SINGAPORE INSTITUTE OF ARBITRATORS
NEWSLETTER
MCI (P) 113/09/2013 **SEPT** 2013 **ISSUES** NO. 7

THE PRESIDENT'S COLUMN

The Singapore Institute of Arbitrators celebrates its 32nd Anniversary this year. I have been involved with the work of the Institute for almost a decade and what a decade it has been for arbitration in Singapore. Much ink has been spilt on the growth of Singapore as an international arbitration centre, so I shall not belabour the point. What I would like to say though is that the work of SIArb has correspondingly increased in this decade. Its membership has grown to about 880 as of August 2013.

The objects of SIArb, as entrenched in its Constitution, remain the same. Chief among these are the promotion of arbitration, improving the standards of conduct and provide training for candidates seeking admission to the ranks of SIArb. These objects have been pursued with commendable industry by the leadership of SIArb and other dedicated volunteers who served tirelessly as Committee members and trainers. I acknowledge the lofty standards set by my immediate predecessor Mr Mohan Pillay, and before him Mr Johnny Tan, Mr Raymond Chan and Mr Richard Tan. I have witnessed personally the passion of these past Presidents who have shaped the SIArb of today.

The core programmes of SIArb such as the International Entry Course and the Fellowship Assessment Course continue to be the gateway for those seeking a quality, structured

Continued on page 2

ANNOUNCEMENTS UPDATES & UPCOMING EVENTS

1. **Fellowship Assessment Course (FAC) - 30 Oct 2013 (Module 1), 8 & 9 Nov 2013 (Modules 2,3,4 and 5), 11 Nov 2013 (Written Assessment)**
2. **SIArb Commercial Arbitration Symposium 2013**
   Venue: Old Parliament House (to be followed by a Networking Dinner Reception & Cocktail) - 14 November 2013, 12pm - 6pm
3. **32nd Annual Dinner**
   Attorney General Steven Chong will be gracing the occasion as our Guest of Honour.
   Venue: Conrad Centennial Singapore, 7pm - 10.30pm

NEW MEMBERS

The Institute extends a warm welcome to the following new associates, members and fellows

Associate

1. Tai Chook Ching

Fellows

1. Palmer Robert Thomas
2. Reginald Jeremy
3. Yong Boon On
4. Anwar Shady
5. Damian John Watkin

Members

1. Shaiks Salim
2. Shaw Matthew
3. Bhargavan Rajendranprasad
4. Steven Loh
5. Chang Fook Cheen
6. Sutedja Candy Agnes
7. Wang hui
8. Advani Sunita Purshotam
9. Yeo Boon Tat
10. Wong Tack Chow
11. Chew Oun Mingtse

CONTENTS

Continued from page 1

training leading to professional qualifications. However, in line with the defining characteristic of international arbitration, SIArb is now an institute that transcends borders.

There are three aspects worthy of mention. First, the Regional Arbitral Institutes Forum that was conceived at the inaugural Conference in Singapore in 2007. The objectives of RAIF are aligned to the Constitutional objects of SIArb. It is hoped that increased collaboration between the seven regional institutes will result in further harmonization of arbitration doctrines and practices. SIArb looks forward to hosting the RAIF Conference again in 2014.

Secondly, SIArb has been assisting our neighbouring countries to develop their arbitration expertise, in particular, their own pool of qualified arbitrators. SIArb has participated in ad hoc training in Vietnam, for instance, but its most significant outreach programme is in Cambodia. SIArb has been appointed by the World Bank in training the first group of arbitrators for the Cambodia National Arbitration Centre since June 2010.

Thirdly, the healthy diversity within the membership body as well as the Council of SIArb is to be welcome. Lawyers and non-lawyers, Singaporeans and non-Singaporeans. It is fitting that an Institute aspiring to a focal point for expertise on international arbitration should draw from this rich, diverse pool of talents. SIArb is not just a training centre. It plays an important role in providing thought leadership and consultation on policy issues affecting arbitration, such as those that have been highlighted by the Honourable the Chief Justice Sundaresh Menon on various occasions in 2012 and 2013.

In this regard, the Council is heartened by the strong turnout at the August AGM. The lively, healthy debate on the Constitutional amendments and the keen interest shown by six very able candidates for the three elected Council positions augur well for the future of the Institute.

I end this inaugural message with heartfelt gratitude to all who have entrusted the helm of this venerable institution to me and a warm introduction of your new Council members:-

President: Chan Leng Sun, SC
Vice-President: Chia Ho Choon (elected by Council to fill the vacancy left by Chan Leng Sun, SC)
Secretary: Naresh Mahtani
Treasurer: Yang Yung Chong
Immediate Past President: Mohan Pillay
Council Members: Johnny Tan
Dinesh Dhillon
Tay Yu-Jin
Steven Lim
Kelvin Aw (declared to succeed Chia Ho Choon who becomes Vice-President)
Audrey Perez (co-opted)
S Sharma (co-opted)

Closing Newsletter Message - IPP Mohan Pillay

As I leave the office of President and hand over to Chan Leng Sun SC, I wanted to address the Institutes' broader membership on 2 areas.

First, to acknowledge & express my gratitude to the Council members who retired at the 2013 AGM. Secondly, to touch on some key elements of the Institute's work in the 2 years of my Presidency.

Retiring Council Members

My first priority is to recognise & thank the 6 retiring Council members for their support & contribution in the last term

a. **Anil Changaroth**, who steps down as Treasurer – he very ably dealt with the challenges of that office, despite having accepted the demands of being elected Chairman of the SCL(S) last year. He continues as Chairman of SCL(S) into 2014.
b. **PP Johnny Tan**, whose term as IPP expires with my stepping down as President - despite having helmed the Institute as President for 4 years, he quite tirelessly carried on active service in my term, as Chairman of the very busy External Relations Committee.
c. **PP Raymond Cha**n who has been the Institute's face of its FAC program as Course Director – on top of this heavy responsibility, he chaired the organising committee to deliver a very successful SIArb Inaugural National Arbitration Conference in July this year.
d. **Chia Ho Choon**, a key part of the Council, quietly but very effectively pulling his weight as Chair of the Activities Committee. He single-handedly put together our major 30th Anniv. Dinner in 2011, and repeated

Continued from page 2

that feat last year, when we had the good fortune to have the Chief Justice as our GoH. In between, we have Ho Choon to thank for our many and enjoyable networking cocktails.

e. **Eric Chew** retires as Co-Chair of the Publications Committee and Editor of the Institute's regular twice yearly Newsletter. He's been the party whip maintaining discipline over timely submission of my President's Column, to make sure that you get the Newsletter on time and with the regularity that is rightly expected of it.

f. **Audrey Perez** steps down co-opted Council member after 1 year, as required by the Constitution. She has been the moving force of the Special Focus Committee through sheer drive & passion – you will see from her Committee report, the flair she brings to the role.

