YCAP AND CJCA INTERVIEW OF KEVIN NASH

This interview is one in a series of interviews undertaken as a joint project between Young Canadian Arbitration Practitioners, YCAP, and the Canadian Journal of Commercial Arbitration, CJCA, with leading members of the Canadian international arbitration community.

Jack Maslen (BLG), Sara Nadeau-Seguin (Teynier Pic) and Hannah Johnston (CJCA) lead the interview of Kevin Nash, the current Registrar of the Singapore International Arbitration Centre.

JM: Good evening, good morning Kevin, thanks again for joining us today. Just to start off: what was your professional background before you made your to Singapore?

KN: Thanks very much to both of you. It is great to be here.

I am very proud to be a member of the ever-expanding Canadian diaspora in international arbitration with most every international arbitral jurisdiction now being well-represented with Canucks. In terms of my journey, I look at it as a slow eastward shift from Western Canada. I was born and raised in Calgary, completed my undergraduate degree at Mount Allison, read law and received my JD at Osgoode Hall, and then worked in Toronto at one of Canada's 'Seven Sister' law firms. Given my interest in arbitration, I had to make the choice of whether to go 'all in' with international arbitration or stay in Canada and hope to be able to balance commercial litigation with at least some arbitration. Taking everything into consideration, I left the relatively safe confines of law firm life in Canada and made the choice to take an LLM in Sweden at Stockholm University's International Commercial Arbitration Law (ICAL) program. Following that, I took another chance and interviewed by video for an institutional job at an emerging institution called the Singapore International Arbitration Centre (SIAC). I arrived in

Singapore not knowing anyone but confident that Singapore was going to be the next big thing in arbitration. As everyone would have seen, according to the Queen Mary University of London-White & Case LLP Survey 2021, Singapore is now tied with London as the leading seat of arbitration in the world and SIAC is ranked behind only ICC as the second most preferred institution in the world. Maybe I made lucky choices?

JM: Was there something that drew you to SIAC or Asia in particular, or was it more just looking to get into the institution side?

KN: Immediately following my LLM, I attended a training course in Italy which drew some of the leading practitioners in arbitration. At the time, I was considering offers at law firms in Europe, returning to my firm in Canada, or working at an institution. At the end of the course, I had the chance to sit down for drinks with one of the true leaders in the field who distilled my options down to the following question: "Do you want to be successful or do you want to be *good*? If you want to be successful, you should definitely practice internationally. But, if you want to understand arbitration in a nuanced and meaningful way, you should consider working at an institution. You will become an expert in procedure and have a portfolio of hundreds or thousands of cases instead of a piece of a few files." He was certainly correct on all counts. There is no better learning than working at a fast-paced and high-volume institution.

The opportunity to be based in Asia also factored in my decision-making. When I look at some of the most exciting jurisdictions in arbitration, and the most dynamic economies, many or most of them are located in Asia. It is even more exciting to think that Asian arbitration is still on the upward slope of the growth curve on the way to the 'Asian Century' for arbitration. As a Canadian, it is also nice to work in a place where it is 30 degrees every day.

JM: Where do you see yourself in five or ten years?

KN: I generally do not engage in much planning beyond the next month or the next institutional project. Sometimes things are so busy at SIAC that the goal is just to get through the week with every one of SIAC's 1,000 active cases being carefully managed and in good shape.

For me, in much the same way as I advise SIAC's Counsel, the priority is always to make sure that I am getting better as a lawyer and continuing to develop as an arbitration practitioner. As I have been restructuring the SIAC Secretariat in 2023, I have focussed on making sure that the texture of the work continues to improve for all the lawyers in my team. The good news is that institutional work in 2023 is much different than it was 10 years ago in terms of the skill and precision required from the case managers. Law firms are also starting to appreciate the rigour of the work and my best recruiting pitch for the SIAC Secretariat is the history of placement of SIAC Counsel in leading disputes groups.

The only prediction that I would make for myself is that I will naturally still be working in arbitration and hopefully helping to improve the practice and enjoying it just as much as I do right now in Singapore at SIAC.

JM: In terms of your day-to-day work, do you have a favorite part of your role?

KN: I will be slightly indulgent and choose two very different aspects of the job: (i) big, chunky policy issues and overall "institution building"; and (ii) the purely technical side of things, which is best exemplified through the scrutiny of awards.

On the policy side, I have enjoyed and appreciated being part of SIAC's growth from a regional institution into a truly global player. Along the way, I was fortunate to be a part of the creation and development of innovative new procedures such as Emergency Arbitration, Expedited Procedure, and Early Dismissal through four revisions to the SIAC Rules. One of the

big, recent moves has been the establishment of SIAC's newest overseas office, SIAC Americas, which is located in Rockefeller Placa in New York and headed by my friend and longtime colleague from the SIAC Secretariat, Adriana Uson. With SIAC on the ground in North America, hopefully there will be lots of opportunities for interaction and collaboration with the Canadian arbitration community. Adriana has lots of exciting things on the docket for SIAC Americas in the coming years.

