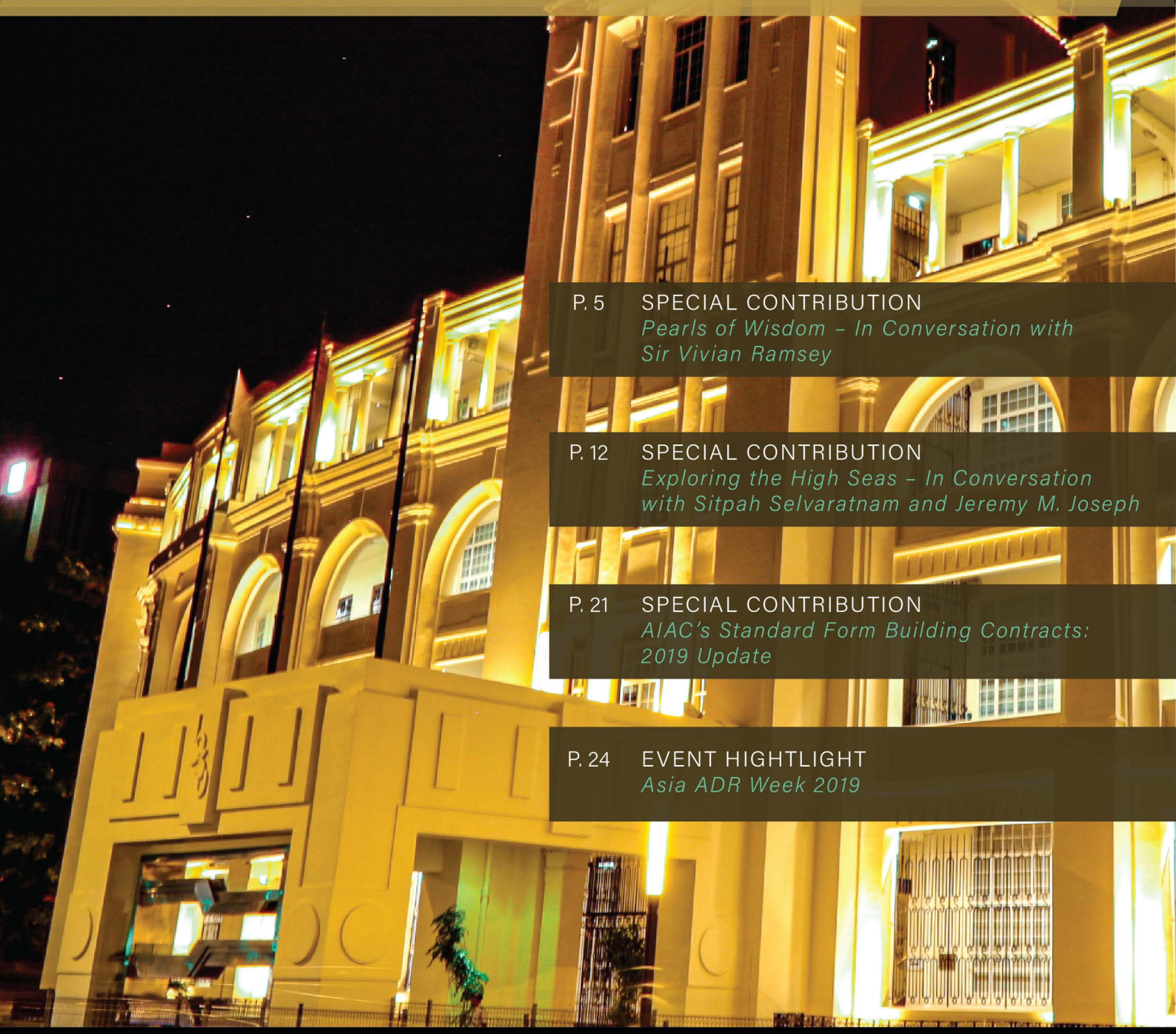
AIAC
ASIAN INTERNATIONAL ARBITRATION CENTRE

NEWSLETTER #02
JULY 2019

MARKING MILESTONES

THE FRUITS OF COLLABORATION



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AIAC

SPORTS MONTH 2019

SEPTEMBER

4 TH

DOCUMENTARY ON MATCH FIXING

7 TH

FUTSAL TOURNAMENT

12 TH

WORKSHOP

ON DRAFTING SPORTS CONTRACT

19 TH

WORKSHOP

ON THE CONSTITUTION OF SPORTING BODIES

23 RD

CERTIFICATE PROGRAMME IN

SPORTS ARBITRATION

27 TH

INTERNATIONAL SPORTS LAW CONFERENCE

For more information or to register,
Please contact **Mr Azril Rosli** at **03 2271 1181**
or email **azril@aiac.world**

TABLE OF CONTENTS

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NEWSLETTER #02

July 2019

*This edition of the AIAC Newsletter has been edited and designed by the AIAC Newsletter Team. Edited by: Ms Nivvy Venkatraman. Designed by: Mr Leonard Loh Chin Sheon, Mr Fakrullah 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.

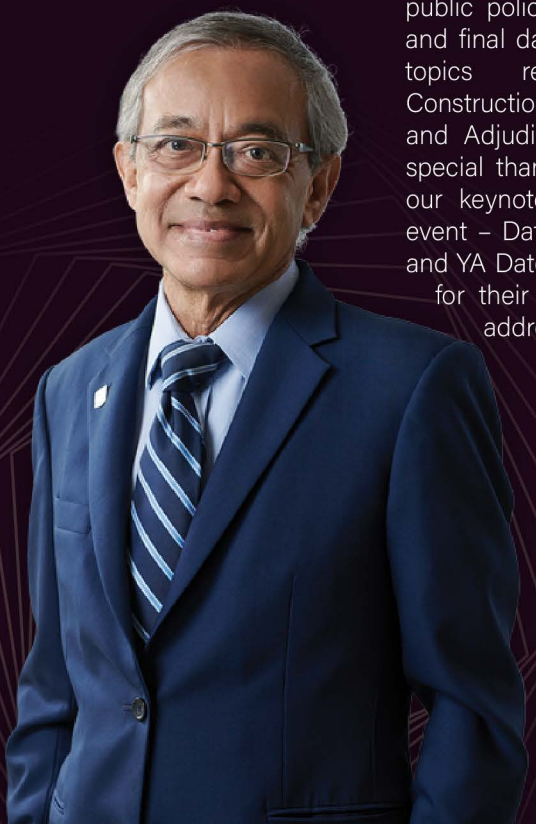
DIRECTOR'S MESSAGE

"Don't stop believing!" is how I would sum up the first six months of 2019 at the Asian International Arbitration Centre ("AIAC").

Over the past few months, the AIAC has undertaken a number of ambitious initiatives to both raise awareness of the Centre and to provide a collaborative platform for the wider dispute resolution community to engage in information exchange.

In March 2019, we successfully organised our 3rd ICC-AIAC Pre-Moot for the Willem C. Vis International Commercial Arbitration Moot. This was one of the largest Vis Pre-Moots in the world with more than 120 local and international teams registering their interest to participate in the Pre-Moot, with 90 teams actually taking part in the event. Pre-Moots provide a fertile ground upon which students who aspire to participate in the Vis Moots in Hong Kong and Vienna can interact with experienced practitioners and diverse participants to refine their advocacy skills. The AIAC would like to take this opportunity to thank all the arbitrators, volunteers and participants without whose invaluable efforts the event would not have been a success!

In June 2019, the AIAC also organised its second edition of Asia ADR Week centered on the theme "The Kintsukuroi Perspective: The Asian ADR Revolution". The theme reflected the ideology of alternative dispute resolution ("ADR") being a melting pot of talent, industries and cultures that mends the imperfections of the global economy. The three-day event saw over 230 participants and speakers from over 17 jurisdictions coming together in Kuala Lumpur to engage in discussions on key issues and the latest developments in the global ADR sphere. The topics canvased during the first two days included the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, project finance, the role of the judiciary, Belt and Road disputes, blockchain technology and public policy issues. The third and final day was reserved for topics relating to the Construction Industry Payment and Adjudication Act 2012. A special thank you goes out to our keynote speakers for the event – Dato' Mah Weng Kwai and YA Dato' Lee Swee Seng – for their insightful key note addresses.



To further consolidate our presence in the field of holistic dispute avoidance, in July 2019, the AIAC held its first two roadshows in Kuala Lumpur and Penang on the 2019 Edition of the AIAC Standard Form of Building Contracts. Both events witnessed the interests of industry experts and various stakeholders in understanding the key features of the 2019 SFCs, and the interplay of arbitration, adjudication, and mediation towards effective dispute resolution mechanisms in line with the best practices in the construction industry. This is a testament to our commitment to make the SFCs more accessible and embraced in Malaysia.

Possibly the most inspirational achievement for the AIAC in the first half of 2019 was the selection of the AIAC Arbitration Rules for the 29th Willem C. Vis International Commercial Arbitration Moot in Vienna, Austria and the 19th Willem C. Vis East International Commercial Arbitration Moot in Hong Kong SAR in 2022. I would like to thank the AIAC's Pre-Moot Organising Committee for their unyielding efforts in realising this unique opportunity which will undoubtedly strengthen Malaysia's position in the international arbitration market.

In light of these achievements, I am delighted to present this July 2019 edition of the AIAC Newsletter which provides a snapshot of the activities undertaken by the AIAC between March 2019 and early July 2019. A special mention must go out to our five Special Contributors – Sir Vivian Ramsey, Sitpah Selvaratnam, Jeremy M. Joseph, Matthew Muir and Jonathan Mackojc – for voluntarily sharing their insights and experiences in this edition of the Newsletter. We are also grateful to the three "Think Tank" contributors for their academic contributions to this Newsletter.

As with the first half of 2019, the remainder of 2019 promises to be just as intriguing with a range of interesting events including SFC roadshows in Johor, Sabah and Sarawak, September Sports Month and an array of evening talks on a broad range of stimulating topics.

As we venture off into the second half of 2019, let us remember that strength and growth only come from continuous efforts and overcoming obstacles – if there were no obstacles, there would be no opportunities for growth. However, in the conscious pursuit of growth, one must always remember to act ethically for, in the words of The Right Honourable Sir Edward Coke to King James I (circa. 1610), "Be ye King or commoner, the law is above you".

Till the next issue, happy reading!

VINAYAK PRADHAN
Director
Asian International Arbitration Centre

PEARLS OF WISDOM

In Conversation with

Sir Vivian Ramsey

Earlier in 2019, the Asian International Arbitration Centre ("AIAC") facilitated a three-week long international arbitration hearing for one of its administered arbitrations. The Presiding Arbitrator in attendance was the esteemed Sir Vivian Ramsey.[1] The AIAC had the privilege of interviewing Sir Vivian Ramsey on his illustrious legal career, including his experience as an international arbitrator, the excerpts of which are set out below.

1. What inspired you to commence your career in the construction & engineering industries?

At school, I studied double maths, physics and chemistry and so studying engineering at university was a natural consequence. I did a degree in engineering science and economics which gave me a general background in all fields of engineering as well as finance and business. I was then very fortunate to join the graduate training school at Ove Arup & Partners where I worked on multi-disciplinary building and engineering projects in the London office. I qualified as a chartered civil engineer and then worked as a resident engineer on site in Libya where I gained valuable overseas experience.

2. What motivated you to pursue a career in law?

I had always been interested in law but my school subjects led me to study engineering. I shared a room with a law student in my first year and found his books more interesting than mine on applied thermodynamics! It was when, whilst in Libya I had time to think more about the future and I developed the idea of studying law for a year, with the intention of returning to Ove Arup to deal with the dispute side of projects. After a successful year of study at the City University, I was given a grant to study for the Bar but continued to work at Ove Arup in vacations. That gave me further motivation.

3. What was the most intriguing and the most challenging aspect of your time at the Bar?

I always found the excitement of opening the papers and reading into a new case fascinating. It was a privilege to be able to help individuals, companies and government authorities to deal with their disputes and bring them to a conclusion. The most challenging cases were those where the clients had the merits but the law was against them, or where the clients thought they had a good case when, in fact, they did not.

[1]Sir Vivian Ramsey is a leading international arbitration practitioner and a former judge of the High Court of England & Wales. Having previously enjoyed a career in civil engineering, Sir Vivian Ramsey embarked on his career at the Bar with Keating Chambers between 1981 and 2005. In 1992, he was appointed as a Queen's Counsel and he also held the position of Head of Chambers between 2002 and 2005. Appointed to the High Court Bench in 2005, Sir Vivian Ramsey was voted Construction Silk of the Year by Chambers Directory. He was appointed the Judge in charge of the Technology and Construction Court in 2007. In 2011, he was appointed the Judge in charge of the Estates and Chairman of the Judicial Advisory Group on IT. In 2012, he was appointed the Judge in charge of the implementation of the reforms arising from Sir Rupert Jackson's Review of Civil Litigation Costs: Final Report. Sir Vivian Ramsey retired from the UK bench in late 2014 and he was appointed to the new Singapore International Commercial Court (SICC) in early 2015. He is the current joint editor of Keating on Construction Contracts. He was also an Honorary Professor in the Department of Civil Engineering at the University of Nottingham and is now a Visiting Professor at the Dickson Poon School of Law at King's College, London. Sir Vivian Ramsey lectures worldwide on construction and commercial law and procedure whilst also furthering his career as an international arbitrator.

4. How would you compare your experience as a former Judge of the High Court of England & Wales to being an international arbitrator?

Before I was appointed as a High Court Judge, I had been an international arbitrator for many years. The practice and procedure in the High Court, particularly the Technology and Construction Court (TCC) had been modernised over recent years and incorporated into the CPR under the Woolf Reforms. Best practice in international arbitration is very similar to the way in which the TCC conducts cases: concise pleadings, production of documents relied upon, limited discovery/disclosure, witness statements, expert issues, meetings, joint statements and reports, active case management and limited hearings managed under a chess clock procedure.

International arbitration also involves more cases with foreign law and a range of legal representation, with many advocates being more used to practice in their own jurisdictions, many of which have not yet embraced modern case management.

The main difference between international arbitration and High Court work was that, as a High Court Judge, the workload was very heavy and diverse. This included criminal cases on circuit outside London, criminal appeals in the Court of Appeal, personal injury, defamation and employment cases, acting as an interim applications judge, being judge in charge of the court estate, chairing an IT Committee, taking a leading role in implementing the Jackson reforms on costs, and encouraging more international work in the TCC.

5. As an international arbitrator, you would have arbitrated both common law and civil law disputes. Are there any significant differences between how arbitration proceedings under the different legal systems are conducted?

About half of my cases involve disputes which are subject to the substantive law of a common law jurisdiction and half are subject to the law of a civil law jurisdiction. In all such cases the Tribunal needs to understand the substantive law. Most advocates prefer to adduce substantive law by calling lawyers from the jurisdiction as expert witnesses who give evidence based on expert reports. In some cases, the advocates will themselves make submissions on the substantive law. Whilst some aspects of the substantive law may differ between common and civil law jurisdictions, ranging from the degree to which evidence is admissible to interpret a contract to the ability to recover interest, there are no significant differences in how the arbitrations are conducted based on whether the arbitrations are conducted under substantive civil or common law. Equally, whilst in some jurisdictions the choice of arbitral seat may have led to some mandatory procedural requirements, such as the form of the award or the way it is signed, the procedure usually follows the same pattern, with differences depending on the parties' preference rather than the difference between common and civil law jurisdictions.

6. Witness cross-examination is an integral aspect of both civil litigation and commercial arbitration. In your opinion, is it necessary for Counsel (or a party's representative) to adopt divergent cross-examination techniques with respect to the chosen dispute resolution forum? What cross-examination techniques are best suited for civil litigation as opposed to commercial arbitration?

Most advocates adopt a similar style of cross-examination whether they are appearing in litigation in court or proceedings before an arbitrator. Advocates and arbitrators from civil law jurisdictions tend to prefer non-adversarial questioning, whilst those from common law jurisdictions prefer adversarial cross examination. I therefore do not think that the differences arise from the fact that a case is being tried in civil litigation or commercial arbitration. My experience in court and arbitration is that the less aggressive advocates tend to obtain more evidence that supports their case and, whilst in some cases, cross-examination as to the credit of a witness is important, tribunals are not assisted by lengthy, aggressive cross-examination.

7. During your illustrious legal career, you would have been exposed to disputes across an array of industries. Is there any one industry which stands out as being the most interesting, and if so, why?

In my career at the Bar I dealt with many disputes relating to dredging. Many of those cases involved claims arising from unforeseen ground conditions and the effect of particular ground conditions on the output of a particular dredging plant. I became very familiar with these disputes and developed expertise in dealing with them. To that extent they were more interesting. However, I have always found an interest in the underlying engineering issues in all cases in all industries and the challenge that brings in aligning those issues with the provisions of the contract.

8. Mistakes of varying degrees are made by the Parties and/or their Representatives throughout the arbitration process. What are the 5 most common mistakes you have encountered in your experience as an arbitrator?

The main mistake is a failure to make "without prejudice save as to cost" offers to protect their clients against the costs of proceedings. Often parties' representatives are not familiar with the rules of costs recovery although in many cases they are as important as the underlying claims. A second mistake is to concentrate on liability issues and ignore quantum. A wise construction lawyer, Sir Patrick Garland, once observed that if parties concentrated on quantum issues they might never have to consider liability issues. Another mistake is for advocates, particularly where there are teams of lawyers from law firms acting as advocates, not to concentrate on the central issues but treat all issues as equally important, often because the individual advocates do not see the whole case. A further mistake is to assume that the Tribunal is impressed by multiple interlocutory applications, often with the purpose of trying

to portray that party as the party with merit. Experienced advocates should manage to resolve such applications in a sensible manner and the applications frequently have the opposite effect. Finally, where the Tribunal rules against a party, it is a mistake to think that the Tribunal will be impressed by the unsuccessful party reserving rights to argue that the decision was in error or there was a lack of due process!

9. In your opinion, what are the ideal qualities for an institution which intends to provide administrative services in an arbitration?

Above all administrative efficiency. Parties choose an institution to ensure that the initial stages of the arbitration and the appointment of arbitrators are dealt with efficiently. Arbitrators also appreciate institutions where any communications are dealt with efficiently. Otherwise, the rules of different institutions or the fees charged are very often similar.

10. You recently concluded an international arbitration at the Asian International Arbitration Centre (AIAC). How would you describe your experience of the administrative services provided by the AIAC? In your opinion, how do the AIAC's facilities compare with other arbitral institutions?

I and my arbitral colleagues had a very positive experience in our recent AIAC arbitration which was conducted efficiently. The AIAC provided services which were very comparable with the other major arbitral institutions. They also assisted by providing a dedicated member of staff to act as tribunal secretary during the hearing which was a great benefit. Equally, we were impressed by the hearing rooms and the IT facilities and support which were available, as well as the staff responsible for these facilities and support.

11. Being an international arbitrator, you would have dealt with a range of institutional rules, some of which are modelled on the UNCITRAL Arbitration Rules and others which would diverge from same. Is there any particular procedural aspect of arbitration proceedings you would recommend arbitrators be particularly wary of when conducting arbitration proceedings under an unfamiliar set of arbitration rules?

There is always a need to check how the particular rules align with any mandatory provisions of local law. For instance, some rules or local laws include mandatory provisions relating to time limits between commencement of the arbitration and the issuance of the award. Equally there are requirements as to the form of the award which might be in the rules or the local law. Therefore, my advice is to read the rules but also find out about the local law.

12. What advice would you offer to students and young practitioners who desire to embark on a career in international arbitration?

Gain in-depth experience of litigation practice in your own jurisdiction before embarking on international arbitration and try to observe an international arbitration before acting in one. The experience in litigation forms an essential basis and allows a practitioner to appreciate any differences between that litigation procedure and international arbitration.

13. In your opinion, what are essential characteristics a person needs to succeed in dispute resolution?

In forms of dispute resolution which lead to a determination it is necessary to assess the evidence and the law. Each party will generally put forward a case based on the evidence and the law which that party thinks is compelling. Sometimes it is not compelling and the decision is straightforward. Usually, though, there is a need to assess the evidence carefully and analyse the legal arguments. This often takes time and I consider that time and perseverance are the main characteristics. Whilst mediation and other forms of dispute resolution need different skills, perseverance is always important.

14. What is your perception of the future of international arbitration and/or dispute resolution in general?

International arbitration faces a number of challenges. Arbitrators have often taken little interest in the cost of arbitration whereas courts have taken a firmer grip. International Commercial Courts, including the one in Singapore where I am a judge, are providing an alternative which some parties find preferable for their international disputes. Short timetables to a decision, particularly by adjudication in construction cases, are showing that parties would prefer speed to rigorous investigation. This was an original premise of arbitration but often courts can now act as efficiently, if not more efficiently than arbitration. However, the concept of international arbitration still retains many benefits and arbitral institutions and arbitrators are seeking to address any shortcomings. Non determinative methods of dispute resolution, negotiation, mediation and temporarily binding adjudication are often preferable ways of resolving disputes. But international arbitration will continue to provide a method of choice for those cases where a determination is needed.

WORKSHOP
ON DRAFTING SPORTS CONTRACTS

3:00 P.M. – 6:00 P.M.
(REGISTRATION COMMENCES AT 2:30 P.M.)

12 SEPTEMBER 2019
SEMINAR ROOM 1, AIAC

Sports contracts are no different than any other commercial contract one may encounter. Most sports contracts usually involve, amongst others, the engagement of athletes by teams or clubs, sponsorship rights, participation rights as well as media rights. In this day and age, top professional athletes command some of the highest paychecks in the world. Negotiation of such contracts in most circumstances involve not only the athletes and the lawyers representing these athletes but also sporting agents as well. Like any other contract, poorly-drafted sports contracts can create inconsistencies in the agreement, which may give rise to disputes and conflicts. These contracts therefore deserve the same precision of draftsmanship as any other instrument.

Recognising the growing interests in sports law and sports contracts, the AIAC introduces its first ever Workshop on Drafting Sports Contracts. The workshop aims to provide an overview and introduction to the fundamentals in drafting sports contracts, such as the basic principles and essential provisions as well as what to look out for in drafting a comprehensive sports contract.

The workshop will be conducted by sports law experts as well as practitioners experienced in negotiating and drafting sports contracts for some of the top athletes in the country.

PROGRAMME

2:30 - 3:00 P.M
Registration

3:00 - 4:30 P.M
The Fundamentals of Sports Contracts: Types, Basic Principles, and Salient Features of a Sports Contract

4:30 - 4:45 P.M
Networking Break

4:45 - 6:00 P.M
Drafting a Comprehensive Sports Contract: What to Look Out For

WORKSHOP FEE : RM30.00

WORKSHOP PACKAGE DEAL : RM50.00

Enjoy a discounted rate of RM50.00 when you register for the Workshop on Drafting Sports Contracts which will be held on 12th September 2019 and the Workshop on Constitution of Sporting Bodies which will be held on 19th September 2019 together!

Full Name .....

Designation and Company / Organization .....

Address .....

Tel : ..... Fax : ..... Email : .....

