SINGAPORE INSTITUTE OF ARBITRATORS
NEWSLETTER
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THE PRESIDENT'S COLUMN

I would like to start this issue by thanking the dedicated trainers, led by our Hon. Secretary Mr Naresh Mahtani, who completed yet another successful International Entry Course (**IEC**) in April 2014. Council members observed that we are seeing an increase in participation from outside Singapore, not just in the IEC but generally in the activities of the SIArb. For instance, 20% of the IEC candidates this year were from outside Singapore. For the Fellowship Assessment Course (**FAC**), we had 19% of the candidates who flew in for the course. We expect a healthy number of foreign candidates for this year's FAC too, which is scheduled for **17 and 18** October 2014.

This is part of a wider, encouraging trend. In the last couple of issues of the SIArb Newsletter, we have had the benefit of reading contributions from French and Australian contributors. In this issue, we have articles from Mr Attalah and Dr Respondek, representing the Middle East and Germany respectively. Well, Dr Respondek is not really foreign to Singapore or Asia, but he personifies the cross-border and cross-cultural dimensions of international arbitration. Our membership now stands at 702. 19% of our Members and 29% of our Fellows are from outside Singapore.

It is heartening to see the larger arbitration community becoming part of the SIArb family and seeing value in our services. This dovetails with the increasing prominence of Singapore as an arbitration hub.

I believe that it reflects a positive development of a larger dimension. That is, the growth of Asian arbitration. While harmonisation is a crucial ingredient in the success of international arbitration, the nuances of local arbitration laws and even the idiosyncrasies of culture are important considerations in the planning and conduct of an arbitration. Experienced practitioners and arbitrators are alive to this fact. In this regard, SIArb stands at an important crossroad. Its mix of a strong Asian component combined with the wealth of experience that its Western members bring enable SIArb to offer activities and training that are extremely relevant to this part of the world.

This is what we continue to strive towards - an Institute that serves the context that we are operating in with an eye to building an even better environment for arbitration in the future.

12 June 2014

ANNOUNCEMENTS UPDATES & UPCOMING EVENTS

1. Arbitration in Singapore – Some Recent Developments (2 July 2014, 5.30pm – 8.15pm)
2. SIArb Commercial Arbitration Symposium 2014, followed by Cocktails (31 July 2014, 12pm – 9.30pm)
3. Regional Arbitral Institutes Forum (RAIF) Conference 2014, followed by Gala Dinner (1 August 2014, 8.30am – 10pm)
4. Fellowship Assessment Course (FAC) (10, 17 – 18 & 20 October 2014, 8.30pm – 5.00pm)

NEW MEMBERS

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

Members

1. Tan Weiyi
2. Roderick Grant Noble
3. Prakash Pillai
4. Andreas D Blattmann
5. Bettina V Diggelmann

Fellows

1. Tan Poh Ling Wendy
2. Tan Puay Boon
3. Frederick Damian Baptist
4. Huang Bo
5. Md Harun Ar Rashid
6. Nandakumar Renganathan

PANEL ARBITRATORS

Primary Panel of Arbitrators

1. Chia Ho Choon
2. David Laurence Kreider

Secondary Panel of Arbitrators

1. S.Magintharan
2. Tan Chau Yee

CONTENTS

Continued from page 9

Another reason for the Singapore judiciary's adoption of the less stringent approach could also be the judiciary's recognition of the age old tradition in Asian cultures of resolving disputes amicably and its benefits to Singapore society, as highlighted by the Court of Appeal in *Toshin* at [40], the key part of which states as follows:

> *"We think that the "friendly negotiation" and "confer in good faith" clauses.....are consistent with our cultural value of promoting consensus whenever possible. Clearly it is in the wider public interest in Singapore as well to promote such an approach towards resolving differences".*

Drafting Multi-Tiered Jurisdiction Clauses

Given the different judicial attitudes to the enforcement of mediation agreements, how should parties draft a mediation agreement?

