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The Qualities of Investment Arbitrators v. Commercial Arbitrators
Second YSIAC Club Keynote Address
by Loretta Mallintoppi, Of Counsel, Eversheds LLP

1. Is there a crisis of the system of arbitrators’ appointments? While there is general agreement that the selection of the “right” arbitral panel is central to the good conduct of the arbitration, opinions differ as to how an “ideal” tribunal should be selected. Parties, and their counsel, may choose an arbitrator because of her or his positions on certain legal matters, if these are known, because of expertise in a particular field of the law or legal background and culture. What is certain is that an arbitrator should not be selected because he/she is likely to endorse the position of the appointing party and effectively become that party’s advocate within the tribunal. The only result of such a biased approach would be that that arbitrator would lose credibility with her colleagues and ultimately harm the case of the party that appointed her.

2. Some of the central questions to be raised concern the role of a party-appointed arbitrator in general terms and whether that role fundamentally differs in the case of a chairperson or of a sole arbitrator. In this regard, it is interesting to take the example of the role played by judges ad hoc in proceedings before the International Court of Justice, because what has been said by some of the distinguished international lawyers that occupied such a position may also be used by analogy in the situation of a party-appointed arbitrator in international arbitration. In particular, Sir Eli Lauterpacht, sitting as a Judge ad hoc appointed by Bosnia-Herzegovina in the Genocide case in 1993 had the following to say on his role:

“Consistently with the duty of impartiality by which the Judge ad hoc is bound, there is still something specific that distinguishes his role. He has the special obligation to endeavour to ensure that, in so far as is reasonable, every relevant argument in favour of the party that has appointed him has been fully appreciated in the course of collegial consideration and, ultimately, is reflected – though not necessarily accepted – in any separate or dissenting opinion that he may write.” (Genocide, Preliminary Objections, ICJ Reports 1993, p. 409, para. 6)

3. Applying these words to international arbitration, the “special obligation” of a party-appointed arbitrator is to make sure that he or she fully appreciates the case made by the party who appointed him/her and that the other tribunal members are aware of this case and take it into account in reaching their decision.

4. The position is different for the President of the tribunal, who should pay due attention to the views expressed by his colleagues and take the lead in reaching – to the extent possible – a unanimous result or at least do her best to reach common decisions on the main issues. The choice of President should be done in consideration of both personal and professional qualities as the interaction and human relationship with the other members of the tribunal is an aspect that should be not be disregarded.

5. It is a given that all arbitrators should be impartial and independent from the parties and institutions that appointed them, and be seen to be impartial and independent. However, depending on the
legal background and general culture of the individuals involved, the perceptions of arbitrators’ conflicts and bias may vary. Moreover, all things being equal, ethical considerations as to arbitrators’ role and parties’ expectations do not necessarily coincide in all legal and cultural environments.

6. An important question – and the focus of this presentation – is whether investment arbitrators should be selected with different considerations in mind than their commercial counterparts and whether they should be treated differently when it comes to matters of independence and impartiality. In other words, should investment arbitrators be subject to higher – or different - standards when it comes to their general qualities and to issues of independence and impartiality?

7. International investment arbitration and international commercial arbitration are fundamentally different processes when it comes to the nature of the interests involved, the applicable law and the legal issues that arbitrators are called to consider. Given that the system of investment arbitration is almost fully transparent, unlike commercial arbitration, the legal questions are often the same and the names of arbitrators who render that awards are published more often than not, inferences can be drawn as to the positions that certain arbitrators take with regard to certain legal issues. Moreover, issues can arise in relation to “repeat appointments” or bias – either presumed or real - in favour of States or investors. This is still true even though the pool of arbitrators has been expanding over the last few years and efforts are being made, particularly by institutions, to appoint a more diverse selection of individuals. However, the fact remains that arbitrators are largely drawn from the same group of people and it is still difficult for younger lawyers and those who are not among the “happy few” to break the glass ceiling.

8. Most investment disputes are governed by the same sets of arbitral rules as commercial arbitrations, such as UNCITRAL, ICC, SIAC or SCC, to name a few. The only exceptions are represented by the specialized systems offered by the NAFTA, the ICSID Rules and the Rules adopted by the PCA which are a revised version of the UNCITRAL Rules. SIAC, with the recently adopted rules, has taken the lead in drafting specialized "Investment Arbitration Rules". This, to my knowledge, is the first time that an arbitral institution may adopt specialised rules on investment arbitration. The new SCC Rules which will be finalized later this year have an annex devoted to investment arbitration.

9. No special qualities are usually required for arbitrators in the main systems of rules, i.e. ICC, LCIA, UNCITRAL, SCC. Similarly, the new SIAC
Rules do not require any specific qualifications, but they refer to the possibility that parties may agree on the qualifications required of an arbitrator (Art. 13.2).

10. By contrast, the ICSID Convention lists the qualities of arbitrators included in the Panel of Arbitrators, who must “be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment.” Competence in the field of law is particularly emphasized in the case of persons designated to serve on the ICSID Panel of Arbitrators (Article 14(1)). By and large, even when the parties choose their own arbitrators, they will select individuals who have the general qualities required by the Convention. However, a number of lawyers with greater commercial law experience and expertise than public international law knowledge continue to be selected by parties and arbitral institutions to sit in investment tribunals.

11. Interestingly, a number of recent Asian international investment treaties go even further than the ICSID Convention in this regard as they contain provisions requiring arbitrators to be experienced in public international law, international trade or international investment rules, or in the resolution of disputes arising under international trade or international investment agreements.

12. Investment agreements also sometimes include lists of arbitrators preselected and agreed by the parties. For instance, Australia and China have agreed in the investment chapter of their FTA signed last year to form a standing body of 20 arbitrators who will be available to determine claims under the agreement.

13. Other investment treaties have opted for codes of conduct imposing strict obligations on arbitrators, which significantly raise the bar of what is currently required by arbitration rules and by the IBA Guidelines on Conflicts of Interest. A notable example is the EU-Singapore FTA which provides that arbitrators should not only be impartial and independent, but also “avoid creating an appearance of bias or impropriety”. This raises interesting issues. While the notion of “bias” is clear, it seems difficult to pin down the concept of “impropriety”, particularly in the absence of any specification of whether objective or subjective standards should apply to define this term. Should the notion of impropriety be interpreted in absolute terms, or should it be regarded as subjective, i.e. in the sense of “impropriety in the eyes of the parties”?

14. The Singapore-EU Code of Conduct casts the net very wide for potential arbitrators, since they are under the obligation to avoid a whole array of objectionable situations and to avoid the appearance or the impression of being involved in such situations. In addition, arbitrators have a continuing duty to disclose any such situations at any stage of the proceedings as soon as they become aware of them, and are expected to make all reasonable efforts to become aware of any such interests or relationships. So, the independence/impartiality bar is raised higher and higher for those who wish to sit as arbitrators in investor-State disputes.

15. The EU Commission has gone as far as including the notion
of a permanent investment court, known as the Investment Court System, in a treaty between the EU and the US, the Transatlantic Trade and Investment Partnership (TTIP), ostensibly also as a response to the backlash against ISDS, and the arbitrators selected under that system.

16. According to the draft text of the TTIP, these judges “shall possess the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognised competence”, “have demonstrated expertise in public international law” and should ideally have expertise in international investment and trade law and the resolution of disputes under international investment or trade agreements (Article 9(4)). At the same time, the judges’ independence should be “beyond doubt”, and not be affiliated with any government (Article 11(1)). These are very stringent criteria that risk limiting the pool of potential candidates to a small number. In addition, the judges would be appointed only by the States parties to the treaty, thus effectively depriving investors of the possibility of intervening in the choice of individuals who will decide their cases.

17. Nationality is also a factor which may be considered in choosing an arbitrator. For instance, under Article 13(5) of the ICC Rules, a sole arbitrator or a chairman must be of a nationality other than that of the parties. In the ICSID system, when arbitrators are appointed by the Chairman of the World Bank pursuant to Article 38 of the Convention, they cannot be nationals of the State of the investor nor of the host State. In addition, when the Chairman of the World Bank appoints arbitrators, the Convention also requires that “due regard” be paid to “the importance of assuring representation on the Panels of the principal legal systems of the world” (Article 14(2)).

