Keep it Simple. Keep it Interesting.

By Sapna Jhangiani, Clyde & Co Clasis Singapore

This article focuses on two talks delivered in Singapore in the past year by eminent arbitrators on the subject of advocacy in international arbitration. The first, entitled “The Do’s and Don’ts of Presenting a Case to Arbitrators” was delivered by Neil Kaplan CBE QC SBS to an audience comprised of the Singapore branch of the Chartered Institute of Arbitrators. The second was presented by Toby Landau QC under the auspices of “YSIAC” and was entitled “An Insider’s Guide to Advocacy in Arbitration: A candid assessment, and critique, of common advocacy techniques from the perspective of the arbitral tribunal”.

Although – sadly – neither of these excellent talks have been published (yet), the author sets out below, for the benefit of others, a combined list of some takeaway points from these presentations (with some development of her own), in the hope that she does them justice:

1. Tribunals are not Superhuman.

This should not be a revelation. However, most Counsel appear to genuinely believe that if you send a tribunal, say, 120 bundles of turgid documents, 25 witness statements and 200 pages of submissions (with 50 accompanying authorities) the tribunal will somehow be able to examine and digest all their contents thoroughly prior to attending a hearing, and then will subsequently ensure that each document had been carefully considered before delivering a reasoned decision.

But if you would struggle to perform this task and find it impossible, you can be sure that a tribunal would as well. They don’t have any greater ability to digest reams and reams of documents than you do. In fact, bear in mind that law firms nowadays have a machinery of associates on every case, whereas most tribunals act alone or with limited secretarial assistance.

2. Find an Opportunity to Orally Present Your Case

Traditionally in common law jurisdictions, judges had little or no opportunity to read into a case before trial. The opening of a case was therefore an important piece of oral advocacy. Counsel had the judge’s attention and, hopefully, an open mind - before any evidence had been presented - upon which to imprint all the reasons why the judge should find in their client’s favour.

Nowadays, the opposite situation prevails. Judges and tribunals are drowning in written material submitted by the parties. Because of the sheer volume of submissions and evidence (see point 1. above), there is yet again a high likelihood of their not being fully acquainted with a case by the time of the final merits hearing. At a final hearing, each Party is likely only to be afforded a brief opportunity to present their case before the evidence is heard. Counsel should therefore consider finding an opportunity for a full oral “opening” of their case (let’s call this the “Kaplan Opening”) after the first round of written submissions and witness evidence, and well in advance of the merits hearing. This would enable Counsel to leave an impression of their case on the tribunal whilst the tribunal’s mind is effectively a blank slate. It would also

“Counsel should therefore consider finding an opportunity for a full oral “opening” of their case... This would enable Counsel to leave an impression of their case on the tribunal whilst the tribunal’s mind is effectively a blank slate.”
promote a dialogue with the tribunal to flush out many of the issues and gaps in the evidence, and enable Counsel to address any shortcomings in their case (including abandoning weak points) in advance of the merits hearing.3

3. Tell a Story

There are scientific reasons why human beings are hard-wired to appreciate a good story. Stories serve the biological function of encouraging good behavior and conformity to social rules.

Most importantly, stories are a tool of persuasion. Certain neurotransmitters must be present in the brain for it to “change”, and they are especially in attendance when a person is curious, is predicting what will happen next and is emotionally engaged.2 This explains why successful religious texts are not written as lists of nonfiction arguments or points. They are stories. Stories about love, rivalries, betrayals, disasters, journeys and friendships. So if you want to persuade, present your narrative as a tale, and aim to bring out the human aspect of the story. In the words of Bernard Hanotiau, speaking on the advocacy panel at the recent inaugural YSIAC Conference in Singapore: “A good memorial should read like a good novel”.

(One caveat here: Don’t make up any of the facts and don’t get carried away. The tribunal is not going to find in your client’s favour based solely on your ability to entertain!).

4. See your Role as that of Assisting the Tribunal

Your role is not to score points against your opponents. It is to present your client’s case to the best of your ability and ensure that the tribunal has everything it needs to make a decision (preferably in your client’s favour). Co-operation between Counsel will be far more helpful (and impressive) to a tribunal than salvos exchanged between Counsel, however clever.

Further examples of helpful behavior to a tribunal may be as follows:

1. Organising your points in a structured way with the use of headings and diagrams where appropriate;
2. Relying only on authorities that are helpful and directly relevant, rather than electronically searching by keyword all the issues relevant to your case and sending the tribunal everything that comes out.
3. Not copying the tribunal on all your correspondence with your opponents (this may sound obvious, but experience suggests it is not so to all).

