost of arbitral proceedings.

The Congress opened with a special welcome note from Mr Davinder Singh, SC (Chairman, SIAC; Executive Chairman, Davinder Singh Chambers LLC). Mr Singh began by expressing SIAC's gratitude to the Minister for Home Affairs and Minister for Law, Singapore, Mr K Shanmugam SC, Minister for Culture, Community and Youth and Second Minister for Law, Singapore, Mr Edwin Tong SC, and Attorney General of Singapore, Mr Lucien Wong, SC, for continuously supporting SIAC and for implementing pioneering and highly innovative legislation that has contributed to showcase Singapore as a pacesetter in the international arbitration community.

Mr Singh announced the agenda and noted that the plenary sessions would be delivered by highly eminent judges, jurists and leading practitioners and arbitrators, each sharing a unique insight on the different topics included on the agenda.

Mr Singh further observed that Singapore is a natural forum and pertinent ground of discussion for all the issues being deliberated during the Congress and many other diverse topics. In this regard, Mr Singh noted the unique role played by the Government of Singapore in implementing innovative legislation that

establishes Singapore as a pacesetter in international arbitration. Mr Singh also praised the role played by The Honorable the Chief Justice of the Supreme Court of Singapore, Mr Sundaresh Menon, in issuing landmark judgments on arbitration-related matters and his other contributions on issues affecting international arbitration.

Mr Singh noted SIAC's intention to be the world's leading dispute resolution centre. Thirty years on, SIAC has been recognized by a leading survey as the most preferred arbitral institution in the Asia Pacific. However, Mr Singh observed that in order to move to the next level to be recognised as an international institution with a global footprint, SIAC will need to come up with fresh and creative ideas to overcome a range of challenges and issues.

Mr Singh concluded by thanking the event's sponsors and the members of SIAC's Board of Directors, the SIAC Court of Arbitration, the Young SIAC (YSIAC) Committee, the SIAC Court President, Mr Gary Born, and SIAC's management and staff for their valuable contributions.

Following Mr Singh's welcome address, Minister Shanmugam delivered an insightful keynote speech. In his speech, Minister Shanmugam commended SIAC and touched upon its progress and fruitful journey over the last thirty years since it commenced operations. SIAC's significant caseload growth over the years as shown in a chart displayed during the speech showed the international community's trust in SIAC as a neutral and independent arbitration centre. SIAC's remarkable ranking as the second most-preferred arbitration institution in the world in the Queen Mary University of London International Arbitration 2021 Survey, with 49% of respondents choosing SIAC as one of their preferred arbitral institutions, also showed the improvement in SIAC's global ranking in thirty years.

In Minister Shanmugam's view, SIAC's growth can be attributed to Asia's economic boom, the increase in demand for dispute resolution mechanisms worldwide, Singapore's supportive and pro-arbitration ecosystem, legal framework and judiciary, the excellent hearing facilities available at Maxwell Chambers, as well as the international arbitration practitioners and arbitrators from around the world who are based in Singapore.

Minister K Shanmugam SC, Minister for Home Affairs and Minister for Law, Singapore

Minister Shanmugam recognised SIAC's efforts in keeping pace with the developing needs of international users through the introduction of innovative mechanisms such as the emergency arbitrator procedure, early dismissal provisions, as well as the Arb-Med-Arb Protocol launched jointly with the Singapore International Mediation Centre (SIMC). Minister Shanmugam added that the establishment of representative offices in Mumbai, Seoul, Shanghai, the Gujarat International Finance Tec-City (GIFT City) and New York, had enabled SIAC to maintain an active presence in key markets. Minister Shanmugam attributed SIAC's growth in the last 3 decades to the former and current leadership at SIAC, SIAC's Chairman, Mr Davinder Singh, SC, the SIAC Board, SIAC's Court President, Mr Gary Born, and the SIAC Court.

Minister Shanmugam anticipated that the next thirty years would be more challenging, yet exciting, for SIAC as it has to keep up with the rapidly evolving needs of the international arbitration community. Key issues include the growing complexity of disputes, new areas of disputes such as disputes relating to climate change and outer space activities, more intense competition as new arbitration centres are being set up every year around the world, as well as users' concerns over the rising time and costs of international arbitration. However, Minister Shanmugam expressed his confidence that SIAC would overcome these challenges.

Minister K Shanmugam concluded his speech by stating that he looked forward to welcoming everyone to Singapore in 2022 for the 2022 UNCITRAL Academy, and the Singapore Convention Week 2022, which is scheduled to run from 29 August until 2 September 2022.

As part of its 30th Anniversary celebrations, SIAC released a four-part video presentation to commemorate this special milestone, which can be accessed here. The heart-warming photograph montage and videos provided Congress participants with a nostalgic look-back at SIAC's history, progress and growth over the past thirty years.

