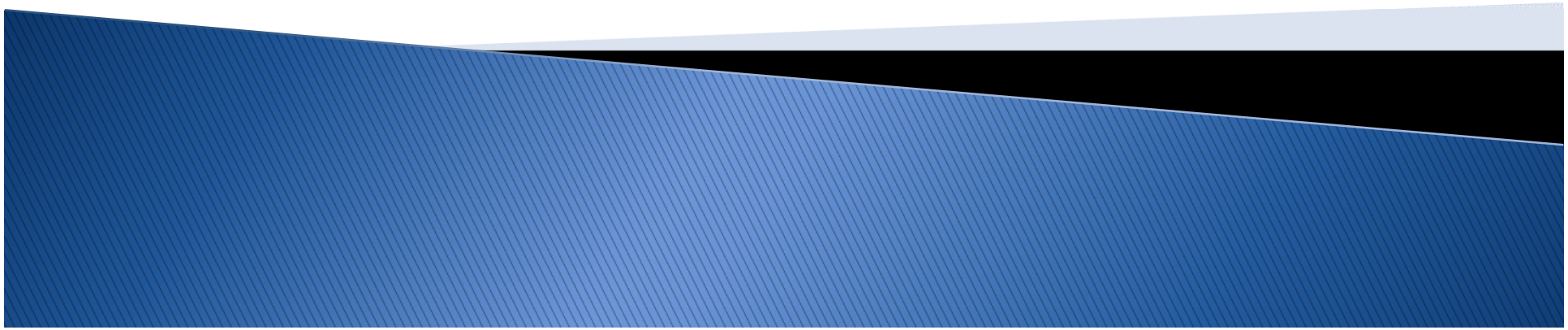
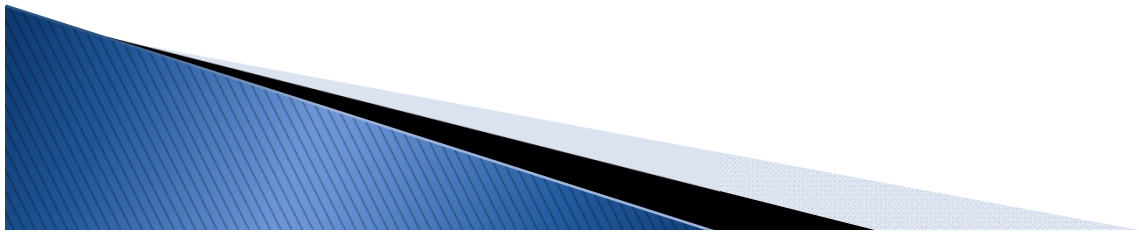
Before a Tribunal…

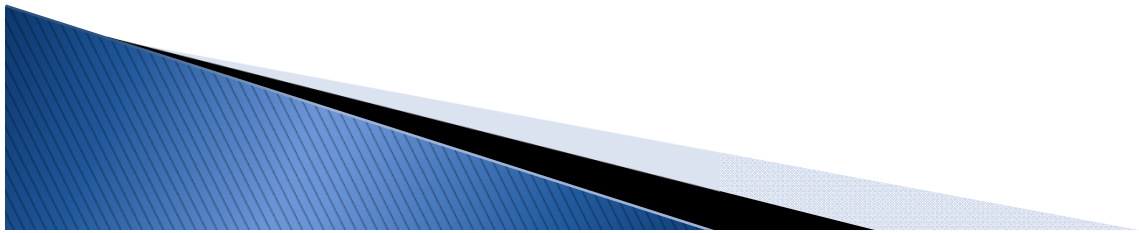


- Judges and International Arbitrators (*Do arbitrators think like judges in domestic courts?)*
- *Tribunal's Expectations of Counsel (What does an arbitrator look for in counsel?)*
- *Arbitrator's treatment of evidence of facts and law (How do arbitrators weigh evidence, decide issues of facts or law?)*



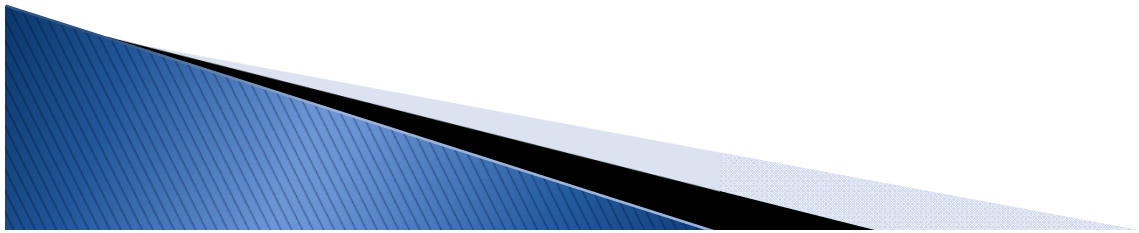
How they see their responsibilities?

