

# 1 YSIAC Conference 2015: Speed Conferencing Sessions



*As for speed conferencing... perhaps I am a little too old to understand this analogy...but I am told that it is the conference equivalent of speed dating...*

With a Delphic introduction along the above lines, the speed conferencing sessions promised to be the highlight of the YSIAC Conference. And indeed, they were.

The programme permitted participants to pre-register for three out of ten sessions of their choice. The topics ranged from the SICC to the Model Law, from mediation to mechanisms for procedural efficiency, and from choice of seat to enforcement pitfalls. Each session, chaired by two young arbitration practitioners and members of the YSIAC, was to run for 20 minutes, with an open floor to the delegates, and discussions subject to the Chatham House rules. At the end of 20 minutes, a gong would sound, signalling to the participants that they should move on to the next session.

And with the sound of the opening gong, the conference rooms burst into a flurry of activity and discussion.

## **Session 1: Would adjudication in the Singapore International Commercial Court be a more attractive alternative to arbitration?**

By Gitta Satryani Juwita,  
Herbert Smith Freehills LLP

Delegates considered various factors and circumstances in which the Singapore International Commercial Court (SICC) could provide a litigant with a more attractive option. Factors considered included ease of enforcement, diversity of the pool of SICC judges, and procedural efficiency. With respect to enforcement, there are courts of certain countries which appear to accord more respect to a judgment

issued by the Singapore courts, of which the SICC is one, compared to an arbitral award, India being one such country. However, the fact remains that an arbitral award would remain more widely enforceable than an SICC judgment. Further, the SICC also did not offer real diversity since a litigant is not able to choose the judge who would hear its matter, unlike in arbitration. As for efficiency, it was noted that arbitration has become more time consuming and the SICC could offer a more efficient process and reduced period from the start of the proceedings to the time a judgment is issued. Delegates also considered cases in which the SICC could be more attractive, for example,

when fraud is in issue and a litigant requires a more detailed and involved cross-examination of a witness. Another example is where there could be unknown third parties who may need to be joined to the proceedings – this is not possible in arbitration without prior consent of the relevant parties. Ultimately however, the delegates noted that it is difficult to know when those specific circumstances could arise at the time when the contract was entered into. In the end, nearly all the delegates considered that the SICC was not a more attractive alternative to arbitration.

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Member,  
SIAC Court of Arbitration

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## **Session 2: A greater role for dispositive motions in international arbitration?**

By Vivekananda Neelakantan,  
Allen & Gledhill LLP

Delegates generally agreed that there was already a tendency amongst tribunals, where possible, to bifurcate proceedings into stages in order to deal with threshold issues, or other issues which could be determinative of the arbitration, in a preliminary phase in order to achieve greater efficiency. However, there was a cautionary note to ensure that the principles of natural justice were scrupulously followed in international arbitration. This meant that measures such as ex-parte proceedings or summary judgment were less likely to find an immediate place in international arbitration. There was also a view that the determination of threshold issues may likely be limited to those based on legal issues. Another difficulty pointed out was that determinations that were dispositive in nature but nevertheless required the production of factual evidence and the presence of witnesses at the early stages of an arbitration posed greater challenges on the preparation of the case to parties, and were therefore less likely to be ordered. An issue was raised as to whether there was scope for the introduction of provisions akin to rule 41(5) of the ICSID Rules of Arbitration in commercial arbitration rules of institutions. Rule 41(5) provides parties the option to file a preliminary objection that a claim is 'manifestly without legal merit' immediately upon constitution of a tribunal. Delegates noted that in reality, rule 41(5) has been used rarely by ICSID tribunals to strike out claims. Another view expressed was that it was an overarching consideration was that ousting a claim at the outset relegated parties to litigation which parties from divergent jurisdictions may have intended to avoid in the first place by selecting international arbitration in their contracts. Therefore, tribunals may be somewhat less reluctant to use strong measures to issue dispositive rulings without complete consensus on the course of action being followed amongst the parties.

## **Session 3: The 2006 Amendments to the Model Law have not yet gained international acceptance. Should this be revisited?**

By Kirtan Prasad, Allen & Overy LLP

The discussions for this session were focused on the following revisions: Article 17 (which, amongst other things, sets out the conditions which must be satisfied for the grant of an interim measure), Article 7 (which defines the form of an arbitration agreement), and the new Article 2A, which encourages the interpretation of the Model Law in accordance with its international origin and nature as a harmonising instrument. Of the three, Article 17, understandably, generated the most debate. Delegates argued the pros and cons of a codified test for interim measures. While one view was that it promoted certainty, another questioned the feasibility of a one-size-fits-all test to deal with the entire gamut of interim measures. However the most hotly debated aspect of Article 17 was subsection B, which permits parties to apply for ex-parte relief. On the one hand, it was suggested that ex-parte relief went against the very DNA of party consent in international arbitration, however, on the other hand, delegates questioned that if state courts could order ex-parte relief (with the ability to subsequently contest it at an inter partes hearing), then why not a tribunal?

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There was a call for greater clarity on the tests to be employed by emergency arbitrators in deciding applications for the grant of urgent interim relief.

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Another point raised was the enforceability of such measures in state courts and the extent of voluntary compliance. Perhaps reflective of the contention around this issue, the 2006 Model Law, like the new Swiss Rules, does not even use the word "ex-parte"; rather it refers to them as "preliminary orders." However the most interesting observation for this session was one in respect of Article 2A, and the harmonisation of standards. One delegate observed that a global exercise to harmonise accounting standards recognised the need to move to a principle based approach, while conceding that complete or perfect harmonisation, would be difficult, if not impossible, to achieve.



## **Session 4: The Emergency Arbitrator: 5 years on, how is the process working?**

By Vivekananda Neelakantan,  
Allen & Gledhill LLP

Delegates discussed the emergency arbitrator provisions and how they have worked in practice and shared their individual experiences of using the provisions or administering cases under the provisions at SIAC. There was general agreement that such provisions were necessary in the light of time taken to constitute tribunals in some cases or the lack of ability or the reluctance of parties to approach national courts for interim relief. There was however a call for greater clarity on the tests to be employed by emergency arbitrators in deciding applications for the grant of urgent interim relief. One suggestion was for the use of the tests prescribed in Article 17A of the UNCITRAL Model Law's 2006 version, which has not been uniformly adopted globally. There was, however, agreement that urgency constituted an important overarching basis for the grant of any relief by emergency arbitrators. Another issue for discussion surrounded the need for clarity on the enforceability of orders or awards issued by emergency arbitrators, particularly since the jury still appears to be out on whether such orders qualify as 'awards' and can be enforced through the New York Convention. It was however pointed out that the issue might eventually die a natural death with jurisdictions such as Singapore and Hong Kong adopting legislation specifically providing for the enforceability of emergency arbitrator orders, or other jurisdictions such as India judicially endorsing emergency arbitrator orders in the exercise of court jurisdiction to grant interim relief in aid of arbitration. A further issue raised as a potential limiting factor to the use of the provisions was the inability of parties to challenge such orders until a tribunal was in place. Delegates however agreed that the short timelines for the consideration of requests by SIAC emergency arbitrators and the quality of the process meant that it was a very viable option for parties.

