YSIAC Conference 2015

The inaugural YSIAC Conference 2015 was held at Maxwell Chambers in Singapore on 4 June 2015. The Conference was a sell-out event, attracting an impressive turnout of about 200 delegates, of which 44% were from overseas, including the UK, USA, Australia, India, China, Indonesia, Korea, Japan and Hong Kong. Delegates included practising lawyers, arbitrators, in-house counsel, public sector officials, industry service providers and members of business associations.

The theme of the Conference was ‘The Dynamics & Challenges of International Arbitration – The Road Ahead’.

The Conference opened with a welcome address by Mr Lucien Wong, Chairman of SIAC’s Board of Directors. Opening remarks were also delivered by Guest of Honour Ms Indranee Rajah, Senior Minister of State, Ministry of Law and Ministry of Education, and by Mr Gary Born, President of the SIAC Court of Arbitration.

This was followed by a unique and exciting programme which offered interactive “speed conferencing” sessions on hot topics in international arbitration, such as enforcement issues in Asia and differences in emergency arbitrators’ provisions in institutional rules.

The YSIAC Conference also featured the first ever YSIAC Conference Essay Competition, which received a total of 66 entries from 20 jurisdictions.

The two afternoon Panel Sessions were centred upon (1) Advocacy Tips and (2) Pointers and Pitfalls for Younger Arbitration Practitioners. For the first Panel Session, the topics discussed encompassed tips on cross-examination techniques to civil law v common law approaches and national court litigation v international arbitration advocacy. The second Panel Session touched upon how to break into the field of international arbitration and the pros and cons of working in a large international firm versus a boutique or local firm, or for an independent arbitrator or as a barrister in chambers. Panellists and moderators included several members of SIAC’s Court of Arbitration, led by SIAC’s Court President Mr Gary Born, and other internationally renowned arbitration counsel, arbitrators and academics.

Read about:

1. Third-Party Funding In Arbitration: Neither a Menace nor a Leveller, But An Inevitable Consequence of Financialization
   By Darren Mayberry

2. Third-Party Funding in International Arbitration: A Slippery Slope or Levelling the Playing Field?
   By Angus Fei Ni

3. False Testimony in Arbitration: Incentives and Solutions
   By Adam Raviv
The Conference was followed by a Gala Evening at Sofitel So. Delegates relaxed and mingled over drinks and dinner served tapas-style in a trendy rooftop poolside setting at the end of a long but exhilarating day.

The YSIAC Conference 2015 would not have been possible without the support of our sponsors. SIAC & YSIAC would like to express their sincere thanks and gratitude to the following sponsors:

**Silver Sponsors**
- King & Wood Mallesons
- Rajah & Tann

**Bronze Sponsors**
- Schellenberg Wittmer

**Premier Corporate Sponsor**
- Wolters Kluwer

**Essay Competition Sponsor**
- Freshfields Bruckhaus Deringer

**Transcription Services Sponsor**
- Planet Depos American Realtime

**F&B Sponsors**
- Jones Day
- DLA Piper

**Product Sponsors**
- Braddell Brothers
- Clyde & Co Clasis Singapore
- King & Spalding

We would also like to thank the following supporting organisations for their help in promoting the event:
- Association of Corporate Counsel Singapore (ACC)
- Asia-Pacific Forum for International Arbitration (AFIA)
- China Young Arbitration Group (CYAG)
- Chartered Institute of Arbitrators (CIARB)
- CIARB Malaysia Young Members Group
- Japan Association of Arbitrators (JAA)
- The Korean Council for International Arbitration (KOCIA)
- Ministry of Law Singapore
- National University of Singapore Faculty of Law (NUS Law)
- Singapore Academy of Law (SAL)
- Singapore Corporate Counsel Association (SCCA)
- Seoul International Dispute Resolution Centre (SIDRC)
- Singapore Institute of Arbitrators (SIARB)
- Singapore Management University (SMU)
- The Law Society of Singapore

Finally, we thank our media partners Global Arbitration Review (GAR) and Singapore Press Holdings. The YSIAC Conference will be held biannually. We look forward to seeing you at the next YSIAC event, details of which will be published on the SIAC website.
YSIAC recently held its inaugural Essay Competition for 2015 in conjunction with its first ever YSIAC Conference. Participants were invited to submit original essays on any of the following topics:

1. Party consent in international arbitration is more fig leaf than fundamental principle. Discuss.
2. Third party funding in international arbitration: a slippery slope or levelling the playing field?
3. If there was one thing you could change about the practice of international arbitration, what would it be?

We received an overwhelming response of 66 entries from 20 different countries, spanning 5 continents. We would like to thank all of the participants for entering the Competition.

We are pleased to announce the following winners, as chosen by a distinguished panel of judges:

**Winner**

Darren Mayberry  
*Airhart & Associates, Louisville, KY, USA*  
SGD 3,000

**1st Runner Up**

Angus Fei Ni  
*Debevoise & Plimpton LLP*  
SGD 2,000

**2nd Runner Up**

Adam Raviv  
*Wilmer Cutler Pickering Hale and Dorr LLP*  
SGD 1,000

The following participants also received honourable mentions for their entries:

- Lim Hui Li Debby  
  *Shook Lin & Bok LLP*

- Nathalia Lossovksa  
  *Holman Fenwick Willan LLP*

- Mak Shin Yi  
  *WongPartnership LLP*

- Anthony Cheah Nicholls  
  *Shearman & Sterling LLP*

- Xia Zhiyi  
  *Peking University*

- Derric Yeoh  
  *Michael Hwang Chambers LLC*

Special thanks are in order both to the YSIAC Publications Sub-committee and our esteemed judges - Ms Lucy Reed, Global Co-head of International Arbitration and Public International Law groups, Freshfields Bruckhaus Deringer; Member, SIAC Court of Arbitration; Professor Lawrence Boo, Head of Chambers, The Arbitration Chambers; and Ms Tan Ai Leen, Registrar, SIAC, for their tremendous efforts and time in reviewing and selecting the winning entries and honourable mentions, all within a very tight timeframe.

Finally, we would like to express our sincere thanks to the Essay Competition Prize Sponsor, Freshfields Bruckhaus Deringer, for its invaluable contribution to the success of this event.
Today, just about any product, service, or right may be priced, monetized, securitized, traded, assigned, or purchased. We might call this universal pricing phenomenon one of the defining features of our latest economic era, an era of financialization. In general, financialization refers to “the increasing dominance of the finance industry in the sum of total economic activity.”

Financialization means that third-party funding is inevitable, since TPF is a financial initiative, and finance’s power and ubiquity permeates every industry and profession, even after the global financial crisis. In general, financialization refers to “the increasing dominance of the finance industry in the sum of total economic activity.”