With that, I would like to look back on some key aspects of the Institute's work & organisation during my term as President - the reorganisation of our Secretariat, our Membership position, the Institute's Education & CPD programs, the Inaugural SIArb National Arbitration Conference, our regional work, and finally highlight some important Constitutional proposals considered at the recent AGM.

Secretariat

Our Secretariat has undergone significant restructuring in the last 2 years, moving from a full time staff of 3 to its current strength of 1. Our Marketing Manager, Pauline Wong left in July 2012, and Jenny Wee, our long serving Executive Officer departed at end January 2013.

As part of the Council's broader evaluation of Secretariat resources and support, the Council chose to outsource instead of simply replacing headcount. We considered this as a more cost efficient and productive option.

The SIArb Secretariat now consists of Subra, our Senior Accounts/Admin Executive, working closely with our outsource service provider, Intellitrain.

It is only right that I recognise the efforts of our Honorary Secretary, Naresh Mahtani who has tirelessly overseen and implemented the various stages of the Secretariat review. I would also like to acknowledge the resilience and commitment of our Senior Accounts/ Admin Executive, Subra who has steadfastly manned the Secretariat throughout this period of change.

Membership

2 years ago, when I took over the Presidency, our membership stood at 753. As at 31 July last year it moved up 10% to 824.

This year, as at 1 August 2013, our overall membership had grown to nearly 900 - 880 to be precise. This represents an overall growth of 127 new members (17%) in the last 2 years.

Much of that has come through increases in our Fellows & Members categories. This is testimony to the quality and appeal of our ICE and FAC courses – which takes me conveniently to the work of our Education Committee, chaired by, now President Chan Leng Sun.

Education Program

Together with our CPD seminars, our education programmes lie very much at the heart of what we do. Both the IEC and FAC courses are proving more popular than ever.

a. IEC - Last year's course attracted some 30 registrations. We have maintained these historically high numbers this year with 31 participants

b. FAC - In the 2012 run we saw 27 sign up, versus previous levels of 11-15. This year's FAC program is scheduled later this year in November, with every hope of generating the same heightened level of interest.

This is due in large part to the tremendous work of IEC Course Director, Naresh Mahtani and FAC Course Director, PP Raymond Chan.

The Council has been keen to expand our education and training programs beyond these traditional, but important avenues. At last year's AGM I reported that we were looking at adding arbitration surgery workshops to our offering. These workshops would explore the practical aspects of the arbitration process using DVDs that replicated mock arbitrations.

I am very pleased to announce that, under the guiding hand of VP Chan Leng Sun, this program will be rolled out as a full day workshop in late September. Leng Sun and his team of experienced trainers will walk participants through a fictional arbitration – from selection of arbitrators, through tactical deliberations and hearings, right up to the award. There will be discussions and analysis at each key stage of the process, to bring to live many of the critical aspects of the arbitral process.

CPD

I announced at our AGM last year that we aimed to provide 7 - 10 such seminars in the coming year. Since then, the CPD Committee organised 10 seminars, with 1 postponed for scheduling reasons. My thanks and appreciation for all the hard work behind this goes to CPD Committee Chair, Tay Yu Jin.

Continued from page 3

SIArb Inaugural National Arbitration Conference

This inaugural Conference, which took place recently on 30 July with Senior Minister of State for Law & Education, Indranee Rajah as our Guest of Honour, is a point of particular pride for me.

Those of you who were at our August 2011 AGM 2 years ago, when I was elected President, may recall my first mention of such an event. It was on that occasion that I announced the prospect of an annual or biennial national arbitration conference as part of an initiative to deliver greater value to our members. The Institute seems particularly well placed to initiate such an event given its position as a national arbitral body.

We found strong support for the Conference both from the nearly 100 delegates who attended, as well as from many of the local law firms who stepped forward to sponsor the event - Clasis LLC (now in JV with Clyde & Co. as Clyde & Co. Clasis), Harry Elias Partnership, Rajah & Tann, Khattar Wong and Lee & Lee.

I would like very much to recognise the individuals who's sterling work made possible what seemed a very distant thought 2 years in August 2011 – the organising Committee helmed by PP Raymond Chan as Chair and PP Johnny Tan as Co-Chair, and their 2 very able committee members, Tay Yu Jin and Eric Chew.

Regional Work

We continue the regional work started very much during the term of PP Raymond Chan, and nurtured along in PP Johnny Tan's term to the footprint we see today.

First RAIF - SIArb is a founding member of RAIF, the Regional Arbitral Institutes Forum, a regional grouping of 7 arbitral institutes from Singapore, Malaysia, Hong Kong, Philippines, Indonesia, Brunei and Australia.

Having organized the Inaugural Conference in 2007, it is very gratifying to see that we have now come to the 7th RAIF Conference hosted by Philippine Institute of Arbitrators, in June this year.

Singapore successfully bid to host RAIF 2014, so that the RAIF Conference will return next year to where it all started in 2007. As with all RAIF Conferences, the Singapore event next year presents an excellent opportunity to meet fellow practitioners from the region – so do look out for details as the conference organisation gets underway.

Secondly, I would like to update you on our continuing work & collaboration on the World Bank funded arbitration training program in Cambodia. Our involvement began in 2010 and our work has continued in the years since then, under the leadership of PP Johnny Tan.

So it is particularly satisfying to report that the Cambodian National Arbitration Centre (NAC) officially opened in March this year, with a panel of 43 arbitrators, trained under our World Bank program. In addition, SIArb has also been working with the NAC on its arbitration rules.

The Institute's role continues, as we are now in discussions with the NAC to assist with further training for the NAC arbitrators.

