ASIAN INTERNATIONAL ARBITRATION CENTRE

NEWSLETTER #01
APRIL 2020

TOWARDS A NEW DECADE

NEW IDENTITY, SAME PHILOSOPHY

ASIAN INTERNATIONAL ARBITRATION CENTRE

Backed by over forty years of experience, the Asian International Arbitration Centre ("AIAC") remains loyal to the heritage we have built under our old name (Kuala Lumpur Regional Centre for Arbitration). Following the 2018 rebranding, the AIAC continues its commitment to the international ADR ecosystem and its users by providing flexibility within our procedures, which allows users to tailor the dispute resolution processes and resolve a wide variety of domestic and international disputes at minimal cost. The AIAC administers arbitration, mediation, adjudication and domain name disputes focusing on continuous improvement of its products and services. Aside from disputes being resolved under the UNCITRAL Arbitration Rules, the AIAC assists in proceedings conducted under the following rules:

- AIAC Arbitration Rules;
- AIAC Fast Track Arbitration Rules;
- AIAC i-Arbitration Rules;
- AIAC Mediation Rules; and
- AIAC Supplemental Rules for Uniform Domain Name Dispute Resolution Policy.

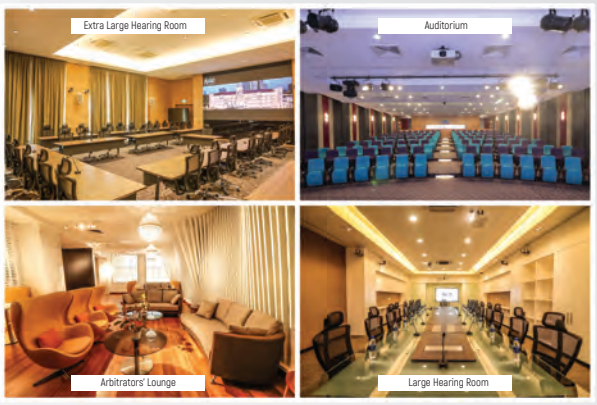
WHY AIAC?

- Modern ADR rules and procedures;
- Over four decades of experience;
- One of the most affordable market rates and multi-currency support;
- State-of-the-art facilities equipped with modern IT technologies and services;
- Light-touch administrative approach;
- Multilingual and diverse legal team;
- ADR Library; and
- Affordable educational programs and courses for seasoned and young ADR practitioners.

AIAC's Rules

FACILITIES

The AIAC is privileged to be located at Bangunan Sulaiman, which is one of the most distinguishable British colonial buildings in Kuala Lumpur, Malaysia. Spanning across 16,430 sqm, Bangunan Sulaiman includes 24 hearing rooms, 12 breakout rooms, a business centre, a library, an auditorium and multiple dining areas. Recognised as a premier hearing centre with the potential to be the best outside the Peace Palace, Bangunan Sulaiman was named a National Heritage Site in Malaysia in 2018.



INNOVATIVE INITIATIVES

As part of the AIAC's holistic dispute management initiative, the AIAC was the first arbitral institution in the world to launch a suite of Standard Form of Building Contracts ("SFCs"). The AIAC's SFCs balance the rights and obligations of all interested stakeholders and were the first standard form contract compliant with the Construction Industry Payment and Adjudication Act 2012. In addition to the AIAC SFCs, the AIAC annually hosts a Sports Month, which aims to promote awareness about sports law and suitability of ADR mechanisms for sport disputes. Moreover, the AIAC is also one of the four offices of the Asian Domain Name Dispute Resolution Centre ("ADNDRC") through which it provides domain name dispute resolution services under the Internet Corporation for Assigned Names and Numbers' Uniform Dispute Resolution Policy. Currently, the AIAC operates the Secretariat of the ADNDRC and Mr. Vinayak Pradhan is the Chairman of such. The AIAC is also authorised by the Malaysian Network Information Centre ("MYNIC Berhad") and the Brunei Darussalam Network Information Center ("BNNIC") to administer .my and .bn domain name disputes. Finally, the AIAC constantly conducts roadshows and capacity building events to disseminate knowledge regarding such initiatives and ADR within Malaysia and abroad.

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

FROM THE EDITORS' DESK

Welcome to the first issue of the Asian International Arbitration Centre's ("AIAC") Newsletter for 2020! The last few months have witnessed some of the world's most turbulent events in history, from Brexit to the COVID-19 pandemic, and it is indeed difficult to believe that we are not even through the first half of the year.

For the AIAC, the most heart-breaking moment has undeniably been the sudden passing of our beloved Director, Mr. Vinayak P. Pradhan, on 8th March 2020. In memory of Mr. Pradhan, this edition of the AIAC Newsletter contains a tribute section which captures Mr. Pradhan's professional achievements, as well as selected messages from his friends and colleagues in the arbitration community. At this juncture, we would like to thank the global arbitration community for the words of love and support sent to the AIAC and Mr. Pradhan's family during these difficult times.

Despite this setback, the AIAC has continued working collaboratively with its partners and stakeholders in promoting arbitration and alternative dispute resolution in Malaysia and beyond.

Between December 2019 and January 2020, the AIAC and the AIAC YPG embarked upon roadshows to various universities across Malaysia. Visiting a total of twelve universities, the AIAC Legal Services Team, and practitioners associated with the AIAC YPG, introduced students to the world of arbitration and mooting in what proved to be a fruitful learning experience.

On the international front, the AIAC started 2020 blazingly in Bangkok, Thailand, to participate in the Asia Pacific Regional Arbitration Group (APRAG) Conference in January 2020. This was followed by our participation in the 38th Session of the UNCITRAL Working Group III: Investor-State Dispute Settlement Reform held in Vienna, Austria from 20th to 24th January 2020, in recognition of the potential and importance of understanding the potential reforms to the current Investor-State Dispute Settlement (ISDS) framework.

Closer to home, we were proud to support the Chartered Association of Building Engineers (CABE) Malaysia Chapter Annual Conference 2020 held at the AIAC's Auditorium on 17th January 2020. Centred around the theme "Achieving Professional Excellence", the one-day conference was filled with informative and thought-provoking sessions, which included a session on the AIAC's Standard Form of Design and Build Contracts.

The first quarter of 2020 also saw the AIAC jointly organising a public forum on the *Reforms to the Construction Industry Payment and Adjudication Act 2012* ("CIPAA 2012") with the Malaysian Bar Council's Construction Law Committee. Held on 26th February 2020, we were honoured to be graced with the presence of YA Dato' Lee Swee Seng, Court of Appeal Judge who delivered an excellent Keynote Address as well as the attendance of several members of the judiciary, including YA Dato' Lim Chong Fong, High Court Judge of Kuala Lumpur and YA Dato' Hajah Aliza Binti Sulaiman, Judicial Commissioner of the High Court of Kuala Lumpur. The forum also received overwhelming attendance from the public, including industry stakeholders and legal practitioners, who shared their ideas on how to improve the CIPAA 2012.

In line with our mission to continue spearheading initiatives aimed at increasing awareness on the latest contemporary and innovative developments in the ADR sphere, the AIAC continued with its AIAC Evening Talk Series with an engaging session on *Business and Human Rights Arbitration*. This talk was timely in that it coincided with the launch of the Hague Rules on Business and Human Rights Arbitration.

As we enter a new decade, the AIAC is also looking to establish its prominence in the technology and intellectual property sector. We had our first tech-related event in 2020 on 20th February, where we hosted LawTech Malaysia's talk on the *Introduction to Regtech*. Further, on 3rd March 2020, we hosted the International Intellectual Property Commercialization Council (IIPCC) Malaysia Chapter's soft launch at our premises. The AIAC also established a Technology Expert Committee which will create a community for lawyers and key technology industry players to discuss recent developments, brainstorm solutions to current issues, collaborate with one another on projects and disseminate information.

Unfortunately, due to the COVID-19 pandemic and the enforcement of the Malaysian Government's Movement Control Order ("MCO"), the AIAC closed its premises between 18th March 2020 and 28th April 2020 ("MCO Period"). Despite this necessitating the cancellation of some of our flagship events, the AIAC still found innovative ways for engaging in capacity building activities during the MCO Period.

Notably, the AIAC had to postpone the 4th AIAC-ICC Pre-Moot which was scheduled to take place in March 2020. However, in lieu of the Pre-Moot, the AIAC, in conjunction with Immediation, organised Virtual Practice Rounds for the 27th Willem C. Vis International Arbitration Moot and 17th Vis (East) Moot, that were also held virtually, between 13th and 15th March 2020 which proved to be a success!

Further, the AIAC also launched its webinar series – ADR Online: An AIAC Webinar Series – to provide a platform for ADR and other legal practitioners to share insights on the legal and commercial impacts of COVID-19 on the global community, amongst other topics. Remarkably, the three webinar sessions in March 2020, and the nine additional webinars held between 1st and 14th April 2020, were well attended with approximately 250 participants tuning in either to the Zoom interactive platform or the Facebook Live broadcast for each session. Given the success of the series, the AIAC intends to continue such webinar initiatives throughout 2020.

With all these exciting initiatives and programmes, the AIAC is confident that the new decade will present incredible opportunities for the Centre to revitalise its offerings in its promotion of ADR globally.

No newsletter would be complete without industry contributions. As such, we would like to thank our Special Contributors – Karen Abraham, Foo Joon Liang, Grace Chaw, Kaylee Tan Jin Yee, Manavendra Mishra, Sanjeev Kapoor and John Coghlan – for their invaluable insights in this Newsletter.

"*The gem cannot be polished without friction, nor man perfected without trials.*"

– Chinese Proverb

If 2020 to date has taught us anything, it would be that life is unpredictable, and we all need the courage and commitment to embrace change and overcome adversity. So long as we take whatever may come in stride and look for positivity in times of uncertainty, we will be able to grow both as individuals and as a global community.

Till the next issue, happy reading and take care!

- AIAC Newsletter Team

REMEMBERING A DOYEN OF ARBITRATION:

A TRIBUTE TO THE LATE

Vinayak P. Pradhan

As an institution, the Asian International Arbitration Centre ("AIAC") has faced its fair share of challenges in recent times. Its strength, however, has always rested in the dedication and unwavering enthusiasm and resilience of its people who have worked collaboratively to make the Centre what it is today.

On 8th March 2020, the AIAC received the devasting news that our beloved Director, Mr. Vinayak P. Pradhan, had passed away peacefully earlier that day, surrounded by his family.

With the AIAC being a close-knit community, the unexpected loss of Mr. Pradhan left a void in the hearts of all the staff at the Centre. Although we only had the pleasure of working closely with Mr. Pradhan for a brief period, from 21st November 2018 to 8th March 2020, Mr. Pradhan had left us with memories and invaluable lessons that will forever be cherished. He was beloved for his wisdom, mentorship, integrity, charm, compassion, sense of humour and love for cricket and whiskey, and his unyielding intellect made him more of a father-figure and role model than a boss for most of us.

Born on 2nd October 1950 in Kuala Lumpur, Malaysia, Mr. Pradhan graduated with a Bachelor of Laws with Honours from the University of Singapore in 1973. Admitted to practice as an Advocate & Solicitor in the High Court of Malaysia in 1974 and in the Supreme Court of Singapore in 1991, Mr. Pradhan's legal career spanned over 45 years during which time he built reputable expertise as a litigation and arbitration practitioner.

In his 45-year career as a Partner and Consultant at Skrine, one of the largest law firms in Malaysia, Mr. Pradhan was considered a preeminent figure in construction law. He also led Skrine's Construction and Arbitration Practice Group for many years. During his time at Skrine, Mr. Pradhan mentored a number of pupils who have gone on to become well-respected lawyers in their own right. In the words of Skrine, Mr. Pradhan was "*a talented advocate, whose oratorical brilliance regularly outshone the best and was immensely respected in the arbitration world*".

Mr. Pradhan's experience was not limited to the construction industry. He was versed in commercial law matters as well as in disputes arising out of the banking, insurance, medical negligence, engineering and energy industries.

In the dispute resolution world, Mr. Pradhan's accomplishments and reputation remain inspirational. His experience panned across domestic and international matters involving a wide variety of foreign laws such as England, Nigeria, Pakistan, Vietnam, Qatar, the People's Republic of China, Hong Kong, India, Sri Lanka, Mongolia, Bangladesh, Thailand, the Philippines and Singapore, and institutional rules including those of the ICC, AIAC, UNCITRAL, LCIA, HKIAC, SIAC, PORAM, PAM and IEM.

In recognition of his skills and legal acumen, Mr. Pradhan held many prominent appointments throughout his illustrious career: Commissioner with the United Nations Compensation Commission dealing with construction and civil engineering claims from corporate entities (1st August 1998 to 31st August 2003); Member of the Permanent Court of Arbitration, The Hague (2003 to 2015); Vice Chair of the ICC Commission on Arbitration and ADR (January 2008 – December 2017); Panel of Conciliators and Arbitrators of the International Centre for Settlement of Investment Disputes (2008 to 2014); Council of Advisors of the Singapore International Arbitration Centre (2009 to 2012); Commissioner with the Enforcement Agency Integrity Commission, Malaysia (2011-2017); Global President, Chartered Institute of Arbitrators (2013); and ICC International Court of Arbitration (2017 – 2018).

Fittingly, in 2016, Mr. Pradhan became the first recipient of the 'Arbitrator of the Year Award' by the Chartered Institute of Arbitrators (Malaysia Branch). In his citation, the Chief Justice of Singapore, Mr. Sundaresh Menon, commented:

> "*In the course of my career at the Bar, I acted as counsel in many arbitrations. I therefore have had the opportunity to appear before a fair number of arbitrators from many parts of the world. With the benefit of this perspective, I have no hesitation in saying that I personally rate Vinayak among the very finest of them.*"

Those who knew Mr. Pradhan would also know that he was an active sportsman in his youth with a keen interest in hockey and cricket. His interest in sports was also evident in his legal career. Since 2016, Mr. Pradhan had been an arbitrator of the Court of Arbitration for Sport (CAS), Lausanne, and also an arbitrator of the Olympic Council of Malaysia. In 2014, Mr. Pradhan was also appointed by CAS as one of the six Ad Hoc judges empanelled to deal with disputes arising out of the 2014 - 17th Asian Games in Incheon, South Korea. Whilst with the AIAC, in July 2019, Mr. Pradhan was also appointed by the *Fédération Internationale de Football Association* (FIFA) as the Deputy Chairperson of the FIFA Adjudicatory Chamber.

One of the most striking aspects about Mr. Pradhan was that regardless of all his professional and personal achievements, he remained humble, joyful and kind until his very last days. We still remember with great fondness, the simplicity that he exuded on his first day of office at the AIAC. With his trusted black backpack on one shoulder, he walked into his office and greeted the staff waiting to welcome him, insisting right at the outset that we all address him as "Vinayak" irrespective of whether he was talking to an intern or a case counsel. It was hard for some of us to swallow this, and many of us continued to address him as Mr. Pradhan as a mark of respect deserving for a man of his stature.

One of our most treasured memories of him was during the ICC Cricket World Cup in 2019, specifically, the mornings after India had won a match. We still remember how Mr. Pradhan would enter the office with a wide smile, beaming with pride as he made his way to each case counsel's cubicle, chatting with them and celebrating India's win. Most of us had very little knowledge of cricket and what little we knew was from a 5-minute Google read in the morning, just before Mr. Pradhan made his way to his room. It had become common knowledge amongst staff that the mornings of the ICC Cricket World Cup 2019 season were sacred and that we could expect Mr. Pradhan to make a quick beeline to each of us to discuss the matches from the night before. Amateurs we were, but it certainly did not stop him from engaging in a detailed and animated description of the matches with us, one in particular, being his commentary from the toss of the coin to the nail-biting super over. It was, of course, the final match between New Zealand and England, which Mr. Pradhan described as being one of the most dramatic in the history of cricket. There was, however, a little less sparkle in his eye that morning, probably owing to the fact that he would have preferred to witness India being part of the super over and clinching the World Cup title!

Coming a close second to his passion for cricket, was his love for a glass of whiskey, especially after a gruelling day of appointments at the AIAC. As the dust of the day settled, Mr. Pradhan would invite those remaining in the office to his room where he would share stories of his past, exchange banter and have a few good laughs with us. There was always something serendipitous in each of these after-work impromptu encounters with Mr. Pradhan, as we often found ourselves leaving his room, a little more enriched in knowledge, invigorated by his ideas and more significantly, inspired by him.

Mr. Pradhan is survived by his wife – Madam Varsha Pradhan – his son and daughter in law – Mr. Avinash Pradhan and Ms. Ho Mei Shi – and daughter – Ms. Anisha Pradhan. Our thoughts rest with the family in these difficult times.

Upon the announcement of Mr. Pradhan's passing, the AIAC received a number of condolence messages from the global dispute resolution community. Respectfully, and with the permission of the authors, we have reproduced some of these messages as part of this tribute.

On a final note, we at the AIAC would like to say:

Mr. Pradhan, it was a privilege knowing you and an honour working with you. You have had a great impact on all of us and you will be dearly missed. We will always cherish the times we spent with you and reminisce about you. We hope to preserve your legacy at the AIAC by emulating the values you've instilled in us and will continue to prescribe to the lessons you thought us. May your soul rest in peace.

Remembering you always,

Your colleagues at the AIAC

… Mr. Vinayak is a kind elder, is a life of wisdom. I still remember that in September 2019, he accepted our invitation and came all the way to Kunming to attend the conference. His wonderful speech won warm applause from all of us. His dedication and professionalism are worthy of our admiration and eternal memory …

-Zhang Jingmei (Director), Kunming International Commercial Arbitration Service Center (KICASC)

… We recall with gratitude his contribution towards BIAC and his presence as a speaker at our training cum seminar on "ADR: International Best Practice and success factors" held at the Dhaka Chamber of Commerce and Industry (DCCI), Dhaka on from 13-18 December 2016. His kind words motivated us in our journey and we will always cherish his support … It was an honor and a privilege to have him with us …

-Muhammad A. (Rumee) Ali (CEO), Bangladesh International Arbitration Centre (BIAC)

… During the term of Director in AIAC, under his strong supporting, the cooperation between AIAC and HIAC achieved great work. We jointly held the China-ASEAN Legal Forum in 2019, established mediation centre for investors, recommended and recognized the Arbitrators and Mediators mutually, which making positive and wide influence in ASEAN and China. The passing of Mr. Pradhan has struck us as his colleagues and friends at the AIAC with grief and loss …

-Wang Xuelin (Chairman), Hainan International Arbitration Court (HIAC)

… Vinayak had all the qualities that are desirable as an arbitrator, particularly as Presiding Arbitrator … One memory that I have which illustrates a facet of his unique personality was when he was presiding as an Arbitrator with myself as a co-Arbitrator. The case was memorable only because there were 5 technical experts having to give evidence on the same technical issue, and our Tribunal decided that we would "hot-tub" the expert witnesses i.e. have them give evidence concurrently in the same session. Because the hearing was held in Singapore where our International Arbitration Act expressly permits a tribunal to require witnesses to take an oath, Vinayak decided that he would administer the oath to the 5 expert witnesses. He then asked all the 5 experts to stand up together and recite the words of the oath in unison, which is a sight that I had never seen before. After that joint oath-taking, Vinayak thanked the expert witnesses graciously and commented "I have always wanted to conduct a choir and this is the nearest I will get to that" …

-Dr. Michael Hwang SC, Michael Hwang Chambers LLC (Singapore)

… Vinayak will be missed by many all over the world. He had a humility about him that belied his stature and standing – a gentle, soft spoken man with a smile always dancing on his lips. We have all lost a good & kind friend …

-Mohan Pillay, Pinsent Masons MPillay LLP (Singapore)

… It was with deep regret that we learned about the sad demise of Mr. Vinayak P. Pradhan, Director of the Asian International Arbitration Centre. Although I did not have an occasion to make a personal acquaintance with him, I have heard that he was very much esteemed. His distinguished career speaks of his outstanding mind and great talent…

-Prof. Mykola Selivon (President of the International Commercial Arbitration Court), Ukrainian Chamber of Commerce and Industry (ICAC)

… My association with Vinayak Pradhan goes back about 50 years ago in Ipoh where his father and mine were friends in the 60's. He was a very kind and principled man … I also had the pleasure of working with him on a Joint Venture Development dispute … Some little things that I remember was when I used to meet him at his office during the Joint Venture Development Dispute on a Friday and found his dressed casually in his office in jeans and when I inquired whether he was on annual leave, he just said 'No' but at Skrine we usually dress down on Friday's. Even though he dressed casually, he was always professional in every way …

-Sr. Isacc Sunder Rajan, Chartered Association of Building Engineers (CABE), Malaysia Chapter

Please pass on my condolences to the family of the late Mr Pradhan. I remember him as an accomplished and dignified man.

-Dr. Michael Pryles AO PBM, Dispute Resolution Services Pty Ltd (Melbourne)

I am extremely sad to hear of this. I knew Mr Pradhan and held him in high regard as a person and a leading light of arbitration. My deepest condolences.

-Chan Leng Sun SC, Chang Leng Sun LLC, Essex Court Chamber Duxton (Singapore)

… The untimely demise of the late Mr Pradhan has marked the loss of a great leader and a friend to the arbitration industry. To the family members of the late Mr Pradhan, we share with them the sorrow and grief during this period of bereavement. May his soul rest in eternal peace.