What would be most helpful to a tribunal in practically all cases would be for each Counsel to set out the issues; the options on each side in relation to each issue; and why the tribunal should find in their client’s favour on each issue. Sounds simple, doesn’t it? Judging from both talks, this ‘utopia’ of arbitration advocacy practically never occurs.

5. Less is More

This principle goes hand in hand with all those set out above. As Lucy Reed commented in her lecture entitled “Tribunal Decision-Making: Art, Science, Sport?” presented in Hong Kong in December 2012,3 “focus not so much on what may go in an arbitrator’s head but more on how much can fit in an arbitrator’s head”.

Keep it short and succinct, and whatever you do, don’t bore the tribunal (the more verbose you are, the more risk there will be of this occurring). Bear in mind as well that the more reams of paper you throw at a tribunal, the less chance there is of it all being read.

Even a complex legal problem with a complicated factual matrix can capture the tribunal’s interest if presented clearly and succinctly, by Counsel seeking to communicate with the tribunal. Don’t forget that oral communication is a two-way dialogue. Eye contact is important, as is “reading” the audience you are communicating with to gauge whether they are following you, or need you to pause or explain something further. You may be a fantastic orator but you won’t get far in persuading the tribunal if you launch into a 50 page monologue worthy of Shakespeare without any thought for your audience.

I would be delighted to expand further on this point, but in the interest of keeping this article short and succinct, I will have to end here.

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1See further: “If it Ain’t Broke, Don’t Change it” by Neil Kaplan published by the Chartered Institute of Arbitrators in (2014) 80 Arbitration, Issue 2, pg. 170.
Chinese Law or No Law: The Lex Arbitri for Arbitrations Conducted by Overseas Arbitration Institutions in Mainland China Practitioners

By Ke Hu and Xi Lin, of Jingtian & Gongcheng

Longlide, Shenhua Coal, and the issue ahead

In a case regarded by many as a “milestone” for arbitration in China, Longlide Packing and Printing Co. Ltd. v. BP Agnati S.r.l (hereinafter “Longlide”)¹, the Supreme People’s Court of China (the “SPC”) upheld the validity of an arbitration agreement providing for arbitrations seated in Shanghai, China, but administered by the ICC – opening the door for overseas institutions conducting arbitration in China. The SPC reasoned that the phrase “arbitration commission”, an essential element for a valid arbitration agreement under Art. 16 of the Arbitration Law (1994), included foreign arbitral institutions such as the ICC, and rejected the request for invalidating the agreement.

However, in the earlier case of Shenhua Coal Transportation & Trading Co., Ltd v. Marinic Shipping Company (hereinafter “Shenhua Coal”)², the SPC held that the “arbitration commission” under Art. 20 of the Arbitration Law referred only to Chinese arbitration institutions and excluded “foreign arbitration institutions”, and thus, there would be no judicial intervention by Chinese courts on the competence of the tribunal for proceedings administered by foreign institutions.

This divergence – Longlide adopted a different meaning for the same term “arbitration commission” even though it was interpreting a provision in the same chapter of the same statute as Shenhua Coal – raises several difficult issues. How could the phrase “arbitration commission” be construed so differently? Can the cases be reconciled?

Perhaps more importantly, Longlide and Shenhua Coal lead to the problematic situation whereby, if an arbitration is administered by a foreign institution and seated in China, it will be a valid arbitration under Chinese law (Longlide) but immune from judicial intervention and review by Chinese courts at the seat (Shenhua Coal).

According to generally accepted conflict of law rules as embodied in Art. V(1)(d) of the NYC, the Longlide arbitration was subject to Chinese law and the Shenhua Coal arbitration was subject to the laws of England and Wales. Thus, Art.20 was not applicable as the Chinese courts had no supervisory jurisdiction.

We may then find a reasonable explanation for the decision in Shenhua Coal: while Shenhua Coal said that Art. 20 was not applicable to an arbitration administered by a foreign institution, it was in fact referring to an arbitration seated abroad.

The “institution standard” in determining the nationality of arbitrations and awards

One may ask why the SPC based its conclusion in Shenhua Coal on the nationality of the administering institution instead of the seat of the arbitration.

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In our opinion, this unfortunate choice was a result of the textual limitations of the Civil Procedure Law of 1991 (the “CPL”); the SPC was adopting the terminology used in legislation out of prudent judicial restraint, since the resolution of *Shenhua Coal* required only a literal interpretation.