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## **Session 5: Enforcement issues in Asia: traps for the unwary**

By Gitta Satryani Juwita,  
Herbert Smith Freehills LLP

Delegates considered peculiarities that arise in different parts of Asia. For example, in Indonesia, it was pointed out that the arbitration law requires an arbitral award to be enforced by the tribunal, failing which it should issue a power of attorney to allow the winning party to enforce the award on the tribunal's behalf. There were also discussions about the Indonesian judges' apparent lack of training and familiarity with arbitration law. One example was a decision in which an Indonesian court considered an ICC award issued by a tribunal seated in Indonesia to be a foreign award on the ground that the ICC was a foreign institute. In addition to Indonesia, Dubai was also discussed. Outside of the DIFC, Dubai laws require the tribunal to sign on every page of the award in order for it to be valid, and an award to be issued within six months, failing which the tribunal must seek an extension of time from the local court otherwise the award would be unenforceable. Delegates also looked at China where there was anecdotal evidence of a court in Shanghai refusing to enforce a foreign ICC award. In Korea, an award providing for punitive damages was held to be against public policy and therefore unenforceable. In conclusion, delegates noted that it is important to consider the place of enforcement at the outset when planning to enter into an arbitration agreement, as well as during the course of the proceedings, to avoid unexpected surprises at the time of enforcement.



## **Session 6: There have been recent criticisms made about the arbitration process, in particular that the arbitration process seems to no longer bring about savings of time and costs. How do we remedy the situation?**

By Vivekananda Neelakantan,  
Allen & Gledhill LLP

Delegates considered the use of information technology and document management systems as a

useful technique to achieve the objective of time and costs savings to some extent, although some felt that for that to happen, tribunals needed to be in tune with changes in technology and be open to a paperless working environment, which was not always the case. A view was also expressed that institutions ought to take the lead in instilling the use of technology in the manner that courts have done in relation to litigation, for example, in Singapore. The expedited procedure drew attention as a valuable tool in institutional rules to secure a quick and effective arbitral process. An interesting option discussed was to customise the threshold of the sum in dispute currently prescribed for the expedited procedure to be available to parties. For instance, the SIAC expedited procedure can be applied for if the sum in dispute is not more than SGD 5 million. The use of tribunal-appointed experts was considered as being helpful in achieving clarity for the tribunal on disputed technical issues although the general view was that the practice of tribunals appointing experts was rather infrequent. Delegates also referred to hot-tubbing of experts as a practice gaining currency and being useful to overcome time and money spent by parties in employing competing experts who often added little value to the tribunals' understanding of technical issues in dispute. Two other measures that found endorsement were the issuance of costs orders or other sanctions for delays occasioned by parties, and the introduction of a tracking tool to help parties understand the status of drafting of awards by arbitrators. The *ICC Guide to Effective Management of Arbitration* and the *ICC's Report on Techniques for Controlling Time and Costs in Arbitration* were mentioned as helpful reference tools in the endeavour to conduct arbitrations more efficiently.

## **Session 7: The law of the arbitration agreement – how to resolve the conundrum? Should there be a fixed procedure for the determination of disputes over the law(s) of the arbitration? If not, can we deal with this issue more efficiently?**

By Gitta Satryani Juwita,  
Herbert Smith Freehills LLP

Delegates considered if there is truly a "default position" and if not, what that position ought to be. Many delegates preferred the approach found in a Singaporean decision

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which advocated for the law of the seat to govern the arbitration agreement in the absence of evidence to the contrary while others preferred the other approach of applying the substantive governing law of the agreement in which the arbitration agreement is found. Delegates also considered if it is worth having institutional rules or the curial law advocating one approach or the other for the sake of efficiency. For example, the HKIAC's model clause contains a model statement reminding parties to consider if they wish to apply the law of the seat to the arbitration agreement. In China, the arbitration law provides for the law of the seat to apply to the arbitration agreement unless otherwise agreed. It was suggested that the SIAC should consider this approach in the next round of rules revision.

## **Session 8: Singapore seems to be the popular seat of choice for international arbitration. Is there room for another seat in Asia?**

By Baldev Bhinder, Ashurst LLP

Delegates expressed a myriad of views on whether another country or city could rise to compete with Singapore's prominence as a seat of arbitration in Asia. Putting aside the two-horse race between Singapore and Hong Kong for arbitration's pole position for a choice of seat, the prevailing view was that China's continued economic rise could bring forward Shanghai's and Beijing's role as possible seats for arbitration (even if at the expense of bulldozing concerns

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[Left to Right] Ms Foo Yuet Min, Mr Andi Kadir, Mr Michael Hwang SC

of neutrality). Similarly the rise of Islamic finance may lead to greater prominence of Brunei and Malaysia as seats. While trade and commercial power may influence the selection of a seat that is more closely linked to the stronger negotiating party or the transaction, the ease of enforcement would continue to weigh heavily on parties negotiating a seat. To that end, the role of the courts in supporting international arbitration proceedings throughout the process and right up to enforcement would be vital for parties when negotiating a seat – a juxtaposition of the Singapore and Indonesian courts in that regard may drive home the point. That being said, the practicalities of arbitrating must not be forgotten and delegates have pointed out that China and Malaysia will appeal to costs-conscious parties while Singapore and South Korea are able to tap on their logistical expertise to present a "one stop shop" for arbitrating parties.