- Dispense justice as between the parties
- Judges do, however, have the overriding duty to the state
- Judges may pronounce law or set legal principles or values. Not arbitrators.



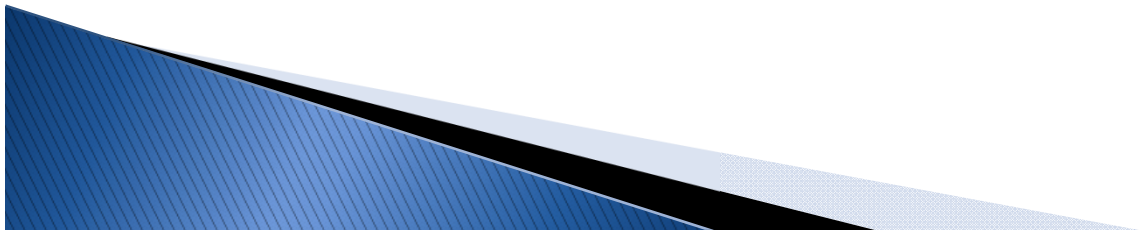
Appeals and nullification

- Judges do not like their cases to be reversed on appeal
- Arbitrators are concerned with ensuring that their awards are not set aside (nullified)
- Judges are bolder in setting deadlines and exercising their default powers
- Arbitrators wants to give defaulting party “the full opportunity” to present its case



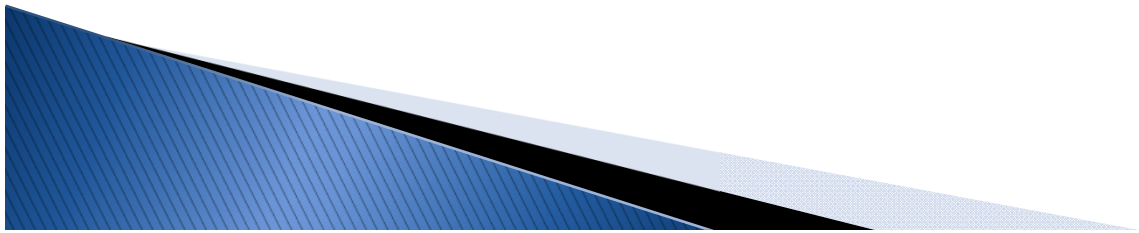
What does an arbitrator look for in counsel?

- Claimant's Counsel ?
- Respondent's Counsel ?
- Address the Key Issues
  - Link facts/law to Issues
- Keep written submissions concise
- Avoid drafting substantive parts of witness statements
- Full and frank disclosure
- Firm but not aggressive advocacy
- Minimal interventions



How do arbitrators weigh evidence, decide issues of facts or law?

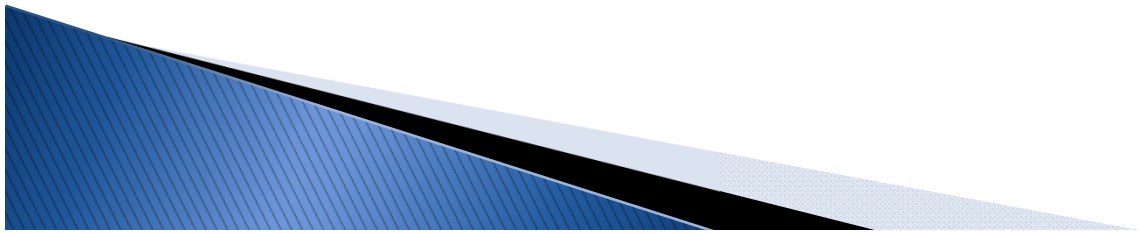
- Freed from domestic rules of evidence
  - Determines the "admissibility, relevance, materiality and weight of any evidence
- *Written statements and oral evidence*
  - Cross-examination
- Evidence of foreign law
- Expert conferencing



So is there a winning formula?

- Have a good case or a good defence.
- Speak in the language of the tribunal. You cannot expect a tribunal who does not understand you to rule in your favour.
- Comply with the timelines set by the tribunal.
- Comply with the disclosure orders, or better still, volunteer as much documents as possible. Keep nothing from the tribunal. Have faith in your case.

- Do not give up on the unconvinced member of the tribunal.
- Minimise procedural challenges unless they are critically disadvantageous to your case. Do not try to win minor battles. Win the case.
- Be generous to your opponent, give them sufficient slack to tie themselves.



RISKS ASSOCIATED WITH THE NON-PARTICIPATING RESPONDENT

DEEMED SERVICE AND NOTICE PROVISIONS

A BOON FOR CLAIMANTS OR A DANGEROUS TRAP?

