SINGAPORE INSTITUTE OF ARBITRATORS

# NEWSLETTER

MICA(P)166/09/2009 APRIL 2011 ISSUE NO. 1

## THE PRESIDENT'S COLUMN

We are into the second half of the Council Year 2010/2011. As mentioned in the October issue of this newsletter, the Council's focus for this council year will be on promotion and facilitation of dispute settlement by arbitration, maintaining and improving the quality of the Institute's continuing professional development programme (CPD), and promoting SIArb within the region.

**a. Promotion and facilitation of dispute settlement by arbitration**

In this regard, I am happy to report that the SIArb Scheme Arbitration is making steady progress. We have now been named as the appointing arbitration centre under the Private Education (Dispute Resolution Schemes) Regulations 2010 (the Council for Private Education Scheme, or CPE Scheme), and the Estate Agents (Dispute Resolution Schemes) Regulations 2011 (the Council for Estate Agencies Scheme, or CEA Scheme).

Under the CPE Scheme gazetted on 10 May 2010, the Institute had been requested to make one appointment to-date. While the single request for appointment may not be very encouraging for the moment, the CPE Scheme has been used as a model for the CEA Scheme and possibly other similar schemes in future.

It should also be borne in mind that the CPE Scheme has another broader objective: to provide students with a quick and affordable avenue to resolve their disputes with private education institutions. This is also in line with the national goal of making Singapore a regional education hub.

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## ANNOUNCEMENTS UPDATES & UPCOMING EVENTS

1. Singapore International Arbitration Forum 2011 on "The Future for International Arbitration" by Maxwell Chambers and the Singapore International Arbitration Centre on 1 June 2011.
2. Fifth (5th) Regional Arbitral Institutes Forum ("RAIF") Conference in Syndey Australia - 16 to 18 June 2011.
3. Seminar on "New French Arbitration Law" by Professor Emmanuel Gaillard on 28 July 2011.
4. Seminar on "SIAC 2010 Rules" on 18 August 2011.

## NEW MEMBERS

The Institute extends a warm welcome to the following new members:

**Fellows**

1. Teodoro IV Kalaw
2. Chia Ming Lai Doris
3. Lim Hung Soon
4. Kua Lay Theng
5. Ng Kok Kwang, Alan
6. Kwan Hon Meng
7. Katsuhiko Yuasa
8. Lim Yen Kia Wilson
9. Urszula Iwona Kedziera
10. Johannes Pieter Jol
11. Choong Jin Han, John

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1. Ho June Khai

**Associate Members**

1. Baldev Bhinder Singh
2. Lynette Maureen Boxall

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Mr. Vikram Nair
Mr. James Arrandale
Mr. Haryadi Hadi

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The CEA Scheme was gazetted on 3 January 2011. Although it is early days yet, I am of the view that given the still high demand for properties despite the various cooling measures introduced by the government recently, the request for arbitration under the CEA Scheme will probably outstrip the request for arbitration from the CPE Scheme. It is good that SIArb's arbitrators are well positioned to be of service to the arbitration industry as well as to the wider community.

**b. Conferences and Seminars**

In the first quarter of 2011, the institute held two seminars under its regular monthly CPD evening seminars. On 9 February 2011, Alastair Henderson presented a paper on "The Law(s) and Rules Applicable to the Substance of the Dispute". On 14 March 2011, Stuart Issacs QC shared with members his thoughts on "Life after death - The arbitral tribunal's role following its final award".

Both seminars attracted good attendance and active participation from the audience. We will continue to bring you more of such seminars. Do keep an eye on the section on "Updates and Upcoming Events" in this newsletter for announcements of coming events.

There will also be a couple of major arbitration conferences in the month of June. While SIArb is not involved in the organisation of these conferences, we are one of the supporting organisations. So do take note of these coming events:

- Singapore International Arbitration Forum (SIAF) 2011 – "The Future for International Arbitration" – 1 June 2011
- 5th Regional Arbitral Institutes Forum (RAIF) Conference, Sydney, Australia – 16 to 18 June 2011

In particular, I would urge members to support the RAIF Conference as RAIF is an SIArb initiative launched in 2005. The Inaugural RAIF Conference was held here with participation from our MOU partners, viz. Malaysian Institute or Arbitrators (MIArb), Badan Arbitrasi Nasional Indonesia (BANI), Institute of Arbitrators and Mediators Australia (IAMA), Hong Kong Institute of Arbitrators (HKIArb) and Association of Arbitration Brunei Darusallam (AABD). The RAIF community has now grown to include its latest member, Philippines Institute of Arbitrators (PIArb). This year's RAIF Conference will be organised in conjunction with the IAMA 2011 National Conference, the theme being "Appropriate Dispute Resolution".