### **Session 9: Is mediation a toothless bite? What about the SIAC-SIMC Arb-Med-Arb Protocol? Is mediation gaining currency in Asia?**

By Baldev Bhinder, Ashurst LLP

Unsurprisingly, delegates felt that mediation generally lends itself to dispute resolution in Asia and that the SIAC-SIMC Arb-Med-Arb Protocol itself may have given some teeth to the previous perception of mediation. While most delegates have not experienced the workings of the new Protocol, many felt that sandwiching a mediation in between an arbitration at an early stage when a tribunal had just been appointed, made good sense in protecting the enforceability

of the mediation agreement (that can be transformed into an award by the tribunal). The timing of the compulsory 8 week mediation period was also more conducive towards settlement as it allowed parties to attempt mediation before their positions became polarised and entrenched further along the adversarial process of arbitration. However, there were mixed views\* on whether the same tribunal appointed to decide the arbitration should conduct the mediation, with most delegates instinctively pointing out that parties would feel prejudiced in such a situation and unlikely to approach the mediation openly. That being said, delegates from civil law backgrounds remarked that it is not uncommon for the same decision-maker to put on both the hats of arbitrator and mediator at different times of the process, for example, in Indonesia. Ultimately, delegates felt it is early days for the Protocol but saw it as a positive step for resolving disputes in Asia.

*\*(Ed. Note: Under the SIAC-SIMC Arb-Med-Arb Protocol, the arbitrator(s) and the mediator(s) will be separately and independently appointed by SIAC and SIMC respectively, under the applicable arbitration rules and mediation rules of each Centre. Unless the parties otherwise agree, the arbitrator(s) and the mediator(s) will generally be different persons.)*

### **Session 10: Are the expedited procedures being effectively deployed? Are there challenges with deploying the expedited procedures (e.g, timelines, conflict between the number of arbitrators agreed upon by the parties, and the number of arbitrators appointed)?**

By Baldev Bhinder, Ashurst LLP

The expedited procedures drew a mixed reaction from delegates that were calibrated from experiences that were dependant on the robustness of the tribunal. Anecdotes of expedited proceedings being derailed by parties failing to comply with timelines or introducing evidence or claims at a late stage were shared, leading to the question as to whether expedited proceedings are needed at all. Delegates recognised that a tribunal could ultimately make or break an expedited procedure but recognised its value in focussing the minds of the tribunal and the institution to resolve the matter within the stipulated timeframes. Some of the delegates raised concerns over the default appointment of sole arbitrators in expedited proceedings and the negative impact that creates for parties that are strongly influenced by the desire to have their party-appointed tribunal members in a three member tribunal as well as possible enforcement issues that may arise. While the Singapore Courts have brushed off attempts to set aside awards on the basis that expedited proceedings are heard by a sole arbitrator rather than the parties' stipulation for a tribunal of three, there was a sense that this very issue is likely to raise its head in enforcement proceedings in other jurisdictions. In that regard, delegates agreed that expedited proceedings may not be suitable for every type of case but the option of such a procedure is certainly a welcome one.

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At the end of the sessions, participants gathered at the main conference hall for the plenary session moderated by Mr. Michael Hwang SC. Mr. Hwang observed that he was particularly impressed with the level of exchange in the few sessions that he sat in on, noting that it wouldn't be out of place at a conference of more senior arbitration practitioners. Each of the session chairs were then invited, in turn, to summarise the discussions on their respective topics in order to provide the delegates with a flavour of the discussions that they did not attend.

In all, the sessions saw the exchange of many promising ideas and incisive observations. True to its name, the speed conferencing sessions provided a brief tryst with the various discussion topics, and left the delegates hungry for more.

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## Panel Session on Advocacy Tips

By Patrick Hennessey, *Barrister, 39 Essex Chambers*



[Left to Right] Mr Gary Born, Mr Cao Lijun

Maxwell Chambers' main conference room was buzzing and crowded for the first session after lunch: buzzing because the delegates had just witnessed the presentation of the essay prizes featuring some impressively large cheques (both literally and figuratively); and packed because a truly stellar panel was assembled to provide invaluable tips on a most crucial topic, advocacy.

SIAC's own President Gary Born was moderating the session and, having introduced his fellow panellists, launched the discussion by observing, in light of the essay prizes just handed out, the importance of written advocacy – this was to be a theme for the afternoon.

Zhong Lun Law Firm Partner Lijun Cao offered some invaluable tips on understanding and responding to a tribunal. Whether advocacy is characterised as an art or a technique, it should be remembered that preparation is key. Knowing your tribunal can be as important as knowing your case, so a good advocate conducts due diligence: is the arbitrator a judge or a lawyer, an academic or a professional? Is there material available which can give clues as to their views on relevant issues? Different arbitrators will prefer different styles and advocacy should be tailored accordingly. The delegates were reminded not to neglect the basics: eye contact, body language,

tone and pace, and as much as possible to keep one eye on the arbitrator – to amused surprise, Mr Cao confirmed that arbitrators are humans, not Buddhas and even the occasional nodding or shaking head from them can be significant.

Next up was 2011 GAR 'Arbitrator of the Year' Professor Bernard Hanotiau who brought over 35 years of experience as arbitrator to the panel, a man whose views on what would impress the tribunal were to be closely regarded. Professor Hanotiau observed that international arbitration had evolved significantly since the 1970s with the difference between civil and common law approaches declining in general but perhaps less when it came to advocacy. To some blushes (and even more incredulity), Professor Hanotiau praised English barristers as a "delight" for a tribunal but did note the tendency of all counsel to be far, far too long (recalling 4,500 page submissions in a recent matter). In a word of warning to all of us, he noted that overly repetitive and lengthy memorials give the frustrating impression that you think the tribunal is stupid. A good advocate, the room was told, is focussed, logical and brief.

Freshfields global co-head of international arbitration Lucy Reed picked up Professor Hanotiau's theme to offer some clear, practical tips: be fully informed on the facts and law in

your case; be clear in language and in thought, know why you have written every single line; and carefully walk the tightrope between connecting with the arbitrator as Mr Cao had advised while also staying true to your own style of advocacy. Top tips included drawing your case on a single sheet of paper summarising the claims that have to be proven, the defences to be neutralised, the elements of the damages award and other relevant matters. The discipline helps focus the case preparation and becomes a roadmap for the advocate. Like Mr Born, Ms Reed opined that the written record is increasingly more important than the oral advocacy. Ms Reed observed that the emphasis put on the 'performance' aspect by many advocates was perhaps disproportionate to the impact that oral argument actually makes and sometimes at the expense of the written material which, in all likelihood, will be what the tribunal returns to when it comes to making the award. When in doubt, all were usefully reminded that all advocates should be relentlessly courteous and courteously relentless.