-Foo Chek Lee, President of the Master Builders Association Malaysia (MBAM)

… Words seem inadequate to express the sadness we feel for this loss. As Deputy Chairman of the FIFA Ethics Committee since June 2019, Vinayak made a telling contribution to protecting the safety and well-being of individuals involved in football, and to ensuring greater transparency of ethics proceedings, one of the main FIFA reforms … his legacy and achievements, and in particular his leadership, his personality and his human qualities, will not be forgotten, and he will be truly missed …

-Gianni Infantino (President) & Fatma Samoura (Secretary General), Fédération Internationale de Football Association (FIFA) (Switzerland)

… Over the years, THAC have been working closely with Mr. Vinayak P. Pradhan and AIAC. We were remarkably touched by his professional determination and his continuous support for our projects and events in Thailand. Mr. Vinayak P. Pradhan will always remain in our hearts …

-Pasit Asawawattanaporn (Manging Director), Thailand Arbitration Center (THAC)

… I was, as with fellow Malaysians in the fraternity, saddened by the news of Vinayak's passing and had very much looked forward to seeing him in June. He was, as one might have guessed, respected and appreciated amongst the secretariat lawyers in Geneva during the late '90s, when he was a Commissioner with us. I am for my part glad I spoke to him last year and will miss him …

-Prof. Chin Leng Lim (Barrister, International Member), Keating Chambers (London)

… Mr Pradhan was recognised internationally for his dedication, experience and leadership in the field of arbitration. His contribution has been immense. He will be greatly missed and dearly remembered by many in the international arbitration community …

-Sarah Grimmer (Secretary-General), Hong Kong International Arbitration Centre (HKIAC)

We have lost a friend, a quiet leader and a sparkling light
Vinayak inspired us in unseen ways with little fanfare, often with no acknowledgment
Sometimes, I think that he did not even realise how much he inspired people; he was just a role model because he was who he was …
A man of high integrity and principle, yet always a friend infused with humility and humour
For us in construction law, he was an early hero, when few had heard of the practice of construction law
For us in arbitration, his leadership by example needs no words
For us in Malaysia, his global recognition as a man of integrity, principle and capability makes us proud
And for me, he was a friend whom I loved and admired and felt his warm return of friendship
We miss you Vinayak ….. thank you for lighting our lives

-Tan Swee Im, 39 Essex Chambers (Kuala Lumpur)

… I am very sad to hear about the passing of Mr Vinayak Pradhan. Vinayak was a hugely respected figure in the international arbitration community and a wonderful ambassador for his country. He was a welcoming friend when I first visited Malaysia and thereafter and he will be greatly missed …

-Adrian Hughes QC, 39 Essex Chambers (London)

… A person of great erudition and intellect, Mr. Pradhan was an extraordinary man and an accomplished lawyer with a host of illustrious appointments … His is a huge loss for the legal fraternity but fortunate for us his legacy is bound to endure … DREx Talks considers itself fortunate to have had the opportunity to associate with such a legal luminary during his lifetime. May his soul rest in peace…

-DREx Talk Secretariat

… A fine gentleman, Mr. Vinayak had been very cooperative and supportive of our collaboration to train potential Community Mediators in Penang. He even had personally attended two events in 2019. Mr. Vinayak will be dearly missed in all our future collaborations …

-Dato' Ong Seng Huat JP (Hon. Secretary), The Council of Justices of the Peace, State of Penang (Malaysia)

… The Board and Management of the Singapore International Arbitration Centre (SIAC) are deeply saddened to learn of the passing of Mr Vinayak P. Pradhan, Director of the Asian International Arbitration Centre (AIAC), and extend our sincere condolences to the family of Mr Pradhan. Mr Pradhan was a distinguished and highly respected member of the international arbitration community. He will be dearly missed by us …

-Lim Seok Hui (CEO), Singapore International Arbitration Centre (SIAC)

… Vinayak Pradhan was a man of considerable intellect and ability and will be missed by the arbitration community. I only had the pleasure of sitting with him once as arbitrator but dealt with him in various other capacities and found him to be extremely capable and a pleasure to work with …

-Peter Megens (Chartered Arbitrator, Barrister & Solicitor), Outlook Consulting Pty Ltd (Australia)

… I knew Vinayak in 2012, during my pupillage with Skrine. I could still recall his office at the corner of 10th floor, Menara UOA, his office room door is always opened, always welcoming other partners, young lawyers and even pupils. He was never too busy for an intellectual discourse, and almost every evening his office room gathers a party of 5 to 8 Skrinees. When a question for guidance is put to him or a query on a legal stance, his eyes always beam with fiery enthusiasm and glowing compassion, and conclusively at his enlightening answer, or question, with a warm smile Vinayak seeks and intends to pass down knowledge, like flames of a torch. Vinayak is a towering figure, a rare lawyer that only emerges every other decade, and his parting is an immense loss to the legal fraternity and the judicial system. Thank you, Vinayak, and my deepest condolences to your loved ones …

-Chin Ze Yi, Ze Yi & Kee (Malaysia)

… On behalf of my firm I would like to convey my deepest condolences to the late Mr. Vinayak Pradhan's family on their great loss. May his soul attain moksha. On my brief encounters with the great man, what was striking was his sense of humour and intelligence. Very few have the equal dose of this qualities...

-Palaniappan Ramasamy, Messrs. Palani (Malaysia)

… It was my pleasure and privilege to have appeared before Mr Pradhan in an arbitration and also to have had the chance to serve with him on the ICC Arbitration Commission for a number of years, and to have met Mdm Pradhan with him from time to time and his other family members. Mr. Vinayak Pradhan was a man of great wisdom, vision, kindness and good humour, as well as of vast knowledge and experience with a profound commitment to public service …

-Kim Rooney (Independent Arbitrator, Barrister & Mediator), Gilt Chambers (Hong Kong)

I am deeply saddened to learn of the passing of Mr. Vinayak P. Pradhan, whom I had the pleasure and honour of sitting with in an arbitration matter in 2010. Vinayak was a consummate and gifted professional and a brilliant teacher, with a warm, generous and humane spirit. All who knew him will feel a deep sense of loss.

-David L. Kreider (Independent Arbitrator)

… My favourite memory of Mr. Pradhan is of his speech at the CIArb International Conference at Shangri-La Rasa Sayang, Penang in December 2018. Mr. Pradhan spoke very incisively about the state of construction adjudication at that time and the impact of several polarising cases such as View Esteem and Leap Modulation. Throughout his speech, Mr. Pradhan's candour and willingness to share his views constantly set the audience abuzz. In a conference which boasted numerous distinguished speakers … Mr. Pradhan's speech was easily the most thought-provoking and memorable …

-Anonymous (Advocate & Solicitor) (Kuala Lumpur)

… With great sadness and regret I was just informed of the passing of Mr. Vinayak Pradhan. The news was sudden and shocking. In 2016-2017, I was involved in an arbitration proceedings, with Vinayak as the president of the panel of arbitration. In view of Vinayak's distinguished record, the party appointed members agreed on Vinayak as the president with no hesitation. During the course of the arbitration, Vinayak showed great skill and experience as well as leadership, leading to the issuance of a unanimous award by the panel …Vinayak Pradhan's passing is a great loss to the international arbitration community. He will be missed and remembered by everybody involved in this field …

-Hossein Piran Ph.D, Member of the Permanent Court of Arbitration (The Hague); Senior Legal Advisor, Iran-United States Claims Tribunal (The Hague)

When I recused myself from an ongoing adjudication case on account of my son's demise, Mr Pradhan personally saw me to wish his condolences. He took time to inquire my well being and of my family. Today I am deeply shocked to learn of his own passing. The Lord has recalled a great man. May his soul rest in peace.

-Nik Hasbi Fathi (Quantity Surveyor & Adjudicator) (Malaysia)

APRAG CONFERENCE 2020

The Asia Pacific Regional Arbitration Group (also known as "APRAG") conducted its Annual Conference for 2020 titled "Innovations and Challenges Facing the Arbitration Industry" from 15th to 17th January 2020. The Conference was jointly organised with the Thailand Arbitration Center (THAC) at Grand Hyatt Erawan, Bangkok Hotel, Thailand. The Asian International Arbitration Centre ("AIAC") is one of the seventeen (17) foundational members of APRAG.

The conference discussed the growing importance of international arbitration in Asia and Australia and the significant developments in the domain of Alternative Dispute Resolution ("ADR") highlighting the future trends in this domain.

The Conference began on 15th January 2020 with the meeting of APRAG Representatives. On 16th January 2020, the Conference continued with the Opening Remarks delivered by Mr. Wisit Wisitsora-at, Permanent Secretary of the Ministry of Justice Thailand, and Welcoming Remarks delivered by Dr. Michael Pryles AO PBM (First President of APRAG). The conference comprised of various educative sessions, namely:

- Artificial Intelligence in International Arbitration;
- Challenges to Arbitration from International Commercial Courts;
- New Trends of Challenges Made Against Arbitrators;
- The Impact of the Singapore Convention on International Arbitration;
- How can Arbitration Centres Co-Exist with Local Registered Lawyers;
- Ancillary Legislation to Support International Arbitration;
- Perennial Problems Faced by Lawyers and End-Users in Civil and Common Law Jurisdictions; and
- Latest Developments of APRAG Members.

The AIAC was represented by Mr. Vinayak Pradhan, the late Director of the AIAC, who spoke during the session on "Latest Developments of APRAG Members". The session was chaired by Mr. Anangga W. Roosdiono (Vice-Chairman of APRAG). Mr. Pradhan presented on "Developments in International Arbitration: The Malaysian Perspective" where he highlighted the AIAC's achievements since our establishment in 1978. He elaborated on the AIAC's rebranding and renaming. His presentation focused on the current decade in the Gregorian calendar "the 2020s" which will end on 31st December 2029. He emphasised the need as well as the responsibility of all arbitral institutions to be ready to evolve to changing sectoral dynamics to provide a sophisticated dispute resolution service. He also described the merits of the progressive, modern and enterprising arbitration regime in Malaysia. During his speech, he invited all stakeholders to visit the AIAC at Kuala Lumpur to witness the operations of one of the more modern arbitral institutions. He further elaborated on the AIAC's tangible, concrete and innovative initiatives in the last decade to address the complexities and needs of dynamic ADR services. Lastly, he reminded all stakeholders of uncompromised responsibilities, the importance of integrity and commitments as dispute resolution providers and as practitioners.

The other representatives during the session included speakers from the ACICA,[1] BAC,[2] BANI,[3] CIETAC,[4] CAA,[5] HKIAC,[6] JCAA,[7] KCAB,[8] SARCO,[9] SIAC,[10] and THAC[11] arbitration institutions. The representatives provided insights on the developments in their respective jurisdictions as well as new developments in institutional arbitration. They also provided personal experiences on the new innovations and challenges facing the dispute resolution industry.

The various panels sessions over this period of three exciting days guided the participants to identify new opportunities for a more predictable cross-border regime for arbitration, demonstrating the exceptional good will of the member states for evolving complex issues, whilst highlighting and promoting the use of arbitration and other forms of ADR.

The AIAC is proud to be a foundational APRAG member and to have participated in and contributed to the Conference. We look forward to continuing our active involvement and support of APRAG's objectives and initiatives.

[1]ACICA is known as the Australian Centre for International Commercial Arbitration.
[2]BAC is known as the Beijing Arbitration Commission/Beijing International Arbitration Center.
[3]BANI is known as the Badan Arbitrase Nasional Indonesia Arbitration Center.
[4]CIETAC is known as the China International Economic and Trade Arbitration Commission.
[5]CAA is known as the Chinese Arbitration Association in Taipei.
[6]HKIAC is known as the Hong Kong International Arbitration Centre.
[7]JCAA is known as the Japan Commercial Arbitration Association.
[8]KCAB is known as the Korean Commercial Arbitration Board.
[9]SARCO is known as the SAARC Arbitration Council.
[10]SIAC is known as the Singapore International Arbitration Centre.
[11]THAC is known as the Thailand Arbitration Center.

INTRODUCING THE AIAC TECHNOLOGY EXPERT COMMITTEE (TEC)

The AIAC is excited to announce the creation of its Technology Expert Committee ("TEC")!

To keep abreast of technological advancements and the booming technology industry, the AIAC launched its Technology Expert Committee (the "TEC") in February 2020. With the rapid clime of new technologies ("tech") being introduced into our ever globalised and interconnected world, the number of tech-related disputes has begun to rise. These disputes would vastly benefit from using alternative dispute resolution ("ADR") mechanisms given the confidential nature of ADR and the ability to choose one's arbitrator or mediator. The tech industry is a niche area with terms and systems not understood by all lawyers or judges; therefore, the parties would benefit immensely from having a tech expert decide the dispute. However, many of the key players within the tech industry are unaware of ADR.

Additionally, one key area that has been seen to create issues relating to tech is the lack of standardised contracts or terms within contracts. That is why the AIAC has created its TEC – the TEC will not only create the first-ever arbitral institution Standard Form of Tech Contracts but it will also to engage in capacity building within the tech industry regarding ADR. The AIAC will be launching the first in the suite of Standard Form of Tech Contracts, which will be a software development contract, hopefully later in 2020. Throughout the year, the AIAC will be engaging in evening talks, discussions, workshops, seminars, and more regarding the use of its holistic dispute resolution mechanisms to resolve tech-related disputes.

The purpose of the TEC is to spearhead initiatives related to ADR and the technology industry. Additionally, it aims to create a community in which lawyers and key players within the technology industry can discuss recent developments, brainstorm solutions to current issues, collaborate on projects, and disseminate information on the advancement both within ADR and the technology industry. The TEC activities will include publications of articles and white papers, creation of standard form contracts, promotional roadshows, opportunities to pitch new technology to end-users, evening talks, roundtables, discussions, seminars, and workshops.

To become a member of the TEC, you are required to have experience within the technology industry of at least five years, including legal, engineering, programming, funding and/or investment, developer, analyst, and any other relevant experience.

If you wish to apply to be a member or have any other queries, please contact us at tec@aiac.world.

More information regarding the TEC will be announced soon! Please follow #AIACTEC to stay informed.

TRAVERSING THE REALM OF INTELLECTUAL PROPERTY: IN CONVERSATION WITH KAREN ABRAHAM

Since the turn of the century, if there is one field which has diabolically transformed every aspect of our lives, it will most certainly be the technology industry. From the humble iPhone to sophisticated artificial intelligence products, innovations are aplenty in every industry including healthcare, finance, defence and, of course, legal services. That said, for innovations to flourish, a framework is required to safeguard the interests of the creative minds behind each innovation. The Asian International Arbitration Centre recently had the opportunity to interview Karen Abraham[1] on her journey to becoming a leading intellectual property practitioner in the region. The excerpts of this interview are below.

1. What inspired you to become an intellectual property ("IP") practitioner?

I was lucky enough to be entering the legal profession just as Malaysia was at the cusp of harmonising its IP laws with international standards.

In the first years of my legal career, in the early 1990s, I had the opportunity to work in the Intellectual Property Department of my firm and was involved in preparing progress reports on Malaysia's negotiations regarding the TRIPS agreement. TRIPS is an international legal agreement between member nations of the World Trade Organization (WTO) that sets minimum standards for each signatory on the regulation of various forms of intellectual property.

I was tasked with preparing speeches and presentations on TRIPS and all the research that comes with it. In doing so, I became aware of just how international the world of IP was, and how much more important it was likely to become in the near future. Unlike other practice areas, IP involves a great deal of local as well as international work, largely due to the alignment of Malaysia's IP laws to international standards such as those imposed by TRIPS. As all signatories to TRIPS implement a similar basic legal framework that mirrors that of other jurisdictions, multinational clients enjoy seamless protection across various jurisdictions.

By the time negotiations concluded and the TRIPS agreement was signed in 1994, I found myself hooked on the fast-paced, highly-international work offered by IP practice, and I have never looked back.

2. How would you describe the technology, media and telecommunications ("TMT") industry?

In comparison with other fields, the TMT industry is incredibly fast-paced. It is constantly evolving, which means practitioners and clients alike have no opportunity to rest on their laurels. As technology develops, companies are forced to adapt to survive. The same can be said for practitioners; we have to be prepared to advise clients on completely new situations we have never encountered before. This makes practice in the TMT industry challenging, but also exciting, as our clients often deal in state-of-the-art technology.

My TMT team assists clients with legal issues emerging from the convergence of technology, media and communications. In an increasingly digitised world, our clients are more and more concerned about, among others, issues like data privacy protection, iOT issues, the protection of AI products, digital signatures & encryption, and technology transactions.

3. What does your typical day as an IP/TMT practitioner look like?

My practice has always been primarily focused on IP litigation and enforcement.

Depending on what the client wants to achieve, I will carve out an IP enforcement strategy for them. Sometimes it may mean filing for speedy relief in the IP court (at the High Court) for an injunction and Anton Pillar order. In other cases, it may be to mobilise nationwide raids under the criminal remedies available under the old Trade Description Act 2011 and now under the new 2019 Trade Mark Act.

[1] Karen Abraham is the Head of Intellectual Property at Shearn Delamore & Co. (Malaysia). She has broad experience in contentious IP work, IP litigation, enforcement and licensing programmes, anti-counterfeiting, exploitation of IP rights, competition law and broadcasting. Ms. Abraham frequently appears in the High Court, Court of Appeal and the Federal Court representing local and global companies. She negotiates and advises on the exploitation and enforcement of IP rights for leading multinational companies around the world. She has also designed and crafted anti-piracy and anti-counterfeiting programmes as well as brand management schemes for small to leading local and global companies. Ms. Abraham further provides legal counsel on all allied IP rights relating to matters such as food and drugs, domain name disputes, licensing, agency franchising, merchandising, commercial sales contracts, sponsorship, advertising and entertainment, and media broadcasting laws. She is also experienced in all aspects of Information Technology (IT), e-commerce, and telecommunications related matters and cyberlaws.

Most of the time, my typical day in the office consists of communicating with clients on calls, WhatsApp and emails and just making sure they know we are there for them and on top of their cases. Clients want to know we are reachable and accessible. This is key in today's world. The nature of that communication differs from day to day. On one day, I might be advising a client on the viability of an action in trademark, patent or copyright against an infringing product; on another, I might be taking a client through the options available to them to ensure their IP assets are properly protected and harnessed.

IP is an evolving subject. Each day presents itself with new, innovative and precedent making decisions that change the course of what we once understood the position in law to be. Throughout the day, I have to make it a point to keep up-to-date with any news relating to my field– unlike other practice areas, the IP/TMT field evolves at a rapid rate. As a practitioner, it is of utmost importance that I keep abreast of new developments so as to be able to address any concerns my client may have.

4. What are the most common types of disputes you come across in your line of work?

My team and I deal with a wide variety of disputes across all areas of IP. Some of the most common disputes we see arise from the infringement and passing off of trademarks. We often enforce our clients' rights against copycat or lookalike goods. These are often sold in physical stores, but we are seeing an increasing number of sellers using online platforms to sell counterfeit goods. Advising and actions on recourse against online market places is almost a weekly occurrence. We also see disputes arising from license agreements, breach of confidential information, and many more.

We have always been at the forefront of patent protection and litigation and we are seeing more and more cases where clients are practicing zero tolerance against patent infringers and patent trolls. Alternative Dispute Resolution processes are also presented to clients. We make sure all contracts we draft have a clear ADR clause as we encourage ADR and mediation options to be present in our contacts to resolve any issues in the agreements we draft.

Wherever possible, we prefer to take pre-emptive measures to nip disputes in the bud. We often send Cease and Desist letters to infringers along with Letters of Undertaking for them to sign, so that the matter is resolved without dragging parties to Court. This way, in the event of a further violation of the IP right concerned, we have a clear case for breach of undertaking instead of what might be a complicated issue of liability.

5. In your opinion, what is the more preferable method for resolving IP and/or TMT disputes – litigation or alternative dispute resolution? Why?

Both litigation and ADR have their respective strengths and challenges. Neither is superior to the other; rather, they should be seen as different tools at the disposal of the parties to an IP dispute. Deciding which tool is preferable will depend on the situation.

For example, we know from experience that where an infringer of IP rights is making good money from their infringing behavior, it is most likely that they will not cooperate with any attempt at an out-of-court resolution. In these cases, the best way to show the infringer that we are serious about enforcing our client's IP rights is to file a suit.

On the other hand, where sensitive trade secrets and new inventions are involved, the privacy and confidentiality offered by ADR processes is of utmost importance. As arbitral proceedings are held behind closed doors and decisions are not made public, they are much better equipped to meet the need of confidentiality than public proceedings in court.

6. What alternative dispute resolution mechanism do you believe is the most effective in resolving IP and/or TMT disputes? Why?

Mediation appears to be a popular option amongst the ADR options in resolving IP disputes. The International Trademark Association (INTA), which is a massive global association focusing on trademarks and other related IP rights and comprising of 7,200 organisations from 187 countries, specifically promotes mediation for IP disputes. Unlike arbitration, mediation is a non-binding process that leaves parties free to withdraw after their initial meeting with a mediator. I believe it is this flexibility that attracts parties to mediation.

However, arbitral proceedings provide a benefit of particular relevance in patent cases: the ability of the parties to choose arbitrators with specialist technical expertise. Although Malaysia has an IP court with specialised judges, it is possible to appoint as arbitrator an individual with first-hand knowledge and experience in the industry. This is exceptionally important in complex patent cases that require an understanding of the subject matter in order to properly make a decision.

Ultimately, as before, this is an issue of which tool is best suited for the situation at hand.

7. Do you consider the Asian International Arbitration Centre's ("AIAC's") products and services to be well suited for the resolution of IP/TMT disputes? What do you think can be done to enhance the effectiveness of the AIAC's products and services in this regard?

Yes, indeed. The AIAC is perfect for this. The most significant development in recent years is, of course, the AIAC's establishment of the Domain Name Dispute Resolution (DNDR) process, which I am proud to say I have been involved in both presiding as a panelist as well as representing parties whose domain names have been hijacked. The demand for these resolutions was, and continues to be, too large to ignore, as can be seen from the 3,693 Domain Name proceedings the WIPO center saw in 2019 alone. In 2018, the AIAC's DNDR Panel resolved 12 domain name disputes.

Leaving aside specific procedures like DNDR, that were specifically modelled around the needs of Domain Name disputes, generally ADR should be considered from the very inception of a contract, not just as and when disputes arise. To this end, I am of the opinion that the AIAC should hold training sessions for lawyers and law firms, educating them on the when, how and why of including ADR clauses when drafting contracts. The idea is to put ADR at the forefront of dispute resolution, by providing for it in every contract this include all IP contracts including supply chain agreements.

The AIAC already provides a sample arbitration clause to be adopted into contracts; the next step forward is to approach law firms and TMT/IP institutions for a pledge of commitment that they will include these sample clauses into all contracts that they draft or enter into.

This is the easiest way to encourage ADR moving forward– it creates an entire culture where ADR is the first port of call for resolving disputes arising from contract.

8. In your opinion, how effective is the legal framework in Malaysia for resolving IP/TMT disputes? Is there anything you consider Malaysia should try adopting from its neighboring jurisdictions to enhance its legal framework?

A problem we face with ADR in Malaysia is that many see it as a mere threat, instead of a serious attempt at resolution.

Singapore has solved this problem by providing for court-based mediation. Court-based mediation is mediation that takes place in the courts after parties have commenced legal proceedings. This type of mediation is mainly carried out by the State Courts and Family Justice Courts. In fact, in civil disputes there is a "presumption of ADR", wherein all civil cases are automatically referred to

mediation or other ADR processes unless one or more party opts out. A party must have good reasons for opting out – reasons deemed unsatisfactory by the registrar will result in cost sanctions.

All these measures serve to put all the weight and gravitas of a civil suit behind attempts at ADR. Parties are forced to take ADR seriously, because they know that litigation proceedings will follow, in which they may be subject to costs sanctions for brushing off an attempt at ADR. Implementing a similar system in Malaysia will encourage parties and practitioners to view ADR as a viable option for resolving disputes alongside litigation.

9. What do you perceive to be the key challenges facing the TMT industry?

The main challenge faced by the TMT industry is that of digital disruption. Simply put, digital disruption is what results from new advancements in digital technologies and the inevitable change this makes to business models. Older methods of providing goods and services begin to lose value– an example of this is the rise of the subscription business model, like that used by Netflix, completely redefining the way content is monetised by advertisers in the media and entertainment industry. Given the rapid advancement of technology, digital disruption is a concern that must be addressed in order to meet the demands of consumers.

Another issue that is at the forefront of the TMT industry is that of data privacy and protection. As digital platforms become bigger parts of our lives, consumers growing increasingly concerned about the use of their online data. To address these concerns, TMT companies have to ensure the safety and security of their customers' data.