Plenary Session – How International Arbitration and International Commercial Courts play Unique, Important and Complementary Roles in International Dispute Resolution?

by Piyush Prasad, *Counsel (Foreign Law), WongPartnership LLP*

***Top Row (Left to Right)*:** Professor Lawrence Boo and The Honourable Justice Judith Prakash
***Middle Row (Left to Right)*:** Dr Michael Hwang, SC and Dr Michael Pryles AO PBM
***Bottom Row (Left to Right)*:** The Honourable Mr Geoffrey Tao Li Ma, GBM and The Honourable Justice Beverley McLachlin PC

The Singapore International Arbitration Centre ("**SIAC**") hosted its annual Congress virtually for the second consecutive year on 10 September 2021. 2021 also marks the 30th anniversary of the SIAC. In his keynote speech Mr K Shanmugam SC, Minister for Home Affairs and Minister for Law, Singapore, congratulated SIAC on successfully completing 30 years. He commended SIAC for keeping pace with the requirements of international businesses by introducing various innovative mechanisms over the last 30 years, like emergency arbitration and early dismissal provisions. However, he predicted that the next 30 years will be challenging as (i) the issues involved in disputes are becoming more complex, especially with the world reeling under Covid-19; (ii) new areas of disputes are coming up, like climate change; and (iii) new fora for dispute resolution will continue to emerge, giving parties more choices. SIAC released video presentations commemorating the milestone, which can be accessed here (part 1, part 2, part 3 and part 4).

International Commercial Courts and International Arbitration – Friends or Rivals?

In the 2021 Queen Mary International Arbitration Survey, 90% of the respondents preferred international arbitration as the method for resolving cross-border disputes.

However, in recent times, specialised international commercial courts have also been established across the globe for a similar purpose. The prominent examples include the Dubai International Financial Centre Courts ("**DIFCC**"), the Singapore International Commercial Court ("**SICC**") and the China International Commercial Court. In this context, the co-moderators, Professor Lawrence Boo and Dr Michael Pryles sought to explore:

- first, whether the international commercial courts play a complementary role or compete with international arbitration; and
- second, the appropriateness of international commercial court Judges acting as arbitrators.

This post provides an overview of the discussion.

Dr Pryles set the stage by remarking that while arbitration works in conjunction with the courts, it would be naïve to ignore the fact that there is, at least, a perceived element of competition between the two systems. Mr Geoffrey Tao Li Ma opined that the two systems complement each other. He observed that most jurisdictions have a statutory leaning towards courts having a complementary role with arbitration – in terms of courts granting interlocutory reliefs and enforcing arbitral awards. There is no competition between the two systems as the courts are not vying for a greater share of litigation. However, Justice Ma explained that seen in a broader context, both courts and arbitration are part of the same system of administration of justice i.e. both provide the parties with the ability to resolve disputes properly and justly. This is where litigants will have a choice to make between the two systems. In this sense, the two systems could be seen to be competing with each other.

Professor Boo distinguished between a domestic court's supportive function and the dispute resolution function of the international commercial courts. Justice Judith Prakash, who is also a Judge of the SICC, explained that SICC was set up because it was perceived that there was a need for a court institution specialising in international commercial dispute resolution, which could complement dispute resolution by arbitration. She noted that in dealing with international disputes, domestic courts are limited by their jurisdictional requirements and also by the fact that they deal with domestic law. To fill these lacunae, the SICC was set up, which borrows certain best practises from arbitration. The SICC has an international panel of Judges hailing from both the common and civil law jurisdictions. Before the SICC, unlike a domestic court, matters of foreign law are decided as a matter of law by way of counsel submissions and not as a matter of fact. The parties have the freedom to use counsel of their choice – foreign counsel can represent their clients before the SICC. Lastly, she also highlighted that there are some disputes which are not arbitrable, like insolvency. In such instances, SICC may be available as an option. She concluded that both systems are complementary but there may be some competition. However, in her view, the field of international commercial relations is so vast that it is a question of "*providing a buffet*" i.e. ultimately, it is up to the parties to choose between arbitration and international commercial courts.

Justice Beverley McLachlin opined that there is no competition between the two systems. She commented that arbitration is set within the context of the rule of law. Every agreement specifies the applicable law to that agreement. So, in a substantive way, arbitration is dependent on the laws that have been formulated by Judges in courts.

Like Justice Prakash, Dr Michael Hwang, SC also viewed the two systems as competitors as well as complementary. He elaborated that these two systems are competitors because both aim to solve disputes arising from the same cross-border transactions. Like international arbitration, SICC also offers a neutral slate of Judges hailing from different systems of law, confidentiality and flexibility of procedure.

