YSIAC Publications Subcommittee:
Darius Chan, Foo Yuet Min, Jonathan Lim, Nicholas Lingard, Julie Raneda
### SIAC Welcomes New YSIAC Committee

The Singapore International Arbitration Centre (SIAC) is pleased to announce the new YSIAC Committee, with effect from 1 January 2017, as follows:

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<tr>
<th>Name</th>
<th>Law Firm / Chambers</th>
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<tr>
<td>1  Mr Ankit Goyal (Co-Chair)</td>
<td>Allen &amp; Gledhill LLP</td>
<td>Singapore</td>
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<td>2  Ms Koh Swee Yen (Co-Chair)</td>
<td>WongPartnership LLP</td>
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<td>3  Ms Jeong Hye Ahn</td>
<td>Yulchon LLC</td>
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<td>4  Mr Andrew Battison</td>
<td>Allen &amp; Overy LLP</td>
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<td>5  Ms Holly Blackwell</td>
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<td>Ascendant Legal LLC</td>
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<td>8  Ms Foo Yuet Min</td>
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<td>9  Mr Rishab Gupta</td>
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<td>10 Mr Hu Ke</td>
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<td>11 Mr Aoi Inoue</td>
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<td>13 Mr Moazzam Khan</td>
<td>Nishith Desai Associates</td>
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<td>14 Mr Jonathan Lim</td>
<td>Wilmer Cutler Pickering Hale &amp; Dorr LLP</td>
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<td>15 Mr Nicholas Lingard</td>
<td>Freshfields Bruckhaus Deringer LLP</td>
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<td>16 Mr Jern-Fei Ng</td>
<td>Essex Court Chambers</td>
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<td>17 Mr Avinash Pradhan</td>
<td>Rajah &amp; Tann Singapore LLP</td>
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<td>18 Ms Julie Raneda</td>
<td>Schellenberg Wittmer Pte Ltd</td>
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<td>19 Mr Kabir Singh</td>
<td>Clifford Chance Pte Ltd</td>
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<td>20 Ms Melissa Thng</td>
<td>Dentons Rodyk &amp; Davidson LLP</td>
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The outgoing members of the YSIAC Committee are Madhur Baya of Lex Arbitri, Christopher Boog of Schellenberg Wittmer Pte Ltd, Sapna Jhangiani of Clyde & Co Clasis Singapore Pte. Ltd, Sue Hyun Lim of Bae Kim & Lee LLC, Kailee Lingard of BHP Billiton Iron Ore, Alberto Ravell of ConocoPhillips Co., and Rena Rico-Pamfiolo of Seawood Resources, Inc..

New members joining the Committee are Jeong Hye Ahn, Holly Blackwell, Rishab Gupta, Moazzam Khan, Nicholas Lingard and Julie Raneda. Co-chairs Ankit Goyal and Koh Swee Yen of the previous Committee as well as the following members of the previous Committee will continue to serve on the new Committee, namely, Andrew Battison, Darius Chan, Simon Dunbar, Foo Yuet Min, Hu Ke, Aoi Inoue, Andi Kadir, Jonathan Lim, Jern-Fei Ng, Avinash Pradhan, Kabir Singh, and Melissa Thng.
Through the tireless efforts of the inaugural YSIAC Committee, the YSIAC membership base (composed of younger arbitration practitioners aged 40 years and under) has grown steadily to become a global network of 1400 young lawyers from 84 jurisdictions.

Since its relaunch in January 2015, the YSIAC Committee has implemented a host of exciting new initiatives and projects for YSIAC members in Singapore and abroad, and we present a snapshot of their achievements below.

In 2015, the YSIAC Committee organised the highly successful inaugural YSIAC Conference, which attracted a record number of over 200 participants, with half of the delegates coming from overseas. In conjunction with the Conference, the YSIAC also held its first ever YSIAC Essay Competition, which garnered 66 entries from 20 jurisdictions. The YSIAC Advocacy Roadshow was launched that year, and featured a series of mock arbitration panels based on case scenarios specifically developed for young arbitration practitioners to develop their oral advocacy skills. The 2015 Roadshow featured the cross-examination of experts, and included a stellar line-up of mock tribunal members, comprised of Mr Gary Born, President of the SIAC Court of Arbitration, various Court members, and other arbitration luminaries. That year, the Roadshow venues included Delhi, Mumbai, Jakarta, Beijing, Seoul, and Tokyo, and the audience feedback was overwhelmingly positive.

In 2016, building on the success of the 2015 YSIAC Advocacy Roadshow, the YSIAC Advocacy Roadshow featured a mock emergency arbitration scenario, and toured the following cities: Tokyo, Mumbai, Seoul, Shanghai and Manila. Eminent arbitration practitioners who participated as emergency arbitrators in these sessions included SIAC Court President, Mr Gary Born, various SIAC Court members as well as other senior arbitrator practitioners.

Also in 2016, the YSIAC organised two YSIAC Club events featuring up and coming arbitration practitioners as panelists, a YSIAC Lunchtime Talk by SIAC Court member, Mr Toby Landau QC, and the second YSIAC Essay Competition (held in conjunction with the SIAC Congress Week 2016).

YSIAC publications include a bi-monthly YSIAC Newsletter, and a YSIAC affiliate blog on the Kluwer Arbitration Blog. Regular networking drinks events, a popular fixture on the YSIAC social events calendar, provide members with opportunities to share views and exchange ideas with their like-minded peers.

**Upcoming events**

The second biennial YSIAC Conference will be held on 9 June 2017.

