Is Increasing Gender and Ethnic Diversity in Arbitral Tribunals a Valid Concern and Should Arbitral Institutions Play a Greater Role in Ensuring Diversity?
by Dina Prokic, Woods LLP

Beyond “Pale, Male and Stale”: The Special Role of Arbitral Institutions in Promoting Tribunal Diversity
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In the past decade, the world has witnessed the election of a number of female heads of state, as well as USA’s first black President, Canada’s first gender-balanced cabinet and France’s youngest President. Hollywood released a first all-Asian cast movie, while the Academy of Motion Picture Arts and Sciences awarded Best Picture to an LGBTQ-related film for the first time in 2017. A number of companies have appointed female CEOs, while fashion brands have instituted new posts for “Diversity Chief Officers”. Evidently, conversations about “inclusion” and “diversity” permeate every sector of today’s society. Numerous initiatives like Arbitral Women and the Equal Representation in Arbitration Pledge demonstrate that international arbitration is no exception.

Is increasing gender and ethnic diversity in arbitral tribunals a valid concern?

The issue of diversity provides fruitful soil for any kind of debate. For example, why is gender at the center of discussion in international arbitration, when, in other parts of life, so many initiatives aim to diminish the gender-based distinctions? Fashion brands are promoting agender apparel,1 linguists are seeking to gender-neutralize languages,2 girls are given boys’ names,3 the number of people identifying themselves with non-binary definitions is growing, etc.4 Instead of highlighting somebody’s gender, should we not yearn to accentuate that individual’s suitability for the role of arbitrator based on their educational background, experience as counsel, publications and conference presentations, teaching engagements, to name a few? As for ethnic diversity, while it may be that arbitration tribunals in the EU and Switzerland are fairly “uniform”,5 does the statement hold true on a global level (especially considering the rise of arbitral institutions and the development of arbitration culture in virtually all corners of the world?)

There are probably as many possible answers to the above question, as there are stakeholders in international arbitration. For those who fall outside the “pale, male and stale” club,6 increasing ethnic and gender diversity conceivably ranks high on the wish list. Conversely, for commercial parties who are considering to resolve their disputes in arbitration, promoting diversity is the least important concern.7 Yet, what parties care about is time- and cost-efficiency of dispute resolution and, at present, neither meets their expectations.8 Moreover, 50% of respondents to the 2010 Queen Mary Survey were disappointed by the performance of an arbitrator, either because of arbitrator’s tardiness in rendering the award, lack of knowledge, or some other reason.9 One way to tackle this criticism is to widen the pool of available arbitrators: the “fresh faces” may be prepared to work quicker and cheaper than their busier, more well-known colleagues, in order to get an opportunity to build their name as arbitrator. Thus, despite the clients’ blanket indifference to diversity,

4 J. Jackman, ‘The number of non-binary students has skyrocketed’, 1 October 2018, https://www.pinknews.co.uk/2018/10/01/non-binary-number-students-skyrocketed/.
5 A large-scale survey that was delivered in all EU Member States and Switzerland showed that only 30 of 871 respondents described their ethnicity as other than “White”, including those who also self-identified as “white”. See A. N. Cole and P. Ortolani, ‘Diversity in arbitration: Insights from a large scale empirical study’, 12(4) TDM (2015), 10 (“Cole and Ortolani”).
6 M. D. Goldhaber, ‘Madame La Presidente – A woman who sits as president of a major arbitral tribunal is a rare creature. Why?’, 3 TDM (2004).
they have a vested interest in appointing diverse arbitrators. Putting lack of diversity in this context, and understanding that some of arbitration’s major flaws could be mitigated by including arbitrators of different gender and various ethnic backgrounds, makes increasing diversity in arbitral tribunals an extremely valid concern.

**Should arbitral institutions play a greater role in ensuring diversity?**

The question of whether “arbitral institutions should play a greater role in ensuring diversity” has yielded no uniform response. While nearly half of respondents (45%) in the 2018 Queen Mary Survey answered affirmatively, opinions to the contrary exist. Several arguments can be raised to contradict the position that arbitral institutions should play a greater role in ensuring diversity, and, in my view, many of them revolve around the inherent vagueness of the task. First, the term “ethnic diversity” suffers from ambiguity. While the International Labor Organization (“ILO”) does not define this particular term, it provides an explanation of the terms “diversity” and “ethnic group”. Diversity “refers to a commitment to recognizing and appreciating the variety of characteristics that make individuals unique in an atmosphere that embraces and celebrates individual and collective achievement.”

An “ethnic group” is understood to mean:

> “a group of people whose members identify with each other through such factors as common heritage, culture, ancestry, language, dialect, history, identity and geographic origin. It includes people from a range of backgrounds including indigenous and tribal peoples, people of African and Asian descent, Roma people and migrant workers.”

The fact that belonging to a particular ethnic group is contingent on an individual’s inner identification, and not some objectively verifiable criteria like citizenship, makes “ethnic diversity” seem like a very subjective construct. Compared to race, “nationality” and “citizenship”, “ethnicity” seems to be the hardest one to define. How can an arbitral institution attempt to increase ethnic diversity, when the underlying concept of “ethnicity” is unclear?

Second, there is no set mark that arbitral institutions should aim to reach. According to the ILO, a comprehensive ethnic diversity policy should include its objectives, as well as define core terms and concepts, envision any reward for progress, and provide for review and sanction mechanisms. The question then is: At what stage would arbitration be deemed sufficiently diverse? In the UK, for example, law firms are awarded with “Gold Standard” certification if they meet three of the five following criteria: (i) 20% of equity partners or, alternatively, 33% of the attorneys becoming equity partners during the past twelve months are women; (ii) 20% of the firm’s primary governance committee are women; (iii) 20% of the firm’s compensation committee or its equivalent are women; (iv) 15% of the top half of the firm’s equity partners in terms of compensation are women; (v) 7% of women equity partners are non-white or 3.5% of women equity partners are LGBT. Are these levels of percentages worthy of the highest recognition? Should arbitral institutions strive to achieve diversity on just 20% of their tribunals? Or should they aim higher? By giving arbitral institutions an unclear task, would we not be asking them to right the centuries of injustice, instead of letting them do what they are supposed to contend with. … Change needs to begin in law schools.”