10. In your opinion, what are the 5 key skills one needs to succeed as an IP and/or TMT practitioner?

i. Versatility. IP is an extremely diverse field, beyond just trademark law, copyright law, patent law and trade secret law. An IP practitioner must be ready to advise clients on all aspects of compliance and regulatory issues on all legislation falling within the purview of the Ministry of Domestic Trade and Consumer Affairs. In each of these areas, we must be ready to advise not only on how to procure and secure ownership of IP but also on its protection, prosecution and exploitation, as well as the resolution of any disputes that may arise. Further, IP practitioners must be familiar with various aspects of the law, from drafting contracts to serving as a litigator in disputes.

ii. Creative and Critical thinking. Given the diversity of the IP field, practitioners must also be innovative and creative in crafting solutions and novel approaches and avenues to protect a client's work. Practitioners must actively consider how best to protect their clients' interests having understood the business and the value of the IP asset to the business.

iii. Communication. The most important thing for any practitioner is to instill trust in their clients. Building a relationship with a client not only makes for smoother sailing when dealing with any one matter, but also opens up a path for future engagement. I have mentioned how this is key earlier.

iv. Attention to detail. IP and TMT practitioners must have a keen, accurate eye, particularly when drafting patents and agreements– a single word out of place could jeopardize the patent claim or change the meaning of an entire clause. Practitioners must be careful when drafting, or may end up jeopardising their client's rights if and when a dispute arises.

v. Commercial awareness. IP and TMT are fields of innovation and invention. Our clients are often on the cutting edge of technology, and turn to us to advise them on how to protect their creations. It is vital for practitioners to understand the commercial reality faced by our clients so as to offer advice that best meets their needs. Understanding that intellectual property is in fact an intangible asset of the client is of utmost importance.

11. How would you sum up your journey in becoming a leading IP/TMT practitioner in the region?

There are many IP leaders in Malaysia and we are a great community of IP lawyers who work very closely together. I am proud to stand amongst them.

I have loved being an IP litigator and brand strategist. TMT work has been exciting and has kept me on my toes. I would have quit being a lawyer if I had chosen to specialise in anything else.

The IP community locally and abroad is an amazing network of global practitioners and we all speak the same language. The language of IP is pretty much harmonised throughout the world and we are able to share our laws and strategies seamlessly. This is the highlight of our practice as we grasp current trends and engage in global strategies.

The journey has enriched my life and I am grateful for all that I have been able to achieve as an IP practitioner, and most importantly, the IP colleagues I have met along the way.

PUBLIC FORUM ON THE REFORMS TO THE CIPAA 2012: 26th FEBRUARY 2020

On 26th February 2020, the AIAC and the Malaysian Bar Council jointly hosted a Public Forum on the Reforms to the CIPAA 2012 ("Public Forum"). The goal of the Public Forum was to bring the construction community together to develop a joint discussion and gather collective thoughts on the necessary amendments to the CIPAA 2012. The Public Forum saw the registration of over 340 people with a mixture of attendance from various construction stakeholders including engineers, quantity surveyors, architect, lawyers, academicians, etc.

The Public Forum was officiated by Dato' Abdul Fareed Abdul Gafoor, the President of the Bar Council and was graced by the presence of YA Dato' Lee Swee Seng, Judge of the Court of Appeal. Ms. Michelle Sunita Kummar, Deputy Head of Legal of the AIAC then presented the CIPAA Reform Survey Findings.

Session 1 of the Public Forum focused on the Preliminary provisions, Adjudication Process and Scope of the CIPAA. The panel comprised of Mr. Darshendev Singh, Partner of Lee Hishammuddin Allen & Gledhill, Mr. Kevin Prakash, Partner of Mohanadass Partnership, and Mr. Rajendra Navaratnam, Partner of Azman Davidson & Co. This session was moderated by Ms. Rammit Kaur Charan Singh, Principal of Victorius Vie Plt. The Panel discussed the proposed reforms on the scope of the CIPAA, the exemptions to the CIPAA as well as the adjudication process – from the payment claim stage up to the issuance of the adjudication decision.

Session 2 covered the discussion on the proposed amendments with respect to the existing methods and principles of enforcing and setting aside, as well as staying the execution, of the adjudication decision. The session was moderated by Mr. Raja Kumar Raja Kandan, Partner of Azman Davidson & Co. The speakers were Mr. Deepak Mahadevan, Partner of Azmi Fadzly Maha & Sim, Mr. Choon Hon Leng, Partner of Raja, Darryl & Loh, YA Dato' Lim Chong Fong, Judge at the High Court of Kuala Lumpur, and Mr. Lam Wai Loon, Partner of Harold & Lam Partnership.

Session 3 discussed the proposed reforms with regards to the appointment of the adjudicators, duties, powers and jurisdiction of adjudicators as well as the role of the AIAC as the Adjudication Authority. The session was enriched by the discussion between Ms. Celine Chelladurai, Partner of Celine & Oomen, Mr. Rajendra Navaratnam, Partner of Azman Davidson & Co, Mr. Albertus Aldio Primadi, Senior International Case Counsel at the AIAC, and Mr. Kuhendran Thanapalasingam, Partner of Zul Rafique & Partners, who acted as the Moderator of the session.

During the last session of the Public Forum, the Panel discussed the potential areas of reform in other parts of the CIPAA 2012 such as the default provisions in the absence of terms of payment, the relationship between adjudication and other dispute resolution processes, and the service of notices and documents under the CIPAA 2012. The speakers of this session were Mr. Soh Lieh Sieng from Contract Solutions-i, Mr. Sanjay Mohanasundram, Partner of Sanjay Mohan, Mr. Foo Joon Liang, Partner of Gan Partnership, and Dato' Nitin Nadkarni, Partner of lee Hishammuddin Allen & Gledhill, who acted as the Moderator of the session.

All in all, the Public Forum attracted a considerable amount of comments, views, and discussions. The AIAC and the Bar Council Construction Law Committee will work further to reflect those comments to propose a reform to the CIPAA 2012 taking into account the collective thoughts from the construction stakeholders.

KEY INSIGHT

REFORMS TO THE CONSTRUCTION INDUSTRY PAYMENT AND ADJUDICATION ACT 2012 : SURVEY RESULT AND CIPAA PUBLIC FORUM ON 26th FEBRUARY 2020

The AIAC is the named adjudication authority of the Construction Industry Payment and Adjudication Act 2012 ("CIPAA 2012"). This role encompasses the power to administer adjudication proceedings and set the competency standards for our adjudicators. In order to streamline the administration of the adjudication process, the AIAC has developed the AIAC Adjudication Rules & Procedure and issues circulars if any need for clarifications arise.

As at the end of 2019, the AIAC had received over 3,000 adjudication case registrations and it had also empanelled at least 600 adjudicators.

The AIAC has also had the privilege of participating in the development of the CIPAA 2012 since its enactment in 2014. The CIPAA 2012 has since become one of the more effective and efficient mechanisms for the resolution of payment disputes in the construction industry in Malaysia. It has continued to rapidly grow in use across the country. However, our observation from having administered these 3,000 cases over the years is that the time is upon us to start thinking about the improvement of the CIPAA 2012 to better serve the interests of the public.

SURVEY RESULT ON THE REFORMS TO THE CIPAA 2012

Recognising that any good law should represent the voice of the people, the AIAC and the Bar Council Construction Law Committee joined forces in disseminating a survey to elicit feedback on the areas of the CIPAA 2012 which, in the view of the public, required reform. Specifically, this survey gauged whether or not reforms to the CIPAA 2012 were necessary, and if so, which parts of the CIPAA 2012 required amendments.

A total of 110 responses were received to the survey from participants of diverse backgrounds. For this purpose of this report, the people who responded to the survey will be classified as "Respondents".

Along with the Bar Council Construction Law Committee, the AIAC team has had the liberty to read the comments provided by the Respondents. Most, if not all, of the feedback was valuable. The AIAC would like to take this opportunity to express our gratitude to everyone who contributed to the survey. Below are several notable findings from the survey. Please be informed that the information produced below should not in any way be treated as representing the views of the AIAC and/or the Bar Council Construction Law Committee – it is simply a product of the feedback received to the survey. The responses reflect the views of the Respondents whose identities have been kept confidential.

DEMOGRAPHICS OF THE RESPONDENTS TO THE SURVEY

110 Respondents

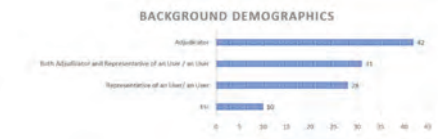
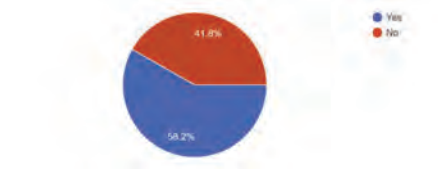


Figure 1 shows that the pool of Respondents comprises not only of adjudication decision-makers (i.e. adjudicators), but also other adjudication participants (i.e, a user of the CIPAA 2012 or the representative of the user of the CIPAA 2012). The AIAC hopes that this diversity this will translate into inclusive and collective findings that will truly reflect the voice of the construction industry.

The first question that the survey posed was whether or not the framework of the CIPAA 2012 needed to be amended. Kindly note that the reference to the "Framework of CIPAA 2012" also includes other procedural frameworks affecting the CIPAA such as the CIPAA Regulations 2014, the AIAC Adjudication Rules & Procedure, the CIPA Exemption Order, and the AIAC Circulars.

ARE REFORMS / AMENDMENTS NEEDED TO THE FRAMEWORK OF CIPAA 2012?



In this regard, approximately 60% of the Respondents indicated that the framework of the CIPAA 2012 needed to be reformed. One could conclude therefore, that the majority felt reforms of the CIPAA 2012 were necessary.

Respondents who indicated "yes" then proceeded to provide their views on which section(s) and/or framework of the CIPAA 2012 should be reformed.

The Respondents who indicated "no" to the first question proceeded to comment on the "others" section of the survey. Interestingly, even though these Respondents were of the view that the CIPAA 2012 did not require any reform, they still provided comments and suggestions to amend the CIPAA 2012 in the "others" section. The inference to be made is that it is likely that more than 58.2% of the Respondents were minded to have the CIPAA 2012 and its accompanying Framework reformed.

1. Part I: Preliminary, Sections 1 – 4 of the CIPAA 2012

The first part of the CIPAA 2012 runs from Sections 1 – 4, primarily focusing on the scope of the application and definition of terms used in the CIPAA 2012.

In this regard, 48% of the Respondents believe that Part I needs to be amended.

Notable comments included:

Firstly, clarification on the phrase "four storeys high".

> ***3. Non-application***
> *This Act does not apply to a construction contract entered into by a natural person for any construction work in respect of any building which is less than* ***four storeys high*** *and which is wholly intended for his occupation.*

As of now, the CIPAA 2012 is not applicable to construction contracts entered into by a natural person for any construction work in respect of any building which is less than four storeys high and which is wholly intended for his occupation. There seems to be a general consensus from the result survey to remove the requirement of the four-storey high or at least for the CIPAA 2012 to provide clarification on the method to calculate the level of the storeys.

Secondly, the Respondents believe that the term "working day" needs to be further clarified. As of now, a "working day" follows the calendar day, and excludes weekends and public holidays applicable in the State where the project site is located. This provision might be a bit problematic in two situations: First where party autonomy rears its head and parties prefer otherwise; and second, when the project site location spans across multiple States.

> *"working day" means a calendar day but exclude weekends and public holidays applicable at the State or Federal Territory where the site is located.*

Thirdly, the Respondents seem to form a collective nod on the insertion of a provision to clarify the position of the CIPAA 2012 regarding its scope of application. Namely, whether it is prospective or retrospective in nature. Although the recent judicial development in the case of Bauer seems to shed light on this issue, in the view of the Respondents, a clear reinforcement in the CIPAA 2012 will clearly put an end to the saga. That said, the AIAC understands that further judicial developments are ongoing in this area.

2. Part II: Adjudication of Payment Disputes, Sections 5 – 20 of the CIPAA 2012

The second part of the CIPAA 2012 is the heart of the adjudication procedure, covering Sections 5 – 20 which regulate the issuance of the payment claim up until the issuance of the adjudication decision.

For that reason alone, it is not surprising that this Part attracted the highest number of Respondents desiring reform, specifically, almost 80% of the Respondents. Notable comments include but are not limited to:

Firstly, clarification on the right of the respondent to raise a counterclaim. As of now, the CIPAA 2012 is silent regarding this and the respondent can only raise a set-off to reduce the payment claim advanced by the claimant. There seems to be a dividing view from the result survey – some Respondents suggested that the CIPAA 2012 should allow counterclaims, whereas others had hoped that the CIPAA 2012 would make it clear that counterclaims cannot be introduced by the respondent in adjudication proceedings.

Secondly, the right to file the notice of adjudication. As of now, the CIPAA 2012 has made it possible for the non-paying party to file the notice of adjudication, although the payment claim is filed by the unpaid party. Filing the notice of adjudication will entitle the non-paying party to enjoy purported privileges in being the claimant which include, the right to issue a notice of withdrawal. As such, clarification was requested on this issue.

> *Section 7(1):*
> *An unpaid party or a non-paying party may refer a dispute arising from a payment claim made under section 5 to adjudication.*
>
> *Section 8(1):*
> *A claimant may initiate adjudication proceedings by serving a written notice of adjudication containing the nature and description of the dispute and the remedy sought together with any supporting document on the respondent.*

"claimant" means an aggrieved party in a construction contract who initiates adjudication proceedings

Thirdly, and quite surprisingly, a vast majority of the Respondents concurred that the 45 working days to issue the Adjudication Decision is too long and needs to be shortened. Now, this suggestion is particularly interesting, seeing that 66% of the participating Respondents were adjudicators. From the perspective of the AIAC, however, this suggestion is feasible since adjudicators' delivery of the Adjudication Decision is reaching 97.83% in terms of timeliness. This means that the vast majority of adjudicators empanelled with the AIAC delivered their adjudication decisions on time. Whether or not this can be translated to a willingness or ability to deliver adjudication decisions within a shortened period will be left to be seen.

3. Part III: Adjudicator, Sections 21 – 27 of the CIPAA 2012

This section focusses on the appointments, duties, obligation, and jurisdiction of the adjudicator. The majority of the Respondents (61.7%) believed that this Part should also be reformed.

Notable comments included the need for clarification regarding the power of the adjudicator to set-aside the proceedings based on non-compliance.

The CIPAA 2012 presently empowers the adjudicator to set aside or make any order dealing with the adjudication proceeding as the adjudicator deems fit, if there is any ground of non-compliance. Pursuant to Section 26(1) of the CIPAA 2012, non-compliance of the parties appears broad and can be derived from time limits, the form or content of documents submitted or in any other respect which amounts to an irregularity. Further, any non-compliance of the parties neither invalidates the power of the adjudicator to hear the dispute nor does it nullify the adjudication proceedings or the decision itself.

26. Power of Adjudicator Not Affected by Non-compliance

*1) Subject to subsection (2), the non-compliance by the parties with the provisions of this Act whether in respect of **time limit, form or content or in any other respect shall be treated as an irregularity** and **shall not invalidate the power of the adjudicator to adjudicate the dispute** nor nullify the adjudication proceedings or adjudication decision.*

2) The adjudicator may on the ground that there has been non-compliance in respect of the adjudication proceedings or document produced in the adjudication proceedings—

a) Set aside either wholly or partly the adjudication proceedings;

b) Make any order dealing with the adjudication proceedings as the adjudicator deems fit; or

c) Allow amendment to be made to the document produced in the adjudication proceedings.

Respondents believe that this section needs to be clarified in several instances: clarity is required regarding what constitutes "non-compliance" and also whether it is reasonable for setting aside to be a penalty for non-compliance. Respondents of the survey have conveyed that the text of the CIPAA 2012 is presently too broad and does not protect the legitimate interest of the parties.

4. Part IV: Enforcement of Adjudication Decisions, Sections 28 – 31 of the CIPAA 2012

Part IV of the CIPAA 2012 mainly covers the stage post the delivery of the adjudication decision. In this regard, there were two school of thoughts: 50% of the Respondents believed that these sections need to be amended; the remaining 50% took the view that the Part should remain as is. Notable comments included:

Firstly, the need for clarification on the enforcement of the Adjudication Decision as a judgement. Respondents believed that the CIPAA 2012 should specifically indicate the timeline for the purposes of the enforcement of an Adjudication Decision. There was also a suggestion for review mechanisms to be in place in respect of erroneous determinations, such as allowing the court to look into the merits of the matter.

Secondly, the Respondents further suggested that clarification needs to be made on the section relating to the direct payment from the principal. The CIPAA 2012 allows the winning party to recover their outstanding sum from the principal of the losing party, in the event the losing party fails to voluntarily comply with the adjudication decision. Many Respondents queried the enforceability of this mechanism as the CIPAA 2012 does not contemplate the consequences of a principal who fails to comply with this mechanism and the procedure available to the principal to recover this sum as a debt from the losing party.

5. Part V: Adjudication Authority, Sections 32 – 33 of the CIPAA 2012

Part V of the CIPAA 2012 focuses on the Adjudication Authority of the CIPAA 2012, namely the AIAC. This particular Part generated the lowest percentage of Respondents requesting amendments (31%). Notable comments included:

Firstly, granting more power to the AIAC to refuse the registration of an adjudication. Of course, as many of you are already aware – the CIPAA 2012 empowers the AIAC to provide administrative support for the conduct of adjudication proceedings. The support provided includes conducting a preliminary review of documentation, registration, appointment, collection of deposits, custodian of adjudication decisions where deposits have not been remitted, amongst others. But there seems to be a general consensus that the AIAC should assume more power to refuse the registration of an adjudication matter that is not compatible with the provisions of the CIPAA 2012. The AIAC's position on this point is that whenever it is apparent that an adjudication matter falls outside the scope of the CIPAA 2012 (for instance, when the matter is exempted pursuant to the CIPA Exemption Order 2014, or the date of the filing of the payment claim or notice of adjudication is premature), the AIAC will not proceed with registering those cases. In case of doubt, however, the AIAC will nevertheless proceed to appoint the adjudicator and have the adjudicator decide upon the issue.

32. Functions of AIAC

The AIAC shall be the adjudication authority and shall be responsible for the following:

a) Setting of competency standard and criteria of an adjudicator;

b) Determination of the standard terms of appointment of an adjudicator and fees for the services of an adjudicator;

*c) **Administrative support for the conduct of adjudication under this Act**; and*

d) Any functions as may be required for the efficient conduct of adjudication under this Act.

Secondly, the Respondents also conveyed a desire for the existence of an ad hoc adjudication process to alleviate the financial hurdles in initiating an adjudication proceeding. Presently, the CIPAA 2012 framework does not recognise the concept of ad hoc adjudication. How this will work in practice remains unseen.

6. Part VI: General, Sections 34 – 37 of the CIPAA 2012

Part VI of the CIPAA 2012 is a general section encompassing Sections 34 to 37. 41.7% of the Respondents indicated a need to amend to this section, with the most notable comment being on the conditional payment provision.

There seems to be an overwhelming nod in favour of reforms to the conditional payment provision. Several Respondents requested more detailed definitions of conditional payment in light of recent judicial developments. Several Respondents also believed that the CIPAA 2012 should clarify whether such a provision applies to all types of construction contracts or only to construction contracts that fall within the ambit of the CIPAA 2012.

7. Part VII: Miscellaneous, Sections 38 – 41 of the CIPAA 2012

With respect to the final Part of the CIPAA 2012, which contains Miscellaneous provisions, 58% of the Respondents believed that amendments were necessary.

Most of the comments relating to this Part concerned proposing an additional mode of service, such as email, fax and private courier. As of now, the default primary mode of service under the CIPAA 2012 is by hand (personal service) or registered post. The push for amendments might derive from the emergence of adjudication claims from States outside the Klang Valley, as well as for matters from Sabah and Sarawak. In those situations, having to serve documents by hand or registered post might not be feasible due to a lack of geographic proximity.

> ***38. Service of Notices and Documents***
> *Service of a notice or any other document under this Act shall be effected on the party to be served—*
> *a) By delivering the notice or document personally to the party;*
> *b) By leaving the notice or document at the usual place of business of the party during the normal business hours of that party;*
> *c) By sending the notice or document to the usual or last-known place of business of the party by registered post; or*
> *d) By any other means as agreed in writing by the parties.*

8. Reforms to the CIPAA Regulations 2014

By assent from the Minister of Works, the CIPAA Regulations 2014 ("Regulations") became applicable on the day that the CIPAA 2012 came into force. The Regulations are intended to supplement the CIPAA 2012 for the better carrying out of the provisions of the CIPAA 2012.

55.6% of the Respondents believed that the Regulations needed to be amended, with most comments dedicated to the criteria of an adjudicator.

Currently, the Regulations require four (4) cumulative criteria to become an adjudicator. The majority of the comments focused on the first criterion, that is the "experience" requirement. According to Regulation 4(a), the competency standard and criteria of an adjudicator includes the requirement of an adjudicator to have "working experience of at least seven years in the building and construction industry in Malaysia".

> ***4. Competency standard and criteria of adjudicator***
> *The competency standard and criteria of an adjudicator are as follows:*
> *a) the adjudicator has working experience of at least seven years in the building and construction industry in Malaysia or any other fields recognized by the AIAC;*
> *b) the adjudicator is a holder of a Certificate in Adjudication from an institution recognized by the Minister;*
> *c) the adjudicator is not an undischarged bankrupt; and*
> *d) the adjudicator has not been convicted of any criminal offence within or outside Malaysia.*

There seemed to be a suggestion to expand the parameter of experience to include experience acquired outside Malaysia. If this eventuates, the AIAC foresees an increase in the number of foreign adjudicators empanelled as well as an increase in adjudication cases involving foreign parties.

9. Reforms to the CIPA Exemption Order 2014

The Construction Industry Payment and Adjudication (Exemption) Order 2014 ("Exemption Order") exempts two categories of Government construction contracts from the statutory adjudication regime under the CIPAA 2012.

The first category of exempted contracts is set out in Schedule 1 of the Exemption Order. These contracts are exempted entirely from the operation of the CIPAA 2012.

The second category of exempted contracts is contained in Schedule 2 of the Exemption Order. It is only a partial exemption in that it gives the parties to Government construction contracts with a contract sum of RM20 million or less, a longer period for the service of certain documents, such as the payment response, adjudication response and adjudication reply, than the time frames provided under the CIPAA 2012. This exemption, however, was only to be applicable until 31st December 2015.

Only 24.4% of the Respondents believed that Exemption Order needs to be amended, with notable comments surrounding the relevancy of the Exemption Order in present times. Few comments suggested that the Exemption Order ought to be omitted and/or be inapplicable. Given that the applicability of the second category of exempted contracts has expired, the need to have this included is a point to be considered. The question which remains is one relevant to the first category of exempted contracts.

10. Reforms to the AIAC Adjudication Rules & Procedure & AIAC Circulars

Shortly after the CIPAA 2012 came into force, the AIAC issued a set of rules and procedure called the AIAC Adjudication Rules & Procedure. These rules and procedures are to facilitate the efficient administration of adjudication cases and other matters by the AIAC under the CIPAA 2012.

In addition, the AIAC has provided a set of forms to assist and guide intended participants in the adjudication process under the CIPAA 2012. These forms are contained in Schedule 1 of the AIAC Adjudication Rules and Procedure.