In 1986, China ratified the NYC, Art. V(1)(d) of which provides that the law of the seat of arbitration (“the country where the arbitration [takes] place”) will govern the procedure of arbitration.

Unfortunately, the first legislation dealing with foreign arbitration after China’s accession to the NYC, the CPL 1991, did not embrace the concept, and its Art. 269 (now Art. 283) provides that if a party seeks the recognition and enforcement of an award rendered “by a foreign arbitral institution”, it should apply to the Chinese courts “under international treaties to which China has entered into or joined, or in accordance with the principle of reciprocity”, therefore characterizing awards rendered by foreign institutions as foreign irrespective of whether the award is rendered in China. This “institution standard” has remained for 24 years.

This is incompatible with the “seat standard” in the NYC. In a 2004 case, the SPC held that the nationality of the award depended on the location of the administering institution, and an ICC award rendered in Hong Kong should be regarded as a French award and be enforced under the NYC, rather than under the Arrangements on the Mutual Enforcement of Arbitral Awards between the Mainland and HKSAR.

Luckily, because of the broad reach of the NYC, the misidentification of nationality has not threatened the enforcement of foreign awards. Also, the NYC as an international convention, is superior to the provisions of the CPL under Art. 260 of the CPL, and by virtue of Art. V(1)(d) the “seat standard” has been commonly adopted by the SPC in determining the applicable procedural law of a foreign arbitration proceeding in cases on recognition and enforcement of foreign awards.

**Shifting to the “seat standard”**

In 2006 and 2008, two lower courts, respectively in Züblin II and Dufourco, characterized awards rendered by the ICC in China as “non-domestic awards” under Art. I(1) of the NYC, as no legislative basis could be found for a Chinese arbitration conducted by a foreign institution. Although these two decisions marked a shift towards the “seat standard”, they were not endorsed by the SPC.

In 2010, in the Notice on Enforcement of Hong Kong Arbitral Awards in Mainland (Fa Fa [2009] No. 415), the SPC directed that arbitral awards rendered in Hong Kong, whether *ad hoc* or institutional, should be enforced under the Mainland-HK Arrangement. This implies that such awards are Hong Kong awards. However, this Notice is not an authority in the context of onshore arbitration or the enforcement of convention awards. The SPC possibly made this deviation because Hong Kong is technically not “foreign”, and thus the hands of the court are not bound by Art. 283 of the CPL.

Presentations made by judges from the SPC in recent seminars have also signaled that the prevailing view within the SPC supports the “seat standard”, although there remains a technical difficulty to fully adopting this standard due to textual limitations of the legislation.

**Chinese law as the *lex arbitri* and Chinese courts as supervisory courts**

We believe that the exclusion of court intervention over foreign arbitrations described in *Shenhua Coal* should not be read literally. Chinese courts have sufficient legislative basis and judicial power to support and supervise arbitrations seated in China that are conducted by foreign institutions. We also suspect that when an appropriate case comes up, this power will be exercised.

The Chinese arbitration community has reached the consensus that the procedural law of an arbitration, the *lex arbitri*, is the law of the seat. However, when it comes to arbitrations conducted by foreign institutions in China, there is a profound disagreement over the *lex arbitri* and the nationality of such arbitration proceedings and consequent awards.

In our view, the silence or ambiguity in the Arbitration Law should not prevent Chinese courts from applying Chinese law to and exercising supervisory power over such arbitration proceedings.

Firstly, China’s sovereignty and the inherent power enjoyed by a sovereign country over its territory, mandates that Chinese law is applicable to arbitration proceedings conducted in the territory of China and that Chinese courts have *in rem* jurisdiction over such procedures.

Secondly, Art.V(1)(d) of the NYC, as an international convention and a reflection of customary international law, provides a solid foundation for applying Chinese law, as “the law of country where the arbitration [takes] place”, to any arbitration seated in China.

Thirdly, under Chinese law there is sufficient basis for foreign arbitration institutions to conduct proceedings in China. The CPL
The NYC leaves the definition of “non-domestic awards” to the discretion of national courts. According to Prof. van den Berg, one situation where an award is considered to be non-domestic is when the governing procedural law of the arbitration, as selected by the parties, is different from the law of the seat of arbitration, which is not the case for a China-seated arbitration conducted by a foreign institution.