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11 See, for example, L. Greenwood, ‘Tipping the balance – diversity and inclusion in international arbitration’, 33 Arbitration International (2017) 99, 104-105 (“Addressing the lack of diversity on tribunals, simply cannot be wholly delegated to the institutions in order to absolve the parties of responsibility.”); and S. A. F. Haridi, ‘Towards greater gender and ethnic diversity in international arbitration’, 2(1) Bahrain Chamber for Dispute Resolution International Arbitration Review (2015) 305, 315 (“at each stage of the career pipeline, every practitioner must take the initiative to combat the factors that lead diverse candidates to leave the arbitration profession and/or experience obstacles that their white male counterparts need not contend with. … Change needs to begin in law schools.”).
13 ILO Promoting Equity, 71.
17 ILO Promoting Equity, 21.
to: administer proceedings? If arbitral institutions should play a greater role in increasing diversity, then the question is: how?

Apart from capturing information about arbitrators and choosing diverse candidates whenever they are asked to make an appointment, what more can institutions do? To answer this question one must first look at some of the reasons behind the present lack of diversity. Then, one must contrast the likelihood of success of proposed measures with the efforts that an institution must invest, i.e. assess whether the potential outcome warrants distracting the institution from its primary task: administering cases.

The lack of diversity on tribunals is linked to arbitration’s confidential nature. Catherine Rogers, Louise Barrington and Mirèze Philippe rightly questioned: “What happens if an arbitrator has a fantastic reputation, but no one knows about it?” Similarly, what happens if somebody acquires significant experience by serving as tribunal secretary, but that fact remains unknown, causing this individual to be overlooked as a potential ‘fresh’ arbitrator? While some arbitral institutions have begun to publish arbitrators’ names and nationalities (like the ICC, CAM-CCBC), information about tribunal secretaries is strikingly absent.

Considering that tribunal secretaries are appointed in 35% of cases, and that they are oftentimes junior lawyers, publishing their names and nationalities would shed light on knowledgeable individuals, thus possibly increasing the pool of potential arbitrators.

Furthermore, the non-diverse character of arbitration tribunals could be explained by the narrow selection of applicable laws in contracts that give rise to disputes. While parties to arbitral proceedings hail from all corners of the world, the laws they choose to govern their relations are not nearly as diverse; English law is the disputants’ preferred choice. Knowledge of the law applicable to the contract is one of the most influential considerations in the process of choosing an arbitrator (other factors being the candidate’s commercial understanding of the relevant industry sector, and experience with the arbitral process.) Given English law’s popularity, the prevalence of native English-speakers or common-law trained arbitrators can hardly be surprising. SIAC’s Annual Report for 2018 is illustrative of the correlation between the governing law and the arbitrators’ nationality: the most frequently chosen laws were those of Singapore (56%) and England and Wales (18%); the largest number of arbitrators came from Singapore (124) and the United Kingdom (85). Similarly, the highest number of arbitrators in HKIAC administered arbitrations in 2018 came from Hong Kong and the United Kingdom, reflecting the disputants’ preferences for Hong Kong and English law. LCIA’s recent data also confirms that the high number of British arbitrators is a consequence of English law’s predominance in contracts.

“While some arbitral institutions have begun to publish arbitrators’ names and nationalities, information about tribunal secretaries is strikingly absent.”

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20 Greenwood and Baker, 421.
26 2010 QM Survey, 11.
If arbitral institutions are to increase diversity in arbitrator appointments, they should attempt to influence the parties’ preferences regarding applicable law before the dispute has even arisen. This would require an arbitral institution to take on the role of an “educator”, i.e. it would familiarize commercial parties by, for example, holding conferences or workshops, with the advantages of choosing certain, presently “lesser known”, national laws for different types of contracts. Subsequent disputes arising from those contracts could possibly generate the need for arbitrators with more diverse backgrounds.

Finally, the gender imbalance on arbitration tribunals is frequently attributed to the fact that few women reach the top echelons of the profession, leading to a smaller pool of possible female arbitrators (the so-called ‘pipeline leak’ problem). While arbitral institutions have little sway over how law firms operate and who they promote, they could facilitate ‘entrance’ into this ‘pipeline’ for aspiring arbitration practitioners, irrespective of gender or ethnic origin. One of the ways this could be done is by sponsoring the participation of financially disadvantaged university teams at the Willem C. Vis Moot, which is probably the first arbitration-related experience for many. Another possibility is to increase the appeal of their internship opportunities for diverse candidates. While these internships undoubtedly provide interns with invaluable practical experience at the outset of their careers, they are modestly or not at all remunerated. In addition, the responsibility to secure requisite visas usually lies with the prospective intern. These circumstances can discourage many from even applying, thus depriving them from the indispensable practical experience and possibly moving the trajectory of their career away from international arbitration. Making these internships financially realistic for people coming from outside the main arbitration centers and assisting with visa-related technicalities could change that, as well as influence the composition of arbitration tribunals in the future.

Each institution should assess the pros and cons of any diversity-related measure. In my view, the benefits seem to prevail: in the short term, taking a pro-active stance would contribute to the institution’s positive public image, and in the long run it could raise the quality of international arbitration, thus cementing its reputation of a preferred dispute resolution mechanism in international transactions.
Michael Goldhaber, writing in 2004, described arbitral tribunals as being predominantly “pale, male and stale”. Fast-forward to today and that description is still accurate. According to the 2018 QMUL International Arbitration Survey (“the QMUL Survey”), while progress has been made in relation to gender diversity over the past few years, ethnic diversity lags far behind. Even for the former the situation is not yet ideal, with the rough figure of women on international arbitration tribunals being pegged at a mere 15%. I argue that institutions should play a greater role in ensuring diversity because: (a) greater diversity is desirable but other stakeholders lack the motivation to act; and (b) institutions have several powerful tools at their disposal to further the cause of diversity.

Why increasing diversity is a valid concern but most stakeholders are not acting

It has been argued that diversity is intrinsically valuable, increases the legitimacy of arbitration, and improves the quality of tribunals’ decision-making. But if diversity brings these benefits, why do tribunals remain persistently homogenous? The answer is that these commonly touted advantages are, surprisingly, more apparent than real.

First, diversity is not intrinsically valuable. A thought experiment demonstrates this: If diversity were valuable in and of itself, we would be happy with increasing the female prison population because women are under-represented. But few people subscribe to that view.