Registration Fee (please tick one)

Workshop on Drafting Sports Contracts	☐	RM 30.00
Package Workshop Fee Workshop on Drafting Sports Contracts on 12th September 2019 and Workshop on Constitution of Sporting Bodies on 19th September 2019	☐	RM 50.00

Mode of Payment (please tick one)

☐ Cheque/ Bank Draft made payable to **"AIAC EVENT"**

☐ Bank Transfer/ Account Deposit

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3RD AIAC-ICC PRE-MOOT FOR THE WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT

22ND-24TH MARCH 2019

SETTING THE STAGE: AIAC & THE YOUTH

AIAC is, and always has been, dedicated to the cause of capacity building, engaging all stakeholders in the dispute resolution culture not only in Malaysia, but also across the Asian region. Among these opportunities, of particular significance are mooting competitions and joint conferences, bringing under a single roof training in advocacy, cultural learning, networking, and the ability to interact with the industry's finest. As our Director, Mr. Vinayak Pradhan, remarked in the AIAC Mooting Workshop in January 2019, creating leaders in the demanding area of dispute resolution, "is a product of intense refinement". Moots are a fertile source of such refinement, where students work in a team, manage their time, and most importantly, learn from their mistakes early on. Our unyielding commitment to this cause is the bedrock upon which we hosted the inaugural joint conference by the ICC Young Arbitrators Forum and AIAC's Young Practitioner's Group (the "Conference") and the record breaking 3rd edition of the AIAC-ICC Vis Pre-Moot ("Pre-Moot") in March 2019.

CURTAIN RAISER: ICC YAF-AIAC YPG CONFERENCE

The Conference was held on 21st March 2019, drawing participation from a diverse mixture of participants, coaches and arbitrators of the Pre-Moot. The conference was poised as a prelude for the Pre-Moot, where experienced practitioners and academics dissected the anatomy of international arbitration in four sessions, with a special emphasis on the legal issues revolving around the Moot Scenario of the 26th Willem C. Vis International Arbitration Moot. The first session began with opening the Pandora's box of procedure, detailing the implied powers of the Tribunal and expert witnesses. The conference moved on to the substantive issues in the moot, including choice of law clauses, force majeure and hardship in international sales contracts. The final session wrapped these issues neatly with a discussion on the enforcement of awards. In closing, the students especially benefitted from the panel discussion on "Careers in International Arbitration: Reflections from the Front Lines" segueing into the closing ceremony of the Conference and the welcoming reception for the Pre-Moot.

MAIN FEATURE: 3RD AIAC-ICC PRE-MOOT

The Pre-Moot was held between 22nd and 24th March 2019 with a record number of 90 teams reflecting 380 participants from 21 countries. The Pre-Moot also welcomed 200 arbitrators, taking a total of 180 hearings making it the largest Vis Pre-moot internationally, leading up to the competitions in Hong Kong and Vienna. Throughout the whole Friday until Saturday morning, all teams pleaded a total of four times in the general rounds, gathering valuable feedback and perspectives from seasoned arbitrators as they progressed. The Elimination rounds commenced on Saturday afternoon featuring the top 32 teams, battling it out in the Round of 32, Round of 16 and Quarter finals. The final day saw the Semi-Finals, the Malaysian Finals and International Finals, culminating in the Awards Ceremony. The Pre-Moot closed with the Pre-Moot's signature Cultural Gala Dinner featuring traditional Malaysian dances to celebrate the diversity of the students, arbitrators and coaches.

Since the Pre-Moot's first edition in 2017, we have seen exponential growth in both the number of beneficiaries, and consequently, our expertise in capacity building. For the last twenty-five years, the Vis Moot has been at the forefront of imparting clinical legal education. As a forward looking institution, it becomes imperative to carry forward the opportunity to apply a comparative perspective in advocacy, an effort which is blind to borders but alive to cultures. In this effort, the AIAC extends financial support to all teams by providing a stipend or accommodation for the duration of the Pre-Moot. This support, made possible by our sponsors, has made the critical difference between hopeful teams struggling to obtain resources, and winning teams with the benefit of nuanced practice.

Inherent in an international competition of this size is also an opportunity to make the Vis Moot more inclusive, and more accessible to the Asian region. In this spirit, our Pre-Moot did not require the teams to actually participate in the Vis Moot in Hong Kong or in Vienna. This meant that the teams who were unable to bear the financial commitment of travelling to the Vis Moot, were able to enjoy a similar experience in Kuala Lumpur, the melting pot of the East. Further, the winner of the Malaysian finals was completely sponsored by AIAC for their onward journey to Vienna or Hong Kong, with the hope that more Malaysian students may achieve laurels in the Vis Moot.

These initiatives are a reflection of our philosophy: being an Asian-oriented, Asian-serving and Asian-marketed premier arbitral institution.

TAKING A BOW: AWARDEES OF THE 3RD AIAC-ICC PRE-MOOT

The Organising Committee congratulates the following winners of the 3rd edition of the Pre-Moot:

1. TEAMS

Champion AIAC-ICC Award	National Law Institute University (Bhopal)
Runner Up AIAC Award	National Academy of Legal Studies and Research, University of Law
3rd Place AIAC Award	National Law School of India University, Team 1
4th Place Shearn Delamore & Co Award	Pontifical Catholic University of São Paulo
Champion of the Malaysian Final Lee Hishammuddin Allen & Gledhill Award	International Islamic University Malaysia, Team 1
Runner-Up of the Malaysian Final Munhoe & Mar Award	Brickfields Asia College, Team 3
Spirit of the Pre-Moot Aarna Law Award	American University of Central Asia

2. INDIVIDUAL ORALISTS

Best Oralist of the International Final Cecil Abraham & Partners Award	Aditya Wadhwa, National Law Institute University (Bhopal)
Best Oralist of the Malaysian Final Sivabalan Sankaran Award	Nur Zulaikha Rohaizat, International Islamic University Malaysia, Team 1
Best Oralist of the Elimination Rounds MAC Construction Consultant Sdn Bhd	Nur Zulaikha Rohaizat, International Islamic University Malaysia, Team 1
Best Oralist of the Preliminary Rounds Shearn Delamore & Co Award	Ern Xu Seah, Erasmus University Rotterdam
Runner Up Best Oralist of the Preliminary Rounds Joy Ramphul Arbitration Chambers Award	Shreyas Sridhar, West Bengal National University of Juridical Sciences
3rd Best Oralist of the Preliminary Rounds Joy Ramphul Arbitration Chambers Award	Siddharth Jain, National Law University Odisha
4th Best Oralist of the Preliminary Rounds Shearn Delamore & Co Award	Isabela Porto, Pontifical Catholic University of São Paulo
5th Best Oralist of the Preliminary Rounds Shearn Delamore & Co Award	Subash Jai Devaraj, Advance Tertiary College (Kuala Lumpur), Team 2
6th Best Oralist of the Preliminary Rounds Shearn Delamore & Co Award	Prerona Banerjee, National Law University Odisha

3. BEST MEMORANDUM AND OUTLINES

Best Memorandum on behalf of the Claimant James Monteiro Award	Dar Al-Hekma University
Best Memorandum on behalf of the Respondent James Monteiro Award	Brickfields Asia College, Team 1
Best Outline on behalf of the Claimant LexisNexis Malaysia Award	Advance Tertiary College (Kuala Lumpur), Team 2
Best Outline on behalf of the Respondent LexisNexis Malaysia Award	International Islamic University Malaysia, Team 2
Honourable Mention for the Best Memorandum on behalf of the Claimant Joy Ramphul Arbitration Chambers Award	Ateneo de Manila University
Honourable Mention for the Best Memorandum on behalf of the Respondent Joy Ramphul Arbitration Chambers Award	Erasmus University Rotterdam
Honourable Mention for the Best Outline on behalf of the Claimant Chambers of Shanta Mohan Award	International Islamic University Malaysia, Team 7
Honourable Mention for the Best Outline on behalf of the Respondent Ramesh Bharani Nagaratnam Chambers Award	International Islamic University

The AIAC also thanks the sponsors, supporting organisations, arbitrators, volunteers and participating students for their invaluable contribution to the continuous success and unprecedented growth of the AIAC-ICC Pre-Moot.

Exploring the High Seas

In Conversation with

&

Sitpah Selvaratnam Jeremy M. Joseph

The maritime industry has always been an integral component of modern societies. As is the case with other vehicles for global commerce, disputes in the maritime industry are diverse and inevitable. For instance, it is not unusual for ships to get involved in collisions, salvage, towage or pollution claims, as well as contractual claims relating to cargo, passengers or insurance. The AIAC is grateful to have been given the opportunity to interview two leading maritime law practitioners in Malaysia – Sitpah Selvaratnam[1] ("SS") and Jeremy M. Joseph[2] ("JJ") – to share their insights on their careers in the maritime industry, the practice of maritime law and the future of the maritime industry in Malaysia, the excerpts of which are set out below.

1. How would you describe the field of Maritime Law?

SS: To me, maritime law is evergreen. It is always exciting and interesting as it is an intrinsic part of international trade and commerce.

Many commercial parties are woven into maritime affairs. There are shipowners carrying goods. Commodity traders and manufacturers importing and exporting goods by sea. Bankers providing ship and trade financing. Insurers securing risks at sea. Port operators, hauliers, oil majors, off-shore oil and gas rigs, shipyards, suppliers, loss adjusters, surveyors, and more. The maritime industry is multi-faceted and rides the world economic cycle. This forms the colourful backdrop to maritime disputes, and maritime law.

The shifting balance between the oversupply of ship tonnage, and increased demand for ship space; and upward or downward movement in the supply and demand for commodities; naturally results in fluctuations in market price for goods and freight rates payable to shipowners. This commercial reality impacts directly on the maritime disputes that arise. Parties invariably want to take advantage of a change in market, and you then have a maritime conflict on your hands! That makes maritime law dynamic. Every case has a twist to its facts, that is refreshing.

JJ: Maritime law is a genus of commercial law. It is the law involving ships and commerce.

2. What is the significance of the maritime industry in Malaysia?

SS: The maritime industry is fundamental to the economic success of Malaysia. An efficient and effective maritime sector underpins trade facilitation. Malaysia's trade growth therefore, is dependent on a sound and strong maritime industry.

Shipping transportation is unfortunately, undervalued by the average person. It is not a common means of passenger transfer unlike air, road or rail. So, it is easy to forget its relevance. But the clothes we wear, the computer parts we use, and the imported foods we eat are mostly brought to us through shipping, and the efficient connectivity of our maritime industry. More than 90% of Malaysia's internationally traded goods are carried by sea through our 7 international sea ports.

Malaysia's palm oil, liquefied natural gas and petroleum produced; and rubber gloves, electrical and electronic parts manufactured, depend on our maritime industry to ensure the timely import of vital equipment and components, and the prompt export of finished products. Other industries within the economy, such as the construction sector, equally rely on plant, equipment and materials being shipped in on time to meet their performance obligations.

Our long coast line, placed along a very critical trade sea route between India, the Middle East, Europe and China, Japan, Korea, positions us well to properly develop and reap

[1]Sitpah Selvaratnam was admitted to the Malaysian Bar in 1990 and commenced her career at one of the largest law firms in Malaysia, where she later became Partner. At the turn of the millennium, Ms Selvaratnam co-founded Tommy Thomas. Having graduated from Cardiff and Cambridge Universities with specialization in International Trade and Maritime Law, shipping and admiralty issues have been her passion since the mid-eighties. In 2002, Ms Selvaratnam was appointed to the first Admiralty and Shipping Law Committee established by the Malaysian Bar Council and later elected its Chair, signaling recognition by her peers of her expertise in this specialised area of law. Having presented papers on the reform of the admiralty and shipping laws and practice in West Malaysia, championed the need for a Specialist Admiralty Court and initiated the two Admiralty Practice Directions which came into effect in 2007 and 2012, Ms Selvaratnam continues her active involvement in shaping the nation's maritime laws and practice. She was the founding President of the International Malaysian Society of Maritime Law, a society established in April 2016 and affiliated with Comite Maritime International.

[2]Jeremy M Joseph's areas of practice are maritime, insurance and commercial law. He is one of the most experienced experts in maritime legal advice in Malaysia and his expertise in maritime law is sought after all over the world. Originally a marine insurance broker, Mr Joseph has knowledge of the maritime and insurance industry. He has been acknowledged by Legal 500 and Chambers Asia consecutively for 11- years from 2009 to 2019 as a leading Malaysian shipping lawyer. Mr Joseph currently advises all sorts of companies and organisations from shipowners and P&I clubs, to insurers, banks, charterers and a variety of other commercial establishments. His firm, Joseph & Partners, has been consistently ranked in the top category every year since 2010 as a leading Malaysian shipping law firm by international publications, Legal 500 and Chambers Asia. The firm also won the prestigious "ALB Malaysia Law Awards for Shipping Law Firm of The Year", hosted by Asian Legal Business and Thomson Reuters for 3 years in a row consecutively (2014-2016). Mr Joseph is the current President of the International Malaysian Society of Maritime Law (IMSML).

the economic benefits of our maritime activities. Transshipment (i.e. transit by road, rail or sea) through Malaysia of global goods, moving between Eastern and Western countries, can be optimised. With the East Coast Rail Link (ECRL) back on track, we can expect to see the East-West coastal connection give rise to greater transhipment activities, that would translate into enlarged employment and revenue opportunities.

Malaysia's jewel in the crown – her off-shore oil and gas exploration and production – is substantially supported by the maritime industry. An off-shore oil rig is conceptually a vessel, and is manned by personnel with marine skills.

Anchor handling and supply vessels shuttle between rigs and shore carrying supplies, stores and personnel. Floating production storage platforms are ships converted to conveniently store oil produced at sea. Accommodation barges float at sea, housing off-shore oil and gas workforce. The maritime industry is therefore, crucial to Malaysia's oil and gas industry, that generates significant employment and revenue to Malaysia.

JJ: I echo Sitpah Selvaratnam's response.

3. What inspired you to pursue a career in Maritime Law?

SS: I received good advice from a lawyer uncle, A.D Rajah in 1985 as I left to read law at the University of Wales in Cardiff, that Malaysia was positioning itself to become a maritime nation and I should undertake the study of maritime law. University of Wales at Cardiff offered Maritime Law under the tutelage of the internationally renowned Professor Cadwallader. It was not a chance to be missed. Probably one of the best decisions of my life! I instantly fell in love with the subject, and the romance has continued for more than 30 years, with me later pursuing my post graduate reading in law at Cambridge University on the Carriage of Goods by Sea, and International Trade.

JJ: I took an interest at the undergraduate level when I was reading law in Wales. The lecturer, Corbett Spurin, got me thinking about pursuing a career in maritime law. After completing my degree, I was keen to learn from the industry and so I worked in the field of marine insurance for several years before I embarked on a legal career.

4. As a legal practitioner, what sort of maritime disputes do you typically encounter?

SS: In my 30 years of practice in maritime law, I have encountered many variations and permutations of disputes surrounding loss of cargo or short delivery of cargo carried on ships under bills of lading or charterparties. Delivery of cargo without bills of lading, or using switched bills of lading are common. Claims for loss of or damage to ships, caused by collision between ships or by an explosion or leakage of dangerous cargo carried on board, are not unusual. Bunker supply disputes are common. There was a particularly interesting situation a few years ago, when a large international bunker supplier became insolvent; raising a fair amount of complex issues surrounding the right to arrest a ship for unpaid bunker supplied.

In this region, with much off-shore oil and gas activity, claims relating to towage, collisions between anchor handling or supply tugs and drillings rigs, or the fouling of tele-communication or pipelines at sea by tug anchors, are not uncommon. Also, claims for breach of charterparties relating to the hire of ships, payment of demurrage, exercise of liens over cargo; or other breach of maritime contracts including with shipyards, are often seen.

Of course, an arrest of a ship for security is inevitable in most of these situations. Arrest of ships as security for arbitrations in foreign seats are even more recurrent. International trade disputes for the failure to supply, or to take delivery of cargo are also encountered, especially when I sit as arbitrator.

JJ: I frequently handle a whole range of maritime disputes. These include bills of lading and charterparty disputes, admiralty arrests, insurance claims, ship repair and ship building arbitration, crew claims, contracts of affreightment disputes, etc.

5. In your opinion, what is the most effective mechanism for resolving a maritime dispute – litigation, arbitration or mediation?

SS: Having been involved in Court litigation, arbitration and mediation of maritime disputes over many years, in my assessment a combination of arbitration with Court assistance for interim relief by way of arrest or injunction, is most effective.

In arbitration, parties are able to select arbitrators with specialist maritime knowledge. Alternatively, parties can contractually stipulate the desired expertise of the arbitrators to be appointed by a designated appointing authority. This is hugely beneficial to the efficacious determination of issues in a maritime dispute that meet the expectations of the maritime parties, who demand that international norms and best practices be well understood by the dispute resolver. The arbitral award is also more readily enforced around the world, as compared to a national Court Judgment. This is an important factor, as maritime disputes are international in nature, and involve parties from different countries.

Maritime claimants have the rare privilege of obtaining security for their claim before the final determination of the dispute, in the form of an arrest of a ship. This right to security however, can only be exercised by invoking the admiralty jurisdiction and assistance of the Court. Hence, the combination I suggest. Mediation is always available to parties, adjunct to the formal dispute resolution mechanism chosen.

JJ: Arbitration is the most popular mode of resolving maritime disputes. But it really depends on many factors. For example, the location of the Defendant and the effectiveness of the judicial and enforcement process of the country can influence the choice parties make on whether to litigate or arbitrate. If the Defendant is in a country, which has a very good judicial system and enforcement process, then parties may prefer to go to court because it is cheaper and direct enforcement of the judgment is easier. However, if the Defendant is in a jurisdiction, which does not recognise a judgment obtained from another country then arbitration is the better choice. This is because many countries have laws that reciprocate and recognise arbitral awards from another country.

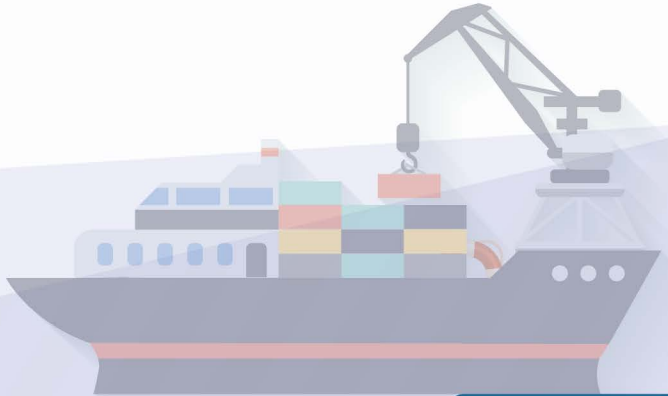
Another factor is that some countries have a judicial system that is inefficient or perhaps the Judges may not be familiar with maritime disputes. These would make arbitration more attractive as parties get to choose the arbitrators themselves, who are usually efficient and possess the requisite expertise. Mediation is suitable in cases where parties want to continue their commercial relationship and wish to resolve matters without spending too much money on fees. Mediation, whilst not as popular as litigation or arbitration, is starting to gain recognition especially as a first-tier mechanism to resolve disputes before resorting to court or arbitration.

6. How is the procedure for conducting maritime arbitrations distinct from commercial arbitrations?

SS: The process and procedure in maritime arbitration is not very different from commercial arbitration. The obvious difference would be in the interim relief of an arrest of a ship in support of the maritime arbitration, that a maritime claimant would take advice on in the course of a maritime arbitration. This is not a consideration in commercial arbitrations. Injunctions to restrain dealings with cargo too may be more common in maritime arbitrations. Demurrage claims, which are essentially claims for the detention of a ship, can largely be dealt with by means of a documents-only arbitration. So, a fast track arbitration process may be suited to more maritime than commercial arbitrations. The expertise of the arbitrators and Counsel is imperative. The maritime terminology and commercial context of the dispute is so peculiar to the maritime industry, that to appoint persons without the necessary maritime experience will be to do the dispute and the parties a significant disservice. Whilst persons with maritime expertise are generally able to handle commercial arbitrations, the reverse may not be true. The choice of specialist maritime arbitrators and Counsel is critical to a successful maritime arbitration.

JJ: The procedure for maritime and commercial arbitration is almost the same. The arbitration agreement is usually included in contracts based on uniform contracts drafted and periodically updated by international maritime organisations such as the Baltic and International Maritime Council (BIMCO), the Association of Ship Brokers & Agents (ASBA) and the Japan Shipping Exchange (JSE). These are, among others, time and voyage charter-parties and another kind of contract for transport of goods (e.g. bareboat charter agreements, contracts of affreightment), shipbuilding, ship repairing and ship scraping contracts, salvage agreements, etc.

Perhaps, the procedures in maritime arbitrations may be slightly different in controversies, which involve factual or technical questions, whose solution would require knowledge of maritime trade. This may influence the choice of arbitrators and technical and legal experts, who for a long time were selected amongst experienced commercial men than among lawyers.



7. In your opinion, how effective are the AIAC Arbitration Rules 2018 and the AIAC Fast Track Arbitration Rules 2018 in resolving maritime disputes? Should one of these rules be preferred over the other for the maritime industry?

SS: Both sets of AIAC rules well cater for maritime arbitration. The AIAC Fast Track Rules were particularly drawn to facilitate the demurrage, documents-only, type of maritime claims.

JJ: Both would be suitable for maritime arbitrations. However, under the Fast Track Rules, claims which are less/unlikely to exceed RM150,000 (in a domestic arbitration) and USD75,000 (international arbitration) shall immediately proceed as a documents-only arbitration unless a substantive oral hearing is deemed necessary by the arbitrator upon consultation with the parties. Documents-only hearings can be decided by a panel of two arbitrators and as a rule, do not require the physical attendance of parties. The time frames for submission of statements, hearings and the making of awards differ. Obviously, arbitration under the Fast Track Rules is more cost effective. Furthermore, the rules have been drafted to make the assessment of costs more predictable. The Fast Track Rules comprises a schedule of Arbitrator's Fees which arbitrators must have regard for albeit are not bound by while fixing fees. Also, the costs of arbitrations under the Fast Track Rules are capped. For documents-only hearings, costs must not exceed 30% of the total amount of the claim and for arbitrations with a substantive oral hearing, costs must not exceed 50% of the total amount claimed.

In view of expediency, the Fast Track Rules restrict the use of expert evidence or supplementary expert evidence. To adduce expert evidence, the party wishing to do so must first request for permission or leave from the Arbitral Tribunal within 14 days after the Statement of Reply or service/exchange of expert reports have been delivered. Most disputes arise out of construction, commodities, insurance, maritime, energy and commercial disputes. The Arbitration Fee is divided into two categories – the Administrative Charges and the Tribunal's Fee. The Administrative Charges equate to 20% of the Tribunal's fees and covers the AIAC's cost of administering the arbitration. The Tribunal's Fee is divided into different scales for International and Domestic Arbitrations but is very reasonable.

8. Over the past decade or so, it has been noted that many Malaysian maritime disputes have been subject to foreign dispute resolution mechanisms, such as arbitration under the Singapore International Arbitration Centre Rules or the London Maritime Arbitrators Association Terms. In your opinion, what has caused Malaysian disputes to be taken away from its shores?

