

# **SIAC China Academy 2020: The Making of an Advocate and an Arbitrator (Virtual Edition) (Day 1)**

**By Jingjing LI, *Paralegal, Zhong Lun Law Firm***

The SIAC China Academy (Virtual Edition), titled “The Making of an Advocate and an Arbitrator” was held on 20 and 21 August 2020. Day 1 of the Academy focused on advocacy training skills.

## **Opening Address by Mr Gary Born**

Mr Gary Born (President, SIAC Court of Arbitration; Chair, International Arbitration Practice Group, Wilmer Cutler Pickering Hale and Dorr LLP) kicked off the SIAC China Academy by delivering an Opening Address titled “The Art of Advocacy in Virtual Hearings”.

Mr Born described how the pandemic changed many aspects of our lives and work, including the way international arbitration is practiced. Although the manner of conducting arbitration hearings has changed, many important aspects have remained unchanged. Even before the pandemic, technology was an important part of the practice of international arbitration through the use of online filings, hyperlinked soft copy exhibits, and the giving of witness testimony through video conferencing at times. The pandemic had greatly increased the use and popularity of virtual hearings. Now, in addition to witnesses, arbitrators, parties and counsel may all need to attend the hearing remotely from their own meeting rooms or from home, which can pose great challenges for the cross-examination process.

As for the foreseeable future, most aspects of the arbitral process will incorporate very substantial elements of virtual technology, this session on how virtual hearings can be best conducted from an advocate’s perspective was very timely and necessary.

## **Panel Discussion: Elements of Persuasive Advocacy and Effective Cross-Examination for International Arbitration**

The first panel discussion, titled “Elements of Persuasive Advocacy and Effective Cross-Examination for International Arbitration”, was moderated by Mr Cao Lijun (Member of SIAC Court of Arbitration; Partner, Zhong Lun Law Firm).

The first speaker was Mr Arthur Dong (Partner, AnJie Law Firm), who explained the differences between domestic arbitration in China and international arbitration. In terms of written advocacy, domestic arbitration in China is greatly influenced by Chinese litigation practice, with fewer and shorter written submissions. Many documents

commonly seen in international arbitration, such as the Notice of Arbitration, Response to Notice of Arbitration, and Rejoinder often do not feature in domestic arbitration in China. Hearings for China's domestic arbitrations would be relatively quick, and the closing statement usually would involve the Claimant reiterating its claims in the arbitration. Domestic arbitration in China seldom involve cross-examination of witnesses, and the proceedings would focus more on the authenticity and relevance of the written documentation.



Arthur Dong

Tan Chuan Thye, SC

The next panellist, Mr Tan Chuan Thye, SC (Partner, Rajah & Tann Singapore LLP) highlighted some key points in approaching written advocacy. He vividly described preparing written submissions as telling a story to a five-year-old child, emphasising that the language should be simple and easy to understand, and the key evidence and facts should be clear. He also stressed the importance of careful revision, and not assuming that you got it right in the first draft. Finally, he gave invaluable advice to young lawyers to keep learning, keep writing and keep reading outside of work.

Then the stage turned to the third speaker, Mr Thio Shen Yi, SC (Joint Managing Partner, TSMP Law Corporation) who gave a brief introduction of cross-examination. The purpose of cross-examination is to support your own case theory from the other side, and sometimes challenge the witness in logic and facts, or even on credibility. “Theme!” Mr Thio emphasised always remember what one’s theme is when preparing a question list. When asking questions, ask “leading questions”, such as “did you...?” and “do you agree...?” Mr Chan Leng Sun, SC (Deputy Chairman, SIAC Board of Directors; Senior Counsel and Arbitrator, Essex Court Chambers Duxton) commented that, when doing re-direct examination, ask open questions, starting with “how” and “why”.