The term “non-domestic awards” should be construed in a pro-enforcement manner for the purposes of the NYC. The proposed approach provides greater certainty regarding the enforcement of arbitral awards domestically. It is undesirable that such awards be characterised as non-domestic awards, thereby reducing the likelihood of their recognition and enforcement in China. In order to facilitate the enforcement of such awards both internationally and domestically, it is necessary to recognize them as Chinese awards.

Conclusion

Longlide demonstrates the commitment of the Chinese legal system to a pro-arbitration policy and the development of arbitration in China. There are still uncertainties, due to the lack of legislation and judicial interpretation, about the lex arbitri of proceeding conducted by the ICC and other foreign institutions in China. We have strong reasons to believe that Shenhua Coal was not intended to exempt such proceedings from China’s legal system. They ought to be governed by Chinese law and supervised by the judicial authorities in China. Awards rendered in such arbitrations should be enforced as onshore foreign-related awards in China.

However, when negotiating or re-negotiating an arbitration agreement in a China-related international transaction, it would be advisable, while selecting an overseas institution such as ICC/SIA/HKIA, to designate the legal place of arbitration outside mainland China, to ensure that the arbitration can be conducted smoothly, and that enforcement can be sought with greater certainty.

Enforcement of awards

Once we agree that such proceedings are Chinese arbitrations, it is clear that such awards, as produced by arbitration procedures governed by Chinese law, should be enforced as Chinese foreign-related arbitral awards in Mainland China, instead of being treated as non-domestic awards.

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Third party funding in international arbitration: a slippery slope or levelling the playing field?

By Nathalia Lossovka

"He who pays the piper calls the tune."

I. Introduction

The debate over third party funding ("TPF") is almost a microcosm of the debate in the arbitration world at large – it pits the “free-market approach” advocates, who argue that the market will correct itself, against the backers of a “regulated” approach, who lament the lack of any regulation controlling the funders. The allure of high value disputes, limited appeal avenues, control of the proceedings and the New York Convention-backed widespread enforcement options are some of the reasons for funders’ interests in arbitration.

This essay argues that TPF as it stands will lead the arbitration industry down the slippery slope as concerns over the spurious litigation, conflicts of interest, costs and privilege have not been sufficiently addressed. In order to reap the benefits of levelling the playing fields and increased access to justice through TPF, this essay proposes some mechanisms to rein in the unruly aspects of TPF.

II. Dredging up spurious claims or access to justice?

TPF will, if it has not already, lead to an increase in the number of arbitration claims. Taking the example of Australian litigation, the liberalisation of TPF led to an estimated 16.5% rise in litigation. With a growing pool of profit-driven funders at bay, cash-strapped claimants may be more willing to pursue claims which they were previously content to let lie.

Backers of TPF argue it is in the funder’s interest to properly assess claims and not back weak claims or take unnecessary risks. Some funders, like IMF (Australia) Ltd, claim to adopt a stringent assessment criteria where less than 5% of the applications receive funding.

However, the assertion that one can rely on the various funders’ assessment criteria erroneously implies that funders have uniform due diligence processes and risk appetites. In reality, funders have varying levels of risk appetites which can lead to an increase in unmeritorious claims since even weak claims can be funded in return for a higher proportion of the damages.

What is worrisome is that even amongst sophisticated funders like Burford Capital and Calunius Capital there is talk of “there’s a price for everything” and assertions that they will not “shy away from risk for fear of loss”. Funders are not just content wagering on single cases. They now are considering “products” such as derivatives, where a single motion is funded, to a basket of cases put together as a portfolio to diversify risk. With this, arbitration claims will then be traded as choses in action. Once such “products” are sold and then re-sold to third parties, arbitral claims can suffer the same fate as the debt obligations which led to the sub-prime mortgage crisis.

On the other hand, TPF allows small players to pursue a claim which they are otherwise unable to afford as it provides an additional means of funding for some and the only means of funding for others. Whilst a funded party has to forgo part of his damages to the funder, these are damages which it would not obtain without the funder in the first place. For the uninitiated, experienced funders can lend...
assistance with due diligence, trial strategy and management, thereby reducing cost wastage. It is for these reasons that courts in England, Australia and Hong Kong have abandoned their traditional aversion to champerty and maintenance and recognised that TPF can facilitate access to justice.

What then can be done to limit the barratrous aspects of TPF while realising the benefits of greater access to justice? For starters, legislation can be passed to curb the farming out of arbitral claims. A threshold value could be set for claims that can be subjected to TPF. Regulations can limit the selling of arbitral “products” by the funders. Such measures will force less scrupulous funders to carefully assess the merits of each dispute before backing it.