Secondly, the argument from legitimacy is weak. The argument goes that a judicial system that reflects its users leads to greater acceptance and better compliance with the decision made, and the same goes for arbitration. Further, optics matters, and parties will be more likely to perceive that their arguments have been properly heard and understood if there is someone “like them” on the tribunal. But the analogy to the judiciary is false because tribunals are not state organs with symbolic value. The types of cases where having someone of the same gender or ethnicity would matter (eg, sexual harassment or discrimination cases) are unlikely to even be arbitrable. The optics argument also cuts both ways. Notably, institutional rules regularly prescribe that sole arbitrators or presidents be of a different nationality from the parties unless parties do not object, to advance the impression of neutrality and impartiality.

Thirdly, the claim that diversity improves decision-making is limited in applicability and difficult to verify. It may well be true that arbitrators with differing characteristics will bring more varied skills and perspectives to the table. Diversity also reduces groupthink, which is problematic because such concurrence-seeking behaviour within a cohesive ingroup tends to override a realistic appraisal of the appropriate course of action. However, these benefits are confined to the scenario of multi-person tribunals. Moreover, unlike the corporate context where the advantage of boardroom diversity in decision-making is quantifiable by improved returns on investment, there is no good proxy for award
quality. Even if data on the success rates of setting aside or resisting enforcement were available, it would be unhelpful because the grounds for challenge practically never delve into the merits.\textsuperscript{13}

I suggest that in truth, diversity matters to us because the lack of tribunal diversity is attributable to unfair differentiation by virtue of gender or ethnicity ("pipeline leak", where fewer females and non-whites make it to the top of the legal profession, and "pipeline block", where they face additional hurdles in being appointed such as implicit bias\textsuperscript{14}), which we abhor because such notions attack the core idea of equal moral worth and dignity that we hold dear.

Unfortunately, such highfalutin “fluffy” notions find little traction with parties, who (to paraphrase Prof Emmanuel Gaillard) want to win fast, pay minimally, and recover all their costs.\textsuperscript{15} Applying this pragmatic calculus, parties have no impetus to go out of their way to improve diversity given its lack of intrinsic value or quantifiable benefits. As for arbitrators, they have limited power to effect change because the prerogative for appointment does not lie with them. By a process of elimination, the spotlight quite naturally lands on arbitral institutions.

\textbf{Arbitral institutions have the tools to improve diversity}

In the QMUL Survey, a significant proportion of respondents (45\%) believed that institutions are best placed to ensure improve tribunal diversity.\textsuperscript{16} Through examining the following three propositions, I will establish that this belief is well-founded. Institutions should play a greater role in improving diversity because they can make a real difference:

(a) institutions can exercise direct influence over the outcome when they are called upon by parties to select the tribunal (the “Direct Influence Argument”);
(b) institutions can indirectly shape parties’ choices by curating more inclusive panels of recommended arbitrators (the “Indirect Influence Argument”);\textsuperscript{17} and
(c) institutions can monitor the diversity problem and implement corrective measures by leveraging the data they collect (“the Data Argument”).\textsuperscript{18}

\textbf{The Direct Influence Argument}

Institutions can make – and have made – a difference in improving diversity on tribunals by exercising their power of selection. For instance, the LCIA selected female arbitrators almost twice as frequently as parties did in 2018.\textsuperscript{19} But this raises the questions of how often it is possible, and in any case whether it is desirable, for institutions to do so.

On the first question, the impact of direct selection necessarily depends on how frequently institutions are actually empowered to make the selection.

\textsuperscript{12} Necessary because awards are infrequently published.
\textsuperscript{14} Greenwood & Baker, 418–419.
\textsuperscript{16} QMUL Survey, 19.
\textsuperscript{17} QMUL Survey, 17.
\textsuperscript{18} dos Santos, 14.
\textsuperscript{19} LCIA 2018 Annual Casework Report, 14.
Party autonomy is the cornerstone of arbitration, and parties have the final say over arbitrator choice unless that power is delegated to institutions. Empirically, the picture is a mixed one as this author's unscientific\(^8\) survey of data from the ICC, LCIA, SIAC and HKIAC demonstrates: ICC data shows that arbitrators were chosen by the institution in less than 30% of cases. For the LCIA, the figure is closer to 40%, while the SIAC and HKIAC select arbitrators in more than 50% of cases per year. But this divergence is not fatal; all this means is that we cannot count solely on institutions to remedy the diversity problem. The data must also be understood in the light of how institutional arbitration predominates over ad hoc arbitration,\(^21\) meaning that even if institutions appoint arbitrators only in a fraction of cases this translates into large numbers in absolute terms.

Secondly, even if institutions can choose to improve gender and ethnic diversity through their choice of arbitrator, they must tread carefully to avoid creating the appearance of gender or ethnicity-based affirmative action. There is a very real danger of perpetuating the very stereotypes this approach is meant to address, if female and non-white arbitrators are appointed precisely because of these characteristics and hence perceived as less capable for needing this “crutch.”

Against this, I argue that it is possible for institutions to appoint more diverse tribunals without falling into the affirmative action trap. Institutions already emphasise objective criteria for arbitrator selection (eg, the SIAC states that selection is based on “expertise and experience relevant to the dispute”\(^22\)). Sometimes the statistics also speak for themselves, in negating any impression of tokenism or affirmative action at the expense of whether arbitrators are really up to scratch. To take one example, in 2018 the Stockholm Chamber of Commerce appointed women and men in a 29:71 ratio, which is not significantly different from the 24:76 ratio for appointment by parties and much lower than the 56:44 proportion of women to men appointed by co-arbitrators.\(^23\) Finally, it would be counter-productive for institutions to appoint arbitrators who are not the best qualified for the job because that would translate into poorer satisfaction with the arbitration and reflect badly on the institution.

Therefore, the direct selection of arbitrators is both feasible and desirable, thereby constituting a potent tool in the arsenal of arbitral institutions for improving diversity.

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\(^8\) Not all institutions report statistics the same way.\(^2\) Sundaresh Menon, “The Special Role and Responsibility of Arbitral Institutions in Charting the Future of International Arbitration”, keynote address at the SIAC Congress 2018 (“Menon”), [8].

\(^21\) SIAC 2016 Annual Report, 16.