41.9% of the Respondents considered that the AIAC Adjudication Rules & Procedure require amendments. Notable comments included the need to clarify the fee deposit determination and to clarify withdrawal cost determination. The Respondents also indicated that the text of the CIPAA 2012 is currently unclear on the method to collect the deposit from the parties and further clarification on the determination of the reasonable sum for withdrawal cost is needed.

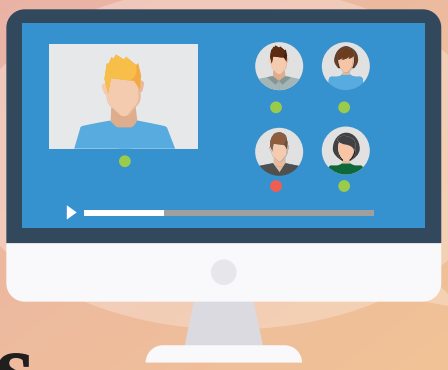
48.8% of the Respondents opined that the AIAC Circulars need to be amended. Most of the comments suggested that the AIAC be required to constantly issue an update regarding judicial developments in adjudication cases. The AIAC takes note of this comment and it will endeavor to publish more adjudication-related developments in our tri-annual newsletters.

11. Reforms to the Guide to the CIPAA 2012

The Guide to the CIPAA 2012 differs from the other instruments outlined above. It is not a legal framework by nature but it helps to provide a commentary to the CIPAA 2012 in layman's terms. In this regard, only 31% of the Respondents believed that the Guide to the CIPAA 2012 needed to be amended, with notable comments being to ask the AIAC to update the same in light of recent judicial developments and issuing guidelines in relation to the SST.

The AIAC takes note of these comments and the AIAC is quite pleased to have received them as it goes someway in indicating that users of the CIPAA 2012 have taken guidance from or do rely on the Guide to the CIPAA 2012 and expect the same to be updated regularly.

SAVE THE DATE !



ADR Online:

An AIAC Webinar Series

Thursday, 16th April 2020

3:00 p.m. MYT (GMT +8)

2020 ECONOMIC STIMULUS PACKAGE: WHAT IT MEANS FOR YOU AND YOUR BUSINESS

Friday, 17th April 2020

4:00 p.m. MYT (GMT +8)

MEDIATION POST COVID-19: THE WAY FORWARD

Monday, 20th April 2020

6:00 p.m. MYT (GMT +8)

THE REALITIES OF WORKING FROM HOME – A DEBATE SPECIAL

Tuesday, 21st April 2020

11:00 a.m. MYT (GMT +8)

A YOUNG LAWYER'S WELLBEING AND MENTAL HEALTH – THE IMPACT OF THE OUTBREAK OF COVID-19

Wednesday, 22nd April 2020

Time TBD

IMPACT OF COVID-19 ON SHIPPING DISPUTES

Thursday, 23rd April 2020

7:00 p.m. MYT (GMT +8)

THE AMENDMENT OF ICSID RULES AND REGULATIONS AND ITS IMPACT ON CONTEMPORARY AND FUTURE INVESTMENT ARBITRATION

Friday, 24th April 2020

6:00 p.m. MYT (GMT +8)

ASIAN ENERGY DISPUTES: PROJECT FINANCE, PRICE REVIEW AND ARBITRATIONS

Presentation through Zoom Live Webinar

For registration and more information, please contact events@aiac.world

AIAC
ASIAN INTERNATIONAL ARBITRATION CENTRE

COVID-19 AND THE AIAC SFC:

THE IMPACT OF THE MOVEMENT CONTROL ORDER ON BUILDING SITES

By Foo Joon Liang[1], Grace Chaw[2] & Kaylee Tan Jin Yee[3]

FOO JOON LIANG

GRACE CHAW

KAYLEE TAN JIN YEE

This is the third in our series of articles on the impact of the Movement Control Order ("MCO") on building projects. In this article, we look at several Frequently Asked Questions ("**FAQs**") from the standpoint of the Standard Form of Building Contracts (2019 Edition) issued by the Asian International Arbitration Centre ("**AIAC**") ["**AIAC SFC**"].

FAQ (1): Does the MCO entitle the Contractor to an Extension of Time ("EOT") under the AIAC SFC?

Yes. The Contractor is entitled to EOT in the event Covid-19 is considered one of the "Time Impact Events" under **Clause 23.8**, provided the mechanisms for an EOT application are complied with.

FAQ (2): Which "Time Impact Events" under AIAC SFC are applicable to the MCO?

There are a few. The "Time Impact Events" under AIAC SFC are divided into "Non-Employer's Events" set out at **Clause 23.8(b)** and "Employer's Events" set out at **Clause 23.8(c)**.

(a) Clause 23.8(b)(i): Is this a *force majeure* event?

> *23.b(i) "Force Majeure as defined in Article 9"*

Article 9.34 defines "*force majeure*" event as:

"an exceptional event or circumstance which:
(a) is beyond a Party's control;
(b) such Party could not reasonably have provided against before entering into the Contract;
(c) having arisen, such Party could not reasonably have avoided or overcome; and
(d) is not substantially attributable to the other Party.

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[1]Foo Joon Liang FCIArb was called to the Malaysian Bar in 2000. He is a Fellow of the Chartered Institute of Arbitrators (CIArb), United Kingdom and is presently the Chairman of the Malaysian Branch of the CIArb. Mr. Foo regularly appears as a counsel at all levels of the Malaysian courts as well as local and international arbitration. He sits on the panel of arbitrators and adjudicators of the Asian International Arbitration Centre (AIAC) and is one of the first 10 Malaysian appointees to the panel of arbitrators of the Hainan International Arbitration Court. He is listed as a Future Leader in Construction by Who's Who Legal 2020. Mr. Foo's practice covers a broad spectrum of disputes, from engineering, construction, power, contract, securities, to company and shareholder disputes. He has been increasingly involved in engineering related incidents in construction projects. Some of his notable matters include the first Construction Industry Payment and Adjudication Act 2012 dispute at the Malaysian Federal Court, the highly publicised failure of a hill slope in Northern Malaysia, and the collapse of a bridge in Kuala Lumpur.

[2]Grace Chaw Hei Hei MCIArb graduated from Monash University, Australia. She is the founder of Grace Chaw & Co., a firm of advocates and solicitors in Kota Kinabalu, Sabah. Ms. Chaw is admitted to the Supreme Court of New South Wales, Australia and in the High Court of Sabah, Malaysia. She handles complex cases at all levels as litigation counsel in both trial proceedings and appellate hearing. Whilst she acts in a broad range of contractual and commercial disputes as well as public interest litigation, she is regularly appointed to act for construction industry stakeholders including landowners, developers, contractors and consultants in construction, land and tortious disputes. She advocates the use of alternative dispute resolution as the appropriate mode of dispute resolution. Ms. Chaw is professionally trained and skilled to provide broad spectrum expertise in dispute resolution through arbitration and adjudication. She is conferred with the Diploma in International Commercial Arbitration by Chartered Institute of Arbitration (CiArb). She is also appointed by Asian International Arbitration Centre (AIAC) to sit as an Adjudicator to conduct statutory adjudication under CIPAA 2012.

[3]Kaylee Tan Jin Yee is an associate at Gan Partnership. Her primary area of practice is construction law. Ms. Tan has experience in adjudication and arbitration proceedings.

This article is for general information only and should not be relied upon as legal advice. The position stated herein is as at the date of publication on 26th March 2020. Any comments/queries relating to this article can be sent to Foo Joon Liang at joonliang@ganlaw.my or Grace Chaw at lawyer@gracechaw.com. The views/opinions expressed in this article are those of the authors only. They do not reflect the views of AIAC unless otherwise stated.

Force Majeure may include, but is not limited to, exceptional events or circumstances of the kind listed below, so long as conditions 9.34(a) to (d) above are satisfied:

(i) …

(ii) …

(iii) riot, commotion, disorder, strike or lockout by Persons other than the personnel, servants, agents and employees of the Contractor and Subcontractors;

(iv) …

(v) …"

All the 4 conditions set out in (a) to (d) of **Article 9.34** must be satisfied for an event of delay to qualify as a force majeure. **Article 9.43** defines "Party" as "*Employer or the Contractor, as the context requires.*"

The spread of Covid-19 is beyond the control of the Contractor. The Contractor could not have foreseen the pandemic and thus could not have reasonably provided for the imposition and subsequent extension of the MCO under existing contracts. The Contractor must comply with the MCO and thus could not have reasonably avoided or overcome the said situation. Further, this situation is not caused by the Employer.

Provided all 4 conditions set out in **Article 9.34** are satisfied, the Contractor would be entitled to an EOT under **Clause 23.8(b)(i)** where his progress is delayed by the MCO as an exceptional event or circumstance.

However, for new contracts being negotiated after Covid-19 has been declared a pandemic by World Health Organisation (WHO) it may be arguable that the Contractor is required to reasonably foresee the situation and thereby reasonably provide for the MCO in its contract administration.

Consequently, the Contractor is required to reasonably avoid or overcome the situation. In such circumstances, the MCO will not qualify as a force *majeure* event. This may well however be a moot discussion, as the next contract that is inked is likely to be after the lifting of the MCO.

Article 9.43 further provides possible force majeure situations, which includes a "lockout". A "lockout" is not defined in the AIAC SFC. **A Dictionary of Law (2nd Edn) by Curzon** defines "lockout" as "*the closing of a place of employment or suspension of work, or the refusal by the employer to continue to employ any number of persons employed by him in consequence of a dispute*".

Article 9.46 defines "Persons" as "*a natural person, sole proprietorship, firm (partnership) or body corporate.*" Although "Persons" by definition appears not to encompass the Minister of Works, Minister of Health and the Government of Malaysia, the illustration given at **Article 9.34(iii)** is intended to exclude lockouts by the Contractor (or his subcontractor) himself, as a basis for an EOT. This definition by no means excludes the MCO from being a *force majeure* event.

(b) Clause 23.8(b)(iv): Is this a delay by Nominated Sub-Contractors or Nominated Sub-Suppliers?

23.8(b)(iv)	*"Delay on the part of Nominated Sub-Contractors or Nominated Suppliers for the reasons as set out in Clause 19.6 of the Standard Form of Building Sub-Contract issued by the AIAC"*

Clause 19.6 of the Standard Form of Building Sub-Contract issued by the AIAC ("**Sub-Contract**") provides for "Time Impact Events" for EOT entitlement of Sub-Contractor, which incorporates Nominated Sub-Contractors or Nominated Suppliers.

Where there is a delay of the Nominated Sub-Contractor or Nominated Suppliers under **Clause 19.6(a), (n), (o), (u) or (v)** of the said Sub-Contract, the Contractor is entitled to an EOT claim under **Clause 23.8(b)(iv)**. The delaying events set out in the said **Clause 19.6** of the Sub-Contract mirror those in **Clause 23.8** of AIAC SFC.

Thus, where the Nominated Sub-Contractor or Nominated Suppliers are similarly delayed by reason of the MCO, **Clause 23.8(b)(iv)** entitles the main contractor to an EOT under the main contract.

(c) Clause 23.8(b)(vii): Is this an unforeseeable change in law?

23.b(vii)	*"compliance with any Unforeseeable changes to any law, regulations, by law or terms and conditions of any Appropriate Authority and/or Service Provider"*

Article 9.65 defines "Unforeseeable" as "*not reasonably foreseeable by an experienced contractor by the date for submission of the Tender.*" "Tender" is defined in **Article 9.64** as "*Form of Tender, which was completed by the Contractor for the Works, and all other documents which the Contractor submitted with the Form of Tender, as included in the Contract.*"

Article 9.3 defines "Appropriate Authority" as "*statutory authority having jurisdiction over the Works*".

"Works" is defined in **Article 9.67** as "*Works described in the Articles of Agreement and are the whole of the materials, labour, plant and other things necessary and requisite for the proper execution of the Contract as shown on the Contract Drawings and described by or referred to in the Employer's Requirements, Specification, the Contract Bills and the Conditions, and include any changes made to these works in accordance with the Conditions.*"

The Government of Malaysia gazetted the **Prevention and Control of Infectious Diseases (Measures within the Infected Local Areas) Regulations 2020 ["PCID Regulations"]** setting out the MCO effectively from 18.3.2020 to 31.3.2020. On 25.3.2020, the Government of Malaysia extended the MCO from 1.4.2020 to 14.4.2020.

The introduction of PCID Regulations was an unforeseeable change in law which was not reasonably foreseeable by an experienced contractor when the tender documents were submitted. Further, it can be said that the extension of the MCO as an unforeseeable change to an existing regulation. In such circumstances, the Contractor would be entitled to an EOT under **Clause 23.8(b)(vii)**.

(d) Clause 23.8(b)(viii): Is this a delay caused by Appropriate Authority?

> *23.8(b)(viii) "delay caused by any Appropriate Authority and Service Provider in carrying out, or in failing to carry out their work which affects the Contractor's work progress, provided always that the Contractor has diligently followed the procedures, terms and conditions laid down by the Appropriate Authority and Service Provider; the delay was Unforeseeable; and such delay is not attributable to any negligence, wilful act or breach of contract by the Contractor, or any Person for whose actions the Contractor is responsible".*

The MCO implemented by the Ministry of Works and its relevant agencies may cause delay to the Contractor's work progress on site as the MCO led to temporary shutdown of sites, restricted the movement of labour and materials to the site and disruption of supply chain, save for critical works which will be discussed at **FAQ 2(e) below.**

This delaying event requires:

(a) the MCO to be followed diligently by the Contractor,
(b) an experienced contractor could not reasonably have foreseen the MCO when the tender documents were submitted, and
(c) the delay event is of no fault of the Contractor or persons under the umbrella of the Contractor.

Where the MCO results in a delay to the on-site progress of the Contractor and the 3 conditions are satisfied, the Contractor will be entitled to an EOT under **Clause 23.8(b)(viii)**.

(e) Clause 23.8(b)(ix): Is this a *lockout*?

> *23.8(b)(ix) "Industrial action by workmen, strikes, lock-outs or embargoes affecting any of the trades employed upon the Works or in the preparation, manufacture or transportation of materials or goods required for the Works and provided the same are not attributable to any negligence, wilful act or breach by the Contractor, or any Person for whose actions the Contractor is responsible"*

The term "lockout" is discussed at **FAQ 2(a) above**.

The MCO is applicable to all construction and maintenance works except for critical works. Critical works are works that, if put to a stop can cause harm to employees, the public or the environment.

Examples of critical works are set out at item 4 of the FAQs issued by the Ministry of Works. However, one can apply for exemption if the exemption comes from project superintendent/project director for government projects; resident engineer/principal submitting person for private projects. (*see the FAQs issued by the Ministry of Works at https://www.pmo.gov.my/2020/03/soalan-lazim-faqs-berkaitan-perintah-kawalan-pergerakan-kementerian-kerja-raya-malaysia-kkr/*)

As such, where the MCO results in a lockout at the site for which the Contractor is not accountable, the Contractor would be entitled to an EOT under **Clause 23.8(b)(ix)**.

(f) Clause 23.8(c)(xiv): Is this a suspension order by the Appropriate Authority?

> *23.8(c)(xiv) "suspension of the whole or part of the Works by order of an Appropriate Authority provided that the same is not attributable to any negligence, wilful act or breach of contract by the Contractor, or any Person for whose actions the Contractor is responsible"*

Similarly, this delaying event requires there to be no fault of the Contractor. The term "Appropriate Authority" and "Works" were discussed at **FAQ 2 (c) above**.

MCO is a suspension order issued by the Government of Malaysia as a measure to prevent the spread of Covid-19. In the construction sector, it was implemented by the Ministry of Works and its relevant agencies. As the MCO was not issued due to negligence, omission, default and/or breach of contract by the Contractor, the Contractor would arguably be entitled to an EOT under **Clause 23.8(c)(xiv)** if the Contractor is required to stop his works in compliance with the MCO.

FAQ (3): What must the Contractor do to claim the EOT?

The 2 main requirements are – **notification and particulars**.

Clause 23.1(b) requires notification of an intention to claim EOT and particulars of the MCO. This must be made within 28 days of becoming aware or should have been aware of the MCO, that is the announcement of the MCO.

Clause 23.1(c) then requires a claim submission of all necessary particulars and substantiations as to how the MCO has affected the progress of works. This must be made within 28 days after the end of the delaying event, that is when the MCO is lifted by the Government of Malaysia.

FAQ (4): How about loss and expense arising from the MCO?

Not all the delaying events entitle the Contractor to loss and expense claim. The Contractor's entitlement to loss and expense is governed under **Clause 24.1**.

Only a delay caused by the MCO, which materially affects the Contractor's works on site pursuant to **Clause 23.8(c)(xiv)** (i.e. suspension of works by an Appropriate Authority), entitles the Contractor to loss and expense claim. This is provided the loss and expense claim cannot be reimbursed to the Contractor under any provisions of the AIAC SFC and provided the mechanisms for a loss and expense claim in **Clause 24.1(a)(i) to (iv)** are complied with.

Contractors should therefore be mindful of cost control measures during the enforcement of the MCO.

PRELIMINARY CASE MANAGEMENT STATISTICS

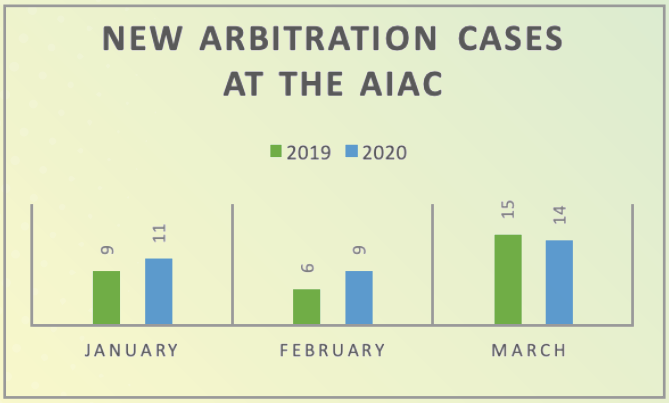
A significant component of the work undertaken by the Asian International Arbitration Centre ("AIAC") is the administration of a range of alternative dispute resolution ("ADR") cases. Specifically, the AIAC administers domestic and international arbitration, adjudication, mediation and domain name dispute resolution matters.

As part of this Newsletter, we present our preliminary ADR statistics for the First Quarter of 2020 (1st January 2020 – 31st March 2020). The information presented here is raw data only.

In light of the Malaysian Government's Movement Control Order, it should be noted that no new case registrations were accepted by the AIAC between 18th March 2020 and 14th April 2020. The figures below should be read against this background.

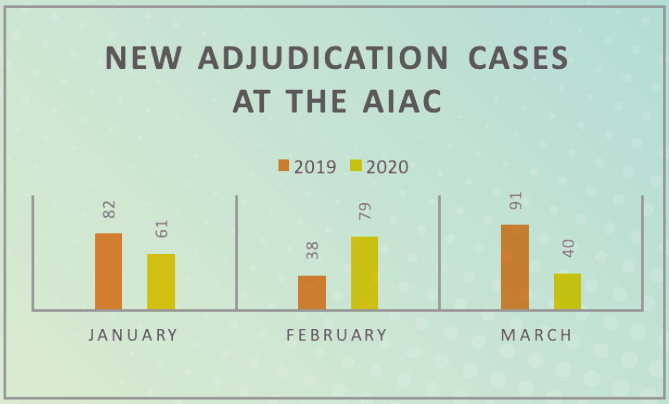
Arbitration

Between January and March 2020, the AIAC received thirty-three (33) new domestic arbitrations and one (1) new international arbitration.



Adjudication

Between January and March 2020, the AIAC received one hundred and eighty (180) new adjudication matters.



Mediation

Between January and March 2020, the AIAC received three (3) new mediation matters.

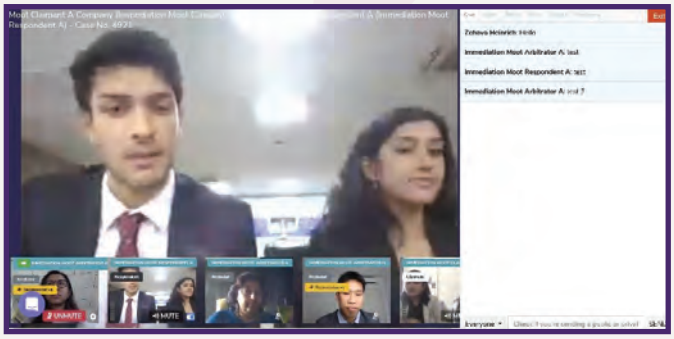
Domain Name Dispute Resolution

Between January and March 2020, the AIAC received 9 new domain name dispute resolution matters. Of these, three (3) were administered under the UDRP whilst six (6) were registered under the MYNIC Rules.

A detailed analysis of our statistics for the 2019 Calendar Year will be featured in the AIAC's 2019 Annual Report. This is anticipated to be released in mid-2020.

AIAC PRE-MOOT

VIRTUAL PRACTICE ROUNDS



Between 13th and 15th March 2020, the AIAC successfully conducted the AIAC Pre-Moot Virtual Practice Rounds ("VPR"). In light of the escalating situation posed by COVID-19, the AIAC decided to cooperate with the Immediation platform and host the VPR on its platform. The VPR were aimed at uplifting the spirit of the teams and to honour their hard work in preparing for the highly anticipated 27th Willem C. Vis International Commercial Arbitration Moot in Vienna and the 17th Vis (East) Moot in Hong Kong.

A total of 36 teams from eleven countries were arbitrated by 65 dispute resolution professionals from thirteen countries, who shared their valuable observations, constructive criticism, and advice in great detail for the benefit of the participants.

We would like to thank the team at Immediation, who provided highly responsive technical support and a tailor-made User Manual for students and arbitrators to ensure easy access to the online platform. Amongst many other exceptional features, the platform allowed arbitrators to place the teams in a "private room," which enabled the arbitrators to deliberate without the presence of the teams, and to put them back in the room once the deliberation concluded.

The VPR were structured to resemble actual in-person and virtual arbitration hearings and in-person hearings of the Vis Moot, whilst helping the teams experience the future of arbitration. With the increasing concerns of COVID-19 as well as considerations of the environmental impact arbitration can have on the world, online dispute resolution ("ODR") is going to become more prominent. Currently, there are many instances in which arbitration and mediation hearings have witnesses examined or consulted by video conference. However, conducting an entire proceeding using an ODR platform has yet to become the norm. The AIAC is looking forward to seeing how technology can continue to assist and lead change in the conduct of proceedings.

We extend our deepest gratitude to all participating teams, arbitrators, and especially to Immediation. Without the support of all, it would have been impossible for the AIAC Pre-Moot to go virtual.

THE AIAC AND CONSTRUCTION LAW (CABE AND YSCL)

On 17th January 2020, the Chartered Association of Building Engineers (CABE) hosted its Annual Conference, which was supported by the AIAC and held in Bangunan Sulaiman, Kuala Lumpur. This event included industry experts who delivered speeches on key topics impacting the construction and property industry.

The Welcome Speech was given by Ms. Michelle Sunita Kummar, AIAC's Deputy Head of Legal, who spoke on behalf of the Director of the AIAC. Ms. Kummar spoke about the AIAC's ongoing efforts in ensuring professional excellence from the perspective of the alternative dispute resolution ("ADR") services sector. She also expressed the Centre's commitment to work with and strengthen ties with CABE in developing the construction and building landscape in Malaysia.