18. When it comes to the relevant standards to measure any threat to an arbitrator’s impartiality and independence and the mechanisms dealing with possible arbitrators’ challenges, the main rules of arbitration do not substantially differ. The standard used most often – notably in the UNCITRAL, LCIA, SIAC and SCC Rules- is that of “justifiable doubts as to the arbitrator’s impartiality or independence”. The ICSID system sets a higher standard for challenges since Article 58 of the Convention speaks of a “manifest lack of the qualities of paragraph (1) of Article 14”. As you will recall, these include competence and the exercise of independent judgment.

19. Prospective arbitrators under the 2012 ICC Rules must disclose in a statement of availability, impartiality and independence, in addition to “any facts or circumstances that could give rise to reasonable doubts as to the arbitrator’s impartiality” also facts or circumstances that could “call into question the arbitrator’s independence in the eyes of the parties”, thus setting a “subjective” test for independence (Article 11(2)). The LCIA system has a similar statement (Article 5.4 of the LCIA Rules 2014) and so does ICSID where nominees must sign declarations attesting that they shall act “fairly between the parties” and “not accept any instruction or compensation with regard to the proceeding from any source” except as provided in the Convention and Rules.

20. There have also been efforts to harmonize standards for disclosure in case of conflicts of interests of arbitrators by professional institutions, such as the IBA with its Guidelines on Conflicts of Interest. However, the IBA Guidelines often fall short of the mark in actual cases and do not appear to be universally endorsed by arbitral tribunals, also due to the fact
that they are no more than general recommendations or informal guidelines. In my view it is preferable for arbitral institutions to adopt rules or “practice directions” on conflicts of interest of arbitrators. This has for instance been done by the LCIA in the form of appendices to the arbitration rules which form part and parcel of such rules.

21. Challenges are usually decided by appointing authorities of the relevant arbitral institutions (ICC, SIAC, LCIA), with the notable exception of the methodology under Article 58 of the ICSID Convention, whereby the decision is made in the first instance by the remaining non-challenged arbitrators. This practice has invidious effects since it puts the unchallenged arbitrators in the difficult position of deciding the fate of a colleague and may also be perceived by the outside world as protecting the interests of an elitist group of specialists. Many have called for a change in this practice but a discussion on this is largely academic since amendments to the ICSID Convention are unlikely to be considered any time soon, if at all.

22. So, in my view there exist certain unique aspects of investment arbitration which may have important implications for the arbitrators appointed to act in this type of disputes. In particular:

Investment arbitration requires specialized legal knowledge with the result that the pool of specialists who can act in these cases will be smaller.

There may be particular considerations when it comes to nationalities, in the case of appointment made to the list of the Chairman of the World Bank.

The awards are often published and the stakes may be higher than in commercial arbitration, not only in monetary terms but also due to the matters of public interest involved. Accordingly, the visibility of investment arbitrators is greater and a greater impact to their professional reputation may result from their decisions.

There may be additional grounds for challenges in investor-State disputes that are not present in commercial arbitration, as is shown by the so-called “issue conflicts” which may be present:

i) when the same individuals act at the same time as counsel and arbitrator in different cases that share the same legal issues, or

ii) when arbitrators have provided academic opinions in publications which arguably show pre-conceived positions regarding some of the legal issues at stake in the arbitration, or

iii) repeat appointments of arbitrators by particular States or lawyers.

23. This last permutation of the “issue conflict” challenges – repeat appointments– concerns situations where the same individual is appointed by the same party, or by the same counsel representing different parties, in several cases. This can be more easily verified in investment arbitrations than in commercial arbitrations as the awards (showing the compositions of tribunals) find their way into the public domain more easily than awards in commercial arbitrations. Arguably, the potential threat to the arbitrator’s independence and impartiality in these cases is two-pronged: on the one hand, the fact that the same arbitrator is appointed on several occasions by the same party or counsel may lead to procedural inequalities because the arbitrator may be privy to information that the other members of the tribunal do not have. In addition, this kind of situation may also indicate a close connection between the
same individuals – or between the arbitrator and a particular party - and suggest the existence of potential bias as the arbitrator may be more inclined to rule in favour of the party to whom he/she “owes” the appointment. Thus, in deciding whether or not a potential challenge on those grounds should be upheld or not, the number of such appointments is significant. However, it is hard to decide when the relationship becomes so close that it is objectionable because a link of economic dependency can be found between the arbitrator and the party or its counsel.

24. It is apparent that, although the standards by which impartiality and independence of arbitrators are measured may be similar (with the exception of the ICSID “manifest lack of the qualities” test), arbitrators appointed in investor-State disputes are in a different position than their commercial counterparts and can potentially face different types of challenges. Consequently, arbitrators sitting in investor-State disputes should be particularly vigilant in matters of disclosure and in avoiding the types of conflicts I have identified. They also ought to be careful to do so not only at the time of appointment but throughout the conduct of the arbitration.

25. One of the immediate consequences of the unique aspects of issues of independence and impartiality in investment arbitration is that the risk of challenges based on “issue conflicts” has progressively led a number of specialists in the field of investment arbitration, particularly those who are members of large international law firms, to choose either to sit as arbitrators, giving up their counsel practice altogether, or to act exclusively as counsel.

26. Is there a solution to improve the system? In my view, a permanent investment court, as advocated by the EU, is not necessarily the answer. Investor-State arbitration, while not a perfect system, still has much to be commended for in resolving international investments disputes. But individuals who sit as arbitrators (and this is increasingly becoming a profession in its own right), not only must be independent and impartial, and remain so throughout the conduct of the proceedings, but they also have to be very cautious and vigilant in avoiding any appearance of impropriety in that regard.

27. Arbitral institutions and parties who make appointments also have their share of responsibility in selecting individuals with the right qualities, both professional and ethical, to sit as arbitrators in investment disputes, who have the necessary knowledge and expertise, and the time and attention to devote to the case in which they are appointed.

28. Arbitral institutions should take the lead in adopting “best practices”, guidelines or even codes of conduct for arbitrators and for international counsel. This could be done in the form of appendices to the arbitration rules and could be used as guidance for the ethical standards for arbitrators and counsel. Ideally, the arbitral institutions should collaborate in adopting similar or the same rules and directions. This might turn out to be a more satisfactory solution than over-regulation and the development of more non-binding codes, guidelines or new principles, which risk making things more confusing, contradictory and complicated than they need be.
Is investment arbitration really different from commercial arbitration? Is there a “glass ceiling” in investment arbitration? Is there a crisis of legitimacy for Asia-based investment arbitration? These questions and more were tackled at the second YSIAC Club event of 2016, held on 16 June.

Lim Seok Hui (CEO of SIAC and SIMC) delivered the welcome address, and Koh Swee Yen (Partner, WongPartnership LLP, Co-Chair of YSIAC Committee) presented opening remarks.

Loretta Malintoppi’s (Of Counsel, Eversheds) keynote address shed light on whether investment and commercial arbitrators should be subject to different standards. In the former case, there are greater concerns over “repeat appointments” and arbitrators previously opining on the very same legal issues in dispute. A related issue is the difficulty for younger lawyers and those outside the “happy few” to break the glass ceiling. To solve this, arbitral institutions could adopt rules on conflicts of interest of arbitrators in the form of appendices to the arbitration rules.¹ This presents a more satisfactory solution than potentially confusing non-binding codes. Another solution found in some recent Asian investment treaties is to expressly require arbitrators to be experienced in particular fields.²

Guy Spooner (Partner, Norton Rose Fulbright) responded that further detailing qualifications for arbitrators would regrettably lead to more challenges to appointments while reducing the pool of eligible arbitrators. In any case, there was no crisis in investment arbitration — the fact that certain States were dissatisfied with awards against them was a sign of a healthy investment arbitration system, not because it makes investors rich but because it has encouraged those investors in the first place.