The Indirect Influence Argument

Next, institutions can exert indirect influence to mitigate the diversity problem by providing an arbitrator panel or shortlist for parties to choose from. This helps to alleviate the form of cognitive bias known as the availability heuristic – the mental shortcut we use to make decisions based on immediate examples we think of – which creates a self-reinforcing cycle of renowned or established arbitrators being frequently reappointed because they come easily to mind.

However, such lists remain susceptible to other kinds of bias such as gender stereotyping and in-group bias, because they frequently comprise a list of names and a CV from which gender and ethnicity are obvious. Putting it another way, it would not further the cause of diversity even if an institution has a diverse panel if parties act on their biases to always pick old, white men. One proposed solution is to omit the names and genders from a list of arbitrators, drawing from the experience of increasing female representation in professional orchestras. Once a screen was erected in front of the performer so judges could not discern gender, female representation jumped from 10% to around 35%. But that solution is problematic when transplanted to our context because of how easy it is to search online for the answer, by matching CVs to identities. Renowned arbitrators might also be identifiable (thus preferentially selected) on the strength of their list of publications and cases handled alone.

There is another reason why the indirect influence that institutions can exert may be limited – parties do not appear to routinely rely on information from institutions to shortlist their arbitrators. The QMUL Survey identified the top three sources of information about arbitrators as word of mouth (77%), internal colleagues (68%), and publicly available information (63%). Arbitral institutions rank a distant sixth, at 40% of respondents. That institutions do not have a monopoly on information is reinforced by the increasing availability of tools like the GAR Arbitrator Research Tool and Arbitrator Intelligence Questionnaire, which provide information such as arbitrator qualifications, experience, case management styles and areas of specialisation. Considering the above, this iteration of the Indirect Influence Argument fails.

But there is a more sophisticated version of the Indirect Influence Argument: Institutions can shape parties’ choices through creating conditions that are conducive for them to select female arbitrators or those of different ethnicities. A common reason for not opting for a diverse tribunal is that parties prefer to “play safe” and go for the known arbitrator. But if a parallel list of arbitrators targeting lower-value disputes or charging lower fees is created, parties may be more willing to take a chance. While the danger is again that of cheapening the cachet of female and non-white arbitrators, the risk of this is arguably overstated. A similar strategy has been mooted for young arbitrators willing to take on lower-value cases to gain the necessary experience, making it clear that the bottom line is not gender, ethnicity or age but relative inexperience – which can be remedied given sufficient time and opportunity. The Indirect Influence Argument thus remains defensible.

The Data Argument

Finally, institutions can contribute significantly to the improvement of diversity through collecting, releasing, and using data.

What comes immediately to mind is data regarding arbitrators’ gender and ethnic breakdown. Such data is useful in raising awareness of the extent of the problem and providing a quantifiable way to measure progress. It is heartening that many institutions already make available such data to the public.

Less obvious, but potentially just as significant, is data about arbitrator availability. As an arbitrator takes on more cases there comes a point of diminishing returns in terms of efficiency and party satisfaction. Institutions can optimise arbitrator appointment by factoring in arbitrators’ pre-existing commitments; between two equally qualified arbitrators this could be a tiebreaker. Incidentally, the balance is more likely to tip in favour of female and non-white arbitrators if they are generally appointed less often and have less packed schedules, providing an objective reason.

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24 Greenwood & Baker, 419.
25 dos Santos, 8.
26 L Yong, “Will the post-Pledge field be pale stale and female?” Global Arbitration Review, 18 May 2018
to appoint them pursuant to the Direct Influence Argument. The beauty of this strategy is that the tiebreaker advantage would self-correct over time as the diversity problem becomes less pronounced. Of course, this strategy is contingent on institutions having data about arbitrators’ overall caseload. Short of asking arbitrators to periodically declare how many cases they have on hand, one way forward could be for institutions to establish a protocol for cross-institutional sharing of information about arbitrators’ caseload.

Accordingly, the Data Argument, too, supports the view that institutions can make a difference in resolving the diversity conundrum.

**Conclusion**

Arbitral institutions, the legal profession, and academia collective comprise an “epistemic community” bound by interests and expertise. Absent a supranational regulatory body, the development of norms must occur from within this epistemic community, through dialogue between its actors. Recognising the inertia that has paralysed parties from effecting positive change and the impracticability of arbitrators taking matters into their own hands, it is time for arbitral institutions to exercise thought leadership and step up to play a greater role, by fully utilising the tools and levers (as outlined above) at their disposal. In doing so, perhaps we might move finally beyond the tired trope of male, white re-appointees to give a fighting chance to anyone with the *will, skill* and *zeal*.  

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YSIAC ESSAY COMPETITION 2019 - 2nd Runner-up
INTERNATIONAL ARBITRATION AND MEDIATION:
FRIENDS OR FOES?
By Kevin Elbert, TSMP Law Corporation

Introduction

The dispute resolution market (including international arbitration and mediation) has grown significantly in the recent years. Given the increased usage of arbitration and mediation, it is now a misnomer to describe them as “alternative” dispute resolution – indeed, they have gone “mainstream”.

The relationship between arbitration and mediation is interesting in view of their respective developments. They are often viewed as “foes” because they are perceived to be substitutes – traditionally, as an alternative to litigation, parties either arbitrate or mediate.

Recently, due to the rise of arbitration-mediation hybrid mechanisms (the “hybrid mechanisms”), their relationship seems to gravitate towards that of “friends”. Under these hybrid mechanisms, a mediated settlement is recorded as a consent award, which is enforceable (almost) worldwide under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”).

This relationship may soon shift again. Following the adoption of the Convention on the Enforcement of Mediation Settlements (the “Singapore Convention”), mediated settlements could now be enforced internationally without relying on the arbitration processes.

In light of the above, this essay analyses whether arbitration and mediation are, at its core, “friends” or “foes”. Their relationship is complex: while there is (to a certain extent) competition between the two, an integration between the two processes could better assist parties to resolve their disputes. This essay thus suggests that they are neither “friends” nor “foes” – but “rivals”.

Arbitration and Mediation as Foes

Arbitration and mediation are the main dispute resolution products/offering if parties prefer not to litigate. As such, they are perceived as substitutes. This is even more so considering that a dispute can only be resolved substantively only at either forum (i.e. by way of arbitration or mediation). Arbitration and mediation are often viewed as competing for the same user base – and therefore traditionally described as “foes”.