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Few advocates command the global renown and respect of Drew & Napier's Davinder Singh SC whose thoughts and advice on cross-examination in international arbitration were the next offering in the session. Cross-examination, Mr Singh reminded us, was a unique form of advocacy, a rare and unmissable opportunity to explain your case to the tribunal through the mouth of the other side's witness – what better way could there be of giving credibility to your case theory? The particular challenge in arbitration (as opposed to in court) is that

advocates have more limited time for cross-examination and there is usually less scope to challenge credibility, but the good advocate should not be deterred, even by a resistant (or worse, sleepy) tribunal. You should not let the witness off the hook and use the sacred time of cross-examination intelligently because for all the discussion of the importance of written submissions, it was still true that some cases do turn on what the witnesses say.

In a brief digression, the panel offered some handy pointers on how

to wake a sleeping arbitrator (politely). A lengthy pause was noted to be surprisingly effective with requests to the chair for a brief adjournment providing a more definite option (if not one which can be deployed too frequently), but there was no need for either of these techniques as Mr Alvin Yeo SC, Chairman and Senior Partner of WongPartnership, delivered the session's final element on the differences between advocacy in national court litigation and international arbitration.

Seamlessly picking up on earlier advice that slides can be an asset to advocacy when used judiciously, Mr Yeo highlighted some of the key differences between court litigation and arbitration. In particular, the greater diversity of tribunals and systems in international arbitration requires a more flexible advocate; the greater flexibility of the arbitral process requires a less formal (but never informal) advocate; and the more inquisitorial approach in arbitration requires the good advocate to focus more on the merits and facts of the case at hand. Of course, skills for either practice are relevant for both, but it was particularly helpful for the delegates to appreciate those differences.

The panel's excellent presentations were followed by further lively debate, in particular on the question of whether written or oral advocacy was more important. Mr Born considered that there must be a balance, and Professor Hanotiau recalled that as an arbitrator, he had regrettably experienced cases where after a week of the hearing, the tribunal wondered why the matter couldn't have just been dealt with on paper. With good advocates, it was noted, the arbitrator learns during the hearing.

The clear message for the young practitioners to take away was not to neglect either oral or written advocacy and after a privileged couple of hours of advice from such a distinguished panel, it was a message well learned.



[Left to Right] Mr Bernard Hanotiau, Ms Lucy Reed, Mr Davinder Singh SC, Mr Alvin Yeo SC

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## 3 Panel Session on Pointers and Pitfalls for Younger Arbitration Practitioners

By Sahil Kanuga, Senior Associate, *Nishith Desai Associates*



[Left to Right] Mr Christopher Thomas QC, Ms Claudia Annacker, Mr Michael Hwang SC, Dr Eun Young Park, Dr Michael Pryles, Mr Nish Shetty, Ms Ariel Ye

The final session of the YSIAC Conference 2015 dealt with pointers and pitfalls for younger arbitration practitioners. Moderated by Christopher Thomas QC from the NUS Centre for International Law (Singapore), the panel included stalwarts Claudia Annacker, Dr. Michael Pryles, Michael Hwang SC, Nish Shetty, Dr. Eun Young Park and Ariel Ye.

In a session designed to get candid, no-holds barred advice from the who's who of international arbitration, the panel did not disappoint and provided delightful and practical experiences, insights and tips for junior counsel in an arbitration team.

### On Law Schools:

The panel got the ball rolling by discussing on whether the law schools of today were doing enough in the realm of *international commercial arbitration*. While it was felt that moot courts provided the best opportunities to develop specific skill sets required for *international commercial arbitration*, especially in terms of overall exposure and practical skills, there was a thought that the value of a post graduate degree today lay more in the overall knowledge of various legal conventions, cultures, rules etc. in addition to the development of practical skills. The consensus was the development of capabilities by the next generation of younger arbitration practitioners which impressed today's stalwarts.

### Importance of litigating in local courts:

Mr. Hwang stressed the importance of court litigation as the highest form of advocacy. In his view, one cannot appreciate the benefits of arbitration until you see, as he so eloquently put it, the '*full menu*' that a court case offers. Some litigation experience before arbitration was critical. The procedure involved before a court such as drafting of a claim, attacking the drafting, interrogatories etc. was rarely practised in arbitration. However, one needs to know that they exist, including the all-important dispositive motion.

Nish Shetty was quick to point out that while litigation is the starting point from where you learned a lot of skills, some litigators could not seem to change gears when they dived into arbitration. Further, the evolution of the Singapore International Commercial Court demonstrated the need for a hybrid structure and brought another important piece for consideration to this equation.

Dr. Park summed it up by stressing that court litigation is the starting point where there were a lot of skills to be learnt but that practitioners must learn how to leave any litigation-related baggage behind when practising arbitration.

### Development of additional skills:

Ariel Ye stressed the importance of learning a foreign language, apart from English. In her view, it helped to be exposed to a foreign culture and enabled one to see business in a different way. Given that the normal commercial disputes lawyer deals with CXOs of companies, learning business management would not be a bad idea, since it helps facilitate better communication with clients. She followed this up with a pertinent example of a case in which settlement discussions had all but failed, a particularly harsh statement pointing to the fact that a competitor would likely step in and seize the market share overnight worked wonders to drive home the point and bring about a positive change in attitude and an eventual settlement.

### Importance of industry knowledge:

Given the way the world was changing, specialisation in a particular industry was considered as a helpful addition to one's skillset.

Mr. Hwang's preliminary thoughts were that it was hard for a disputes lawyer to be attached to a particular industry. An alternative platform, enabling today's young practitioner to achieve the end of domain expertise, would be to start as a transactional lawyer.

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[Left to Right] Mr Bernard Hanotiau, Dr Michael Pryles

Nish Shetty elucidated further that flexibility was one of the attractive attributes of arbitration and not every dispute actually requires an arbitrator to know the language. Issues needed to be explained through the process, which would then enable the gap to be bridged.

#### **Internal training, cross-examination and taking control of files:**

While certain firms provide for intensive training and also enable the young practitioners of today to participate in excellent and thought provoking matters, Claudia Annacker pointed out that the high stakes involved rarely permit them to 'open their mouth' and participate.

Other ways to ensure that juniors participate more actively involved dividing the juniors into teams and role playing, or even creating opportunities where juniors were able to cross-examine the less important witnesses in live matters. Certain firms deliberately take on smaller cases to enable juniors to work on and actually take the lead on them and, in addition, also encouraged juniors to take up roles as tribunal secretaries, all of which are invaluable to their personal and professional growth.

