Highlights from the SIAC Virtual Congress 2020

Welcome Address & Keynote Speech

by Jae Hee Suh, *Senior Associate, Allen & Overy*

The Honourable the Chief Justice Sundaresh Menon

The Covid-19 pandemic has ushered in a period of reflection for all industries. It has encouraged (or sometimes forced) us to critically examine the *status quo* and question our assumptions.
International arbitration is no exception. For example, we have witnessed a significant increase in the use of virtual hearings and seminars, after the pandemic successfully challenged the assumption that these should primarily take place in person. The success of SIAC's first virtual Congress, with more than 1000 participants from all over the world, is itself a great illustration of this "new normal".

It was therefore timely that, in opening the Congress, **Mr Davinder Singh, SC** (*Chairman of the SIAC; Executive Chairman of Davinder Singh Chambers LLC*) and **the Honourable the Chief Justice Sundaresh Menon** (*Supreme Court of Singapore*) encouraged and challenged the participants to reflect further on the *status quo* of international arbitration, to both celebrate its success and critically evaluate its future.

The "Collective Mission" to promote Singapore

In his welcome address, Mr Singh, SC reflected on the progress of the "*collective mission*" to promote Singapore as the most trusted place for dispute resolution. Mr Singh, SC noted that the aim of this mission is to ensure that Singapore would have not only the best ecosystem for investments, businesses, and financial and legal services, but also an ecosystem that guarantees integrity, stability, predictability and the rule of law.

Mr Singh, SC elaborated on how the different branches of the Singapore government have contributed to this mission. The Executive tirelessly monitors international developments and develops pioneering policies. The Attorney General's Chambers thoughtfully reflects these policies in draft laws that are in turn carefully scrutinised, debated, and passed by the Parliament. The eminent local and international jurists of the Singapore judiciary (including the Singapore International Commercial Court) influence developments in international arbitration through their judgments and opinions.

In Mr Singh, SC's view, the prime evidence of Singapore's success in this mission is the fact that the recently adopted *United Nations Convention on International Settlement Agreements Resulting from Mediation*, which comes into effect on 12 September 2020, was entitled the Singapore Convention. The accolade, Mr Singh, SC noted, speaks volumes of the world's view of Singapore's place in the dispute resolution universe.

Mr Singh, SC also stressed that SIAC is acutely conscious of its role in this ongoing mission, noting, "*everything we do reflects on Singapore*", and thanked the members of SIAC's multinational Board of Directors and Court of Arbitration (including, in particular, the SIAC Court President Mr Gary Born) and the SIAC's management and staff for their invaluable contributions to the mission. He closed his speech by assuring the participants that "*Covid or not, SIAC will continue to deliver; Covid or not, SIAC would do even more for all of you*."

Arbitration's Blade and the Rule of Law

Mr Singh, SC's words of welcome were followed by the keynote speech, delivered by the Honourable the Chief Justice Sundaresh Menon, titled "*Arbitration's Blade: International Arbitration and the Rule of Law*". In his speech, the Chief Justice examined the extent to which international arbitration does or does not meet the demands and basic values of the rule of law, and, to the extent it does not, whether this offers a cause for concern.

The Chief Justice observed that international arbitration could only claim to support an *attenuated* model of the rule of law because, largely as a matter of design, it does not commit to a

number of key values and purposes of the general framework of the rule of law. For example:

- Its limited ability to deal effectively with multiple contracts and proceedings creates a risk of inconsistent findings and outcomes.
- Due to its consensual nature, it is unsuited to resolving certain disputes that involve interests going beyond the immediate parties.
- Its predisposition towards confidentiality is inconsistent with the rule of law values of transparency and open justice.
- Its longstanding practice of party appointed arbitrators sits somewhat uneasily with the principle that adjudicators must both be impartial and be seen to be impartial, and potentially undermines public trust and confidence in the process.
- Its underlying principle that parties have no right to a right answer has restricted the avenues for correction of error, thus increasing the risk that disputes would not be decided according to law.

The Chief Justice noted however that the rule of law is not the only important virtue by which arbitration should be judged. It could thus be reasonable and legitimate to accept a lesser degree of conformity to the rule of law where this assists in the realisation of other goals that are judged to be more important. Still, he stressed that it would be wise, perhaps even essential, for the arbitration community to consider the cost that has been incurred in terms of rule of law values and whether the price is still worth paying.

For example, the fact that arbitral awards are largely immune from review of error may be viewed as an acceptable trade-off if it yields benefits of speed and convenience, or is tempered by the pervasiveness of impartial and expert arbitrators who are more likely than not to get it right. However, if these premises are no longer true, should we simply assume that the trade-off continues to be justified?

The arbitration community should answer this and similar questions in light of the continuously evolving landscape (including, for example, the increasing criticism that arbitration has become too lengthy and costly and the concerns regarding party-appointed arbitrators). Adopting Joseph Raz's metaphor of law as a knife and law's conformity with the rule of law as the sharpness of the knife, the Chief Justice vividly captured the danger of failing to undertake this crucial process of introspection.

"*If* [the arbitration's blade] *was meant to be wielded only by particular users for particular types of disputes, then its inadequacies from a rule of law perspective can be given the credit of design. But where its edges have been blunted through neglect, complacency or misuse, then arbitration becomes a poorer and less effective blade on the whole for no good reason, and if left to wear down may in time prove unfit for purpose*."