Financialization means that third-party funding is inevitable, since TPF is a financial initiative, and finance’s power and ubiquity permeates every industry and profession, even after the global financial crisis. In general, financialization refers to “the increasing dominance of the finance industry in the sum of total economic activity.”

As long as potential litigants require funding, and financiers believe the claim sufficiently meritorious and worth the investment and risk, there will be demand and supply for third-party funding.

For this reason, third-party funding (hereinafter also “TPF”) should be a perfectly acceptable aspect to the rather larger, perhaps unnatural system of financialization. To the extent that third-party funding lies anywhere on a slippery slope, the slope would be financialization itself, and we would find third-party funding somewhere already near the bottom. As for any hopes that third-party funding might level the treacherous and uneven slope of financialization, at best, it may allow for the prosecution of a few claims that might otherwise be abandoned.

Nonetheless, outright objections to third-party funding must confront the reality of that finance now impacts, if not dominates, almost every realm of human endeavor.

The torts and prohibitions of maintenance and champerty under the common law are falling into obsolescence, and the FIRE economy continues to narrow our conception of usury prohibited under the law. Public policy must recognize the tide of financialization, and focus its efforts on regulating and prohibiting third-party funding abuses rather than barring it from commercial arbitration outright.

This essay first looks at financialization itself and how the world order effectively mandates TPF’s presence in commercial arbitration. It briefly summarizes TPF funding arrangements, and then examines the resolution of champerty and usury obstacles to TPF in common law jurisdictions. Then this essay tackles some of the fears and objections regarding TPF and then concludes that commercial arbitration should tolerate, if not welcome TPF, but do so with strict regulation and full scrutiny.

As long as potential litigants require funding, and financiers believe the claim sufficiently meritorious and worth the investment and risk, there will be demand and supply for third-party funding.
would have us blame the market in their stead. Under financialization, it is flatly inevitable that TPF will become a standard option for participants in commercial arbitration. The market decides, and arbitrators and the courts can only (and manifestly must) regulate TPF. The Basics of Third-Party Funding

In third-party funding, an investor will pay for the costs of a lawsuit in exchange for a payout of 25% to 60%, usually contingent upon a successful outcome. For claimants, TPF demands a median of a third of the recovery, but the fee can vary depending on the size of the investment and anticipated risk. Some firms, such as Gerchen Keller Capital LLC (US), exclusively fund the defense side, and offers an alternative fee arrangement of reduced hourly rates with a bonus provision for a successful outcome, with further but limited recourse options. TPF funds both sides, and the flexibility of arrangements mirrors the flexibility of the market. Just as financialization exhibits manufacturing conglomerates turned financiers (GE Capital), the TPF world includes a variety of players. TPF firms include corporations, such as Buford Capital LLC, bank subsidiaries, such as Credit Suisse’s Parabellum, or hedge funds, such as EJF Capital.

The Erosion of Traditional Obstacles to Third-Party Funding, Champerty and Usury

Very simply, champerty or maintenance means an agreement to buy into another’s lawsuit. At common law, funding agreements were illegal or unenforceable, purportedly because public policy discouraged profit-seeking in the administration of justice and out of concerns of protecting disadvantaged parties.

Likewise, usury laws prevented financial actors from extracting undue profit from loans. Originally, usury was a biblical prohibition on lending at any interest rate, at least to other Israelites. Aristotle also condemned lending at interest as the most pernicious of the four types of exchange, including barter and natural exchange (of commodities for money for commodities), and “unnatural” retail exchange. Money, as a medium of exchange, should not beget money, and the ancients viewed the profit motive with at least as much suspicion as traditional common law courts.

Financialization’s ‘lending for any purpose’ and ‘pricing of everything’ has challenged the relevancy, if not necessarily the overall wisdom, of these ancient and traditional judicial attitudes so skeptical of profit. Nonetheless, public policy concerns regarding the abuses of usury and champerty necessitate heavy regulation and appellate review of TPF agreements in commercial arbitration.

The UK abolished champerty in torts by statute, but champerty may remain a ground to challenge enforceability of contract on public policy grounds. Four Australian jurisdictions (three states and one territory) abolished champerty as a crime and tort by statute. The bulk of US jurisdictions readily permit TPF. Nonetheless, a minority prohibits them on usury grounds or champerty grounds.

For several reasons, the wider range of results in UK and Australian TPF rulings, with their more deliberative focus on public policy concerns, may be more relevant to arbitral TPF than the US experience. First, US jurisdictions prohibiting TPF appear principally concerned with protecting individual plaintiffs from complex financing schemes, whereas commercial arbitral teams are typically more sophisticated in such matters. Second, Australian TPF companies focus almost exclusively on large commercial claims like those in commercial arbitration, whereas US TPF is also fairly involved in smaller, more commonplace ‘domestic’ claims. Third, UK and Australia share with arbitration the ‘English Rule’ where the loser pays costs (as opposed to contrary ‘American rule’), and such costs recovery potentially prejudices an unsuccessful Respondent more. Fourth, US Courts are quite accustomed to contingency fee arrangements between attorney and client, and thus more readily embraced TPF as analogous to such arrangements. Therefore, the commercial arbitration field should adopt the UK and Australian stance towards TPF, toleration without encouragement. That means commercial arbitration should permit TPF, but subject to heavy regulation, and also subject to scrutiny on appellate review by an opposing party because of possible public policy implications.

Currently, Singapore and Hong Kong strictly prohibit even attorney contingency fees. A recent Singaporean decision prohibited even a counsel’s fee-sharing agreement as champerty, even though it left open a potentially large exception for impecunious clients. Meanwhile, a Hong Kong court jailed a barrister for over three years for charging clients a contingency fee. Therefore, although arbitral TPF may presently seem unlikely in Singapore, a draft for the International Arbitration Act’s 2012 amendments included regulations for TPF, and recently the Singapore Academy of Law recommended adopting TPF in certain cases, but strictly regulating it. Hopefully, Singapore can adopt a more moderate approach, or it may risk losing favor as a premier and preferred center for commercial arbitration.

---

1Khoui & Harford, TPF in International Arbitration (2012), p. 36
9Sections 13(1) and 14(1) & (2) of the UK Criminal Law Act 1967.
11See Rancman v. Interim Settlement Funding Corp., 789 N.E.2d 217, 218 (Ohio 2003), where Ohio high court sua sponte prohibited TPF arrangement on champerty grounds after lower courts prohibited it as impermissible usury.
14Report Of The Law Reform Committee On Litigation Funding In Insolvency Cases (2014).
Third-party funding: the major objections necessitate its regulation, and not its outright prohibition

The objections to Third-Party Funding are speculative and largely not established. Therefore, opponents of TPF simply have no chance to defeat TPF’s powerful financial interests in the environment of financialization.

The complete prohibition of TPF from the field of commercial arbitration is not just unlikely, it would constitute an unjust and hypocritical special pleading.