The arbitration community has addressed such conflicts through the new IBA Guidelines on Conflicts of Interest in International Arbitration (23 October 2014), providing that (1) arbitrators are under a duty to disclose any relationship with TPF providers and (2) parties must disclose a direct or indirect relationship between an arbitrator and a third-party funder.

A. Arbitrators

An impartial and independent tribunal is one of the more sacrosanct features of international arbitration. A conflict can arise where a funder funds several claims and the arbitrator in one of those claims is also the lawyer in another claim funded by the same funder. Such conflicts can lead to challenges of the arbitrator and the appointment of a substitute arbitrator could not only potentially increase costs for the parties but would also be disruptive to the proceedings. If the disclosure of the arbitrator’s involvement with the funder is made after the close of proceedings, catastrophic consequences can follow as the award may be rendered invalid.

The way forward also lies in the introduction of rules requiring disclosure by arbitral institutions. First, parties should be required to disclose TPF arrangements and details of the funder. The institution should then perform its own conflict check against its database of current cases that its panel of arbitrators are involved in. If a potential conflict arises, the institution should facilitate the replacement of the subject arbitrator. Second, arbitrators should be required to report to the institutions on the cases where they act as a lawyer and a funder is involved. Whilst such disclosure is arguably required under the current rules on justifiable doubts on independence, the requirement to disclose TPF arrangements should be explicitly spelt out. This will facilitate the conflict check that the institution will perform. A further step in the future could involve information sharing amongst the institutions.

B. Funded party’s lawyers

In the three-cornered relationship between the funder, the funded party and the funded party’s lawyer, a conflict may arise where the funder assumes de facto control of the claim. The funder, being in effect the payor of the lawyer’s fees, may insist on pursing the claim through arbitration fully, while in the lawyer’s professional opinion its client, the funded party, would be better off settling the dispute. Concerns have been raised that the lawyer may support the funder’s views and breach his/her professional duties towards the client.

Recent decisions hardly tackle this issue head on. The English Court of Appeal in Arkin case skirted the issue by ruling that the TPF arrangement is valid as long as the funded party is in control of the litigation. The High Court of Australia in the Fostif case took the view that the influence exerted by the funder did not constitute an abuse of process.

The regulation by bar associations and the adoption of a code of conduct for funders may be an answer to this problem.

First, the professional conduct rules should provide that the lawyer’s duty is to the client and to act in the client’s best interest even if this is adverse to the funder’s interests.

Due to its public policy dimension, disclosure of TPF arrangements in investment arbitrations is the first step towards weeding out the funding of unmeritorious claims. With disclosure, the institutions and tribunals will be better placed to adopt measures such as security for costs, as discussed below, in order to safeguard against the possibility of an empty victory for the unfunded party, which is often the defendant state.
Third party funding in international arbitration: a slippery slope or levelling the playing field?

By Nathalia Lossovskaya

Second, like the English Code of Conduct for Litigation Funders 2011, funders can and should adopt a voluntary self-governing regime, providing that where disagreements arise, the lawyer owes his/her professional duties to the client and not to the funder. Such a code can also provide that if a conflict arises between the funded party and the funder, the lawyer may continue to act solely for the funded party. 27

IV. Costs – leaving the winner in the lurch

Funders can buy into arbitrations for a portion of the damages with none of the exposure to costs. If a funded party loses its claim and cannot satisfy an adverse costs award, the funder can perform a disappearing act. In litigation, the court can join the funder and its parents to the proceedings to make them jointly and severally liable for the loser’s indemnity costs, like in the case of Excalibur Ventures v Texas Keystone Inc & Ors. 28 In contrast, an arbitral tribunal neither has the jurisdictional reach nor the coercive powers to enforce adverse orders against the funder. The arbitration agreement fares no better in providing a recourse since this agreement cannot be used to bind the funder.

In this author’s opinion, this problem is not new. An analogous situation is where a claimant subsidiary company is funded by its parent company, which is happy to enjoy a favourable award but, in the case of a loss, can abandon the subsidiary (often an empty shell) and turn the opposing side’s victory into a pyrrhic one. The solution to this and the TPF scenario lies in disclosure. It is only through disclosure of TPF arrangements that precautions can be taken against leaving the winner in the lurch.

