

A SPORTING SUCCESS

Persevering Through 2019

5

Special Contribution

A Jewel of International Law: In Conversation with Monica Feria-Tinta

13

Special Contribution

The World of Expedited Procedures and Emergency Arbitrators: In Conversation with Mohanadass Kanagasabai

21

Special Contribution

An Insight into the FinTech Industry: In Conversation with Mohammad Ridzuan Abdul Aziz & Chiara Accornero



ASIAN INTERNATIONAL ARBITRATION CENTRE

"THE BANGUNAN SULAIMAN HAS POTENTIAL TO BE THE BEST [ARBITRATION CENTRE] OUTSIDE THE PEACE PALACE."

"SMART, COST-EFFECTIVE AND WELL-INFORMED CHOICE WHEN SELECTING HEARING VENUE"

GLOBAL ARBITRATION REVIEW (GAR) 2019

Your Preferred Hearing Venue

MALAYSIA:

Strategically located in the heart of South-East Asia with hassle free hotel bookings



Latest IT technology ranging from HD Video Conferencing (VC), Web-seminars, Online Meetings and Tele-conferencing. Full suite of collaboration features for laptops, tablets or mobile devices.

Communicate to any VC system (Polycom, Zoom, Cisco, BlueJeans, Lifesize, etc.)



State-of-the-Art features in our Advanced CRT rooms – Ultra-HD video recording for specialised court-style video capture, with Smart Voice-Tracking microphones and automated Audio-to-Text transcription



Over 30 rooms available for hearings. Available 365 days a year



The AIAC offers the most affordable hearing facilities amongst arbitral institutions*



*GAR 2019 SURVEY
Guide to Regional Arbitration (Volume 7 – 2019)



TABLE OF CONTENTS

Director's Message	4	Key Insight	25
Special Contribution	5	<i>AIAC Evening Talk Series: Energy Contracts and Arbitration</i>	
<i>A Jewel of International Law: In Conversation with Monica Feria-Tinta</i>		Event Highlight	26
Event Highlight	9	<i>Inaugural AIAC-Bar Council - CIArb Joint Conference 2019</i>	
<i>AIAC September Sports Month 2019</i>		Think Tank	27
Special Contribution	13	<i>Comparative Analysis of the Dispute Resolution Mechanisms in the "FIDIC Red Book 2017" and the "AIAC Standard Form Building Contract 2019" by John Coghlan</i>	36
<i>The World of Expedited Procedures and Emergency Arbitrators: In Conversation with Mohanadass Kanagasabai</i>		Event Highlight	31
Event Highlight	16	<i>ADNDRC Conference 2019 - "Manage Domain Names and Trademarks in the E-Business World"</i>	
<i>AIAC's India ADR Training Initiative in New Delhi, India</i>		Event Highlight	32
Key Insight	17	<i>Kuala Lumpur Summit on Commercial Dispute Resolution in China</i>	
<i>Interview with the Champion of the 3rd AIAC-ICC Pre-Moot - National Law University (Bhopal)</i>		Event Highlight	33
Key Insight	19	<i>AIAC Evening Talk Series: Alternative Dispute Resolution and FinTech</i>	
<i>Interview with the Winner of the Malaysian Final of the 3rd AIAC-ICC Pre-Moot - International Islamic University Malaysia (Team 1)</i>		Key Insight	34
Special Contribution	21	<i>The AIAC's Capacity Building and Outreach Initiatives</i>	
<i>An Insight into the FinTech Industry: In Conversation with Mohammad Ridzuan Abdul Aziz & Chiara Accornero</i>		Announcement	36
		Case Summaries	37
		Events Calendar - Save the Date!	41

NEWSLETTER #03

December 2019

*This edition of the AIAC Newsletter has been edited and designed by the AIAC Newsletter Team. Edited by: Ms. Nivvy Venkatraman & Ms. Chelsea Pollard. Designed by: Mr. Leonard Loh Chin Sheon, Mr. Mohammed Fakrullah Bin Bahadun, Mr. Mohammad Syahir Alias and Ms. Nurul Ain Sumarji. Distributed by: Asian International Arbitration Centre.

**The AIAC invites readers to contribute articles and materials of interest for publication in future issues. Readers interested in contributing to future editions of the Newsletter, or who have any queries in relation to the Newsletter, should contact Ms. Nivvy Venkatraman (Senior International Case Counsel) at nivvy@aiac.world or Ms. Chelsea Pollard (International Case Counsel) at chelsea@aiac.world.

Published by:



ASIAN INTERNATIONAL ARBITRATION CENTRE

Bangunan Sulaiman, Jalan Sultan Hishamuddin,
50000 Kuala Lumpur, Malaysia

T +603 2271 1000
F +603 2271 1010
E enquiry@aiac.world
W www.aiac.world

DISCLAIMER

This edition of the Newsletter has been circulated electronically only. Readers who intend to receive future editions in hard copy should notify the AIAC of same in writing. The articles and materials that are published in this Newsletter contain the views of the writers concerned and do not necessarily reflect the views of the AIAC. Information in the Newsletter has been compiled or arrived at from sources believed to be reliable and in good faith, but no representation, express or implied, is made as to their accuracy, completeness or correctness. Accordingly, the AIAC accepts no liability whatsoever for any direct, indirect, or consequential loss or damage arising from the use of information in this Newsletter, reliance on any information contained herein, any error, omission or inaccuracy in any such information or any action resulting therefrom. This newsletter is also available on our website.

DIRECTOR'S MESSAGE



With an eye on the dawning of a new year, the Asian International Arbitration Centre ("AIAC") takes time to reflect on the achievements of the year gone by and to recount the gains of 2019. Notably, the AIAC goes from strength to strength in its unyielding efforts and indomitable spirit to mark its presence in the fields of alternative dispute resolution and holistic dispute management.

Picking up the baton in September 2019, the AIAC hosted the second edition of September Sports Month which culminated in the Sports Law Conference 2019. The running theme of the conference, which saw over 26 speakers and 200 participants, was the exploration of novel concepts, notable advancements and contemporary issues in international sports law. Discussions were particularly pivoted on the rise of the sporting spirit particularly in Asian countries, and the consequent need for more governance and a regulatory framework. Speakers at the conference were also given the platform to discuss the relatively new but fast-growing eSports industry and the inherent challenges encountered therein. Other AIAC initiatives in line with September Sports Month 2019 included a Workshop on the Constitution of Sporting Bodies to provide an overview and introduction to the fundamentals, features and significance of sports constitutions, and the AIAC Certification Programme in Sports Arbitration, aimed at providing a holistic understanding of sports law and the practicalities in the resolution of sporting disputes. In addition to the Sports Month in September the AIAC visited New Delhi to establish a relationship with representatives of the local arbitration community and introduced them to the AIAC's products and services. The AIAC plans on continuing this initiative in India next year.

In October 2019, the AIAC together with the Beijing Arbitration Commission / Beijing International Arbitration Center co-hosted the Kuala Lumpur Summit on Commercial Dispute Resolution in China. The AIAC is proud to have had this opportunity to promote its international appeal and world class facilities to the summit attendees. Amongst the topics explored during the full day event were the new trends and challenges across a range of fields in commercial dispute resolution in China, including commercial arbitration and mediation, construction, energy, investment, finance, intellectual property and entertainment industries. A warm thank you goes out to our co-hosts and special keynote speaker, Tan Sri James Foong Cheng Yuen, former Federal Court Judge of Malaysia. In November, the AIAC hosted the first ever China ASEAN Forum to strengthen the connections between Malaysia, China and other ASEAN countries as well as launch the first joint empanelment mechanism in cooperation with Hainan International Arbitration Court.

Keeping with the AIAC's spirit of raising awareness of the Centre and its suite of arbitration rules, I am also proud of our Case Counsels who authored the moot problem for the 14th LawAsia International Moot 2019. The International Rounds of the 14th LawAsia Moot took place in early November 2019 in Hong Kong and saw students tackling a creative problem with regard to International Dispute Resolution, Commercial Law and Contract Law, whilst being challenged by cutting-edge industry developments, such as expedited procedures, emergency arbitrator awards and arbitration of art disputes.

In other news, 16th October 2019 was a momentous date for the construction industry in Malaysia. The Federal Court of Malaysia delivered its landmark decisions in the cases of *Jack-In Pile (M) Sdn. Bhd. vs Bauer (Malaysia) Sdn. Bhd.* and *Ireka Engineering & Construction Sdn. Bhd. vs PWC Corporation Sdn. Bhd.*, where it was held that the Construction Industry Payment and Adjudication Act 2012 ("CIPAA 2012") will only have prospective application. Following these judicial developments, the AIAC as the adjudication authority, is cognisant that any dispute arising from a construction contract entered into before the enforcement of CIPAA 2012 that is, 15th April 2014, will be precluded from resolution under the said mechanism of statutory adjudication.

Showcasing our visionary spirit, the AIAC has also hosted a range of informative talks and trainings sessions in the second half of 2019 as part of the AIAC Evening Talk Series. The topics addressed include present-day issues, such as incorporating effective arbitration clauses into energy law contracts, the barriers faced by parties involved in the belt and road initiative, and resolving FinTech disputes without resorting to litigation. The success of these events is certainly participant driven and the AIAC welcomes all of you to join us at our future events!

Further information on the various AIAC events are set out in the following pages of this Newsletter for our readers. I would also like to take this opportunity thank our Special Contributors, namely Monica Feria-Tinta, Mohanadass Kanagasabai, Mohammad Ridzuan Abdul Aziz, Chiara Accornero, and John Coghlan, for taking the time to share their invaluable industry insights in this edition of the Newsletter.

"Globalization is a great thing, but it needs a legal framework in which to blossom" - Loretta Napoleoni.

Aimed to inspire and encourage young minds to be involved in the ever-expanding field of alternative dispute resolution, the AIAC Young Practitioners Group Roadshow will be coming to various colleges across Malaysia from November 2019 and stretching into early 2020. We sincerely encourage all interested participants to look out for more information and look forward to meeting you.

My colleagues and I at the AIAC end our reflection on 2019 with gratitude for the support shown to all our initiatives throughout the year. Amongst our achievements and accomplishments of the year, we count the people with whom we have built lasting connections with to be the most important. So, here is to a new year and a new chance to make it brighter, bolder, and better!

A handwritten signature in black ink, appearing to read 'Vinayak Pradhan', written over a white background.

VINAYAK PRADHAN

Director
Asian International Arbitration Centre

A JEWEL OF INTERNATIONAL LAW – IN CONVERSATION WITH MONICA FERIA-TINTA

Succeeding in the field of international law is a dream many aspiring lawyers possess but only few attain. In the 21st Century, there is indeed a high level of participation by female lawyers at the junior to intermediate levels at law firms and in chambers. However, there is still room for improvement when it comes to having female lawyers at the partner or senior counsel levels (or even the judiciary) in many jurisdictions. That said, one prominent female figure in the field of public international law is none other than the accomplished Monica Feria-Tinta¹ of 20 Essex Street Chambers. The Asian International Arbitration Centre recently had the opportunity to interview Ms. Feria-Tinta on her journey to becoming a leading public international lawyer. The excerpts of this interview are below.

1. Could you please tell us a bit about yourself and how you embarked on your journey to become one of the most well-known female international lawyers worldwide?

I studied international law at the London School of Economics after my first law degree, which I undertook in a civil law system in Latin America. My first job after obtaining my LL.M., was as Teaching Assistant to Professor Christopher Greenwood, then principal Professor at LSE in Public International Law. This gave me a strong academic foundation in General International Law which was complemented by training in specialised areas which I undertook in Strasbourg, Geneva and The Hague. In The Hague, I attempted the Hague Academy Diploma, which as you know, is awarded very seldom. It was the year that Professor Pierre-Marie Dupuy delivered the general course. You can be asked not only any question in the area of Public International Law but also questions in the area of Private International Law. I had immersed myself in the work of the International Law Commission, earlier that year, in Geneva. So, I felt prepared. Obtaining the Diploma was wonderful. Only two of us did so that year from over 300 lawyers attending the Course. But having learned international law from practitioners (i.e. Professor Christopher Greenwood was at the English Bar and would eventually become the UK Judge at the International Court of Justice, Professor Pierre-Marie Dupuy appeared often as Counsel before the ICJ and acted also as arbitrator) I was interested in practising international law. As Daniel Bethlehem once put it, it is helpful when teaching public international law "to have what's been called 'the smell of gunpowder on your clothes'". Working for international tribunals such as the ICTY and the International Court of Justice in The Hague allowed me to acquire experience in the adjudication of complex international law cases. Participating in the negotiations of a treaty during a Diplomatic Conference in the capacity of Legal Adviser to a State Delegation gave me early in my career a wonderful insight into treaty-making processes and the manner in which sovereign States conduct such negotiations. Soon afterwards I started representing cases before UN organs

and regional courts, acting before Special Rapporteurships, engaging with the law as counsel. Being called to the English Bar was then a natural progression.

In the course of my practice at the English Bar, I have had a spell at the UK Foreign & Commonwealth Office, advising in the heart of the British government on international law issues. I am also currently a Partner Fellow at the Lauterpacht Centre for International Law, University of Cambridge.

All these experiences have shaped me as an international lawyer.



¹Monica Feria-Tinta is a barrister at the English bar, specialising in public international law and international arbitration, practising from Twenty Essex, a leading commercial barrister's chambers in London and Singapore. She appears before international courts and tribunals and acts as counsel in international arbitrations under ICSID, SIAC, SCC, LCIA and ICC rules. She acts for Sovereign States, corporations, state-owned companies and private parties. She also accepts appointments as an arbitrator. Monica advises in English, Spanish and French. In 2019, she was featured amongst the most distinguished female barristers in 100 years of history at the Middle Temple.

2. What was your biggest challenge when you first started out and how did you overcome this?

I probably had a challenge I was (happily) not aware of. Both English and French lawyers (and Canadian, US and Australian lawyers) have been highly represented in the field. I was not aware that western lawyers dominated the field in such a way and therefore never wondered to what extent I was going to have a chance in that environment.

What I knew, however, is that I wanted to do something of substance in the field. I knew I brought to the field the perspective of someone who had experienced war, who had experienced being uprooted, and for whom international law was not something that developed in an ivory tower. Indeed, Grotius, who is often referred to as the father of international law, had written his masterpiece, *De iure belli ac pacis*, while in exile. I had grown up during two dictatorships and studied my first law degree during a civil war. I was a rarity amongst my peers in international law. But my uniqueness was in fact my strongest asset. It informed my understanding of the law and often as a consequence, I have been able to see connections others were not able to see.

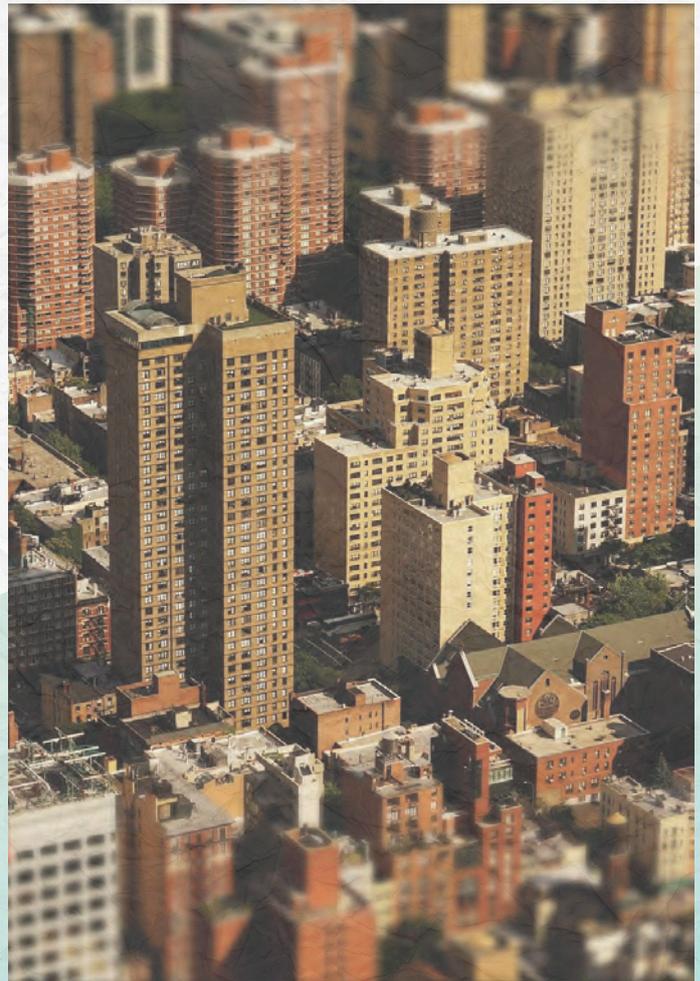
3. You qualified as a lawyer in both civil and common law jurisdictions. How has being multi-qualified helped you in your career?

I feel it as an advantage, particularly when practising arbitration. I am able to understand both legal traditions, and therefore *procedure* in both legal traditions, which is key in arbitration. As a consequence, not only can I read better, counsel who have trained in either tradition, but also arbitrators. I can manage expectations better. I can anticipate strategies and find better ways to argue my case. If sitting as arbitrator, I am able to understand where parties (trained in either system) are coming from, as well as finding points of consensus with my co-arbitrators perhaps more easily, as I understand their way to approach the case.

Also, in the course of my work as an international lawyer, often, it is necessary to analyse different legal systems. I can easily digest entire legal systems (whether common-law or civil law) to the advantage of my work. So, my dual training allows me to be more effective either as Counsel or as arbitrator.