For example, a common complaint is that TPF encourages or increases litigation. Yet strikingly, in Australia in 2011, one estimate identifies TPF inserted itself into only one out of 25,000 cases. Indeed, so far TPF financing is extraordinarily selective, even in the U.S., where TPF firm Juridicia considered 1,200 cases but only invested in 30 cases. Furthermore, were TPF to encourage filing claims, this would be a feature, not a bug, provided such claims had merit. After all, a meritorious suit unfunded condones a violation of contract, or fraud, or possibly even worse. Indeed, TPF’s dispassionate market mechanism ensures that TPF firms will only invest in cases which appear to have great merit, at least at the outset.

A principle of international commercial arbitration is that only parties to the underlying contract may sit at the arbitration table, but TPF firms are not direct parties. Yet, such an objection against TPF seems especially narrow and procedural since commercial arbitration advertises itself as informal and flexible to the parties’ interests. So, if the claimant requires, or even desires TPF to maintain its suit, but otherwise adheres to arbitral rules (including disclosure and conflict of interest requirements), this should not genuinely disturb the tribunal or the respondent. To the extent that TPF may have a prejudicial impact on an award of costs of the arbitration to either side, an arbitral tribunal should require disclosure of the TPF terms, and should be fully and unambiguously empowered to reduce the award of costs by the proportion of TPF involvement or recovery, in accordance with the demands and equity of each case.

In fact, many of the concerns and fears regarding TPF should be addressed through judicious and cautious regulation. While the American Bar Association’s Commission on Ethics determined in 2012 that TPF’s emergence required no updates to US ethical rules, international commercial arbitration may wish to take a more comprehensive, proactive regulatory stance recommended by other experts.

Just as a properly regulated TPF regime poses little real danger to arbitral proceedings, it may well only modestly level the playing field. In most commercial cases, it appears that well-capitalized commercial claimants prefer to use outside TPF firm money rather than commit their own capital to outside counsel for an unknown duration of time. In such a case, TPF provides liquidity of convenience rather than a life line, but may still retain a claim that would otherwise be abandoned primarily because of the opacity of the opportunity cost. Even so, since TPF firms are so selective, many meritorious claims will remain unfunded because of uncertainties or apparent rather than substantial flaws.

Were TPF to encourage filing claims, this would be a feature, not a bug, provided such claims had merit. After all, a meritorious suit unfunded condones a violation of contract, or fraud, or possibly even worse.

CONCLUSION: Regulate but Permit Third-Party Funding in Commercial Arbitration

In light of financialization, third-party funding is inevitable. Financialization began with the political choice to abdicate decision-making on credit allocation to the market, resulted in great power flowing to the finance industry, and has permitted finance’s intrusion in every path of life. The legal system, and more particularly commercial arbitration, should not hold any illusions; even though it is a profession, it is not a special island to itself. The ultimate decision which would later create TPF was made long ago in other forums, but since the legal profession remains somewhat independent and can still enforce a limited measure of public policy, it can regulate and scrutinize TPF agreements to provide transparency, police possible abuses, and administer overall equity and justice. Insofar as TPF strikes legal practitioners with anxiety, so too do laborers suffer without occupational security and under the onerous burden of debt so prevalent under financialization. The complete prohibition of TPF from the field of commercial arbitration is not just unlikely, it would constitute an unjust and hypocritical special pleading. Perhaps together, as a society, we might review the ultimate wisdom of surrendering important public policy decisions to the market. In the meantime, commercial arbitration should permit TPF on its own terms now, and not least because its dangers are as yet speculative and unverified. Nonetheless, with a rapid and un-theatrical adoption of TPF, commercial arbitration may yet yoke TPF with strict regulation and a regime permitting serious post-award scrutiny. After all, TPF may be inevitable, but commercial arbitration serves the primary contracting parties first and foremost.

16Barker “TPF Funding in Australia and Europe” (2011) p. 32.
“[I]n those times . . . a man would buy a weak claim, in hopes that power might convert it into a strong one, and that the sword of a baron, stalking into court with a rabble of retainers at his heels, might strike terror into the eyes of a judge upon the bench. At present, what cares an English judge for the swords of a hundred barons?”

- Jeremy Bentham

I. INTRODUCTION

It has been more than two decades since Australia passed the Maintenance, Champerty and Barratry Abolition Act of 1993, and nearly a decade since professional third-party funding (“TPF”) firms began sprouting in the soils of English and American courts and international tribunals.

In that time, sophisticated courts and tribunals have welcomed the chance to administer justice in the face of complex financial and structural innovations introduced by the presence of TPF. Having taken root in the common law’s home-jurisdictions and in international arbitration, TPF is now transitioning from nascent struggles for legitimacy towards full professional integration as an entrenched species in the global dispute resolution ecosystem.

This process has produced a wealth of information on the TPF industry, much of it disseminated by funders keen to educate a skeptical legal profession and public. Through surveying current literature and interviewing industry participants, I will dissect the most common policy justification for TPF: its ability to increase “Access to Justice.” In the process, I will argue that in the realm of international arbitration, not only does TPF succeed in increasing access to justice, it also generates a positive effect on the quality of claims by inducing disputants to make more economically rational decisions regarding their claims.

II. ACCESS TO JUSTICE

The most common refrain of funders themselves on the benefits of TPF is that it provides greater access to justice for the impecunious claimant. But beyond justice-dispensation at the macro level, TPF also provides numerous little-understood economic benefits and opportunities for consumers, providers, and investors in litigation alike.

A. Enabling Claims:

The universally echoed claim-enabling function of TPF is valid, and its effects are probably more visible in international arbitration than in the domestic context. Domestically, reputable funders in the major TPF markets do not engage in funding smaller claims such as personal injury suits, in part because it is a field already occupied by contingency-fee attorneys, and because the small size of the claims and potential returns are unattractive for funders with large amounts of capital to deploy. As such, the existence of commercial TPF provides little boon to the truly impecunious prospective litigant holding smaller claims. However, in the commercial litigation/arbitration arena, funders have been a welcome presence for both cash-strapped companies and law firms.

Not only do funders provide smaller, less well-resourced claim-holders the capital to challenge much larger defendants in the first place, that funding equalizes the parties’ bargaining positions for more equitable settlement discussions. A larger defendant capable of bankrolling long-term litigation is ill incentivized to engage in settlement discussions with a small claimant incapable of sustaining similar costs, regardless of how solid the underlying claim.

1Professionals at Burford Capital, Juridica Capital Management, Gerchen Keller Capital, Bentham U.S.A, and Lake Whillans were interviewed. This paper will not quote directly those interviewed except with express permission, and will otherwise summarize their views.

The disparity is amplified in investor-state arbitration, where states are generally better positioned for the long haul than claimants. This represents the traditional funding dynamic, where TPF supplies funds to prosecute a claim. But funding goes far beyond the prototypical, and offers many more avenues to “access” justice.