Ms Kathryn Sanger (Partner, Herbert Smith Freehills (Hong Kong)) then shared her approach for virtual hearings. She stressed the importance of “testing” the equipment such as microphone and camera to be fully prepared in advance. Virtual hearings also placed greater demands on witness control. How to show exhibits to witnesses quickly is an important aspect that needs to be considered. One may start off the cross-examination asking the witness to show his or her surroundings to ensure that there is no other person in the room.

Mr Chan Leng Sun, SC shared his opinion on how to advocate effectively from the perspective of a tribunal. He pointed out that the crux of the problem is “C.A.S.E.”, i.e Chronology, Authority, So what, and Excess. First, it is helpful for the tribunal to have a better understanding of the case by stating the facts in a chronological order. Second, never misrepresent the law and never misstate your submissions. Third, every claim should have a destination, and one should explain how each point one makes affects the case. Finally, one should not put unnecessary issues to the tribunal to decide.

This panel discussion was very enlightening to me. The speakers mentioned many key points regarding opening statements, closing statements and cross-examination, which provided practical tips to me as well as other participants for the mock hearings held in the later sessions.

### **Mock Evidentiary Hearing**

After a short break, the mock evidentiary hearing began, which was also the most stressful and exciting part of the Academy for me. The participants were divided into six groups for the mock hearings to present an opening statement, cross-examination and a closing statement on the case scenario sent to us in advance.

I was assigned to the first group, in which Mr Cao Lijun was the sole arbitrator, and Ms Gerui Lim (Member, YSIAC Committee; Director, Drew & Napier LLC) and Mr Hu Ke (Partner, Jingtian & Gongcheng) role-played as the factual and expert witnesses.

For the first mock hearing, I was impressed when one of the participants roleplaying as Counsel, started the cross-examination by asking the witness to rotate the camera to show the surroundings to prove that no one else was around him, just as Ms Sanger suggested in the morning panel discussion. Mr Cao Lijun mentioned in his feedback to the participants for the first mock hearing, that we should try our best to avoid asking open-ended questions in the cross-examination. Further, one should learn how to appropriately interrupt the witness and continue with the questioning when the witness takes too much time to expand upon an adverse answer.

For the second mock hearing, I role-played as the Respondent’s Counsel. I was able to further improve upon my list of questions after listening to the morning panel discussion and the first mock hearing. When commenting on my performance, Ms Gerui Lim commended my questions, saying that many of my questions were quite to the point. Mr Cao further commented that some of my questions needed to make a clearer point in order to assist the tribunal. For example, when I asked “did you promote the game” and the witness answered “no”, I should have gone further and asked, “do you think you have breached your contractual obligations by refusing to do so?”

Over these two mock hearings, I learned how to cross-examine and how to guide witnesses to give favourable answers. This will be of great help to my future career in conducting real hearings. The Academy's faculty and facilitators were all very patient and well prepared. They gave us many useful suggestions, from which I benefitted a lot.

### **Virtual Hearing Demonstration by Teaching Faculty and Q&A**

A virtual hearing demonstration was then conducted by the teaching faculty. The mock tribunal featured Mr Chan Leng Sun, SC, Mr Cao Lijun and Mr Thio Shen Yi, SC. Ms Weina Ye (International Partner, Herbert Smith Freehills Kewei Joint Operation Office) and Mr Gary Born role-played as the Claimant's counsel. Ms Lijun Chui (Member, YSIAC Committee; Counsel, Clifford Chance) and Ms Kathryn Sanger role-played as the Respondent's counsel. Mr Yuxian Zhao (Associate, Han Kun Law Offices) and Mr Tan Pang Leong Nicholas (Partner, Allen & Gledhill LLP) respectively role-played as the Claimant's factual and expert witness. Ms Angela Yan (Associate, Zhong Lun Law Firm) and Ms Kate Apostolova (Member, YSIAC Committee; Senior Associate, Freshfields Bruckhaus Deringer) respectively role-played as the Respondent's factual and expert witness.