Lim Seok Hui, CEO of SIAC, said, “We would like to express our sincere thanks and appreciation to the outgoing Committee members and the former Committee members who are staying on for the new term, for their invaluable contributions, dedication and commitment. Their energy and enthusiasm was truly invigorating and it was a great pleasure to have worked with this group of dynamic young lawyers from diverse legal systems and cultures. We welcome the new YSIAC Committee and very much look forward to working closely with them to continue expanding the footprint of YSIAC to other areas of the globe.”

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Arbitrability has become an interesting topic of discussion following the Indonesian Supreme Court’s ruling in *Astro Nusantara International B.V. et al. v. PT Ayunda Prima Mitra et al.* [2010] concerning the refusal of enforcement of a foreign arbitral award in Indonesia. This article will deal with some issues related to the concept of arbitrability in Indonesia.

**Arbitrability under Indonesian law**

Indonesia is a member of the New York Convention, which was ratified through Presidential Decree No. 34 of 1981. In 1999, the Indonesian government enacted the Arbitration Law. Indonesian arbitration is governed by these two sets of rules.

Generally, arbitrability refers to a question whether the subject matter of a dispute is capable of settlement by arbitration. The Arbitration Law expressly provides that only certain disputes are arbitrable. The first criterion of disputes that can be resolved through arbitration are disputes in the commercial sector. Under the Arbitration Law, disputes related to commerce, banking, finance, investment, industry, and intellectual property rights are considered as disputes in the commercial sector.

The second criterion of disputes that can be resolved by arbitration are those where the merits of which concern rights that, according to the law and regulations, are fully controlled by the disputing parties. The Arbitration Law does not provide much detail about this class of dispute. But the Elucidation part of the Arbitration Law does mention that the rights fully controlled by disputing parties are rights founded upon their agreement. Therefore, one may fairly say that the second criterion essentially refers to contractual disputes.

Article 5 of the Arbitration Law suggests that the first criterion (disputes in the commercial sector) and the second criterion (contractual disputes) are cumulative requirements for demonstrating that a dispute is arbitrable.

**First issue: arbitrability of tort claims**

Arbitration is a creature of contract, and hence one may say that any claim or dispute submitted to arbitration must relate to a contract where the relevant arbitration clause is laid down. In contrast, tort claims do not normally arise from a prior contractual relationship. Broadly drafted arbitration clauses classically say that “any and all disputes arising out of or in connection with the contract must be referred to arbitration”. While this type of arbitration clause can be considered as a catch-all clause, a question still remains: Does such an arbitration clause cover a tort claim? Ultimately, the question is whether a tort claim is arbitrable.

In Indonesia’s context, tort claims are rather similar to unlawful act claims. The Indonesian Civil Code provides that every unlawful act that causes losses to another person obliges the wrongdoer to compensate the losses. There is no statutory...
definition of the term unlawful act. In practice, the courts, however, have interpreted an unlawful act broadly to include violations of both statutory law and unwritten norms of law, such as propriety, customs, and reasonableness. It can be said that the notion of an unlawful act is open-ended where the courts can give a wide interpretation as to what amounts to an unlawful act.

The dichotomy between contractual and unlawful act claims creates an issue of arbitrability. Some Indonesian litigants try to circumvent arbitration clauses by formulating their contractual claims as unlawful act claims, and then arguing that those claims do not fall within the ambit of the arbitration clauses. Common examples are contract cancellation cases. In this type of case, plaintiffs normally argue that the disputed contract is obtained by the defendants fraudulently and such unlawful (tortious) act of the defendants does not amount to a contractual issue, and hence it is not subject to the arbitration clause set out in the disputed contract. To emphasize the non-arbitrability of the unlawful act claim, a third party would be placed as one of the defendants to suggest that the claim is not contractual in nature, and hence it is not arbitrable. In some cases, Indonesian courts have decided to take jurisdiction over those unlawful act claims.

So, is an unlawful act claim arbitrable? As mentioned above, Article 5 and the Elucidation part of the Arbitration Law essentially suggest that disputes capable of settlement by arbitration are contractual disputes. Some other provisions of the Arbitration Law, however, imply that unlawful act claims can also be resolved by arbitration. For instance, Article 1 of the law provides that “Arbitration means a method of settling civil disputes ...”. It is no question that unlawful act disputes are a type of civil dispute. Moreover, Article 2 of the Arbitration Law provides that “This law regulates the resolution of disputes or differences of opinion between parties in a particular legal relationship that have entered into an arbitration agreement”. The use of the unspecific term “particular legal relationship”, as opposed to “contractual relationship”, suggests that the lawmakers did not only contemplate contractual relationships when drafting Article 2, but they also contemplated other recognizable legal relationships under Indonesian law, such as those that arise from unlawful acts. The Presidential Decree on the ratification of the New York Convention suggests the same by declaring that Indonesia will apply the New York Convention to differences arising out of legal relationships considered to be commercial under the Indonesian law, “whether
they are contractual or not” (see the attachment of Presidential Decree No. 34 of 1981).

In Government of the Regency of Pasir (Regency of Pasir) v. Samtan Co. Ltd. et al. [2006], the Indonesian Supreme Court dismissed the Regency of Pasir’s unlawful act claim on the basis that Indonesian courts have no jurisdiction over a case relating to an agreement with an arbitration clause. The case concerned the implementation of a divestment clause contained in a coal mining cooperation agreement between P.N. Tambang Batu Bara (a state-owned coal mining company) and PT Kideco Jaya Agung (Kideco), a joint venture company established by a consortium of Korean companies led by Samtan Co. Ltd. The Regency of Pasir claimed that Samtan Co. Ltd being the controlling shareholder of Kideco had committed an unlawful act by not having Kideco implement the divestment clause whereas the divestment is required by Presidential Decree No. 49 of 1981 (on Basic Provisions of Coal Mining Cooperation Agreement between P.N. Tambang Batu Bara and Private Contractors) for the interests of Indonesian government, citizens, or companies. The cooperation agreement between P.N. Tambang Batu Bara and Kideco contained a broadly-drafted arbitration clause as follows.