THE CONTEXT

An application made to the Tribunal to proceed to determine the reference without a response from the Respondent and in its absence;

Early contemplation of the entire objective of the reference – enforcement – in an “arbitration unfriendly” environment.

THE SOURCES OF THE RISK

In the place of enforcement:

The New York Convention:

Article V 1 (a) and (d)

In the supervisory Court at the seat:

Under particular provisions of the lex arbitri and/or

Article 34 (2) (a) (ii) and (iv) of the Model Law

Relevant provisions - in practically identical terms – Due process requirements:

Illustrated by NYC Art V:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that — …….

(*b*) the party against whom the award is invoked ***was not given proper notice*** of the appointment of the arbitrator or of the arbitration proceedings ***or was otherwise unable to present his case***; or…….

(d) the composition of the arbitral authority or the arbitral procedure ***was not in accordance with the agreement of the parties,*** or, failing such agreement, was not in accordance with the law of the country where the arbitration took place;

Does “proper” notice require proof of actual notice?

In arbitration and enforcement friendly jurisdictions the usual answer is – “No” – when applying to proceed or enforce;

Compliance with the requirements of the lex arbitri and/or any stipulated rules and/or any agreement of the parties as to service and notice will usually suffice.

Numerous provisions of arbitral law and rule warrant this conclusion.

RELEVANT EXAMPLES

ARTICLE 3 (1) (a) of the Model Law effective in Singapore:

Article 3. Receipt of written communications

(1) Unless otherwise agreed by the parties:

(*a*) any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business, habitual residence or mailing address; if none of these can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last-known place of business, habitual residence or mailing address by registered letter or any other means which provides a record of the attempt to deliver it;

(*b*)the communication is deemed to have been received on the day it is so delivered.

SCMA RULE 3

3. **Notice, Calculation of Periods of Time**

3.1. Without prejudice to the effectiveness of any other form of written communication, written communication may be made by fax, email or any other means of electronic transmission effected to a number, address or site of a party. The transmission is deemed to have been received on the day of transmission.

3.2. For the purposes of these Rules, any notice, including a notification, communication or proposal, is deemed to have been received if it is physically delivered to the addressee or if it is delivered at his habitual residence, place of business or mailing address, or, if none of these can be found after making reasonable inquiry, then at the addressee's last-known residence or place of business. Notice shall be deemed to have been received on the day it is so delivered.

3.3. For the purposes of calculating a period of time under these Rules, such period shall begin to run on the day following the day when a notice, notification, communication or proposal is received…….

SCMA DEFAULT RULE FOR APPOINTMENT

6.4. Where a party fails to appoint the Arbitrator within 14 days **of receipt** of a request to do so from the other party, or if the 2 Arbitrators fail to agree on the appointment of the third Arbitrator within 14 days of their appointment, the appointment shall be made, upon the request of a party, by the Chairman.

What is the consequence if at enforcement, a party proves it did not receive the request to appoint?

Was the composition of the Tribunal effected in accordance with the agreement of the parties?

SIAC RULE 2

SIAC Rule 2: Notice and Calculation of Periods of Time

2.1 For the purposes of these Rules, any notice, communication or proposal shall be in writing. Any such notice, communication or proposal may be delivered by hand, registered post or courier service, or transmitted by any form of electronic communication (including electronic mail and facsimile), or delivered by any other appropriate means that provides **a record of its delivery**. Any notice, communication or proposal shall be deemed to have been received if it is delivered: (i) to the addressee personally or to its authorised representative; (ii) to the addressee's habitual residence, place of business or designated address; (iii) to any address agreed by the parties; **(iv) according to the practice of the parties in prior dealings;** or (v) if, after reasonable efforts, none of these can be found, then at the addressee's last-known residence or place of business.

2.2 Any notice, communication or proposal shall be deemed to have been received on the day it is delivered in accordance with Rule 2.1.

2.3 **For the purpose of calculating any period of time under these Rules, such period shall begin to run on the day following the day when a notice, communication or proposal is deemed to have been received**. Unless the Registrar or the Tribunal determines otherwise, any period of time under these Rules is to be calculated in accordance with Singapore Standard Time (GMT +8)

UNCITRAL ARBITRATION RULE ARTICLE 2

Notice and calculation of periods of time

Article 2

1. A notice, including a notification, communication or proposal, may be transmitted by any means of communication that provides or allows **for a record of its transmission.**

2. If an address has been designated by a party specifically for this purpose or authorized by the arbitral tribunal, any notice shall be delivered to that party at that address, and if so delivered shall be deemed to have been received. Delivery by electronic means such as facsimile or email may only be made to an address so designated or authorized.