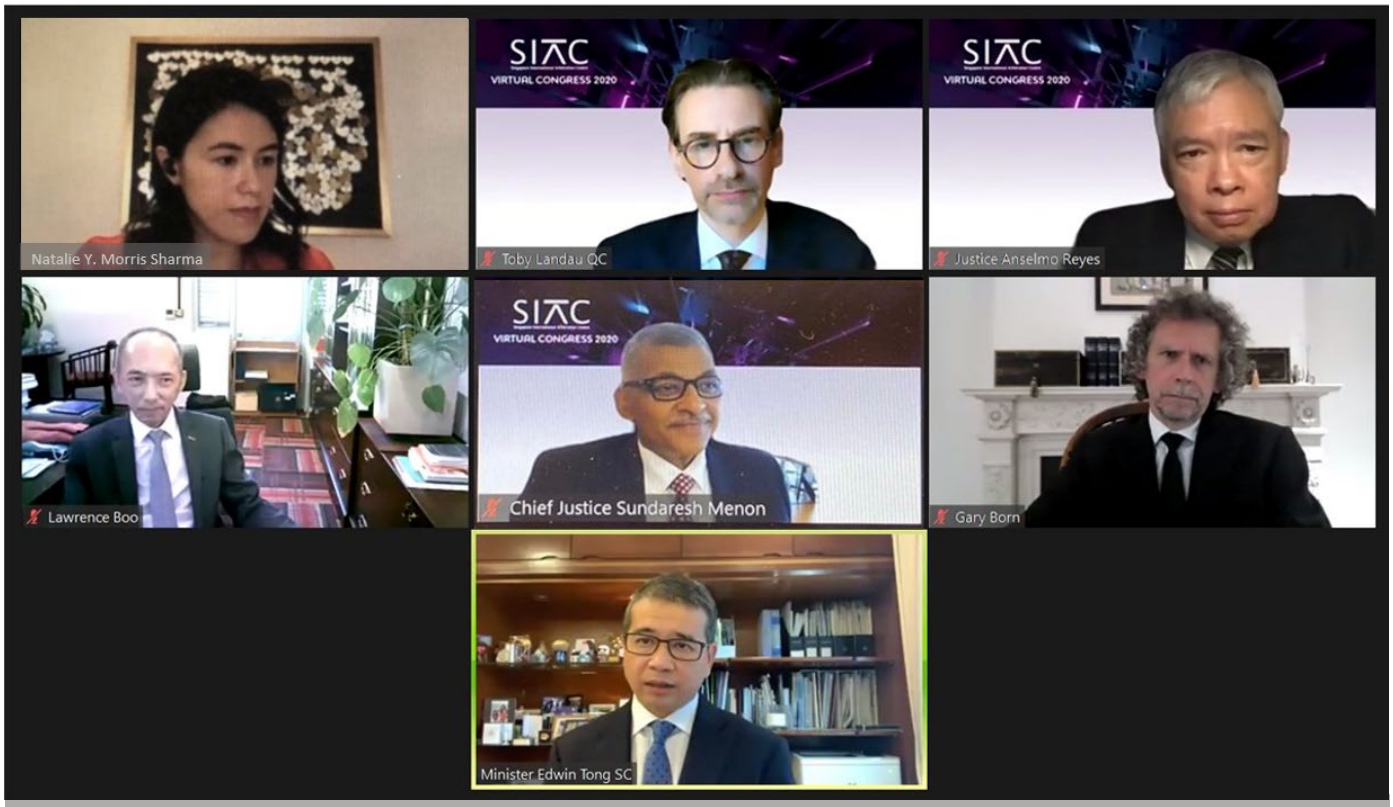
Mr Davinder Singh, SC

Nevertheless, the Chief Justice was optimistic that the rosy portrait of arbitration as the "*quintessence of bespoke justice*" (a phrase coined by Professor Jan Paulsson) remains within our grasp. In his view, arbitration continues to hold the potential – perhaps more so than any other mode of dispute resolution – to offer bespoke justice through the customisation of pathways for the resolution of disputes. He opined that the virtue of agility is important enough to be recognised as a rule of law value in its own right, particularly in this age characterised by pervasive change and profound uncertainty. The virtue of agility is the sharpest point of arbitration's blade, and "*arbitration's custodians would do well to preserve it and put it to good use*".

The Covid-19 pandemic has brought home the fact that arbitration community should not be complacent: we must strive to reflect and reinvent in order to stay relevant. The inspiring speeches of two prominent legal luminaries of Singapore will surely provide the much-needed encouragement and guidance in this regard.

Plenary Session – International Arbitration: the Challenges and Changing Landscape

by Sara Paradisi, *Senior Associate, Bryan Cave Leighton Paisner LLP*



***Top Row (Left to Right)*:** Ms Natalie Y. Morris-Sharma, Mr Toby Landau QC and The Honourable Justice Anselmo Reyes
Middle Row (Left to Right): Professor Lawrence Boo, The Honourable the Chief Justice Sundaresh Menon and Mr Gary Born
Bottom Row: Mr Edwin Tong SC

Introduction

1. The Singapore International Arbitration Centre (**SIAC**) hosted its annual Congress on 2 September 2020. It was a historic event, with over 1000 attendees joining "virtually" from all over the world. It was a prime example of Singapore's leadership in dispute resolution and SIAC's unparalleled efforts in the collective mission to set Singapore apart from the rest. In the words of Mr Davinder Singh, SC (*Chairman of SIAC*): *"COVID or not, SIAC will continue to develop. COVID or not, SIAC will do even more for you all."*

2. The plenary session on "International Arbitration: The Challenges and Changing Landscape" followed the incredibly thought-provoking keynote address by The Honourable Chief Justice of Singapore, Mr Sundaresh Menon on "Arbitration's Blade: International Arbitration and the Rule of Law". The moderator, Mr Toby Landau QC (*Member, SIAC Court of Arbitration; Barrister and Arbitrator, Essex Court Chambers*) acknowledged that, when the title for the plenary session was first set, nobody had any idea about quite how much the landscape would change and how rapidly it would do so. The title is one that, perhaps poignantly, has now become of particular significance.