Constitutional Amendments

I mentioned in my last message that the Council was recommending a number of Constitutional amendments for consideration at the AGM.

This included an important proposal to remove the current Constitutional restriction for all Council members and office bearers to be Singapore citizens or permanent residents. The Council considered that in today's world, this unduly restricted the talent pool of individuals available to support and serve the Institute at Council and office bearer level.

The proposed amendment to broaden this category saw considerable, and in my view, very healthy debate at one of the best attended AGMs in recent memory.

I was very pleased to see that there was near unanimous support to broaden the pool, beyond Singapore citizens and permanent residents, to those ordinarily resident in Singapore. Save for 3 objections, the house overwhelmingly voted in favour of enlarging the qualifying criteria in this way. It is my firm belief that this will tap into the increasingly cosmopolitan & multinational Singapore arbitration community, and strengthen the Institute in the long term.

Finally, it remains for me thank the Institute's membership for your support, and the privilege & honour of serving you as President of the SIArb these last 2 years.

Immediate Past President Mohan Pillay (2011-2013)

Reflections on Costs and Ethics in International Arbitration

SIArb National Arbitration Conference 2013

Steven Lim, Managing Director, Clasis LLC
Partner, Clyde & Co Clasis Singapore

(This is the speech presented at the SIArb National Arbitration Conference 2013)

I will be discussing two topics – cost and the ethics in international arbitration. Let me explain this duality of topics. When we were invited to speak at this inaugural national arbitration conference, we were told the institute would like us to pick up on issues raised by the Chief Justice at his speech at the institute's annual dinner in November last year. I wanted to share some views on costs but foolishly allowed myself to be cajoled into also addressing the issue of ethics. I say foolishly, because I now find that I am in the distinctly uncomfortably position of being in the minority of one to have picked up the hot topic.

Costs

I will begin with some brief comments on costs. These comments have to be brief, as first, I have to keep to time and second, my co-panelist will also be speaking on the topic and we do not wish to inflict upon you a double portion of the same ointment today.

I should also add the thoughts I wish to share are, what I will label, in development. They are impressions I have formed working on the cases I have had the fortune, or misfortune, to be involved in but have not been tested much under the cold analytical light of public forums such as this. I offer my thoughts with these caveats.

I think it would be fair to say that I would be serving you with platitudes if I stood here today and spoke to you about techniques for saving and time and costs, as may be found in the ICC's Techniques for Controlling Time and Costs in Arbitration, even if these come from the 2012 second edition rather than the 2007 first edition.

The tools for managing time and costs in international arbitration are well known. Yet there is a persistent a concern that international arbitrations are taking too long and are too expensive.

It may be helpful to look at some statistics here. The Chartered Institute commissioned a survey in 2010 on costs of international arbitration. The survey had 254 respondents. The results showed that party costs averaged $2.6 million in common law countries and $3 million in civil law countries. More interestingly, 20% of survey respondents actually spent more than $10 million on party costs when the amount in dispute was between $20 million and $100 million. And 10% of survey respondents spent more than $10 million on party costs despite their amount in dispute being between $2 million and $20 million. There was a clear lack of proportionality between costs and amount in dispute in these cases.

Why are we failing to control costs? High costs is not a new compliant. Is it because we do not have the tools to do so? Or is it because we are not using the tools available to us?

Let me give an example. We can all probably agree that we can speed up an arbitration and save costs if counsel and arbitrators work to minimize the issues in an arbitration at an early stage. Too often, time is wasted over issues that are not relevant and will not decide the matters in dispute. The tools which one can use to do this are available, but they are not used often enough or are not used properly.

It is common to have a list of issues at an intermediate stage of the arbitration. Too often the list is drawn up perfunctorily as a laundry list of every single issue that has been raised in the arbitration. This list then becomes just another document in the arbitration and is largely ignored for the rest of the process. Handled this way, the list of issues just adds to time and cost, which is a shame because it is a useful tool to limit time and costs. The list, when used properly, can focus the parties and arbitrators' minds on reducing the issues in the arbitration to those that will be really dispositive of the dispute. After the issues have been distilled in the list, arbitrators and counsel can work to confine the arbitration to these issues, and ensure that no time and

Continued from page 5

costs is wasted on matters that ultimately will have no bearing on the final determination of the dispute.

To do so, counsel may need to master the case faster and to grasp its core at an earlier stage. Arbitrators may need to be more robust in encouraging counsel to do this. Arbitrators may also need to be more robust in managing the arbitration by reference to the core issues. This would include the document production process, the need for witness evidence and the time needed for oral examination at the hearing.

Have we, as arbitrators, placed far too much weight on the duty to give the parties an opportunity to present their case and not to pre-judge the issues and far too little weight on the countervailing duty to manage the case diligently and efficiently, and to do our best to conduct the arbitration in a manner that costs do not rise to an unreasonable proportion of the interests at stake?

Rule 1 of the IBA Rules of Ethics for International Arbitrators, which I will also touch on when I turn to ethics, is stated to be a Fundamental Rule. It reads, *"[a]bitrators should proceed diligently and efficiently to provide the parties with a just and effective resolution of their disputes, and shall be and shall remain free from bias".*

There is, as one would expect, a reminder to be just and free from bias. There is also, though, equal mention of efficiency and effectiveness. As I said, this is stated to be a fundamental rule.

Also Rule 7 states, *"all arbitrators…shall do their best to conduct the arbitration in such manner that costs do not rise to an unreasonable proportion of the interests at stake".*

We have an equal duty to control costs. Have we given far too little weight to this?

Is another reason that we are failing to control time and costs, simply that the quantum of costs typically do not feature in the forefront of the minds of counsel and arbitrators at the onset of the arbitration – it comes to the fore only after the battle has been fought and the dust has fallen? Is it time to consider having a budget for the battle before arms are locked?

In England, the Jackson reforms on Civil Litigation Costs proposed a system of costs management. The essential elements are these:

a. The parties prepare and exchange litigation budgets, or as the case proceeds, amended budgets.

b. The court determines the extent to which the budgets are approved.

c. So far as possible, the court manages the case so that it proceeds within the approved budget.

d. At the end of the litigation, the recoverable costs of the winning party are assessed in accordance with the approved budged.

This places the quantum of costs up front and center before the costs are spent.