International Commercial Court Judges acting as Arbitrators – A New Take on Double Hatting?

In the second part of the session, the panellists discussed a more nuanced aspect of the interplay between international commercial courts and arbitration. The discussion focused on whether it is appropriate for a member of an international commercial court ("**International Judge**") to act as an arbitrator in the jurisdiction of that court. For context, Dr Pryles set out the following two scenarios:

- first, when co-arbitrators are looking to appoint a presiding arbitrator, then is it appropriate for the co-arbitrators to approach an International Judge when they know that the court is considering an appeal from an award made by one of the co-arbitrators?

- second, would an International Judge be embarrassed to accept appointment in that court's jurisdiction knowing that that court could entertain a set-aside application of any decision / award made by the Judge in the arbitration proceedings?

Justice Ma referred to the tenets of conflict of interest, actual or perceived and concluded that, in principle, there is no reason why an International Judge cannot sit as an arbitrator within the jurisdiction of that international court. But, he explained that when a non-permanent International Judge takes up an arbitrator appointment and owing to his court commitments, if he / she sits as an arbitrator after the court hours, this would appear improper. This situation, according to him, is actually a perception issue and not really a matter of conflict of interest.

On the aspect of embarrassment for an International Judge in accepting arbitral appointments, Justice McLachlin reminisced that earlier in Canada there were no separate courts of appeal. In case of an appeal, the Judges would sit *enbanc* to determine that appeal. So, it was usual for Judges to sit in appeal and overrule decisions made by their fellow Judges, and this system was never viewed from the prism of embarrassment.

Dr Hwang, who was formerly the Chief Justice of DIFCC, explained the DIFCC policy which enjoined the Judges from accepting appointments in arbitrations where the seat was in DIFC. The reason for this policy *inter alia* was to avoid any embarrassment as well as the theoretical possibility that in case of a challenge to an award seated in DIFC, one of the parties might object to the DIFCC hearing challenge on the ground of possible conflict. Dr Hwang added that since the International Judges frequently act as arbitrators, the chance of such a challenge is quite high.

As a possible solution, Professor Boo suggested that in the Singapore context, perhaps, the Judges of the domestic courts may refrain from acting as an International Judge of the SICC. On this point, Justice Prakash clarified that it is beneficial to have International Judges bring in the additional experience, which is useful while dealing with matters of international disputes.

With more international commercial courts coming into existence, inevitably, there will be a corresponding increase in instances when International Judges end up acting as arbitrators. While this particular practice does not strictly come within the ambit of double hatting, as articulated by the panellists, it may lead to a new discussion on double hatting in the future.