The panel discussion was moderated by Darius Chan (Senior Associate, Norton Rose Fulbright).

¹ See, for example, the Annex to the LCIA Rules 2014.
² See, for example, Article 9(4) of the draft text of the Transatlantic Trade and Investment Partnership, which mandates that tribunal members “possess the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognised competence”, “have demonstrated expertise in public international law”.

By
Calvin Liang
Tan Kok Quan Partnership
Kevin Nash (Deputy Registrar & Centre Director, SIAC) spoke about key provisions in the draft SIAC Investment Arbitration Rules, including the opt-in emergency arbitrator provisions. Some questioned whether any State would agree to these. Separately, the Court of Arbitration of SIAC will, by default, appoint the sole or presiding arbitrator from a list Parties can object to. If the appointment cannot be made according to this list-procedure, the Court may appoint from the names previously deleted by the Parties.

Olga Boltenko (Senior Associate, Clifford Chance) suggested a mandatory period for Parties to agree before moving to the list-procedure, thus allowing Parties greater input. She also highlighted how Article 9.19.4(d) of the Trans-Pacific Partnership’s Investment Chapter, which allows parties to agree to any arbitral institution or arbitration rules, presents an opening for SIAC and the SIAC Investment Arbitration Rules.

Monica Chong (Senior Associate, WongPartnership LLP) discussed recent measures by States to recalibrate their terms of engagement, including a minimum period to exhaust local remedies and express carve-outs for certain trade areas. This shows burgeoning awareness that investment treaties are not merely “photo opportunities”.

The lively Q&A touched on litigation funding. Ms Malintoppi opined that arbitrators must disclose any professional ties with the litigation funders behind parties, given possible relationships of economic dependency. Mr Chan noted that the draft SIAC Investment Arbitration Rules were attuned to these concerns.

The event, generously hosted by Norton Rose Fulbright and supported by Women in International Law Singapore, was packed to the rafters. Some participants stood for the duration of the seminar. That so many young arbitration practitioners were prepared to suffer for their craft must surely be a sign of a healthy arbitration system (albeit the post-seminar wine and mirth helped salve the pain).

“An enlightening discourse on some of the issues and pitfalls in investor-state arbitration, it was heartening to see the confidence that these seasoned practitioners had in the system and its growth in Singapore. I look forward to the developments in the law here and to many more conversations in the future.”

- Kelvin Kek, Senior Associate, Allen & Gledhill LLP

“The discussion about the legitimacy issues in investment arbitration and the proposed solutions thereto was most interesting; it was refreshing to hear that the existence of such concerns are in fact reflective of a healthy and working system. I thought that this discussion was well complemented by the presentations on the trends in Asia which also highlighted how these issues are perceived in the region as well as on the draft SIAC investment arbitration rules and how they seek to address some of these issues.”

- Emily Choo, Practice Fellow, Centre for International Law

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3 Rule 26.4 of the draft SIAC Investment Arbitration Rules.
4 Rule 8.1 of the draft SIAC Investment Arbitration Rules.
5 Article 8(1) of the Permanent Court of Arbitration Rules 2012.
6 See for example, Articles 14.3 and 14.4 of the Model Text for the Indian Bilateral Investment Treaty.
7 See Article 29.5 of the TPP relating to ‘Tobacco Control Measures’.
8 Communication between Pakistan’s Board of Investment and Ministry of Law concerning re-negotiation of German-Pakistan BIT, November 23, 2009.
9 Articles 23(I) and 34 of the draft SIAC Investment Arbitration Rules.
To What Extent Can Arbitral Rules From Arbitral Institutions Such As SIAC Provide A Credible Alternative To Investor State Arbitration Under ICSID Or UNCITRAL Rules?

By Rajat Rana

Overall Winner of the YSIAC Essay Competition

Arbitral rules from arbitral institutions, such as the Stockholm Chamber of Commerce (SCC), the London Court of International Arbitration (LCIA), the International Chamber of Commerce (ICC), are already used by investors as an alternative to investor state arbitration under ICSID or UNCITRAL rules. Investors have brought dozens of investment disputes under these arbitral rules in the past two decades—51 under the SCC rules; 4 under the ICC rules; and 1 under the LCIA rules. Moreover, 18% of bilateral investment treaties refer to ICC arbitration, whereas the SCC rules are available under 60 bilateral investment treaties and the multilateral ECT.

But whether arbitral rules from arbitral institutions such as the SCC, the LCIA, the ICC, or the draft investment arbitration rules of the Singapore International Arbitration Center (SIAC) (collectively, “Non-ICSID”) provide a credible alternative to investor state arbitration under ICSID or UNCITRAL rules depends on at least two important factors: (1) the ability of investors to enforce final arbitral awards under these rules in domestic courts; and (2) the distinct procedural and substantive advantages (e.g. fairness and efficiency) available to parties for resolving disputes under Non-ICSID or UNCITRAL rules. The importance of these two factors to the credibility of these rules for resolving investor state disputes is evident, for example, from the results of the 2015 survey by the School of International Arbitration at Queen Mary, University of London. Under the survey, while the enforceability of awards and avoidance of national courts were the two most valuable characteristics of arbitration, the procedural and substantive disadvantages such as cost, lack of ineffective sanctions during the arbitral process, lack of insight into arbitrators’ efficiency, and speed were considered the worst characteristics of international arbitration.

4 2015 International Arbitration Survey: Improvements and Innovation in International Arbitration, at p.6
5 Id. at p. 7
In this essay, I contend that SIAC’s Draft Investment Arbitration Rules (SIAC Draft IA Rules) come closest to providing a credible alternative to investor state arbitration under ICSID or UNCITRAL rules by: (1) removing unnecessary hurdles to enforceability of final arbitral awards in domestic courts through broad and binding waivers of (a) immunity to jurisdiction, and (b) the parties’ right to appeal, review, or recourse to domestic courts; and (2) providing distinct procedural and substantive advantages to the parties for resolving investment treaty disputes in comparison to ICSID or UNCITRAL rules.

I. Enforceability of Arbitral Awards Under Non-ICSID Rules Is Key to Their Credibility as an Alternative to Investor-State Arbitration Under ICSID Rules

A party’s ability to enforce final arbitral awards under Non-ICSID rules is essential to their credibility as an alternative to investor-state arbitration under ICSID or UNCITRAL rules.

Generally, the ICSID rules provide a clear advantage over other arbitration mechanisms because the ICSID Convention “excludes any attack on the award in national courts.” Under Articles 53 and 54 of the ICSID convention, as well as its drafting history, each Contracting State is obligated to recognize and enforce a final arbitral award as if it were a final judgment of a court in its territory, without any review on the basis of its national laws. And non-compliance with a final arbitral award can result in a referral of the dispute to the International Court of Justice.

Moreover, the ICSID is part of the World Bank and there is a perception that failure to respect an ICSID award may result in indirect political consequences to the country’s credibility and reliability. For example, in 2011, the U.S. announced that as a result of Argentina’s failure to pay outstanding arbitral awards, the U.S. would vote against loans to Argentina from the World Bank and other multilateral lending institutions.

In contrast, the investment treaty arbitral awards under Non-ICSID rules may be subject to “potentially protracted and costly review procedures” because their recognition and enforcement is subject to conditions under Article V of the New York Convention. And the

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6 Subject to domestic court’s upholding the validity of such waiver under their national laws.
9 Id.
10 Id.
11 Supra, note 7 at 1103. But see also Freya Baetens, Enforcement of Arbitral Awards: To ICSID or Not to ICSID is NOT The Question, Juris Arbitration Series, Juris New York, pp. 211-228 (5)(2012) (arguing that there appears to be a little evidence of any (statistically relevant) difference between actual enforcement and compliance rates of ICSID as opposed to ‘non-ICSID’ awards).
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domestic laws of a number of states, including China, India and the Gulf Cooperation Council states, allow additional grounds for challenging foreign arbitral awards. Indeed, the Convention’s provision for non-enforcement on public policy grounds results in the “necessary gateway for protective, national law.”