Arbitrators and counsel need to make more use of the flexibility of the arbitration process to design and agree procedures that are appropriate for the resolution of the particular dispute in a cost and time efficient manner. Arbitration need not be practiced by rote. It is prudent not to discard, too readily, precedent refined by time and experience but equally arbitration should not be a hidebound process. Where there is good reason, one need not shy away from innovation. The way things have been done in the past can and should be adapted to suit the needs of the particular case at hand with the aim of resolving the case faster and cheaper.

Ethics

Let me now turn to the issue of ethics. I offer my thoughts on this issue with even more diffidence than the issue of costs. As you all know ethics has recently been discussed and debated by those who are much greater and better than I, and who have considered the issue much longer and with more depth. I am in no position to offer any critique of the positions taken by these giants in the arbitration world. Let me call the thoughts that I offer personal reactions to what has fallen from the great and the good.

As I read the material that has been written on this topic, and sat through hours of video of the much celebrated keynote speech at ICCA 2012, which ignited this debate – indeed one can call it an award winning speech – and the ensuing debates at Queen Mary and the LSE, it dawned on me that there were two different and distinct strands in the debate on the call for ethical standards.

The concerns that underpin these two strands are different, and the import they have for the world of arbitration are also different – one is, in my view, comparatively benign, the other alarmingly malign.

In the debate these two strands are sometimes conflated, arguments for one used to justify the other or debunk the other. As I came to see that there were

Continued from page 6

indeed two different and distinct strands, I found that for my own understanding of the issues at stake I had to prise these two strands apart.

The first strand, on which I believe there is more common ground – and indeed is one which has been discussed and debated for much longer, long before the Chief Justice's clarion call at ICCA – is the call for harmonization of standards in the world of international arbitration, and in particular on the point of ethics, with regard to professional ethical standards for international arbitration.

International arbitration, by its nature, involves parties, counsel and arbitrators from different jurisdictions. Each of these actors in the process bring with them different legal traditions, different practices and different ethical standards. The concern was that these differences gave rise to an uneven playing field; that parties or counsel were not playing to the same rules or, perhaps, even the same game, and this impugned the fairness and integrity of the process.

The remedy called for was for the arbitration world to come together to find common ground and forge common standards – to level the playing field. The result of this collaborative effort was to be a common set of laws, rules or guidelines establishing one common game for all players, and a common rulebook by which the game should be played.

The second strand is more alarming and more controversial. The alarm arises not from its controversy but it's truth, if it is true. It is that there is a malaise, a rot, in the practice of international arbitration by both arbitrators and counsel. The Chief Justice spoke of it in these stark and chilling terms at the annual dinner of this institute:

> As a former arbitration practitioner myself, I have seen the dark side of the profession and it is disturbing. It is especially so when those engaged in it lose sight of the fact that beyond the fees and the expenses lie the parties who depend on the integrity of arbitrators, and who count on arbitrators who will see beyond their fees and be constantly mindful of their duty to secure justice.

To illustrate his point, the Chief Justice gave this example:

> Let me illustrate the need for this with an anecdote conveyed to me by a leading arbitration counsel. He was engaged in an ongoing arbitration with an opposite number who was just as illustrious a practitioner and they were before arbitrator X. A second unrelated dispute emerged with both counsel again pitched on opposite sides. Before they could get round to discussing potential appointees to hear the case, the same arbitrator X called the first practitioner, told him that the opposing counsel had already spoken to arbitrator X and informed him that he was willing to appoint arbitrator X provided the first practitioner agreed. Arbitrator X asked if the counsel would agree to appoint him. Everybody knew that the fee for the second engagement was potentially large; and at the time of this conversation, arbitrator X was considering his award in the first arbitration. Most of us would agree that there are any number of things wrong with this. But we need to go to the next step and make it wholly unacceptable, even unthinkable that such a thing should happen.

What is particularly chilling to me about the second strand, and what the Chief Justice has said, is that there is, already, no dearth of ethical codes or standards for arbitrators and for counsel in international arbitration. Aside from the national professional ethical rules and standards that would bind each of us as legal or other professionals, we have the IBA Rules of Ethics for International Arbitrators which were released in 1987. We also have the IBA Guidelines on Conflicts of Interest in International Arbitration which were issued in 2004. A review of these guidelines is currently underway. Arbitral institutions regularly require their arbitrators to comply with their own code of ethics. The SIAC requires every arbitrator accepting an appointment to sign up, afresh each time, to their Code of Ethics. The IBA released its Guidelines on Party Representation in International Arbitration this year. These are just some of the ethical rules, codes and standards that are extant.

The problem with the first strand was a lack of common standards and hence a lack of common understanding as to how the game should be played. The problem with the second strand is not that there is a lack of standards or rules, or perhaps even a lack of understanding, but that there are those who will not play by the rules whatever they are or for whom the desire for fees will always trump the rules. As you can see, the second problem is more alarming and probably more intractable than the first.

Following the principle that it is easier to address a difficult problem if it is broken down into parts, let me comment on the first strand to begin with.

Call for harmonization

As I see it, there is much more common ground on the

Continued from page 7

call for harmonization of standards. I see it as a good thing in a world that is much more globalized and inter-connected. International arbitration has become the default mechanism for resolving international cross-border commercial disputes. It would help all parties to agree a common rulebook by which the game can be played. After all, I think most will agree that the modern system of international arbitration is built on foundations which are the result of a great push for harmonization – the New York Convention, providing for the reciprocal recognition and enforcement of international arbitral awards and the UNCITRAL Model Law, which is accepted as the gold standard for arbitration legislation.

So, as I sat through the debates and other videos on this topic I was somewhat surprised to hear that there was a chord of dissonance in what I thought was the chorus for harmonization. This came from no less an eminent practitioner than Toby Landau. He called the rush for harmonization "legis-itis" and charged that most codes and guidelines of this sort resulted in no more than vague general statements that gave rise to more harm than good. The statements, he said, had to be vague because, to achieve broad consensus, they had to be general and uncontroversial. Therefore, they really stated nothing new. Yet they had the potential to create harm because the vague generality of the statements would be seized upon as justification for unwarranted challenges that the other side in an arbitration had breached some rule or guideline. In sum, "legis-itis" results in little thought leadership but only vague statements that, in reality, do not guide but hinder.