First, lawyers need to pay closer attention to all forms of dispute resolution clauses. These "*midnight clauses*" or "*4am clauses*" can no longer be drafted with impunity and on the basis that they can be ignored. It is common to find a party to a contract with a multi-tiered dispute resolution clause ignoring the early stages of the dispute resolution process calling for negotiations or mediation and proceeding immediately to arbitration or litigation, albeit in a fit of anger or with a genuine desire to get a final binding resolution of the dispute speedily.

Parties have to be carefully advised on the procedure, time and costs involved in all levels of dispute resolution before a suitable clause may be crafted.

Parties who are after quick, efficient and low costs methods of dispute resolution may well be advised to adopt many of the fast track arbitration schemes available in the market rather than adopt a multi-tiered dispute resolution procedure.

Having said the above, if parties are serious about negotiations and mediation as a part of their dispute resolution process then, in terms of legal criteria, they are well advised to draft their dispute resolution clauses in accordance with the VSC's guidelines in *WTE*.

The VSC's criteria are tough to satisfy, but once satisfied the mediation agreement is highly likely to be binding in England, Singapore and Australia.

Assuming that the parties want to mediate in Singapore, the simplest method of satisfying the VSC's criteria may be to choose institutional mediation where the various institutes have their standard set of mediation procedures.

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Minimizing Delays in International Arbitration Proceedings

By Dr. Andreas Respondek

Arbitration has long been heralded as the cheaper and faster alternative to lengthy, drawn-out court proceedings. The original goal of arbitration proceedings was to provide the parties an alternative venue for a speedy resolution of their commercial disputes. Several recent surveys seem to suggest however that somewhere along the line, arbitration may have gone off track. Delays in arbitration seem to have become an increasing feature of international arbitration proceedings.

The latest Queen Mary Report[1] has confirmed that the users of international arbitration proceedings have serious concerns about the increasing delays in international arbitration proceedings. Other recent studies[2] reached identical results and identified "*delay*" as the main drawback of international arbitration proceedings. The Chief Justice of Singapore, Chief Justice Sundaresh Menon, identified similar and related issues in his keynote address at the Chartered Institute of Arbitrators' International Arbitration Conference held on August 2013 in Penang[3], including increased costs caused by delay. This prompts the question: Are international arbitration proceedings still up to speed and are the rules of international arbitration institutions still fulfilling the stakeholders' expectations and adequately addressing the issue of "*delay*"? What should be the consequences from the Queen Mary report and other reports' findings?

Continued from page 12

The possible sources of delays in arbitration

Typically, delays in arbitration can be caused by all parties involved in the arbitration, i.e. the parties to the dispute, their counsel and also the arbitral institution. The following summary tries to deal with all three potential sources of delay and propose remedies.

How delays can be minimized by arbitral institutions

A typical source of delay occurs at the final stage of the arbitration proceedings with regard to the late drafting of arbitral awards. I have encountered several international arbitration matters where we had to wait for an award (even preliminary awards) for more than a year. This is not acceptable. What should be remembered in this respect is the old saying: "*Justice delayed is justice denied*". And apart from the fact that such delays are clearly at variance with the parties' justified expectations in arbitration proceedings, they raise also ethical questions about the arbitrator(s) attitude involved in the matter.

There are two measures arbitration institutions could implement to address this type of unacceptable behaviour. Firstly, arbitration institutions should grant extensions for the rendering of agreed award deadlines only; if there are compelling reasons present. An arbitrator's "*work overload*" should never qualify as a valid reason for an extension of any deadline. Experienced arbitrators should be in a position to manage their workload just like everybody else. Routine extensions of award deadlines should never take place.