As a result, enforcement of arbitral awards under the Convention has encountered obstacles in some states, including India and China. For example, a Chinese court declined enforcement of an arbitral award under the Convention because enforcement would be contrary to China’s economic interests, and until the Indian Supreme Court’s 2012 decision in *Bharat Aluminum Co. v. Kaiser Aluminum Technical Services Inc.*, Indian courts followed an interventionist approach towards enforcing foreign arbitral awards in India.

Moreover, a number of countries signatory to the Convention limit the enforcement of arbitral awards to commercial disputes and, although the Convention’s “commercial” requirement has produced few difficulties in the U.S. courts, this is not always the case in other countries. For example, the Supreme People’s Court of China excluded disputes between a foreign investor and a host government under the Convention’s “commercial” requirement. This is troubling as *ad hoc* arbitrations remain the most prevalent dispute resolution option under BITs concluded by China. And Indian courts have not yet dealt with the enforcement of investment treaty awards under the “commercial” requirement of the Convention.

Nonetheless, in comparison to arbitral rules of the SCC, the ICC, the LCIA, and the UNCITRAL rules, the SIAC Draft IA Rules represent a significant innovation to deal with potential challenges facing enforcement of arbitral awards. As summarized below in Chart 1, SIAC’s rules provide for broad and binding waivers to immunity from jurisdiction and the right to appeal or review final arbitral awards in domestic courts. Specifically, (1) “a waiver of any right of immunity from jurisdiction to which such party might otherwise be entitled,” and (2) “irrevocable waiver of rights to any form of appeal, review or recourse to any state court or other judicial authority. . . .” In contrast, there is no waiver of immunity to jurisdiction under the SCC, the ICC, the LCIA, and the UNCITRAL rules. Additionally, the SCC rules do not provide for a waiver of the right to appeal or review of final arbitral awards in domestic courts, and the UNCITRAL rules only provide for an optional waiver of right to appeal or review of final arbitral awards in domestic courts.

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12 Supra note 8, at 693
14 India and China submitted the highest number of arbitration disputes to SIAC in 2015—Indian parties submitted 91 disputes followed by 46 disputes submitted by China. See SIAC Annual Report 2015, at p. 13
15 Supra note 13 at p. 2729
16 (2012) 9 SCC 552
19 Chad Catterwell et al., Enforcement of Investment Treaty Arbitration Award, pp. 181- 199 (2015)
21 Rule 1.4, SIAC Draft IA Rules
22 Rule 29.9, id. (emphasis added)
SIAC’s rules provide for broad and binding waivers to immunity from jurisdiction and the right to appeal or review final arbitral awards in domestic courts.

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<tr>
<th>ISSUE</th>
<th>SIAC</th>
<th>SCC</th>
<th>ICC</th>
<th>LCIA</th>
<th>UNCITRAL</th>
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<tr>
<td>Waiver of Immunity to Jurisdiction</td>
<td>Agreement by a party to arbitration under these Rules constitutes a waiver of any right of immunity from jurisdiction to which such party might otherwise be entitled.</td>
<td>None</td>
<td>None</td>
<td>None</td>
<td>None</td>
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<tr>
<td>Waiver of Right of Appeal/Review in Domestic Court</td>
<td>. . . the parties . . . irrevocably waive their rights to any form of appeal, review or recourse to any state court or other judicial authority insofar as such waiver may be validly made and the parties further agree that an award shall be final and binding on the parties from the date it is made.</td>
<td>None</td>
<td>. . . the parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made.</td>
<td>. . . the parties shall be taken to have waived any right of appeal or review in respect of any determination and decision of the LCIA Court to any state court or other legal authority.</td>
<td>Optional waiver statement</td>
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(Chart 1)

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23 Id.
24 Rule 34(6), ICC Rules
25 Article 34(6), LCIA Rules
26 Annex to UNCITRAL Rules
Thus, subject to domestic courts’ interpretation of waiver provisions under the final SIAC Investment Arbitration Rules, SIAC’s rules may come closest to providing the most credible alternative to investor-state arbitration under ICSID or UNCITRAL rules.


Today, investor-state arbitration faces many challenges such as inefficiency, transparency, and the lack of rules on practices such as third party funding and emergency arbitration. Non-ICSID rules’ credibility as an alternative to investor-state arbitrations under ICSID or UNCITRAL rules, thus, also depend on their ability to tackle these challenges by offering distinct procedural and substantive advantages to parties for resolving arbitration disputes.27 As shown in Chart 2 below, in comparison to the ICSID, SCC, ICC, LCIA, and UNCITRAL rules, the SIAC’s Draft IA Rules resolve many of these concerns by focusing, among others, on efficient resolution of investment disputes, third party funding, and fairness of arbitration proceedings. For example:

1. Efficiency of Arbitration Proceedings
   a) Early Dismissal: Today, ICSID is the only arbitral institution that offers an early dismissal process to filter out frivolous and unmeritorious claims based on the “manifestly without legal merit” standard.28 Based on ICSID jurisprudence, the SIAC Draft IA Rules go a step further by allowing a party to move for early dismissal of a claim within 30 days after the constitution of the tribunal if the claim is manifestly: (a) without legal merit; (b) outside the jurisdiction of the tribunal; or (c) inadmissible.29 The high threshold set by the “manifestly” standard for dismissal is likely to deter parties from bringing frivolous objections. There is no provision for early dismissal under the SCC, ICC, LCIA, and UNCITRAL rules.
   b) Emergency Arbitration: Emergency arbitration is not available under the ICSID or UNCITRAL rules, and Article 29(5) of the ICC rules exclude emergency arbitration from investment disputes. The SIAC Draft IA Rules, however, provide for the availability of an emergency arbitrator procedure in investment treaty arbitration if the parties “expressly agree” to their application,

28 Id.
29 Rule 25.1, Draft SIAC Investment Arbitration Rules
To What Extent Can Arbitral Rules From Arbitral Institutions Such As SIAC Provide A Credible Alternative To Investor State Arbitration Under ICSID Or UNCITRAL Rules?

thus, leaving it up to the host states’ discretion to confer such protection on investors.  

c) Time Limits to Close Proceedings: Unlike Rule 38(1) of the ICSID rules which allow the tribunal to determine when to close arbitral proceedings, the Draft SIAC IA Rules require the tribunal to close the proceedings within 30 days after the last hearing on the matters to be decided in the award, or the filing of the last post-hearing submissions, whichever is later. There are no time limits to close proceedings under the SCC, ICC, LCIA, and UNCITRAL rules.

3. Availability of Sanctions During Arbitration:

According to the 2015 survey, the lack of effective sanctions during the arbitral process was considered as one of the worst characteristics of international arbitration. The Draft SIAC IA Rules expressly address this issue by empowering the tribunal to sanction any party for failure or refusal to comply with tribunal’s orders or directions or any partial award or to attend any meeting or hearing. Moreover, the tribunal has the discretion to award all or part of the legal or other costs where appropriate.

| Rule 24.6, id. | Rule 29.1, id. | Rule 23(l), id. | Supra note 4. | Rule 23(m), id. |
Thus, Non-ICSID rules such as SIAC’s Draft IA Rules can provide a credible alternative to investor-state arbitration under ICSID or UNCITRAL rules by attempting to remove unnecessary hurdles to enforceability of final arbitral awards in domestic courts, and providing distinct procedural and substantive advantages to the parties for resolving investment treaty disputes in comparison to ICSID/ UNCITRAL rules.

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(Chart 2)

Thus, Non-ICSID rules such SIAC’s Draft IA Rules can provide a credible alternative to investor-state arbitration under ICSID or UNCITRAL rules by attempting to remove unnecessary hurdles to enforceability of final arbitral awards in domestic courts, and providing distinct procedural and substantive advantages to the parties for resolving investment treaty disputes in comparison to ICSID/ UNCITRAL rules.