Providing an arbitrator and a counsel's viewpoint, Mr. Hwang pointed out that people often underestimate the value a junior brings to the table. His juniors regularly cultivated research, argumentative and presentation skills

whilst he, as the senior, ended up doing the oral advocacy. Additionally, as an arbitrator, he explained how in order to keep effective track on each matter, he ensures that a junior was placed on matters, thus ensuring active participation and development of case-management skills from an early age.

Learning by observation was perhaps the order of the day and the most widespread way by which juniors continue to develop their skillsets.

On the other hand, cross-examination, explained Dr. Pryles, is an art for which certain skills are required, which many may not have. The art of cross-examination is effective if done properly. Insofar as international commercial arbitration is concerned, it is a different creature which covers different legal systems, civil and common-law countries, poor and rich countries. There is a convergence which takes place in arbitration.

Taking command of a large, complicated matter with several limbs is, in itself, an art and, as with all litigation, the devil lies in the details. Such matters often require different teams focusing on the factual pattern and close co-ordination is key for an overall perspective on the case strengths and weaknesses, and the overall strategy to be adopted.

Clarity and the ability to focus on a single point, instead of adopting a shotgun approach with a view to bamboozling the tribunal, was discussed by Dr. Pryles and the panel agreed with him that a tribunal would look at what you want them to look at. Filing multiple copies of the same document creates an unnecessary and complicated mess. An effective case management hearing on how the arbitration is to be managed assumes importance. Dr. Pryles was of the view that case management designed to work on an issue-by-issue basis, by reference to which evidence is arranged and led, will enable practical efficiencies right from leading the evidence up to the publication of the award. While the concept of arbitration has evolved to bring about flexibility, some certainty is key to bring about efficiencies.

The session proved to be most helpful and gave rise to several thought provoking questions which the panel was happy to address. In addition to what was discussed by the panel, Mr. Gary Born, President of the SIAC Court of Arbitration, in his welcome address, probably set the tone for the younger arbitration practitioners with evergreen pearls of wisdom: "be relentlessly courteous and courteously relentless".



[Left to Right] Mr Christopher Thomas QC, Ms Claudia Annacker



# ESSAYS

## 4 Third-Party Funding In Arbitration

By Lim Hui Li Debby

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In his opinion, money is a commodity which you may sell cheap or dear, according to circumstances, with a clear conscience. A capitalist, by charging a high rate of interest, becomes in his eyes a secured partner by anticipation... There are two men in him; he is petty and great— a miser and a philosopher...

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- Honoré de Balzac, Gobseck

that is better able to bear litigation risk, the weaker party could buttress his negotiating position and secure a settlement that reflects the case merits rather than the parties' bargaining positions.<sup>9</sup> Furthermore, funders have advantages in intelligence, specialisation, and expertise as repeat players over individual claimants.<sup>10</sup> As such, TPF serves a “welfare-enhancing function in society”.<sup>11</sup> In fact, TPF can be used by both claimants and respondents to improve their ability to bargain.<sup>12</sup>

### Introduction

Like Balzac's usurer, third-party funders evoke a farrago of reactions. To some they are viewed as “vulture investors”<sup>1</sup>, to others they offer innovative means of securing effective access to justice. In reality, the practice is complex and multi-faceted, incapable of being characterised in the rather black and white manner commonly employed by journalists and academics.<sup>2</sup>

Reflecting the current zeitgeist, the tribunal in *Alemanni v. Argentina*<sup>3</sup> held that Third-Party Funding (“TPF”) “is by now so well established both within many national jurisdictions and within international investment arbitration that it offers no grounds in itself for objection to the admissibility of a request to arbitrate”. The way forward for this burgeoning industry is to: (a) optimize the benefits that it can deliver; (b) recognize, anticipate and minimise the legitimate issues and concerns; and (c) deal with the less genuine concerns.<sup>4</sup>

### Levelling the Playing Field

The sophisticated investment arbitration system is already not financially viable for the medium-sized company.<sup>5</sup> As cases such as *Pirelli* and *Lola Fleurs* evince, the tension between the need to finance arbitral proceedings and access to justice is a real one.<sup>6</sup> TPF solves this problem by allowing easier access to justice for impecunious claimants, such that in the words of Bentham, wealth no longer has the monopoly of justice against poverty.<sup>7</sup>

Quite apart from the indigent litigant, there are others who seek TPF as a risk- management tool. The parties' financial disparities often lead to disparities of justice because of the wealthier party's bargaining advantage. When imbalances in risk preferences skew settlements away from the merits, this is just as much a market failure as a failure of procedure.<sup>8</sup> By enlisting the help of a funder with a diversified portfolio

However critics feel that TPF is clearly far from the levelling force that investor-state arbitration desperately needs, even though TPF can hardly be blamed for pre-existent flaws in the system.<sup>13</sup> As one critic commented, “in a system so fraught with problems, [TPF] is a complication investor state arbitration can do without. From the standpoint of states, the credibility of investor-state arbitration is not enhanced by this type of investment activity”.<sup>14</sup>

As the sovereign party is usually the respondent, the way to achieve equipoise would be to further develop defence-side funding. For instance, TPF is available for respondents for a counterclaim or as a percentage of the difference between the claim and final award.<sup>15</sup> The TPF industry appears to discern a “clear demand for respondent funding in investor-state arbitration”.<sup>16</sup> There have already

<sup>1</sup>Mark Kantor, “Third-Party Funding in International Arbitration: An Essay About New Developments”, in 24(1) ICSID Rev. 65 (2009), p 66

<sup>2</sup>C. Bogart, “Third party funding in international arbitration”, Burford Capital 22 January 2013, [www.burfordcapital.com/articles/third-party-funding-in-international-arbitration/#](http://www.burfordcapital.com/articles/third-party-funding-in-international-arbitration/#).

<sup>3</sup>ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility, para 278

<sup>4</sup>Selvyn Seidel, “Third-Party Investing in International Arbitration Claims : To Invest or Not to Invest? A Daunting Question”, ICC Publication, Dossier X: Third Party Funding in International Arbitration in ICC, October 2013, p4

<sup>5</sup>Bernardo Cremades, “Third Party Funding in International Arbitration”, <http://www.cremades.com/pics/contenido/File634523783352588756.pdf>, p3

<sup>6</sup>Yves Derain, “Foreword”, ICC Dossier X, p 5

<sup>7</sup>Letter of March 1787, The Works of Jeremy Bentham, vol.3, chapter XII.