**c. 30th Anniversary of SIArb**

This year marks the 30th anniversary of the Institute. It was on 2 April 1981 that the Institute held its inaugural meeting, which saw the election of its first council into office. To celebrate the Institute's 30th anniversary, we shall be holding a special dinner to commemorate this significant milestone in our history. The date and venue will be announced at a later date. I hope that many of you will be able to join us at this special 30th anniversary dinner.

Johnny Tan Cheng Hye PBM
President

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## Congratulations!

The Council of the SIArb congratulates Mr. Chan Leng Sun (SIArb's Honorary Treasurer), on his appointment as Senior Counsel in January 2011.

Leng Sun is qualified in Malaysia, Singapore and England. He has been a partner at Ang & Partners, Singapore since 1995. He had taught shipping law at the National University of Singapore and served as a Legal Officer with the United Nations Compensation Commission in Geneva. Leng Sun is Adjunct Faculty for International Commercial Arbitration at SMU. He chairs the Law Society ADR Committee and the SIArb Education Committee. He sits as an arbitrator and adjudicator on the panel of various institutions, such as SCMA, SIAC, ICC, KLRCA, FIDReC, the Income Tax Board of Review and the Maintenance of Parents Tribunal.

# Case Law Development

## By Dr. Philip Chan

In this issue, four cases will be examined. The International Arbitration Act (Chapter 143A of the Statutes of Singapore) would be referred to as IAA and the Arbitration Act (Chapter 10 of the Statutes of Singapore) would be referred to as AA.

The first case, Galsworthy, examines the different approaches taken by the court in the two stages of an application for enforcement of an award.

The second case, AAY and others, concerns the confidentiality of arbitration related proceedings in court and publication of redacted versions of judgments issued in such proceedings.

The third case, Engineering Construction, sets out the threshold of entitlement to appeal against an arbitral award under the AA particularly when the subject matter of dispute concerns a "one-off" contract.

The final case, Excalibur Land, is noteworthy because of its unusual outcome, in that the court deferred the hearing of the case until the outcome of an arbitration involving the defendant.

**Galsworthy Ltd of the Republic of Liberia v Glory Wealth Shipping Pte Ltd [2010] SGHC 304 [Choo Han Teck J]**

In Galsworthy, an application to set aside an enforcement order was brought before the High Court against the decision of the Assistant Registrar who had dismissed the application. The award sought to be enforced was made in a London arbitration, and had previously been challenged in the English Courts. In dismissing the appeal, the court considered the principles involved in the two stages of an enforcement proceeding - the initial grant of leave to enforce the arbitral award, and subsequent resistance to that enforcement.

As the application before the court involved challenging the enforcement order, the court proceeded to consider as a preliminary point whether the defendant (GWS) was entitled to apply to set aside the order granting leave to enforce the arbitration award in circumstances where GWS had already made an application in the English courts challenging the award on grounds of irregularity under s 68 of the English Arbitration Act and appealing on a point of law under s 69 of the English Arbitration Act.

A party who seeks to challenge an award can do so either in the supervising court of the arbitration (in this case, the English courts), via an application to set aside the award, or in the courts in which enforcement is sought (in this case, the Singapore courts), via an application to set aside the leave to enforce. It is important to note that a party will only be permitted to take one of these routes.