SS: If the parties to the dispute are both Malaysian-based entities, the dispute should naturally have its home ground for resolution, in Malaysia. Such parties may nevertheless, choose Singapore or London for the resolution of their disputes. This is an indication of the level of confidence and comfort in having their disputes resolved in Malaysia. Often, parties look for a neutral venue or one that has a sound track record for independence and quality administration of disputes. London is a well stablished seat for maritime dispute resolution. However, the success of Singapore is very inspiring, and may be emulated elsewhere to provide parties with a wider choice of neutral seats or venues for maritime dispute resolution.

JJ: I have seen maritime contracts between two Malaysian parties who agree to resolve their disputes in London or Singapore. This is not only perplexing but a cause for concern. It seems that within the domestic market, parties prefer to resolve their arbitration differences outside Malaysia. Perhaps, they are either unaware or lack confidence in Malaysia as a venue to resolve their disputes.

I think there is insufficient educational training, investment and marketing to change the perception of the domestic maritime market and gain their confidence in our arbitration services.

Malaysia has everything that London and Singapore can offer with the added advantage of being cheaper in comparison to them. Even if parties prefer to use international lawyers or arbitrators, which they can free do so in arbitration disputes, they can still use Malaysia as a host venue. It is still cheaper than travelling to London or using the services of their arbitral institutions or associations.

Of course, there is still some work needed to widen our pool of local talent in the shipping bar and arbitrators and update some of our maritime laws but even as matters stand now, there is gravitas to compete at an international level.

9. Do you believe that Malaysia has the potential to become a hub for maritime arbitration? What sort of framework does Malaysia presently have in place (or should Malaysia put in place) to achieve this potential?

SS: Malaysia has the potential to be a hub for maritime arbitration. Its substantial maritime activities on land and off-shore, its many active sea ports and oil-rigs, and its active trade portfolio, all have the capacity to generate maritime disputes which are ripe for resolution by arbitration in Malaysia. The China Belt and Road Initiative, and the corresponding maritime infrastructure collaboration, can potentially position Malaysia to be a country neutral for international or regional maritime dispute resolution.

Certainly AIAC has the soft-skills, that take the form of its well respected and experienced Director, Mr. Vinayak Pradhan who is a distinguished international arbitrator himself and its many Case Counsels that hail from numerous countries; the tools, by way of its internationally accepted Rules and the fine administration thereof; and structural hardware, in terms of its superior state of the art technology in its numerous hearing rooms, housed in a large heritage building; to provide world class services in administering maritime disputes.

Malaysia's Admiralty Court has exhibited, if not before, by its handling of the arrest, preservation, management and sale of the Superyacht, Equanimity, that it has the capacity and capabilities of affording the highest standards of assistance to support maritime arbitrations seated in Malaysia.

Key international arbitration and maritime laws are applied in Malaysia, including the New York Convention and UNCITRAL Model Law on International Commercial Arbitration; the Hague Rules for the carriage of goods by sea; 1996 Convention with the 1996 Protocol on shipowners' limitation of liability, and the 1952 Arrest Convention. Malaysia is well ready to receive and determine maritime disputes.

But to be a maritime dispute resolution hub, more has to be done. Malaysia needs to have the single-minded political will to make maritime superiority its priority. To my mind, given the regional landscape, Malaysia needs to excel as a maritime nation, to become a maritime dispute resolution hub. This means focused attention given to the sustained and expedited review and enhancement of maritime laws, and upgrading of skills and quality of services rendered across the entire gamut of maritime activities. We need a critical mass of highly specialised persons to generate an ecosystem and the energy necessary to attract confidence. These include lawyers, arbitrators, judges, law makers, and law enforcers completely familiar with and experienced in maritime law; not just with maritime safety and trade. This would enlarge the width and depth of our quality of maritime services and deliverables. The ancillary support services of master mariners, naval architects, marine engineers, surveyors, adjusters, and shipyards to support maritime dispute resolution services is equally important. Inviting foreign expertise to set-up base in Malaysia would be strategic to generate a maritime hub. That would, in our context, be a necessary precursor to being a maritime dispute resolution hub.

JJ: Malaysia has the potential to become a hub or I would not be wasting my time and have invested half my adult life into maritime law. The fact is that it is cheaper to resolve maritime disputes in Malaysia than in many other countries within the same time zone. Malaysia today has a world class arbitration centre. Why do people look at London and Singapore? The principal reasons cited are:

- *the availability of specialist counsel, solicitors and experts;*
- *availability of experienced specialist arbitrators (particularly in the maritime field);*
- *the experience of the Commercial Court in exercising its supervisory jurisdiction and in ordering "interim measures" such as injunctions and document or property preservation orders; and*
- *the wealth of English commercial and maritime case law.*

I would postulate that the framework mentioned above is already available in Malaysia with the existence of the specialist Admiralty Court, a shipping Bar, an active Maritime Law Society and AIAC as a world class arbitration center.

But we must be more aggressive in promoting Malaysia as an arbitration venue especially within the domestic market first. Over the next decade, we would like to attract international maritime arbitration cases and sit among the ranks of London, Hong Kong and Singapore.

10. Congratulations on recently being appointed as the President of the International Malaysian Society of Maritime Law (IMSML). What role does the IMSML plan to play in 2019 in shaping the maritime industry in Malaysia?

JJ: As a Society, we intend to continue our focus on delivering quality maritime law training, networking events and conferences. But we are also committed to working with the Government to push for much needed maritime law reforms. We also intend to prioritise assisting the AIAC to promote themselves in the maritime industry as an institution who can offer their services and facilities for parties to resolve their maritime disputes.

11 What inspired you and your colleagues to found the IMSML? As the immediate Past President of IMSML, what is the importance of a body like IMSML in promoting maritime arbitration in Malaysia?

SS: It was to place maritime law and maritime arbitration in the forefront of maritime minds rendering maritime services in Malaysia, that IMSML was established. The pioneer office bearers of IMSML, Justice Ong Chee Kwan, Jeremy Joseph and I, believed that IMSML had to fill a void in the Malaysian maritime terrain. We needed an active Maritime Law Society to forge the various maritime interests, and focus attention on the common direction we needed to collectively take. IMSML was, and is, viewed as the means by which the various sectors of the maritime industry can gather, collect and generate a single voice to drive development in Maritime Malaysia. We felt that the naturally segmented maritime industry can secure a neutral platform through IMSML, because the law is the constant; regulating all activities undertaken by every sector of the maritime industry. It provides the common intersection of the varied maritime interests, that can help unify our maritime initiatives.

IMSML's goal is to bring excellence in maritime services by constantly highlighting the demands of international laws and conventions. Through IMSML, there is repeated visibility of maritime law and the choice of maritime arbitration in Malaysia.

IMSML's virtual secretariat is AIAC. IMSML's many events, including its several International Maritime Law Conferences, Maritime Law Review Workshops, and Evening Interaction Series of Seminars, are all held at AIAC. Maritime users are frequently exposed to the superior infrastructure, capacity and capability of AIAC. IMSML is the de facto ambassador of maritime arbitration in Malaysia. Visibly, capacity and capability are key to promoting confidence in a dispute resolution centre. That is well underway through IMSML.

Malaysia's Investment Treaty Disputes: Experience of Malaysia and its Investors

By Daniel Chua[1]

Malaysia and its investors are no strangers to investor-state disputes arising from Bilateral Investment Treaties ("**BIT**") and Multilateral Investment Treaties ("**MIT**"). Interest in Investor-State Dispute Settlement ("**ISDS**") is growing, both in the use of investment treaties to bring disputes, but also in a negative way, with criticism of the system of ISDS from non-governmental organisations. Since 2015, the AIAC's Investment Treaty Arbitration and International Law department has been playing an active role to promote ISDS by organising various capacity-building events in Malaysia.

In this piece, we briefly consider the reported investor-state disputes involving Malaysia and its investors which have concluded, settled, or terminated.

Gruslin v Malaysia (I) and (II)

The first reported investor-state arbitration involving Malaysia arose in *Gruslin v Malaysia (I)* relating to a construction dispute. Very few details are available, apart from the claim being registered with International Centre for Settlement of Investment Disputes ("**ICSID**") in January 1994, and both parties agreed to discontinue the proceedings in April 1996.

In *Gruslin v Malaysia (II)* the same Belgian investor, Gruslin, made a claim under the Belgium-Luxembourg Economic Union-Malaysia BIT (1979) after suffering losses on his portfolio investments in the Kuala Lumpur Stock Exchange ("**KLSE**"). Gruslin claimed that he made an investment of approximately USD2.3 million in securities listed in the KLSE through an entity known as Emerging Asian Markets Equity Citiportfolio, managed by Citiportfolios SA. In 1997, Malaysia was hit by a currency crisis, which resulted in the Central Bank of Malaysia imposing exchange control measures on the trading of Malaysian Ringgit on 1 September 1998.

Gruslin contended that the exchange control measures were contrary to Malaysia's Belgium-Luxembourg Economic Union-Malaysia BIT commitments and caused losses to him. ICSID proceedings were registered on 12 May 1999.

A jurisdictional objection was raised about whether Gruslin's investment was covered by the BIT. Under Article 1(3) of the BIT, a covered investment made in Malaysia had to be classified as an "*approved project*" by the appropriate Ministry in Malaysia, in accordance with relevant legislation and administrative practice.

Malaysia argued that Gruslin's investment was not within the definition of an approved project and therefore did not qualify as an investment under the BIT. Malaysia relied on historical evidence of approvals granted to other investments, i.e. correspondence between Malaysia's Ministry of International Trade and Industry and various foreign governments and foreign investors who had obtained "*approved project*" status for their investment.

Gruslin relied on a note verbale (a form of diplomatic note) exchanged between the Malaysian Foreign Ministry and the Dutch Embassy in Malaysia with regard to the clarification of the term "approved project". It reads:

> *"[T]he term "Approved Projects' under Article 1(3)(i) of the Agreement on Encouragement and Reciprocal Protection of Investments between Malaysia and the Belgo-Luxemburg Economic Union should be read together with Article 1(3)(a) to Article 1(3)(e). If any project undertaken does not require approval from the relevant designated Ministries, hence Article 1(3)(i) is not applicable."*

The tribunal rejected Gruslin's contention that the note verbale abrogated the requirements of Article 1(3) of the BIT. It was not clear whether the note verbale was intended for Gruslin's investment.

Gruslin also argued that, as the investment had been approved pursuant to Article 7 of the KLSE Listing Manual (which required approval of the then Capital Issues Committee ("**CIC**")), therefore the listing of any shares on the KLSE was an investment in an "*approved project*" for the purpose of satisfying Article 1(3) of the BIT.

The tribunal disagreed, taking the view that approval by the CIC only satisfied a general administrative requirement that the business of a corporation be approved by a governmental agency. By contrast, whether or not the investment was an "approved project" within the meaning of Article 1(3) of the BIT had to be an approval which was of a regulatory nature. The tribunal noted that "mere investments in shares in the stock market, which can be traded by anyone, and not connected to the development of an approved project, are not protected".

Having failed to demonstrate that his investments fell within the jurisdictional threshold of an "approved project", the

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tribunal upheld Malaysia's jurisdictional objection that Gruslin's investment was not covered under the BIT.

Malaysian Historical Salvors Sdn Bhd v Malaysia

The second ISDS claim against Malaysia stems from a salvage contract awarded by Malaysia to Malaysia Historical Salvors Sdn Bhd ("MHS"), a company registered in Malaysia and owned by a UK national. The contract was an industry-standard salvage contract on 'no-finds, no-pay' basis, a common practice in marine salvage contracts. Under the contract, Malaysia would receive the sale proceeds of any recovered items sold at auction, and thereafter disburse to MHS the portion of the sale proceeds belonging and due to them.

The dispute arose from the share of the proceeds of the auction of 24,000 intact individual pieces of porcelain recovered in the shipwreck Diana. MHS claimed that, under the contract, it was entitled to 70% of the amount realised at the auction, but was paid only 40% of the realised amount (some USD1.2 million). MHS further alleged that Malaysia withheld from sale some salvaged items of Chinese origin valued at over USD400,000 and did not pay its share of the best attainable value of the items.

Upon exhausting all recourse to local remedies, MHS registered its claim in ICSID on September 2004, based on violations of the Malaysia-United Kingdom BIT (1981). Malaysia raised a jurisdictional objection, alleging that the investment was not covered under the BIT.

According to Malaysia, the salvage contract was not an 'investment' within the meaning of Article 25(1) of the ICSID Convention as the contract was "*for the sole purpose of archaeological interest and the study of historical heritage*". In addition, Malaysia argued that the MHS case did not meet the conceptual requirements of an 'investment' espoused in *Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco*, as the marine salvage contract did not contribute to the economic development of Malaysia. Under the *Salini* test, an investment is seen to possess four elements:

- a contribution of money or assets.
- a certain duration.
- an element of risk.
- a contribution to the economic development of the host state.

Applying the test, the tribunal concluded that the contribution of money and assets, duration of the Contract, and risks undertaken by MHS were associated with the norms of a commercial marine salvage contract, and not in the sense of a qualitative investment in Malaysia under an investment treaty. In particular, the tribunal viewed that the salvage contract did not make either a significant or substantial contribution to the economic development of Malaysia. The tribunal held that it would not take into account any perceived political or cultural benefits arising from the contract when assessing whether it constituted an 'investment', except where such benefits would have had a significant impact on Malaysia's economic development. The contract when assessing whether it constituted an 'investment', except where such benefits would have had a significant impact on Malaysia's economic development. The tribunal therefore held that it was not "an investment" and dismissed the claimant's claim on jurisdictional grounds. Given this finding, the tribunal did not address the arguments on "approved project".

MHS sought to annul the tribunal's jurisdictional ruling. By a majority decision, an ad hoc annulment committee determined that the tribunal should have determined its jurisdiction by taking into account the meaning of a covered investment under the Malaysia-United Kingdom BIT, and not merely by reference to cases decided under the ICSID Convention. According to the committee, MHS contributed cultural and historical value to Malaysia.

In annulling the tribunal's findings, the Committee also directed Malaysia to bear the full costs of the annulment proceedings. However, MHS did not proceed with the arbitration.

MTD Equity Sdn Bhd v Chile

The first of the ISDS claims filed by Malaysian investors, MTD Equity Sdn Bhd ("**MTD**") held shares in El Principal SA, which was awarded a contract for the construction of a residential and commercial complex in Chile. MTD's claim arose from the Chilean government's rejection of a zoning development project application necessary to execute the development project.

A claim was filed under the Chile-Malaysia BIT (1992), arising from the cancelled real estate investment and development in the town of Pirque in Chile. The application to invest was approved by Chile's Foreign Investment Commitment ("**FIC**") and a foreign investment was signed by MTD, all in March 1997. As a result, MTD invested approximately USD17 million in cash injection and shares. The Project was endorsed by the Mayor or Pirque through a letter dated 14 August 1997. However, a change of Minister changed the course of the Project, as the new Minister would not support new urban area to the south of Santiago, where Pirque was located, and requested that the Project be built elsewhere in Chile.

Registering a claim under the Chile-Malaysia BIT (1992), MTD argued that it was entitled to fair and equitable treatment, and most favoured nation treatment accorded under the Chile-Croatia BIT (1994) and Chile-Denmark BIT (1993). Article 3(1) of the BIT reads:

> *"Investments made by investors of either Contracting Party in the territory of the other Contracting Party shall receive treatment which is fair and equitable, and not less favorable than that accorded to investments made by investors of any third State."*

In examining fair and equal treatment, the tribunal observed that the Chile-Malaysia BIT did not make any reference to customary international law in relation to fair and equitable treatment. The tribunal thus interpreted the BIT by reference

to its stated objectives, finding that fair and equitable treatment should be in "*an even-handed and just manner, conducive to fostering the promotion of foreign investment. Its terms are framed as a pro-active statement – 'to promote', 'to create', 'to stimulate' – rather than prescriptions for a passive behaviour of the State or avoidance of prejudicial conduct to the investors.*" The tribunal also referred to the standards of fair and equitable treatment described by the tribunal in Tecmed v Mexico.

The tribunal also agreed that the inclusion protections of the Chile-Malaysia BIT those included in the Chile-Denmark BIT and the Chile-Croatia BIT was "*in consonance*" with the objective of the Chile-Malaysia BIT, i.e. "*to protect investments and create conditions favorable to investment*".

The tribunal found that Chile breached its obligation to provide fair and equitable treatment. The FIC's approval of MTD's investment was made in full knowledge that the development project was inconsistent with the Chilean government's urban policy. The tribunal considered that the FIC's approval gave the investor the expectation that the project was feasible in that location from a regulatory perspective.

According to the Tribunal, Chile was under an obligation to act coherently and apply its policies consistently, independent of the due diligence of the investor. However, MTD was required to bear responsibility over its own failure to conduct proper due diligence before investing in Chile, stating that MTD:

> *"should bear the consequences of their own actions as experienced businessmen. Their choice of partner, the acceptance of a land valuation based on future assumptions without protecting themselves contractually in case the assumptions would not materialize, including the issuance of the required development permits, are risks that the Claimants took irrespective of Chile's action."*

The tribunal found it unacceptable "*that an investment would be approved for a particular location specified in the application and the subsequent contract when the objective of the investment is against the policy of the Government*". Notwithstanding that, the tribunal reduced its award of damages to MTD to approximately USD6 million with interest, given the investor's failure to conduct proper due diligence when deciding to invest in Chile.

Telekom Malaysia v Ghana

In 1996, Malaysian investors Telekom Malaysia ("**TM**"), through an 80 percent owned subsidiary G-Com, invested a sum of USD38 million in Ghana Telecommunications Company Limited. As a result, TM acquired 30% of shares in Ghana Telecommunications Company Limited as well as control over its management.

In consideration for installing 400,000 landlines in Ghana by 2002, TM was given a five-year management contract to run the company for the duration of Ghana Telecommunication's fixed line duopoly with new entrant Westel. In 2000, TM tendered an additional USD50 million deposit for a further 15% equity stake. However, according to trade reports, the additional 15% stake was never acquired by TM, and its USD50 million down payment was returned by the Government of Ghana.

TM managed to install 240,000 landlines in the country. TM's investment in Ghana Telecommunications became a political issue in the presidential election and the newly elected President Joh Kufuor showed hostility towards the Malaysian company's investment. In 2001, Ghana opted not to renew a telecommunications management contract of the telecommunication company TM invested in upon its expiry, and instead put the management of the company out to tender.

Following a period of negotiation, TM filed a claim under the Malaysia-Ghana BIT (1996) in September 2002 before an ad hoc tribunal at the Permanent Court of Arbitration under the UNCITRAL Arbitration Rules. TM alleged that Ghana had expropriated its investments, and claimed a sum of USD174 million.

In May 2005, the Government of Ghana and TM announced that they had reached an amicable settlement of their dispute, where the Government of Ghana agreed to pay TM an undisclosed sum, allegedly USD100 million over a period of two years.

Ekran Berhad v China

Reportedly the first ISDS claim filed against China, the investment concerned real estate projects involving arts and culture in Hainan by Ekran Berhad's subsidiary, Sino-Malaysia Culture and Art Co, Ltd ("**SMCAC**"). SMCAC was granted a 70-year lease over 900 hectares of land valued at USD6 million, which was due to expire in 2063. In 2004, the Hainan Provincial Government revoked SMCAC's landholding rights due to an alleged failure to "develop the land as stipulated under local legislation". The claim, filed in 2011 under the Malaysia-China BIT (1988), was discontinued two years later, without an arbitral tribunal having been appointed.

Astro All Asia Networks, South Asia Entertainment Holdings v India

In 2016, UK-based Astro All Asia Networks Limited and its Mauritian subsidiary South Asia Entertainment Holdings Limited (entities of Malaysia's Astro Holdings group, a media and entertainment holding company) filed claims under the United Kingdom-India (1994) and Mauritius-India (1998) BITs respectively, seeking a halt to criminal proceedings. Kuala Lumpur-based Astro Holdings had sent a notice of dispute along with its foreign subsidiaries in 2015, but it is unclear if its claim ever proceeded to arbitration.

The investors argued that India had subjected them to an unfair and biased investigation, in breach of several provisions of their respective BITs with India. The claims were

filed in response to allegations of corruption raised in respect of the investors' foray into India's mobile and television market, and within the context of a national controversy over the granting of 2G licenses. The claims centred on criminal prosecutions brought against certain principals of the investor companies.

While very little has been reported on the concurrent proceedings, it is surmised that an attempt by the claimants to obtain interim measures to suspend or restrain the criminal prosecutions was unsuccessful. However, it appeared that the tribunal, in a confidential ruling, granted some interim measures designed to ensure that potential witnesses in the arbitration are not restrained from participating in the proceedings.

In October 2018, the UNCITRAL tribunal issued consent awards recording the investors' withdrawal of their treaty claims with prejudice, and ordering them to pay full costs.

Boonsom Boonyanit v Malaysia

In 2017, the estate of Boonsom Boonyanit ("**Boonyanit**") issued a notice of dispute against Malaysia, alleging that the Malaysian courts had deprived the late Boonyanit of the value and enjoyment of her property investments in the state.

The dispute concerned two properties in Penang totalling 80,000 square feet. Boonyanit was said to have bought the property in 1967 and registered her title under the country's land title registration system. In 1997, an individual purporting to be Boonyanit sold the land to a third party, Malaysia's Adorna Properties Sdn Bhd ("**Adorna**"). It was not disputed that the seller forged Boonyanit's signature in the sale agreement and transfer document.

Boonyanit pursued litigation over the transfer in the 1990s, losing in her claim before the High Court before prevailing on appeal before the Court of Appeal. However, the Federal Court (Malaysia's apex court) overturned the Court of Appeal's ruling in 2000, finding that despite the fraudulent transfer Adorna had acquired immediate indefeasible title to the properties because it had been a bona fide purchaser for value and without notice.

The ruling caused huge controversy in Malaysia. The estate of Boonyanit (Boonyanit having died a year before the Federal Court ruling) applied to have the decision overturned but the Federal Court refused to revise the decision in 2004, effectively exhausting all domestic remedies available to Boonyanit. Adorna subsequently developed the properties.

In 2010, the Federal Court revisited the ruling against Boonyanit in an unrelated case, acknowledging that it was "*clearly wrongly decided*" and "*highly regrettable*". Boonyanit's estate alleged in its notice of dispute that the court's admissions prove the state acted "*wrongfully and egregiously*" and in breach of the ASEAN Investment Agreement (1987).

It was reported that the Malaysian government agreed to pay a settlement to Boonsom's estate in October 2018. Had it proceeded, the claim would have been one of the few ever brought under the erstwhile MIT. The treaty was terminated in 2012 but contains a 10-year sunset clause for investments made while it was in force.

Observations

Malaysia's experience in investment arbitration, for the most part, demonstrates the importance of ensuring that an investment is covered under a relevant BIT. The number of investment disputes settled by both Malaysia and its investors is also evidence that not all disputes are resolved by lengthy, expensive arbitration proceedings. In some of the cases examined, the prospect of undergoing arbitration is compelling enough to spur parties into negotiating an amicable settlement of investment disputes.