B. Monetizing Claims

Since treat claims as assets, the funded claimant can become the holder of more than just a good claim, but a monetize-able asset, and use the asset to generate cash flow. For example, a growing startup is attempting to generate cash flow and faster growth. Such a cash-hungry business has neither ability nor positive economic incentive to prosecute a meritous claim if that claim does not translate to capital it can presently invest. The introduction of a sophisticated funder means that the business can take a capital infusion from the funder in exchange for a portion of the claim, and deploy that money now for a much greater return on capital than it would obtain on money received years later, if and when the case is filed and resolved. By then, the company’s growth could have slowed down, or worse, been stymied by lack of capital when it needed it the most—during its growth phase.

There is the worry that as the industry grows, easy money flooding in might increase appetite for risk and inevitably attract the unscrupulous. The response to this is simple: the markets do not reward the foolhardy, scrupulous or not. According to Lee Drucker of Lake Whillians, this kind of “venture”-style participation by funders not only increases access to justice, it also spurs innovation through provision of much needed capital to growing companies, and helps deter monopolistic behavior by large companies seeking to drive upstart competitors out of business. If successful, such a strategy would contrast sharply with the “vulturous” activity detractors of TPF have invoked. By fueling the growth of threatened young companies, TPF can nurture new life rather than scavenge for bankrupt-carriion.

Of course, such immediate claim-monetization can be attractive to not only early-stage startups, but also large companies that require cash to fund ongoing operations. In the most stark cases, companies whose sole asset had been nationalized by states have begun to rely systematically on TPF to pursue ICSID claims against states, classifying these claims as assets on the basis of investor backing.

As long as a claim can be valued, the possible forms of monetization are endless. A capital infusion can come through a debt-issuance, a lump-sum payment that is some percentage of the risk-adjusted present value of a portion of the claim, an outright buyout of the company, or a direct equity investment in the company that reflects the claim-value-adjusted worth of the company as determined by the funder. At least one of the funders I spoke to already engages in purchasing large equity stakes in claim holders, and has even purchased one claim holder—not the claim—outright from venture-backers who are much more leery of litigation risk in a funded start-up than the litigation funder.

C. Justice for Who?

Critics have long maintained that the “access to justice” narrative is merely an excuse for encouraging litigation—frivolous or not—where there would have been none, and further that greater “access” is only granted to the claimants and plaintiff’s attorneys, with arbitral respondents being denied the benefits of funding. With respect to the first criticism, the practices of funders and the returns they have achieved over the past several years have made it clear that any accusation of frivolity is unfounded. Critics have suggested that the merit of a case is merely one among many factors funders consider, and frivolous cases are easily capable of receiving funding given a high enough potential return to reward the funder for risk. However, every funder I spoke with considered the merits of a case their foremost due diligence priority. Several found it self-evident that managers of capital would avoid frivolous claims at all costs. This makes sense, given that litigation can only result in binary outcomes, and the only way for an investor in binary outcomes to succeed is to win or settle favorably. Since victory hinges entirely on the case’s merits, the merits naturally become a funder’s most important concern.

There is the worry that as the industry grows, easy money flooding in might increase appetite for risk and inevitably attract the unscrupulous. The response to this is simple: the markets do not reward the foolhardy, scrupulous or not. A funder who invests in a portfolio of bad cases, aiming for one spectacular win to cover every loss and still generate a sufficient return on capital to satisfy investors will find that suits with only nuisance value will either lose outright or settle for the miniscule nuisance value they are worth. Meanwhile, investors in such a risky strategy will demand high returns for the risk they are taking. These two facts taken together make the math behind an “unscrupulous” strategy difficult if not impossible.

Facts so far bear this out: no fund has collapsed solely as a result of bad investments, and while the conduct of counsel has resulted in costs being imposed on a funder.
no arbitral tribunal or court has ever suggested that a funded case was frivolous or sought to sanction an ultimate funder. As for the utterly unscrupulous, they invariably exist in any profession, and are among the many things sophisticated investors must guard against.

There remains the criticism of TPF increasing the sheer number of litigations. While this view may have some traction in the domestic milieu, it is less persuasive in an international arbitration context. Arbitral tribunals are constituted from among commercially sophisticated arbitrators, who are unburdened with immediate duties to the public—as courts are—and compensated from claim to claim. As such, the availability of arbitration, unlike the courtroom, is market-driven and does not diminish with every incremental claim. The fact that a few more arbitrations may be brought does not mean other claimants are denied expediency or access to arbitration. Instead, it bolsters the legitimacy of arbitral regimes. Even from a policy standpoint, a greater net number of arbitrations is not undesirable if they result in greater access to justice granted to claimants who would otherwise not have come before tribunals.

Finally, while it is true that funding goes almost exclusively to the claimants, this is not necessarily a bad thing. The same entities that are often in the respondent’s seat can just as easily access TPF as claimants should they have a viable claim. And as already discussed, there are a variety of financial reasons even large companies might want to make use of TPF. Moreover, as the TPF marketplace becomes more efficient, and providers of capital seek new ways to deploy money, innovative risk-shifting products have become increasingly available to defendants.

There has been speculation on reverse contingency fees, where a funder gets a percentage of the respondent’s savings, this being the difference between the amount originally claimed and the amount ultimately awarded. Several funders I spoke to expressed skepticism to reverse contingency structures, citing the psychological difficulties inherent in asking defendants to value savings even when they have lost.

Funders did say, however, that so long as the parties in a funding relationship can identify and value “success” upfront, defendant funding can occur without much trouble. For example, if the defendant can value success as any settlement payout below 50 million dollars, then the funder can share the defense risk, and be paid a premium if success is achieved. Other, non-monetary indicators of success also exist, for example the avoidance of an injunction. Tellingly, some have begun to fund generic drug makers defending claims brought by patent holders, where the value of a successful defense is easily quantified.

The same model can be applied to any dispute where the respondent can comfortably value a successful defense. Even states are welcome to apply to be funded. In the words of Burford’s CEO, funders are entirely “agnostic” as to who they fund, and the fact that states are not typically customers “has more to do with the fact that governments have access to capital at a lower cost than [TPF providers] do.” This being the case, as the industry matures and the cost of capital declines, defensive financing may soon become economical for smaller, developing states with low credit ratings. Indeed, given developing states’ relative unsophistication vis-à-vis their often well-resourced and sophisticated corporate opponents, the introduction of an experienced funder may help level the playing field for states in the investor-state arbitration equation. Such a possibility may not be far off: several interviewed funders reported experiencing competition in the international arbitrations arena, where there is an increasingly robust network for referring and shopping claims.

The fact that a few more arbitrations may be brought does not mean other claimants are denied expediency or access to arbitration. Instead, it bolsters the legitimacy of arbitral regimes.