However, this author submits that the above view is too simplistic. It fails to appreciate that each dispute resolution process has its own unique selling propositions (“USPs”) and therefore has a specialised target market, in terms of dispute and user profile. Arbitration and mediation are totally different dispute resolution processes which embrace different techniques, procedures and philosophies – they are aimed at different dispute and user profiles. While there is undoubtedly an overlap in the target market, they are not direct substitutes.

First, on the dispute profile. Arbitration specialises at resolving disputes where the principal remedies sought are typically in the form of damages and/or declarations. After all, arbitration is a rights-based adjudication process whereby parties refer their dispute to an arbitral tribunal, who will determine the dispute based on the applicable law.

While (in modern arbitral jurisdictions) a tribunal is generally empowered to order injunction and/or specific performance, it tends to be averse/reluctant to do so due to inter alia practical difficulties in enforcement.

On the other hand, mediation specialises at resolving disputes which require flexibility in terms of its outcome. This is unsurprising because mediation is a

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3 See for example, section 12(5) of the Singapore International Arbitration Act (Cap. 143A).
party-driven process and a mediator only facilitates and assists parties to agree on their desired outcome. The outcome, in the form of a mediated settlement, has endless possibilities as parties are free to settle on any terms they wish – notwithstanding such outcome/arrangement is not contemplated/ provided for under the underlying agreement. This is particularly useful to resolve complex disputes, for example, where a party’s performance is integral to the resolution of disputes.

For illustration, this essay considers a dispute involving a management of an IT system, where Party A contracts with Party B to build, develop and subsequently manage an IT system (which is critical for Party A’s business operations). In the event of a dispute (e.g. poorly managed services) and Party A intends to terminate the agreement and replace Party B with a third party vendor, it is not in Party A’s interest to immediately do so as it may result in Party B immediately ceasing work – this would be disruptive to Party A’s operations. Even if Party A could subsequently claim damages from Party B, certain irreparable damage could have been caused in the interim (e.g. reputational).

Instead, what Party A would want as part of the outcome of termination is a seamless takeover and/or transition from Party B to the new vendor – this would include Party B handing over to the new vendor all the source codes and documentation and knowledge transfer relating to the IT system. This outcome is more likely to be achieved by way of mediation, instead of arbitration – especially if the underlying agreement does not provide for such outcome/mechanism. Practically speaking, a tribunal may also have difficulties in making an order relating to hand-over due to the intricacies of the hand-over processes (e.g. timelines, milestones, etc).

Indeed, a 2016 survey conducted by the Queen Mary University (London) and White & Case LLP shows that within the Technology, Media and Telecoms industry, mediation is the most encouraged dispute resolution mechanism under the dispute resolution policy of the organisations surveyed.5

Second, on the user profile. A segment of the target market for mediation is parties who are more averse to approaching their disputes in an adversarial manner and parties with relationship to preserve. Forming a part of this target market is parties of Asian cultures, where conflicts are usually discouraged and where face-saving is highly valued.6 For example, the Indonesians value the practice of musyawarah or reaching agreement and consensus through negotiation, instead of letting a dispute be adjudicated.7

On the other hand, arbitration, being an adversarial process, is more suited for parties whose main aim is to resolve the differences between them – period; and it can do so quickly.8 At the end of the day, arbitration is a binary process – there will be a loser and a winner, which means that there will be at least one unhappy party. In the ordinary course of proceedings, there will inevitably be accusations and mudslinging. Hostility, antagonism and aggression are the hallmarks of the system. This makes it very difficult for parties to be on good terms after the arbitration ends.

To the extent that arbitration is a rights-based adjudication process, it is very much the same as litigation. This author could not have put it any better than Lord Sumption, who in his recent 2019 Reith Lectures series, described the binary nature of litigation as follows (emphasis in underline added): 9

Litigation can rarely mediate differences. It is a zero-sum game. Winner carries off the prize, the loser pays. Litigation is not a consultative or participatory process. It is an appeal to law. Law is rational, law is coherent, law is analytically consistent and rigorous. But in public affairs, these are not always virtues. Opacity, inconsistencies and fudge maybe intellectually impure, which is why lawyers don’t like them. But they are often inseparable from the kind of compromises that we have to make as a society if we are going to live together in peace.

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5 Queen Mary University (London) and White & Case LLP, “International Dispute Resolution Survey: Pre-empting and Resolving Technology, Media and Telecoms Disputes” http://www.arbitration.qmul.ac.uk/media/arbitration/docs/Fixing_Tech_report_online_singles.pdf; last accessed: 9 August 2019
6 See for example, Adrian Tan, “A kinder, gentler way to settle disputes, named after Singapore” The Straits Times (Singapore, 26 July 2019)
8 See for example, the Expedited Procedure under Rule 5 of the SIAC Rules 2016
The above description is apposite. Mediation may have its “opacity, inconsistencies and fudge” – it is nonetheless “inseparable” if parties want to continue and preserve their relationship.

The above demonstrates that arbitration and mediation have separate target markets in terms of dispute and user profile. Therefore, they are not direct substitutes.

That being said, it is undeniable there are disputes and/or users whose profile fall within the intersection of the two sets of target markets, and it is this overlapping market that arbitration and mediation are directly competing for – to this extent, they could be described as “foes”.

**Arbitration and Mediation as Friends**

Notwithstanding a degree of competition between arbitration and mediation, they can still be “friends”. The two processes can be deployed in a complementary way to effectively resolve disputes. According to data gathered from the Global Pound Conference series from 2016 to 2017, 52% majority of respondents indicated that the most effective commercial dispute resolution processes usually involve combining adjudicative and non-adjudicative processes.10

Arbitration and mediation complement each in at least two ways. First, by incorporating arbitration mechanism in the mediation process, it ensures the enforceability of mediated settlements. Typically, the use of mediation as a form of dispute resolution is limited in its efficacy because mediated settlements are only enforceable in the same way as any other contract. This may mean an onerous and lengthy journey to enforce it in foreign jurisdiction, in the event a party does not perform its end of the settlement. However, one of the main USPs of the hybrid mechanisms is that a mediated settlement could be recorded as a consent award, which is generally enforceable under the New York Convention.