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AIAC'S STANDARD FORM BUILDING CONTRACTS: 2019 UPDATE

By Matthew Muir (Partner) & Jonathan Mackojc (Lawyer)

Editorial Note:

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TAKEAWAYS

The Asian International Arbitration Centre's (**AIAC**) Standard Form Contract (**SFC**) initiative is a first of its kind in the arbitration arena. Broadly speaking, it is an attempt to guide parties through issues and gaps in existing SFCs in Malaysia, and to entice them to resolve any disputes with the AIAC.

Key features – among others – include enhanced clauses with respect to delay events, insurance obligations, work programme and progress reports, and a simplified definition of practical completion.

Parties are currently able to access samples of five types of SFC:

* 2019 Main Contract (**MC**)
* 2019 Sub-Contract (**SC**);
* Minor Works Contract (**MWC**);
* Design and Build Contract (**DBC**); and
* Design and Build Sub-Contract (**DBS**).

WHAT ARE STANDARD FORM OF CONTRACTS?

SFCs are pre-prepared contracts that consist of common clauses such as payment, variations, delay damages, and extensions of time as well as containing 'boilerplate' clauses. They attempt to streamline efforts to conclude and sign contracts – particularly to avoid significant negotiation between parties – as they leave space only for crucial party information such signatures, dates and names.

SFCs are pitched as a common instrument used by parties to improve efficiency, minimising legal and transaction costs. However, parties soon realise that they may need to significantly amend their SFCs in certain situations, particularly with high-value projects where a 'standard approach' is not always best.

SFC's are often used in projects involving residential and commercial buildings. However, they rarely (appropriately) address risk allocation and project administration in public and private infrastructure projects, particularly those with complex party arrangements, structures, and significant (known and unknown) risks.

In the United Kingdom the New Engineering Contract (**NEC**), particularly the NEC3, is a popular and well-received standard form contract, even for public sector projects. The NEC4 was released in June 2017 and has a significant number of contracts on offer, with two new additions – Design Build Operate Contract (**DBO**) and Alliance Contract (**ALC**).

The NEC approach has not been popular in Australia (where SFCs published by Standards Australia Limited are generally preferred), but in other regions such as Hong Kong it has, and the Hong Kong Development Bureau strongly endorses the use of the NEC, regularly issuing practice notes to help guide parties.

KEY DEVELOPMENTS

15th August 2017
AIAC (formerly the Kuala Lumpur Regional Centre for Arbitration) announced and published its suite of SFCs.

6th April 2018
AIAC launched the 2018 edition of its SFCs.

3rd July 2018
AIAC launched two additional (Design and Build) SFCs.

28th November 2018
AIAC updated two of its SFCs – 2019 Main Contract and 2019 Sub-Contract. AIAC abandoned its previous approach where it had a separate contract for 'With' and 'Without Quantities'.

WHY THE SFC INITIATIVE IS IMPORTANT TO MALAYSIA

AIAC's SFC initiative is targeted at the construction industry in Malaysia, which has traditionally faced certain difficulties such as:

* lack of best practice in safety standards;
* poor integration with the international market;
* manpower shortage;
* quality issues;
* delays;
* abandoned projects;
* accidents;
* reliance on unskilled foreign labour; and
* poor contract administration.

With respect to the latter, Malaysia is not the only nation facing this challenge. Arcadis recently reported that poor contract administration remains the number one cause of construction disputes in its 2018 Global Construction Disputes Report.

These issues are to be considered against the backdrop of the Malaysian Government's long-standing target to become a high-income nation (ie 'developed nation status') by 2020 – Eleventh Malaysia Plan **(11MP)**. According to the 11MP, one of the Government's key objectives is to transform the construction industry by:

* enhancing knowledge content;
* driving productivity;
* fostering sustainable practices; and
* increasing the internationalisation of construction firms.

Reports published in 2017 by the Central Bank of Malaysia and Construction Industry Development Board indicate that the construction industry alone contributed 7.4% GDP in 2016, and a total project value (peak) of RM$229 billion. Statistics for Q1 2018 similarly indicate positive growth where the value of construction work increased by 5.9%, attributed to a growth in civil engineering and special trades. There was, however, a slight slowdown in growth – 5.3% in Q1 and 5.2% in Q3. These statistics clearly indicate that the construction industry has significantly contributed to the Malaysian economy, and will continue to do so.

Another important consideration, in the context of major projects, is the impact of the election result earlier this year. On 10 May 2018, Malaysia welcomed former Prime Minister Tun Doctor Mahathir back into power. Doctor Mahathir is Malaysia's longest serving Prime Minister and serves for the second time, having retired in 2003.

One of Dr Mahathir's early reforms included a detailed study on mega projects awarded to foreign countries. A taskforce, headed by Datuk Seri Mohamed Azmin Ali (Minister of Economic Affairs), was set up earlier this year to review these projects and to ensure that future processes are transparent.

Reform will undoubtedly have a significant effect on current projects, those in the pipeline, and future market-led proposals. Consequences may include current contracts being renegotiated or terminated, and stricter contractual provisions and risk allocations for future projects, restricted percentages of ownership, and Government-imposed JVs, particularly where major projects are led by foreign developers and investors.

That all said, Malaysia is still an attractive destination to invest in. This view is shared by Arcadis in its 2018 International Construction Costs Report, which surveyed 50 jurisdictions and reported that Kuala Lumpur is within the top five jurisdictions where it is 'less costly to construct'.

In September 2018, the World Bank published an article which identified another challenge Malaysia is facing – its digital economy. This was also identified in the Arcadis 2018 Global Construction Disputes Report, which recognises the need for digital transformation in the construction sector. Improvements to digital infrastructure would further promote Malaysia as an attractive host country for major projects within the next few decades and offer a shortcut to the overhauling of its construction sector. Globally, the construction industry '…remains one of the least digitalised'.

The AIAC SFC initiative is a small contribution, yet one which will likely improve the construction industry in Malaysia. Parties will be able to streamline their processes as there will be less room for negotiation, and more for collaboration.

AIAC'S GOALS

AIAC has seemingly responded to the Malaysian Government's vision: cementing the notion that Malaysia ought to be one of the world's most attractive construction markets.

Interestingly, the institution has taken a proactive approach to construction contracts, promoting dispute avoidance. This seems counter-intuitive considering that AIAC's key mandate is to resolve disputes. AIAC evidently views this as alternative route by which it can gain the confidence of parties – that AIAC is ready and able to assist irrespective of whether parties are in dispute, or seeking advice (at an early stage) so as to identify and avoid potential disputes. AIAC's focus on the entire relationship with potential parties (pre-contract formation through to live disputes) is a new strategy other arbitral institutions have overlooked – focusing instead on pure 'back-end' dispute resolution services.

The AIAC's SFCs govern duties, rights and relationships by promoting continuity of works, accountability, transparency, and reduce ambiguity with their user-friendly plain-English set of contracts. The AIAC currently allows parties to download five SFCs, free of charge. Parties are able to customise a contract by filling out an online form with key field contents, directly via AIAC's SFC-dedicated website. (Currently only three contracts are customisable.)

KEY DISPUTE RESOLUTION PROVISIONS IN THE SFCS

Dispute resolution – arbitration

Clause 34.1 of the MC is relatively prescriptive. The default rules are the AIAC Arbitration Rules, and the seat of arbitration is Malaysia.

Clause 34.2 no longer provides a non-exhaustive list of powers that the Arbitrator may exercise, as was the case in the 2017 AIAC SFC. It now refers to the powers in the AIAC Arbitration Rules and the Arbitration Act 2005.

Clause 34.3 lists situations for the commencement of

arbitration, and remains unchanged.

Clause 34.4 provides that nothing shall disqualify a 'CA' [contract administrator] (previously, 'architect') from being called as a witness and giving evidence on any matter relevant to the dispute.

Clause 34.5 states that the arbitration award is final and binding.

Clause 14 of the MWC provides that parties are to refer 'any disputes, controversy or claims' to Arbitration. The seat of arbitration is also Malaysia. Unlike the other SFCs, the default rules are the AIAC Fast Track Arbitration Rules (revised in 2018) and no provisions deal with arbitrator powers, commencement of an arbitration, or an award being final and binding. However, Rule 19.7 of the AIAC Fast Track Arbitration Rules provides that an award is final and binding on the parties.

Clause 25 of the SC is relatively similar to the MC, but deals with commencement of arbitration in a different manner – it does not list exceptions.

A unique provision in the SC is Clause 25.4, which allows for the consolidation of arbitration proceedings where a dispute arises in connection with the Main Contract and concerns the Sub-Contract Works. In this event, the Contractor must provide written notice to the Sub-Contractor indicating that the dispute under the Sub-Contract will be referred to the appointed arbitrator under the Main Contract. This is subject to the agreement of the Employer. Clause 25.5 states that any award is final and binding.

Dispute resolution – meditation

Clause 35.1 of the MC allows parties to refer their dispute to mediation. The contract provides that mediation is to be in accordance with the AIAC Mediation Rules (updated in 2018).

Clause 35.2 provides that prior reference to mediation does not prejudice the parties' rights to arbitration, nor is it a condition precedent to arbitration.

Clause 35.3 clarifies that parties may refer their disputes to mediation at any time, whether before or during any arbitration or other proceeding, including litigation.

Clause 26 of the SC deals with mediation in a similar fashion, with respect to matters related to the carrying out of the Sub-Contract Works, whether in contract or in tort.

As in the earlier (2017) edition, the 2018 MWC does not provide for any mediation process, only arbitration via AIAC's Fast Track Arbitration Rules.

OTHER KEY PROVISIONS

Provisions targeting bribery and corruption

Clause 13.1(a) of the MWC provides that the employer is entitled to terminate the contract based on reasonable evidence of 'illegal bribery or corrupt practices relating to and/or in connection with the execution of the Works'. This provision is relatively broad and may capture a range of conduct.

Clause 21.4 of the SC is similar, however is a more substantive provision that defines unacceptable conduct on the part of the Sub-Contractor: 'bribe, gift, gratuity, commission or other thing of value, as an inducement or reward' either directly or indirectly. If the subcontractor or his 'personnel, servants, agents or workmen' have engaged in such conduct, the Contractor must send the Contract Administrator (previously Architect) a written report of this alleged bribery or corrupt practice. The previous rules required a copy of the report to be provided to the Employer – this is no longer the case.

Clause 21.4(b) provides an exception where the Contractor may not terminate the Sub-Contractor's engagement if the inducements and rewards are lawful.

Clause 25.4 of the MC adopts similar wording to that in the SC – where the Employer may terminate the Contractor's engagement. The Employer or the Contract Administrator (on behalf of the Employer) must give the Contractor 14 days' written notice before terminating their engagement. The burden is on the Contractor to show that their conduct was lawful.

HIGHLIGHTS

The SFCs comply with the Construction Industry Payment and Adjudication Act 2012 (CIPAA). The CIPAA (Act 746) was introduced to allow parties to resolve payment disputes via statutory adjudication, and are relevant to construction and engineering projects. The CIPAA has been in effect since 15 April 2014, and many regard it as an important development for the sector. The AIAC (via its former title of KLRCA) is the appointed Adjudication Authority by virtue of Part V of CIPAA, and is responsible for administering adjudications under the Act.

CONCLUSION

The suite of AIAC's SFCs has been tailored to the Malaysian market and are relevant to a range of parties including employers, contractors, sub-contractors, and consultants.

The difficulties Malaysia has experienced in its construction industry are not exclusive to that country. As other jurisdictions face similar issues, it will be interesting to observe whether other arbitral institutions follow AIAC's lead and publish their own set of contracts to address issues in their respective region.

SFCs are a useful tool for new or inexperienced parties. However, they do not offer a 'one-size-fits-all' solution. When preparing early-stage legal documentation, parties should obtain specific legal advice as to whether or not an SFC is appropriate.

ASIA ADR WEEK 2019

THE KINTSUKUROI PERSPECTIVE : THE ASIAN ADR REVOLUTION

27TH - 29TH JUNE 2019

Between 27th June 2019 and 29th June 2019, the AIAC held its second edition of Asia ADR Week centred on the theme of "The Kintsukuroi Perspective – The Asian ADR Revolution". The event was a remarkable success with over 90 domestic and international speakers and more than 200 participants in attendance. The first day of Asia ADR Week concluded with a cocktail reception at the AIAC whilst the second day of the Asia ADR Week concluded with a Gala Dinner at The Majestic Hotel, Kuala Lumpur. The third day of Asia ADR Week was dedicated to issues relating to the Construction Industry Payment and Adjudication 2012. An overview of the sessions held during Asia ADR Week are covered below.

Cocktail Reception


Gala Dinner


Gala Dinner

Opening of AIAC Asia ADR Week 2019

The Asian International Arbitration Centre's (AIAC) Asia ADR Week 2019 was officially launched in the morning of 27th June 2019. Mr. Vinayak Pradhan, Director of the AIAC, in his opening remarks, marveled at the resonance between this year's theme - The Kintsukuroi Perspective – and the world of alternative dispute resolution (ADR) being a melting pot of talent, industries and cultures that mends the imperfections of the global economy.

Mr Pradhan highlighted how far the AIAC has come since its inception and expounded on the capabilities of the AIAC in many areas of ADR such as online dispute resolution, mediation, domain name dispute resolution, and sports arbitration, in addition to the Centre's capabilities in managing construction adjudications and commercial arbitration.

The keynote speaker, Dato' Mah Weng Kwai, echoed Mr. Pradhan's views and the AIAC's role in the development of ADR in the Asian region. The keynote address delved into the broader theme of the international global order and its impact on the world, specifically with respect to the rule of law and the role of international arbitration in its development.

Mr. Pradhan and Dato' Mah then opened the conference by symbolically restoring a cracked pot to demonstrate the beauty of Kintsukuroi - the centuries-old Japanese art of fixing broken pottery with a special gold-dusted lacquer.

DAY 1

Day 1 Session 1 - Breaking Down Walls: The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)

The Asia ADR Week kicked off with its first panel on The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). The discussion was as diverse as its panel hailing from five different jurisdictions!

The panel comprised of Mr Romesh Weeramantry from Clifford Chance (Singapore), Dato' Nitin Nadkarni (Malaysia), Professor Chin Leng Lim (Hong Kong), Professor Jongi Kim (South Korea) and our amazing moderator Mr Lukas Bastin (London). The discussion started with a general understanding of the CPTPP and thestory of how the TPP turned into one of the most significant treaties of our times (despite the US' withdrawal from it). The whole panel agreed that it is a ground-breaking agreement and will change the role of Asia on the global trade platform.


Session 3 - Breakout Session 1

Session 3 - Breakout Session 2

Day 1 Session 2 – Bespoke or Off the Rack? Dispute Resolution in Project Financing Arrangement

The topic of whether or not to have a bespoke dispute resolution agreement has always been controversial. The political risk associated with international project financing causes project participants to seek efficient and unbiased forms of dispute resolution. Delays in the resolution of project disputes can negatively affect project economics, through lower project revenues and higher project expenses.

We were graced by experts in the project financing field, Mr. Peter Quayle of Asian Infrastructure Investment Bank (China), Mr. Tay Peng Cheng of Wong Partnership LLP (Singapore), Mr. Ramanand Mundkur of Bharucha, Singh, Mundkur & Partners (India) and Mr. Duncan Speller of Wilmer Hale (London), with our homegrown Ms. Kamilah Kasim of Rahmat Lim & Partners as the moderator of the session. Ms. Kasim introduced the session with an overview of the contracts involved in a project financing arrangement. The speakers then expressed their views on alternative dispute resolution as an effective mechanism to deal with these disputes. They then went on to share their sentiments on the

increasing interest to use arbitration, especially, institutional arbitrations, in the field. Finally, they discussed the pertinence of consolidation which is an important aspect in project financing, especially since there are a number of contracts involved.

Day 1 Session 3 – Breakout Session 1 – Specialist Arbitrations: Patent Disputes, Maritime, Investment, Domain Names and Fashion & Art

The niche areas of some industries require specialist arbitrators – for example, patents, art and fashion, maritime as well as human rights and investment treaty cross-over cases. What are the key considerations and issues which set these types of arbitrations apart?

Moderated by Mr. Benjamin Hughes of The Arbitration Chambers (Singapore), legal professionals from various fields presented their views on the different niche areas. Ms. Maya Ishido of the International Arbitration Centre in Tokyo (Japan) shared her views on the ideal dispute resolution structure to deal with patent disputes. This was followed by Mr. Jeremy M. Joseph from Joseph and Partners (Malaysia), who gave his views on the international maritime arbitration scene with takeaways on the appropriate regime to adopt in different types of disputes. Mr. Antony Crockett of Herbert Smith Freehills (Hong Kong) expressed his views on investment arbitrations and in particular, emphasised that it is substantially different from commercial disputes and should be treated as such. Next, Mr. Bahari Yeow of Lee Hishammuddin Allen & Gledhill (Malaysia), an expert in Intellectual Property Law, discussed the domain name dispute resolution mechanism and its features. Finally, Ms. Noor Kadhim of Cubism Law (United Kingdom) shared her thoughts on arbitration for art-related disputes and the importance of having experts involved in authentication claims.

Session 3 - Breakout Session 1

Session 3 - Breakout Session 2

Day 1 Session 3 – Breakout Session 2 – Holistic Dispute Resolution and The Belt & Road: A Realm Where Cooperation Reigns

Breakout Session 2 of Day 1 of Asia ADR Week 2019 was titled "Holistic Dispute Resolution and the Belt & Road; A Realm Where Cooperation Reigns". With renewed interest in the Belt and Road Initiative in Malaysia, the panel showcased five eminent speakers exploring the different alternative dispute resolution mechanisms, including arbitration, mediation and commercial courts in Belt and Road related disputes. The breakout session, moderated by Dato' Ricky Tan of Ricky Tan & Co, included Ms Jeanne Huang of University of Sydney (Australia), Mr Paul Starr of King & Wood Mallesons (Hong Kong), Mr Sun Wei of Zhong Lun Law Firm (China), Dato' Quek Ngee Meng of Halim, Hong & Quek (Malaysia) and former Secretary for Justice of Hong Kong, The Honourable Rimsky Yuen GBM SC JP of Temple Chambers (Hong Kong), all of whom debated on the appropriate applicable law and considerations to take into account in resolving Belt and Road disputes. The panel discussed the importance of alternative dispute resolution mechanisms and dispute prevention regimes in the context of the Belt and Road initiative. The Honourable Rimsky Yuen GBM SC JP insightfully commented that litigation, arbitration, and mediation need not be competitors or stand-alone dispute resolution regimes; rather there should be a joint will to cooperate and innovate a dispute resolution regime that will provide appropriate options to the end users.

Day 1 Session 4 – The Gentle Force of Compromise: Mediation

With the Singapore Mediation Convention coming into force in August 2019, in the words of this session's moderator Ms Shanti Abraham, "there are exciting times ahead for mediation!" Therefore, Session 4 of Day 1 of Asia ADR Week was titled "The Gentle Force of Compromise: Mediation".

Our speakers included Ms Christina Hioureas who spoke to us straight from New York (via our high-tech video conferencing system) and discussed how mediation can complement international arbitration. Our second speaker was Ms Athita Komindr who gave the audience the UNCITRAL perspective on mediation. Then the floor was turned over to practitioners who had experience on the ground. We started with Mr Lim Tat, who shared with us his vision of the Singapore Mediation Convention. Mr Christopher To then shared from his vast experience and discussed the benefits of the Convention and cautioned us against the bumpy road ahead because of the lack of defined standards for meditation. The session wrapped up with our last speaker, Ms Sakshi Vijay, who spoke on the current landscape on mediation in India and contrasted it with other countries in South-East Asia, including Malaysia.

Session 3 - Breakout Session 1

DAY 2

Day 2 Session 1 – Fellowship of the Judges: The Role & Impact of the Judiciary in Asia's ADR Landscape

Is ADR a help or hindrance?

The first panel discussion for Day 2 of Asia ADR Week titled, "Fellowship of the Judges: The Role & Impact of the Judiciary in Asia's ADR Landscape" was made up of esteemed sitting and retired judges from across the Asian region. Moderated by one of Malaysia's most highly acclaimed arbitrators, Tan Sri Dato' V.C. George, a retired Judge of the Court of Appeal in

Malaysia, the interplay between ADR proceedings and the judiciary was clarified by a group of eminent panellists who have served the judiciary in different jurisdictions. The presenters on the panel were The Hon. Justice Dato' Mary Lim, Judge of the Court of Appeal (Malaysia), Prof. Anselmo Reyes, retired Judge of First Instance, High Court (Hong Kong) and Judge of the Singapore International Commercial Court (Singapore), The Hon. Wayne Martin AC QC, Former Chief Justice of the Supreme Court of Western Australia (Australia,) and The Hon. Justice Robert Tang GBM SBS JP, Non-Permanent Judge of the Hong Kong Final Court of Appeal (Hong Kong). The judges gave an overview of the relationship between the judiciary and the conduct of arbitral proceedings in their respective jurisdictions and debated on issues such as the publication and enforceability of arbitral awards.

Day 2
Session 1

Day 2
Session 2

Day 2 Session 2 – Public Policy as a Shield: Enforceability of Contractual Obligations

The 2nd session of Day 2 of Asia ADR Week 2019 explored the heavily debated topic, "Public Policy as a Shield: Enforceability of Contractual Obligations". The session was moderated by His Excellency Dato' Mohamad Ariff Md Yusof, the Speaker of the House of Representatives in Malaysia (Malaysia) and consisted of speakers, Prof. Robert Volterra of Volterra Fietta Chambers (United Kingdom), The Hon. V.K. Rajah SC of Essex Court Chambers Duxton (Singapore), Ms. Elodie Dulac of King & Spalding (Singapore), Ms. Monica Feria-Tinta of 20 Essex Street (United Kingdom) and Ms. Caroline Kenny QC QC of Owen Dixon Chambers West (Australia). The panel discussion commenced with a brief insight into the international standards regulating the relationship between the State and its international counterparts and different methods in engaging state's responsibility. This was then followed by a discussion on several key issues such as the applicability of international treaties in domestic courts and the effectiveness of treaty clauses in overriding public policy. Notable cases such as Boonsom Boonyanit v Adorna Properties Sdn Bhd were discussed to determine the increased importance of treaties in regulating the power of a State. Ms. Monica Feria-Tinta further opined that there are an increasing number of treaties providing for investor-state dispute resolution mechanisms which can be used where a State acts to renege its contractual obligations.

Day 2 Session 3 – The Bullet Train: Summary & Expedited Procedures in Arbitration

Strikeout or homerun? The third-panel discussion of the day titled, "The Bullet Train: Summary & Expedited Procedures in Arbitration" was moderated by Professor Lawrence Boo of Maxwell Chambers (Singapore). He was joined by speakers, Mr. Ng Jern-Fei QC from the Essex Court Chambers (United Kingdom), Mr. Ben Olbourne of 39 Essex Chambers (Singapore), Mr. Vyapak Desai from Nishith Desai & Associates (India), Mr. Leong Wai Hong of Skrine (Malaysia) and Ms. Chiann Bao of Arbitration Chambers (Hong Kong). During this session, the panel provided an overview of the history of expedited and summary procedures adopted by various arbitration institutions in Asia and elsewhere. The speakers distinguished expedited procedures from summary procedures and explored the necessary factors for an expedited procedure and the speedbumps that may arise. They further analysed statistics relating to the use of these procedures in Asia and compared these to the different procedures adopted by a number of arbitral institutions across the globe and shared a common view which suggested that summary and expedited procedures are becoming widely available in the arbitration arena.