3. Mr Landau QC divided the discussion into two broad categories of issues: (1) issues arising out of Chief Justice Menon's keynote address; and (2) pandemic related issues. This Report provides an overview of the discussion.

Issues arising out of Chief Justice Menon's keynote address

4. The thesis in Chief Justice Menon's keynote address is that we are presented with a new mechanism to "test" international arbitration and, in particular, to assess whether the trade-offs being taken in respect of the rule of law are justified. Mr Landau QC referred to Chief Justice Menon's well-known ICCA 2012 Congress keynote address and asked Chief Justice Menon whether the "frailties" he identified in 2012 to the development of international arbitration remain unchanged 8 years later.

5. Chief Justice Menon noted that, although he was using a different model of analysis to "health-check" international arbitration, some of the main concerns he identified in 2012 have not gone away: (i) there continues to be a lack of common understanding as to how to approach potentially difficult issues. Those differences in understanding give rise to missed expectations, missteps and problems that ultimately affect the legitimacy of arbitration; and (ii) criticisms of speed, cost and burdensome process are still very much an issue. He cautioned that, despite the tremendous advantages of arbitration, if users start thinking that arbitration has become too complex and burdensome for effective use, the significant global efforts to make arbitration successful will be lost. He encouraged the international arbitration community to re-examine these issues periodically and strive for solutions.

6. Mr Landau QC remarked that every international arbitration conference includes a discussion on the possible solutions to the concerns highlighted by Chief Justice Menon. He asked whether the international arbitration community will be talking about the same issues in 8 years' time and, if so, how this can be avoided.

7. Chief Justice Menon suggested that the international arbitration community needs to be open to radical rethinking on some of these issues. He attributed the increasing complexity and rising costs of arbitration to the fact that arbitration is a "one-shot process". Therefore, parties go to incredible lengths to achieve the desired result before a tribunal because of limited avenues for appeal. This results in efforts being front-loaded, which becomes a huge investment in time and costs at an early stage in the process. He suggested that the "one- shot process" feature of arbitration should be combined with the recognition that arbitration allows users the flexibility to customise procedures in a way that is truly cost efficient. Therefore, tribunals should rethink how to limit the time and costs incurred on discrete issues to avoid arbitration becoming a "different way of doing business".

8. The Honourable Justice Anselmo Reyes, Singapore International Commercial Court, agreed with Chief Justice Menon. Justice Reyes raised the issue of enforcement. He noted that it is possible to talk of shared values when referring to jurisdictions such as Singapore and Hong Kong, who share similar notions of due process and public policy, and regularly cite each other's jurisprudence. However, the same notions are often not applicable for other jurisdictions in South East Asia; different judiciaries and tribunals have diverging views on what is due process, and what is consistent with public policy. Therefore, in order to have shared values across the board, one will have to continue the efforts spearheaded by SIAC to discuss these issues with judges, arbitrators, lawyers and law students – and that will take much longer than 8 years.

9. Mr Landau QC invited Ms Natalie Y. Morris-Sharma (*Deputy Senior State Counsel, Attorney-General's Chambers, Singapore*) to comment on whether these recurring unresolved criticisms also affect the investor state dispute settlement (**ISDS**) sector. Ms Morris-Sharma agreed that these issues also afflict ISDS. However, the difference is that the radical rethinking is already happening in ISDS. Therefore, while we may be talking about the same issues in 8 years' time, the conversation could be more of a "stocktake" of any changes resulting from the thinking that is happening now. Professor Lawrence Boo (*Member, SIAC Court of Arbitration; Independent Arbitrator, The Arbitration Chambers*) agreed with Ms Morris-Sharma and remarked that it is easier for reforms to occur in ISDS. This is due to the involvement of

states who have a forum to discuss these issues.

10. Minister Edwin Tong SC (*Minister for Culture, Community and Youth, and Second Minister for Law, Singapore*) commented that international arbitration was set up as a *"mercantile alternative"* to dispute resolution before the courts. While he agreed that the international arbitration community needs to be open to radical rethinking, he cautioned that there are features of the arbitration process which are market driven. Users value confidentiality, the ability to choose arbitrators with the requisite knowledge and technical expertise, and finality; these are the "expected quid-pro-quos" which make arbitration attractive. Therefore, institutions and policy makers should not throw the baby out with the bathwater but, instead, focus on how to make arbitration less expensive and time consuming as it is within their power to resolve this.

11. Mr Gary Born (*President, SIAC Court of Arbitration*) agreed that we will likely be discussing the same issues in 8 years' time. However, he remarked that SIAC's case load will continue to increase in the coming 8 years because users will continue to value arbitration. We should continue to talk about issues of time and cost to enable institutions and parties to find incremental solutions to make the process move more quickly and efficiently. However, it is important to recognise that one of the fundamental aspects of the rule of law is party autonomy. Therefore, he cautioned that institutions and policy makers should not impose a solution or an idealised version of the rule of law from the top down.