Toby described some of his points as philosophical. I have to say I found the arguments somewhat abstract and abstruse. This is not to dismiss it, though. I am in no position, as I said at the beginning, to offer any critique of the positions taken by these giants in the arbitration world.

It did appear to me though, putting the philosophical arguments to one side, there was broad consensus for harmonization. This came through quite distinctly at the debate at the LSE between the Chief Justice and Jan Paulsson. The debate ended, to borrow the words of the poet T.S. Elliot, not with a bang but a whimper. There was, disappointingly, no conflagration of views, no clash of the titans. The Chief Justice opened the debate. After listening to the Chief Justice, Paulsson began his opening salvo with the comment that the Chief Justice was a different person from the Attorney General who made the strident call for change at ICCA. He had, in the words of Paulsson, moved on from law enforcement, and in taking on the raiments of the judiciary had also assumed a more conciliatory, accommodating and avuncular tone. It was downhill from there, with Paulsson and the Chief Justice finding common ground on many of the issues in the debate. Much of the common ground, it seemed to me, was on the first strand, that harmonization was a worthy goal.

For my part, I have generally found the fruits of harmonization, such as the work of the IBA on the Guidelines on Conflicts of Interest and on the Taking of Evidence in International Arbitration to be of great practical assistance.

Before I move on to address the second strand, let me make a very brief survey of what has been produced so far in the push for harmonization with regard to arbitrator and counsel ethics in international arbitration. There is of course only time to comment briefly on some of the material that has been produced. I will look at the IBA Rules of Ethics for International Arbitrators and the IBA Guidelines on Party Representation in International Arbitration. I won't comment on the IBA Guidelines on Conflicts of Interest. This is well known and needs no introduction.

IBA Rules of Ethics for International Arbitrators

The IBA Rules of Ethics for International Arbitrators is probably less well known. This may be in part because these Rules were partially superseded by the Guidelines on Conflicts of Interest. These Rules, however, have not been abrogated on areas that are not covered by the Guidelines on Conflicts of Interest.

What do these Rules provide? Although called rules, these are in truth guidelines just as the Guidelines on Conflicts of Interest. The Rules are open to adoption by incorporation into the arbitration agreement if the parties wish.

The Rules begin with the introductory note that, *"[i]nternational arbitrators should be impartial, independent, competent, diligent and discreet".*

Rule 1 is stated as a Fundamental Rule that, "[a] bitrators should proceed diligently and efficiently to provide the parties with a just and effective resolution of their disputes, and shall be and shall remain free from bias".

Rule 2 states that an arbitrator shall only accept appointment if he is:

a. Fully satisfied that he is able to discharge his duties without bias.

Continued from page 8

b. Fully satisfied he is competent to determine the issues in dispute, and has adequate knowledge of the language of the arbitration.

c. Able to give to the arbitration the time and attention which the parties are reasonably entitled to expect.

Rule 2 also states, *"it is inappropriate to contact parties in order to solicit appointment as arbitrator".*

Rule 5 deals with communications with the parties and states, in the event that a prospective sole arbitrator or presiding arbitrator is approached by one party alone, or by one party-appointed arbitrator, he should ascertain that the other party or parties, or the other arbitrator, has consented to the manner in which he has been approached. In such circumstances, he should, in writing or orally, inform the other party or parties or the other arbitrator, of the substance of the initial conversation.

Rule 7 states, *"all arbitrators…shall do their best to conduct the arbitration in such manner that costs do not rise to an unreasonable proportion of the interests at stake".*

The Rules contain many salutary reminders of the ethical obligations of arbitrators. Pausing here for the moment, to return to the anecdote about Arbitrator X that the Chief Justice had recounted, it is clear from the Rules what ethical breaches might have occurred:

a. It was clearly inappropriate for Arbitrator X to have solicited the appointment in the second arbitration.

b. It was also inappropriate, assuming in that case that there was only to be a sole arbitrator, for the second practitioner to have discussed the potential appointment with Arbitrator X, before he had even discussed it with the first practitioner.

IBA Guidelines on Party Representation in International Arbitration

Let me move on to the IBA Guidelines on Party Representation in International Arbitration issued this year. Prior to working on the Guidelines, the IBA conducted a survey on whether differing norms and practices undermined the fairness and integrity of the arbitration process. The survey revealed a high degree of uncertainty regarding what rules govern party representation in international arbitration.

The Guidelines, as the label suggests, are not mandatory. They may be adopted by the parties in whole or in part. Note it is the parties, and not the party representatives, that may choose to make the Guidelines contractually binding in an arbitration. This must be the case, as the foundation of arbitration is the agreement between the parties. Therefore it is only the parties who can agree to adopt a certain set of rules or standards for the arbitration.

The Guidelines also state that arbitral tribunals may apply the Guidelines in their discretion, subject to any applicable mandatory rules, if they determine that they have the authority to rule on party representation in order to ensure the integrity and fairness of the arbitral process. The Guidelines are careful to state that they neither recognize nor exclude the existence of such an authority. The allusion to the authority is, however, intriguing. There are commentators who have said that tribunals do have this power. Further discussion of this issue must however be left over for another occasion.

Guidelines 1 – 3 deal with the application of the Guidelines and make it clear that an obligation on a party representative is an obligation or duty of the party, who may ultimately bear the consequences of the misconduct of the party representative.

Guidelines 4 – 6 deal with party representation. Guideline 5 provides that once the tribunal has been constituted, a person should not accept representation of a party when this creates a conflict of interest with an arbitrator. Perhaps, it might have been more accurate to say that a party should not put forward such a party representative – since the Guidelines really bite, in this case, against the party and it is difficult to see how the Guidelines bite on someone who is considering whether to, but has not yet taken up, the position of party representative.

The Guideline 6 provides that the tribunal may exclude the new party representative from the arbitration process if Guideline 5 has not been complied with. This is probably one of the more controversial aspects of the Guidelines. Even the Chief Justice, who has been the proponent of regulation, appeared to hesitate about this at the LSE debate. His concern was the party's right to have counsel of his choice.

If the Guidelines had been adopted as a matter of contract, the justification for this may arguably be found in contract. Even in the absence of this, there is a view that the tribunal is empowered to do so to protect the integrity of the arbitration process. Again, further discussion of this must be left over to another occasion.