Day 2
Session 1

Day 2
Session 2

Day 2 Session 4 - Rapid Fire Debate: Swiping Left or Swiping Right?

The fourth session of Day 2 of Asia ADR Week – "Rapid Fire Debate: Swiping Left or Swiping Right" – was indeed a battle of wits. This session gave the audience the opportunity to become a part of the discussion and vote for the speaker that they agreed with the most. Our first warriors were Ms. Chittu Nagarajan (Modria, India) and Mr. Anil Changaroth (ChangAroth Chambers LLC, Singapore) who battled on the topic "Digitisation: Are we missing the human element in ADR?".

Next up, we had Ms. Crystal Wong (Messrs Lee Hishamuddin Allen & Gledhill, Malaysia) and Mr. Sanjay Mohan (Messrs Sanjay Mohan, Malaysia) who played the devil's advocates on opposing sides on the topic "Diversity in Age: Opportunities for the Young vs Quality in Experience".

Our third debate was between Ms. Vanina Sucharitkul (ICC International Court of Arbitration) and Mr. Clinton Tan Kian Seng (Messrs Thomas Philip, Malaysia) on the burning topic of "Prague Rules vs IBA Rules: The Good and the Bad."

Our last pair spoke on the topic "To Reveal or Not to Reveal: Third Party Funding and The Person Behind the Mask" and the speakers were Ms. Cheng Yee Khong (IMF Bentham, Hong Kong) and Mr. Eugene Tan (Clyde & Co, Singapore).

Day 2 Session 5 - The Wireless Connection: Blockchain Technology & ODR

Our last session on Day 2 of Asia ADR Week was titled "The Wireless Connection: Blockchain Technology & ODR". The first two speakers Mr. Olivier Marquais (Loyens & Loeff, Luxembourg) and Mr. Deepak Pillai (Messrs Christopher & Lee Ong, Malaysia) deep dived into the complex fundamentals of blockchain technology and smart contracts. Then we had Mr. Andrew Dane (Online Mediation Services, London) who gave us a crash course on Online Dispute Resolution (ODR) and its potential. Our last speaker of the day was Mr. Joe Al-Khayat (Resolve Disputes Online, Australia) who discussed with us the latest platforms for ODR and how such platforms are changing the landscape of ODR. Overall, the session was a fantastic opportunity for all lawyers to understand the current and potential role of technology in alternative dispute resolution.

Day 2
Session 5

Day 3 – CIPAA Conference

Dedicated to the Construction Industry Payment and Adjudication Act 2012 (the "CIPAA"), Day 3 of Asia ADR Week began with a warm greeting from the Director of the AIAC, Mr. Vinayak Pradhan. He explained that the theme "Kintsukuroi" is apt as the adjudication process is the gold lacquer that glues back all broken pieces in the construction industry. The Keynote Address was delivered by YA Dato' Lee Swee Seng, Judge of the High Court of Malaya, Kuala Lumpur (Construction Court) who remarked that adjudications under the CIPAA are at risk of increased delays as there have been an increasing number of stay and setting aside applications. He further projected a number of case statistics and referred to a number of landmark judicial pronouncements relating to the CIPAA. Finally, Ms. Nivvy Venkatraman, Senior International Case Counsel at the AIAC, presented the AIAC's preliminary adjudication statistics for the 2018 calendar year.

Day 3 Session 1 – The Cornerstone: Keeping in Line with Judicial Decisions

The 1st session of Day 3 of Asia ADR Week 2019 was titled "The Cornerstone: Keeping in Line with Judicial Decisions". Moderated by Dato' Mah Weng Kwai, a retired Judge of the Court of Appeal of Malaysia, the panellists took turns in discussing notable cases relating to the CIPAA. The session kickstarted with Mr. Belden Premaraj of Belden Advocates & Solicitors who discussed the case of Bauer (M) Sdn Bhd v Jack-In Pile (M) Sdn Bhd in relation to the retrospectivity of the CIPAA. Following that, Mr. Wilfred Abraham of Zul Rafique & Partners, presented on the case of Leap Modulation Sdn Bhd v PCP Construction Sdn Bhd. Mr. Foo Joon Liang of Gan Partnership then considered the issue of natural justice by referring to TYL Land and Development Sdn Bhd v SIS Integrated Sdn Bhd. Finally, Ms. Chu Ai Li of Azman Davidson & Co. discussed the decision of Kerajaan Malaysia v Shimizu Corp & Ors. The moderator concluded the session by reminding the audience to stay tuned as the Federal Court will be delivering its decision on the retrospective effect of the CIPAA in July 2019!

Day 2
Session 1

Day 2
Session 2

Day 3 Session 2 – Workshop 1 – Common Mistakes Your AIAC Case Counsel Encounters"

The second session for the day was divided into three breakout workshops. Workshop 1, titled, "Common Mistakes Your AIAC Case Counsel Encounters" was moderated by Ms. Rammit Kaur Charan Singh of Victorious Vie Plt. The panel featured our very own Deputy Head of Legal, Ms. Tatiana Polevshchikova, and International Case Counsel, Mr. Albertus Aldio Primadi, who were joined by Mr. Kevin Prakash of Mohanadass Partnership and Mr. James Patrick Monteiro of James Monteiro Advocates & Solicitors. This was an engaging session where the AIAC Case Counsels discussed the different problems that they have encountered in adjudication proceedings. Mr. Prakash and Mr. Monteiro on the other hand, imparted their own experiences as counsels and adjudicators involved in the adjudication process. The panel received an immense number of questions from the floor signifying a growing interest in adjudication as an alternative dispute resolution method. The main concern was the calculation of working days in a CIPAA claim due to the silence of same in the CIPAA. However, the panel clarified the doubts of the participants in this enlightening session.

Day 3 Session 2 – Workshop 2 – Submitting a CIPAA Claim and Dispelling Myths about CIPAA

Workshop 2 which was titled, "Submitting a CIPAA Claim and Dispelling Myths about CIPAA" was an interactive session between the speakers on the panel and the audience. The session started with the moderator Mr. Ivan Loo (Skrine, Malaysia) engaging with the audience by asking questions. These questions then culminated into what was an interesting session on understanding the CIPAA in detail.

The first speaker Ms. Karen Ng Gek Suan (Azman Davidson & Co, Malaysia) taught the audience about the fundamentals of filing a CIPAA claim. Then, Mr. Daniel Tan Chun Hao (Messrs Tan Chun Hao, Malaysia) enlightened us about the rest of the procedure with a focus on what the respondent (or non-paying party) has to do. Lastly, a combined session by Ms. Celine Chelladurai (Messrs Celine & Oommen, Malaysia) and Mr. Alan Adrian Gomez (Messrs. Tommy Thomas, Malaysia) considered the adjudicator's and the claimant's perspective of CIPAA proceedings. The final topic was an audience favourite and resulted in many questions that were answered by our expert panellists.

Day 3 Session 2 – Workshop 3 – Construction Contracts Made Easy

Customisable and free! Workshop 3 of Day 3 of Asia ADR Week 2019, titled "Construction Contracts Made Easy", focused on the AIAC's Standard Form of Building Contracts (SFCs). The session was moderated by our very own Case Counsel, Ms. Diana Rahman, who provided the audience with an introduction to the SFCs. The discussion was led by Mr. Lam Wai Loon (Harold & Lam Partnership, Malaysia) who explained the purpose and key features of the SFCs. Next, we had Dr. Chan Yuan Eng (Department of Surveying & Faculty of Engineering & Science UTAR, Malaysia) who presented a step by step guide on using the online platform to create a set of bespoke construction contracts, tailored to the specific project at hand. The potential of the SFCs was further explored by Mr. Rajendra Navaratnam (Azman Davidson & Co., Malaysia) who shared an interesting idea about receiving feedback about the amendments made by the users of the AIAC SFCs. Finally, Sr. Isacc Sunder Rajan (Pro Consort Sdn Bhd) Mr. Lam, and Mr. Navaratnam enlightened the audience with a case study on the landmark decision of Cubic Electronics Sdn. Bhd. v Mars Telecommunications Sdn Bhd.

Day 3 Session 3 – Setting us Apart: SFCs and the Contract Administrator

The 3rd session of Day 3 of Asia ADR Week 2019, titled "Setting us Apart: SFCs and the Contract Administrator", explored a unique clause which can be found in the AIAC 2019 SFCs. The panel moderated by Ms. Tan Swee Im (39 Essex Chambers, UK and Malaysia) featured expert speakers Mr. Garth McComb (Driver Trett, Malaysia), Ar. Thurai Das (Das Azman Architects, Malaysia), Mr. Nick Longley (HFW, Australia) and Mr. Paul Sandosham (Clifford Chance, Singapore), all of whom discussed the role of the Contract Administrator in a construction contract. The panel discussion commenced with a brief review on the role and the underlying aspects of having a Contract Administrator under the AIAC 2019 SFCs and how this differs from other standard form building contracts. The session explored the different perspectives that our eminent speakers have on SFCs and Contract Administrators in their respective jurisdictions. Mr. Paul Sandsoham and Mr. Nick Longley provided an insightful session by comparing the role of a contract administrator undervthe AIAC 2019 SFCs to that under the Singapore and Australian regimes. Being the only standard form construction contract in Malaysia to include Contract Administrators, the panel presented a holistic view of this clause from an international viewpoint given that, as pointed out by one of the panellists, a contract administrator can often make or break a project.

Day 3 Session 4 – Adjudication: What it means for the Global Construction Industry

As our Asia ADR Week 2019 reached its final destination, our last session titled, "Adjudication: What it means for the Global Construction Industry", aimed to focus on adjudication regimes from different jurisdictions. The moderator Mr. Chris Ryder (Corrs Chambers Westgarth, Australia) was joined by a host of speakers including Ir. Albert Yeu (Hong Kong Institute of Construction Adjudicators, Hong Kong) who considered how presently Hong Kong does not have a statutory regime for adjudication and discussed Hong Kong's proposed security of payment ordinance model. Next, we had Mr. Chang Wei Mun (Raja, Daryl & Loh, Malaysia) who briefed the audience on the process of adjudication and the appointment of adjudicators under the CIPAA. Ms. Asya Jamaludin (CMS, Singapore) provided an insight into the adjudication landscape in Singapore under The Security of Payment Act (SOPA) and the key amendments made to the SOPA. Our last speaker Mr. David Bateson (39 Essex Chambers, Singapore), examined the adjudication timeline from the UK's perspective. The session was an interactive one where the moderator Mr. Chris Ryder also provided an insight into the Australian regime of adjudication and how it is divided into the "west coast model" and the "east coast model"

AIAC

AIAC CERTIFICATE PROGRAMME IN

SPORTS ARBITRATION

23rd - 26th SEPTEMBER 2019

#AIACWORLD #SPORTSMONTH2019

The Asian International Arbitration Centre (AIAC) has identified the need for resolution of disputes in the sports industry in Malaysia. Arbitration has been known to be an effective medium to resolve disputes amicably and that conviction remains a principal catalyst for our proposed establishment of a sports tribunal. This tribunal will not only be a dedicated platform for the resolution of sporting disputes in Malaysia but also for the ASEAN region. Backed with the administrative and state-of-the-art facilities of the AIAC, the tribunal will be designed to ensure affordable access to justice for athletes, sporting associations, sports organizations and other persons of interest in the sporting industry.

Drawing from the recognition by the Court of Arbitration for Sports (CAS) of the AIAC as an official alternative hearing centre, the tribunal will offer a cost-effective appeal route to CAS, providing aggrieved parties the opportunity to have their appeals at CAS heard in Malaysia at the AIAC.

Notwithstanding the above, sporting dispute resolution in Malaysia remains at its infancy. Knowledge and experience in the theoretical and practical aspects of sports dispute resolution at both, national and international levels amongst sports stakeholders in Malaysia has also been scarce at best. The peculiarities and unique exigencies of sporting disputes and the international implications of decisions rendered in sporting disputes warrants and necessitates specific attention to procedure including but not limited to the procedures undertaken in arbitration as well as a comprehensive and thorough examination of the law of sport. The AIAC Certificate Programme in Sports Arbitration bridges this gap and offers a holistic approach to understanding sports law and the practicalities in the resolution of sporting disputes.

For more information or to register,
Please contact **Mr Azril Rosli** at
03 2271 1181 or email **events@aiac.world**

"Right of Suspension"
A Double-Edged Sword in Construction Contracts

By Albert Yeu[1]

Common standard forms of construction contract adopted in Hong Kong regulate the contractor's obligations and duties to carry out the contracted works. Examples include the Hong Kong General Conditions of Contract for Civil Engineering Works, Clause 10 – *"The Contractor shall, subject to the provisions of the Contract, execute the Works and provide all labour, materials, Constructional Plant, Temporary Works, transport to and from the Site or in and about the Works and everything whether or a temporary or permanent nature required in and for such execution so far as the necessity for providing the same is specified in or reasonably to be inferred from the Contract"*; New Engineering Contract 3 (NEC 3) Engineering and Construction Contract (ECC), Core Clause 20.1 – *"The Contractor Provides the Works in accordance with the Works Information"*; and NEC 4 ECC, Core Clause 20.1 – *"The Contractor Provides the Works in accordance with the Scope".*

An express obligation that the contractor shall proceed with the works "regularly and diligently" means that "... the contractor is essentially to proceed continuously, industriously and efficiently with appropriate physical resources so as to progress the works steadily towards completion substantially in accordance with the contract requirements as to time, sequence and quality of work".[2] In common law, a wrongful suspension by a contractor may become a repudiatory breach of contract.[3,4] Exceptions maybe claimed by reason of mistake.[5] A right of suspension of works, however, can arise under contract or statute. In the contractual position, the NEC4 ECC gives the contractor the right to terminate its obligation to provide the works under Clause 90. One of the reasons is that the client fails to pay an amount due under the contract within thirteen weeks of the date that the contractor should have been paid. A statutory right to suspend works arises from a construction act, i.e. security of payment legislation (SOPL).[6]

In the Hong Kong proposed SOPL public consultation paper published June 2015[7], it formulates an adjudication model including the right to suspend performance or reduce the rate of performance for non-payment:[8]

Although this statutory right is rarely exercised in other jurisdictions, the following two court cases in Singapore and New Zealand put this matter under the spotlight.

I-Lab Engineering Pte Ltd v Shriro (Singapore) Pte Ltd

In *I-Lab Engineering Pte Ltd v Shriro (Singapore) Pte Ltd*,[9] the court had to look at s.26 of the Building and Construction Industry Security of Payment Act (Chapter 30B):

> **"Right to suspend work or supply (Remained in the Building and Construction Industry Security of Payment (Amendment) Act 2018)"**

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[1] Authored by Ir. Albert Yeu, FCIArb, FHKICAdj, MICE, MHKIE, NEC4 ECC Accredited Project Manager, Chartered Civil Engineer, Arbitrator, Adjudicator, Mediator, and Dispute Board Member. Queries or comments regarding this article can be directed to albertyeuadr@gmail.com. The views/opinions expressed in this article are those of the author only and they do not reflect the views of the AIAC unless otherwise stated.
[2] *West Faulkner Associates v London Borough of Newham* [1995] 71 BLR 1.
[3] *Wesiak v D&R Constructions (Aust) Pty Ltd* [2016] NSWCA 353.
[4] *Triple Point Technology v PTT Public Company* [2019] EWCA Div 230.
[5] *Mayhaven Healthcare Limited v DAB Builders* [2009] EWHC 2634 (TCC).
[6] Malaysia s.29(1); UK s.112(1) as amended by UK Act Amendment s.145(2); Singapore s.26(1); West Australia s.42(3); Ireland s.5(1); New Zealand s.59(2)(b) and s.72(1); Queensland s.33 as amended by BIF Act s.98.
[7] Public Consultation on Proposed Security of Payment Legislation for the Construction Industry (June 2015), Hong Kong SAR Development Bureau.
[8] Public Consultation on Proposed Security of Payment Legislation for the Construction Industry (June 2015), Hong Kong SAR Development Bureau, p. 47: *"A party which has not been paid an amount which an adjudicator has decided should be paid to them or which has been admitted as due to them in a Payment Response shall be entitled, on giving not less than 5 or 10 working days notice respectively to the paying party and (where known) to any party which pays the paying party and to the site owner, to do any or a combination of the following:*
a) Suspend performance of their contractual obligations.
b) Suspend performance of part of their contractual obligations.
c) Reduce the rate of performance of part or all of their obligations.
Parties which exercise rights to suspend or reduce their rate of performance shall be entitled to additional time to complete their obligations and payment of reasonable costs and expenses in respect of delay and disruption arising from the suspension or reduction in rate of performance".
[9] *I-Lab Engineering Pte Ltd v Shriro (Singapore) Pte Ltd* [2018] SGHCR 15.

26. — (1) Subject to the provisions of this Act, a claimant may suspend the carrying out of construction work, or the supply of goods or services, under a contract if, and only if —

(a) the claimant has served on the respondent the notice referred to in section 23 (1) *(b)*;
(b) a copy of the notice has been served by the claimant on the principal (if known) and the owner concerned;
(c) 7 days have elapsed since the notice was served on the respondent, the principal (if known) and the owner, or since the last of them was served the notice; and
(d) the claimant has not been paid the adjudicated amount.

(2) During the period of suspension exercised in accordance with subsection (1) —

(a) the claimant is not liable to the respondent, the principal or the owner for any loss or damage suffered by the respondent, the principal or the owner, respectively, or by any person claiming through or under the respondent, the principal or the owner; and
(b) the respondent, the principal and the owner shall have no claim against the claimant for any loss or damage suffered as a result of the suspension, but the principal and the owner may recover liquidated damages or any other remedy from the respondent pursuant to any contract or under any law.

(3) If the claimant, in exercising the right to suspend the carrying out of construction work or the supply of goods or services in accordance with subsection (1), incurs any loss or expenses as a result of the removal by the respondent from the contract of any part of the work or supply —

(a) the respondent is liable to pay the claimant the amount of any such loss or expenses; and
(b) any such loss or expenses may be recovered by the claimant as a debt due from the respondent.

(4) ... "

I-Lab was a sub-contractor of a hospital project and Shriro was the subcontractor of I-Lab for air-conditioning and mechanical ventilation and electrical installation works. In November 2017, Shriro successfully obtained an adjudication decision against I-Lab for a progress payment and I-Lab attempted unsuccessfully to set aside the decision. Meanwhile, Shriro suspended the works under s.26 pending I-Lab's payment of the adjudicated sum. During the suspension period, I-Lab proceeded to complete various works falling within the ambit of the sub-contract and continued to refuse payment to Shriro.

I-Lab commenced suit in January 2018 against Shriro for the costs and expenses incurred to carry out the sub-contract work by I-Lab itself due to Shriro's wrongful suspension of works. It sought a declaration that the works were properly omitted from the scope of the sub-contract and Shriro was not entitled to claim any sums from I-Lab in connection with the omitted works.

In turn, Shriro relied on s.26(3) of the SOPL as the statutory basis of the claim and averred that I-Lab had wrongly omitted the works from the sub-contract and prevented Shriro from fulfilling its obligations. Shriro submitted that it was entitled to the full contract sum of the omitted works, which I-Lab averred that Shriro should not be paid for the works that it did not carry out.

Among other reasons in the judgment, the court gave an interesting analysis on the statutory intention of s.26 that the intention of s.26(3) is to preserve the sub-contractor's position during the period of suspension so as to sustain both the attractiveness and efficacy of the primary right to suspend. S.26(3) serves as a protective function and there is no intention to enhance the sub-contractor's position beyond what would ordinarily be the case. Both the scope and the effect of the right to suspend under s.26 are tightly controlled and give no more latitude than what is sufficient to achieve this statutory purpose. Unlike the suspension clause in some other jurisdictions that are drafted in a boarder sense, the only case where a suspension right can arise in the Singapore's SOPL is conditional upon an adjudication determination made in the claimant's favour. Applying this analysis, Shriro was allowed to essentially claim for the "damages" to be assessed rather than conclusively the "full contract sum" during the suspension period arising under s.26.

Marsden Villas Limited v Wooding Construction Limited

In contrast, the suspension clause in the New Zealand's SOPL is a broader one. An interesting matter was discussed in *Marsden Villas Limited v Wooding Construction Limited*[10] about whether a late but bona fide payment schedule served during the notice period for suspension could sufficiently terminate the right to suspend, as provide in Section 72 of the SOPL:

"72 Suspension of construction work (Repealed by s.24A of the Construction Contracts Amendment Act 2015)

A party who carried out construction work under a construction contract (party A) has the right to suspend work under that contract if –

(a) any of the following circumstances applies:
- (i) a claimed amount is not paid in full by the due date for its payment and no payment schedule has been provided by the party who it is claimed is liable for the payment (party B);
- (ii) a scheduled amount is not paid in full by the due date for its payment even though a payment schedule given by party B indicates a scheduled amount that party B proposes to pay to party A;
- (iii) party B has not complied with an adjudicator determination that party B must pay an amount to party A by a particular date; and...."

In this case, Marsden hired Wooding to carry out a building project. In March 2006, Wooding notified Marsden of its intention to suspend work and the actual suspension took place in April 2006. Before the suspension notice expired, Marsden served a payment schedule to Wooding and before the actual suspension took place, Marsden paid the amount stated in the payment schedule to Wooding. Although the payment schedule was served out of time under the SOPL, Marsden argued, based on the s.72(1)(a)(i), that before there was a right to suspend works it was necessary for both the claimed amount to not be paid and for there to be no payment schedule provided. Marsden further contended that it was not necessary for the purposes of the New Zealand's SOPL for the payment schedule to be delivered within the statutory minimum period. It emphasised "*the very severe and potentially financially disastrous consequences that may flow from an inadvertent error to provide a payment schedule on time*."

The court gave reasons as to why Marsden's assertion was unsupported:

1. the word "has been provided" used in s.72(1)(a)(i) indicates a reference back to the timeframe provided for in s.22 and not any future time in which a payment schedule can be provided after the earlier time has expired;
2. the structure of s.72 does not make sense if the provision of a payment schedule partway through the five-day period can terminate the right to suspend. If that were so, s.72(1)(c) could be expected to specifically refer to the provision of a payment schedule, as an event cancelling the right to suspend work;
3. the New Zealand position follows the UK's Housing Grants, Construction and Regeneration Act 1996, section 112 where the time limit for providing an effective notice to withhold payment relates back to s.112, but not any other time thereafter; If s.72(1) is interpreted as allowing Marsden to avoid interim suspension by providing a payment schedule, it would lead
4. to the anomalous position that Marsden would be liable for the full amount of the payment claim in terms of s.23, but that sum would not be treated as owed for the purposes of suspension under s.72.