The court noted that the application in the English court was dismissed without a hearing on the merits, as the required security was not furnished by the defendant. However, the court was of the view that the defendant's application before the Singapore court to set aside the order granting leave to enforce was a considered decision on their part to avoid the need to furnish security to the English court. The court opined that "This was not a case where the party resisting an award voluntarily withdrew its appeal at the supervising court to mount a challenge at the enforcement court. GWS had elected their forum of challenge and they ought to be bound by it. GWS ought to have either furnished security as directed or appealed against that order. It is the principle of comity of nations that requires our courts to be slow to undermine the orders made by other courts unless exceptional circumstances exist. None existed here. Furthermore, if the application here was allowed, it could result in a duplication or conflict of judicial orders."[9]

Accordingly, the court held that the defendant "was not entitled to make this application since it had elected to proceed in the English courts, and the application here to set aside the order granting leave to enforce amounted to an abuse of process."[8]

The court also noted that, "if [the defendant's] s 68 application was heard on the merits and failed, they would be entitled to challenge the enforcement of the final award in the enforcement court if the grounds and standards between the supervising and enforcement jurisdiction are different." [9]

Having disposed of the preliminary point, the court proceeded to consider the three grounds of challenge raised by the defendant against the enforcement of the award, on the assumption that the defendant was entitled to make its application to set aside the order granting leave to enforce on the merits. [10]

As a guide, the court acknowledged that, "there are two stages regarding enforcement proceedings; the first stage of enforcement pertains to the initial grant of leave to enforce, and the second stage of enforcement whereby a party to whom an award was made against resists the enforcement based on the grounds set out in the IAA." [11] After reviewing the relevant cases, the court held that the standard applicable to the first

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stage is that of a "mechanistic process" as decided in Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd and another [2006] 3 SLR(R) 174; and the standard applicable to the second stage "is clear from the express wording of s 31(2) [of IAA] that a party ought to prove the grounds relied on a balance of probabilities, as was held in Strandore Invest A/C and others v Soh Kim Wat [2010] SGHC 151". [11]

The court ultimately held that the grounds raised were without basis and dismissed the appeal.

**AAY and others v AAZ [2010] SGHC 350 [Chan Seng Onn J]**

In AAY and others, an application to amend an Order of Court was made pursuant to ss. 22 and 23 of the IAA, relating to the confidentiality of the proceedings in court. The amendment if not granted might have resulted in a total bar to the publication of the judgment concerned. The amendment was sought by the defendant in the following terms:

"[Suit Y] be heard otherwise than in open court, pursuant to the Plaintiffs' application under section 22 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) (the "IAA")" instead of "[Suit Y] be heard in camera".

The starting point for the court's analysis was the stated basis of the plaintiffs' application for confidentiality: this was pursuant to sections 8(2) and 8(3) of the Supreme Court of Judicature Act and Order 42 rule 2 of the Rules of Court ("ROC") and/or sections 22 and 23 of the International Arbitration Act and Order 69A.

Section 8(2) gives the court power to hear matters "in camera", following which (under Order 42 rule 2) there is a total bar on publication of the judgment. Section 22 of the IAA provides that, on the application of a party, proceedings shall be heard "otherwise than in open court". In such cases, the court may direct what information may or may not be published (under s 23 of the IAA). The defendant's application therefore sought to establish that the basis for the order had been s 23 of the IAA and not s 8(2) of the Supreme Court of Judicature Act.

The plaintiff objected to the amendment, on the basis that the court should not be allowed to vary its decision once its order has been issued. However, the learned judge held at paragraph 17 that, "the in camera order was an accidental slip or omission which could be amended under Order 20 r 11 of the ROC because it was clear to the parties at the hearing in August 2007 that I had intended, when I made the orders recorded in the Order of Court, for Suit Y to be heard "otherwise than in open court" pursuant to ss 22 and 23 of the IAA." Therefore, the amended order reflected, rather than varied, the court's decision.

The court then proceeded to decide whether the judgment concerned could be published with restrictions as prescribed under the IAA.

The court held at paragraph 30 that "Even if the defendant had not applied to amend the Order of Court, … s 23 of the IAA applied, instead of O 42 r 2 of the ROC, so that publication of the Judgment (with the appropriate redactions) may be ordered where the hearing was held in camera pursuant to an application granted on the basis of ss 22 and 23 of the IAA."