Guidelines 7 – 8 deal with ex parte communications with the tribunal. They clarify that interviewing prospective nominees is permissible if it is on expertise, experience, ability, availability, willingness and existence of

Continued from page 9

potential conflicts of interest. They also clarify that a party representative may communicate with a party nominated arbitrator on the selection of the chair. The Guidelines, therefore, come down in favour of what has been commonly accepted practice.

Guidelines 12 – 17 deal with party obligations as to disclosure. They address the extent to which party representatives ==should advise their clients to take reasonable steps to search for and produce documents. They state that party representatives are not only required to advise on but also to take reasonable steps to assist with searching for and producing documents.

Guideline 13 provides that a party representative should not make any request to produce, or any objection to a request to produce, for an improper purpose such as to harass or cause unnecessary delay.

Guidelines 18 – 25 deal with interactions between party representatives and factual and expert witness. The Guidelines state that party representatives may assist witnesses in preparation of witness statements. Further, as long as it is consistent with the principle that the evidence given should reflect the witness' own account of relevant facts, events or circumstances, or the expert's own analysis or opinions, party representatives may meet or interact with witnesses and experts to discuss and prepare their testimony.

Guidelines 26 – 27 deal with sanctions on non-compliance. These include the tribunal's authority to admonish a party representative, draw adverse inferences on evidence relied on or legal arguments made, consider the party representatives' misconduct in apportioning costs of the arbitration and take any appropriate measures to preserve the fairness and integrity of the proceedings.

The Guidelines are a step forward in the harmonization of ethics for counsel in international arbitration, a matter on which, the IBA's survey revealed there was a *"high degree of uncertainty"*. Prior to the introduction of the Guidelines there was no international consensus on practices for the interviewing of arbitrators, preparation of witnesses for testimony, and the obligation to produce documents, to name a few examples. Practices in different jurisdictions varied dramatically, not just between the common law and civil law world, but also within the common law world.

Bearing in mind the objective here is harmonization of differing standards, and the leveling of the playing field, it is not surprising perhaps that the focus of the Guidelines in addressing sanctions for non-compliance is the impact on the arbitration and that the sanction lies ultimately on the party, and not against the party representative personally. There is also, of course, the question as to the jurisdiction of the tribunal over the party representative as opposed to the party.

SIArb's role in harmonization

What role can or should the institute play in this harmonization of ethical standards to create common ground amongst international differences? It is not my place today to prescribe, but clearly as a leading institute in one of the leading arbitral venues in the world, the institute and its members have a role in ensuring that the views of practitioners in Singapore are heard and contribute to the agreement on common standards for the benefit of the international arbitration community.

A malaise striking at the heart of arbitration?

I now return to comment on the second strand. It is fair to say this is more controversial than the first. In contrast to the relatively broad consensus on harmonization, there appears to be disagreement as to whether there really is a malaise, a rot, gnawing away at the heart of international arbitration. If there is, this should obviously be a concern for all of us. The question is how real this is?

To clarify, the concern here is not that there are some isolated cases of arbitrator misconduct but that this is more pervasive than the isolated case, that it is a growing problem, and unless something is done to check it, it will consume the practice of arbitration and tarnish the integrity of the process beyond repair.

Part of the debate concerns the issue of party appointed arbitrators. Those who see a problem point to party appointed arbitrators as a symptom of the disease. The thesis is the very fact of party appointment taints the arbitrators, the mere fact that their position is derived from the parties makes them partial and not independent, and further that a good number of party appointed arbitrators do in fact act partially. I have cast the argument here at its most extreme.

Many of us will have our own views on this. There are very good reasons why a party may want to retain the right to nominate an arbitrator, not least because parties may prefer to have someone they know something about decide their case, rather than someone who is a complete unknown. This is not to say there is an expectation that this arbitrator will find in their favour. There may be a hope but I would say in most cases, no expectation. For my part, I can say that I have no such expectation when, as counsel, I nominate an arbitrator on behalf of a party. Likewise,

Continued from page 10

I sense no expectation when I accept a nomination as an arbitrator, beyond competence, integrity and availability.

Bernard Hanotiau, speaking at the debate at Queen Mary in response to the Chief Justice, was quite categorical that in his experience of over 300 hundred arbitrations, over 95% of the arbitrators were impartial and independent. He did not see a problem with the process of party appointment. He accepted there may be a problem in the sphere of investment arbitration, with some arbitrators being pro-state or pro-investor, but said that one should not equate the problems in investment arbitration with commercial arbitration.

Conclusions on the perceived malaise

What should our reaction be to the second strand, the concern that there is a malaise or rot? I made the point earlier that what was most chilling about the Chief Justices' admonition, was that there is presently no dearth of ethical codes or standards for arbitrators and for counsel in international arbitration. If these are not enough, what would be?

How should this institute react? The Chief Justice's call at the annual dinner was for this institute to take the lead in crafting a code of ethics that will define the members of this institute. How should the institute do this, if we decided to do this, amongst the plethora of codes that already surround us? If there is a malaise, the current codes have not been the antidote.

Fortunately, it is not my role today to prescribe or to come up with the answers. I will venture this one suggestion though – that perhaps one way to proceed is for this institute to take a part in ascertaining the extent and the nature of the problem. How can we design a cure for the disease unless we are sure of its etiology? Because of the private and confidential nature of arbitration, each of us individually has only a limited perspective of the problem. This institute however, through its wide membership, has the advantage of a collective and perhaps a more complete view. This institute is also well placed to engage with the arbitration institutions, the SIAC, the ICC and others to get their perspective on the extent and nature of the problem and to engage with the users, through the SCCA for example, to see what users' think.

I end with this thought. The Chief Justice's admonitions are serious ones, particularly if there is a malaise that threatens the institution that we all work in. It is something that we all need to reflect on and to collectively respond to as an institute.

COSTS AND ETHICS IN ARBITRATION DEALING WITH THE CONCERN OF RISING COSTS ASSOCIATED WITH ARBITRATION

FRANCIS GOH, PARTNER HARRY ELIAS PARTNERSHIP LLP

(This is an adaptation of the speech presented at the Inaugural SIArb National Arbitration Conference 2013)

The issue of the astronomical rise of costs in Arbitration has been noted by eminent individuals, including our Chief Justice Sundaresh Menon, when he delivered his address at the SIArb 31st Anniversary Annual Dinner on 20 November 2012.