To ‘lock in’ the involvement of the funder, the involvement of TPF arrangements should weigh heavily in favour of the granting of security for costs. For instance, in a recent ICSID ruling, the presence of a TPF provider was one of the reasons for ordering the claimant to pay security for costs. 29

Security for costs assumes a greater importance in investment arbitration. Taxpayers’ dollars are spent defending a funded investor’s claim with no safeguard in place to recover the state’s costs in the event of a successful defence. 30

A further proposition is to provide avenues to seek costs orders against funders in arbitration legislation. 31 The successful party could then apply to court for an order against the funder. Funders should be required to a minimum capital or purchase insurance policies to ensure the viability of any costs order awarded against them. 32

V. Privilege and confidentiality

From the negotiation of the TPF agreement to the provision of the submissions prepared by counsel, there are bound to be many exchanges with the funder. Whereas privilege has been held to extend to communications with third parties in some jurisdictions as long as it was for the dominant purpose of obtaining legal advice, 33 it is unlikely that, with the exception of some correspondence, privilege will extend to all communications with the funder. The funder’s commercial interests are likely to militate against the attachment of privilege. 34 Further, the confidentiality of the arbitral proceedings is a key aspect of arbitration that is compromised when a party discloses documents to a funder.

In order to maintain privilege, one option is for parties to agree to exclude communications with funders from discovery in the arbitration agreement. 35 Further, rules of evidence can be amended to extend privilege to communications with the funder for the purpose of litigation or legal advice. To maintain the confidentiality of the proceedings, all funders should be made to sign a non-disclosure agreement before any documents are shared with them.

VI. Conclusion

The opaque nature of TPF funding in arbitration and the lack of regulation has led many to be wary of the potentially vulturous involvement of funders. For the control mechanisms proposed above to have bite, disclosure of TPF arrangements is imperative. The involvement of arbitral institutions is all too important since to rely on the funders to self-regulate is both naive and unsatisfactory. If the unruly aspects of TPF can be controlled, it holds great potential to pave the way to justice for the smaller players in arbitration.

INTERVIEW

with Eun Young Park
Interviewer: Sue Hyun Lim

How was your childhood like? Were there any influences during your formative years that geared you towards a career in international disputes?

I moved around many times and gained new experiences. I grew up in a big city and then moved to the countryside and noticed the different perspectives, behaviours, norms, and viewpoints. It was the first time I encountered a different culture. I eventually adjusted to it, but the problem was that a couple years later I had to move back to the big city again. I became a ‘stranger in a new environment.’ I had to catch up and it was not easy to settle back into the city. I moved to Seoul for college and again saw different cultural issues.

Noticing and learning from these kinds of cultural and perspective differences and the way people engage with others from different backgrounds became deeply ingrained into me. When I moved to the U.S. to study, I again saw differences. The fundamental nature, however, was not too different, because there were two commonalities: 1) communication and 2) understanding. If someone has an open mind you can communicate with them and try to make them recognise the difference and understand other opinions in order to reach a constructive relationship. Actually going through many transitions helped me become active in international dispute resolution, because I understand that issues concerning cultural differences can sometimes amount to legal issues.

How did you first get involved in international arbitration?

I served as a judge before working at a firm and getting involved in international arbitration. It was an honour and a great prestige to be appointed as a judge at the beginning of my career. However, I was a young and dynamic professional and it was a bit difficult to be content just taking on the passive role of a judge. As a judge you sit quietly in a robe, without a lot of opportunities to take initiatives. I really wanted to become an international person rather than working only with domestic issues; that’s why I left the bench and joined a firm. It was about the time when Korea was going through the Asian financial crisis in the late 1990s and a number of failed companies faced issues concerning compliance and restructuring. Against this backdrop, there was increasing demand for international work including international dispute resolution.

The first international arbitration case was enormously interesting: a failed joint venture between a Korean car manufacturer and a Brazilian partner to produce automobiles. It was truly a case of global dispute resolution with three different types of parallel proceedings: several civil suits, criminal cases, and an ICC international arbitration in New York. The amount was very large and I had to manage all of these cases and update my Korean client. With many proceedings including enforcement proceedings and related administrative proceedings with the government, the entire matter lasted almost 12 years!

Through this experience I learned, among other things, the importance of cultural difference. The reaction of Westerners when breaches occur is to litigate, whereas until a decade or two ago, Koreans were more reluctant to go to litigation unless the parties became enemies because Koreans had a tendency to care more about harmony. Because the Korean business tradition was not well known to non-Koreans at that time, I had to bring forth in front of Western arbitrators an expert who testified to the differences in business culture between Korea and the West. Culture really matters, internationally speaking.