III. CONCLUSION

At the end of our conversation, one funder asked for the subject of the present article, and upon being presented with a slippery slope versus levelling the playing field dichotomy, exclaimed that “[TPF] is neither! It is a commercial reality, because litigation is expensive.” Indeed, we have good reason to be weary of slippery-slope arguments against TPF. The modern TPF provider is almost always a highly sophisticated investor, focused on sound returns and setting positive precedents for a rapidly growing industry. Through their efforts, funding is increasingly becoming a standard feature of the international arbitral landscape, where the thought of arbitrators being intimidated by “the sword of a baron”, or sophisticated enterprises coming before tribunals frivolously “vex” each other is more specter than reality. So far, no institutionalized ambulance chasing by unscrupulous “vulture” funds has materialized. Instead, TPF has introduced more economically astute decision-making to the analysis and prosecution of claims, and provided succor to low credit ratings. Indeed, given developing states’ relative unsophistication vis-à-vis their often well-resource corporate opponents, the introduction of an experienced funder may help level the playing field for states in the investor-state arbitration equation. Such a possibility may not be far off: several interviewed funders reported experiencing competition in the international arbitrations arena, where there is an increasingly robust network for referring and shopping claims.

As the TPF industry matures and the cost of capital declines, such benefits will only inure to more consumers and providers of arbitration, with the most robust claims funded at the lowest cost. In time, justice could become not only more accessible as a social good, but be dispensed immediately as an asset to benefit the aggrieved.

11See Scherer et al. “Third Party Funding in International Arbitration in Europe”, at 211.
14Lawe, “speculate and arbitrate to accumulate”, at 3
Likewise, Singapore’s perjury statute A(1), (2). But even where a witness knowingly presenting testimony in “open court.” This essay explains why the various theoretical safeguards against false testimony in arbitration are weak constraints on perjury. It then proposes a new way for arbitrators to discourage false testimony, if they are given the power to do so.

### I. CURRENT SAFEGUARDS AGAINST FALSE STATEMENTS ARE INADEQUATE

In theory, multiple deterrents should discourage arbitration witnesses from making false statements, and discourage parties and representatives from presenting such testimony. In practice these supposed disincentives are either weak or nonexistent.

#### A. Criminal Prosecution Is Not a Deterrent

The archetypal risk facing a witness who testifies falsely is a prosecution for perjury. The fear of criminal prosecution is certainly a powerful impetus for witnesses to tell the truth. But in reality, perjury prosecutions based on arbitration testimony are exceedingly rare. In many places, such prosecutions are not legally possible, and even where they are allowed they rarely happen. In almost all U.S. jurisdictions, for example, criminal perjury statutes do not clearly apply to testimony given in private arbitrations. Likewise, Singapore’s perjury statute only covers testimony in “open court.” The German, Austrian, and Swedish penal codes criminalize false testimony presented the testimony.

Before a court or another agency competent to administer oaths, but their respective arbitration laws do not authorize arbitrators to administer oaths.

#### B. Civil Liability Is Not a Deterrent

If criminal liability is not a significant risk for witnesses who lie in an arbitration, what about civil liability? If anything, a successful private action against a dishonest arbitral witness is even less likely than a perjury prosecution— particularly in common law jurisdictions. For more than 400 years, common law courts have refused to recognize a civil claim for perjury. Nor does a witness have much to fear from the arbitrators themselves; arbitrators cannot hold individual witnesses in contempt or personally fine them. The most an arbitrator can realistically do to a dishonest witness is criticize the witness’s honesty in a (likely confidential) award.

#### C. Attorney Discipline Is Not a Deterrent

N Or are party representatives likely to face professional consequences for presenting false witness testimony. Although numerous jurisdictions—and, more recently, international arbitral institutions—knowingly presenting...

---

2See Blankley, supra note 1, at 934-937 (surveying state and federal arbitration laws).
3Oaths Act (Ch. 211, 1885 Rev. Ed.) § 21(1).
false testimony, attorneys are unlikely to be disciplined for violating these professional rules in an international arbitration. Proving that a lawyer knows his witness is testifying falsely is a high bar to meet. There is a fine line between knowing certain evidence is false and merely suspecting it to be false, particularly where—as is usually the case—a witness has more first-hand knowledge of the facts than the lawyer does. Moreover, even if counsel violates a rule against presenting false testimony, the lawyer’s professional disciplinary body will probably never hear of it—particularly given the confidentiality of most arbitrations.

Thus, if an attorney is going to face consequences for misbehavior in an international arbitration, they will have to be imposed by the arbitral tribunal itself rather than any external disciplinary body. But even under the arbitration-specific guidelines recently established by the LCIA and IBA, those consequences are unlikely to be severe and unlikely to have repercussions for counsel beyond the ongoing arbitration itself.

For example, the new LCIA Rules, adopted in 2014, list several possible penalties for violating the institution’s guidelines for party representatives, including its prohibition on knowingly presenting false evidence. But even the most extreme measure contemplated under these provisions, the disqualification of the attorney from the remainder of the arbitration, would have no effect outside the proceeding. The remaining penalties, which provide for merely a “written reprimand” or “written caution,” would have little tangible effect on attorneys—particularly as those “punishments” would remain confidential with the rest of the arbitration.

D. Vacating an Award Is Not a Deterrent

“Fraud,” including perjury, is a ground for vacating an arbitral award under some national laws and is a generally recognized ground for setting aside an award under the “public policy” exceptions in the New York Convention and the UNCITRAL Model Law. But a party that asks a court to annul an award based on false testimony still faces long odds. Normally a court will not disturb an arbitrator’s finding of fact as to a witness’s credibility. If a party unsuccessfully argues during the arbitration that the other side is presenting false testimony, a court will not revisit the tribunal’s factual finding.

Moreover, even where a court does vacate an award on the basis of fraud, the party whose witness committed perjury is still not necessarily worse off than it would have been absent the false testimony. The worst case scenario for such a party is that its favorable award will be vacated and the dispute arbitrated in a new proceeding where, this time, the witness might be forced to tell the truth.

That is, in principle, no worse for the dishonest party than if the witness had told the truth in the first place. When a party faces a stark choice of either losing now by telling the truth, or risking not winning farther down the road by testifying falsely, it may choose dishonesty as the best policy.

E. Cost-Shifting Is Not a Deterrent

Finally, shifting of costs is often identified as a key deterrent to misbehavior by parties and arbitration counsel — including, theoretically, false witness testimony. But in international commercial arbitration, the losing party—by practice and often by rule—is typically responsible for the other side’s costs even in the absence of wrongful behavior during the proceeding. Where paying costs and fees is the likely result of a losing effort in any event, the risk of owing these fees as a sanction for false testimony provides little marginal deterrent to counsel or parties. Indeed, if a party believes that truthful testimony by its witness will likely cause it to lose the case, the possibility of cost shifting may actually weigh in favor of dishonesty.