4. What made you decide to choose international law and international arbitration as your areas of specialisation?

I developed an interest in public international law early in my career, when I was an undergraduate. The interest was broad and extended from law of the sea to human rights. As I did my LLM in public international law, I committed to this area of practice, public international law. Later, at the English Bar, I was very much exposed also during my training in Chambers, to international arbitration. I have had the opportunity to work with some of the most famous arbitrators in the world. This all influenced the direction of my practice.



5. We note that you have stellar achievements and credentials in international arbitration, both commercial and investment. What inspired you to diversify into these fields and what attributes would one need to succeed in these fields?

I practise international law at a leading commercial barristers' chambers in London. I did pupillage with commercial barristers. This prepared me to diversify my practice also onto commercial arbitration and I have been involved in arbitrations in the construction, energy, manufacturing and telecommunications sectors. As mentioned, I am also sitting as arbitrator.

As to what attributes one needs to succeed both in commercial and investment arbitration: I believe that a strong background in public international law is key to a successful practice in investment arbitration. Investment arbitration is a different animal from commercial arbitration. Take the recent *Yukos* case. The key question to determine the case was a technical question on treaty interpretation. As to commercial arbitration, I believe that brevity, the capacity to go to the point quickly and realise what is crucial to the outcome of the case, are key skills.

6. You have appeared and advised before the International Court of Justice (ICJ), Permanent Court of Arbitration (PCA), Inter-American Commission on Human Rights, Inter-American Court of Human Rights, and International Tribunal for the Law of the Sea (ITLOS)- just to name a few. What has been the most exciting part about this sort of advocacy work and if you could change the system, what would that change be?

The matters that reach a court like the ICJ or ITLOS are disputes between sovereign States, often of great importance for those States. The matters are also usually complex. Advising a State in such cases is truly exciting for that reason. As an advocate, one is speaking on behalf of a State. It is obviously a great honour to be able to assist a Court to resolve a dispute of that nature and to be trusted by a State on such matters. Representing individuals before International Courts is also very exciting. Often at stake are issues that will have an impact on the entire legal system back in the jurisdiction of the State in question. The notion that an individual or a collectivity of individuals can hold a State accountable, at the international level, for violations of international law, is a relatively modern notion. We are experiencing a diversification of actors engaging with international law as the field evolves.

I generally find dispute resolution exciting. What I enjoy most is the variety of avenues international law offers, often, to resolve a dispute.

As to what would I change: enforcement is a crucial area in my view. Any improvements in the enforcement mechanisms of international law courts (in particular, of regional and UN organs) are key to the system.

7. Is there a current legal issue that is close to your heart right now?

I am currently acting in an oil spill case that occurred in Asia. It raises issues very important to the industry, in the manner in which oil exploration and exploitation takes place, off-shore, and the intersection with regimes of

international law such as environmental law at sea. It raises issues relating to good practices in the construction and the operation of off-shore platforms and quite crucially, the responsibility that States bear, including vis a vis neighbour States and populations in that context.

8. You were one of the Speakers for this year's Asia ADR Week which was organised by the Asian International Arbitration Centre ("AIAC"). How do you see the development of international arbitration in Malaysia? Do you think Malaysia has the potential to become a global leader in arbitration?

I think that Asia is a very vibrant region. To the extent that businesses continue to develop quickly in the region (infrastructure, construction, energy sectors), arbitration is an important method of dispute resolution to play a key role. Further, state-owned entities are also very commercially active in Asia. I was very impressed by my visit to the AIAC. I was impressed by the arbitration facilities available at AIAC and by how modern Kuala Lumpur as a city is. The Asia ADR week attracted a very wide spectrum of arbitration practitioners. This all shows a great potential.

9. Sometimes the most difficult part about embarking on a career in international law and/or arbitration is finding that first opportunity to give you a footing in the industry. What advice would you give to budding international lawyers who are trying to get their first break in the industry or to those practitioners who are trying to expand their skills set to include international law?

Never stop learning. Be flexible when looking for opportunities. International law is a discipline that you need to study in-depth to be able to practise it. It is not something that one can pick up on the side. Studying it though is just the beginning. You have to commit to a discipline in which you want to be an expert. But even if you want to practise international law, be good at the basics: contracts, torts. So, start with the basics and train hard to be firstly a good lawyer.



AIAC SEPTEMBER SPORTS MONTH 2019

As part of our efforts to increase public awareness of sporting disputes and to promote the development sports law in Asia and beyond, the Asian International Arbitration Centre ("AIAC") dedicates an entire month to the promotion and development of sports law and sports dispute resolution. In September 2019, the AIAC held its second edition of September Sports Month ("September Sports Month 2019"), the highlights of which are covered below.

Documentary on Match Fixing

On 4th September 2019, the AIAC kicked off September Sports Month 2019 with the screening of Al Jazeera's investigative documentary titled 'Cricket's Match Fixers'. This undercover documentary revealed how criminal gangs and certain cricket players colluded to underperform in matches to gain millions as a result of a guaranteed outcome in sport, facilitating the seedy underbelly of the world of sports betting. The documentary showcased the participants who facilitate widespread manipulation in cricket including fixers, athletes, coaches and match officials, with bets raked in at about USD\$500 billion a year.

The event concluded with a panel discussion on the documentary and a commentary on the issue of match-fixing at large by Mr. James Kitching, the Managing Director of Kitching Sports, with the discussion being moderated by the AIAC's International Case Counsel, Mr. Abinash Barik. An important takeaway from the discussion was the point that the dissimilarities of jurisdictions in criminalising sports corruption led these crimes to spread globally in various sports such as cricket, football and badminton. The documentary screening event continued with a cocktail reception with participants and speakers networking for the remainder of the evening.

AIAC's 2nd Futsal Tournament

On 7th September 2019, the AIAC hosted its second edition of the AIAC Futsal Tournament as part of the event line up for September Sports Month 2019. The tournament brought in the participation of 12 teams from the legal profession competing for the championship title. The preliminary rounds began as early 8:00am whilst the elimination rounds started after the lunch break. Throughout the tournament, the competition was extremely fierce but the Solicitas Selangor team managed to bring home the Championship trophy. All in all, the event proved to be a success in bringing together local legal professionals for a day of good sportsmanship, in line with the vision of September Sports Month 2019. The event was also sponsored by 100 Plus and Great Wall Law Firm China, to whom the AIAC would like to express its gratitude.

AIAC Workshop on Drafting Sports Contracts

On 12th September 2019, the AIAC hosted a Workshop on Drafting Sports Contracts as part of September Sports Month 2019. The panel of speakers comprised of Mr. Richard Wee, Managing Partner of Richard Wee & Chambers, Mr. Izham Ismail, Chief Executive Officer of the Professional Footballers Association of Malaysia (PFAM), Ms. Susanah Ng of Kitching Sports, and Mr. Brian Song, Managing Partner of Messrs. Song & Partners. The first segment of the workshop focused on the contractual dynamics of professional sportsmanship, such as the importance of players' rights, image rights and various contracts that players encounter in the course of their professional careers, which saw the panellists drawing from their own personal experiences in the field of sports contracts. The second segment of the workshop involved a simulation exercise in which panellists guided participants in an exercise to draft contractual clauses which touched on key issues in sporting contracts such as doping, morality and image rights. As a first of its kind sports workshop initiative, we were delighted to have received remarkable interest from the industry and wish to thank our speakers and participants for their active involvement in the workshop.



AIAC Workshop on the Constitution of Sporting Bodies

On 19th September 2019, the AIAC hosted a Workshop on the Constitution of Sporting Bodies, bringing its two-part series of workshops for September Sports Month 2019 to a close. The workshop was aimed at providing an insight into the constitution of sporting bodies and the socio, legal and economic effect of the same. The line of panellists comprised of Dr. Jacobs CJ, Partner at LJ Sports PLT, Dr. Wirdati Radzi, Senior Lecturer at the Universiti Malaya, Ms. Samrith Kaur, Managing Partner at Messrs. Samrith Sanjiv & Partners, Mr. Thomas Delaye-Fortin, Head of Legal and Governance at the Badminton World Federation, and Dr. Jady Zaidi Hassim, Associate Professor at the Universiti Kebangsaan Malaysia, with an honorary attendance by H.R.H. Tunku Tan Sri Imran Ibni Almarhum Tuanku Ja'afar, Honorary Life President of the Olympic Council of Malaysia. The first segment of the workshop saw our panellists sharing their views on the overall framework and effect of the constitution of sporting bodies. This was followed by an entertaining presentation by Mr. Delaye-Fortin which had the audience involved in the drafting of a constitution for a mock sporting body known as the "Global International Lepak Association" or GILA. The second segment of the workshop consisted of another interactive discussion in which panellists engaged with participants who were divided into groups to discuss issues pertaining to the constitution of sports bodies. All in all, we were delighted to have received remarkable interest from sporting bodies as well as sports lawyers for this workshop and we wish to thank our speakers and participants for making the workshop a success.



AIAC Certificate Programme in Sports Arbitration 2019

Between 23rd and 26th September 2019, the AIAC organised its 4th edition of the AIAC Certificate Programme in Sports Arbitration. Since its launch in 2016, the intensive four-days course has received a steady number of local and international participants, interested in learning the ropes and theories of sports arbitration from top sports arbitrators from around the world. The course directors and faculty members included none other than Prof. Richard McLaren of Innovative Dispute Resolution Ltd (Canada), Mr. Paul J Hayes QC of 39 Essex Chambers (Australia), Mr. Malcolm Holmes QC of Eleven Wentworth (Australia), and Mr. Lau Kok Keng of Rajah & Tann LLP (Singapore). Over the first three days of the certificate programme, the candidates were introduced to the foundations of sports arbitration and sporting disputes, before concluding on the last day with a sports tribunal moot. The AIAC wishes to thank the course directors and faculty members for sharing their knowledge and wisdom with our candidates through a very comprehensive and detailed curriculum.



AIAC International Sports Law Conference 2019 (SLAC 2019)

The highlight event of September Sports Month was, without a doubt, the AIAC International Sports Law Conference 2019 (SLAC 2019), held on 27th September 2019. The theme for the SLAC 2019 was 'Stepping up to the Crease: Asia's Meteoric Rise in the World of Sports'. The theme selected was fit to reflect Asian athletes' unprecedented rise and acclaim in the global sporting arena, which has taken the sporting world by surprise. The current decade marked a growing need for mature discourse on sports jurisprudence and harmonised governance of national and international sports federations across continents. The theme not only encompassed key advancements and contemporary issues in international sports law such as match-fixing, safety in sports, equality in sports, and legal issues in eSports but also embraced Asia's meteoric rise in the global world of sports.

Opening of the AIAC International Sports Law Conference 2019 (SLAC 2019)

The SLAC 2019 was officially launched in the morning of 27th September 2019. Ms. Michelle Sunita Kummar, Deputy Head of Legal at the AIAC, shared with the audience how the idea for the theme came about, referencing Mr. Vinayak Pradhan's, Director of the AIAC's, past experience playing cricket for the Malaysian Bar. Ms. Kummar then reiterated to the audience the AIAC's commitment to the development of sports law and sports dispute resolution in Asia and beyond.

Following Ms. Kummar's opening remarks, YB Steven Sim Chee Keong, the Deputy Minister of Youth and Sports, Malaysia, then delivered his special address. The Deputy Minister started off his speech by presenting and updating the audience on the government's efforts in the development of sports and the sporting industry. The Deputy Minister also shared his insights on the various developments that the Youth and Sports Ministry are overseeing, such as the establishment of the National Coaching Academy, the launch of the Kuala Lumpur Sports Medicine Centre as well as the support of the government to propel the development of eSports in Malaysia.

The Deputy Minister's special address was followed by a keynote address by Prof. Richard McLaren OC, of the famed McLaren Report (Russian doping scandal). Prof. McLaren started his speech by giving examples of how Asian countries are becoming more united thanks to sports, mentioning how North and South Korea had set aside their differences to have a friendly match with each other. Prof. McLaren also shared how global businesses and cross-border investments have been focused on Asian teams, such as the investments and sponsorships into the Chinese Super Leagues as well as how Chinese and Arab companies have been making huge investments in western sporting leagues. Prof. McLaren also interestingly highlighted the many upcoming major sporting events that will be held in Asia, such as the Tokyo Olympic 2020 and the 2022 FIFA World Cup in Qatar. Before ending his speech, Prof. McLaren also touched upon sports arbitration, where he shared his views on how Malaysia can potentially become a hub for sports arbitration with the existence of the AIAC's world class facilities as well as the steadfast support of the Malaysian government.



YB Steven Sim then officially launched the conference by batting in a cricket ball while standing in a specially-designed cricket pitch which led to the showcasing of the conference's official launch video.

**Session 1:
The 2019 Sports Arbitration Update:
Hot Topics and Recent CAS Decisions**



The much-awaited SLAC 2019 kicked off with its first session titled 'The 2019 Sports Arbitration Update: Hot Topics and Recent CAS Decisions'. The panel of speakers comprised of Mr. Paul J Hayes QC of 39 Essex Chambers (Australia), Mr. Takuya Yamazaki of Field-R Law Offices (Japan) and Mr. Etienne Rizk of Total Sports Asia (Malaysia). The session was moderated by H.R.H. Tunku Tan Sri Imran Ibrni Almarhum Tuanku Ja'afar, the Honorary Life President of the Olympic Council of Malaysia. The discussion commenced with a brief introduction into the legitimacy and future of CAS, followed by a general discussion on why CAS decisions are constantly challenged. The Panel considered the development of sports jurisprudence including CAS and non-CAS decisions and whether poor performance and injury of the players are valid grounds for termination of the contract. The panel also discussed the new FIFA Regulations on the Status and Transfer of Players to better protect the interests of the players and remarked on how clubs should protect their players and treat them as an asset instead of associating them as a liability. The session concluded with a short Q&A discussion which saw the panel sharing their views and opinions on key issues that may arise as we move into 2020.

**Session 2:
Match-Fixing: The Overlap Between
Criminal Law and Sports Discipline**



The second session of the SLAC 2019 titled "Match-Fixing: The Overlap Between Criminal Law and Sports Discipline" outlined the long-existing problems in the sports sector. The line of panelists comprised of highly-experienced practitioners, namely Mr. Lau Kok Keng of Rajah & Tann LLP (Singapore), Ms. Spring Tan of Withers KhattarWong LLP (Singapore), Mr. Stanley Bernard of the Malaysian Football League, Mr. Thomas Delaye-Fortin of the Badminton World Federation with Mr. Malcolm Holmes QC of Eleven Wentworth (Australia) moderating the session. The distinguished speakers shared their views on recent cases involving match-fixing and other forms of corruption in the sports sector as well as the effect of such corruption on the careers of professional players and other sports participants (who in most cases ended up being banned from participating professionally for life or even slapped with a hefty fine). This was followed by a discussion on whether match-fixing constitutes a criminal or ethical breach coupled with a guidance on the standard of proof for establishing match-fixing. In the end, the speakers outlined possible steps to eliminate or at least reduce corruption in sports which included further harmonisation and development of the applicable regulations, and even the legalisation of betting or the establishment of more effective punishments as well as educative steps. The session concluded with special emphasis on the need for everyone to combine their efforts to combat match-fixing.

**Session 3:
Safety in Sports: Protection of
Athletes and the Scope of Duty of
Care**



The third session of the SLAC 2019 was centered on the ground-breaking topic of "Safety in Sports: Protection of Athletes and the Scope of Duty of Care". The panelists in this session were Mr. Hamidul Haq of Rajah & Tann LLP (Singapore), Mr. Anish Dayal of Anish Dayal Chambers (India), Mr. Henry Goldschmidt of Morgan Sports Law (United Kingdom) and Mr. Muhammad Syakir Che Mansor of the Ministry of Youth and Sports with Ms. Diana Rahman, AIAC Case Counsel moderating the session. In this session, the speakers gave an insight into how the scope of the duty of care has been developed by the English, Indian and Singaporean legal systems. In particular, criteria for finding a breach of duty of care and relevant standards of proof were outlined. Special emphasis was given to the fact that the said duty should not exist in a vacuum but should be considered alongside different regulatory standards and codes of conduct. Most importantly, the speakers demonstrated how the duty of care has evolved and continues to evolve with an aim to protect the rights of the athletes in the best possible way. In this vein, the speakers also emphasised that special attention should be paid to the protection of young players from different kinds of abuse in sports. The session concluded with an interactive Q&A session where the distinguished speakers provided their views on what the future holds for the concept of the duty of care and safety in sports.

**Session 4:
Free Kick for Equality: Gender and
Race in Sport**



The fourth session of the SLAC 2019 explored the heavily debated topic, "Free Kick for Equality: Gender and Race in Sport". The session was moderated by Ms. Lesley Lim of Richard Wee Chambers (Malaysia) and speakers include Ms. Aahna Mehrotra of AM Sports Law & Management Co. (India), Mr. Matthew D. Kaiser of Global Sports Advocates (USA), Dr. Wirdati Mohd Radzi of University of Malaya and Ms. Amani Khalifa of Freshfields Bruckhaus Deringer LLP (UAE). The panellists commenced with a brief discussion on the Caster Semenya and Dutee Chand cases, before proceeding to review how gender and religion continue to be deep-rooted problems in sports. This was followed by a discussion on several key issues and whether there exists a need for separate new categorisation based on performance level rather than on gender. Dr. Wirdati Mohd Radzi also remarked on how there is need for anti-discriminatory and harassment committee in the Malaysian sports industry. The panel also considered the value of sports and how it enhances the capacity of an individual and deliberated on the protection of fair competition or human rights as everyone has the right to compete irrespective of their biological make-up. The panel concluded by discussing various initiatives adopted by different countries and sporting bodies to promote equality of gender and race in sports.