You once served as a judge in the Korean courts. How does your past experience as a judge influence your practice as an arbitrator?

Naturally as a judge you try to hear both sides and not be quick to arrive at a judgment, which became ingrained into me. So I try to refrain from making a decision until I hear both sides. Being so may sound unbefitting to the client when performing the role of an advocate.
INTERVIEW
with Eun Young Park

Mr Eun Young Park

What do you like best about Singapore and SIAC?
I respect the SIAC for its certainty and predictability and reasonableness under the rule of law.

I also like to take short walks around the region of my office to freshen up. I think quite a lot while I walk; sometimes I walk with my colleagues because the different environment inspires different perspectives. The walk is also a time to organise and to be in solitude, because I am constantly surrounded by many busy things. I sometimes have afternoon tea for the same effect and to reflect. The typical day also includes client dinners and conference calls, the latter are with clients and lawyers spread across the globe.

Years ago I served as an arbitrator and afterwards shared my experience with the Secretariat about possible improvements. The SIAC took my recommendations quite seriously and has considered them in improving its overall practices. I have no idea if that has to do with being appointed in 2013 as a Board Member, and ultimately becoming a Court Member in 2015, but I really liked working with SIAC and was glad to be closely involved.

How did you first get involved in the governance of SIAC?
I believe SIAC is important, because the roots of arbitration trace back to Western initiatives and it was a dispute resolution process mainly used in Europe. Now that the global economy has covered the entire globe, it is important that businesses are not regulated in a jungle. There needs to be systems, and Asia and South America and other continents need to have a system to resolve business, economic, and commercial interests. Singapore thankfully has been a leader in organising a system in the Asian region.

Favourite place to stay while in Singapore?
My favorite place is St. Regis, which is next to a well-preserved, historic botanical garden. I really like to take a power walk in the morning before the sunrise, take a shower, and go to work.

Other than Singapore, favourite seat of arbitration and why?
I enjoy London as a seat of arbitration, because it is full of in-depth knowledge and experiences in international arbitration that go back more than 100 years. So many people and judicial bodies are well-experienced in arbitration. London is so mature and it feels great to be part of such a system. The only difficulty is that London compared to Singapore is a bit far from Korea.

Good example of international arbitration at its best?
Recently I had a very contentious arbitration case in Singapore, and there were so many difficult procedural issues. But the opposing counsel and I could come to an agreement on most of the difficult procedural issues. It made the dispute resolution process much more efficient than if we were to fight on every procedural issue. While we fought heavily on the merits, parties could reach an agreement on most procedural issues because both counsels were well experienced in international arbitration.

In one of my bad arbitration experiences, the opposing counsel raised almost every procedural issue. At one point, we struggled to agree on the venue of the arbitration hearing. The opposing counsel argued that the

Describe your typical day at work.
Well, busy [laughs]. On my way to work I have phone calls with my colleagues, sometimes with clients, and sometimes with overseas contacts to organise things and check on the status of matters. Afterwards I have internal meetings. I talk to my colleagues quite often. For lunch sometimes it is very quick: often just a sandwich due to my busy schedule. But I occasionally schedule big lunch outings for the practice group in order to have some relaxing and fun times.
venue should be in São Paulo, despite the fact that parties agreed New York as a seat of the arbitration, because there is great food and wine in the city. The point is that in a good arbitration the parties do not have to fight over every procedural issue, because dealing with tactics does not provide benefits but only delays. We did strongly argue on the merits. Tribunals are usually happy and appreciative towards us for taking a reasonable approach to the arbitration proceedings. Reasonableness often saves a great deal of costs and time for the parties.

What is the strangest thing you have seen happen in an arbitration?

When I had an arbitration in New York in 2003, the opposing counsel left the hearing room accusing the tribunal of lack of due process. Arbitration is more flexible than litigation. The opposing counsel who was familiar with litigation tactics may have wanted to make a point but it was not very courteous to the arbitrator. In an arbitration, cordiality is important. Even when you strongly argue, it is important to maintain courtesy; otherwise one will not be well received.

Who do you consider to be your mentor(s)?

I would consider Jan Paulsson as my mentor. I had a case against him and was quite impressed with his advocacy — knowing the proper amount of depth and emphasis. He also had enormous knowledge in arbitration. He is a visionary in the field of international arbitration. I would truly call him an international lawyer.