On the technical side, one of the biggest value-adds at SIAC is the review or 'scrutiny' of awards. In SIAC arbitrations, every award has to be reviewed and approved by the Registrar prior to issuance. During the course of my career at SIAC, I have likely reviewed more than 1,000 awards but that first moment when I open an award is still exciting. It's almost the same feeling as opening up a good novel that you have been waiting to read. As the scrutiny process is a two-stage mechanism at SIAC, with SIAC Counsel taking the first cut and the Registrar/Deputy Registrar performing the final review, it is also fun to see the way that SIAC Counsel develop into true "scrutiny experts" with deep knowledge on how to protect awards against potential challenges.

I particularly like reviewing decisions on jurisdiction and admissibility which is likely my quiet preference over, for instance, a merits award on quality of steam coal. As an arbitration practitioner, there is always a new angle to be discovered and you can never have too much experience on jurisdiction.

JM: In Canada, maybe unlike some more "mature" arbitration jurisdictions, a lot of the arbitrations from my clients are ad hoc. If you were to advise parties of the benefits of having an institutional versus an ad hoc arbitration, are there clear benefits to using an institution?

KN: I am increasingly open-minded in terms of the best mechanisms to resolve disputes and cases are often "horses for courses". However, by and large, and all else equal, I do think that institutional arbitration is more effective than *ad hoc* arbitration. In my view, one of the biggest misconceptions is that *ad hoc* arbitrations will somehow be faster and more cost-effective than institutional arbitrations. This is simply not the case based on my observations of around 5,000 cases. It is uncontroversial that there is a direct relationship between the duration of the proceedings and the overall legal spend, and institutions are experts in ensuring that arbitrations stay on track and conclude in a timely fashion. Institutional fees also make up only a small fraction of the overall costs of an arbitration. In my view, the institutional versus *ad hoc* debate is largely over and the more relevant questions for users are the choice of institution, seat, applicable laws, and whether the case would benefit from any complementary mechanisms such as negotiation or mediation.

JM: This is perhaps a difficult question because there's a tension with efficiency, but is transparency and an increase in transparency an objective of the institution? If so, what steps are being taken in that regard?

KN: SIAC was actually a first-mover and perhaps moved too soon on the issue of transparency in arbitration. In the SIAC Rules 2013, we introduced a provision to provide that SIAC would have the authority to publish anonymized awards. Unfortunately, due to some negative feedback from our users, we had to pull this mechanism back and subsequently determined that SIAC would only publish awards with the express consent of the parties.

For SIAC, and in my personal view, the exercise on publication going forward will need to be done with prudence and it should be a commercial approach. I have discussed publicly on quite a few occasions that SIAC will be including publication provisions in the 7th Edition of the SIAC Rules which is slated for release in 2024. The important fine point for SIAC

will be the modality to allow any party to "opt-out" of the publication provision. We also need to be cognisant that many parties prefer and select SIAC on the basis of our strong confidentiality provisions.

Thinking a bit out loud, I take the view that there are two, broad components to transparency: (i) public transparency; and (ii) transparency within the proceedings. On the first point, institutions need to strike a balance with the very good features of public transparency to advance arbitration scholarship and enhance the integrity of the proceedings against the view that everyone wants transparency but on 'someone else's case'. On the second point, transparency within the proceedings, and allowing parties to look behind the institutional veil and understand the decision-making process is also important and institutions need to be accountable. Overall, on the shoulders of some very progressive moves over the past decade, transparency in arbitration is in a good place right now and SIAC will hope to help move transparency forward.

JM: Another thing we wanted to get your views on are some questions around access to justice. Is this something that's on the institutions' radar, increasing access to justice?

KN: It's critically important and there are still barriers to entry into the arbitral process. Third-party funding is an important plank to improving access to justice and Singapore paved the way for a third-party funding regime by abolishing the historic torts of champerty and maintenance in 2017. SIAC was also one of the first institutions to include express provisions on third-party funding in the SIAC Investment Arbitration Rules 2017. It's worked well.

SIAC is also moving towards the introduction of a properly cost-effective procedure for lower value cases which will be unique to the major institutions. We are going to see how far we can push the envelope on the costing for this procedure. It's really exciting and it will be a boon for parties with good cases

but who may not have the resources to secure funding or deal with the front-loading of fees and deposits in international arbitration. These low-cost cases will also have an ancillary benefit of giving SIAC a bigger mandate to appoint younger, first-time arbitrators.

…

HJ: We often talk about how arbitrating remotely is a lot greener, it can be more efficient. Obviously there are so many benefits. But just to play devil's advocate, are there any negatives you perceive? Anything that may be lost with an increase in virtual proceedings?

KN: Virtual hearings have really changed the game for arbitration and SIAC now has a full docket of in-person hearings, virtual hearings, and hybrid hearings. The most common complaint that we hear from external counsel is that you lose 'the feel of the room' and arbitrators often wonder whether virtual hearings affect their assessment of witness credibility. There are also subtle differences between virtual advocacy and in-person advocacy and questions as to whether an advocate can really persuade a tribunal and tell a compelling story of the case over an internet connection. Based on my observations, these concerns are vastly outpaced by the great benefits that virtual hearings have brought to arbitration hearings in terms of efficiency, reduced costs, allowing a broader playing field of participants, and making arbitration greener. The most typical case at SIAC would now have the interlocutories handled virtually with the evidentiary hearing in-person.