35 Appendix II, SCC Rules
36 Article 9B, LCIA Rules
37 Rule 13, SCC Rules
38 Article 5.6, LCC Rules
39 Rule 12.1, Draft SIAC Investment Arbitration Rules
40 Article 18 and Annex to the LCIA Rules
41 Rule 34, SCC Rules
42 Article 4, UNCITRAL5 Id. at p. 7
SIAC Investment Arbitration: Rule Innovations Are Only The First Step

By
Arie Chase Eernisse
1st Runner Up of the YSIAC Essay Competition

Rule innovations alone – no matter how enlightened or essential – will not win customers away from the dominant forms of investment arbitration used today, namely ICSID and UNCITRAL rules-based arbitration. The groundbreaking new SIAC Investment Arbitration Rules (“IA Rules”) offer a substantially more efficient and progressive system of investment arbitration premised on a more muscular administrative apparatus. However, until investors and states gain confidence that the new system works in practice or until they have some political reason to “buy in” to the new system, they will be hesitant to abandon the time-tested default options. As such, the most important way in which SIAC can succeed in its quest to gain a foothold in the investment arbitration market is to shape the investment treaty landscape to its advantage and target a niche clientele of likely users.

Assessing the competition

Through 2015, claimants had filed a total of 451 ICSID-administered investment arbitration cases, with all but a handful administered in accordance with the ICSID Arbitration Rules or ICSID Additional Facility Rules, both of which were last revised in 2006. ICSID’s main procedural flaws include, among other things, the secretariat’s relative lack of authority in prompting action from sluggish parties and arbitrators, the indefinite “ceasefire” period of inactivity that accompanies arbitrator challenges, and various issues related to annulment proceedings, which now seem to follow initial proceedings almost as a matter of course. On the other hand, ICSID arbitration has the treaty-based advantage of eventually leading to an award that is final and binding within the territories of Contracting States to the ICSID Convention and thus not subject to set-aside procedures at the national level.

1 See Jonathan Lim and Dharshini Prasad, Draft SIAC Investment Arbitration Rules 2016—an overview, Lexis®PSL, 18 February 2016 (providing a comprehensive overview of the IA Rules’ main improvements to international investment arbitration procedure).
4 ICSID Convention, Arts. 53-54.
Through 2015, the total number of publicly known investment arbitrations filed in accordance with the UNCITRAL Arbitration Rules was 212, with the most common administering institution being the Permanent Court of Arbitration at the Hague. While the long-awaited revision of the UNCITRAL Arbitration Rules in 2010 incorporated some important innovations on issues such as multi-party arbitration and interim measures, it is safe to assume that the UNCITRAL Arbitration Rules will never empower institutional actors as much as the IA Rules will, as it would be against the ad hoc spirit of the original UNCITRAL Arbitration Rules, designed as they were to give parties and arbitrators maximum autonomy, with minimal interference from an administering institution. Also, unlike ICSID awards, UNCITRAL awards often must overcome the additional hurdle of national-level enforcement proceedings, where the awards are typically subject to set aside on New York Convention grounds, including public policy – but, on the other hand, they are not subject to an ICSID-like annulment process.

**Learning from the SCC’s experience**

SIAC can learn the most about how to compete against the behemoths that are ICSID and UNCITRAL by studying the trajectory of the Arbitration Institute of the Stockholm Chamber of Commerce (“SCC”). Based on the number of cases filed, the SCC has emerged as the only serious alternative to ICSID for pursuing an investment arbitration claim at an institution in accordance with that institution’s own rules. Through 2015, the SCC had administered 85 investor-state arbitration cases, with 72% (62) administered under the SCC Arbitration Rules. Notably, 2015 was a record year in terms of new investor-state cases, with 12.

The SCC has historically thrived in this area thanks in large part to Sweden’s status as a neutral state in close geographic proximity to Eastern and Western Europe, as well as the former Soviet Union. As of 2012, 61 bilateral investment treaties (“BITs”) called for arbitration under the SCC Arbitration Rules. Among these BITs, there are several between countries of Western Europe and Eastern Europe or parts of the former Soviet Union that provide for arbitration at the SCC, including, for example, the Belgium-Luxembourg Economic Zone.

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2. For instance, provisions such as Article 25 of the UNCITRAL Arbitration Rules, which states that “the arbitral tribunal may extend the time limits [for written statements] if it concludes that an extension is justified,” are unlikely to be diluted to allow an arbitral institution to set strict deadlines.
3. See New York Convention, Art. V.
5. Based on data on the UNCTAD website, the other institutions that have administered cases in accordance with their own rules include: ICC (4), LCIA (1), the Cairo Regional Center for International Commercial Arbitration (1) and the Moscow Chamber of Commerce and Industry (3). See http://investmentpolicyhub.unctad.org/ISDS/FilterByRulesAndInstitution.
Union-Poland BIT,14 U.K.-Czech BIT,15 Spain-Russian Federation BIT,16 and U.K.-Russian Federation BIT.17

The East-West theme also undergirds the SCC’s prominence as one of only two institutions permitted to administer disputes related to the Energy Charter Treaty (“ECT”), a multilateral treaty on cooperation in the areas of energy transit, trade, investments, and efficiency, as well as environmental protection.18 As one scholar has explained, “[t]he treaty was born out of the need to find a mutually accepted foundation for energy cooperation between Western European countries and countries of the former Soviet Union and Eastern Europe.”19

Through 2015, of the 87 claims filed under the ECT and in the public domain, 13 have been administered by the SCC under the SCC Rules.20 In comparison, 55 have been administered by ICSID.21

In addition to these historical and political considerations, the SCC has also developed its niche market for investment arbitration cases thanks to its advantage in terms of administrative costs. The high costs of registration and administration at ICSID make the pursuit of smaller claims there uneconomical. In particular, potential claimants from developing countries may lack the resources to initiate and sustain such expensive proceedings. ICSID-administered cases generally involve claim amounts that are relatively high, which justifies the institution charging claimants a $25,000 lodging fee that is not adjustable depending on the amount in dispute.22 ICSID also charges a $32,000 annual fee for its administrative services.23

In contrast, the SCC only charges €2,000-2,500 (US$2,280-2,850) for its registration fee,24 and it determines administrative costs based on the amount in dispute.25 So, for example, a claim for €120,000 would incur an estimated administrative fee of only €4,520 (US$5,150). The relatively low cost of investment arbitration proceedings at the SCC has attracted many cases for which the claim amount was quite low.26 But that is not to say that institutions such as the SCC are not capable of also administering high-value claims. In fact, SCC is currently administering the highest known investment arbitration claim to be filed in 2014, Cem Uzan v. Republic of Turkey, with an amount in dispute of US$2.5 billion.27

Creating targeted user bases for the SIAC IA Rules

Compared to the SCC, SIAC could enjoy an equally strong, if not stronger, reputation as a center for investment arbitration so long as it actively seeks to shape the evolving investment treaty regime and creates a niche
SIAC Investment Arbitration:
Rule Innovations Are Only The First Step

Of the roughly 2,850 investment treaties in existence (as of April 2014), 1,194 involve an Asian country (i.e., about 42%), and of the roughly 200 investment chapters under FTAs, 61 involve an Asian country (i.e., about one-third). This includes 24 intra-Asian FTAs with investment chapters. Among these international investment agreements, a few present historic opportunities for SIAC to expand its influence.

First, there is the Trans-Pacific Partnership (“TPP”), which involves 12 Pacific Rim countries, including five Asian countries and Australia and New Zealand. The TPP has already been concluded and, as such, does not list the SIAC IA Rules as an option for the filing of claims in its investment chapter. The TPP provides, however, that if the claimant and respondent agree, “[t]he claimant may submit a claim . . . [under] any other arbitral institution or any other arbitration rules.”

Under other investment treaties, language of the “any other institution” variety has been relied on by investors to proceed with arbitration at non-enumerated arbitral institutions, such as the SCC. Thus, SIAC can push for use of the IA Rules on this basis for disputes arising under the TPP. It might also seek to get the list of available institutions amended eventually, though that could be more difficult.