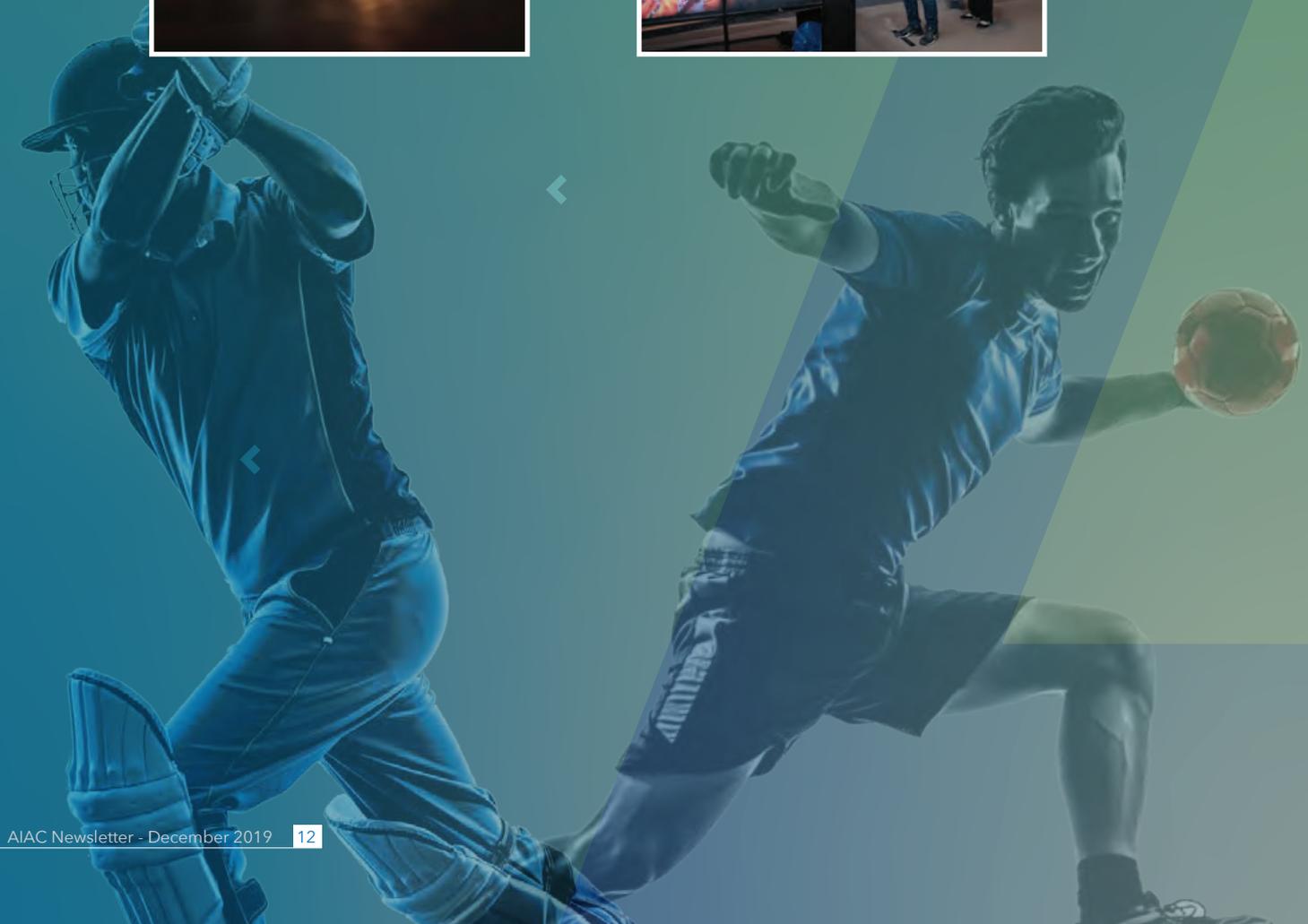
**Session 5:
eSports: Evolving Legal Issues**



The fifth and final session of the SLAC 2019 focused on "eSports: Evolving Legal Issues". The session was moderated by Mr. Richard Wee of Richard Wee Chambers (Malaysia). The first speaker, Mr. Ian Smith of the Esports Integrity Commission (United Kingdom), who participated in the session via video conference, deep dived into the issue of integrity in eSports. Following that, Mr. Allan Phang of AirAsia Esports (Malaysia) gave us an overview of the future of eSports, highlighting the key upcoming developments in the field. The session continued with Mr. Frank Ng of Orange Esports (Malaysia) providing his view on the potential areas in which eSports could expand and issues likely to be encountered such as doping and match-fixing. The last speaker for the session was Ms. Tiffani "Oling" Lim of Battle Arena Malaysia, who not only shared her experience as a former eSports athlete, but also addressed the main challenges in the sector, with an emphasis on rules in e-matches and the absence of federations governing eSports. The session concluded with an interactive Q&A session where the speakers provided their views on what the future holds for the evolution of the legal framework surrounding eSports.

SLAC 2019 Cocktail & Dinner Reception

Following the last session of the SLAC 2019, the AIAC treated the speakers and guests to a cocktail and dinner reception held at the AIAC Pavilion. The reception also saw the attendance of past participants to the AIAC Certificate Course in Sports Arbitration course from the previous editions, doubling as an alumni gathering for these participants. Plenty of game stalls were set up around the reception venue, such as archery, basketball, coconut bowling, shooting and putting games. Upon arriving to the AIAC Pavilion, each guest was given a game card for them to collect points from participating in the games. Upon collecting a number of points, they were then entitled to redeem special prizes. Two virtual reality (VR) game stalls were also set up in the two seminar rooms, where guests were given the opportunity to try out their boxing and skiing skills while wearing the VR headsets. All in all, the atmosphere was lively as everyone was having fun trying out the games and networking with one another.



THE WORLD OF EXPEDITED PROCEDURES AND EMERGENCY ARBITRATORS

IN CONVERSATION WITH

MOHANADASS KANAGASABAI

As the practice of arbitration gains traction around the world and continues to evolve in developing best practices, the products and services offered by arbitral institutions must also develop. Over the past decade, two products which have been released to the public by certain arbitral institutions are expedited procedures for the conduct of arbitral proceedings and the appointment of emergency arbitrators. The Asian International Arbitration Centre ("AIAC") recently had the opportunity to interview Mr. Mohanadass Kanagasabai¹ of Mohanadass Partnership (Malaysia) on the merits of the said mechanisms. The excerpts of this interview are below.



1. What are expedited procedures in arbitration and how do they differ from emergency arbitrator mechanisms?

Expedited procedures in arbitration are designed to achieve a speedy resolution of disputes. The obvious example is fast track arbitration, where the entire reference may be disposed of within 4 to 6 months of commencement. More recent innovations in some seats provide for summary dismissal of unmeritorious claims, or decisions on points of law or fact by way of early determination procedures. Expedited procedures differ from emergency arbitration mechanisms in that the former are aimed at final resolution of the claim or issues in the claim whereas the latter seeks to achieve an interim solution pending final award to maintain status quo between parties.

2. In what circumstances should Parties consider using expedited procedures as opposed to traditional arbitration procedures?

There is no hard and fast rule, but if expedited procedures are available under the rules of arbitration governing a reference, issues of fact and law that are discrete and which might have a significant impact on outcome of the case are good candidates for expedition. Typically, these procedures are designed to knock out unmeritorious claims or points of law and fact or those that fall outside the jurisdiction of the Arbitrator. See for instance, Article 43 of HKIAC Rules 2018. In doing so, the idea is to leave alive only *bona fide* disputes thus saving cost and time. This is also often a question of litigation strategy. Good counsel will be able to best advise what

situations would warrant the deployment of such procedures in a given situation.

3. In what circumstances should a party consider requesting the appointment of an emergency arbitrator from an arbitral institution? Are there any situations you have encountered in practice where you have recommended a party seek interim measures from a court as opposed to appointing an emergency arbitrator? If so, what factors influenced your recommendation?

An Emergency Arbitrator is appointed only to hear an urgent application for interim relief. He has, in that sense, a very specific and narrow remit and is required to hand down his decision within 15 days of his appointment under the AIAC Rules. Once he has carried out that function, his appointment terminates and he may not be appointed as arbitrator to hear the substantive dispute between the parties. Where a party requires orders as a matter of urgency in the nature of injunctions to restrain or compel something being done or to preserve some property or asset, emergency relief is appropriate. If the interim orders are not needed urgently, the Emergency Arbitrator procedure should not be invoked. The party seeking interim relief should simply move the arbitrator appointed to hear the dispute and seek such interim relief from him or her without triggering the emergency mechanism.

¹Mohanadass Kanagasabai, the Managing Partner of Mohanadass Partnership (Malaysia), has two decades of dispute resolution experience having appeared as counsel in numerous disputes at all levels of the High Court of Malaya and in domestic and international arbitration. He has also been granted special ad-hoc admission to appear at the High Court of Borneo as counsel in arbitration related matters. Mr. Kanagasabai is rated by the Asia Pacific Legal 500 as a leading individual for dispute resolution in Malaysia, and also recognised for his expertise in Band 1 for Dispute Resolution (Construction) by Chambers and Partners. Described as an "arbitration specialist" with a "giant reputation", Mr. Kanagasabai is a former President of the Malaysian Institute of Arbitrators and former Chair of the Dispute Resolution and Arbitration Committee of the Inter Pacific Bar Association.

The Court presents a more attractive option for interim relief where the orders sought are needed against third parties. The arbitrator's reach is limited to the parties to the arbitration agreement only but the Court is not similarly hampered. Other considerations that may be relevant are whether the nature of relief sought is something that is better provided or supervised by the Courts for instance the appointment of an interim Receiver and Manager. Save for these considerations, I would recommend the Emergency Arbitrator procedures for speed and multi-jurisdictional enforceability.

4. In your opinion, what has the reception of expedited procedures and emergency arbitrator mechanisms been in your jurisdiction in comparison to other jurisdictions? Is there a reason for this level of reception?

In Malaysia, both expedited procedures and emergency arbitration mechanisms are well received. I would put this down to several reasons.

- a) First, the excellent administration of such cases by the revitalised AIAC administrative team under the leadership of its new Director, Mr. Vinayak Pradhan.
- b) User familiarity with the rules and laws applicable to these processes.
- c) Strong, continuing and essential judicial support for the arbitral and alternative dispute resolution processes generally.
- d) The availability of an excellent pool of Arbitrators and Adjudicators who are well equipped to deal with these applications.
- e) Confidentiality of the process which is now further safeguarded by recent amendments to Court rules.

5. In your opinion, what are the shortcomings of expedited procedures and emergency arbitrator mechanisms and how can these shortcomings be addressed?

A well-run expedited arbitration or emergency arbitrator process is unlikely to elicit complaints from users. Much therefore depends on skill of the arbitrator. The perceived or potential shortcomings of these procedures may best be captured in that old adage that "justice hurried is justice buried". But in a fast-paced world, made faster by technological advances, this is somewhat an anachronistic notion.

The Right Honourable Chief Justice of Malaysia, Tan Sri Tengku Maimun binti Tuan Mat aptly observed in her keynote address at the AIAC's China-ASEAN Legal Forum on 13th November 2019 that the law must match the realities and development of commerce. Commercial reality is that business moves rapidly. Malaysia must continue to position itself to capture its fair share of the legal services sector and allied industries. To do this, we must be able to deal quickly and effectively with disputes that unfailingly accompany trading and business activities. Speedy and effective dispute resolution is achievable if one has high quality arbitrators, adjudicators and Judges, as Malaysia undoubtedly does.

6. What is required for an arbitral institution to be effective in administering arbitrations under expedited rules and/or emergency arbitrator mechanisms?

The institution must have a clear set of tried and tested rules. These rules should be frequently reviewed to keep abreast with commercial, legal and technological developments. Good understanding of the procedures by the administrators and administrative efficiency are of course fundamental. More importantly, administrators should invest in educating users or potential users both domestic and international as to the availability of these mechanisms so they gain greater currency and familiarity. Arbitral institutions are emerging everywhere. Staying relevant and ahead of the pack require innovation, improvement and energy.

7. How would you describe your experience in having conducted an expedited arbitration and/or having acted as an emergency arbitrator?

I can claim some credit for the genesis of the AIAC's Fast Track Arbitration Rules. The first version of the then KLRCA's Fast Track Rules was a work in collaboration with the Malaysian Institute of Arbitrators when I was its President about ten years ago. It was designed with speed as the primary motivating factor but giving the Arbitrator wide powers so that he could temper that speed with due process. The first set of fast track rules have, of course, seen several revisions since then.

The first fast track arbitration that I presided over as arbitrator was based on these initial set of rules. Interestingly, the case started as a dispute in Court with parties reaching agreement after initiating Court proceedings to have the dispute resolved by the KLRCA's Fast Track Arbitration Rules. This is always an option available to parties engaged in any Court litigation to explore. I had eminent counsel representing both parties to the dispute and their cooperation went a long way in enabling me to render my award within 160 days of commencement. I must admit that it was a challenging assignment but extremely rewarding. Understanding a case properly and making a decision within such a rapid time frame is not easy, nor to be taken lightly. My belief is that every party, winner or loser, must walk away from an arbitration satisfied that he has had a fair and impartial hearing. That may be a challenge in a limited time setting but achievable, nonetheless.

Turning to emergency arbitration, I found my first appointment to be an eye opener. I had 15 days from the time of appointment to render a final decision to be handed down in writing. Within these 15 days, I had to set a case management meeting with parties, fix timelines for Witness Statements and legal submissions, and to consider and write my reasoned decision.

Along the way, there were administrative issues that I had to consider. In this respect, I received able and cheerful assistance even when I troubled Ms. Chelsea Pollard from the AIAC on a Sunday!

The task of deciding is not always easy. What is a just interim solution in a given factual context is sometimes a fine balancing exercise, requiring the decision maker to

draw upon good commercial instincts as well as a sound grasp of the law. Vigilant Emergency Arbitrators will know how to strike that balance without giving one party an undue advantage at a stage when the evidence taking process remains incomplete.

8. In your opinion, how effective are the AIAC's Fast Track Arbitration Rules 2018 and the emergency arbitrator mechanism in Schedule 3 of the AIAC Arbitration Rules 2018 in assisting parties to expeditiously resolve disputes and/or obtain interim reliefs?

Having been involved in arbitrations as both counsel and arbitrator in leading international arbitration centres including London and Singapore, I can safely say that the AIAC's Fast Track procedures and emergency arbitrator mechanism are second to none. These rules and procedures more than adequately allow for due process whilst enabling speed and efficiency. They are user friendly, and easy to understand and apply. The other great advantage is that from a cost benefit perspective, arbitration in Malaysia is a far more attractive proposition than most other international seats.

9. What do you believe will be the future of expedited arbitration and/or emergency arbitrator mechanisms on an international scale?

In the several years that I served as the Chair of the Inter-Pacific Bar Association's, Dispute Resolution and Arbitration Committee, I participated in many discussions that were the focus of arbitration users and practitioners internationally. Two concerns were dominant. Namely, that arbitrations were getting too costly, and, secondly, were taking as long to conclude, if not longer, than Court processes.

Against this backdrop, it is obvious that arbitral institutions and arbitrators have to innovate to stay relevant and useful to end users. Expedited procedures and emergency mechanisms are, in this context, an inescapable innovation and necessary facet of the arbitration landscape. Many institutions have adopted them, some more aggressively than others. It is only a matter of time before they are universally accepted.



AIAC'S INDIA ADR TRAINING INITIATIVE IN NEW DELHI, INDIA

On 12th September 2019, the Asian International Arbitration Centre ("AIAC") as part of its "India ADR Training Initiative" jointly organised with Symbiosis Law School, Noida, a mini-conference on international arbitration in Asia themed "The Malayan Tiger's Journey to India: A New Dawn of Alternative Dispute Resolution". The mini-conference was held at India International Centre Annexe, New Delhi, India.

The mini-conference kicked off with a welcoming address by Prof. Dr. Chandrashekhar Rawandale, Director, Symbiosis Law School followed by special address by Senior Advocate, Mr. Sachin Datta, who spoke on the role of academia to nurture the next generation of dispute resolution practitioners, and the Indian Arbitration and Conciliation Amendment Act 2019, respectively. The AIAC's Deputy Head of Legal, Ms. Michelle Sunita Kummar, spoke on the suitability of the AIAC ADR Services to the Indian arbitration framework. She highlighted firstly on the new dawn of arbitration in India with the 2019 amendments to the Indian Arbitration Act, and secondly, how the AIAC as a leading ADR Hub, is able to facilitate dispute resolution services to Indian parties in various sectoral disputes. The Keynote Address was delivered by Honourable Mr. Justice Sanjeev Sachdeva, Judge of the High Court of Delhi, who highlighted the collective role of judiciary, dispute resolution practitioners and academia to establish India as a pro-arbitration jurisdiction.