“..., any dispute between the Parties hereto arising before or after termination concerning anything related to this Agreement and the application thereof, including contentions that a Party is in default in the performance of its obligations, shall, unless settled by mutual agreement, or by mutually satisfactory conciliation, be referred for settlement by arbitration to the International Centre for Settlement of Investment Disputes ...”

A similar position was taken by the Indonesian Supreme Court in PT Armada Eka Lloyd (Armada) v. Samsung Shipping Corporation (Samsung) et al. [2006]. Armada and Samsung entered into a time charter of M.V. Master Pioneer on the basis that the latter is the owner of the vessel. But, it was found later that the vessel belongs to another party. Consequently, Armada filed an unlawful act claim against Samsung for fraud. The time charter contained the following arbitration clause:

“That should any dispute arise between owners and the Charterers, the matter in dispute shall be referred to three persons in London, one person to be appointed by each of the parties hereto, and the third by the two so chosen, their decision or that of any two of them, shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of the court. The arbitrator shall be commercial men.”

Given the arbitration clause, the Indonesian Supreme Court refused to hear Armada’s unlawful act claim.

Further, in Persekutuan Perdata Dermawan Nugroho & Co (DN&C) v. PT Landmark [2011], the Indonesian Supreme Court
decided to dismiss an unlawful act claim filed by DN&C with the reasoning below:

“Even if it is true that the intention and purpose of the Plaintiff’s claim are concerning an unlawful act, i.e. the Defendant’s action of withholding an amount of money belonging to the Plaintiff, yet such action still amounts to a dispute that must be settled under the Lease Agreement cq. Article XVI (Arbitration Clause).

In a recent case, PT Korindo Heavy Industry (Korindo) v. Hyundai Motor Company (Hyundai) [2015], the Indonesian Supreme Court again dismissed an unlawful act claim on the basis that Indonesian courts have no jurisdiction to hear a dispute about an agreement the parties to which are bound by an arbitration clause. The case was essentially about unilateral termination of several agreements (a distributorship agreement, supply agreement, and technical license agreement) entered into by Korindo and Hyundai. Korindo asserted that Hyundai’s actions of unilaterally terminating the agreements and refusing to supply spare parts following the termination of the agreements amount to an unlawful act and a breach of certain statutory as well as regulatory provisions. The following is the arbitration clause contained in the distributorship agreement.

“… any dispute of claim arising out of or in connection with this Agreement or any breach hereof shall be settled finally by arbitration. The arbitration shall take place in Seoul, Korea, and shall be conducted in accordance with the Rules of the Korean Commercial Arbitration Board by three arbitrators appointed according to those rules …”

The supply agreement and the technical license agreement contained an almost similar clause.

In view of the foregoing decisions, it appears that the Supreme Court has taken the position that (i) unlawful act claims are arbitrable, and (ii) any unlawful act claim that arises out of or in relation to a contract with arbitration clause must be resolved through arbitration.

Second issue: arbitrability vis-à-vis enforceability

As discussed earlier, Article 5 of the Arbitration Law has laid down the rules of arbitrability in Indonesian arbitration, including the rule that only “disputes” in the commercial sector that can be settled by arbitration. This rule underpins Article 66 (b) of the Arbitration Law stating that Indonesia will only recognize and enforce international arbitration awards which, under the provisions of Indonesian law, fall within the scope of commercial law. The two provisions essentially suggest that foreign arbitral awards can only be enforced in Indonesia if they concern disputes that are arbitrable under Indonesian law.

It is then fair to say that the interpretation or application of the rules on arbitrability may affect the enforceability of foreign arbitral awards in Indonesia. This is particularly true in Astro Nusantara International B.V. (Astro) et

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1 The Supreme Court decisions do not formally bind lower courts because like other civil law countries, Indonesia does not follow the rule of binding precedent. Yet, practically speaking, the Supreme Court decisions are persuasive authorities. It is not difficult to find a situation where a lower court follows the Supreme Court decisions.
between Astro and Ayunda arose out of a contractual relationship laid down in the SSA, the Indonesian Supreme Court ruled that the content of the SIAC award did not fall within the commercial sector, rather it fell within the field of procedural law (as the award contains an order of anti-suit injunction). As a consequence, the award could not be enforced in Indonesia.

The question then is what needs to fall within the commercial sector: the subject matter of dispute, the legal relation between disputing parties, or the orders set out in foreign arbitral awards?

The Arbitration Law specifically refers to the term “disputes” when setting down the rules of arbitrability (Article 5 – “disputes” that can be settled by arbitration are those in the commercial sector and the merits of which concern rights that are fully controlled by disputing parties). As pointed out above, Article 5 of the Arbitration Law underpins Article 66 (b) of the Arbitration Law stating that Indonesia will only recognize and enforce international arbitration awards which fall within the scope of commercial law. Elucidation of Article 66 (b) elaborates on the meaning of “the scope of commercial law”, i.e. “activities” in the field of commerce, banking, finance, investment, industry, and intellectual property rights. Further, the Presidential Decree on the ratification of the New York Convention provides that Indonesia will apply the New York Convention only to differences arising out of “legal relationships” which are considered to be commercial under the Indonesian law.