On this note, this author suggests that the Singapore Convention would not diminish the importance of this synergy between arbitration and mediation; and the impact of the Singapore Convention should not be overstated. The Singapore Convention is still at its infancy and it remains to be seen how the corresponding Model Law is applied and interpreted by the signatory States. Further, while the Singapore Convention received a very warm welcome (with China and the USA being the first signatories), it will take time before more States sign and ratify the Singapore Convention11 – it takes half a century for the New York Convention to be what it is today.

Second, the hybrid mechanisms improve the cost effectiveness12 of dispute resolution. Cost effectiveness is especially important considering that there have been much complaints about the length and costs of arbitration, due to inter alia due process paranoia.13 By combining features of arbitration and mediation, parties could access a less costly and more flexible process whilst retaining the effectiveness of

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11 46 States have signed the Singapore Convention as at 7 August 2019. See for example, Cara Wong, “46 countries sign international mediation treaty named after Singapore” The Straits Times (Singapore, 7 August 2019).
12 Cost effectiveness refers to the proportionality of time or otherwise costs of the dispute resolution process to the result and overall value gained by the successful party, be it in terms of money or such other desired outcome.
the dispute resolution process. For instance, within the hybrid mechanisms, the discovery process in arbitration (which typically happens before the mediation process) allows parties to mediate with a better idea of their respective merits due to the disclosure of documents – and therefore potentially increasing the chances of a successful mediation.

With a view of bolstering the cost effectiveness of the hybrid mechanisms, there is also a trend of appointing the same person as both the mediator and the arbitrator within the process. Where the mediator and arbitrator are the same person, there is familiarity with the dispute and hence there is no need for any duplication of work, additional expense or delay when switching from one process to another.

Jurisdictions such as Singapore and Hong Kong have expressly allowed for such possibility under its arbitration legislation if all parties consent to the same. Further, to avoid a potential challenge on the award on this process, the respective legislation expressly provides that no objection may be made against the conduct of the arbitral proceedings by an arbitrator solely on the ground that the arbitrator had acted previously as a mediator.

There have also been judicial decisions suggesting that hybrid mechanism per se is not a factor in support of setting aside an award. In the case of Gao Haiyan v Keeneye Holdings Limited (CACV 79/2011), the Hong Kong Court of Appeal found no apparent bias simply because of the underlying Med-Arb process. In assessing whether the mediation process therein resulted in apparent bias or any impartiality on the part of an arbitrator, the Court also considered the culture of the parties and the practice that was normally accepted in Xi’an (being the seat of arbitration).

The above demonstrates how arbitration and mediation, albeit two different process, can be deployed in synergy to better resolve disputes between parties – and therefore could be described as “friends”.

**Conclusion**

The notion that mediation and arbitration are substitutes or are somehow competitors in the dispute resolution landscape demonstrates a lack of understanding in the nature and USPs of arbitration and mediation and their role in the greater dispute resolution market. The sentiment that arbitration and mediation are “foes” may perhaps have been promulgated by traditional dispute resolution practitioners, who used to practise only either arbitration or mediation; or traditional dispute resolution centres that tend to administer only either arbitration or mediation.

However, with practitioners and dispute resolution centres getting increasingly progressive and providing both services (by way of collaboration or otherwise) and the emergence of the hybrid mechanisms, this sentiment may no longer hold true.

The terms “friends” or “foes” are uni-dimensional, and neither reflect the true relationship between arbitration and mediation. Together, they can be deployed in synergy to resolve disputes efficiently. Individually, each of them can achieve the best possible outcome for parties depending on the nature of the disputes and parties – though, they are also still in competition for a market share and the same user base.

For the reasons above, in this author’s view, they are neither “friends” nor “foes” simpliciter. Given that they are competing with another for the same objective of resolving disputes, perhaps they are better described as “rivals” – friendly rivals.

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14 Section 33 of the Hong Kong Arbitration Ordinance (Cap. 609).
15 Section 17 of the Singapore International Arbitration Act (Cap. 143A).
16 See for example, the SIAC-SIMC Arb-Med-Arb Protocol.
YSIAC Conference Report
HOW TO WIN AN ARBITRATION
By Yi-Jun Kang, Clifford Chance Pte Ltd

The Young SIAC (“YSIAC”) Conference 2019 took place on 20 November 2019, attracting young arbitration practitioners from all across the globe. The theme of the 2019 Conference was “Arbitration 2.0 – Navigating New Frontiers in International Dispute Resolution”, which explored the impact of various trends, technologies and innovations in international arbitration.

Nonetheless, while trends may come and go, the goal of an arbitration practitioner remains constant – that is to obtain an ultimate victory in every arbitration. Keeping this overarching goal in mind, the afternoon panel session (‘How to win an arbitration’) explored what means can be used to achieve this and the panellists also shared how to effectively use those means.

The panel was moderated by Ms Pauline Low (Associate Counsel, SIAC) and comprised Mr Lau Wai Ming (Senior Legal Counsel, Accenture), Mr Jern-Fei Ng QC (Barrister, Essex Court Chambers), Mr James Nicholson (Senior Managing Director, Head of Asia Economic & Financial Consulting, FTI Consulting), Mr Siraj Omar SC (Director, Drew & Napier LLC) and Mr Andrew Pullen (Barrister, Fountain Court Chambers).

Panel discussion

The panel discussion began with the quintessential question – what exactly is a “win” in arbitration? The panel was quick to disregard the traditional understanding of winning. Instead, there was immediately a consensus amongst the panellists that a “win” must necessarily be viewed from the lens of the client and is therefore an outcome which achieves a client’s objectives and is in the best interests of the client.

While there is of course no magic formula to achieve a “win” in arbitration, the panel shared many pearls of wisdom gleaned from their years of experience. Some of their tips include the following:

Eyes on the prize: Mr Ng QC shared that one should never lose sight of the end goal, i.e. a favourable and enforceable award. This focus therefore informs everything he does from the outset – the case theory advanced on behalf of one’s clients as well as the conduct of the arbitration process.

Getting a head-start from inception: Mr Omar SC highlighted that dispute resolution clauses are often overlooked during the drafting process. He emphasised that a well-framed arbitration clause is half the battle won. He noted that while clients may not be cognisant of this, it is the lawyers’ job to think about potential disputes which may arise, the potential reliefs the client may need, enforcement issues, and hence frame the dispute resolution clause accordingly.