The Hong Kong Proposed SOPL

The proposed suspension clause in the Hong Kong proposed SOPL model appears to operate in a boarder scope following the UK and New Zealand. It is, however, a double-edged sword where on one hand an unpaid party may exercise a statutory right to suspend or reduce the rate of performance of contractual obligations. On the other hand, a payment of reasonable costs and expenses in respect of delay and disruption arising from the suspension or reduction in rate of performance need to be clearly qualified as to whether it should extend to the payment of contract price when the relevant works are omitted during the suspension period. SOPL users are encouraged to fully understand their protection and rights arising out of the proposed statutory regime in Hong Kong. For more information about the proposed SOPL in Hong Kong, please contact the Hong Kong Institute of Construction Adjudicators at secretary@hkicadj.org.

[10] *Marsden Villas Limited v Wooding Construction Limited* HC AK CIV-2006-404-002136 25 May 2006.

AIAC STANDARD FORM OF BUILDING CONTRACTS 2019 ROADSHOWS

By the AIAC SFC Team[1]

On 3rd July 2019, the AIAC began its 2019 Roadshows on the Standard Form of Building Contracts (the "AIAC SFCs"), whilst also providing an overview of the Construction Industry Payment Adjudication Act (the "CIPAA"). The AIAC 2019 Roadshow will be going to Penang, Sabah, Sarawak, and Johor. The Kuala Lumpur Roadshow's networking reception was sponsored Harold and Lam Partnership. Additionally, the AIAC SFCs have received the support of the construction industry, and the endorsement from the Society of Construction Law, Chartered institute of Arbitrators Malaysia (CiArb Malaysia), Malaysia-China Commercial Law Cooperation Committee, Chartered Association of Building Engineers Malaysia Chapter, Malaysian Society of Adjudicators, and Malaysian Institute of Arbitrators.

The AIAC 2019 SFC and CIPAA Roadshow kicked off with a welcoming speech by Mr. Vinayak Pradhan, Director of the AIAC and Chairman of the AIAC SFC Expert Advisory Committee, who explained the purpose behind the AIAC SFCs and its vision for the future. The AIAC SFCs aim to resolve issues before they even begin, which is unique coming from an arbitration centre. The AIAC SFCs are the first to be published by an arbitration centre. The goal of the AIAC SFCs is to not only promote dispute avoidance, but to also provide the proper mechanisms for the expeditious handling of disputes when they arise. In order to effectuate its vision of providing industry players a more equalised playing field, the AIAC SFCs provide for more checks and balances in the contract management and are free of charge.

In the first session, attendees heard from Mr. Lam Wai Loon and Sr. Isacc Sunder Rajan Packianathan regarding the AIAC 2019 Standard Form of Building Main and Sub-Contracts. Mr. Lam provided an overview of the development of the Main and Sub-Contract and highlighted the key features and amendments made in the AIAC 2019 SFCs. One of the major amendments was the introduction of the Contract Administrator, which was discussed in depth by Sr. Isacc Sunder. Rather than defaulting the administration of the contract to the architect, the AIAC 2019 SFCs provide the employer the opportunity to appoint a Contract Administrator who will oversee the management of the contract and also has the power to delegate certain tasks to the appropriate stakeholder. Additionally, the AIAC 2019 SFCs are fully customisable and no longer distinguish between With and Without Quantities, which allows the parties to amend the contract to their specific needs. Not only did the amendments aim to provide a better framework for administering contracts, but they also enhanced the clarity of the provisions for users. Therefore, the AIAC 2019 SFCs were made easier to read and more concise. For example, the definitions of terms like force majeure and adverse weather conditions were amended to provide more clarity.

In the second session, Mr. Kevin Prakash and Mr. Vijaya Ratnalingam covered the AIAC Design and Build Main and Sub-Contracts along with the AIAC Minor Works Contract. The session began with Mr. Prakash discussing the duties, rights, and obligations of all the stakeholders involved in each of the contracts. He emphasised the importance of taking the contract in one's hand and reading through it to understand it completely. Mr. V. Ratnalingam followed with an insightful overview of the effectiveness and importance of having Design and Build as well as Minor Works standard form contracts. He stressed the preventative measures that can be taken by an employer to avoid liability; for example, an employer shall give written instruction to the contractor with all necessary details such as time period for the completion of work.


Kuala Lumpur

Kuala Lumpur


Penang

Penang

[1]This Key Insight has been written by the AIAC SFC Team comprised of Mr Aldio Albertus Primadi (International Case Counsel), Ms Diana Rahman (Case Counsel) and Ms Chelsea Pollard (International Case Counsel). For more information related to the AIAC SFCs, please visit our website at www.sfc.aiac.world, or alternatively, please send an email to the AIAC SFC team at sfc@aiac.world.

The third session distinguished between the ADR provisions contained in the AIAC SFCs with that in the CIPAA. Mr. Kevin Prakash covered the first topic by highlighting the ADR provisions in the AIAC SFCs. For example, he explained that the AIAC SCFs give involved parties the option to use mediation prior to commencing an arbitration. Additionally, Mr. Prakash highlighted the provisions within the AIAC SFCs that make it CIPAA compliant. This was followed by Mr. James Monteiro's presentation which provided an overview of CIPAA as a whole whilst updating the audience on the latest CIPAA jurisprudence. He further highlighted the important matters pending decision with the Federal Court that those in the industry should watch out for.

The Roadshow concluded with a dynamic panel session organised by the Malaysian Society of the Adjudicators which focused on how to succeed in a CIPAA dispute from each stakeholder's point of view moderated by Ms. Tan Swee Im. Mr. Albertus Aldio Primadi explained the common mistakes the AIAC encounters while administering adjudication matters that can prolong the adjudication process. Attendees then heard from Mr. Leong Hong Kit who provided the perspective of a claimant's representative. He highlighted the importance of first assessing whether you can bring the claim by ensuring that all the requirements of CIPAA are met and none of the exclusions apply. For example, there must be a written construction contract in order to bring a claim. He then discussed how to assess whether you have a claim worth bringing. Then, participants heard from the perspective of the respondent's representative from Ms. Serene Hiew. She highlighted that preparing for a CIPAA claim, or any other dispute for that matter, begins before the dispute itself arises. To prepare oneself for any potential dispute, the most important habit is to archive documents in an orderly fashion so they are easy to find. Then Ms. Tan Swee Im presented from the adjudicator's perspective explaining how parties have to help lead the adjudicator through the dispute. She explained that the adjudicator does not know the case like the parties do, so they must lead her through the maze of documents by the nose. Additionally, she pointed out that parties in their submissions must go step by step, and dots by dots like a drawing using numbers, where you must go 1, 2, 3, and so on rather than 1, 2, 7, otherwise you will not end up with the result you want or intended for. Finally, Mr. James Monteiro explained the relationship between CIPAA disputes and the court.

Each session was followed by lively Q&A sessions in which the industry players had the opportunity to ask the Expert Advisory Committee members and other speakers about the AIAC SFCs and CIPAA.

THE IMPARTIALITY AND INDEPENDENCE OF ARBITRATORS AND ITS IMPLICATION ON THE VALIDITY OF ARBITRAL AWARDS

I Ketut Dharma Putra Yoga[1]

Abstract

Arbitration is a way to resolve disputes outside the courts as a form of an alternative dispute resolution. The submitted dispute will be decided by one or more arbitrators, who will then render an arbitral award. One of the most fundamental principles of arbitration that must be adhered to by all arbitrators worldwide is the impartiality and independence of arbitrators, which have been regulated in various international laws. Arbitrators are not allowed to communicate with any party related to the case they are hearing. Further, arbitrators should not be influenced by others in making their decision and drafting the arbitral award to ensure objectivity and prevent any bias. An arbitrator's failure to act impartial and independent can lead to the invalidity or annulment of an arbitral award.

Intisari

Arbitrase adalah cara untuk menyelesaikan senketa di luar pengadilan sebagai bentuk resolusi sengketa alternatif. Sengketa tersebut akan diputuskan oleh satu atau lebih arbiter, yang mana akan mengeluarkan putusan arbitrase. Salah satu prinsip arbitrase yang paling mendasar adalah prinsip imparsial dan independensi. Prinsip tersebut harus dipatuhi oleh semua arbiter di seluruh dunia dalam menyelesaikan sengketa arbitrase. Imparsial dan independensi para arbiter telah diatur dalam berbagai hukum internasional. Arbiter tidak diperkenankan untuk berkomunikasi dengan pihak yang terkait dengan kasus yang ditangani. Selain itu, arbiter tidak boleh terpengaruhi oleh orang lain dalam membuat putusan dan penulisan keputusan arbitrage untuk menjaga objektivitas sehingga tidak akan ada bias. Ketidakpatuhan terhadap prinsip imparsial dan independensi dapat menyebabkan ketidakab-sahan atau pembatalan putusan arbitrase.

A. Introduction

Arbitration is a dispute settlement mechanism outside of courts that is decided by arbitrators. The product of arbitration is called the arbitral award, rendered by the arbitrators, which is legally binding on the parties and enforceable in courts (Arthur O'Sullivan and Steven M Sheffrin, 2003).

The impartiality and independence of arbitrators is one of the most fundamental principles in arbitration that must be upheld in practice. This principle derives from an arbitrator's essential obligation towards the parties: to fairly adjudicate the dispute submitted to their jurisdiction by virtue of the parties' arbitration agreement.

Section 24(1) (a) of the Arbitration Act 1996 grants the court the power to remove an arbitrator on the ground that circumstances exist that give rise to justifiable doubts as to his impartiality. The circumstances which may arise are not exhaustively listed but subject to a general test. As pointed out by Figueroa Valdes and Juan Eduardo, arbitration is based in trust and consent. As such, the arbitrators' respect of professional ethics acquires great importance for the respectfulness of the arbitral institution itself as an alternative dispute resolution mechanism.

Practically, in State-to-State arbitration that was being practiced in the 19th century and during the beginning of the 20th century, arbitrators were regarded as agents of the State (Richard H. Kreindler and Thomas Kopp, 2013). They were, on the bench or tribunal, representing states and stressing the case of the state that had appointed them to the tribunal. Thus, arbitration was seen as sort of a continuation of classic diplomacy on another platform. The arbitrators were seen as representatives of their respective States. However, over time, this understanding an arbitrator's function progressively gave way to the later notion of the impartial arbitrator.

The impartiality and independence of arbitrators are crucial to ensure justice and fairness for both parties in the dispute. An arbitrator's failure to act in accordance with the principle of impartiality and independence can potentially harm the parties. This would also lead to the issuance of impartial and non-objective decisions. The party who feels aggrieved may argue that the award rendered it is null and void, and that is has no binding power on the parties.

Keywords: arbitration, arbitral award, impartiality and independence

Kata Kunci: *Arbitrase, keputusan arbitrage, imparsialitas dan independensi*

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B. The Concept of Impartiality and Independence

At first glance, the concepts of impartiality and independence are similar, yet both are actually different. Alan Redfern and Martin Hunter stated that the concept of independence is related to the personal connection or relationship between the arbitrator and the parties or their counsel-personal, social and financial. The stronger the connection between the arbitrator and one of the parties, the less independent the arbitrator is. Each arbitrator is to declare whether there pre-exists any kind of relationship, past or present, direct or indirect, with any of the parties or counsels assisting them.

Unlike independence, the concept of impartiality is more abstract; it is more of a state of mind that only can be proved through facts. Impartiality is the absence of any bias in the mind of the arbitrator towards a party or the matter in dispute. Thus, impartiality and independence are conceptually different. An arbitrator who is impartial but not wholly independent may be qualified, while an independent arbitrator who is not impartial must be disqualified.

Impartiality is said to be the defining feature of the judge, but the mirage of absolute judicial impartiality becomes more distorted when it is superimposed onto the arbitrator. All the guarantees that ensure impartiality are either missing or openly flouted in the arbitral process. Catherine A. Rogers explained the example, wherein attorneys can only be eligible for appointment or election as judges if they possess certain professional qualifications, while arbitrators are not formally required to have any minimum qualifications, and in most cases they are not even required to possess any legal training.

As explained above, the impartiality and independence of arbitrators are required during the entire arbitration process to protect the arbitral institution and guarantee an objectively rendered arbitral award. In such case, to make arbitration neutral, parties from different nationalities will require the presiding arbitrator to have a different nationality (Loretta Malintoppi, 2015). Ideally, in the process of drafting an arbitral award, there should be no kind of bias predisposing the arbitrator towards one of the parties.

C. Legal Framework of Impartiality and Independence of Arbitrators

The impartiality and independence of the arbitrators are regulated in various international laws. The United Nations Commission on International Trade Law ("**UNCITRAL**") Arbitration Rules uses the twin concepts of impartiality and independence. Moreover, the UNCITRAL Model Law on International Commercial Arbitration specifies in Article 12(2) that:

"An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence."

Following that, any challenge must be brought within 15 days of the appointment of the arbitrator or the discovery of the fact and determined by the relevant appointing authority as agreed between the parties or as stipulated by the Permanent Court of Arbitration ("**PCA**").

Under Article 14(1) of the Stockholm Chamber of Commerce ("**SCC**") 2010, there is an explicit requirement of a type akin to the UNCITRAL formulation (on which the SCC Rules were based), that is, every arbitrator must be impartial and independent, and also each arbitrator shall sign a statement of impartiality and independence disclosing any circumstances which may give rise to justifiable doubts. In addition to SCC, the International Chamber of Commerce Rules of Arbitration ("**ICC Rules**") also prescribed the impartiality and independence of the arbitrators, as Article 7 provides that every arbitrator must be and remain independent of the parties involved in the arbitration.

Article 6(4) of the PCA Optional Arbitration Rules for Two Parties, of Which Only One is a State provides:

"The appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account as well the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties."

Moreover, an arbitrator's partiality and dependency can also be caused by conflict of interest. The International Bar Association Guidelines on Conflict of Interest in International Arbitration 2014 provides a non-binding standard of independence and impartiality in international arbitration. The guidelines are written in two parts. The first part consists of general standards expressing the principles that should guide arbitrators, parties and arbitral institutions when deliberating over possible bias. The second part consists of a list of specific situations meant to give practical guidance.

The list is divided into three parts: a red list, an orange list and a green list. The red list describes situations in which an arbitrator should not accept appointment, or withdraw if already appointed. The guidelines deem certain situations described in the red list as non-waivable, such as when there is an identity between a party and the arbitrator, or the arbitrator has a significant financial interest in one of the parties or the outcome of the case. The orange list is a non-exhaustive enumeration of specific situations, which, in the eyes of the parties may give rise to justifiable doubts as to the arbitrator's impartiality or independence.

The rules explained above ensure that the principle of impartiality and independence is upheld in arbitration. The principle applies wherever arbitration proceedings take place, whether ad hoc or otherwise. Therefore, the withdrawal of the concept by the arbitrator is a hostile act and cannot be tolerated.

D. The Implications on the Validity of the Arbitral Award

Article 35 of International Law Commission Draft on Model Rules on Arbitral Procedure ("**ILC**") 1958 explains that there are four grounds that can be used to challenge

the validity of an arbitral award by either party. These grounds include: (a) the tribunal has exceeded its powers; (b) there was corruption on the part of a member of the tribunal; (c) there has been a failure to state the reasons for the award or a serious departure from a fundamental rule of procedure; and (d) the undertaking to arbitrate or the compromis is a nullity.

In practice, the corruption conducted by one of the members of the tribunal that can lead to the invalidity of the arbitral award is ex parte communications, which is one of the things that violate the principle of impartiality and independence. IBA Guidelines on Party Representation in International Arbitration (2013) states that ex parte communications mean oral or written communications between a Party Representative and an Arbitrator or prospective Arbitrator without the presence or knowledge of the opposing Party or Parties. The IBA International Code of Ethics 1988 stipulates that the asking of qualifications and availability, and discussion of the appointment of the presiding arbitrator are acceptable.

Article 13 of the International Centre for Dispute Resolution ("**ICDR**") Rules specifies that ex parte communications relating to the case are prohibited. It is stated that no party or anyone acting on its behalf shall have any ex parte communications relating to the case with any arbitrator, or with any candidate for party-appointed arbitrator, except to: advise the candidate of the general nature of the controversy and of the anticipated proceedings; discuss the candidate's qualifications, availability, or impartiality and independence in relation to the parties; or discuss the suitability of candidates for selection as a presiding arbitrator where the parties or party-appointed arbitrators are to participate in that selection. No party, or anyone acting on its behalf, shall have any ex parte communications relating to the case with any candidate for presiding arbitrator.

In practice, ex parte communications have become a problem that have occurred in several international trials. An example is in the case, The Republic of Croatia v The Republic of Slovenia, pursuant to the Croatia-Solvenia Bilateral Investment Treaty submitted to the PCA. The tribunal held that the wrongful behavior of arbitrators could serve as a ground to invalidate an arbitral award.

In that case, there were telephone conversations between the arbitrator appointed by Slovenia and one of Slovenia's Agents, in which Slovenia's Agent provided the arbitrator with its argument and facts that will be discussed with another member of the tribunal. It was ruled that ex parte communications impacted the procedural fairness, due process, impartiality and independency to the extent that the arbitration proceedings have been systematically and gravely violated.

Another case that showcases an arbitrator's impartiality is the ICSID case, Victor Pey Casado et al. v Chile. One of the arbitrators provided the party with a partial draft of the decision on jurisdiction prepared by the president. Ex parte communications conducted by the tribunal with one party tainted the impartiality and independence of the tribunal and resulted in the invalidity of the arbitral award.

Another possibility is that the ex parte communication could occur between an arbitrator and the State's lawyer, where the lawyer of the State does so without instruction or approval of the State. Yet in any case, the lawyer of the State can still be categorized as an agent or organ of the State who is mandated to represent the State.

Under article 4(2) of ILC Responsibility of States for Internationally Wrongful Acts, it is stipulated that a State organ refers to any person or entity that has status in accordance with the internal law of the State. Moreover, article 7 of ILC Responsibility of States for Internationally Wrongful Acts states that even if the organ of the State exceeds its authority or contravenes instructions, he or she shall be considered an act of the State.

In the case of Velasquez Rodriguez v Honduras in 1998, the Inter-American Court of Human Right adjudicated that all Governments should always be held responsible for all acts committed by their agents by virtue of their official capacity, even when they act outside the sphere of their authority. Ex parte communications have been clearly and convincingly able to invalidate arbitral awards and taint the impartiality and independence principles.

In addition, non-compliance with the principle of impartiality and independence are not only caused by external factors, but also internal factors, i.e. tribunal themselves. Theoretically, apart from the looking at the arbitrators' impartially and independently, the role of their assistants and/or secretaries must also be paid attention to in order to ensure the clarity of the arbitral award.

If the assistant or the secretary caused any mistake or worked improperly, it is possible for the arbitral award to be challenged by the parties or annulled. The tasks of the assistant or secretary should not exceed the tasks of the arbitrators themselves. This is because it can cause the decision to be not objective and biased.

Basically, the tasks of the assistant or secretary are limited only in the scope of administrative services in order to help the tribunal's tasks. In the Notes on Organizing Arbitral Proceedings that published by UNCITRAL it stipulated that various administrative services (e.g. hearing rooms or secretarial services) may need to be procured for the arbitral tribunal to be able to carry out its functions. When the arbitration is administered by an arbitral institution, the institution will usually provide all or a good part of the required administrative support to the arbitral tribunal.

Furthermore, in the Notes on Organizing Arbitral Proceedings (2012) that was published by UNCITRAL, it explains that to the extent the tasks of the secretary are to be purely organizational (e.g. obtaining meeting rooms and providing or coordinating secretarial services). Differences in views, however, may arise if the tasks include legal research and other professional assistance to the arbitral tribunal (e.g. collecting case law or published commentaries on legal issues defined by the arbitral tribunal, preparing summaries from case law and publications, and sometimes also preparing drafts of procedural decisions or drafts of certain parts of the award, in particular those concerning the facts of the case). However, it is important to ensure that

the secretary does not perform any decision-making function of the arbitral tribunal. It would be inappropriate for the secretary to do legal research and other professional assistance to the arbitral tribunal.

The ICC Note on the Appointment, Duties and Remuneration of Administrative Secretaries emphasizes that secretaries shall not perform any decision-making functions. Drafting awards is one of the arbitrator's essential duties, whereas, arbitral secretaries were only allowed to carry out administrative tasks thereby the name "administrative secretary" (Young ICCA Guide on Arbitral Secretaries, 2014).

Article 1(1) of Young International Council for Commercial Arbitration ("**Young ICCA**") stipulates that an arbitral secretary or assistant should only be appointed with the knowledge and consent of the parties. This is because the remuneration and reasonable expenses of the arbitral secretary are paid by the parties, whereas the arbitral tribunal is paid on an hourly basis.

Article 1(4) of Young ICCA also specifies that an arbitrator must not delegate any part of his/her decision-making duty to the secretary or assistant in a way that could dilute the arbitrator's mandate. The task of an assistant or secretary becomes a noteworthy concern in the proceeding, as it will also affect the validity of the arbitral award. The task of an assistant or secretary should not be more dominant than the tribunal's tasks.

Article 3 (j) of Young ICCA mentions about the roles of the arbitral secretary in drafting appropriate parts of the award. Under the commentary, an arbitral secretary is permitted to draft some basic parts of the award, such as Procedural Background, Factual Background, and the Parties' Positions. The legal reasoning section, the final analysis and operative portions of the award can only be written by the arbitrators.

Undoubtedly, hiring a secretary or assistant is important for to ensure effective and efficient proceedings (The ICCA Reports, 2013). In particular, it could increase the level of efficiency in terms of organization and preparatory assistance to the arbitral tribunal; allow the arbitral tribunal to cope with voluminous submissions; improve the quality of the work done by the arbitral tribunal; and act as a central means of communication between parties and the arbitral tribunal.

There are some cases where the secretary or assistant is exceeds his capacity. Thus, it must be noted that the arbitral secretary or assistant has a limited scope of work.

In the case of OAO Yukos Oil Company, the PCA tribunal rendered an award ruling that they unanimously decided that the Russian Federation had breached Article 13(1) of the Energy Charter Treaty by taking measures having an effect "equivalent to nationalization or expropriation" and ordered the Russian Federation to pay damages in excess of USD 50 billion.

Despite that, 7 months later, the Russian Federation filed three writs to the Hague District Court seeking to annul the award by arguing that the arbitrators were not independent, as the assistant played a significant role in analyzing the evidence and legal arguments, in the tribunal's deliberations, and in drafting of the arbitral award.

The fact that the assistant spent far more time on the arbitrations than did any of the arbitrators was confirmed by information provided by the PCA Counsel for the Russian Federation who requested the secretariat of the PCA for a specification of the time spent by the assistant and the arbitrators. It showed that the assistant spent 2,625 hours, whereas the three arbitrators billed between 1,700 hours each.

In particular, this information indicates that an assistant to the tribunal, who was supposedly responsible only for administrative tasks, instead devoted between 40% and 70% more time than any of the arbitrators. As such, the assistant must be presumed to have performed a substantive role in analyzing the evidence and arguments and in preparing the final award. Additionally, such evidence indicates that the arbitrators delegated to the assistant substantive responsibilities that are not lawfully delegable.

As a result, the actions of the assistant that exceeded the mandates of the tribunal resulted in unfairness or injustice for one of the disputing parties. This subsequently becomes a ground objection for the aggrieved party to challenge the validity of the arbitral award.