Left to Right: Kathryn Sanger, Kate Apostolova, Thio Shen Yi, SC, Weina Ye, Chui Lijun, Chan Leng Sun, SC, Tan Pang Leong Nicholas, Cao Lijun, Gary Born, Angela Yan and Zhao Yuxian

For this mock hearing demonstration conducted by experienced lawyers and arbitrators, the questions asked in cross-examination hit the core of the problem very well. When Respondent's counsel was conducting cross-examination of Claimant's factual witness, they intentionally interrupted the witness who was giving unfavourable answers several times. When conducting re-examination, Claimant's counsel brought up those questions again and asked the witness to further explain to the tribunal. These further explanations helped Claimant recover some ground that was lost in cross-examination. A colleague told me that crafting a succinct and effective re-examination question is an art. The session showed me, by example, how a good re-examination should be done.

The first day's sessions focused on how to do cross-examination in a virtual hearing, how to craft your questions so as to elicit useful answers from the witnesses. These skills are very practical. I very much appreciated this event organised by SIAC and hope that more and more law students, young lawyers and junior arbitration practitioners will join the SIAC Academy in the future.

# **SIAC China Academy 2020: The Making of an Advocate and an Arbitrator (Virtual Edition) (Day 2)**

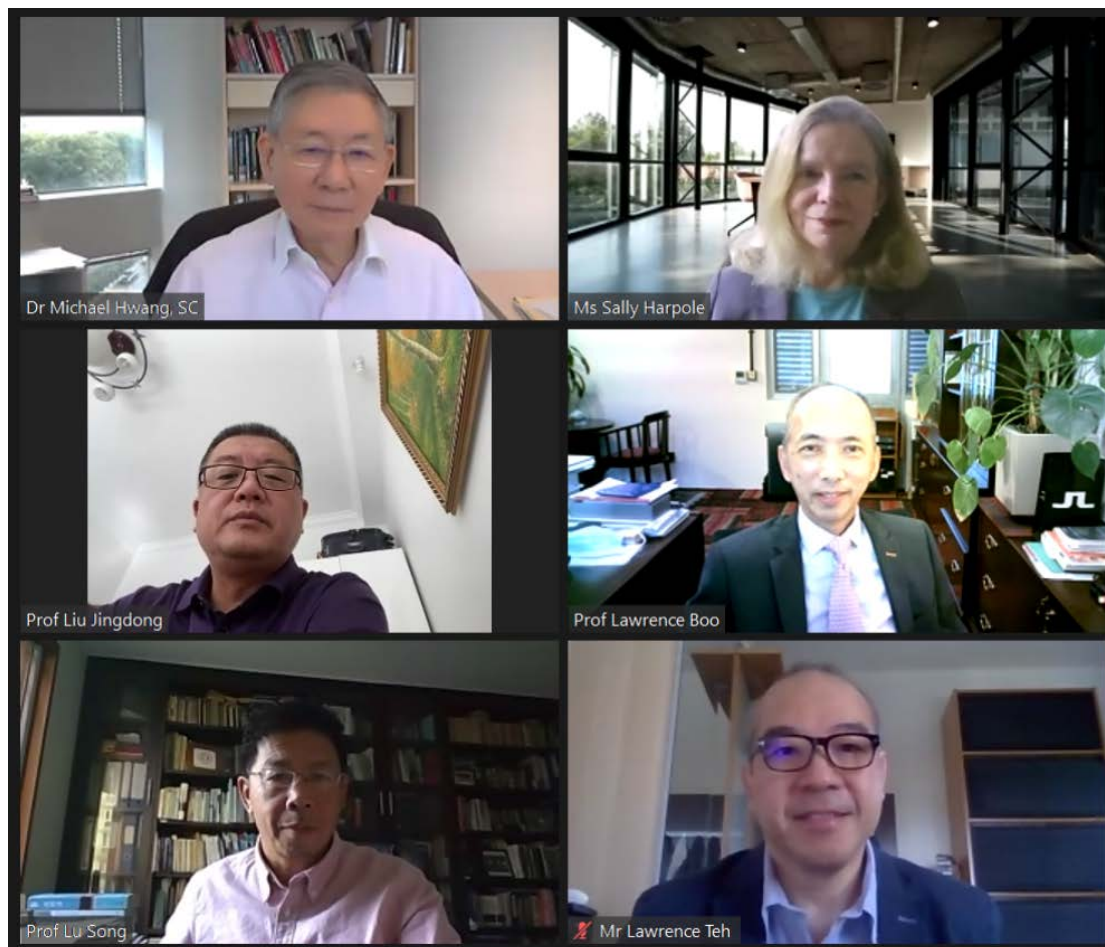
*By Yang Liu, Han Kun Law Offices*

While the first day of the SIAC China Academy focused on advocacy training in international arbitration, the focus for the second day of the Academy shifted to arbitrator training, with in-depth discussions on issues that arbitrators may face in each stage of the arbitration process.

## **Panel Discussion on Pre-Appointment Checks and Disclosures; Accepting an Appointment as an Arbitrator; Running an Efficient Arbitration; Managing Parties and Counsel; Working Effectively with Fellow Arbitrators**

The panel discussion was moderated by Professor Lawrence Boo (Member, SIAC Court of Arbitration; Independent Arbitrator, The Arbitration Chambers) and featured a stellar panel of speakers comprising Ms Sally Harpole (International Arbitrator), Dr Michael Hwang SC (Senior Counsel and Chartered Arbitrator), Professor Liu Jingdong (Director of International Economic Law Department, the Institute for International Law Studies of Chinese Academy of Social Sciences), Professor Lu Song (Professor of Law, Emeritus, China Foreign Affairs University) and Mr Lawrence Teh (Senior Partner, Dentons Rodyk & Davidson LLP). The panellists discussed a variety of aspects of an arbitrator's role and work.