3. In the absence of such designation or authorization, a notice is:

(a) received if it is physically delivered to the addressee;

or

(b) deemed to have been received if it is delivered at the place of business, habitual residence or mailing address of the addressee.

(cont..)

UNCITRAL ARBITRATION RULE ARTICLE 2 (cont)

4. If, after reasonable efforts, delivery cannot be effected in accordance with paragraphs 2 or 3, **a notice is deemed to have been received if it is sent to the addressee's last-known place of business, habitual residence or mailing address by registered letter or any other means that provides a record of delivery or of attempted delivery.**

5. A notice shall be deemed to have been received on the day it is delivered in accordance with paragraphs 2, 3 or 4, or attempted to be delivered in accordance with paragraph 4. A notice transmitted by electronic means is deemed to have been received on the day it is sent, except that a notice of arbitration so transmitted is only deemed to have been received on the day when it reaches the addressee's electronic address.

6. For the purpose of calculating a period of time under these Rules, such period shall begin to run on the day following the day when a notice is received…….

BUT CAVE OR BEWARE!

As noted compliance with lex arbitri and applicable rules providing for valid service/notice will usually suffice;

However it is unlikely “substantial or near compliance” will do, where consent to a stipulated means is the foundation of jurisdiction;

Deeming provisions do not prove actual receipt;

Critically, they cannot guarantee that due process has been achieved;

There is consequently scope for a party to argue that even though the serving party has done all that is required by law, rule or contract, the reference was not brought to its attention.

INNOCENT, NOT VERY GUILTY OR SERVICE DODGERS! AND DOES IT MATTER?

Those who did not receive notice effected in accordance with law or rule through no fault of their own;

Those who were guilty of some fault such as failing (including in breach of contract) to notify a change of address;

Those who appear to be lying about lack of receipt of notice.

IS THERE A PRINCIPLE ENFORCEMENT SHOULD NOT OCCUR AGAINST A PARTY IGNORANT OF THE COMMENCEMENT OF AN ARBITRATION?

In some jurisdictions – yes;

For example - the Swedish Supreme Court has refused to allow enforcement of an award against a Respondent which was unaware of the reference because it had failed to notify a change of address as it was contractually required to do; (See cases referred to in ***Hans Dahlberg & Marie Ohrstrom, 'Proper Notification: A Crucial Element of Arbitral Proceedings', Journal of International Arbitration 27, no. 5 (2010): 539***.

There is worrying anecdotal evidence and poorly reported instances of refusal to enforce even in some NYC signatory jurisdictions in this region, where the enforcing party has been unable to prove actual notice has been received – proof of it being sent by a prescribed method may be insufficient.

I take Vietnam as an example and concede immediately that the situation there is improving: (cont…)

IS THERE A PRINCIPLE ENFORCEMENT SHOULD NOT OCCUR AGAINST A PARTY IGNORANT OF THE COMMENCEMENT OF AN ARBITRATION? (Vietnam cont.)

The Arbitration Law of Vietnam is found in the Law on Commercial Arbitration No 54 -2010-QH12 (LCA).

Recognition and enforcement of foreign arbitral awards is regulated by Art 68 (1) (e) of the LCA and (arguably - vide infra) and by the Civil Procedure Code as amended in 2011 and 2015 (CPC).

Under Article 68, a court may "cancel" a foreign award if it contravenes "**fundamental principles"** of Vietnamese law (instead of public policy as in the NYC) and under Art. 370 now 459 of the Civil Procedure Code a court may refuse to recognize a foreign arbitral award, including if it deems such award is contrary to **"basic principles of Vietnamese law"** ;

Historically there was a complete lack of guidance on the interpretation of those provision and courts rejected enforcement on the basis a host of technical infringements of local law (principally the Vietnamese Civil Code and the Commercial Law);- See as examples: **Energo-Notus v Vinatex (1998), Tyco v Leighton Contractors Vitenam (2003), Toepfer v Sao Mai (2011)**

IS THERE A PRINCIPLE ENFORCEMENT SHOULD NOT OCCUR AGAINST A PARTY IGNORANT OF THE COMMENCEMENT OF AN ARBITRATION? (Vietnam cont.)

Most relevant in this context: In 2012 the People's Court of Hanoi refused to enforce an arbitral award granted by the International Cotton Association (ICA) because **the ICA arbitration tribunal had failed to duly notify the Vietnamese defendant of the proceeding**. The Court held that the deficient notice constituted both a fault in the arbitration procedure (as provided in Article 370.1(c) of the Civil Procedure Code) and a breach of principles regarding parties' rights of self-protection (set out in Article 9), and on that basis refused to recognize and enforce the foreign award.

In another case, the People's Court of Long An **applied the provisions for service of notice in court proceedings to judge that the service of arbitral documents of the tribunal was improper** and hence, refused the recognition of foreign arbitral awards (Ecom v Dong Quang (2013), Decision No. 01/2013/QDST-KDTM.