<sup>8</sup>Jonathan Molot, “A Market Solution To A Procedural Problem”, 99 Georgetown Law Journal 65 (2010), p115

<sup>9</sup>Ibid, p 65

<sup>10</sup>Maya Steinitz, “Whose Claim Is This Anyway? Third Party Litigation Funding”, Minnesota Law Review, Vol. 95, No. 4, 2011, p1301

<sup>11</sup>Avraham and Wickelgren, “Third Party Litigation Funding - A Signaling Model”, De Paul Law Review, Vol I. 63, No. 233, 2014, p251

<sup>12</sup>Note 10, p1302

<sup>13</sup>Rebecca Lowe, “Speculate and arbitrate to accumulate”, <http://www.ibanet.org/Article/Detail.aspx?ArticleUID=804e46e3-dfc0-4966-b16e-31627803970c> 14 G. Kahale, III, Is Investor-State Arbitration Broken?, TDM Vol I. 9, issue 7, 2012, p 32

<sup>14</sup>G. Kahale, III, Is Investor-State Arbitration Broken?, TDM Vol I. 9, issue 7, 2012, p 32

<sup>15</sup>Bernardo Cremades, “Third Party Litigation Funding:

Investing in Arbitration”, TDM Vol I. 8, issue 4, October 2011, See p 16-25 for a detailed write-up on structures for Defendants.

<sup>16</sup>Carolyn Lamm and Eckhard Hellbeck, “Third-party funding in investor-state arbitration – Introduction and Overview”, ICC Dossier X, p 104

been instances such as the case brought by Philip Morris against Uruguay where the state's legal defence was funded by a third party albeit a non-profit advocacy group.<sup>17</sup> However where a State Party receives TPF, there may be sovereign authority issues or political implications to address, as a funder may exercise control over dispute strategy and management.<sup>18</sup>

### Slippery Slope?

The examples of TPF that have entered the public consciousness through the media are cases involving salacious situations.<sup>19</sup> As such there is a need to unpack sentiments about TPF's "ick factor"<sup>20</sup> and seek to understand and address these misgivings. A practice may not sit well at first, but upon reflection there may turn out to be nothing wrong with it.<sup>21</sup>

However where a State Party receives TPF, there may be sovereign authority issues or political implications to address, as a funder may exercise control over dispute strategy and management.

The "commodification of justice" argument relies on the artificial decoupling of professional from market forces.<sup>22</sup> When one considers the pervasive use of economic measures to allocate the rights and duties among citizens in a free-market capitalist society, it is difficult to see how TPF is any worse than permitting

the recovery of non-economic damages for emotional distress.<sup>23</sup>

Critics argue that where potential recovery is sufficiently large, the lawsuit will be an attractive investment, even if the likelihood of actual recovery is small.<sup>24</sup> Ultimately funders invest to win and they are often better placed than the claimant to form a dispassionate view of the merits.

Funders usually adopt matrix approach to claims valuations which may mean that a USD30 to 40 million claim only has an expected value of USD15 million.<sup>25</sup> This is followed by a qualitative assessment of the claim where less tangible variables are appraised.<sup>26</sup>

There is some evidence that TPF corresponds to an increase in litigation and court caseloads.<sup>27</sup> But if a claim holder has a meritorious claim, does it not have a legal right to justice? In the first place TPF did not create the claims. Justice Kirby stated that "[a] litigation funder . . . does not invent the rights. It merely organizes those asserting such rights so that they can secure access to a court of justice that will rule on their entitlements".<sup>28</sup>

### Disclosure of TPF

There are certain elements of international arbitration in which TPF poses potential problems, for example counsel and arbitrators are often selected from the same pool. This raises the possibility of a funder funding multiple claims such that a practitioner might act as arbitrator in one but counsel for the claimant in another. This is not just a theoretical problem. A conflict of interest has the potential to disrupt the arbitral proceedings or vitiate the entire award.

Under the latest 2014 *IBA Guidelines on Conflict of Interests*, parties who have TPF arrangements are now expected to disclose the existence of such funding to the Tribunal and other parties.<sup>29</sup> These *Guidelines* do not require the parties to disclose the terms of any funding arrangements.

Funders' reticence towards disclosure stems from fear that the adversary would change its strategy when discovering the funding relationship. The other concern is that the tribunal might consider the TPF relationship when deciding on awards of costs or security for costs. In respect of the first concern, a funder's willingness to get on board may serve as a signal to the adversary regarding the strength of the claim.<sup>30</sup> Such a signal can strengthen the funded party's bargaining position and enhance the chances of an early and high settlement.<sup>31</sup> The second concern is addressed below.

### Security for Costs

If litigation funders do not invent the claimant's rights, then ipso facto the defendant's right to obtain security for costs should be independent from the claimant's funding arrangements. There is no reason for security for costs to be awarded based merely on the presence of a funder.

Approximately 50% of funded claimants are in a financial position to pay for the costs of arbitration themselves.<sup>32</sup> TPF should not impact the arbitral tribunal's decision on security for costs unless a respondent can show that TPF is being used abusively.<sup>33</sup> This will incentivise disclosure of the fact of the funding relationship - the benefit

<sup>17</sup>Ibid

<sup>18</sup>Munir Maniruzzaman, "Third-Party Funding in International Arbitration – A Menace or Panacea?" <http://kluwerarbitrationblog.com/blog/2012/12/29/third-party-funding-in-international-arbitration-a-menace-or-panacea/>

<sup>19</sup>Victoria Shannon, "Harmonizing Third Party Litigation Funding", 36 *Cardozo L. Rev.* 861 (2015), p867

<sup>20</sup>W. Bradley Wendel, "A Alternative Litigation Financing and Anti-Commodification Norms", *DePaul L. Rev.* (forthcoming 2013), p3

<sup>21</sup>Ibid, p4

<sup>22</sup>Catherine Rogers, "Gamblers, Loan Sharks & Third-Party Funders" in Catherine Rogers, *Ethics in International Arbitration*, Oxford, Oxford University Press, 2014, p217

<sup>23</sup>Note 20, p52

<sup>24</sup>Note 1, p53

<sup>25</sup>See the illustration in Lisa Nieuwveld and Victoria Shannon, *Third-party funding in international arbitration*, Alphen aan den Rijn, Kluwer Law International, 2012, p 31 to 33

<sup>26</sup>Ibid

<sup>27</sup>David Abrams and Daniel Chen, "A Market for Justice", *University of Pennsylvania Journal of Business Law*, Vol. 15, 2013, p1075

<sup>28</sup>*Campbells Cash & Carry Pty. Ltd. v. Fostif Pty. Ltd.*, (2006) 229 A LR 58

<sup>29</sup>See General Standard 6

<sup>30</sup>Note 10, p1305

<sup>31</sup>Ibid

<sup>32</sup>Yasmin Mohammad, A partial commentary of the RSM Production Corporation v. Saint Lucia decision, <http://emailing.iccwbo.org/events/Yasmin-Mohammad.pdf>, p5

<sup>33</sup>Kirtley and Wietrzykowski, 'Should an Arbitral Tribunal Order Security for Costs When an Impecunious Claimant Is Relying upon Third-Party Funding?' (2013) 30 *Journal of International Arbitration*, Issue 1,

of this outweighs the possibility of claimants using TPF abusively.