Given those provisions, in the context of enforcement, arbitrability appears to concern the nature of dispute or legal relationship between disputing parties, rather than the orders set out in foreign arbitral awards. Leading scholars have opined that the orders set out in a foreign arbitral award cannot in any way negate the commercial nature of the award so long as the dispute based on which the award is issued arises from a commercial arrangement. It is plain that the dispute or the legal relationship between Astro and Ayunda is commercial in nature because it is derived from the SSA. Thus, saying that the SIAC award in the Astro case does not fall within the scope of Indonesian commercial law is debatable.

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A foundational principle of international commercial arbitration is that of party autonomy.

Article 19(1) of the UNCITRAL Model Law reflects this and states: “Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.”

Notwithstanding the parties’ broad freedom to select the procedural rules, it is often the case that arbitration agreements are completely silent on the procedure to be followed by the arbitral tribunal.

Silence as an Implicit Expression of Party Autonomy

The parties’ silence on the procedure may be interpreted in contrasting ways.

It can be argued that the parties’ failure to exercise their procedural freedom in the arbitration agreement should be interpreted as a blank mandate to arbitrators on how to conduct the arbitration proceedings.

Yet, it can also be argued that parties’ silence on the procedure is an implicit expression of party autonomy, bearing a very specific meaning: a reciprocal commitment – made at the time of the arbitration agreement – to a cost-efficient and effective dispute resolution [see Baron Mustill, The History of International Commercial Arbitration – A Sketch, in THE LEADING ARBITRATORS’ GUIDE TO INTERNATIONAL ARBITRATION 3, 31 (Lawrence W. Newman et al. ed., 3rd ed. 2014), regarding the promise and expectation that international commercial arbitration provides a quick, well informed and inexpensive dispute-resolution mechanism].

It is here suggested that arbitral tribunals should interpret the absence of any express agreement between the parties on specific procedural rules as the implicit expression of the parties’ mutual intention to commit to the default and foundational values of arbitration: procedure’s efficiency, speed and flexibility.

This default assumption, inherent in the choice to arbitrate, is well explained by a U.S. Federal Court: “Those who choose to resolve dispute by arbitration can expect no more than they have agreed. One choosing arbitration should
not expect the full panoply of procedural and substantive protections offered by a court of law. In short, by agreeing to arbitrate, a party ‘trades the procedures and opportunity for review of the courtroom for the [perceived] simplicity, informality, and expedition of arbitration.’” [see Card v. Stratton Oakmont, Inc., 933 F. Supp. 806 (D. Minn. 1996)].

**Ex-Ante v. Ex-Post Parties’ Procedural Expectations**

One aspect that deserves to be carefully considered is that the parties’ procedural expectations (and their consequent behavior) are far from consistent at different points in time.

At the time they enter into an arbitration agreement that is silent on the procedure (I will refer to this point in time as “t0”), the parties’ ex-ante expectation is to receive from the arbitral tribunal a just and cost-efficient resolution of any dispute that may arise in the future.

Contrary to their ex-ante expectation, it is well known that, once a dispute arises (I will refer to this point in time as “t1”), parties tend to depart from their original pre-commitment to solving the dispute through an efficient procedure and instead they expect the arbitral tribunal to please all their ex-post procedural requests.

While at t0, parties (being in a cooperative disposition) mutually agree to defer their disputes to arbitration as a way to efficiently solve their potential disagreements, at t1 (when the disagreements materialize and the cooperative disposition vanishes) they try everything at their disposal to prevail and flood the arbitral tribunal with any sort of procedural request that might shift the case in their favor [see e.g. Queen Mary University of London and White & Case, 2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process”, 20, for the abuse of procedural requests for document production].

**Parties’ Behaviors as a Problem of “Time-Inconsistent Preferences”**

The parties’ inconsistent behavior at t0 and at t1 may be better understood by bringing into the discourse insights from social sciences, and particularly from the field of behavioral science.

As explained by cognitive psychologists [see Daniel Kahneman, THINKING FAST AND SLOW (2011)] and behavioral economists [see Richard Thaler, MISBEHAVING: THE MAKING OF BEHAVIOURAL ECONOMICS (2015)], an individual can be thought of as consisting of two selves.

On the one side, there is a forward-looking self, who thinks about the future in a conscious and rational way. This first self (also called the “planner”), acting in a cool and reflective mood, believes that in the future he will be able to behave according to his original plan (e.g., when, after an abundant dinner on a Saturday night, we think we will have no difficulties in sticking to the plan to eat low-calories meals during the coming week).

On the other side, there is a second self that is completely selfish and that surrenders to the passions and desires of the moment. This second self (also called the “doer”) does not
care at all about the costs of his actions and about what is best in the long term (e.g., when Monday comes and we end up eating a lot more than we predicted the previous Saturday).

The tension between the two selves can be explained in light of the fact that individuals tend to value something that is “now” much more than something that is “later”. In other words, individuals’ preferences change in the “present time”, which leads an individual (the “doer”) to make choices that are inconsistent with the ones the same individual (the “planner”) had predicted he or she would have made. This is known as the phenomenon of “time-inconsistent preferences”.

Just like any other individual, it is possible to argue that the parties to arbitration proceedings also experience the dynamic of having “time-inconsistent preferences”.

At the time parties enter into an arbitration agreement they behave as cool and rational “planners”, implicitly committing to an efficient and quick future dispute resolution and expecting from themselves and the arbitral tribunal to behave accordingly to this pre-commitment.

Notwithstanding these good intentions, once parties find themselves in the middle of a dispute they behave as selfish “doers”, engaging in activities that are contrary to their original pre-commitment of having a cost-effective arbitration.

In the struggle between long-term preferences (e.g., preserving the benefits of an efficient arbitration and, more in general, arbitration’s attractiveness over court litigation) and short-term preferences (e.g., prevailing in the dispute once it arises),
parties tend to substantially discount the value of long-term preferences in comparison to the value they assign to short-term preferences.