The court had earlier explained that, "The maxim generalia specialibus non derogant provides that "where the literal meaning of a general enactment covers a situation for which specific provision is made by another enactment contained in an earlier Act, it is presumed that the situation was intended to be dealt with by the specific provision rather than the later general one" (Francis Bennion, Statutory interpretation: a code, London: LexisNexis 2008, 5th Ed at p306)….Section 23 of the IAA deals specifically with proceedings under the IAA whilst O 42 r 2 of the ROC deals generally with proceedings held in camera. Section 23 of the IAA cannot be construed as a general enactment vis-à-vis O 42 r 2 of the ROC on the issue of proceedings heard in camera. Section 23 of the IAA deals in detail with the situation where proceedings under the IAA are heard otherwise than in open court (including where the proceedings are heard in camera) and should be applied in the present case" [30]

**Engineering Construction Pte Ltd v Sanchoon Builders Pte Ltd [2010] SGHC 293 [Quentin Loh J]**

The matter before the court was an application for leave to appeal against an arbitral award pursuant to Section 49 of the AA. Loh J considered the standard for appeals in arbitration as considered by the English courts.

Section 49(5) of the AA (which is in pari materia with Section 69(3) of the English Arbitration Act 1996) provides as follows:

Leave to appeal shall be given only if the Court is satisfied that -

"(a) the determination of the question will substantially affect the rights of one or more of the parties;

(b) the question is one which the arbitral tribunal was asked to determine;

(c) on the basis of the findings of fact in the award -

(i) the decision of the arbitral tribunal on the question is obviously wrong; or

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(ii) the question is one of general public importance and the decision of the arbitral tribunal is at least open to serious doubt; and

(d) despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the Court to determine the question."

Two questions of law were raised in the appeal, and the court held that:

- The first question was in effect the construction of the subcontract clauses and the right of repudiation. The appeal on this basis failed, as it was a 'one-off' contract and it related to the particular facts of the case. As a result, it clearly did not satisfy either The Nema principles nor section 49 of the AA. [52]

- The second question was whether a provision permitting the main contractor to make deductions of "ascertained or contra accounts" could extend to a bona fide counterclaim for unascertained and unquantified damages for breach of contract. This suffered from the same defect as the first question, since this was a one-off contract and it was decided on its own particular facts. [53]

In arriving at his decision, the learned judge referred to an English case, CMA CGM SA v Beteiligungs-KG MS "Northern Pioneer" Schiffahrtsgesellschaft mbH & Co & Others [2003] 1 WLR 1015 ("The Northern Pioneer"). The court in that case observed that Lord Diplock's formulation in The Nema "was calculated to place a particularly severe restraint on the role of the commercial and higher courts in resolving issues of commercial law of general public importance." However, the court noted that this had now been superseded by the statutory criteria in section 69(3)(c)(ii) of the English AA, which opened the door "a little more widely to the granting of permission to appeal than the crack that was left open by Lord Diplock." [51]

**Excalibur Land (S) Pte Ltd v Win-Win Aluminium Systems Pte Ltd and another [2011] SGHC 37 [Kan Ting Chiu J]**

The matter arose from related arbitration and litigation proceedings. The plaintiff in the litigation, Excalibur, was the developer of a project. Win-Win, the first defendant, was the sub-contractor. Leck, the second defendant, was a director of Win-Win. In the arbitration, Win-Win was the claimant against Tavica, which was the main contractor in the developer's project.

This case is very interesting because the preliminary hearing resulted in the staying of the case before the court, until the conclusion of arbitration between parties who were not the same as the parties in the court action.

The court made an Order in 2001, shortly after the commencement of the litigation, in the following terms:

(a) the hearing of the Suit be adjourned pending the conclusion of arbitration proceedings between Win-Win and Tavica;

(b) Excalibur and Win-Win abide and be bound by the decision of the arbitrator in the said arbitration proceedings for the purposes of this Suit; and

(c) costs of the adjournment shall be costs in the cause ("the Order"). [12]

The Order was made because, "In the arbitration proceedings and the Suit, Win-Win raised common issues of fact." [10]. Further, the learned judge "was concerned that there were common issues of fact and that it would not be desirable to have inconsistent findings of fact by the court and the arbitrator." [11]

In the arbitration, the issues were bifurcated, with the issues common to both the arbitration and the litigation dealt with separately from the issues which only concerned the arbitration. Following an Interim Award in the arbitration in 2009, Win-Win filed an application for leave to appeal against the Arbitrator's findings, which was dismissed. Excalibur thereafter filed an application in the suit for a preliminary hearing (before the trial) for the court to determine the following as preliminary issues: -

(i) whether the Arbitrator's findings were binding on Excalibur, Win-Win and Leck in the Suit pursuant to the Order;
(ii) whether the Arbitrator's findings were to be applied to the questions of law and facts in the Suit; and
(iii) if the Arbitrator's findings were treated as binding, whether judgment may be entered against Win-Win and Leck.