This was followed by a Panel session titled "Practitioners and the AIAC's views on Arbitration in India: Present and Future". This Panel session was moderated by Mr. Sonal Kumar Singh, Partner, AKS Partners and the speakers included, Mr. Niraj Singh (Partner, RNS Associates), Mr. Raghvendra Singh (Partner, Concept Legal International), Mr. Kamraj Nayagam (Partner, Mah-Kamariyah & Philip Koh), Mr. Abinash Barik (International Case Counsel, AIAC), Mr. V. Inbavijayan (Advocate, India), and Mr. Anand Prasad (Chamber of Anand Prasad).

The Panel members addressed important topics ranging from objectively assessing the actual impact of the Indian Arbitration and Conciliation Amendment Act 2019, to how, at this stage, the AIAC has an advantage concerning the expectations of Indian arbitration stakeholders. The Panel members also addressed the changing arbitration landscape in India which was initially saturated with ad-hoc arbitrations as opposed to institutional arbitrations, as well as the grading system of arbitrators' and arbitral institutions, modified timelines and the confidentiality regime.

The Panel session concluded on a high note with a discussion of the best practices which are followed by arbitral institutions along with pro-arbitration legislations in other parts of Asia and how those experiences can contribute to the immense growth of Indian dispute resolution practice. The Panel session was followed by a lively Q&A session in which dispute resolution practitioners, industry players and students had the opportunity to ask the speakers about the new arbitration regime in India and role of AIAC in facilitating Indian arbitrations in the future.



In addition to the above mini-conference, the AIAC also held a training session with Nishith Desai Associates (NDA) on 12th September 2019, and another training session with Cyril Amarchand Mangaldas (CAM) on 11th September 2019, at their respective New Delhi offices, as part of its India ADR Training Initiative. The training sessions were titled "Suitability of AIAC ADR Services for Construction and Commercial Disputes". The trainings were conducted by Ms. Michelle Sunita Kummar, Deputy Head of Legal at the AIAC, Mr. Abinash Barik, International Case Counsel at the AIAC and Mr. Kamraj Nayagam, Partner, Mah-Kamariyah & Philip Koh. The session saw video conference participation from NDA's and CAM's various offices across the country. Mr. Vyapak Desai, Senior Leader and Head, International Dispute Resolution and Investigations Practice, of NDA and Ms. Radhika Bishwajit Dubey, Director, Dispute Resolution moderated the training sessions respectively.

The AIAC India ADR Training Initiative will be going to Mumbai, Bengaluru and Chennai in the near future. The AIAC would like to thank all the co-hosts, sponsors, speakers, participants and volunteers who contributed to making the first installment of the AIAC India ADR Training Initiative a success.

INTERVIEW WITH THE CHAMPION OF THE 3rd AIAC-ICC PRE-MOOT NATIONAL LAW UNIVERSITY (BHOPAL)



Standing amongst the other 90 teams originating from over 20 countries, the title of the Champion of the 3rd AIAC-ICC Pre-Moot was seized by National Law University (Bhopal). Members of the winning team were Pranjal Agarwal, Aditya Wadhwa, Ankit Gupta, Nilakshi Srivastava and Shiuli Mandloi. In addition to being part of the Champion team of the 3rd AIAC-ICC Pre-Moot, Aditya Wadhwa also prevailed as the Best Oralist of the International Final Round and was bestowed with the Cecil Abraham & Partners Award. The AIAC took the opportunity to interview this year's winning team, the excerpts of which are below.

1. Why did you decide to join the Pre-Moot?

The day we were selected by our University to participate at Vis (East) International Commercial Arbitration Moot 2019, we were advised by our coach, peers, and past Vis participants that our preparation will remain incomplete if we do not experience the AIAC-ICC Pre-Moot held in Kuala Lumpur, Malaysia. The dates of the tournament were also convenient for us to directly travel to Hong Kong following the Pre-Moot.

2. How did you prepare as a team for this Pre-Moot? Can you share your experience working as a team?

Our preparation for the Pre-Moot was not any different from our preparation for the Vis (East) because we were told (and realised was true) that the AIAC-ICC Pre-Moot was a precise simulation of the final competition. We were a team of five comprising of two speakers and three researchers. We started with our preparation in the month of September and first completed understanding the basic principles of international commercial arbitration. Then, we collaboratively did Vis specific research by doing thread-bare analysis of the videos of the oral rounds and the memorandums submitted by teams in the previous edition of the moot. Subsequently, we sat together in our

University library to analyse the case record that we now feel cannot be done individually. The bouncing off of ideas as to how a particular fact can be used from which side of the table was an enriching and rewarding experience. Apart from that we were fortunate to all be great friends from the very start that allowed us to understand each other and for it to be conducive environment in the moot preparation room. The eight months of working as a team showed us the power of combined efforts.



3. What was the most challenging moment in your Pre-Moot experience? Did it become one of your memorable moments?

The most challenging yet exciting moment in our Pre-Moot experience was the Round of 32 when we faced the same team to whom we had lost in the Indian Pre-Moot. The challenging part was that both the teams were well aware of each other's pleadings and style of arguing, therefore it demanded us to make the case in a different fashion. With regards to the latter part of the question, it did become one of the most memorable moments since we emerged as the winners of this round.

4. What is the biggest change in yourself after your experience in the Pre-Moot?

The biggest change in us after the Pre-Moot was the advantage of the feedback received from seasoned arbitrators. The community lunch sessions allowed us to freely talk to the arbitrators helping us gain insights from them. We feel indebted to them.

5. "Once a mootie, always a mootie": Are you planning to participate next year or coach a team of your university in the future?

We believe it was a few days after the tournament had ended in Hong Kong that we realised it was impossible to stay away from a valuable experience like this. We truly believe in the above quote and all of us have decided to stay connected with this competition, in one way or the other. While we don't plan on participating again in the competition, but we are sure of coaching the team that will represent our University and hopefully come back to the AIAC to connect with the family.

6. Do you think your Pre-Moot experience will have an impact on your future career?

Yes, the AIAC-ICC Pre-Moot has given us the experience of a lifetime and we can already see it affecting our professional and personal lives. It is incredible how in only three days, we were able to further develop our research, speaking and inter-personal skills, along with the ability to think on our feet and gauge the tribunal simply by their expressions. We believe that it has made us all better lawyers and will surely help us in all the future avenues we undertake.

7. Who do you want to dedicate your success to?

This achievement would not have been possible without the constant support from our coach, Mr. Sameer Shah, Director CIArb, India chapter, who worked with us tirelessly and helped us polish every aspect of our presentation during the oral rounds. Even our beloved and talented alumnae from our University - Ms. Rajeswari Mukherjee, a past Vis participant mentored us throughout the process. We also owe a huge part of our success to Mr. Abhinav Bhushan who kept us motivated throughout the Pre-Moot with his reassuring smile and Ms. Chelsea Pollard, who ensured that we felt at home during the course of the competition. We also particularly remember Mr. Ben Olbourne, an arbitrator at the Pre-Moot who gave us constructive feedback which we still cherish. Further, there are many more people who we meet during our journey who are responsible for our victory and we want to thank them all for contributing to our win - it couldn't have been possible without you all.

8. Will you recommend other students to join future Pre-Moots?

Pre-Moots are very unique to the Vis Moots. Since the Vis Moot involves learning at every step until you reach the ultimate competition, Pre-Moots therefore, become an integral part to ace the final competition. We believe that such events are a *sine qua non* for Vis mooting. Pre-Moots help you to gather all possible questions that may be asked, develop the skill to gauge diverse arbitral tribunals and most importantly helps you to experiment different lines of argumentation.

9. What do you think of the level of organisation of the Pre-Moot?

This is the simplest question that a participant of AIAC-ICC Pre-Moot can answer. We won't be exaggerating if we say that the AIAC-ICC Pre-Moot is a highly organised international event. The best part was the assignment of liaison officers who helped us throughout the process. Right from wake-up calls in an intense schedule to arranging and looking after our boarding and lodging, it was indeed very well organised.

10. What is the most valuable feedback by the arbitrators?

The best advice rather than a feedback that we got was to analyse and gauge the arbitral tribunal. We were advised to study our arbitral tribunals focussing on the jurisdiction from which they belong. This helped us to equip ourselves to answer the tribunal in the manner in which they have been trained. This is something that really made a difference in Vis (East), wherein, it proved to be a game changer in especially the quarter-final rounds.



INTERVIEW WITH THE WINNER OF THE MALAYSIAN FINAL OF THE 3rd AIAC-ICC PRE-MOOT

INTERNATIONAL ISLAMIC UNIVERSITY MALAYSIA (TEAM 1)



Participating ever since the inception of the AIAC-ICC Pre-Moot, the International Islamic University Malaysia (Team 1) emerged as the Winner of the Malaysian Final of the 3rd AIAC-ICC Pre-Moot. The team comprised of Fatin Nursa'adah Azman, Nur Zulaikha Rohaizat, Muhammad Asyraf, Mustafha Kamaruddin, Amirah Huda. On top of that, Ms. Nur Zulaikha Rohaizat also managed to snatch the title of the Best Oralist of the Malaysian Final (the Sivabalan Sankaran Award) as well as the title of the Best Oralist of the Elimination Rounds (the MAC Construction Consultant Sdn. Bhd. Award). The AIAC took the opportunity to interview certain members of the winning Malaysian Team, the excerpts of which are below.

1. Why did you decide to join the Pre-Moot?

FATIN: This is my third time participating in the AIAC-ICC Pre-Moot. The 1st Pre-Moot was my first ever moot competition and I have been drawn to it ever since. The Pre-Moot has contributed a lot to my personal growth and development. I decided to join the 3rd Pre-Moot as I believed it would give me a new experience and allow me to taste the excitement of mooting for the last time before graduating.

NUR: There were a lot of international and local teams involved so I decided to join the Pre-Moot to prepare myself for Vienna and to see where I stood as compared to the other teams.

2. How did you prepare as a team for this Pre-Moot? Can you share your experience working as a team?

FATIN: One thing this Pre-Moot taught me is to believe in your team. My team and I all had different working ethics, that being said, we worked at our own pace and met up at least twice a week to update each other on our progress. On the ground level, we had a Google Drive where we shared our materials so all of us could read and access the reading materials. Before the AIAC Pre-Moot, we attended the Seoul Pre-Moot and ended as the runner up. This has helped us to improve our submissions based on the feedback given by the arbitrators.

NUR: We delegated the issues and did thorough research on the issues. We discussed our findings and arguments and helped one another in making them better. Working as a team requires a lot of patience and trust in your team members because they are all that you have on the competition day.



3. What was the most challenging moment in your Pre-Moot experience? Did it become one of your memorable moments?

FATIN: Personally, it would be expectations from people around us. Having won twice in the 1st Malaysian finals and bagging the Best Malaysian Team in the 2nd Pre-Moot, IUM decided to send 7 teams for the 3rd Pre-Moot. It was challenging for my team and I as we had to make sure that no teams got left behind on top of making sure that our team was on the right track. It sure did become a moment I won't forget as all 7 teams worked together closely and we grew as family. More than winning, I could not have been happier to have seen my juniors receiving the Honourable Mention Award for their outline. I believe more successes are waiting for them in the future.

NUR: Most challenging moment was when one of the team members was hospitalised for a few weeks and she was not able to be present for training. It was challenging because we could never ascertain at that time if she would be fit to submit on the competition day. Nonetheless, we managed to overcome that and it turned out to be a memorable moment as it further strengthened our trust and friendship with each other.

4. What is the biggest change in yourself after your experience in the Pre-Moot?

FATIN: This Pre-Moot experience has thought me to enjoy the journey and not fret about what is in store in the future. I found a life-time friend, Rachel, from BAC. We crafted and discussed our arguments together. Little did we know we are going to face each other in the finals. It was a humbling experience to learn and grow together, although being in different teams.

NUR: I have become more confident in my ability to submit my case and I have learnt to stay focused on my goal.

5. "Once a mootie, always a mootie": Are you planning to participate next year or coach a team of your university in the future?

FATIN: I will be graduating soon, as such being a participant is no longer an option. But I will definitely coach the team from my university, given the chance to do so.

NUR: I have always been helping out with trainings for junior teams and will continue to do so in the future.

6. Do you think your Pre-Moot experience will have an impact on your future career?

FATIN: Most definitely. The Pre-Moot has opened doors for me to submit in front of prominent arbitrators and lawyers.

NUR: Yes.

7. Who do you want to dedicate your success to?

FATIN: To every beginner mooties, friends and family. Specially to Tatiana Polevshchikova, who has always believed in us since Day 1.

NUR: My parents for always understanding me and supporting me.

8. Will you recommend other students to join future Pre-Moots?

FATIN: Yes.

NUR: Yes.

9. What advice will you give to other students considering to join Pre-Moot in the future?

FATIN: Don't doubt, just do it!

NUR: You need a whole lot of patience and hard work in order to get what you want in any mooting competition and do not neglect your studies.

10. What is the most valuable feedback by the arbitrators?

FATIN: All of them gave helpful and constructive feedback. One that stuck with me was the advice to "always make sure that your arguments are concise and precise to ensure people can easily follow your flow".

NUR: To always start an oral submission with sentiments and end it with sentiments as well.



AN INSIGHT INTO THE FINTECH INDUSTRY

IN CONVERSATION WITH

MOHAMMAD RIDZUAN ABDUL AZIZ & CHIARA ACCORNERO

In this digital age, the term “disruption” has become a buzzword for technological innovations which are transforming the way traditional industries carry out their day-to-day operations. The industries which are being pushed to modernise their practices not only include the healthcare, legal and hospitality industries, but also the banking industry. A buzzword frequently used in the banking industry is “FinTech”. However, many are unaware of what this term entails and how it is gradually changing the nature of the banking industry. The Asian International Arbitration Centre (“AIAC”) recently had the opportunity to host an evening talk on FinTech and Alternative Dispute Resolution (“ADR”). Thereafter, the AIAC was given the opportunity to interview two of the speakers from the evening talk – Mr. Mohammad Ridzuan Abdul Aziz¹ and Ms. Chiara Accornero,² on their experience in the FinTech and ADR industries. The excerpts of this interview are below.



1. What is FinTech?

Ridzuan: It refers to the innovative technological approaches that facilitate the mobilisation of financial resources to the real economy for value creation and fair distribution to relevant stakeholders.

2. How has the FinTech been received by the market?

Ridzuan: Initially slow (early year 2015) due to lack of understanding and advocacy by key stakeholders (e.g. financial regulators, policy makers). From Q4 2016 onwards, awareness has improved and support towards comprehensive implementation is now at an all-time high – evidenced by support from various key stakeholders from private and public sectors.

3. What sort of services can legal professionals provide for the FinTech industry?

Ridzuan: Legal services could first facilitate awareness by sharing fresh perspectives brought by FinTech – both positives and negatives, especially for new business models and/or pivot by the incumbents prior to venturing into FinTech. Secondly, legal professionals can provide the judiciary with the much needed awareness among others on the need to understand potential liabilities and its implications from association and/or deployment of FinTech – particularly on conducting investigations, gathering facts for evidence, and other subsequent steps leading to judgement. Thirdly, legal professional could equip the industry with the relevant knowledge and agreement structure that could protect their rights, intellectual properties, brand and other intangibles assets

¹Mohammad Ridzuan Abdul Aziz has over 20 years of commercially-driven regulatory, compliance and technology experiences in Asia-Pacific. He provides business-oriented regulatory advice, solution and consultancy to banks, remittance companies, fund management entities, broker dealers (equity and derivatives) as well as sovereign wealth managers on regulatory requirements, compliance risks management, licensing, business viability and practical implementation of FinTech and regulatory technology (RegTech). Mr. Ridzuan is currently WorldRemit's Country Director for Malaysia and Head of Business for Thailand and Indonesia. He is also the current president of the Fintech Association of Malaysia and instrumental in raising the profile of the association, particularly on establishing an industry-wide fintech blue- print as one of the key elements for Malaysia digital economy.

²Chiara Accornero, a national of Italy, holds a Master of Laws from the University of Turin and a Certificate in Transnational Law from the University of Geneva. Before joining the WIPO Arbitration and Mediation Center in Geneva in 2016, she worked in a Turin-based law firm in the areas of intellectual property and contract law. Ms. Accornero is currently the representative of the WIPO Center at Maxwell Chambers in Singapore.

the judiciary with the much needed awareness among others on the need to understand potential liabilities and its implications from association and/or deployment of FinTech - particularly on conducting investigations, gathering facts for evidence, and other subsequent steps leading to judgement. Thirdly, legal professional could equip the industry with the relevant knowledge and agreement structure that could protect their rights, intellectual properties, brand and other intangibles assets concerning their business transactions, especially involving external parties, customers and regulators.

4. What sort of disputes commonly arise in the FinTech industry?

Ridzuan: On rights over intangible assets, rights and access to data. These are areas where the stakeholders, especially businesses would have concerns over proving their rights, legitimacy of their business existence and rights to use certain data under various circumstances - especially involving personal data, transactions data and data derived from various combinations resulting from analytics, inferences and assumptions.

Chiara: Disputes in the FinTech industry are often contractual and may concern, for example: the use of intellectual property (IP) under a licensing agreement; the performance of software development and maintenance agreements; the performance of service level agreements and outsourcing agreements; royalty payments; and IP infringements. Parties to such FinTech disputes include financial institutions like banks, credit card issuers, insurance companies as well as technology service operators such as digital platform and software providers.

With business becoming more international, FinTech disputes often involve parties located in different geographic areas and implicate the laws of multiple jurisdictions, as well as different business and legal cultures. The subject matter involved in FinTech disputes can be very specific, and may involve confidential information and trade secrets. As the technology involved in FinTech disputes evolves rapidly, there is also a real premium on settling disputes rapidly and effectively.