Secondly, the probably more powerful measure would be to introduce serious financial disincentives for arbitrators for rendering an award late. Any delay in rendering an award should be combined with and lead to an automatic decrease of the arbitrator's fees payable to him by the institution. For instance, the first deadline extension could lead to an automatic decrease of the arbitrator's fees of 10 % and each subsequent extension could be similarly sanctioned. To implement this proposal, institutional fee schedules should be amended to reflect automatic fee reductions in case of award delays. It is submitted that this financial disincentive would be a powerful tool to assist the parties in obtaining their awards on time.

Another feature that might help to reign in delays is to make the overall average lengths of the proceedings by arbitral institutions more transparent. Undoubtedly there are international arbitration institutions that do a more efficient job in administering the cases submitted to them than others. Such differentiation with regard to the average length of the proceedings would help arbitration users to obtain a clearer picture as to what timeframe to expect and enable them to select arbitral institutions that have a shorter average length of proceedings than other institutions. How could this be accomplished? This could be arranged by having arbitral institutions publish the average length of the proceedings under their administration on their website, from the date notice of arbitration has been submitted until the date final award has been rendered.

As of today, there does not seem to be any arbitration institution which publishes such data. This is surprising, because the average length of proceedings can be considered a key performance indicator of the overall success of an arbitral institution. Publishing this important information could work as a marketing tool for institutions to differentiate themselves from other institutions competing in the same market segment. Parties and their counsel would obviously in all likelihood choose an institution that is more efficient in case administration as proven by its record of shorter overall proceedings.

Last not least there is another area that the existing rules of most international arbitration institutions do not seem to sufficiently address: arbitrator misconduct. While arbitrator misconduct is certainly the exception rather than the rule, nevertheless misconduct does occur. I was recently involved in an international arbitration proceedings administered by a European institution where two (renowned) international arbitrators simply disappeared and could not be contacted any more. The institution involved seemed rather generous by sending repeated reminder emails, letters and faxes to the respective "*defecting*" arbitrators for more than a year. Parties deserve better. There should be clear deadlines in the procedural rules that institutions must replace arbitrators if an arbitrator fails to react within a certain time period, e.g. one month. In addition, to make sure that wayward arbitrators cannot hide under the guise of confidentiality of the proceedings, institutional rules should make an exception from confidentiality of the proceedings with regard to arbitrator misconduct. Otherwise confidentiality could become an efficient means to protect arbitrators that have engaged in professional misconduct.

In addition, arbitral institutions might consider introducing performance evaluations of arbitrators by the parties' respective counsel to an arbitration after the award had been rendered. This might help to identify efficient arbitrators

1 Queen Mary, University of London and PWC: International Arbitration Survey 2013 - Corporate choices in International Arbitration **http://www.pwc.com/gx/en/arbitration-dispute-resolution/index.jhtml**

2 Debevoise & Plimpton LLP: Protocol to promote Efficiency in International Arbitration (2010): **http://www.debevoise.com/files/News/2cd13af2-2530-40de-808a-a903f5813bad/Presentation/NewsAttachment/79302949-69b6-49eb-9a75-a9ebf1675572/DebevoiseProtocolToPromoteEfficiencyinInternationalArbitration.pdf; Ben Giaretta, The evolution of international arbitration (March 2014), http://www.ashurst.com/publication-item.aspx?id_Content=10197; Ousting the arbitrator for delaying proceedings? http://www.prell-lawyers.com/index.php?page=newsletter&lang=en&id=35; Berwin, Leighton, Paisner: Research based report on perceived delay in the arbitration process, July 2012 https://www.blplaw.com/media/pdfs/Reports/BLP_International_Arbitration_Survey_Delay_in_the_Arbitration_Process_July_2012.pdf**

3 Arbitration Vol. 79 (November 2013), 393-406

Continued from page 13

who follow the original ideas why arbitration had been introduced in the first place.