It was observed that given the skyrocketing costs, Arbitration is no longer an economic alternative dispute resolution process. There remains no coherent doctrine or approach for determining costs. We need to deal with the concern of rising costs associated with Arbitration, if Arbitration is to retain credibility and public confidence. How do we do this?

Currently, costs remain largely in the discretion of the Tribunal. One suggestion is that we should amend the rules of Arbitral Institutions to direct or guide Arbitrators in the areas of costs. The danger here is that we may 'over-prescribe' or 'over-legislate'. Where should we draw the line to fetter the flexibility given to the Arbitrator to decide on the issue of costs? In the ensuing debate, such change may take too long to come into effect.

Another aspect to look at relates to parties and their expectations. There appears to have been a subtle shift in parties' expectations over the years. As Arbitration has gained traction around the world, the focus seems to have shifted away from seeking a commercial resolution to the dispute through Arbitration, into

Continued from page 11

one where parties through their legal counsel are taking a more legalistic and procedural approach in proceedings. If parties want their 'pound of flesh' at all costs, then they should not complain at the high price! However, perhaps this merely reflects the reality that the Arbitration process has been high-jacked by fee driven counsel and does not really reflect the true desire of the parties in Arbitration.

We turn now to examine the role of the Arbitrator. What can the concerned Arbitrator do to remedy the issue of rising costs of Arbitration?

There already exists much material setting out proposals and techniques to make Arbitration more time-efficient and costs effective. I would recommend for example the ICC guide "Techniques for Controlling Time and Costs in Arbitration" [ICC Commission on Arbitration, 2007, ICC Publication 843]. What is needed now is for the Arbitrator to weave these into the Arbitration process. Whether the Arbitrator is equipped to do this and is willing to do this will be the result of training mixed with ethics which provides the moral compass.

It would not be setting the bar too high to say that it is reasonable to expect an Arbitrator to be ethically minded such that he is prepared to manage the Arbitration process to ensure that the search for justice is pursued in the most efficient and economical manner.

Two concepts can guide the Arbitrator to exercise the discretion on costs more effectively:

(a) Costs are a function of "Time to Resolution": Simply put, the longer an Arbitration takes, it will get more expensive.
(b) Costs are a function of "Activities Undertaken": Simply put, the more parties engage in activities such as interlocutory applications, discovery, meetings, or lengthy oral testimony / cross-examination, then, overall costs will go up.

Given the above, it is easy to see why an Arbitrator who is proactively engaged in the management of the Arbitration process can help to move the matter along in a more cost effective way.

Rather than just going through the motions during meetings with counsels, the Arbitrator should discuss with parties at the earliest opportunity the rules of engagement. Some of these could be:

(a) Having parties agree on the List of Issues: Of law, of fact and in relation to technical aspects;
(b) Having a Statement of Undisputed facts drawn up;
(c) Using an Agreed / Joint Expert or Neutral Evaluator;
(d) Delimiting scope of discovery / Specifying a core bundle;
(e) Delimiting the scope of cross-examination by using techniques such as qualified agreement on facts or a 'chess clock' approach;
(f) The Arbitrator can also take the opportunity to remind parties on his outlook on costs: for example, that the arbitrator will take into account the cost-incurring conduct of the parties and the reasonableness of such activity when making the award on costs.

In conclusion, while the rising cost of Arbitration is of concern, the resources to tackle such a scourge are already available. When concerned Arbitrators embrace and discharge their duty to proactively manage the Arbitration process, the search for justice through the Arbitration process can be achieved in a cost effective way.

Case Summaries

by Pua Lee Siang, Partner Bih Li & Lee)

York International Pte Ltd v Voltas Limited [2013] SGHC 124

The plaintiff succeeded in its application under section 31(1)(d) of the Arbitration Act for an injunction against the defendant to restrain it from receiving payment from the bank on a performance bond until and unless the plaintiff is adjudged to be liable in the arbitration proceedings between the plaintiff and the defendant.

Facts

By a Purchase Agreement ("Purchase Agreement"), the plaintiff agreed to supply, deliver, test and commission 5 chillers for a district cooling plant. Under the Purchase Agreement, the plaintiff must furnish an "unconditional" performance bank guarantee. After negotiations, the parties agreed on the terms of the guarantee ("Guarantee") which does not state that

Continued from page 12

it is unconditional. A dispute arose over whether the parties were in breach of the terms of the Purchase Agreement and the matter was referred to arbitration. When the defendant invoked the Guarantee, the plaintiff filed the present application for an injunction.

Decision

The Court granted the injunction on the following grounds:

a. The Guarantee is conditional. In deciding whether the Guarantee is conditional or unconditional, the Court found that the Guarantee is patently ambiguous and applied the exception enunciated in the Court of Appeal decision of *Master Marine AS v Labroy Offshore Ltd* [2012] 3 SLR 125. The exception is that when the words of the Guarantee are patently ambiguous, the court's only recourse is to refer to extrinsic evidence to determine the parties' intention. The relevant extrinsic evidence would be the underlying agreement that provides for the guarantee. In this case, the Court was of the view that the omission of the word "unconditional" from the Guarantee is a strong indicator that it is conditional. Further, the Court agreed with the Court of Appeal in the decision of JBE Properties Pte Ltd v Gammon Pte Ltd [2011] 2 SLR 47 that the court is entitled to interpret performance bonds as being conditioned upon facts rather than upon documents. Being conditional, the Guarantee is premised on there in fact having been a breach of the underlying contract leading to loss.

b. Under the terms of the Guarantee, the written claim must assert a breach of the underlying contract and the loss suffered. In the present case, the defendant failed to assert in its demand that it had suffered any loss. On this basis, the Court held that the demand is defective and constitutes an additional ground on which an injunction should be granted.

AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC [2013] UKSC 35

Facts

AES Ust-Kamenogorsk Hydropower Plant LLP ("AESUK") is the grantee and lessee of a 25 year concession granted by agreement dated 23 July 1997 entitling it to operate an energy producing hydroelectric plant ("Concession Agreement"). Ust-Kamenogorsk Hydropower Plant JSC ("JSC") is the current owner and grantor of the concession. The Concession Agreement is governed by Kazakh law, but contains a London arbitration clause governed by English law.