E. Conclusion

International arbitration always obliges the appointed arbitrators to uphold the principle of impartiality and independence. An arbitrator's partiality and dependency are considered as a ruthless corruption, resulting in problems dealing with the validity of the rendered arbitral awards.

Arbitrators shall be independent at all times, and they should not be influenced by anyone, even by the State who appointed him or her as an arbitrator in a dispute. Additionally, the duties and relationship between arbitrators and their assistant and/or secretary must not exceed the parameters set.

The drafting of the arbitral award and considering legal research on a dispute should be done only by the arbitrators, not by the assistant or secretary. Otherwise, it will create a concern on the impartiality and the independence of the arbitrator, and ultimately impact the validity of the arbitral award.

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AIACYPG
YOUNG PRACTITIONERS GROUP

PAVING THE WAY FOR THE YOUNG LEADERS OF TOMORROW

The AIAC established a Young Practitioners Group ("YPG") under its auspices on 17th March 2017. The YPG brings together dispute resolution practitioners below the age of 40 and students interested in building their careers in this fast-growing and dynamic field. Members of the YPG are offered a variety of exclusive events in multiple languages, such as seminars, training days and workshops, visits to ports, interviews with distinguished practitioners, etc. Apart from that, the YPG also has a certain target market in order to achieve its goals – that is, a platform targeted at students and young practitioners under age of 40.

The Co-Chairs of the AIAC YPG are Ms. Tatiana Polevshchikova, Deputy Head of Legal at the AIAC and Mr. Aniz Ahmad Amirudin, Partner at the Cecil Abraham & Partners. Mr. Albertus Aldio Primadi, International Case Counsel at the AIAC, has been appointed as the Secretary-General of the AIAC YPG – a new role to oversee all functions and branches of the AIAC YPG.

Defying Expectations: Thoughts on Life as a Barrister and the Opportunities and Challenges at the Bar, an interview with Ng Jern-Fei QC.

AIAC YPG focuses on building capacity for young students and practitioners. To point out, the group actively collaborates with other international and regional groups, for example ICC YAF, YSIAC, Young PIArb, CIArb YMG Malaysia, ICDR Y&I, etc.) and was recently confirmed as a member of the Co-Chairs Circle, a global platform for the exchange of knowledge and experience between young groups, during its annual meeting in Rome, Italy. This major accomplishment will allow the AIAC YPG to be the voice of its members at this prestigious international platform.

The group has demonstrated continuous success from day one. Within a year of its inception, the AIAC YPG went from zero to 1,245 registered members. 676 of the YPG members are students, and the remaining 569 are young practitioners. The AIAC YPG is also representative of 40 countries with 668 Malaysian members and 577 Non-Malaysian members.

Bearing in mind the diverse fields in ADR, the AIAC YPG organises itself into 7 committees to cater to all preferences and to channel the specific expertise of its members. Each of the committee is spearheaded by an AIAC Case Counsel and two practitioners, working together to undertake a youth capacity building initiative that is relevant to their corresponding fields. The 7 committees are as follow:

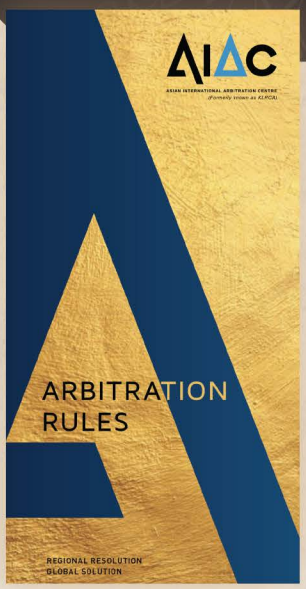
1. **Investment Arbitration Committee**
2. **Commercial Arbitration Committee**
3. **Sports Arbitration Committee**
4. **Maritime Arbitration Committee**
5. **Belt and Road Committee**
6. **Adjudication Committee**
7. **Mediation Committee**

The AIAC YPG is cognisant of the importance of maintaining relationships and connections with universities all around Malaysia to facilitate the affairs and communications between the AIAC, AIAC YPG and the Malaysian students. Currently, the Student Representatives of the AIAC YPG come from the following universities:

1. **International Islamic University Malaysia**
2. **Universiti of Malaya**
3. **Universiti Teknologi Mara**
4. **HELP University**
5. **Taylor's University**
6. **Multimedia University (Melaka)**
7. **Universiti Kebangsaan Malaysia**
8. **Brickfields Asia College**
9. **SEGi College Sarawak**
10. **Universiti Sultan Zainal Abidin**
11. **Advance Tertiary College (Kuala Lumpur)**

The AIAC YPG strives to be the pioneer in building the capabilities of the youth in the region whilst promoting the usage of ADR. Please visit our website (https://www.aiac.world/ypg) to be kept in the loop of our upcoming projects and also to register yourself as a member!

AIAC ARBITRATION RULES SELECTED FOR THE WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT IN 2022



Kuala Lumpur, 28th May 2019: The Asian International Arbitration Centre (the "AIAC") is pleased to announce that its Arbitration Rules have been selected for the 29th Willem C. Vis International Commercial Arbitration Moot in Vienna, Austria and the 19th Willem C. Vis East International Commercial Arbitration Moot in Hong Kong SAR in 2022 (collectively referred to as "the Vis Moot").

The Vis Moot is an international competition for law students designed to foster the study of international commercial law and arbitration through the application of a realistic problem. Since its inception twenty-six years ago, the Vis Moot has encouraged students all over the world to apply a comparative perspective in their legal analysis and advocacy. In 2019, the Vis Moot attracted a record of 372 teams from 84 countries, 1001 registered team coaches and 1498 registered arbitrators to Vienna; while the Vis East Moot brought 137 teams from 28 countries to Hong Kong.

Since 2017, the AIAC has collaborated with the International Court of Arbitration of the International Chamber of Commerce (the "ICC") to organise a Pre-Moot to the Vis Moot. The Pre-Moot has become a well-known platform for the teams, coaches and arbitrators from around the world. At the 3rd AIAC-ICC Pre-Moot, held from 22nd to 24th March 2019, the AIAC hosted 90 teams with close to 380 participants from 21 countries and 180 hearings with over 300 arbitrators, making it the largest Pre-Moot internationally leading up to the main competitions in Hong Kong and Vienna. As Mr. Vinayak Pradhan, the Director of the AIAC, stated "*the AIAC is determined to carry the spirit of inclusivity of the Vis Moot. What makes this Pre-Moot unique is that we welcome non-participating teams at Vienna and Hong Kong to come and experience the Vis Moot through us. Through this initiative, we are able to bring together an outstanding group of law students from Asia who struggle to obtain the resources to get to Vienna or Hong Kong.*"

As an arbitration centre established through the agreement between the Asian-African Legal Consultative Organisation (the "AALCO") and the Government of Malaysia, the AIAC is committed to the development and growth of alternative dispute resolution across the globe, especially in Malaysia and Asia. The AIAC is extremely pleased by the recognition of its past and present contributions to the international arbitration community and is delighted to start working on new projects leading up to the application of the AIAC Arbitration Rules internationally in 2022. We truly believe that the use of the AIAC Arbitration Rules in the Vis Moot will not only serve as the most beneficial learning experience for students and arbitration practitioners, but will also increase awareness about Malaysia as a jurisdiction.

About the Asian International Arbitration Centre (AIAC)

Established in 1978, the Centre was the first arbitration centre in Asia to be established under the AALCO, an international organisation comprising 47 member states from across the region. The Centre was first set up to provide institutional support as an independent and neutral venue for arbitration proceedings in Asia. Currently, it stands alongside only four other regional centres located in Egypt, Nigeria, Iran and Kenya. Further information on the Centre can be obtained from http://www.aiac.world.

WORKSHOP

ON THE CONSTITUTION OF SPORTING BODIES

3:00 P.M. – 6:00 P.M.
(REGISTRATION COMMENCES AT 2:30 P.M.)

12 SEPTEMBER 2019
SEMINAR ROOM 1, AIAC

A constitution forms an integral part of sports bodies. It provides a system under which the sport operates, and where the national sporting body can make rulings and set governing standards for the sport which will, in turn, affect those playing at different levels. It also provides much needed structure in ensuring that all those involved in the sport will share common objectives and adhere to a set of uniform policies and procedures. A well drafted and comprehensive constitution provides stakeholders with the ability to work together to address issues of joint concern and would enable those from different levels of the sport hierarchy to share common strategic goals and work together to maximise the ability of the sport to strengthen and market itself. The constitutions of sporting bodies are also, often, supplemented by regulations which are by comparison, more easily amendable. These regulations set out policies and procedures underpinning the constitution in greater detail and thus, are equally important.

Recognising the growing interests in sports law and the need to foster an understanding of constitutions governing a sports body and how they impact athletes and other stakeholders, the AIAC introduces its first ever Workshop on the Constitution of Sporting Bodies The workshop aims to provide an overview and introduction to the constitution of sporting bodies, such as the fundamentals and significance of sports constitutions as well as key features and important provisions in the constitution of a sports body.

The workshop will be conducted by sports law experts and in-house legal advisors in the local sporting industry as well as representatives from the Sports Commissioners' Office.

PROGRAMME

2:30 - 3:00 P.M
Registration

3:00 - 4:30 P.M
The Fundamentals of Sports Constitution: Significance and Effect

4:30 - 4:45 P.M
Break

4:45 - 6:00 P.M
Key Features and Important Provisions in a Sporting Body Constitution

WORKSHOP FEE : RM30.00

WORKSHOP PACKAGE DEAL : RM50.00

Enjoy a discounted rate of RM50.00 when you register for the Workshop on Drafting Sports Contracts which will be held on 12th September 2019 and the Workshop on Constitution of Sporting Bodies which will be held on 19th September 2019 together!

Full Name .....

Designation and Company / Organization .....

Address .....

Tel : ..... Fax : ..... Email : .....

Registration Fee (please tick one)

Workshop on Drafting Sports Contracts	☐	RM 30.00
Package Workshop Fee Workshop on Drafting Sports Contracts on 12th September 2019 and Workshop on Constitution of Sporting Bodies on 19th September 2019	☐	RM 50.00

Mode of Payment (please tick one)

☐ Cheque/ Bank Draft made payable to **"AIAC EVENT"**

☐ Bank Transfer/ Account Deposit

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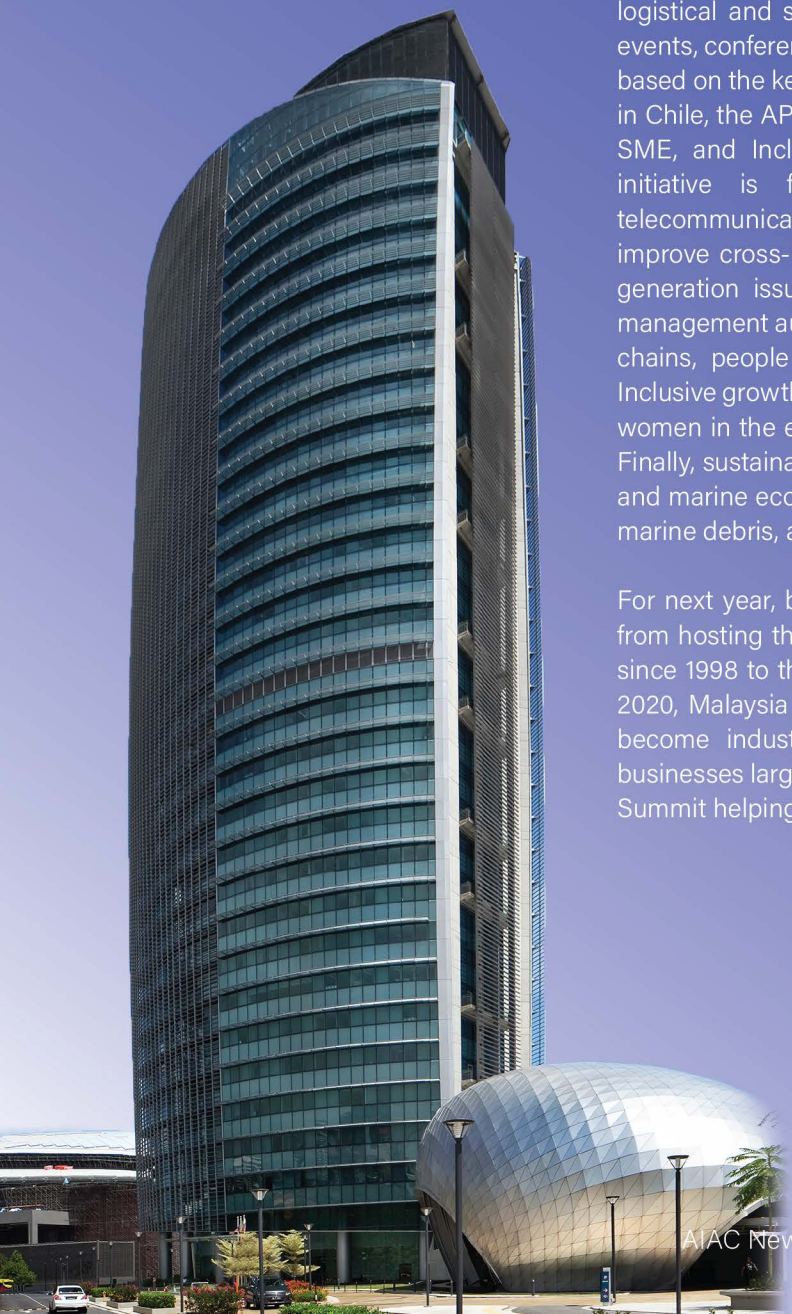
Looking Towards the Future for APEC 2020 in Malaysia

By Chelsea Pollard[1]

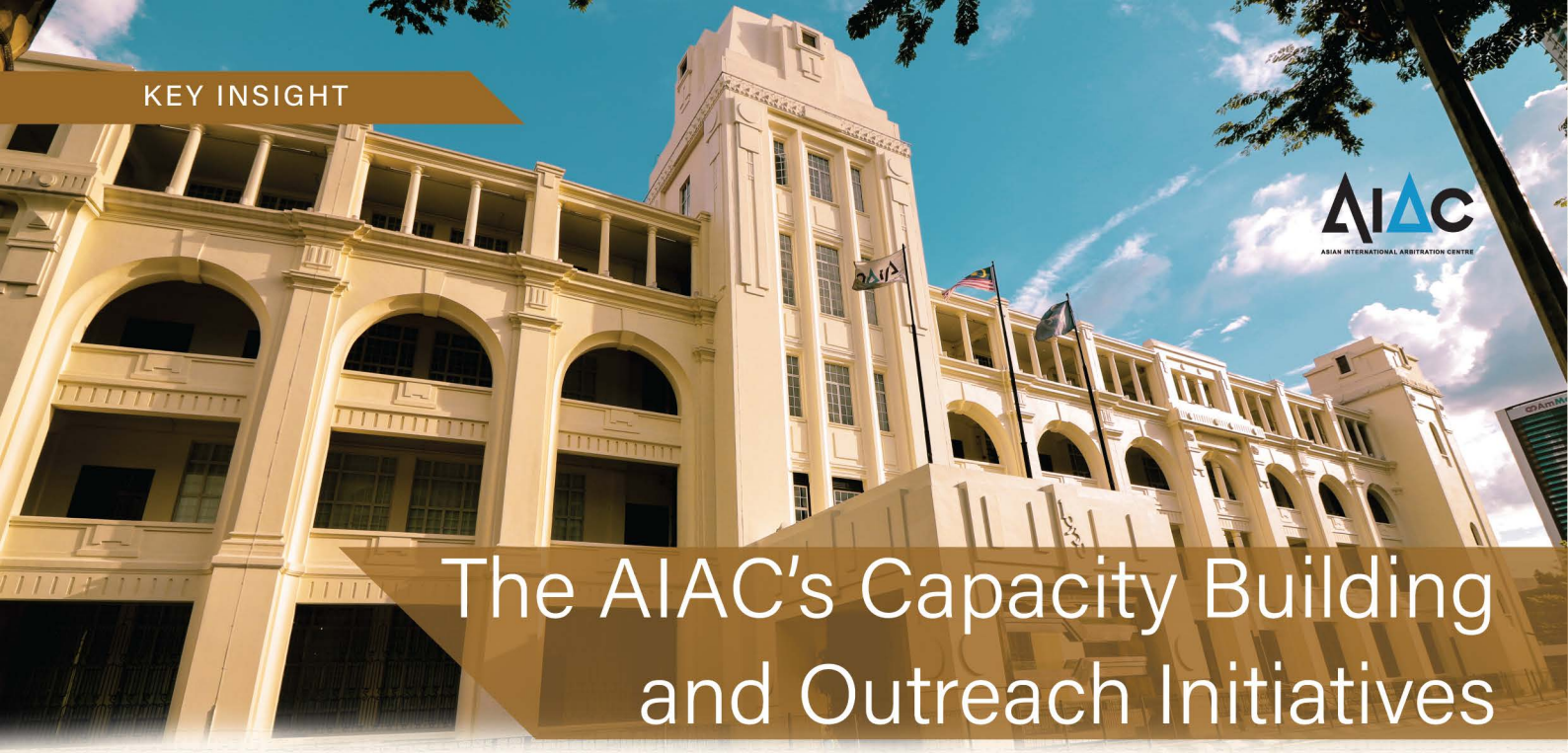
In 2020, Malaysia will host the Asia Pacific Economic Cooperation ("APEC") Summit for the second time since 1998. The key message for 2020 is Shared Prosperity. Hosting the APEC Summit in 2020 is fitting with Malaysia's Vision 2020. It provides a unique opportunity for Malaysia to showcase it distinctiveness to the other 20 APEC members and why it is important to be a part of APEC. Out of Malaysia's total trade, 77% is with APEC members and it has over RM23 billion in foreign direct investments coming from APEC nations. The year 2020 is not only an important milestone for Malaysia, but for APEC as a whole. In 1994, during its Summit in Bogor, Indonesia, APEC set a goal for the adoption of a long-term free and open trade and investment regime in the Asia-Pacific by 2020. Therefore, 2020 will be a pivotal time for both Malaysia and APEC to reflect on their developments, achievements, shortfalls, and visions for the future. The official handing over from Chile will take place this November with the preparatory ground work already taking place.



Being the host for APEC 2020 means that Malaysia will be in charge of both the logistical and substantive organisation of the APEC Summit. A multitude of events, conferences, workshops, and meetings will take place throughout 2020 based on the key areas of focus decided on by Malaysia. For example, this year in Chile, the APEC Summit is focusing on Digital Society; Integration; Women, SME, and Inclusive Growth; and Sustainable Growth. The digital society initiative is focusing on improving the coverage and quality of telecommunications as well as enhancing the shared regulatory principles to improve cross-boarder trade standards. Integration is aimed at tackling next generation issues, such as, trade facilitation, customs-coordination, border management automation, regulatory convergence, participation in global value chains, people and knowledge mobility, and investments in infrastructure. Inclusive growth, on the other hand, is promoting the increasing participation of women in the economy as well as innovation of small to medium enterprises. Finally, sustainable growth is protecting the environment, including the ocean and marine ecosystems by combating illegal fishing, preventing and reducing marine debris, as well as promoting sustainable energy and smart cities.

For next year, businesses in Malaysia have the unique opportunity to benefit from hosting the APEC Summit in 2020 and to showcase their achievements since 1998 to the other APEC member states. Hopefully, by being the host in 2020, Malaysia will continue to inspire those in its economy to innovate and become industry leaders. Once the principles for 2020 are announced, businesses large and small should find ways to involve themselves in the APEC Summit helping Malaysia bring itself one step close to Vision 2020.

[1]Chelsea Pollard is an International Case Counsel at the AIAC. She is also the Co-Chair of the American Society of International Law's New Professionals Interest Group. Queries or comments regarding this article can be directed to chelsea@aiac.world. The views/opinions expressed in this article are those of the author only and they do not reflect the views of the AIAC or the American Society of International Law unless otherwise stated.



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 between late-February and June 2019, the AIAC Legal Services Team participated in the following external speaking engagements:

1. "The Fundamentals of International Legal Business Practice" IBA Conference, Japan Federation of Bar Associations, 27th February 2019, Tokyo, Japan
2. "Careers in International Arbitration: Reflections from the Front Lines", ICC YAF – AIAC YPG Conference, 21st March 2019, AIAC
3. "Managing the Exploitation of Confidential and Business Information by Employees", Legal 500 Malaysia Summit (Moderator), 28th March 2019, Kuala Lumpur, Malaysia
4. Keynote speech, Opening Ceremony of Mediation Skills Course, 30th March 2019, Penang, Malaysia
5. "Introduction to the AIAC", INTA Roundtable on WIPO Mediation and Arbitration Rules, 1st April 2019, Shearn Delamore & Co., Malaysia
6. "Dispute Resolution for Transportation of Goods: Conventional and Alternative", Laws of Shipping and Admiralty: Are We in Sink?, 11th April 2019, UiTM Shah Alam, Malaysia
7. "Arbitration in Malaysia", Visit from Attorney General's Chamber Brunei and Attorney General's Chamber Malaysia, 12th April 2019, AIAC
8. "AIAC's Drive and Innovation", Shanghai International Arbitration Forum (panel speaker), 20th April 2019, China
9. "Independence and Impartiality in Arbitration", Introduction to ADR, 19th May 2019, Taylor's University, Malaysia
10. "The Singapore Mediation Convention and its Implications", Introduction to ADR, 19th May 2019, Taylor's University, Malaysia
11. The African Arbitration Academy, 14th – 15th June 2019, London, England
12. "Unconscious Bias in International Arbitration", Arbitral Women, 26th June 2019, Kuala Lumpur, Malaysia
13. "Common Mistakes Your AIAC Case Counsels Encounter", Asia ADR Week, 29th June 2019, AIAC
14. "Construction Contracts Made Easy", Asia ADR Week (Moderator), 29th June 2019, AIAC
15. Keynote speech, Certificate Presentation Ceremony of Mediation Skills Course, 30th June 2019, Penang, Malaysia
16. "The Role of In-House Counsel and Company Secretaries in the Emerging Asian Arbitration "Ecosystem", 2nd annual General Counsel & Company Secretary (panellist speaker), 18th July 2019, Kuala Lumpur

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

1. Visit from Embassy of Netherland
2. Visit from University of Brawijaya
3. Visit from University Lancang Kuning
4. Visit from UKM
5. Visit form ALSA UM
6. Visit from UNISZA
7. Visit from AGC Malaysia and AGC Brunei
8. Visit from IIUM
9. Visit from Head of Legal, Streamline Studios
10. Visit from ALSA Taylor University

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

Guangxi Dev & Cap Sdn Bhd v Sycal Bhd & Another Appeal [2019] 1 CLJ 592 (Court of Appeal) *("Guangxi")*

The Court of Appeal in *Guangxi* decided "*that any application for an oral hearing must be considered on its merits* … [and] *cannot be denied purely on the ground that time is limited*" (at [24]). However, if the application for an oral hearing is made only a few days before the hearing is due, then limited time may be a justifiable reason to deny the request (at [25]). The court also noted that "*instead of conceding to an oral hearing, the adjudicator could also order parties to put in written submissions with documents included as was done in" Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd & Another Case* [2017] 1 CLJ 101 (*id.*). Therefore, when a party makes a timely request for an oral hearing, the adjudicator must consider that request on its merits, and not deny it solely on the basis of limited time.