How delays can be minimized by the tribunals and counsel

A party whose prospect of winning an ongoing arbitration are not the best might have an incentive to delay the proceedings and may employ procedural tactics and even criminal acts in order to avoid or delay the smooth operation of the arbitral proceedings and the rendering of a final award. When times get rough, tactics sometimes get dirty and the so-called "*guerrilla tactics*" may emerge. "*Guerrilla tactics*" is essentially unscrupulous behaviour or conduct of the parties' counsel intended to gain a competitive advantage by trying to obstruct, delay or derail an arbitration. They can range from mere delay tactics (e.g. interjecting excessive objections, bullying witnesses on cross-examination, concocting creative interpretations of legal rules and strategically jockeying for procedural advantages) to unjustified challenges of arbitrators or the withholding of evidence. Another means is that a party with greater financial resources may try to conduct more discovery or motion practice than needed to gain the upper hand over a party with lesser financial means by driving the costs of the proceedings above what one party can afford. The most common form of "*guerrilla tactics*" and the one that poses the most frequent problem for arbitrators are ethically borderline tactics.

In this respect, in his 2013 CIArb Penang address[4], Chief Justice Menon pointed out some parties' counsels' attitude, may not always identify with the ethical standards that traditional practitioners take for granted. What a majority of the practitioners might qualify as "*guerrilla tactics*" might be defended by others as a legitimate strategy, or even as part of an attorney's obligation to diligently represent the client's interests.

One tactic that is often used by counsel to justify their "*guerrilla tactics*" is to claim that if their respective applications are not followed, then they would be deprived a fair opportunity to present their case. Some tribunals seem to be too reluctant to reign in the behaviour of a party who abuses the rules, often relying on the need to ensure that they are not seen to curtail a party's presentation of its case.

There is no doubt that parties should be treated fairly, and given an equal opportunity to present their case. However, it appears that not a single law or arbitration rule provides that a party should be afforded "*every opportunity*" to present its case, with most rules and laws choosing instead to set the bar at a "*reasonable opportunity*". A "*reasonable opportunity*" certainly does not require the tribunal to accept any and all of a party's applications, what seems to be sometimes overlooked by tribunals.

It is important that arbitrators are cautious and recognize the fine line between a party's legitimate demand for due process and "*guerrilla tactics*". Therefore, the most effective weapon against "*arbitration guerrillas*" is an experienced tribunal. In addition, tribunals could implement measures to eliminate the basis for "*guerrilla tactics*" that always lead to procedural delays, such as tribunals putting more emphasis on initial case management conferences like those foreseen under Art. 24 of the ICC Rules. A case management conference could address and help to prevent such "*guerrilla tactics*" and the delays resulting from them by introducing for instance the "*IBA Guidelines on Party Representation in International Arbitration*" for part of the proceedings and stipulate sanctions for using "*guerrilla tactics*".

Also in this respect the most helpful tool to minimize the use of "*guerrilla tactics*" might be a financial one. The arbitral tribunal's most effective tool for regulating party's misconduct leading to procedural delays is the award of costs in the final award. Tribunals should make it clear from the outset that they will use the "*cost weapon*" against party misconduct which causes delays.

How delays can be minimized by the parties themselves

More often than not parties to an arbitration seem to have unrealistic expectations of what they can achieve through an arbitration and what the ultimate outcome of the proceedings might be. Their assessment of the legal merits of their case may be incomplete, overoptimistic or at least unrealistic. If parties do not have a realistic appraisal of the legal merits of their case, parties may tend to push their counsel for unnecessary applications or instruct them to submit spurious arguments.

It is a major task of the parties' counsel to prevent such unnecessary time consuming steps in an arbitration by providing their parties with a realistic assessment of the legal merits of their case and the likely outcome and results.