Starting your case on the right foot: Mr Pullen highlighted that from the perspective of a claimant, thorough ground work should be done before the commencement of an arbitration. In particular, he said that even before filing a notice of arbitration, a party should fully consider whether its claims and causes of action will withstand scrutiny, test the veracity of the available evidence and potentially even have experts do a sanity check on quantum issues. This approach was supported by Mr Nicholson, who stated that a win is getting most of the damages claim in an arbitration, if not all.

Appointing the right arbitrators: The constitution of the tribunal is (perhaps unsurprisingly) a critical element to ensuring ultimate victory. Mr Ng QC noted that the seat of arbitration, governing law and the nature of dispute are the typical factors which weigh on a party’s mind when nominating an arbitrator. However, a less common but equally critical consideration should be that of business practices and legal traditions involved in a particular dispute. By way of example, he added that if one’s client operates in a particular jurisdiction where business is usually conducted informally, having an arbitrator who is aware of and sensitive to such particular cultural nuances would go a long way in obtaining a favourable outcome for one’s client.

Selecting the right expert and utilising experts effectively: Many practitioners will be aware that the selection of expert witnesses is by no means a straightforward process. Mr Pullen highlighted that the most important considerations are usually
subject area expertise and experience in acting as an expert witness in arbitrations. He mentioned that it would be ideal if a potential candidate possesses both but sometimes, especially in particularly esoteric fields, it may not be easy to identify such an individual. Mr Nicholson agreed, and noted that the most eminent expert in a particular field may not necessarily be the best expert witness. He further stated that the advantages of having a good expert witness are largely twofold: it brings the dual benefits of efficiency and credibility, especially if the expert is involved at the outset. This can assist with a coherent presentation of the case.

Having a clear case theory: According to Mr Ng QC, it is imperative for winning that a lawyer is able to tell the arbitrator, in one paragraph, what you want and why you should get it. Mr Omar SC concurred with this view. He emphasised the importance of having a clear case theory and a central argument, which should play right through from the pleadings and witness statements to cross-examination.

Using procedural tools to one’s advantage: Mr Pullen shared from his experience that applications for interim measures can be decisive in the context of an entire case. Interim measures can include interim measures ordered by a national court or tribunal, such as injunctions and document preservation orders. Mr Pullen stated that when deployed effectively, especially when the other side’s resources are under constraint, these can provide one with substantive “wins” early in the proceedings – putting the opposition on the back foot. On the flipside, Mr Lau cautioned that counsel in developing arbitration jurisdictions usually employ more “creative” guerrilla tactics, sometimes successfully, in an attempt to derail arbitrations.

Conclusion

Overall, the interactive session provided a unique opportunity for the delegates to tap on the rich experience of the eminent panel and to gain insight into how experienced practitioners, counsel and consultants strategise their way through an arbitration to achieve the ultimate success for their clients. The war stories shared by the panel were helpful in driving home their points and putting things in perspective for the delegates. The panel’s comments were a timely reminder to junior lawyers to be cognisant of a client’s objectives at all times, and to always keep the end goal of a favourable and enforceable award in view. After all, the last thing a claimant wants is to obtain an award that is substantively in one’s favour but which turns out to be a pyrrhic victory. While there is certainly no silver bullet that would guarantee a “win” in an arbitration, the delegates definitely went away with many insights on how one can set themselves up for victory early on in the arbitration process.
YSIAC Conference Report

THIS HOUSE BELIEVES THAT EMOTIONAL INTELLIGENCE WILL ALWAYS TRUMP ARTIFICIAL INTELLIGENCE

By Esther Candice Lim, Braddell Brothers LLP

Introduction
Humans versus robots: the YSIAC debate held during the YSIAC Conference 2019 on 20 November 2019 sought to address the deep question of what it means for us to be human and the timely question of whether technology can and will, one day, surpass us.

The moderator for the debate was Professor Nadja Alexander (Director, SIDRA). Arguing for the motion were Professor Dr. Maxi Scherer (Special Counsel, Wilmer Cutler Pickering Hale and Dorr LLP) and Mr Adrian Tan (Partner, TSMP Law Corporation) – Human 1 and Human 2 respectively (“Humans”). Arguing against the motion were Mr Todd Wetmore (Partner, Three Crowns LLP) and Mr Rimsky Yuen, SC (Barrister, Arbitrator and Mediator, Temple Chambers) – Robot 1 and Robot 2 respectively (“Robots”).

The starting vote? 85% in favour of the motion and 15% against.

First Round of Arguments
Human 1 opened confidently, proclaiming that the votes of the 130 strong audience members demonstrated the “absolute superiority of human intelligence”, which was met with congratulatory smiles all around. She argued that the motion does not mean that emotional intelligence (or human intelligence) will trump artificial intelligence in every instance, conceding that there are obvious situations, such as Google Translate being able to translate 150 languages, where artificial intelligence is superior to human intelligence. Human 1 stated that the ultimate question, therefore, is whether artificial intelligence is superior to human intelligence, to which she argued “no”.

Citing statistical studies, Human 1 argued that while artificial intelligence can assist in routine situations, it is deficient in unprecedented or emergency situations. Put simply, artificial intelligence is a calculation of the likelihood of an event based on existing input data. Human 1 then brought the issue closer to home, with an illustration of an arbitral tribunal making decisions based on probability predicted by a machine. She reasoned that parties would not accept such decisions as they will argue that every case is unique to its own facts. Artificial intelligence also cannot provide reasons as to why it reached a certain outcome, she said.

Human 1 concluded by reading, to the audience’s glee, a nonsensical chapter of a Harry Potter novel written by a program with artificial intelligence, which was met with raucous laughter. Spoiler alert: Ron eats Hermione’s family.

In response Robot 1 first declared that the Robots took the motion to mean whether emotional intelligence will always trump artificial intelligence in the course of decision-making in arbitration, before quickly firing back that “the motion is embarrassed by its own ambition”. Acknowledging Human 1’s concession that emotional intelligence will not always trump artificial intelligence, he argued that human intelligence is fundamentally limited. On the other hand, artificial intelligence, being in its infancy, can only develop and improve moving forward, with the ability to potentially incorporate elements of emotional intelligence as well. Citing an article, he argued that artificial intelligence is capable of self-learning.

Robot 1 canvassed how artificial intelligence can help humans avoid cognitive bias, focusing effect, and omission bias in arbitral decision-making, and how artificial intelligence can be deployed 24 hours every day (much like associates in law firms!). He closed his arguments by stating that emotions are not a substitute for collection and analysis of data and any motion positing the primacy of emotional intelligence over artificial intelligence is an attempt to place intuition over reason.

