Kluwer Arbitration Blog

SIAC Congress Recap: SIAC Virtual Congress 2020 Plenary Session on the Challenges and Changing Landscape

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The Singapore International Arbitration Centre ("**SIAC**") hosted its Congress on 2 September 2020. For the first time, the Congress was held virtually. The Chairman of the Board of Directors of SIAC, Mr Davinder Singh, SC, in his welcome address thanked over 1,000 attendees for attending virtually from all over the world despite time zone differences. The Honourable Chief Justice of Singapore, Mr Sundaresh Menon, delivered the keynote address on "Arbitration's Blade: International Arbitration and the Rule of Law".

The plenary session on "International Arbitration: the Challenges and Changing Landscapes" followed the keynote address. The moderator, Mr Toby Landau, QC, Member, SIAC Court of Arbitration; Barrister and Arbitrator, Essex Court Chambers Duxton (Singapore Group Practice) and Essex Court Chambers (London), divided the discussion into 2 themes: (A) rule of law issues arising in international arbitration (as highlighted in Chief Justice Menon's keynote address); and (B) Covid-19 related issues. This blog provides an overview of the discussion.

A. Rule of Law Issues

Mr Landau set the ball rolling by referring to Chief Justice Menon's ICCA 2012 Congress keynote address and queried whether the "frailties" he identified, to the development of international arbitration, in 2012 persisted in 2020. Chief Justice Menon noted that costs, delay and inefficient processes remain challenges to be surmounted. He cautioned that the significant global efforts, which have made arbitration successful, would be lost if users started believing that arbitration had become too complex and burdensome for effective use. He encouraged the international arbitration community to periodically re-examine these issues and strive for solutions.

Groundhog Day in International Arbitration?

Recognizing that certain issues remained unresolved, Mr Landau remarked that international arbitration was experiencing Groundhog Day. The potential solution to these problems had been discussed at various international seminars over the years but an effective solution was yet evasive. Chief Justice Menon suggested that it was imperative that the international arbitration

community remained open to radical rethinking. Referring to the increasing complexity and costs of arbitrations in the present times, Chief Justice Menon attributed this to the fact that arbitration was a "*one-shot process*". Parties leave no stone unturned towards achieving the desired result before a tribunal because of limited avenues for appeal / review. Therefore, costs and efforts are front loaded. He urged tribunals to limit time and costs on discrete issues. To bring home his point, Chief Justice Menon cited the example of a case in which written submissions were so voluminous that it was estimated the arbitrator, spending 6 minutes per page, would take a year to finish reading the submissions! He stressed that if the arbitration community shied away from taking a step back and revisiting these issues, mediation could benefit (at the cost of arbitration).

The Honourable Justice Anselmo Reyes, Singapore International Commercial Court, concurred with Chief Justice Menon that these issues would continue to arise in the future. Referring to Chief Justice Menon's comment on shared values, he noted that there exists a divergence in the treatment of international arbitration in jurisdictions around the world. For example, Justice Reyes noted that Singapore and Hong Kong shared similar notions of due process and public policy. However, the same notions may not be applicable for other jurisdictions in South East Asia. He commended the role institutions like SIAC play, in cultivating a universally acceptable approach on these issues, through discussions among judges, arbitrators, lawyers and law students. Justice Reyes added that while rethinking the system was a good idea, it was a difficult task.

At this point, Mr Landau invited Ms Natalie Y. Morris-Sharma, Deputy Senior State Counsel, Attorney-General's Chambers, Singapore, to comment on whether these recurring issues affected the investor state dispute settlement ("**ISDS**") sphere. Ms Morris-Sharma agreed that these issues afflicted ISDS as well, however, the difference was that the radical rethinking was already afoot, which could result in a transformed ISDS system in the near future. Professor Lawrence Boo, Member, SIAC Court of Arbitration; Independent Arbitrator, The Arbitration Chambers, remarked that, comparatively, it was easier for reforms to occur in ISDS. This was due to the involvement of states.