Understanding parties’ time-inconsistent behavior through the lens of behavioral economics not only allows putting in a theoretical framework to a much discussed and observed practical issue, but helps offering the rationale for possible solutions.

The Arbitral Tribunal as the Gatekeeper of the Procedure

Notwithstanding the major role that parties play in determining the effectiveness of arbitration proceedings, the users of international commercial arbitration often bemoan that arbitration is losing its attractiveness in comparison to court litigation.

In light of the above discussion, however, this complaint sounds paradoxical, considering that a good deal of the blame for this tendency can be placed on the very same parties and particularly on their “time-inconsistent preferences”.

In looking for a possible strategy that may help in restoring the original values and attractiveness of international commercial arbitration, it is apparent that the arbitral tribunal can and should play a fundamental role.

A well-established principle governing arbitration proceedings is that, in case parties are silent on the procedural rules, “the arbitral tribunal may [...] conduct the arbitration in such manner as it considers appropriate” [see Article 19(2) of the UNCITRAL Model Law].

In the absence of an agreement between the parties, it is on the arbitrators to define the scope of the procedure; they will ultimately have to determine whether to use their procedural discretion in order to preserve the parties’ ex-ante expectation for a cost-efficient arbitration.

Despite their broad discretion, it is well known that arbitrators are often reluctant to reject parties’ procedural requests (e.g., requests for production of documents), failing to adequately perform their role as the gatekeepers of an efficient procedure [see Gary B. Born, INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES: COMMENTARY & MATERIALS, 90-91 (1994)].
Based on the behavioral economics’ insights discussed above, this arbitrators’ tendency translates into systematically making the parties selfish “doers” self prevail over the parties’ rational “planners” self.

In other words, the arbitral tribunal’s attitude of routinely admitting parties’ procedural requests (i.e., the preferences unilaterally expressed by the parties at t1) comes at a substantial cost: sacrificing the ex-ante expectations of the parties for an efficient dispute resolution (i.e., the preferences mutually agreed and expressed by the parties at t0).

**Conclusions**

In the arbitral tribunal’s dilemma between (i) securing parties’ mutual ex-ante preferences or (ii) pleasing parties’ unilateral ex-post preferences, a strong guiding - but traditionally overlooked – principle is offered by the above assumption that parties’ silence on the procedure should be considered as an implicit expression of party autonomy, where the parties adhere to the default values of arbitration (speed, efficiency and flexibility).

Once assumed that an arbitration agreement that is silent on the procedure should be interpreted as an implicit expression of party autonomy, it can then be argued that the arbitral tribunal should not only be unafraid of rejecting ex-post trivial procedural requests unilaterally advanced by one of the parties, but also be compelled to protect parties’ ex-ante reciprocal commitment to a cost-efficient and effective dispute resolution.

Absent any contrary agreement of the parties, ensuring speed and efficiency of arbitration proceedings requires arbitral tribunals to adequately perform their role as the gatekeepers of the procedure, and this ultimately boils down to protecting parties’ rational and reflective selves (i.e., the “planners”) from their selfish and often unreasonable other selves (i.e., the “doers”).

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In recent years, the hallmarks that distinguish arbitration from litigation have been eroded. The features that make arbitration the preferred choice for international dispute resolution are often undermined by increases in costs and delays. Meanwhile, in-house counsel is under exceeding internal pressure to see that disputes are resolved (i) expeditiously and (ii) without its client exceeding the budget allocated at the outset of a dispute.

Selecting the right arbitrators is critical to ensuring that an arbitration is conducted fairly yet expeditiously. This note addresses the issue of arbitrator selection from the client perspective and, specifically, it considers: What practical steps in-house attorneys should take when deciding whom to appoint?

**Ensuring the right to appoint: It’s all about the clause**

The international arbitration community has been embroiled in a debate over the last few years as to whether parties should maintain the right to appoint arbitrators. Leaving aside the debate regarding the morality of party-appointed arbitrators, users—especially repeat users—of international arbitration consider the ability to appoint an arbitrator an attractive (and, even, a
necessary) feature of the arbitral process. Having input on the
constitution of the tribunal gives users the sense of having some level
of control over the proceedings, as they can ensure that at least a third
of the tribunal has qualities they deem to be important and relevant to
the dispute.

While arbitrator selection remains important to users of arbitration,
the choice to do so is not always there. In-house litigators often
find themselves bound by dispute resolution choices made by (or
imposed on) their organization’s transactional lawyers. These choices
can result in arbitration clauses that restrict the parties’ ability to
appoint arbitrators or to even propose candidates. The right to make
appointments has to be either expressly contained in the clause or
granted by reference to rules or statutes that permit party intervention
in the tribunal formation process. The SIAC Arbitration Rules, for
example, contemplate proposals by the parties (if a sole arbitrator
is to be appointed) and nomination by each of the parties (if three
arbitrators are to be appointed) in case the arbitration agreement
does not contain an express agreement on the appointment of the
arbitrators. Some arbitration rules, however, provide for default
institutional appointments in the absence of an agreed-upon
appointment process.

The arbitration clause, as well as the applicable rules and legislation,
may also impose restrictions on the nationality, independence, or
qualifications of arbitrators. For example, the clause may provide
that the arbitrators shall be of a nationality other than that of any
of the parties, or that they possess specific qualifications related to
the subject matter of the contract. Although these restrictions tend
to reduce the pool of available candidates, they are not necessarily
unacceptable if agreed by informed parties. Arbitration clauses should
not be negotiated on a one-size-fits-all basis.