Summary

All three stakeholders in institutional arbitration proceedings (institution, counsel, parties) can make substantial contributions in order to prevent delays and to streamline and speed up arbitration proceedings. For the institution, the following rule changes should be pursued: An amendment to the institutional rules would further help to speed up proceedings and maintain arbitration's competitive edge over other forms of dispute resolution forum. These could include amending fee schedules (automatic decrease of an

4 See footnote 3 above

Continued from page 14

arbitrator's fees in case of delays), abstaining from granting routine extensions of deadlines for rendering arbitral awards, publishing the average length of proceedings on an institution's website and introducing arbitrator performance evaluations. With regard to the parties' counsel, increased emphasis on the use of case management conferences should be followed to lay down the foundation rules to avoid and eventually sanction delay, prevent the use of "*guerrilla tactics*" by creating mandatory adequate ground rules in the agreed procedural rules and give counsel a "*reasonable opportunity*" to represent their case, instead of "*every opportunity*". Last not least, the parties themselves can contribute to speedy proceedings provided they have received a realistic assessment of the legal merits of their case through realistic and straightforward feedback from their counsel and as a consequence thereof, abstain from supporting any procedural applications without real merit.

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International Arbitration in 2020: An Alarming Prediction

by Abdelhak ATTALAH*

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During the FIIAI (Fidération Internationale des Institutions de l'Arbitrage International) extraordinary conference held in Paris to commemorate its 2nd anniversary, under the theme "*Back to the Future*", a revolutionary recommendation, which relates to the qualification to act as arbitrator, was unanimously enacted by its working group which states verbatim that "arbitrators must pass routine periodic examinations known as Cognitive Reflection Test (CRT)[1] developed by Shane Frederick in 2005 –which is a three item measure shown to predict susceptibility to decision-making biases, in order to retain the minimum scores accreditation that qualify them to arbitrate".

To get a summary idea on what might happen in an arbitrator's mind during decision-making, the answers to the CRT three questions might be helpful:

Question 1: A bat and a ball cost $1.10 in total. The bat costs $1.00 more than the ball. How much does the ball cost?

Question 2: If it takes 5 machines 5 minutes to make 5 widgets, how long would it take 100 machines to make 100 widgets?

Question 3: In a lake, there is a patch of lily pads. Every day, the patch doubles in size. If it takes 48 days for the patch to cover the entire lake, how long would it take for the patch to cover half of the lake?

Each of the three questions has an intuitive answer which immediately jumps to mind, but incorrect, which are respectively:

Answer 1: 10 cents,
Answer 2: 100 minutes
Answer 3: 24 days

Indeed, if the ball costs 10 cents, and the bat costs $1.00 more, then the total for the two is $1.20, not $1.10 as the problem stipulates. If we reflect upon the three questions for even a moment we would recognize that the correct answer for the first question is that the ball costs five cents, the bat costs $1.00 more i.e. $1.05, and together, they cost $1.10. And by assuming that each machine makes the same widgets at the same rate, therefore, each machine produces one widget in 5 minutes. Consequently, only 5 minutes are needed for 100 machines to make the 100 widgets. Finally, the patch will cover half of the lake the day before it should cover the entire lake which is the 47th day.

This new form of accreditation system by which arbitrators are gauged for their skills by the arbitral institutions should be an essential complement to the prevalent recruitment based on the CV only. Arbitral institutions should go further by developing a scheme of periodic review and evaluation of its arbitrators using a CRT to measure the impact of cognitive ability on judgment and decision making, commented the secretary general of the FIIAI, by arguing that the CRT has been used to assess the decision making processes of professional groups such as judges and financial planners.[2]

Although the above news is pure imagination, it might be a plausible response to the call of the Honourable the Chief Justice Sundaresh Menon[3] during the ICCA 2012 congress held in Singapore, who claimed that "there needs to be a structured programme of continuing professional

1 Shane Frederick, 'Cognitive Reflection and Decision Making' (2005) 19(4) Journal of Economic Perspectives 25-42.

2 Eva I. Hoppe and David J. Kusterer, 'Behavioral biases and cognitive reflection' (2009) 2, fn1 <http://ssrn.com/abstract=1488752 or http://dx.doi.org/10.2139/ssrn.1488752> accessed 11 January 2014.

3 ICCA Congress 2012 Opening Plenary Session International Arbitration: The Coming of a New Age for Asia (and Elsewhere)