In the Panel Discussion, Ms. Chelsea Pollard, AIAC's International Case Counsel, highlighted that the AIAC Standard Form of Building Contracts (SFC) 2019 Roadshows in KL, Penang, Sabah, Sarawak, and Johor were an outstanding success. These Roadshows led to an increased number of users on the SFC website and downloads of the SFCs.

The AIAC was honoured to join this successful Conference and is looking forward to working with CABE again in the future.

Additionally, on 28th January 2020, the Young Society of Construction Law Malaysia (YSCL) and the AIAC jointly hosted the YSCL's inaugural event, a panel talk for visiting construction management and quantity surveying students and staff from the University of Westminster. The Society of Construction Law Malaysia recently created the YSCL which is spearheaded by Mr. Abang Iwawan.

At the outset, the students were given a tour of the AIAC building, followed by a presentation on the history of AIAC and ADR in Malaysia by Ms. Chelsea Pollard, AIAC's International Case Counsel. The event concluded with a panel discussion by Ms. Pollard and YSCL committee members, Mr. Nicholas Ian Jones, Mr. Eric Gabriel Gomez, and Ms. Laarnia Rajandran, on the construction industry in Malaysia. The panellists discussed the common challenges faced by junior construction practitioners and how to overcome such obstacles.

INDIAN ARBITRATION AMENDMENT ACT, 2019: LATEST DEVELOPMENTS

By *Sanjeev K Kapoor*[1] & *Manavendra Mishra*[2]

1. Introduction

1.1 India recently witnessed an upheaval of its arbitration laws when the Arbitration and Conciliation (Amendment) Act, 2019 ("**2019 Amendment Act**"), amending the Arbitration and Conciliation Act, 1996 ("**Principal Act**"), was passed by the Upper House of Parliament (*Rajya Sabha*) on 18th July 2019 and the Lower House of Parliament (*Lok Sabha*) on 1st August 2019. Soon after, on 9th August 2019, the 2019 Amendment Act received the assent of the President. However, only certain provisions of the 2019 Amendment Act were notified on 30th August 2019, while others are yet to be brought into force.

1.2 The 2019 Amendment Act encapsulates various recommendations made by the HighLevel Committee ("**Committee**") formed under the Chairmanship of Justice B. N. Srikrishna, Retired Judge, Supreme Court of India, which submitted its Report on 30th July 2017. The Committee was constituted by the Central Government in order to eliminate some challenges/difficulties with respect to the Arbitration and Conciliation (Amendment) Act, 2015 ("**2015 Amendment Act**") and rationalise institutional arbitration in India.

1.3 The 2019 Amendment Act addresses certain key areas including: (i) streamlining and encouraging institutional arbitrations by providing for independent accreditation and appointment of arbitrators through arbitral institutions; (ii) making the arbitration procedure more robust and friendly, with an emphasis on addressing the ease of doing business ranking, as well as for making India a hub for international commercial arbitrations; and (iii) clarifying certain difficulties and issues arising from the 2015 Amendment Act.

2. Key Highlights

2.1 The 2019 Amendment Act has brought significant changes including appointment of arbitrators by arbitral institutions instead of courts in India, setting up of the Arbitration Council of India, introducing timelines for filing pleadings, exempting international arbitrations from prescribed time lines , altering the scope of several key sections of the legislation, and clarifying the scope of the 2015 Amendment Act.

2.2 Set out below is a brief overview of the key highlights of the 2019 Amendment Act:

3. Appointment of Arbitrators by Arbitral Institutions instead of Courts

3.1 The 2019 Amendment Act introduces appointment of arbitrator, by graded arbitral institutions designated by the Supreme Court (in international commercial arbitration) or the High Court (in other arbitrations). Where there are no graded arbitral institutions in a State, the 2019 Amendment Act provides for maintenance of a panel of arbitrators by the Chief Justice of the High Court of the concerned State for discharging functions of the arbitral institutions.

3.2 In effect, the amendment replaces the power of courts to appoint arbitrators in case of disagreement between the parties, with designated arbitral institutions making appointments in the court's stead. This appears to be modelled after similar mechanisms in Singapore and Hong Kong.

Sanjeev K Kapoor

Manavendra Mishra

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[2] Manavendra Mishra is a Principal Associate at Khaitan & Co, Mumbai, in the Dispute Resolution practice group. He focuses on international and domestic arbitrations, notably Shareholder, Investor and Infrastructure disputes and White-Collar Crime. Mr Mishra is presently a member of the Steering committee of YMCIA, Mumbai Centre of International Arbitration. He has also been appointed on the first steering committee of Society of Construction Law' Young Leaders Group, India. Mr Mishra has also handled significant arbitration matters and appears as counsel in infrastructure, oil & gas, sewage & drainage, design contracts and EPC arbitration. He has published many articles and is a guest lecturer in law colleges in India. He has also been invited as speaker by ICC many institutions and forums for arbitration seminars.

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3.3 The 2019 Amendment Act further provides that:

(i) if multiple requests for appointment of an arbitrator are made to different arbitral institutions in the same dispute, the arbitral institution to which a request was first made shall be competent to appoint the arbitrator; and

(ii) an application for appointment must be disposed of by the arbitral institution within a period of thirty days from the date of service of notice on the opposite party.

3.4 Pertinently, the provisions of the 2019 Amendment Act relating to the new mechanism for appointment of arbitrators by arbitral institutions have not yet been notified.

3.5 Given the novelty of this mechanism in the Indian context and the fact that these provisions are not yet brought into force, there is still some ambiguity regarding the precise operation of the appointment mechanism. In particular, it is unclear how many such institutions may be designated with powers of appointment and how the grading is likely to operate. Different institutions may have different empanelled arbitrators and appointment procedures, leading to differing practices, which will likely play an important part in how parties choose seats of arbitration. It is not uncommon for belligerent parties to refuse to agree on arbitrators and refer the matter to courts for appointing arbitrators to delay proceedings. Therefore, the approach of parties once these amendments are notified, will have a significant impact on overall dispute strategy.

4. Constitution of the Arbitration Council of India

4.1 The 2019 Amendment Act makes a watershed change in the structure of the Principal Act by inserting Part IA (Sections 43A to 43M) in the Principal Act for establishing the Arbitration Council of India ("**ACI**"). However, the government is yet to bring these provisions into force.

4.2 The ACI is proposed as a governing body with overarching powers for guiding arbitration policy in India and promoting alternative dispute resolution. The 2019 Amendment Act also prescribes detailed provisions regarding constitution, appointment of members, and general functioning of the ACT. The ACI's powers include:

(i) framing policies to grade arbitral institutions and accredit arbitrators (as per the qualifications and norms contained in the Eighth Schedule, which is inserted vide the 2019 Amendment Act);
(ii) evolving policy and guidelines for the establishment, operation and maintenance of uniform professional standards in respect of all matters relating to arbitration and alternative dispute resolution mechanisms;
(iii) conducting training, workshops, etc., relating to arbitration;
(iv) maintaining an electronic depository of all the arbitral awards made in India; and
(v) generally promoting arbitration and other alternative dispute resolution mechanisms.

The scope of the ACI's powers may, however, be enhanced by the government if required.

4.3 In light of the need for further clarity among practitioners regarding the functioning and operations of the ACT, the Department of Legal Affairs of the Government of India has released draft rules pertaining to the functioning of the ACI[3]. These rules primarily relate to the internal functioning of the ACI such as appointment of its members, terms of service, salary / allowances, etc. The government intends to invite active consultation of all relevant stakeholders, and has opened these draft rules for submission of comments till 14th March 2020.

4.4 Given the proposed framework under the 2019 Amendment Act, the ACI is likely to become the nodal agency for all arbitration related policy work in India. It will also directly affect arbitration practice since only institutions graded by the ACI may be designated by courts. However, with limited visibility on the precise workings of how the ACI will grade arbitral institutions and accredit arbitrators, this move is seen with some circumspection and has invited apprehensions that it may increase administrative interference in choosing arbitrators.

5. The Eighth Schedule

5.1 The Eight Schedule has been inserted into the Principal Act by way of the 2019 Amendment Act to crystallise the standardised eligibility requirements for the appointment of an individual as an arbitrator. The Schedule brings much needed objectivity and guidance to what was otherwise an ad hoc process.

5.2 Further, while the Schedule provides positive requirements and eligibility conditions, it does not incorporate specific, objective disqualifications, such as those enumerated in soft law instruments like the International Bar Association Guidelines on Conflict of Interest in International Arbitration 2014.

6. Revised Timelines and Scope of Applicability

6.1 The 2019 Amendment Act modifies the scope of these existing timelines contained in the Principal Act and introduces certain fresh timelines to streamline arbitration procedures. In particular, the 2019 Amendment Act mandates that the filing of the statement of claim and statement of defence must be completed within a period of 6 months from the date of constitution of the Tribunal. While this timeline appears reasonable, certain issues are still unclear. The provision does not deal with counter-claims and the replies thereto, nor with Rejoinders and Sur-rejoinders, which are allowed in domestic arbitration proceedings quiet routinely. Therefore, it will be interesting to see how arbitrators and parties deal with these situations in practice.

6.2 As stated above, the 2015 Amendment Act introduced a mandatory timeline for passing an award in India seated arbitrations i.e. 12 months from the constitution of the tribunal, which is extendable up to 18 months by consent of parties. The 2019 Amendment Act has redefined the scope of these timelines, as follows:

(i) international commercial arbitrations are excluded from the purview of the timeline and parties must only endeavour to adhere to the same; and
(ii) in other arbitrations, the time limit of 12 months will now commence from the completion of the pleadings of the parties and not from the constitution of the tribunal.

[3] Available at: http://legalaffairs.gov.in/acts-rules-policies.

6.3 Recently, the Delhi High Court, in a landmark judgment,[4] clarified that these new timelines under the 2019 Amendment Act will also apply to arbitration proceedings which are ongoing as on the date of enactment of the 2019 Amendment Act.

6.4 These new timelines are a welcome change / clarification and are generally well received. They provide clarity regarding pre-trial and post-trial timelines and do away with the previously prescribed block timelines.

7. Confidentiality

7.1 The 2019 Amendment Act inserts a provision (*Section 42A*) which requires the arbitration proceedings to be kept confidential by the arbitrator and the arbitral institutions. A carve out is created for the arbitral award, where its disclosure is necessary for the purpose of implementing and enforcing the award.

7.2 There have been instances in domestic proceedings where pleadings of one proceeding are produced in another. In fact, pleadings filed in arbitrations are often produced by parties in anti-arbitration injunction suits. As such, it will be interesting to see how courts approach situations where pleadings or other documents filed in arbitration proceedings are used in other proceedings.

8. Protection to Arbitrators

8.1 The 2019 Amendment Act inserts a provision to protect arbitrators for acts and/or omissions done during the arbitration proceedings, i.e. an arbitrator shall not be subject to a suit or other legal proceedings for any action or omission done in good faith in the course of arbitration proceedings. It remains to be seen how the said provision is read with Section 14 of the Principal Act which provides for the challenge to an arbitrator's mandate due to bias. Nevertheless, it is a welcome provision in light of the issues felt in Dubai in the recent past.

9. Modifying the Applicability of 2015 Amendment Act

9.1 Soon after the 2015 Amendment Act was brought into force, several differing opinions (including between courts) emerged regarding the applicability of the 2015 Amendment Act, i.e. whether it applies to pending proceedings before arbitral tribunals / courts. The issue arose primarily on account of the ambiguous language of the 2015 Amendment Act.

9.2 In fact, there were conflicting opinions, between different High Courts.[5] In March 2018, after over 2 years of differing views, the Supreme Court passed a judgment in *Board of Control for Cricket in India v. Kochi Cricket Private Limited and Others*[6] ("**BCCI judgment**"), deciding the applicability of the 2015 Amendment Act. In effect, the Supreme Court held that the 2015 Amendment Act will apply to: (i) arbitral proceedings which have commenced on or after the commencement of the 2015 Amendment Act; and (ii) applications filed in court after the commencement of the 2015 Amendment Act even if the arbitral proceedings were commenced before the amendment came into force. While this brought some quietus to the issue, this was short-lived.

9.3 The 2019 Amendment Act (by inserting Section 87 in the Principal Act) redefined the applicability of the 2015 Amendment Act, in direct contradiction to the *BCCI* judgment. The 2019 Amendment Act provided provides that the 2015 Amendment Act will apply to: (i) arbitral proceedings that have commenced prior to the introduction of the 2015 Amendment Act as well as; (ii) the applications before court arising out of or in relation to such arbitral proceedings irrespective of whether such court proceedings have commenced prior to or after the commencement of the 2015 Amendment Act. Interestingly, the 2019 Amendment Act specifically provides that the aforesaid scope shall be retrospective and apply from the time the 2015 Amendment Act was brought into force.

9.4 This led to a peculiar situation where the applicability of a legalisation was drastically redefined almost 4 years after it was first enacted. Since several applications before court had already been decided between 2015 and 2019 as per the dictum of the *BCCI* judgment, the redefined scope under the 2019 Amendment Act may lead to the reopening / appeal of several cases.

9.5 The issue of applicability of 2015 Amendment Act and the validity of the redefined scope under the 2019 Amendment Act was finally put to rest by the Supreme Court, *vide* its judgment dated 27 November 2019 in *Hindustan Construction Company Limited & Anr v. Union of India*.[7] By way of this judgment, the Supreme Court declared that insertion of Section 87 into the Principal Act, by the 2019 Amendment Act was manifestly arbitrary, and hence, unconstitutional. The Supreme Court effectively struck down the redefined scope of the 2015 Amendment Act as provided under the 2019 Amendment Act and reinstated the dictate of the *BCCI* judgment.

COMMENT

10. The 2019 Amendment Act is definitely a step forward in promoting institutional arbitration in India along with streamlining and overcoming some of the challenges faced after the enactment of the 2015 Amendment Act. The 2019 Amendment Act takes arbitration practice and laws into a new domain, with substantial safeguards and regulations to further plug the holes and ensure a robust and sustainable mechanism to support the growth of arbitration in India.

10.1 The 2019 Amendment Act, however, did not take into consideration some recommendations by the Committee, notably on incorporating the International Bar Association (IBA) Rules on Evidence. Further, how the amendments are actually implemented would be key to gauge their success in the future. The scope, composition, and functioning of the ACI remains to be seen as does the implementation thereof into practice. The actual manner of implementation of the ACI would determine if it becomes a deemed regulator of arbitration institutions in India or remains a supervisory body. We look forward to the interesting times that the 2019 Amendment Act shall usher in the arbitration diaspora and the changing landscape thereof in India.

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[4] *Shapoorji Pallonji & Co. Pvt Ltd v Jindal India Thermal Power Limited*, (OMP (MISC) (COMM) 512/2019) passed on 23rd January 2020.
[5] See judgments of the Madras High Court in *New Tirupur Area Development Corporation Ltd v M/s Hindustan Construction Co. Ltd* (A. No. 7674 of 2016); Calcutta High Court in *Tufan Chatterjee v Rangan Dhar* AIR 2016 Cal 213; and Bombay High Court in *Rendezvous Sports World v the Board of Control for Cricket in India* 2017 (2) BomCR 113.
[6] *Board of Control for Cricket in India v. Kochi Cricket Private Limited and Others*, (2018) 6 SCC 287.
[7] *Hindustan Construction Company Limited & Anr v. Union of India* (Writ Petition (Civil) No. 1074 of 2019).

BUSINESS AND HUMAN RIGHTS ARBITRATION:

A NEW FRONTIER

On 21st January 2020, the AIAC and AIAC YPG held its first Evening Talk (the "Talk") titled "*Business and Human Rights Arbitration: A New Frontier*" to mark the beginning of the new year. On this occasion, the AIAC and AIAC YPG selected a rather unchartered topic, that is, business and human rights arbitration. Such is meant to be a follow up to the launch of the Hague Rules on Business and Human Rights (the "Hague Rules") on 12th December 2019. The Talk featured the following distinguished speakers who are pioneers and experts in this niche and emerging area of law:

- Mr. Cecil Rajendra, a renowned Malaysian lawyer, poet and the Recipient of Lifetime Achievement Award by the Malaysian Bar and the International Bar Association's Pro Bono Award 2019 for his visionary Legal Aid & Human Rights contributions;
- Professor Diane Desierto, Associate Professor of Human Rights and Global Affairs at the Keough School of Global Affairs, University of Notre Dame and a Member of the Drafting Team of the Hague Rules; and
- Mr. Antony Crockett, Senior Consultant at Herbert Smith Freehills.

Ms. Irene Mira, International Case Counsel at the AIAC, moderated the Talk.

The primer of the Talk itself was not only the newly created Hague Rules, but also the widely accepted United Nations Guiding Principles on Business and Human Rights which comprises of a set of guidelines for States and companies with respect to the protection and enforcement of human rights in the context of business activities.

Mr. Rajendra, who views himself as a "lawyer by profession but a poet by compulsion" commenced the Talk by sharing his experience as a human rights advocate for those who have limited to no access to justice, i.e: labour workers and indigenous people. An example of Mr. Rajendra's longstanding contribution to the law would be the free legal aid clinic in the Bayan Lepas free-trade zone that he, among others, established in 1980. He and his colleagues dealt with human rights violations ranging from discriminatory treatment, housing issues and sexual harassment that the workers experienced in the said free-trade zone. He then presented his thoughts on Article 2 of the Preamble of the Hague Rules which, in his opinion, was a tacit admission to the need and urgency of a grievance mechanism and access to a remedy for those whose fundamental rights are affected by business operations.

Mr. Crockett played the role of the devil's advocate for the purpose of the Talk. He presented arguments as to why arbitration may not be an appropriate process for the resolution of human rights grievances against corporations as practitioners encounter challenges when such issues crop up in both commercial and investment arbitrations. Before one does business and human rights arbitration, Mr. Crockett opined that one needs to carefully consider how to obtain prior consent to arbitrate the business and human rights dispute between the aggrieved party and the corporation, which more often than not is a multinational corporation – a sentiment that Mr. Rajendra completely shared. Other important factors include but are not limited to the human rights policy implemented by the multinational corporations, and issues related to costs and legal representatives in the proceedings.

Professor Desierto acknowledged that many are indeed still pessimistic towards a business and human rights arbitration mechanism, especially when one analyses relevant issues of the rights of indigenous people and their participation in such arbitration, the enforceability of arbitral award in respect of a dispute adjudicated pursuant to the Hague Rules, and the arbitrability of labour disputes in different jurisdictions. She then canvassed the history behind the drafting of the Hague Rules which was a work in the making since 2013 by the Business and Human Rights Arbitration Working Group.[1] This was followed by an explanation of how this legal instrument aims to facilitate business and human rights arbitration without having the aggrieved parties espousing diplomatic protection as a pre-requisite to arbitration. Professor Desierto added that much of the desired elements in arbitration, such as expertise of the arbitrators and transparency, are incorporated in the Hague Rules to ensure its efficiency. A notable provision regarding witness protection is worth highlighting given the nature and subject matter of business and human rights disputes.

All in all, alternative dispute resolution stakeholders are yet to see the Hague Rules being implemented in business and human rights disputes. While there are divergent views on the practicality of the use of the Hague Rules, this development in international arbitration and law are certainly one to watch over.

[1] The Business and Human Rights Arbitration Working Group is a private group of international practicing lawyers and academics, aimed to create an international private judicial dispute resolution avenue available to parties involved in business and human rights issues as claimants and defendants, thereby contributing to filling the judicial remedy gap in the UN Guiding Principles on Business and Human Rights. See https://www.cilc.nl/project/the-hague-rules-on-business-and-human-rights-arbitration/ for more information.

FIDIC CONTRACTS AND THE GOVERNING LAW, WHETHER CIVIL OR COMMON LAW, PROVIDE RELIEF FROM COVID-19'S ADVERSE IMPACT ON CONSTRUCTION AND ENGINEERING PROJECTS ACROSS THE GLOBE

By John Coghlan[1]

1. Introduction

1.1 On 10 April 2020, the World Health Organisation's (**WHO**) Director General categorised the new coronavirus (**COVID-19**) as a pandemic and its recent "*Situation Reports*" indicates that it has infected approximately 1.6 million people globally.

1.2 Consequently, governments across the globe are implementing different emergency measures, including imposing travel bans, quarantining citizens and restricting social interaction, in an attempt to delay and stop COVID-19 spreading further. Such measures are adversely affecting all industries, including the global Construction and Engineering Industry and its extensive supply chain, which generates approximately $10 trillion annually (*McKinsey Global Institute – Reinventing Construction*).

1.3 Given the above and FIDIC's recent announcement that the Asian Infrastructure Investment Bank (AIIB) (26/11/19) will use FIDIC's contracts, including the 1999 First Edition of its "…Plant & Design-Build…by the Contractor" (Yellow Book), to procure Construction & Engineering projects, we discuss the Yellow Book's clauses, together with the Governing Law, which provide Contractors with relief from the adverse effects of COVID-19, below.

1.4 Finally, we set out the Contractor's optimal strategy to protect its position and, if necessary, enhance its prospects of success if the matter evolves into a formal "dispute".

2. FIDIC: Epidemic / Governmental Actions – Delay to the Works

2.1 FIDIC provides the Contractor with the right to submit a claim for an "*extension of Time to Completion*" (Cl/8.4) if the completion of the Works is or will be delayed due to:

> "*…(d) Unforeseeable shortages in the availability of personnel or Goods caused by epidemic or governmental actions, If the Contractor considers himself to be entitled to an extension of the Time for Completion, the Contractor shall give notice to the Engineer in accordance with Sub-Clause 20.1 [Contractor's Claims]*" (Cl/8.4 /final para.) (emphasis added)

2.2 The Contractor, therefore, must provide the Engineer with a notice of its claim no later than 28 days from the date it became aware, or should have become aware, of the event i.e. COVID-19 and/or "*governmental actions*", which are or could cause a delay to completion of the Works in the above context. If the Contractor fails to comply with the notice period, it loses its right to claim (Cl./20.1).