A solution to the problem of witness dishonesty must change the incentives within the arbitral structure. And in international commercial disputes, no incentive works better than a financial one.

II. AN ACTUAL DETERRENT

If criminal prosecution, civil liability, professional discipline, vacating an award, and cost-shifting are all inadequate deterrents to witness perjury, then what is left? Surely there are ways to keep arbitral witnesses honest. A solution to the problem of witness dishonesty must change the incentives within the arbitral structure. And in international commercial disputes, no incentive works better than a financial one.

A. A Monetary Sanction

When a witness testifies falsely in an arbitration, the arbitrator should have the power to modify the size of the overall award to penalize this misbehavior. Because shifting the costs of a proceeding will often be an inadequate measure, a monetary sanction independent of legal fees and costs should be an option for arbitrators.

A party should be better off as an “honest loser” than as a dishonest winner. A sanction for false testimony would directly counteract the substantial motivation parties often have to shade the truth. The risk of a large penalty

1See, e.g., ABA Model Rule 3.3(b)(3); CCBE Code of Conduct § 4; Singapore Legal Profession Act (Ch. 161, § 71, Rev. Ed. 2010), Rule 57; IBA Guidelines on Party Representation in International Arbitration, ¶ 26(c).
4See, e.g., IBA Guidelines on Party Representation in International Arbitration, ¶ 26(c).
5See, e.g., UNCITRAL Arbitration Rules, Art. 42(1); LCIA Arbitration Rules, Art. 28.4; Final Award in ICC Case No. 11670, 22 ASA Bull. 333 (2004).
will make a party think twice about presenting perjured testimony even where truthful statements (or no testimony) could damage the party’s chances of prevailing on the merits.

A party may argue that it should not be punished for the sins of its witness. But the complaint that parties do not control their witnesses has less weight in arbitration than in court. Most arbitration witnesses are affiliated in some way with the party on whose behalf they testify and are often under the party’s direct control. Impartial, “bystander”-type witnesses with little stake in the outcome are the exception in arbitration—and often have the least incentive to lie. In any event, arbitrators can take this concern into account when determining a penalty for perjured statements: the “closer” the witness is to the party, the more severe the punishment should be.

The form of the penalty would depend on which side has presented the false evidence. If the claimant wins the case and the respondent is found to have presented false testimony, the tribunal can adjust the award upward by a certain amount—say, 25 percent—to reflect this wrongdoing. Where a witness for the claimant lies and the respondent wins the case on the merits, there will be no monetary award to modify and a straight fine of the claimant might be appropriate. Or, if the tribunal decides to award costs to the winning side, that cost award can be adjusted upward.

As a practical matter, it will usually be the losing party, rather than the winning side, that is found to have presented false testimony. But in the rare case where the panel believes that the winning side presented perjured testimony, it can also modify the award accordingly. For example, if a claimant wins on the merits but presents false testimony, the tribunal could sharply reduce the award, or even zero it out if the conduct is sufficiently egregious. If the respondent wins the case but presents a dishonest witness, the tribunal could reduce or eliminate the cost award the respondent would normally receive, or assess a separate penalty.

The size of the sanction should be proportional to the amount in controversy in the arbitration. The threat of a $10,000 fine will have little impact on party decisions in a billion-dollar case. It could even send the implicit, and perverse, message that false testimony is a minor cost of doing business that rational parties will sometimes be willing to pay. Conversely, a sanction that is many multiples of the amount at issue in the arbitration would probably not be appropriate and may invite an enforcement challenge.

B. Arbitrator Authority To Sanction

With the limited exception of cost-shifting, no major international arbitral institution expressly grants arbitrators the power to sanction parties. Without clear authority under the rules, arbitrators will be reluctant to punish parties for presenting false testimony. Indeed, they may not believe it is an option at all. Thus, institutional rules should expressly allow arbitrators to punish parties for presenting false testimony. A rule could provide simply: “The arbitrator may order appropriate sanctions against a party that has presented false evidence.”

A party may argue that it should not be punished for the sins of its witness. But the complaint that parties do not control their witnesses has less weight in arbitration than in court.

Arbitrators and institutions applying such a rule should make clear that a perjury accusation is a very serious charge and that sanctions will not be imposed without substantial proof. Arbitrators, like judges and juries, are often called upon to weigh the credibility of opposing witnesses. Penalties for false statements should not be the result any time a tribunal harbors doubts about a witness’s story.

Accordingly, a showing of “clear and convincing evidence” that a witness has testified falsely would be an appropriately strict standard to apply before a tribunal penalizes a party. It would provide for sanctions only where the evidence of dishonesty is particularly strong, without setting the bar unreasonably high or likening the arbitration to a criminal case.

III. CONCLUSION

In the adversarial forum of an arbitration, effective cross-examination may show that a witness has testified falsely. But such exposure is not always possible, and even when it is, a witness still might gamble that his or her dishonesty will not be revealed. This impunity threatens to undermine arbitration as a fair and legitimate means of dispute resolution. Arbitrators should therefore have the power to hold parties accountable for the dishonesty of their witnesses. To the extent that institutional rules do not provide this power, those rules should be amended accordingly. That way, witnesses, parties, and counsel will know that honesty is not only a moral and legal imperative, but—perhaps more importantly for them—a financial imperative.

The views expressed in this essay are the author’s alone and do not necessarily reflect the views of the author’s firm or clients.
We would like to know more about you, so could you tell us what your growing up years were like?

AY: I grew up during the Cultural Revolution mainly in a small town in Sichuan, China. To me the Cultural Revolution meant two things: first, my family and the people in our neighborhood were pretty much equally poor and short of everything including clothes, food, and toys. My second strong impression was that it seemed as if adults were fighting all the time, going from one political movement to the next – as kids, we never understood what was going on.

I am the eldest child in my family. I have one sister and two brothers. My father was in the army serving in Tibet – far away from home. We saw him only once or twice a year during my childhood. My mother used to be a school teacher but during the Cultural Revolution she worked in an agricultural tool manufacturing factory as a staff member. There is a famous quote in China by Chairman Mao: “Women hold up half of the sky”. Surely I held up half of the sky in my family – I had to help my mother. I learned to look after myself since I was 8 and then to look after my siblings, helping them with their homework, doing the cooking, cleaning, walking long distances to buy rice, carrying heavy coal home with my bare hands and helping my mother with the endless list of chores.

I once joked with my mother saying that she was training me to become a “project manager” since I was 8 years old. It’s true that, in later stages of my life, when I came to manage large and complicated cases, all the tricks I learned from childhood came in handy.

What do you consider to be your favourite childhood memory?