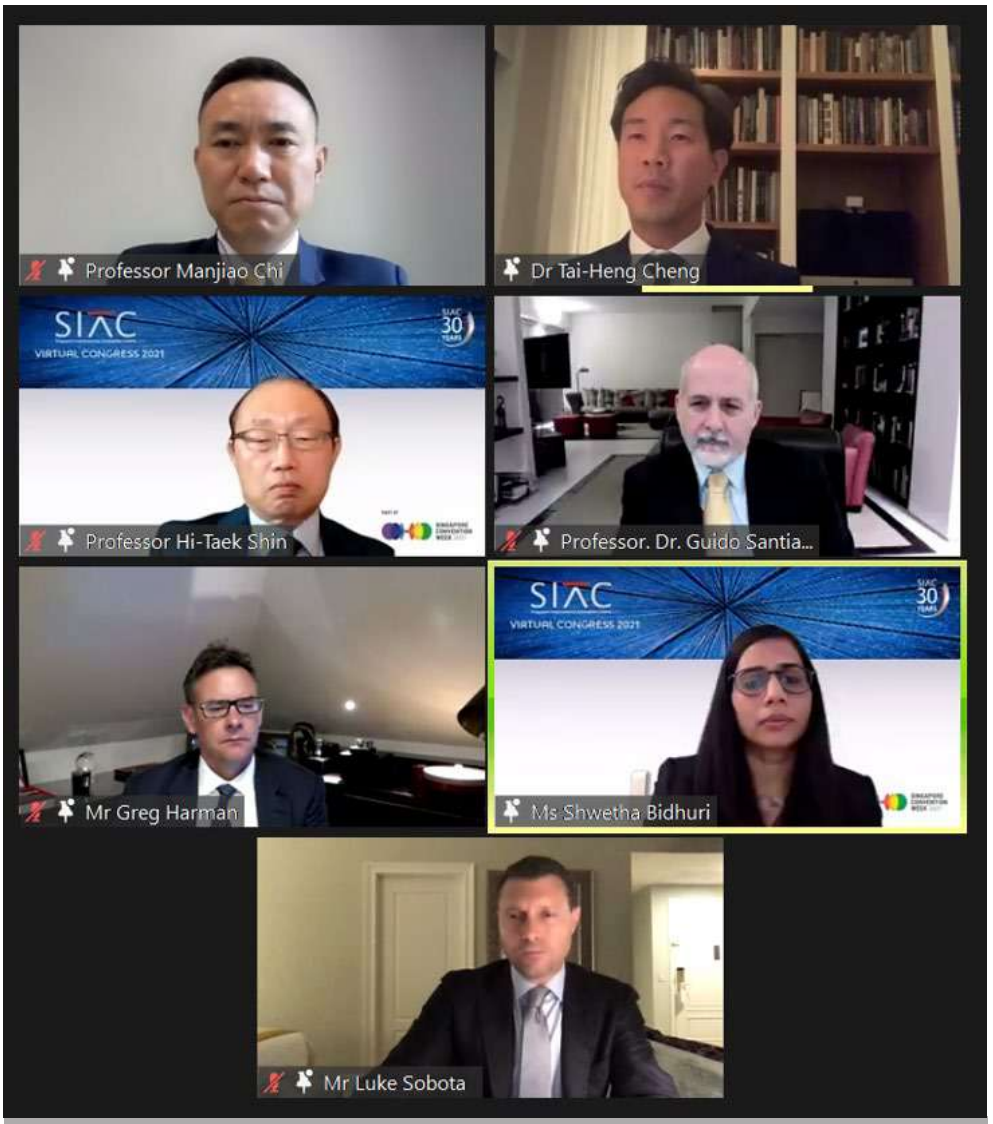
Conclusion

SIAC turned 30 in 2021. It also emerged as the most preferred arbitral institution in Asia and achieved its highest ever case load in 2020. Concurrently, Covid-19 brought the world to a grinding halt – throwing up new challenges for dispute resolution, like virtual hearings. The verdict of the plenary session is clear that arbitration is not the default mechanism for resolving all cross-border disputes. There is certainly room for international commercial courts to co-exist and flourish. Given the rapidly changing world around us, SIAC has its work cut out in order to maintain its position as a leading global arbitral institution. [1]

[1] This article is republished from the original published post on the Kluwer Arbitration Blog as "SIAC Congress Recap: SIAC Virtual Congress 2021 Plenary Session on Interplay between International Arbitration and International Commercial Courts on 11 September 2021 http://arbitrationblog.kluwerarbitration.com/2021/09/11/siac-Congress-recap-siac-virtual-Congress-2021-plenary-session-on-interplay-between-international-arbitration-and-international-commercial-courts/

The Multi-Million Dollar Question – Will the Pandemic and Governments' Responses to it Lead to a Spike in Investor-State Arbitrations?

by Trina Tan*, Associate, Omni Law LLC*



***Top Row (Left to Right)*:** Professor Manjiao Chi and Dr Tai-Heng Cheng
***Middle Row (Left to Right)*:** Professor Hi-Taek Shin and Professor. Dr. Guido Santiago Tawil
***Middle Row (Left to Right)*:** Mr Greg Harman and Ms Shwetha Bidhuri
Bottom Row: *Mr Luke Sobota*

The 2021 SIAC Congress held virtually on 10 September 2021 drew arbitration aspirants and practitioners from all over the globe, and sought to grapple with the key challenges of the day within the realm of arbitration. The second panel session, on *"The Multi-Dollar Question: Will the Pandemic and Governments' Responses to it Lead to a Spike in Investor-State Arbitrations?*", delved into the vexing question of the potential impact of the COVID-19 pandemic on investor-state arbitrations.

The panel was moderated by Mr Luke Sobota (SIAC Board of Directors, Three Crowns LLP) and comprised a diverse range of voices: Ms Shwetha Bidhuri (SIAC), Dr Tai-Heng Cheng (Sidley Austin LLP), Professor Manjiao Chi (UIBE Law School, China), Mr Greg Harman (BRG), Professor Hi-Taek Shin (KCAB International, Twenty Essex Chambers) and Professor. Dr. Guido Santiago Tawil (SIAC Court of Arbitration, Independent Arbitrator).

Claims

Mr Sobota opened the session with a discussion on the impact of

the COVID-19 pandemic on the types of potential claims that may be brought against states.

Dr Cheng observed that the typology of claims might be as follows: (1) bad faith actions by governments to use the pandemic to target foreign investors, (2) measures taken in good faith to combat the pandemic, but which are disproportionate, and (3) measures taken in good faith to combat the pandemic, which are implemented well and fairly. Dr Cheng noted that the second category would be complex, as it would bring into collision the "old" view of investor-state arbitration, which recognised the state's freedom to enact legitimate policy subject to compensation being provided to injured investors, and a more sympathetic view to governments arising from an understanding that it may be unfair to require compensation from developing nations which cannot afford it.