2.3 FIDIC does not define the term "*epidemic*", however, the WHO provides the following definition:

> "*Epidemic: The occurrence in a community or region of cases of an illness, specific health-related behaviour, or other health-related events clearly in excess of normal expectancy. The community or region and the period in which the cases occur are specified precisely. The number of cases indicating the presence of an epidemic varies according to the agent, size, and type of population exposed, previous experience or lack of exposure to the disease, and time and place of occurrence.*"(https://www.who.int/hac/about/definitions/en/) (emphasis added)

2.4 In addition, the WHO defines the "*Epidemic Threshold*" as follows:

> "*Epidemic Threshold: Is the critical number or density of susceptible hosts required for an epidemic to occur. The epidemic threshold is used to confirm the emergence of an epidemic so as to step up appropriate control measures.*"

2.5 Further, we note that on 30 January 2020 the WHO's Director General convened a second meeting of the International Health Regulations (2005) Emergency Committee (**Committee**) to discuss whether COVID-19 constituted a "*Public Health Emergency of International Concern*" (**PHEIC**) and advised

> "*The Committee agreed that the outbreak now meets the criteria for a Public Health Emergency of International Concern and proposed the following advice to be issued as Temporary Recommendations.*" (emphasis added)

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2.6 In addition, on 11 March 2020 the WHO's Director General stated the following:

> "*WHO has been assessing this outbreak around the clock and we are deeply concerned both by the alarming levels of spread and severity…*
>
> *We have therefore made the assessment that COVID-19 can be characterized as a pandemic….*" (emphasis added)

2.7 The WHO's "*Definitions: emergencies*" does not define a "*pandemic*", however, its "*Bulletin*" provides:

> "*A pandemic is defined as "an epidemic occurring worldwide, or over a very wide area, crossing international boundaries and usually affecting a large number of people*"[2]

2.8 Notwithstanding the above, the WHO does not appear to have formally categorised COVID-19 as an "*epidemic*". It may, therefore, be necessary to obtain expert evidence (epidemiological), to determine the date on which COVID-19 reached the "*Epidemic Threshold*", which is the minimum "*number of cases*" COVID-19 is required to reach, prior to the virus being categorised as a "*pandemic*", to categorise the virus as an "*Epidemic*" in accordance with the WHO's definition.

2.9 In addition, FIDIC does not define "*governmental actions*", however, if such actions, including China's "*coronavirus shutdown*" of factories and "*quarantine measures*" (Financial Times/10 February 2020) and/or Malaysia's "*…strict nationwide controls locking down all travel in or out of the country in an effort to stem infections of Covid-19…*" (CNN/17 March 2020) and/or the UK government's "*coronavirus lockdown*" (BBC/25 March 2020) cause a shortage in the availability of personnel and/or Goods then the Contractor may rely on the above.

3. FIDIC: "*Force Majeure*" – Delay to the Works / Additional Costs

3.1 In addition, Cl/19 is titled "*Force Majeure*" and excludes the Contractor's liability for an event which is beyond its reasonable control.

3.2 Specifically, Cl/19.1 provides a list of "*Force Majeure*" events, however, it would be difficult to construe any of the events to incorporate COVID-19. The preceding paragraph within Cl/19.1, however, uses the term "*but is not limited to*" which means that FIDIC's list is non exhaustive.

3.3 Consequently, a Contractor may categorise COVID-19, as a "*Force Majeure*" event and seek to rely on the same to exclude any liability it has incurred because of the event.

3.4 In this context, the Contractor is required to provide a "*Notice of Force Majeure*" event to the Engineer no later than 14 days after it become aware, or should have become aware, of the event (Cl.19.4).

3.5 In addition, if the "*Force Majeure*" event prevents the Contractor from completing any obligation under the Contract and this causes it to suffer "*delay and/or incur Costs*" it has a right to raise a claim under Cl/20.1 [Contractor's Claim] for an "*extension of time*" and additional Costs (Cl/19.4).

3.6 It should be noted, however, that for the Contractor to obtain any additional Costs the "*Force Majeure*" event must occur in the Country (Cl/19.4(b)), which is defined as "*…the Country in which the Site (or most of it) is located…*" (Cl/1.1.6.2).

3.7 Finally, the Contractor should be mindful that the above could lead to "*Optional Termination*" (Cl/19.6) and/or "*Release from Performance under the Law*" (Cl/19.7).

4. FIDIC: Change in Law – Delay to the Works / Additional Costs

4.1 Further, governments are introducing new laws to stop COVID-19 spreading, for example the UK's emergency "*Coronavirus Act 2020*" (**CA/20**) on 25 March 2020 and the Malaysian's "*Movement Control Order*" (**MCO**), which initially applied from 18 March until 31 March 2020 and has now been extended to 14 April 2020.

4.2 The UK's CA/20 is designed to protect life and the nation's public health together with support the medical staff dealing with the crisis. Specifically, its aims may be defined as follows:

(a) "*containing and slowing the virus;*
(b) *easing legislative and regulatory requirements;*
(c) *enhancing capacity and the flexible deployment of staff across essential services;*
(d) *managing the deceased in a dignified way; and*
(e) *supporting and protecting the public to do the right thing and follow public health advice*". (https://www.gov.uk/)

4.3 At the date of writing it could be argued, however, that the UK government has not provided clear instructions/guidance regarding whether the UK's construction and engineering projects, save essential projects such as hospital maintenance etc, should close.

4.4 In contrast, Malaysia's MCO, which derives its authority from the "*Prevention and Control of Infectious Diseases Act 1988*" and "*Police Act 1967*", prohibits individuals from leaving their homes, with limited exceptions, and closes all government and private premises.

4.5 In addition the "*Prevention and Control of Infectious Diseases (Measures within the Infected Local Areas) Regulations 2020*" sets out measures to stop COVID-19 spreading, and includes a list of "*essential services*", which does not include the construction and engineering industry/projects, to remain open.

4.6 On 18 March 2020, the Malaysian National Security Council provided a statement which defines an "*essential service*" which may operate throughout the period of the MCO. In addition, it states that construction and engineering projects may operate if closing the same would create a risk to "*public security and safety*". In this context, the Malaysian Department of Works and Department of Occupational Safety and Health are required to provide formal approval for the project to remain open. In other words, those managing such projects should ensure that they apply for an obtain the approval in question, however, the remainder are required to close to comply with the above.

4.7 That being the case, FIDIC's Cl/13.7 is titled "*Adjustments for changes in Legislation*" and provides:

> "*The Contract Price shall be adjusted to take account of any increase or decrease in Cost resulting from a change in the Laws of the Country…which affect the Contractor in the*

[2] *WHO Bulletin Volume 89, Number 7, July 2011, 469-544.*

performance of obligations under the Contract... If the Contractor suffers (or will suffer) delay and/or incurs (or will incur) additional Cost as a result of these changes in the Laws…"

4.8 In the above circumstances, the Contractor has a right to raise a claim under Cl/20.1 [Contractor's Claim] for an "*extension of time*" and additional Costs (Cl/13.7(a) and (b)), however, it must notify the Engineer no later than 28 days from the date it became aware, or should have become aware, of the event i.e. change in law, failing which it loses its right to claim (Cl./20.1).

5. Governing Law: "*Force Majeure*"?

5.1 FIDIC's Cl/1.4 is titled "Law and Language" and provides:

> "…The Contract shall be governed by the law of the country (or other jurisdiction) stated in the Appendix to Tender…"

5.2 The Parties, therefore, have the right to decide on the law which governs the Contract, which in many cases is not the law of the Country in which the project is being completed, and any disputes (Cl/20) arising from the same (**Governing Law**).

5.3 The Governing Law will include the rules which apply to the Contract's interpretation and the meaning/application of other legal principles such as "*Force Majeure*".

5.4 Specifically, "*Force Majeure*" (**FM**) derives from France and is used, in both civil law and common law legal systems across the globe, as a method of excluding liability for an event which is beyond the Parties' control and renders performance, on an objective analysis, too onerous and/or impossible.

5.5 In civil law legal systems, such as the People's Republic of China (**PRC**) and countries within the Middle East the FM principle is set out within the respective civil codes i.e. statutes. For instance, in the PRC the FM principle exists within Article 180 of the PRC's General Rules on the Civil Law and Articles 117 & 118 of the PRC's Contract Law – these apply automatically if the Contract is silent regarding the same.

5.6 In contrast, in common law legal systems, such as England and Malaysia, the Parties have the freedom to agree whether to include a FM clause within their construction and engineering contracts. The FM principle, therefore, is a "creature of contract" which evolves through the Court's binding authorities i.e. case law, of high ranking courts (Supreme Court/Court of Appeal) which, in a common law legal system, the lower courts are bound to follow in subsequent cases with similar facts. For example, the Court of Appeal in England & Wales has found that the word "*prevent*" within an FM clause meant that the FM event rendered performance "*legally or physically impossible*" and not merely "*difficult or unprofitable*"[3]. In addition, it held that an FM clause which required the FM event to be "*beyond the control*"[4] of a party could only be relied upon if that party had taken all reasonable steps to avoid the event or mitigate its results.

5.7 Given the above, the key, therefore, is to construe the Contract as a whole, in accordance with the Governing Law, to be able to advise on its meaning. In this context, the issue is whether, as part of a wider strategy (see Section 8 below), Cl/19 "*Force Majeure*" and/or the relevant Governing Law's application of the FM principle is beneficial. The Contractor should of course be mindful that it is required to prove that the FM event caused it to fail to perform its obligations and, as mentioned in paragraph 3.7 above, there may be consequences to relying on the same.

6. FIDIC: Fully Detailed Claim

6.1 In addition to the above, the Contractor is required to submit: a "*fully detailed claim*" as follows:

> *"…Within 42 days after the Contractor became aware (or should have become aware) of the event or circumstance giving rise to the claim, or within such other period as may be proposed by the Contractor and approved by the Engineer, the Contractor shall send to the Engineer a fully detailed claim which includes full supporting particulars of the basis of the claim and of the extension of time and/or additional payment claimed…* (Cl/20.1/Para.5)

6.2 In addition, Cl/20.1/Para.5 sets out the approach the Contractor's "*fully detailed claim*" should adopt if the event has a "*continuing effect*". Specifically, the Contractor is required to submit an "*Interim…fully detailed claim*" and the Contractor is required to submit a "*final claim" no later than 28 days "…after the end of the effects…*" of the event (Cl/20.1/Para.5(c)).

6.3 If the Contractor fails to comply with the above or any other "*Sub-Clause in relation to a Claim*" then the Engineer will take account of the extent that the Contractor's failure has prejudiced its investigation into the Claim within his assessment for any additional time and/or costs (Cl/20.1/Para.10).

6.4 It should be noted, however, that the above does not apply to the 28 day period in which the Contractor must provide its initial Notice of the "*event*" (Cl/20.1/Para.2) failing which the Contractor risks being "time barred".

7. Observations / Strategy

7.1 The WHO's "*Situation Report – 1*" dated 21 January 2020 indicates that it was first informed of COVID-19 on 31 December 2019 at which time there were 44 cases.

7.2 On 11 March 2020, the WHO Director General categorised COVID-19 as a pandemic and its recent "*Situation Reports*", approximately 4 months after the initial report, indicate that it has infected over 350,000 people globally.

7.3 As mentioned at the outset COVID-19 is and will continue to adversely affect Construction and Engineering projects across the globe for some time and the Contractor, therefore, should consider the following:

Protect your Position: Contractor's Claim

7.4 The Contractor's first consideration, in relation to COVID-19 and any event that may adversely impact its performance, should be to protect its position as a matter of the Contract and the relevant Governing Law. In this context:

[3] *Tennants (Lancashire) Ltd v G.S. Wilson & Co. Ltd [1917] AC 495.*
[4] *Channel Island Ferries Ltd v Sealink UK Ltd [1988]* 1 Lloyd's Rep 323.

Notices

7.5 The Contractor, whether working under an unamended or amended Yellow Book, should ensure that it submits its notice/s in accordance with the Contract's requirements and reserve its legal rights.

7.6 Specifically, under Cl/8.4 the Contractor is required to submit a notice under Cl/20.1 "*Contractor's Claims*" only, no later than 28 days from the date it became aware, or should have become aware, of the event causing a shortage in the availability of personnel and/or Goods to complete the Works.

7.7 Under Cl/19, however, the Contractor is required to submit two Notices: (1) under Cl/19.2 "*Notice of Force Majeure*" no later than 14 days after becoming aware of the event, and (2) under Cl/19.4 a Cl/20.1 "*Contractor's Claims*" Notice, no later than 28 days from the date it became aware, or should have become aware, of the event preventing its performance.

7.8 The Contractor should note that if it fails to submit its initial notice within the 28-day period mentioned above it may lose its right to claim i.e. "time barred" (Cl./20.1/Para.2).

Fully Detailed Claim

7.9 Subsequent to its notice/s the Contractor should prepare and submit a "*fully detailed claim*" in accordance with the Contract's requirements and reserve its legal rights.

7.10 Specifically, under Cl/20.1/Para.5 the Contractor is required to submit a "*fully detailed claim*", which complies with the same, no later than 42 days from the date it became aware, or should have become aware, of the event giving rise to the claim. This includes the 28 day period to provide the initial Notice under Cl/20.1/Para.2.

7.11 However, given COVID-19 will have a "*continuing effect*", the Contractor is required, in the first instance, to submit an "*Interim…fully detailed claim*" which complies with the requirements set out in Cl/20.1.

7.12 Further, which may well follow several months of submitting "*Interim…fully detailed claim*", the Contractor is required to submit a "final claim", no later than 28 days "*…after the end of the effects…*" of the event (Cl/20.1/Para.5(c)).

7.13 The Contractor should note that it is required to particularise and substantiate the above claims and it would assist to refer to and apply the Governing Law while reserving its rights as a matter of the same.

7.14 If the Contractor is working under an amended Yellow Book, or any other contract, which does not include the above relief, including "*epidemic…governmental actions*" and/or "*Force Majeure*" clause, then it may well be necessary to formulate a claim using the Governing Law only. In this context, as set out in see Section 5 above, PRC Law applies Article 180 of the PRC's General Rules on the Civil Law and Articles 117 & 118 of the PRC's Contract Law automatically if the Contract is silent regarding the same and the relevant case law of England and Wales may apply e.g. Frustration, which could result in the Contract being discharged and the parties released from future obligations (see *Davis Contractors Ltd v Fareham Urban District Council [1956] AC 696*).

Contractor's Claim is not a Dispute

7.15 We are conscious that some Contractors may be concerned that submitting the "Notices" and "Contractor's Claim", as mentioned, may have a detrimental impact on its relationship with the Employer.

7.16 In this context, however, it should be noted that the "Notices" and a "Contractor's Claim" are merely a contractual mechanism which protects the Contractor's rights/position and not a formal "dispute".

7.17 Specifically, the Contractor should note that a "*dispute*" crystallises if it disagrees with the "Engineer's Determination" (Cl/3.5), pertaining to its "*Contractor's Claim*", following which it may choose to initiate the remainder of the Yellow Book's tiered dispute resolution mechanism, which concludes with "Arbitration" (Cl/20.6).

8. Conclusion

8.1 In conclusion, the Contractor may, depending on the evidence, argue that "*governmental actions*" and/or a "*change in law*" are causing delay to the Works and the latter is also causing it to incur additional Costs. In addition, it may contest that COVID-19 constitutes an "*epidemic*" and/or a "*Force Majeure*" event under the Yellow Book (see above).

8.2 Specifically, the Contractor should think strategically and ensure that it understands its Contract's relevant terms and the Governing Law, together with the consequences of the same, to protect its position. Further, it should define its objectives, mindful of the project's position and its relationship with both the Employer and other members of the supply chain, to formulate a flexible optimal strategy to manage the process and reach its objectives.

8.3 The Contractor would be wise to instruct an experienced Construction and Engineering lawyer to enhance its prospects of success.

ANNOUNCEMENT

AIAC'S PRECAUTIONARY MEASURES IN RESPONSE TO THE COVID-19 PANDEMIC

On 19th February 2020, the AIAC advised the members of the public of the measures implemented at its premises to safeguard against the COVID-19 pandemic. The key points of this message have been reproduced below alongside an update of subsequent measures adopted by the AIAC.

Temporary Closure

In accordance with the Malaysian Government's Movement Control Order ("MCO") issued on 16th March 2020, and subsequently extended on 25th March 2020 and 10th April 2020, the AIAC's premises will be closed from Wednesday, 18th March 2020 to Tuesday, 28th April 2020 ("MCO Period"). During this period, the AIAC neither accepted any physical service of documents nor actioned any appointment or commencement requests in its adjudication, arbitration, mediation or domain name dispute resolution proceedings, save for domain name disputes under ICANN's Uniform Dispute Resolution Policy. The AIAC Secretariat will be working remotely from home, and will be able to attend to all inquiries that you may have within usual working hours.

Single Entry Point

Until further notice, a single-entry point into the AIAC's premises has been implemented. All visitors of the AIAC will be required to enter its premises through the Bangunan Sulaiman Ground Floor Lobby entrance and undergo temperature scanning. Please be advised that access to the AIAC's premises will not be granted to individuals with a recorded temperature of 38°C and above. Such individuals will be asked to kindly leave the premises to seek immediate medical advice. The contact information of these individuals will also be recorded for safety purposes and secured in line with domestic legislation on personal data protection requirements.

Hearings & Meetings

To ensure smooth proceedings, an email will be sent by the AIAC a day before your scheduled hearing or meeting reminding you of the above requirements and measures. Please contact the AIAC's Reservations Team (reservations@aiac.world) if it is necessary to modify your booking or if you require an extra hand sanitizer in a Hearing or Breakout Room.

Events

These precautionary and preventative measures are also applicable for all events held within the AIAC's premises, i.e. both AIAC and non-AIAC events. For events held at the AIAC Pavilion, participants will be directed to the Lower Ground Floor Lift Area of the AIAC Pavilion, where a temperature scanning point will be stationed.

Increased Cleaning and Sterilisation

The AIAC's cleaning staff has been directed to increase cleaning and sterilisation practices within the AIAC. Hand sanitisers are for use at various locations within the AIAC. Please ask a member of our staff if you need assistance locating one.

Internal Safety Measures

All employees of the AIAC are subject to thermal scanning on a daily basis until further notice.

Business Continuity Plan

Prior to the MCO's enactment, the AIAC implemented a Business Continuity Plan ("BCP") to ensure the operational sustainability of the AIAC Secretariat. Under the BCP, each of the AIAC's Departments – Legal Services, Business Development, Operations & Finance – were split into two teams. This ensures that each week, half the members of the relevant departments will be working on-premises, whilst the remaining members will be working from home, with rotations taking place the following week.

The BCP is expected to continue after the MCO Period concludes until further notice.

Irrespective of whether a member of the AIAC Secretariat is working on-premises or remotely, the AIAC Secretariat will remain contactable during business hours.

We hope that the measures outlined above will assist the AIAC in ensuring the safety of our guests, visitors, patrons and staff. We seek your co-operation and understanding in adhering to the implemented measures which will be in place until further notice.

Thank you for your care and attention to this matter.

Warm regards,

AIAC Management

ASIAN INTERNATIONAL ARBITRATION CENTRE
(Established under the auspices of the Asian-African Legal Consultative Organisation)
Bangunan Sulaiman, Jalan Sultan Hishamuddin, 50000 Kuala Lumpur, Malaysia
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AIAC YPG ROADSHOW

As a testament to its mission to raise awareness and impart knowledge on arbitration and alternative dispute resolution, the AIAC and the AIAC YPG embarked on roadshows to various universities in Malaysia as follows:

14th November 2019, Brickfields Asia College
14th November 2019, UOW Malaysia KDU University College
15th November 2019, SEGi College Sarawak
30th November 2019, Advance Tertiary College, Penang
6th December 2019, Universiti Kebangsaan Malaysia
7th December 2019, Universiti Malaya
8th December 2019, Universiti Sultan Zainal Abidin
10th December 2019, Universiti Utara Malaysia
13th December 2019, International Islamic Universiti Malaysia
13th December 2019, Multimedia University, Melaka
21st December 2019, Universiti Sains Islam Malaysia
15th January 2020, INTI International University
17th January 2020, Advance Tertiary College Kuala Lumpur

A representative from the AIAC and a young practitioner from the AIAC YPG carried out advocacy training, arbitration module workshops, and also intellectually stimulating group exercises (e.g. moot exercises) for the students.

Many students were pleased with the quality of the workshops provided. "*I found it supremely valuable*" quoted Shaun Ng, a student from Brickfields Asia College. "I *learned a lot about arbitration and the benefits of mooting*".

With regards to how important mooting is, Aaina Nadira, a student from International Islamic University Malaysia, believes that "*it's very important to join mooting*" as based on her personal experience, mooting has helped her improve her analytical skills and oral advocacy skills.

The importance of mooting translates well into the realm of soft skills whilst aiding one in increasing their employability factor. As quoted by Ng Choon Kiat, a student from Universiti Utara Malaysia, mooting "*is a criterion being emphasised by many potential employers*". Aaina Nadira further adds that one of the main benefits of mooting competitions are the "*networking opportunities*".

AIAC and YPG strived to provide the best quality speakers and finest materials to ensure the students were given the best possible opportunity to fully grasp the ideas being presented.

When asked how satisfied they were with the invited speakers, Ng Choon Kiat applauded that "*each speaker was an experienced lawyer*" and had "*great knowledge*" to impart upon the participants.

The great wealth of experience provided by the speakers was helpful to the students with regard to the students' future in the legal field. Yvonne, a Brickfields Asia College student, found that coming to the workshop aided her in that it made her "*very certain what (she is) pursuing is right,*" and that the workshop, in general, had exposed her to lessons that "*usually (we) don't hear or see every day*", especially in classes.

A workshop can be deemed successful if the speakers manage to inspire the attendees. In this regard, the AIAC and the AIAC YPG successfully managed to spark the interest of the students to participate in mooting competitions. A KDU student, Umar, was quoted saying she would "*definitely join*" mooting competitions now as what once used to be a "*pressurising matter*" is now seen in a more "*positive light*", as they now are instilled with the belief that these competitions can be very fun as well.

With the fun interplay between the speakers, the positive environment portrayed on stage, and the valuable information shared, the success of the roadshows has even managed to generate interest to potentially work in the field of arbitration and alternative dispute resolution. For instance, when asked whether he would be interested in interning at AIAC, Kingsley, a student from KDU positively answered "*I would love to apply for an internship; it sounds fun*".

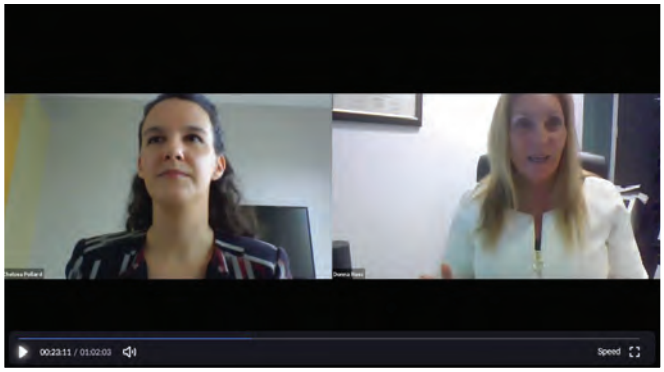
We look forward to meeting some of the participants from the YPG Roadshow at a mooting competition in the near future!

ADR Online:

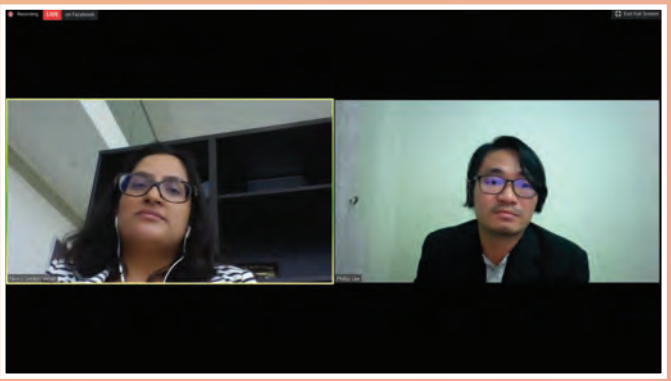
An AIAC Webinar Series

Despite the Malaysian Government's Movement Control Order ("MCO") placing mobility restrictions on persons resident in Malaysia, this did not curtail the AIAC's efforts to engage in capacity building and information dissemination activities during the MCO period.