HJ: You mentioned [before the recording began] that the SIAC Secretariat has 16 lawyers who are qualified in 13 different jurisdictions. But what is SIAC doing to diversify arbitral panels?

You are quite right. Including me, and hoping that I count correctly, the SIAC Secretariat is comprised of lawyers qualified in Canada, the United States, Singapore, India, China, Malaysia,

the Philippines, Vietnam, Indonesia, Georgia, Nepal, Colombia, and Sri Lanka. Given that SIAC has received cases from parties from more than 100 jurisdictions, the effectiveness of our case management depends on this diverse staffing of lawyers.

In terms of the diversity of appointments, in 2022, when SIAC is called upon to make the appointment, we appointed almost 50% women arbitrators. Institutions are really leading the way on this initiative. The overall diversity of appointments is something that Lucy Reed and I discuss on a regular basis and give effect to on appointments. My general refrain on diversity, and based on my experience, diverse arbitrators make for better arbitrations and the appointment of arbitrators at SIAC needs to match our diverse and global user-base. We therefore prioritise, among many other factors, gender diversity, geographic diversity, ethnic diversity, cultural diversity, diversity of background, qualifications and experience, and generational diversity.

Overall, and I might have to supplement my earlier answer, developing arbitrator careers is another great part of my job, and I get a lot of satisfaction from recommending or making a solid first-time appointment. As anyone who has worked at an institution would understand, institutions take great care on every appointment, and it is difficult to appoint off a CV without additional information. For that reason, we are always canvassing the world, speaking with practitioners, looking at second-chair or third-chair counsel on SIAC cases, staying abreast of the counsel who are active in court, and determining the practitioners who would merit a first-time appointment. Of course, there is the much-discussed, "chicken or the egg" dilemma where the conventional thinking is that you cannot get appointed as an arbitrator … unless you have already been appointed as an arbitrator. This is where the institutions carry the day. I am very confident that the Case Management Teams at every institution take similar pride in appointing first-time arbitrators and giving an opportunity to deserving candidates. I have personally seen so many good stories of first-time arbitrators who were initially appointed on a 50,000 dollar case

10 years ago who now regularly sit on cases on the north side of 100 million.

HJ: How does SIAC promote or achieve diversity if the parties themselves are driving the process and they're not selecting diverse panels?

KN: Great point. The institutions are doing well but we need more forward-thinking from parties and co-arbitrators. Fortunately, there are lots of opportunities for institutions to make appointments where parties are not able to agree. Under the SIAC Rules, unless the parties otherwise agree, the default position is that a sole arbitrator will be appointed as parties are generally not able to reach an agreement on a joint nomination. SIAC also generally appoints the third and presiding arbitrator on three-member tribunals, makes appointments on behalf to three-member tribunals when one side is not participating, and may appoint all three arbitrators in three-member, multi-party situations.

The goal with these institutional appointments is to put diverse and talented arbitrators in a position to succeed and help to build their standing in the arbitration community which will result in these arbitrators picking up party-nominations and co-arbitrator nominations. For the same reason, and given the public platform, we also consider diversity in all of our outreach initiatives and capacity-building.

I heard a very good joke recently by someone who mentioned that they received a nomination list for prospective arbitrators that 'looked like it came from the 1990s'. If we really want to develop and future-proof arbitration, we need to make sure that we are building a bigger tent with our arbitrator appointments.

JM: Thinking about some of the readers of this interview, Canadian law students or young Canadian lawyers thinking about careers in international arbitration, who are considering making courageous steps like you did a

number of years ago. Do you have any advice or comments for them, or lessons learned that you think are relevant to share?

KN: The best advice given to me was to "be good". I would take the liberty of adding a few more words to that advice and suggest that students should also be patient, collegial, and flexible in approach.

Students and young lawyers might be surprised at the willingness of arbitration practitioners to help them chart a career path. I receive dozens of emails from students every week and I am always willing to provide advice or sit down for a chat because I remember how difficult it was to break into international arbitration. I know that this same sentiment is shared by many of my friends in arbitration at all levels of seniority.

On the patience point, it is important to realise that there is no 'one way' to be successful and arbitration is a marathon rather than a sprint. Among the expanding options, a young practitioner could start in litigation, in arbitration practice, in academia, in-house, or working at an institution. I can think of more than a few successful arbitrators who spent the bulk of their career working in corporate law and had no experience in disputes before setting out as an arbitrator.

Finally, on flexibility, my view coming out of my LLM was that I would go anywhere in the world for the best opportunity in arbitration. Now that there is a direct flight from Vancouver to Singapore, maybe I will see a few more Canadians making the same choice to set up their arbitration practice in Singapore.

JM, HJ: Thank you!