*RSM v St Lucia* marked the first time that the claimant in an ICSID matter was ordered to post security for costs. The majority was influenced by the Claimant's proven history of defaulting on costs orders and its admitted lack of financial resources.<sup>34</sup> The Tribunal pointed out that the presence of TPF could not alleviate the concerns that the Claimant will again default on payment, as the funder's responsibility for adverse costs was uncertain.<sup>35</sup> Unfortunately, the assenting reasons controversially stated that the burden of proof would shift onto a Claimant to show why security for costs should not be granted if the presence of TPF is detected.<sup>36</sup> It is arguable that *RSM v St Lucia* involved extreme circumstances and the Tribunal might have been sympathetic to the small impoverished Respondent-State.

### Relationship between the Funder and the Funded Party

The public fallout between S&T Oil and Juridica has highlighted the possibility of "funder's remorse."<sup>37</sup> With a wide range of specialist expertise and experience, and consistent with its own commercial objectives, a funder can add real value to the management and resolution of arbitration claims. However, how much control should the funder have over proceedings? Also, as the funder is interposed between the funded party and its solicitors, this may give rise to conflicts of interest. This issue can emerge sharply where the funder and client may disagree over settlement.

To avoid these kinds of conflicts of interest, the identification and management of potential conflicts should thus be addressed in the funding agreement. The agreement should expressly acknowledge that the lawyer owes his professional and fiduciary duties to the claimant and that, in the event of a conflict of interest between the claimant and the

funder, the lawyer may continue to act solely for the claimant, even if the funder's interests are adversely affected by him doing so."<sup>38</sup> The funding agreement should also establish the causes whereby the relationship can be terminated.

Given the similarities between the concerns governing insurance agreements and funding agreements, one can adapt the measures developed in the former context to the latter.<sup>39</sup> There has to be some risk-sharing and calibration such that the incentives of all parties in the triangulated relationship are aligned.

The parties' financial disparities often lead to disparities of justice because of the wealthier party's bargaining advantage.

### Regulation

TPF is currently in an "embryonic regulatory state"<sup>40</sup>, especially so for international arbitration where there is no code available yet. There is a need to set the parameters and have industry good practices. Regulatory standards are the best approach to cultivating transparency and certainty in the TPF industry while dispelling mistrust and fear that involvement of funders in arbitration is a slippery slope. The *Code of Conduct for Litigation Funders* is an example of soft-law regulation that could be a useful first step in developing a code of conduct of TPF in arbitration.

A clearer understanding of the nature, practices and effects of TPF specifically in international arbitration

is needed before meaningful regulation can be developed.<sup>41</sup> Admittedly, the clockwork of TPF's development will outpace its regulation. In this regard, any regulation implemented should aim to provide a baseline but not to stifle creativity in designing, useful, reliable financing arrangements to add to the current menu of options available to litigants.<sup>42</sup>

One area of concern would be the packaging of many sub-prime claims with otherwise meritorious claims and sell this portfolio to secondary speculators.<sup>43</sup> Such packaging of legal-claim-backed securities through diversification reduces the funder's risk, making the funder more likely to invest in riskier cases. Ultimately, selling the case in the secondary market might dilute the signaling property of the regime.<sup>44</sup> A solution may be to tailor securities regulation to such legal-claims-backed securities. These protections involve detailed registration, reporting, and disclosure requirements about the issuing entity and all material characteristics of the asset pool and selection criteria.<sup>45</sup>

There is also a need for governance rules where TPF is provided to publicly traded companies, since issues of insider trading and market manipulation could arise. For instance, after Oxus Gold announced that it had received funding for its claim against Uzbekistan, its shares soared almost 50%.<sup>46</sup>

### Conclusion

Subject to the proper scrutiny and management of TPF's role, its continued growth should be welcomed. It would be in the interest of the international arbitration community to consider the problems posed by TPF and the solutions to those problems before TPF takes off in a substantial way. The failure to address these issues may undermine the legitimacy of arbitration as a dispute resolution process.

<sup>34</sup>Decision on Security for Costs, para 86

<sup>35</sup>Ibid, para 83

<sup>36</sup>Assenting Reasons, para 18

<sup>37</sup>Note 22, p214

<sup>38</sup>Khoury, Hurford and Bowman, "Third party funding - a panacea or a plague?" TDM 4 (2011), p8

<sup>39</sup>Note 10, p1332

<sup>40</sup>Seidel and Sherman, ICC Dossier X, p32

<sup>41</sup>Note 22, p213

<sup>42</sup>Note 19, p909

<sup>43</sup>Sundares Menon, "Some Cautionary Notes for an Age of Opportunity", Chartered Institute of Arbitrators International Arbitration Conference 22 August 2013, p9

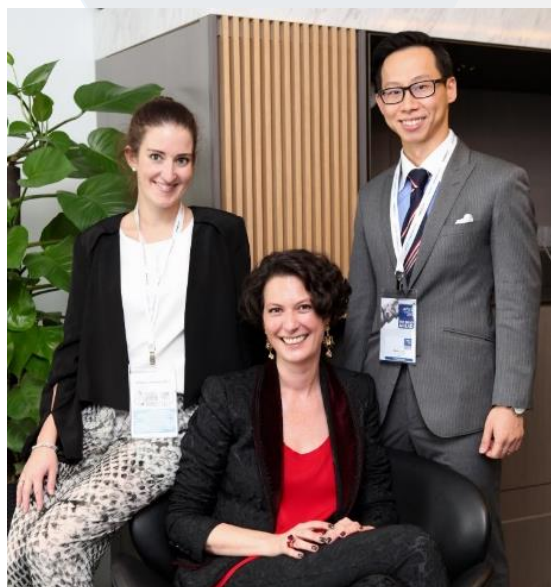
<sup>44</sup>Note 11, p264

<sup>45</sup>Note 10, p1335

<sup>46</sup>Note 40, p37

# INTERVIEW

with Claudia Annacker  
Interviewers: Darius Chan & Kailee Lingard



[Left to Right] Ms Kailee Lingard, Ms Claudia Annacker, Mr Darius Chan

## How did you first get involved in international arbitration?

Because of my background in public international law, I was asked to work on the defence of the Government of Japan in the arbitration initiated by Australia and New Zealand under the United Nations Convention on the Law of the Sea in the *Southern Bluefin Tuna Case*. The dispute initially arose under the trilateral Convention for the Conservation of Southern Bluefin Tuna, the CSBT Convention, with regard to an experimental Southern Bluefin Tuna fishing program carried out by Japan on the high seas. Following unsuccessful attempts to resolve the dispute under the CSBT Convention, Australia and New Zealand invoked the compulsory