Covid-19 Related Issues

12. The world has changed completely. Mr Landau QC asked the panellists to what extent the changes that have been forced upon us by the COVID-19 pandemic are here to stay. In Chief Justice Menon's view, the pandemic has taught us three things: (i) what is possible – we moved to a stage of virtual hearings in a matter of days; (ii) what is necessary – by using technology, we have come to harness efficiency; and (iii) the importance of access to justice – technology has increased the access to justice by reducing the cost of accessing justice.

13. Justice Reyes and Professor Boo commented that they hope the "new normal" is here to stay. Ms Morris-Sharma observed that the publication of guidelines by institutions will aid the "new normal" to become more than just a temporary transition. Interestingly, she also commented on the positive impact that COVID-19 has had on mediation, highlighting how the pandemic has led to a focus on relationships and time and cost savings.

Conclusion

14. Will we be talking about the same issues in 8 years' time? Almost certainly. However, hopefully, the international community will have taken on board the warnings of the esteemed panellists. As pointed out by Chief Justice Menon and Mr Born, the reform needs to come from the ground up. In true "2020 style", Mr Toby Landau QC ended the session by thanking the Pakistan telecommunications system for keeping him online. He also thanked Mr Born for joining from London in the early hours of the morning. It was a touching reminder that Singapore continues to remain open to the world, albeit "virtually" for now.

Lunchtime Chat – Confluence of Civil and Common Law Influences in International Arbitration

by Lim Tse Wei, *Associate, Herbert Smith Freehills*

Top Row (Left to Right): Dr Michael Moser, Mr Chan Leng Sun, SC and Mr Liyu (Denning) Jin
Middle Row (Left to Right): Ms Adriana Uson, Ms Chié Nakahara and Mr Philip Jeyaretnam, SC
Bottom Row: Ms Jeonghye Sophie Ahn

To what extent has international arbitration bridged the divide between the common and civil law traditions? Despite successes at creating a transnational arbitration culture, the gap between the two traditions remains a live issue and the search for a balance between the two legal traditions must continue. That was the prevailing message at the Lunchtime Chat "Confluence of Civil and Common Law Influences in International Arbitration" at the SIAC Virtual Congress on 2 September 2020, featuring regional thought leaders from the common and civil law worlds.

Joining the discussions were Mr Chan Leng Sun, SC (*Deputy Chairman, SIAC Board of Directors; Senior Counsel and Arbitrator, Essex Court Chambers Duxton*), Dr Michael Moser (*Member, SIAC Board of Directors; International Arbitrator, Twenty Essex*), Mr Philip Jeyaretnam, SC (*Global Vice- Chair & ASEAN CEO, Dentons Rodyk & Davidson LLP*), Ms Jeonghye Sophie Ahn (*Co-Head of International Dispute Resolution Team, Yulchon*), Mr Liyu (Denning) Jin (*Partner, Han Kun Law Offices*), and Ms Chié Nakahara (*Partner, Nishimura & Asahi*). Moderating the cross-cultural panel was Ms Adriana Uson (*Head of (Americas), SIAC*).

The discussions were timely, coinciding with growing calls for civil law-centric alternatives in international arbitration, most notably the Prague Rules, which highlight the increasing dissatisfaction of users with the current orthodoxy of international arbitration. Against this background, the panel assessed the wisdom of current international arbitration practices and identified further learnings to be extracted from the common and civil law traditions.

Cultural divergences remained most apparent in the evidentiary

practices of international arbitration. Dr Moser led the discussions on document production regimes, which he called "the poster child of the debate between common and civil law". This long-standing debate has prompted multiple attempts to balance the competing goals of both traditions as regards document production, resulting in the prevailing compromise under the IBA Rules on the Taking of Evidence. However, this is facing rising dissatisfaction from both cultures. Common law users favouring document production have criticised the IBA Rules as being ineffectual given the significant hurdles to this procedure, particularly the considerable difficulty of describing documents unknown to them for production. A larger resistance to the modern compromise has come from the civil law community through the release of the Prague Rules, offering an alternative civil law-centric procedure for international arbitration with highly limited document production.

Ms Ahn highlighted further cultural divisions in expert witness procedures. Modern arbitral practices, in her view, overemphasise the common law approach to expert evidence, with party-appointed experts being the norm. Party appointments, in her view, resulted in a perceived disinclination of experts to contradict an appointing party's case. Such concerns highlighted the virtues of the civil law approach to expert evidence whereby experts are appointed by and at the discretion of the arbitral tribunal.

Civil law, in Ms Ahn's view, presented an attractive direction of expert procedures reforms in international arbitration. In fact, as Mr Chan, SC noted, such reforms have been echoed by Singapore, with the proposed Civil Justice Reforms advocating court-appointed experts as the new starting position.

Notwithstanding these persisting divisions, cultural convergence has had successes in modern arbitral standards on the taking of factual evidence. Ms Nakahara observed that despite an overall common law inclination, there has been a visible cross-adoption of skills by arbitral parties from both cultures. The general rule in international arbitration of witness statements supplanting oral evidence is an adoption of the civil law's preference for contemporaneous documentary evidence and has seen common law practitioners fine-tuning witness statement preparation techniques to fit this mould. Similarly, Ms Nakahara noted that, though a hallmark of the common law system, the art of cross- examination in international arbitration has developed into a hybrid exhibiting a restraint on lines of questioning inspired by the civil law tradition. These developments have collectively resulted in a harmonised system adapted to both legal cultures.