In answer to the first question, "(i) whether the Arbitrator's findings are binding on Excalibur, Win-Win and Leck in the Suit pursuant to the Order;" the court held that the Arbitrator's findings were binding in the Suit. [36] It held that there could have been circumstances where the findings would not have bound the parties: this would have been where "the parties to the arbitration proceedings changed, eg, by the addition, removal or replacement of parties, or the issues in the proceedings changed, then a situation

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may arise where it can be said that the arbitration proceedings contemplated in the Order were not the proceedings that followed." [26]

In arriving at this decision, the court considered the following matters.

- Although the whole arbitration proceeding has not completed, the relevant decisions of the Arbitrator in a bifurcation order "bind the parties even if the Arbitrator had not made his final decision on the whole arbitration proceedings." [28, 29]

- "Having accepted the Order without appealing against it, there was no merit in Win-Win's and Leck's contention that the Order should not apply against them because the parties in the arbitration proceedings and the Suit were not the same parties." [32]

- "…the Arnold exception is an exception to the doctrine of res judicata. In the present suit, however, the Arbitrator's findings do not bind Win-Win and Leck by virtue of the operation of that doctrine, but by the force of the Order. This is a conceptually distinct base on which parties may be bound by the Arbitrator's findings, and the Arnold exception has no application to the application of the Order." [34]

- "…even if it is assumed that the Arnold exception may apply in this context, the defendants had not shown that the Arbitrator had made such an egregious mistake that grave injustice would result if his findings were to bind Win-Win and Leck. Win-Win had fought long and hard to deny any liability towards Excalibur." [35]

In answer to the second question, "(ii) whether the Arbitrator's findings are to be applied to the questions of law and facts in this Suit;", the court held that "the Arbitrator's findings in the arbitration proceedings on the common issues are to be applied to the Suit pursuant to the Order. This, however, does not mean that the Arbitrator's findings are to be taken to have addressed all questions of law and fact in the Suit." [37]

Finally, in answer to the third question, "(iii) if the Arbitrator's findings are treated as binding, whether judgment may be entered against Win-Win and Leck.", the court held that, "the rights and liabilities of Win-Win and Leck are not necessarily determined by the Arbitrator's findings. If there are issues raised in the Suit that were not addressed in the bifurcated issues and dealt with in the Arbitrator's findings, then those issues must be dealt with before Excalibur's claims against Win-Win and Leck can be determined." [39] Judgment was entered against Win-Win and Leck.

**Dr. Philip Chan**
**Associate Professor**
Department of Building
School of Design and Environment
National University of Singapore