JSC commenced proceedings against AESUK in Kazakhstan alleging that AESUK had failed to supply certain information in breach of the terms of the Concession Agreement ("Kazakhstan action").

AESUK commenced proceedings against JSC in England claiming declarations that the arbitration clause was valid and enforceable and an anti-suit injunction restraining JSC from pursuit of the Kazakhstan action. Significantly, AESUK has not commenced, and has no intention or wish to commence, any arbitration proceedings. It contended that JSC was bound by the arbitration agreement not to pursue court proceedings and if JSC commences arbitration proceedings, it will defend them.

Issue

The issue is whether the English court has power to make the declaration and grant the injunction sought by AESUK.

Decision

The Court held that it has the power under section 37 of the Senior Courts Act (formerly the Supreme Court Act) 1981, *"The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so"*. Section 37 applies as JSC has invaded AESUK's right not be sued in Kazakhstan in breach of the arbitration agreement.

It is well established that the English court would give effect to the parties' arbitration agreement by injuncting foreign proceedings brought in breach of the agreement regardless whether arbitration proceedings are commenced or not.

The power was not affected by anything in the Arbitration Act 1996 as the provisions of the Arbitration Act 1996 applied only when arbitral proceedings were on foot or were in contemplation. In the present case, no arbitration proceedings have been commenced and AESUK does not intend or wish to institute any. The Court found no reason why AESUK should be required to commence arbitration against JSC (who rejects the existence and application of the arbitration agreement) in order to obtain relief in relation to the foreign proceedings which JSC had brought in breach of the arbitration agreement. Further in such an arbitration, the injunction that AESUK would seek to restrain JSC from pursuit of the foreign proceedings would not be effective without the backing of the court's power of enforcement of the tribunal's orders and the court's contempt jurisdiction. In the circumstances, the

Continued from page 13

court should be able to intervene directly, by an order enforceable by contempt under section 37.

In some cases where foreign proceedings are brought in breach of an arbitration clause or exclusive choice of court agreement, the appropriate course will be to leave it to the foreign court to recognize and enforce the parties' agreement on forum. But in the present case, the foreign court has refused to do so, and done this on a basis which the English court is not bound to recognize and on grounds unsustainable under English law, the express choice of law governing the arbitration agreement. In these circumstances, there was every reason for the English court to intervene to protect AESUK's prima facie right to enforce the arbitration agreement.

Wholecrop Marketing Limited v Wolds Produce Limited [2013] EWHC 2079 (Ch)

This case illustrates the importance of paying attention to the dispute resolution clauses of the parties' agreement.

Facts

Wholecrop Marketing Limited ("Wholecrop") sells seed potatoes to growers and then markets the resulting crop when harvested. Wolds Produce Limited ("Wolds") supplied seed potatoes to Wholecrop under a contract which was subject to the British Potato Trade Association Terms and Conditions ("BPTA Terms and Conditions"). Under the BPTA Terms and Conditions, any dispute arising out of the contract shall be settled by arbitration according to the Arbitration Rules of BPTA.

Clause 18 of the BPTA Terms and Conditions states:

> "Any dispute arising out of the Contract shall be settled by Arbitration according to the Arbitration Rules of the British Potato Trade Association in force as the date of receipt by the Secretary of the request for Arbitration referred to below, and all parties, whether members of such Association or not, shall by their respectively entering into the Contract be deemed to have full knowledge of such rules and to have elected to be bound thereby. **A request for Arbitration must be addressed to the Secretary WITHIN 12 MONTHS AFTER RECEIPT BY ONE PARTY OF NOTICE IN WRITING from the other party of the basis of the claim or dispute"**. (The emphasis is in the original). " (emphasis added)

A dispute arose between the parties as to whether the seed potatoes supplied by Wolds had been contaminated with a herbicide that kills the capacity for germination in the seed potatoes, thereby rendering them useless.

There was a series of correspondence between the parties' solicitors stating the parties' respective claims and/or positions. Wholecrop and Wolds disagreed as to the date upon which the dispute arose. Wholecrop said the dispute arose on 28 September 2010 (so that the 12 month period under Clause 18 expired on 28 September 2011). Wolds contended that it was 9 October 2010 (so that the 12 month period under Clause 18 expired on 9 October 2011).

In March 2012, after a mediation that failed, Wholecrop commenced court proceedings. No arbitration proceedings were commenced. Wolds objected on the basis that the deadline to commence arbitration proceedings under Clause 18 expired on 9 October 2011 and accordingly, all claims arising out of the contract are time barred.

Issue

The issue is whether under Clause 18, the parties intended that at the expiration of the 12 month period, both the right to commence arbitration and the right to commence court proceedings are time barred?

Decision

The court decided that based on a construction of Clause 18, the parties intended that both the right to commence arbitration and the right to commence court proceedings are time barred at the expiration of the 12 month period.

The court was of the view that the clause should not be read to bar only the right to arbitration and not litigation because it is difficult to understand why parties would have agreed to arbitrate all claims within 12 months and yet provide that a stale claim should be litigated within 6 years instead.

29 August 2013

Annual General Meeting 2013








Date	Event
28 Aug 2013	Annual General Meeting 2013

The Institute's 32nd Annual General Meeting was successfully held on 28 August 2013 at M Hotel. This was a landmark AGM as it saw constitutional amendments being passed after an engaging session amongst the members lasting several hours. Prior to the AGM, Mr Samuel Leong, Counsel, SIAC also gave an informative talk on the new SIAC governance structure. After the serious business of AGM was over, members proceeded to a networking session. All the best to Council 2013/2014 in their upcoming endeavours!

Inaugural SIArb National Arbitation Conference









Date	Event
30 july 2013	The International Inaugural National Conference

The International Inaugural National Conference was held on 30 July 2013 at M Hotel. The Guest of Honour was Senior Minister of State, Ms Indranee Rajah. The sessions on current developments in Arbitration Law, Arbitration from the end-user's perspective and the Courts role in supporting arbitration were well received by the participants.

Publisher

Singapore Institute Of Arbitrators
32 Maxwell Road #02-07, Maxwell Chambers, Singapore 069115
Tel: (65) 6372 3931 / 32 Fax: (65) 6327 1938

Printed by Ngai Heng Book Binder Pte Ltd.