The panel also explored how arbitrators and counsel could best navigate the cultural divide. Exploring the role of tribunals, Mr Chan, SC considered how involved should arbitrators be in arbitral proceedings amid increasing calls for arbitrators to control time and costs in arbitrations. Recent suggestions within the international arbitration community have encouraged tribunals to proactively intervene in arbitral proceedings in a manner similar to civil law judges. He cautioned, however, that while proactive intervention could enhance procedural efficiency, recently advocated civil law- inspired styles of tribunal intervention could be construed by common law-based supervisory courts as being excessive. Most notably, the right of tribunals to provide preliminary views on the merits of disputed issues and the relevance of evidence submitted by parties under the Prague Rules may not find favour with common law supervisory courts and, if done haphazardly, could be perceived as prejudging the dispute as has been criticised by Singapore courts. His view was that, ultimately, an arbitrator should avoid assuming the role of an expert determiner.

Mr Jeyaretnam, SC highlighted that tribunals have the additional responsibility of coordinating party expectations on counsel conduct in international arbitration. The cultural divide has presented conflicting standards on counsel conduct, an apparent example of which is the sequestration of witnesses that is not practiced in many jurisdictions. Tribunals, in his view, must be alive to such conflicts and ensure that the procedural assumptions of all parties are brought out and articulated in case management to ensure a level playing field.

Differences in procedural expectations, in Mr Jin's view, also accentuated a need for arbitration counsels to familiarise themselves with local procedural preferences to

enhance the strength of submissions. Mr Jin argued that Chinese arbitrations provided a useful case study. A common feature of Chinese arbitrations was the preference for early inquisitorial hearings, with tribunals actively summarising disputed issues as a roadmap for party submissions. Early hearings also provided parties with short timelines to file submissions, and have resulted in respondents' defences being brief submissions, while claimants' submissions are detailed documents due to the additional preparation time that claimants would have had. These, in Mr Jin's view, were salient differences of Chinese arbitrations from the conventions of modern international arbitration that practitioners should be prepared for in view of the growing selection of China as an arbitral seat.

Overall, the panel provided a timely reminder that the modern orthodoxy of international arbitration must be improved and it may be time to reassess the perceived common law dominance in international arbitration practice. The current pandemic, it was viewed, presented a helpful incentive and testing platform for reforms, with virtual hearings compelling the need to adopt shorter hearings alongside truncated and highly-focused cross-examinations. However, the panel cautioned that there is no "*one-size-fits-all*" solution to bridge the cultural divide. Arbitration procedures and institutional rules should avoid being too prescriptive and ultimately allow both arbitrators and counsels to draw experiences from their own cultural umbrellas to suit each individual dispute. That flexibility was, in the panel's view, the great strength of international arbitration.

Virtual Congress Debate – This House believes that Virtual Hearings are just as effective as In-Person Hearings

by Alyssa Leong, *Senior Associate, Rajah & Tann Singapore LLP*

Top Row (Left to Right): Ms Joy Tan and Mr John P. Bang
Middle Row (Left to Right): Mr Edmund J Kronenburg and Mr Rob Palmer
Bottom Row: Mr Gary Born

"This House believes that Virtual Hearings are just as effective as In- Person Hearings". The motion could not have been more on point. In what feels like a post-apocalyptic world where travel is banned, in-person hearings rendered almost impossible, and virtual hearings becoming the new norm, the debate rages on as to whether virtual hearings are truly an effective alternative to in-person hearings.

The SIAC Virtual Congress 2020 Debate session held on 2 September 2020 saw impassioned advocacy from both the proposition and opposition as they battled it out on screen for the pride of being this year's victors.

The moderator for the debate was Mr Edmund J Kronenburg (*Managing Partner, Braddell Brothers LLP*). Arguing for the motion – and ostensibly with the "advantage" of having a world-renowned arbitration heavyweight on the team – were Mr Gary Born (*President, SIAC Court of Arbitration; Chair, International Arbitration Practice Group, Wilmer Cutler Pickering Hale and Door LLP*) and Ms Joy Tan (*Joint Head of Commercial & Corporate Disputes Practice, Corporate Governance &*

Compliance Practice and the Financial Services Regulatory Practice, WongPartnership LLP). Arguing against the motion were the formidable duo of Mr John P Bang (*Member, SIAC Court of Arbitration; Head of International Arbitration, Bae, Kim & Lee LLC*) and Mr Rob Palmer (*Managing Partner, Singapore, Ashurst LLP*), who won over the hearts of the over 1000 viewers with their charm and wit (and while wearing hot pink flamingo board shorts).

The proposition was in it to win it. The lively Ms Tan fired off the debate by arguing that virtual hearings *can* be more effective than a physical hearing because it challenges the old ways of conducting an arbitration. Given the common complaints that arbitrations are costly and lengthy, Ms Tan argued that virtual hearings could change all that. With virtual hearings, there could be substantial savings in costs and travel time as counsel, arbitrators and parties would not be required to fly in for a hearing. With such scheduling flexibility, parties would also be able to obtain earlier hearing dates instead of waiting months (and sometimes years) for a hearing date. Ms Tan also argued that virtual hearings forces counsel to be more efficient with the time allocated to them, and she demonstrated this to a tee by packing in a punch and concluding her speech well before her time was up.

Undeterred by Ms Tan's fiery speech, the opposition's Mr Bang made a strong and confident rebuttal that was as simple as - "*avoid everything Joy and Gary have to say*". Mr Bang argued that not everyone has access to the kind of technology that is needed to conduct a virtual hearing effectively; and when people are connecting from different time zones, someone will inevitably have to cover the graveyard shift and that can't possibly be effective. More pertinently, Mr Bang argued that in virtual hearings, one can't ensure that the witness observes the procedural and ethical rules that we take for granted in in-person hearings. Mr Bang made a compelling case that there's nothing to prevent a witness from turning off the video link and pretending that it was accidental, or pretending that they can't hear the counsel's question or see the document referred to, in a bid to buy time or to avoid answering the counsel's questions. While virtual hearings may be just as effective as in-person hearings in the *future*, Mr Bang says "*but not today, Gary*".