On 24th March 2020, the AIAC held its inaugural webinar titled, "ODR (Online Dispute Resolution) Advocacy Skills". Approximately 350 attendees participated in the webinar session via the AIAC's Zoom Live Webinar platform. The session was also simultaneously broadcasted on Facebook Live, generating over 1,200 views. This webinar was conducted by Ms. Chelsea Pollard, International Case Counsel at the AIAC, and Ms. Donna Ross LLM FCIArb, Principal of Donna Ross Dispute Resolution and Attorney of The Ross Law Firm. Ms. Pollard provided an overview on ODR etiquette, and shared ADR best practices on opening and closing statements, as well as cross examination techniques. Ms. Ross shared her experience in carrying out a successful ODR session and emphasised the importance of sufficient preparation before an ODR hearing and effective presentation during an ODR hearing. Thereafter, both Ms. Pollard and Ms. Ross facilitated a lively Q&A session with the attendees.

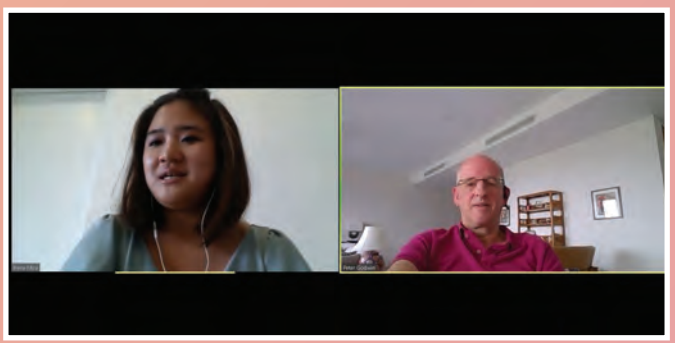


On 27th March 2020, the AIAC held its second webinar titled "Using Technology to Optimise Legal Services". Attended by 220 registered attendees via the AIAC's Zoom Live Webinar platform, this session was further enhanced with over 400 Facebook Live views on the AIAC's Facebook page. Conducted by Ms. Nivvy Venkatraman, Senior International Case Counsel at the AIAC, this session provided an overview on the different types of technology that are available to assist legal practitioners, including emerging new legal technology. Ms. Venkatraman emphasised the importance of embracing legal technology, noting that the legal industry is constantly evolving and that technology will invariably help lawyers manage their caseload. Mr. Philip Lee Abdullah, Manager of FINPRO – Malaysian Bar, Marsh JLT Specialty later joined Ms. Venkatraman, and provided his insight during the Q&A session, drawing attention on how ADR may be facilitated to resolve blockchain disputes, and how technology may facilitate arbitration, mediation and adjudication proceedings, as well as practice management more effectively.



On 30th March 2020, the AIAC hosted the third installment of its webinar series titled, "Computer-Side Chit Chat with Peter Godwin". Approximately 140 attendees participated in the webinar via the AIAC's Zoom Live Webinar platform and there were more than 330 views of the live broadcast on the AIAC's Facebook Page. The session featured an interview with Mr. Peter Godwin, Regional Head of Dispute Resolution (Asia) & Managing Partner of Herbert Smith Freehills (Malaysia), by Ms. Irene Mira, International Case Counsel at the AIAC.

Mr. Godwin shared his experience as a Counsel and Arbitrator in Asia and provided insights on the pathway to becoming an international arbitrator. He also addressed legal aspects arising from the COVID-19 pandemic on the industry, including force majeure clauses and the increasing popularity of virtual arbitrations. During the Q&A session, he provided guidelines for consideration when appointing an arbitrator wherein he highlighted that apart from professional experience, an arbitrator's influence in the industry should also be taken into account.



Given the success of the AIAC's Webinar Series in March, the AIAC has lined up a number of additional webinars, which continue through the MCO period ending on 28th April 2020 and beyond. Featuring a range of external speakers, the topics that will be covered include managing arbitration proceedings in a contactless society, the intersection of ADR and insolvency, domain name dispute resolution, and the impact of COVID-19 on careers in arbitration, capital markets, & the world of sports.

We hope that in a time of social distancing, such informative webinars can help unite all those interested in ADR to share insights in a safe and collegiate environment.

CHINA-ASEAN LEGAL FORUM

On 13th November 2019, the Asian International Arbitration Centre ("AIAC") and the Hainan International Arbitration Court ("HIAC") co-organised the much anticipated "China-ASEAN Legal Forum", in collaboration with the ASEAN Law Association of Malaysia (the "ALA Malaysia") and the China ASEAN Legal Corporation Center, at the AIAC's historic premises, Bangunan Sulaiman, Kuala Lumpur. The AIAC and HIAC also signed a Memorandum of Understanding and launched the AIAC/HIAC Joint Initiative to strengthen their relationship.

The forum opened with a welcome address by Ms. Tatiana Polevshchikova, Deputy Head of Legal at the AIAC, followed by an address by Mr. Shi Wen, the Director of HIAC.

After the warm welcome, The Right Honourable Chief Justice of Malaysia, Tan Sri Dato' Seri Utama Tengku Maimun binti Tuan Mat, graced the stage to deliver the keynote address, which was received with great enthusiasm from the audience. During her illuminating address, the Chief Justice endorsed the importance of Alternative Dispute Resolution ("ADR") and highlighted the strong need for corporation between ADR organisations and the judiciary to resolve the prevalent challenges. She explored the blooming economic and cultural ties between Malaysia and China, and discussed the mutual benefits of the Belt and Road Initiative. She stressed the well substantiated fact that large-scale international commerce inevitably results in disputes, resolution of which requires an amicable, just and swift play of the relevant adjudicatory bodies. She brought to light the fact that the judiciary recognises the crucial role and advantages of arbitration as well as other ADR mechanisms, some of which are ingrained in the court process. This is concomitant with the Rule of Law, since it affords the parties with greater autonomy in the resolution of their disputes, which in turn results in greater access to justice. The Chief Justice also pointed out that the present scheme is far from perfect.

The first session of the China-ASEAN Legal Forum discussed in detail the "Harmonisation of Law in ASEAN and China: Unchartered Territory in Alternative Dispute Resolution". The esteemed speakers for the session were triumphant in bringing the contours of the topic to light. The panel included YA Dato' Mary Lim Thiam Suan (Court of Appeal Judge, Malaysia), Prof. Shen Sibao (Director of the Institute of International Commercial Law in UIBE, Chairman of the China International Economic and Trade Law Association, Chairman of the Shenzhen Court of International Arbitration, Chairman of ADR and Arbitration Commission of ICC China) and Ms. Hong Jiang (Senior Consultant, Hui Zhong Law Firm, Shanghai). Dato' Teh Tai Yong (Senior Partner, Teh Kim Teh, Salina & Co) moderated the enlightening session with verve and was able to engage the audience effortlessly. During the session, the speakers touched on relevant issues like cross-border enforcement and the significance of international conventions in creating a harmonised legal environment between ASEAN and China.

The enlightening second session of China-ASEAN Legal Forum deliberated the dimensions of the "Enforcement of Arbitral Awards in China & ASEAN" and was moderated by Dato' Mah Weng Kwai. The distinguished panel addressing this topic comprised of Professor Choong Yeow Choy (University of Malaya), Ms. Teng Haidi (King & Wood Mallesons), and YA Dato' Lee Swee Seng (Court of Appeal Judge, Malaysia), who explored the enforcement issues in China and ASEAN in elaborate detail.

Discussions during the enthralling session primarily focused on the enforcement of arbitration awards under the New York Convention and addressed various significant aspects related to it. The panelists delved into a lively discussion regarding the history of enforcement of arbitration awards, the need of the arbitration realm that lead to the adoption of the New York Convention, the contributions the said Convention has made in the recognition and enforcement of arbitration agreements and awards, and the overall success of the Convention with respect to the signatory States.

The speakers also elaborated on the growth of arbitration in the ASEAN region in the wake of the adoption of the UNCITRAL Model Law by most countries and the increase in the number of arbitration centres. The discussion lead to an appreciation for the arbitration-friendly attitude being adopted by national courts and support being offered by the judiciary and governments in promoting arbitration as a mechanism to resolve disputes. The role of stakeholders in the improvement of arbitration practices was also highlighted.

The session also touched upon prominent and current cases in ASEAN countries where the courts enforced arbitration awards and took a pro-arbitration stance in consonance with international developments. The esteemed panelists elaborated on the positive attitude of the judiciary in China and ASEAN countries in adopting the New York Convention. Insights on the recent enforcement statistics and cases were regarded as highly informative by the delegates attending the events, who participated in the discussion by raising questions and offering suggestions.

The last session in the afternoon titled "Call for Cooperation: ASEAN and China as Partners in Belt & Road Initiatives" featured a range of different topics relating to the Belt and Road Initiative ("BRI"). Mr. Robert Yao, Senior Partner of DHH Law Firm in Beijing, shared his insights of how Chinese lawyers can go global and establish their legal practice overseas. He opined that this will be particularly important when Chinese enterprises begin to expand and invest abroad under the BRI. Echoing Mr. Yao's presentation, Ms. Goh Siang Joo, Partner of Goh, Cheah & Chong in Kuala Lumpur, talked about the liberalisation of the legal profession in Malaysia and went through the current requirements for foreign legal practitioners to establish and practice in Malaysia.

Mr. Jay Patrick R. Santiago, Senior Associate of Quisumbing Torres in Manilla, gave an analysis and comparison of various investment treaties signed by the ASEAN countries, outlining some of the main features of those investment treaties. Finally, Mr. Tony Ng, International Case Counsel at the AIAC, canvassed Malaysia's strategic positioning and the pro-arbitration stance of the Malaysian judiciary with reference to recent judgements delivered by Malaysian Courts and also the AIAC's recent case statistics. He also gave his insights on how the AIAC could contribute to the resolution of disputes arising from the BRI projects.

The moderator of the session, Mr. Raphael Tay, Partner of Lee Hishammuddin Allen & Gledhill in Kuala Lumpur, engaged the speakers in discussion on some lively (if not controversial!) topics including the cultural awareness of Chinese legal practitioners and enterprises, problems of transparency and corruption of foreign investments, and the potential impact on the BRI investments in South East Asia due to the territorial disputes in the region.

The forum concluded with Closing Remarks delivered by Dato' Ricky Tan, President of China-ASEAN Legal Cooperation Center (Malaysia), who thanked all the participants, delegates and organisers of the event for their sincere efforts and contributions.

Overall, the China-ASEAN Legal Forum was successful in bringing to light the current trends and developments in ADR in both China and ASEAN Countries. As trade, investment, and cross-border commerce and construction continue to grow in the ASEAN region, the role played by dispute resolution mechanisms will continue to be pivotal, especially in the wake of the BRI by China. At the AIAC, we are adept in handling disputes related to China and the ASEAN region due to our unparalleled expertise and experience in rendering efficient and holistic ADR services. We expect to partner with law firms, universities and other stakeholders in China and the ASEAN region to fulfil our commitment of providing the best services to our users.

The AIAC is grateful to the co-organisers, supporting organisations, kind speakers, presenters, moderators and participants who made the China-ASEAN Legal Forum a roaring success.

INTERNATIONAL INTELLECTUAL PROPERTY COMMERCIALIZATION COUNCIL SOFT LAUNCH

On 3rd March 2020, the International Intellectual Property Commercialization Council's ("IIPCC") Soft Launch of its Malaysia Chapter took place at Bangunan Sulaiman. The IIPCC, which is headquartered in Hong Kong, has local chapters in various countries around the world, such as the United States, Singapore, Hong Kong, China, and Korea. The IIPCC is a global, non-profit, non-partisan organisation providing a platform for the innovator and entrepreneur ('IP-Innopreneur') communities and enterprises to increase their understanding of intellectual property ("IP") and to gather resources for unleashing the value and realising the commercialisation potential of their creative and innovative IP into products, services, or processes.

The Soft Launch began with a speech by Mr. Daniel Lui, the Vice President of IIPCC and Co-Founder & CEO of LawTech Malaysia, who introduced the main focus of the event – IP commercialisation and trade secrets.

Ms. Karen Abraham, Head of Intellectual Property at Shearn Delamore & Co, delivered the Keynote Address and emphasised the importance and relevance of IP and the use of alternative dispute resolution ("ADR") to resolve IP-related disputes. She also highlighted the need for IIPCC, and other organisations, to disseminate awareness and education to the public about not only harnessing but commercialising IP.

In her Keynote Address, Ms. Abraham stated that currently, art and technology are accessible at our fingertips, which in turn changes the way business interactions take place. IP rights are necessary to assure quality and uphold the rights of innovators. Malaysian IP rights have been evolving, such as the Trademark Act; however, she explained there is still room for improvement. As non-governmental organisations, the Asian International Arbitration Centre ("AIAC") and IIPCC are uniquely situated to provide a platform to discuss and innovate the reforms of Malaysian IP law.

With the fast-paced nature of IP, having an avenue to resolve disputes is of great importance. Although Malaysia has specialised IP Courts to deal with IP disputes, we must not ignore ADR. Ms. Abraham advocated for the use of ADR in IP disputes, given ADR's confidential nature, specialised expertise, and international enforceability. Many institutions are either specialising in IP disputes or creating a list of panellists with IP expertise. For example, the World Intellectual Property Organization ("WIPO") has its own ADR division, which is of widespread use. Additionally, the Hong Kong International Arbitration Centre has an IP Panel and has reported that IP matters made up 1.8% of their overall arbitration matters.

Even though Malaysia is slow to adopt the use of ADR in IP disputes, Ms. Abraham proposed that this is probably attributable to the following: failure of including an arbitration clause in the relevant agreements, uncertainty of the arbitrability of IP disputes, and concerns regarding enforceability across different jurisdictions. That said, courts have even seen a decrease in IP disputes, as many are moving towards a less adversarial environment. As such, the time seems right to introduce ADR into the IP world here in Malaysia.

In her Opening Speech, Ms. Chelsea Pollard, International Case Counsel at the AIAC, gave a brief background to the AIAC as well as its products and services. In doing such, she highlighted how the AIAC has already empanelled arbitrators and mediators with specialisation in IP and technology, which can be found using the filters on the AIAC's panellist search. Additionally, the AIAC recently launched its Technology Expert Committee ("TEC"), which is aimed at providing a platform to discuss the use of ADR in technology related disputes.

Following the Opening Speech, Mr. Johnson Kong, Board Member of IIPCC, and Ms. Patricia Chung, Managing Partner of Chung Chambers & President of IIPCC Malaysia, provided an introduction to IIPCC. They highlighted that in IP commercialisation, there are many different players, such as lawyers and entrepreneurs, and IIPCC, which was founded in 2014, aims to bring these industry players together to create a dialogue regarding IP laws, which encourages innovation and provides for a better way of life. IIPCC is an independent non-governmental organisation serving the global community that has no funding and affiliation with any public or private entity. The IIPCC understands the value of creating jobs and promoting education and knowledge sharing so that people understand the value of IP. To effectuate its goals, IIPCC works with the community and various organisations, such as the AIAC.

This introduction to the IIPCC was followed by the signing of a Memorandum of Understanding between the IIPCC and the AIAC. The Soft Launch then moved onto its panel sessions for the afternoon.

The first panel session was titled "IP Commercialisation: Valuation & ADR". Moderated by Ms. Adeline Chin, Co-Founder of LawTech Malaysia, the panel comprised of Mr. Kong; Mr. Michael Lim Jr., Managing Director of Crowe Growth Consulting; Mr. Ridzuan Aziz, President of the FinTech Association of Malaysia; Ms. Christine Ng, Director of IP Valuation & Strategic IP at Adastra IP; and Ms. Diana Rahman, Senior Case Counsel at the AIAC. The panel discussed how IP monetisation is a subset of IP commercialisation, and they explained that for IP commercialisation to take place, there must be value in the IP, and it must be original. To monetise IP, which includes licensing, the IP must have commercial value; without value, the monetisation will be downwards.

The panel also noted that there has been an upward trend of IP related to Artificial Intelligence (AI) created within the tech industry. Recently, the Kota Kinabalu High Court has used AI for sentencing, and the panellists believed that there was excellent potential for the use of AI within the judicial system. One issue with AI is that it is intangible, making it a challenge to value AI IP. In the creation of IP, there can be diminishing ownership depending on the contribution to the IP itself. When commercialised, it boils down to the contribution given to the process.

The panel also observed that Malaysian investors have been skeptical of funding technology-related start-ups, which the panellists believed was due to the lack of ability to understand advanced technology. In order to commercialise IP, start-ups must be able to communicate their value, even though it may not be evident at first. The panellists explained that IP valuation is essential because it provides them a better bargaining chip when speaking with investors, potential buyers, clients, etc.

As with all industries, disputes related to IP are inevitable. The panellists concurred that ADR is the preferred method to resolve IP-related disputes, given the parties' ability to choose an arbitrator or mediator specialised in IP and/or technology. Moreover, ADR is confidential, cheaper than courts, and can be less adversarial if mediation is the chosen course of action. Opting for mediation gives the parties the potential to carry on with business without severing ties after the dispute. As of today, the AIAC has received several domain name disputes under both the MYNIC and UDRP policies. Although it has not received any IP arbitration or mediation disputes, it was commented that some disputes have had elements or issues pertaining to IP.

The panel commented that in deciding the territory for commercialisation, it is vital to look for places that can facilitate the growth of the business. More importantly, it is crucial to recognise the jurisdiction and the laws that apply as well as the effectiveness of the law and dispute resolutions mechanisms.

The second and final panel session was titled "The Last IP Right: Trade Secret". Moderated once again by Ms. Chin, the panel comprised of Mr. Kong, Ms. Chung, and Ms. Rahman. The panel explained that trade secrets exist at the point of the start-up of the business model. What can constitute a trade secret is anything that is being kept secret and has value. At the moment, Malaysia does not recognise trade secrets. The question then becomes, whether Malaysia should recognise trade secrets and make them registerable.

Under Malaysian law, the protection of trade secrets usually falls within a person's employment contract or a non-disclose agreement (NDA). The panellists pointed out that the seriousness and consequences of disclosing trade secrets need to be emphasised in the eyes of the judiciary to provide for a proper remedy. Currently, a mere remedy of damages for breach of contract will not be able to compensate for the damage and impact which has already been done.

One issue faced is that if a dispute regarding a trade secret is raised with the courts, the party must disclose the trade secret for the judiciary to make a decision. Interestingly, in China, the burden of proof is shifted to the defendant, meaning no disclosure by the Plaintiff is required. The panellists highlighted that although ADR would provide a beneficial forum for trade secrets given its confidential nature, there lies an issue of the arbitrability of employment disputes that would need to be addressed.

It was also observed that in Malaysia, there has been a misuse of court proceedings to obtain trade secrets and gain advantages over a competitor. One solution proposed by the panellists was to introduce a system similar to the International Knowledge Registry (IKR), which is a system to prove the existence of trade secrets at a particular time and location without disclosing the actual secret.

Overall, the Soft Launch at Bangunan Sulaiman was a resounding success! The AIAC looks forward to collaborating with the IIPCC and the IP industry in the near future to further promote ADR as the preferred method for resolving IP disputes.

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 December 2019 and March 2020, the AIAC Legal Services Team participated in the following external speaking engagements:

1. Guest Lecturer, "*The AIAC and its Role in International Arbitrations*", University of Malaya, Kuala Lumpur (3rd December 2019)
2. Moderator, "*Advocacy in International Arbitration*", AIAC Evening Talk Series, Kuala Lumpur (4th December 2019)
3. Moderator, "*AIAC Standard Form of Building Contracts 2019 Roadshows*", KSL Hotel & Resort, Johor Bahru (5th December 2019)
4. Presenter "*AIAC YPG Roadshow*", University Kebangsaan Malaysia, Bangi, (6th December 2019)
5. Presenter "*AIAC YPG Roadshow*", University of Malaya, Kuala Lumpur (7th December 2019)
6. Presenter, "*AIAC YPG Roadshow*", Universiti Sultan Zainal Abidin, Terengganu, (8th December 2019)
7. Presenter, "*AIAC YPG Roadshow*", School of Law - Universiti Utara Malaysia at Sintok, Kedah (10th December 2019)
8. Presenter "*AIAC YPG Roadshow*", International Islamic University Malaysia, Selangor (13th December 2019)
9. Presenter, "*A Lawyer's Essential Guide in Alternative Dispute Resolution (ADR): Drafting and Mooting*", AIAC YPG Roadshow, Multimedia University, Malacca (13th December 2019)
10. Presenter "*AIAC YPG Roadshow*", Universiti Sains Islam Malaysia, Negeri Sembilan (21st December 2019)
11. Presenter, "*AIAC YPG Roadshow*", INTI International University, Nilai, Negeri Sembilan (15th January 2020)
12. Speaker, "*AIAC Standard Form of Design and Build Contracts*", CABE Malaysia Annual Conference 2020, AIAC, Kuala Lumpur (17th January 2020)
13. Presenter, "*Developments in International Arbitration: The Malaysian Perspective*", Session on Latest Developments of APRAG Members, APRAG Conference 2020, Bangkok (17th January 2020)
14. Moderator, "*Business & Human Rights Arbitration: A New Frontier*", AIAC Evening Talk Series, Kuala Lumpur (21st January 2020)
15. Speaker, "*Overview of the Construction Industry in Malaysia*," Young Society of Construction Law Malaysia, Kuala Lumpur (28th January 2020)
16. Moderator, "*Introduction to RegTech*," AIAC and LawTech Malaysia, Kuala Lumpur (20th February 2020)
17. Panellist, "*Session 3 - Adjudicator and the Adjudication Authority*", Public Forum: Reforms to the Construction Industry Payment and Adjudication Act, Kuala Lumpur (26th February 2020)
18. Presenter, "Workshop on Arbitration, Construction Law and Adjudication", Institut Latihan Kehakiman dan Perundangan (ILKAP) Judicial and Legal Training Institute, Selangor (27th February 2020)
19. Speaker, "*Opening Speech*," International Intellectual Property Commercialization Council, Malaysia Soft Launch, Kuala Lumpur (3rd March 2020)
20. Panellist, "*IP Commercialisation: Valuation & ADR*," International Intellectual Property Commercialization Council, Malaysia Soft Launch, Kuala Lumpur (3rd March 2020)
21. Panellist, "*The Last IP Right: Trade Secret*," International Intellectual Property Commercialization Council, Malaysia Soft Launch, Kuala Lumpur (3rd March 2020)
22. Speaker, "*ODR Advocacy Skills*", ADR Online: An AIAC Webinar Series (24th March 2020)
23. Speaker, "*Using Technology to Optimise Legal Services*", ADR Online: An AIAC Webinar Series (27th March 2020)

The AIAC Legal Services Team has also showcased its products and services before visiting universities and external parties between December 2019 and March 2020 including the following visitors:

- Visit from University Pembangunan Nasional Veteran Jakarta (Indonesia)
- Visit from Universiti Putra Malaysia (Malaysia)
- Visit from Colombo Law Alliance (Sri Lanka)
- Visit from University of Westminster, London (United Kingdom)
- Visit from Jeff Leong, Poon & Wong Law Firm (Malaysia)
- Visit from Universitas Lancang Kuning (Indonesia)
- Visit from University Brawijaya (Indonesia)
- Visit from Universiti Kebangsaan Malaysia (Malaysia)

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!

