

YSIAC Conference Recap: How to Win an Arbitration

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

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

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

Panel discussion

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

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

- **Eyes on the prize:** Mr Ng QC shared that one should never lose sight of the end goal, *i.e.* a favourable and enforceable award. This focus therefore informs everything he does from the outset – the case theory advanced on behalf of one’s clients as well as the conduct of the arbitration process.
- **Getting a head-start from inception:** Mr Omar SC highlighted that dispute resolution clauses are often overlooked during the drafting process. He emphasised that a well-framed arbitration clause is half the battle won. He noted that while clients may not be cognisant of this, it is the lawyers’ job to think about potential disputes which may arise, the potential reliefs the client may need, enforcement issues, and hence frame the dispute resolution clause accordingly.
- **Starting your case on the right foot:** Mr Pullen highlighted that from the perspective of a claimant, thorough ground work should be done before the commencement of an arbitration. In particular, he said that even before filing a notice of arbitration, a party should fully consider whether its claims and causes of action will withstand scrutiny, test the veracity of the available evidence and potentially even have experts do a sense check on quantum issues. This approach was supported by Mr Nicholson, who stated that a win is getting most of the damages claim in an arbitration, if not all.
- **Appointing the right arbitrators:** The constitution of the tribunal is (perhaps unsurprisingly) a critical element to ensuring ultimate victory. Mr Ng QC noted that the seat of arbitration, governing law and the nature of dispute are the typical factors which weigh on a party’s mind when nominating an arbitrator. However, a less common but equally critical consideration should be that of business practices and legal traditions

involved in a particular dispute. By way of example, he added that if one's client operates in a particular jurisdiction where business is usually conducted informally, having an arbitrator who is aware of and sensitive to such particular cultural nuances would go a long way in obtaining a favourable outcome for one's client.

- **Selecting the right expert and utilising experts effectively:** Many practitioners will be aware that the selection of expert witnesses is by no means a straightforward process. Mr Pullen highlighted that the most important considerations are usually subject area expertise and experience in acting as an expert witness in arbitrations. He mentioned that it would be ideal if a potential candidate possesses both but sometimes, especially in particularly esoteric fields, it may not be easy to identify such an individual. Mr Nicholson agreed, and noted that the most eminent expert in a particular field may not necessarily be the best expert witness. He further stated that the advantages of having a good expert witness are largely twofold: it brings the dual benefits of efficiency and credibility, especially if the expert is involved at the outset. This can assist with a coherent presentation of the case.
- **Having a clear case theory:** According to Mr Ng QC, it is imperative for winning that a lawyer is able to tell the arbitrator, in one paragraph, what you want and why you should get it. Mr Omar SC concurred with this view. Besides, he emphasised the importance of having a clear case theory and a central argument, which should play right through from the pleadings and witness statements to cross-examination.
- **Using procedural tools to one's advantage:** Mr Pullen shared from his experience that applications for interim measures can be decisive in the context of an entire case. Interim measures can include interim measures ordered by a national court or tribunal, such as injunctions and document preservation orders. Mr Pullen stated that when deployed effectively, especially when the other side's resources are under constraint, these can provide one with substantive "wins" early in the proceedings – putting the opposition on the back foot. On the flipside, Mr Lau cautioned that counsels in developing arbitration jurisdictions usually employ more "creative" guerrilla tactics, sometimes successfully, in an attempt to derail arbitrations.

Conclusion

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

More coverage from YSIAC Conference is available [here](#).