Second Round of Arguments
Human 2 stepped forward, eloquently rebutting Robots’ interpretation that the motion includes the words “decision-making in arbitration”. He said, “I don’t see it but that is the beauty of machine
language”. Human 2 argued that if one were to look at the context of arbitration and court disputes, a dispute is, at its core, people disagreeing with other people, and that a key part of dispute resolution is getting people to understand and accept the dispute in question.

If someone could write a better code and create a better program, perhaps it is only a matter of time before artificial intelligence is able to create the next Hollywood blockbuster. Robot 2 asked whether having reasons is necessarily “good”, for sometimes people do not require reasons but an outcome.

Lastly, Robot 2 invited the audience to question the premise of the motion. He said, “It puts people in the position that A is always against B. I ask why they should be exclusive rather than inclusive. Why should we think in the way the motion represents?”

Rebuttal arguments

In rebuttal, Human 1 argued that it is a fiction that artificial intelligence is not prone to human biases, citing an article which reported that an artificial intelligence program was found to have a gender bias vis-à-vis men. She rebutted Robot 1’s argument about limitless learning by stating machine learning means improvement, but one only based on past data at any given moment in time. Hence there is no way machine learning can go beyond what has been done in the past.
Finally the Humans and Robots took questions from the audience, which they responded to with another round of clever sparring between Human 2 and Robots 1 and 2.

**Conclusion**

At the end of the spirited debate which traversed humans, robots, and my favourite quote from Human 2, “Do you love me?” the audience were invited to cast their votes once more.

*The result? 68% for and 32% against.*

The Robots moved the most minds that day, but it is heartening to know that many still have faith in the relevance of human (or emotional) intelligence. As Robot 2 says, why should artificial intelligence and emotional intelligence even be mutually exclusive in the first place? Artificial intelligence is improving by leaps and bounds. It will no doubt become an even more advanced and widely used tool for lawyers and arbitrators in the near future – not just in legal research, but also in document disclosure and with expert evidence. With the advancement of artificial intelligence programs, it is hoped that lawyers and arbitrators can then spend more time on the human (and some would say most important) aspects of each case: the client’s needs and the effective resolution of the dispute before them.
YSIAC Conference Report
ARBXTalk by Christopher Chan of Lazada Singapore
By Margaret Huang, WongPartnership LLP

For the first time, YSIAC Conference this year featured an ARBXTalk where the speaker was given 18 minutes to present a topic of his or her choice in an inspirational or thought-provoking way.

Mr. Christopher Y. Chan, the General Counsel and Head of Government Affairs at Lazada Singapore, was the speaker at the inaugural event. What started out as a light-hearted talk from him on how to achieve your dreams (like buying that coveted yacht of his) soon descended into a deeper discussion on what it means to be a lawyer today.

What it means to be a lawyer today

Mr Chan had 3 tips to offer:

1. Do not pigeonhole yourself.
With disputes becoming more international and cross-border, lawyers can no longer afford to pigeonhole themselves. They need to learn to be able to manoeuvre through sectors or areas which they never have had any experience in and to expand their horizons into the unfamiliar.

He took the rise of e-commerce as an example. According to Mr Chan, on 11 November this year, Alibaba sold a record of $38 billion worth of goods worldwide in just 1 day and that’s a sharp increase from its sale of $25 billion last year on the same day. The way people are buying things have changed drastically over the years. While most of us would know how to use the online payment functions, how many of us actually take the time to understand how these systems work and the common issues that these operators face? Yet, as problem fixers, lawyers need to constantly keep a curious mind in order to navigate through the latest evolution.

In the same vein, Mr Chan also noted that the practice of law is changing, and in particular, a lot of technologies are now involved in the work of a lawyer. Indeed, lawyers these days have no lack of artificial intelligence that can assist in their daily research and discovery processes. However, what that also means is that lawyers need to re-brand themselves to be able to provide that human touch and intelligence which machines are not yet capable of doing so (e.g. the ability to make a judgment call when there is no data, the ability to stand up in negotiations and “pound the table” when needed, and the ability to command a room).

2. Do your homework.
Mr Chan shared his experience going into the technology sector without any former experience. His advice: do a lot of research on the business and the audience, and prepare as if you are going for trial.

He also disclosed that his first interview question to any lawyer who wishes to work in his company would be “What is the last thing you bought on Lazada?”, and he expects the candidate to, at least, have downloaded and tried the Lazada application. His motto: If you want to work in a ‘tech’ space, you ought to be comfortable with it and curious about it.

Mr Chan emphasised the importance of knowing who your audience is, and before every meeting that he attends, he will do a due diligence search on
the Internet on the people he is meeting and try to understand in advance who they are. Similarly, I think that lawyers would do well to find out more about each of the arbitrators’ style before going for any hearing, and keep those in mind when presenting their client’s case.

3. **Network, network and network.**
   In the midst of all the lawyering and hard work, Mr Chan reminded young lawyers to take time to build a brand for themselves and to keep expanding their network of contacts. In his words, young lawyers should “dig a well before you are thirsty” so that when an opportunity comes up, you will be the first that comes to mind.

   This is not just about building network among fellow lawyers but also with people from different fields. These days, arbitral disputes have become more cross-border and often, in large commercial disputes, parties are always on the lookout for experts to assist them. In his view, lawyers who have the reputation of becoming a “one stop shop” and who can assist to connect people would certainly be favourably looked upon by their clients.

   Mr Chan also reminded the audience that in this day and age, the best way to reach out to people is by the use of technologies such as social media and, of course, not forgetting that all of us were at a conference where there is easily 100 of new people around us!

**Concluding comments**

Mr Chan’s injection of his personal experience kept the discussion light-hearted and engaging yet at the same time the short discussion left the young lawyers with much thoughts as to where they would want to go next and how best to navigate the new frontiers in arbitration 2.0. Mr Chan’s point on having an interest in learning is an important message for young lawyers who aspire to practice across a wide range of sectors. Lawyers cannot be an expert in all fields; yet they are expected to be problem solvers for any and all legal issues that arise. The only way to do that is to build an interest in learning and to research rigorously in order to thoroughly appreciate the nuances and intricacies in the issues that may arise.