Rising to the opposition's challenge, the legendary Mr Born (who did not look or sound like someone who had been awake and attending the SIAC Virtual Congress since 3am) took to the stage. Mr Born was unfazed by Mr Bang's arguments. Armed with empirical evidence and statistical studies, Mr Born set out to convince the viewers that the motion shall pass. With arbitral institutions and national courts around the world doing virtual hearings with minimal to no technical glitches and receiving positive feedback, Mr Born was emphatic that virtual hearings are more effective than in-person hearings. Indeed, the fact that this year's SIAC Congress had more participants than any other congress in the past was a testament to the effectiveness of virtual hearings. Mr Born echoed Mr Bang's sentiments that the debate should focus on the present and not the future. On that score, the fact that parties could carry on with the arbitration through a virtual hearing, as opposed to not having a hearing at all, meant that virtual hearings were "the only show in town" and by definition, were more effective than in-person hearings.

The opposition's Mr Palmer began by analogising COVID to a party that had been "in full swing for some time now". He likened in-person hearings to champagne that was completely out, but Mr Born and Ms Tan had found a supply of extra strong "virtual hearing lager" to keep the party going. While the "virtual hearing lager" was "fairly sickly stuff", Mr Born and Ms Tan were continuing to rave about it. But Mr Palmer warned - the hangover was coming. And in the morning, Mr Born and Ms Tan would be full of regret for having overdone the virtual hearings.

Mr Palmer did not disagree that electronic bundles and less travel made virtual hearings more efficient. But effectiveness was something else entirely. Mr Palmer was vehement that virtual hearings facilitated unethical behaviour and that this was fatal to the proposition's arguments. He argued that because of digitisation (and not anonymity), people were generally less inhibited online and this presented ample opportunity for unethical behaviour. A witness may easily put a phone directly under the screen, read off pre-prepared answers, or communicate with counsel in encrypted chat forums like telegram, thereby compromising

the integrity of the proceedings. To make good his point, Mr Palmer revealed that while he acceded to Mr Bang's request to put on a formal shirt for the debate so as not to embarrass the team, this did not stop him from wearing – wait for it – a pair of hot pink flamingo board shorts underneath and Mr Palmer then stood up on screen for all the viewers to see. Had we had an in-person congress, I'm confident the audience would have been in raptures by now (if they weren't already).

At the conclusion of this dynamic debate, the result was put to an online vote, and the viewers awarded the debate to Mr Bang and Mr Palmer. What had initially appeared to be a straightforward motion reflected deeper and more fundamental concerns about virtual hearings that had the propensity to affect the integrity of arbitral proceedings. While virtual hearings may be "*the only show in town*" for now, it certainly has some ways to go before it can truly be as effective, if not more effective, than in-person hearings.

Virtual Hearing Demonstration

by Patrese McVeigh, *Senior Associate, Ashurst LLP*

Top Row (Left to Right): Mr Kap-You (Kevin) Kim, Mr Andre Yeap, SC, Mr Daniel Allen and Mr James Nicholson
Middle Row I (Left to Right): Mr Andrew Webb, Mr Craig Celniker, Mr Robert Wachter and Mr Arthur Dong
Middle Row II (Left to Right): Ms Sheila Ahuja, Mr Steven Y. H. Lim, Mr Alastair Henderson and Dr Eun Young Park
Bottom Row (Left to Right): Mr Iain Potter, Mr Prakash Pillai and Ms Elodie Dulac

A tale of War and Peace

First, let me set the scene to this tale. A dispute arose between Plumet Co., Ltd. (**Claimant**), the Republic of War and Peace (**First Respondent**), and the Kingdom Mining Development Corporation (**Second Respondent**) (together, **Respondents**) in relation to an Iron Ore Supply Agreement. Under that Agreement, the Respondents undertook to mine and supply iron ore to the Claimant. The Claimant undertook to build an iron refinery and smelter, and to purchase the iron ore from the Respondents for use in that iron refinery and smelter.

The villain in this tale is the formidable COVID-19. The Respondents claim that, due to the restriction on activities, decreased workforce and supply chain disruptions during COVID-19, they were unable to mine and supply iron ore to the Claimant. Without the iron ore, the Claimant claimed it could not commence its operations and lost its entire investment. The Claimant commenced an arbitration against the Respondents for breach of contract. In its defence, the Respondents made the argument that is very much in vogue: COVID-19 falls within the scope of the relevant force majeure clause, and it should therefore be excused from any alleged breach.

With the scene set, the SIAC assembled a team of elite advocates and arbitrators from around the world to bring the arbitration between the Claimant and Respondents to life in an aptly named production "SIAC Virtual Congress 2020: Virtual Hearing Demonstration". The production was broken down into two sessions. The first session consisted of the Claimant and Respondents' opening submissions and the cross-examination of fact witnesses. The second involved the cross-examination of expert witnesses

and closing submissions.