These considerations require entities operating in the FinTech sector to carefully choose a strategy to protect and enforce their IP rights, including the way potential disputes will be resolved.

5. In your opinion, are FinTech disputes better resolved through litigation or through alternative dispute resolution (ADR)? Why?

Ridzuan: The latter as it provides more flexibility and room for win-win outcomes. Litigation would always result in a win-lose outcome and I would only resort to it in pursuing justice under criminal cases. Personally, it is always better to use ADR for commercial disputes as it is more cost effective, non-disruptive to business operations and likely to be amicable most of the time.

Chiara: It goes without saying that disputes should be anticipated by parties and dispute resolution options and provisions should be carefully considered during contract negotiations. While no single dispute resolution mechanism can offer a comprehensive solution in all circumstances, the potential of ADR in the field of FinTech is significant. ADR procedures such as mediation and arbitration have features that, if well managed, can translate into substantial time and cost savings, making them a more affordable and accessible avenue for resolving FinTech disputes.

ADR options such as mediation and arbitration allow parties to tailor the procedure to fit their needs and preferences. One of the key elements for parties in FinTech disputes is the choice of mediators and arbitrators familiar with the FinTech area; ADR allows parties to choose their mediators and arbitrators, and the WIPO Arbitration and Mediation Center maintains a list of mediators and arbitrators specialized in all fields of IP and technology, including FinTech. ADR offers parties a neutral forum where they can resolve disputes in a single procedure, which may be particularly interesting for international disputes as it avoids multijurisdictional litigation. ADR also allows parties, to a large extent, to keep the proceedings and outcomes confidential. The international enforcement provided by the New York Convention and now the Singapore Convention (once it comes into force), further ensures that arbitral awards and settlement agreements resulting from mediation are complied with internationally.

6. What are the common legal challenges encountered by FinTech players? Are there any challenges that are unique to respective jurisdictions and if so, what are these challenges?

Ridzuan: A Common challenge is low literacy towards legal avenues available in legal disputes. Commonly, litigation would be chosen due to lack of understanding



and ill advise by certain unqualified advisers close to the business owners. It is not unique to a specific jurisdiction, in my view, as Fintech businesses are largely driven by founders who are technologically sound but not so competent in business management, corporate strategy and/or legal aspects.

7. Is the FinTech industry presently regulated? If so, how effective have the regulatory measures been to date? What are the shortcomings of same?

Ridzuan: Yes, the FinTech industry is generally regulated. The regulators have been pro-active in their approaches, evidenced by creation of sandboxes, FinTech festivals driven by them and continuous dialogues with industry players and other relevant stakeholders in managing new and emerging concerns raised by the FinTech industry. It is a given fact that regulators would not be able to catch up with the rapid development of Fintech but their willingness to be part of the Fintech industry eco-system has boosted confidence, especially for investors and consumers to experiment and allow FinTech to be deployed in many areas commonly run by traditional players such banking, fund management and lending.

8. How would you describe your experience in the world of FinTech so far?

Ridzuan: It has been challenging yet exciting and promising. FinTech has opened many fresh perspectives and will transcend across various sectors and create unimaginable interconnectedness for various and different eco-systems, largely for the benefit of the consumers, younger generations and with lower cost.

9. What sort of services should institutions offer to facilitate the resolution of FinTech disputes?

Chiara: To facilitate the resolution of FinTech disputes and to ensure the quality of its procedures, the WIPO Arbitration and Mediation Center maintains a dedicated list of mediators and arbitrators familiar with all areas of IP and technology, including FinTech. The WIPO Arbitration Rules also feature specific provisions on confidentiality, trade secrets and confidential information, and technical evidence that are well suited for FinTech disputes.

To maximise the benefits of ADR procedures, one should not underestimate the efficiency of mediation to facilitate the resolution of FinTech disputes. The use of dispute resolution escalation clauses - for example, mediation followed in the absence of settlement by arbitration - has proven highly effective in assisting parties to settle IP and technology disputes. Seventy percent of WIPO mediations have settled, giving parties the opportunity to settle their case in a time and cost efficient way and to get on with their business.

10. What are the emerging trends in the FinTech industry that you believe may change the course of the global financial services industry in the near future?

Ridzuan: Blockchain, eco-systems interconnectedness and emergence of technology-empowered new business models.



SAVE
THE DATE!

ASIA
ADR
WEEK
2020
18-20 JUNE
@ AIAC

ADR IN A
KALEIDOSCOPE
BEYOND WHAT MEETS THE EYE

When Elton John sang “the twisting kaleidoscope moves us all in turn”, there is perhaps little chance he was thinking about commerce and dispute resolution. Yet the metaphor is starkly applicable. The kaleidoscope takes us all back to our past: a toy to transform the mundane mechanical to a splash of infinite and vivid patterns. Taken apart, the coloured pieces are themselves of little value, but when put together, a single twist creates infinite and constantly transforming patterns. It is a tool which translates the occupation of the hand to pleasures of the eye.

The changes in ADR are as fast-paced as the changing visions in a kaleidoscope. Throughout its evolution, the naked eye has so far viewed commercial interests of efficiency and cost as the primary drivers. However, the future will require a perspective that understands how the other coloured pieces oft-overlooked: the social, political and the economical interplay with the commercial to create a meaningful and ever-changing patterns. Although the patterns are new, they use the same pieces over and over again. It becomes critical therefore to look at the arrangement of the pieces themselves, and how they can be placed and rotated to engineer a vision that is acceptable.

AT ASIA ADR WEEK 2020, AIAC'S EMBLEMATIC TRIANGLE HOPES TO BE THE EYE PIECE WHERE WE MOVE AWAY FROM A MYOPIC EMPHASIS ON PROCEDURE AND ENFORCEMENT, TO A KALEIDOSCOPIC VISION OF DIVERSITY AND SUSTAINABILITY.

Mark Twain strongly believed that there are no new ideas: we simply put the old ones in a mental kaleidoscope and give them a turn until they make curious combinations. Political events in the West which may push parties to look East, the dismantling of the ISDS Era, or the push for diversity in arbitration can only be understood by appreciating their larger context of similar changes in national priorities and society. By acknowledging these changes, the discussion will map their impact of 21st century values on private justice, and how the community of institutions, arbitrators and practitioners, akin to the hand that twists the kaleidoscope, can act together to create a beautiful vision for the future.

AIAC EVENING TALK SERIES:

ENERGY CONTRACTS & ARBITRATION



On 15th October 2019, the Asian International Arbitration Centre (“AIAC”) held a talk as part of its Evening Talk series. On this occasion, Mr. Guy Block, a Partner and Head of the Energy and Transport Department at Janson (Belgium) delivered his presentation titled “*Energy Contract & Arbitration: How to ensure the success of energy projects by making outcome of arbitral disputes more predictable.*” The session was moderated by AIAC’s International Case Counsel, Ms. Irene Mira. The presentation itself was unique as it departed from the usual legal discussion on energy disputes. At the outset of his presentation, Mr Block emphasised the shifting trend in energy disputes from one which was heavily-focused on the legal aspects into a field which covers the financial and technical aspects of energy projects and arbitration.

Mr. Block started his presentation by laying out the typology of energy disputes, i.e. solar, wind & hydro projects and gas, fuel, & nuclear projects. Mr. Block covered the steps taken since the conception of the projects such as: financing, obtaining environmental, construction and production permits prior to the start of energy projects, conclusion of purchase agreements entered into by the producer and supplier (be it a long-term energy purchase agreement or power purchase agreement), and the consumption of energy as the final stage of the energy project cycle.

Subsequently, Mr. Block also presented an overview of the types of energy contracts and the contractual clauses which are commonly found therein. For example, Power Purchase (and Service) Agreements (PP(S)As) are well known to be complex and detailed. PP(S)As usually cover large sums of project value and have dual functions, i.e: a) coordinating activities along energy chains and b) serving a regulatory role to ensure the establishment of competitive markets. Other types of energy contracts include: Design Built and Operate (DBO), Engineering Procurement Contract (EPC), and Management Contract (MC). Mr Block then presented on the take-or-pay (TOP) and take-and-pay (TAP) schemes, stabilisation clause, indexation and adaptation clauses, *force majeure* clause, hardship clauses, and change in law clauses in energy contracts. The discussion then continued to how contemporary energy contracts seem to balance State’s right to regulate and investor’s acquired rights under the umbrella of energy contracts.

Before concluding his presentation, Mr. Block also shared some landmark cases on energy disputes in the context of the Energy Charter Treaty and/or bilateral investment treaties, namely:

- 1) *Achmea* case before the Court of Justice of European Union (CJEU) which speaks to the issue of the overlap and compatibility between investment treaty arbitration regime and the law of European Union;
- 2) *Micula* case which has now been brought before the Supreme Court of the United Kingdom for the purpose of enforcement of the ICSID Award against Romania having previously been brought before the ICSID, the European General Court, and even the US District Court for the District of Columbia; and
- 3) *Vattenfall B and others v. Federal Republic Germany (Vattenfall case)* in which the ICSID arbitral tribunal declared its jurisdiction over the case and dismissed Germany’s claim that pursuant to the CJEU decision in *Achmea* case the intra-European Union bilateral investment treaties are not compatible with the provisions of the European Union Law.

Mr. Block ended the presentation by once more emphasising the importance of securing the non-legal aspects before the commencement of the energy projects and the importance of having a solid energy contract which covers alternative dispute resolution mechanisms agreed between the Parties.

The evening was indeed insightful in providing the audience with a comprehensive overview of energy arbitration!

INAUGURAL AIAC - BAR COUNCIL - CIARB JOINT CONFERENCE 2019

An inaugural conference titled "Developing A Career in International Arbitration" was held on Friday, 4th October 2019, jointly organised by the Asian International Arbitration Centre ("AIAC"), the Malaysian Bar Council and the CIARB Malaysia Branch. The organising chairperson, Ms. Crystal Wong Wai Chin of Lee Hishamuddin Allen & Gledhill delivered the opening address, followed by the delivery of the keynote speech by YA Dato' Mary Lim Thiam Suan, Court of Appeal Judge, Malaysia.

The conference then began with the first session entitled "Evolution - What The Future Holds for the Arbitration Industry." The panel of speakers includes Dato' Nitin Nadkarni (Lee Hishamuddin Allen & Gledhill), Mr. Michael James McIver (Plus Three Consultants), Mr. Foo Joon Liang (CIARB Malaysia Branch), Dr. Noorfajri Ismail (Ph.D) (Universiti Teknologi Malaysia), Ms. Tatiana Polevshchikova (Deputy Head of Legal, AIAC), and moderated by Ms. Tan Hui Wen (Skrine). The speakers mainly discussed the evolution of alternative dispute resolution ("ADR") throughout the decades and the current impact of technology in shaping ADR institutions globally.

In the second session, the panel focused on "Tips for Advancing your Career in International Arbitration". The session was moderated by Ms. Diana Rahman (Case Counsel, AIAC) and the speakers includes Mr. Mak Hon Pan (Azman Davidson & Co), Ir. Ang Kok Keng (Synergy Building Solutions), Mr. Benson Lim (fellow CIARB), Mr. Oliver Watts (FTI Consulting) as well as Mr. Jay Patrick Santiago (Quisumbing Torres). The speakers shared their personal experiences in developing their careers in international arbitration and discussed tips on how young practitioners can hone their skills and build their profile to further develop their name in the international arbitration circle.

The AIAC was proud to co-organise this engaging conference and we look forward to future collaborations with the Malaysian Bar Council and the CIARB Malaysia Branch in the near future!



COMPARATIVE ANALYSIS OF THE DISPUTE RESOLUTION MECHANISMS IN THE "FIDIC RED BOOK 2017" AND THE "AIAC STANDARD FORM OF BUILDING CONTRACTS 2019"

By John Coghlan¹

1 Introduction

- 1.1 Earlier in the year the Asian International Arbitration Centre (AIAC) invited me to provide a Construction and Engineering Law training seminar at its headquarters in Kuala Lumpur (Malaysia).
- 1.2 We discussed potential topics for the seminar and, conscious that the "International Federation of Consulting Engineers" (FIDIC), one of the leading providers of standard form contracts to the international Construction and Engineering industry, had published the second edition of its "Conditions of Contract for Construction" in December 2017 (2017 Red Book) and that the AIAC had recently published its new "Standard Form of Building Contracts 2019" (2019 AIAC) we decided that summarising and comparing the Contracts' respective dispute resolution mechanisms (DRM) would provide members with genuine added value.
- 1.3 I delivered the seminar at the AIAC's headquarters on 3 October 2019 to a very receptive and inquisitorial audience. The seminar concluded with a long and interesting "Question & Answer" session focusing on several issues including the interpretation and application of the contract's DRM's together with several generic Construction and Engineering Law questions/problems to which I was delighted to provide answers/solutions.
- 1.4 We have posted the slides for the seminar within the "Insights" tab on our website (<https://www.cels.global/insights/>) and in the remainder of this article we provide a more detailed summary of the Contracts' DRMs together with our "Summary/Observations" in relation to the same.

2 2017 Red Book's DRM

- 2.1 The 2017 Red Book's DRM comprises several clauses (CI.) and subclauses (SC.) which we categorise as follows:
 - (a) Claims (CI. 20);
 - (b) The Engineer's Role/Determination (CI.3);
 - (c) Dispute Avoidance/Adjudication Board (SC. 21.1);
 - (d) Amicable Settlement (SC. 21.5); and
 - (e) Arbitration (SC. 21.6).
- 2.2 We adopt FIDIC's defined terms and discuss each of the above in turn below:

Claims

- 2.3 Cl. 20 of the 2017 Red Book titled "Employer's and Contractor's Claims" is comprehensive and sets out the contract's Claim's procedure. Specifically, SC. 20.1 sets out three scenarios under which the Employer and/or the Contractor may raise a Claim against the other party to the Contract:
 - (a) First, the Employer may raise a Claim against the Contractor if it considers that it is entitled to an additional payment, a reduction in the Contractor Price and/or an extension to the Defects Notification Period (SC. 20.1(a));
 - (b) Second, the Contractor may raise a Claim against the Employer if it considers that it is entitled to an additional payment and/or an EOT (CI. 20.1(b)); and
 - (c) Third, either Party may raise a Claim against the other party for any "...entitlement or relief... of any kind whatsoever (including in connection with any certificate, determination, instruction, Notice, opinion or evaluation of the Engineer)..." so long as the Claim may not be raised under either SC 20.1(a) or SC 20.1 (b) (SC. 20.1(c)).

ABOUT THE AUTHOR



C&E
LEGAL SOLUTIONS

John Coghlan
Principal

C&E Legal Solutions
The Construction and Engineering
Law Specialists - www.cels.global

E: johncoghlan@cels.global
UK: +44 (0)7938 948 131
Qatar: +974 5559 3797

¹John Coghlan is a construction and engineering law specialist with over 30 years' experience, as a sub-contractor and a lawyer, of working within the construction and engineering industry. He advises on all phases of construction and engineering projects within the UK and internationally. Mr. Coghlan is presently the Principal of C&E Legal Solutions, a firm of construction and engineering law specialists. Queries or comments regarding this article can be directed to johncoghlan@cels.global. The views/opinions expressed in this article are those of the author only and they do not reflect the views of C&E Legal Solutions or the AIAC unless otherwise stated.

2.4 Further, the claiming Party under SC 20.1(a) or SC 20.1(b) is required to provide a Notice of the Claim to the Engineer no later than 28 days after becoming aware of the event giving rise to the Claim (SC 20.2.1(a)) failing which it loses its right to Claim i.e. "time barred" (SC 20.2.1(a)). In addition, the claiming Party must provide the Engineer with its "fully detailed Claim" no later than 84 days after becoming aware of the event giving rise to the Claim.

2.5 That said, if either party raises a Claim under SC 20.1(c), and the other Party and/or the Engineer disagrees with the same, then the claiming Party is required to refer the Claim direct to the Engineer for its "Agreement or Determination" under SC.3.7.

The Engineer's Role/Determination

2.6 The Engineer plays a fundamental role in the 2017 Red Book's DRM and is expressly required to "...act neutrally between the Parties..." when exercising its authority under SC.3.7, titled "Agreement or Determination", of any "matter" or Claim. It should be noted, however, that generally the Engineer is "...deemed to act for the Employer..." when performing its duties under the Contract (SC.3.2).

2.7 Specifically, the Engineer, following receipt of a Notice of Claim under Cl. 20, is required to consult with the Parties and attempt to reach agreement within 42 days (SC.3.7.1) - the Parties should note that this time limit starts running on different days depending on whether the Parties' disagreement constitutes a "matter" or a formal Claim and the SC under which the Claim was raised (SC 3.7.3). If the Parties fail to reach an agreement or both Parties advise the Engineer that they are unable to reach an agreement, then the Engineer is required to provide an "Engineer's Determination" (SC. 3.7.1).

2.8 The Engineer's determination must be "fair" (SC 3.7.2) and provided within 42 days - the Parties should note that this time limit starts running on different days depending on whether the Parties' disagreement constitutes a "matter" or a formal Claim and the SC under which the Claim was raised (SC 3.7.3).

2.9 If either Party is dissatisfied with the Engineer's determination it must provide a NOD within 28 days after receipt of the same (SC 3.7.5) - the Parties should note that this time limit starts running on different days depending on the SC under which the Claim was raised (SC 3.7.3). Following raising a NOD either Party may invoke its right to obtain a decision from the DAAB under SC.21.4 (SC 3.7.5).