International commercial arbitration is becoming more and more popular for Asians, and many are bringing their claims to SIAC. Last year, SIAC experienced a “milestone” year, with “the highest ever number of cases filed, highest ever number of administered cases and highest ever total sum in dispute in the history of SIAC, which commenced operations in 1991.” At the same time, international investment arbitration is also on the rise in Asia. For example, prior to 2012, only one ICSID claim had been filed against Korea, a contract-based claim from 1984. In the last four years, however, the floodgates have opened up as two ICSID claims and one UNCITRAL claim have been lodged against the state, while two ICSID claims and one Moscow Chamber of Commerce and Industry claim have been filed by Korean investors against other states.

SIAC could enjoy an equally strong, if not stronger, reputation as a center for investment arbitration so long as it actively seeks to shape the evolving investment treaty regime and creates a niche clientele for itself.

29 ICSID ARB/84/2 (“Colt Industries”).
30 The cases brought against Korea are Lone Star Funds v. Korea (ICSID Case No. ARB 12/37), Hanocal v. Korea (ICSID Case No. ARB/15/17) and Dayyani v. Korea (the UNCITRAL claim). The cases brought by Korean investors are Samsung v. Oman (ICSID Case No. ARB/15/30), Ansung Housing v. China (ICSID Case No. ARB/14/25) and Beck v. Kyrgyzstan (the Moscow Chamber of Commerce and Industry claim).
32 Id.
33 TPP, Art. 9.19(4)(d).
Second, the ASEAN Comprehensive Investment Treaty represents another key opportunity for SIAC to expand its clientele for investment arbitration claims. It provides for investor-state dispute resolution through, among others, ICSID, UNCITRAL, the Regional Centre for Arbitration at Kuala Lumpur or “any other regional centre for arbitration in ASEAN” or “if the disputing parties agree . . . any other arbitration institution.”

Thus, similar to the TPP, it would allow for investors to bring cases to non-enumerated institutions, such as the SIAC, provided that the state consents. And there is a possibility that the list of options could be amended as well.

Third, the Regional Comprehensive Economic Partnership, which has not yet been concluded, could be the first treaty to include the option to arbitrate according to the SIAC IA Rules. Or that honor could also go to a myriad of other investment treaties that are being negotiated or will be negotiated by states in the near future.

In addition to taking advantage of these historic opportunities, SIAC would benefit by promoting the IA Rules as an option for inclusion in model investment treaties, especially those of Asian states, and also to seek out “jackpot” opportunities to be the institution of choice for resolution of disputes related to sectoral treaties, such as the ECT.

As a practical matter, the SIAC should primarily be focused on marketing itself as the institution of choice for disputes involving one or more Asian party – as it is perfectly positioned, both geographically and politically, to serve as a central and virtually neutral investment arbitration hub catering to both intra-Asian disputes and disputes between Asians and parties from other parts of the globe.

SIAC should also be pitching its IA Rules to developing countries disillusioned by ICSID arbitration and those that are not ICSID Contracting States by emphasizing that the IA Rules will provide them with a more fair and efficient system of dispute resolution than ICSID arbitration in the event that they are sued by an investor.

Finally, in marketing itself to both states and investors, SIAC will surely gain adherents by stressing the reasonableness of its administrative costs in comparison to those of ICSID.

Conclusion

As discussed above, in order to gain a foothold in the international investment arbitration market, SIAC will need to learn from the SCC’s impressive example and promote its IA Rules as an option in the investment arbitration sections of numerous, targeted international investment agreements. If successful, SIAC will be able to develop a niche clientele of users – most likely, investors from Asia and developing countries, and also investors with claims against non-ICSID states. In due course, the IA Rules could very well become a credible alternative to the ICSID and UNCITRAL rules.
Conflict Of Interest Often Restrict The Ability Of Lawyers In Law Firms To Take On Arbitrator Appointments. Is This A Problem For Diversity In Arbitration And, If So, What Solutions Can Be Proffered To Improve The Situation?

By
Sinyee Ong
2nd Runner Up of the YSIAC Essay Competition

The question proceeds on the basis of two assumptions. First, that conflicts of interest prevent lawyers practising within law firms from accepting arbitral appointments. Second, that such conflicts restrict diversity in arbitration. This essay challenges both those assumptions, identifies the real lack of diversity within arbitral appointments, and offers solutions to promote diversity and the use of arbitration generally. If taken, these solutions would disrupt the dominance of lawyers on arbitral panels and return arbitration to the dispute resolution procedure preferred by commercial users.

Addressing the Conflict Perception

An arbitrator’s appointment can be challenged on grounds of an actual or perceived conflict of interest. Actual conflicts of interest are clear and can be easily identified before the lawyer makes the declaration of independence or takes the appointment. This is because he/she will be able to identify circumstances of actual conflict without reference to the law firm in which he/she is employed. For instance, where the lawyer is acting as counsel for one of the parties in the arbitration. As a consequence, challenges to the appointment on grounds of actual conflict are “very rare, partly ... because the existence of actual bias is very rare”.2

A perceived conflict of interest, or the appearance of bias in the absence of actual bias, is much more difficult to identify. A challenge will only succeed if “circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger ... that the tribunal was biased”.3 In those circumstances, the potential arbitrator should not adjudicate the dispute because “justice should not only be done, but should manifestly and undoubtedly be seen to be done”.4

In order to identify whether a lawyer will be perceived to be biased, he/she must turn to

1 Paragraph 1.1 (Non-Waivable Red List), Part II, IBA Guidelines on Conflicts of Interest in International Arbitration (the “IBA Guidelines”)
2 Locabail (UK) Ltd v Bayfield Properties Ltd [2000] HRLR 290, at [3]
3 Porter v Magill [2002] 2 AC 357, at 102 (per Lord Hope)
4 R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 2) [1999] 2 WLR 272, at page 284A (per Lord Browne-Wilkinson)
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the wider organisation of which he/she is a part: the law firm. That is because the fair-minded observer (i.e., the client or counterparty), is taken not to be able to distinguish between the lawyer and the law firm. The two are fudged: the lawyer is presumed to act on behalf of each and every client of the law firm, and have an interest in each and every matter.

In reality, this simply is not the case. Law firms frequently act for one client in one matter and against that client in another (whether in contentious or non-contentious matters). Within the law firms, lawyers (or rather, partners) act as independent contractors each with an independent client base. Each lawyer is responsible for his/her own clients and his/her budget. Further, in large international law firms that are organised across practice areas, industry sectors, geographies or profit centres, lawyers in one part of the law firm rarely have contact with lawyers in, or clients of, another part of that law firm. In essence, legal representation by one part of the law firm can never really impact on the minds of lawyers (to create actual bias) in another part of the law firm.

The fact that a perceived conflict does not arise even in circumstances where a lawyer takes an appointment in an arbitration involving one of the firm’s clients is reflected in: (i) statistics that record the dismal success rate of challenges to arbitral appointments; and (ii) recent jurisprudence that casts doubt on the IBA Guidelines (which set out various situations where conflicts of interest may be perceived to have arisen).

According to the ICC Bulletin Statistical Reports, the success rate for an arbitrator challenge is low (5%). This reveals that challenges are merely tactical moves by overly zealous lawyers trying to make an inevitably futile point early in the arbitration process; challenges are not impediments to diversity in arbitral appointments.

In the recent case of W Limited v M Sdn Bhd, the claimant challenged the arbitral award on the ground of apparent bias. The arbitrator was a partner of a law firm which had provided transactional advice to a sister company of the defendant. The claimant asserted that such

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In essence, legal representation by one part of the law firm can never really impact on the minds of lawyers (to create actual bias) in another part of the law firm.

6 [2016] EWHC 422 (Comm)
circumstances fell under the ‘Non-Waivable Red List’ of the IBA Guidelines because the sister company is an ‘affiliate’ of the defendant and the law firm ‘derives significant financial income therefrom’.\(^7\)

The court, however, took a different view. Knowles J relied heavily on the actual knowledge of the arbitrator. He recognized that neither the arbitrator nor the law firm did any work for the defendant or its parent company. He further noted that the arbitrator operated as a sole practitioner using the firm only for secretarial and administrative assistance. The arbitrator carried out conflict checks but these did not alert him to the fact that the sister company was being advised by the law firm. There was no conflict because the conflict situation was not in his mind in that he was simply not aware of any commercial relationship with the defendant’s group of companies. Absent this knowledge, “a fair minded and informed observer” could not conclude that there was a “real possibility that the tribunal was biased, or lacked independence or impartiality”.\(^8\)

Knowles J further held that whether a conflict of interest situation has arisen depends on the facts of a given case.\(^9\) The Courts will look to the IBA Guidelines only as guidance. The real scrutiny is on the factual circumstances (and whether a conflict has actually arisen in the mind of the arbitrator).