arbitration provisions of the United Nations Convention on the Law of the Sea. The arbitral tribunal, presided by Judge Schwebel, revoked the provisional measures previously ordered against Japan by the International Tribunal for the Law of the Sea and decided that it lacked jurisdiction on the ground that the dispute settlement provisions in the CSBT Convention precluded resort to arbitration under the United Nations Convention on the Law of the Sea.

The hearing took place at the World Bank. A Japanese fishing boat owner attended the hearing with his hair cut and coloured like that of a bluefin tuna.

## Does Paris really have the best food in the world?

Do I get the choice of Sicily?

**Despite your hectic schedule as a partner, you are a visiting professor at the Paris West University Nanterre and an adjunct professor at the University of Vienna – is teaching a passion of yours and how important is it to you to find the time?**

Academia is where I started and still feel at home. It is quite important to keep close contact with academia and I strongly believe that academic research and teaching substantially contribute to the quality of the

practice of international arbitration and public international law.

## What is the thing you most like to do in your free time?

Fashion design.

## What is your favorite holiday destination?

Italy.

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

My earliest and most important mentor was a leading professor for public international law at the University of Vienna, Professor Zemanek. I worked for him as a research and teaching assistant from 1993 to 1998 and he supervised my PhD thesis and habilitation in public international law. He laid the cornerstone for my specialisation and career in this field. I learned from him the fabric of international law, but also two truths that are of importance in practicing international law: basic principles control even with respect to the most complex set of questions, and there are two sides to most legal questions. Few areas are black and white.

## If not a lawyer, what would you like to be?

Ambassador.

“  
...two truths that are of importance in practising international law: basic principles control even with respect to the most complex set of questions, and there are two sides to most legal questions.  
”

# INTERVIEW

with Claudia Annacker



Claudia Annacker

## What is a regular day in the life of Claudia Annacker like?

Coffee in the morning; coffee in the afternoon.

## Are there any particular practices or features concerning arbitrations in Europe that you think should also be applied in Singapore?

It is difficult to generalise about “Europe.” Each European jurisdiction has its own traditions, influenced by local custom and the legal education of judges and counsel. Different European jurisdictions have quite different approaches even though many, like Singapore, have well-developed, strong pro-arbitration policies.

## What can seats of arbitration such as Paris and Singapore do in order to stay ahead of ‘competition’ from other up-and-coming seats?

Seats, such as Paris and Singapore, lead because their arbitral institutions, courts and legal cultures are trusted and viewed as stable for the long term. While there is an increasing trend towards regionalisation in arbitration, the formal legal infrastructure, including the national arbitration law, the track record in enforcing arbitral agreements and awards, neutrality, and the efficiency of court proceedings, are most important in the parties’ choice of the seat of an arbitration. In addition to maintaining world-class facilities, it is necessary for leading seats to be attractive for specialised arbitrations, such as

“

What is a regular day in the life of Claudia Annacker like?

Coffee in the morning; coffee in the afternoon.

”

investment treaty disputes, which require special expertise of judges that will hear annulment proceedings, and to react promptly to adapt their legislative framework to changes in the arbitration environment.

## Do you think there is a future for investor-state arbitration given its criticisms?

Yes. Notwithstanding the criticisms and the fact that certain states have terminated bilateral investment treaties or denounced the ICSID Convention, states continue to enter into investment treaties providing for investor-state arbitration. More than 2,000 treaties providing for investor-state arbitration are currently in force. These treaties typically have sunset clauses that provide for continuing protection of investments, for ten to twenty years following their termination. While states may address certain shortcomings in the current system in new investment treaties or investment treaty chapters in free trade agreements, I think it is unlikely that investor-state arbitration will be abandoned altogether.

## Are there any particular feature(s) of civil law practice or procedure that you think international arbitration should adopt?

Again, it is difficult to over-generalise about civil law procedures. There is probably as significant a difference between the practice of a French *avocat* and the procedures of French courts and a German *Rechtsanwalt* and the procedures of German

courts, on the one hand, compared to those of an English lawyer and the English courts and an Italian lawyer and the Italian courts, on the other. Despite these differences, I think that international arbitration could benefit if arbitral tribunals were to take the role of judges that is more typical of proceedings in the civil law inquisitorial tradition than the common law approach, defining the legal and factual issues that the tribunal expects the parties to present, rather than merely evaluate the evidence and the legal arguments that the parties choose to present. This approach should foster the efficiency of arbitral proceedings and save costs.

## Can and should institutions do more to promote diversity in arbitral tribunals? What more can or should be done? Would an alternative appointment mechanism help?

Arbitral institutions can promote diversity in arbitral tribunals, but there are limits. Most arbitrations feature party-appointed arbitrators. Parties have their own interests in each particular case to pursue, and cultural traditions also tend to restrict an institution’s choices. Nevertheless, arbitral institutions have a long-term interest to ensure a sustainable pool of arbitrator candidates, as well as pluralism and perspective in arbitral tribunals. They also have an interest in dispelling the perception of arbitration as a Western-biased institution. The need for diversity is particularly acute in specialised arbitrations, such as investment treaty arbitrations, which feature repeat appointments of specialists who act as counsel and arbitrators.

Arbitral institutions could offer education programs, young arbitrators’ programs and fellowships and appoint new entrants for smaller, more straightforward cases. For example, the CAC (Portuguese Chamber of Commerce) maintains a list of practitioners who have substantial experience as counsel, but not yet significant experience as an arbitrator, and makes a concerted effort to name individuals from this list to serve as arbitrators for smaller disputes.

## If you could give one tip to young female lawyers in international arbitration, what would it be?

Aim high. Take chances.