2.10 The Parties should note, however, that if neither Party provides a NOD within 28 days after the Engineer's determination then both Parties shall be deemed to have accepted the same which is deemed "final and binding" (SC 3.7.5).

2.11 Finally, if either Party fails to comply with an "agreement" or an Engineer's determination, which is final and binding, then the other party may refer the "failure" direct to arbitration under SC.21.6 and the arbitrator/s may deal with the reference as if it relates to the DAAB's final and binding decision under SC 21.7(SC 3.7.5).

Dispute Avoidance/Adjudication Board (DAAB)

2.12 SC.21.1 requires the Parties to constitute a DAAB in accordance with the Contract Data and refer all Disputes to the DAAB in accordance with SC. 21.4 "Obtaining DAAB's Decision".

2.13 Prior to the above, however, the Parties may at any time, save for during the period for an Expert's determination, jointly request in writing that the DAAB assists the Parties informally to attempt to resolve any issues/disagreements that relate to the Contract's performance. The Parties are not bound by the DAAB's informal advice nor does it affect any future Dispute resolution procedure (SC. 21.3).

2.14 That said, the Parties may refer a Dispute to the DAAB within 42 days of providing the NOD (SC. 21.4.1). The DAAB is required to provide its decision within 84 days of receiving the reference which shall be "binding" on both Parties who are required to promptly give effect to the same (SC. 21.4.3). If a Party fails to comply with the DAAB's decision then the other Party may refer the issue direct to arbitration, bypassing SC.21.4 "Obtaining the DAAB's Decision" and 21.5 "Amicable Settlement", and the arbitral tribunal has the power to order enforcement of the DAAB's decision (SC.21.7).

2.15 Either Party, however, has a right to provide a "Notice of Dissatisfaction with the DAAB Decision" to the other Party within 28 days after receiving the same. If neither Party provides a NOD, then the DAAB's decision becomes "...final and binding..." (SC. 21.4.4). Of note is that neither Party may proceed to arbitration of a Dispute unless a NOD has been provided for the Dispute in question in accordance with SC.21.4.4.

Amicable Settlement

2.16 SC.21.5 requires the Parties, following the provision of a NOD under SC. 21.4.4, to attempt to resolve the Dispute amicably for a mandatory period of 28 days from the date the NOD was issued. If the Parties fail to resolve the matter amicably then either Party may refer the Dispute to arbitration under SC. 21.6.

Arbitration

2.17 Either Party may refer any Dispute, which is not subject to a DAAB's "final and binding" decision, to arbitration under SC.21.6. An arbitration may commence before or after completion of the Works and, unless the Parties agree otherwise, will be subject to the International Chamber of Commerce's Rules of Arbitration (**ICC Rules**).

2.18 The arbitral tribunal shall comprise 1 or 3 arbitrators appointed in accordance with the ICC Rules and the arbitrators will have the power to "...open up, review and revise any certification, [engineer's] determination (other than final and binding determinations)...decision of the DAAB...(other than final and binding decision)..." (SC.21.6).

2.19 Article 35.6 of the ICC Rules states that "Every award shall be binding on the parties".

3 2019 AIAC's DRM

3.1 The 2019 AIAC's DRM requires the Parties to raise their initial claims under several clauses which we categorise as follows:

- (a) Variation Claim (Cl.11);
- (b) EOT Claim (Cl.23);
- (c) Loss & Expense Claim (Cl.24);
- (d) Construction Industry Payment and Adjudication Act 2012 (**CIPAA**);
- (e) Mediation (Cl.35); and
- (f) Arbitration (Cl.34).

3.2 We adopt the AIAC'S defined terms and discuss each of the above in turn below:

Variation Claim

3.3 Cl.2 sets out the Contract Administrator/CA's "powers, functions and instructions", which includes the right to instruct the Contractor to complete a Variation to the Works at any time prior to the CA issuing the Certificate of Practical Completion (Cl.11.4). The Contractor, regardless of whether it disputes the CA's instructions/Variation, is required to complete the same (Cl.11.4).

3.4 Further, the Contractor is required to provide the CA with its submission and supporting evidence relating to the Variation, to allow the CA to value the same in accordance with Cl.11.7, no later than 30 days after completing the Variation (Cl.11.6(a)). The CA may request additional evidence/documents, if that provided was insufficient, no later than 14 days after receipt of the original submission. (Cl.11.6(b)).

3.5 If the Contractor fails to provide the initial submission/documents within the 30 days' time limit set out in Cl.11.6(a) then the Contractor may provide the submission/documents during CA's assessment of the "final account" under Cl.30.10. This provides the Contractor with a second opportunity to raise its claim.

3.6 The CA, however, may value the Variation on the "information available" at any time prior to issuing the Certificate of Practical Completion (Cl. 11.6(d)). In this context, the Parties may agree with the CA's valuation which becomes "conclusive" (Cl.11.6(d)) or dispute the valuation in which case either Party may refer the dispute direct to arbitration under Cl. 34 (Cl. 11.6(d)).

3.7 In addition, the Contractor may claim "Additional Expenses Caused by the Variation" (Cl.11.9), which it would not be paid under Cl.11.7 "Valuation [of Variation] Rules" or Cl. 24 "Loss and Expense", no later than 28 days after completion of the Variation (Cl.11.9(a)(iii)) failing which they would be deemed to have "waived his rights" to claim the same i.e. time barred.

EOT Claim

3.8 The Contractor may claim an EOT if the regular progress of the Works is delayed by any of the events listed in Cl.23.8 titled "Time Impact Events" (**TIE**) and the CA has the authority to "...grant a fair and reasonable EOT for the completion of the Works." (Cl. 23.1(a)).

3.9 Specifically, the Contractor must submit a "written notice", including stating its intention to claim an EOT together with describing the TIE, to the CA no later than 28 days after the event occurred (Cl.23.1(b)). Subsequently, the Contractor must provide its "relevant particulars", which substantiate the EOT claim, to the CA no later than 28 days after the end of the "cause of delay" (Cl. 23.1(c)).

3.10 If the Contractor fails to comply with the above time limits it has a right to submit a "fully detailed claim for an EOT" to the CA, no later than 42 days after Practical Completion of the Works (Cl.23.10(a)). the CA is required to provide its determination in relation to the same no later than 42 days following receipt of the fully detailed EOT claim setting out its reasons for the same (Cl.23.10(b)). This provides the Contractor with a second opportunity to raise its claim.

3.11 We note that Cl.23 does not include express wording which provides the Contractor with a means of disputing the CA's determination and the inference, therefore, is that if the Contractor disagrees with the CA's determination then it may refer the dispute direct to arbitration under Cl. 34.

Loss & Expense Claim

3.12 The Contractor may make a claim, under Cl.24.1, for "direct loss and expense" caused by an Employer's Event if it "...could not be reimbursed by a payment under any other provision in the Contract..." (Cl.24.1(a)).

3.13 Specifically, the Contractor must submit a "written notice" to the CA of its intention to claim direct loss and expense under the above, which describes the issue and an estimate of the claim's value, no later than 28 days after the event occurred (Cl. 24.1(a)(i)), followed with its "relevant particulars", substantiating the direct loss and expense claim, no later than 28 days after the "event ended" (Cl. 24.1(ii)).

3.14 The Contractor should note that if it fails to comply with the above time limits it shall be deemed to have "waived his rights under this Contract and/or the law to any such direct loss and/or expense" (Cl. 24.1(iii)) i.e. time barred.

3.15 The CA must provide its determination within 42 days of receiving the Contractor's "relevant particulars" of its direct loss and expense claim which sets out its reasons (Cl. 24.3).

3.16 We note that Cl.24 does not include express wording which provides the Contractor with a means of disputing the CA's determination and the inference, therefore, is that if the Contractor disagrees with the CA's determination then it may refer the dispute direct to arbitration under Cl. 34.

Construction Industry Payment and Adjudication Act 2012 (CIPAA):

3.17 The 2019 AIAC expressly incorporates the CIPAA within: (1) Cl. 23A "EOT Pursuant to Section 29 of CIPAA", (2) Cl. 24A "Loss and Expense Incurred Pursuant to Section 29 of CIPAA", and (3) 30A "Direct Payment under Section 30 of CIPAA".

3.18 The CIPAA was introduced to facilitate regular and timely payment in the Malaysian Construction and Engineering industry and provides either party to a "construction contract", as defined, with a statutory right to "adjudication of payment disputes". The adjudication decision is binding unless one of the three grounds in Section 13 of CIPAA are satisfied including "the dispute is finally decided by arbitration or the court" which is reflected in Cl.23A.2 of the 2019 AIAC.

Mediation

3.19 Under Cl.35.1 either Party may refer:

"...their dispute as to any matter arising under or out of or in connection with the carrying out of the Works and whether in contract or in tort...for mediation in accordance with the AIAC Mediation Rules."

3.20 The Parties should note that referring a dispute to mediation is not an express mandatory precondition to referring the dispute to arbitration under Cl.34.

Arbitration

3.21 The 2019 AIAC's DRM's final forum for dispute resolution is arbitration in accordance with Cl.34.1 under which either Party may refer:

"Any dispute, controversy or claim arising out of or relating to this Contract...[to arbitration] in accordance with the AIAC Arbitration Rules."

3.22 The seat of arbitration is Malaysia (Cl.34.1(b)) and the arbitrators have the power as set out in the AIAC Arbitration Rules and the Arbitration Act 2005 (Cl. 34.2).

3.23 The arbitration award shall be "final and binding on the Parties" (Cl. 34.5).

4 Summary / Observations

4.1 In summary, the 2017 Red Book includes a comprehensive DRM which requires the Parties to follow three mandatory requirements prior to commencing Arbitration namely obtaining an Engineer's Determination, the DAAB's Decision and attempting Amicable Settlement. Consequently, it could be construed as providing Parties with the ability to avoid or resolve disputes amicably without proceeding to a potentially costly and time-consuming Arbitration.

4.2 Alternatively, however, the 2017 Red Book's DRM could be construed as a convoluted time-consuming mechanism which the Parties are obliged to follow to obtain a final and binding arbitral award. In this context, it could be argued that the above mandatory requirements merely delay access to Arbitration and a final and binding arbitral award which, in most instances, obtains the additional benefit of being enforceable under the Convention on the Recognition and Enforcement of Foreign Arbitral Award 1958 i.e. the New York Convention.

4.3 In contrast, the 2019 AIAC's DRM includes a claims procedure within several clauses (Variation/EOT/Loss & Expense) which, following the Parties' disagreement which crystallises a dispute, either expressly or implicitly provides direct access, without a requirement to satisfy any mandatory provisions, to Arbitration. Such an approach could be construed as providing the Parties with direct access to Arbitration to obtain a quick final and binding arbitral award which, in most instances, obtains the additional benefit of being enforceable under the New York Convention.

4.4 Conversely, however, the 2019 AIAC's DRM could be construed as encouraging Parties to enter formal Arbitration without exploring the alternative methods of resolving the dispute. On balance, however, such an analysis ignores the 2019 AIAC's DRM' provisions, including Mediation and Adjudication under the CIPAA, which encourage the Parties to resolve their disputes prior to commencing formal proceedings.

4.5 Both Contracts are of course structured differently and designed for different markets, however, both DRM's encourage Parties to resolve their disputes without recourse to Arbitration, which implicitly places emphasis on the project and completing the Works.

4.6 In our experience, the Parties to a Construction and Engineering contract would be wise to ensure that they understand and manage the "legal risk" in the same including its DRM, throughout a project's lifecycle, which is fundamental to enhancing their prospects of successfully delivering a complex project in accordance with their initial expectations - a "win-win" outcome for the project's stakeholders.

ADNDRC CONFERENCE 2019 - "MANAGE DOMAIN NAMES AND TRADEMARKS IN THE E-BUSINESS WORLD"



On 11th September 2019, the Asian International Arbitration Centre ("AIAC") participated in the Asian Domain Name Dispute Resolution Centre's ("ADNDRC") Conference in Shenzhen, China. Hosted by the Hong Kong International Arbitration Centre ("HKIAC"), the ADNDRC Conference addressed emerging issues in domain name dispute resolution centered on the theme "Manage Domain Names and Trademarks in the E-business World".¹

INTA's Chief Representative for Asia Pacific, Mr. Seth Hayes delivered the Keynote Remarks. AIAC's Case Counsel, Ms. Diana Rahman spoke in Session 1 entitled Insider's Views on Procedural Issues alongside Dr. Fan Yang of the China International Economic and Trade Arbitration Commission ("CIETAC"), Mr. Wesley Pang of HKIAC and Mr. Hyun Jun Kim of the Korean Internet Address Dispute Resolution Committee ("KIDRC"). The session was moderated by Dr. Christopher To of Gilt Chambers, Hong Kong. In Session 2, Mr. Jacob Chen, Mr. Sebastian Hughes, Ms. Chloe Lee and Mr. Xun Yang shared on the Panellists' Views on Substantive Issues. Following that, Session 3, which was conducted in Mandarin, focused on protecting and recovering domains and trademarks registered in bad faith before the Chinese courts. The speakers included Mr. Jacob Chen, Mr. Peng Guo, Ms. Min Yang and Ms. Ally Zhuang. After the networking lunch, the conference continued with Session 4, also conducted in Mandarin, entitled "Tackling Domain Name and Trademark-squatting - Regulation, Law and Practice". The

speakers for Session 4 included Mr. Gary Gao, Mr. Liguozhou, Mr. Eugene Low, Ms. Wen Zou and Ms. Phoebe Tang. Afterwards, Session 5 focused on "ICANN new gTLD programme next round: what brand owners should know", where the speakers included Mr. Dennis Cai, Mr. Julien Chaisse and Mr. Nathan Yang. The last session of the day, Session 6, was aptly titled "Online Dispute Resolution (ODR) for Resolving IP Disputes", where the speakers included Mr. Daniel Lam BBS, JP, Mr. Douglas Clark, Mr. Joe Simone and Mr. Peter Cheung SBS. To officially mark the closing of the conference, Mr. Dennis Cai delivered the closing remarks.

The AIAC forms the Kuala Lumpur office of the ADNDRC. Other offices include CIETAC in Beijing, HKIAC in Hong Kong and KIDRC in Seoul. Since its inaugural conference in 2005, the ADNDRC Conference has provided a unique forum for participants to exchange views on hot topics on domain name dispute resolution, bringing together in-house counsel, barristers, solicitors, arbitrators, domain name experts, and senior executives of major local and international corporations. The AIAC looks forward to the next edition of the ADNDRC Conference!

¹This Event Highlight has been written by the AIAC Domain Name Dispute Resolution ("DNDR") Team. For more information on the ADNDRC services provided by the AIAC, please visit our website at www.adndrc.org, or alternatively, please send an email to the AIAC DNDR Team at aiac@adndrc.org.

KUALA LUMPUR SUMMIT ON COMMERCIAL DISPUTE RESOLUTION IN CHINA

On 17th October 2019, the Asian International Arbitration Centre (“AIAC”) co-organised the “Kuala Lumpur Summit on Commercial Dispute Resolution in China” with the Beijing Arbitration Commission/ Beijing International Arbitration Centre (“BAC/ BIAC”).

The Summit started with opening remarks by Dr. Fuyong Chen, Deputy Secretary General at the BAC/BIAC, and Ms. Tatiana Polevshchikova, Deputy Head of Legal at the AIAC. Tan Sri James Foong Cheng Yuen, a former Federal Court Judge, delivered the keynote address.

The first panel discussion titled “Innovative Practice and Guiding Policy in PRC’s Commercial Arbitration and Mediation: Balance between Market Law” started with presentations by Dr. Wang Xuehua (Beijing Huanzhong & Partners) and Ms. Xueyu Yang (Hui Zhong Law Firm). A discussion followed with Ms. Gunavathi Subramaniam (Nasser Hamid & Associates) as moderator and Mr. Paul Aston (Holman Fenwick Willan LLP) and Ms. Shanti Abraham (Shanti Abraham & Associates) as commentators. Apart from recent developments in arbitration and mediation in China and Malaysia, the panel members also gave their views on the potential impact of the Singapore Convention on Mediation which had just been opened for signature in August 2019.

The second panel discussion titled “Restructuring in the Capital Market of PRC: Addressing the Global Change and New Economic Environment” was reported by Dr. Xiuming Tao (JunZe Jun Law Offices) and Mr. Zhi Bao (Baker McKenzie FenXun) followed by a lively discussion moderated by Mr. Jalalullail Othman (Shook Lin & Bok) and commented by Mr. Leong Wai Hong (Skrine) and Ms. Leng Wie Mun (Kevin & Co). The panel gave insights on private investment disputes, issues of compliance defect and some unique challenges for the resolution of investment disputes.

The morning ended with a panel discussion titled “Lessons from the Tech Giant Battles: New Trends of Resolving Technology and Patent-related Disputes in the PRC” reported by Mr. Hu Ke (Jingtian & Gongcheng). After Mr. Hu’s presentation, a discussion followed with Ms. Hemalatha Parasa Ramulu (Skrine) as moderator, Mr. Choon Hon Leng (Raja, Darryl & Loh) and Mr. Peter Bird (Berkeley Research Group) as commentators. The panel discussed some of the most high-profile court cases involving tech giants. The issues of arbitrability and investor-state arbitration of IP disputes were also addressed.