The ruling implied that in order to be recognized in Vietnam, a foreign arbitral proceeding operating in accordance with its own rules must also follow procedural principles applicable before Vietnamese courts

Although the Supreme People's Court of Vietnam issued a Practice Note 246/ TANDTC-KT dated 25 July 2014 (Practice Note 246) and Resolution 01 of 2014, giving internal guidance on the resolution of applications for recognition and enforcement of foreign arbitral awards in Vietnam, uncertainty and risk remain on interpretation of the phrase, ***"contrary to basic [or fundamental] principles of Vietnamese law".***

HOW WILL THE TRIBUNAL APPROACH THESE PROBLEMS?

Overarching aim will be to ensure a party is provided with an adequate opportunity to present a case and to render an enforceable award;

In the case of the non-participating and unrepresented respondent, it will be particularly concerned, before proceeding to an award, to ensure strict compliance with applicable provisions of the lex arbitri, any agreed applicable rules or provisions in the arbitration agreement as to service/notice.

It will want to know about, and may have regard to the various possibilities evident from efforts made to give notice; and engage the Respondent in the arbitration process, so that it may form a view of whether there is an innocent cause of non-participation (and how it may be overcome); or deliberate evasion; so as to guide its directions on what should be done to give notice (if anything) beyond the applicable law or rule or contract.

The Tribunal will want to consider how best to deal with each type of scenario as and when it arises.

HOW SHOULD THE CLAIMANT'S LAWYER PROCEED? SOME PRACTICAL SUGGESTIONS

IGNORE YOUR PRINCIPAL'S REASSURING HANDOVER – "THIS IS AN EASY ONE THERE IS NO DEFENCE AND THE OPPO' IS NOT RESPONDING!"

Start out with the objective of satisfying the Tribunal the proceedings have come to the notice of the Respondent;

Do not be inclined to try and persuade a Tribunal that law, rule or contractually prescribed methods of service and deemed delivery or receipt will always do – it is cheap and easy but may be fatal to enforcement of an award and thus a huge waste of time and money.

Identify and make sure you (or the client) comply strictly with the precise requirements as to notice in the lex arbitri, any applicable rule or arbitration agreement;

Be able to demonstrate to the Tribunal that you (or client) have done so; ….

HOW SHOULD THE CLAIMANT'S LAWYER PROCEED? SOME PRACTICAL SUGGESTIONS (cont)

Ascertain from the client (or by investigation if possible and proportionate) and at the start, where the Respondent's assets might be found; then consider if there is likely to be hostility to enforcement in that jurisdiction; and what might be required there to prove "proper" notice and a valid appointment of the Tribunal;

If the likely enforcement jurisdiction is hostile to deemed notice provisions, it sometimes helps to show that you have complied with particular local laws as to service of arbitral or legal proceedings – take local legal advice;…….

HOW SHOULD THE CLAIMANT'S LAWYER PROCEED? SOME PRACTICAL SUGGESTIONS (cont)

If relying on electronic means of communication, be in a position to satisfy the Tribunal that, for example, emails sent to an address used in the course of a business relationship, is still an active address and in use; and that emails are being received;

If suspicious that there is evasion of service, consider the use of local lawyers or process servers to effect physical service on an individual who can be shown to be a controlling mind of the Respondent or on a person or at an address prescribed by local law for effective service;

HOW SHOULD THE CLAIMANT'S LAWYER PROCEED? SOME PRACTICAL SUGGESTIONS

Do not presume you can rely on an institution to effect valid service or that efforts to serve by an institution are or will be endowed with some special quality of respect in an enforcing Court;

If there are service difficulties and unresponsiveness, it serves well to raise the problem with a Tribunal at an early stage so that the Tribunal does consider and shows it has considered the adequacy of methods employed to effect service, in its directions and then in recital of the procedural course of the reference in its award;

It also helps to set a service and communication protocol which is to apply throughout the reference at each critical stage where the Respondent should particularly be given a right to be heard – i.e. at the pleading stage, on the setting of the procedural course, on decisions as to whether there should be an evidentiary hearing; on the form, sequence and timetabling of evidence and submissions and on the close of the proceedings (the last chance to be heard).

HOW SHOULD THE CLAIMANT'S LAWYER PROCEED? SOME PRACTICAL SUGGESTIONS

Produce evidence of continued trading at and from the service address used;

Demonstrate notification to other trading counterparties of the Respondent or the authorities, of a change of address from a contractual address for service if that other address is used without response;

Finally, ask the Tribunal to make an express finding of fact that it is satisfied the proceedings have come to the Respondent's notice

CONCLUDING RECOMMENDATION

GO THAT EXTRA MILE !