This of course is the correct approach. The appearance of bias (or perceived conflict) to the reasonably minded observer should arise only where the arbitrator will gain a substantial pecuniary advantage depending on the outcome of the arbitration. In reality, such a situation rarely arises even in the largest of law firms that (rightly or wrongly) are the nurseries for the arbitrators of tomorrow.

Take Kirkland & Ellis LLP ("Kirkland"),\(^{10}\) one of the top ten law firms globally in terms of gross revenue. Kirkland has an annual gross revenue of US$ 2.15 bn. If Kirkland advises a client on a corporate transaction for US$ 200,000 (a substantial legal fee which does not arise too often), this makes up 0.009% of Kirkland’s annual gross revenue. The profit-per-equity-partner at Kirkland is US$ 3.51 mil. Applying 0.009% to the profit-per-equity-partner, each partner “receives” only US$ 327 from that corporate transaction. If one of these partners (not involved in that corporate transaction) takes an arbitral appointment in proceedings to which the client is a party, it certainly cannot be said that the US$ 327 (or the business relationship with the client) would actually operate in his/her mind such that he/she could in any way be perceived to be biased towards the client.

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\(^7\) Paragraph 1.4 (Non-Waivable Red List), Part II, IBA Guidelines

\(^8\) Footnote 7, at [22]

\(^9\) Footnote 7, at [37]

\(^{10}\) http://abovethelaw.com/2015/04/the-2015-am-law-100-revenues-rising-profits-popping-and-a-new-1-firm/2/?rf=1
This point is confirmed in *Sierra Fishing Company and others v Farran and others*\(^1\) that addressed the issue through the lens of a small law firm. In *Sierra*, the claimants challenged the arbitrator for apparent bias. The arbitrator was previously a legal advisor to the first defendant’s bank. He and his father are partners of the same law firm. The father had been instructed to act for the first defendant in his personal capacity on several occasions. In addition, the law firm was (perhaps) the main law firm used by the first defendant. Popplewell J decided that based on the factual circumstances, “a fair minded observer would be predisposed to favour Dr Farran [the first defendant] in the dispute in order to foster and maintain the business relationship with himself, his firm and his father, to the financial benefit of all three”\(^2\) (emphasis added).

The perception in *Sierra* may very well be true for small law firms with a limited pool of clients. The pressure to foster/maintain business relationships (and therefore retain legal fees) of the few clients may weigh on the lawyer’s mind to create actual bias. However, it is a false perception in large law firms and the solution lies in correcting that perception.

### Resolving the Conflict Assumption

Large law firms spend millions of their clients’ dollars at the bar each year. It is to the bar that they must look to for guidance to resolve and correct the conflict perception.

In *KFTCIC (Kuwait Foreign Trading Contract & Investment Co) v Icori Estero SpA*,\(^3\) an arbitration award was made by a three-member tribunal. The losing party appealed against the award on the basis that the president of the tribunal was conflicted because he came from the same set of chambers as one of the counsels to the arbitration. This was, however, rejected by the Paris Court of Appeal. It was held that “the function of a barrister is essentially carried out independently and that belonging to a set of chambers of barristers ... is characterized, in essence, by the sharing of premises and support staff, without ... common interests or a certain economic or intellectual dependence between various members of a set of chambers”.

Later, in *Laker Airways Inc v FLS Aerospace Ltd*,\(^4\) one of the parties requested that the arbitrator resign from his appointment on the basis that counsel for the other party came from the same set of chambers as the arbitrator. The court rejected this proposition. Rix J held that barristers are independent (even where they are from the same set of chambers). This is because “barristers are all self-employed ... precisely in order to maintain the position where they can appear against or in front of one another”\(^5\).

Barristers are perceived to be independent because they are self-employed and the sharing of chambers is simply for administration and support.

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1. [2015] EWHC 140 (Comm)
2. ibid, at [57]
4. [1999] CLC 1124
5. Ibid, at 1133
Conflict Of Interest Often Restrict The Ability Of Lawyers In Law Firms To Take On Arbitrator Appointments. Is This A Problem For Diversity In Arbitration And, If So, What Solutions Can Be Proffered To Improve The Situation?

purposes. In practice, the same is true of lawyers practising in law firms. Each lawyer (or partner) has his/her own budget. So do barristers. Each partner shares the overhead of the firm in the same way that barristers share costs of chambers. In large law firms, lawyers may be even more independent than barristers as partners across geographies and profit centres may not share overhead. The law firm, like the barrister chamber, is marketed as a single organisation: partners, like barristers, market their services together. The only distinction is that law firms may have a diverse international network of offices. However, that is changing as more barrister chambers set up offices internationally (especially in Asia) to chase the Asian promise of unlimited dispute work.16

It follows that resolving the conflict assumption requires law firms to debunk the conflict perception with the same vigour as the bar. Internally, this requires lawyers of the law firm to support the arbitral appointments of other lawyers by incorporating effective waiver clauses in mandatory letters of engagement. Lawyers should explain to clients why waiver clauses are required: (i) because there is no actual or perceived conflict; and (ii) because the professional development of lawyers as arbitrators is to the greater benefit of the firm, the profession and the clients. Arbitrators are required to consider all sides of a dispute and to carve a fair and equitable way forward to an acceptable resolution. Developing lawyers with such skills would contribute to effective dispute resolution for the clients.

The arbitration institutions can also help. The Singapore International Arbitration Centre has published a Code of Ethics for an Arbitrator (the “Code”).17 Article 3 sets out the criteria for determining bias in an arbitrator. This Code can be supplemented by identifying the limited and proscriptive instances of actual conflicts of interest. Borrowing a codified approach from the civil law system to define the boundaries of conflicts crosses the common/civil law divide in the same way that arbitration, as an international dispute resolution procedure, seeks to do.

16 See, for instance, 39 Essex Chambers
If a set of simple and concise guidelines (clearly delineating between actual and perceived conflicts) can be adopted and endorsed by the major law firms of the world, then it will be easy for lawyers to identify and decline arbitral appointments where a true conflict of interest arises. In all other situations, lawyers can accept arbitral appointments and, by the same measure, be slow to challenge an arbitral appointment for a perceived, yet baseless, strategic advantage, particularly if a lawyer comes from a law firm that is a signatory to those guidelines.

The Real Diversity Issue

The real diversity issue is that there are not too few lawyers populating the arbitral tribunals of today, but too many. Over 30 years ago, Sir John Donaldson MR observed that arbitration is “no more and no less than litigation in the private sector”. Over 30 years on and nothing has changed save that arbitration is now so dominated by lawyers that the only difference from court litigation is that the former is a private process whereas the latter is a public process.

Arbitration began as a means of commercial dispute resolution in England where commercial men were elected to the tribunal. This was because arbitration was born to provide a commercial solution to business disputes in industrial sectors such as shipping, construction or insurance in which the customs and ways of the business were held above the legal benchmarks that were otherwise imposed. Arbitration was never conceived to provide an alternative judicial process to guide the parties to the same legal solution as that provided by the Courts.

Rather than focus on diversity in legal professionals, we should seek to improve diversity in arbitral appointments by encouraging men and women from different commercial and professional backgrounds to be appointed as arbitrators. If this can be done, the doors of the ‘arbitrator club’, dominated by lawyers in the glorious sunset of their careers, can be pried open. Then, arbitration as a commercial means of dispute resolution will remain attractive. More commercial disputes will be referred to arbitration because commercial parties will have confidence that the arbitration procedure would produce the “right” commercial result. By encouraging diversity and confidence in the arbitral process, the tide of professional international commercial dispute resolution rises.