AY: Despite the harsh conditions, there are two fond memories that all my family members love to talk about. The first was when I used mercurochrome - a kind of liquid medicine you apply when you scrape your skin – as make-up on several boys and girls in my neighbourhood. It comes in two colours, red and purple. I used the red to do make-up for the girls on their faces and I drew moustaches for the boys and watches on their wrists using the purple one. We had a great time. Only when I had finished drawing, was I told that it was not washable! That was the funniest and silliest thing I had ever done (the kids had to carry the marks to school for a few days (laughs)).

My second favourite childhood memory was how I used to “steal” my mother’s books. At that time, kids did not have any entertainment except radios and we were always short of books. I found two suitcases of my mother’s books under the bed and read them all secretly. The best part was how I found her secretly hidden books, the four volumes of Dream of the Red Chamber (one of China’s Four Great Classical Novels, written in the middle of the 18th century during the Qing Dynasty, a masterpiece of Chinese literature, generally acknowledged to be the pinnacle of Chinese fiction). The books were sitting on top of a chest of drawers, wearing a fake book cover for Chairman Mao’s Quotations book cover to hide her favourite literature (such books were rarely available and people were publicly discouraged to read them)!

Do you prefer to converse in Mandarin or do you prefer to converse in English, and why?

AY: Mandarin is my mother language. I started to learn English seriously in college. Learning a foreign language takes a huge effort, especially legal English. Once you start, you have to keep learning. My daughter is now in an international school and learns everything in English, including mathematics. I now have to learn mathematics in English in order to keep up with her.

Do you think Chinese is a more beautiful language?

AY: Chinese is certainly a beautiful language. Each language has its own beauty. But in terms of legal language, I sometimes find that English is more accurate and precise. My written Chinese has been influenced by English and I still find it hard to switch between the two languages.

What is a talent you have that is not well-known?

AY: This is an interesting question. I think my lesser-known talent is being a good mother. Communicating with kids is really a challenge – you need to be very creative to communicate with them and make them understand you. You have to change your way of thinking as an adult and adapt to their way of thinking. I was told by my daughter that I’m very popular among her friends.

For example, when my daughter was four she did not want to eat rice. I said to her, “You have a slide in your body, connected to your stomach, which is like a square. Rice are in the square right now and want to dance, but
they are short of numbers. Can you put more rice in your mouth so that they can go down the slide to join their friends?” Hearing this, she opened her mouth and ate all the rice in her bowl.

In terms of your work, how did you first get involved in international arbitration?

AY: Similar to many of my lawyer friends, I became an international arbitration lawyer by accident. In the middle of the 1980s, college graduates were rare and we were assigned jobs by the government, which you had to accept whether you liked it or not.

I was assigned to work for a Chinese state-owned law firm, which at the time was one of only two firms in China that could provide legal services to foreign clients in English. In 1986/1987, the firm was instructed to defend a state-owned Chinese trading company in an ICC arbitration case. That was the first international arbitration case since China enacted the open-door policy, now three decades ago. With no experience at all, I thus began my journey into international arbitration.

Interestingly, the hearing for that case was conducted in Singapore. It was my first ever overseas trip. I recall that when we arrived, we were unexpectedly received by Singaporean government officers from its trade bureau. They wanted to know why we were here and why the ICC arbitration had anything to do with Singapore. We told them that the other party was from the Middle East and we believed that Singapore was a neutral and convenient venue for both parties. It was perhaps after this interaction that the Singaporean government started thinking about making Singapore a centre for international arbitration!

In your journey in international arbitration, who would you consider to be your mentor(s)?

AY: Apart from international arbitration, I also do a lot of China-related dispute resolution work. Of course along the path of my professional life, I have learned from many of my lawyer friends, but I would like to mention two individuals who were important to my career.

The first is Mr. Gao Zhunlai. He was a senior lawyer in the state-owned Chinese law firm I worked for. Mr. Gao was trained in China and Germany. At the time, we did not have Microsoft Word or other word processors which could perform spell-check. Using old typing machines, it was always difficult to spot typos. That was why we, in our early twenties, thought having a couple of typos was not a big deal.

In my first year as a young associate, very often on a late Friday afternoon Mr. Gao would call young associates to his office. He would give us memos or submissions prepared by others and ask us to review and proofread them. If we found no typos, we would be given chocolates. We were so eager to get our prizes that we took turns to read and check those documents many times, word for word and line by line – including footnotes. However, for a very long period of time, no matter how hard we tried, we never got any chocolates. It was often that Mr. Gao would spot a typo that we did not spot in a few minutes. “Shame on you,” he would often say to us with grin on his face.

My second important mentor is Mr. Christopher Moger QC from London. Christopher has many leading skills: his piercing cross-examinations, formidable advocacy skills,
excellent judgment and meticulous attention to detail taught me a great deal and made a serious impact upon my career development.

We have heard that arbitrations in China are one-day affairs. Is that the norm, and what is the process like?

AY: It is still the norm. In some extreme situations, it may be half a day, but a hearing usually lasts one day. I am now sitting as arbitrator for CIETAC and most of the cases finish in one day. It is getting more common now for witnesses to submit witness statements, but common law-style cross-examinations are still rare and not known to the majority of Chinese counsel because China has an inquisitorial system.

What do you think are the biggest challenges and opportunities facing international arbitration in Asia?

AY: I can comment on China only. The adversarial system is very different from the inquisitorial system we have in China. That was why the majority of Chinese lawyers do not have much knowledge about international arbitration. In addition, Chinese clients also lack knowledge on international arbitration in general. Many Chinese companies now want to do business on a global scale, but, largely speaking, their legal counsel at home are often not ready to manage cross-border dispute resolution and their business leaders as well as their employees, have limited international experience.

A group of lawyers and arbitrators recently set up the Beijing International Arbitration Forum for those who are interested in international arbitration. The purpose is to promote international arbitration and to increase awareness. When Chinese companies do business outside of China, disputes are inevitable. To use international arbitration as the method for dispute resolution, they need to understand the rules of the game. If they assume that international arbitration is the same as domestic Chinese arbitration, and are not equipped with knowledge of international arbitration, they will be at a serious disadvantage. It is the Chinese legal profession’s duty to learn and master the subject in order to help their Chinese clients.

Tsinghua Law School sets up a programme dedicated to international arbitration. Many students and practitioners who have attended the programme highly recommend it. It is probably the first of its kind, a programme run in English. I am one of the lecturers on the programme as I believe it is very important to share knowledge and experiences with the younger generation.

If you make a comparison in terms of the number of cases, we see a significant number of commercial disputes resolved by the courts and not by arbitration, despite the fact that China has more than 200 arbitral institutions. There were at least 9 million litigation cases filed in the courts last year. Therefore there is a lot of room for arbitration to improve in China.

What can be done to improve? Do you think it is something that Chinese policy makers and the judiciary are looking at right now?