Counsel's Perspective

First and foremost, bear in mind that arbitration is a consensual dispute resolution process which contracting parties have agreed to:

- ***Temperament is important especially when opposing counsel or party is from civil law jurisdictions who are not familiar with our arbitral system.***

- ***Be confident, be firm, be fearless advocates but do not be aggressive or mercenary.***

- ***Build rapport with arbitrators and counsel as we all share the same objective of resolving the dispute.***

- ***Do not have to win every skirmish or battle as long as you win the war.***

Knowledge of Arbitral System, Rules and the Law

This is trite but the key is ability to identify and focus on the issues upon which the case turns.

Helps in the preparation of your case in that you will know what evidence to look for and present.

Be commercial, rather than legal, in approach, after all, arbitrators are `commercial men' with knowledge of how businessman approach, weigh and make business decisions.

Be concise – the ability to reduce your case to the simplest of terms goes a long way towards helping the arbitrators understand your case. Clarity of expression certainly helps.

Brief your witnesses so that they understand what the case is, and what their case is not. It may well work against your case if your witnesses spout `rehearsed answers'.

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DEALING WITH THE LAST-MILE CHALLENGES- AWARD ENFORCEMENT

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OVERVIEW

- Effect of arbitration award
- Enforcement of Awards made in Singapore
- Enforcement of Foreign Awards
- Potential impediments

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EFFECT OF AWARD

- An award is final and binding upon the parties and enforceable against the party against whom it is made.
- If the award is the final award:
  - It terminates the arbitration
  - It extinguishes the original cause of action; original cause of action is replaced by the right to enforce award
  - The arbitrator becomes *functus officio*

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ENFORCEMENT OF AWARD MADE IN SINGAPORE

- Awards made in Singapore may be enforced by
  1. Entry as judgment or order of court
  2. Set-off or defence in litigation

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ENFORCEMENT OF AWARD MADE IN SINGAPORE

- [1] Entry as judgment or order of court
  - S 19, IAA: An award on an arbitration agreement may, by leave of the High Court or a Judge thereof, be enforced in the same manner as a judgment or an order to the same effect and, where leave is so given, judgment may be entered in terms of the award.
  - s 46(1),AA: An award made by the arbitral tribunal pursuant to an arbitration agreement may, with leave of the Court, be enforced in the same manner as a judgment or order of the Court to the same effect.

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ENFORCEMENT OF AWARD MADE IN SINGAPORE

- [2] set-off or defence in litigation
  - S 19B(1), IAA: An award made by the arbitral tribunal pursuant to an arbitration agreement is final and binding on the parties and on any persons claiming through or under them and may be relied upon by any of the parties by way of defence, set-off or otherwise in any proceedings in any court of competent jurisdiction.
  - S 44(1), AA: An award made by the arbitral tribunal pursuant to an arbitration agreement shall be final and binding on the parties and on any person claiming through or under them and may be relied upon by any of the parties by way of defence, set-off or otherwise in any proceedings in any court of competent jurisdiction.

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ENFORCEMENT OF AWARD MADE IN SINGAPORE

- Procedure to apply for leave to enforce (O 69 r 3(1)(f) read with r 14 of ROC):
  - O 69, r 3(1)(f), (2), ROC: Apply by originating summons.
  - O 69, r 14, ROC: Supported by affidavit which
    - (a) exhibit the **arbitration agreement or any record of the content of the arbitration agreement** with an authenticated copy of the **original arbitral award** accompanied by **translation in the English language** if the agreement, record or award is not in the English language;
    - (b)states the name and usual/last known address of the applicant and the party against whom it is sought to enforce; and
    - (c) details of how and to what extent the award has not been complied with at the date of the application.
- Once leave is given by the High Court to enter judgment on an application to enforce the award, the other party has 14 days after receipt of the order to challenge the leave granted (O 69, r 14(4), ROC).

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ENFORCEMENT OF AWARD MADE IN SINGAPORE

- Court may refuse leave to enforce if
  - [1] Award exceeded terms of reference, incomplete or ambiguous
  - [2] Grounds for setting aside exist

  (Will be further explained in final section)

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ENFORCEMENT OF FOREIGN AWARD

- Awards made outside Singapore may be
  - [1] Enforced by an action under common law
  - [2] Recognised and enforced under the New York Convention ("NYC")
  - [3] In Singapore, Non-NYC awards may also be enforced under the Arbitration Act
  - [4] Recognised as binding for all purposes and be relied upon by any of those parties by way of defence, set-off or otherwise in any legal proceedings in Singapore,

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ENFORCEMENT OF FOREIGN AWARD