After a networking lunch, the afternoon session started with a panel discussion on construction disputes, titled “Public Supervision and De-administration on Construction Projects in PRC: Quality, Efficiency, and Environment Protection”, reported by Dr. Zhou Xianfeng (JunHe LLP). A discussion followed with some notable construction lawyers including Mr. Donatian Felix Dorairaj (Dorairaj, Low & The) as moderator and Ms. Tan Swee Im (39 Essex Chambers), Mr.

Andrew Goddard QC (Atkin Chambers) and Mr. Andrew Jeffries (Jeffries Arbitration) as commentators. Various issues such as de-administration measures and environmental protection were vividly discussed. The speakers brought in some insightful international perspectives into the panel discussion.

The last session titled, “New Era Under The New Trade Relations: The Role of Arbitration and Opportunities Under The Belt And Road Initiative For ASEAN Countries”, was reported by Mr. Liu Jiong (AllBright Law Offices). After the presentation, a discussion was held which was moderated by Mr. Arvindran Manosegaran (IMF Bentham) and commented by Mr. Allen Choong (Rahmat Lim & Partners), Dato’ Sunil Abraham (Cecil Abraham) and Dr. Sam Luttrell (Clifford Chance). The panel discussed the opportunities presented by the Chinese Belt and Road Initiative and its potential impact on the scene of alternative dispute resolution.

The AIAC is thankful to the valuable contribution of the speakers and, most importantly, the BAC/ BIAC’s tremendous effort in bringing some high-profile speakers from China to Kuala Lumpur and the successful organisation of this well-attended Summit!



AIAC EVENING TALK SERIES

ALTERNATIVE DISPUTE RESOLUTION AND FINTECH

On 18th September 2019, the Asian International Arbitration Centre ("AIAC") co-organised an evening talk with LawTech Malaysia titled "Alternative Dispute Resolution for FinTech." The panel was moderated by Ms. Adeline Chin, co-founder of LawTech Malaysia, and included Mr. Mohammad Ridzuan Abdul Aziz, President of Fintech Association of Malaysia; Ms. Chiara Accornero, Representative of World Intellectual Property Organisation ("WIPO") Arbitration & Mediation Center in Singapore; Ms. Patricia Chung, Partner of Chung Chambers; and Ms. Chelsea Pollard, International Case Counsel at the AIAC.

Attendees of the event ranged from Alternative Dispute Resolution ("ADR") practitioners to members of the FinTech industry. As an introduction into ADR for those unfamiliar with such, Ms. Pollard gave a brief description of the varying ADR mechanisms that are available to parties and the services offered at the AIAC. Ms. Jenna Huey Ching, co-founder of LawTech Malaysia then gave an overview of LawTech Malaysia and its expansion into FinTech and RegTech. Finally, Ms. Accornero presented on the best practices adopted by WIPO in its ADR services to resolve FinTech disputes.

Following these introductions, the panel discussion kicked off with an explanation of what FinTech is and how it is currently being used in Malaysia. The panellists then discussed how ADR can be used to resolve FinTech disputes, and why ADR is becoming a more popular forum for disputes due to the constant interaction between multiple parties from across the world. Specifically, the panellists explained to the attendees that ADR is a consent-based method of resolving disputes, which means that both parties must agree to use the ADR mechanisms. Therefore, the disputes best fit for ADR are those which are contractually based. However, certain government initiatives, such as voluntary ombudsman arrangements, have been using ADR as a means of resolving disputes between consumers and banks.

The panellists then discussed the importance of paying attention to whether a contract has an arbitration clause, and if so, whether it is succinct. For example, it is important to pay attention to the following elements of an arbitration clause: 1) the seat of arbitration, 2) the procedural rules selected, 3) number of arbitrators selected, 4) language of the arbitration and 5) whether there are any pre-conditions to arbitration. When selecting certain procedural rules, such as the AIAC's Arbitration Rules, it provides for a default seat of arbitration, number of arbitrators and language. The reason it is important to decide these features at the contracting stage or rules that provide defaults, is that once a dispute arises, parties are typically at odds with each other and an agreement of any sort is difficult.

One aspect of the AIAC's Arbitration Rules and AIAC's Mediation Rules that can be fitting for FinTech disputes is the use of med-arb, which means that the parties would first



engage in mediation and in the absence of a settlement, the dispute would proceed to arbitration. This allows for the parties to first attempt to amicably settle the dispute, which, if successful, is typically a better outcome for both parties. Additionally, the AIAC's Arbitration Rules provide avenues for relief when an issue needs to be decided expeditiously. These avenues include: emergency arbitrators, for relief before the arbitral tribunal is constituted; interim relief, for relief after the arbitral tribunal is constituted, but is necessary before the proceedings commence; and the AIAC's Fast Track Arbitration Rules, which are the AIAC's rules for expedited proceedings. Moreover, the AIAC's Arbitration Rules also allow for joinder of parties and consolidation of proceedings. By providing such avenues and elements under its Rules, the AIAC ensures that the proceedings are tailored to the specific needs of the parties. At the end of the day, one of the most important elements of ADR is party autonomy, which means the parties have control over the mechanisms used. In order to protect this, the AIAC ensures that the parties are provided with not only comprehensive procedures, but also the ability to choose the best fitting procedure for that dispute. Finally, the AIAC's panel of arbitrators and mediators are from varying industries to guarantee that the most qualified arbitrator or mediator is appointed for each matter.

The evening talk concluded with a Q&A session during which attendees were able to ask the panel questions regarding the varying types of ADR mechanisms and services offered by the AIAC and WIPO, how to guarantee their arbitration clause is enforceable, and what to do if the other party does not want to have an arbitration clause. Following the evening talk, a networking session was held in which attendees were provided with the opportunity to talk with the panellists one on one.

THE AIAC'S CAPACITY BUILDING AND OUTREACH INITIATIVES

As part of the AIAC's Capacity Building and Outreach Initiatives, the members of the AIAC Legal Services Team regularly present or moderate at conferences or deliver lectures to both students and experienced practitioners, both locally and internationally, on a broad range of topics. Aside from the talks given at the AIAC by the Legal Services Team about its products and services, between July and November 2019, the AIAC Legal Services Team participated in the following external speaking engagements:

1. Moderator, *"Expedited Proceedings and Interim Measures"*, Asian International Arbitration Centre, Kuala Lumpur, Malaysia (5th August 2019)
2. Speaker, *"Presentation of the LawAsia Moot Problem"*, LawAsia Opening Ceremony, Asian International Arbitration Centre, Kuala Lumpur, Malaysia (23rd August 2019)
3. Speaker, *"The BRICS Technology Transfer Summit Forum and International Commercial Arbitration Service Seminar"*, Kunming International Commercial Arbitration Service Centre (KICASC), Kunming, China (2nd September 2019)
4. Moderator, *"Match Fixing Documentary"*, September sports Month 2019, Asian International Arbitration Centre, Kuala Lumpur, Malaysia (4th September 2019)
5. Trainer, *"Suitability of AIAC ADR Services for Construction and Commercial Disputes"*, AIAC India ADR Training Initiative, Cyril Amarch annd Mangaldas, New Delhi, India (11th September 2019)
6. Panellist, *"Insider Views on Procedural Issues"*, ADNDRC Conference 2019, Shenzhen, China (11th September 2019)
7. Speaker, *"Practitioners and the AIAC's views on Arbitration in India: Present and Future"*, AIAC India ADR Training Initiative, New Delhi, India (12th September 2019)
8. Trainer, *"Suitability of AIAC ADR Services for Construction and Commercial Disputes"*, AIAC India ADR Training Initiative, Cyril Amarch annd Mangaldas, New Delhi, India (11th September 2019)
9. Panellist, *"Insider Views on Procedural Issues"*, ADNDRC Conference 2019, Shenzhen, China (11th September 2019)
10. Speaker, *"Practitioners and the AIAC's views on Arbitration in India: Present and Future"*, AIAC India ADR Training Initiative, New Delhi, India (12th September 2019)
11. Trainer, *"Suitability of AIAC ADR Services for Construction and Commercial Disputes"*, AIAC India ADR Training Initiative, Nishith Desai Associates, New Delhi, India (12th September 2019)
12. Speaker, *"Construction 4.0: Bridging the Knowledge Gap"*, Kuala Lumpur, Malaysia (17th September 2019)
13. Speaker, *"Alternative Dispute Resolution for Fintech"*, AIAC Evening Talk Series, Asian International Arbitration Centre, Kuala Lumpur, Malaysia (18th September 2019)
14. Speaker, *"Workshop on Arbitration, Construction Law and Adjudication"*, ILKAP (Judicial and Legal Training Institute), Malaysia (19th September 2019)
15. *"UNCITRAL Working Group II (Dispute Settlement) 70th Sessions"*, Vienna International Centre, Vienna, Austria (23rd - 30th September 2019)
16. Moderator, *"Safety in Sports: The Protection of Athletes and the Scope of Duty of Care"*, September Sports Month 2019, Asian International Arbitration Centre (27th September 2019)
17. Panellist, *"Trademark and the world: Accessing Madrid Protocol"*, INTA Roundtable and Workshop on Trademarks and Brands: A Nepal Trademark Dialogue Global Trade and Best Practices, Nepal (30th September 2019)

18. Moderator, *"Understanding Your Contract's Dispute Resolution Mechanism"*, Asian International Arbitration Centre, Kuala Lumpur, Malaysia (3rd October 2019)
19. Moderator, *"Tips on Developing Your Career in International Arbitration"*, AIAC Bar Council-CI Arb Joint Inaugural Conference 2019, Asian International Arbitration Centre, Kuala Lumpur, Malaysia (4th October 2019)
20. Speaker, *"Introduction to Adjudication and the AIAC's ADR Services"*, SEGI University, Kota Damansara, Malaysia (8th October 2019)
21. Speaker, *"Diversity in Arbitration"*, KL Bar Council Gender Equality & Diversity Committee, Kuala Lumpur, Malaysia (8th October 2019)
22. Moderator, *"Energy Contracts and Arbitration"*, AIAC Evening Talk Series, Asian International Arbitration Centre, Kuala Lumpur, Malaysia (15th October 2019)
23. Moderator, *"Artificial Intelligence in the Legal World"*, LawTech Hackathon 2019: Supernova Summit, Found8, Kuala Lumpur, Malaysia (21st October 2019)
24. Speaker, *"ADR and the Role of the AIAC"*, Legalink's General Meeting, Kuala Lumpur, Malaysia (25th October 2019)
25. Moderator, *"The Singapore Mediation Convention: Can Mediation Finally Challenge Arbitration?"*, AIAC Evening Talk Series, Asian International Arbitration Centre, Kuala Lumpur, Malaysia (6th November 2019)
26. Speaker, *"CIPAA: Maximising the Chances of Success"*, Lee Hishammuddin Allen & Gledhill's Thursday Talk Series, Lee Hishammuddin Allen & Gledhill's, Kuala Lumpur, Malaysia (7th November 2019)
27. Speaker, *"Enforcement of Arbitral Awards under New York Convention"*, China International Economic and Trade Arbitration Commission's (CIETAC), Beijing, China (8th November 2019)
28. Speaker, *"AIAC YPG Roadshow at Brickfields Asia College: Arbitration Moot Workshop"*, Brickfields Asia College, Petaling Jaya, Malaysia (14th November 2019)
29. Speaker, *"AIAC YPG Roadshow at KDU College: Alternative Dispute Resolution Workshop and Moot Arbitration Workshop"*, KDU College, Damansara, Malaysia (14th November 2019)
30. Speaker, *"AIAC YPG Roadshow at SEGi College Sarawak: Alternative Dispute Resolution Workshop and Moot Arbitration Workshop"*, SEGI College, Sarawak, Malaysia (15th November 2019)
31. Arbitrator, *"17th CIETAC Cup International Commercial Arbitration Moot"*, China International Economic and Trade Arbitration Commission's (CIETAC), Beijing, China (17th to 22nd November 2019)
32. Speaker, *"Arbitrators Powers and Duties Under AA2015"*, University of Malaya, Kuala Lumpur, Malaysia (19th November 2019)
33. Speaker, *"AIAC Standard Form of Building Contracts 2019 Roadshows Sabah"*, Hyatt Regency Kinabalu, Sabah, Malaysia (23rd November 2019)
34. Speaker, *"Philippine Arbitration Day Convention"*, Philippine Institute of Arbitrators, Philippines (25th November 2019)
35. Speaker, *"How to Write a Valid Arbitration Award - What is Needed to Avoid an Appeal to the Courts"*, University of Malaya, Kuala Lumpur, Malaysia (26th November 2019)
36. Moderator, *"Dispute Resolution: an International Approach"*, Asian International Arbitration Centre, Kuala Lumpur, Malaysia (27th November 2019)
37. Speaker, *"Malaysian Institute of Arbitrator's 6th Annual Law Review & Year-End Party"*, Asian International Arbitration Centre, Kuala Lumpur, Malaysia (28th November 2019)
38. Speaker, *"AIAC Standard Form of Building Contracts 2019 Roadshows Sarawak"*, Hilton Kuching, Sarawak, Malaysia (29th November 2019)
39. Speaker, *"AIAC YPG Roadshow at ATC Penang: Alternative Dispute Resolution Workshop and Moot Arbitration Workshop"*, Advance Tertiary College, Penang, Malaysia (30th November 2019)

The AIAC Legal Services Team has also showcased its products and services before visiting universities and external parties between July and November 2019 including the following visitors:

- Visit from Law Society of England and Wales
- Visit from Jeff Leong, Poon & Wong
- Visit from Lee Hishammuddin Allen & Gledhill
- Visit from ALSA Universitas Airlangga
- Visit from Monash University
- Visit from Ghana Justice
- Visit from Japanese Arbitrator
- Visit From Lawyers from Guangzhou
- Visit from Messrs Christopher & Lee Ong
- Visit from Jabatan Kehakiman Syariah Selangor (JAKESS)
- Visit from Justitia Training Center
- Visit from UNISZA
- Visit from IIUM
- Visit from Tarumanagara University, Indonesia

ANNOUNCEMENT

24th October 2019**PROSPECTIVE APPLICATION OF THE CONSTRUCTION INDUSTRY PAYMENT AND ADJUDICATION ACT 2012**

On 16th October 2019, the Federal Court of Malaysia delivered its decisions in the cases of *Jack-In Pile (M) Sdn Bhd v. Bauer (Malaysia) Sdn Bhd* and *Ireka Engineering & Construction Sdn Bhd v. PWC Corporation Sdn Bhd*.

In their grounds of judgment, the Federal Court held that the Construction Industry Payment and Adjudication Act 2012 (the "CIPAA 2012" or the "Act") is prospective and does not apply to construction contracts entered into before the coming into force of the Act, that is, contracts executed before **15th April 2014**.

In light of these recent judicial developments, users of the CIPAA 2012 are advised and hereby notified that the AIAC will **not** register payment disputes arising from construction contracts executed prior to 15th April 2014. For the avoidance of doubt, registration of payment disputes arising from construction contracts executed on or after 15th April 2014 remain unaffected.

Notwithstanding the above, should there be any disagreement, question or issue between the parties relating to the date the construction contract is executed or is deemed to have been executed, or is to be treated as having been executed, which affects the AIAC's assessment of the application of the CIPAA 2012 *viz-a-viz*, the Federal Court's decisions, the AIAC will proceed to register such matter and take it under further advisement by referring the same for determination by the appointed adjudicator. Appointments of adjudicators shall proceed in the usual manner Parties are put on notice that the registration of these matters, and any continuance of the proceedings thereafter, are strictly and solely at their own risk.

For ongoing matters that are or may be potentially affected by this judicial development, parties are advised to consult their representatives and obtain legal advice in respect of the same and contact their respective AIAC Case Counsel for a status update.

A copy of the grounds of judgment in the case of *Jack-In Pile (M) Sdn Bhd v. Bauer (Malaysia) Sdn Bhd* and *Ireka Engineering & Construction Sdn Bhd v. PWC Corporation Sdn Bhd* can be found [here](#) and [here](#), respectively.

This announcement is effective from the date of issuance until further notice.

For general inquiries, please write to enquiry@aiac.world or reach us at +603 2271 1000.

About the Asian International Arbitration Centre (AIAC)

Established in 1978, the Centre was the first arbitration centre in Asia to be founded under the Host Country Agreement concluded between the Asian-African Legal Consultative Organisation and Government of Malaysia. The AIAC was first set up to provide institutional support for arbitration proceedings in Malaysia and Asia. Currently, it stands alongside only four other regional centres located in Egypt, Nigeria, Iran and Kenya. Further information about the AIAC can be obtained from <http://www.aiac.world>.

CASE SUMMARIES

Keeping abreast of the latest developments in local and international jurisprudence is important for anyone practising or interested in alternative dispute resolution. In the following pages, the AIAC has summarised a selection of local and foreign decisions relating to adjudication and domestic and international arbitrations for your reading pleasure. Enjoy!

ADJUDICATION

Jack-In Pile (M) Sdn Bhd v Bauer (Malaysia) Sdn Bhd

The Federal Court delivered its landmark decision on 16th October 2019 and in its grounds of judgment held that the Construction Industry Payment and Adjudication Act 2012 ("CIPAA") is prospective and does not apply to construction contracts entered into before the coming into force of the CIPAA, that is, contracts executed before 15th April 2014. The Court stated that in its view, the Parliament would have included clear provisions if it had intended for CIPAA to operate retrospectively. The Court further stated "[g]iven that the CIPAA impacts parties' substantive rights, a retrospective application of the CIPAA would have the effect of interfering with the basic principle of freedom of contract". In light of these findings, the Federal Court upheld the pay-when-paid clause in the contract between the parties, which the Respondent had relied on, notwithstanding Section 35 of the CIPAA. This appeal was heard by the Federal Court together with three other appeals, all pivoting on the prospectivity or retrospectivity of the CIPAA.