Skyworld Development Sdn Bhd v Zalam Corporation Sdn Bhd and other appeals [2019] MLJU 162

The High Court set aside the adjudication decision in *Skyworld Development Sdn Bhd v Zalam Corporation Sdn Bhd* pursuant to Section 12(3) of the Construction Industry Payment and Adjudication Act 2012 (the "CIPAA") as it was served one day late. In reaching this decision, the court clarified the term "working days" and explained that documents served outside working hours is served effectively on the same day served, unless parties have agreed otherwise. In this case, parties had agreed for the service of documents to be effected by e-mail. Skyworld sent the Adjudication Reply via e-mail on 21st May 2018 after working hours and the court held that it was served on that day. As such, the last day to serve the Adjudication Decision would have been on 25th July 2018 and therefore, the adjudication decision, which was served on 26th July 2018 was served out of time.

Ireka Engineering and Construction Sdn Bhd v PWC Corp and Another Appeal [2019] MLJU 35

The Court of Appeal in *Ireka Engineering and Construction Sdn Bhd v PWC Corp* upheld the High Court's decision to enforce the adjudication decision pursuant to section 28 of the CIPAA. It was held that there was no breach of natural justice when an adjudicator refuses to consider set-offs raised in two separate contracts in other projects also subject to adjudication proceedings. The Court held that pursuant to section 5(1) of the CIPAA, an adjudication is for a matter arising under a construction contract, meaning one contract unless the adjudications are consolidated. If a matter sought to be heard together with two or more adjudications in respect of the same subject matter under the same construction contract in one adjudication, then the parties must expressly consent to same.

Likas Bay Precint Sdn Bhd v Bina Puri Sdn Bhd [2019] MLJU 49

The Court of Appeal in *Likas Bay Precint Sdn Bhd v Bina Puri Sdn Bhd* upheld the findings of the High Court in granting a winding up petition based on an adjudication decision despite the adjudication decision not having been registered and enforced as a judgment of the High Court. In reaching this decision, it was noted that the wording of Section 28 of the CIPAA did not require an adjudication decision to be registered as a judgment prior to the issuance of a winding up order The High Court also confirmed that a successful party in an adjudication can also rely on Section 31 of the CIPAA in such an instance which expressly provides that the remedies available under the CIPAA are without prejudice to other remedies available in the construction contract or any written law. In this case, the Appellant further argued that the adjudicator had, in his adjudication decision, ordered for the monies to be paid to the AIAC and not to petitioner. Despite this, the court held that, the beneficiary of the money was the petitioner and therefore, the requirements for winding up were satisfied.

Inai Kiara Sdn Bhd v Puteri Nusantara Sdn Bhd [2019] 2 CLJ

The Court of Appeal allowed an appeal against the High Court's decision and enforced the Adjudication Decision. In coming to this decision, they held that the Respondent had to file an application for setting aside under Section 15 of the CIPAA to invoke the grounds therein in opposition to an enforcement claim under Section 28 of the CIPAA.

DOMESTIC ARBITRATION

Arch Reinsurance Ltd v Akay Holdings Sdn Bhd [Civil Appeal No.: W-02(IM)-1214-07/2015] ("*Arch Reinsurance*")

The Court of Appeal in *Arch Reinsurance* held that when determining whether to stay an originating summons pursuant to Section 10 of the Arbitration Act 2005, the court must take into consideration the entire circumstances in which the contract documents were created. In this matter, the Court explained that although the Charge document contained a statutory right that was not arbitrable, because "*the subject matter of the dispute in the Charge was the very subject matter in dispute in the Subscription Agreement and Bond Conditions*," the right in "*rem*" from the Charge document could not exist until and when an arbitral tribunal found that a breach of the Subscription Agreement and Bond Conditions existed (at [37]). The Court of Appeal held that the High Court erred by not taking into consideration that the three agreements were so intertwined that one could not be considered in isolation of the others. Accordingly, the Court determined that the Originating Summons arising from the Charge document was stayed until an arbitral tribunal could determine whether a breach of the Subscription Agreement and Bond Conditions existed. Therefore, when the contractual relationship is made up of varying documents, the court must take into consideration the entire relationship when determining whether a dispute exists under Section 10 of the Arbitration Act 2005.

Tune Talk Sdn Bhd v Padda Gurtaj Singh [2019] [Civil Appeal No. W-02(IM)(NCC)-1712-10/2014] ("*Tune Talk*")

In *Tune Talk*, the Court of Appeal considered whether non-compliance with Order 69, Rule 8(2)(b) of the Rules of Court was sufficient grounds to set aside an *ex parte* order for the recognition and enforcement of the final award. The Court held that despite the final award being negative and declaratory in nature, it was still enforceable as long as Sections 38 and 39 of the Arbitration Act 2005 were complied with, since the basis to set aside an award under these Sections were exhaustive. The Court explained that non-compliance with Order 69, Rule 8(2)(b) of the Rules of Court was not a fatal requirement since it is subordinate to the Arbitration Act 2005 and it is a procedural, rather than a substantive, requirement. Additionally, the common law principles asserted by the defendant would circumvent the Arbitration Act 2005, and accordingly cannot be applied.

East Coast Economic Region Development Council v Inai Kiara Sdn Bhd & Another [2019] W-02(IM)(NCVC)-1048-05/2018; *Target Resources Sdn Bhd v THP Bina Sdn Bhd* [2019] B-02(C)(A)-664-03/2018; *Maxwell Accent JV Sdn Bhd v Kuala Lumpur Aviation Fuelling System Sdn Bhd* [2019] W-02(C)(A)-827-04/2017; *Dunggon Jaya Sdn Bhd v Aeropod Sdn Bhd and Another* [2019] S-02(NCVC)(A)-1146-06/2017 (the "*Performance Bond Cases*")

In the Performance Bond Cases, the Courts of Appeal in Malaysia considered whether injunctions on performance bonds in construction contracts based on unconscionability should be granted. Albeit Sections 11(f) and 11(h) of the Arbitration Act 2005 have since been appealed, Section 11(a) of the Arbitration Act 2005 (as amended in 2018) still grants the courts the power to "*maintain or restore the status quo pending determination of the dispute*". In East Coast Economic, the Court of Appeal held that an ongoing arbitration, in and of itself, was not sufficient to order an injunction on a performance bond and considerations of "serious issues to be tried" and "balance of convenience" were not applicable to such determination. However, when determining whether to such injunction should have been granted, the Court took in such considerations. Whereas in *Target Resources*, in determining whether it was unconscionable for the employer to receive proceeds under a bank guarantee, the Court of Appeal found there was sufficient evidence that unconscionability existed, which was not a mere base assertion, taking into consideration that there was a serious issue to be tried and the balance of convenience was in favour of granting an injunction. In *Maxwell Accent*, the Court of Appeal held that "*there must be sufficient evidence to show that the circumstances or conduct are of such degree such as to prick the conscience of a reasonable and sensible man and in every case where 'unconscionability' is made out, there would always be an element of unfairness or some form of conduct which appears to be performed in bad faith*" (at [33]). The Court found that there was sufficient evidence of such conduct and therefore ordered an injunction to restrain the employer from calling on or receiving proceeds under the bank guarantee. Similarly, in *Dunggon Jaya*, the Court of Appeal ordered an injunction to restrain the employer from calling on or receiving proceeds under a bank guarantee holding that that test for unconscionability is "*whether sufficient evidence had been placed before the court so as to enable the court to be satisfied, not necessarily beyond reasonable doubt, that a case of unconscionability had been established to an extent that is sufficient for the court to be minded to order the injunction sought*" (at [31]). The Court explained that the test for granting such an injunction is, (1) "*whether the totality of the facts presented before him discloses a bona fide serious issue to be tried*;" (2) "*having found that an issue has been disclosed that requires further investigation, he must consider where the justice of the case lies*[, by balancing the convenience];" and (3) whether monetary damages are inadequate (at [36]).

Awangsa Bina Sdn Bhd v Mayland Avenue Sdn Bhd [Case No.: WA-28NCC-1146-12/2018]

Awangsa Bina filed a winding up petition against Mayland Avenue in respect of an alleged debt due under a Final Account. Pending arbitration, Mayland Avenue filed an application to stay the winding up petition pursuant to Section 10 of the Arbitration Act 2005 or in the alternative, to strike out the petition under the discretion given to the court pursuant to section 465 of the Companies Act 2016. In affirming *NFC Labuan*, the court held that Section 10 of the Arbitration Act 2005 does not apply to winding up petitions. Nonetheless, the court struck out the petition under Section 465 as it could be shown *prima facie* that there was a "dispute", which is a matter to be decided by an arbitrator and not the court.

Jaya Sudhir A/L Jayaram v Nautical Supreme Sdn Bhd and Others [Civ. Appeal No.: 02(i)-83-09/2018(W)]

The Federal Court dismissed the Court of Appeal's decision and upheld the granting of an injunction to restrain the ongoing arbitration. In its decision, the Federal Court decided that the higher standard in *J Jarvis & Sons Limited v Blue Circle Dartford Estates Limited* [2007] EWHC 1262, which is the test for an injunction pursuant to Section 10 of the Arbitration Act 2005, need not be met by a party litigant seeking an injunction to restrain the prosecution of an arbitration to which he is not a party but which would affect his proprietary rights. Instead, the court preferred the test in *Keet Gerald Francis Noel John v Mohd Noor @ Harun Abdullah* [1995] 1 CLJ 293 as the party litigant was not a party to the arbitration even though his proprietary rights were at stake.

INTERNATIONAL ARBITRATION

CL v SCG [2019] HKCFI 398

In CL v SCG, the Court of First Instance considered when the six (6) year limitation period starts to run under Section 4(1)(c) of the Limitation Ordinance and whether it began to run while a party was seeking enforcement of the award in China. The Court explained that to determine when the cause of action accrues, it depends on the facts and circumstances of the specific matter as well as the terms of the award. In this matter, the cause of action accrued when the ordered payment was not made "within a reasonable time of the publication of the award and demand being made" (at [16]). A reasonable time was determined by the Court to be 21 days, therefore the cause of action accrued 21 days from when the first demand for payment was made. Additionally, the Court held that because there were no provisions in the Arrangement Concerning Mutual Enforcement of Arbitral Awards, Arbitration Ordinance, or the Limitation Ordinance which stated that the limitation period was suspended while a party sought enforcement in China, the limitation period continued to run during an such application.

Dickson Valora Group (Holdings) Co Ltd and another v Fan Ji Qian [2019] HKCFI 482 (*"Dickson Valora"*)

In *Dickson Valora*, the Court of First Instance considered whether an anti-suit injunction can be issued against a non-party to an arbitration agreement. The first issue the Court dealt with was whether the arbitration clause in the Shareholders Agreement applied to the 3rd Addendum. In respect to this issue, the Court held that, considering that (1) the 3rd Addendum was an addendum to the Supplementary Agreement, which was expressly intended to supplement the Shareholders Agreement; (2) the three documents were executed by the same three parties; (3) the documents were presumably intended to be read as a whole; and (4) neither the Supplementary Agreement nor the 3rd Addendum had dispute resolution or choice of law provisions, the arbitration clause in the Shareholders Agreement applied to the 3rd Addendum. The next issue was whether a non-party to the 3rd Addendum could be bound by the arbitration clause. In relying on Hong Kong common law, the Court determined that because the rights on which the non-party's lawsuit rested derived from the contract, it was governed by the contractual mechanisms, namely the arbitration clause. Therefore, the Court held that the Claimants had "*the right to prevent a claim against them based on their contractual obligations being pursued otherwise than by the contractually agreed mode, viz arbitration in Hong Kong*" (at [46]). In so determining whether an injunction should be granted, the Court explained that an injunction should be granted in such case, unless the Defendant (non-party) could show strong reasons for not doing so. The third issue for the Court was whether the Plaintiff's failed jurisdictional challenged in a PRC court gave rise to issue estoppel. The Court relied on Section 3 of the Foreign Judgments (Restriction on Recognition and Enforcement) Ordinance, which provides that if a judgement of an overseas court is contrary to the arbitration agreement, it shall not be recognised or enforced in Hong Kong if the person against whom it was given did not consent or submit to the overseas court's jurisdiction. In so relying, the Court held that based on its same reasoning for the anti-suit injunction, the judgement of the PRC court did not give rise to issue estoppel in Hong Kong. Consequentially, taking into consideration all the relevant factors, the Court determined that there were no strong reasons not to grant the injunction and therefore granted the injunction in favour of the Claimants.

ZCCM Investments Holdings PLC v Kansanshi Holdings PLC & Another [2019] EWHC 1285 (Comm)

The arbitral tribunal in this case issued a "Ruling on Claimant's Permission Application" ("Ruling"). The Appellant sought to challenge the ruling pursuant to Section 68 of the Arbitration Act 1996 and had to show that the Ruling was an "award". The High Court of England and Wales held that it was a Procedural Order and not an award as, among other reasons, the ruling pertained to a procedural issue and not the substance of the claim and that it was not a final decision on the merits of any of the claims. Further, they reasoned that from the surrounding circumstances and the form of the Ruling, a reasonable recipient would not have considered it to be an award.

EVENTS CALENDAR - SAVE THE DATE!

5th Aug 2019	Evening Talk Series : Expedited Proceedings and Interim Measures
13th Aug 2019	Driving Forces Behind Belt & Road Initiative
4th Sept 2019	AIAC Sports Month 2019 - Documentary on Match Fixing
7th Sept 2019	AIAC Futsal Tournament 2019
12th Sept 2019	AIAC Sports Month 2019 - Workshop on Drafting Sports Contracts
19th Sept 2019	AIAC Sports Month 2019 - Workshop on the Constitution of Sporting Bodies
23rd Sept 2019	Certificate Programme in Sports Arbitration
27th Sept 2019	International Sports Law Conference
8th Oct 2019	AIAC Standard Form of Building Contracts 2019 Roadshows at Kota Kinabalu, Sabah
10th Oct 2019	AIAC Standard Form of Building Contracts 2019 Roadshows at Kuching, Sarawak
17th Oct 2019	2019 Kuala Lumpur Summit on Commercial Dispute Resolution in China
2nd - 6th Nov 2019	AIAC Certificate in Adjudication
5th Dec 2019	AIAC Standard Form of Building Contracts 2019 Roadshows at Johor Bahru, Johor

JANUARY

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INTERNATIONAL

SPORTS LAW CONFERENCE

27 SEPT 2019

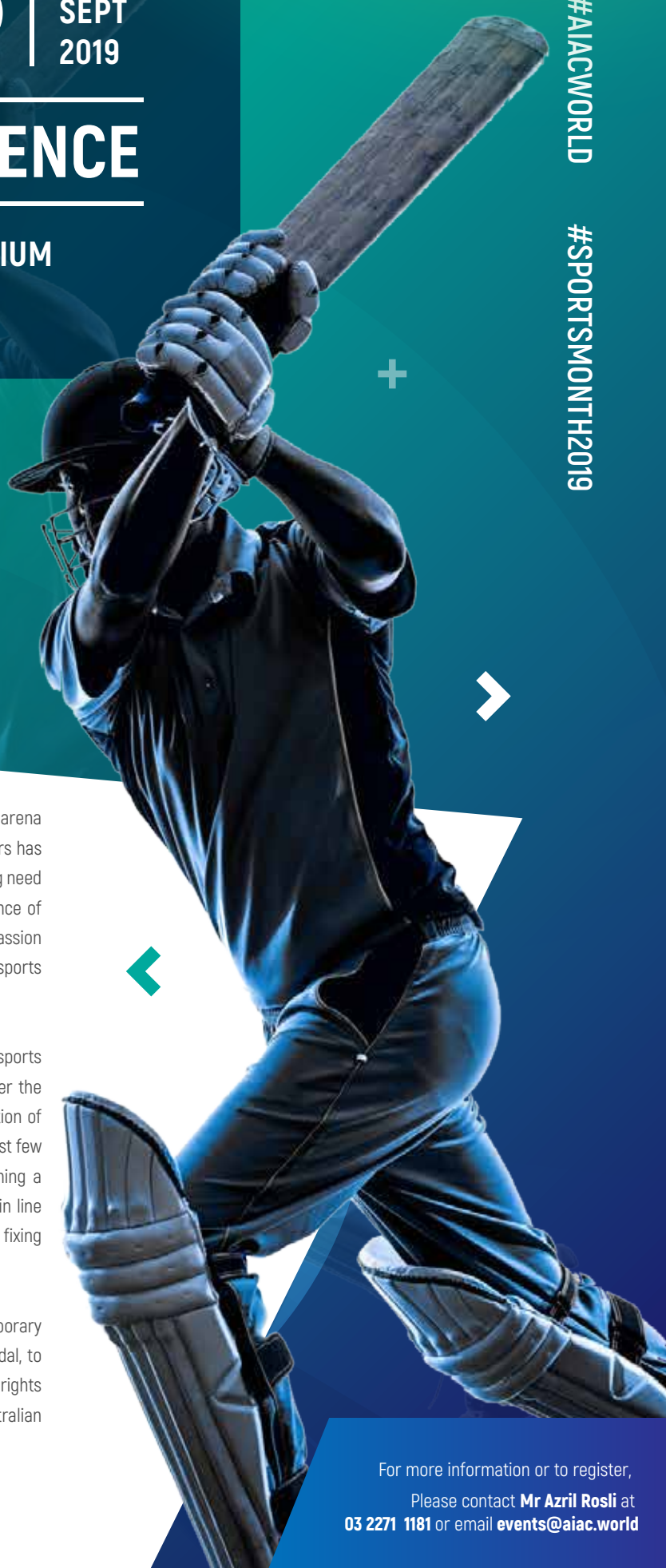
#AIACWORLD #SPORTSMONTH2019

9.30 AM - 6.30 PM
WITH DINNER & COCKTAIL RECEPTION TO FOLLOW

AIAC AUDITORIUM
BANGUNAN SULAIMAN

STEPPING UP TO THE CREASE:

ASIA'S METEORIC RISE IN THE WORLD OF SPORTS

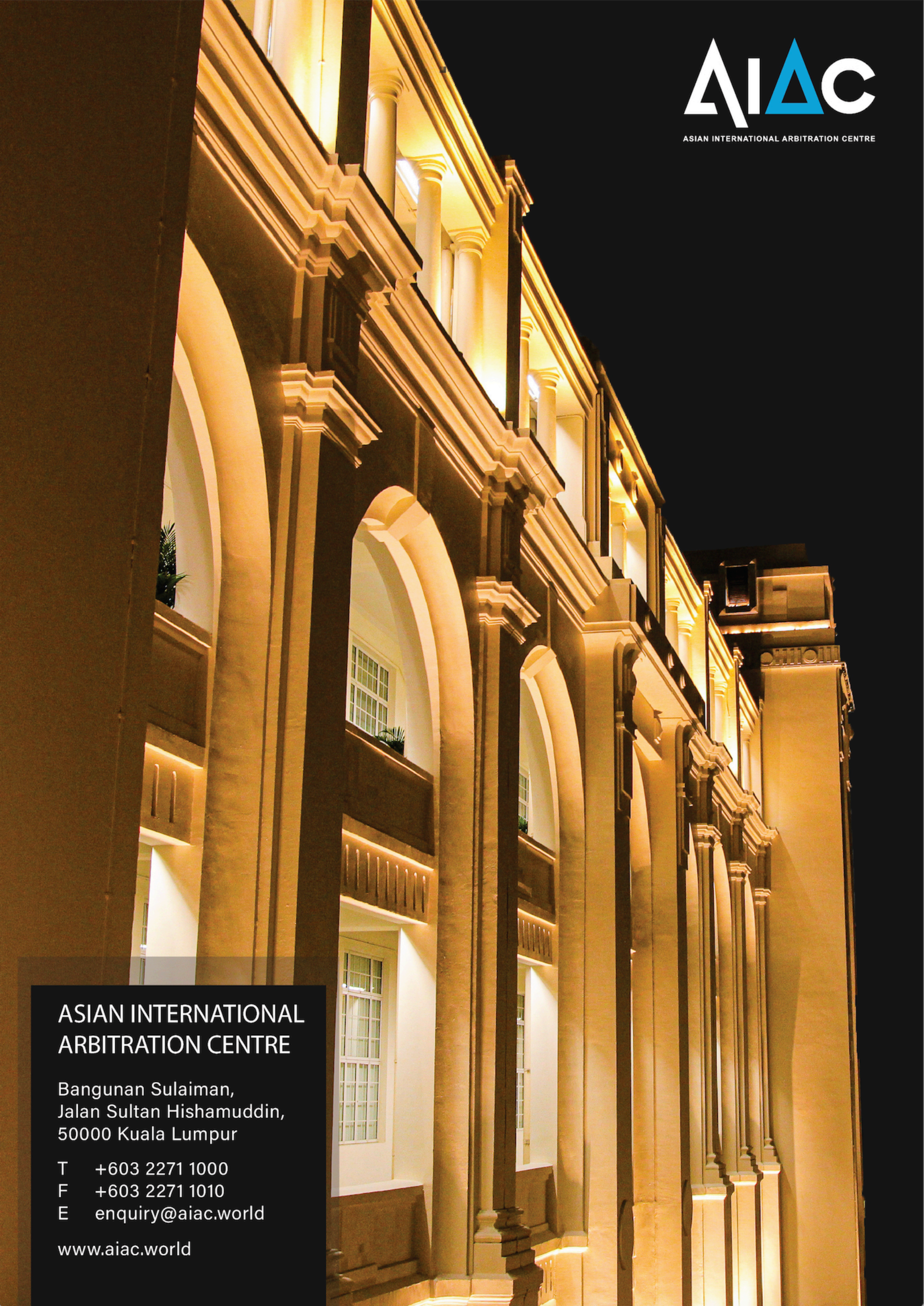


Asian athletes' unprecedented rise and acclaim in the global sporting arena accompanied with the emotions and fan-base of some 4 billion spectators has taken the sporting world by surprise. This historic decade marks a growing need for mature discourse on sports jurisprudence and harmonized governance of national and international sports federations across continents. Asian passion for sports has played a pivotal role in removing the Eurocentric lens that sports was historically often viewed through.

The emergence of 21st century socio-medico awareness in the world of sports has also brought about novel legal concepts on equality and rights under the wider umbrella of sporting rights and sports democracy, placing the notion of hat-tricks and heartbreaks into focus. The law vs. spirit of sports in the past few years has also seen Asian countries actively pushing towards establishing a more comprehensive regulatory and wholesome sports law framework, in line with international standards, dealing with a host of issues including match fixing and doping to name a few.

The theme this year will not only explore key advancements and contemporary issues in international sports law ranging from the Sandpapergate scandal, to genetic and biological variations in track and field, as well as competing rights on freedom of speech and public interest highlighted through the Australian rugby crisis, but also discuss Asia's meteoric rise in the world of sports.

For more information or to register,
Please contact **Mr Azril Rosli** at
03 2271 1181 or email **events@aiac.world**



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