- Awards made outside Singapore may be
  - [1] Enforced by an action under common law
    - Alexander G Tsavliris & Sons Maritime Co v Keppel Corp Ltd [1995] 2 SLR 113 (SGCA)
      - The appellant provided salvage services to the vessel Atlas Pride. However, the owners of Atlas Pride failed to pay the applicant salvage remuneration that was awarded pursuant to an arbitral award (
      - The applicant then arrested the Atlas Pride pursuant to an in rem writ issued pursuant to s 3(1)(i) of the HCAJA (i.e. any claim in the nature of salvage).
      - HELD: The words "in the nature of salvage" ought to be read as "arising out of salvage". The arbitration to determine the amount of remuneration payable to the appellant arose out of the salvage. Therefore, the action to enforce an arbitral award was within the admiralty jurisdiction of the High Court.

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ENFORCEMENT OF FOREIGN AWARD

- Awards made outside Singapore may be
  - [2] Recognised and enforced under the New York Convention
    - *Article I (1) NYC*
      - This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a state other than the state where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the state where their recognition and enforcement are sought
    - *Article III, NYC*
      - : Each Contracting State shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

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ENFORCEMENT OF FOREIGN AWARD

- Awards made outside Singapore may be
  - [3] In Singapore, Non-NYC awards may also be enforced under the Arbitration Act.
    - This is so because the act will apply to awards irrespective of where the seat of arbitration is
    - *Section 46(3) Arbitration Act*
      - Notwithstanding section 3, subsection (1) shall apply to an award irrespective of whether the place of arbitration is Singapore or elsewhere

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ENFORCEMENT OF FOREIGN AWARD

- Awards made outside Singapore may be
  - [4] Recognised as binding for all purposes and be relied upon by any of those parties by way of defence, set-off or otherwise in any legal proceedings in Singapore,
    - s 29(2), IAA: Any foreign award which is enforceable under subsection (1) shall be recognised as binding for all purposes upon the persons between whom it was made and may accordingly be relied upon by any of those parties by way of defence, set-off or otherwise in any legal proceedings in Singapore.
    - Although the IAA provides a platform through which a party might have an award in its favour recognised and enforced , it was not the only means by which a party might seek to utilise the award it had obtained. In Pacific King Shipping Pte Ltd v Glory Wealth Shipping Pte Ltd [2010] SGHC 173, it was held that there was no obstacle to a statutory demand being made for the purposes of a winding up petition which was founded on a binding arbitral award whether or not such award has been enforced by registration under the IAA.

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ENFORCEMENT OF FOREIGN AWARD

- Procedure to apply for leave to enforce (O 69A rr 3(1)(e) & 6 of ROC):
  - O 69A, r 3(1)(e), (2), ROC: Apply by originating summons.
  - O 69A, r 6, ROC: Supported by affidavit which
    - (a) exhibit the **arbitration agreement or any record of the content of the arbitration agreement** with an authenticated copy of the **original arbitral award** accompanied by **translation in the English language** if the agreement, record or award is not in the English language;
    - (b)states the name and usual/last known address of the applicant and the party against whom it is sought to enforce; and
    - (c) details of how and to what extent the award has not been complied with at the date of the application.
  - Once leave is given by the High Court to enter judgment on an application to enforce the award, the other party has 14 days after receipt of the order to challenge the leave granted (O 69A, r 6(4), ROC).

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IMPEDIMENTS TO ENFORCEMENT OF AWARD

- A party not satisfied with the award has two recourses:-
  1. Apply to Set Aside the Award; and
  2. Apply to the Court to Refuse Enforcement of the Award.
- The two recourses are cumulative rights, i.e., a party can apply to set aside the award first. If the application is not successful, he can apply to the Court to refuse enforcement of the award (*Aloe Vera American v Asianic Food (S) Pte Ltd* [2006] 3 SLR(R) 174).

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SETTING ASIDE OF AWARD

- An arbitral award can only be set aside by the Court of the seat of arbitration.
- In Singapore, the grounds for setting aside are provided in Article 34 of the Model Law.
- Procedural grounds:-
  - a party to the arbitration agreement was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of Singapore; or
  - the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
  - the award deals with a dispute not contemplated by, or contains decisions on matters beyond the scope of the submission to arbitration; or
  - the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties

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SETTING ASIDE OF AWARD

- Substantive grounds -
  - the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
  - the award is in conflict with the public policy of this State
- The Singapore Court has taken a strict approach in construing whether an award is in conflict with the public policy.
  - The legislative policy of the IAA is to give primacy to the autonomy of arbitral proceedings and upholding the finality of arbitral awards (whether foreign arbitral awards or IAA awards)." (*AJT v AJU* [2011] SGCA 41)
  - The party applying to set aside the award has to demonstrate egregious circumstances such as corruption, bribery or fraud which would violate the most basic notions of morality and justice (*Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 SLR 3
  - Merely contending that the award was "perverse or irrational" could not of itself amount to a breach of public policy.
  - An arbitral award maybe set aside if upholding the award would shock the conscience or be wholly offensive to the ordinary reasonable and fully informed member of the public (*PT AsuransiJasa Indonesia (Persero) v Dexia Bank* [2007] 1 SLR(R) 597).
- S24 IAA-Court may set aside an award if a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced.