Going Back to the Basics

Mr Edwin Tong, SC, Minister for Culture, Community and Youth, and Second Minister for Law, Singapore, commented that international arbitration was set up as a "*mercantile alternative*" to dispute resolution before courts. Mr Tong added that the features of arbitration were market driven. The merchants valued confidentiality and the ability to choose arbitrators with the requisite expertise and finality. However, over the years, Mr Tong agreed with others, arbitration had indeed become more expensive and time consuming. He, too, urged the arbitral institutions and policy makers to come up with solutions. However, he cautioned that in the zeal to solve problems, we must not throw out the baby with the bathwater.

Mr Landau observed that the market demands increasingly constrained the application of rule of law in arbitration. He noted that there is a trade-off between what the market wants, in terms of party nomination and confidentiality, and the values of rule of law.

Mr Gary Born, President, the Court of Arbitration of SIAC, also agreed with the panellists' assessment that these issues would likely continue to afflict international arbitration. On a positive note, Mr Born highlighted SIAC's expedited procedure and early dismissal (see Rules 5 and 29 of

the SIAC Rules, 2016, respectively), as successful methods to tackle time and costs issues.

Possible Solutions

Taking a cue from an audience member's question regarding the Prague Rules, Mr Landau asked the panellists whether the civil law inquisitorial model, where the court plays an active role, as opposed to the common law model, where the court plays a passive role, presents an answer to the issues which arise with arbitration being a "*one-shot process*".

In response, Mr Reyes noted that the Prague Rules were unlikely to help in stemming the problems. He added that while the Prague Rules encouraged tribunals to be proactive, this failed to provide any guidance on the applicable due process or the rule of law criteria.

Overcoming Due Process Paranoia

Circling back to the Chief Justice Menon's point on finding solutions, Mr Landau stated that the due process paranoia may inhibit a tribunal's endeavour to come up with innovative solutions. Chief Justice Menon pointed out that empirically, there were very few cases which have been set aside on due process concerns.

Mr Born emphasized the role arbitral institutions play in dealing with the issue of delay and costs. He explained that under the SIAC *ad valorem* system of compensating arbitrators (see Rule 34.1 of the SIAC Rules, 2016), there was no incentive to prolong the arbitral process.

B. Covid-19 Related Issues

Mr Landau next explored issues arising due to Covid-19 under 2 heads: (i) policy issues; and (ii) practical considerations of running cases remotely.

Mr Landau asked the panellists their views on the extent to which the pandemic had forced the changes and whether these changes would remain subsequently? According to Chief Justice Menon, the pandemic has taught the legal community three things: (i) it is possible to deploy virtual media for conducting hearings; (ii) technology harnesses efficiency – waiting and travel time has been reduced drastically, and schedules can be accommodated easily; and (iii) access to justice – technology has increased the access to justice by reducing the cost of accessing justice. On a lighter note, he remarked that video hearings are tiring and hoped that the pandemic would lead to the development of bespoke hearing platforms.

Justice Reyes commented that practitioners were still grappling with the implications of virtual proceedings and currently, what was being done physically had been transposed to the virtual space. He anticipated that in due course, oral advocacy and witness examinations would undergo changes to adapt to the virtual space.

Effect on ISDS

As far as the effect of Covid-19 on ISDS is concerned, Ms Morris-Sharma noted that the current global uncertainty weighed in favour of mediation as a method of resolving disputes as opposed to arbitration. She added that mediation was premised on bringing together people in order to resolve disputes. Towards this goal, technology could level the power play between disparate players by use of "*synchronous and asynchronous mediation processes*". She, however, noted that the ability to gauge subtle body language was valuable during an in-person mediation and it would be useful to find ways to replicate this in a virtual environment.