In short, in order to obtain the ability to appoint arbitrators (or at least
to make an informed decision foregoing such an option), in-house
counsel should pay close attention to the arbitration agreements in
their contracts, as well as to the applicable institutional rules and the
law of the seat. Transactional lawyers should be encouraged to involve in-house counsel with responsibility over disputes at the early stages of the negotiation of contracts to ensure that the dispute resolution provision is given proper consideration.

**Identifying qualifying criteria and preparing an initial list**

Assuming the applicable clause and rules allow party intervention in the tribunal formation process, outside counsel should first be instructed to prepare a list of potential arbitrator candidates for initial review and consideration. No specific format is required, but the list should at least summarize each candidate’s qualifications and experience, and include a brief biography or *curriculum vitae*.

Outside counsel should also be asked to outline the qualifying criteria used to identify the potential candidates. These factors will change from one case to the next, but typically encompass some of the following factors:

1. Reputation and prominence as an arbitrator
2. Familiarity with issues relevant to the dispute
3. Education and training
4. Languages
5. General availability
6. Nationality
7. Potential known conflicts
8. Gravitas to persuade other members of the tribunal

Some of these criteria may come in conflict with each other. For example, the world’s most reputable and prominent arbitrators are generally busy and will not necessarily have particularly flexible schedules. Relatedly, there is a universally recognized need to expand the pool of experienced arbitrators, particularly to ensure greater diversity. Outside counsel should therefore be encouraged to prepare
a list that is reflective of this goal.  

**Identifying suitable candidates and preparing the short list**

A comprehensive review and discussion of the first list usually results in the pre-selection of three or four arbitrator candidates. That should be followed by a more detailed review of each of the shortlisted candidates, including an assessment of their relevant publications and awards, to the extent they are publicly available. Both in-house and outside lawyers should also reach out to select “arbitration contacts” seeking, on a no-names and no-case specific basis, feedback on the shortlisted candidates. The practice is common among arbitration practitioners but reciprocity will be expected.

Finally, and to the extent permitted by the applicable rules and legislation, outside counsel should be instructed to conduct a preliminary personal interview with each of the shortlisted candidates to confirm the candidate’s (i) lack of conflicts of interest; (ii) willingness to accept the appointment; (iii) and availability. The importance of ensuring a candidate’s availability cannot be overstated. Selecting a tribunal that is comprised of busy arbitrators will ensure that the case is not decided expeditiously.

At the end of the process, one or two candidates will typically survive the vetting process. While the decision is the client’s, the appointment or nomination should not be made unless it receives the full support and endorsement of outside counsel.

**The bottom line**

Arbitrator selection is not a science. It is a subjective process filled with risks—most of which will become apparent once the arbitration is well underway. Armed with the proper advice, however, in-house attorneys should be able to mitigate some of these risks and select an arbitrator that will ensure that the arbitration is conducted fairly and impartially. At the very least, if proper due diligence is conducted at the outset, in-house counsel can ensure that it is selecting an arbitrator that will endeavor to ensure that the arbitration is conducted efficiently and expeditiously.

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YSIAC Oral Advocacy Workshops 2016

In the last quarter of 2016, YSIAC conducted a series of oral advocacy workshops in five major arbitration centres in the Asia-Pacific region, Tokyo, Mumbai, Seoul, Shanghai, and Manila. Each workshop began with an opening address by a leading practitioner, which was then followed by oral submissions by young practitioners representing the parties on a mock arbitration problem before a panel of established arbitrators from the region and internationally. The workshops then closed with feedback by the mock arbitration tribunal, a Q&A session and some concluding remarks on the art of oral advocacy.

For these workshops, YSIAC used a bespoke mock arbitration problem based on the 2016 SIAC Rules, designed to provide an opportunity for young practitioners to hone their oral advocacy skills through making submissions before leading practitioners from both civil and common law jurisdictions.

The mock arbitration problem involved a joint venture dispute between one Claimant and two Respondents. The Claimant had applied, before an Emergency Arbitrator, for emergency interim relief and the Respondents had raised a number of jurisdictional objections in response.

A total of 357 people attended the workshops from 13 different jurisdictions. The workshops were well received and the feedback from attendees was that the subject matter of the workshop and the presentations were informative, practical and entertaining.
The first YSIAC Advocacy Workshop kicked off in Tokyo on 15 September 2016 in the offices of Nishimura & Asahi. Ms. Lim Seok Hui, CEO of SIAC and SIMC, delivered the Welcome Address and Mr. Aoi Inoue, Special Counsel at Anderson Mori & Tomotsune and Member of the YSIAC Committee, gave the opening remarks. Mr. Kevin Nash, Deputy Registrar & Centre Director of SIAC, provided the introduction to the case scenario and explained the concept of the workshop.

The mock Emergency Arbitrators were: Mr. Hiroyuki Tezuka, Partner at Nishimura & Asahi, Member of the SIAC Court of Arbitration and Chair of the SIAC Users Council Japan National Committee; Mr. Steven Lim, Managing Partner, Singapore at Nabarro LLP; and Mr. Chan Hock Keng, Partner at WongPartnership LLP.

During the first session, each party’s counsel made oral submissions on the three jurisdictional objections. Ms. Julie Raneda, Counsel at Schellenberg Wittmer Pte Ltd, Ms. June Yeum, Partner at Clyde & Co, and Ms. Yoko Maeda, Special Counsel at City-Yuwa Partners represented the Claimants in the mock arbitration. Mr. Yutaro Kawabata, Partner at Nishimura & Asahi, Mr. Mugi Sekido, Partner at Mori Hamada & Matsumoto and Mr. Aoi Inoue were the Respondents’ counsel.