Ms Bidhuri noted that the impact of the pandemic on the number of investor-state arbitrations would take time to unfold and would depend on the success of early cases. On the flipside, Dr Cheng observed that sympathy for governments taking up public policy measures to combat national crises may increase in line with ESG (Environmental, Social and Governance) rising as a global macro-trend. A one-off investor with fewer reputational concerns may have the appetite to commence an investor-state arbitration, whereas a large multinational company invested in ESG may have to grapple with public relations concerns if it files a claim.

Defences

Turning to the various types of defences that may be advanced, Ms Bidhuri observed that it may not be easy for states to make out the defence of necessity or defences under treaties that do not have specific exceptions for public order or public health. Professor Chi took the audience through the broad defences that a state may employ in such investor-state arbitrations, namely: (a) force majeure, and (b) investment treaty-specific exceptions. He cautioned that even if COVID-19 could be argued as an unforeseen or irresistible event, this assessment may change as states become more accustomed to the situation, and this may affect their ability to meet the high threshold of force majeure.

The principle of proportionality

Naturally, the topic turned to the various counterarguments that investors may employ to rebut the defences put up by states. Professor Chi observed that proportionality would be a major argument, and this would depend heavily on the state, the kind of measures taken, and the intensity of those measures. Professor Tawil observed that, in all crises, there will be an incentive for states to concentrate power, and the means by which this is done can be assessed only on a case-by-case basis. Professor Shin observed that there may be a change in perspective or general consensus on social and community values, which may also affect the assessment of proportionality.

All in all, the panelists shared the view that in the case of the COVID-19 pandemic, it must be appreciated that this is a global pandemic affecting all nations, and a balancing approach must be taken.

Damages

Mr Harman, given his expertise in valuation, was asked about the assessment of damages in claims brought against pandemic-related measures. He noted that the pandemic has unlikely changed the fundamental principles governing the measure of damages, which aims to put the innocent party back in the same position it would have been had the wrong not been done, but additional complexity may arise in identifying the appropriate counterfactual as this requires consideration of what a proportionate response would have been.

While the extent to which the pandemic complicates the damages assessment will be case-specific, Mr Harman considered that there may be added complications with factors such as the valuation date and the valuation method. While the discounted cash flow (DCF) method is often used, one big issue is the level of certainty at which cash flow can be forecasted, and the pandemic has increased the level of uncertainty even for stable businesses. Another complication is the need to distinguish between the impact of the pandemic itself, and the impact of the illegal act. There is also a further question of whether the DCF method can fully capture the risk of such "Black Swan" events.

Future trends in ISDS

Mr Sobota queried Professor Shin on whether the COVID-19 pandemic has impacted the deliberations of the UNCITRAL Working Group III on reforms to Investor-State Dispute Settlement (ISDS). Professor Shin noted that the impact of COVID-19 would be more severe in both absolute and

relative terms for developing nations as opposed to developed nations. The ability of developing nations to defend ISDS claims and to make payment would result in a significant strain on their ability to fight the pandemic, and could inflame sensitivities between foreign investors and populist governments. While the current Working Group III discussions relate mainly to procedural reforms, there are calls for reform of substantive protection standards to tilt the balance in favour of the host state, such as by introducing temporary moratoria on claims arising from pandemic-related measures.

Mediation

Mr Sobota then directed the panel to the topic of alternative dispute resolution, such as mediation, and whether the COVID-19 pandemic would make parties more amenable to it. The panelists offered varying perspectives. Professor Shin observed that large multinational companies may have an incentive to mediate if they are concerned about public reaction on a global level. Dr Cheng offered the example of a company whose factory has been requisitioned for the production of masks. In such a case, the company might be attracted to a mediated outcome where it is compensated for the fair services of the factory or given new contracts for the manufacture of more masks. On the other hand, Professor Tawil's view was that states would likely want to defend themselves instead of mediating, due to their internal regulations or concerns with mediating specific claims against the backdrop of a whole host of other similar claims.

Enforcement

The last topic of the session dealt with enforcement difficulties that may be faced by investors. Dr Cheng, Professor Tawil and Ms Bidhuri raised concerns about the differing standards of review in the enforcement or setting aside of arbitral awards, particularly in non-ICSID cases. Professor Shin observed that one measure available for investors is to obtain security from respondent nations in precarious financial positions. However, such measures need to be approached with caution as they may inflame sentiments against ISDS.