Ireka Engineering & Construction Sdn Bhd v PWC Corporation Sdn Bhd

The relevant questions of law posed to the Federal Court in this case were summarily, whether the CIPAA gives rise to substantive rights and is consequently, prospective in nature.

With regard to the principles of law applicable, the Federal Court referred to *inter alia* Lord Scott's judgment in *Wilson v First Country Trust*, a House of Lords decision, and succinctly reproduced that "there is a common law presumption that a statute is not intended to have retrospective effect. This presumption is part of a broader presumption that Parliament does not intend a statute to have an unfair or unjust effect".

The Federal Court also contemplated, amongst others, Section 41 of the CIPAA, and found that the aforesaid section does not and cannot amount to an express statement of intent by Parliament for the CIPAA to apply retrospectively. It is clear upon a plain reading of the aforesaid section, all that is provided by Parliament is that litigation and arbitration proceedings commenced prior to 15th April 2014 are not impacted by the introduction of the CIPAA.

The Federal Court went on to find that the CIPAA is a legislation of general application which undoubtedly "affect[s] the substantive rights of parties and such rights ought not to be violated as it is of fundamental importance to the appellant besides being an essential component of the rule of law". Therefore, the Federal Court unanimously decided that the entire CIPAA ought to be applied prospectively.

Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd And Another Appeal [2019] MLJU 742

The Federal Court upheld the majority view of the Court of Appeal wherein the CIPAA would be applicable to all payment claims relating to a construction contract, as defined in section 4 of the CIPAA. The Court stated, "it is difficult to fathom any basis for concluding that Parliament intended a bifurcated approach depending on the type of claim. We could see no conceivable basis and/or logical reason that the Parliament would have intended a different approach between the interim payment and final payment. If the Parliament had intended to exclude final claims from the adjudicatory ambit of CIPAA, it could have clearly included a proviso or provisions to that effect".

Regarding the issue of whether an adjudicator had jurisdiction to adjudicate when a payment claim was served after the construction contract has been terminated, the Federal Court in considering the relevant termination clause of the construction contract, found that the right of payment under the construction contract survives the termination. Therefore, parties' inclusion of an express provision in the construction contract, entitling a party to make a payment claim after termination of the same, is not necessary.

Regarding the appellant's argument that the Architects Act 1967 and the Architects Rules 1996 provide for a specific dispute resolution mechanism *vis-à-vis* architect's fees wherein the dispute is one which ought to have been arbitrated instead of adjudicated under the CIPAA, the Federal Court upheld the findings of the High Court Judge wherein arbitration and adjudication are not mutually exclusive to each other. As such, the CIPAA can apply to disputes between architects and their clients.

Visi Nusajaya Sdn Bhd v Elite Alliance Engineering Sdn Bhd [2019] 1 LNS 945

In this case, the defendant issued a notice under Section 466 of the Companies Act 2016 against the plaintiff, demanding for payment of the sum of RM736,242.36, due pursuant to an Adjudication Decision dated 18th December 2018 under the Construction Industry Payment and Adjudication Act 2012.

In order to restrain the defendant from proceeding with the issuance of a winding up petition, the plaintiff sought a Fortuna injunction and at the same time filed an application to set aside the said Adjudication Decision.

The learned Judge noted that there need not be any judgment against the non-paying party in order for an unpaid party to present a winding up petition. However, the learned Judge went on to decide that the said Adjudication Decision is not binding as it is yet to be enforced pursuant to Section 28 of the CIPAA.

In deciding that the Adjudication Decision is not yet binding on parties, the Court also took cognisance of the defendant's deemed admission, to the existence of an oral agreement pertaining to the plaintiff's setting-off and counter-claim against the defendant, by the defendant counsel's choice to not file a reply to the plaintiff's supplementary affidavit.

Desaru Peace Holding Club Sdn Bhd v Malaysian Resources Corporation Berhad [2019] 1 LNS 1034

The High Court in this case allowed the plaintiff's application to set aside the Adjudication Decision dated 11th February 2019 under the CIPAA.

In this case, the adjudicator had directed a 10-page limit on the Adjudication Reply. However, the adjudicator subsequently allowed the Adjudication Reply in its totality, despite its non-compliance, without expunging the additional pages. The adjudicator reasoned in the said Adjudication Decision that the plaintiff had elected to not issue a Payment Response and as such, the defendant should not be taken by surprise, and have to limit its Adjudication Reply to the plaintiff's detailed Adjudication Response.

Regarding the adjudicator's findings in relation to the non-issuance of the Payment Response, the learned Judge stated that the Adjudicator appears to have misunderstood and/or misapplied the CIPAA.

Further, the Court held that although an adjudicator can cure any non-compliance in respect of the adjudication proceedings or any documents produced in the adjudication proceedings under Section 26 of the CIPAA, the adjudicator is nevertheless required by the rules of natural justice to do so fairly and in doing so to observe the rule of the right to be heard and the rule against bias. The adjudicator is also statutorily required under Section 24(c) of the CIPAA to comply with the principles of natural justice.

Therefore, it was held that the Adjudicator had breached the rule against bias and had failed to act fairly, in allowing the defendant's non-compliance with the procedural rules that the Adjudicator had set under Section 25 of the CIPAA.

DOMESTIC ARBITRATION

CHE Group Berhad v Dato Kweh Team Aik [2019] MLJU 782

The High Court construed the following clause contained in the Statement in Lieu of Prospectus, Term Sheet & Application of Shares executed by parties, namely “*Governing law; Arbitration: The law of the Federation of Malaysia (without giving effect to its conflict of law principles) govern all matters arising out of or relating to this Term Sheet*”, and held that the mere word ‘arbitration’ appearing in the heading/ title of the said clause is not in itself conclusive that the said clause amounts to an agreement to arbitrate. The High Court Judge referred to Section 9 of the Arbitration Act 2005 and concluded that the mere inclusion of the word ‘arbitration’ by itself does not automatically mean that there was an intention by the parties to refer disputes to arbitration.

INTERNATIONAL ARBITRATION

X v Jemmy Chien (also known as Chien, Ching Yu or 簡慶裕) [2019] HKCU 345

In this case, the plaintiff in seeking to set aside the respective arbitral awards on merits and on interest and costs, raised *inter alia* an argument that the said arbitral awards are in conflict with the public policy of Hong Kong. The plaintiff argued that the service agreement executed with the defendant, which was the subject matter of the arbitration, was a sham. The learned judge found that the public policy ground is not sufficiently meritorious to render the awards manifestly invalid. Public policy should be narrowly construed. Non-enforcement is to be balanced against public policy interests in upholding the parties’ arbitration agreement, facilitating enforcement of arbitral awards, and observing obligations assumed under the New York Convention for Recognition and Enforcement of Foreign Arbitral Awards. Furthermore, the learned judge emphasised that if the Court accepts that the service agreement is valid and binding between the parties, there is then no reason for the Court to refuse enforcement of the awards.

PJSC Tatneft v Bogolyubov and others [2019] EWHC 1400 (Comm)

The learned judge in deciding an application for security for costs filed by the defendants, who are all Ukrainian businessmen, found that there is a real risk of there being substantial obstacles to the enforcement of a costs order in favour of the defendants, in Russia. In delivering his decision, the learned judge took cognisance of the fall in the rate of enforcement of decisions involving Ukrainian applicants or from Ukrainian courts by the Russian Courts, the absence of a bilateral treaty between the United Kingdom and Russia, uncertainty as to the ambit of enforcement on the basis of reciprocity particularly in respect of English court judgments, existing sanctions, and the risk that an order for costs may be regarded as unenforceable. Moreover, the learned judge held that a Russian court may expansively apply the concept of public policy to refuse recognition and enforcement of foreign, including English, decisions. Therefore, the learned judge allowed the defendants’ application and ordered the claimant to pay security for costs.

Brahmani River Pellets Limited v Kamachi Industries Limited LNIND 2019 SC 562

The issue before the Supreme Court of India in this case was whether the Madras High Court had the jurisdiction to appoint an arbitrator under Section 11(6) of the Arbitration and Conciliation Act 1996 despite the relevant arbitration agreement stipulating that the venue of arbitration was in Bhubaneswar. The Supreme Court considered the distinctions between seat of arbitration and its venue, and held that where the arbitration agreement specifies the jurisdiction of the court at a particular place, only said court will have the jurisdiction to deal with the matter and parties.

In the present case, considering the agreement of the parties that the “venue” of arbitration shall be at Bhubaneswar, the intention of the parties is to exclude all other courts. Therefore, when the parties have agreed to have the “venue” of arbitration at Bhubaneswar, the Madras High Court erred in assuming the jurisdiction under Section 11(6) and only the Orissa High Court will have the jurisdiction to entertain the petition for an appointment filed under Section 11(6). The impugned order was liable to be set aside.

INVESTMENT ARBITRATION

Clorox Spain S.L. v. Bolivarian Republic of Venezuela PCA Case No. 2015-30

Clorox Spain S.L., a Spanish based company, initiated a claim based on the Spain-Venezuela bilateral investment treaty, against the Government of Venezuela, alleging that legislative and administrative measures adopted by Venezuela had forced Clorox Venezuela to discontinue its operations in the country.

In 2011, Clorox International, a United States based company, had assigned its shareholding in Clorox Venezuela to shell company, Clorox Spain S.L. in order to bring these claims under the Spain-Venezuela bilateral investment treaty. Venezuela raised an argument that the ownership of all shares in Clorox Venezuela by Clorox Spain S.L. was insufficient to be construed as an 'action of investing'.

The Permanent Court of Arbitration (PCA) tribunal in this case dismissed the claim by Clorox Spain S.L. The tribunal stated that Clorox Spain S.L. had satisfied the burden of proving *ratione personae* as required under the bilateral investment treaty. However, the tribunal concluded that Clorox Spain S.L. only becomes a protected investor if it had been active in the act of investing, as required under the bilateral investment treaty, which it had failed to do.

Cube Infrastructure Fund SICAV and others v Kingdom of Spain ICSID Case No. ARB/15/20

An International Centre for Settlement of Investment Disputes (ICSID) tribunal issued an award in favour of Cube Infrastructure Fund SICAV against Spain. The tribunal found the Claimant's legitimate expectation in relation to their investment to have been defeated by Spain's reforms. The tribunal issued an award against Spain for breaching the Claimant's rights under Article 10 of the Energy Charter Treaty (ECT), in respect of their investments in photovoltaic (PV) plants and hydro plants. The tribunal held that the Claimant was entitled to rely on representations that the incentives provided under a special regime for renewable energy by Spain, which provided for enhanced prices to be paid to producers of renewable energy, would not be significantly amended, or abolished, retrospectively. The Tribunal thus decided that the Claimants were entitled by way of damages to €2.89 million in compensation for losses caused to the PV investments and a further €30.81 million for losses caused to the hydro investments. In a dissenting opinion, one arbitrator assessed that the Claimant was not entitled to compensation for the damage allegedly suffered in relation to their hydro investment, as Spain had made efforts to maintain the guarantee of adequate profitability notwithstanding the replacement of a system based on volume of production with a system based on capacity. In the said dissenting opinion, it was opined that the Claimants ought be compensated only if they could demonstrate that the reforms will be in violation of the guarantee of a reasonable return.

SolEs Badajoz GmbH v Kingdom of Spain ICSID Case No. ARB/15/38

The dispute arose out of a series of energy reforms undertaken by Spain which affected its renewable energy sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers. The ICSID tribunal concluded that the Claimant's legitimate expectations were not limited to a reasonable return, but that it would receive a feed-in tariff that was stable, which was an essential element of the regulatory regime on which Claimant relied on when it made its PV investment decision. The tribunal thus held that Respondent breached its obligation under Article 10(1) of the ECT to accord fair and equitable treatment to Claimant's investment. As a consequence of the breach of Article 10(1) of the ECT, the tribunal awarded compensation in the amount of EUR40.98 million to the Claimant.

SAVE THE DATE !



- 4th December 2019** Evening Talk Series - Advocacy in International Arbitration
- 5th December 2019** AIAC Standard Form of Building Contracts 2019 Roadshows at Johor Bahru, Johor
- 6th December 2019** Joint Seminar with Malaysian Bar Council and Korean Bar Association
- 15th January 2020** AIAC YPG Roadshow at INTI University & College
- 20th January 2020** AIAC for the Asia Diplomatic Corps
- 21st January 2020** Evening Talk: Business and Human Rights Arbitration
- 26th February 2020** Public Forum on the Reformation of the CIPAA 2012
- 12th - 15th March 2020** YPG Conference & 2020 KL Pre-Moot for the Willem C. Vis International Commercial Arbitration Moot
- 23rd - 27th March 2020** AIAC/RICS Diploma in Mediation
- 28th March - 5th April 2020** CiArb Diploma in International Commercial Arbitration Course March 2020 (APAC)
- 25th - 29th April 2020** AIAC Certificate in Adjudication
- 18th - 20th June 2020** Asia ADR Week 2020 - ADR in a Kaleidoscope: Beyond What Meets the Eye

2019

SEPTEMBER

S	M	T	W	T	F	S
1	2	3	4	5	6	7
8	9	10	11	12	13	14
15	16	17	18	19	20	21
22	23	24	25	26	27	28
29	30					

OCTOBER

S	M	T	W	T	F	S
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30	31		

NOVEMBER

S	M	T	W	T	F	S
					1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	30

DECEMBER

S	M	T	W	T	F	S
1	2	3	4	5	6	7
8	9	10	11	12	13	14
15	16	17	18	19	20	21
22	23	24	25	26	27	28
29	30	31				

2020

JANUARY

S	M	T	W	T	F	S
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28	29	30	31	

FEBRUARY

S	M	T	W	T	F	S
						1
2	3	4	5	6	7	8
9	10	11	12	13	14	15
16	17	18	19	20	21	22
23	24	25	26	27	28	29

MARCH

S	M	T	W	T	F	S
1	2	3	4	5	6	7
8	9	10	11	12	13	14
15	16	17	18	19	20	21
22	23	24	25	26	27	28
29	30	31				

APRIL

S	M	T	W	T	F	S
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28	29	30		

MAY

S	M	T	W	T	F	S
				1	2	
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	30
31						

JUNE

S	M	T	W	T	F	S
	1	2	3	4	5	6
7	8	9	10	11	12	13
14	15	16	17	18	19	20
21	22	23	24	25	26	27
28	29	30				

JULY

S	M	T	W	T	F	S
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28	29	30	31	

AUGUST

S	M	T	W	T	F	S
						1
2	3	4	5	6	7	8
9	10	11	12	13	14	15
16	17	18	19	20	21	22
23	24	25	26	27	28	29
30	31					



2020 KL Pre-Moot

for the *Willem C. Vis* International
Commercial Arbitration Moot

Bangunan Sulaiman, AIAC, Kuala Lumpur, Malaysia

- ★ Conference | 12th March 2020
- ★ Pre-Moot | 13th - 15th March 2020



★ Sponsorship opportunities available ★

For more information, please contact us at +603 2271 1000 or pre-moot@aiac.world

 bit.ly/4thklpremoot

 [klpremoot](https://www.instagram.com/klpremoot)

AIAC CERTIFICATE IN ADJUDICATION



25th - 29th April 2020

8.30 a.m. - 5.30 p.m.

Auditorium, AIAC

AIAC Certificate in Adjudication is conducted by AIAC and is open to everyone, especially those in the construction industry. Aside from training future adjudicators and providing them with the necessary skills to conduct an adjudication, programme is also suitable for those who do not want to become adjudicators but would just like to seek more knowledge on the subject. This programme is recognised by the CIPAA Regulations as necessary qualification to be a CIPAA Adjudicator under CIPAA 2012. The training is conducted over five days by experts from the U4 construction industry and consists of these units:

UNIT 1 THE APPLICATION OF STATUTORY ADJUDICATION TO THE CONSTRUCTION INDUSTRY

Enables the participants to acquire knowledge and develop a better understanding of adjudication and the effects of the Construction Industry Payment and Adjudication Act (CIPAA) 2012 on the construction industry.

UNIT 2 THE PRACTICE & PROCEDURE OF ADJUDICATION UNDER THE CIPAA

Gives participants a deeper knowledge of the important provisions of CIPAA and necessary requirements of the adjudication process.

UNIT 2A CIPAA REGULATIONS

Introduces participants to the Regulations of the Act which will give full effect and the better execution of the provisions of CIPAA 2012.

UNIT 3 FUNDAMENTALS OF CONSTRUCTION LAW

Introduces the participants to the Malaysian Legal System and provides basic knowledge of construction law, which includes basic concepts of the laws of contract, tort and evidence.

UNIT 4 THE CONSTRUCTION PROCESS

Introduces the participants to the basic knowledge of the construction process particularly procurement, processes and contractual arrangements.

UNIT 5 WRITING ADJUDICATION DECISIONS

Provides participants with the skills necessary to write an adjudication decision in accordance with the provisions in CIPAA.

CPD
POINTS
AVAILABLE

For more information, please contact +603 2271 1000 or email to cipatraining@aiac.world



**ASIAN INTERNATIONAL
ARBITRATION CENTRE**

Bangunan Sulaiman,
Jalan Sultan Hishamuddin,
50000 Kuala Lumpur

T +603 2271 1000
F +603 2271 1010
E enquiry@aiac.world

www.aiac.world