AY: The Chinese Arbitration Act has been around for 20 years and the legal community has given a lot of comments on the Act. It certainly should be updated given the changes that have taken place over the past two decades. It is not clear if there is any timetable for law makers, but I believe that we the practitioners should make an effort by contributing our knowledge and experiences in the area.

Do you think there is enough incentive for practitioners in China to venture into international arbitration given the huge domestic market?

AY: I believe Chinese companies in international business will be better served by Chinese lawyers if such lawyers are bilingual, cross-cultural, and have knowledge of international arbitration.

Using well-established UK law firms or US law firms or the like is also fine, but Chinese companies need in-house lawyers who have the language skills and can cope with the cultural differences and understand how to communicate with their non-Chinese speaking counterparts.

If [Chinese companies] assume that international arbitration is the same as domestic Chinese arbitration, and are not equipped with knowledge of international arbitration, they will be at a serious disadvantage. It is the Chinese legal profession’s duty to learn and master the subject in order to help their Chinese clients.

There is a big gap and a serious shortage of talent in this area, something the Chinese bar association has now realised. When Chinese outbound investment exceeds $100 billion, they need more help.

Moving away from China for a while to the arbitration community more generally, why do you think there are so few female arbitrators? Do you think this an issue?

AY: I have encountered many good arbitration lawyers who are female. They are very good, very talented. Every time I listen to them, I think they make the point much clearer than their male colleagues (laughs). For arbitrators, it is true and maybe it is because of age? I recall Michael (Pryles) saying that when practitioners reach a certain age they are more willing to sit on the bench.

Another reason may be that traditionally, litigation or dispute resolution is dominated by male lawyers because it is confrontational. That is why we do not see many female arbitration lawyers. But there are more young female lawyers entering this area. It just needs time.
You are one of the very few established female arbitration practitioners in China, and in fact in Asia. You are also one of the most respected Chinese lawyers in international arbitration. What do you think makes you stand out?

AY: Thank you for your compliments. I certainly learned from the many people I have encountered. I think that good lawyers all share three important qualities.

The first is passion. You have to enjoy what you do. If you want to do international arbitration or dispute resolution, you’ve got to possess the ability to do whatever it takes. You become a partner and friend, more than just a counsel to your clients, and hold their hands through the entire journey. It is like when you are at war, you must use all your skills and knowledge to help and protect your master. Clients will appreciate that kind of fighting spirit when they come to choose their counsel. That is one common trait I see in many successful arbitration practitioners. You need to have the passion and the mental state to do everything lawfully possible to help your client achieve justice.

I once asked a student why he wants to study international arbitration. He joked saying that he can then make more money. That is certainly not right and I believe he knows it as well. Being a lawyer is like being a doctor whose role is to save lives, and a lawyer’s role is to protect the legitimate interests of your clients. Money is only the result, the reward of the excellence of your service. It will never be the purpose of the legal profession.

The second quality is breadth of knowledge. I do not just mean knowledge of international arbitration, a broad-based knowledge of social subjects will help. For example, when parties are in dispute, it often means that your client is in a difficult position, no matter whether it is on the claimant’s side or the respondent’s side. Often only having legal knowledge is not enough. At least you will need to know how to manage a nervous client and witnesses, and how to manage your team which is working under a deadline and emotional stress caused by your nervous client. I also often encourage my young colleagues to take MBA classes so they can understand their clients better.

The third is good communication skills. One problem I often see in young lawyers is that they use a lot of jargon when speaking to their clients. They want to show how authoritative they are. However, if the client is not a lawyer, you have to serve your client in a language they understand. That is easy to say and difficult to do.

Lawyers need to have the ability to simplify issues. I always like to ask my young colleagues who are working with me to create a diagram on one page for each case, no matter how complicated, as it is very useful to have such a diagram and to walk through it with your client.

Also, find analogies to help if your client has difficulty understanding what you want to do and why. For example, if I want a client to give me documents for review when the client encounters a potential dispute, I will use the doctor-hospital relationship as an example. I will say if you go to a hospital to do a surgery, you want to do a thorough physical check before the surgery, right? Then I will say collecting documents and allowing lawyers to review them is equivalent to a physical check in hospital. Therefore, I will warn the client not to miss anything as it may risk your life if you do not tell everything to your doctor.

You mentioned that you became an arbitration lawyer by accident. So if you weren’t a lawyer or arbitrator, what would you be?

AY: I may become a screenwriter. I keep saying that and my friends keep laughing at me because I have talked about it for 20 years and I still have not done it.

You mentioned earlier that you came to Singapore the first time you left China. What do you like best about Singapore and the SIAC?

AY: You’ve heard all the good comments: very efficient, highly organised, people are very professional and it is very clean. I still clearly remember my first impression when I first landed in Changi Airport in 1987. We were queuing for a taxi and I noticed that there was a frame on the floor with a number on it, so each taxi would stop within the frame. I was very deeply impressed at how organised Singapore was! Remember that was more than 25 years ago.

Of course SIAC is the same, one of the best arbitral institutions known to me. Very efficient and professional, and I have a very high regard for the staff working here.

“...You have to enjoy what you do. If you want to do international arbitration or dispute resolution, you’ve got to possess the ability to do whatever it takes – 为客户两肋插刀. You become a partner and friend, more than just a counsel, and you are willing to go through the entire journey with your client.”
What advice would you offer to someone starting out in international arbitration?

AY: Determine whether you are interested in this area because otherwise it is hard. When we do international arbitration hearings, we often do not have much time to sleep, particularly during the hearing, often only two or three hours a night in order to have time to prepare for the next day. I recall when I was handling a big case in Stockholm, I asked my team composed of young lawyers to go back to the hotel to rest and to meet me in the lobby by 4am in the morning. I was deeply touched when I went down to the lobby and saw my team already there waiting for me.

I believe attending training programmes in international arbitration like the programme at Tsinghua law school or other similar programme is useful. I started my career as an international arbitration lawyer without much training, so I learned the hard way. Attending international arbitration programmes will provide you with an opportunity to learn and also an opportunity for you to find out if you are interested in this subject or not.

Attending moots or mock trials is also a very good way to learn. I know that now the Vis Moot is popular among Chinese law students. That is indeed a good way to learn. I attended the pre-moot programme earlier this year to help students. One comment I gave was the need to structure their arguments, giving first priority to their most important and powerful points given that they have very limited time. I told the students that they need to think strategically about what should be said in the limited timeframe. The students found it helpful.

Given that you are such an established practitioner, we find it very rare and admirable for someone like you to get involved with students. What makes you do it?

AY: Well, thank you for saying that. Many well-established practitioners are doing the same. It is very common in the arbitration community to see arbitration practitioners do counsel work, sit as arbitrators and teach on arbitration subjects. I think it is a very good way to share knowledge and experiences within the community. Since not many Chinese lawyers are familiar with international arbitration, I view this as part of my mission to help the younger generation. I find it as rewarding as being an arbitration lawyer.