Closing remarks

In closing remarks, panelists reaffirmed their views that the resolution of pandemic-related disputes will require a case-specific approach. Mr Sobota raised the issue of supply chain disruptions, where losses suffered by an investor may arise as a result of COVID-19 measures implemented in more than one state. Both Dr Cheng and Ms Bidhuri observed that this could create complications in establishing the causative link between the loss and quantifying the damages. Professor Shin noted that such cases could become trade disputes under the World Trade Organisation, with Dr Cheng adding that a private company may fund a dispute using the state as a proxy.

Finally, Mr Sobota asked the panelists whether they considered the current legal or procedural framework well-equipped to deal with the pandemic, or whether the pandemic has exposed gaps in the present framework. Professor Shin thought that the current ISDS framework may take too much time to resolve disputes, and one suggestion could be a special global commission to deal with COVID-related investor-state claims which can resolve such disputes within a specific timeframe. Ms Bidhuri thought that joint interpretative statements could be useful in assisting tribunals in the application of the law.

Conclusion

The session was an enlivening discussion on the various ways in which the pandemic may affect investor-state arbitration. The panelists were percipient in identifying the complications that the COVID-19 pandemic may present at each stage of an investor-state arbitration, and in advocating a sensitised approach to addressing these complications. It is perhaps only fitting that the session ended with the panelists expressing a measuredly optimistic view that international investment as a dynamic and ever-changing body of rules, will adapt to meet the demands of its time. [2]

[2] This article is republished from the original published post on the Kluwer Arbitration Blog as "SIAC Congress Recap: The Multi-Million Dollar Question – Will the Pandemic and Governments' Response to it Lead to a Spike in Investor-State Arbitrations?" on 12 September 2021 http://arbitrationblog.kluwerarbitration.com/2021/09/12/siac-Congress-recap-the-multi-million-dollar-question-will-the-pandemic-and-governments-response-to-it-lead-to-a-spike-in-investor-state-arbitrations/

Lunchtime Roundtable – Shifting Paradigms in International Arbitration: Arbitral Tribunals, Party-Nominated Arbitrators and Diversity

by Peace Adeleye, *Associate, Kenna Partners*

Top Row (Left to Right): Ms Foo Yuet Min, Mr Ashish Kabra and Mr Zhulkarnain Abdul Rahim
Middle Row (Left to Right): Mr John Liu, Ms Gitta Satryani and Mr Kabir Singh
Bottom Row (Centre): Ms Myung-Ahn Kim

Introduction

Users of international arbitration are familiar with the common criticism that arbitral tribunals in international arbitration tend to be "old, male and stale". Further to this, there have been growing concerns and discussions around the subject of diversity in international arbitration. On September 10, 2021, during its Annual Congress, the Singapore International Arbitration Center held a Lunchtime Roundtable discussion on the subject – 'Shifting Paradigms in International Arbitration: Arbitral Tribunals, Party-Nominated Arbitrators and Diversity'. The Roundtable discussion which was moderated by Mr Kabir Singh (Partner, Clifford Chance), featured Ms Foo Yuet Min (Director, Dispute Resolution, Drew & Napier LLC), Mr Ashish Kabra (Head (Singapore) International Dispute Resolution & Investigations Practice, Nishith Desai Associates), Mr Zhulkarnain Abdul Rahim (Partner, Dentons Rodyk & Davidson LLP), Mr John Liu (Partner, AllBright Law Offices), Ms Gitta Satryani (Partner, Herbert Smith Freehills LLP) and Ms Myung-Ahn Kim (Partner / Senior Foreign Attorney, Yoon & Yang LLC). The panel addressed the meaning, scope, importance, and type of diversity needed in international arbitration, the hallmarks of a diverse tribunal and the stakeholder with the responsibility of ensuring diversity in international arbitration.

Diversity in International Arbitration: Moving beyond Gender

When discussions on diversity arise in international arbitration, the foremost idea that springs up frequently revolve around gender. However, the panellists of the Roundtable discussion noted that beyond gender, there were other forms of diversity that were still left unaddressed in international arbitration. Ms Foo while stressing on the broad nature of diversity noted that diversity included a

broad array of other areas including age, race, nationality, and geographic representation. She explained that while there was no one definition for diversity, the hallmark of a truly diverse tribunal is the differences in perspectives and experiences. Mr Abdul Rahim on the other hand reiterated the importance of diversity, which leads to intellectual rigor, better decision making and increased neutrality of the panel, and opined that the most important aspect is intellectual diversity or diversity in knowledgebase.