The second session concerned the application for emergency interim relief. Mr. Paul Sandosham, Partner at Clifford Chance made oral submissions on the Claimant’s behalf, whilst Mr. Rob Palmer, Partner at Ashurst, represented the Respondents.

The panel discussion which followed the sessions was moderated by Mr. Kevin Nash. During the panel discussion, the panel members shared their views and experiences on the conduct of oral arguments and provided useful and informative tips on oral advocacy. Mr. Hiroyuki Tezuka provided concluding remarks to the workshop.

Report by Aoi Inoue, Special Counsel at Anderson Mori & Tomotsune.
YSIAC ADVOCACY WORKSHOP – MUMBAI

Mumbai was the second stop after Tokyo. The Mumbai YSIAC Advocacy Workshop also marked the beginning of SIAC’s events in India for 2016. It was held on 29 September 2016, and it commenced with an introduction by Mr. Pranav Mago, Head (South Asia) of SIAC. Ms. Lim Seok Hui, CEO of SIAC and SIMC, welcomed the over 120 delegates and introduced the SIAC Rules 2016, which formed the basis of the mock arbitration for the workshop. Mr. Cyril Shroff, Managing Partner of Cyril Amarchand Mangaldas, and the venue sponsor, delivered the opening address. Mr. Ankit Goyal, Partner at Allen & Gledhill and Co-Chair of the YSIAC Committee, presented a brief account of the schedule and objectives of the event.

The mock Emergency Arbitrators were: Mr. Darius Khambata, Senior Advocate of the Bombay High Court; Ms. Sherina Petit, Partner at Norton Rose Fullbright; and Mr. Alvin Yeo SC, Chairman and Senior Partner at WongPartnership LLP.

During the first session on the Emergency Arbitrator’s jurisdiction, Mr. Udit Mendiratta, Senior Associate at Trilegal, challenged jurisdiction on behalf of the Respondents on the basis that the arbitration clause was pathological. In response, Mr. Sahil Kanuga, Senior Associate at Nishith Desai Associates, defended the arbitration clause, relying on the judgement of the Supreme Court of India in Pricol to support the Claimant’s case. Mr. Madhur Baya, Founder of Lex Arbitri, continued the arguments for the Respondents with respect to the breach of a mandatory pre-condition to arbitration. Ms. Sapna Jhangiani, Partner at Clyde & Co., responded and focused on the factual matrix of the mock case. The final preliminary issue on the proper parties to the arbitration was presented by Mr. Vivekananda N, Counsel at Allen & Gledhill LLP, and Ms. Shalaka Patil, Senior Associate at Cyril Amarchand Mangaldas, for the Respondents and the Claimant respectively. Throughout, the Emergency Arbitrators interjected with questions.

At the second session on the application of emergency interim relief, Mr. Kabir Singh, Partner at Clifford Chance LLP and Mr. Sumit Rai, Partner at Economic Laws Practice, presented arguments on behalf of the parties on the applicable test required for the emergency relief sought. The Emergency Arbitrators thoroughly tested the arguments, including by close examination of the authorities cited by counsel. The final arguments on the question of whether the relief should be granted was presented by Ms. Niyati Gandhi, Associate at Nishith Desai Associates, and Mr. Samuel Leong, Associate at Norton Rose Fulbright.

The proceedings were followed by a Q&A session with the panel of Emergency Arbitrators moderated by Mr. Kevin Nash. The panelists remarked on the different styles of advocacy showcased during the workshop, which was a prevalent feature of international arbitration. They also shared valuable career insights and anecdotes with the attendees.

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YSIAC ADVOCACY WORKSHOP – SEOUL

“Practice, practice and practice,” and “challenge the status quo.”

These were the two top tips Dr. Eun Young Park, Partner at King & Chang, shared with young practitioners at the third stop of YSIAC Advocacy Workshop roadshow in Seoul. The participants in the workshop had the opportunity to put this advice into practice and gain invaluable lessons on advocacy from the four eminent arbitrators who comprised the panel of Emergency Arbitrators: Ms. Sae Youn Kim, Partner at Yulchon LLC; Mr. Toby Landau QC, Barrister and Arbitrator at Essex Court Chambers; Mr. Kevin Kap-You Kim, Partner at Bae, Kim & Lee LLC; and Dr. Park.

Ms. Lim Seok Hui kicked off the workshop with a welcome address and remarks on the emergency arbitrator procedure under the 2016 SIAC rules. Dr. Park then gave an opening address whereby he noted that the growing number of initiatives by young lawyers, exemplified by the success of groups like YSIAC, is one of the main factors shaping the future of arbitration. Dr. Park encouraged young practitioners to be relentless, both in honing their skills and challenging traditional ideas.

Ms. Sue Hyun Lim, Partner at Bae, Kim & Lee LLC, introduced the case scenario. During the first session, Ms. Saemee Kim, Associate at Lee & Ko, and Ms. Seungmin Lee, Partner at Shin & Kim appeared on behalf of the Claimant on the jurisdictional issues. The Respondents were represented by Mr. Byungsup Shin, Attorney at KL Partners, and Mr. Harold Noh, Senior Associate at Quinn Emmanuel Urquhart & Sullivan LLP. Parties’ counsel presented their cases forcefully, and were calm in the face of numerous interventions by the panel.

The second session kicked off with oral submissions by Ms. Una Cho, Attorney at Kim & Chang for the Claimant on the application for emergency interim relief. Mr. Jern-Fei Ng, Barrister at Essex Court Chambers represented the Respondents in the application.