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SETTING ASIDE OF AWARD

- Breach of natural justice
- In *SohBeng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86, VK Rajah JA affirmed the principles in *John Holland Pty Ltd v Toyo Engineering Corp (Japan)* [2001] 1 SLR(R) 443 governing a challenge based on breach of natural justice:

  > *'It has been rightly held in* John Holland Pty Ltd v Toyo Engineering Corp (Japan) *[2001] 1 SLR(R) 443 ("*John Holland*"), at [18], that a party challenging an arbitration award as having contravened the rules of natural justice must establish: (a) which rule of natural justice was breached; (b) how it was breached; (c) in what way the breach was connected to the making of the award; and (d) how the breach prejudiced its rights.'*

- The Court of Appeal accepted that the doctrine of natural justice is based on two rules:
  - firstly, parties to arbitration have a right to be heard effectively on every issue that may be relevant to the resolution of a dispute (*audi alteram partem*), and
  - secondly, that an arbitrator should not base his decision on matters not submitted to him (*nemo judex in causa sua*).
- However, these two rules are not easily breached.

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APPLICATION TO REFUSE ENFORCEMENT OF AWARD

- If a party fails in his application to the Court to set aside the award, he can apply to the Court in the country, where the award is sought to be enforced, to refuse enforcement of the award.
- Art 36 Model Law

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APPLICATION TO REFUSE ENFORCEMENT OF AWARD

- *Article 36. Grounds for refusing recognition or enforcement*
- *(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:*

(a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:

(i) a party to the arbitration agreement referred to in Article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

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APPLICATION TO REFUSE ENFORCEMENT OF AWARD

- *Article 36. Grounds for refusing recognition or enforcement*
- *(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:*

  (b) if the court finds that:

  (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

  (ii)the recognition or enforcement of the award would be contrary to the public policy of this State.


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PANEL DISCUSSION

1) Arbitration is not litigation. What do you feel a tribunal looks for in deciding a dispute (clear facts, persuasive law or a commercial solution)?

2) How important is the procedure and process of the arbitration in itself, compared to the result of the arbitration?

3) Will arbitration continue as a significant form of dispute resolution over the next 30 years or will other forms of ADR overtake arbitration?

UPCOMING EVENT
SCMA DISTINGUISHED SPEAKER SERIES
04 NOVEMBER 2016

Deputy Secretary General of BIMCO, Søren Larsen

The SCMA Distinguished Speaker Series is a program of speeches featuring international speakers who have distinguished themselves in the area of shipping and/or maritime arbitration. Designed to present thought leading ideas and developments in the field of maritime arbitration, the speeches cover a comprehensive spectrum of topics. For 2016, SCMA is proud to welcome Deputy Secretary General of BIMCO, Søren Larsen as our Distinguished Speaker.

His speech will be titled: **BIMCO and Maritime Arbitration in the Asia Pacific**

TIMING: 10.30am – 14.00pm (Inclusive of lunch)
VENUE: 32 Maxwell Road Level 3 Maxwell Chambers

1.5 CPD POINTS

For more information, please log on to our website: www.scma.org.sg

SCMA DISTINGUISHED SPEAKER SERIES 2016

Deputy Secretary General of BIMCO, Søren Larsen

DATE:
4th November 2016, Friday

TIMING:
10.30am – 14.00pm
(Inclusive of lunch)

VENUE:
32 Maxwell Road
Level 3 Maxwell Chambers

FEE:
SCMA Member: S$35.00
Public: S$70.00

REGISTRATION:
Click on the following link to register by 31st October 2016
https://goo.gl/forms/vvm3Qff1Ptk0Ff7E2

Organized by
SCMA
SINGAPORE CHAMBER OF MARITIME ARBITRATION
www.scma.org.sg

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(Please see below for a synopsis of Mr Søren Larsen's speech)

We look forward to welcoming all of you at the event.

Who should attend?

- ***Arbitrators / Lawyers /In-house Counsel / Ship Owners / Charterers/Operators / Ship Brokers / Managers***
- ***Marine Insurers and Insurance Brokers / Correspondents***
- ***Shipyards / Ship Financing Institutions / Regulators***
- ***International Commodity Traders***
- ***Institutions of Higher Learning***
- ***Stakeholders in the Maritime and Trade Industry***

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