Though desirable, diversity in international arbitration raises several concerns. One being the concern of symbolic tokenism, or a superficial compliance with diversity without recourse to merit. Ms Kim noted that the delineation of the nature of the dispute may assist in solving this concern. Whilst drawing insight from the Investor-State Dispute Settlement (ISDS) approach, she explained that some disputes by nature determine the diverse class of persons, background and experiences required. For example, in a construction dispute, technical knowledge may be very pivotal.

Party Nominated Arbitrators and Diversity

The legitimacy of the arbitral process is built on the concept of party autonomy – in this context, it is the freedom of parties to select their arbitrators. The consequence of this, is parties' selection of non-diverse arbitral tribunal members. Mr Kabra whilst providing an Indian perspective noted that although clients frequently request for well-known names in the arbitral circles to act as party-nominated arbitrators, he suggested that counsel now have the responsibility of advising their clients on diversity concerns in the selection of arbitrators, especially considering the need for their clients to make decisions based on Environmental, Social and Governance (ESG) considerations. With the elevation of several female judges to the Supreme Court of India, Mr Kabra opined that this would increase the diversity in the pool of individuals selected as arbitrators in arbitrations in India.

Mr Liu who provided a Sino perspective noted that although PRC clients and arbitral institutions do not pay attention to gender diversity, they nonetheless emphasised a diversity in legal background of the panel. He however expressed optimism in this state of affairs in the near future by highlighting that there was an increase in female participation in the fields of litigation and arbitration.

Ms Satryani also provided an Indonesian perspective on the concerns of diversity. She explained that in Indonesia-seated arbitration, especially domestic arbitration, there was less consciousness about issues of diversity. However, for international arbitration, especially institutional arbitrations such as SIAC arbitrations, she noted that there was an increased consciousness of the issue of diversity. She explained that in this regard, there was more focus on cultural diversity, whether the arbitrator understands Indonesian business practices, than on gender or other forms of diversity.

The panellists of the Roundtable discussion emphasised the importance of diversity but noted that counsel also has the duty to highlight the importance of diversity to their clients. In highlighting the importance of diversity for better decision making, Ms Kim noted that although it was difficult to empirically determine whether a diverse tribunal makes a better decision, her experience from practice seems to suggest that a diverse tribunal has the ability to make a fair decision and in the long run assist in avoiding the situation of an echo-chamber where personal views are reinforced.

Conclusion

In a bid to ensure diversity, there has been increased affirmative action in favour of previously underrepresented groups. However, this approach raises concerns of meritocracy. On this note, it may be important to take a cue from Maxi Scherer's two-pronged approach. This is an approach where a large section of a diverse pool is first selected and then pruned to the most qualified.

In conclusion, having highlighted the relationship between party autonomy and the composition of an arbitral tribunal, there is the need for counsel to play an active role in emphasising the importance of diversity to their clients and encouraging them to consider having a more diverse tribunal. Arbitral institutions must also rise to this challenge and advocate for

increased diversity (especially in relation to disability, nationality, age, and race). Party autonomy and a diverse tribunal are parallel lines that can meet if stakeholders make a conscious effort at working towards it. Achieving diversity in arbitration is a duty for all stakeholders, including arbitral institutions, counsel and clients. Everyone must acknowledge this duty and take active steps at working towards it.[3]

[3] "This article is republished from the blog post originally published on the *Practice Law Arbitration blog* on 19 November 2021 and is reproduced with the permission of Thomson Reuters."

The Role of Arbitral Institutions in Controlling the Time and Costs of Arbitral Proceedings

by Samuel Teo and Samuel Wittberger, *LLB (Hons), National University of Singapore Faculty of Law*

Top Row (Left to Right): Mr Toby Landau QC and Ms Chiann Bao
Middle Row (Left to Right): Ms Koh Swee Yen and Ms Yoshimi Ohara
Bottom Row (Left to Right): Professor. Dr. Mohamed Abdel Wahab and Mr Dmitry Dyakin

Introduction

The final panel session of the SIAC Virtual Congress 2021 addressed the long-standing issue of the role of arbitral institutions in controlling the time and costs of arbitral proceedings. The session was moderated by Mr Toby Landau QC (Vice President, SIAC Court of Arbitration; Barrister and Arbitrator, Duxton Hill Chambers (Singapore Group Practice)). Joining the discussions were Professor. Dr. Mohamed Abdel Wahab (Founding Partner & Head of International Arbitration, Construction & Energy, Zulficar & Partners Law Firm), Ms Chiann Bao (Arbitrator, Arbitration Chambers), Mr Dmitry Dyakin (Member, SIAC Court of Arbitration; Partner & Co-Head, Dispute Resolution Practice, Rybalkin, Gortsunyan & Partners), Ms Koh Swee Yen (Partner, WongPartnership LLP), and Ms Yoshimi Ohara (Partner, Nagashima Ohno & Tsunematsu).