On pre-appointment interviews with a party, Ms Harpole emphasised the need to avoid any discussion of substantive issues during the interview and suggested setting the parameters of the interview beforehand and to record the conversation. In a similar vein, Dr Hwang suggested have someone take notes of the interview and having the interview at the arbitrator's office, rather than the party's office. Dr Hwang also shared that he would request some information on the nature of the dispute in order for him to determine his suitability to handle the case. Mr Teh shared that he would disclose the interview to the parties once the tribunal is constituted. Professor Liu shared his concern with pre-appointment interviews, as it is difficult to ensure that the contents of the interview will not influence the arbitrator's perception of the case.



Left to Right: Dr Michael Hwang, SC, Sally Harpole, Prof Liu Jingdong, Prof Lawrence Boo, Prof Lu Song and Lawrence Teh

On conducting conflicts of interest checks prior to accepting an appointment, Mr Teh shared that he would err on the side of caution on conflict of interest issues, by conducting a very extensive conflict check on a global basis. Ms Harpole acknowledged that while there exist no clear rules on conflicts of interest, she would rely on her personal judgment in assessing the situation as well as the general industry guidelines. Dr Hwang shared that he keeps a list of arbitrations that he has done previously and introduced the different practices between SIAC and ICC in terms of conflicts of interest guidelines. Professor Lu observed that an independent arbitrator would generally encounter less conflicts of interest as opposed to those working in law firms.

On the manner of conduct of the arbitration, different arbitrators shared their own styles and preferences on the conduct of the case management conference and on the bifurcation of proceedings.

### **Workshop on How to Handle Potentially Tricky Scenarios as an Arbitrator**

In small groups, this highly interactive workshop provided participants with the opportunity to explore certain tricky scenarios that may be encountered by an arbitrator



in practice. My group's facilitator, Ms Charis Tan (Partner, Peter & Kim), led the participants to discuss how an arbitrator should properly handle pre-appointment interviews, parties and counsel and fellow arbitrators.