The cast list

The star-studded cast for the first session consisted of Tribunal members Dr Eun Young Park (*Member, SIAC Court of Arbitration; Co-Chair, International Arbitration & Cross-Border Litigation Practice, Kim & Chang*), Mr Arthur Dong (*Partner, AnJie Law Firm*) and Mr Prakash Pillai (*Partner, Clyde & Co Clasis Singapore*), Ms Sheila Ahuja (*Partner, Allen & Overy LLP*) as Counsel for the Claimant and Mr Andre Yeap, SC (*Senior Partner, Head, International Arbtiration, Rajah & Tann Singapore LLP*) as Counsel for the Respondent, with guest appearances from Mr Daniel Allen (*Foreign Lawyer, Mori Hamada & Matsumoto*) as the Claimant's Fact Witness and Mr Robert Wachter (*Co- Head, International Arbitration & Cross-Border Litigation Group, Lee & Co*) as the Respondents' Fact Witness.

The line-up for the second session was just as good, featuring Tribunal members Mr Steven Y.H. Lim (*Arbitrator & Barrister, 39 Essex Chambers Singapore*), Mr Craig Celniker (*Head, International Arbitration and Asia Dispute Resolution, Morrison & Foerster*) and Mr Kap-You (Kevin) Kim (*Senior Partner, Peter & Kim*), Ms Elodie Dulac (*Partner, King & Spalding*) as Counsel for the Claimant and Mr Alistair Henderson (*Managing Partner, Southeast Asia, Herbert Smith Freehills*) as Counsel for the Respondents. Guest appearances were made from a "hot tub" of experts: Mr James Nicholson (*Head of Asia Economic & Financial Consulting, FTI Consulting*) for the Claimant's Expert, Mr Iain Potter (*Partner, MDD Forensic Accountants*) for the Respondents' Expert and Mr Andrew Webb (*Managing Partner, Berkeley Research Group*) for the Tribunal-Appointed Expert.

The plot: a battle royale of competing contractual interpretations

The first session opened with confirmations from the parties that there were no objections to the hearing being conducted virtually (the production would have made for a very different storyline if there had been!). Ms Ahuja then opened for the Claimant with a powerful and expertly structured submission. The Claimant's claim was a relatively simple one: the Respondents, in failing to deliver the iron ore as stipulated by the Agreement, caused the Claimant to suffer significant loss.

The Claimant noted and flatly rejected the Respondents' attempt to rely on the force majeure clause to excuse its non-performance. The Claimant argued that, based on Singapore law, the force majeure clause should be read strictly as against the party seeking to rely on it. With this in mind, and on a plain reading of the clause, COVID-19 simply did not fall within its scope. Attempts by the Respondents to use pre-contractual evidence to widen the scope of the clause and fall within its protection should be dismissed.

Even if the Tribunal found against the Claimant on this submission, it was argued that the Respondents were still not entitled to any relief under the force majeure clause because they had failed to satisfy the operative parts of the clause. On the Claimant's case, the Respondents had failed to demonstrate the events had actually prevented them from performing their obligations under the Agreement (as opposed to merely disrupting or making its performance more difficult). The Claimant said the Respondents could have responded to events in a variety of ways and, had some of these been implemented (and there was an expectation that they would be due to the best efforts mitigation obligation), the effect of the events may not have been so severe.

Mr Yeap, SC for the Respondents, met the Claimant's submissions with their own confident, persuasive and straightforward case. While agreeing that the dispute turned on the interpretation of the force majeure clause, the Respondents disagreed with the Claimant's interpretation. The Respondents rejected that the clause should be given such a narrow meaning. The Respondents' position was that, on their own plain reading of the clause, the clause adopted an inclusive definition of force majeure, and clearly this COVID-19 "storm" to which the Respondent had fallen victim fell within that scope.

However, if there was any ambiguity on the interpretation of the force majeure clause, the Tribunal could refer to evidence of pre-contractual negotiations. Such evidence showed the parties had originally contemplated listing out the events that would attract relief under the force majeure clause. That list was removed from the final version of the Agreement. By removing that list, the parties had demonstrated an intention to broaden the scope of the clause

and the events that it might capture. There was no question that this broad scope captured COVID-19.

The plot twist: playing commercial hardball and alleged phoney phone calls

Mr Yeap, SC for the Respondents was first up to the virtual podium to question the Claimant's witness, CEO of the Claimant Mr Victor Hugo. His first line of questioning was a sound one (and one that I'm sure was met with many laughs from the audience): "You're the CEO, right? Yes. Does anyone call you Hugo Boss?". The line of questioning unfortunately did not seem to shake Mr Hugo's resolve. Mr Hugo was resolute in his evidence on the pre-contractual negotiations and meaning of force majeure: he was a business man, not a lawyer, and, as a business man, he negotiated a narrow force majeure clause so that only truly significant events would be captured. While this line may resonate with some, it was probably less convincing to legally trained minds.

The spotlight was then passed over to Ms Ahuja to cross-examine the Respondents' witness, CEO of the Second Respondent, Mr Leo Tolstoy. Her cross-examination was clinical, expertly working through the material with Mr Tolstoy to isolate (and obliterate) his evidence of the parties purportedly agreeing to widen the scope of the force majeure clause: an unrecorded phone call and an email from Mr Tolstoy that was never acknowledged by the Claimant's witness ("cough" liar "cough"). As an arbitration lawyer, there really is nothing better than a good cross-examination on credit (and being part of the audience off-camera where you don't have to keep a poker face).