Quoting from John F. Kennedy, ‘the rising tide lifts all the boats’.

18 Norther Regional Health Authority v Derek Crouch Construction Company Limited [1984] a QB 644, at 670
Interpreting Contracts under Singapore Law in International Arbitration

HSBC Trustee (Singapore) Ltd v Lucky Realty Co Pte Ltd [2015] SGHC 93

By
Darius Chan
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Introduction

In a series of cases since 2008, the Singapore Court of Appeal (Singapore’s highest court) has been articulating the contours of a contextual approach to contractual interpretation. Under this contextual approach, the Singapore courts “must ascertain, based on all the relevant objective evidence, the intention of the parties at the time they entered into the contract”. In doing so the court can have regard to evidence beyond the contract itself, viz, extrinsic evidence.

The different types of extrinsic evidence can be divided into four categories, namely, evidence of:

(a) circumstances surrounding the contract;
(b) subjective intentions of the parties;
(c) parties’ pre-contractual negotiations; and
(d) parties’ post-contractual conduct.

As the Singapore Court of Appeal has observed, civil law jurisdictions and transnational conventions typically allow contracts to be proven by any means, including all the four categories named above.

However, the Singapore Court of Appeal has held that extrinsic evidence is admissible only if it is “relevant, reasonably available to all the contracting parties and relates to a clear or obvious context”. (Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd [2008] SGCA 27 (hereinafter called the Zurich criteria)). Subsequently, the Court of Appeal formulated specific pleading requirements to ensure that the Zurich criteria are met (Sembcorp Marine Ltd v PPL Holdings Pte Ltd [2013] SGCA 43).

1 Norton Rose Fulbright (Asia) LLP. The author would like to thank Asst Professor Goh Yihan for his comments. All errors are the author’s alone.
Do international arbitration tribunals have to apply the *Zurich* criteria when interpreting Singapore-law governed contracts?

Readers would be aware that international arbitrations very frequently do not adopt the rules of evidence of its seat or a particular jurisdiction. Neither do international arbitrations typically adopt detailed prescriptive rules in relation to the admissibility of evidence. Instead, the IBA Rules on the Taking of Evidence in International Arbitration are increasingly used by arbitrators in Procedural Order Number 1 as guidelines which the tribunal is not necessarily bound by. The IBA Rules gives a tribunal wide discretion to exclude evidence which lacks "sufficient relevance to the case or materiality to its outcome". Arbitral rules similarly give the tribunal wide discretion in determining the relevance, materiality and admissibility of evidence. For instance:

(a) The UNCITRAL Arbitration Rules simply provide that "the arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered"; and

(b) The SIAC Arbitration Rules go further in providing that "the Tribunal shall determine the relevance, materiality and admissibility of all evidence. Evidence need not be admissible in law" (underline added).

If the *Zurich* criteria form part of the law of contract, a tribunal would be expected to apply those criteria as part of the law of contract. Conversely, if the *Zurich* criteria form part of the law of evidence, a tribunal would not be constrained by the *Zurich* criteria. This is all the more so for SIAC tribunals, where the SIAC Arbitration Rules expressly provide that "evidence need not be admissible in law".

The Singapore High Court considered this issue (*HSBC Trustee (Singapore) Ltd v Lucky Realty Co Pte Ltd* [2015] SGHC 93). The decision in *HSBC Trustee* may have the effect of constraining international arbitration tribunals to apply, as part of the law of contract, the *Zurich* criteria when interpreting contracts governed by Singapore law. The High Court’s reasoning on each of the four categories of extrinsic evidence are discussed below.

First, in relation to evidence on circumstances surrounding the contract, the High Court reasoned that the law of evidence admits this type of evidence “without restriction” and the law of contract then accepts all of the evidence to be a legitimate aid to construction. Later in the same judgment, the High Court stated that, as a matter of the law of contract, this type of evidence is a permissible aid to construction if it satisfies the *Zurich* criteria. On this reasoning, the *Zurich* criteria appears to form part of contract law.

Secondly, in relation to evidence on subjective intentions of the parties, the High Court reasoned that both the law of evidence and the law of contract permit such evidence only if there is latent ambiguity in the contract. A latent ambiguity is one which becomes apparent only when the language is applied to the factual situation. In so finding, the High Court cited *Sembcorp Marine* which, in turn, cited certain English contract textbooks.

On a proper reading of *Sembcorp Marine*, however, the textbooks were arguably cited in the context where the Court of
Appeal was reviewing not so much rules of contract, but the applicable rules of evidence within a section of the judgment focusing on the Evidence Act. That English contract textbooks may discuss rules of evidence is not unexpected. As HSBC Trustee recognised, in the context of English law, the law of contract and the law of evidence are both primarily common law and can therefore evolve together, virtually without any need to draw a distinction between the two, in the same judicial decisions (or textbooks).

Thirdly, in relation to parties’ pre-contractual negotiations and post-contractual conduct, the High Court found that the Zurich criteria applied, but did not expressly state whether the criteria operated by way of the law of contract or evidence or both. However, the High Court expressed the view that a dispute over how a contract is to be construed must yield the same final judicial determination whether the contract is construed in litigation “or even in arbitration”.

The High Court’s reasoning may be supported by an extra-judicial writing in 2010 by VK Rajah JA who delivered the judgment in Zurich in 2008. Judge of Appeal Rajah expressed his view that “the admissibility of extrinsic evidence for the purposes of contractual interpretation is a substantive question” and that “the main area of substantive law controlling the subject is the law of contract”.

However, any doubt as to the status of the Zurich criteria appears to have been settled by Sembcorp Marine in 2013. Writing for the Court of Appeal in Sembcorp Marine, Chief Justice Menon emphasized that the admissibility of extrinsic evidence generally is governed by the rules of evidence and not by the rules of contractual interpretation (which are governed by the substantive law of contract). The rules governing the admissibility of extrinsic evidence in Singapore (in court litigation) are primarily statutory in the form of the Evidence Act and secondarily in the common law. The province of the Evidence Act is the treatment of evidence, and this is conceptually independent and distinct from rules of contractual construction. While the rules of evidence under the Evidence Act may indirectly affect the application of specific rules of contractual interpretation, they do not directly prescribe how a contract should be interpreted and construed.
Specifically, the Zurich criteria were re-cast by Chief Justice Menon along the following lines: “under s 94(f) [of the Evidence Act], extrinsic evidence which was relevant and reasonably available to all the contracting parties and which would go towards establishing the relevant context of the contract would be admissible”.

It is arguable that the Zurich criteria form part of the law of the evidence, and not simultaneously or otherwise the law of contract. Once the rules of evidence (whether articulated in terms of the Evidence Act or the Zurich criteria) are applied to determine whether certain extrinsic evidence is admissible, the Zurich criteria do not resurface under the law of contract. The rules of admissibility of extrinsic evidence do not form part of the law of contract. International arbitration tribunals are therefore not necessarily bound by those rules.

This in turn begs two related questions.

Does this create a structural problem where a contract governed by Singapore law would be interpreted differently, depending on whether the matter is heard by way of litigation or arbitration? Ultimately the practical difference may be more apparent than real. Even if certain types of extrinsic evidence may be more readily admissible in arbitration, the weight placed on such evidence may be limited.

If that is the case, should tribunals readily admit extrinsic evidence? The Singapore Court of Appeal formulated the Zurich criteria (and related pleadings requirements) to avoid the time and cost arising from a “tsunami” of materials parties may seek to discover and adduce in the common law adversarial process.

Whether this “tsunami” has engulfed tribunals, and whether it contributes to delays and costs in international arbitration, may require an empirical study in its own right. Anecdotally, there has been no suggestion that SIAC arbitrations have been bogged down by virtue of the fact that the SIAC Rules permit evidence not admissible in law.

Nevertheless, even if the Zurich criteria may not bind arbitral tribunals, readers—especially those who have had to wade through long Redfern schedules requesting all manner of extrinsic evidence—may find it helpful if tribunals were to bear the rationale of the Zurich criteria in mind and critically evaluate the relevance, proportionality and materiality of those requests.