On the pre-appointment interview, a situation a potential arbitrator may face is when a party goes beyond what is strictly necessary to "interview" a potential arbitrator by, for example, emotionally accusing the other party of illegal activities or detailing the facts of the dispute. In such circumstances, the participants agreed that an arbitrator should stay calm and explain the purpose of the interview to the party. The arbitrator should at all times avoid any discussion of the merits of the case during the interview and such clear boundaries should be set at the beginning of the interview.

An even trickier scenario discussed was: What if a law professor once published an article advocating a position that may be adverse to the position in a party's case? The question was whether the professor had the obligation to disclose the publication to the parties. The participants debated this issue at length, and took the view that there was no obligation of disclosure *per se*, but it remained a matter calling for serious personal judgment.

In a case scenario where there was a non-participating respondent, the participants first discussed how to ensure that the respondent has been given a sufficient opportunity to present its case. Ms Tan suggested keeping the delivery receipt of all emails sent to the respondent and asking the claimant to provide alternative addresses of the respondent to maximise the chances of the respondent receiving copies of the documents and correspondence filed in the arbitration.

Another scenario discussed in the workshop was the late submission of extensive documents and evidence by the respondent one day before the scheduled hearing. The participants disagreed as to whether the tribunal should postpone the hearing, but the majority believed that extension may be a better option to protect the enforceability of the final award. Ms Tan suggested postponing the hearing for a day or two, but to have the respondent bear the extra cost involved.

On working with fellow arbitrators, the participants debated whether an arbitrator should issue a concurring opinion when certain facts in the award are inaccurate but immaterial to the outcome of the dispute. Ms Tan deemed the issue to be one of personal style, but suggested the importance of maintaining an appearance of unanimity of the tribunal in the final award.

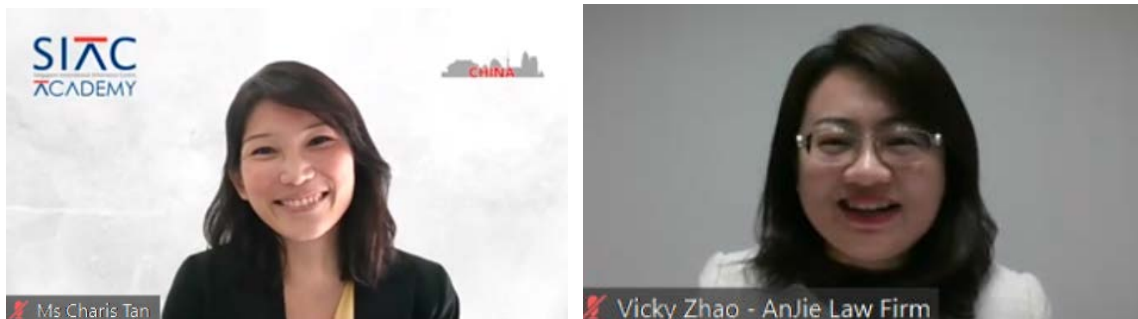
The fruitful discussion provided the participants with practical suggestions and materials for further reflection, especially for those young practitioners in the early stages of their arbitration practice. At the end of the day, there do not always exist clear-cut rules on the proper conduct of arbitrators, which means that the exercise of personal judgement becomes very important.



## Lunchtime Chat: Building Your Career as An Arbitrator

The lunchtime chat was moderated by Ms Vicky Zhao (Member, YSIAC Committee; Partner, AnJie Law Firm), and the panel comprised four distinguished panellists: Professor Lawrence Boo, Ms Jessica Fei (Member, SIAC Court of Arbitration; Partner, King & Wood Mallesons), Dr Michael Hwang and Ms Charis Tan. Ms Zhao kicked off the chat by asking about the panellists' first appointment as arbitrators. Dr Hwang and Professor Boo shared about their very first appointments, which both took place a significant number of years ago. Professor Boo emphasised that the first appointment is about getting exposure, and gaining people's confidence on your ability as an arbitrator. Even a small case could be a good start.