The second person is Peter Leaver, Q.C. He gave me a lot of guidance with regard to the best practices of being an arbitrator.

What is your favourite childhood memory?

When I was 10 years old, I unexpectedly caught a big fish. The pond was tiny and was not considered a good fishing place. But I really wanted to fish there regardless of the results. I ended up being the only one who caught a fish from that pond. I had a hard time struggling with the fish but finally caught it after 20 minutes. It was big news in my village. This tiny boy who caught a fish about the same size he was became a hero. I felt like the big fish was a compensation for being bold and courageous.

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

I am a powerful listener. I try to listen to people very carefully. I try to understand what they really mean and consider their emotions and feelings and what they want. My philosophy is that the written words do not fully reflect the words in the mouth. And the words in the mouth do not fully reflect the feelings in your heart. I can better help my clients by truly learning about what they mean during our communication.

What is your favourite restaurant?

Do Ga Hun is near the Gyeongbokgung Palace, which is two blocks away from our office. The restaurant is in a historic site and was a duchess’ house from Joseon Dynasty. It was sold to an owner of a gallery and he renovated the place. The restaurant presents French and Italian cuisines, and the place is preserved in its traditional Korean style, so you can enjoy the feel of traditional Korea while being provided with Western food. I enjoy experiencing the mixture of the West and the East.

You recently published a book describing your experiences being involved in international matters. Tell us more about your book.

The book is entitled “Reaching Out to the World.” I wrote the book based on my experience as an international lawyer. Based on my experience I tried to explain the contemporary world system.

The West governs the super-structure with the rule of law. The West takes the lead in legal areas, because the law is a reflection of what has happened during several centuries: imperialism, colonialism, the establishment of the world system after the two world wars. I wanted to give a perspective to the Korean people especially about the legacies of the world system. To understand where the world will go, I examined many countries from Europe, Asia, Americas, and Africa to understand why certain countries and societies are successful and have overcome difficult issues, and why certain countries and societies failed. In examining all of these, I wanted to put forth a question to the Korean people about where we should go. The question goes especially to the young Korean generations about what vision they need to have in this world system.

One of the main points is that Korea had been an isolated country for more than 200 years. We were not aware of what was happening outside our borders. Being isolated has not been too beneficial. When we were colonised in the early 20th century, we did not know what went wrong. We need to know about the world system and become global citizens who understand issues transcending across societies. By being a global citizen that can participate in the world system, there are gains of global leadership on many levels: to the individual, to the society, and to the country.

The most important thing is to understand the world. To understand the world, one needs to know about the immediate past, because today is a reflection of yesterday. If we know today, then we will know where we will go tomorrow. I received a lot of letters from youngsters seeking guidance and asking for directions on their career. I felt very proud and satisfied about this good work, a sort of pro bono for young people who have not had international experience.

Biggest challenges and opportunities facing international arbitration (in Asia)?

The biggest challenge of arbitration in Asia is building a system of arbitration. Institutions, businesses,
There are challenges that come from globalisation. In Korea, the legal market was traditionally very protected and isolated. Only Korean law firms worked here, and enjoyed a monopoly and protection. The market opened a few years and will gradually open more. Foreign law firms are currently open in Korea doing limited work and will gradually do more. There will be more competition and could lead to a volatile situation. But for the young lawyers it is a great opportunity. Because everything is unsettled, there are great opportunities amidst changes and transitions. The opportunities, however, do not come to you if you just sit and wait. You need act and take initiatives, explore, make your own path.

Mr Eun Young Park

Tip for someone starting out in international arbitration?

First, you need to develop basic skills in contracts and litigation. You need to know the common legal terms. Being contractual in nature, arbitration often comes out of very detailed, complex legal terms in contracts.

Second, you need to be a creative thinker. Knowing the law of your own jurisdiction is important, but you need to learn about other countries’ laws. To become an international lawyer, you cannot make judgments on the basis of only your legal system. You need to try to understand laws of other legal systems in order to become a true international lawyer.

Finally, you need to be a global communicator, which is someone who understands the meaning of language and culture. Language is important in arbitration, because you need to communicate. If you know how the opponent and the arbitrator think, you will better understand your case and make your case more persuasive. You need to be able to understand people, whether that be the arbitrator, your opponent, or the client.

Advice for a young law student interested in international arbitration but whose native language is not English?

Simply practice, practice, practice! You need to put work in daily.

To become an international lawyer, you cannot make judgments on the basis of only your legal system. You need to try to understand laws of other legal systems in order to become a true international lawyer.