The mock hearing was followed by a feedback session led by Professor Joongki Kim. All four arbitrators expressed their shared appreciation for the high quality of advocacy. The panelists were all in agreement that the key to great advocacy is being “likable.” Mr. Landau QC advised advocates against fighting with the arbitrators that they were trying to persuade, and if the tribunal is not with them on a point, that it would be best to leave the point and move onto the next. Ms. Kim also counselled against an aggressive style, and said that an advocate should aim to be soft, slow and clear.

In response to a question from the audience, the arbitrators shared their tips on developing advocacy skills through means other than appearing before

3 Report by Jae Hee Suh, Associate at Allen & Overy.
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arbitral tribunals. Dr. Park said that advocacy is ultimately about persuasion and one could benefit from practicing on persuading one’s friends and colleagues, even about daily matters. Mr. Kim suggested that one should take advantage of various opportunities for public speaking, including conferences, internal seminars, or even acting. Professor Kim concluded the session by noting that advocacy is an art, not a science.

YSIAC ADVOCACY WORKSHOP - SHANGHAI

The fourth stop of the YSIAC Advocacy Workshop was held on 26 October 2016 at Dentons’ Shanghai Office. Ms. Lim Seok Hui, CEO of SIAC and SIMC, delivered the welcome address and extended her gratitude to the attendees. Mr. Hu Ke, Partner at Jingtian & Gongcheng, gave an introduction to the case scenario and explained the workshop.

The panel consisted of Mr. Yang Ing Loong, Partner at Latham & Watkins; Mr. Chan Hock Keng, Partner at Wong Partnership LLP; Mr. Chen Luming, Partner at JunHe LLP; and Ms. Kathryn Sanger, Partner at Herbert Smith Freehills.

During the first session, parties’ counsel made oral submissions on the jurisdictional objections. Claimant’s counsel were Mr. Ma Han, Associate at Hui Zhong Law Firm; Mr Zhang Liangmin (Joe), Associate at Jingtian & Gongcheng; and Mr. Zhang Cunyuan, Associate at Zhong Lun Law Firm. Respondents’ counsels were Mr. Gong Suni, Associate at Broad & Bright Law Firm; Ms. Wang Jie (Christina), Legal Consultant at Debevoise & Plimpton LLP; and Mr. Chen Yuwei, Associate at JunHe LLP. Parties’ counsel advocated zealously for their respective positions. The panel members raised pertinent questions during each counsel’s oral submissions.

The second session involved oral submissions on the application for emergency relief. Claimant’s counsel were Mr. Li Xinli (David), Senior Associate at Dentons Shanghai Office, and Mr. Mu Di (Vincent), Counsel at Fangda Partners. Respondents’ counsel were Mr. Yang Yi (Blake), Associate at Martin Hu & Partners and Ms. Ye Weina, Senior Associate at Herbert Smith Freehills.

The panel discussion which followed the sessions was moderated by Mr. Kevin Nash, Deputy Registrar & Centre Director of SIAC. During the discussion, the panel members shared their views and experience on how to conduct oral arguments and discussed the differences in arbitration and cross-examination practices under civil law and common law. They provided feedback for each counsel’s performance and gave useful and informative tips for advocacy. Finally, Ms. Ariel Ye, Partner at King & Wood Mallesons, provided the closing remarks. She shared her first arbitration experience.

4 Report by Gayle Li, Legal Translator at Dentons Shanghai Office.
and encouraged the young practitioners to continuously hone their oral advocacy skills.

**YSIAC ADVOCACY WORKSHOP – MANILA**

“Mud slung is ground lost.” This was the advice given by Mr. Gary Born, President of the SIAC Court of Arbitration and Partner at Wilmer, Cutler, Pickering, Hale & Dorr LLP, during his opening remarks for the YSIAC Arbitration Workshop in Manila on 25 November 2016. Distinguished speakers, lawyers, advocates and arbitrators gathered at the Romulo Mabanta Buenaventura & de los Angeles Law Offices (Romulo) to do just that—gain ground and build on it.

The panel of Emergency Arbitrators comprised Mr. Gary Born; Mr. Chou Sean Yu, Partner at WongPartnership LLP; Mr. Louie Ogsimer, Partner at Romulo; and Ms. May Tai, Partner at Herbert Smith Freehills.

At the first session on the jurisdictional issues, the oral submissions for the Respondent were presented by Mr. Russel Rodriguez, Partner at SyCip Salazar Hernandez & Gatmaitan and Mr. Roland Glenn Tuazon, Senior Associate at Romulo on behalf of the Respondents. The Claimant was represented by Mr. Christopher Louie Ocampo, Senior Associate at the Angara Abello Concepcion Regala & Cruz Law Offices and Mr. Dranyl Jared Amoroso, Associate at the Quisumbing Torres Law Offices.

On the application for emergency interim relief at the second session, Ms. Wendy Lin, Partner at WongPartnership LLP, represented the Claimant and Ms. Katie Chung, Senior Associate at Norton Rose Fulbright (Asia) LLP, acted for the Respondents.

Every advocate structured his presentation and arguments differently, and each had a distinct advocacy style. Some chose to present using a storyline and some presented their arguments thematically.

The panelists asked a range of questions, testing not only the advocates’ knowledge but also their ability to think and respond on their feet under pressure.

After the session, the panelists shared insights about oral advocacy and arbitration in practice, highlighting that arbitration is a growing form of dispute resolution, one that we would see further developments in the years to come.

**CONCLUSION**

The YSIAC Advocacy Workshops in 2016 provided a valuable platform for young practitioners to hone their oral advocacy before leading practitioners, and for the exchange of ideas on advocacy between practitioners in the field both regionally and internationally. The workshops were a tremendous success by all accounts, and are likely to continue in future years.

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5 Report by Ana Margarita A. Rodriguez, Associate at Angara Abello Concepcion Regala & Cruz Law Offices.