Ms Zhao next invited the panellists to offer suggestions on how to become an arbitrator. Ms Fei emphasised gradually building one's profile in the industry. A potential candidate must be keen to market himself or herself to the right audience. Ms Tan offered the practical advice that the best advertisement is the work before you and encouraged participants wishing to become arbitrators to do their best for their current cases. Dr Hwang added two more suggestions: (1) joining the young practitioners' circle in arbitration institutions and organisations, such as YSIAC and Young ICCA; (2) publishing articles on arbitration and speaking at public events.



Charis Tan

Vicky Zhao

The panellists then shared their views on the qualities of a good arbitrator. Ms Fei identified the following elements: (1) diligence and willingness to invest time in the case; (2) business commercial sense; (3) good case management skills. Dr Hwang further emphasised the importance for an arbitrator to have a good legal foundation, with strong legal techniques to arrive at a proper conclusion of the case. He also referred to personal connections and a solid industry reputation as good ways to obtain arbitral appointments.

Ms Tan shared about the challenges she faced in her first appointment as an arbitrator and emphasised the importance of handling one's first case to build up one's confidence as an arbitrator. Professor Boo encouraged first-time arbitrators to play the role as if he

or she has done it several times and be patient, decisive and firm. On decisiveness, Dr Hwang advised first-time arbitrators to not be caught up with relatively small decisions, i.e. do not treat every issue not agreed with by the parties as a disputed issue. The arbitrator needs to identify issues important to the resolution of the dispute.

### **Panel Discussion on Tribunal Deliberations and Drafting an Enforceable Award**

This distinguished panel comprised Dr Helena Chen (Joint Head of Office-China & Partner, Pinsent Masons LLP), Mr Hee Theng Fong, JP (Consultant, Harry Elias Partnership LLP), Mr Ho Chien Mien (Partner, Allen & Gledhill LLP), Dr Michael Hwang, SC and Mr David L. Kreider (International Arbitrator, Chartered Arbitrator) and was moderated by Ms Jessica Fei. The panellists discussed the requirements of an enforceable arbitral award. These include: (1) that the tribunal must have jurisdiction over the dispute; (2) the arbitral proceedings must comply with all the applicable rules, including the law of the seat and the applicable arbitration rules; (3) the award should set out the reasons for the decisions; and (4) the award must be duly delivered to the parties.

For an arbitral award to be enforceable internationally, additional considerations include: (1) whether the award contravenes the public policy of the enforcing jurisdiction; and (2) whether the dispute is arbitrable in the enforcing jurisdiction.



Left to right: Ho Chien Mien, David L. Kreider, Dr Helena Chen, Hee Theng Fong, JP and Jessica Fei

### **Workshop on Reviewing a Draft Award**

In my small group workshop led by Ms Charis Tan and Dr Michael Hwang, the participants had the opportunity to review and comment on a draft award. For each issue, we learned that the preferable structure is to set out the claimant's arguments, respondent's arguments and thereafter the tribunal's analysis.

Several principles of drafting were discussed: (1) the description of facts must be precise, and should always be accompanied by citations; (2) whenever an assertion is made, the tribunal must explain its legal basis; (3) the award should not go beyond the parties' arguments and volunteer analysis on what the parties have not submitted on; (4) the tribunal's decision on costs and interests should be addressed in the final award.

This was an invaluable exercise for less-experienced practitioners to get a sense of the considerations that should be on the minds of arbitrators when drafting the award.

### **Closing Remarks**

Ms Jessica Fei brought the China Academy to a close with brief closing remarks.

The Academy provides extremely valuable training to young arbitration practitioners and showcases the SIAC's steady contribution to the professional development of the arbitration community in China.