With the aim of identifying the culprits of delays and excessive costs of arbitral proceedings, Mr Landau QC proposed to proceed by evaluating the roles of four prime suspects: (1) institutions and institutional rules; (2) arbitrators themselves; (3) the arbitral procedure; and (4) counsel themselves.

(1) Institutions and Institutional Rules

The session began with a discussion on the necessity of

setting time periods for institutional activity. Ms Bao noted that while institutional rules typically contain timelines for arbitrators and counsel, they rarely regulate institutional activity. At most, institutional rules include provisions requiring institutions to do something "as soon as practicable". While she acknowledged that such an inquiry would necessarily differ for each case, she shared that having some parameters would be desirable.

Illustrating this, the panel zoomed in on delays in the scrutiny process for arbitral awards. Professor. Dr. Abdel Wahab highlighted that whilst close scrutiny protects awards from potential setting aside applications, the corollary is that the process is often drawn-out or perceived to be so. He thus suggested that institutions could provide rough estimates of the timelines involved in the scrutiny process.

Concluding this issue, the panel considered whether sanctions should be imposed alongside the recommendation for prescribed timelines. Specifically, Mr Landau QC questioned whether institutions should forfeit their fees where there was undue delay in their operations, which 86% of poll respondents voted in favour of via Zoom's polling function.

The discussion then shifted to institutional fees and whether there is room for review. Ms Bao shared that institutions' administrative fees are often overlooked as they often occupy a fraction of the costs of arbitration. Professor. Dr. Abdel Wahab remarked that institutions could provide an annex to their rules, listing out the various additional services that may be rendered and their corresponding prices. Concurring, Mr Dyakin shared that if institutions are more transparent regarding costs and time issues, this would create more competition and incentivise internal regulation of these matters.

(2) Arbitrators

Responding to the sensitive issue of transparency in how arbitrators clocked their hours and charged, Ms Ohara suggested that such information be collated and shared with parties while proceedings are ongoing. Ms Koh posited that although transparency is desirable, parties may use such data to mount challenges against arbitrators. Professor. Dr. Abdel Wahab concurred, adding further that there is disparity in practice regarding how arbitrators measure their time or keep records. Thus, he suggested that arbitral institutions take the lead in providing templates and guidelines to arbitrators.

Case counsel and their role in reducing delays was next on the agenda. Ms Koh opined that case counsel could check in on the tribunal regularly and advise them accordingly, thereby moving the arbitral process along in a timely fashion. She then suggested that institutions could even tap on their case counsels' experience to develop a 'blacklist' of arbitrators who unduly delay proceedings.

Viewers were thus invited to vote again, this time on the desirability of a temporary institutional moratorium on appointing arbitrators who have unduly delayed the rendering of awards. Although 95% of viewers voted for this, Ms Ohara highlighted that institutions could consider a 'carrot-and-stick' approach by also rewarding tribunals who are efficient.

(3) Arbitral Procedure

Next, Mr Landau QC directed the panel to consider the role of institutions in controlling the arbitral procedure itself, specifically through institutional rules revision.

Ms Koh highlighted recent revisions to expedited procedure rules that allow tribunals to order 'documents-only' arbitrations. However, in her experience, tribunals are still hesitant to exercise this power if one party requests otherwise. She suggested revising the rules to make documents-only arbitration the default. Ms Bao agreed with the idea but noted that it might be more palatable to set out soft guidelines instead.

Mr Landau QC concurred, citing due process paranoia as one of the main reasons why tribunals are generally reluctant to override the parties' wishes in favour of a more streamlined procedure. He then suggested that institutional rules could include a provision warning parties that in agreeing to those rules, the tribunal is given the full authority to curtail the process to save time and costs, and each party thereby gives up its right to complain.

On the issue of costs, Mr Landau QC raised the idea of having parties state their budget in cost

management conferences, with the effect of limiting the costs recoverable at the end of the arbitration. While approving the idea in principle, Professor. Dr. Abdel Wahab commented that the main limitation would be counsels' resistance to such a proposal. In the final poll of the session, 51% of poll respondents agreed that institutional rules should require early cost management conferences to fix costs in every case.

Conclusion

The call for greater transparency was a recurring theme throughout, undergirding many of the ideas proffered by the esteemed panellists. It remains to be seen whether institutions will adopt the suggestions raised, but it is likely that, contrary to the hopes of the panel, the same issues of delays and costs will continue to be a mainstay in future discussions. [4]

[4] "This article is republished from the blog post originally published on the *Practice Law Arbitration blog* on 4 November 2021 and is reproduced with the permission of Thomson Reuters."


SIAC
Singapore International Arbitration Centre