# SIARB SEMINARS AND EVENTS

## October 2010 to March 2011

### Seminar on "Managing Maritime Casualties: Claims, Insurance and Other Legal Obligations"

Date: 14 October 2010

Speaker: Mr. Andrew Gray

Chairperson: Mr. Lee Wai Pong





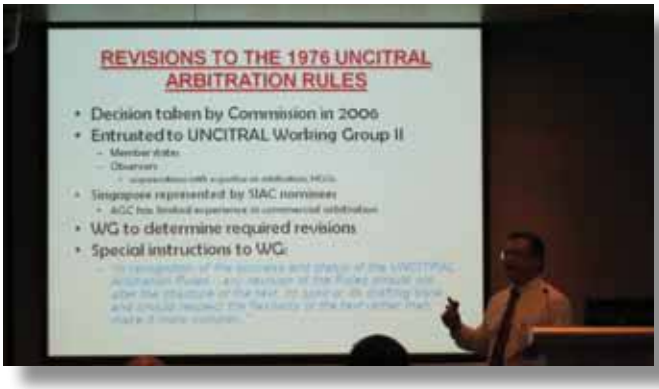



## Seminar on
## "The New 2010 UNCITRAL Arbitration Rules"

**Date: 27 October 2010**

**Speakers: Mr. Jeffrey Chan, SC, Deputy Solicitor-General and Mr. Simon Milnes**

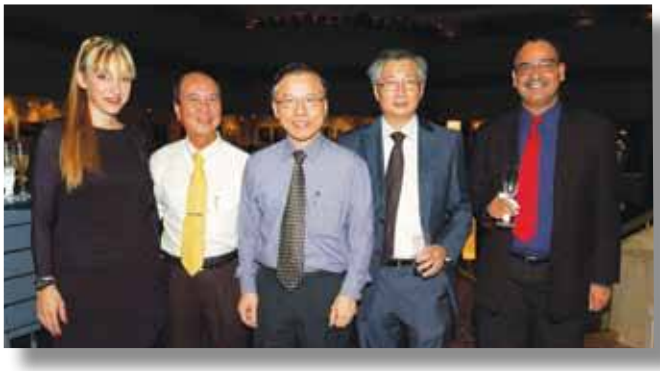
**Chairperson: Mr. Minn Naing Oo**


# SIARB ANNUAL DINNER

**Date: 29 October 2010**

**Venue: Marina Mandarin, Singapore**



## Seminar on
## "The Law(s) and Rules Applicable to the Substance of the Dispute"

**Date: 9 February 2011**

**Speaker: Mr. Alastair Henderson**

**Chairperson: Mr. Ben Giaretta**

On 9 February 2011, Alastair Henderson of Herbert Smith gave a presentation on "The Laws and Rules Applicable to the Substance of the Dispute". The talk was chaired by Ben Giaretta of Ashurst.

Alastair delivered an insightful and engaging presentation on this complex subject. He enlivened the subject matter with pertinent and relevant examples from his extensive practice in the area. He included a particularly interesting assessment of the choice of alternatives to national law in arbitrations. Alternatives include transnational laws and rules. Alastair highlighted that where parties fail to choose a governing law, then the tribunal must determine what law to apply. Attendees were interested to note that the SIAC Rules and ICC Rules differ in approach on this point: while it seems the ICC Rules will permit the application of either transnational or national laws, it is generally understood that the SIAC Rules may only permit application of national laws. However, there is no formal guidance for tribunals as to how selection of substantive law should be made.

The talk prompted many pertinent and thoughtful questions from the audience, and attendees were fortunate enough to hear the views of Associate Professor Norah Gallagher who attended the presentation.

## Talk on
## "CPE Mediation-Arbitration Scheme"

**Date: 11 February 2011**

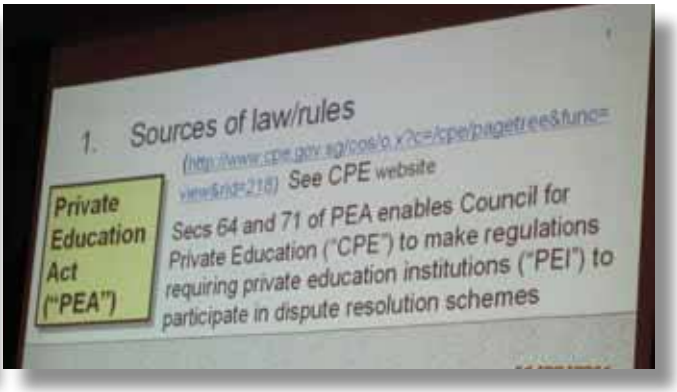
**Venue: YMCA, Singapore**












## Seminar on
## "Life after death"
### The arbitral tribunal's role following its final award"

**Date: 14 March 2011**

**Speaker: Mr. Stuart Isaacs QC**

**Chairperson: Mr. Chan Leng Sun, SC**

SIArb wishes to express its appreciation to **Stuart Isaacs QC** for a most enlightening and insightful seminar on the topic "Life after death – The Arbitral Tribunal's role following its Final Award". As Issacs QC explained much has been said and written about the role of the arbitral tribunal from the commencement of the arbitration to the final award, but little has been published about the tribunal's role after the final award. Hence, his choice of topic. Issacs QC examined the concept of functus officio, explored the tribunal's power under Legislation and Rules to correct its award, distinguished "correction" from "interpretation", and examined what constitutes "clerical error", "typographical errors", "errors in computation" and "errors of similar nature", that may be corrected. Issacs QC went on to discuss the remission of an award by a state court, and practical issues such as notification and publication of an award which may trigger time limits for enforcement.

**Publisher**

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