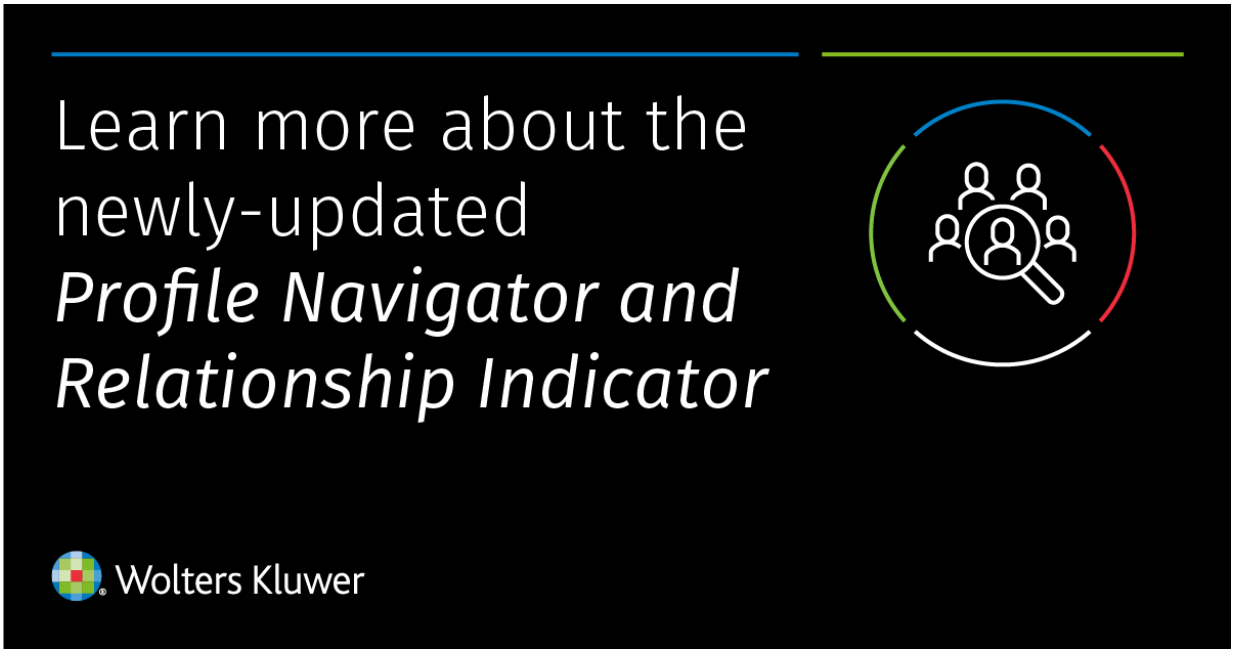
Effect on Singapore and SIAC

Mr Born noted that Covid-19 challenges, in fact, presented opportunities for SIAC because Singapore was no longer beholden to the "*tyranny of geography*". As a global arbitral institution, SIAC was ready to compete with other institutions around the globe. Mr Tong added that there was a lot more to Singapore than just the physical infrastructure. Singapore has a first class judiciary, internationally reputed arbitral institutions and more importantly, the resilient spirit to overcome any challenges that Covid-19 may pose.

C. Conclusion

The Covid-19 made 2020 a year of many firsts. The SIAC Congress, for the first time, was held entirely virtually. In several SIAC arbitrations, cross-examinations were conducted virtually, for the first time. Despite fears of a Groundhog Day in arbitration, the caseload at SIAC has shown a consistent upward trend. This trend is a testament to the international arbitration community which embodies the resilient Singapore spirit to combat challenges. It is hoped that the community will respond to Chief Justice Menon's call for a radical rethinking and come back as a stronger "*mercantile alternative*" to courts.

More coverage from SIAC Congress is available here.



This entry was posted on Thursday, September 3rd, 2020 at 9:00 am and is filed under COVID-19, Due process, ICCA, ISDS, Prague Rules, Rule of Law, SIAC, SIAC Congress
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