INVESTMENT ARBITRATION

***CMC Muratori Cementisti CMC Di Ravenna Società Cooperativa v Mozambique* (ICSID Case No: ARB/17/23)**

The dispute involved reliance on a bilateral investment treaty ("BIT") between Mozambique and Italy, the latter where the Claimant group of companies was based. By public tender, the Claimant was awarded a contract for works relating to the reconstruction project of a portion of the principal north-south highway in Mozambique. The relevant contract was entered into between the Claimant and Mozambique's national roads administration, Administracão Nacional de Estradas ("ANE"), which was financed by the European Development Fund, to rehabilitate the portion of the said highway designated as Lot 3, which was approximately 106 kilometres.

In 2007, the Claimant completed the work for the Lot 3 portion of the highway, and at that time raised concerns regarding compensation it claimed to be due to them for the said work. During this time, ANE and the Claimant engaged in discussions relating to the compensation and in May 2009, ANE issued a determination of the amounts due to Claimant. The Claimant sought additional compensation, in which ANE responded on 30th October 2009 with an offer that the Claimant claims it accepted in its letter dated 2nd November 2009. However, ANE characterised the Claimant's letter as a counteroffer, which it did not accept and thus, resulting in the expiry of its offer. Despite discussions continuing from 2010 and well into 2016, ANE ultimately refused to make any payment of additional compensation to the Claimant.

The Claimant, in 2017, commenced arbitration against Mozambique, asserting that the later had breached a number of its obligations to investors under the said BIT, in an attempt to recover the additional compensation. At the outset, the Respondent raised a jurisdictional challenge and further contended that the Claimant's claims were without merit.

The Tribunal concluded that it had the jurisdiction to consider the Claimant's claims before it. In so finding, the Tribunal held the following, that the Claimants were investors within the meaning of the BIT; the Claimants had an investment and were "Nationals of another Contracting State" under the ICSID Convention; the Claimant's claims are not purely contractual, but a number arise under the BIT and are therefore within the jurisdiction of the Tribunal; the Cotonou Convention does not supersede the BIT, nor does it conflict with the BIT, and thus accordingly the Lot 3 Contract does not require the application of the Cotonou Arbitration Rules; and although the Achmea objection was timely, it did not deprive the Tribunal of jurisdiction. Notwithstanding its jurisdictional finding, the Tribunal then wholly dismissed the Claimant's claims on the basis that it identified no breaches by Mozambique against the said BIT.

***Almasryia for Operating & Maintaining Touristic Construction Co. L.L.C. v. State of Kuwait* (ICSID Case No. ARB/18/2)**

This dispute arose from the 'Agreement for the Promotion and Reciprocal Protection of Investments Between the Government of the Arab Republic of Egypt and the Government of the State of Kuwait 2001' ("BIT 2001") which adopted the ICSID Convention.

In brief, the Claimant, a company incorporated in Egypt, had entered into a joint venture agreement to develop a piece of land in Kuwait with an unrelated individual and a company, wherein the Claimant had allegedly purchased a small percentage of the said land for USD20 million. Subsequent to the joint venture agreement, the respective individual had attempted, but was unsuccessful in his application to the Kuwait Courts, to secure a deed of ownership to the said land. The Claimant claimed that Kuwait's failure to grant the said deed of ownership had violated its obligations under the BIT 2001.

The Respondent, at the outset of the proceedings, applied for a dismissal of the Claimant's claims alleging they manifestly lacked legal merit, pursuant to Rule 41(5) of the ICSID Convention ("Arbitration Rules").

The Tribunal, after determining the Respondent's objection was timely, dismissed the Claimant's claims. It found that the Claimant's non-issuance of a written notification to the Respondent to attempt to settle the dispute amicably prior to commencing the arbitration, as was required under Article 10(2) of the BIT 2001, was a legal impediment to the jurisdiction of the Tribunal. The Tribunal also held that for an expropriation claim to be entertained, property rights must essentially exist "*in accordance with the laws of Kuwait*", which was absent in the present case.

***Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary* (ICSID Case No. ARB/17/27)**

In the above case, the Claimants asserted that as a result of changes to Hungarian land law introducing new measures regulating possession and disposal of State-owned agricultural land, their leasehold rights to 760 hectares of State-owned land in Ikrény were expropriated and the value of their farming business in Hungary was diminished. This resulted in several confrontations between the Claimants and the new lessees. The Claimants contended that it had a contractual and a statutory pre-lease right to the land, which meant that upon expiry of the lease, if Hungary intended to lease the land to any other third party, it should inform the Claimants of the said third-party offer it had intended to accept, thereby allowing the Claimants to step in and enter into a renewed lease on the same terms as the said third-party offer.

In addition to raising preliminary jurisdictional objections, the Respondent also opposed the expropriation claim. The Respondent submitted that following amendments to the law, the Claimants had no contractual pre-lease right and that, even if they had, the NLA's denial of the exercise of that right would only constitute a breach of contract, not a violation of international law. The Respondent also argued that statutory pre-lease right is not a vested right under international or Hungarian law. Instead, it is a right conferred by general legislation which can change based on policy considerations and bear circumstances. In this context, it argued that the Claimants had never received any assurances that the legislation would remain unchanged.

Following its review, the Arbitral Tribunal held that Hungary was at liberty to remove or otherwise alter the statutory pre-lease provisions of its laws prospectively. Still, such a change should not have applied retrospectively to already vested rights. If so, then the state should provide compensation. The Tribunal thus found that Hungary breached its BIT with the United Kingdom by expropriating the Claimants' investment without compensation. The Tribunal awarded damages to the Claimants in the sum of EUR7,148,824.00 plus interest, as well as ordering they be reimbursed for their legal costs.

INTERNATIONAL ARBITRATION

***Minister of Finance (Incorporated) 1Malaysia Development Berhad v International Petroleum Investment Company Aabar Investments PJS* [2019] EWCA Civ 2080**

The Defendant had initiated the first arbitration arising from a binding term sheet executed by the Parties, wherein the arbitral tribunal ultimately made a consent award under the settlement deeds entered into by the Parties, which thus terminated the first arbitration.

Subsequently, the Claimant, after the departure of YB Dato' Seri Najib Tun Razak as the Prime Minister of Malaysia, filed applications seeking to set aside the consent award made in the first arbitration between Parties, wherein the Defendant attempted to stay the said setting aside applications.

In the interim, the Defendant sought to commence the second arbitration, seeking declarations that the settlement deeds executed between Parties were valid and binding, and not liable to being set aside. In response, the Claimant applied for an injunctive order restraining the Defendant from pursuing the second arbitration pending the final determination of the court applications.

The English Court of Appeal in allowing the appeal herein, found no compelling basis to grant the Defendant a stay on the Claimant's court applications and further, granted the Claimant an injunction to restrain the pursuit of the second arbitration until the final determination of those applications. It was held that the Claimant's right to have the setting aside proceedings determined first had been infringed by the pursuance of the second arbitration, which was itself vexatious, and thus an injunction ought to be granted.

***BGS SGS Soma JV v NHPC Ltd.* [Civil Appeal No. 9307 of 2019]**

The Supreme Court of India in the instant case overruled prior case law thereby clarifying that in the context of international arbitrations, choosing an arbitral seat was tantamount to granting exclusive jurisdiction to the court of the seat, and thus also giving effect to principles of party autonomy and territoriality. The Court reasoned that if anything to the contrary was allowed, there could be a situation where the same award would be subject to challenge in two countries, with possibly conflicting outcomes, which would pose a grave problem to the court where the award was then sought to be enforced.

Furthermore, the Court clarified that when unless there is an indication to the contrary, if the arbitration clause designates a place as the "venue" of the arbitration proceedings, it is tantimoneous with "seat" of the arbitral proceedings. The Court explained that when using the word "venue" in such a context, it is referring to the entirety of the arbitration proceedings, and not just the place of one or more individual or particular hearing(s).

Based on the facts at hand, the Court took into consideration that, in the absence of any indication to the contrary, the fact that while the parties' arbitration agreement provided for arbitration proceedings to be held at either New Delhi or Faridabad, the parties had elected for all the arbitration proceedings to take place in New Delhi, and that the Award was subsequently signed in New Delhi. Accordingly, New Delhi was accepted as the final juridical seat of the present arbitration.

***Hindustan Construction Company Limited and Anr. v. Union of India And Ors* [WP (Civil) No. 1074 of 2019]**

In this landmark Indian case, the Supreme Court held that the insertion of Section 87 and the repeal of Section 26 of the Arbitration and Conciliation (Amendment) Act, 2015 (the "2015 Amendment Act") vide the Arbitration and Conciliation (Amendment) Act, 2019 (2019 Amendment Act), was manifestly arbitrary, against public policy, and in violation of Article 14 of the Constitution of India.

In a prior decision in *BCCI v. Kochi Cricket Private Limited*, the Supreme Court had held that despite the prospective nature of the 2015 Amendment Act, the change it introduced vis-à-vis the automatic stay of arbitration awards whenever an application to set aside the award was filed, shall apply retrospectively.

The Court noted that legislature's purpose for the introduction of Section 87 in the 2019 Amendment Act had been to remove the uncertainty around the prospective applicability of the 2015 Amendment Act but instead, it had resurrected the mischief sought to be corrected by the 2015 Amendment Act and was therefore unconstitutional. The Court clarified that the position in the aforesaid *BCCI* case continues to apply to date, *i.e.*, by filing a setting aside petition, there shall be no automatic stay against the enforcement of any arbitral award, irrespective of when the arbitration was commenced.

DOMESTIC ARBITRATION

***Obnet Sdn Bhd v. Telekom Malaysia Bhd* [2019] 6 MLJ 707**

The Court of Appeal, in this case, decided the issue of discovery in arbitration proceedings wherein Telekom Malaysia had applied for the discovery of a settlement agreement executed between Obnet and the State Government of Selangor.

The arbitrator ruled against the discovery, on the grounds that the settlement agreement was confidential. Telekom Malaysia subsequently applied to the High Court for the discovery of the settlement agreement, which was allowed by the Judge of the High Court. Obnet appealed.

The Court of Appeal allowed the appeal and set aside the order of the High Court, allowing the disclosure of the settlement agreement. It was held that "*in the exercise of discretion to order discovery, regard must be taken of the fact that disclosure of confidential documents may involve a breach of confidence.*" [at 13]. Although the State Government was not a party to the arbitration, there was no impediment found for adding it as a party to High Court application. Furthermore, the Court found that it was bound by the decision of the arbitrator against the disclosure of the settlement agreement, and therefore the High Court should have declined to order discovery. In so finding, the Court highlighted that any relevant information necessary for the arbitration could be discovered through the examination of Obnet's witnesses without the disclosure of the settlement agreement.

***Kerajaan Malaysia v. Syarikat Ismail Ibrahim Sdn Bhd & Ors* [2020] 1 LNS 40**

The Appellant, the Government of Malaysia, appealed an Order of the High Court whereby the Respondent's application to vary the Award dated 18th August 2016 of an arbitral tribunal was allowed. The appeal concerned the powers of the arbitral tribunal and their relationship with the supervisory powers of the Court.

The Court of Appeal allowed the appeal and set aside the Order of the High Court, finding that the Judge's decision to allow the Respondent's application "*without referring to the arbitrator within the scheme of the Act had compromised the integrity of the decision making process itself and it is also against the spirit and intent of section 42(2) of the* [Arbitration Act] *2005.*" [at 51].

The Court of Appeal noted that, in "*relation to arbitration, the courts have used extremely strict test to intervene by setting out concepts such as 'illegality, 'manifestly unlawful and unconscionable', 'perverse and patent injustice' being the applicable tests for intervention in a party autonomy concept. Party autonomy concept is a key to understanding the strict test developed over the years by eminent judges, within and outside our jurisdiction and that jurisprudence cannot be wiped out by just a stroke of the pen.*" [at 50]. Furthermore, he noted that the courts could not give meaning to section 42(2) of the Arbitration Act 2005 jurisprudentially without referencing past cases.

ADJUDICATION

***Samsung C & T Corporation, UEM Construction JV Sdn Bhd v. Bauer (Malaysia) Sdn Bhd* (High Court of Malaya, Kuala Lumpur, Originating Summons No.: WA-24C-257-11/2018)**

In this case, Samsung filed a setting aside application for an Adjudication Decision on the grounds that the Adjudicator exceeded his jurisdiction and that a breach of natural justice occurred. This application was heard together with Bauer's application to have the said Adjudication Decision enforced.

Samsung claimed that the issues raised in Bauer's Payment Claim were *res judicata*. In addition, Samsung argued that the Adjudicator had denied it the right to be heard on Bauers' reply to the Adjudicator's request for clarification, which included computations in footnotes and enclosures which went well beyond the Adjudicator's request for clarification.

The Court held that the Adjudicator had considered previously adjudicated sums, which were *res judicata*, and thus acted in excess of his jurisdiction. Additionally, the Court found that it would have been fair to allow Samsung the opportunity to be heard on the Bauer's computations *vis-à-vis* the footnotes, and there was a denial of natural justice during the adjudication proceedings. Accordingly, Samsung's application to set aside the Decision was allowed, and Bauer's application to enforce the said Decision was dismissed.

***CT Indah Construction Sdn Bhd v. BHL Gemilang Sdn Bhd* [2020] 1 CLJ 75**

The issue before the Court of Appeal was an application by the subcontractor, the Appellant, for direct payment from the principal, the Respondent, under section 30 of the Construction Industry Payment and Adjudication Act 2012 (the "CIPAA"). The principal resisted the said application on the grounds that the BHL Builders, the main contractor and party against whom the adjudication decision was made, was wound up and thus, the same would amount to making a preferential payment.

With regard the Respondent's arguments, which raised provisions on undue preference in the Companies Act, the Court of Appeal unanimously found that the liability of the Respondent to make the said direct payment is imposed on it by legislation, that is, by subsection 30(3) of the CIPAA, despite the main contractor being under receivership. Therefore, payment made to the Appellant by the Respondent would not be from the assets of the main contractor, but instead, it will be a debt due from BHL Builders to the Respondent (once the Respondent makes direct payment to the Appellant). Following which, the Respondent will have to recover from BHL Builders pursuant to subsection 30(4) of the CIPAA.

The Court of Appeal concurred with the Appellant that a legal obligation to pay might arise either by statute (as in the present case) or by contract. The Court noted the mandatory requirement of subsection 30(3) of the CIPAA, wherein "*it is a requirement of law which the respondent has no discretion not to comply with it*" [at 15]. Accordingly, the Court of Appeal allowed the appeal and set aside the decision of the High Court.

***ASM Development (KL) Sdn Bhd v. Econpile (M) Sdn Bhd* (High Court of Kuala Lumpur, Originating Summons No.: WA-24NCvC-363-07/2019)**

The Defendant had obtained an Adjudication Decision in its favour, for *inter alia* RM67,767,269.32 being the adjudicated sum. The Defendant subsequently served a statutory demand for payment under section 466(1)(a) of the Companies Act 2016 on the Plaintiff, thereby giving notice that refusal or failure to pay the said sum or to compound it to satisfaction, would result in winding-up proceedings being initiated against the Plaintiff. In the current case, the Plaintiff filed for an injunction to restrain the Defendant from presenting the winding-up proceedings.

Separately, a supplementary Adjudication Decision had been issued, correcting the adjudication sum granted to RM59,767,269.32. The Defendant then obtained an Order to enforce the said supplementary Adjudication Decision. Notably, the said Order was obtained only after the Defendant's issuance of the statutory demand. In this regard, the Court pointed out that unlike a judgment or order entered, wherein no dispute to the judgment debt may be countenanced, when a statutory demand was issued based on an adjudication decision, an injunction may restrain a creditor from presenting its winding-up petition when there exist disputes on substantial grounds.

The Court held that considering there was still an ongoing arbitration; there was no need to subject the Plaintiff to winding-up proceedings, which are very harsh in nature. It was noted that winding-up proceedings are not meant to be enforcement proceedings for the recovery of monies, and accordingly, an injunction will not circumvent or defeat the purpose of the CIPAA.

***Mega Sasa Sdn Bhd v Kinta Bakti Sdn Bhd & Ors* [2020] MLJU 117**

The Plaintiff, in this case, prayed for several declarations, primarily that the purported appointment of the adjudicator in this matter was null and void, that sub-Sections 18(1), 19(3) and 19(4) of the CIPAA were invalid for contravention of Article 8(1) of the Federal Constitution (the "FC"), and that the AIAC Adjudication Rules & Procedure were invalid.

In furnishing his findings, the learned Judge held that the CIPAA is not discriminatory in violation of Article 8(1) of the FC, stating "*there is a strong presumption of constitutionality of a statute*" and quoting Gopal Sri Ram JCA, "*the primary approach of a court to all written law is to act upon the presumption that Parliament does not intend an unfair or unjust result … It is a strong presumption. But it is rebuttable. And only when it is rebutted does the constitutionality of the particular written law become an issue*" [at 53].

The learned judge further held that the charging of fees and expenses of the adjudicator and the AIAC's administrative fees vide the AIAC Adjudication Rules and Procedure were not unconstitutional and that the same are charged for services rendered.

It is further worth noting, albeit academic at this juncture, that in determining the Plaintiff's challenge on the basis of the late Mr Pradhan's appointment as the Director of the AIAC being invalid, it was held that such claim was unmeritorious.

SAVE THE DATE !

16th April 2020	**ADR Online: An AIAC Webinar Series -** 2020 Economic Stimulus Package: What it Means for You and Your Business
17th April 2020	**ADR Online: An AIAC Webinar Series -** Mediation Post COVID-19: The Way Forward
20th April 2020	**ADR Online: An AIAC Webinar Series -** The Realities of Working from Home – A Debate Special
21st April 2020	**ADR Online: An AIAC Webinar Series -** A Young Lawyer's Wellbeing and Mental Health – The Impact of the Outbreak of COVID-19
22nd April 2020	**ADR Online: An AIAC Webinar Series -** Impact of COVID-19 on Shipping Disputes
23rd April 2020	**ADR Online: An AIAC Webinar Series -** The Amendment of ICSID Rules and Regulations and Its Impact on Contemporary and Future Investment Arbitration
24th April 2020	**ADR Online: An AIAC Webinar Series -** Asian Energy Disputes: Project Finance, Price Review and Arbitrations
27th April 2020	**ADR Online: An AIAC Webinar Series -** Sports in the New Age of Physical Distancing: What an Athlete, a Sports Practitioner and Sporting Associations Have to Say About It
28th April 2020	**ADR Online: An AIAC Webinar Series -** The Elephant in The Room: What is a Good Arbitral Award?
30th April 2020	**ADR Online: An AIAC Webinar Series -** Keeping Confidentiality: How to Safeguard your Privacy in ODR

2020

JANUARY

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MAY

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31						

JUNE

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JULY

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AUGUST

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SEPTEMBER

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OCTOBER

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NOVEMBER

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DECEMBER

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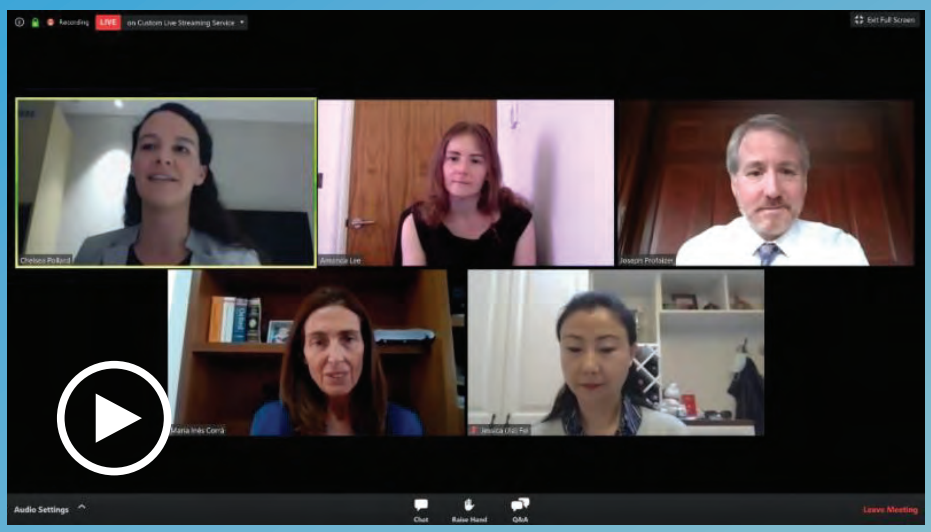

ADR Online:

An AIAC Webinar Series

With the recent announcement extending the nationwide Movement Control Order ("MCO") for a further period, we at the AIAC wish to reassure you of our continuous efforts to keep you connected with the ADR community. Although we miss the vibrant energy that members of our ADR community bring to Bangunan Sulaiman, we hope that our **ADR Online: An AIAC Webinar Series** has gone some way towards making this period more endurable. We are pleased to advise that we will be continuing our suite of webinars and hope that you will find them most beneficial and educational. For more information, please email events@aiac.world.

"This is my second one this week. Great stuff. Learning everyday. "

Tan Sri Datuk Seri Panglima David Wong Dak Wah
Retired Chief Judge of Sabah & Sarawak
(Kota Kinabalu)

"Heartiest congratulations on your ongoing series. Thanks for sharing."

Adv Col DK Bishnol
Arbitrator, Bombay High Court
(Mumbai)

"Thank you AIAC for providing me with the fishing rod of online learning and practice, and teaching me how to use and leverage it adjusting me to this New World of virtual work. Your webinars are a lightning rod for us to harness old and new knowledge and skills. Syabas!"

Dato' Lim Chee Wee
Partner, Skrine
(Kuala Lumpur)

"The webinar was timely as the legal services sector was facing the difficulties encountered with the implementation of the MCO that impeded the conventional way of doing legal work. Well done to the AIAC."

Lam Ko Luen
Partner, Shook Lin & Bok
(Kuala Lumpur)

"Great webinar! Congratulations Panelists and Asian International Arbitration Centre for developing ADR's on virtual proceedings on these moments."

Nazareth Romero
MCIArb Arbitrator
(Rome)

"Thanks to the AIAC for organizing these webinars."

Robert Heath
Queen's Counsel, Victorian Bar
(Melbourne)

"The session on how the COVID-19 crisis was impacting the world of sports law and sports arbitration was very pleasant and informative. I look forward to the next in AIAC's series."

Clifford J. Hendel
Founder, Hendel IDR
(Madrid)

"The webinar was very interesting and helpful. As the Clerk to ArbDB Chambers, I was keen to see what the views from practitioners were about advocacy changing in the light of technology taking over and replacing regular hearings."

Martin Poulter
Clerk, ArbDB Chambers
(London)

"It was an excellent and very informative session. Well done to the AIAC and keep them coming!"

Mark McGeoch
Managing Director, Ankura Consulting
(Singapore)

Thank You and Stay Tuned

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