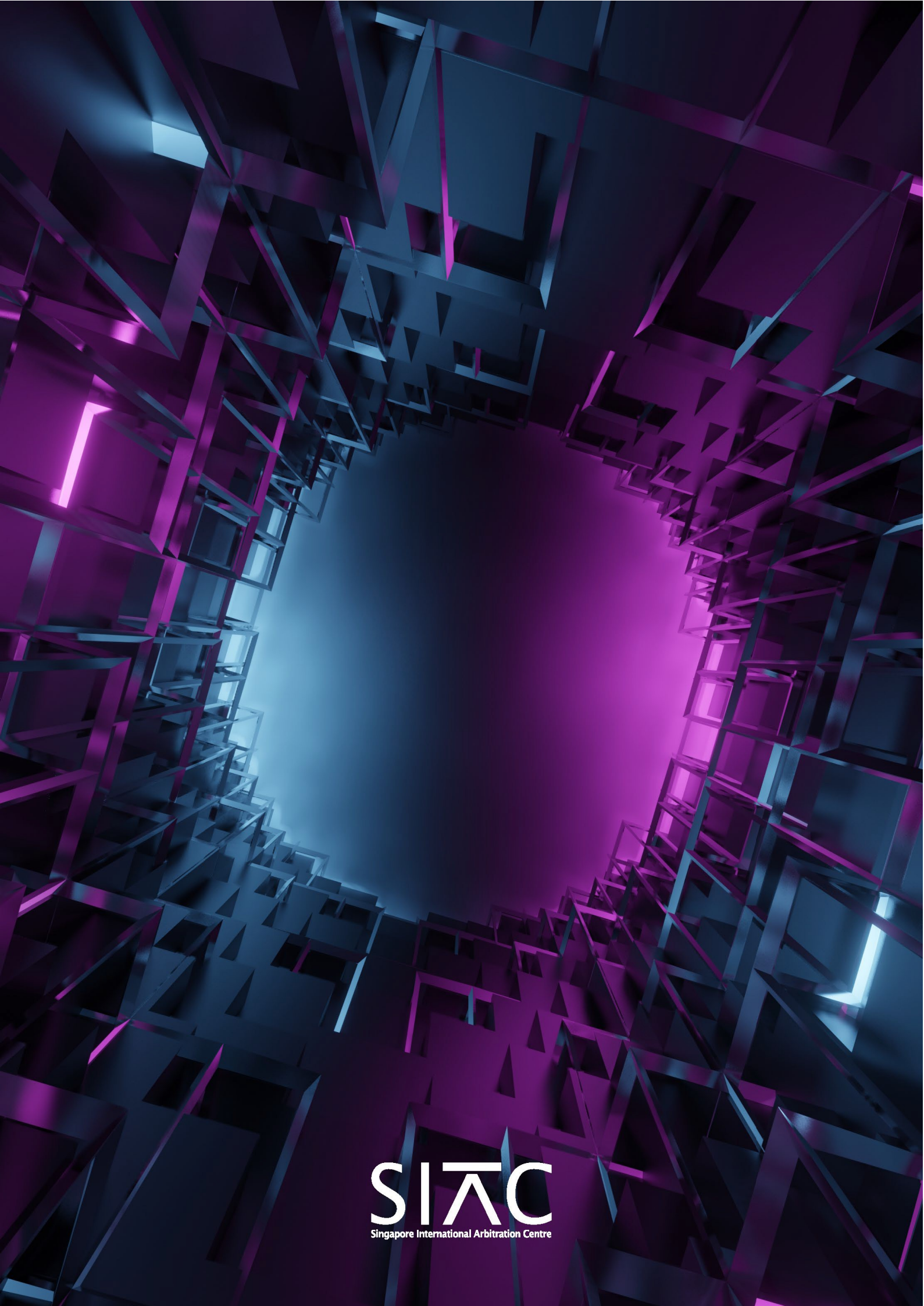
Calling all the experts to the stage: expert witness hot-tubbing, with the odd technical mishap

With time running out on the strict one and half hour chess clock (and virtual cocktails around the corner), the second session took off at pace. Ms Dulac for the Claimant began her cross-examination of the Claimant's expert, Mr Nicholson, and the Respondents' expert, Mr Potter, only for technical issues to strike. Never fear, the Presiding Arbitrator, Mr Lim came to the rescue, wasting no time moving swiftly on, but returning the floor to Ms Dulac when the opportunity arose. It was then Mr Henderson's turn to cross-examine for the Respondents; he provided us with yet another well- executed attack on credit. It served as good warning to experts (and instructing counsels alike) to consider their instructions carefully and verify critical factual assumptions.

Next up was the cross-examination of the Tribunal-Appointed Expert, Mr Webb, who prepared a report to assist the Tribunal in determining the consequences of the pandemic on iron ore mining operations. Mr Webb was questioned by both counsel on various assertions made in his report, which was ultimately suggested by Mr Henderson to be of little relevance at all given it did not consider the country at hand, the Republic of War and Peace. Mr Henderson then closed on behalf of the Respondents. In considering the quantum of damages, the Respondents' position was that the Claimant's expert report had grossly exaggerated the assessment of likely losses. Ms Dulac then took the floor to make her closing submissions on behalf of the Claimant. On the issue of the quantum of damages, she submitted that the Respondents' expert approach was truncated, disregarding elements specific to the case at hand, leading to a gross underestimation of damages in this case. On this note, the Tribunal proceeded to end the session, with everyone off to have a few well-deserved virtual cocktails.

A curtain call on physical hearings?

Particularly in the context of international arbitration, in which the witnesses, their counsel, and the arbitrators may hail from many countries across the globe, virtual hearings have proven, and will continue to prove, a useful tool in the arsenal for conducting arbitration hearings, pandemic notwithstanding. Only time will tell, but it is unlikely that the curtains will be permanently drawn on physical hearings – it may be some time from now, but we are sure the encores lie in wait.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